

International Criminal Tribunal for Rwanda

Procedural Issues of Joinder and Severance

*A comparative study of practice concerning the
"same transaction" in common law jurisdictions.*

Rules 48 and 49 of the Rules of Prosecute and Evidence provides that several accused or crimes may be included in the same indictments provided that the crimes were part of the "same transaction." The notion of "same transaction" is also important in the many common law jurisdiction to the question of joinder.

Hoda F. Soliman
150-72-1279
War Crimes Project
International Criminal Tribunal for Rwanda
Professor Scharf
Faculty Advisor, Professor Cox
Upper Class Writing Requirement, UCWR
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I. Introduction and Summary of Conclusions

In light of the possibility of establishing an international criminal court with jurisdiction over war crimes and crimes against humanity, the Rwanda Tribunal constitutes a substantial milestone in the history of international criminal law and criminal procedure.¹ The issues before the Rwanda Tribunal will serve as important precedent for the establishment of an international criminal court. Issues currently being addressed by the Rwanda Tribunal are the notion of “same transaction,” joinder and severance. An accused may be charged with several crimes at different times before trial; and more than one accused may be charged with crimes that are factually similar. Thus, the possibility of joinder of parties and joinder of crimes is provided for in Rule 48² and Rule 49³ respectively. The possibility of joinder of crimes or joinder of parties is beneficial to the Rwanda Tribunal in view of the limited resources available. Without the prospect of joinder of claims and joinder of parties, the right of the accused to be tried without undue delay may be otherwise jeopardized.⁴ Joinder of crimes and joinder of

¹ See VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, 1-3 (1998).

² Rule 48 of the Rwanda Tribunal Rules states as follows:

Rule 48

Joinder of Accused

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

Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 48, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

³ Rule 49 of the Rwanda Tribunal Rules states as follows:

Rule 49

Joinder of Crimes

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

Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 49, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

⁴ See MORRIS & SCHARF, *supra* note 1, at 481.

accused are essential instruments in a criminal procedure system. The use of Rule 48 and Rule 49 of the Rules of Prosecute and Evidence will be determinative of a system which operates without undue delay, prejudice or judicial inefficiency. The Rwanda Tribunal, like every jurisdiction that employs rules of joinder, will need to balance questions of judicial efficiency and tactical advantage of the government against the rights of the defendant(s) to a fair trial. Based on limited research and comparative analysis of criminal procedure codes and case law, I have concluded that the Rwanda Tribunal will benefit, thereby increasing its efficiency, from the employment of joinder and severance, Rule 48 and Rule 49 of the Rules of Prosecute and Evidence.

II. Factual Background

Rwanda is composed primarily of two tribes, the Hutu (majority) and the Tutsi (minority). Over the years, the two tribes have evolved into two separate and distinct ethnic groups.⁵

In 1994, after years of violent clashes between the Tutsi army (known as the Rwandan Patriotic Front, RPF) and the Hutu extremists, President Juvenal Habyarimana's plane was shot down by missile.⁶ Immediately, the two tribes looked to each other for the responsibility. Within hours, Hutu soldiers began killing Tutsi civilians and even moderate Hutu members. Rwanda borders and transportation centers were sealed, and the United Nations' peacekeeping forces were prevented from

⁵ *See id.* at 49. The differences ranged from economic and political views to vocations and physical appearances. *See id.* The patrilineal line, taking into account the ethnic heritage of the father, was the basis for determining a tribal classification. *See id.*

⁶ *See* MORRIS & SCHARF, *supra* note 1, at 53. The plane was shot down by surface-to-air missile, killing everyone on board. *See id.* The Hutu extremists immediately accused the Tutsis of the assassination. *See id.*

investigating.⁷ The slaughter of the Tutsi tribe quickly spread throughout the country.⁸ The responsibility for the genocide of the Tutsi tribe was, and continues to be, shared in varying degrees by three categories of individuals: “ the planners, the ‘military’ superiors and subordinates, and the unwilling accomplices.”⁹ The international community, the United Nations and the Security Council responded to the atrocities and crimes against humanity by adopting Resolution 955 which provided for the establishment of the Rwanda Tribunal.¹⁰ Upon its inception, the Rwanda Tribunal incorporated the Rules of Procedure and Evidence in order to set up a framework.

The Rules of Procedure and Evidence allow the Tribunal to manage the amount and degree of criminals and crimes that occurred in Rwanda. The Tribunal faces the issue of bringing all persons (the planners, the military superiors and subordinates, and the unwilling participants) involved in the massacre to justice, with judicial efficiency. Many of the rules allow the Tribunal to gain tactical advantages and form strategies in implementing justice within a reasonable amount of time. Rule 48 and Rule 49 permit the Tribunal, at its discretion, to consolidate crimes and defendants. Thus, Rule 48 and Rule 49 save the Tribunal time, resources and valuable funds while affording the accused a fair trial.

⁷ See *id.* at 53-54.

⁸ See MORRIS & SCHARF, *supra* note 1, at 55. Mass graves were filled and bodies were dumped in rivers. See *id.* Radio broadcasters instructed listeners to complete the murders and “fill the graves.” *Id.*

⁹ *Id.* at 55.

¹⁰ See MORRIS & SCHARF, *supra* note 1, at 72. The adoption of the statute annexed was by vote of 13 in favor, 1 opposed (Rwanda) and 1 abstention (China). See *id.* Rwanda gave several reasons for opposing Resolution 955, some of these objections were: “the composition and structure of the Tribunal, failure of the Tribunal to give priority to genocide prosecutions, the prohibition of the death penalty (which the Rwandan national courts favor), and the failure to designate Rwanda as the seat of the Rwanda Tribunal.” Daphne Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR.J.INT’L. 501, 504 (1996).

Within the context of the Rwanda Tribunal and criminal procedure, Rule 48 and Rule 49 of the Rules of Prosecute and Evidence play a vital role in shaping the operation and manner in which an international criminal court would manage crimes of grand stature and high numbers of accountability (*ie.* war crimes and crimes against humanity).

III. Legal Discussion

The following memo will discuss Rules 48 and 49 of the Rules of Prosecute and Evidence, the notion of “same transaction” and questions of joinder and severance. Joinder and severance will be further subdivided into joinder/severance of offenses and joinder/severance of accused. In addition, the paper will address issues of double jeopardy (the inclusion of lesser included offenses), advantages and disadvantages to the court, and prejudice(s) to the accused. In current criminal justice systems, joinder and severance of offenses and defendants present conflicts of considerable dimensions. The conflicts in this area occur with interests that commonly clash in the field of criminal procedure: the prompt and effective handling of cases, without putting excessive demands on judicial resources, and the avoidance of prejudicial and unfair treatment of defendants.¹¹ The traditional rationale for joinder of defendants and offenses is the conservation of time.¹² Nevertheless, there are broad policy issues of principal significance underlying the explanation of questions involving joinder and severance.

¹¹ *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO JOINDER OR SEVERANCE 1 (1968).

¹² *See id.* at 1. The time lost refers to the identical efforts of several prosecutors, witnesses having to appear numerous times, and the time given by judges and court officials. *See id.*

A. Joinder and Consolidation

Joinder and consolidation is a procedural issue that affects a small percentage of criminal cases. The reason that joinder concerns a low number of cases is because it is a trial issue and relatively few criminal cases go to trial.¹³ Of the cases which go to trial, only those involving either multiple offenses or multiple defendants are affected by joinder (and severance) rules.¹⁴ The outcome of a case can be altered by the number and nature of charges and defendants joined together.¹⁵

Joinder arises in two distinct situations: joinder of offenses and joinder of defendants. Joinder of offenses arises in three instances:¹⁶ (1) offenses which are of the “same or similar character,”¹⁷ (2) offenses which are based on the same act or transaction, or on two or more acts or transactions connected together;¹⁸ and, (3) offenses which constitute parts of a common scheme or plan.¹⁹ Joinder of defendants occurs when persons accused of the same or different crimes *committed in the course of the same transaction* may be jointly charged and tried.²⁰

¹³ AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE 13-4 (1986). This fact is based on cases which are heard and tried within the United States. *See id.* This fact may be substantially different in the context of the Rwanda Tribunal in which nearly every crime will go to trial. *See id.*

¹⁴ *See id.* *See also* MORRIS & SCHARF, *supra* note 1, at 481 (Since a trial cannot commence in the absence of the accused, the issue of a joint trial will arise only after two or more accused are in the custody of the Rwanda Tribunal).

¹⁵ *See* STEPHEN A. SALZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE, 879 (1996). There was a time at which the government could only charge one offense in one indictment and was greatly restricted in trying defendants together. *See id.* This time has past, largely because of the “economies of joinder in the era of scarce resources.” *Id.*

¹⁶ FEDERAL RULES OF CRIMINAL PROCEDURE 8 (1998) (“Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan”).

¹⁷ HARRY I. SUBIN, CHESTER L. MIRSKY & IAN S. WEINSTEIN, THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS 198 (1993). *See also* Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 49, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

¹⁸ *See id.*

¹⁹ *See id.*

The decision to prosecute jointly may be influenced by an array of practical and tactical factors, including, but not limited to, the merits of the individual cases.²¹ Factors which may influence a court's decision to try defendants or offenses jointly are: witness convenience (having witnesses testify only once), prosecutorial commitment (joint trial dealing with several charges will involve the same prosecutorial commitment as a trial handling one charge and one defendant), the defendant's right to a speedy trial (if the multiplicity of trials causes postponement for substantial periods), and judicial efficiency.²² Many different factors and policy considerations weigh heavily on the court's decision to consider the possibility of joinder of parties or joinder of crimes. The standards may be set forth appropriately, but the circumstances and results of joinder may differ dramatically.

1. Joinder of Offenses

Joinder of offenses entails rules regarding the joinder of what are concededly separate offenses. Joinder of offenses occurs when there is one defendant and multiple crimes. In the case of the indictment of the single defendant, the Rules of Procedure and Evidence allow separate crimes to be joined in one indictment "if the series of acts committed together form the same transaction, and the said crimes were committed by the

²⁰ Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 48, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II (emphasis added).

²¹ AMERICAN BAR ASSOCIATION, *supra* note 13.

²² *See id.* at 13-4-13-6. Given the number, variety and impact of possible relevant factors, the different policies and analyses, and different facts involved, different judgments on joinder are inescapable. *See id.* In some instances, identically situated cases may reach contrary conclusions as to whether multiple offenses or defendants should be tried together. *See id.* Many times, the disposition of the defendant(s) affects whether or not the trial will be conducted with joint offenses or defendants. *See id.*

same accused.”²³ The Rules of Procedure and Evidence for the Rwanda Tribunal is a model of the Federal Rules of Criminal Procedure established by the United States; therefore, a discussion of the Federal Rules is required for further explanation.

The Federal Rules of Criminal Procedure of the United States, particularly Federal Rule 8(a), expressly authorizes the joinder in the same indictment or information of two or more offenses.²⁴ Federal Rule 8(a) allows separate offenses to be joined if they are “of the same or similar character, or are based on the same transaction, or on two or more acts or transactions connected together, or constituting parts of a common scheme or plan.”²⁵ The word “transaction” is a word with flexible meaning which means a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.²⁶ “Connected” transactions occur when one offense depends upon the other or leads to the commission of the other so that “proof of the one

²³ Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 49, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

²⁴ Romualdo P. Eclavea, *Joinder of Offenses under Rule 8(a)*, *Federal Rules of Criminal Procedure*, 39 A.L.R. Fed. 479, *2a (1997). Rule 8(a) applies only to joinder of offenses charged against a single defendant. *See id.* Rule 8(a) permits the joinder in the same indictment of felonies and misdemeanors. *See id.*

²⁵ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198-199. *See also* FEDERAL RULES OF CRIMINAL PROCEDURE 13 (1998) (“The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information”) (emphasis added). *See also* JAMES G. CARR, CRIMINAL PROCEDURE HANDBOOK 341-343 (1994). *See also* FEDERAL RULES OF CRIMINAL PROCEDURE 8(a) (1998).

²⁶ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198, note 1 *quoting United States v. Park*, 531 F.2d 754, 761 (5th Cir. 1976) (In *Park*, offenses relating to the possession of drugs and guns were joined in the same indictment as arising from the same “transaction”). In this instance again, the court will balance the speed and efficiency of the court against the right of the accused to fair trial. *See id.* Conspiracy is an example of cases in which the courts have held proper joinder in the same indictment, on the ground that the offenses were of the same or similar character. *See id.* In conspiracy cases, the court did not look to the immediateness of the connection of the crimes, but rather to the logical relationship of the substantive counts in relation to the conspiracy as a whole. *See id.* Other cases in which joinder of offenses in the same indictment was held proper under Rule 8(a), on the ground that the offenses were of the same or similar character, are: evasion of income taxes for different years, robbery, theft or burglary committed on different dates, racketeering offenses, and kidnapping, or aiding and abetting a kidnapping, of another person on different dates. *See id.*

act...constitute[s]...(or) depend[s] upon proof of the other.”²⁷ Offenses are considered otherwise connected when the offenses “arise out of a series of connected acts, and the evidence as to each count, of necessity, overlaps; where most of the evidence admissible in proof of one offense is also admissible in proof of the other; or where there are common elements of proof in the joined offenses.”²⁸ The term “common scheme or plan” refers to separate offenses that are interrelated by a common object rather than an overlapping of proof — an overarching criminal plan.²⁹

Furthermore, Rule 8(a) is not limited to crimes of the same character, but also covers those of similar character, which means “nearly corresponding, resembling in many ways, having [a] general likeness.”³⁰ Similar character offenses normally involve the repeated commission of an offense, resembling one another, often with the same modus operandi.³¹ The Federal Rules, in using terminology like “same or similar character,” limit the usage of joinder to related offenses. Unrelated offenses are difficult

²⁷ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198, note 1. Examples of “connected” offenses which may be tried jointly are: the interstate transportation of a stolen motor vehicle and the interstate transportation of a firearm by a felon; the manufacture of a controlled substance and the receipt by a convicted felon of a firearm; extortion and false declaration before a grand jury; and, armed bank robbery, jeopardizing the lives of others in the commission, and kidnapping to avoid apprehension. *See id.*

²⁸ *State of Arizona v. Garland*, 1998 WL 54618, *3 (Ariz. App. Div. 1).

²⁹ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198, note 1. Examples of crimes which arise out of a “common scheme or plan” and may be charged under one indictment are: offenses of entering a military property for unlawful purpose, rape, assault with a dangerous weapon and escape, sale and possession of heroin committed on different dates, offenses of aiding and abetting a bank officer in the willful misapplication of funds, and interstate transportation of two different women for the purposes of prostitution. *See id.*

³⁰ Eclavea, *supra* note 24, at *2a.

³¹ *See id.* Commentators have been critical of “similar offense” joinder because the offenses are distinct (each requiring its own witnesses and evidence), and many critics argue that joinder of offenses does not save time, but rather, confuses the jury and prejudices the defendant. *See id.*

to join under the Federal Rules because the prejudice to the defendant is outweighed by any benefit that the government or the court may experience.³²

a. Case Law: United States

Although permissive joinder of offenses is conceptualized in the Federal Rules of Criminal Procedure,³³ joinder of offenses, and the types permissible, has developed through case law. Through statutes and case law, courts have established that joinder is permissible in three instances (as mentioned above): (1) offenses which are of the “same or similar character;” (2) offenses which are based on the same act or transaction, or on two or more acts or transactions connected together; and, (3) offenses which constitute parts of a common scheme or plan.³⁴ The instances which allow joinder of offenses are best understood in the context of actual cases.

Offenses which are of the “same or similar character” may vary depending on fact situations and the crimes involved. Courts have held a number of crimes to have involved the “same or similar” character. Joinder of counts on the basis that they were of the same or similar character was upheld by the Seventh Circuit in *United States v. Koen*³⁵ (fraud involving a federally funded program, arson that was intended, in part, to conceal the fraud, and insurance fraud following the arson); the Tenth Circuit in *United States v. Levine*³⁶ (bank fraud and mail fraud counts properly joined where both classes of

³² AMERICAN BAR ASSOCIATION, *supra* note 13, at 13-14. Joint trials of unrelated offenses, including those of dissimilar character, are occasionally authorized in situations where a joint trial would be desirable. An example of this may be when the multiple prosecution aspects of a case create greater problems for the defendant than any aspect of a fair trial. *See id.*

³³ *See generally* FEDERAL RULES OF CRIMINAL PROCEDURE 8(a) and 13 (1998).

³⁴ *See* SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198. *See also* Eclavea, *supra* note 24.

³⁵ JAMES G. CARR, CRIMINAL PROCEDURE HANDBOOK 341-343 (1994) *citing* 982 F.2d 1101 (7th Cir 1992).

³⁶ *Id. citing* 983 F.2d 165 (10th Cir. 1992).

fraud arose out of the defendant's business) and *United States v. Muniz*³⁷ (firearms counts charging unlawful possession of separate firearms on different dates); and the Eleventh Circuit in *United States v. Walser*³⁸ (charges of perjury and aiding and abetting properly joined with counts alleging false and fraudulent statements to a government agency; though offenses were distinct in time, they were similar and all related to a scheme to mislead the government). Whether crimes involve the "same or similar" character is usually determined at the discretion of the court. Depending on the factual circumstances of the case, a court may determine that two completely unrelated offenses contain the "same or similar" character. However, more often than not, there is a common thread which connects the character of the offenses (thereby eliminating the possibility of joinder of completely unrelated offenses).

Other crimes in which case law has determined that the offenses are of the "same or similar character" and can be properly joined are offenses involving tax evasion;³⁹ offenses involving narcotics and other drugs;⁴⁰ offenses involving robbery, burglary or

³⁷ *Id. citing* 1 F.3d 1018 (10th Cir. 1993).

³⁸ *Id. citing* 3 F.3d 380 (11th Cir. 1993).

³⁹ Where tax evasion flows directly from other criminal activity and such evasion results in large part from necessity of concealing illegal proceeds of that activity, joinder of substantive and tax charges is proper. *United States v. Whitworth*, 856 F.2d 1268 (1988). See also *United States v. Muller*, 698 F.2d 442 (1983) (where court properly joined offenses wherein defendant was charged with mail scheme to defraud employer and then converted money to his own use, becoming personal income and as such defendant fails to report such income on federal income tax returns).

⁴⁰ Joinder of two drug counts was proper where offenses were of same type, evidence as to which count overlapped, and time period between offenses was sufficiently short. *United States v. Rodgers*, 732 F.2d 625 (1984). See also *United States v. Weaver*, 905 F.2d 1466 (1990) (although initial joinder of marijuana and cocaine conspiracies was improper since they were separate and distinct conspiracies, their joinder was harmless).

theft;⁴¹ offenses involving stolen property and the transportation of the property; embezzlement;⁴² mail fraud; and, offenses against persons.⁴³

Furthermore, conspiracy and substantive offenses have largely been held to be properly joined under Fed. R. Crim. P. 8(a). For example, charges of perjury and charges of conspiracy may be joined where perjury was the overt act in furtherance of conspiracy and proof/evidence was common to both charges.⁴⁴ In prosecution against more than one defendant, where all defendants were charged with conspiracy and with various extortion counts, offenses may be joined under Rule 8(a).⁴⁵ Joinder of conspiracy charges and tax evasion charges were proper under the Federal Rules where income that was not reported on tax return for years in question was derived from illegal activity in conspiracy to distribute drugs.⁴⁶

Joinder has also been held to have been permissible on the basis that all counts were based on “two or more acts or transactions connected together.”⁴⁷ Conspiracy and substantive counts constitute two or more transactions “connected” together so that they

⁴¹ Joinder in the same indictment of the offenses of robbery, or theft or burglary, which were committed on different dates, is proper under the provision of Rule 8(a), “same or similar character.” See *Eclavea, supra* note 24, at *12. It has been held in cases that the joinder, in the same indictment of two or more offenses of theft or larceny or of two or more offenses under burglary or housebreaking, committed on different dates, is proper under Rule 8(a) since the offenses are of the same or similar character. See *Eclavea, supra* note 24, at *13.

⁴² Rule 8 provides for joinder of offenses charged where they are based on same act or transaction and where purported acts of embezzlement are part and parcel of the same overarching criminal plan. See *Eclavea, supra* note 24, at *15.

⁴³ Offenses against persons are the type committed in Rwanda, and those of which many of the criminals will be facing charges. Offenses against persons include kidnapping, abortion, rape, murder, and assault. See *Eclavea, supra* note 24, at *17-20.

⁴⁴ See *Eclavea, supra* note 24, at *9 quoting *United States v. Sweig*, 91 S.Ct. 2256 (1971).

⁴⁵ See *Eclavea, supra* note 24, at *9 quoting *United States v. Yefsky*, 994 F.2d 885 (1st Cir. 1993).

⁴⁶ See *Eclavea, supra* note 24, at *9 quoting *United States v. Wirsing*, 719 F.2d 859 (1983).

⁴⁷ JAMES G. CARR, CRIMINAL PROCEDURE HANDBOOK 342 (1994).

may be considered the same transaction for purposes of indictment and trial.⁴⁸ Joinder of conspiracy charges with related offenses was upheld by the First Circuit in *United States v. Yefsky*.⁴⁹ The court concluded that where the conspiracy embraced many of the acts alleged in the tax fraud count, joinder was proper.⁵⁰ It was also concluded that joinder of the conspiracy charge with mail fraud counts was permissible where both schemes used the same basic mechanism to accomplish their purposes and, as well, share the same participants and victims, and overlap in time.⁵¹ Joinder was also held permissible on the basis that all counts were connected together, by the Fifth Circuit in *United States v. Robichaux*⁵² where “some securities used to accomplish fraud alleged in one count were also used for [the] transaction alleged in two other counts; both transactions occurred within a couple of months of each other and required similar background explanations, [al]though victims differed.”⁵³

Other examples of different substantive offenses considered so “connected together” as to constitute part of the same transaction are: fraud and obstruction of justice;⁵⁴ interstate transportation of vehicle and firearm;⁵⁵ and, perjury and violation of civil rights.⁵⁶

⁴⁸ See *Eclavea*, *supra* note 24, at *20h. Joinder is held to be proper under Fed. R. Crim. P. 8(a) where two or more offenses are based on the same act or transaction. See also *United States v. Moya-Gomez*, 860 F.2d 706 (1988) (In determining whether count charging defendant with possession with intent to distribute cocaine was properly joined with conspiracy count, court was required to decide whether evidence was sufficient to establish [a] link between [the] particular transaction involved in distribution charge and [the] conspiracy).

⁴⁹ JAMES G. CARR, *supra* note 47, at 342 citing 994 F.2d 885 (1st Cir. 1993).

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² JAMES G. CARR, *supra* note 47, at 342 citing 995 F.2d 565 (5th Cir. 1993).

⁵³ *Id.*

⁵⁴ Joinder of state senator being prosecuted for fraud scheme and codefendant being prosecuted for obstruction of justice in connection with fraud scheme was proper where evidence was relevant to each defendant and no real danger of prejudice was shown. *United States v. Pisani*, 590 F. Supp. 1326 (1984).

The third type of offense(s) which may be properly joined are offenses which constitute part of a common scheme or plan. Within the offenses involved is a common scheme or transaction which establishes a relation between the offenses. “Common scheme” refers to separate offenses that are interrelated by a common object.⁵⁷ An overlapping of proof does not constitute a “common scheme.”⁵⁸ Joinder of offenses which constitute a common scheme or plan was upheld in the Third Circuit in *United States v. Thornton*⁵⁹ (overarching drug conspiracy that began in late 1985 and ended in 1991 held to be part of a common scheme), and in the Sixth Circuit in *United States v. Lloyd*⁶⁰ (“all of the counts in this indictment are logically related”).

b. Comparative Analysis

In order to fully understand the context of joinder and “same transaction” in the international setting, it is imperative that one review the criminal codes, procedures and relevant case law of foreign nations. For purposes of this paper, a review of the criminal codes, procedures and relevant case law is limited to a few select countries within the international forum.

⁵⁵ Defendant’s conviction of interstate transportation of a stolen motor vehicle and interstate transportation of a firearm by a felon was affirmed since both offenses arose out of the same sequence of events. *United States v. Abshire*, 471 F.2d 116 (1972).

⁵⁶ Joinder of perjury count with count charging violation of civil rights was proper where statements upon which perjury count was based were made during grand jury’s inquiry and can be said to be part of the same transaction. *United States v. Duzac*, 622 F.2d 911 (1980).

⁵⁷ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198, § 13.6, note 1.

⁵⁸ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 198, § 13.6, note 1. *See also United States v. Halper*, 590 F.2d 422, 429 (2d Cir. 1978) (Court held that a Medicaid fraud offense and an income tax evasion offense were not related since the government failed to prove that the money earned in the Medicaid fraud went unreported in the tax return). *See also United States v. Weber*, 437 F.2d 327 (3d Cir. 1970) (Common to all counts was a scheme to extort money and jobs from contractors dealing with members of the defendant’s union, even though each count related to a separate act or transaction).

⁵⁹ JAMES G. CARR, *supra* note 47, at 343 *citing* 1 F.3d 149 (3d Cir. 1993).

⁶⁰ JAMES G. CARR, *supra* note 47, at 343 *citing* 10 F.3d 1197, 1215 (6th Cir. 1993).

In Canada, “any number of counts for any number of offenses may be joined in the same indictment; however, each count in an indictment may be treated as a separate indictment.”⁶¹ The exception pertains to charges of murder which is governed by its own section. Section 589 provides: “No count that charges an indictable offense other than murder shall be joined in an indictment to a count that charges murder unless...(a) the count that charges the offense other than murder *arises out of the same transaction* as a count that charges murder; or (b) the accused signifies consent to the joinder of counts.”⁶²

In Canada, the general rule with respect to joinder and severance is toward joint indictment and trial.⁶³ Joint trials occur where there is evidence of a common enterprise⁶⁴ and where the evidence on one count is admissible on the other count,⁶⁵ among other offenses. There appears to be no restriction on the number or kind of indictable offenses which may be joined in the same indictment, *except* that no other offense may be charged in the same indictment with a count for murder.⁶⁶ If the counts are not inconsistent, there is no inherent objection to their being tried together provided that the defendant does not apply for separate trials.⁶⁷ The relevant inquiry is whether the same cause or matter is

⁶¹ JUSTICE DAVID WATTS & MICHELLE FUERST, TREMEER’S CRIMINAL CODE 967 (1996). Section 591 of the Criminal Code enacts the general rule of joinder of counts in an indictment. *See id.* Any number of counts for any number of offenses may be joined in the same indictment, but must be distinguished as in Form 4. *See id.* The general rule is subject to exception as relating to charges of murder. *See id.*

⁶² *See id.* at 965 (emphasis added).

⁶³ *See id.* at 969 quoting *R. v. McLeod*, 6 C.C.C. (3d) 29 (Ont. C.A.) (1983), affirmed (1986).

⁶⁴ WATTS & FUERST, *supra* note 61, at 969 quoting *R. v. Quiring* (1974), 27 C.R.N.S. 367 (Sask. C.A.) (where the essence of the case is that defendants were engaged in common enterprise, and as a general rule it is right and proper that they be jointly indicted and tried).

⁶⁵ *See id.* quoting *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont.C.A.) (where the evidence on one count is admissible on the other count, it is proper to try the counts together).

⁶⁶ *See id.* quoting *R. v. Brounstein* (1923) 39 C.C.C. 250 (Sask. C.A.) (emphasis added).

⁶⁷ *See id.*

comprehended by two or more offenses.⁶⁸ This applies equally to several counts in an indictment, and to successive indictments.⁶⁹

Therefore, in applying Canadian rule, it seems that any offense, other than murder, would be able to be joined properly unless the defendant filed for a separate trial. If the count charges murder, no count that charges an indictable offense other than murder shall be joined unless the count arises out of the same transaction as the murder count or the accused gives his/her consent to the joinder of counts.

Looking to another area of the international community, Nigeria's criminal law and criminal procedural system also allows for one trial for more than one offense — joinder. Nigeria's criminal procedure provides: "If in one series of acts or omissions *so connected together* as to form the same transaction, or which form part of a series of offenses of the *same or similar character*, more offenses than one are committed by the same person, charges for such offenses, whether felonies, misdemeanors or simple offenses, may be joined and the person accused tried at one trial."⁷⁰ The courts in Nigeria have held that "identity of time is not an essential element in determining whether certain events form the same transaction within the meaning of the section; it is the continuity of action and the sameness of purpose that determine whether the events constitute the same transaction."⁷¹

⁶⁸ *Kienapple v. The Queen* (1974) 44 D.L.R. 3d 351 (Convictions for rape and unlawful sexual intercourse in respect of same indictment).

⁶⁹ *See id.*

⁷⁰ C.O. MADARIKAN & T. AKINOLA AGUDA, *THE CRIMINAL LAW AND PROCEDURE OF THE SIX SOUTHERN STATES OF NIGERIA*, 97 (1974) (emphasis added) *It should be noted that the authorities relied upon are older in publication.

⁷¹ *Id.* at 98.

A review of certain Third World countries reveals that, in some instances, they have the same standards when it comes to issues of joinder and “same transaction.” The Criminal Procedure Code of Malaysia, a third world country, sets out that “two or more offenses which are committed by the same accused may be tried together if the acts committed are so connected as to form the same transaction.”⁷² As a guide, the High Court of Malaysia has set out certain factors that would determine if the acts would form the same transaction. These factors are: “proximity of time, unity or proximity of place, continuity of action and community of purpose or design.”⁷³

c. Advantages and Disadvantages to the Court

Joinder of offenses produces certain advantages for the court. Employing joinder of offenses allows the court to save valuable time and resources. Joinder of offenses minimizes the time required to dispose of offenses. In addition, a prosecutor may handle several counts in one indictment, as opposed to managing several indictments which may require more than one prosecutor. The joint trial of offenses enables the state to avoid the duplication of evidence required by separate trials, to reduce the inconvenience to victims and witnesses, and to achieve a variety of other economies in connection with prosecutorial and judicial resources.⁷⁴

On the contrary, the government may experience some disadvantages in joining offenses. The government may want to try the defendant on separate counts for each

⁷² *Public Prosecutor v. Ridzuan Kok bin Abdullah*, 1995-2 MLJ 745. Court ordered joinder of the offenses of drug trafficking and for being in possession of drugs. *See id.*

⁷³ *Id.* Both offenses were committed at the same time and same place, there was a continuity of action and community of purpose or design, thus forming part of the same transaction that could be expedited together.

⁷⁴ AMERICAN BAR ASSOCIATION, *supra* note 13, at 13-19 quoting *Commonwealth v. Lasch*, 464 Pa. 573 (1975) (duplication of evidence).

offense, as a joint trial may reduce the harassment and delay of multiple prosecutions and thus, may result in a detrimental turn for the government. In addition, many offenses include different sets of facts; therefore, the only time saved is that of jury selection.⁷⁵

Joint trials may be too complicated for the jury to understand, and thus, result in an acquittal due to confusion. Also, a conviction or an acquittal on one charge may prompt a plea, or dismissal, of other charges, and thereby render a subsequent trial unlikely.⁷⁶

d. Advantages and Disadvantages to the Accused

Joinder of offenses offers more advantages for the government in its prosecution of the accused. The accused may experience a sufficient number of disadvantages if the offenses brought against him are joined. Some of these disadvantages are: a defendant's right to a fair trial before an impartial jury (uninfluenced by evidence of other offenses) may best be served by separate trials; the defendant may be unable to present separate defenses to each of the offenses charged; and, the jury may conclude that multiple counts indicate a criminal disposition to commit each offense charged, and assess guilt accordingly.⁷⁷ Overall, joinder of offenses puts the defendant at an unfair disadvantage and increases the risk of prejudice to the defendant, due to confusion of law and evidence by the trier of fact and the "smear" effect such confusion can produce.⁷⁸

On occasion, however, the situation may be somewhat the reverse and the accused may seek joinder of offenses. The defendant may seek a prompt and unified disposition

⁷⁵ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 199.

⁷⁶ AMERICAN BAR ASSOCIATION, *supra* note 13, at 13-19

⁷⁷ See generally W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 17.1 (c) - (f) (1984).

⁷⁸ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 199. See also AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE I (1968).

of all the charges. Expense, delays, harassment, and personal trauma involved in multiple trials may cause a defendant to prefer a single trial.⁷⁹ A single trial may result in a faster disposition of all cases, it may increase the possibility of concurrent sentences, and it may prevent the application of enhanced sentencing statutes.⁸⁰

2. Joinder of Accused

Joinder of accused is another tool within the spectrum of criminal procedure. Unlike joinder of offenses, joinder of accused involves many more substantial risks because it joins together separate defendants. Rule 48 of the Rules of Evidence and Procedure provides: “Persons accused of the same indictment or different crimes committed in the course of the same transaction may be jointly charged and tried.”⁸¹ Joinder of accused arises in two situations: (1) when the defendants have allegedly participated, either as principals or accomplices, in the same criminal acts; or (2) when the defendants are charged with different crimes in which they are alleged to have participated in the same “series of acts or transactions” with which the charges are concerned.⁸²

Again, a review of the Federal Rules of Criminal Procedure of the United States is required for a further understanding of Rule 48 of the Rules of Prosecute and Evidence established by the United Nations and the Rwanda Tribunal. Federal Rule 8(b) governs joinder of accused. Federal Rule 8(b) reads as follows: “Joinder of defendants in the

⁷⁹ AMERICAN BAR ASSOCIATION, *supra* note 13, at 13-15.

⁸⁰ *Id.* at 13-13.

⁸¹ Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 48, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

⁸² SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 199. *See generally* LAFAVE & ISRAEL, *supra* note 77 at § 17.3 (b).

same indictment or information is permissible if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.”⁸³ Determining whether the acts of defendants are part of a “series of acts or transactions” depends on the existence of a common nexus, which is something more than the mere existence of similarity in the acts.⁸⁴ Offenses charged in an indictment should be so closely related in time, place and/or manner that there is a connection between them and thus, it will constitute a series of acts or transactions.⁸⁵

One of the general principles associated with joinder of accused is the need for some common nexus between offenses alleged in an indictment. Common nexus may also be referred to as “common link,” “common plan,” “direct relationship between acts,” and/or “common scheme.”⁸⁶ If the common activity embraces all of the charged offenses, even though not all of the defendants were charged or engaged in the completion of every offense, joinder of defendants is permissible under Federal Rule 8(b).⁸⁷ Another general principle associated with Rule 8(b) is “commonality of proof.”

⁸³ Teresia B. Jovanovic, *What Constitutes “Series of Acts or Transactions” for Purposes of Rule 8(b) of Federal Rules of Criminal Procedure, Providing for Joinder of Defendants who are Alleged to have Participated in Same Series of Acts or Transactions*, 62 A.L.R. Fed. 106, *2 (1998). See also FEDERAL RULES OF CRIMINAL PROCEDURE 8(b) and 14 (1998).

⁸⁴ Jovanovic, *supra* note 83.

⁸⁵ See *id.*

⁸⁶ *Id.* at *3. The Supreme Court has indicated that such a “common nexus or plan” may be evidenced by such factors as whether the transactions have occurred in the same place, within a short period of time, and using the same modus operandi. *United States v. Scott*, 90 S.Ct. 560 (1969).

⁸⁷ See *id.* In *United States v. Burreson*, the court indicated that when the transactions set forth in an indictment are basically the same, and when one person serves as a common link between the transactions, they are part of the same series of acts or transactions for purposes of joinder of defendants. 102 S.Ct. 165 (1981).

Joinder of offenses in one indictment may constitute a series of acts or transactions for purposes of Rule 8(b) if the same evidence could be used at trial to prove facts relevant to all of the charges.⁸⁸ Offenses related in time, place and/or manner may also constitute a series of transactions and thereby justify joinder of defendants.⁸⁹

The test for initial joinder under Rule 8(b) is what is reasonably alleged — not what is ultimately proved.⁹⁰ Under the Federal Rule, every defendant is not required to have participated in every offense charged. Provided there is a commonality that links the offenses together, Rule 8(b) can be utilized.

a. Case Law: United States

As stated earlier, joinder of defendants works in two instances: (1) “when the accused are alleged to have participated as principals or accomplices in the same criminal acts; or (2) when the accused are charged with different crimes in which they are alleged to have participated in the same ‘series of acts or transactions’ with which the charges are concerned.”⁹¹ In the former instance, joinder of defendants is rather simple. The accused are alleged to have participated as principals in the *same* criminal acts; therefore, joinder is very simple in that the crimes are identical.⁹² Thus, there is no prejudice to the defendant(s) in joinder. It is the occurrence when the accused are charged with *different* crimes in which they are alleged to have participated in the same “series of acts or

⁸⁸ *Id.*

⁸⁹ Jovanovic, *supra* note 83, at *6. Defendants are alleged to have engaged in the “same series of acts or transactions” when they are alleged to have acted pursuant to an overall scheme about which all defendants knew and in which they all participated in. *United States v. Grey Bear*, 863 F.2d 572 (1988).

⁹⁰ Jovanovic, *supra* note 83, at *6 quoting *United States v. Morrow*, 39 F.3d 1228 (1994).

⁹¹ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 199.

⁹² Jovanovic, *supra* note 83, at *4 (emphasis added).

transactions” that presents a problem regarding joinder.⁹³ Problems of prejudice and unfair treatment to the defendants arise. The courts have held proper joinder in many instances which concern different crimes that arise out of the same “series of acts or transactions.”⁹⁴ In *United States v. Walker*, the court held that where defendants’ conspiracy activities are part of a series of acts or transactions making up underlying offenses, it is not necessary that each defendant be charged in each count or be shown to have participated in each act or transaction.⁹⁵ In *United States v. Mandel*, the court indicated that “whether or not separate offenses are part of a series of acts or transactions under Rule 8(b) depends on the relatedness of the facts underlying each offense.....when the facts underlying each offense are so closely connected that proof of such facts is necessary to establish each offense, joinder of defendants is proper.”⁹⁶ United States’ statutory and case law has demonstrated that joinder of defendants is proper in two instances involving either the commission of the same crime by two or more principals, or the commission of different crimes involving the same series of acts or transactions. In establishing whether or not a “series of acts or transactions” is implicated, the court will determine if the several offenses charged are part of a common scheme or plan, or if the offenses are so closely connected with respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.⁹⁷

⁹³ *Id.* at *4 (emphasis added).

⁹⁴ *Id.* at *4 (emphasis added).

⁹⁵ *United States v. Walker*, 922 F. Supp. 732 (1996).

⁹⁶ *United States v. Mandel*, 415 F. Supp. 1033 (1976).

⁹⁷ AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE 13 (1968).

b. Comparative Analysis

Like joinder of offenses, many foreign nations contain certain provisions providing for the joinder of defendants. Analogous to the comparative analysis of joinder of offenses, the analysis of joinder of defendants is also limited to a select group of foreign countries.

Canada's Criminal Code and Procedure allows for the joinder of defendants in matters where the accused acted in concert and were equal principals in the commission of the crime.⁹⁸ In these instances, the joinder of defendants is admissible for any number of counts and at the discretion of the court.⁹⁹ Again, the general exception to this rule is when counts of murder are involved.¹⁰⁰ For accessories after the fact, the code states, "any one who is charged with being an accessory after the fact to any offense may be indicted, whether or not the principal or any other party to the offense has been indicted or convicted or is not amenable to justice."¹⁰¹ The general rule with respect to joinder of trial and defendants is that the law presumes the jury's ability to disregard the statements of the co-accused.¹⁰²

⁹⁸ WATTS & FUERST, *supra* note 61, at 967.

⁹⁹ *Id.* See also *R. v. Nielsen*, (1984), 16 C.C.C. (3d) 39 (Man. C.A.) (An indictment may join two accused even though one was ordered to stand trial and the other was found by way of direct indictment).

¹⁰⁰ See *id.* "No count charging an indictable offense other than murder shall be joined in an indictment to a count that charges murder." *Id.* Joinder is only authorized where the non-murder count is an indictable offense which arises out of the same transaction as the count that charges murder, or where the defendant gives consent to the joinder. See *id.*

¹⁰¹ *Id.* at 967, 970 quoting *R. v. Vinette*, (1974), 19 C.C.C. (2d) 1 (S.C.C.) (Evidence admissible against the principal is equally admissible against an accessory after the fact).

¹⁰² *R. v. McLeod*, (1983), 6 C.C.C. (3d) 29 (Ont. C.A.).

In Nigeria, persons may be charged jointly when “more persons than one are accused of the same offense or of different offenses committed in the same transaction or when a person is accused of committing an offense and another of abetting or being an accessory to or attempting to commit such an offense...”¹⁰³ In Nigeria, if one accused is brought before the court after another accused has pleaded to the charge, but before any further steps to the trial have taken place, they may be charged together and the accused who has already pleaded may be called on to plead again, but once any further steps in the trial of the first accused have taken place, no other accused may be joined with him for purposes of that trial.¹⁰⁴ Thus, Nigeria’s criminal procedure provides for joinder of defendants only in the pre-trial stages. Once the first steps in the trial proceedings have occurred, joinder of defendants is no longer an option.

Although many countries provide for joinder of offenses, it is more difficult to locate a criminal procedural system in which joinder of defendants is permissible. The reasoning may be that joinder of defendants presents a higher risk of prejudice, and may often result in the need for severance. Many criminal procedure codes provide for the joinder of offenses and remain silent on joinder of accused. Often, the issue of joinder of accused is established through case law.

The Rwanda Tribunal ordered the first joint trial to determine the charges against Clement Kayishema and Obed Ruzindana of genocide, crimes against humanity and

¹⁰³ C.O. MADARIKAN & T. AKINOLA AGUDA, *THE CRIMINAL LAW AND PROCEDURE OF THE SIX SOUTHERN STATES OF NIGERIA*, 94 (1974). *It should be noted that the authorities relied upon are older in publication.

¹⁰⁴ *See id.*

violations of international humanitarian law during the massacres.¹⁰⁵ The Trial Chamber refused joinder of a third accused because of respect for the rights of the first two accused to be tried without undue delay and the right of the third accused to have sufficient time to prepare for a defense.¹⁰⁶ It was difficult to reconcile the nuances in scheduling the commencement of a single trial. The Trial Chamber also concluded that the Prosecutor “failed to show that the alleged crimes of the third accused related to the ‘same transaction’ as the alleged crimes of the first two accused.”¹⁰⁷

c. Advantages and Disadvantages to the Court

The standard which applies to a proceeding involving two or more defendants is beneficial to the prosecution in many ways. Duplicate trials of the same factual circumstances can be avoided, separate trials increase the burden upon victims and witnesses, delay the disposition of charges and expand the “drain on prosecutorial and judicial resources.”¹⁰⁸ Furthermore, separate trials can produce inconsistent results, which may undermine the public confidence in the criminal justice system.¹⁰⁹

On the other hand, separate trials for defendants are occasionally beneficial to the prosecution. Joint trials may take longer than separate trials because of the extra steps

¹⁰⁵ See MORRIS & SCHARF, *supra* note 1, at 481. The Prosecutor v. Clement Kayishema (Case No. ICTR-95-1-T).

¹⁰⁶ See *id.* at 481-482.

¹⁰⁷ *Id.* at 482. The Trial Chamber stated that, “a same transaction must be connected to specific material elements which demonstrate on the one hand, the existence of an offense of a criminal act which is objectively punishable and specifically determined in time and space, and on the other hand, prove the existence of a common scheme, strategy or plan, and that the accused therefore acted together in concert.” *Id.* at 482, note 1614.

¹⁰⁸ AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE 13-17 (1986).

¹⁰⁹ See *id.* at 13-18.

necessary to reduce prejudice¹¹⁰ or because the prosecutor overproves the case.¹¹¹ It can be said that on average, prosecutors prefer to try defendants together.

d. Advantages and Disadvantages to the Accused

For the accused, joinder of trials may be favorable in some instances. Joinder of trials for defendants may be favorable because it reduces the trauma, harassment and expense of trials. In addition, the defendant may benefit from his co-defendant's judgment. For example, A and B are charged and tried jointly. B is found not guilty. A's chances of an acquittal increase.

Despite the limited advantages of joinder for defendants, joinder of accused is most often a tool despised by defendants. Multiple prosecutions offer no protection for the multiple defendant.¹¹² "Guilt by association" is a strong pull for many defendants and often results in a conviction. Inconsistent defenses can often escalate into cross-accusations between defendants, and often the defendants convict each other.¹¹³ In addition, the multiple defendant trial creates substantial problems for the defendant who elects not to testify and then incriminates a co-defendant in an out-of-court statement.¹¹⁴ Finally, the multiple defendant may be deprived of his right to a fair trial and fair treatment, and thus, may result in prejudice to each individual defendant.

¹¹⁰ *See id.* at 13-18, note 6. Multiple defendant trials may require long voir dire, prolonged cross-examination, frequent mid-trial cautioning instructions to the jury, and extensive submitting of jury instructions. *See id.*

¹¹¹ *See id.* at 13-18, note 7.

¹¹² *See id.*

¹¹³ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-19.

¹¹⁴ *See id.* at 13-18.

3. Failure to Join Certain Offenses

The defendant's failure to move for joinder will waive any right of joinder with respect to related offenses that the defendant knows have been charged.¹¹⁵ However, the defendant's right to joinder of related offenses is "not waived where the defendant is prevented from moving for joinder because the charges were deliberately not charged or were otherwise hidden from the defendant."¹¹⁶

B. Severance of Offenses and Defendants

Severance of offenses and accused may occur for numerous reasons. Severance refers to the "[m]isjoinder of offenses or trials of two or more defendants or offenses named in the same indictment or information, which/who would normally be tried together."¹¹⁷ Severance is a tool used both in cases where offenses are joined¹¹⁸ and in cases where defendants are joined.¹¹⁹ Both the prosecuting attorney and the defendant retain the right of severance; however, the court remains the final arbiter in the decision of whether or not to grant severance of offenses or defendants.¹²⁰ When evaluating whether severance is "appropriate to promote" or "necessary to achieve" a fair determination of [each] defendant's guilt or innocence, the court shall consider a number of factors including, the complexity of the evidence, the possible prejudice to the defendant, and judicial efficiency.¹²¹ Like joinder, severance entails many policy

¹¹⁵ *See id.* at 13-25.

¹¹⁶ *Id.*

¹¹⁷ STEPHEN H. GIFIS LAW DICTIONARY 451 (1991).

¹¹⁸ Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 49, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

¹¹⁹ Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 48, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II.

¹²⁰ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-29.

¹²¹ *Id.*

considerations that weigh heavily on the court's decision. Severance of defendants and offenses is based on a case-by-case analysis and the results alternate depending on a number of considerations and factors.

1. Severance of Offenses

Like joinder, an analysis of United States statutory and case law is essential in studying the rules, effects and procedures of joinder and severance. Many countries provide for issues of joinder in criminal codes and procedures, however, these countries address the issue of severance in a minimal fashion. Many criminal codes and procedures provide that severance will be granted by the judge upon a showing of prejudice. No further explanations are provided. Therefore, it is vital that one study the criminal procedure of the United States when assessing situations which require severance.

Severance of offenses may occur in several circumstances. Whenever two or more *unrelated* offenses have been joined for trial, the prosecuting attorney or the defendant shall have the "absolute right" to severance of the offenses.¹²² In dealing with *related* offenses, the court should grant severance: "(1) before trial, whenever severance is deemed appropriate to promote a 'fair determination' of the defendant's guilt or innocence of each offense; or (2) during trial, whenever, upon the consent of the defendant or upon the finding of 'manifest necessity', severance is deemed necessary to a fair determination of the defendant's guilt or innocence of each offense."¹²³ Severance of

¹²² *Id.* The right to severance of unrelated offenses is coextensive with permissible joinder. In most cases, joint trials of unrelated offenses are difficult to justify because the defendant suffers all of the disadvantages. The current standard within the United States is to authorize limited joinder of unrelated offenses while providing an absolute right to sever unrelated offenses. *Id.* at 13-30 (emphasis added).

¹²³ *Id.* The severance of related offenses is an issue that is committed to the discretion of the judge (emphasis added).

offenses usually arises in a situation where the defendant feels undue prejudice from the joinder of offenses and feels that joinder of offenses would deny him a right to a fair trial.

Since severance of offenses may occur at the pre-trial and mid-trial stages, there are different means for achieving the “fair determination” objective according to the stage at which the proceeding is.¹²⁴ If the decision to sever offenses is being considered *before* trial, severance is to be granted “when appropriate to promote a fair determination of the defendant’s guilt or innocence of each offense.”¹²⁵ When a severance decision is being contemplated *during* a trial, severance is to be granted when “there is a manifest necessity to achieve a fair determination of the defendant’s guilt or innocence of each offense.”¹²⁶ The manifest necessity standard exists only when severance is an option during the course of the trial.

The test for severance is less rigorous at the pre-trial stage than it is at the mid-trial stage. At the pre-trial stage, concerns over constitutional rights to a fair trial are at the forefront. It is at this stage that attorneys are contemplating what may unfold during the trial and anticipating any subsequent events. However, at the mid-trial stage, the severance test is subject to constitutional rules involving double jeopardy (which will be discussed later).¹²⁷ Thus, mid-trial severance runs the risk of preverdict termination of charges.¹²⁸ The tests are the same whether the motion for severance is made by the prosecution or the defense.

¹²⁴ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-30.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *See id.* A preverdict termination of the trial as to some or all of the charges will bar a subsequent trial on the terminated charges, unless the defendant has consented. *See id.*

It should also be noted that in cases where there has been misjoinder of offenses, the appropriate remedy is not dismissal of the charges, but rather, a *compulsory* severance of offenses.¹²⁹ Upon a showing of evidence of misjoinder, there is no discretion of the court involved — severance is mandatory.

2. Severance of Accused

As with joinder of offenses, the right to severance is available when one defendant has been joined with another defendant. The right of severance allows the defendant to respond to any signs of prejudice or unfair treatment. In the United States, severance is governed by the Federal Rules of Criminal Procedure Rule 14, which provides: “If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, *the court* may order an election or separate trials of counts, grant severance of defendants or provide whatever relief justice requires.”¹³⁰

Generally, there are three considerations which should be regarded when contemplating severance: (1) whether the number of defendants or the complexity of the evidence as to the several defendants is such that the jury probably will be unable to differentiate the evidence and apply the law intelligently as to the charges against each defendant; (2) whether evidence not admissible against all defendants probably will be

¹²⁹ Eclavea, *supra* note 24, at *8 (emphasis added). See generally *United States v. Bally Mfg. Corp.*, 345 F. Supp. 410 (1972) which held that even if the vice of misjoinder of offenses under Rule 8(a) of the Federal Rules of Criminal Procedure were found to exist, dismissal was simply not the remedy. See also *United States v. Cullen*, 305 F. Supp. 410 (1969) denying defendant’s motion to dismiss counts on a federal offense, the court held that even if there were improper joinder, the motion for dismissal would be an inappropriate means of meeting this claimed defect.

¹³⁰ Nineteenth Annual Review of Criminal Procedure, *Joinder and Severance*, 78 Geo. L. J. 927, note 1067 (1990) (emphasis added). See also FEDERAL RULES OF CRIMINAL PROCEDURE 14 (1998).

considered against a defendant “notwithstanding admonitory instructions;” and (3) whether there are antagonistic defenses.¹³¹

The first of these considerations arises when the case is so complex that the trier of fact cannot be expected to comprehend the evidence relating to various defendants and various charges.¹³² In these cases, severance may be clearly apparent. Illustrative of this principle is a case in which seventeen defendants were charged in 2,533 counts.¹³³ On the other hand, a case which involves two defendants and few counts does not require severance because there are a small amount of questions to be considered by the trier of fact.¹³⁴ As one can see, a wide spectrum of discretion is used by the trial judge in determining whether severance may be appropriate.

The second of the considerations is extremely important regarding evidentiary issues.¹³⁵ In the trial of multiple defendants, evidence is often legally admitted against only one of the defendants, but may result in a prejudicial effect on other defendants.¹³⁶ Evidence may prove to be detrimental to a defendant in that the use of a co-defendant’s statement may be admissible against the defendant. In addition, the possibility of self-incrimination is even higher because a defendant may seek to give a statement regarding his co-defendant and in the end, may incriminate himself. Most often, the judge is required to give the jury instructions to consider the statement only for one defendant; however, evidence and common sense prove that the statement will affect the jury’s

¹³¹ See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, JOINDER AND SEVERANCE 40 (1968).

¹³² See *id.*

¹³³ *United States v. Moreton*, 25 F.R.D. 262 (W.D.N.Y. 1960).

¹³⁴ *United States v. Cohn*, 230 F. Supp. 587, 588 (S.D.N.Y. 1964).

¹³⁵ AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 131, at 40.

¹³⁶ See *id.*

perception of all defendants (seeing as they are being tried together for “similar acts or transactions”). The ultimate question will be whether, under all the circumstances of the particular case, the jury was able to follow the court’s instructions and appraise the evidence independent of each defendant.¹³⁷

The third consideration listed above addresses severance when joined defendants’ defenses are antagonistic to each other.¹³⁸ Severance is not required simply because there is hostility between the defendants¹³⁹ or because the defenses offered by the several defendants are in some respects different from one another.¹⁴⁰

If the joinder is proper under the rules, severance will be granted only if prejudice is shown. The most common grounds (as duplicated in the considerations) for demonstrating prejudice include: cases in which the admission of a statement of one defendant would violate another defendant’s confrontation clause rights (exculpatory testimony from a co-defendant);¹⁴¹ cases in which a non-testifying co-defendant would tend to exonerate a defendant;¹⁴² cases in which co-defendants have irreconcilably conflicting defenses (antagonistic defenses);¹⁴³ and cases in which the evidence against one defendant would be so prejudicial as to deny that defendant a fair trial (disparity in evidence).¹⁴⁴

¹³⁷ *Peterson v. United States*, 344 F.2d 419, 422 (5th Cir. 1965).

¹³⁸ AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 131, at 40.

¹³⁹ *Allen v. United States*, 202 F.2d 329 (D.C. Cir. 1952).

¹⁴⁰ *United States v. Fujimoto*, 102 F. Supp. 890 (D. Hawaii 1952).

¹⁴¹ *Bruton v. United States*, 391 U.S. 123 (1968). *See also* LAFAVE & ISRAEL, *supra* note 77 at § 17.2 (b).

¹⁴² *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965). *See also* LAFAVE & ISRAEL, *supra* note 77 at § 17.2 (c).

¹⁴³ LAFAVE & ISRAEL, *supra* note 77, at § 17.2 (d).

¹⁴⁴ LAFAVE & ISRAEL, *supra* note 77, at § 17.2 (e) & (f).

Thus, when the issue of severance arises in a case, a judge has an infinite amount of discretion. There are numerous factors to consider, including those which would not independently justify severance, when deciding whether a case should be severed and tried separately. In many cases, the decision of whether to grant severance will be difficult and one of the factors which should be given extreme weight is the defendant's right to a fair trial.¹⁴⁵

3. Failure to Prove Grounds for Joinder

“If a defendant moves for severance at the conclusion of the prosecution's case or [severance] of all of the evidence, and there is not sufficient evidence to support the allegation upon which the moving defendant was joined for trial with the other defendant(s), the court should grant severance if it is deemed necessary to achieve a fair determination of that defendant's guilt or innocence.”¹⁴⁶ Normally, the question of proper joinder of defendants is determined from an examination of the charges and is done prior to the trial. However, the prosecution may fail to prove certain charges/allegations during the course of the trial.¹⁴⁷

It should be noted that in cases where the prosecution has failed to prove joinder, severance is not a matter of right. Such a rigid sanction would prove to be too harsh in the absence of actual prejudice.¹⁴⁸ Thus, it seems appropriate that in the matter in which it is established that allegations needed for joinder are not supported by the evidence, the

¹⁴⁵ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 200.

¹⁴⁶ AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 131, at 43.

¹⁴⁷ *See id.* at 44. *See generally Ingram v. United States*, 272 F.2d 567 (4th Cir. 1959) (It may be established that two offenses alleged to be related are in fact independent of one another).

¹⁴⁸ *See id.* at 44-45. *See also The Supreme Court, 1959 Term*, 74 Harv. L. Rev. 81, 159-60 (1960).

judge should review the need for severance.¹⁴⁹ The standard therefore requires severance if it is “deemed necessary to achieve a fair determination” of guilt or innocence.¹⁵⁰

C. Timeliness of Motion & Waiver

A motion for joinder or severance of offenses or defendants must be made before trial, except in the instance in which the motion is based on information or evidence not previously known.¹⁵¹ If the defendant is aware of a ground for severance before trial, he should not be allowed to delay the motion until the trial has commenced. Such a delay, if allowed, would result in disruption of judicial processes and a waste of court and prosecution resources.¹⁵² In the cases in which all or most of the evidence or information is known before trial, a motion for severance must be made in the pre-trial stages otherwise the motion is considered waived. Severance is waived if the motion is not made at the appropriate time.¹⁵³ It should be noted that the prosecution is limited to pre-trial motions.

If, however, information or evidence arises after the commencement of the trial that was not previously known to the defendant,¹⁵⁴ a motion of severance is permissible mid-trial. Mid-trial motions for severance usually involve questions of prejudice that have become evident during the progress of the trial.

¹⁴⁹ *See id.* at 44-45.

¹⁵⁰ *Id.* at 45.

¹⁵¹ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-39 (1986).

¹⁵² AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 131, at 27.

¹⁵³ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-30. Defendant must raise the motion for severance before the trial has commenced...this is so even though the initial joinder was clearly improper. *Wynn v. United States*, 275 F.2d 648 (D.C. Cir. 1960).

¹⁵⁴ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-40, 41. Mid-trial motions for severance are impermissible by the prosecution. *See id.* The prosecution is required to make any motions *before* trial. *See id.* (emphasis added).

Furthermore, a defendant may renew an overruled pre-trial motion on the same grounds before or at the close of all of the evidence.¹⁵⁵ In the event that evidence or prejudice becomes apparent during trial, the defendant should be entitled to renew his motion for severance even though the motion is made essentially upon the same grounds.¹⁵⁶ Once the trial is under way, the court has before it additional information, and thus, the question is ripe for the decision once again.¹⁵⁷

In viewing motions for severance (and in some instances, joinder) it appears that defendants are allowed additional flexibility in controlling the course of the proceeding. Motions for severance permit the defendant to respond to motions for joinder, unfair prejudice and prosecutorial advantages; however, these allowances are not without limit.

D. Dangers of Double Jeopardy Inherent in Joinder

Double jeopardy is a vital concept within the ambit of joinder and severance. Double jeopardy, similar to the “non bis in idem” principle of international law, limits the number of prosecutions and punishments which can be brought against one defendant.¹⁵⁸ In the United States, “double jeopardy” is guaranteed through the Fifth Amendment (and applicable to the states through the Fourteenth Amendment) and protects against the second prosecution for the same offense, and against multiple punishments.¹⁵⁹

The double jeopardy clause is especially important in questions of joinder of offenses and defendants because joinder presents a threat of double trial or double

¹⁵⁵ See *id.* at 13-39.

¹⁵⁶ See *id.* at 13-41.

¹⁵⁷ *Ingram v. United States*, 272 F. 2d 567 (4th Cir. 1959).

¹⁵⁸ SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 196.

¹⁵⁹ BLACK'S LAW DICTIONARY 340 (6th ed. 1991). The evil sought to be avoided is double trial and double conviction.

conviction. In cases which involve joinder of offenses, attachment of jeopardy for the greater offense bars retrial for lesser included offenses.¹⁶⁰ At the same instance, attachment of jeopardy for the lesser included offense bars retrial for the greater offense.¹⁶¹ Therefore, if A is brought to trial for murder, manslaughter, assault and kidnapping, and subsequently convicted and subject to one prison term, he can not be brought upon charges of assault and kidnapping for additional prison time. Double jeopardy is important when considering joinder because joinder will subsequently bar any further prosecution of the crimes of any further punishment. Joinder of offenses will involve many offenses, one trial and one punishment.

The double jeopardy hazard of multiple trials can be avoided by encompassing all charges into one indictment.¹⁶² By incorporating all charges into one indictment, prosecutors run the risk of “multiplicity.”¹⁶³ Multiplicity problems may arise in two situations: “(1) where more than one statute condemns similar conduct although one statute punishes an aggravated form of that conduct (possession of drugs, and possession of drugs with intent to distribute); and, when a defendant’s continuing conduct may result in multiple violations of a single statutory provision.”¹⁶⁴

“The double jeopardy clause not only protects against multiple trials for the ‘same offense,’”¹⁶⁵ but multiple punishments as well. While a person may be charged in one

¹⁶⁰ *Harris v. Oklahoma*, 433 U.S. 682 (1977).

¹⁶¹ *Brown v. Ohio*, 432 U.S. 161 (1977).

¹⁶² SUBIN, MIRSKY & WEINSTEIN, *supra* note 17, at 196. All charges included in one indictment are considered the “same” for double jeopardy purposes. *See id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 197 quoting *United States v. Jones*, 533 F.2d 1387 (6th Cir. 1976) (Possession of a firearm on three separate occasions constituted a continuing offense, so that defendant could only be convicted on one count of indictment).

¹⁶⁵ *Id.* at 196-197.

indictment, there are limitations on whether a person may be punished for each separate violation. In *Blockburger v. United States*,¹⁶⁶ the Supreme Court stated that the test for determining whether two distinct statutory provisions constitute two offenses or only one for double jeopardy purposes is “whether each provision requires proof of an additional fact which the other does not [or if one crime is a lesser-included offense of the other].”¹⁶⁷

In certain instances, even if two statutory provisions constitute the “same offense” under *Blockburger*, multiple prosecutions are not barred in *all* circumstances.¹⁶⁸ First, in *Brown v. Ohio*,¹⁶⁹ the Court suggested that “[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.”¹⁷⁰ Second, the Court also stated that no-multiple-prosecution rule might not apply “when a defendant is retried on the same charge after a mistrial...dismissal...,or after a conviction is reversed on appeal.”¹⁷¹ Third, the double jeopardy clause is not violated when the defendant requests separate trials on the greater and the lesser offenses, or “in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other.”¹⁷²

¹⁶⁶ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 448 (1991).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 449 (emphasis added).

¹⁶⁹ *See id.* citing 432 U.S. 161 (1977).

¹⁷⁰ JOSHUA DRESSLER, *supra* note 166, at 449.

¹⁷¹ *Id.*

¹⁷² *Id.* In an instance where the defendant fails to raise the issue that one offense might be a lesser included offense of the other, the defendant waives his right to raise the issue later in the proceedings.

It should be noted that double jeopardy applies only to subsequent criminal proceedings; therefore, any further civil proceedings regarding the same offense or defendant is permitted. An illustration of this point is *Hudson et al. v. United States*.¹⁷³ In this case, the Office of the Comptroller of the Currency imposed monetary penalties on petitioners for violating a statute and thereby causing two banks, in which they were officials, to make certain loans which gave the petitioners a loan benefit.¹⁷⁴ The Court held that the “double jeopardy clause is not a bar to petitioner’s later criminal prosecution because the OCC administrative proceedings were civil [in nature], and not criminal.”¹⁷⁵

E. Authority of the Court

At its discretion and authority, the court may order joinder and/or severance of either defendants or offenses.¹⁷⁶ The United States’ standard provides that the court may order the joinder of offenses or defendants sua sponte (“on its own volition”) only in cases where no party objects. The court would be acting on its own to join offenses or defendants in cases where there are separate charges or defendants and neither party has moved to join. The court will recognize the advantages to joinder in general; however, it may be difficult for the court to identify disadvantages to the defendant (or the prosecutor in some instances).¹⁷⁷ The parties will be better able to assess their situations — the issues and the evidence raised. As a result, the parties will be able to foresee the risks of prejudice from joinder of offenses or defendants.¹⁷⁸ When the parties have come to the

¹⁷³ *John Hudson, Larry Baresel, and Jack Butler Rackley, Petitioners v. United States*, 118 S.Ct. 488 (December 1997) available in LEXIS, Nexis Library, GENFED-Courts File.

¹⁷⁴ *See id.*

¹⁷⁵ *Id.*

¹⁷⁶ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-44.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

conclusion that separate trials are preferred over a joint trial, the trial court should not be able to order otherwise.¹⁷⁹

The court is permitted, on its own motion, to order the severance of offenses or defendants, initially joined for trial.¹⁸⁰ The court may sever offenses or defendants either before or during trial.¹⁸¹ In order for the court to sever offenses or defendants, there are specific tests to be met. Before trial, the court may sever on its own motion only in situations where the prosecution or defense could prevail on a motion for severance.¹⁸² Thus, the court can only sever if severance is appropriate or necessary to a “fair determination of the defendant’s guilt or innocence.”¹⁸³ During trial, the court may sever on its own motion only if the circumstances prompting the severance meet the “manifest necessity” test — the occurrence of circumstances that make the continuation of the trial or the finding of a fair verdict either impossible or highly unlikely.¹⁸⁴ Upon independent conclusion by both parties that a joint trial is preferred, the court should be able to direct attention to compelling circumstances for acting on its own motion.¹⁸⁵ Unlike the authority of the court in regards to joinder, the court in a motion for severance, is *not* required to keep the trials or offenses joint.

IV. Conclusion

Joinder is a procedural issue which involves many aspects of the criminal process—pre-trial, trial and appeal. Joinder encompasses many procedural, as well as

¹⁷⁹ *See id.*

¹⁸⁰ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-44.

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *Id.* at 13-31.

¹⁸⁴ *Id.* at 13-31 quoting *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824).

¹⁸⁵ *See id.* at 13-45.

substantive issues that are necessary to the adjudication of a fair trial. Joinder arises in two distinct situations, joinder of offenses and joinder of defendants. The decision to prosecute jointly, albeit offenses or defendants, may be influenced by a range of practical and tactical factors, including, but not limited to: witness convenience, prosecutorial commitment, right to a speedy trial, and judicial efficiency.¹⁸⁶ Although each factor should be considered accordingly, jurisdictions may consider one factor more heavily than another (*ie.* defendant's right to a fair trial).

In considering the issue of joinder, courts and prosecutors should consider the advantages and disadvantages to both the court, as well as the defendant. The accused always retains a right to enjoy a fair trial without undue delay or prejudice. This notion remains prevalent throughout criminal procedural systems within the international fora.

Joinder of offenses or defendants is usually brought about by a motion from one of the parties, or on the motion of the court. The judge may join parties at the court's discretion. Failure to motion for joinder may result in waiver of any right to joinder. In the event that there is misjoinder or prejudice to the defendant, the issue of severance arises. Severance allows the parties or the court to separate offenses or defendants, and maintain separate claims. Like joinder, the court remains the final arbiter in decisions of severance.

Double jeopardy is a vital concept within the ambit of joinder and severance. Joinder allows for the avoidance of the double jeopardy hazard of multiple trials. The double jeopardy clause not only protects against multiple trials, but against multiple

¹⁸⁶ AMERICAN BAR ASSOCIATION, *supra* note 108, at 13-4-13-6.

punishments as well. Double jeopardy only applies to subsequent proceedings of the same nature (*ie.* criminal); therefore, further proceedings (*ie.* civil) regarding the same offense or defendant are permitted. Although considered an “American” concept, the double jeopardy notion is similar, if not identical, to the international principle of “non bis in idem,” which limits the number of prosecutions and punishments that can be brought against one defendant.

Joinder of crimes and defendants is beneficial to the Rwanda Tribunal in view of the limited resources available. Without the prospect of joinder of parties or offenses, the right of the accused to be tried without undue delay may be otherwise jeopardized.¹⁸⁷ Joinder of crimes and joinder of defendants are essential tools in a criminal procedural system. The Rwanda Tribunal would prosper in its use of the tools of joinder (as well as severance). Like every jurisdiction which deals with joinder, the Rwanda Tribunal will need to address issues such as judicial efficiency, the rights of a defendant to a fair trial and certain prejudices to the defendant which may result as a consequence of joinder; however, the Tribunal will be likely to find that the employment of joinder within its criminal procedure will only bring efficiency and advantages to the court. The effective use of Rules 48 and 49 of the Rules of Prosecute and Evidence will be determinative of a judicial system which operates with commitment, deference to the rights of the defendant, and judicial efficiency.

¹⁸⁷ MORRIS & SCHARF, *supra* note 1, at 481.

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