POISONED CHALICE?: THE RIGHTS OF CRIMINAL DEFENDANTS UNDER INTERNATIONAL LAW, DURING THE PRE-TRIAL PHASE

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This article reproduces the arguments from an appellate brief filed in support of a defendant before the International Criminal Tribunal for Rwanda (ICTR)—Juvénal Kajelijeli—with alterations to conform to law journal style. I agreed to draft the brief because of my belief that the support for and a firm enforcement of the rule of law might lead to peace and security. I have written about the rapes that were committed during the Rwandan genocide[1] and my most recent article focuses on finding ways to end impunity for gender crimes committed during armed conflict[2]. Thus, the brief was written with an understanding and a hope that by recognizing the humanity and protecting the rights of those alleged to have committed atrocities under international law, we might also protect the rights and humanity of the survivors of those atrocities.

What prompted me to turn the brief into an article was the recent entry into force of the Rome Statute of the International Criminal Court (ICC) and my desire to inject into the discussions about the ICC, the need to recognize the rights of the criminal defendant before international criminal tribunals. Thus, this article uses Mr. Kajelijeli's case to illustrate what those rights are of criminal defendants under international law, during the pre-trial phase. To make this ar-

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[1] *See* Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003).

[2] *See* Sherrie L. Russell-Brown, *The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict*, ___ WIS. INT'L L. J. ___ (forthcoming 2004).

ticle relevant and useful to cases before the ICC, I draw comparisons between the internal law and rules of the ICC and the ICTR.

I conclude that my hope for this article is that it will provide some material with which international law scholars and practitioners—those most likely to be the prosecutors, defense counsel and judges of international criminal tribunals—can ensure that international criminal tribunals, including the ICC, are meaningful instruments for avoiding the guilt of some being ascribed to the whole, and that they play an important role in enabling survivors of atrocities to obtain official acknowledgement of what befell them. International law practitioners and scholars can do so by ensuring that international criminal tribunals are vigilant in protecting the rights of the criminal defendants before them.

"We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."

—U.S. Supreme Court Justice Robert H. Jackson,
Chief American Prosecutor at the International
Military Tribunal at Nuremberg[3]

[3] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 627 (1992) (quoting Justice Jackson).

INTRODUCTION

Given the vulnerability of individuals to arrest and detention in the context of international crises and with the entry into force on July 1, 2002 of the International Criminal Court (ICC),[4] an examination of the rights of criminal defendants *during the pre-trial phase* under international law is both timely and necessary.

Take, for example, September 11, 2001. According to a complaint recently filed against the U.S. government in the United States District Court for the Western District of Louisiana, on September 12, 2001, Hady Hassan Omar—an Egyptian citizen—was arrested and detained for seventy-three days.[5] Mr. Omar alleges that he was unable to speak to counsel until approximately two weeks after his detention.[6] No criminal charges were ever filed against him.[7] According to the New York Times:

> No one knows exactly how many young Muslim men were rounded up in the aftermath of 9/11. As of November of [2001], when federal authorities stopped issuing information on the subject, the tally was 1,147. What is known is that thus far, of those initial 1,147 arrests, only three have resulted in terrorism-related indictments, and more than 400 people have been deported following lengthy internment periods and closed hearings.[8]

Mr. Omar might simply have been in the wrong place at the wrong time.[9]

As a consultant, I had the opportunity to work on a case for one of the defendants before the International Criminal Tribunal for Rwanda (ICTR)—Mr. Juvénal Kajelijeli—who was arrested without a warrant and without the prosecutor first possessing the requisite information tending to show that he had committed a crime over which the ICTR has jurisdiction.[10] Mr. Kajelijeli was arrested without knowing the reasons for his arrest at the time of the arrest and detained for three months without any charges being filed

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[4] *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 126, U.N. Doc. A/CONF. 183/9 (1998), *reprinted in* 37 I.L.M. 999, 1068 (1998), *available at* http://www.un.org/law/icc/ (last visited Mar. 13, 2003) [hereinafter Rome Statute].

[5] *See* Compliant ¶ 48, Hady Hassan Omar v. Casterline, No. CV02-1933A (W.D.La. filed Sept. 9, 2002).

[6] *Id.* ¶ 34.

[7] *Id.* ¶ 48.

[8] *See* Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES, Oct. 27, 2002, § 6 (Magazine), at 52.

[9] *Id.* at 50.

[10] *See* Prosecutor v. Kajelijeli, No. ICTR-98-44-I, (Int'l Crim. Trib. For Rwanda (ICTR) Nov. 9, 1998), *available at* http://www.ictr.org. The 60th Trial Day was held on December 12, 2002. The Defense will continue to put on its case starting again from March 31, 2003 until, approximately, April 24, 2003.

against him.[11] After charges had been formally brought, Mr. Kajelijeli was detained an additional five months before counsel was assigned and detained for close to seven months before his first appearance before a judge.[12] Mr. Kajelijeli was arrested on a day when a sweep of arrests occurred throughout West Africa in the aftermath of the genocide that occurred in Rwanda in 1994.[13] I argued that Mr. Kajelijeli might simply have been in the wrong place at the wrong time.[14]

Thus, although "fair trial" rights of criminal defendants post-retention of counsel and post-initial appearance are certainly important, exploration of what might be perceived as very basic rights—rights such as the right not to be arbitrarily arrested and detained, the right to know the reasons for ones arrest at the time of arrest, the right to be promptly charged or released, the right to know the nature and cause of any charges, the right to be brought promptly before a judge for an initial appearance, and, the right to have immediate access to counsel—are also extremely important.

In 2000, as a recent graduate with a Master of Laws in international law and international human rights law, I was retained as a consultant to prepare the legal briefs on behalf of Mr. Kajelijeli. In that capacity, I had the opportunity to draft a number of pre-trial briefs that addressed the rights of criminal defendants. The most extensive was a fifty-one page appellate brief[15] submitted to the Appeals Chamber of the ICTR, which explored the rights of persons before arrest, up until their initial appearance before a Trial Chamber. In the brief, I argued that as a result of the Prosecutor of the ICTR's violations,[16] as well as the ICTR's own violations, of important rights of

[11] *See* Application Concerning the Arbitrary Arrest and Illegal Detention of the Suspect Juvénal Kajelijeli ¶¶ 1.1-1.6, *Kajelijeli*, *supra* note 10, (on file with author) [hereinafter Application]; *see also* Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing ¶ 42 (May 8, 2000), *Kajelijeli*, *supra* note 10, *available at* http://www.ictr.org (last visited Mar. 11, 2003) [hereinafter May 2000 Decision].

[12] *See* May 2000 Decision, *supra* note 11, ¶ 45.

[13] *Id.* ¶ 18.

[14] *See* Appellant's Brief in Support of his Appeal of Trial Chamber II's May 8, 2000 Decision Denying Appellant's Challenge to the Tribunal's Jurisdiction Based on his Arbitrary and Illegal Arrest and Detention ¶ 11, *Kajelijeli*, *supra* note 10 (on file with author).

[15] *Id.*

[16] Throughout this article, when I use the term "Prosecutor" I am referring to the former Prosecutor of the ICTR, Louise Arbour rather than the actual prosecutor in Mr. Kajelijeli's case. Louise Arbour is now a Justice on the Supreme Court of Canada. Prior to her appointment to the bench, from October 1996 until September 1999, she was the Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda. On August 11, 1999, Carla Del Ponte—former Attorney General of Switzerland—was appointed the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and for Rwanda by the Security Council. According to

detained persons and the accused—more specifically, the right not to be arbitrarily arrested and detained; the right to know the reasons for arrest at the time of arrest and to be promptly charged; the right to be informed in detail, in a language one understands, the nature and cause of the charges; the right to have an initial appearance without delay; and the right to counsel—the jurisdiction of the ICTR over Mr. Kajelijeli was jeopardized.

I was interested in the case and agreed to join Mr. Kajelijeli's defense team as a consultant, in part because of my concern for the rule of law. I felt then and feel now that in order for the ICTR to serve as an example in the Great Lakes region in Africa, as well as internationally, of the respect for and strengthening of the rule of law, it had to be held to an exacting standard when it comes to the protections afforded persons in the context of the administration of criminal justice.[17] Irrespective of the gravity of the crimes within its jurisdiction, the ICTR should not flout its own internal rules and procedures nor internationally recognized rules of criminal procedure. Likewise, irrespective of the gravity of the crimes under the jurisdiction of the ICC (genocide, crimes against humanity, war crimes, and the crime of aggression) or any future international criminal tribunal,[18] internationally recognized rules of criminal procedure ought to be obeyed.

Article 15 of the Statute of the International Tribunal for Rwanda, the "Prosecutor shall act independently as a separate organ of the [ICTR]." *See* Statute of the International Tribunal for Rwanda, *available at* http://www.ictr.org/wwwroot/ENGLISH/basicdocs/statute.html (last visited Mar. 11, 2003) [hereinafter Statute].

[17] For a discussion of the contribution of the ICTR, see Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325 (1997) and Rupa Bhattacharyya, *Establishing A Rule-of-Law International Criminal Justice System*, 31 TEX. INT'L L.J. 57, 62 n.23 (1996) (wherein Bhattacharyya states that,"[t]he government of Rwanda requested the creation of an international tribunal for several reasons, including its desire to avoid 'the risk of being accused of administering an 'expeditious victor's justice'; its belief that genocide was a 'crime against humanity, calling for collective efforts to prevent, stop and punish it'; and its hope that a 'free and fair international tribunal would contribute to allay the fear of retribution, . . . would facilitate much needed national reconciliation . . . and was indispensable in building a legal system based on the rule of law.' "). *See also, e.g.*, M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993).

[18] There have been talks of an international criminal tribunal for Sierra Leone to prosecute rebel leaders accused of war crimes in Sierra Leone, (*see U.N. War Crimes Court to Try 20 Suspects in Sierra Leone*, N.Y. TIMES, Jan. 4, 2002, at A8), for Cambodia, to prosecute the Khmer Rouge (*see* Seth Mydans, *Cambodia and U.N. Break an Icy Silence on Khmer Rouge Trials*, N.Y. TIMES, Sept. 1, 2002, §1, at 11), and for Indonesia, to prosecute the Indonesian military and militia leaders (*see* Seth Mydans, *The World; And Justice for All*, N.Y. TIMES, Oct. 22, 2000, §4, at 4.)

With respect to what those rights are of persons within the international criminal justice system, pre-eminent international criminal law scholar, Professor Cherif Bassiouni, using an "inductive" research methodology,[19] has identified eleven different rights, or a cluster of rights, that are "associated with the protections afforded an individual in the criminal process."[20] Each of these rights, according to Professor Bassiouni

> has been found to be basic to fairness in the criminal process. Without these rights, the criminal process can be abused and manipulated to curtail individual liberties and thus ultimately to deny democracy. The link between individual human rights, which are most susceptible to abuse during the criminal process, and democracy is beyond question. Neither democracy nor human rights can exist without one another—and neither can exist without the individual protection of persons brought into the criminal process, because it is in that arena where most human rights violations occur.[21]

Of the eleven rights Bassiouni identifies, this article addresses four: 1) the right to be free from arbitrary arrest and detention, including the right to be informed of the reasons for arrest at the time of arrest and the right to be "promptly" charged; 2) the right to a fair trial, including the right to be informed of the charges; 3) the right to a speedy trial, including the right to be brought promptly before a judge; and lastly 4) the right to assistance of counsel.

Whether these rights exist as a matter of international criminal law and/or the internal "law" of the ICTR (or the ICC) is not the issue. They do exist.[22] As I found out working on Mr. Kajelijeli's case, the issue is that the ICTR did not seem to be enforcing these rights in accordance with the applicable international rule, law or "precedent."

Consequently, this article has both a practical and theoretical purpose. There is very little scholarship on the issue of the rights of persons before international criminal tribunals, in part, as has been explained, because of the "unsavory background of a large number of the persons accused and the severity of the crimes alleged, as well as by overwhelming concern for the

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[19] According to Professor Bassiouni, "[t]he inductive method is the technique by which 'general principles of international law' are extracted from domestic legal principles or norms discovered in the major legal systems of the world. This approach is the most appropriate means of comparative law research and must be particularized with respect to each subject or specific inquiry." *See* Bassiouni, *supra* note 17, at 243.

[20] *Id.* at 253.

[21] *Id.*

[22] *See infra* pp. 64-90.

rights of the victims."[23] Rarer still is scholarship that addresses those rights relative to the pre-trial phase, which is what I do in this article.[24] I also wrote this article in the hopes that it will serve as a starting point for defense counsel constructing legal arguments on behalf of clients before international criminal tribunals, and that it will also serve to *raise* awareness of the issue of the rights of the criminal defendant under international law during this important, nascent period of the ICC.

In addition to highlighting issues about which there is relatively little discussion, my hope is that this article will also be effective because I discuss those issues in terms of a real ongoing case. In an effort to provide a factual context for the legal propositions discussed herein, I discuss them as they relate to Mr. Kajelijeli's case. In addition, so that this article has relevance to the ICC, where applicable, I draw comparisons between the internal law and procedure of the ICTR and that of the ICC.

Thus Part I gives a brief procedural, as well as factual, background of Mr. Kajelijeli's case. The specific facts relevant to the rights addressed in this article are discussed separately in the parts of the article in which the particular right is discussed. Part II of this article addresses a criminal defendant's right to be free from arbitrary arrest and detention under international law. Part III addresses the right to be informed of the reasons for arrest at the time of arrest and the right to be "promptly" charged. Part IV addresses the right to be informed in detail, in a language one understands, of the nature and cause of any charges. The right to be brought "promptly" before a judge is addressed in Part V, and, lastly, Part VI addresses the right to counsel. The article concludes with the hope that it will cause international law scholars and practitioners, those most likely to be the prosecutors, the defense counsel—and the judges—to further explore the rights of criminal defendants before international criminal tribunals, including the ICC. In addition, the hope is that this article will convey the import for victims, defendants and the international community, of having international criminal tribunals act vigilantly to protect the rights of the criminal defendants that appear before them.

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[23] Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 112 (2002).

[24] *Id.* at 115 n.19 (wherein Cogan states that "[t]here have been scattered articles dealing with particular substantive aspects of the fair trial right in the context of international criminal law," and then lists twelve law review articles that address confrontation, the right to counsel, proceedings in absentia, privilege against self-incrimination, admission of evidence, the standard of proof beyond a reasonable doubt, search and seizure, fairness, and speedy trial).

I. PROCEDURAL AND FACTUAL BACKGROUND OF MR. KAJELIJELI'S CASE

On June 5, 1998, Mr. Juvénal Kajelijeli was arrested in Benin and placed in custody.[25] On August 29, 1998, an indictment was confirmed against him.[26] On September 9, 1998, Mr. Kajelijeli was transferred from Benin to the seat of the ICTR in Arusha, the United Republic of Tanzania.[27] On February 2, 1999—roughly *five* months after being transferred to the ICTR—he was assigned defense counsel.[28] Mr. Kajelijeli initially appeared before a Trial Chamber on April 7, 1999—close to *seven* months after being transferred to the ICTR.[29]

Because he had not yet been assigned counsel and "[c]onsidering the irregularities which attended [his] arrest and that were continuing throughout [his] prolonged . . . detention," Mr. Kajelijeli decided to personally file his Application "with the appropriate Trial Chamber of the ICTR so that justice should be done."[30] In his Application, Mr. Kajelijeli contended that the ICTR did not have jurisdiction over him, in part, because of the procedural irregularities with respect to his alleged arbitrary and unlawful arrest and detention.[31]

Mr. Kajelijeli specifically argued that: 1) he had been arbitrarily arrested and detained; 2) he did not know the reasons for his arrest at the time of arrest on June 5, 1998; 3) he was detained in Benin for three months without knowing the charges against him and without being charged; 4) before his transfer to the ICTR, he was handed three documents, two of which were in a language he neither spoke nor understood, and the third was redacted as to him, so it could not provide him with any notice, let alone adequate notice, of the charges against him; 5) he had been at the ICTR for two months and had not yet been assigned counsel; and, lastly 6) he had been at the ICTR for two

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[25] *See* May 2000 Decision, *supra* note 11.

[26] *Id.*

[27] *Id.* ¶ 45.

[28] *Id.*

[29] *Id.* ¶ 27. According to the Prosecutor, in the May 2000 Decision, an initial appearance was scheduled for October 19 and November 24, 1998 and the Prosecutor was at a loss to explain why the initial appearances did not take place on those dates. When the Prosecutor conferred with the Registry to look into the matter, the explanation was given that the postponement was due to problems in the assignment of counsel. According to the Prosecutor, in the May 2000 Decision, after counsel was finally assigned, an initial appearance was scheduled for March 10, 1999 and was postponed by the defendant's counsel on the basis that there were irregularities in the indictment. *Id.*

[30] *See* Application, *supra* note 11.

[31] *See id.*

months and had not yet made his initial appearance.[32] In its May 2000 Decision, ICTR Trial Chamber II dismissed Mr. Kajelijeli's jurisdictional objections.[33] The Trial Chamber found no violation of the ICTR's Statute or its Rules of Procedure and Evidence.[34]

According to Rule 72(D) of the ICTR's Rules of Procedure and Evidence,[35] in the case of a dismissal of an objection based on lack of jurisdiction, an appeal lies as of right.[36] Thus, Mr. Kajelijeli had a right to appeal the May 8, 2000 dismissal of his Application and he filed a Notice of Appeal on May 12, 2000.[37] On August 10, 2000, the appeal was dismissed on procedural grounds.[38] An amended indictment was confirmed against Mr. Kajelijeli on January 25, 2001.[39] Mr. Kajelijeli challenged the jurisdiction of the ICTR now based upon the January Indictment.[40] Trial Chamber II dismissed that jurisdictional motion on March 13, 2001, and by March 14, 2001, the trial against Mr. Kajelijeli had begun.[41]

Mr. Juvénal Kajelijeli—according to the January Indictment—"served as Bourgmestre of Mukingo commune from 1988 to 1993 and was re-appointed Bourgmestre of Mukingo commune in June 1994. He remained in that post until mid-July 1994."[42] At times other than those referred to above,

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[32] *Id.* ¶¶ 1.1, 1.4-1.5, 2.1-2.2, 3.1-3.5.

[33] *See* May 2000 Decision, *supra* note 11, ¶ 47.

[34] *Id.*

[35] *See* ICTR RULES OF PROCEDURE AND EVIDENCE, http://www.ictr.org/wwwroot/ENGLISH/rules/index.htm (last visited March 11, 2003) [hereinafter Rules]. The ICTR Rules have been amended eleven times since their entry into force on June 29, 1995. There are, at present, nine consolidated texts of the Rules dating from January 12, 1996 until July 6, 2002. For the Appellate Brief I drafted and submitted to the ICTR, I analyzed the facts in relation to whichever version of the ICTR's Rules applied at the given time. For the purpose of this article, since there are no real substantive differences between the rules I applied in the Appellate Brief and the most current rules, e.g. the July 6, 2002 text of the Rules, herein I quote from the most current version of the Rules.

[36] *Id.* at R. 72(D).

[37] *See* "Order (on Motion to Grant Relief from Dismissal of Appeal)," December 12, 2000, http://www.ictr.org (last visited March 11, 2003) (hereinafter, the "Dismissal Order").

[38] *Id.*

[39] *See* "Amended Indictment pursuant to the Tribunal Order dated 25 January 2001," *at* http://www.ictr.org (last visited March 11, 2003) [hereinafter, the "January Indictment"].

[40] *See* "Decision on the Defence Motion Objecting to the Jurisdiction of the Tribunal," *at* March 13, 2001, http://www.ictr.org (last visited March 11, 2003) [hereinafter, "March 2001 Decision"].

[41] *Id.* Mr. Kajelijeli filed a Notice of Appeal on March 16, 2001 against the March 2001 Decision. *See* "Decision (Appeal Against the Decision on 13 March 2001 Dismissing 'Defence Motion Objecting to the Jurisdiction of the Tribunal')," September 18, 2001, *at* http://www.ictr.org (last visited March 11, 2003) [hereinafter, "September 2001 Decision"]. The appeal was referred by the majority to the Appeals Chamber. *Id.*

[42] *See* January Indictment, *supra* note 39, ¶ 3.5.

the January Indictment alleges Mr. Kajelijeli "exercised the de facto authority of Bourgmestre in Mukingo commune as a result of his association with, and patronage of, Joseph Nzirorera."[43] The Bourgmestre "represented executive power at the level of the commune. Like the Préfet, he was appointed by the President of the Republic on recommendation from the Minister of the Interior. The Bourgmestre was under the hierarchical authority of the Préfet."[44]

Specifically, the January Indictment alleges that Mr. Kajelijeli, in his capacity as Bourgmestre, "exercised authority over his subordinates including civil servants, members of the Police Communale and Gendarmerie Nationale, the civilian population of Mukingo commune and Interahamwe-MRND."[45] The January Indictment charges Mr. Kajelijeli with conspiracy to commit genocide, genocide, complicity to commit genocide, direct and public incitement to genocide, crimes against humanity (murder, extermination, rape, persecution on racial, political, religious grounds, other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (causing violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment against the Tutsi(s) and causing outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault against the Tutsi(s)).[46] The charges against Mr. Kajelijeli are based upon theories of both individual and superior responsibility.[47]

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[43] *Id.* ¶ 4.6.1. According to the January Indictment, Mr. Nzirorera, another ICTR defendant, was the National Secretary-General of the *Mouvement Révolutionnaire National pour le Développement* [hereinafter MRND], a former minister in the MRND Governments of 1987, 1989, 1990 and 1991, as well as a "fellow native" of Mukingo *commune*, and that Mr. Kajelijeli "benefited in authority and status from this association." *Id.* ¶ 4.6. The MRND was founded on July 5, 1975 by Juvénal Habyarimana—the former President of Rwanda whose death in a plane crash on April 6, 1994 sparked the massacre of the Tutsis. According to the January Indictment, the aim of the MRND "was to provide the President of the Republic with a powerful apparatus intended to control the workings of the State. The movement's objectives were, among others, to support and control the actions of the various State powers. Only the Chairman of the MRND could stand for the Presidency of the Republic. All Rwandans were members of the MRND from birth." *Id.*¶ 4.1.

[44] *Id.* ¶ 3.4.

[45] *Id.* ¶ 3.6.

[46] *Id.* ¶ 6.

[47] *Id.*

II. The Right to be Free from Arbitrary Arrest and Detention

Before a person can be arrested and brought before the ICC, even under "urgent" circumstances, the Rome Statute mandates the demonstration of the existence of an arrest warrant.[48] In contrast, under ICTR Rules 39 and 40(A)(i), "in the conduct of an investigation" and "[i]n case of urgency, the Prosecutor may request any State: (i) to arrest a suspect and place him in custody."[49] No arrest warrant is necessary. It is, however, necessary that the arrestee be a "suspect." Indeed, the status of "suspect" under the ICTR Rules is critical because it dictates what the Prosecutor can or cannot do in the conduct of investigations. According to the ICTR Statute and its Rules, in the course of an investigation the Prosecutor can summon, question, and in the case of urgency, arrest and place in custody, not just any *person*, but rather a "suspect."[50]

"Suspect" is defined in ICTR Rule 2(A) as "[a] person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction."[51] Thus, under the ICTR Rule 40 arrest procedure, the question was, in the case of Mr. Kajelijeli, and is, generally, does the Prosecutor possess, by the time of arrest, "reliable information" which tends to show that the person targeted for arrest may have committed a crime over which the ICTR has jurisdiction (i.e., the crimes of genocide, crimes against humanity, violation of Article 3 common to the Geneva Conventions & Additional Protocol II). If so, that person has the status of a "suspect" who can be summoned, questioned, and, "in the case of urgency," arrested and placed in custody by the Prosecutor. In sum, "reliable information," under the ICTR Rules, is the trigger that turns a "person" into a "suspect" upon which certain acts can be taken. According to the facts in Mr. Kajelijeli's case, as presented by the Prosecutor and accepted by Trial Chamber II in its May 2000 Decision, Mr. Kajelijeli was staying at the home of a man in Benin for whom there was a warrant for an arrest on June 5, 1998, when a series of arrests took place throughout West

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[48] *See* Rome Statute, *supra* note 4, at art. 92(1) and (2)(c) which provides:

> 1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91. 2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain . . . (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought.

[49] Rules, *supra* note 35, R.39, 40(a)(i).

[50] Statute, *supra* note 16, art. 17(2); Rules, *supra* note 35, R.39.

[51] Rules, *supra* note 35, R. 2(A).

Africa.[52] On June 5, 1998, when the Benin authorities came to arrest Mr. Nzirorera—Mr. Kajelijeli's host and a future ICTR defendant—they found Mr. Kajelijeli at Mr. Nzirorera's home and arrested him as well.[53] There was no arrest warrant for Mr. Kajelijeli.[54]

On the issue of whether the Prosecutor possessed the requisite "reliable information" prior to Mr. Kajelijeli's arrest, in its May 2000 Decision, Trial Chamber II noted that the Prosecutor succeeded in having an indictment confirmed against Mr. Kajelijeli.[55] The Prosecutor presented the following evidence:

> When the arrest was effected upon the home of Joseph Nzirorera, Kajelijeli was there. He could not explain his status or his presence in the country. He was taken into custody by the officials or the national officials of Benin and the following day there was a request from the deputy prosecutor that he be placed, be retained in custody because of allegations against him concerning the genocide in Rwanda and allegations of his involvement in criminal activity in Rwanda in 1994. It's on the basis of the Rule 40 request that he was held in custody and that he was taken into custody.[56]

The Prosecutor added,

> I would simply like to remind the Court that back on the June 5th, 1998, when Mr. Kajelijeli was taken into custody, his arrest and the arrest of Joseph Nzirorera was one of a series of arrests that took place all across West Africa. There were arrests in Mali. There were arrests in Cameroon. There were arrests in Benin. And these arrests were all part of a much larger investigation. The plan and or the execution of the arrests, as they were planned by the Office of the Prosecutor was to have all of the arrests take place on the same date throughout various countries in West Africa. Even if Mr. Kajelijeli was not an initial target for those arrests, the Office of the Prosecutor had done significant investigations on Mr. Nzirorera and his activities in Ruhengeri in organizing the killings and the genocide in Ruhengeri. I have read a number of witness statements and every time there is a discussion of Mr. Nzirorera's activities, specific activities in Ruhengeri, there is also mention of Kajelijeli. Kajelijeli did not just pop out of the air because we discovered him in Mr. Nzirorera's house. If he was Mr. Nzirorera's sidekick, that cannot be held against the Prosecutor. There are ample witness statements that document his in-

[52] *See* May 2000 Decision, *supra* note 11, ¶ 18; December 7, 1999 Hearing Transcript 26:3-18, 46:11-47:21 (on file with author) [hereinafter Transcript]; *see also* Application, *supra* note 11, ¶ 3.1.

[53] *Id.*

[54] *Id.*

[55] *See* May 2000 Decision, *supra* note 11, ¶ 33.

[56] *See* Transcript, *supra* note 52, at 26:3-18 (emphasis added).

> volvement in the crimes and acts of violence and killings that took place in Rwanda in 1994 and it is on that basis that he was indicted.[57]

Neither the Trial Chamber's notation that an indictment was subsequently confirmed against Mr. Kajelijeli nor the Prosecutor's presentation of evidence that Mr. Kajelijeli stayed at the home of and was the sidekick of a suspect on a day when a series of arrests took place throughout West Africa, were really explanations for what information the Prosecutor possessed *prior* to arresting Mr. Kajelijeli which formed the basis for arresting Mr. Kajelijeli on June 5, 1998, without an arrest warrant and pre-confirmation of an indictment. Trial Chamber II's notation seemed to be suggesting that the subsequent confirmation of an indictment against Mr. Kajelijeli was sufficient to establish that the Prosecutor possessed "reliable information" prior to June 5, 1998, when Mr. Kajelijeli was arrested. The Prosecutor seemed to be making several arguments. Distilled, they were that Mr. Kajelijeli was in the wrong place at the wrong time, and that he was the unfortunate "sidekick" of the wrong man.

First, the Prosecutor explained that Mr. Kajelijeli was staying with a man for whom there was an arrest warrant, and that he was at that man's home on a day when a sweep of arrests occurred throughout West Africa. Then, the Prosecutor concluded that Mr. Kajelijeli was arrested on the basis of ICTR Rule 40, which provides that the Prosecutor has the right to request a State to arrest and place a "suspect" in custody. Therefore, the question was whether Mr. Kajelijeli had the status of a "suspect" when he was arrested.

Second, it was unclear whether the Prosecutor's discussion about witness statements was a reference to witness statements that were obtained and read *before* or after the June 5, 1998 arrest since at the end of the colloquy, the Prosecutor states that it was on the basis of these witness statements that Mr. Kajelijeli was indicted, not arrested. The issue should have been what information did the Prosecutor possess *on or before* June 5 or 6, 1998, when Mr. Kajelijeli was arrested in Benin to support his arrest, not afterwards, when the Prosecutor had an indictment confirmed against Mr. Kajelijeli.

It appeared from Trial Chamber II's decision and the Prosecutor's explanations that the Prosecutor might not have possessed the requisite information except that on a day when there was a sweep of arrests throughout West Africa, Mr. Kajelijeli was staying at the home of and was presumed to be the "sidekick" of a man for whom the Prosecutor had issued an arrest warrant. From the Prosecutor's explanation and the Trial Chamber's silence, the inference that could be drawn was that it was Mr. Kajelijeli's location at

[57] *Id.* at 46:11-47:21. (emphasis added).

the home of and association with an "accused" (i.e., a person against whom an indictment had been confirmed) that constituted the "reliable information" upon which he was arrested and detained.

Under the ICTR's Rules, that is not the standard upon which to arrest a person, without an arrest warrant and prior to confirmation of an indictment. In order to safeguard the rights of individuals vulnerable to arrest and detention, like refugee Hutus in neighboring African countries, especially in situations of mass arrests such as those that took place throughout West Africa on June 5, 1998, the ICTR's Rules specifically provide that the Prosecutor can arrest and detain a person without an arrest warrant and *before* confirmation of an indictment, when two elements are met: 1) in the case of "urgency," and, 2) when the Prosecutor possesses "reliable information" which tends to show that that person may have committed a crime over which the ICTR has jurisdiction—i.e., when the person becomes a "suspect." In the case of Mr. Kajelijeli, even if the "urgency" element was met, it did not appear that the "reliable information" requirement had been met. Based upon the evidence as presented by the Prosecutor and accepted by Trial Chamber II, Mr. Kajelijeli was not a "suspect" on June 5, 1998, as that term is defined under ICTR Rule 2(A).

In further support of her argument that Mr. Kajelijeli's arrest and detention were lawful, the Prosecutor stated that whether she possessed "reliable information" is "peculiarly the province of the Prosecutor. It is when the information produces evidence that it is appropriate to submit it to a court."[58] Thus, as a fall back argument, the Prosecutor seemed to be saying that if the Prosecutor states that there is "reliable information," that is the end of the inquiry. This suggests that the Prosecutor has the unbridled and unchecked authority to summon, question, arrest and place in custody any person she wishes, without first having to demonstrate to the satisfaction of the ICTR, a basis for the arrest so long as evidence is produced and submitted to the court at a later date. Such a standard is problematic, would be setting a dangerous precedent and is in violation of the ICTR's own internal rules and procedures as well as internationally recognized rules of criminal procedure.

It is axiomatic that the ICTR must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.[59] The Rome Statute states that the ICC shall apply, *inter alia*, "[i]n the second place, where appropriate, applicable treaties and the principles

[58] *See* Prosecutor's Response to Supplementary Material ¶ 45 (on file with author).

[59] Report of the Secretary 1-1 General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., Supp. No. at para. 106, U.N. Doc. S/25704 (1993) [hereinafter Secretary General's Report].

and rules of international law, including the established principles of the international law of armed conflict."[60] Thus, the ICTR, as well as the ICC, are obligated not only to abide by their own internal "laws," but also by the fair trial guarantees articulated in the International Covenant on Civil and Political Rights (ICCPR).[61]

Article 9(1) of the ICCPR provides, *inter alia*, that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."[62] "It is not the deprivation of liberty in and of itself that is disapproved of, [under Article 9(1),] but rather that which is arbitrary and unlawful."[63] Further, Article 9(1)

> Obligates a State's legislature to define precisely the cases in which deprivation of liberty is permissible and the procedures to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.[64]

Thus, there are two limitations on the deprivation of liberty: 1) the principle of legality and 2) the prohibition of arbitrariness. "[D]eprivation of liberty is permissible only when it transpires 'on such grounds and in accordance with such procedure as are established by law' and when this is not arbitrary."[65] Further,

> [T]he prohibition of arbitrariness is to be interpreted broadly. Cases of deprivation of liberty provided for by law must not be manifestly disproportional, unjust or unpredictable. And the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.[66]

Using Mr. Kajelijeli as an example, his arrest in Benin on June 5, 1998 appears to have been both unlawful and arbitrary, and thus, possibly in violation of international law. His arrest was unlawful because Mr. Kajelijeli was not a "suspect" when he was arrested, as required by the ICTR Rules. His arrest was arbitrary in that it was unpredictable, unjust and inappropriate.

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[60] *See* Rome Statute, *supra* note 4, art. 21(b).

[61] Int'l Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

[62] *Id.* art.9(1).

[63] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 159-160 (1993) [hereinafter NOWAK COMMENTARY]. The Nowak Commentary is the most authoritative interpretation of the ICCPR.

[64] *Id.* at 160.

[65] *Id.* at 171.

[66] *Id.* at 172-73.

As explained above, the ICTR's Rules establish the procedure by which a person—pre-confirmation of an indictment and without an arrest warrant—can be deprived of his or her liberty. The Prosecutor can deprive a person of his or her liberty before confirmation of an indictment, without requesting an arrest warrant, "in case of urgency" and if that person has the status of a "suspect." A person becomes a "suspect" when the Prosecutor possesses "reliable information" which tends to show that that person may have committed a crime over which the ICTR has jurisdiction. Even if that person, in fact, committed a crime within the ICTR's jurisdiction, if the Prosecutor does not possess "reliable information" which tends to show that the person may have committed such a crime, an arrest is unlawful. In other words, if the person does not yet have the status of a "suspect," then even in the case of urgency, the Prosecutor cannot arrest the person on either a hunch or a hope that the appropriate information will subsequently surface. The Prosecutor simply cannot deprive *any* person of his or her liberty until she, in fact, possesses the appropriate information and the person thereby becomes a "suspect." To allow such deprivation would be contrary to the ICTR's internal laws.

In the case of Mr. Kajelijeli, whether or not he committed any crimes within the ICTR's jurisdiction when he was arrested on June 5, 1998, he was not a "suspect" as that term is defined in the ICTR's Rules. The Prosecutor seemed not to have possessed the appropriate information as required under the ICTR's Rules. The only information that the Prosecutor proffered was that Mr. Kajelijeli was staying at the home of an "accused" on the day and at the exact time when the Prosecutor had arranged to have that "accused" person arrested.

If, upon finding Mr. Kajelijeli at the home of an "accused," the Prosecutor suspected that perhaps Mr. Kajelijeli himself may have committed crimes within the ICTR's jurisdiction, then the Prosecutor could have opened an investigation on Mr. Kajelijeli as she had on his host, Mr. Nzirorera. If the Prosecutor was afraid that while she was investigating whether Mr. Kajelijeli committed any crimes under the ICTR's jurisdiction, Mr. Kajelijeli might leave Benin, then she could have expedited her investigation and possibly kept Mr. Kajelijeli under surveillance. It was improper to deprive Mr. Kajelijeli of his very fundamental right to liberty while the Prosecutor came up with information to support her arrest *ex post facto* and to support her subsequent indictment. That does not appear to be the lawful procedure under the ICTR's Rules; the procedure is not to arrest first and ask questions later. According to the lawful procedure as laid out in the ICTR's Rules, Mr. Kajelijeli had to have the status of a "suspect" on June 5, 1998 when he was arrested in order for the Prosecutor to have deprived him of his liberty. If he

was not yet a suspect on June 5, 1998, but he came into the Prosecutor's view because he was found at Mr. Nzirerora's house, then Mr. Kajelijeli should not have been arrested until such time as the Prosecutor possessed the requisite information. By doing otherwise, Mr. Kajelijeli's arrest and detention were arguably unlawful.

Mr. Kajelijeli's arrest was also arguably arbitrary. As explained above, the term "arbitrary" in Article 9(1) of the ICCPR is not merely to be equated with illegality but it is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[67] In addition, the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.[68]

In *Mukong*,[69] Mr. Mukong was arrested after an interview given to a correspondent of the British Broadcasting Corporation in which he criticized both the President of Cameroon and the Cameroon Government—i.e., Mr. Mukong said the "wrong" things. Technically, Mr. Mukong's arrest might have been in keeping with Cameroon criminal procedure and Cameroon law, but it was a paradigmatic unpredictable, unjust and inappropriate arrest.

Likewise, in the case of Mr. Kajelijeli, the only evidence provided to the Trial Chamber was that Mr. Kajelijeli was staying at the home of the "wrong" person at the "wrong" time. Had Mr. Kajelijeli left Mr. Nzirorera's house on June 4, 1998, or had Mr. Kajelijeli stayed at a hotel in Benin, or had Mr. Kajelijeli gone for a walk on June 5, 1998 before 5 a.m., which is when the Benin Authorities came to arrest Mr. Nzirorera, or had Mr. Kajelijeli never visited Mr. Nzirorera, he might not have been arrested and detained. Arguably, that constitutes an unpredictable, unjust and inappropriate arrest given that had Mr. Kajelijeli merely not been in Mr. Nzirorera's home at 5 a.m. on June 5, 1998, he might not have been taken by the authorities at all.

The Human Rights Committee is the authoritative interpreter of the ICCPR and its rules concerning the rights of the detained and the accused.[70] In addition, to the extent that the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[71] concerning the rights of detained persons and the accused are sim-

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[67] *Id.*

[68] *See* Human Rights Committee jurisprudence, Mukong v. Cameroon, 458/1991, 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, ¶ 9.8. Under Article 28 of the ICCPR, the Human Rights Committee is the authoritative interpreter of the ICCPR.

[69] *Id.*

[70] *Id.*

[71] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

ilar to or mirror provisions of the ICCPR, opinions of the European Court of Human Rights (European Court) interpreting the European Convention are illustrative of international standards concerning the rights of the accused. With respect to the right not to be unlawfully and arbitrarily arrested and detained, the language in the European Convention is somewhat different from the language in the ICCPR. However, the European Convention's language is very similar to that of the ICTR's Rules. The Convention provides that a lawful arrest or detention is one in which there is "reasonable suspicion" of the person having committed an offence.[72]

According to the European Court in *Fox,* having a "'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."[73] The court in *Fox* found that there had been a breach of Article 5(1)(c) of the European Convention based on facts that resemble those in Mr. Kajelijeli's case.

As in Mr. Kajelijeli's case, *Fox* involved a very serious crime, that of terrorism in Northern Ireland. The four applicants had been arrested and detained because they were suspected of being terrorists.[74] The court accepted that their arrest and detention was based upon a "*bona fide* suspicion that [they] were terrorist[s]."[75] Two of the applicants had previous convictions for acts of terrorism connected with the IRA and each of the applicants was questioned during his or her detention about specific terrorist acts of which he or she was suspected.[76] And as in Mr. Kajelijeli's case the United Kingdom contended that "it was unable to disclose the acutely sensitive material on which the suspicion against the three applicants was based because of the risk of disclosing the source of the material and thereby placing in danger the lives and safety of others."[77] The United Kingdom also stated that

> [A]lthough it could not disclose the information or identify the source of the information which led to the arrest of the applicants, there did exist in the case of the first and second applicants strong grounds for suggesting that at the time of their arrest the applicants were engaged in intelligence gathering and courier work for the Provisional IRA and that in the case of the third applicant there was available to the police material connecting him with the kidnapping attempt about which he was questioned.[78]

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[72] *Id.* art. 5(1)(c).

[73] *See* Fox v. United Kingdom, 13 Eur.H.R. Rep. 157 (1991) (Eur. Ct. H.R.).

[74] *Id.* at 159.

[75] *Id.* at 160.

[76] *Id.* at 159-60.

[77] *Id.* ¶ 33.

[78] *Id.*

Although the court noted that Article 5(1)(c) of the European Convention "should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organized terrorism," and that "Contracting States [could not] be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity," the court nevertheless held that it had to be able to "ascertain whether the essence of the safeguard afforded by Article 5(1)(c) [had] been secured."[79]

Consequently, the court in *Fox* held that the United Kingdom had to "furnish at least some facts or information capable of satisfying the [c]ourt that the arrested person was reasonably suspected of having committed the alleged offence."[80]

> The fact that [two of the applicants had] previous convictions for acts of terrorism connected with the IRA, although it could reinforce a suspicion linking them to the commission of terrorist-type offences, [could not] form the sole basis of a suspicion justifying their arrest . . . some seven years later. The fact that all of the applicants, during their detention, were questioned about specific terrorist acts [did] no more than confirm that the arresting officers had a genuine suspicion that they had been involved in those acts, but it [could not] satisfy an objective observer that the applicants may have committed these acts.[81]

Lastly, the court held that:

> The aforementioned elements on their own [were] insufficient to support the conclusion that there was "reasonable suspicion." The Government ha[d] not provided any further material on which the suspicion against the applicants was based. Its explanations therefore [did] not meet the minimum standard set by Article 5(1)(c) for judging the reasonableness of a suspicion for the arrest of an individual.[82]

The court, therefore, found that there had been a breach of Article 5(1) of the European Convention.[83]

Similarly, Mr. Kajelijeli's case involves very serious violations of international humanitarian law. As in *Fox*, international standards protecting the detained and the accused should not have been applied in such a manner as to put disproportionate difficulties in the way of the ICTR in taking measures to

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79 *Id.* ¶ 34.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

bring such violators to justice. In addition, like the authorities' asserted suspicion in *Fox,* perhaps there was a suspicion that Mr. Kajelijeli may have committed a crime within the ICTR's jurisdiction because he was found at the home of a man for whom it had issued an arrest warrant. Lastly, as was true in *Fox,* the Prosecutor stated that any information she may have possessed on or before Mr. Kajelijeli's arrest on June 5, 1998 to support the arrest was "peculiarly the province of the Prosecutor."[84] Nevertheless, the European Court found all of the above explanations insufficient to support arrests under Article 5(1)(c) of the European Convention. The United Kingdom had to provide some facts or information on which its "reasonable suspicion" was based and upon which it ordered the applicants' arrests. Because the United Kingdom was unable to or refused to provide such facts or information, the court found that there had been a breach of Article 5(1).[85] Likewise, the Prosecutor in Mr. Kajelijeli's case was unable to provide the facts and/or information she possessed on or before June 5, 1998, which formed the basis of Mr. Kajelijeli's arrest. Thus, as in *Fox,* the ICTR may have been in breach of not only its own rules but international standards as well.

III. THE RIGHT TO BE INFORMED OF REASONS FOR ARREST AT TIME OF ARREST, AND THE RIGHT TO BE "PROMPTLY" CHARGED

Under the Rome Statute—which, again, unlike the ICTR Statute and Rules, requires an arrest warrant before arresting a person—a person arrested in a custodial State, which was the case with Mr. Kajelijeli, shall be brought "promptly" before the competent judicial authority which shall determine that "the warrant applies to that person, [that t]he person has been arrested in accordance with the proper process, [and that t]he person's rights have been respected."[86] In addition, "within a reasonable time" after the person's surrender before the ICC, "the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial."[87] The Rome Statute does not define "reasonable time" for charging a detained person, nor is it exactly clear whether it articulates a right to be informed of the reasons for an arrest *at the time of arrest.*

With respect to "suspects" arrested in a custodial State, the ICTR Statute and Rules appear to be silent on the issue of the right to know the reason for arrest at the time of arrest and the right to be "promptly" charged. However, the ICTR Rules do speak to those rights in the context of "accused"

[84] *See* Prosecutor's Response to Supplementary Material, *supra* note 58, ¶ 45.

[85] *See Fox, supra* note 73, at 169.

[86] Rome Statute, *supra* note 4, at art. 59.

[87] *Id.* art. 61.

persons—again, persons, according to ICTR Rule 2(A), "against whom one or more counts in an indictment have been confirmed."[88]

First, with respect to "prompt" charging, an "accused" by definition is a person against whom a *charge* or an indictment has been made or confirmed at the time of arrest. The procedure under the ICTR Rules is that a "suspect" becomes an "accused" upon confirmation of an indictment against that person and upon confirmation, a judge may then issue an arrest warrant for that "accused."[89]

Second, with respect to an "accused" knowing the reasons for arrest at the time of arrest, ICTR Rule 55 mandates that the ICTR Registrar instruct arresting authorities to:

> (i) Cause the arrest of the accused and his transfer to the Tribunal; (ii) Serve [the warrant for arrest and order for surrender, the confirmed indictment and a statement of the rights of the accused, and if necessary a translation thereof in a language understood by the accused] upon the accused; (iii) Cause the documents to be read to the accused in a language understood by him and to caution him as to his rights in that language; and (iv) Return one set of the [above] documents together with proof of service, to the Tribunal.[90]

The facts with respect to whether Mr. Kajelijeli was informed of the reasons for his arrest at the time of his arrest on June 5, 1998 appeared to be undisputed. In his Application, Mr. Kajelijeli stated that when he was arrested, in spite of his insistence to know why he was arrested, all he was told was that the reasons for his arrest would be disclosed at a later date.[91] In response, the Prosecutor contended that, "[i]n any case, the Authorities in Benin should have explained to [Mr. Kajelijeli] why he was being arrested."[92] Thus, the Prosecutor submitted no contrary evidence on the issue of whether or not Mr. Kajelijeli was, in fact, informed of the reasons for his arrest at the time of his arrest in Benin on June 5, 1998.

ICCPR Article 9(2) has several requirements including that "[e]very person who is arrested . . . must be informed of the reasons."[93] "When an arrest is made pursuant to criminal justice, the person arrested must be promptly informed of the charges lodged against him or her."[94] Once the person concerned has been charged with a criminal act, she or he is to be

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[88] *See* Rules, *supra* note 35, at R. 2(A).

[89] *Id.* at R. 47(H)(ii).

[90] *Id.* at R. 55(B) and (C).

[91] *See* Application, *supra* note 11, ¶ 1.1.

[92] *See* May 2000 Decision, *supra* note 11, ¶ 26.

[93] Nowak Commentary, *supra* note 63, at 174.

[94] *Id.*

informed pursuant to ICCPR Article 14(3)(a) "promptly and in detail in a language which he understands of the nature and the cause of charge against him."[95] Specifically, Article 9(2) provides: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."[96] "Initial information must be provided at the time of arrest."[97] "Subsequent information, which is to be provided promptly . . ., must contain the specific accusations in a legal sense, enabling the person concerned to submit a well-founded application for remand."[98] Thus, ICCPR Article 9(2) requires that notification of the reasons for arrest must take place at the time of the arrest. Specific charges are to be made promptly.[99]

In the case of Mr. Kajelijeli, the Prosecutor did not contest that Mr. Kajelijeli was not informed of the reasons for his arrest *at the time of his arrest.* She conjectured that the Benin Authorities should have explained to Mr. Kajelijeli why he was being arrested. The Human Rights Committee has held that "[i]n the absence of any State party information to the effect that the author *was* promptly informed of the reasons for his arrest" the Committee would have to rely on the statement of the accused.[100] Mr. Kajelijeli stated that upon his arrest he was not told the reasons for his arrest. He was told that he would find out the reasons at a later date. Thus, Mr. Kajelijeli's right to be informed, at the time of his arrest, of the reasons for his arrest was arguably violated.

And is also unclear why the Prosecutor attempted to pass the blame and the responsibility for this lapse on to the Benin Authorities. It was undisputed that the Benin Authorities did not arrest Mr. Kajelijeli of their own accord. Trial Chamber II found that the "Benin Authorities rendered assistance to the Prosecutor and arrested [Mr. Kajelijeli] upon a request from the Prosecutor."[101] Therefore, it was the Prosecutor's responsibility, not the Benin Authorities', to ensure that Mr. Kajelijeli was promptly informed of the reasons for his arrest at the time of his arrest. Mr. Kajelijeli was not so informed and this was arguably incompatible with international law.

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95 *Id.*

96 ICCPR, *supra* note 61, art. 9(2).

97 NOWAK COMMENTARY, *supra* note 63, at 175.

98 *Id.*

99 *Id.* at 165.

100 Clifford McLawrence v. Jamaica, 702/1996, 29 September 1997, U.N. Human Rights Comm., 60th Sess. 702nd mtg., at ¶5.5, U.N. Doc. CCPR/C/60/D/702/1996 (1996) (holding that the author was only apprised of the charges for his until almost arrest three weeks after his arrest which is incompatible with ICCPR Art. 9(2)).

101 *See* May 2000 Decision, *supra* note 11, ¶ 33.

With respect to any criminal charges, specific charges are to be made *promptly*. Interpreting the word "promptly," the Human Rights Committee has held that a delay of even a few days in bringing charges and informing a detainee of them is incompatible with the requirements of ICCPR Article 9(2).[102] With respect to Mr. Kajelijeli, charges were brought against him on August 29, 1998 and before his transfer from Benin to the Tribunal on September 9, 1998—three months after he had been arrested in Benin—he was served with a warrant of arrest, a copy of the redacted Indictment and an Order for non-disclosure of the indictment.[103] That was the earliest that he could have been informed of any charges against him. Detaining a person for close to three months without charge, and without informing a person of the charges against them, appears to be in violation of international law. Thus, arguably both Mr. Kajelijeli's right to be informed, at the time of his arrest, of the reasons for his arrest, and his right to be "promptly" charged were violated.

IV. The Right to be Informed in Detail in a Language One Understands of the Nature and Cause of Any Charges

According to the ICC Rules of Procedure and Evidence, the ICC shall take measures to ensure that it is informed of the arrest of a person in response to a request made by it under Rome Statute articles 89 or 92, i.e., a request made to any State on the territory of which that person is found.[104]

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[102] *See* Peter Grant v. Jamaica, U.N. Human Rights Comm., 56th Sess., 597th mtg, at ¶ 8.1, U.N. Doc. CCPR/C/56/D/597/1994 (holding that there was a violation of ICCPR art.9(2) because the author was informed of the charges against him after seven days); Patrick Taylor v. Jamaica, U.N. Human Rights Comm., 60th Sess., 707th mtg, at ¶ 8.3, U.N. Doc. CCPR/C/60/D/707/1996 (holding that to detain author for a period of 26 days without charge was a violation of ICCPR art. 9(2)); Clifford McLawrence v. Jamaica, U.N. Human Rights Comm., 60th Sess., 702nd mtg, at ¶ 5.5, U.N. Doc. CCPR/C/60/D/702/1996 (1996) (holding that author was only apprised of the charges for his arrest until almost three weeks after his arrest which is incompatible with ICCPR art.9(2)); McCordie Morrison v. Morrison, U.N. Human Rights Comm., 64th Sess., 663rd mtg, at ¶ 8.2, U.N. Doc. CCPR/C/64/D/663/1995, (holding that a delay of nine days before informing a person who is arrested of the charges against him constitutes a violation of ICCPR art. 9(2)); Everton Morrison v. Jamaica, U.N. Human Rights Comm., 63rd Sess., 635th mtg, at ¶ 21.2, U.N. Doc. CCPR/C/63/D/635/1995 (holding that a delay of three or four weeks in charging the author is in violation of ICCPR arts.9(2) and (3)); Juan Jijón v. Ecuador, U.N. Human Rights Comm., 44th Sess., 277th mtg, at ¶ 5.3, U.N. Doc. CCPR/C/44/D/277/1988 and Paul Kelly v. Jamaica, U.N. Human Rights Comm., 41st Sess., 253rd mtg, at ¶ 5.8, U.N. Doc. CCPR/C/41/D/253/1987 (holding that there were violations of ICCPR Article 9(2) because the delays exceeded a few days).

[103] *See* May 2000 Decision, *supra* note 11, ¶ 42.

[104] ICC Rules of Procedure and Evidence, Rule 117(1), at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/724/06/PDF/N0072406.pdf?OpenElement (last visited March 13, 2003) [hereinafter ICC Rules].

Once so informed, the ICC shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute.[105] The documents shall be made available in a language that the person fully understands and speaks.[106] In addition, Rome Statute article 67(1) provides that

> [I]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) *To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks* . . . .[107]

Under the ICTR Statute, as an "accused," Mr. Kajelijeli had the right "[t]o be informed promptly and in detail in a language which he . . . [understood] of the nature and cause of the charge against him . . . ."[108] Also, the ICTR Rules provide that the ICTR Registrar shall instruct the arresting authorities to "[s]erve [the warrant for arrest and order for surrender, the confirmed indictment and a statement of the rights of the accused, and if necessary a translation thereof in a language understood by the accused] upon the accused" and "[c]ause the documents to be read to the accused in a language understood by him and to caution him as to his rights in that language;. . . ."[109] In its May 2000 Decision, Trial Chamber II found that Mr. Kajelijeli, as an "accused," was "served with a warrant of arrest, a copy of the redacted [i]ndictment and an [o]rder for non-disclosure of the indictment," and therefore "was notified about the charges against him."[110] Additionally, the Trial Chamber found that Mr. Kajelijeli was served with a confirmed indictment while he was still in Benin, "thus he was promptly informed of the charges against him."[111] Finally, Trial Chamber II found that the indictment was also "read out" to Mr. Kajelijeli at his initial appearance.[112] There were several problems with this holding.

Mr. Kajelijeli was indeed presented with a "[c]onfirmation and non-disclosure indictment," "[w]arrant of arrest and order for surrender" and "Acte d'Accusation amende caviarde" (redacted and amended indictment) before

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105 *Id.*

106 *Id.*

107 Rome Statute, *supra* note 4, art. 67(1)(a) (emphasis added).

108 Statute, *supra* note 16, art. 20(4)(a).

109 Rules, *supra* note 35, R. 55(C) (referring back to Rule 55(8)).

110 May 2000 Decision, *supra* note 11, ¶ 42.

111 *Id.*

112 *Id.*

his transfer to the ICTR.[113] However, both the "[c]onfirmation and non-disclosure indictment" and the "[w]arrant of arrest and order for surrender" were in English, a language Mr. Kajelijeli does not understand.[114] And the redacted and amended indictment, although in French, was redacted as to Mr. Kajelijeli.[115] Thus, in the indictment, Mr. Kajelijeli was not able to find any mention of his name or what offense, if any, he may have committed.[116] Therefore, although Mr. Kajelijeli might have been handed the appropriate documents on the eve of his transfer to the ICTR on September 9, 1998, this does not satisfy the ICTR Statute and Rules which required that the documents be in a language that Mr. Kajelijeli understood and also read to him in a language he understood so that they could have provided him with adequate "notice" as to the charges against him. Further, it was not sufficient to state that the indictment was "read out" to Mr. Kajelijeli at his initial appearance since his initial appearance occurred 210 days after he had been transferred to Arusha. That could not meet the requirement of being "promptly" informed.

Moreover, with respect to the issue of the redacted indictment and the fact that Mr. Kajelijeli was presented with an indictment which was redacted as to his name and any offense that he might have committed, Trial Chamber II stated "redaction is aimed at the public."[117] However, it was not only the public that was kept in the dark about the details of the indictment. Mr. Kajelijeli, an indictee, was also unaware of what charges had been filed against him. Further, Trial Chamber II stated that, in any case, "the Defen[s]e Counsel acknowledges that there was in fact no irregularity with the indictment."[118] That was incorrect. Defense counsel explicitly made it clear to the Trial Chamber that he was not contesting the *integrity* of the indictment but rather was challenging whether the indictment could have provided notice to Mr. Kajelijeli if it was redacted as to any information concerning him.[119] Thus, the Defense indeed complained that the redacted indictment, redacted as to Mr. Kajelijeli, even though written in a language Mr. Kajelijeli could understand, provided inadequate notice as to the charges against him.[120] To hold that an indictment redacted as to any information concerning the accused suffices under the ICTR Statute and Rules to provide

113 *Id.* ¶ 10.

114 *Id.*

115 *Id.*

116 *See* Application, *supra* note 11, ¶ 1.5.

117 *See* May 2000 Decision, *supra* note 11, ¶43.

118 *Id.*

119 *See* Transcript, *supra* note 52, at 63:24-64:19.

120 *Id.*

the accused with knowledge of the nature and cause of the charges against him or her seems illogical and, more importantly, appears not to comport with international law.

As explained above, once a person has been charged with a criminal act, ICCPR Article 14(3)(a) is triggered.[121] The duty to inform under Article 14(3)(a) is more precise and comprehensive than that for arrested persons under ICCPR Article 9(2).[122] ICCPR Article 14(3)(a) provides that, "[i]n the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[123] In order to comply with fair trial rights, the notification of charges before trial must be "in detail" and must provide information about the "nature and cause of the charges" against the accused. "Nature and cause of a criminal charge means not only the exact legal description of the offence but also the facts underlying it. This information must be sufficient to allow preparation of a defense pursuant to Article 14(3)(b)."[124] This information may be provided either orally or in writing.[125] Information must be given in a language the accused person understands.[126]

In the case of Mr. Kajelijeli, the only document presented to him in a language he understood, was the redacted and amended indictment. It was not "in detail" and it did not provide him with any information as to the "nature and cause of the charges" against him, as it was, in fact, redacted as to any information having to do with Mr. Kajelijeli. Mr. Kajelijeli could not find his name in the indictment. Any legal descriptions of offences and facts underlying them were redacted as to Mr. Kajelijeli. Accordingly, under international law, Mr. Kajelijeli may have been handed the appropriate documents at the appropriate time, but it appeared that he was not informed in detail in a language which he understood of the nature and cause of the charges against him. Mr. Kajelijeli's fundamental right to be so informed, therefore, was arguably violated.

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121 *See* ICCPR, *supra* note 61, art. 14(3).

122 *See* Clifford McLawrence, *supra* note 103, para. 5.9.

123 ICCPR, *supra* note 61, art. 14(3)(a).

124 *Id.*

125 *See* Human Rights Committee, General Comment 13, ¶ 8.

126 ICCPR, *supra* note 61, art. 14(3)(a).

V. THE RIGHT TO HAVE AN INITIAL APPEARANCE AND BE FORMALLY CHARGED BEFORE A TRIAL CHAMBER "WITHOUT DELAY"

The Rome Statute provides that within a "reasonable time" after the person's surrender before the ICC, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.[127] Such hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.[128] "Reasonable time" is not defined.

ICTR Rule 62 concerning an accused's initial appearance, like the rules on the assignment of counsel, is a status-based rule. Rule 62 is triggered by the status of a person and the occurrence of a particular event. Specifically, Rule 62(A) provides that: "Upon his *transfer* to the Tribunal, the *accused* shall be brought before a Trial Chamber or a Judge thereof *without delay*, and shall be formally charged."[129]

With respect to the right to have an initial appearance and be formally charged before a Trial Chamber "without delay," the undisputed facts were that Mr. Kajelijeli was transferred to the ICTR, as an accused, on September 9, 1998, and his initial appearance was not until 210 days later, on April 7 and 8, 1999.[130] In the May 2000 Decision, Trial Chamber II raised the same argument for why Mr. Kajelijeli's initial appearance was delayed as it did for why assignment of counsel for Mr. Kajelijeli was delayed (which is discussed, *infra*, Part VI). Trial Chamber II held that "[i]t is also on record that the Accused contributed to the delay in the assignment of Counsel in this case and he stands to blame for the delay in his initial appearance, which is intertwined to the issue of the assignment of Counsel."[131]

Trial Chamber II appeared to have adopted rules of procedure for an initial appearance that are not provided for either in the ICTR Statute or Rules. Nowhere in ICTR Rule 62 concerning the "Initial Appearance of Accused and Plea," does it provide that the accused must be assigned counsel first before he or she can have an initial appearance. The occurrence or scheduling of an accused's initial appearance is not dependent upon whether counsel has been assigned.[132] Presumably, if the ICTR Registry complies with the Rules, if an accused is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused until counsel is either engaged by the ac-

127 Rome Statute, *supra* note 4, art. 61(1).

128 *Id.*

129 Rules, *supra* note 35, R. 62. (emphasis added).

130 *See* May 2000 Decision, *supra* note 11, ¶ 11.

131 *Id.* ¶ 45.

132 *See* Rules, *supra* note 35, R. 62.

cused or assigned under Rule 45—indigence process.[133] However, there is no correlation between the assignment of counsel and the occurrence of an accused's initial appearance and there is no requirement that counsel be assigned in order for an accused to have an initial appearance under Rule 62. Nor does Rule 62 require that an accused be "co-operative" before he or she can be formally charged and brought before a Trial Chamber for his or her initial appearance. These seemed to have been extraneous and arbitrary requirements that Trial Chamber II adopted.

Ironically, at a hearing, the Prosecutor in Mr. Kajelijeli's case went to great lengths to demonstrate why an initial appearance before the ICTR was not as important as an arraignment or initial appearance in national jurisdictions.[134] All that her explanation might have done, however, was to demonstrate precisely *why* an initial appearance before a Tribunal is, in fact, very important and was very important in Mr. Kajelijeli's case.[135]

For example, the Prosecutor explained that the arraignment process is important in national jurisdictions and not as important before international tribunals because in national jurisdictions, that is when "an accused is assigned an attorney if he is indigent."[136] The Prosecutor pointed out that in Mr. Kajelijeli's case, "initiatives were being taken to assign Mr. Kajelijeli counsel soon after he was transferred to Arusha."[137] Further, the Prosecutor explained that the initial appearance or arraignment is important in national jurisdictions because it is usually during the initial appearance or the arraignment "that the accused is apprised of the nature of the charges against him."[138] Again, in Mr. Kajelijeli's case, the Prosecutor pointed out that he "was served with a copy of the indictment against him" when he was being transferred from Benin to Arusha.[139]

What is ironic about this explanation is that Mr. Kajelijeli made his *pro se* Application in November 1998, two months after he had arrived in Arusha, precisely because he had not yet been assigned any counsel, including duty counsel, and because he had been served with an indictment that had been redacted as to him and he had not yet been brought before a Trial Chamber for his initial appearance. Had Mr. Kajelijeli made his initial appearance before a Trial Chamber "without delay" after his transfer to the ICTR, he would have been able to express these complaints directly to the

133 *See* Rules, *supra* note 35, R. 44 *bis* (D).

134 *See* Transcript, *supra* note 52, at 36:12-40:8.

135 *Id.*

136 *Id.* at 36:22-23.

137 *Id.* at 36:25-37:3.

138 *Id.* at 37:5-6.

139 *Id.* at 37:8-10.

Trial Chamber and the Trial Chamber might have been able to assist him with having his right to counsel respected and might have been able to obtain and have read to him an unredacted indictment in a language he spoke and understood. Indeed, the purpose of ICTR Rule 62 is to ensure that the Trial Chamber or the judge shall:

> (i) Satisfy itself or himself that the right of the accused to counsel is respected; (ii) Read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself or himself that the accused understands the indictment; (iii) Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf; (iv) In case of a plea of not guilty, instruct the [r]egistrar to set a date for trial.[140]

The Trial Chamber was unable to assist Mr. Kajelijeli with his lack of representation and with the fact that he had not been apprised of the charges against him, precisely because he was not brought before a Trial Chamber without delay.

So it is ironic that the Prosecutor would base her reasoning for why an initial appearance was not important in Mr. Kajelijeli's case, and is generally not important before an international, as opposed to a national tribunal, on the grounds that the rules had been complied with—the accused was in the process of being assigned counsel and had been served with a copy of the indictment—when it was clear from Mr. Kajelijeli's November 9, 1998 Application, and the fact that he had to file an application and file it *pro se*, that that was not the case and the very purpose of an initial appearance is so that the Trial Chamber or a Judge can satisfy itself or him or herself that an accused's rights have not been trampled on. ICTR Rule 62 exists so that neither the Prosecutor's nor the Registrar's assurances have to be relied upon. The Trial Chamber or a judge thereof is entrusted with the responsibility to satisfy it or him or herself that an accused's rights are being respected.

Again, had Mr. Kajelijeli had a prompt initial appearance, the purpose of an initial appearance would have been served. The Trial Chamber would have been able to satisfy itself that Mr. Kajelijeli's right to counsel was, in fact, not being respected and that he, in fact, needed to have an unredacted indictment read to him in a language he spoke and understood. In Mr. Kajelijeli's case and generally, an initial appearance was and is crucial. Moreover, it is not for the Prosecutor to decide whether and under what circumstances an initial appearance is necessary. ICTR Rule 62 provides that the occurrence of an event (i.e., transfer to the ICTR), and the status of a person (namely that of an "accused") triggers the right to an initial appear-

[140] Rules, *supra* note 35, at R. 62(A).

ance "*without delay*." Under ICTR Rule 62, the analysis stops there, and the Trial Chamber's analysis should have stopped there as well. Arguably, a delay of 210 days before an initial appearance is inconsistent with international law.

ICCPR Article 9(3) provides that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."[141] While no time limits are expressly stated and they are to be determined on a case-by-case basis, the Human Rights Committee has stated that, "delays must not exceed a few *days*."[142] The jurisprudence of the Committee interpreting Article 9(3) bears this out.[143] In Mr. Kajelijeli's case, the delay was close to seven months. This appears to be inconsistent or incompatible with the requirements of international law.

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[141] ICCPR, *supra* note 61, art. 9(3).

[142] Human Rights Committee, General Comment 8, ¶ 2 (emphasis added).

[143] *See* Silbert Daley v. Jamaica, 750/1997, 3 August 1998, U.N. Doc. CCPR/C/63/D/750/1997, ¶ 7.1 (holding that a delay of six weeks in bringing an arrested person before a judge cannot be deemed compatible with the requirements of ICCPR Article 9(3)); Clarence Marshall v. Jamaica, 730/1996, 25 November 1998, U.N. Doc. CCPR/C/64/D/730/1996, ¶ 6.1 (holding that to detain the author for a period of three weeks without bringing him before a judge was a violation of ICCPR Article 9(3)); Patrick Taylor v. Jamaica, 707/1996, 15 August 1997, U.N. Doc. CCPR/C/60/D/707/1996, ¶ 8.3 (holding that the failure of Jamaica to bring the author before the Court during the twenty-six days of detention and not until three days after his re-arrest was a violation of ICCPR Article 9(3)); Steve Shaw v. Jamaica, 704/1996, 4 June 1998, U.N. Doc. CCPR/C/62/D/704/1996, ¶ 7.3 (holding that a delay of three months before being brought before a judge or judicial officer constitutes a violation of ICCPR Article 9(3)); Clifford McLawrence v. Jamaica, 702/1996, 29 September 1997, U.N. Doc. CCPR/C/60/D/702/1996, ¶ 5.6 (holding that a delay of one week could not be deemed compatible with ICCPR Article 9(3)); McCordie v. Morrison, 663/1995, 25 November 1998, U.N. Doc. CCPR/C/64/D/663/1995, ¶ 8.2 (holding that a delay of more than nine days before bringing the author before a judge or judicial officer constituted a violation of the requirement of ICCPR Article 9(3)); Winston Forbes v. Jamaica, 649/1995, 25 November 1998, U.N. Doc. CCPR/C/64/D/649/1995, ¶ 7.2 (holding that to detain the author for a period of fourteen days before bringing him before a competent judicial authority constituted a violation of ICCPR Article 9(3)); Anthony Leehong v. Jamaica, 613/1995, 12 August 1999, U.N. Doc. CCPR/C/66/D/613/1995, ¶ 9.5 (holding that three months to bring an accused before a magistrate does not comply with the minimum guarantees required by the ICCPR and, therefore, constitutes a violation of ICCPR Article 9(3)); Peter Grant v. Jamaica, 597/1994, 10 April 1996, U.N. Doc. CCPR/C/56/D/597/1994, ¶ 8.2 (holding that a period of seven days between the author's arrest and his being brought before a judge was too long and constitutes a violation of ICCPR Article 9(3) and, to the extent that this prevented the author from access to the court to have the lawfulness of his detention determined, of Article 9(4)); Trevor Bennett v. Jamaica, 590/1994, 10 May 1999, U.N. Doc. CCPR/C/65/D/590/1994, ¶ 10.4 (holding that to detain the author for a period of four weeks before bringing him before a competent judicial authority constituted a violation of ICCPR Article 9(3)).

VI. THE RIGHT TO COUNSEL

The Rome Statute provides for the right to legal assistance, and further, the right to legal assistance "without payment" if a person does not have sufficient means to pay for counsel.[144] ICC Rule 21 also provides for the process by which legal assistance is assigned.[145]

Under the ICTR's Statute, its Rules, and the ICTR's "Directive on the Assignment of Defence Counsel,"[146] entitlement to counsel is based upon the status of a person, such as "suspect" or "accused," as well as the occurrence of a particular event, such as "transfer," "questioning," or "the personal service of an indictment." Article 17(3) of the ICTR Statute provides that

> *If questioned*, the *suspect* shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.[147]

An accused, under the Statute, has the right

> [t]o be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.[148]

Likewise, ICTR Rule 42(A) provides that "[a] *suspect* who is to be *questioned* by the Prosecutor shall have . . . the right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it."[149] According to ICTR Rule 40(B) and (C), if, under Rule 40(A)(i), the Prosecutor requests a State to arrest a "suspect" and place him in custody, and upon showing that a major impediment does not allow the State to keep the "suspect" in custody or to take all necessary measures to prevent his escape, the Prosecutor applies for an order to transfer the "suspect" to the seat of the ICTR or to such other place as the Bureau may decide and to detain him provisionally, the "sus-

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144 Rome Statute, *supra* note 4, arts. 55(2)(c), 67(1)(d).

145 *See* ICC Rules, *supra* note 104, R. 21.

146 *See* Directive on the Assignment of Defence Counsel, *available at* http://www.ictr.org/wwwroot/ENGLISH/basicdocs/directiveadc.htm (last amended July 1, 1999) [hereinafter Directive].

147 Statute, *supra* note 16, art. 17(3) (emphasis added).

148 *Id.* art. 20(4)(d).

149 Rules, *supra* note 35, R. 42(A) (emphasis added).

pect" shall enjoy all the rights provided for in Rule 42, including the right to counsel, from the moment of his transfer.[150]

Lastly, Article 2 of the Directive provides that

> Without prejudice to the right of an accused to conduct his own Defence, a *suspect* who is to be *questioned* by the Prosecutor during an investigation, and an *accused* upon whom personal service of the indictment has been effected shall have the right to be assisted by Counsel provided that he has not expressly waived his right to Counsel.[151]

Therefore, there are numerous provisions under the ICTR's Statute, Rules and Directive confirming a right to counsel for both "suspects" and "accused" under certain circumstances.

With respect to the right to counsel, generally, the undisputed facts were that Mr. Kajelijeli was transferred to the seat of the ICTR in Arusha without representation and remained in custody for 147 days before defense counsel was assigned. In the May 2000 Decision, Trial Chamber II blamed Mr. Kajelijeli for the delay in assigning counsel.[152] It found that Mr. Kajelijeli "frustrated [serious efforts to secure an assigned Counsel for him] by selecting Counsel whose names were not on the Registrar's drawn up list," and that therefore, it was its view that Mr. Kajelijeli "contributed to the delay of the assignment of counsel."[153] The Trial Chamber consequently held that Mr. Kajelijeli "himself abused his right to Counsel by not following the established procedure on the assignment of Counsel."[154] The error of this holding was twofold: 1) the right to counsel is a status-based right, the entitlement to which is not dependent upon any particular conduct or behavior of a person; and 2) the Trial Chamber applied an erroneous procedure for the assignment of counsel to an indigent accused.

According to the record in Mr. Kajelijeli's case, on June 12, 1998, as an alleged "suspect," he was questioned. Consequently, as a "suspect to be questioned," under Article 17(3) of the ICTR Statute, ICTR Rule 42(A) and the Directive, Article 2, as described above, Mr. Kajelijeli had the right to counsel and to be informed of such right prior to questioning. The record reflected, and defense counsel conceded, that prior to his June 12, 1998 questioning, Mr. Kajelijeli was informed of his right to counsel and for the purposes of that interview, "voluntarily" waived his right to counsel.[155]

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150 *See id.* R. 40(B), (C).

151 Directive, *supra* note 146, art. 2. (emphasis added).

152 *See* May 2000 Decision, *supra* note 11, ¶¶ 40-41.

153 *Id.* ¶ 40.

154 *Id.* ¶ 41.

155 *Id.* ¶ 39.

On August 29, 1998, upon confirmation of the indictment against him, Mr. Kajelijeli's status changed from "suspect" to "accused."[156] And, once an "accused," Mr. Kajelijeli had the right

> [t]o be tried in his . . . presence, and to defend himself . . . in person or through legal assistance of his . . . choosing; to be informed, if he . . . [did] not have legal assistance, of this right; and to have legal assistance assigned to him . . . in any case where the interest of justice so require[d], and without payment by him . . . in any such case if he . . . [did] not have sufficient means to pay for it.[157]

On or about September 9, 1998, when personal service of the indictment had been effected upon Mr. Kajelijeli, as an accused, he had the right to be assisted by counsel provided that he had not expressly waived his right to counsel.[158] There was no evidence in the record to suggest that as an "accused" Mr. Kajelijeli expressly waived his right to counsel. Indeed, in his November 9, 1998 *pro se* Application, Mr. Kajelijeli explicitly complained that he was without counsel.[159] Thus, on or about September 9, 1998, as "an accused upon whom personal service of an indictment had been affected," Mr. Kajelijeli arguably was entitled to the assistance of counsel.

Mr. Kajelijeli's exercise of this right was not dependent upon any particular conduct or behavior on his part. Mr. Kajelijeli's right to be assisted by counsel was triggered when he allegedly had the status of a "suspect to be questioned" and was triggered again when he became an "accused upon whom personal service of an indictment had been effected."

Further, Trial Chamber II arguably applied, as did the ICTR Registry, an erroneous procedure for the assignment of counsel to an indigent accused. The ICTR Rules and the Directive outline the correct procedure. According to ICTR Rule 45(C) concerning the assignment of counsel,

> In assigning counsel to an indigent suspect or accused, the following procedure shall be observed: (i) A request for assignment of counsel shall be made to the Registrar; (ii) The Registrar shall enquire into the financial means of the suspect or accused and determine whether the criteria of indigence are met; (iii) If he decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.[160]

According to the Directive: 1) a "suspect or accused . . . who wishes to be assigned Counsel shall make a request to the Registrar of the Tribunal

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156 *See* Rules, *supra* note 35, R. 47(H)(ii).

157 Statute, *supra* note 16, art. 20(4)(d).

158 *See* Directive, *supra* note 146, art. 2.

159 *See* Application, *supra* note 11, ¶¶ 2.1-2.2.

160 Rules, *supra* note 35, R. 45(C).

. . .";[161] 2) a "suspect or accused who requests the assignment of Counsel, must fulfill the requirement of indigence as defined in Article 4";[162] and 3)

> [a]fter examining the declaration of means laid down in Article 7 and relevant information obtained pursuant to Article 9, the Registrar shall determine if the suspect or accused is indigent or not, and shall decide: (i) Without prejudice to Article 18, either to assign Counsel *and choose for this purpose a name from the list drawn up in accordance with Article 13*; or (ii) Not to grant the request for assignment of Counsel, in which case the decision shall be accompanied by a written explanation giving reasons therefor.[163]

Thus, under the ICTR Rules and the Directive, it is the ICTR's Registrar who assigns counsel to the indigent accused — "he shall [either] assign counsel from the list" or "assign counsel and choose for this purpose a name from the list drawn up in accordance with Article 13."[164] Although the Registrar can certainly arbitrarily decide to include an indigent accused in the process of assigning counsel, neither the ICTR's Rules nor its Directive provide for his or her participation. An "indigent accused" is not involved in the decision of who is assigned to his or her case. The responsibilities of the accused are to request assignment of counsel and to provide evidence of indigence. After the Registrar is satisfied that those two requirements have been met, the assignment process is the responsibility of the Registrar and the length of time it takes to assign counsel, and whether or not counsel is actually assigned, is solely the responsibility of the Registrar.

In Mr. Kajelijeli's case, according to Trial Chamber II and the Prosecutor, Mr. Kajelijeli requested assignment of counsel based upon indigence. One can infer from the fact that the ICTR Registry began the process of appointing counsel, that, in accordance with the Rules and the Directive, Mr. Kajelijeli submitted his financial information within a reasonable time, that the Registrar examined such information, determined that the criteria of indigence had been met and decided to assign counsel to Mr. Kajelijeli. Thereafter, there were no other requirements for Mr. Kajelijeli, and he should not have had anything to do with the process. There is nothing in the ICTR's Rules or the Directive about the Registrar preparing a short list of counsel and requiring an accused to select a name off of that list or off of the entire list kept by the Registrar under Article 13, before counsel can be assigned. No such procedure exists and it was arguably arbitrary for the Registrar to include those steps in the process. It was also problematic that Trial Cham-

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161 Directive, *supra* note 146, art. 5.

162 *Id.* art. 6.

163 *Id.* art. 10(A) (emphasis added).

164 Directive, *supra* note 146, art. 10(a)(i); Rules, *supra* note 35, R. 45(C)(iii).

ber II accepted any such procedure and concluded that somehow Mr. Kajelijeli was to blame for the delay in the assignment of counsel because he had not been "cooperative" in the process assuming, arguendo, that Mr. Kajelijeli was uncooperative. The Registrar should have assigned Mr. Kajelijeli counsel off of its Article 13 list once it had determined that Mr. Kajelijeli met the criteria of indigence. In summary, the fact that Mr. Kajelijeli was detained at the ICTR for 147 days without representation could not be blamed on Mr. Kajelijeli, and arguably was in violation of the ICTR's Statute, its Rules, the Directive, as well as international law.

ICCPR Article 14(3)(d) provides that

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.[165]

A systematic interpretation of ICCPR Article 14(3)(d), including the *travaux préparatoires*, tends to lead to the following result:

> Everyone charged with a criminal offence has a primary, unrestricted right to be present at the trial and to defend himself. However, he can forego this right and instead make use of defence counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defence counsel by the court at no cost, insofar as this is necessary in the interest of administration of justice. Whether the interests of justice require the State to provide for effective representation by counsel depends primarily on the seriousness of the offence and the potential maximum punishment. The Committee found, e.g., that fines of 1,000 Norwegian krones for two traffic violations did not require the assignment of a lawyer at the expense of the State, whereas in a capital case it was 'axiomatic' that legal assistance be available. Although the accused in principle has no influence on the selection of a counsel assigned to him under a legal aid scheme, he may at any time make use of the right to defend himself when an ex-officio counsel is appointed against his will (e.g., in military court trials).[166]

[165] ICCPR, *supra* note 61, art 14(3)(d).

[166] NOWAK COMMENTARY, *supra* note 63, at 259-260.

In addition, the Human Rights Committee has stated that all persons arrested must have *immediate* access to counsel.[167] Therefore, as an indigent accused who was to have counsel assigned to him "under a legal aid scheme," Mr. Kajelijeli was to have no influence on the selection process. He could have chosen to defend himself if he did not want to be represented by counsel assigned by the ICTR. Nevertheless, with respect to the actual *assignment* of defense counsel by the ICTR, according to the ICTR Statute, Rules, Directive and international law, Mr. Kajelijeli was to have no role in the selection of counsel. There should have been nothing for him to obstruct. Mr. Kajelijeli was assigned counsel *147 days* after his transfer to Arusha. In the interim, he was unrepresented. This, arguably, was not in accordance with international law.

Further, even assuming that an indigent accused is involved in the assignment process and somehow "frustrates" the efforts of the Registrar to assign him or her permanent counsel, the ICTR's Rules and the Directive very clearly provide for *interim counsel* until permanent counsel can either be engaged or assigned. ICTR Rule 44 *bis* (D): Duty Counsel, provides: "If an accused or suspect transferred under Rule 40 *bis*, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45."[168] In addition, Articles 10(B) and 10 *bis* of the Directive provide: 1) "To ensure that the right to Counsel is not affected while the Registrar examines the declaration of means laid down in Article 7 and the information obtained pursuant to Article 9, the Registrar may temporarily assign Counsel to a suspect or accused for a period not exceeding 30 days"; and, 2) "If a suspect or accused, (i) Either requests an assignment of Counsel but does not comply with the requirement set out above within a reasonable time; or (ii) Fails to obtain or to request assignment of Counsel, or to elect in writing that he intends to conduct his own defen[s]e, the Registrar may nevertheless assign him Counsel in the interests of justice in accordance with Rule 45(E) of the Rules and without prejudice to Article 18."[169]

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[167] *See Concluding Observations of the Human Rights Committee: Georgia 1 April 1997* ¶ 27, U.N. Doc. CCPR/C/79/Add.74 (1997) (stressing that all persons who are arrested must immediately have access to counsel); *UN Human Rights Committee, General Comment 20* ¶ 11 (stating that the protection of the detainee requires that prompt and regular access be given to lawyers). *See also* Paul Anthony Kelly v. Jamaica, 537/1993, 29 July 1996, CCPR/C/57/D/537/1993, at ¶ 9.2 (finding that the author's right to communicate with counsel under ICCPR Article 14(3)(b) was violated because police officers ignored his request for *five* days).

[168] Rules, *supra* note 35, at R. 44 *bis* (D).

[169] Directive, *supra* note 146, arts. 10(B) and 10 *bis*.

On or about September 9, 1998, Mr. Kajelijeli was transferred to Arusha, as an accused, and at the time, he was unrepresented. According to ICTR Rule 44 *bis* (D), it was mandatory for the Registrar to summon duty counsel as soon as practicable after Mr. Kajelijeli had been transferred to Arusha. Thus, Mr. Kajelijeli had the explicit right to be represented by duty counsel as soon as practicable after September 9, 1998 until permanent counsel was assigned which took place on February 2, 1999. Moreover, according to Directive Article 10(B), during the Registrar's examination of Mr. Kajelijeli's financial means, temporary counsel could have been assigned in addition to or in place of the duty counsel that should have been summoned for Mr. Kajelijeli upon his transfer to Arusha. Also, according to Directive Article 10 *bis*, if Mr. Kajelijeli had failed to obtain counsel or to request assignment of counsel or did not comply with the submission of financial information within a reasonable time or failed to elect in writing his intent to conduct his own Defense,[170] the Registrar could have assigned him permanent counsel in the interests of justice again to replace the duty counsel that should have been summoned for Mr. Kajelijeli upon his transfer to Arusha. Thus, notwithstanding the Registrar's discretionary authority to assign either temporary or permanent counsel under the particular circumstances outlined in Article 10(B) and 10 *bis*, there was no explanation for why duty counsel, under Rule 44 *bis*, was not summoned to represent Mr. Kajelijeli until permanent counsel was either engaged or assigned. Furthermore, ICTR Rule 44 *bis* (D) and Directive Articles 10(B) and 10 *bis* very clearly illustrate the concern of the Directive and Rules that an indigent accused's right to counsel not be affected or interrupted while the process of assigning counsel takes place. According to the record before the Trial and Appeals Chambers, duty counsel was never provided for Mr. Kajelijeli. In fact, the Registry, in their submission to Trial Chamber II, stated "the LDFMS began the process of appointing a Duty Counsel to represent him but the Accused did not follow established procedure for assignment of Counsel and several factors delayed the actual assignment of Counsel to him."[171] Thus, Trial Chamber II incorporated into its reasons for why Mr. Kajelijeli was not assigned duty counsel, its reasoning for why Mr. Kajelijeli was not assigned permanent counsel for five months, as well. In sum, under the ICTR's Statute, Rules and the Directive, there was no acceptable reason for why Mr. Kajelijeli was without representation for 147 days. Furthermore, Mr. Kajelijeli's lack of representation

[170] Note that none of these events occurred here because Mr. Kajelijeli, in fact, requested assignment of counsel and there was no evidence in the record to indicate that he did *not* submit his information regarding indigence within a reasonable time.

[171] *See* May 2000 Decision, *supra* note 11, ¶ 25.

for 147 days between transfer to the ICTR and assignment of permanent counsel arguably constituted a violation of the ICTR Statute, its Rules, the Directive as well as international law.

CONCLUSION

The above discussion of what happened in Mr. Kajelijeli's case before the ICTR is important (prior to the ICC becoming active) because it clarifies the rights of criminal defendants under international law in the pre-trial phase and because it highlights how those rights can easily be violated and overlooked. Richard Goldstone, former Chief Prosecutor of the ICTR and current Justice of the Constitutional Court of South Africa, explained with respect to the International Military Tribunal at Nuremberg,

> [The trials of war criminals] ensured that guilt was personalized—when one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminals. One does not see a group representative of the German people—the people who produced Goethe or Heine of Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding the guilt of the Nazis being ascribed to the whole German people. Then, too, the Nuremberg Trials played an important role in enabling the victims of the Holocaust to obtain official acknowledgement of what befell them.[172]

My hope is that this article will provide some food for thought, some material with which international law practitioners and scholars alike can ensure that all international criminal tribunals, and especially the ICC (understanding that the ICC, as a permanent and pre-existing tribunal was not "established by the victors of any particular conflict"),[173] are meaningful instruments for avoiding the guilt of some being ascribed to the whole, and that they also play an important role in enabling survivors of atrocities to obtain official acknowledgement of what befell them. International law practitioners and scholars can do so by ensuring that international criminal tribunals, like the ICC, are vigilant in protecting the rights of the criminal defendants before them.

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[172] Richard J. Goldstone, *50 Years After Nuremburg: A New International Criminal Tribunal for Human Rights Criminals, in* CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES 215, 215-16 (Albert J. Jongman ed., 1996), *cited in* Akhavan, *supra* note 17, at 338.

[173] *See* Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT'L L. J. 197 (2001).