

Memorandum for the
Office of the Prosecutor
International Criminal Tribunal for Rwanda

Issue 12: Transfer and Provisional Detention of Suspects - Are the powers of the Prosecutor under Rule 40*bis* too great compared to similar prosecutorial powers in the federal jurisdiction of the United States, Canada, England, S. Africa, France, and Scotland?

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Discussion

I. Introduction and summary of conclusions.

There is a natural concern that an individual's arrest and detention not be arbitrary or unjust. Freedom from arbitrary arrest is hallmark of the Universal Declaration of Human Rights.¹ This basic principle is espoused in the laws around the world and one of the basic foundations in creating such laws. When laws are made that allow governments the power to arrest and detain arbitrarily, those laws conflict with this basic principle. When a government is allowed to provisionally detain a person before an indictment or trial, it is said that the government has too much power. However, the counter-argument in favor of provisional detention can be made when the Prosecutor can show the likelihood of a suspect fleeing from justice if released from custody while his case is pending adjudication. Provisional arrest and detention creates a balancing test between safeguarding fundamental individual liberties against the interest of bringing to justice those who commit atrocious crimes like genocide. The implementation of Rule 40 and 40bis indirectly creates a balancing test that pits the interest of basic Human Rights against the interest of justice. Specifically, the balancing test is between provisionally detaining a suspect to assure his presence at trial or provisionally releasing the suspect and chancing his absconding from justice.

A. Issue.

Transfer and Provisional Detention of Suspects - Are the powers of the Prosecutor under Rule 40bis too great?

This memo will examine the arrest and detention laws of the United States, Canada, England, S. Africa, France, and Scotland. These countries' Constitutional, criminal laws and

¹ Universal Declaration Of Human Rights (art. 1), Adopted and proclaimed by General Assembly resolution 217A (III) of 10 December 1948. [Reproduced in the accompanying notebook at tab 1.]

criminal procedures will compare against Rules 40 and *40bis* to see if these rules are unreasonable and the powers of the Prosecutor at the Rwanda Tribunal are too great.

B. Conclusion.

Rule 40 and *40bis* are not unreasonable and do not afford the Prosecutor of the Rwanda Tribunal any greater power than reasonably necessary. These rules were created for the purpose of guiding the Prosecutor to fully perform his task of investigation and prosecution of individuals accused of genocide and other crimes that traditionally were not prosecuted. To further complicate the Prosecutor's responsibilities, the cases under the jurisdiction of the Tribunal are ever increasing in complexity that demand longer and more detailed investigations in the pursuit of justice. Further, because of the lack of resources, the ability to recapture suspects who have absconded justice is extremely difficult and not conducive to the goal of swift and certain justice.

Many other countries have similar prosecutorial powers and the length of detention in the Tribunal Detention Unit is average when compared to other country practices around the world. Keeping in mind that the International Criminal Court Rules including Rule 40 and *40bis* were created by a combination of Tribunal Judges and other States and Organizations, based on their domestic laws, customary and international laws and treaties, the rules generally fall into the definition of customary international law and its four sub-elements consisting of *opinio juris*, duration, uniformity and consistency, and generality.

Like many international treaties, legislations, acts, declarations and constitutions of the United States, Canada, England, S. Africa, France, and Scotland, Rule 40 and *40bis* cannot be considered arbitrary or oppressive or too powerful, because there are safeguards in the rules to prevent abuse by the Tribunal. There is a requirement that when detaining a suspect, the

prosecutor must present a reliable and consistent body of material justifying the further detention of the suspect. This material must be reviewed by the judge and decided upon by him alone.

The Rwanda Tribunal does not have the resources in which to institute an effective bail system that would assure the return of suspects or the safety of the community if the detainee were released. Even if such a system was in place, there is no fundamental right to be released even if the suspect will not be tried immediately. Because of the gravity of the crimes that are being charged in the Rwanda Tribunal, it can be argued that the interest of justice is stronger than the interest of individual liberty when there are many safeguards in place that achieve the goal of preventing arbitrary detention and abuses against fundamental human rights. In the totality of all the circumstances surrounding the creation, implementation and purpose of Rule 40 and 40*bis*, it cannot be said that these rules afford the Prosecutor any greater power than necessary.

II. Factual Background.

Provisional detention periods have been an increasing concern as the number of provisional detainees has risen in both the Rwanda Tribunal and the former Yugoslavia Tribunal. More suspects are arrested and detained while fewer cases are adjudicated due to various complications and complexities.²

As of March 18, 2002, the Rwanda Tribunal has seventeen suspects on trial; six are serving their sentences in Mali, one has been acquitted, one is awaiting appeal, one has been condemned and awaiting transfer, thirty-two are awaiting trial, fifty-eight detainees are under arrest under the authority of the Tribunal, and two are out of the custody of the Tribunal at

² Press Release, President of International Tribunal for Former Yugoslavia Briefs Security Council, Asks for Change in Court's Statute, U.N. Doc. SC/6879 (20 June 2000). The President of the ICTY contributes this increase with the significant political changes in the Balkans that has allowed a higher frequency of arrest while trials become increasingly complex. [Reproduced in the accompanying notebook at tab 2.]

Arusha.³ So far, no one who has been arrested and detained by the ICTR has not been released from provisional detention under Rule 40*bis*.

III. Legal Discussion

Since the Nuremberg Trials, the United Nations General Assembly has attempted to address the creation of an international court that could prosecute acts of genocide. The General Assembly created a committee in the 1950's for proposal of such a court but did not act on the proposal because of a disagreement on the definition of aggression as described in the proposal. In December of 1989, the General Assembly tasked the International Law Commission to resume work on the creation of an international criminal court. While the creation of the international criminal court focused on substantive international criminal law, there was little attention given to international criminal procedure and evidence rules. Logically, there was no need for any type of criminal procedure and evidence because there was no international criminal court created since the Nuremberg Trials.⁴ The conflict in former Yugoslavia involved such atrocious crimes of genocide that the need for an international criminal court was brought into the forefront.⁵ The International Criminal Court for the former Yugoslavia (ICTY) was created in May 1993, and following shortly thereafter, the International Court of Rwanda (ICTR) was created in November 1994. The ICTY was the first tribunal to have rules of evidence and procedures that the ICTR adapted.

³ International Criminal Tribunal for Rwanda Website, NEW DOCUMENT: Status of Detainees dated 03-18-02, <<http://www.icttr.org>> [Reproduced in the accompanying notebook at tab 3.]

⁴ VIRGINIA MORRIS AND MICHAEL P. SCHARF, *The International Criminal Tribunal for Rwanda*, 410 (Transnational Publishers, Inc.)(1998). [Reproduced in the accompanying notebook at tab 4.]

⁵ Establishment of an International Criminal Court Overview. <<http://www.un.org/law/icc/general/overview.htm>>. [Reproduced in the accompanying notebook at tab 5.]

The ICTY rules of procedure and evidence were created through the combined efforts of the Tribunal Judges from proposals submitted by the United States, the American Bar Association, Canada, France, Australia, The United Kingdom, Argentina, Helsinki Watch, The Lawyers Committee for Human Rights, and the International Women's Human Rights Law Clinic.⁶ These rules were expediently adopted by the Judges because the Tribunal felt that they had a moral obligation to show all parties concerned that human rights abuses will not go unpunished, and more importantly, it allowed the Prosecutors to proceed with their investigations and prosecutions with a guideline in place.⁷

A. Rule 40 and 40bis:

The Rules of Procedure and Evidence of the Rwanda Tribunal allows provisional arrest and detention of suspects during the course of an investigation by the Prosecutor. Under Rule 40(a), the Prosecutor can request any State to arrest a suspect and place him in custody for transfer to the Tribunal and to take all necessary measures to prevent the escape of a suspect or an accused, in injury to or intimidation of a victim or witness, or the destruction of evidence. The Prosecutor must issue an indictment within 20 days or the suspect must be released. Rule 40bis empowers the Prosecutor to request the Judge to transfer and provisionally detain a suspect at the Tribunal's detention unit.⁸ A suspect who has been transferred to the detention unit may be

⁶ Virginia Morris And Michael P. Scharf, *supra* note 4, at 413. [Reproduced in the accompanying notebook at tab 4.]

⁷ M. CHERIF BASSIOUNI, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 823 (Transnational Publishers, Inc.)(1996). [Reproduced in the accompanying notebook at tab 6.]

⁸ Rules of Procedure and Evidence of the Rwanda Tribunal (*Adopted on 29 June 1995*), UN Doc. ITR/3/Rev.10 (May 31, 2001). The prosecutor does not have sole discretion or power to arrest, detain and transfer a suspect to the detention unit of the Tribunal. In cases of urgency, the prosecutor may request any State to arrest a suspect. The State concern shall comply with the request in accordance with Article 28 of the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994. In order to transfer a suspect to the seat of the Tribunal, the Prosecutor must show that a major

held for a period not exceeding 30 days from the day after the transfer. The Prosecutor may then request an additional 30 days of detainment by indicating a need to do so to further the investigation.⁹ If special circumstances arise, the Prosecutor can make a third request for an additional 30 days of detention.¹⁰ The total period of provisional detention shall in no case exceed 90 days after the day of transfer of the suspect to the Tribunal's Detention Unit. If an indictment or arrest warrant has not been confirmed, the suspect shall be released after the 90th day of confinement to the authorities of the State to which the request was initially made.¹¹

These rules of provisional arrest and detention are identical to the Rule of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.¹²

B. The Impact of Treaties and Customary International Law on Rule 40 and 40bis

1. Treaties and Declarations

Generally, treaties are more persuasive than customary laws because they are sets of promises between nations that are formal and typically derived from extensive deliberation and negotiation. In Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, Basic

impediment does not allow the State to keep the suspect in custody or prevent his escape, then apply to a Judge for an order to transfer the suspect. Before approving the request the Judge considers whether there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction, whether the detention is a necessary measure to prevent the escape of the suspect, the intimidation of witnesses or witnesses, or the destruction of evidence.

⁹ Rule 40bis (f): At the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing and before the end of the period of detention, to extend the provisional detention for a period not exceeding 30 days.

¹⁰ Rule 40bis (g): At the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing and before the end of the period of detention, to extend the detention for a further period not exceeding 30 days.

¹¹ Rules of Procedure and Evidence of the Rwanda Tribunal (*Adopted on 29 June 1995*), UN Doc. ITR/3/Rev.1 (May 31, 2001), Rule 40bis (C), (F), (G), (H).

¹² Rules of Procedure and Evidence of the Yugoslavia Tribunal (*Adopted on 11 February 1994*), UN Doc. ITR/3/Rev.22, December 13, 2001. Rule 40(A), 40bis.

Document 1.8 defines treaties as "an international agreement concluded between states in written form and governed by international law." In the numerous treaties between the United States and other countries, provisional detention is routinely addressed with definitive time periods of the detention.¹³ Other examples are the European Union Extradition Regulations, European Convention on Extradition, Convention for the Protection of Human Rights and Fundamental Freedoms, and the Universal Declaration of Human Rights.¹⁴

An argument against the provisions of Rule 40 and 40*bis* can be made because of the language contained in most treaties pertaining to provisional detention. However, the same language can support arguments for detention according to Rule 40 and 40*bis*. The Universal Declaration of Human Rights, Article 9 states, "No one shall be subjected to arbitrary arrest, detention or exile."¹⁵ In the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5(1)(c) states, no one shall be deprived of his liberty unless it's for the lawful arrest or detention of a person.¹⁶ The European Convention on Extradition, Article 16(4) states that provisional arrest may be terminated if, within a period of 18 days after the arrest, the requested party has not received the request for extradition. It shall not, in any event, exceed 40 days of such arrest.¹⁷

¹³ Extradition Treaty, April 30, 1951, U.S. - Union of S. Africa, art. 10, T.I.A.S. No. 2243; Extradition Treaty, December 25, 1964, U.S. - Belgium, art. 7, T.I.A.S. No. 5715; Extradition Treaty, U.S. - Canada, art. 10(3), T.I.A.S. No. 8237; Extradition Treaty, U.S. - France, art. 4, T.I.A. S. No. 7075. [Reproduced in the accompanying notebook at tab 7.]

¹⁴ The European Union Extradition Regulation 2002, Schedule 1, art. 10(3); European Convention on Extradition, art. 16(4); The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, art.5; Universal Declaration of Human Rights, art. 9.(See Tab 1) [Reproduced in the accompanying notebook at tab 8.]

¹⁵ Universal Declaration of Human Rights, GAOR Resolution 217a (III) of 10, December 1948 (visited March 29, 2002)<<http://www.un.org/Overview/rights.html>> [Reproduced in the accompanying notebook at tab 1.]

¹⁶ The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. [Reproduced in the accompanying notebook at tab 8.]

Most treaties state that the protection against arbitrary arrest and detention is a fundamental human. However, these treaties fail to elaborate when an arrest or detention should be considered arbitrary, even against its own provisions of arrest and detention. For example, the Inter-American Commission on Human Rights prohibits indefinite pre-trial detention. If a person is held without any time limit, it can be a violation of a fundamental human right. In addition, a violation of a treaty may occur if a suspect is held for a period of time that exceeds the time period he would have been required to serve if convicted.¹⁸

Rule 40 and 40*bis* are written within the requirement of this fundamental right. The rules have specific time limits (maximum of 20 days detention under Rule 40, and 90 days maximum in 30 day increments in Rule 40*bis*) so this would defeat most arguments based on the arbitrary nature of the rules due to the appearance of indefiniteness. The amount of time to be served by defendants who are convicted for genocide can range up to life imprisonment. It may be argued that a maximum of 90 days in detention is reasonable if the detentions are approved according to Rules 40*bis*(c), (f), (g) and (h). Lastly, the European Court and European Commission of Human Rights have come to the reasoning that though a suspect has the right to a trial within a reasonable amount of time, this does not force the judicial authorities to provisionally release a suspect if they cannot bring him to trial within a reasonable amount of time. The reasonableness of the detention must be independently assessed separate from the reasonableness of the delay to trial.¹⁹ Applying this analogy to Rule 40*bis*(f), the prosecutor must prove that the detention of a suspect must continue because of the needs of the investigation. It has been proven that the

¹⁷ Eur. Conv. on Extradition: March 1997. (visited on March 13, 2002) <<http://www.magnet.mt/gazette/publications/euconex.htm>>. [Reproduced in the accompanying notebook at tab 8.]

¹⁸ Human Rights and Pre-Trial Detention: A handbook of International Standards relating to Pre-Trial Detention, Professional Training Series No. 3, United Nations, New York and Geneva, 1994. [Reproduced in the accompanying notebook at tab 9.]

¹⁹ *Id.*

investigation of suspects involved in the Rwanda Genocide have been difficult and complex for varying reasons which supports the reasonableness of the detention. The same analogy applies to sub-section (g) of the rule in that if there are special circumstances, further detention may be warranted.

2. Customary International Law

Customary international law helps to define legal rights and wrongs in areas of criminal procedures and rules not covered by treaties. It can also help in figuring out a legal problem such as how long should a provisional detention be. The problem arises when customary practice is used for a momentary gain that deviates from international law acceptance.²⁰

How do you determine if Rule 40 and 40bis is consistent with customary international law? One method is to compare the practice of provisional detention by the Rwanda Tribunal to the elements of customs. The elements are *opinio juris*, duration, uniformity and consistency, and generality.²¹

(1) *Opinio juris*: a sense of legal duty or obligatory as a matter of law; a recognition by countries that a practice is the result of a rule of international law. In the International Court of Justice Statute, Article 38(1)b states, "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law.*"²² For example, in *Nulyarimma and others v. Thompson and Buzzacott v. Hill and others*, the court held that the crime of genocide was a

²⁰ Essay by David H. Ott, *Public International Law in the Modern World* (13-16 1987); see BURNS H. WESTON, RICHARD A. FALK, HILARY CHARLESWORTH, *International Law and World Order: A Problem-Oriented Course Book* 109-111 (American Case Book Series, West Publishing, 3rd ed., 1997). [Reproduced in the accompanying notebook at tab 10.]

²¹ *Id.*

²² BURNS H. WESTON, RICHARD A. FALK, HILARY CHARLESWORTH, *supra* note 20, at 76. [Reproduced in the accompanying notebook at tab 10.]

peremptory norm of customary international law and that States may exercise universal jurisdiction over such a crime.²³

(2) Duration: the length of time a practice has been followed.²⁴ Provisional detention has been practiced at least since the writing of the Magna Carta. In modern time, provisional detention law has been practiced since approximately 200 years ago by Britain.²⁵ In the International Criminal Tribunal of Yugoslavia (ICTY), Rule 40 and 40*bis* has been implemented since the inception of the Tribunal.²⁶

(3) Uniformity and consistency: the practice of detention does not vary greatly from state to state. In comparing the ICTY and ICTR Rules of Procedure and Evidence, the implementation of the rules does not contradict each other and the implementation is identical.

(4) Generality: whether a practice is fairly widespread among a majority of states. Just about every country near the region of Rwanda practices provisional detention where the rules of detention do not differ greatly.²⁷

²³ Nulyarimma v. Thompson; Buzzacott v. Hill (Case nos. A5 and S23 of 1999) Federal Court, Australia, 8BHRC 135, 1 September 1999. (LEXIS, All sources>Area of Law>By Topic>International Law>European Court of Justice and European Court of Human Rights Cases>). [Reproduced in the accompanying notebook at tab 11.] Both these cases addressed the problem of whether the crime of genocide could be applied to the Australian common law for purposes of civil remedies. In doing so, the court describes how the crime of genocide derives from customary international law. In the Nulyarimma case, the appellants requested an arrest warrant for the Deputy Prime Minister from the registrar of the Magistrate's Court of the Australian Capital Territory. The warrant charged that he and others had committed genocide when creating a piece of legislation, specifically the "Native Title and Amendment Act 1998." The registrar denied the request for the warrant because the crime of genocide was not applicable to Australian law. The appellants appealed. The case of Buzzacott, he instituted a proceeding in the South Australian Registry of the Federal Court of Australia, against the Minister for Foreign Affairs and Trade and the Commonwealth of Australia, claiming that the respondents committed genocide and other offenses against the Arabunna people. Unlike the Nulyarimma case, he only sought for civil damages.

²⁴ Essay by David H. Ott, *supra* note 20. When accessing the element of duration, the length of time can also be short indicated in the International Court of Justice North Sea Continental Shelf Cases in 1969. [Reproduced in the accompanying notebook at tab 10.]

²⁵ ANDREW HARDING and JOHN HATCHARD, Preventive Detention and Security Law: A Comparative Survey 5, International Studies in Human Rights Volume 31, Martinus Nijhoff Publishers (1993). [Reproduced in the accompanying notebook at tab 12.]

²⁶ The ICTY was created in May 1993, and the ICTR was created in November 1994.

Rule 40 and 40*bis* generally fall into the sub-elements of customary international law. Provisional detention becomes obligatory under *opinio juris* because of the written provisions of the Rules of Procedure and Evidence of the Tribunal and because of the history of provisional detention. As mentioned earlier, most countries practice provisional detention with varying limits to the maximum length of detention ranging from an average of 74 days up to indefinite.²⁸ Rule 40 allows a maximum of 20 days in detention and release if there is no indictment within the 20 days. Rule 40*bis* allows a maximum of 90 days in 30-day increments that first must be approved by a Judge of the court after a request by the Prosecutor. Statutes of the International Tribunal of Rwanda state that the Tribunal shall have the power to prosecute persons committing genocide and crimes against Humanity, under Articles 2 and 3. Article 14 states that the judges of the Tribunal shall adopt the rules of procedure and evidence for the conduct of the pre-trial phases from the ICTY with such changes, as they deem necessary. Article 15 states that the prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in Rwanda during the specified period.²⁹ Rule 40 specifically states that in case of urgency, the Prosecutor may request any state to arrest a suspect and place him into custody and to take any necessary measures to prevent the escape of a suspect. The sense of duty and/or obligation to provisionally detain suspects derives from the authority of the Tribunal statutes and rules authorizing Judges to prosecute violators of international law, and Prosecutors to investigate, arrest and detain the same individuals.

²⁷ Andrew Harding And John Hatchard, *supra* note 25. See Chart. [Reproduced in the accompanying notebook at tab 12.] The differences between the countries listed in this comparison are the judicial review process that ranges from quite vigorous to very weak and uncertain. Out of the fifteen countries compared, five have a maximum time frame of provisional detention that averages to 74 days. The remaining countries maximum lengths of detention are indefinite.

²⁸ See footnotes above.

²⁹ The specified period in which the Prosecutor can prosecute violators for crimes of genocide and other crimes under the statute is between 1 January, 1994, and 31 December, 1994.

Rule 40 and 40*bis* are uniform and generally consistent with many other countries' rules of detention. A growing number of countries utilize a judicial review mechanism to safeguard against unjust detentions. In the Rwanda Tribunal, an "objective" review process is utilized as enumerated in Rule 40*bis*(b)(ii).³⁰ The judge will allow the transfer and detention of a suspect only if the prosecutor has requested such an arrest or transfer, and there is a reliable and consistent body of material that tends to show that the suspect may have committed a crime.

The Rules of Evidence and Procedure of the ICTY and ICTR have created a new set of international laws, but they do fall within the scope of international law. The crimes that are under the jurisdiction of the two Tribunals are not based on the specific statutes of the Tribunals or any United Nations regulation, but from international treaties and customs.³¹ This is especially true when the crime is genocide.³² The Tribunal Rules were created with the ideology of fundamental customary international laws that are found in most treaties that safeguard personal liberties. The Tribunal Rules are not a body of autonomous laws as evident by the languages in many treaties that resemble Rule 40 and 40*bis*.³³ In view that a core foundation in the formulation of the ICTY and ICTR Rules of Evidence and Procedure derives from customary international law, and implementation of these rules correlate with the crime of genocide, which

³⁰ Andrew Harding And John Hatchard, *supra* note 25, at 32. [Reproduced in the accompanying notebook at tab 12.] The judicial review can be either an objective review or a subjective review. An objective review entails the court taking upon themselves to review the necessity of the detention in order to prevent the threat the Prosecutor is alleging if the detainee is released. In contrast, a subjective review is when the court allows the Prosecutor to solely judge the necessity of the detention.

³¹ GABRIELLE KIRK MCDONALD AND OLIVIA SWAAK-GOLDMAN, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, (Kluwer International, Vol.I, 2000). [Reproduced in the accompanying notebook at tab 13.]

³² See footnote 23.

³³ See footnote 17. The European Convention on Extradition, Article 16(4) has a provision describing the period of release from provisional detention.

has been defined as deriving from customary international law, the provisions of Rule 40 and 40*bis* should be accepted as a reasonable and necessary tool for the Prosecutor of the ICTR.

C. Bail and Arbitrariness of Pre-Trial Detention and Violation of Personal Liberties

The International Court of Rwanda legal documents do not contain any general provisions for a specific bail system. Because of this, there is no compelling legal obligation to release a suspect from custody even if there is no proof of flight or any other concerns. In addition, there is little case law deciding whether a person should or should not be released because of a concern of danger to the public or because of a violation of the rules. Rule 65, Provisional Release, is the only rule that remotely resembles any type of provisional release with a bail attachment.³⁴ The lack of a bail system and any language in the rules reflecting such a system may contribute to the notion that provisional detention under Rule 40 and 40*bis* can be arbitrarily applied.

However, because there are no bail provisions in the ICTR rules, this does not mean that Rule 40 and 40*bis* are imposed arbitrarily. What this may mean is that the criminal procedures of the Tribunal may be considered inadequate where detention is necessary for the prevention of flight, the protection against the destruction of evidence and for the protection of potential witnesses. Even if there are claims that the Tribunal face inadequate criminal process either because of a lack of resources or lack of investigation information already collected, there are protectiveness measures that work to prevent the unjust detention of suspects. For example, in the case of Jean-Bosco Barayagwiza, the suspect was accused and arrested for genocide. He was held in provisional detention beyond the statutory limits as allowed in Rules 40 and 40*bis*. He

³⁴ Rule 65: Provisional Release. The provisional release of a detainee must be ordered by the Trial Chamber and only under "extraordinary circumstances." The Trial Chamber has discretion on any provisional release conditions impose on the detainee including the posting of a bail bond.

challenged his detention and the Tribunal decided in his favor reasoning that his rights were repeatedly violated as enumerated in the rules. Because the Rules have specific enumerated time periods of maximum provisional detention, the charges were dismissed and he was released from custody of the Tribunal.³⁵ In the cases of Edouard Karemera and Mathieu Ngirupatse, the judge only allowed 20 days of detention out of the 30 days asked by the prosecutor, reasoning that the Prosecutor possessed evidence against the suspects and an indictment should have already been issued.³⁶

The mechanisms that afford a detainee an avenue of redress against provisional detainment further supports the notion that Rule 40 and 40*bis* may not be applied arbitrarily, as evidenced in the case of Barayagwiza stated above. In addition, the Prosecutor must submit to the Judge supporting the request for further detention that must contain a reliable and consistent body of material that tends to show that the suspect may have committed a crime. An example of a reason to support a detention, a Prosecutor can show that the detainee is a flight risk. For example, during the arrest of Georges Ruggiu, he was in possession of a South African passport and he traveled frequently. In order to avoid arrest, he would alter his physical appearance and frequently change his domicile and used false identities.³⁷ When Aloys Ntabakuze and Gratien Kabiligi were arrested, they were in possession of fraudulent passports.³⁸ These actions can be argued as indicia of reliability that a suspect is a flight risk and has all intentions to avoid justice.

³⁵ Judicial Diplomacy, International Criminal Tribunal for Rwanda, No. 16, August 14, 1997, (visited March 19, 2002) <<http://www.diplomatiejudiciarire.com/UK/Tpiruk/ubu16.htm>>. The Prosecutor v. Jean-Bosco Barayagwiza, Case No. ICTR-97-19-AR72. [Reproduced in the accompanying notebook at tab 14.]

³⁶ Judicial Diplomacy International Criminal Tribunal for Rwanda, No. 43, (visited March 19, 2002) <<http://www.diplomatiejudiciarire.com/UK/Tpiruk/ubu43.htm>>. [Reproduced in the accompanying notebook at tab 15.]

³⁷ Prosecutor v. Georges Ruggiu, Case No. ICTR-97-32-1. [Reproduced in the accompanying notebook at tab 16.] Georges Ruggiu was found guilty and sentenced to twelve years in prison.

Rule 40 and 40*bis* were written and adopted by the Judges of the Tribunals with specific goals in mind. The most important goal was the allowance of Prosecutors to conduct their investigation and prosecution of genocide within a framework of rules that would guide them in accomplishing these tasks. These rules were created with the combined efforts of not only the Tribunal Judges, but from proposals by many States and Organizations based on the combinations of customary and international laws, treaties and each countries' domestic laws. Rule 40*bis* allows the Prosecutor to provisionally detain a suspect. Provisional detainment is allowed not because of the convenience of the Prosecutor to conduct a continuing investigation of a suspect. But reasons that the complexities of these investigations coupled with the severity of the crimes involved, the general unstableness of Rwanda, the ability of suspects to abscond justice by hiding anywhere in the world, and the lack of resources that allows the recapture of these suspects, justifies the Prosecutor to exercise the reasonable powers of provisional detention under Rule 40*bis*. The Prosecutor's ability to provisionally detain suspects is further reasonable because the standard of proof that a crime was possibly committed must be shown before the request is honored, the provisions of redress of detention by a detainee, and the fact that the prosecutor does not solely decide whether a suspect is detain, but is decided by a judge. In combination, these facts remove the power of arbitrariness from the prosecutor in deciding who remains in provisional detention.

D. What are the rules of detention of the United States, Canada, England, S. Africa, France and Scotland?

1. United States, The Eighth Amendment and the 1984 Bail Reform Act

³⁸ See footnote 35.

When a person is arrested and detained, he has the opportunity to post bail and be released from custody pending trial.³⁹ The Eighth Amendment of the United States Constitution states that when bail is available, excessive bail is prohibited. It is often thought that the Eighth Amendment guarantees the right to bail but this is incorrect. It has been interpreted that the Eighth Amendment does not define what is "excessive" bail, but that bail can be exercised where available, "where available" meaning as stated in the laws of the United States. The 1984 Bail Reform Act specifically details the requirements of detention of suspects held in federal custody.⁴⁰

(a) Main Provisions of 1984 Bail Reform Act (18 USCS 3142):

Section (a) states that upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that pending trial, the person be:

- released on personal recognizance or on an unsecured appearance bond;
- released on a condition or combination of conditions under Section (c);⁴¹
- temporarily detained to permit revocation of conditional release;⁴²
- detained under subsection (e).

³⁹ When an individual is arrested either by warrant or by probable cause, the government must bring the individual in front of a judicial officer as soon as reasonably possible. This may be either within hours of the arrest or the very next day depending on a reasonable delay. A reasonable delay in bringing an individual may result from either the administrative processing of the suspect after arrest or the task of discovering the identification of an unidentified arrestee.

⁴⁰ 18 U.S.C.S. § 3142 (2002) Release or detention of a defendant pending trial. [Reproduced in the accompanying notebook at tab 17.] The United States Supreme Court has not decided whether the States are compelled constitutionally to federal bail constraints, however, in *Schilb v. Kuebel*, 404 U.S. 357 (1971), the Court has eluded that the excessive bail provision of the Eighth Amendment may be applied to the States via the 14th Amendment.

⁴¹ §3142(c) state that conditions imposed shall include but are not limited to that the person not commit a Federal, State, or local crime during the period of release and will not pose a danger to the safety of any other person or the community.

⁴² §3142(d)(2) applies to defendants who are already on provisional release, or pending deportation or exclusion. The length of time the person can be held in provisional detention is a maximum of 10 days, excluding Saturdays, Sundays, and legal holidays.

Section (e) gives the authority of the judicial officer to detain a person if he is found to be unable to satisfy conditions as listed in section (c) and after a hearing pursuant to the provisions of section (f). Section (f) is the actual detention hearing in which the judicial officer shall determine if the defendant can meet the condition(s) of release.

(b) The Hearing under §3142(f):

The purpose of the hearing under this section is to determine whether the conditions imposed on the defendant will assure his appearance in future proceedings and not pose any danger to other persons or the community. The hearing must take place immediately upon the defendant's first appearance, unless there is a request for a continuance either by the government or the defendant. If the defendant requests a continuance, then he must be heard no later than five days of the continuance. If the government requested the continuance, the hearing must take place within three days of the continuance.⁴³ At these hearings, the defendant has a right to an attorney, either from his choosing or for free if he cannot afford one, an opportunity to testify on his behalf, present witnesses, to cross-examine witnesses at the hearing, and to present information by proffer or otherwise.

The government attorney who submits a motion for detention initiates the hearing. The circumstances surrounding the request are cases involving a crime of violence, an offense for which the maximum sentence is life imprisonment or death, an offense under the Controlled Substance Act which imposes a ten year sentence, and any felony that the defendant has been convicted of more than once whether federal, state or local.

(c) Factors to Be Considered when Deciding Release, §3142(g):

The judicial officer will use certain factors and considerations when making a determination whether or not to provisionally release a defendant. These factors include the

⁴³ Not including Saturdays, Sundays, or legal holidays.

nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug; the weight of the evidence against the defendant; the history and characteristics of the person including his physical and mental condition, family ties, employment, financial resources, length of residence in the community, criminal history, and the nature and seriousness of the danger to any person or the community if the defendant is released.

Prior to the 1984 Bail Reform Act, the courts would deny bail only when it was not available to the defendant. The Bail Reform Act allowed the courts to deny bail based on the threat of danger to other persons and the community. Immediately after the act was passed, challenges were made to the Supreme Court that failed because the court reasoned that Congress was justified in denying bail to offenders who presented a danger to other persons or the community. In the case of United States v. Anthony Salerno and Vincent Cafaro,⁴⁴ provisional release of the defendants was denied because of the threat to other persons and the community. The court provided a "balancing test" for the judicial review of any conditions imposed on a defendant. The balancing test is between the defendant's liberty interest and the government compelling interest to protect. The court took note that the governmental compelling interest is not limited to whether the defendant will return to court, but also the perceivable threat to other persons or the community. The standard for the government to succeed in detaining a defendant requires a demonstration by "clear and convincing"⁴⁵ evidence that the conditions imposed on the defendants will not assure their return to the court for further adjudication and/or secure the safety of other persons or the community.

⁴⁴ *United States v. Salerno*, 481 U.S. 739. Anthony Salerno was the boss of the Genovese Crime Family and Vincent Cafaro was a Captain in the crime family. The Genovese Crime Family is part of the American Mafia organization called the "Costra Nostra." [Reproduced in the accompanying notebook at tab 18.]

⁴⁵ *Id.* 481 U.S. 741.

In the immediate case, the clear and convincing evidence of the danger derived primarily from secret electronic wiretap conversations of the defendants. The defendants were overheard in wide-ranging conspiracies in furthering their criminal enterprise by using violent means that included threats, beatings and murder. The government was able to prove clearly and convincingly that since the defendants had spoken of committing violent acts to further their criminal interest, any condition of release imposed on them would be ineffective.

The defendants then argued that pre-trial detention was a form of punishment that violated the due process clause of the Constitution.⁴⁶ Pretrial detention under the Bail Reform Act is regulatory and not penal. The fact that a person is detained does not lead to the conclusion that the government is punishing the person. The Court looked at the legislative intent in constructing the Bail Reform Act and found that the Act's intent was not to punish individuals before trial but rationally construct a regulation dealing with the assurance that individuals who were provisionally released would return to court and not present a danger to others while released. The court then concluded that the detention imposed were on the regulatory side and not on the penal side.

There are several similarities between the Rules of Procedure and Evidence of the Rwanda Tribunal and the 1984 Bail Reform Act. Rule 42 of the Tribunal provide suspects while being questioned by the Prosecutor the right to be assisted by Counsel of his choice or have one assigned to him, the right to an interpreter, the right to remain silent and be cautioned that any statements can be used against him. The Bail Reform Act under Section (f)(2)(b) allows the

⁴⁶ 14th Amendment of the United States Constitution which states that the states are forbidden to deny their citizens due process of law or equal protection of the law, that is, it made certain provisions of the Bill of Rights applicable to the states. The provision the defendants sought was the 6th Amendment's right to a speedy trial, to be informed of the nature of the accusation, to be confronted with the witnesses against him, and to have counsel for his defense. The Bail Reform Act meets this constitutional requirement in that in Section (f)(2)(b), the defendant is allowed an attorney, to bring witnesses and to cross-examine any witness present.

detainee the same rights including the right to bring witnesses and cross-examine any witness present. Another important similarity is under Rule 40*bis*(b)(ii) and (iii), after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material that leads to show that the suspect may have committed a crime. Respectively, the Judge decides provisional detention to be necessary to prevent the escape of the suspect, or to prevent any injury to witnesses. The Bail Reform Act under Section (g) decides whether the defendant shall be released based on certain factors in relations to the probability of the defendant's return to the court and the probability of harm to others.

With the exception of Rule 40*bis*(iii) that allows the detention of a suspect for the purpose of an investigation, the Bail Reform Act of the United States and Rule 40 and 40*bis* have little differences. Compared to the United States, which has an extensive history of Constitutional Protection aimed at the highest levels of individual civil liberties, an extensive and complex system of jurisprudence, a high level of resources in the administration of justice which include a bail system, the Rules of the Rwanda Tribunal are reasonable considering the difference in the variables mentioned.

2. Canada, The Charter of Rights and Freedom, Criminal Codes, and The Bail Reform Act of 1971:

Canada has three basic doctrines that address provisional detention. The first is the Charter of Rights and Freedom⁴⁷, the second is the Criminal Codes, and third is the Bail Reform Act of 1971. The Canadian Constitution deals primarily with how the laws are made whereas the Charter of Rights and the Criminal Codes deals with the actual implementation of the laws.

⁴⁷ The American Bill of Rights had an impact in the development of the Charter, as the language of the Charter is similar to that of the American Bill of Rights. The Charter of Rights is uniformly applied throughout the country.

The Bail Reform Act of 1971⁴⁸ was passed because of a concern of unnecessary provisional detention. The act served two immediate purposes. One, it limited the warrantless arrest powers of the police by requiring the release of suspects if the police have no reasonable grounds or probable cause to believe that the public would be in danger if released. Two, it empowers a superior officer in charge of a detention facility to release a suspect in accordance with the principles of the Criminal Code.

(a) The Main Provisions of the Charter of Rights relating to detention are:

Section 9 - Detention or imprisonment:

- Everyone has the right to not be arbitrarily detained or imprisoned.

Section 10 - Arrest or Detention:

Everyone has the right on arrest or detention:

- (a) to be informed promptly of the reasons therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

(b) The Provisions of the Criminal Code Section 515 relating to detention are:

Part XVI Compelling Appearance of Accused Before a Justice and Interim Released

- (1) When an accused is charged with an offense other than an offense listed in Section 469,⁴⁹ the justice shall release the accused without conditions, unless the prosecutor shows cause why the detention of the accused is justified.

⁴⁸ Office of Justice Programs-U.S. Dept. of Justice, World Fact Book of Criminal Justice Systems (visited March 13, 2002)<<http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjcan.txt>> [Reproduced in the accompanying notebook at tab 19.]

⁴⁹ LAWRENCE M. OLIVO, Introduction to Law in Canada 399, Captus Press, Inc., (1997). [Reproduced in the accompanying notebook at tab 20.] The most relevant section of 469 that applies pre-trial detention is sub-section (a)(viii) murder. Under Criminal Code Section 515(11), if a defendant is charged with murder as defined under section 469, the justice shall order the accused detained in custody until he is dealt with according to law. This individual is not entitled to an automatic bail hearing. He must apply for a release and if the request is granted, the hearing can heard only before a Judge of the Ontario Court (General Division).

- (5) Where the prosecutor shows cause why the detention of the accused is justified, the justice shall order the accused to be detained in custody until he is dealt with according to law.
- (10)(b) Where the detention is necessary for the protection or safety of the public, or if released from custody, commit a criminal offense.
- (10)(c) Where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution case, the gravity of the nature of the offense, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

C. The Main Provisions of the Bail Reform Act are:

- (1) that the continued detention is necessary in the public interest.
- (2) that the accused is unlikely to attend trial if released.
- (3) that the issue of release is of such a serious nature that it should be dealt with by a Justice.

When a person is arrested in Canada, the suspect must be brought to the Justice of the Peace within 24 hours for further processing. At this point, the Justice will decide whether to detain the suspect for trial or release him. Barring any public safety considerations, or any Criminal Code sections that forbid immediately release, pre-trial detention is discouraged and release is frequently done. This is evident by Section (1) whereas the suspect is generally released without any conditions. Once the suspect is before the Justice, the bailing process can take up to 8 days before the defendant is released.⁵⁰

In the case of *The Attorney General of Quebec v. Edwin Pearson*,⁵¹ the defendant was arrested and charged with narcotics trafficking and was immediately denied bail. Similar to the

⁵⁰ Office of Justice Programs-U.S. Dept. of Justice, World Fact Book of Criminal Justice Systems, *supra* note 48.

⁵¹ R. v. Pearson, [1992] 3 S.C.R. 665. [Reproduced in the accompanying notebook at tab 21.]

offense of murder under Section 469(a)(iii)⁵², the defendant was charged with violation of Section 515(6)(d), which mandates that the defendant does not automatically receive a bail hearing, must apply for a hearing and the onus on him to convince the Justice of his provisional release. The defendant's first claim was that the pre-trial detention was arbitrary and a violation of the fundamental rights provided by law. The Court reasoned that the pre-trial detention was not arbitrary because the detention is not governed by an unstructured discretion; rather there are specific fixed conditions for bail. Further, the bail process is subject to procedural guarantees and subject to review by a superior court.⁵³ Another argument by the defendant was that the pre-trial detainment was a form of punishment and he was not proven guilty beyond a reasonable doubt as required by law. The court reasoned that the bail process does not decide guilt or innocence and does not impose punishment. However, the fundamental right of the presumption of innocence is applied throughout the entire judicial process including the bail hearing which does not even decide the guilt or innocence on the merits of the case.

The Rules of Procedure and Evidence of the Rwanda Tribunal have one important similarity to the Canada Criminal Code. In Criminal Code Section 515(10)(c) a pre-trial detention is justified by the goal of maintaining confidence in the administration of justice, the strength of the prosecutor's case, the gravity of the nature of the offense and its surrounding circumstances, and most important, the potential of a lengthy term of imprisonment. The Prosecutor in the Rwanda Tribunal must justify pre-trial detention by using a reliable and consistent body of material to prove the strength of his case against the detainee. Another similar factor is the potential length of time in prison and the gravity of the charge of genocide.

⁵² Also included in Section 469 under section (c.1) is the Crime Against Humanity and War Crimes.

⁵³ This line of reasoning is similar as the case of *U.S. v. Salerno*, 481 U.S. 739, (See foot note 44). The Salerno court mentioned that the purpose of the Bail Reform Act was not to punish but to regulate bail provisions.

The most notable difference between Rule 40*bis* and Criminal Code Section 515 is the standard of proof required by the prosecutor in both the ICTR rules and the Canadian Criminal code.

Rule 40*bis* requires the prosecutor to produce reliable and consistent body of material relating to the charge against the suspect, but Criminal Code 515 simply states that the prosecutor must only show cause in justifying the provisional detention of a suspect. There is no further explanation in the criminal code as to what "show cause" really means.

3. England and European Treaties:

England does not have a written Constitution and the source law derives primarily from legislation, judicial decisions, and administrative guidelines. Though European Treaties are not part of domestic law, England uses the language in treaties to develop rules of evidence and procedures.⁵⁴

The initial detention of a suspect comes from the arrest by the police, either with a warrant or without. Once arrested and detained, the suspect has the right to counsel and to notify others of his incarceration. However, the right to counsel may be delayed for up to 36 hours. When a person is detained the detention must be reviewed by a review officer different from the custody officer, every six, fifteen, and 24 hours after the detention was authorized. A detainee cannot be held for more than 24 hours without being charged unless arrested for a serious offense. A senior police officer may authorize detention for up to 36 hours in this case. The authority for the senior officer to detain a suspect up to 36 hours comes from S. 42 PACE. In order to justify the detention, the senior officer must have reasonable ground for believing that detention is necessary to preserve evidence, the offense that the accused is held for is serious,

⁵⁴ JOHN HATCHARD, BARBARA HUBER and RICHARD VOGLER, *Comparative Criminal Procedure* 180, *The British Institute of International and Comparative Law* (1996). [Reproduced in the accompanying notebook at tab 22.] An example of a treaty is the European Convention on Human Rights.

and the investigation is being conducted diligently and expeditiously. If the detention goes beyond 36 hours, a court must authorize the continued detention up to a maximum of 96 hours.

If a suspect is denied bail, he must be brought before the first sitting of the Magistrate's Court. The government and the detainee both present evidence for pre-trial release. If the suspect is detained, he may appeal immediately to the High Court or Crown Court.

A suspect, who is to remain in pre-trial custody for an indictable offense, can be held for a maximum of 96 days from the initial appearance with the Magistrate's Court for the committal to trial. Once there is a committal for trial, the suspect can be detained up to a maximum of 120 days from the committal proceeding and the actual trial.

As mentioned earlier, England uses legislation, judicial decisions, and administrative guidelines in case adjudication. In the following case heard in the Thames Magistrate's Court, the application of an legislation called the Prosecution of Offense Act 1985, governed the custody time period of pretrial detention that differs from PACE regulations. Not only was the suspect held in provisional detention for the maximum time limit allowed by law, but an additional provisional detention period anew was levied when an additional offense was charged against the suspect.

In this case, the suspect was arrested on July 26, 2000, and charged with fraudulent evasion of duty on cigarettes and spirits. He was remanded in pretrial custody with a time limit of 70 days, thus expiring on October 5, 2000. During the course of the 70 days, the prosecution continued their investigation and found other offenses committed by the suspect that were not uncovered when he was initially detained. Because of this new evidence, on October 5, 2000, the prosecution levied an alternate charge of conspiracy of fraudulent evasion of payment of the duty chargeable on goods. The suspect now was facing a new period of pretrial detention and

was held accordingly. The suspect challenged the new period of trial detention because the charge of conspiracy was not separate from the original charge and should have been levied from the onset.

The court decided that the conspiracy charge was a separate offense from the original charge. Interpreting the Prosecution of Offenses Act 1985, the court stated that under subsection 22, the prosecution will be allowed to complete a preliminary stage of proceeding for an offense, and the accused may remain in custody while the prosecution completes this stage, "in relation to that offense." The maximum time allowed under this subsection is 70 days of pretrial detention. The court concluded that the statutory language was clear that each offense was subject to its own custody time period. They further concluded that the Act and the regulations relate the custody time limit to an offense and not to a set of facts or offender. The burden of proof that the original charge and subsequent charge are different involved the prosecution must producing material referencing chronology, history of inquiry, and the nature of the case. Further, the court required that the prosecution's continuing investigation that uncovered the conspiracy must have been conducted under the auspice of due diligence. To overcome any allegations of abuse of process by the prosecution in seeking detention of suspects beyond any statutory time period, the court stated that bad faith must be established. The court is not clear on who has the burden of proof in determining whether bad faith existed or not.⁵⁵

Rule 40 and 40*bis* are silent when additional charges are levied against a suspect and the maximum allowable period of detention is coming to an end. The difference between Rule 40 and 40*bis* and the Prosecution of Offenses Act 1985, is that the Rule 40 is silent on reasons to

⁵⁵ R. v. The Thames Magistrate's Court, Queens Bench Division, November 15, 2000, *available in* Lexis, Nexis Library<Country & Region (excluding the U.S.)>United Kingdom>Case Law>Combined Sources>. [Reproduced in the accompanying notebook at tab 23.]

detain after the initial 20 days of detention and under *40bis* the request for additional detention is based on furthering the investigation and special circumstances. There is a maximum time limit of 90 days of provisional detention without an indictment under *40bis* regardless of any justification for detention arising thereafter. The Prosecution of Offense Act 1985, provides that each separate offense committed by a suspect is subject to its own pretrial detention period with no restraint on the number of separate charges and the separate periods of detention attributed to each charge.

In theory, if the prosecution proves that their investigation is being conducted with due diligence and in good faith, and continues to discover new charges separate from other charges; a suspect may be provisionally detained indefinitely. However, in practice it would be difficult for the prosecution to prove good faith and due diligence as their investigational time period increases.

4. South Africa and the 1996 Constitution:

South Africa has derived its criminal procedure from the common law as exemplified in the Criminal Procedure Act 51 of 1977. Within the last decades, South Africa has acquired characteristics of an inquisitorial system of jurisprudence.⁵⁶ On December 10, 1996, The Constitution of the Republic of S. Africa was signed into law.⁵⁷ The basic provisions for freedom and security of the person and arbitrary arrest and detention are mostly standard from many other Constitutions and Declarations. The following are the highlights to these provisions:

Freedom and security of the person:

⁵⁶ DAWID VANWYK, JOHN DUGARD, BERTUS DE VILLERS, DENNIS DAVIS, *Rights and Constitutionalism: The New South African Legal Order* 406, Juta & Co., Ltd (1996). [Reproduced in the accompanying notebook at tab 24.] A presiding judge conducts the inquisitorial model pretrial investigations; in contrast to an adversarial model the police conduct the pre-trial investigation.

⁵⁷ This Constitution was amended from an interim Constitution (Act 200 of 1993) and was first adopted by the Constitutional Assembly on May 8, 1996.

S. 12(1) Everyone has the right to freedom and security of the person, which includes the right:

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;

Arrested, detained and accused persons:

S. 35(1) Everyone who is arrested for allegedly committing an offence has the right:

- (a) to remain silent;
- (c) not to be compelled to make any confessions;
- (d) to be brought before a court as soon as possible but not later than
 - i. 48 hours after the arrest; or
 - ii. the end of the first court day that is not an ordinary court day;
- (f) to be released from detention if the interest of justice permits, subject to reasonable conditions.

Under the Criminal Procedure Act, Section 50, an arrested person must be charged and brought to court within 48 hours as echoed in the Constitution. The only problem with the South African Constitution is the silence of detention without trial under normal circumstances and beyond the limit of 48 hours. South African Legislation makes provision for two types of pre-trial detention, (1) for purpose of interrogation concerning acts of terrorism, and (2) unlawful possession of certain weaponry. When detaining a person under these two provisions, the commissioned police officer must objectively have reason to believe that the person committed the offense of terrorism or possessed certain weaponry. The initial detention is ten days, extended for further ten-day periods by a Supreme Court Judge. The detainee will have the opportunity to submit in writing his objection to the detention. The maximum period a detainee may be held before trial is thirty days. The only time a detainee will be held indefinitely with no judicial review is when there is a declaration of a state of emergency, which allows the suspension of the right to freedom and security of the person to the extent necessary to restore peace and order. The declaration of a state of emergency may last only 21 days from the declaration. The Assembly may extend a declaration of a state of emergency for no more than

three months at a time and the resolution to extend must be adopted by a majority vote of the members of the National Assembly.⁵⁸

Prior to the adoption of the South African Constitution in 1996, the country practiced an oppressive preventive detention under the Internal Security Act 74 of 1982. This Act allowed the Minister of Law and Order to detain an individual indefinitely if in his opinion there is reason to apprehend a person if its believed that he will commit acts of terrorism, sabotage or, if it's believed that the person engages in activities which endanger the security of the state or the maintenance of law and order. It is the opinion that since these provisions have been appealed, if the government tried to reintroduce them, they would be struck down as contrary to the 1996 Constitution.⁵⁹

5. France

The Declaration of Human Rights (1789) and the French Constitution have interesting language relating to the liberties of a person. In the Declaration of Human Rights, Article 7 states that "No man may be accused, arrested or detained except in the cases determined by law...but any citizen summoned or apprehended by virtue of the law, must give instant obedience; resistance makes him guilty."⁶⁰ The only language that resembles a personal liberty is Article 9, which states, "As every man is presumed innocent until proven guilty..." The French Constitution of October 4, 1958, does not even mention anything about personal liberties but includes a provision excusing criminal activities of the members of the government under

⁵⁸ Constitution of The Republic of South Africa, Section 37(2). [Reproduced in the accompanying notebook at tab 25.]

⁵⁹ Legal City, Detention-Holding People in Custody, (visited on April 9, 2002) <<http://www.legalcity.net/Rdigest.aspTitle=Detention>>. [Reproduced in the accompanying notebook at tab 26.]

⁶⁰ The Declaration of the Human Rights (1789), (visited on April 8, 2002) <<http://www.elysee.fr/ang/instit/text1/htm>> [Reproduced in the accompanying notebook at tab 27.]

Article 68-1.⁶¹

The initial detention of a suspect at a police station may be up to 24 hours. The extension of the detainment can be increased up to a maximum of 48 hours, but must be on the authority of a prosecutor.⁶² If the offense the suspect is accused of committing involves drugs or terrorism, then the detention can be a total maximum of 96 hours. The arrested person has the right to notify a relative of the arrest and be represented by counsel.⁶³

After the initial detention by police, the arrestee is taken before the Magistrate who has the power to remand in custody. There are two reasons to remand an arrestee in provisional detention: (1) to prevent interference with the courts of justice; and, (2) for security reasons.⁶⁴ The detainee now has the right to prepare for his defense against detention. He can elect to voluntarily remain in provisional detention for a maximum period of 4 days to prepare his defense or be judged immediately on the detention issue. If he elects to obtain representation, during the course of the 4 days of detention, the magistrate will hear both sides and make a determination to whether provisionally release or to further detain. If the magistrate decides to remand the detainee, he can only detain him for a maximum period of six months. This applies

⁶¹ Constitution of October 4, 1958, (visited on April 8, 2002) <<http://www.assemblee-nationale.fr/English/8ab.asp>> [Reproduced in the accompanying notebook at tab 28.]

⁶² This rule applies to witnesses who were at a scene of a crime, in the view of the police, can provide material evidence. The witnesses who are not suspected of being involved in the offense must be released as soon as practical according to this time frame. However, in cases of drugs or terrorism, the witness can also be held for a total of 96 hours according the provisions of this rule of being released as soon as practically possible.

⁶³ The right to counsel is a limited one in that the counselor only has 30 minutes to interview the arrestee, may not be present during any interview or further police procedure, and cannot interview the arrestee until 24 hours has passed since the arrest. If the person has been arrested for offenses involving organized crime, drug rings, racketeering, the time is increased to 36 hours before the counselor can interview the arrestee. If the arrestee is arrested and charged with terrorism or drug smuggling, the time is extended to 72 hours after the arrest.

⁶⁴ Examples of "security reasons" include the protection of the defendant, or to prevent further offending, or to preserve the public order.

only to detainees who are accused of a non-serious crime.⁶⁵ If the detainee is charged with a serious offense, the remand in custody cannot exceed four months in the first instance, and the detention is renewable in periods of four months for an indefinite period. If the detainee is charged with a grave offense, he can be held up to one year in the first instance and renewable thereafter for one year.⁶⁶

The bail system has not always been practiced in France and has only come into existence to strengthen the presumption of innocence.⁶⁷ Bail is not automatic and subject to the Magistrate's decision to release the detainee or remand. There are the usual conditions of bail that includes the payment of pre-existing fines or damages, or money bail. A breach of any bail condition is punishable by an immediate remand in custody.

In the case of *Muller v. France*,⁶⁸ the defendant was arrested and charged for bank robbery in December 1988. In December 1989, he was ordered detained for a further period of one year in order to prevent him from re-offending or attempting to escape punishment since the offenses carried lengthy jail times and he had previous convictions. In December of 1990, the judge again extended the detention for one year based on the continuing investigation of the case. In June 1991, the defendant applied for release but was refused because of his past convictions and the likelihood of not returning to court because of the possible sentence. In November 1991, the judge committed the case to be sent to the prosecutor and in December 1991, the trial date

⁶⁵ A non-serious crime is defined as an offense that carries less than five years imprisonment and the defendant has not previously served a sentence of a year's duration.

⁶⁶ After the initial one-year detention, if a request is made for an extension, the detainee can appeal the request for the remand.

⁶⁷ John Hatchard, Barbara Huber And Richard Vogler, *supra* note 54, at 44. [Reproduced in the accompanying notebook at tab 22.]

⁶⁸ *Muller v. France*, Eur. Ct. H.R., 17 March 1997 (visited on March 20, 2002) <<http://www.interights.org/icl/report/asp.?DocNom-739>>. [Reproduced in the accompanying notebook at tab 29.]

was set. During the time period of the defendant's detention, the investigation involved multiple defendants and multiple jurisdictions that complicated the investigation and the court processes, which included joinder of all the defendants. The defendant was found guilty and sentenced to 10 years imprisonment with the period of detention deducted from the sentence.

The defendant complained that his pre-trial detention violated the provision of Article (5)(c) in that he was detained based on the assumption that he would re-offend or flee if released. The court agreed with him and gave him partial relief. The court reasoned that the period of detention did run from the time of the arrest until the conviction of the court and the defendant confessed to the charges as soon as he was arrested. The court also pointed out that the case was complex in that the co-defendants were simultaneously tried in three different courts. Since the defendant had confessed and the closure of the investigation had ceased in November of 1991, there was no danger of collusion. In reference to the past convictions and the possibility of re-offending, the court reasoned that the risk of fleeing could be gauged solely on the basis of the severity of the sentence faced and a reference to the defendant's past history could not suffice to justify refusing release because of the danger of re-offending.⁶⁹ In addition, the delays in the entire judicial proceeding including the shifting of judges which delayed the trial showed a lack of due expedition by judicial authorities. However, the court again noted that the fact that the defendant had confessed to the offenses upon arrest and dismissed his claim for pecuniary damages since the period of detention was deducted from the ten-year sentence.

The prosecutor in the Rwanda Tribunal may run into problems if it is proven that during the detention of a suspect under Rule 40*bis*(f) for further investigation, the investigation conducted falls short of due diligence. The rules do not specifically mention that the

⁶⁹ The court however failed to state what a proper standard for release would be in this example.

investigation must be done diligently. However, if there is overt evidence that the investigation is not being conducted in a manner so described, then allegations of arbitrary detention may be made.

6. Scotland:

Scotland's criminal procedures have been revised several times in the past decade to reflect contemporary notions of fundamental human rights. Along with these constant revisions, the United Kingdom ratified the European Convention on Human Rights (ECHR) in 1951 that directly affects Scotland's criminal procedures. In addition to the ECHR, Scotland's parliament passed the Human Rights Act 1988, which gives further effect to the ECHR throughout the United Kingdom.⁷⁰ The Criminal Justice (Scotland) Act 1995, list provisions and standards for pre-trial release by bail. Under subsection (2), the Act mandates that a person released on bail must appear at the appointed times at every hearing with which he is charged with, does not commit any crimes while on bail, does not interfere with witnesses or otherwise obstruct the course of justice, and be available for further inquiries by the court in pursuing that matter he is charged with. In addition to the above conditions, the judge can mandate further conditions that will also assure the detainee will comply with the interests and concerns of the court. Under subsection 28A, there is a prohibition of bail for the charges or prior convictions of murder, attempted murder, rape or attempted rape.⁷¹

Under Scottish law, a person can be investigated and apprehended on the spot for a crime committed or by a warrant. He may be detained for a limited time to allow an investigation to

⁷⁰ Scottish Human Rights Trust Publications, Human Rights Act: Introduction to the Human Rights Act. <<http://www.scotrights.org/publications/intro.htm>>. [Reproduced in the accompanying notebook at tab 30.]

⁷¹ Criminal Justice (Scotland) Act 1995 (c. 20)(visited on April 29, 2002) <http://www.legislation.hmso.gov.uk/acts/acts1995/Ukpga_19950020_en_2.htm#mdiv1>. [Reproduced in the accompanying notebook at tab 31.]

ensue. If he is charged with an offense, he will either be detained or released on bail.⁷² If the person is not released on bail, there are two different circumstances that affect the time of pre-trial detention. If a person is arrested without a warrant on a petition, he can be provisionally detained for no more than 80 days without an indictment being served upon him. If the person has been arrested with a warrant on a petition, then he can be provisionally detained up to a maximum of 110 days. If the person has been arrested by a warrant and has been released, his trial must commence within 12 months or he must be released regardless if he was indicted during the 12-month period.⁷³

There are some similarities and differences between Rule 40 and 40*bis* and the Scottish laws. Both the rules and the Scottish laws provide the ability for a detainee to be provisionally released under similar conditions. Those conditions being that the detainee assures the court that they will return when required, witnesses will not be interfered with and there will be no obstruction of justice committed while on provisional release. In addition, the judges in both cases can further set conditions per their discretion beyond the routine requirements of provisional release as stated above. A distinct difference is that even though the ICTR is prosecuting crimes of genocide, the ICTR rules provide possible provisional release. In contrast, the Criminal Justice (Scotland) Act 1995, specifically prohibits any type of provisional release for crimes of murder or rape, or even the attempt to commit murder or rape.

⁷² DAVID M. WALKER, *The Scottish Legal System: An Introduction to the Study of Scots Law* 533, W. Green/Sweet & Maxwell Law Publishers (1992). [Reproduced in the accompanying notebook at tab 32.]

⁷³ Criminal Procedure (Scotland) Act 1995, Chapter 46 (visited on April 30, 2002) *available in* Lexis, Nexis Library<Country&Region(excluding U.S.)>Scotland>Legislation &Regulations>Statutory &Statutory Instruments of Scotland>. [Reproduced in the accompanying notebook at tab 33.]