

# **WE WERE SAILING INTO UNCHARTED WATERS: FLAWS IN THE APPLICATION OF CANADA'S *CRIMES AGAINST HUMANITY AND WAR CRIMES ACT***

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Résumé de l'article

Les deux procès qui ont eu lieu au Canada en vertu de la *Loi sur les crimes contre l'humanité et les crimes de guerre* ont révélé de sérieuses lacunes relativement à l'application de la *Loi*, en particulier en ce qui concerne la rédaction des actes d'accusation. En effet, devant le TPIR et le TPIY, les actes d'accusation offraient une narration factuelle détaillée et précise des conduites criminelles constitutives des crimes principaux de génocide et de crimes contre l'humanité pour lesquels les accusés subissaient leur procès. Les condamnations et les acquittements devant ces tribunaux reposaient en définitive sur la preuve, réussie ou non, de ces conduites criminelles sous-jacentes. En référant uniquement aux crimes principaux sans détailler les conduites sous-jacentes, les actes d'accusation canadiens empêchent à l'accusé de savoir précisément de quoi il est accusé; affectent négativement sa préparation et surtout ne permettraient pas éventuellement de savoir si un jury est unanime sur la commission d'au moins un des crimes sous-jacents, ce qui revient dans les faits à priver l'accusé de son droit à un procès devant jury. Les auteurs proposent que les actes d'accusation canadiens démontrent une méconnaissance fondamentale des éléments requis pour prouver les crimes de génocide et de crimes contre l'humanité, et compromettent en définitive la tenue de procès équitables sous l'égide de la *Loi*.

# WE WERE SAILING INTO UNCHARTED WATERS: FLAWS IN THE APPLICATION OF CANADA'S *CRIMES AGAINST HUMANITY AND WAR CRIMES ACT*

Marc Nerenberg\* and Philippe Larochelle\*\*

In Canada's two trials to date under the *Crimes Against Humanity and War Crimes Act*, serious flaws in the application of the *Act* have emerged, in particular regarding the framing of the indictment. In prior proceedings at the *ICTR* and *ICTY*, the indictments contained detailed recitations of the facts, including the specific "constitutive crimes" for which trials on the "chapeau crimes" of genocide, war crimes and crimes against humanity were held, and in which convictions and acquittals were based on these indicated "constitutive crimes". In Canada, the indictments merely indicated the "chapeau crimes" and not the "constitutive crimes", making it impossible for an accused to know precisely for what he is charged, negatively affecting trial preparation, and impossible to determine if a jury is actually unanimous on any given "constitutive crime", effectively rendering illusory the right to a jury trial. The authors argue that the Canadian indictments foster a fundamental misunderstanding of the essential elements needed to prove the international crimes of genocide, war crimes and crimes against humanity, compromising the possibility of holding a fair trial under the *Act*.

Les deux procès qui ont eu lieu au Canada en vertu de la *Loi sur les crimes contre l'humanité et les crimes de guerre* ont révélé de sérieuses lacunes relativement à l'application de la *Loi*, en particulier en ce qui concerne la rédaction des actes d'accusation. En effet, devant le TPIR et le TPIY, les actes d'accusation offraient une narration factuelle détaillée et précise des conduites criminelles constitutives des crimes principaux de génocide et de crimes contre l'humanité pour lesquels les accusés subissaient leur procès. Les condamnations et les acquittements devant ces tribunaux reposaient en définitive sur la preuve, réussie ou non, de ces conduites criminelles sous-jacentes. En référant uniquement aux crimes principaux sans détailler les conduites sous-jacentes, les actes d'accusation canadiens empêchent à l'accusé de savoir précisément de quoi il est accusé; affectent négativement sa préparation et surtout ne permettraient pas éventuellement de savoir si un jury est unanime sur la commission d'au moins un des crimes sous-jacents, ce qui revient dans les faits à priver l'accusé de son droit à un procès devant jury. Les auteurs proposent que les actes d'accusation canadiens démontrent une méconnaissance fondamentale des éléments requis

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pour prouver les crimes de génocide et de crimes contre l'humanité, et compromettent en définitive la tenue de procès équitables sous l'égide de la *Loi*.

Los dos procesos que se efectuaron en Canadá en virtud de la *Ley sobre los crímenes contra la humanidad y los crímenes de guerra* revelaron lagunas importantes respecto a la aplicación de la Ley, en particular en cuanto a la redacción de las actas de acusación. En efecto, ante el TPIR y el TPIY, las actas de acusación ofrecían una narración detallada y precisa de los hechos, incluyendo las conductas criminales constitutivas de los crímenes principales de genocidio y de crímenes contra la humanidad por los cuales los acusados fueron procesados. Las condenas y las absoluciones ante estos tribunales reposaban en definitiva sobre la prueba, conseguida o no, de estas conductas criminales subyacentes. En referencia únicamente a los crímenes principales sin detallar las conductas subyacentes, las actas de acusación canadienses impiden al acusado saber precisamente de qué está acusado; afectan negativamente su preparación y sobre todo no permitirían eventualmente saber si un jurado es unánime sobre la comisión de al menos uno de los crímenes subyacentes, lo que conlleva al hecho de privar al acusado de su derecho a un proceso ante jurado. Los autores proponen que las actas de acusación canadienses demuestran un desconocimiento fundamental de los elementos requeridos para probar los crímenes de genocidio y los crímenes contra la humanidad, y comprometen en definitiva la postura de procesos justos bajo la égida de la Ley.

We were sailing into uncharted waters. The trial of *R v Jacques Munghware*,<sup>1</sup> Canada's second ever genocide trial, was about to go where no one had gone before: there had never before been a trial by jury on a charge of genocide anywhere in the world. Then, on the morning of the scheduled start of jury selection, we found ourselves on our feet in a large Ottawa courtroom, re-opting for a trial by judge alone. Much as we were reluctant to disembark from this historic voyage, we considered that force of circumstances had left us little choice.

There were unresolved legal issues that we, Mr Munghware's counsel, believed made proceeding before a jury a risky business at best. Given that we felt forced to abandon his right to a trial by jury, we considered at the time that this lack of clarity on certain fundamental issues would likely be one of our grounds of appeal, should Mr Munghware's trial result in a conviction. But in the end he was acquitted of all charges, no appeal followed his trial, and the unresolved legal issues remained unresolved.

Then, some of these issues, perhaps inadvertently, were revived in the Quebec Court of Appeal judgment in the case of *Munyaneza v R*,<sup>2</sup> the appeal that followed Canada's first genocide trial. We thought an opportunity had come, in a potential Supreme Court appeal of *Munyaneza*, to resolve significant flaws and incoherencies in the application of Canada's *Crimes Against Humanity and War Crimes Act*,<sup>3</sup> flaws that we believe seriously undermine the workings of the *Act*. Given that the *Act* was by then almost 15 years old, this would have been a good opportunity to evaluate whether or not this act is actually working as intended. Alas, it has now turned out to have been a missed opportunity, since the Supreme Court, on 18 December 2014, turned down *Munyaneza's* application<sup>4</sup> for leave to appeal. We will explain here the issues of this regrettable development that we feel should have been dealt with by Canada's highest court.

In identifying the unresolved issues, one might consider that there are three separate issues involved. The first issue – probably the real crux of the matter – is the degree of specificity, detail and precision needed in an indictment on charges of genocide, war crimes and/or crimes against humanity. Secondly, there is the issue of the proper characterization of the essential elements that must be proved for conviction on those charges. And finally, there is the question of the nature of the unanimity that must be reached by a jury in a trial for such crimes. However, because all three questions depend upon each other, and are inextricably inter-related, these three issues can also be seen as a single overarching whole.

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<sup>1</sup> *R v Jacques Munghware*, 2013 ONCS 4594 [Munghware].

<sup>2</sup> *Désiré Munyaneza v R*, 2014 QCCA 906 [Munyaneza].

<sup>3</sup> *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [Act].

<sup>4</sup> *Désiré Munyaneza v Her Majesty the Queen*, 2014 QCCA 906, leave to appeal to SCC refused, 35993 (December 18, 2014).

## I. Background

Let's start from the beginning, which starts well before the indictments were drafted and the charges were laid in either of the two Canadian genocide cases. The modern era of prosecutions for war crimes and crimes against humanities begins in 1993-1994 with the setting up of the United Nations *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).<sup>5</sup> These two *ad hoc* tribunals came into being in close proximity in time to each other, with very similar structures and rules of procedure and evidence, and with both answering to a single United Nations' established appeal body that essentially generated a common jurisprudence applicable to both *ad hoc* tribunals. Thus, the charging instruments – the indictments – at each of these *ad hoc* tribunals shared a common structure and approach under both their rules and their jurisprudence.

### A. International Criminal Indictments at the UN *ad hoc* Tribunals

The indictments drafted at the *ad hoc* international criminal tribunals bore little resemblance to those that we are familiar with in Canadian practice. Most notably, they were two part instruments that contained *both* the charges *and* the material facts that underlay, described and delimited such charges.<sup>6</sup> These indictments were often very voluminous, going into a great deal of specific detail of the when, where and how the broader charges were alleged to have been committed.<sup>7</sup>

In the judgments that followed the trials at the *ad hoc* tribunals, the accused were convicted or acquitted of the various specific acts attributed to them in the statement of material facts in their indictments. In essence, the specific criminal acts described in the facts portion of the indictments were treated as a series of distinct crimes, each of which (if committed under the requisite circumstances and/or with the requisite special mental element) could lead to a separate conviction or acquittal on the charges.<sup>8</sup>

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<sup>5</sup> ICTY founded by a resolution of the Security Council: *Resolution 827 (1993)*, SC Res 827, UNSCOR, 1993, UN Doc S/RES/827, (1993); ICTR founded by a resolution of the Security Council: *Resolution 955 (1994)*, SC Res 955, UNSCOR, 1994, UN Doc S/RES/955, (1994).

<sup>6</sup> At the ICTY, the facts section was generally portioned out as sets of facts supporting each count of the indictments, while at the ICTR, the facts section generally stood alone with background, historical context and all the underlying facts being provided before the indictment finally arrives at the section outlining the counts – the charges *per se*.

<sup>7</sup> For example, *Prosecutor v Théoneste Bagosora*, ICTR-96-7-I, Amended indictment (12 August 1999) (International Criminal Tribunal for Rwanda), online: ICTR <<http://www.ictor.org>> [*Bagosora*], ran 63 pages long, the first 15 pages providing background and historical context, the next 37 pages providing a concise description of the facts, and the final nine pages listing counts of the indictment – the charges *per se*.

<sup>8</sup> Using Théoneste Bagosora, *Prosecutor v Théoneste Bagosora et al*, ICTR 98-41-T, Trial Judgement, (18 December 2008) (International Criminal Tribunal for Rwanda, Trial Chamber I), online: ICTR <<http://www.ictor.org>> [*Bagosora*, 98-41-T], again as an example, we find that, at para 14, the Trial Chamber found all the accused not guilty of conspiracy for lack of concrete evidence that a conspiracy existed, and then, at para 31 it found Bagosora guilty of genocide, crimes against humanity, and serious

Though they were embedded in the sections of the indictments describing the “material facts”, which also described the general background and circumstances of the overarching charges, these criminal acts described therein were not mere “acts” or “facts”. They were the actual *crimes* themselves – the separate crimes – with which the accused had been charged.

Thus, an accused could be *convicted* of genocide on the basis of certain alleged acts while being *acquitted* in the same judgment of having performed *other* specified acts. Furthermore, at appeal, some of these specific convictions or acquittals could be challenged, and if successfully so, the quantum of sentence might be altered either up or down.<sup>9</sup> Or the Appeals Chamber could find that the accused had been convicted at the trial on the basis of acts not specified in the indictment, with no evidence having been advanced concerning the actual acts outlined in the indictment, consequently reversing his conviction and entering an acquittal.<sup>10</sup>

It might be noted, as well, that evidence that did not go to support any of the material facts specifically alleged in the indictment was often found to be inadmissible before the *ad hoc* international tribunals – in order to avoid exactly this sort of confusion at the end of the day regarding the precise nature of the charges against the accused. With the trials being, as a rule, enormously long and complicated, some mechanism needed to be in place to keep them focused on the actual charges

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violations of article 3 common to the *Geneva Conventions (Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, online: ICRC <<https://www.icrc.org/>>; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, online: ICRC <<https://www.icrc.org/>>; *Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949, online: ICRC <<https://www.icrc.org/>> and *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, online: ICRC <<https://www.icrc.org/>>) and *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, online: ICRC <<https://www.icrc.org/>>, based on a series of specific allegations of killings that took place between April 7-9, 1994, none of which appear in the charges *per se* in the indictment, but which were rather all found in the description of the facts. Then, at para 40, the Chamber adds that the accused “are acquitted in relation to a considerable number of allegations with which they were charged”. This follows from the specific sections of the judgment dealing with those events. Similarly, none of the allegations for which they were acquitted appear in the charges *per se*, but are to be found in the recitations of the facts in the indictments of the different accused. At para 41, the Trial Chamber sentenced Bagosora to life in prison.

<sup>9</sup> Again, using *Bagosora*, 98-41-T, *supra* note 8 as an example, the Appeal Chamber, in its Judgment at paras 573, 577, 605-606, 631-635, 660, 670, 689, 691, 695-696, 721, 730 and 737, affirmed the Trial Chamber’s findings on a wide variety of allegations for which he had been convicted at trial, and reduced his sentence, at para 741, from life in prison to 35 years.

<sup>10</sup> For example, in *Prosecutor v Muvunyi*, ICTR 2000-55-A-T, Judgment (12 September 2006) (International Criminal Tribunal for Rwanda, Trial Chamber III), online: ICTR <<http://www.ictr.org/>>, the Trial Chamber found him guilty of a host of charges on the basis of evidence of alleged command responsibility and sentenced him to 25 years, when, in fact he had been charged with direct responsibility (for which there was an absence of evidence), and not with command responsibility. The Appeal Chamber, in *Muvunyi v the Prosecutor*, ICTR 2000-55-A-A, 29 August 2008, online: ICTR <<http://www.ictr.org/>>, quashed most of those convictions, and acquitted him of all charges but one, on which a re-trial was ordered. Following his conviction at re-trial, his original sentence was reduced to 15 years.

and not on a plethora of peripheral issues.<sup>11</sup>

Because of their bifurcated nature, containing lengthy and detailed “facts” sections, the indictments at the *ad hoc* international tribunals were singularly lacking in details in the “charges” section; they outline all of the details in the “facts” section. The “charges” sections are short and concise, generally just listing the crimes in the most general ‘statutory’ terms – there being no further need for particulars that have already been given elsewhere in the same charging instruments.<sup>12</sup>

## B. International Criminal Indictments in Canada

In Canada, in both the *Munyaneza* and *Mungwarere* cases (the only genocide cases to have been tried in Canada to date), the Crown preferred indictments that purported to be in the Canadian style, concisely delineating the crimes charged. And indeed, these two indictments superficially resembled domestic Canadian indictments in their brevity. They were much, much shorter than the indictments one normally finds before the international tribunals. But a superficial resemblance to domestic Canadian indictments does not necessarily equal sufficiency. It is our position that these two indictments were so completely lacking in the kind of particulars that one would have expected to find in a usual Canadian indictment, such as the specific times and places of the crimes, the identities of the victims, the names of accomplices etc., that the indictments themselves appear to have been framed, not in the style of a usual Canadian indictment, but rather, in the style of *one* part of the international indictments, the “charges” section. But, being similar to only one of the two intrinsically inter-related sections of the international style of indictment does not equal sufficiency either. Being *completely lacking* in the information that would have been contained in other essential section, the “facts” section, these indictments were, in our opinion, woefully incomplete as instruments upon which a fair trial could be held.

To render the discussion that follows comprehensible, the counts in the two indictments in question are reproduced in their entirety here.

The *Munyaneza* indictment charged him as follows :

[TRANSLATION]

### First count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, committed the intentional killing of members of an identifiable group of people, to wit: the Tutsi, with intent to destroy the Tutsi, in whole

<sup>11</sup> For example, *Prosecutor v Gaspard Kanyarukiga*, ICTR-2002-78-T, Trial Judgement (1 November 2010) (International Criminal Tribunal for Rwanda, Trial Chamber II), online: ICTR <<http://www.ictt.org>>, in which evidence of most of the allegations heard against him at trial was excluded because it was not mentioned in the Amended Indictment.

<sup>12</sup> See *Bagosora*, *supra* note 7.

or in part, committing an act of genocide, as defined in subsections 6(3) and 6(4) of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, thereby committing the indictable offence of genocide, as provided for in subparagraph 6(1)(a) of the said Act.

#### Second count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, caused serious bodily or mental harm to members of an identifiable group of people, to wit: the Tutsi, with intent to destroy the Tutsi, in whole or in part, committing an act of genocide, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of genocide, as provided for in subparagraph 6(1)(a) of the said Act.

#### Third count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, committed the intentional killing of members of a civilian population or an identifiable group of people, to wit: the Tutsi, knowing that the said intentional killing was part of a widespread or systematic attack on the Tutsi, committing a crime against humanity, as defined in subsections 6(3), 6(4) and 6(5) of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, thereby committing the indictable offence of a crime against humanity, as provided for in subparagraph 6(1)(b) of the said Act.

#### Fourth count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, committed the act of sexual violence in regard to members of a civilian population or of an identifiable group of people, to wit: the Tutsi, knowing that the said act of sexual violence was part of a widespread or systematic attack on the Tutsi, committing a crime against humanity, as defined in subsections 6(3), 6(4) and 6(5) of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, thereby committing the indictable offence of a crime against humanity, as provided for in subparagraph 6(1)(b) of the said Act.

#### Fifth count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, during an armed conflict, to wit: hostilities between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic Front (RPF), committed the intentional killing of people who were not taking a direct part in the said conflict, committing a war crime, as defined in subsections 6(3) and 6(4) of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, thereby committing the indictable offence of a war crime, as provided for in subparagraph 6(1)(c) of the said Act.

#### Sixth count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, during an armed conflict, to wit: hostilities between the Rwandan



Armed Forces (RAF) and the Rwandan Patriotic Front (RPF), committed the act of sexual violence against people, committing a war crime, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of a war crime, as provided for in subparagraph 6(1)(c) of the said *Act*.

#### Seventh count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, during an armed conflict, to wit: hostilities between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic Front (RPF), pillaged, committing a war crime, as defined in subparagraphs 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of a war crime, as provided for in subparagraph 6(1)(c) of the said *Act*.<sup>13</sup>

The *Mungwarere* indictment charged him as follows :

#### [TRANSLATION]

#### First count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Kibuye, in Rwanda, committed the intentional killing of members of an identifiable group of people, to wit: the Tutsi, with intent to destroy the Tutsi, in whole or in part, committing an act of genocide, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of genocide, as provided for in subparagraph 6(1)(a) of the *Crimes Against Humanity and War Crimes Act*.

#### Second count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Kibuye, in Rwanda, committed the intentional killing of members of a civilian population or an identifiable group of people, to wit: the Tutsi, knowing that the said intentional killing was part of a widespread or systematic attack on the Tutsi, committing a crime against humanity, as defined in subsections 6(3), 6(4) and 6(5) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of a crime against humanity, as provided for in subparagraph 6(1)(b) of the *Crimes Against Humanity and War Crimes Act*.<sup>14</sup>

We are of the firm and considered opinion that, notwithstanding the abundance of verbiage in these indictments, they are both woefully lacking in the kind of specificity, detail, particulars and precision that would allow anyone to know clearly exactly which specific alleged criminal acts either of these accused would be facing at trial.

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<sup>13</sup> *Munyaneza*, *supra* note 4.

<sup>14</sup> *Mungwarere*, *supra* note 1.

## II. The Problem with the Canadian Indictments

Being completely devoid of any “facts” sections, the two Canadian indictments contained far fewer particulars than would be expected in an international indictment, and at the same time, were far less precise and specific than would usually be expected in a Canadian indictment for non-international crimes. It is our contention that these Canadian indictments were so broad and general as to have failed to outline the specifics of *any* of the crimes charged. These indictments placed the charges into a range of time months long (the entire length of the genocide), defined the location of the crimes as the entire prefecture involved in each case (essentially provinces with populations between roughly 500,000 to 750,000 people), didn’t mention any specific victims or accomplices, and thus didn’t specify precisely when or where or to whom *any* of the specific crimes would have occurred. The indictments generally merely parroted the language of the *Act* in formulating their descriptions of the crimes. In other words, they defined the charges in terms of their statutory definitions and *not* in terms of the specific alleged criminal acts of the accused.

In both cases, the defence objected to the lack of precision and detail in the indictments, and in both cases the defence objections were rejected by the court.<sup>15</sup> The basis for rejection was essentially that the ‘form’ of the indictment is a ‘procedural matter’, governed by usual domestic rules of criminal procedure, that the indictments conformed to the letter of Canadian criminal procedure, and also, that Canadian rules of disclosure made up for any lack of details in the indictment. Unsurprisingly, we do not agree with this analysis. In a nutshell, we would argue that the improper characterization of the crimes charged is not merely a question of form and is far from being merely a procedural matter, and furthermore, that referencing the rules of disclosure is a complete red herring having nothing to do with the issue at hand.

### A. The Difference Between the Two Canadian Cases

What set the two cases apart from each other was the fact that during the pre-trial stage in *Mungwarere*, when the matter of the indictment was debated, the trial was scheduled to go before a jury, whereas the *Munyaneza* trial had already been tried by judge alone. This raised additional arguments in *Mungwarere* that might not necessarily be seen as applicable to a trial by judge alone. These pre-trial arguments raised in *Mungwarere* concerned the degree of particularity needed in an indictment before a jury – most particularly about the need to identify and separate out the individual alleged crimes in a way that would permit the jury to deliberate and decide the question of guilt or innocence on each of these crimes individually, assuring true jury unanimity on each crime.

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<sup>15</sup> In *R c Jacques Mungwarere*, 2011 CSON 1254, Inscription – Requête pour casser l’acte d’accusation at para 20 [*Mungwarere*, Requête]: “Je suis donc d’avis que l’acte d’accusation est conforme à toutes les exigences procédurales canadiennes”; and *R c Munyaneza*, 2009 QCCS 2201.

A central argument in *Mungwarere* had been that without separate counts for each alleged crime (such as, for example, each alleged murder) a jury could convict even if they were divided as to which crimes the accused might actually have committed. Taken to its extreme, each of the twelve jurors could have their own “favourite” crime on which they would convict upon which the eleven other jurors would all have acquitted, and yet a conviction could result from such a deliberation. But it would be a conviction in which no individual crime had necessarily received more than one vote in twelve of ‘guilty beyond a reasonable doubt’. We consider this to be a perverse result.

## **B. The Difference of Opinion Between the Quebec Court of Appeal and the Ontario Superior Court**

The Ontario Superior Court judge in *Mungwarere* did not seem to find it to be problematic that some members of the jury might be basing a decision to convict on one particular group of murders, while other members of the jury would convict based on a completely different group of murders. The *Mungwarere* decision on the indictment question dismissed the issue of clarity in jury deliberations in the following terms:

[18] *[L]es membres du Jury doivent répondre oui unanimement à la question suivante : est-ce que monsieur Mungwarere a commis le meurtre intentionnel de personnes? Les membres du Jury doivent pouvoir répondre oui unanimement à cette question. Il importe peu toutefois que la moitié d’eux soit convaincue hors de tout doute raisonnable que l’accusé a commis le meurtre intentionnel de A, B, et C alors que l’autre moitié est convaincue hors de tout doute raisonnable que l’accusé a commis le meurtre intentionnel de D, E et F*<sup>16</sup>.

However, the Quebec Court of Appeal, in *Munyaneza*, appears to have disagreed with this analysis. After this very same issue was raised before it by *Munyaneza*, the resulting appeal judgment dealt with the question of possible division on the jury as to which murders had actually been committed in these terms:

[74] In *Philippe v. R.*, J.E. 2004-398, this Court noted that the formalism once required is no longer mandatory, although it urged prudence when the trial is before a jury:

[Translation]

[28] Subsection 581(1) Cr. C. requires that the count apply to a “single transaction” only. It has long been established that the terms “a single transaction” or “une seule affaire” do not preclude referring to several incidents in one count. Although the rules governing the drafting of indictments were long formal and strict, there are nevertheless cases from rather far back in judicial history involving indictments that group together several similar incidents. [...]

<sup>16</sup> *Mungwarere*, Requête, *supra* note 15 at para 18.

[29] The statement in a count encompassing several events must receive particular attention in a trial before judge and jury, where the rule of unanimity prevails. For example, where two distinct transactions are contemplated in one count, care must be taken to prevent a jury from arriving at a unanimous verdict of guilt for an alleged offence if six of the jurors are convinced beyond any reasonable doubt of the accused's guilt with respect to the first transaction and the other six are equally persuaded although with respect to the second transaction. Where the transactions contemplated in the counts are not part of an ongoing series of events and are distinct as to the manner in which they were perpetrated and the defences raised against them, the judge would be wise to order that the count be divided (subsection 590(3) *Cr. C.*).

[75] Certainly, the latter concern is justified. For example, can a jury, unanimous as to the commission of genocide, convict an appellant on the first count, if six of the jurors based their finding of guilt on the murders committed near the Ngoma church and the other six based it on the murders committed after the kidnappings at the roadblocks? However interesting this question may be, the Court need not decide it, since this trial took place before a judge alone.<sup>17</sup>

Thus, while the Ontario Superior Court judge in *Mungwarere* seemed to have seen no problem with jury members not agreeing on what specific crimes may have been committed, the Quebec Court of Appeal, in *Munyaneza*, seemed to at least consider it to be an open question worthy of resolution. The Quebec Court of Appeal chose not to deal with this question, not because it was not worthy of consideration, but because they were of the opinion that it was not applicable to the particular case before them (which finding, we will argue below,<sup>18</sup> was an error, in our opinion). The conflict in reasoning between the Quebec Court of Appeal and the Ontario Superior Court suggests to us that this is still a very live issue. Notwithstanding the Supreme Court's decision not to grant leave to appeal in *Munyaneza*, and thus, not to hear this issue (or any other issue raised by *Munyaneza*) at this time, we believe that this is an issue that must be resolved at some point in the future, if the *Act* is to be coherently applied.

### III. Specificity in the Indictment

The central issue at hand is the question of specificity of the indictment. In other words, is it necessary for indictments under the *Act* to specify in detail the individual criminal acts covered therein as separate counts, with dates, times, locations and victims specified (to the best of the Crown's ability to ascertain them), or is the present practice sufficient, in which all the criminal acts are rolled together into broad general charges of genocide, war crimes and crimes against humanity, taking place over an extended period of time, in a large area, with multiple unnamed victims merely identified by the group to which they belong?

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<sup>17</sup> *Munyaneza*, *supra* note 4 at paras 74-75.

<sup>18</sup> See *infra* section IV. A.

### A. The Relevancy of this Issue to All Cases Under the Act

The Quebec Court of Appeal and the *Mungwarere* trial judge appear to be somewhat at odds as to the implications of this issue in a jury trial. With respect, while we agree with the Appeal Court that an indictment of the type faced by *Munyaneza* would be problematic in a jury trial, we disagree with the Appeal Court's ruling on the issue that, because *Munyaneza* had been tried by judge alone, it was not a question that was before them, even though it would have formed the basis of an interesting question regarding jury trials.

It is our position that logic dictates that the same considerations for specificity in the indictment must apply in *all* cases regardless of whether or not the ultimate trial will be heard by a jury. Since a trial by jury is the 'default' position under the *Act*, inasmuch as the *Act*, through reference to the laws of evidence and procedure in force in Canada, prescribes trial by jury, with trial by judge alone being an exception that must be agreed to by both sides,<sup>19</sup> and since the indictment is always written long before the accused can even consider any possible option of trial by judge alone, the indictment must, therefore, *always* be written envisaging at least the possibility of a jury trial. Thus, we would submit that any of the arguments related to jury trials apply with equal force to all cases under the *Act*.

Furthermore, if indictments of the type used in *Munyaneza* and *Mungwarere* are acceptable, even the norm, in trials under the *Act*, then no competent defence attorney could refrain from cautioning an accused under the *Act* that a jury trial would be too fraught with serious dangers and pitfalls to risk proceeding that way. Any accused would thus be effectively denied the right to the supposed default position jury trial provided for in the *Act*. The right to a jury trial would remain completely illusory. Therefore the question really does apply to *Munyaneza*, whose trial might have arrived at a completely different conclusion had he not been essentially denied the right to a jury trial that the *Act* purports to give him (but which, through sleight of hand, withdraws from him by making the prospect of a jury trial too risky, due to the complete uncertainty as to the basis upon which a jury would render its ultimate verdict).

### B. Canadian Legal Principles

The two indictments under discussion here were drawn up under the authority of the *Act*, which gives Canada universal jurisdiction to try crimes against humanity, genocide and war crimes (whether committed in Canada or elsewhere) and defines these crimes<sup>20</sup> in essentially the same terms as the *Rome Statute*.<sup>21</sup> The *Act*

<sup>19</sup> *Act*, *supra* note 3 at section 10, puts offences alleged to have been committed before the coming into force of the *Act* under the laws of evidence and procedure in force at the time of the proceedings. Thus genocide, for which murder is an included offence, falls under sections 469, 471, and 473 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]

<sup>20</sup> *Act*, *supra* note 3 at subsections 4(3) and 6(3).

<sup>21</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1<sup>st</sup> July 2002) [*Rome Statute*].

does not contain any explicit rules governing the indictment as to either form or content and it specifies that the proceedings “shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings”.<sup>22</sup> Let’s look at what that means regarding specificity in the indictment.

The *Criminal Code* deals with the information requirements of Canadian indictments at Section 581(3):

A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to<sup>23</sup>

Section 587(1) provides a remedy for cases where the indictment falls short of providing that requisite information: “A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars.”<sup>24</sup> In both the *Munyaneza* and *Mungwarere* cases, the defence sought more particularized indictments under these sections, but failed to convince the respective trial judges of the necessity. We believe that those decisions have led to a flawed application of *Act* in the only two trials that have so far been conducted under it.

Canadian courts have long dealt with questions of insufficiency of the indictment, *R v Brodie*<sup>25</sup> being the leading case. It held that a charge must identify the act “by specifying the time, the place and the matter”<sup>26</sup> and that a particular indictment should be quashed if it did not describe the offence “in such a way as to lift it from the general to the particular”.<sup>27</sup> The unanimous Supreme Court held, in that case, that:

It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment. An accused person may not be charged merely of having committed murder; the statement must specify the matter.<sup>28</sup>

This proposition that an indictment must “describe the offence in such a way as to lift it from the general to the particular” was later re-affirmed by the Supreme Court in *R v Wis Development Corporation Ltd.*<sup>29</sup> As well, the Ontario Court of Appeal has held that charging the offence in the words of the statute will be insufficient if the offence as so described is capable of covering a multitude of diverse and unrelated acts.<sup>30</sup>

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<sup>22</sup> *Act*, *supra* note 3 at section 10.

<sup>23</sup> *Criminal Code*, *supra* note 19

<sup>24</sup> *Ibid.*

<sup>25</sup> *R v Brodie*, [1936] SCR 188 [*Brodie*].

<sup>26</sup> *Ibid* at 193.

<sup>27</sup> *Ibid* at 198.

<sup>28</sup> *Ibid* at 194.

<sup>29</sup> *R v Wis Development Corporation Ltd*, [1984] 1 SCR 485 at p 500 (quoting, with approval, the Court of Appeal’s decision) [*Wis Development Corporation Ltd*].

<sup>30</sup> *R v Milberg* (1987), 35 CCC (3<sup>d</sup>) 45 (Ont CA), leave to appeal to SCC refused 79 NR 398.

The indictments in Canada's two genocide cases, by having their counts framed in such broad terms, and by not detailing any of the alleged criminal acts beyond the statutory definitions of the overarching offences (i.e. genocide, war crimes and crimes against humanity), have indeed, clearly failed to describe the offences in such a way as to lift them "from the general to the particular". Aside from specifying a time span running the entire length of the genocide and a location covering the entire prefecture, both indictments replicated virtually verbatim the words of the *Act* as their only descriptions of the crimes.

The Ontario Court of Appeal's test as to whether there has been compliance with the requirements of s 581(3) is whether the indictment contains sufficient detail to give the accused reasonable information with respect to the charge and to identify the transaction referred to therein.<sup>31</sup> Yet, since these two indictments contained no information beyond the fact that the crimes took place over a three-month period somewhere inside the prefectures involved, nothing in either of these indictments would allow anyone to identify the actual individual specific transactions that they purported to cover. The indictments as drafted allowed the Crown to pick and choose from a myriad of separate allegations of various criminal acts, on various dates, in various locations, involving various victims, mentioned somewhere or other in the vast<sup>32</sup> disclosure, yet none of these allegations were actually specified or particularized anywhere in the indictments.

This would appear to be at odds with the ruling of the Supreme Court in *Saunders* that:

It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. [...] To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial": *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.<sup>33</sup>

In these two cases, it is not that the Crown would be trying to prove something different than what was specifically mentioned in the indictments, but rather that the indictments failed to particularize the charges at all, leaving the accused facing a great stew pot of undifferentiated charges, any of which he might find served up on his plate at trial. With no mention of any specific particularized charges, any offence would have "different particulars" than the non-existent particulars in the indictments. When the specific accusations are treated as fungible material, interchangeable at the whim of the prosecutor, inasmuch as none are specifically mentioned in the indictment, how is the accused to know upon what matter his trial will actually be held, so that he can efficiently, properly and fully prepare for it?

<sup>31</sup> *R v Ryan*, 2013 SCC 3, [2013] 1 SCR 14; *R v Charbonneau* (1985), 23 CCC (3d) 1 (Ont CA), leave to appeal to SCC refused with respect to *Ryan* (February 24, 1986).

<sup>32</sup> In *Mungwarere*, for instance, the disclosure was so large that it would have taken a single individual well over a year, working full time, to just read, and watch (videos) or listen (audios) to it all once.

<sup>33</sup> *R v Saunders* [1990] 1 SCR 1020 at 5 [*Saunders*].

The Supreme Court has said more than once that an indictment is only sufficient if it allows the accused to prepare his defense,<sup>34</sup> and the right to prepare a full defence is part of the fundamental right to a fair trial. Precision in the indictment goes hand in hand with the ability of the accused to prepare for trial and defend himself. While the *Act* specifies that Canadian laws of procedure are to be followed in prosecutions under the *Act*, and while the two indictments in question do respect the *form* expected in an indictment under Canadian criminal procedure, we contend that these indictments are defective nonetheless. The Supreme Court found in *Cotroni v Quebec Police Commission*: “Precision in a criminal charge is not to be regarded merely as a matter of form. Precision is necessary if the accused is to be able to defend himself effectively”.<sup>35</sup> These indictments, in their extreme vagueness, imposed serious impediments on the ability of these two accused to effectively prepare for trial, given the vastness of the range of possible accusations that might or might not surface at their trials, thus imposing serious impediments on their ability to defend themselves effectively.

### C. International Legal Principles

As mentioned above,<sup>36</sup> indictments at the *ad hoc* international tribunals, such as the ICTR and the ICTY, bore very significant differences from the indictments preferred in the *Munyaneza* and *Mungwarere* cases. The ICTR/ICTY indictments all had lengthy recitations of the material facts underpinning the charges, and the issue that arose repeatedly, especially early on at those tribunals, was whether or not evidence regarding facts not outlined in the indictments would even be admissible at trial. In principle, the answer was “no”, although in practice, techniques were developed to “cure” defective indictments in the appropriate circumstances. But the fundamental principles developed by the ICTR/ICTY Appeals Chamber held that the prosecutor should be in possession of enough information to provide an unambiguous indictment; the prosecution was expected to know its case before trial, and could not mould its case in relation to the evidence as it unfolded.<sup>37</sup>

Furthermore, the prosecutor had an obligation to state in the indictment, itself, the material facts underpinning the charges in the indictment, although not the specific evidence by which such material facts were to be proven.<sup>38</sup> In order to plead an indictment with sufficient particularity, the prosecution needed to set out the

<sup>34</sup> *R c Côté*, [1978] 1 RCS 8; *Wis Development Corp Ltd*, *supra* note 29; *R c Douglas*, [1991] 1 RCS 301.

<sup>35</sup> *Cotroni v Quebec Police Commission*, [1978] 1 SCR 1048 at p 1058 [*Cotroni*].

<sup>36</sup> See *supra* section II. A.

<sup>37</sup> *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgment (23 October 2001) at para 92 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), [*Kupreškić et al*].

<sup>38</sup> *Prosecutor v Ntagerura*, ICTR-99-46-A, Appeal Judgment (7 July 2006) at para 21 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictor.org>>; *Prosecutor v Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment (13 December 2004) at para 470 (International Criminal Tribunal for Rwanda, Appeals Chamber) online: ICTR <<http://www.ictor.org>> [*Ntakirutimana*]. See article 17 (4) of the *Statute*; Rule 47 (C) of the *Rules of Procedure and Evidence*; and articles 20 (4)(a) and (b) of the *Statute*.



material facts with enough detail to inform a defendant clearly of the charges against him so that he could prepare his defence.<sup>39</sup> The principle that one can *only* be convicted for allegations of criminal conduct that are specifically pleaded in the indictment was central to the seminal Appeals Chamber's Decision in the ICTY case *Prosecutor v Kupreškić et al*:

[T]he Appeals Chamber does not share the Trial Chamber's view that allegations of specific criminal conduct not pleaded in the Amended Indictment [...] can serve as a basis for conviction<sup>40</sup>

And, at the ICTR, in what was known as the Cyangugu Case (*Prosecutor v Ntagerura et al*),<sup>41</sup> it was emphasized that a conviction can only result from crimes specifically and explicitly pleaded in the Indictment (which finding was upheld at Appeal<sup>42</sup>):

29. [I]t is clear from the Statute and the Rules that this information should be included in the Indictment, which is the only accusatory instrument provided for therein.

30. Accordingly, the prosecutor has an obligation to plead all material facts underpinning the charges against an accused in the Indictment with sufficient detail so that the accused can prepare his defence.<sup>43</sup>

The degree of specificity for names of victims depended on the alleged proximity to the accused.<sup>44</sup> The ICTR Appeals Chamber jurisprudence supported the position that criminal acts that were physically committed by the accused personally *must* be set forth in the indictment.<sup>45</sup> It follows that, for trials of alleged direct perpetrators, the degree of specificity required in the indictment is great: the victims should be named or identified in some form if their names are not known. Given these constraints, we would suggest that, if the two accused in the Canadian cases, being charged as direct perpetrators, had been before the ICTR on indictments identical to those they faced here, *no* evidence could have been led against them since *none* of the particulars required there were to be found in either of these indictments.

It should be noted that while it was possible to cure a defective indictment at the *ad hoc* tribunals by means of timely clear and consistent information about a missing matter, it is not just any disclosure that qualifies as "timely, clear and

<sup>39</sup> *Kupreškić et al*, *supra* note 37 at para 88.

<sup>40</sup> *Ibid* at para 314.

<sup>41</sup> *Prosecutor v André Ntagerura et al*, ICTR-99-46-T, Judgment and Sentence (25 February 2004) (International Criminal Tribunal for Rwanda, Trial Chamber III), online: ICTR <<http://www.ictr.org>>, see especially paras 29-39 [*Ntagerura et al*, Judgment and Sentence].

<sup>42</sup> *Procureur c Tihomir Blaškić*, IT-95-14-A, Dispositif de l'Arrêt Concernant l'Appel du Procureur s'agissant de l'Acquittement d'André Ntagerura et Emmanuel Bagambiki (8 February 2006) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictr.org>>.

<sup>43</sup> *Ntagerura et al*, Judgment and Sentence, *supra* note 41 at paras 29-31 and 37.

<sup>44</sup> *Prosecutor v Tihomir Blaškić*, IT-95-14-A, Appeal Judgement (29 July 2004) at para 210 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

<sup>45</sup> *Prosecutor v Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement (13 December 2004) at para 27 (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictr.org>>.

consistent information”. The Trial Chamber in the *Prosecutor v Zigiranyirazo* case stated that: the process of curing an indictment does take place only when the material fact was already in the indictment in a certain manner, not when it was not included at all.<sup>46</sup> And the *Prosecutor v Bagosora et al* Trial Chamber added:

The presence of a material fact somewhere in the prosecution disclosures during the course of a case does not suffice to give reasonable notice; rather, it must be evident that the material fact will be relied upon as part of the prosecution case. Mere service of witness statements by the prosecution as part of its disclosure requirements is generally insufficient to provide notice to an accused.<sup>47</sup>

The practice of curing the indictment through timely, clear and consistent disclosure did, over time, become more or less the norm at the ICTR, as the prosecution endeavored more and more to follow the guidelines that arose in the jurisprudence. However, matters not in the indictment in any form at all could not form the basis of conviction without timely and clear disclosure of the prosecution’s specific intentions to lead such evidence. In *Prosecutor v Gaspard Kanyarukiga*, a late ICTR case, a great many allegations that arose in the testimony, and were contained somewhere in the disclosure, were ultimately excluded at the Judgment stage because they were mentioned nowhere in the amended indictment upon which Kanyarukiga stood trial, or even worse, had been present in the original indictment and removed when the indictment was amended – a clear indication that the prosecution had abandoned them. While Kanyarukiga was ultimately convicted, it was only for acts that appeared in some form in the amended indictment.<sup>48</sup>

However, in Canada, this obligation to include all relevant criminal acts in some form in the indictments has somehow been transformed into a mere obligation to *disclose* such acts somewhere in the massive disclosure. This, we submit, is an error in law based upon a misapprehension of the disclosure requirements at the international tribunals.

#### **D. Misapprehension in Canadian Courts of the Nature of International Indictments**

In the *Mungwarere* decision on the sufficiency of the indictment, the judge discussed what he perceived to be the difference between ICTR indictments and Canadian indictments, finding the facts section of ICTR indictments to be the equivalent of disclosure in Canadian law:

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<sup>46</sup> *Prosecutor v Zigiranyirazo*, ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (30 September 2005) at para 13 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictr.org>>.

<sup>47</sup> *Prosecutor v Bagosora et al*, ICTR 98-41-T, Decision on Bagosora Motion for Exclusion of Evidence Outside the Indictment (11 May 2007) at para 7 (International Criminal Tribunal for Rwanda), online: ICTR <<http://www.ictr.org>> [References omitted].

<sup>48</sup> *Prosecutor v Gaspard Kanyarukiga*, ICTR-2002-78-T, Trial Judgment (1 November 2010) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictr.org>>.

[13] *Il est vrai qu'au TPIR les faits sont incorporés dans l'acte d'accusation lui-même. Il est aussi vrai que le tribunal peut s'inspirer de la procédure du TPIR compte tenu de l'expérience du TPIR en la matière. Fondamentalement, les deux façons de procéder sont ici sans différence véritable. La déclaration de faits employée par le TPIR sert le même but que l'obligation de divulgation de la Couronne au Canada, c'est-à-dire bien informé [sic] l'accusé. Notre procédure a bien évolué depuis trois décennies. Il fut un temps où la poursuite n'avait qu'à soumettre un acte d'accusation spécifiant les éléments essentiels du crime et rien d'autre. Maintenant, la règle d'or est de s'assurer que l'accusé a en main toute l'information que la poursuite a en sa possession et son contrôle. Par conséquent, l'accusé connaît en détail tous les faits entourant l'allégation contre lui y compris toute la preuve, soit-elle inculpatrice ou disculpatoire dont dispose la poursuite.*<sup>49</sup>

With all due respect, this paragraph represents a complete misunderstanding of the situation prevalent at the International Criminal Tribunal for Rwanda (ICTR) and other international tribunals. It is built on the false premise that the summary of facts in the indictment at the ICTR is a replacement for disclosure, and that there are not the same disclosure requirements in the international arena as exist in Canada. This is simply untrue. The rules of disclosure at the international tribunals closely parallel the rules of disclosure used in Canada. Everything relevant in the prosecution's possession at the ICTR and International Criminal Tribunal for the former Yugoslavia (ICTY) was supposed to be disclosed to the accused,<sup>50</sup> just as is the case in Canada. Thus the disclosure at those tribunals was absolutely massive – thousands upon thousands of pages of evidence were routinely disclosed in all cases there.

This massive disclosure was, rather, one of the reasons that precision and specificity were necessary in the indictments, – so that the accused might know which of the vast multitude of events in the disclosure would be those upon which he would stand trial. In Bizimungu, at the ICTR, the Appeals Chamber upheld the Trial Chamber's conclusion that the failure to mention a particular prefecture in the indictment, which contained a list of specific prefectures in which the accused was alleged to have committed crimes, meant that the accused was therefore not charged with any crimes in the missing prefecture.<sup>51</sup> The Trial Chamber had noted that "the failure to include the facts in the indictment cannot be cured by references in the Pre-

<sup>49</sup> *R c Jacques Mungwarere*, 2011 CSON 1254, Inscription – Requête pour casser l'acte d'accusation at para 13.

<sup>50</sup> Kate Gibson and Cainnech Lussiaà-Berdou, "Disclosure of Evidence" in Karim A A Kahn, Caroline Buisman & Christopher Gosnell, eds, *Principles of Evidence in International Criminal Evidence* (Oxford: Oxford University Press, 2010) 306 at 312.

<sup>51</sup> *Prosecutor v Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Prosecutor's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence (25 June 2004) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <<http://www.ictr.org>> [*Bizimungu et al*, Interlocutory]; upholding *Prosecutor v Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA (23 January 2004) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictr.org>> [*Bizimungu et al*, Motion].

Trial Brief or evidence adduced at trial”.<sup>52</sup> The Appeals Chamber found the Trial Chamber’s finding to be appropriately grounded in Appeals Chamber jurisprudence that: “the failure to plead could not be remedied by the Pre-Trial Brief, disclosed witness statements or the prosecution’s opening statement”.<sup>53</sup> Similarly, at the ICTY, the Trial Chamber in the case *Prosecutor v Brđanin* found that:

[A]n accused is entitled to know the case against him and is entitled to assume that any list of alleged acts contained in an Indictment is exhaustive, regardless of the inclusion of words such as “including”, which may imply that other acts are being charged as well.<sup>54</sup>

In *Prosecutor v Ntakirutimana*, the Appeals Chamber made clear how ambiguity regarding what material facts will form part of the prosecution case may indeed exhaust the resources of the defence, in the face of massive disclosure:

[T]he prosecution cannot intentionally seek to exhaust its opponent’s resources by leaving the defence to investigate charges that it has no intent to prosecute. The prosecution should make every effort to ensure not only that the indictment specifically pleads the material facts that the prosecution intends to prove but also that any facts that it does not intend to prove are removed.<sup>55</sup>

The Appeals Chamber, in *Ntakirutimana* also clearly rejected the notions that evidence should only be excluded if it radically transforms the prosecution case, or that the prosecution should be permitted to “cure” its indictment and convict on previously unknown evidence of acts that were “generally consistent with the overall theme of the prosecution case”, because:

Such a rule would reward the pleading of broad generalities and encourage the prosecution to avoid narrowing its case to conform to the evidence it knows it can prove, in order to leave open the possibility of benefiting from testimony of criminal acts disclosed for the first time on the stand.<sup>56</sup>

And it is just such “pleading of broad generalities” that characterizes the two Canadian indictments, which indictments would clearly have been insufficient in the international arena – partly because of the massive disclosure that is commonplace there, as here, in cases of this scope. It is submitted that such disclosure is not a substitute for a clear and particularized indictment – neither in Canada nor at the international tribunals. The summary of facts section in ICTR/ICTY indictments neither replaces nor supplements nor amplifies the disclosure. Rather, the summary serves to limit and define the charges. It tells the accused what he is actually accused of – as distinct from whatever evidence the prosecution may have in hand. In essence, the summary of facts in the indictment is the antithesis of disclosure – it is rather like a fence erected around the relevant portion of the disclosure that limits the jeopardy of

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<sup>52</sup> *Ibid* at para 13.

<sup>53</sup> *Bizimungu et al*, Interlocutory, *supra* note 51 at para 18.

<sup>54</sup> *Prosecutor v Brđanin*, IT-99-36, Decision on Motion for Acquittal (28 November 2003) at para 88 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

<sup>55</sup> *Ntakirutimana*, *supra* note 38 at para 43.

<sup>56</sup> *Ibid* at para 78.

the accused and the scope of the trial to that which falls inside the fence.

The section with the summary of facts in the indictment lets the accused know what actual acts and “constitutive”<sup>57</sup> or “underlying” crimes form the basis of his charges, and limits the evidence presentable at trial to evidence that supports those now defined charges. It allows the accused to limit his trial preparation to a defence against the actual crimes for which he has been charged, rather than every potential possible charge that might arise from the massive disclosure. There being no summary of facts section in the Canadian indictments, it is incumbent upon the Crown to produce indictments that particularize those constitutive crimes in the indictment so that the accused may clearly know what actual crimes he will face in court, and it is necessary for those individual constitutive crimes to appear in distinct and separate counts so that a jury can unanimously convict or acquit the accused on each individual crime. To elaborate this, we shall examine the fundamental essential elements that must be proved in order to find guilt for the crime of genocide.

#### IV. Characterization of the Essential Elements Needed to Prove Genocide<sup>58</sup>

The crime of “genocide”, though dating back in the historical record at least to biblical times, has only relatively recently become the object of sanction under criminal law, be it national or international:

The term “genocide” was first used by the jurist Rafael Lemkin in 1944 to characterize the deliberate plan of the Nazis to exterminate the Jews and Gypsies (R. Lemkin, *Axis Rule in Occupied Europe*, 1944).

A few years later, the term came to describe a crime in the *Convention on Prevention and Punishment of the Crime of Genocide* signed at Paris on December 9, 1948. The Convention is now considered part of international customary law. [...] The provisions of this convention have been included verbatim in the statutes of the ICC, ICTY, and ICTR.

Since the Second World War no other international crime has received more prominence. [...] The use of the term “genocide” has become synonymous with the most egregious violations of human rights. It has been crowned the most contemptible of all crimes, and assumed a position at the apex of the hierarchy of international crime. The Secretary-General’s Report for the ICTR labels genocide the most notorious of all crimes. Before the advent of the International Tribunals, genocide had never been

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<sup>57</sup> It should be noted that the usual terminology is “underlying” crimes. We prefer the term “constitutive” crimes, as coined in legal argument by Richard Perras, counsel for Munyaneza, and believe it to more clearly express the true legal nature of these crimes. We shall, therefore, use the term “constitutive” instead of “underlying” throughout this article (except in the case of quotations from other authors).

<sup>58</sup> For the sake of simplicity, the foregoing discussion is largely framed in terms of genocide. Analogous reasoning is applicable to all war crimes and crimes against humanity.

prosecuted as a crime before an international or national court.<sup>59</sup>

Since its inception, the ICTR has been the world's main forum for trials of genocide, trying far more cases for that particular crime than all of the other International Tribunals combined, and its jurisprudence has been the most significant in defining many aspects of the crime and its judicial treatment. Among its findings,

ICTR case law has established a hierarchy in the gravity of the crimes under its jurisdiction, considering genocide and crimes against humanity to be more serious than violations of Additional Protocol II, and that genocide is "the crime of crimes" (*Kambanda Judgement and Sentence*, para 16).<sup>60</sup>

### A. The *Chapeau* Element

In seeking properly characterize the elements of the international crimes of genocide and crimes against humanity, it must be remembered that:

domestic crimes are not the same as international crimes and domestic forms of liability are not necessarily the same as those found in international law. International crimes are characterized by so-called *chapeau* elements which set them apart from mere domestic crimes: widespread or systematic attack against a civilian population for crimes against humanity, genocidal intent for genocide. These *chapeau* elements, be they the 'attack upon a given civilian population' in relation to crimes against humanity, or a genocidal intent in relation to genocide, set those crimes in a completely different criminal sphere than their domestic counterparts.<sup>61</sup>

One of the central issues in the analysis is the characterization of the culpable acts of the accused: Are they *facts* that go to prove the charges? Are they *elements* of the offence? Are they *separate crimes* that have been charged under a common *chapeau*? Our position is that the third alternative is the correct characterization of those acts – they are indeed separate crimes, even when they have been charged in a single count.

We would suggest that a proper characterization of the crime of genocide is that it essentially consists of two parts, the "*chapeau* element" and the "constitutive (AKA 'underlying') offence". An important aspect of this structure of the crime of genocide is that

the offences that can constitute genocide have independent physical and mental elements [...] Thus killing and causing serious bodily harm are not simply means of committing genocide in the way that stabbing, shooting, or

<sup>59</sup> Rodney Dixon, Karim A A Kahn & Judge Richard May, eds, *Archbold International Criminal Courts: Practice, Procedure & Evidence* (London, UK: Sweet & Maxwell, 2003) at 389.

<sup>60</sup> John R W D Jones & Steven Powles, *International Criminal Practice*, 3<sup>d</sup> ed (Oxford: Oxford University Press, 2003) at 148.

<sup>61</sup> Guénael Mettraux, *International Crimes and the Ad Hoc Tribunals*, (Oxford: Oxford University Press, 2006) at 213[Mettraux].

beating someone are all means of inflicting death or serious injury. Rather, each act has its own distinct elements, which are separate from the factors that transform particular conduct into the international crime of genocide.

Accordingly, the “acts of genocide” listed in the [1948 Genocide] Convention are best understood as underlying offences of the crime of genocide, which are distinguished by their actual or intended results — immediate death, mental injury, prevented births — and which can themselves be committed using different methods.<sup>62</sup>

It is our position that the *chapeau* element is not a description of the crime itself. Rather, the *chapeau* element defines the special intent (the *dolus specialis*) with which the constitutive offence must have been committed if that constitutive offence is to be characterized as genocide. (Similarly, it defines the particular circumstances in which the constitutive offences must have occurred for those constitutive offences to rise to the level of war crimes or crimes against humanity.)

The general requirements for genocide, as they have been applied at the *ad hoc* Tribunals, are contained in the *chapeau* to subparagraph (2) of Article 4/2,<sup>63</sup> and consists of two requirements: the offences must be committed with the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’; and the victims must be subjectively perceived as falling within one of the protected categories, which must in turn be objectively identifiable to some extent. The first general requirement, genocidal intent, has three components: (1) the specific intent to achieve a prohibited result, which is (2) the partial or total material destruction of (3) a distinct group defined on the basis of nationality, ethnicity, race, or religion.<sup>64</sup>

Thus, the offence that is charged and tried is, in fact, the constitutive offence (such as murder). The *chapeau* element, if it is proven, raises the severity of *that* crime into the realm of genocide, the “crime of crimes”, or other war crimes and crimes against humanity.

## B. The “Constitutive” Crimes

It is our contention that the constitutive crimes are *not* merely the facts that go to prove an overarching crime of genocide. The constitutive crimes themselves, if committed with the requisite special intent, *are* the actual acts of genocide and *are* thus the very crimes being tried. The defining elements of the constitutive (AKA “underlying”) offences have not essentially changed since the first ICTR Trial Judgment to deal with the issue:

<sup>62</sup> Gideon Boas, James L Bischoff & Natalie L Reid, *International Criminal Law Practitioner Library, Volume II: Elements of Crimes under International Law*, (Cambridge: Cambridge University Press, 2008) at 155.

<sup>63</sup> *Ibid* at 156: “The provisions on genocide in the statutes of the ICTY and ICTR reproduce verbatim Articles II and III of the [1948] Genocide Convention. Article 4 of the ICTY Statute is virtually identical to Article 2 of the ICTR Statute (collectively, ‘Article 4/2)’.”

<sup>64</sup> *Ibid* at 156-157.

As with much of the *ad hoc* Tribunals' jurisprudence on genocide, the definitions of the elements of these underlying offenses were first offered by the *Akayesu* Trial Chamber, and have changed little since that 1998 judgement. [See e.g. *Kayishema and Ruzindana* Trial Judgement, paras 95, 108, 117-118; *Rutaganda* Trial Judgement, para 47; *Brdanin* Trial Judgement, para 514]<sup>65</sup>

Killing, as an underlying offence of genocide, has been consistently defined by *ad hoc* chambers as requiring the specific intent to cause the death of the victim. Grounding its conclusion on a comparative textual analysis of the English and French texts of the ICTR Statute, the *Penal Code of Rwanda*, and the *travaux préparatoires* of the Genocide Convention, the *Akayesu* Trial Chamber held that:

The term 'killing' used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term '*meurtre*', used in the French version is more precise [...] Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which '*meurtre*' [...] is homicide committed with the intent to cause death. [*Akayesu*, paras 500–501]<sup>66</sup>

That many genocidal acts – or constitutive crimes – may have been charged in a single count of an indictment does not transform such crimes into anything less than the actual crimes charged. A charge of genocide by murder is still a charge of murder. It is, in fact, “murder +” (a murder *plus* the intent to destroy a group as such) with the special intent being an *additional* intention that must be proved over and above the requisite intent to kill the individual that defines the killing as murder. As defined in *Akayesu*:

517. [T]he crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged, listed in Article 2(2) of the Statute, must have been “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

518. Special intent is a well-known criminal concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an international offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.<sup>67</sup>

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<sup>65</sup> *Ibid* at 177.

<sup>66</sup> *Ibid* at 176-179.

<sup>67</sup> *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgement (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <<http://www.ictor.org>> [*Akayesu*].



### C. The Nature of an Analysis of the Crime of Genocide

As practiced at the international tribunals, an analysis of the crime of genocide is, at its essence, a two-step process: *firstly*, it must be established that the accused committed the constitutive (“underlying”) offence with the requisite intent that defines that constitutive offence (e.g. murder), and *secondly*, it must be established that the accused, at the time that he intentionally committed that constitutive offence, *also* intended that the commission of the constitutive offence would be leading to the destruction, in whole or in part, of the identifiable group, as such (of which the victim was a member).

The relevant state of mind for genocide is therefore composed of both the *mens rea* relating to the underlying offence (say, intending to kill members of the group or cause serious bodily harm to members of the group) and the *mens rea* related to the chapeau elements of the crime (genocidal *mens rea* proper). Its *actus reus* is limited both as to the kind of underlying offences which may constitute genocide and in relation to the forms of participation which may entail individual criminal responsibility for participating in such an act.<sup>68</sup>

These acts are sometimes referred to as the *actus reus* of genocide. The expression ‘underlying crimes’ or ‘underlying offences’ is preferred here for two reasons: first, it sets a distinction (applying to all crimes within the Tribunal’s jurisdiction) between the so-called *chapeau* elements on the one hand and underlying offences on the other; secondly, these various underlying offences each are made up of both an *actus reus* and a *mens rea*. It may therefore be somewhat misleading to refer to them simply as ‘*actus reus*’ since each of them in fact contains its own individual *mens rea*.<sup>69</sup>

Thus, in order to ground a conviction for genocide by intentional murder, the essential elements of the crime of which the trier of fact must be convinced beyond a reasonable doubt are that (a) an unlawful killing took place, (b) the accused committed that unlawful killing, and (c) the accused intended to kill that person, and then additionally that (d) the accused intended that intentional killing to contribute to the destruction, in whole or in part, of the identifiable group, as such (of which the person who was killed was a member).

In order to find that a killing was intentional, and thus, murder, the trier of fact must find that the requisite mental element of intentionality existed in mind of the accused at the time of the killing. Intention cannot be transferred from one killing to another. Thus, a jury must agree on the essential elements of *at least one murder*, before they even need to ask themselves if the accused possessed the special intent of genocide at the time of that killing.

It is our contention that this was always the intention of the *Act*. As Richard Perras, counsel for Munyaneza, put it succinctly:

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<sup>68</sup> Mettraux, *supra* note 61 at 208.

<sup>69</sup> *Ibid* at 235.

1) You have to read the whole of the Act to understand it.

2) Section 15 clearly states that the underlying offense FORMS THE BASIS OF THE CHARGE. It is thus a “Constitutive” crime of the *Chapeau* offense. It seems to me, from this formulation, that the legislator chose explicitly to impose, or at least endorse, the 2 step judgment approach of the International tribunals: i.e. a) Render judgment on the “basis” crimes (that is, the “constitutive crimes”) *as charged*. Then, using convictions only: b) Render judgment on the Big crime.

3) Section 15 also answers the question of jury unanimity because it provides that, though the sentence is pronounced on the *Chapeau* offense, it is based on the crime that forms the basis of the charge. (See sections 15 (1) (a), 15 (1) (b), 15 (1) (c), 15 (2) (a), 15 (2) (b), 15 (2) (e), and 15 (3) of the Act.) It also flows from section 15 that, as is the case in front of the International Tribunals, the accused has to be found guilty or not guilty of the Underlying or Constitutive crime. Since Canada opted for the international approach, it must follow through in interpreting the Act in light of that approach.<sup>70</sup>

The Supreme Court of Canada clearly supports the first basic proposition advanced by Me Perras, from which his argument derives, having recently said:

The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed 2008), at p 1.<sup>71</sup>

Particulars give the accused exact and reasonable information to enable him to establish fully his defence. Furthermore, particulars assist the trial judge in rulings on admissibility of evidence<sup>72</sup>. Especially in the case of a jury trial, it is essential that confusing or prejudicial evidence pertaining to crimes that are not specifically charged in the indictment be excluded, and that the jury be instructed to disregard any such evidence that it may have heard. Absent such exclusion and instruction, the trial cannot be fair. And it is our contention, that following the scheme of the Act, the object of the Act cannot be fulfilled unless the constitutive crimes are clearly spelled out in separate counts.

## V. The Nature of Unanimity Needed by a Jury in a Case of Genocide or Crimes Against Humanity

In contrast to *Munyaneza*, which was tried by judge alone, the *Mungwarere* case was expected to be before a jury. This required the pleading of important issues regarding the requisite clarity and specificity of the indictment in a jury trial.

<sup>70</sup> Personal email communication from Richard Perras, July 2014.

<sup>71</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 108.

<sup>72</sup> *R v Canadian General Electric Co* (1974), 17 CCC (2d) 433 (Ont HCJ).

In a trial by judge alone, in which the primary purpose of clarity and specificity in the indictment is to clearly inform the accused of what he is charged, *some* ambiguity in the indictment can *sometimes* be remedied by disclosure. By contrast, in a trial by jury, the indictment serves as well to inform the jury of the precise parameters of the case that they are trying.

#### **A. The Essential Nature of Particularity of Individual Allegations**

A jury, at the end of the trial, must be in a position to answer direct and straightforward questions of guilt or innocence with an affirmative or negative answer. When the accused is standing trial for a multiplicity of different specific crimes, allegedly committed at different times and places against different victims, a jury is put in an untenable position when asked to decide guilt or innocence based merely on multifaceted charges that reflect little more than the chapeau elements of the counts, and not the specifics of the allegations.

If ultimately convicted, the accused has the right to know of what he has been convicted. A judgment rendered by a judge, would, of necessity, be a reasoned judgment, that clearly explains the basis upon which the conviction has been reached and the reasoning behind such conclusions. The accused would thus know that he has been convicted of having committed certain specified and specific crimes against certain specified and specific victims at certain specified and specific dates and times. If the accused should thus decide to appeal his convictions, he – and the Court of Appeal – would know which convictions he would be seeking to infirm.

However, a jury does not produce a nuanced and reasoned judgment. It pronounces a verdict of guilt or lack of guilt on each count of the indictment — nothing more and nothing less. With an indictment in which multiple alleged crimes have been lumped together into singularly general counts – a simple statement of guilty or not guilty on each of the vaguely worded counts will not tell the accused of what specific crimes he has been convicted. A conviction by a jury based on such an indictment would provide the accused with none of the essential clarity to which he is entitled. And this would severely limit his ability to even know if a legal error had been committed which could be subject to appeal. If he does not know, specifically, of what he has been convicted, how can he guess whether or not there was sufficient proof of that un-named crime upon which a reasonably instructed jury could have convicted?

In our opinion, it is, thus, absolutely essential that the indictment particularize and specify each individual allegation of each criminal act as a separate and individualized charge so that the jury can be asked to pronounce its verdict on each individual alleged crime. Thus the jury must have access to the particulars to know what events the Crown intends to prove beyond a reasonable doubt to support the charges, and what offences the defence must rebut in order to be able to arrive at a reasoned decision as to whether or not the Crown has made its case at the end of the day.

These particulars should be provided to the jury and the accused as part of a clear and precise indictment that allows all concerned to know exactly what material facts the trial is about. Absent such material facts specified in the indictment, in the form of a series of clearly delineated charges that the Crown intends to prove, the prosecution would be presenting the accused and the jury with a moving target. Anything short of that degree of precision in the indictment risks resulting in a miscarriage of justice due to uncertainty.

It is not contested that Canadian criminal law *permits* the inclusion in a single count of an indictment multiple acts that could have been charged separately. It is also not contested that Canadian criminal law *permits* each member of a jury to arrive at his or her verdict based upon different facts from each other – the members of a jury need not take the same route to their conclusion. The leading case on this issue of alternative acts being covered a single charge is *R v Thatcher*,<sup>73</sup> which we contend is not logically applicable to cases charging “constitutive” crimes within a “*chapeau*” crime.

## **B. The Rule in *Thatcher* is Inapplicable**

In *Thatcher*, it was settled that the jury need not agree on whether Thatcher had personally killed his ex-wife or if he had hired someone else to kill his ex-wife, since both sets of fact still constituted Thatcher murdering his ex-wife.<sup>74</sup> Either line of reasoning led to the same conclusion. As long as the members of the jury agreed that he had murdered his wife by one route or another, they could be unanimously satisfied that he was guilty of murder, and could convict. It mattered not that they may have disagreed as to which route he had actually taken.<sup>75</sup>

As discussed in *Thatcher*, the reasoning behind permitting these particular jury instructions is to avoid an unjust result under certain circumstances (such as existed in the *Thatcher* case) in which the jury is confronted with a choice between two different modes of participation in the crime, which are *mutually exclusive*.<sup>76</sup> This

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<sup>73</sup> *R v Thatcher*, [1987] 1 SCR 652 [*Thatcher*].

<sup>74</sup> *Ibid*, judgment of Dickson C J at para 3 described the issue thus: “The effect of the argument, in the circumstances of this case, was that in order to find Mr. Thatcher guilty of murder, the jury had to be unanimous that he intentionally killed his former wife or, alternatively, that he aided or abetted another person or persons in her killing; it was simply not sufficient that some members of the jury would hold to one theory and other members would hold to the other theory. That, as I see it, is the principal issue in this appeal.”

<sup>75</sup> *Ibid*, per Dickson C J at para 82: “As Professor Peter MacKinnon points out in, *Jury Unanimity: A Reply to Gelowitz and Stuart* (1986), 51 CR (3d) 134 at 135, if an accused is to be acquitted in situations when every juror is convinced that the accused committed a murder in one of two ways, merely because the jury cannot agree on which of the two ways, ‘it is difficult to imagine a situation more likely to bring the administration of justice into disrepute – and deservedly so’.”

<sup>76</sup> *Ibid*, per Dickson C J at para 72: “The Crown is not under a duty to separate the different forms of participation in a criminal offence into different counts. Obviously, if the charge against Thatcher had been separated into different counts, he might well have been acquitted on each count notwithstanding that each and every juror was certain beyond a reasonable doubt either that Thatcher personally killed

puts the jury in the position of having to choose between two different routes to guilt that *cannot both be true* (though they can both be false). Thus, in that case, disagreement on such a choice, even if all the members of the jury are in agreement that he had committed the murder, would have had the anomalous and unjust effect of letting a guilty person go free despite all twelve members of the jury being convinced beyond a reasonable doubt of his guilt.<sup>77</sup>

On the other hand, if the unfettered use of the same sort of jury instructions could rather *lead to* an unjust result in other circumstances, that is creating circumstances in which an innocent person can be convicted on the basis of something less than proof beyond a reasonable doubt, then those instructions must be avoided.<sup>78</sup>

In a genocide or crimes against humanity case involving multiple constitutive crimes, there is no mutual exclusivity of the various crimes alleged in the prosecution evidence. Being convinced that the accused had committed any one of the crimes does not exclude being convinced that he had committed any or all of the others. Thus, there is nothing that prevents the jury from reaching unanimity on one particular crime even if they do not agree on any of the others. But allowing the jury members to each pick a particular crime of which to find him guilty without reference to any other jury member's finding *does* lead to the anomalous result that the accused can be found guilty without any agreement on what he is guilty of.

Furthermore, in the cases of *Munyaneza* and *Mungwarere*, we were not dealing with different modes of participation in the same crime, as in *Thatcher*. Nor were we dealing with different moments or aspects of the *actus reus* of a single crime (as in much of the jurisprudence that follows *Thatcher*).<sup>79</sup> We were, rather, dealing with a series of distinct and discrete crimes that cannot and should not have been conflated together as one.

It is our firm conviction that it would be a perverse result that would bring the administration of justice into disrepute if a conviction for only one murder in a non-genocidal context would require the usual complete unanimity of the jury that the accused had intentionally killed that person (regardless of the method used in the killing), yet a conviction for killing many people, and thus being found guilty of the "most egregious", the "most contemptible of all crimes", indeed, of the so-called "the

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his ex-wife or that he aided and abetted someone else who killed his ex-wife. This is precisely what s. 21 is designed to prevent."

<sup>77</sup> *Ibid*, per Lamer J at para 91: "It is true that the Crown presented two factually inconsistent theories: that the appellant actually killed the deceased or that he aided and abetted the killer. The overwhelming mass of the evidence against the appellant, however, was consistent with both theories and pointed only to his participation in the murder. The jury could not have been convinced beyond a reasonable doubt of one theory to the exclusion of the other, but must have been convinced beyond a reasonable doubt that the appellant participated in the murder, either as principal or aider and abettor."

<sup>78</sup> *Ibid*, per Lamer J at para 92: "If the Crown presents evidence which tends to inculpate the accused under one theory and exculpate him under the other, then the trial judge must instruct the jury that if they wish to rely on such evidence, then they must be unanimous as to the theory they adopt."

<sup>79</sup> Such as, for example: *R v Pearson*, [1994] JQ n° 66 (Qc CA); *R v GLM*, 1999 BCCA 467; *R v Reyat* 2010 BCSC 1623; *R v Robinson* (2004), 189 CCC (3d) 152.

crime of crimes”, could be possible on the basis of each juror having found that the accused had intentionally killed a *different* person than any other juror may have found, such that *no two jurors even need to agree on any of those murders*.

In such a circumstance, given that only one juror in twelve may think that any given murder actually took place, or, if so, that the accused was responsible, there is left a vast area of doubt about each one of those murders resulting from the other jurors’ failure to agree on that conclusion. In essence, the more doubt there is, the easier it is to convict – only one person needs to be convinced of guilt regarding *any* given crime, and *no agreement*, let alone unanimity, is required at all as to whether or not the accused actually committed any one of those murders. When there is doubt, the accused is supposed to be given the benefit of that doubt – here, the benefit of the doubt accrues to the prosecution!

It was found in *Prosecutor v Jean-Paul Akayesu* that

Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld.<sup>80</sup>

As Guénael Mettraux explains in *International Crimes and the Ad Hoc Tribunals*, there is

a principle of justice which requires that, if faced with uncertainty as to whether the definition of a crime (or the definition of a form of liability) requires a higher or lower mental threshold, the benefit of the doubt should accrue to the accused: *in dubio pro reo*. [...]The law, including international law, should never be made at the expense of an accused person.<sup>81</sup>

It is manifest that these same principles should apply in all cases. Any doubt, any uncertainty must accrue to the accused.

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The way in which the *Act* was applied in both *Munyaneza* and *Mungwarere* regarding their indictments was, in the opinion of the authors, both incoherent and incorrect in law. Furthermore, it is submitted that if such applications are allowed to stand, they will have made the *Act* into a completely unworkable statute – one whose application would be so replete with uncertainty that justice could not be assured. With no possibility of justice, Canada will be returned to the days of relying solely on deportation rather than criminal trials to deal with the possibility of war criminals seeking safe haven in this country. Canada will have abdicated its responsibilities under the *Rome Statute of the International Criminal Court* (of which, this country

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<sup>80</sup> *Akayesu*, *supra* note 67 at para 501.

<sup>81</sup> Mettraux, *supra* note 61 at 215.

was a principle moving force) to try such criminals in our country. This was clearly not the intention of either the *Rome Statute* or the *Act*.

We had hoped that the Supreme Court would have entertained this question in a *Munyaneza* appeal and would have shown a greater understanding of the problems and pitfalls of the type of indictments preferred in the *Munyaneza* and *Mungwarere* cases than has been demonstrated in the lower courts so far. Since the Supreme Court never gives its reasons for granting or rejecting applications for leave to appeal, we can only guess at their reasons for declining to look at the matter this time around, which speculation we do not propose to enter into. Nevertheless, we do believe that in order for the *Act* to be a vigorous workable statute, the Supreme Court must, at some point, clarify the issue discussed in this article, and must find that a properly detailed and specific indictment, that particularizes the individual constitutive crimes, is an essential tool in the fight to end impunity – while still providing the necessary protection of the innocent against unjust conviction. It is only thus that truly fair trials will be able to be held under this important piece of legislation.