2006

Bail in the 21st century: is there a role for ankle monitors, electronic supervision, and the like within international criminal justice in light of long pre-trial detention?

David Selby

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE:

BAIL IN THE 21ST CENTURY: IS THERE A ROLE FOR ANKLE MONITORS, ELECTRONIC SUPERVISION, AND THE LIKE WITHIN INTERNATIONAL CRIMINAL JUSTICE IN LIGHT OF LONG PRE-TRIAL DETENTION?

Prepared by David Selby
Spring 2006

TABLE OF CONTENTS

Index of Authorities

Legislation

1. Int'l Criminal Trib. for Rwanda: Rules of Procedure and Evidence - Revision 37, Rule 65 Provisional Release.

2. Statute of the Int'l Criminal Trib. for Rwanda, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., at art. 3, U.N. Doc. S/RES/955 (1994)

3. Statute of the Int'l Criminal Trib. for the former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993)

4. Twelfth Annual Report of the ICTY (2005)

Court and Tribunal Cases

5. *Prosecutor v. Ignance Bagilishema*, Case No. ICTR-95-1A-T, Judgment, (ICTR Trial Chamber June 2001)

6. *Prosecutor v. Ignance Bagilishema*, Case No. ICTR-95-1A-T, Press Release, (ICTR October 2001)

7. *Prosecutor v. Haradin Bala*, Case No. IT-03-55-A, Decision Granting Provisional Release (ICTY Trial Chamber April 2006)

8. *Prosecutor v. Milan Simic*, Case No. IT-95-9/2, Decision Granting Provisional Release (ICTY Trial Chamber May 2000)

Treaties and Books

9. ICTR, Completion Strategy of the ICTR (2005)

10. Kath Dodgson, Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme (March 2001)

11. Ann Crowe, Offender Supervision with Electronic Technology (2002)

Journals and Law Review Articles

12. Mark Burns, *Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards.* 18 J. Contemp. L. 75 (1992)

13. Annesley Schmidt, *Electronic Monitoring: What Does the Literature Tell Us?.* 62-DEC Fed. Probation 10 (1998)

14. Matthew DeFrank, *ICTY Provisional Release: Current Practice, A Dissenting Voice, and the Case for a Rule Change.* 80 Tex. L. Rev. 1429 (2002)

15. Daryl Mundis, *Current Developments at the Ad Hoc International Criminal Tribunals.* 2 J. Int'l Crim. Just. 1163 (2004)

16. Daniel Rearick, *Innocent Until Alleged Guilty: Provisional Release at the ICTR.* 44 Harv. Int'l L.J. 577 (2003)

Miscellaneous/Websites

17. National Law Enforcement and Corrections Technology Center, *Tech beat* (Winter 1999)

18. ICTR General Information, at http://69.64.11.53/ENGLISH/geninfo/index.htm

19. ICTR Detainees – Status on 13 April 2006, at http://69.64.11.53/ENGLISH/factsheets/detainee.htm

20. ICTY core achievements, at http://www.un.org/icty/cases-e/factsheets/achieve-e.htm

21. ICTR Detention of Suspects and Imprisonment of Convicted Persons The Detention Facility, at http://69.94.11.53/ENGLISH/factsheets/7.htm

22. Wikipedia, *International Criminal Tribunal for Rwanda*, at http://en.wikipedia.org/wiki/International_Criminal_Tribunal_for_Rwanda

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

The International Criminal Tribunal for the former Yugoslavia ("ICTY") altered its requirements for provisional release of detainees in 1999.[1] Originally the court would only allow provisional release of detainees under "exceptional circumstances". This "exceptional circumstance" requirement put an incredibly high burden of proof onto the detainee, and granting of provisional release was the exception and never the rule[2]. The modification of the rule came in 1999 when the ICTY dropped the "exceptional circumstance" requirement, thus allowing qualified detainees to obtain pre-trial provisional release. Following the ICTY's amendment of the provisional release rule, in June 2003 the International Criminal Tribunal for Rwanda ("ICTR") similarly revised their provisional release requirements.

ICTR Rule 65(B) reads "Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard and only if satisfied that the accused will appear for trial, and if released, will not pose any danger to any victim, witness or other person."[3] This memorandum's focus is on the appropriateness of electronic supervision and ankle monitoring in the International Criminal Tribunal environment, and specific feasibility in the ICTR. Discussion revolves around viability of provisional release in the ICTY currently and potential viability of provisional release in the ICTR. Recommendations

[1] *See* ICTY Rules, Rule 65 (B) [Reproduced in accompanying notebook at Tab 1]

[2] *See* Prosecutor v. Simic, Case No. IT-95-9-PT, Decision on Provisional Release of the Accused (Mar. 26, 1998) [Reproduced in accompanying notebook at Tab 8]; Prosecutor v. Dukie, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw Indictment and Order for Provisional Release (Apr. 24, 1996)

[3] *See* ICTR Rules, Rule 65(B) [Reproduced in accompanying notebook at Tab 1]

for future ICT courts provisional release can be construed by comparing any future tribunals to the different circumstances of the ICTY and the ICTR.

B. Summary of Conclusions

1. The ICTR Cannot Provisionally Release Detainees with Electronic Monitoring

Rule 65(B) of the ICTR permits the provisional release of detainees when the detainee is able to meet the following three pronged test: (1) that there was a trusted host country willing to transport the detainee back to the tribunal; (2) That the detainee would reappear before the tribunal if released; (3) That the detainee would not pose any danger to victims, witnesses or others if released. Provisional release is feasible only when there are host nations available for the detainees to be transferred to. ICTR detainees who have been acquitted on all charges have experienced lengthy delays before locating a host nation; it can be inferred that those still facing charges would face even greater difficulties in locating a hosting nation.[4] In 2001 the detainee Bagilishema was acquitted on all charges in June. The tribunals request for a nation to host Bagilishema was denied by every nation until France reconsidered and accepted him in October, four months later. Electronic monitoring requires authorities to monitor the provisionally released detainee, so electronic monitoring is not functional without enforcement from authorities. Without a hosting nation readily available, provisional release can not be granted to

[4] *See* Prosecutor v. Bagilishesma, Case No. ICTR-95-1A-T, Decision Acquitting the Accused of All Charges and Ordering Immediate Release (June 7, 2001) [Reproduced in accompanying notebook at Tab 5]; Innocent Until Alleged Guilty: Provisional Release at the ICTR, page 7, (2003) [Reproduced in accompanying notebook at Tab 16]

detainees who otherwise would qualify.[5] Detainees may be able to satisfy the courts belief that they will return to trial and not interfere with any witnesses, but they can not be granted provisional release without a country to live in. The tribunal must be fully aware of where the detainee would live, and have assurances from a host nation that the detainee will be monitored by local authorities and transferred back to the tribunal when requested. Without the provision of a host nation, there is simply no where for a detainee to be released to, and so provisional release can not be granted without one.

2. The ICTY Can Provisionally Release Detainees with Electronic Monitoring

The ICTY detainees have many different ethnic backgrounds; as a result there are many host nations willing to accept their detainee citizens. The ICTY must rely on these hosting nations to ensure that the provisional release requirements are complied with by the detainees. So far the ICTY has provisionally released twenty-four detainees; these detainees are still awaiting trial but no serious complications have arisen yet.[6] Electronic monitoring and ankle bracelets have the potential to assist the ICTY in tracking the location of detainees to ensure that they are indeed in compliance with release requirements. GPS tracking bracelets allow the monitoring authorities to know the exact location of the detainee, which would allow authorities to know if the detainees have had any contact with witnesses or victims.

[5] Without a hosting nation, and compounded by the lack of a police force, the ICTR must rely on penitentiary detention for all detainees.
[6] *See* ICTY at a glance Key Figures of ICTY Cases, available at http://www.un.org.icty/glance-e/index.htm [Reproduced in accompanying notebook at Tab 20]

3. Future International Criminal Tribunals Should Compare themselves to the ICTY or ICTR to Determine Provisional Release Feasibility

The ICTR and ICTY are similarly purposed institutions with polarized political circumstances which clearly demonstrate the different societal conditions in one of which detainees can be provisionally released with relative ease, and the other of which detainees can not be provisionally released due to technical issues. To determine whether provisional release can be granted to qualified detainees, future International Criminal Tribunals (ICTs) should compare the availability of a host nation for their detainees to that of the ICTR or ICTY detainees. If they are similar to the ICTY, and have host nations willing to accept the detainees, then provisional release is feasible. If they are more analogous with the ICTR and have no hosting nations readily accepting the detainees, provisional release is not feasible.

II. Factual Background

1. History of the International Criminal Tribunal for Rwanda

During a one hundred day period from April 1994 through July 1994, more than nine hundred Tutsi citizens in Rwanda were killed by the Hutu in Rwanda. The Tutsi managed to rebel against the Hutu regime and seize power. In 1994 the United Nations received a request from the Government of Rwanda appealing for the establishment of an international tribunal for the purpose of prosecuting those responsible for genocide and other serious violations of international humanitarian law committed in the territory of

Rwanda between 1 January 1994 and 31 December 1994.[7] Acting under Chapter VII of the Charter of the United Nations, the United Nations Security Council passed resolution 955 on November 8th 1994.[8] This resolution authorized the creation of the International Criminal Tribunal for Rwanda. The Security Council expressed the desire to prosecute any persons responsible for the violations of international humanitarian law, in an effort to help national reconciliation and to restore peace. The tribunal was established to prosecute those persons who were responsible for genocide and other violations of international humanitarian law.

As of April 2006 the Tribunal has completed twenty six-trials, and released twenty verdicts.[9] There are currently twenty-seven accused detainees on trial; these individuals were arrested between 1996 and 2002, and the majority of them were arrested before 2000.[10] Fifteen detainees are still awaiting the beginning of their trial; these individuals were arrested between 2001 and 2005.[11] The average length of detention for detainees awaiting trial or currently on trial has been five years. One of the longest pretrial waiting periods has been for the former Director of Cabinet for the Ministry of Defense who was arrested in March 1996 and had his trial begin in April 2002.[12] These extended pre-trial waiting periods are the cause of much concern in the legal rights world.

---

[7] *See* International Criminal Tribunal for Rwanda [hereinafter ICTR] General Information, available at http://69.94.11.53/ENGLISH/geninfo/index.htm [Reproduced in accompanying notebook at Tab 18]

[8] *See* United Nations Security Council Resolution 955 (1994), available at http://dacess-ods.un.org/TMP/9304360.html [Reproduced in accompanying notebook at Tab 2]

[9] *See* Status of ICTR Detainees, available at http://69.94.11.53/ENGLISH/factsheets/detainee.htm [Reproduced in accompanying notebook at Tab 19]

[10] *Id.*

[11] *Id.*

[12] *Id.*

Many individuals have suggested the appropriateness of pre-trial provisional release for these detainees who are waiting around in prison for so many years before being tried.[13]

Detainees are currently held in the United Nations Detention Facility, constructed in 1996.[14] The facility is located in the Tanzania correctional centre, which is only ten kilometers from the Tribunal's headquarters. The facility complies with international prison standards and consists of eighty nine holding cells, "kitchen, medical facilities, library, a classroom and a gym".[15] Currently sixty detainees are incarcerated within the Detention Facility.[16]

In determining the practicality of provisional release, it is important to know how much longer the detainees can expect to be held in custody. The ICTR currently plans to finish up the tribunals function and complete its case load, if the tribunal can move quickly enough the need for provisional release may be moot. The ICTR released a completion strategy guide in December 2005 which states that by 2008 all trials will have commenced, and by 2008 sixty-five to seventy trials will be completed.[17] The Prosecutor estimates that by 2010 the ICTR trial court will have completed all case work, and only the appeals court will still be in session.

---

[13] *See* Innocent Until Alleged Guilty: Provisional Release at the ICTR, (2003) [Reproduced in accompanying notebook at Tab 16]

[14] *See* Detention of Suspects and Imprisonment of Convicted Persons The Detention Facility, available at http://69.94.11.53/ENGLISH/factssheets/7.htm [Reproduced in accompanying notebook at Tab 19]

[15] *Id.*

[16] *See* Status of ICTR Detainees, available at http://69.94.11.53/ENGLISH/factsheets/detainee.htm [Reproduced in accompanying notebook at Tab 19]

[17] *See* Completion Strategy of the ICTR, available at http://69.94.11.53/ENGLISH/completionstrat/s-2005-782e.pdf [Reproduced in accompanying notebook at Tab 9]

2. History of the International Criminal Tribunal for the former Yugoslavia

The ICTY was established in a different political context than that of the ICTR. After the collapse of the Soviet Union, there was a strong uprising of national identities in the former Yugoslavia.[18] Yugoslavia was composed of Bosnia, Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia.[19] In the early 1990's the different ethnic groups began to secede from Yugoslavia and form their own territories. Many thousands of non-Serbians were expelled from Yugoslavia or killed as a result of the ensuing struggle from 1991 up until the 1999 war in Kosovo.[20] On May 25th, 1993, the United Nations Security Council passed resolution 827, which established the International Criminal Tribunal for the former Yugoslavia.[21] The tribunal was established to prosecute those responsible for violations of international humanitarian law committed in the former Yugoslavia since 1991.

One hundred and sixty-one defendants were indicted by the ICTY; forty-seven of these accused are currently in custody within the United Nations ICTY Detention Unit which is located within The Hague, The Netherlands.[22] Twenty-three additional

[18] *See* Yugoslavia, available at http://en.wikipedia.org/wiki/Yugoslavia; Socialist Federal Republic of Yugoslavia, available at http://en.wikipedia.org/wiki/Socialist_Federal_Republic_of_Yugoslavia

[19] *Id.*

[20] *Id.*

[21] *See* United Nations Security Council Resolution 827 (1993), available at http://dacess-ods.un.org/TMP/2097092.html [Reproduced in accompanying notebook at Tab 3]

[22] *See* ICTY at a glance Key Figures of ICTY Cases, available at http://www.un.org.icty/glance-e/index.htm [Reproduced in accompanying notebook at Tab 20]

defendants are currently on pre-trial provisional release.[23] Detainees have been provisionally released on health concerns, or temporarily to attend family funerals. In 2006 the ICTY provisionally released Haradin Bala so that he could attend his daughters memorial service.[24] In 2000 the ICTY provisionally released Milan Simic, without the "exceptional circumstances" clause, the tribunal accepted Simic's request for provisional release due to health issues.[25]

The ICTY has been in existence for over ten years, the need to complete the trials has pushed the ICTY to establish a timetable for concluding the tribunals' prosecution of accused defendants. In 2002 the tribunal endorsed a roadmap which acted to conclude all investigations by the prosecution by the end of 2004, completion of trial court level proceedings by 2008, and completion of appeals court level proceedings by 2010.[26]

3. Provisional Release and Electronic Monitoring

Not only in the International Criminal Tribunals but throughout North America and Europe the cost of imprisoning criminals has escalated substantially over the last half decade.[27] In the United States, prison overcrowding became such a problem that states were ordered to relieve prison conditions.[28] The US Supreme Court upheld a decision finding overcrowding conditions in Alabama prisons to constitute a violation of the Eight

[23] *Id.*

[24] *See* Prosecutor v. Haradin Bala [Reproduced in accompanying notebook at Tab 7]

[25] *See* Prosecutor v. Milan Simic [Reproduced in accompanying notebook at Tab 8]

[26] *See* Twelfth Annual Report (2005) of the ICTY, available at http:// http://www.un.org/icty/rappannu-e/2005/index.htm [Reproduced in accompanying notebook at Tab 4]

[27] *See* Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards

[28] *Id.*

and Fourteenth amendments of the US Constitution. At least thirty nine states, including the District of Columbia were ordered by the courts to reduce prison crowding. The extraordinary costs of building prisons and maintaining them became too much of a burden politically and economically for justice systems and their communities. As a result many justice systems began to implement provisional release of defendants as a method of managing the growing criminal population. Throughout North America and Europe, provisional pre-trial release has become a common strategy to alleviate the need for expensive prison space. Criminal offenders accused of and convicted for sexual crimes, substance abuse, and robbery, are often placed on provisional release.[29]

Provisional release with electronic monitoring consists of varied monitoring systems which ensure the released defendant complies with the orders of the court. If any violation of the court's instructions occurs, provisional release is revoked and the defendant is placed back into the penitentiary system.

The various electronic monitoring consist of dedicated telephone systems installed between the monitoring company and the defendant's place of residence. One automated system consists of a computer voice recognition system which will call the defendant at random times throughout the day; the defendant is then required to speak to the system over the phone.[30] This is a highly advanced system which is capable of distinguishing family members from the defendant, yet can still recognize the defendant when he is ill with a cold. Alternative systems consist of a monitoring company calling or physically checking up on the defendant periodically. This is a less technically

[29] *Id.*

[30] *See* Electronic Monitoring: What does the Literature Tell Us? (1998) [Reproduced in accompanying notebook at Tab 13];]

sophisticated method, but serves the same functionality as the computer system. These systems are highly intrusive to the family life of the defendant, and demand a lot of participation from the defendant. The benefits are often perceived to outweigh these taxations on the family life.

Another form of electronic monitoring is the ankle bracelet. Traditionally the ankle bracelet consisted of a tamper proof electronic tag placed around the defendant's ankle. This device would transmit a signal to another device located within the defendant's place of residence. If the defendant attempted to tamper with the tag or moved outside a set proximity from the home-based monitoring device, the authorities or monitoring company were immediately notified. With the system's immediate notification of provisional release violations, respondents can act quickly act to apprehend the defendant.[31] In recent years GPS-based ankle bracelets have been introduced. These allow the defendants to be tracked at all times without the use of a home monitoring device.[32] The disadvantage of ankle bracelets is that they are extremely limited in their ability to restrain defendants from fleeing. If a defendant removes the bracelet, or leaves his or her allowed proximity, the bracelet can only notify the authorities. A defendant who is able to move quickly could easily evade the authorities.

Provisional release and electronic monitoring have helped reduce penitentiary overcrowding; there are other benefits to these systems as well. Studies have indicated that provisional release systems can help reduce the costs associated with imprisonment.

---

[31] *Id.*

[32] *See* Pro Tech GPS available at http://www.ptm.com; Jemtec Electronic Monitoring, available at http://www.jemtec.ca

It can cost legal systems hundreds of dollars a day to imprison an individual, but outsourcing the defendant to a provisional release system can cut confinement costs considerably.[33] These cost savings are achieved because special needs, medical requirements, utilities, meals, staffing, and prison cells need not be provided for by the state. Defendants often continue to take care of their own needs through court-approved private appointments. Another substantial benefit associated with provisional release systems is a lower repeat offense rate.[34] Repeat offense rates tend to be twenty five percent lower for those who are on electronic monitoring, than for those who are provisionally released without such electronic monitoring.[35]

III. Legal Discussion

Provisional release in the ICTR and ICTY:

In the ICTR provisional release is extremely limited by the courts restrictions on its use. In the ICTY provisional release has been granted to twenty-three detainees since 1999. In order to gain provisional release the accused defendant must prove that he or she meets the three factor test: (1) that there was a trusted host country willing to transport the detainee back to the tribunal; (2) That the detainee would reappear before the tribunal if released; (3) That the detainee would not pose any danger to victims,

[33] *See* Electronic monitoring of released prisoners: an evaluation of the Home Detention Curfew scheme, supra note , [Reproduced in accompanying notebook at Tab 10]

[34] *Id.*
[35] *Id.*

witnesses or others if released. Because tribunal defendants are charged with serious crimes (such as genocide and crimes against humanity) the burden is on the defendant, unlike in domestic minor infraction cases where the burden is typically on the prosecution to prove why provisional release should not be granted. Therefore, in the ICTR and ICTY cases, the defense must prove the willingness of the defendant to return to the court for trial, must guarantee that the defendant will pose no harm to any victims or witnesses, and finally must have the guarantee of a host country that the defendant will be monitored and returned.[36]

Provisional release in the ICTR:

Given this three-prong test, the appropriateness of provisional release is difficult to establish for those on trial in Rwanda. The Hutu are generally the individuals who are on trial. The Hutu were in power prior to the 1994 genocide that spurred the creation of the tribunal.[37] In 1994 the Hutu massacred over 900,000 Tutsi citizens. The homeland for both the Hutu and the Tutsi's was Rwanda; but the Tutsi are now in power and have little inclination to provide hosting to these detainees. In fact these defendants could be subject to retaliation by Tutsi or other citizens within Rwanda if they were to be released there. The difficulty in finding hosting for any provisionally released detainee is best demonstrated by the as demonstrated in the Ignance Bagilishema case.[38] Bagilishema

[36] *See* ICTR Rule 65 (B), [Reproduced in accompanying notebook at Tab 1]

[37] *See* Rwandan Genocide, available at http://en.wikipedia.org/wiki/Rwanda_genocide

[38] *See* Prosecutor v. Bagilishesma, Case No. ICTR-95-1A-T, Decision Acquitting the Accused of All Charges and Ordering Immediate Release (June 7, 2001) [Reproduced in accompanying notebook at Tab 5]; Innocent Until Alleged Guilty: Provisional Release at the ICTR, page 7, (2003) [Reproduced in accompanying notebook at Tab 16]

was charged with many counts of genocide and crimes against humanity. In June 2001 the ICTR unanimously acquitted Bagilishema from all charges; he was declared a free man on that day. The prosecution appealed the verdict, but Bagilishema was free to go while the appeal ran its course. Despite having been acquitted in June 2001, it took the ICTR four months to locate a willing host and transport Bagilishema there.[39] Every nation initially contacted by the ICTR declined to accept Bagilishema, the ICTR asked France a second time to reconsider. In October 2001 France finally relented and permitted Bagilishema to live in France while his case was under appeal.

Any pre-trial provisional release program must look realistically at the fact that it took four months to find a country willing to accept a detainee who was cleared of all charges; one can only imagine the difficulty in trying to secure nations willing to accept those who still face charges of genocide in the future. The inability of the ICTR to locate readily available hosting nations for its detainees serves as a substantial obstacle to implementing a functional pretrial provisional release system.

Provisional Release in the ICTY:

Unlike the ICTR, the ICTY has been able to find host nations willing to accept detainees. Since the ICTY was created to deal with the conflict between several different ethnic groups, many of the different detainees in the ICTY are compromised of different citizenships, unlike those in the ICTR who are mainly from Rwanda. This critical difference between the ethnicities of the detainees in the ICTY and the ICTR is what permits the ICTY to readily find host nations for those detainees who qualify for

[39] Innocent Until Alleged Guilty: Provisional Release at the ICTR, page 7, (2003) [Reproduced in accompanying notebook at Tab 16]

provisional release. Many of the detainees' host nations readily accept the detainees, and are even proud to receive these perceived "war heroes". Unlike in the ICTR where Rwanda has no desire to host the detainees, the ICTY has established trusted relationships with many of the home countries of the detainees. These countries include the United Nations mission in Kosovo, Bosnia and Herzegovina.

The ICTR lacks its own police force

Because the ICTR does not have its own police force, it is unable to arrest, monitor, or control detainees in any setting. The Tribunal consistently relies on foreign nations to help police, transfer, and even detain the defendants. The United Nations Detention Facility which currently holds the detainees is accommodated by Tanzania. The Tribunal would not have the ability to police detainees who were provisionally released**.** Any monitoring efforts would necessarily need to be managed by any host nation willing to accept the detainees.

Assuming that the ICTR could find host nations willing to accept these defendants, would the ICTR be able to require similar monitoring systems in each country? It would be extremely difficult to get different countries to have similarly reliable tracking systems. The most suitable system would be a GPS electronic tracker; this would allow the defendant to be tracked via a satellite through a central tracking system. A GPS tracking system would allow a centralized tracking monitor to know the location of provisionally released detainees twenty four hours a day. However this system does little to enforce a return to trial or ensure the safety of witnesses. If the defendant were to remove the bracelet and flee, the tribunal would have few options

when it came to recapturing the defendant. They would need to rely on authorities of other nations to assist in relocating the defendant, since they do not have their own police force to respond to any fleeing violations. Furthermore the tribunal currently has no rules in place to punish those who flee; there would be no repercussions and thus little incentive for any defendant to comply with orders of the tribunal.

The ICTY Can Rely on Trusted Host Nations

The ICTY has the fortune of being able to provisionally release detainees to nearby nations which have a trusted relationship with the tribunal. As a result of the trusted relationships, the ICTY is able to rely on the statements from authorities in those nations promising to monitor and return the defendants when the tribunal makes the request. Although the ICTY also lacks its own police force, the ability to rely on authorities in other nearby nations helps to relieve a lot of concern over the monitoring and enforcement of any detainees' provisional release. Many of the European nations surrounding the ICTY have contemporary law enforcement agencies; these systems provide some enforcement power against provisionally released detainees.

Do the economic benefits justify release?

The ICTR Tribunal receives its funding from the UN; it also has received a substantial sum in supplementary funds and resources from member nations.[40] Currently the detention facility is not over crowded; it was constructed to hold eighty-nine

[40] *See* ICTR] General Information, available at http://69.94.11.53/ENGLISH/geninfo/index.htm [Reproduced in accompanying notebook at Tab 18]

individuals, far more than the sixty detainees currently under detention.[41] Over the last few years the Tribunal has acted to define its roadmap for concluding the trials. Trials take an average of sixty-two court room days per detainee, and take years of preparatory work before the trial is actually read to proceed. This makes trials themselves an expensive proposition.

If the ICTR were to implement electronic monitoring of pre-trial provisionally released detainees, the Tribunal would need to spend substantial resources to create a standardized tracking system, and it would be even more costly if this system were implemented in several different host countries. If the host countries were to spend the money, or use their existing systems, standards would not be uniform, and the tribunal would be unlikely to control or specify the exact systems to be used. Thus, many factors currently suggest that provisional release for detainees is inappropriate in the ICTR. Given the hardship in bringing these individuals back to the Tribunal for trial, the stated timeline indicating the remaining detainees will go to trial in the next few years, and the existence of sufficient space to host these detainees, there seem to be few substantial benefits for the Tribunal if they were to provisionally release the detainees.

Resources Should be Used to Maximize Trial Speed

The resources that would be required to create new electronic monitoring, or integrate Tribunal operations with other existing tracking systems are better used in supplying the Tribunal's regular operations with additional resources. Instead of spending time and money on a temporary system which would be used only for a few

[41] *See* Status of ICTR Detainees, available at http://69.94.11.53/ENGLISH/factsheets/detainee.htm [Reproduced in accompanying notebook at Tab 19]

years, the resources would be much better applied towards hiring more judges, prosecutors, or support teams to help accelerate the rate at which these defendants go to trial.[42] Most of these detainees have already been in custody for years; at this point the Tribunal owes them the duty of the quickest route to a trial. For the Tribunal and prosecutors to spend time negotiating with potential hosting nations, their police forces, and manufacturers of tracking systems, and then to spend time and resources transferring detainees around the world; would be an extreme misallocation of precious resources. Despite the severity of the crimes these detainees are accused of committing, they are entitled under international human rights law to a speedy trial.[43] Any attempts by the tribunal at this point, in the final hours of the tribunal's existence to begin to recognize the detainee's rights to provisional release seem to be misplaced. Any efforts should be put towards accelerating the pace at which these defendants will be tried, and to guarantee that they do not have to wait any longer than is necessary.

IV. Implications for Future International Criminal Tribunals

Provisional release with electronic monitoring can in principle provide assistance in enforcing provisional release rules of future ICTs. The provisional release permitted in the ICTY indicates a growing acceptance of provisional release in the international tribunal setting, even when the crimes are of egregious nature. The lack of provisional release in the ICTR also demonstrates tribunal situations where provisional release is not readily available or feasible. Future international criminal tribunals can compare the fact patterns of each tribunal against those of the ICTY and the ICTR to determine the

[42] *See* Innocent Until Alleged Guilty: Provisional Release at the ICTR, page 7, (2003) [Reproduced in accompanying notebook at Tab 16]
[43] *I.d.*, page 2,

viability of provisional release with electronic monitoring for their detainees. The Tribunals should look, for example, at the nationality of the detainees, and determine the ease with which a host country can be found. The ICTR demonstrates the difficulty in locating host countries, and how that severely limits the ability of any provisional release of detainees. The varied nationalities of the ICTY detainees and the varied locations in which the aggressions occurred, have allowed the detainees readily available host nations. Future Tribunals should determine the feasibility of implementing a provisional release system based on the availability of host nations for the detainees. If host nations are not readily available, the court should not expend substantial amounts resources to attempt to find placement or arrange for tracking systems.

V. Conclusions

Provisional release is relatively new in international criminal law. As the ICTY continues to conclude its proceedings, provisional release is continuously used to allow twenty-three of the defendants to live outside of the UN detention center. Electronic monitoring and ankle bracelets could help the ICTY confirm that the detainees are indeed abiding by the Tribunals release conditions. GPS ankle bracelets are a relatively cheap way for the tribunal to track the location of defendants and ensure that they are where the host nations say they are, and they are not interfering with witnesses or victims.

However, provisional release and electronic monitoring would not be easily implemented for the ICTR detainees. The lack of a readily available host nation prevents the ICTR detainees from meeting the Tribunals three prong test for provisional release. Ankle bracelets and electronic monitoring cannot enforce or capture a defendant, because

the ICTR lacks a police force, detainees can not be released without the guarantee of provisional release enforcement by a host country.

Future criminal tribunals can determine the applicability of provisional release by comparing their detainees' status to those of the ICTR and the ICTY. Those that are closer in fact patterns to the ICTY can if they qualify be provisionally released; those closer in fact patterns to the ICTR will be less likely to be eligible for provisional release.

Electronic monitoring and ankle bracelets should be viewed only as an aid to enforcement by the nations who provisionally host the defendant. These devices are used to alleviate overcrowding in the penitentiary systems in most countries; they are not generally used in enforcement of primary punishment for capital crimes. These systems are not able to physically restrain detainees, and the lack of ICT police force would make it very difficult to recover any detainee who might flee. Electronic monitoring in the domestic setting has the side effect of reducing repeat offenses by those on provisional release, but this benefit is not likely to carry over to ICT detainees. Finally it should be noted again that provisional release with electronic monitoring electronic monitoring and provisional release , and the types of crimes provisional release is normally not used for capital crimes, or those crimes as serious as the ones before an International Criminal Tribunal.

Electronic monitoring could have a place in international criminal provisional release, but the benefits should not be overly relied on. The limited enforcement of release requirements, difficulty of recapturing detainees who flee, and protection of witnesses or victims are still very real problems. Therefore every aspect of a detainee's behavior needs to be considered before provisional release is granted.