NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

ISSUE # 6:
LAW OF EVIDENCE: WHAT ARE THE LEGAL PREREQUISITES FOR INTRODUCING THE STATEMENTS OF A MEMBER OF A CONSPIRACY (CONSPIRATOR A) AS EVIDENCE AGAINST A CO-CONSPIRATOR (CONSPIRATOR B)

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STATUTES, RULES AND CODES

2. International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence,

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3. Federal Rules of Evidence,

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5. Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, Volume 1 (1998).

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13. Todd R. Russell and O. Carter Snead, *Federal Criminal Conspiracy*, American Criminal Law Review, 35 Am. Crim. L. Rev. 739 (Spring 1998).

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14. Bourjaily v. United States, 483 U.S. 171 (1987).

15. Harrington v. California, 395 U.S. 250 (1969).

16. Kotteakos v. United States, 328 U.S. 750 (1946).

17. United States v. Alonzo, 991 F.2d 1422: 1993 U.S. App. LEXIS 9418 (citing Fiswick v. United States, 329 U.S. 211, 217 (1946)).

18. United States v. Blakey, 960 F.2d 996 (11th Cir. 1992).

19. United States v. Brown, 943 F.2d 1246 (10th Cir. 1991).

20. United States v. Garcia, 893 F.2d 188 (8th Cir 1990).

21. United States v. Gatling, 96 F.3d 1511 (D.C. Cir. 1996).

22. United States v. Gonzalez-Balderas, 11 F.3d 1218 (5th Cir. 1994).

23. United States v. Guyton, 38 F.3d 655 (7th Cir. 1994).

24. United States v. Lindermann, 85 F.3d 1232 (7th Cir. 1996).

25. United States v. Lujan, 936 F.2d 406 (9th Cir. 1991).

26. United States v. Meggers, 912 F.2d 246 (8th Cir. 1990).

27. United States v. Moss, 9 F.3d 543 (6th Cir. 1993).

28. United States v. Neal, 78 F.3d 901 (4th Cir. 1996).

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. ISSUE

This research memorandum seeks to examine the following issue:

Law of Evidence: What Are The Legal Prerequisites For Introducing Statements of a Member of a Conspiracy (Conspirator A) As Evidence Against a Co-conspirator (Conspirator B).[1]

B. SUMMARY OF CONCLUSIONS

Statements of co-conspirators are admissible as evidence against other co-conspirators.[2] There is a generally accepted exception to the rule against the admissibility of hearsay evidence for statements made by co-conspirators.[3] This exception to the hearsay rule allows for the introduction into evidence of statements made by co-conspirators upon a showing that the statement was made in furtherance of the conspiracy.

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[1] *See* United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topic No. Six, Fascimile dated January 12, 1999. The focus of this memorandum is derived from that fascimile. The scope of this memorandum includes a comparison and illustration of how the United States, Canada and Great Britain deal with the issue of co-conspirator statements. (Appendix at 1).

[2] *See generally* Fed. R. Evid. 801(d)(2)(E). (Appendix at 3).

[3] *See generally* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 565-566 (1998). (Appendix at 5).

The prosecution will have to make preliminary showings that a conspiracy did in fact exist, that the defendant was involved in the conspiracy and that the statements were made in furtherance of that conspiracy.[4] Courts require that there be some proof of a conspiracy and evidence of the defendant's role in that conspiracy before hearsay evidence is allowed. This procedure is well established in the United States, Canada and The United Kingdom. Questions arise as to just how much proof of a conspiracy is needed in order to get statements admitted into evidence. However, such decisions still remain primarily with the judge's discretion.

Although the co-conspirator exception to the hearsay rule allows evidence of a highly prejudicial nature to be admitted against the accused, the courts are concerned about the rights of the accused and thus place the burden on the prosecution to introduce independent evidence of the existence of a conspiracy before allowing the hearsay evidence in as evidence against the accused.[5] Some courts require proof beyond a reasonable doubt that the conspiracy alleged existed.[6]

This memorandum is organized as follows. The general rules of the ICTR concerning evidentiary matters are briefly laid out. Then the general exception to the rule against the use of hearsay as evidence is explained, with a discussion of its application in the United States, and similar provisions used in Canada and The United Kingdom. Each element of the exception and how it is satisfied is laid out in turn using each of these three jurisdictions. This is followed by a discussion of the various procedures used in

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[4] *See Bourjaily v. United States*, 483 U.S. 171, 183 (1987). (Appendix at 14).

[5] *See generally United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996). and *R v. Murray; R v. Morgan; R v. Sheridan*, 1997 2 Cr App Rep 136. (Appendix at 21).

these jurisdictions for introducing hearsay evidence at trial, focusing on the options the court has for admitting hearsay evidence. the proof it may require when the evidence is presented and whether it can allow such evidence and require a determination of its admissibility at a later time. Lastly, there are examples of some evidentiary issues that have arisen in the Untied States system when dealing with hearsay statements of co-conspirators.

II. FACTUAL BACKGROUND

For forty years now there have been numerous massacres of the Tutsi tribe in Rwanda, the most recent beginning on 6 April 1994, after the Rwandan President Juvenal Habyarimana was killed in a plane crash.[7] The Hutu people blamed the Tutsis for shooting down the plane, accusing them of assassinating President Habyarimana.[8] This event sparked a killing spree by Hutu extremists resulting in the killing of over 500,000 Tutsi people until the Rwanda Patriotic Front eventually gained control of the Rwandan Government.[9]

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[6] *See generally Regina v. Tremblay*, 1995 CCC LEXIS 2451, 101 C.C.C. 3d 538. (Appendix at 10).

[7] *See generally* 1 Virginia Morris & Michael P. Scharf. *The International Criminal Tribunal for Rwanda* 47 (1998). (Appendix at 5).

[8] *See generally* 1 Virginia Morris & Michael P. Scharf. *The International Criminal Tribunal for Rwanda* 47 (1998). (Appendix at 5).

[9] *See generally* 1 Virginia Morris & Michael P. Scharf. *The International Criminal Tribunal for Rwanda* 47 (1998). (Appendix at 5).

Over objection by the Rwandan government, the United Nations Security Counsel established the International Criminal Tribunal for Rwanda.[10] The Tribunal was given the authority to investigate and prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and any Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states.[11]

The ICTR has already indicted many persons for conspiracy to commit genocide. On 8 October 1996, Andre Ntagerura, who was a senior cabinet Minister and a prominent member of the ruling party, the MRND, in southwestern Rwanda, was charged with responsibility for the killings of an estimated one hundred thousand Tutsi civilians in Cyangugu Prefecture between February and July 1994.[12]

On 7 December 1996, Ferdinand Nahimana, the senior representative of *Radio Television Libre des Milles Collines,* was accused of responsibility for broadcasting messages designed to incite inter-ethnic hatred and to encourage the Hutu population to kill and commit acts of violence and persecution against the Tutsi population and others on political grounds.[13]

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[10] *See generally* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998). (Appendix at 5).

[11] *See generally* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 47 (1998). (Appendix at 5).

[12] *See* John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 351 (1998). (Appendix at 11). The charges against Ntagerura included: genocide, conspiracy to commit genocide, complicity in genocide, crimes against nature and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 of the ICTR's Statute). (Appendix at 7).

[13] *See* John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 351 (1998). (Appendix at 11). The charges against Nahimana included: conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against nature. (Appendix at 7).

Elizaphan Ntakirutimana, the Pastor of the Seventh Day Adventist Church in Mugonero, in Kibuye Prefecture and Gerard Ntakirutimana, a physician at Mugonero Hospital, were charged with attacks on Tutsi men, women and children from various places within Kibuye Prefecture who had sought refuge in the Mugonero Complex from attacks.[14] These attacks, which were taking place throughout this area, were being committed by the accused and members of the National Gendamerie, communal police, militia and civilians and resulted in hundreds of deaths.[15]

III. LEGAL DISCUSSION

A. GENERAL PROVISIONS: THE SCOPE OF THE TRIBUNAL AND THE RULES OF EVIDENCE OF THE ICTR

The Rules of Procedure and Evidence for the Rwanda Tribunal govern all proceedings before the Trial Chambers and the Appeals Chamber.[16] The rules provide the general standards for the admissibility of evidence during the trial proceedings as well

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[14] *See* John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 352-353 (1998). (Appendix at 11). The charges against Ntakirutimana and Ntakirutimana included: genocide, complicity in genocide, conspiracy to commit genocide, crimes against nature and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 of the ICTR's Statute). (Appendix at 7).

[15] *See* John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 353 (1998). (Appendix at 11). These two were also charged with massacres of Tutsi men, women and children, many of whom had escaped from the massacre at Mugonero, in an area known as Bisesero in April-June 1994. (Appendix at 7).

[16] 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (1998). Rule 89 of the Rwanda Tribunal sets forth General Provisions and states as follows:

as any appellate proceedings.[17] Evidentiary question that are not specifically addressed in the Rules are to be determined based on considerations of fairness, the spirit of the Statute, and *general principles of law* [emphasis added].[18] This allows the Tribunal to look to the legal systems of other countries for guidance. Although national rules of evidence are not binding on the Rwanda Tribunal, these rules may provide further guidance in the form of general principles of law.[19]

Article 1 of the International Criminal Tribunal for Rwanda Statute [hereinafter ICTR], grants the Tribunal "the power to prosecute persons" who perpetrated genocide between "1 January 1994 and 31 December 1994."[20] Article 2 of the ICTR statute allows

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> (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
>
> (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favor a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.
>
> (C) A Chamber may admit any relevant evidence which they deem to have probative value.
>
> (D) A Chamber may request verification of the authenticity of the evidence obtained out of court.

(Appendix at 5).

[17] 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 563 (1998). (Appendix at 5).

[18] 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 563-564 (1998). (Appendix at 5).

[19] 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 564 (1998). (Appendix at 5).

[20] *See* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 (1998). Article 1 states:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwanda citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute. (Appendix at 6).

the prosecution to include a charge of conspiracy.[21] Although the ICTR does not contain a definition for conspiracy, the common law crime of conspiracy is generally defined as an agreement between two or more people with the intent to do an unlawful act.[22] The prosecution must therefore satisfy two elements: "(1) an agreement between two or more persons; and (2) an intent thereby to achieve a certain objective which...is the doing of...an unlawful act..."[23]

B. CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE

Rule 90[24] of the ICTR provides that witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.[25] The statute also affords the accused the right to

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[21] *See* 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 (1998). Statute of the ICTR, Article 2. (Appendix at 6).

[22] *See* Dressler, *Criminal Law* 937 (1994). The United States Model Penal Code, Section 5.03 Criminal Conspiracy defines criminal conspiracy as:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> > (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation of such crime, or
> >
> > (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> (Appendix at 4).

[23] *See* Dressler, *Criminal Law* 937 (1994). (Appendix at 5).

[24] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995. (Appendix at 2).

[25] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995. Rule 71(A) states:

examine or have examined the witness against him.[26] Together, these provisions would seem to generally preclude hearsay evidence since the declarant of the statement is not present before the Trial Chamber or a Presiding Officer appointed thereby and the defense has no opportunity to examine the declarant.[27]

It should be noted that in the Tadic case. the defense urged that the Trial Chamber of the Yugoslavia Tribunal should exclude hearsay statements in situations where there were no circumstantial guarantees of trustworthiness.[28] The Trial Chamber declined to do so in holding that Rule 89(C) allows the Trial Chamber to hear any evidence deemed to have probative value, including hearsay evidence.[29] However, the common Appeals Chamber has yet to rule on the extent of the admissibility of hearsay evidence.[30]

> "At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer." (Appendix at 2).

[26] *See generally* 1 Virginia Morris & Michael P. Scharf. *The International Criminal Tribunal for Rwanda* 565 (1998). (Appendix at 3).

[27] *See generally* 1 Virginia Morris & Michael P. Scharf. *The International Criminal Tribunal for Rwanda* 565 (1998). (Appendix at 3).

[28] *See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 566 (1998). (citing *Defense Motion and Response of the Prosecutor on Hearsay, The Prosecutor v. Dusko Tadick,* Case No. IT-94-1-T, 26 June 1996 and 10 July 1996). (Appendix at 3).

[29] *See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 566 (1998). (citing *The Prosecutor v. Dusko Tadic,* Case No. IT-94-1-T (Decision on the Defense Motion on Hearsay, 5 Aug. 1996)). In evaluating the probative value of hearsay evidence, however, the Trial Chamber said it would pay special attention to indicia of reliability. To this end, "[t]he Trial Chamber may be guided by, but not bound to hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate." *Id.* (Appendix at 3).

[30] *See generally* 1 Virginia Morris & Michael P. Scharf. *The International Criminal Tribunal for Rwanda* 566 (1998). (Appendix at 3).

In the United States, hearsay is not admissible except as provided by the Federal Rules of Evidence.[31] The United States defines hearsay as:

> "...a statement , other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[32]

The United States has, however, an exception within the Federal Rules that allows for the use of hearsay evidence which states that:

> A statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.[33]

Were a defendant to challenge hearsay evidence that has been admitted, the court would conduct harmless error analysis of the alleged violation of Rule 801(d)(2)(E).[34] This analysis proceeds under a non-constitutional standard which asks whether the error had a substantial influence on the outcome of the trial.[35] Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is effected.[36] Moreover, where evidence of the defendant's guilt is proved by overwhelming

[31] *See generally* Fed. R. Evid. 802. (Appendix at 3).

[32] Fed. R. Evid. 801(c). (Appendix at 3).

[33] Fed. R. Evid. 801(d)(2)(E). (appendix at 3).

[34] *See United States v. Perez*, 989 F.2d 1574, 1583 (10th Cir. 1993). Here, the court held that the use of the hearsay evidence was harmless error because of the overwhelming evidence of the guilt of the accused evidenced by statements and telephone recordings of the defendant discussing drug deals with undercover agents posing as suppliers. (Appendix at 29).

[35] *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946). (Appendix at 16).

[36] Fed. R. Evid. 103(a)(1). (Appendix at 3).

evidence, an erroneous ruling may be harmless beyond a reasonable doubt.[37] If it is determined by the reviewing court that the lower court's evidentiary error is harmless, the lower court need not make any [further] findings on Rule 801(d)(2)(E).[38] However, the Rules except admissions from the hearsay definition because it is disingenuous for a party to claim that a statement that he himself made is unreliable.[39]

The Rwanda Tribunal's exclusionary rule[40] is intended to achieve four important objectives, namely: (1) to discourage human rights violations in the gathering of evidence; (2) to exclude evidence obtained by illegal means, such as torture, for reasons of unreliability; (3) to avoid tainting the judicial process; and (4) to protect the fundamental interest of justice with respect to due process and the rule of law.[41] The exclusionary rules of other jurisdictions are logically premised on the same type of concerns as those of the Tribunal.

One such concern advanced by the United States is that of necessity,[42] which warrants the recognition of the co-conspirator exception to the hearsay rule. Conspiracies are secretive; often their aim is to commit destructive crimes (drug dealing, kidnapping,

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[37] *Harrington v. California*, 395 U.S. 250, 254 (1969). (Appendix at 15).

[38] *See United States v. Perez*, 989 F.2d 1574, 1584 (10th Cir. 1993). (Appendix at 29).

[39] *See United States v. Lindermann*, 85 F.3d 1232, 1239 (7th Cir. 1996). (Appendix at 24).

[40] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995. Rule 95 states:

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. (Appendix at 2).

[41] *See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 567 (1998). (Appendix at 5).

extortion, murder); often they raise social costs and risks more than individual crimes; live testimony by active participants is hard to get.[43] These reasons account for the crime of conspiracy, the leeway given to the government in prosecuting, and the co-conspirator exception itself.[44]

This exception to the hearsay rule is in force in other countries as well. In Canada, the Quebec Court of Appeal has held that "when two or more people are bound together in pursuit of an unlawful object, anything said, done or written by one in the furtherance of the common purpose is admissible in evidence against the other.[45] This exception applies when it is a question of proving, not the existence of a conspiracy, but the participation of one of the accused in the conspiracy.[46]

The United Kingdom as well has in place an exception to the hearsay rule for the statements of co-conspirators. The United Kingdom Court of Criminal Appeal has held that "The acts and declarations of any conspirator in furtherance of the common design are admissible in evidence against any other conspirator and this principle applies when the charge is one of a crime committed in pursuance of a conspiracy, whether the

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[42] *See United States v. Lindermann*, 85 F.3d 1232, 1239 (7th Cir. 1996). (Appendix at 24).

[43] *Id.* at 1238. (Appendix at 24).

[44] *Id.* at 1238. (Appendix at 24).

[45] *Regina v. Tremblay*, 1995 CCC LEXIS 2451; 101 C.C.C. 2d 538. (Appendix at 10).

[46] *Id.* The judge in this case held that the evidence was ultimately not hearsay and that the exception to the hearsay rule did not even apply to the facts of this case. Because the co-conspirator's statements did not implicate the appellant in the conspiracy, the statement was admissible evidence against the appellant only to show that the conspiracy existed. Therefore, if there had been an error by the judge in instructing the jury to use the evidence to decide whether or not the appellant was part of the conspiracy, it was harmless error because the statements did not implicate the appellant in the conspiracy, it was only relevant to show whether or not there was a conspiracy. (Appendix at 10).

indictment contains a count for conspiracy or not..."[47] The court went on to hold that such statements can be considered against all suspected co-conspirators, either before it is decided that there is an overall conspiracy, to decide if there is in fact a conspiracy, or after it has been decided that there is a conspiracy.[48] In order for the act or statement of A to be admissible against B, the rule requires: (1) that the act or statement of A must be in the course or furtherance of the common purpose; and (2) that independent evidence be adduced of the existence of the conspiracy and the involvement in it of B.[49]

The rule that the acts and statements of one party to a common purpose may be evidence against another, is particularly associated with charges of conspiracy.[50] However, it is not confined to such cases and applies to other offenses where complicity is alleged.[51] In the United Kingdom, it was held by the Court of Appeal that there was no doubt that where a defendant was charged with being a party to a conspiracy, evidence of the acts done or statements made by a co-conspirator in furtherance of the conspiracy was admissible against him even though he was not present at the time, provided that it was proved that there was a conspiracy to which he was a party.[52] However, when a conspiracy was not charged, the principle that where two persons were engaged in a

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[47] *R v Murray; R v Morgan; R v. Sheridan*, [1997] 2 Cr App Rep 136. (Appendix at 12).

[48] *Id.* (Appendix at 12).

[49] *Id.* (Appendix at 12).

[50] *Id.* Where several persons were each convicted of offenses relating to insider dealing, it has been held that "although there was alleged to be a network between them for the passing of information, each allegation related only to an offense committed by one of them alone..." (citing *Gray, Liggins Riding and Rowlands* [1995] 2 Cr App R 100.) (Appendix at 12).

[51] *See generally Id.* (Appendix at 12).

[52] *Id.* (Appendix at 12).

common enterprise, the acts and declarations of one in pursuance of that common purpose were admissible against the other, applied to the commission of a substantive offense or series of offenses by two or more people acting in concert; it was limited, however, to evidence which showed the involvement of each defendant in the commission of the offense or offenses.[53] Even if the principle was wider than that, the prosecution would have to make clear the nature and limits of the agreement in pursuit of which the specific offenses were alleged to have been committed.[54] The rule permits the actions and declarations of one party, A, to be used in evidence against the other, B, and is thus an exception to the general rule that B is not to be prejudiced by the acts or statements of another, and an exception to the hearsay rule in so far as it may involve reliance on A's statements as evidence of their truth.[55]

C. STANDARD OF PROOF

In the United States, in order to admit a co-conspirator's statement into evidence under Rule 801, the trial judge must determine by a preponderance of the evidence that: (1) a conspiracy existed; (2) the defendant and the declarant were involved in the conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy.[56]

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[53] *Id.* (Appendix at 12).

[54] *Id.* (Appendix at 12).

[55] *Id.* (Appendix at 12).

[56] *See Bourjaily v. United States*, 483 U.S. 171, 183 (1987). (Appendix at 14).

1. Requirement of Independent Evidence of the Existence of a Conspiracy

In the United States, there is a requirement that there be independent evidence of a conspiracy apart from the hearsay statement.[57] The presumption of unreliability of hearsay evidence can be rebutted by appropriate proof.[58] It has been held that a co-conspirator's statement, standing alone, was insufficient to meet the preponderance standard of Rule 801.[59] Individual pieces of evidence, insufficient in themselves to prove a point, may in culmination prove it.[60] A piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.[61] This avoids the possibility that the court may place too much importance on hearsay statements which are often unreliable. However, it has also been held to the contrary that a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay

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[57] *United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996). (Appendix at 21).

[58] *See* Fed. R. Evid 807. This Rule states that:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. (Appendix at 3).

[59] *United States v. Sepulveda*, 15 F.3d 1161, 1182 (1st Cir. 1993). (Appendix at 31).

[60] *See Bourjaily v. United States*, 483 U.S. 171, 179-180 (1987). (Appendix at 14).

[61] *See Id.* at 180. (Appendix at 14).

statements sought to be admitted.[62] A trial judge may receive the evidence and give it such weight as his judgment and experience counsel.[63]

Determining the admissibility of hearsay evidence requires a determination of preliminary questions. Federal Rule of Evidence 104(a) provides:

> Preliminary questions concerning... the admissibility of evidence shall be determined by the court.[64]

The Federal Rules, however, nowhere define the standard of proof the court must observe in resolving these preliminary questions. American courts have traditionally required that evidentiary matters be established by a preponderance of proof.[65] The inquiry made by a court is not whether the proponent of the evidence wins or loses the case on the merits, but whether the evidentiary Rules have been satisfied.[66] This preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.[67]

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[62] *See Id.* at 181. The court went on to hold that a co-conspirator's statements could themselves be probative of the existence of the a conspiracy and the participation of both the defendant and the declarant in the conspiracy. (Appendix at 14).

[63] *See Id.* at 181. (Appendix at 14).

[64] Fed. R. Evid. 104(a). (Appendix at 3).

[65] *See Bourjaily v. United States*. 483 US. 171, 183 (1987). (Appendix at 14).

[66] *Id.* at 175. (Appendix at 14).

[67] *See Id.* (1987). (Appendix at 14).

Canada requires that the trier of fact be satisfied beyond a reasonable doubt that the conspiracy alleged existed.[68] The judge would instruct the jury that if they come to the conclusion that there was a conspiracy and that there is evidence which indicates that the defendant was part of it, then at that point, the statements of the other co-conspirators and the acts committed by the other co-conspirators are seen as if they were the statements and acts of the members of the conspiracy.[69]

The United Kingdom requires a showing of agency that may be proved partly by what one conspirator said in the absence of another conspirator and partly by the other evidence of common purpose.[70] For the court, it makes no difference which is adduced first, but a conspirator's statement will have to be excluded if it transpires that there is no other evidence of common purpose, it is an instance of conditional admissibility.[71]

2. Proof That the Defendant and the Declarant Were Involved in the Conspiracy

Proof that the defendant and the declarant were involved in the conspiracy is also needed. In order to prove that an agreement existed, the government need only show that the conspirators agreed on the essential nature of the plan, not that they agreed on the details of their criminal scheme.[72] United States courts have held that a hearsay statement

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[68] *See Regina v. Tremblay*, 1995 CCC LEXIS 2451, 101 C.C.C. 3d 538. (Appendix at 10).

[69] *See Id.* (Appendix at 10).

[70] *See R v Devonport and anor*, 1996 1 Cr App Rep 221, 1996 Crim LR 235. (Appendix at 11).

[71] *See Id.* (Appendix at 11).

[72] *See United States v. Gatling*, 96 F.3d 1511, 1520 (D.C. Cir. 1996). (Appendix at 21).

is inadmissible without independent corroborative evidence of the defendant's participation in the conspiracy.[73] A piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.[74]

The Quebec Court of Appeal has held that if it is decided that the conspiracy alleged did exist, the trier of fact must then review all the evidence and decide, on the basis of the evidence directly receivable against the accused, whether on a balance of probabilities, he was a member of the conspiracy.[75]

3. Requirement That the Statement Was Made During the Commission of or In Furtherance of the Conspiracy

The final requirement is that the statement was made during the course and in furtherance of the conspiracy. United States courts have held that an out of court statement is admissible if, on independent aid, the court is satisfied that, more likely than not, the statement was made during the course and in furtherance of the conspiracy.[76] However, the courts have not yet determined when independent evidence of a conspiracy

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[73] *See United States v. Lindermann*, 85 F.3d 1232, 1239 (7th Cir. 1996). (Appendix at 24).

[74] *See Bourjaily v. United States*, 483 U.S. 171, 181 (1987). Here, the hearsay statement concerned the agreement between two persons to sell cocaine. The court held that the hearsay evidence was admissible because of evidence that the accused arrived at a prearranged spot at the prearranged time, that he picked up the cocaine and that there was a large sum of money found in his car. (Appendix at 14).

[75] *See Regina v. Tremblay*, 1995 CCC LEXIS 2451; 101 C.C.C. 3d 538. In this case there were two persons against which the hearsay evidence was being admitted and the judge instructed the jury to decide separately whether each person was a member of the conspiracy by examining the whole of the evidence for each person individually. (Appendix at 10).

[76] *See United States v. Meggers*, 912 F.2d 246, 248 (8th Cir. 1990). (Appendix at 26).

is required.[77] The court need not resolve whether a co-conspirator's statements alone could provide proof of the conspiracy if the government provides independent evidence to corroborate the existence of the conspiracy.[78]

The Quebec Court of Appeals has held that if the trier of fact finds, on a balance of the probabilities, the accused participated in the conspiracy, he must then go further and decide whether the Crown had established the existence of his participation beyond a reasonable doubt.[79] It is only at this stage that the trier of fact may then apply the hearsay exception and consider evidence of the acts and declarations performed and made by the co-conspirators in furtherance of the objects of the conspiracy as evidence against the accused on the issue of guilt.[80] A plaintiff who alleges a conspiracy is entitled to put into evidence any acts or declarations of any of the co-conspirators which are in furtherance of the alleged conspiracy.[81] Such acts and declarations are material facts and may be pleaded as such.[82]

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[77] *See United States v. Neal*, 78 F.3d 901, 905 (4th Cir. 1996). (Appendix at 28).

[78] *See Id.* Police officer's testimony that he had been spotted by the accused corroborated the witness' statement to another member of the conspiracy that the drug deal was called off because he had seen narcotics agents in the area. The fact that the deal fell through immediately after the witness had spoken with the accused supported the government's theory that the witness worked for the accused. This independent evidence sufficiently corroborated the out-of-court statements to establish a conspiracy by a preponderance of the evidence. (Appendix at 28).

[79] *See Regina v. Tremblay*, 1995 CCC LEXIS 2451; 101 C.C.C. 3d 538. (Appendix at 10).

[80] *See Id.* (Appendix at 10).

[81] *See Mil-Davie Inc. v. Hibernia Management and Development Division Co. Ltd.*, 1998 Fed. Ct. Trials LEXIS 1136. The claim here is one for conspiracy and the rules of evidence with respect to conspiracies are somewhat broader and more complex than for the ordinary run of the civil case. (Appendix at 8).

[82] *See Id.* (Appendix at 8).

4. Admissibility of a Written Document

If the hearsay evidence sought to be admitted is a written document rather than an oral statement, concerns as to whether it is admissible against all members of the conspiracy or only the document's author will arise.

The United Kingdom Court of Criminal Appeals has held that a document is admissible against the appellants if it constitutes an act or declaration...in furtherance of the conspiracy, provided that there is some further evidence beyond the document itself that they were parties to the conspiracy alleged against them.[83] Furthermore, only a realistic or reasonable inference that a document was prepared [or statement made] in furtherance of the conspiracy is sufficient to prove that it was made in furtherance of the conspiracy.[84] Here, although, none of the other co-conspirators had anything to do with the preparation of the document, or had handled it, prima facie it was prepared in furtherance of the conspiracy and was therefore admissible.[85]

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[83] *See R v Devonport and anor*, 1996 1 Cr App Rep 221, 1996 Crim LR 235. The court held that such further evidence did exist and that the court could therefore go on to examine the document in order to decide whether it was in fact made in furtherance of the conspiracy and therefore admissible against all of the co-conspirators. (Appendix at 11).

[84] *See Id.* Here, the document was seen as an indication of the intended or prospective distribution of the proceeds of the conspiracy when it had been fulfilled. It identified the conspirators and was a compelling example of written evidence of the existence of the conspiracy and of the identity of the participants in it. (Appendix at 11).

[85] *See Id.* (Appendix at 12).

D. ORDER OF PROOF

Another concern is what, if any, safeguards the court should take when admitting hearsay evidence against co-conspirators. Questions arise as to whether or not factual predicates are met as to the veracity of such statements and the court must decide whether to allow the statements into evidence or not.

In the United States it has been held that the court may conditionally admit co-conspirator statements subject to later determination that the factual predicates were met.[86] One such factual predicate is whether or not a conspiracy actually existed. Admission of a co-conspirator's statements are subject to eventual proof of a conspiracy.[87] Statements may be admitted subject to proof of requirements.[88] However, a court is not required to conduct a pretrial hearing to determine the admissibility of a co-conspirator's statements.[89] Such determinations need not be made prior to trial in all cases: If the court determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.[90]

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[86] *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1224 (5th Cir. 1994). (Appendix at 22).

[87] *United States v. Moss*, 9 F.3d 543, 549 (6th Cir. 1993). (Appendix at 27).

[88] *United States v. Van Hemelryck*, 945 F.2d 1493, 1498 (11th Cir. 1991). (Appendix at 33).

[89] *United States v. Ruiz*, 987 F.2d 243, 246 (5th Cir. 1993). (Appendix at 30).

[90] *See Id.* Here, the court concluded that there was ample evidence to make a prima facie case by a preponderance of the evidence, that the two conspiracies that were charged in the indictment did exist, that the Defendants who were on trial in this case and who were charged in the two separate conspiracies alleged in the indictment, were in fact members of the conspiracy and that the statements of the co-

One problem with admitting hearsay evidence prior to a determination of whether or not there was a conspiracy and therefore whether or not the statements were made in furtherance of a conspiracy is that such statements can be prejudicial to the accused.

Canadian courts have held that before resorting to evidence of the acts and declarations of co-conspirators...the jury were obliged to determine, that the respondent was a member of the conspiracy charged."[91] The appropriate standard was on the balance of the probabilities and once this standard was satisfied, the acts and declarations of co-conspirators were evidence admissible against the accused in accordance with the well-known exception to the hearsay rule.[92]

This affords an accused some protection from unfair prejudice brought about by the use of hearsay evidence against him. An accused is protected by reason of the high onus of proof upon the Crown to establish the existence of a conspiracy and the accused's involvement in that conspiracy and with the obligations upon the trial judge to instruct either himself or herself or the jury precisely and clearly on the law.[93] In situations where hearsay evidence is being used, the Crown presents its entire case, including the hearsay evidence of the alleged co-conspirators and then the trier of fact is instructed to ignore the

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conspirators...were made at times when the conspiracies existed and that they were made in furtherance of those conspiracies. (Appendix at 30).

[91] *Regina v. Duff*, 1994 CCC LEXIS 2506, 90 C.C.C. 3d 460. (Appendix at 9).

[92] *See generally Id.* This case was a bench trial and the accused was aware of the weight that the trial judge would place on the evidence pointing to a conspiracy and to the appellant's alleged involvement in that conspiracy. The court held that because there was overwhelming direct evidence of the appellant's involvement in the conspiracy, the hearsay could add little to the issue of whether or not there was a conspiracy. (Appendix at 9).

[93] See *Id.* The court states that this process is not inherently prejudicial to any accused. (Appendix at 9).

hearsay evidence, to consider only the direct evidence and to determine beyond a reasonable doubt, whether a conspiracy does exist.[94]

The judge can also require the government to meet its initial burden by producing the non-hearsay evidence of conspiracy first, prior to making a finding concerning the hearsay's admissibility.[95] The court held that although the question of the admissibility of the hearsay evidence remains with the judge until he or she determines there is some reasonable evidence of a conspiracy and the accused's involvement in that conspiracy, the hearsay evidence cannot be used to make that determination.[96] The hearsay exception may be brought into effect, but only where there is some evidence of the accused's membership in the conspiracy directly admissible against him without reliance upon the hearsay exception.[97]

If the trier decides that a conspiracy as alleged did exist, the trier then must review the evidence and decide whether, on the basis of the evidence directly receivable against the accused, a probability is raised that he was a member of the conspiracy.[98] If this conclusion is reached, then they become entitled to apply the hearsay exception and consider the evidence and declarations performed and made by the co-conspirator in furtherance of the objects of the conspiracy as evidence against the accused on the issue

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[94] See *Regina v. Duff*, 1994 CCC LEXIS 2506, 90 C.C.C. 3d 460. (Appendix at 9). This case was a bench trial and the court notes that this procedure for the use of hearsay evidence is applicable equally to trials where the judge is the trier of fact as well as in jury trials. (Appendix at 9).

[95] *See Id.* (Appendix at 9).

[96] *See Id.* (Appendix at 9).

[97] *See Id.* (Appendix at 9).

[98] *See Id.* (Appendix at 9).

of his guilt.[99] If the trier of fact is not satisfied beyond a reasonable doubt, after hearing all the evidence, then the accused charged with participation in the conspiracy must be acquitted.[100] This procedure clearly avoids the danger of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes.[101]

If there is some evidence to permit the issue of admissions to be submitted to the trier of fact, the matter must be considered in two stages: (1) a preliminary determination must be made as to whether, on the basis of the evidence admissible against the accused, the Crown has established on the balance of probabilities that the statement is that of the accused; and (2) if this is met, the trier of fact should then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt.[102]

E. SAMPLE EVIDENTIARY ISSUES

Situations will arise involving varying types of hearsay statements and it must be determined by the court whether or not a certain statement is admissible under the co-conspirator statement hearsay exception.

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[99] *See Regina v. Duff*, 1994 CCC LEXIS 2506, 90 C.C.C. 3d 460. (Appendix at 9).

[100] *See Id.* (Appendix at 9).

[101] *See Id.* (Appendix at 9).

[102] *See Id.* (Appendix at 9).

1. Statements Made in Furtherance of a Conspiracy

One requirement is that a hearsay statement be during the course of or in furtherance of the conspiracy in order to be admissible.[103] But exactly when a statement is made in furtherance of a conspiracy is sometimes difficult to determine.

An example of such a situation is when a statement made by a conspirator was made in order to familiarize others with conspiratorial operations.[104] There it was held that such a statement was made in furtherance of the conspiracy.[105] Statements made to familiarize others are usually made in the hope of recruiting conspirators. Courts seem to agree that statements made for the purpose of recruiting conspirators are generally admissible. This is evident in that courts have held that statements of the facts of a conspiracy are admissible when made in order to recruit co-conspirators.[106]

Statement made to encourage continued participation in a conspiracy are considered to be in furtherance of the conspiracy .[107] In Lujan, the court held that because a person maintained a message center at her home, she played a role in the conspiracy to sell drugs.[108] This person's only role in the conspiracy, according to the court, was to induce others to deal with the conspirators and to generally further the

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[103] *See generally* Fed. R. Evid. 801(d)(2)(E). (Appendix at 3).

[104] *See United States v. Guyton*, 38 F.3d 655, 659 (7th Cir. 1994). (Appendix at 23).

[105] *See generally Id.* (Appendix at 23).

[106] *See United States v. Garcia*, 893 F.2d 188, 190 (8th Cir 1990). (Appendix at 20).

[107] *See generally United States v. Lujan*, 936 F.2d 406, 411 (9th Cir. 1991). (Appendix at 25).

objects of the conspiracy.[109] Therefore, the statements made were admissible under the co-conspirator exception to the hearsay rule.[110]

Similarly, statements made to enhance trust and cohesion among conspirators is admissible since made in furtherance of the conspiracy.[111] In Simmons, the court allowed a statement into evidence concerning the brutal murder of a drug dealer by fellow drug dealers, all members of the same "Crew".[112] The purpose of the statement was to enforce discipline among the other members of the "Crew" and to warn them that a similar fate awaited them if they failed to remain loyal to the "Crew".[113] Because these statements promoted cohesiveness among the "Crew" and helped induce other members to assist in the affairs of the criminal enterprise, the district court did not abuse its discretion in admitting the disputed testimony.[114]

Statements made in furtherance of a conspiracy must be more than mere narrative, that is statements relating to past events, even those connected with the operation of the conspiracy where the statements serves no immediate or future conspiratorial purpose.[115] In Wolf, the witness testified in court that when she asked the defendant, charged in a child abuse conspiracy, that resulted in the death of her daughter, what was wrong with

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[108] *See generally Id.* (Appendix at 25).

[109] *See generally Id.* (Appendix at 25).

[110] *See generally Id.* (Appendix at 25).

[111] *See generally United States v. Simmons*, 923 F.2d 934, 945 (2nd Cir. 1991). (Appendix at 32).

[112] *See generally Id.* (Appendix at 32).

[113] *See generally Id.* (Appendix at 32).

[114] *See generally Id.* (Appendix at 32).

[115] *See United States v. Perez*, 989 F.2d 1574, 1578 (10th Cir. 1993). (Appendix at 29).

the child when she observed her lying on the floor, the defendant had said that her husband had hit the child.[116] The court held that this hearsay evidence was inadmissible against the conspirator under the co-conspirator exception because it was a mere narrative and did not further the conspiratorial objectives of abusing a child or covering-up the abuse.[117]

Canada as well has held that because a conversation is not mere narrative but rather an attempt to recruit a witness into participating in the conspiracy, the Crown can use that conversation as evidence under the co-conspirator rule.[118]

Statements which serve to aid in conspiracy are admissible as statements in furtherance of the conspiracy, but statements which implicate one conspirator for the purpose of shifting blame from another are inadmissible.[119] In Blakey, a co-defendant had stated that the other co-defendant had been the one who tried to pass a forged check.[120] The court held that the statement was not admissible under the hearsay exception because it was intended by the co-defendant solely to point a finger at one co-defendant, in order to shift the focus of the investigation away from himself.[121]

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[116] *See United States v. Wolf*, 839 F.2d 1387, 1395 (10th Cir. 1988). (Appendix at 34).

[117] *See generally Id.* (Appendix at 34).

[118] *See Regina v. Tremblay*, 1995 CCC LEXIS 2451; 101 C.C.C. 3d 538. The co-conspirator rule had no application here, however, because the evidence showed that the meeting at which the deceased were killed did not happen by coincidence, but rather, was arranged in a planned and deliberate manner by several persons. The statement to the witness did not implicate the accused in the conspiracy and the statement was at least admissible against the accused to show the existence of a conspiracy. (Appendix at 10).

[119] *See United States v. Blakey*, 960 F.2d 996, 998 (11th Cir. 1992). (Appendix at 18).

[120] *See generally Id.* (Appendix at 18).

[121] *See generally Id.* (Appendix at 18).

2. Statements Made Prior to or After Participation in the Conspiracy

Co-conspirator hearsay statements are admissible even if made before the defendant joined the conspiracy.[122] In Brown, the government presented hearsay evidence through two government witnesses and the court held that the evidence, as a whole, established that a conspiracy existed, that the defendants were members of that conspiracy and that the statements of the defendants were made during the course and in furtherance of the conspiracy.[123] The defendant contended that in order for these statements to be admissible, the government was required to prove that he was a member of the conspiracy at the time the statements were made, however, the court held that the prevailing view among the circuits is that previous statements made by co-conspirators are admissible against the defendant who subsequently joins the conspiracy.[124]

However, it has been held that confessions or admissions made by one co-conspirator after he has been apprehended is not in any sense in furtherance of the

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[122] *See United States v. Brown*, 943 F.2d 1246, 1255 (10th Cir. 1991). (Appendix at 19).

[123] *See generally Id.* (Appendix at 19).

[124] *See Id.* The court gave a limiting instruction concerning the hearsay evidence. Rule 104(b) of the Federal Rules of Evidence states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

This means that in terms of the exhibits that are to be admitted by the government, each is going to be admitted conditionally, and that condition is that the government prove otherwise the existence of the conspiracy alleged. Until or unless the Court otherwise admits [the evidence] unconditionally, it is not admitted to establish the existence of the conspiracy, rather the conspiracy will have to be established otherwise. (Appendix at 3).

criminal enterprise, rather it is a frustration of it.[125] In Alonzo, it was held that once apprehended the conspirator ceased to act in the role of a conspirator because "...the plot was then terminated."[126] Therefore, his admissions were not admissible against his fellow conspirators.[127]

F. CONCLUSION

In summary, since the ICTR allows the Tribunal to look to other jurisdictions for guidance concerning rules and procedures for dealing with evidentiary issues, the Tribunal is free to follow or model its own rules concerning the admissibility of hearsay statements of one co-conspirator as evidence against another co-conspirator. As is evidenced by the discussion above, countries have adopted some form of a co-conspirator hearsay exception to the general rule against the use of such evidence in the interests of justice. As well, there are general concerns for avoiding or at least limiting the prejudicial effect that admitting such evidence may have on the accused. Interests of justice and the accused's right to a fair trial must be weighed and guarded at all steps of the process.

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[125] *See United States v. Alonzo*, 991 F.2d 1422: 1993 U.S. App. LEXIS 9418 (citing *Fiswick v. United States*, 329 U.S. 211, 217 (1946)). (Appendix at 17).

[126] *See generally Id.* (Appendix at 17).

[127] *See generally Id.* (Appendix at 17).