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

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

ISSUE # 7:

**LAW OF THE EVIDENCE: DOES IT EFFECT THE ADMISSIBILITY OF
CONSPIRATOR A's STATEMENT AGAINST CONSPIRATOR B IF:**

1. **A IS CHARGED IN THE SAME INDICTMENT WITH B**
 2. **A IS CHARGED IN A DIFFERENT INDICTMENT WITH B**
 3. **A IS NOT CHARGED AT ALL**
 4. **NEITHER A NOR B IS CHARGED WITH THE SPECIFIC OFFENCE OF
CONSPIRACY (BUT THE EVIDENCE AT TRIAL ESTABLISHES THAT
A CONSPIRACY EXISTED ACCORDING TO THE PREREQUISITES
SET OUT IN 1 ABOVE).**
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I. Introduction and Summary of Conclusions

A. Issue and Areas of Law Used

You have asked for a research memorandum on the law of evidence regarding the admissibility of Conspirator A's statement against Conspirator B if: (1) A is charged in the same indictment with B; (2) A is charged in a different indictment from B; (3) A is not charged at all; and (4) Neither A nor B is charged with the specific offense of conspiracy, but the evidence at trial establishes that a conspiracy existed according to the prerequisites set out in (1) above. This memorandum examines how the International Criminal Tribunals for Rwanda (herein after ICTR) and the former Yugoslavia (hereinafter ICTY) treat the admissibility of evidence; and compares the treatment with that of the United States Federal Courts. This memorandum focuses on the evidentiary issue of the co-conspirator statement exclusion to the hearsay rule as found in the United States Federal Rules of Evidence, and notice requirements in the Rules of Evidence and Procedure for the International Criminal Tribunal for Rwanda.

B. Summary of Conclusions

A co-conspirator's statement would be admissible in all of the described scenarios if the ICTR is convinced that the statement has probative value and is in keeping with the interests of a

fair and just trial.¹ Although the co-conspirator's statement would be admissible in scenario (4), in which the accused was not charged with the specific offense of conspiracy, the notice requirements of Rule 66 of the Rules of Evidence and Procedure (hereinafter *ICTR Rule 66*) for the ICTR would need to be met.²

Rule 89 of the Rules of Evidence and Procedure (hereinafter *ICTR Rule 89*) for the ICTR allows the ICTR to hear any evidence that it determines is probative and is in the interests of a fair and just trial.³ ICTR Rule 89 is analogous to the combined rules 401, 402, and 403 of the United States Federal Rules of Evidence (hereinafter *Federal Rule(s) of Evidence*).⁴ The admissibility standard required by ICTR Rule 89 is actually a lower standard than that required by the Federal Rules of Evidence because ICTR Rule 89 is not limited by exclusionary rules regarding co-

¹ *ICTR Akayesu Judgement*, 2 September 1998, Section 4 (Citing ICTR Rule 89).

² *ICTY Tadic Judgment*, 7 May 1997, para. 533 (Indicating that notice was important by adjourning for three weeks to allow the Defendant to prepare for new charges).

³ See *ICTR Akayesu*, at Section 4 (Citing ICTR Rule 89).

⁴ *Fed. R. Evid. 401 - 403* (These rules provide the general framework for the admission of evidence as follows:

Rule 401 defines relevance: “‘Relevant Evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”;

Rule 402 generally admits relevant evidence: “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.”; and

Rule 403 excludes relevant evidence on certain grounds: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

conspirator statements.⁵ An analysis of how the federal courts in the United States would treat each scenario in the issue is relevant because any evidence that would meet the higher standard of the Federal Rules of Evidence would meet the standard required by ICTR Rule 89; and any evidence that did not meet the Federal Rules of Evidence standard would be subject to an argument for exclusion under ICTR Rule 89 because both standards are based on the principles of fairness and justice.

Federal Rule of Evidence 801 (d)(2)(E) specifically allows for co-conspirator A's statements to be used against co-conspirator B at trial.⁶ Certain prerequisites must be proven by a preponderance of the evidence for the statement to be admitted at trial: (1) that a conspiracy existed; (2) that the accused was part of the conspiracy; and (3) that the statement was made in the furtherance of the conspiracy.⁷ The United States Federal Courts treat the admission of co-

⁵ See *ICTR Akayesu*, at Section 4 (The Chamber noted that it was not bound by any rules of evidence other than the rules found in the statute) See also *ICTY Tadic Judgment*, 7 May 1997, paras. 529 - 555 (The *ICTY* discussed the general provisions for considering evidence and concluded that it was not bound by any rule of evidence or evidentiary concept other than those found in the statute; and that Rule 89 allowed the *ICTY* to consider any relevant evidence and assign whatever weight that it seems fit to the evidence. It is important to note that Rule 89 for the *ICTY* actually contains a limitation that is not in Rule 89 for the *ICTR* which is discussed below).

⁶ Federal Rule of Evidence 801 gives the definition of Hearsay, which is excluded by Federal Rule of Evidence 802. Federal Rule of Evidence 801 (d)(2)(E) excludes "the statement of a co-conspirator of a party made in the course and furtherance of the conspiracy" from the definition of hearsay, thereby making Federal Rule of Evidence 802 not applicable to co-conspirator statements.

⁷ See *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S. Ct. 2775, 2778 (1987) (*Bourjaily* is the seminal case on co-conspirator statements because the United States Supreme Court laid out several different requirements concerning Federal Rule of Evidence 801 (d)(2)(E). *Bourjaily* was convicted of conspiracy to distribute cocaine partly on the statements of a co-

conspirator statements as an evidentiary matter separate from the substantive issues of the case.⁸

Since the admission of a co-conspirator statement is an evidentiary issue rather than substantive in the United States Federal Courts, the underlying indictment does not affect the admission of the statement if the statement is determined to satisfy the rules of evidence.⁹ In each of the scenarios of the issue statement, the admission of the co-conspirator statement in the United States Federal Courts would not hinge upon the underlying indictments, but on whether the statement was relevant to the underlying charges under Federal Rules of Evidence 401 and 402; was not excluded by any other rule as required under Federal Rule of Evidence 402, which would be determined by applying the statement to Federal Rule of Evidence 801 (d)(2)(E); or excluded on the grounds under Federal Rule of Evidence 403.¹⁰

II Factual Background¹¹

conspirator who was available to testify, but chose not to.).

⁸ *Id.*

⁹ *See Bourjaily*, 483 U.S. at 176; *See also* *United States v Carter*, 14 F.3d 1150, 1155; *United States v. Kiefer*, 694 F.2d 1109, 1112 n.2 (8th Cir. 1982) (holding that there does not need to be a charge of conspiracy for the statement of a co-conspirator to be used).

¹⁰ *See generally* Fred Warren Bennett, *Litigating the Admissibility of Co-conspirators' Statements: a Defense Attorney's Perspective*, 18 Am. J. Trial Advoc. 325, 326 (1994).

¹¹ *ICTR Akayesu*, at Section 2, (Since the issue concerns the International War Crimes Tribunal for Rwanda, I have taken all of the historical facts included in the Factual Background as the Tribunal determined them to be in the Akayesu decision).

A. History of Conflict

The Hutus and the Tutsis have been involved in a political and armed power struggle in Rwanda for most of the twentieth century. This struggle became a civil war in 1990. A peace agreement called the Arusha Accords was reached in 1993 but not implemented. This peace agreement created great discord among the Hutu and was used to incite racial hatred against the Tutsi. The president of Rwanda, Juvenal Habyarimana, was killed in 1994 when his plane was shot down as it returned from a conference regarding the implementation of the Arusha Accord. Hutu extremists used the death of the President to initiate a whole scale slaughter of Tutsis and Hutus thought to be sympathetic to the Tutsis. This slaughter lasted for three months in which an estimated 500,000 to 1,000,000 people were killed. The International War Crimes Tribunal was formed on November 8, 1994 so that the perpetrators of this slaughter could be brought to justice.

B. Indictments

A number of cases arising out of the indictments that have been confirmed at the ICTR could potentially require the admission of a co-conspirator's statement. There have been six indictments as of August 10, 1996 that have charged ten different defendants with, among other charges, conspiracy to commit genocide or complicity in genocide.¹² Andre Ntagerura, Obed

¹² John R.W.D. Jones, *The Practice Of The International Criminal Tribunals For The Former Yugoslavia And Rwanda*, Transnational Publishers, Inc. (1998), 349 - 353 (Jones provides a summary of the indictments that have been confirmed at the ICTR).

Ruzindana, and Charles Sikubwabo were charged on the same indictment with, among other charges, conspiracy to commit genocide and complicity in genocide for their part in the killing and wounding of hundreds of Tutsi men, women, and children at the Mugonero Complex in April of 1994.¹³ The massacres at the Mugonero Complex were also one of the subjects of a different indictment, suggesting the existence of a conspiracy between defendants under different indictments. That indictments charged both Elizaphan Ntakirutimana, who was the Pastor of the Seventh Day Adventist Church in Mugonero, and Gerard Ntakirutimana, who was a physician at Mugonero Hospital, with conspiracy to commit genocide, among other charges, for their part in the massacres in the Mugonero Complex.¹⁴

Ruzindana and Sikubwabo were also charged with six other named defendants on another indictment that did not include charges of conspiracy to commit genocide or complicity in genocide; but the existence of a conspiracy can be inferred by the indictment because all eight defendants are assigned responsibility for specific acts of genocide.¹⁵ The massacres at Bisesero were one of the subjects of this indictment, which also gives rise to an inference of the existence of a conspiracy involving the eight defendants with two other ICTR defendants who have been charged on different indictments. Eliezer Niyitigeka, who was the Minister of Information in the government created after the death of President Juvenal Habyarimana, and Alfred Musema, who was the Director of the Gisovu Tea Factory in Kibuye Prefecture, were each charged on separate

¹³ *See Id* at 351 (Indictment ICTR-69-10-T).

¹⁴ *See Id* at 352 (Indictment ICTR-96-17-I).

¹⁵ *See Id* at 349 (Indictment ICTR-95-1-I).

indictments for, among other charges, conspiracy to commit genocide for their part in the massacres at Bisesero between the months of April and June of 1994.¹⁶

Ferdinand Nahimana, who was the senior representative of Radio Television Libre des Milles Collines, was indicted individually for, among other charges, conspiracy to commit genocide and complicity in genocide for his efforts in inciting the murder of Tutsis through the broadcast of messages.¹⁷ Joseph Kanyabashi, the former bourgmestre of Ngoma commune in Butare Prefecture, was indicted individually for, among other charges, complicity in genocide for his part in the killings that occurred in his area.¹⁸ A charge of complicity would also infer that some sort of a conspiracy existed because the accused had to be complicit with those who committed or planned the actual killing.

III Legal Discussion

A. General Admissibility of Evidence at the ICTR

ICTR Rule 89 allows the ICTR to hear any evidence that it determines is probative and is

¹⁶ *See Id* at 351,352 (Indictment ICTR-96-13-I and Indictment ICTR-96-14-I)

¹⁷ *See Id* at 351 (Indictment ICTR-96-11-I).

¹⁸ *See Id* at 352 (Indictment ICTR-96-15-I).

in the interests of a just and fair trial.¹⁹ The ICTR has interpreted ICTR Rule 89 as to not require the application of any evidence law or rules of evidence from another jurisdiction in determining evidentiary matters.²⁰ The ICTR has also determined that when conducting an analysis into the evidence it will apply rules of evidence that it determines “...are consonant with the spirit and general principles of law.”²¹ These determinations were made in the Akayesu Judgement as a general comment on the analysis of evidence prior to specific findings on the evidentiary matters involved in the case.²² This determination is directly consistent with the determination made by the *ICTY* in its Tadic decision.²³

¹⁹ *ICTR Akayesu*, at Section 4 (Citing ICTR Rule 89) ICTR Rule 89 gives the general provisions for the rules of evidence and states:

(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 favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may request verification of the authenticity of evidence obtained out of court.

²⁰ *ICTR Akayesu*, at Section 4 .

²¹ *See Id.*

²² *See Id.*

²³ *ICTY Tadic*, paras. 529 - 555 (Both Tribunals detailed the general admissibility of evidence prior to addressing the arguments offered by the defendant’s in both trials that uncorroborated statements should not be admitted because they are unjust and unfair. The argument, rejected by the Tribunals, was that since civil law jurisdictions do not allow uncorroborated statements, the Tribunals should also exclude them).

B. Application of Co-conspirator Statements to General Admissibility

In determining the admissibility of a co-conspirator statement, the issue is whether or not the statement is relevant and is in the interests of a fair and just trial. The first argument would be that the co-conspirator's statement is relevant to the charge in the indictment because it helps the Tribunal to determine the truth.²⁴ The second argument would be that the evidence is in the interests of a fair and just trial because it is in keeping with the general principles of law.²⁵

The concept of "general principles of law" was discussed by Judge Stephan at the ICTY: "...where a substantial number of well-recognized legal systems adopt a particular solution to a problem it is appropriate to regard that solution as involving some quite general principle of law such as referred to in Sub-rule 89(B)."²⁶ The United States Federal Courts have developed a particular solution to the issue of admitting a co-conspirator's statement against a defendant at trial.²⁷ The United States Federal Courts first look to the relevance of the statement and then to any grounds that would require the exclusion of the relevant statement either because admission

²⁴ *ICTR Akayesu*, at Section 4.

²⁵ *Id.*

²⁶ See *Jones*, *supra* note 12, at 299 (Citing *Separate Opinion of Judge Stephan on Prosecution Motion for Production of Defence Witness Statements*, Prosecutor v. Tadic, Case No. IT-94-1 (27 November 1996) at 6).

²⁷ See *Generally Bourjaily*, 483 U.S. at 176; *Fed. R. Evid.* 401 - 403, 801(d)(2)(E).

of the statement would cause unfair prejudice or is prescribed by a Federal Rule of Evidence.²⁸

Although the ICTR has held that it is not bound by any national rules of evidence, it will look to established general principles of law for guidance.²⁹ Since the ICTR does not have a rule specifically dealing with the use of a co-conspirator statement, the United States treatment of the issue could be used as a guide by the ICTR in an evidence admission analysis.³⁰

1. Relevance

Evidence is relevant if it makes a material element of the case more probable or not.³¹ In the instant analysis, a co-conspirator statement would be relevant to prove a charge of conspiracy

²⁸ *See Id.*

²⁹ *ICTR Akayesu*, at Section 4.

³⁰ *See ICTR Akayesu*, at Section 4. (The ICTR addressed its evaluation of evidence in a general statement on evidentiary matters. The ICTR determined that it is only bound by its own rules of evidence, particularly ICTR Rule 89 when it evaluates evidence, but will look to other jurisdictions for guidance on issues that are not specifically covered by the rules).

³¹ *Fed. R. Evid. 401*; *See generally Old Chief v United States*, 519 U.S. 172, 172-173 (1997) (The defendant had been convicted of possession of a firearm by a convicted felon partly on evidence of his prior conviction for assault. The United States Supreme Court held that under Federal Rule of Evidence 401 the prior conviction was relevant even though it did not go directly to an element of the crime because it “was a step on one evidentiary route to the ultimate fact, since it served to place Old Chief within a particular sub-class of offenders for whom firearms possession is outlawed...”); *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587-588 (1993) (A civil case in which the defendant was sued for causing birth defects through an anti-nausea drug prescribed to pregnant women. The defendant contended, among other things, that the common law of evidence superceded the Federal Rules of Evidence if there is no specific rule to deal with an issue. The United States Supreme Court held that the Federal Rules of Evidence were the only evidentiary authority to be used in Federal Courts; and specifically that Federal Rule of Evidence 401 was an admission threshold that is to be construed very liberally.).

because it goes directly to whether a conspiracy existed. In the scenarios in which the defendant is not charged with conspiracy, the co-conspirator's statement would be relevant to prove any material fact in the underlying crimes of the conspiracy.³² The general policy argument for using the co-conspirator's statement to prove an underlying crime is that the statement operates as a vicarious party - opponent admission due to the relationship of the co-conspirators.³³

The United States Court of Appeals, Fifth Circuit, gave a clear definition of what an admission is in 1957:

For an admission, rightly understood but so often confused, in its classic prototype is merely-- but significantly-- a position taken by the adversary, either personally or through an authorized agent, which is contrary to and inconsistent with the contention now being made in the litigation. It is that simple. It need not have been, as is so often said, an admission against interest, nor is there a need to lay a predicate for its use. All that is needed is an authoritative statement by the adversary inconsistent with the contemporary litigation position.³⁴

³² *United States v Xheka*, 704 F.2d 974, 986 (7th Cir. 1983), *cert denied*, 494 U.S. 993 (1993) (Two brothers were convicted of conspiracy and burning down their restaurant. The brothers had been charged along with another co-conspirator, who was acquitted of the charges. The Court held that even though the co-conspirator was acquitted of the charge of conspiracy, the co-conspirator statement could be used against defendants to prove the underlying charge); *See also United States v Martorano*, 557 F.2d 1 (1st Cir. 1977) (The defendant was convicted of conspiracy and loan-sharking. The defendant had been charged along with another co-conspirator whose statements were used against him. The Court held that even though the co-defendant was acquitted of conspiracy, the co-conspirator's statement could be used against the defendant to prove the underlying charge).

³³ Fred Warren Bennett, *Litigating the Admissibility of Co-conspirators' Statements: a Defense Attorney's Perspective*, 18 Am. J. Trial Advoc. 325, 326 (1994).

³⁴ *Cox v. Esso Shipping Co.*, 247 F.2d 629, 632 (5th Cir. 1957) (Cox was a sailor who was hurt aboard ship and sued the shipping company for negligence. The shipping company argued that Cox was comparatively negligent and used his statements against him as admissions of a party-opponent.).

When a party's statements are offered against her, the statements are considered admissions and not subject to the hearsay rule.³⁵ Statements offered by the defendant, however, are not considered admissions, and are not allowed to be admitted under the admissions exception to the hearsay rule.³⁶ The statements of a defendant in which he admitted to striking his girlfriend with an ax prior to being taken into custody by the police were admitted against him at trial under the admissions exception to the hearsay rule.³⁷ Co-defendants who made statements in prison that were not deemed to have met the co-conspirator requirements still had the statements used against them as admissions by party-opponents.³⁸

2. Interests of a Fair and Just Trial

³⁵ *Wong Ken Foon v. Brownell*, 218 F.2d 444, 446 (9th Cir. 1955) (Citing *Wigmore*, Vol. IV, (3d Ed.) p. 4) (This is an immigration case in which Wong was claiming to be the son of a natural born U.S. citizen, but had prior contradictory statements admitted against him as admissions.).

³⁶ *U.S. v. Phelps*, 572 F.Supp. 262, 264 - 266 (E.D.Ky.1983) (Phelps tried to introduce his own statement through the testimony of one of the officers that arrested him and another defendant for possession of marijuana with the intent to distribute. The Court held that the statement was hearsay and could not be admitted under the admissions exception because it was being offered by the person making the statement rather than against the person.).

³⁷ *U.S. v. Penass*, 997 F.2d 1227, 1229 (7th Cir. 1993), *certiorari denied* 114 S.Ct. 458, 510 U.S. 971, 126 L.Ed.2d 390 (Penass hit his girlfriend in the head with an ax because he mistook her for someone else. When the police arrived on the scene, he admitted to them that he had struck her before being taken into custody.).

³⁸ *U.S. v. DeLuna*, 763 F.2d 897, 917 (8th Cir.1985) *certiorari denied* 106 S.Ct. 382, 474 U.S. 980, 88 L.Ed.2d 336 (The defendants were convicted of skimming profits from a casino partly on recorded statements made by several of the defendants while in jail awaiting trial. The defendants argued that the statements were not made in furtherance of the conspiracy, and therefore could not be used against them; but the Court held that the statements were used correctly against the defendants who made them as admissions party's.).

a. Hearsay

Once the relevancy of the evidence is established, the ICTR must be convinced that the evidence comports with the interests of a fair and just trial as applied to the general principles of law. The policy for allowing co-conspirator statements to be used against the defendant in the United States is embodied in Federal Rule of Evidence 801 (d)(2)(E), which excludes statements by a conspirator from the definition of hearsay.³⁹

³⁹ *Fed. R. Evid. 801* (This rule defines what is and what is not hearsay and states: Rule 801. Definitions

The following definitions apply under this article:

- (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.
- (c) Hearsay. "Hearsay" is 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.
- (d) Statements which are not hearsay. A statement is not hearsay if--
 - (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or
 - (2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the

Hearsay is barred by the Federal Rules of Evidence unless it falls within specific exceptions.⁴⁰ It is important to note that Federal Rule of Evidence 801 (d)(2)(E) does not create an exception to the hearsay rule for statements of co-conspirators; but excludes those statements from the definition of hearsay, which takes them out of the hearsay analysis. A statement by a co-conspirator must meet certain requirements to be admitted under Federal Rule of Evidence 801 (d)(2)(E). The requirements are that a conspiracy existed; the conspiracy was in progress when the statement was made; the declarant was a co-conspirator; the statement was made in furtherance of the conspiracy; and that the defendant was part of the conspiracy.⁴¹

The elements of criminal conspiracy do not need to be proven, only that there was an agreement to act and that the statement was made in furtherance of the agreement.⁴² The

statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).).

⁴⁰ *Fed. R. Evid. 802 - 804.* (Rule 802 generally excludes hearsay evidence. Rules 803 - 804 provide for twenty-nine exceptions to the hearsay rule, including a catch-all exception (804 (5)) that allows statements that do not technically fit the other exceptions as long as the statements are relevant; the only evidence available for what it is offered; is in keeping with the interests of justice; and notice is given.)

⁴¹ Edward J. Imwinkelried, *Evidentiary Foundations 4th Ed.*, Lexis Law Publishing (1998), 333-334.

⁴² *United States v. Gil*, 604 F.2d 546, 548-49 (7th Cir. 1979) (Gil and his brother-in-law were indicted together distribution of heroin. Gil was convicted in large part on his brother-in-law's statements to a police officer which were admitted as a co-conspirator's statement even though conspiracy was not charged. The Court held that Federal Rule of Evidence 801(d)(2)(E) did not require that the legal elements of conspiracy be proven, but that an agreement amounting to a conspiracy be shown.) ; *See also Fed. R. Evid. 801(d)(2)(E)* (Report of the Senate

determination of whether or not the statement was made in furtherance of the conspiracy hinges on what the goal of the conspiracy was.⁴³ Statements made while concealing the crime after it has been committed are not deemed to be made in furtherance of the conspiracy because the conspiracy is considered ended upon the completion of the intended goal.⁴⁴ In *Xheka*, the United States Court of Appeals, Seventh Circuit, held that since the defendants had conspired to burn down their restaurant so that they could collect the insurance money, any statements made prior to collecting the insurance money or abandoning the conspiracy would be made in furtherance of the conspiracy.⁴⁵

The statement must also be made during the conspiracy, which has been held to end when the defendant bows out or completes the intended goal.⁴⁶ The defendant must be shown to have

Committee on the Judiciary). The Senate Committee reasoned that even though there is a reference in the rule to co-conspirator, the only requirement is show what amounts to a joint venture for evidentiary matters.

⁴³ See generally *Xheka*, 704 F.2d at 985, 986 (Citing *Grunewald v. United States*, 353 U.S. 391, 397, 77 S.Ct. 963, 970, 1 L.Ed.2d 931 (1957); *United States v. Walker*, 653 F.2d 1343 (9th Cir.1981), cert. denied, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982); *United States v. Hickey*, 360 F.2d 127, 141 (7th Cir.1966), cert. denied, 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210).

⁴⁴ See *Id* (Citing *Grunewald v. United States*, 353 U.S. at 405, 77 S.Ct. at 974; *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949)).

⁴⁵ See *Id*.

⁴⁶ *United States v. Patel*, 879 F.2d 292, 293 (7th Cir. 1989), cert. denied, 494 U.S. 1016 (1990) (Patel was convicted for bringing in over a ton of hashish into the United States for distribution. Patel agreed to cooperate with the police during the investigation, but during the cooperation, statements of other co-conspirators that implicated Patel were recorded. Those statements were later used against him at trial. Patel argued that his cooperation amounted to abandoning the conspiracy and therefore the statements should not have been used against him

been a member of the conspiracy; and once he joined the conspiracy, all prior statements made by other conspirators can be used against him as if they were made after he joined.⁴⁷ The defendant must clearly communicate to all co-conspirators that he is ceasing to take part in the conspiracy for him to be considered to have abandoned the conspiracy.⁴⁸ Fighting and discord among the conspirators is not sufficient to show that the conspiracy has been dissolved; but rather has been held to be strong evidence of a continuing conspiracy.⁴⁹

The determination of whether or not the statement that is being offered meets the requirement of Federal Rule of Evidence 801 (d)(2)(E) is made by the trial judge according to Federal Rule of Evidence 104 (a).⁵⁰ Federal Rule of Evidence 104 (a) covers the determinations

under Federal Rule of Evidence 801(d)(2)(E). The Court held that since Patel did not communicate his intent to abandon the conspiracy to the co-conspirators, and was not completely forthcoming with the police, he was still a member of the conspiracy when the statements were made.).

⁴⁷ *United States v. Sansone*, 231 F.2d 887, 892 - 893 (2d Cir.), cert. denied, 351 U.S. 987 (1956) (Sansone was convicted of conspiracy to distribute narcotics partly on statements of a co-conspirator who was also an informant. Sansone argued, among other things, that statements made by the informant and other co-conspirators prior to his joining the conspiracy should not be used against him. The Court held that since all statements made in furtherance of the conspiracy are admissible against a conspirator, statements made prior to the defendant joining the conspiracy are adopted by the defendant when he becomes a member of the conspiracy.).

⁴⁸ *See Id.*

⁴⁹ *United States v. Amato*, 15 F.3d 230, 234 (2d Cir. 1994) (Amato was a loan-shark and a member of the Colombo Mafia family, which was in the midst of an internal feud. Amato's co-conspirator in the loan-sharking operation joined the opposite side of the feud, and the two had a falling out. Amato objected to the use of the co-conspirator's statements against him, arguing that the falling out ended the conspiracy. The Court held that not only did the fighting not end the conspiracy, but could be used to infer that the conspiracy still existed.).

⁵⁰ *See Bourjaily*, 483 U.S. at 175

of preliminary questions of evidence; and requires the trial judge make those determinations prior to the admission of the evidence (unless conditioned on fact), and out of the hearing of the jury.⁵¹ Procedurally, this requires the trial judge to conduct an evidentiary hearing on the admissibility of the statement prior to the jury hearing it.⁵² Since this is an evidentiary issue under Federal Rule of Evidence 104 (a), the party offering the statement need only prove the prerequisites for admission under the burden of proof of the preponderance of the evidence.⁵³

A conspiracy must be proven by the preponderance of the evidence prior to the statement being used in court.⁵⁴ The co-conspirator's statement itself can be used to determine if the conspiracy existed, but must be supported by some other independent evidence of a conspiracy.⁵⁵ The defendant does not have to be charged with conspiracy to allow the statement to be used.⁵⁶

⁵¹ *Fed. R. Evid. 104 (a)* (This rule covers preliminary matters and states: Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except with respect to privileges).

⁵² *See Bourjaily*, 483 U.S. at 175.

⁵³ *See Bourjaily*, 483 U.S. at 175.

⁵⁴ *See Bourjaily*, 483 U.S. at 188; *See also United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir. 1988), *cert. denied*, 488 U.S. 821 (1988)(The defendants were convicted of racketeering partly on surveillance recordings of statements made by each co-conspirator. The defendants argued that the statements themselves could not be used to determine if a conspiracy existed, The Court held that as long as the statements were corroborated by independent evidence, they could be used.)

⁵⁵ *Bourjaily*, 483 U.S. at 181 (The court held that independent evidence of a conspiracy did not have to prove the existence of the conspiracy prior to the court using the statement in its analysis as to whether or not the statement meets the criteria for admission).

⁵⁶ *United States v. Carter*, 14 F.3d 1150, 1155 (Carter was convicted of possession of marijuana with the intent to distribute after the car in which he was a passenger was stopped and

The distinction made is that the statement is an evidentiary matter that can be resolved with a preponderance of the evidence burden, which is much less of a standard than the beyond a reasonable doubt standard required for a conviction on an indictment for conspiracy.⁵⁷

b. Comparison of the Federal Rules with Rule 89

Rule 89 has been held by both the ICTR and the ICTY to allow admission of relevant evidence as long as it comports with the interests of a fair and just trial.⁵⁸ The Federal Rules of Evidence contain a similar analysis of admitting relevant evidence unless there are grounds for its exclusion.⁵⁹ The general analysis for the admission and exclusion of evidence under the Federal

seized. Statements of the driver of the car were admitted against Carter as co-conspirator statements and Carter argued that the government did not sufficiently show the existence of a conspiracy. The Court reasoned that since Carter had been riding in the car for a long time, and since he attempted to leave once the car was stopped, then a conspiracy could be inferred.); *United States v. Kiefer*, 694 F.2d 1109, 1112 n.2 (8th Cir. 1982) (Citing *United States v. Miller*, 644 F.2d 1241, 1244 n. 5 (8th Cir.), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 140 (1981); *United States v. Scavo*, 593 F.2d 837, 845 n. 4 (8th Cir.1979). See 4 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(E) [01] (1971))

(Kiefer was convicted of firearms violations after converting semi-automatic weapons to automatic weapons in violation of Federal statutes. Statements made by the person from whom Kiefer bought the guns prior to conversion were used against him as co-conspirator statements even though he was not charged with conspiracy. The Court held that there does not need to be a charge of conspiracy for the statement of a co-conspirator to be used and that it was well settled that an indictment for conspiracy is not needed).

⁵⁷ *Bourjaily*, 483 U.S. at 181.

⁵⁸ *ICTR Akayesu*, at Section 4.

⁵⁹ *Fed. R. Evid.* 401 - 403.

Rules of Evidence is found in the combined Rules 401, 402, and 403.⁶⁰ The grounds for exclusion under Federal Rules of evidence 403 are unfair prejudice; confusion of the issues; misleading the jury; or undue delay.⁶¹ When conducting an analysis under Federal Rule of Evidence 403, the Federal Rules Advisory Committee stated that the analysis should be based on balancing the need for the evidence from the harm that the evidence may produce if admitted.⁶² Unfair prejudice is analogous to fair and just because the goal of each is to prevent the wrong outcome from being reached based on misleading or highly emotional evidence.

c. Tribunal Treatment of Hearsay

The ICTR held in its *Akayesu* Judgement found that hearsay evidence was not presumed to be inadmissible.⁶³ The ICTR The ICTY held that hearsay evidence could be heard in the trials before the tribunal.⁶⁴ The ICTY reasoned that, because of ICTY Rule 89, all evidence is good if it meets the relevance and fair and just test.⁶⁵ The ICTY did say that at times, the application of

⁶⁰ See *Fed. R. Evid. 401 - 403 supra* at note 4.

⁶¹ See *Id.*

⁶² *Fed. R. Evid. 403 (Advisory Committee Note)* The committee cited the undue influence of emotion on the fact finder as the extreme harm. The committee went on to state that surprise is not the harm that the rule is designed to address.

⁶³ *ICTR Akayesu*, at Section 4.

⁶⁴ *Decision on Defence Motion on Hearsay, Prosecutor v. Tadic*, Case No. IT-94-1, T.Ch. II, 5 Aug. 1996.

⁶⁵ *Id.*

hearsay rules may be appropriate, but that it was up to the trial judges to perform the balancing test.⁶⁶ The ICTY indicated that because its trials were bench trials, the issue of inflaming the jury is not present; and that the trial judge is in the best place to evaluate the evidence, test it, and then determine the weight of it.⁶⁷

Since the ICTR and the ICTY have determined that hearsay evidence can be evaluated by the Tribunals, any co-conspirator statements that are offered would qualify for evaluation at trial. Admissibility standards are designed to protect the fact finder from hearing unwarranted evidence. The issue would then be the weight given to each statement rather than the admissibility because the Tribunal judges who would be hearing the statements for evaluation are also the fact finders. The Tribunals would have to determine the weight given to each statement, and if any prerequisites would need to be met.

d. Notice Required under Rule 66

ICTR Rule 66 requires the defense be given notice of evidence to be used against him.⁶⁸

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ ICTR Rule 66 lays out the general notice requirements for proceedings at the ICTR and states:

Disclosure by the Prosecutor

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution

The ICTY indicated the importance of the notice requirement of rule 66 when it adjourned for three weeks at the end of the Prosecution's presentation in the Tadic case so that the defendant could prepare to answer new allegations that came up during the trial.⁶⁹ This may become an issue if the defendant has not been charged with conspiracy in the indictment because the defendant may not have notice that statements from a co-conspirator will be used against him.

IV Conclusion

The co-conspirator's statements can be used against the defendant if the argument can be made that the statements are relevant and in the interests of a fair and just trial.⁷⁰ Relevancy of a co-conspirator statement can go to either a specific charge of conspiracy, or to other charges if the conspiracy from which the statement arises was connected to the other charges. The fair and

witnesses.

(B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

⁶⁹ *ICTY Tadic*, para. 533.

⁷⁰ *ICTR Akayesu*, at Section 4

just argument is a policy argument that can be explored by comparing the Federal Rules of Evidence with the Rules of Evidence and Procedure for the Rwanda Tribunal. The Rules of Evidence and Procedure for the ICTR are similar to the Federal Rules when Rule 89 is compared with Federal Rules 401, 402 and 403. The difference is that the Rwanda Rules do not contain a hearsay exclusion. Under the Federal Rules, the co-conspirator statement must conform to the foundational requirements before it can be admitted. The ICTR Rules have no such requirement.

Federal Rule of Evidence 801 (d)(2)(E) specifically allows for co-conspirator A's statements to be used against co-conspirator B at trial. Certain prerequisites must be proven by a preponderance of the evidence for the statement to be admitted at trial: (1) that a conspiracy existed; (2) that the accused was part of the conspiracy; and (3) that the statement was made in the furtherance of the conspiracy.⁷¹ The United States Federal Courts treat the admission of the co-conspirator statement as an evidentiary matter separate from the substantive issues of the case.

Since the admission of a co-conspirator statement is an evidentiary issue rather than substantive in the United States Federal Courts, the underlying indictment does not affect the admission of the statement if the statement is determined to satisfy the rules of evidence. In all four of the scenarios of the issue statement, the admission of the co-conspirator statement in the United States Federal Courts would not hinge upon the underlying indictments, but instead would be determined by whether or not it could be shown by a preponderance of the evidence that the

⁷¹ See *Bourjaily*, 483 U.S. at 175.

prerequisites required by Federal Rule of Evidence 801 (d)(2)(E) have been met.

The argument is stronger for the admission of the conspirator statements under the ICTR Rules because it can be shown that the statements would be admitted under tougher standards in the United States. This argument goes directly to the fair and just standard because it follows that if the statements would be admitted in the United States under a similar balancing test, but with stronger restrictions; then the statements should be admitted under the ICTR Rules. This analysis depends upon the notice requirements of the ICTR Rule 66.