Prisoners of the international community: the legal position of persons detained at international criminal tribunals
Abels, D.

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Chapter 1 Introduction

1.1 Detention at international criminal tribunals

The hardships that the top Nazi leaders faced during their remand detention and imprisonment in Nuremberg and Spandau prison are well documented in Albert Speer’s ‘Spandau Secret Diaries’. According to Speer, the inmates were only allowed on a half-hour walk each day. During these walks, they were separated by ten meters. For the rest of the day, they were forbidden to talk to each other, although they could exchange a few words during work, ‘if the guard happen[ed] to be in good humor’.¹ When Robert Ley committed suicide during his remand detention, security became even tighter inside Nuremberg prison. Goda states that, ‘[u]nder constant observation by guards, the prisoners lived in bare cells under the rule of constant searches, solitary confinement, heavily censored mail and procedures of silence that precluded speaking with one another except at lunch on court days’.² Later, when the prisoners’ wives and relatives came to visit them in Spandau, they were granted no privacy.³ In addition, the prisoners’ access to the news was severely restricted. They were not permitted to read newspapers or magazines. Speer stated in his diaries that ‘[e]ven with historical books, we are only allowed those dealing with the period before the First World War. The guards are strictly forbidden to tell us anything about political events’.⁴ The conditions of their imprisonment were very much a matter of politics, Spandau being ‘one of the last symbols of the joint responsibility of the four Allied Powers for Berlin and for Germany as a whole’.⁵ Goda has noted that Spandau ‘was under the control of uneasy allies who never trusted one another’s motives, particularly where the fate of Germany was concerned. It employed a set of regulations concerning feeding, letter writing, visits, and overall secrecy that were, at

⁴ *Id.*, p. 113.
the very least, odd. It had no governing body after 1948 and could not adapt itself to change without torturous international negotiations’.6

A further source of controversy has been the way in which Rudolf Hess was treated in Spandau. From 1966 until his death in 1987, Hess was Spandau’s only inmate in a prison built for hundreds of prisoners, a circumstance which fueled the myth that Hess was held in solitary confinement for all those years. Moreover, no efforts were ever made to further the social rehabilitation of the Spandau prisoners or their reintegration into society.7 As Kress and Sluiter note, ‘[o]verall, the treatment of the prisoners in Spandau emphasized their exclusion from society, rather than their belonging to it’.8

Much has changed since the closure of Spandau. This is reflected in the accounts of the conditions of detention of persons detained by, for example, the International Criminal Tribunal for the former Yugoslavia (ICTY). Upon Mladić’s transfer to The Hague in May 2011, for instance, the media reported that he would be held in one of the most humane prisons in the world.9 Moreover, according to Banning and De Koning, the detainees of the United Nations Detention Unit (UNDU) were, under McFadden’s rule as Commanding Officer, permitted to phone home for seven minutes each day, to play chess, the piano or guitar and to keep a canary as a pet. They could paint or work with clay and had access to a gymnasium, where they could play tennis, football or volleyball.10

Such treatment, which may appear lenient, has led to the UNDU and the Rwanda Tribunal’s detention facility being labeled as the ‘Scheveningen Hilton’ and the ‘Arusha Hilton’, respectively.

1.2 Purpose of the study

Besides such ‘popular’ accounts, however, little has been written about the legal position and conditions of detention of persons detained by international criminal

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7 Claus Kress and Göran Sluiter, *supra*, footnote 5, at 1761.
8 Ibid.
tribunals. Both international criminal law and the law of international criminal procedure have undergone significant development over the past decades and both fields of law have attracted much attention from legal scholars. The reason why the intramural legal position of international detainees has received so little attention may be that there is a general perception that the detention conditions at the international criminal tribunals’ remand facilities are rather good and therefore unproblematic. Such lack of attention may also be attributed to the position of detention law vis-à-vis substantive criminal law and the law of criminal procedure. Evidently, ‘detention as such’ constitutes an aspect of the law of criminal procedure. This is less clear, however, in regard to the modalities of detention. Furthermore, although prison law is generally considered to be part of substantive criminal law, the same cannot be said of the law governing detention on remand. From a positivist legal perspective, the position of detained persons is best viewed as a matter of administrative law, rather than of criminal law.

It is the purpose of this study to disclose the law governing the detention of persons detained under the tribunals’ jurisdiction. As stated above, no such task has yet been undertaken. Apart from describing the law, this research will examine whether such law corresponds to relevant international penal standards and human rights law. In addition, this research aims to contribute to the (further) development of both the international criminal justice system and the law governing detention at the international criminal tribunals, by providing recommendations. The need for recommendations is based on the working hypothesis of this study, that certain particularities of the international detention context warrant a different approach to detention in the domestic context. Underlying that hypothesis is the recognition that the international penal standards and the relevant human rights norms relate specifically to the domestic context. They do not address the specific situation of internationally detained individuals and the particularities of that context.

Regarding such particularities, it is, generally speaking, a fact that international detainees are held for a very long time before their guilt or innocence is established. In fact, the duration of a person’s remand detention at a tribunal is comparable to that of an average prison sentence at the domestic level. Furthermore,

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the characteristics of persons held by tribunals are very different from those of domestic prison or detention populations. Usually, persons held by tribunals do not belong to the more disadvantaged groups of society and do not have a criminal background. Prior to coming to the relevant tribunal, many occupied a high social status in their country of origin. Many of them are well-educated and have an intellect that is higher than average. Some have substantial financial resources at their disposal. They are of a relatively high age, which has an effect on their general health, and many of them suffer from traumata, caused during wartime. Other particularities of the international detention context relate to the tribunals’ characteristics. The tribunals are located in a host State and are, in certain respects, dependent on that State. They function as mini-states, but lack their own state-infrastructure and enforcement mechanism. Furthermore, they operate pursuant to specific mandates, which relate to the heinous nature of the crimes falling under their jurisdiction and which may affect certain aspects of the detention regime. Accordingly, the question arises as to whether such particularities require that additional and different efforts be made on the part of the international detention authorities in order for detained persons to be able to enjoy their (fundamental) rights.

14 The Swedish investigators noted in respect of relationships between staff members and detainees that ‘in many respects the detainees, as a group, have ample resources, high social competence and (formerly) high social status. It probably requires great personal confidence and strength of character, as well as patience, to approach the type of people detained at the DU’; see ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.6.3. Most of the Special Court detainees, however, lack any secondary or tertiary education and have a poor financial background.
16 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.9.
17 Id., par. 2.3.
18 This concerns, inter alia, the availability of specialist medical treatment, public services and communications facilities, the protection of the premises of the tribunal and assistance in situations which threaten the security and good order of the detention facility.
1.3 Scope of the study and definitions

As stated above, the primary aim of this study is to disclose the tribunals’ law of detention. In order to do so, it has been necessary to set out the details of and divergences between the detention arrangements at the different tribunals. For this reason, the law of the different tribunals is discussed separately, notwithstanding the inescapable parallels and overlaps.

Many of the legal instruments that govern the conditions of detention at the tribunals are not publicly available and could only be obtained by visiting the tribunals and by asking the detention authorities for copies. They are incorporated in the present study and their content will through this study be available to both academics and practitioners.

This study only concerns the legal position and conditions of detention of persons detained directly under the jurisdiction of the international criminal tribunals. In other words, the legal position and conditions of detention of convicted persons, after their transfer to so-called States of enforcement in order to serve their sentences, is beyond the scope of the present study. Imprisonment in States of enforcement is primarily governed by domestic law and, therefore, does not qualify as ‘detention under the jurisdiction of the international criminal tribunals’.

The different aspects of detention addressed in Chapters 5 to 8 were selected on the basis of the central working hypothesis of this study. According to this hypothesis, the particularities of the international context, as set out above, affect such aspects of detention, and, as a consequence, may have a negative impact on the legal position of detained persons. In accordance with the third aim of this study, as stated above, the purpose of the relevant Chapters is (after having outlined the applicable law and practice and after having analysed the law’s consistency with international standards), to establish whether such a negative impact is discernible and, if so, what may be done to repair it.

The aforementioned working hypothesis is central to this study. As a consequence, the study is mainly detainee-oriented. However, the deeper cause of this orientation lies in the general conception of detention law that underlies this study. According to that conception, which is based on the argumentation of Peters and
Kelk, detention law has both an instrumental and a protective function. The primary, instrumental function is considered to be self-evident and uncontroversial. Further, the instrumental function is less relevant for the rule of law dimension of detention law. More relevant for the latter dimension (and perhaps less evident) is detention law’s protective function, which is reflected in, inter alia, how the law’s core principles that are set out in Chapter 4 provide guidance to the law’s instrumental application. It is this protective function that forms the focal point of this research.

The study examines the law of detention of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon (STL) and the International Criminal Court (ICC). The primary reason for concentrating on these tribunals (and not others) is the international character of their detention regimes. For this reason, the detention law of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has been excluded; the ECCC Rules of Detention are part of domestic law. The Crimes Panels of the District Court of Dili in East Timor have been excluded due to the scarcity of relevant legal documents and case-law on detention. In addition, the Nuremberg and Tokyo Military Tribunals fall outside the scope of this research, in view of the fact that international penal standards and human rights law were practically non-existent at the time that those institutions were functioning.

The study focuses on the modalities of detention, rather than on detention ‘as such’. Whereas the latter ‘governs the measures necessary to execute the disposition of the (sentencing) judgment’, the ‘modalities of detention’ concern the day-to-day life in the detention facility and include such aspects as medical care, contact with the

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19 C. Kelk, supra, footnote 11, p. 87.
20 Ibid.
21 Ibid.
22 Ibid. The principles of the tribunals’ law of detention are examined in Chapter 4.
23 Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia.
24 See ECCC, Decision on Nuon Chea’s Appeal Concerning Provisional Detention Conditions, Prosecutor v. Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC09), P.-T. Ch., 26 September 2008, par. 26, where the Pre-Trial Chamber noted that ‘the ECCC Detention Facility is under the authority of the Royal Government of Cambodia and subject to Cambodian law’.
outside world and the inmates’ right to complain about the detention regime. Kelk refers to this distinction as that between the internal and the external legal position of detained persons. The external legal position relates to the (judicial) decisions, on the basis of which detained persons enter and leave the remand facility. This aspect of detention falls under the law of criminal procedure. By contrast, the detainees’ internal legal position appears to be more strongly associated with administrative law.

It is necessary to distinguish between the terms ‘detention’ and ‘imprisonment’. Whereas detention refers to the confinement of persons (detainees) pending trial, imprisonment refers to post-conviction confinement (of prisoners).

The tribunals’ legal frameworks do not provide for the imposition of penal measures on mentally disordered offenders by admitting them into forensic psychiatric institutions. Moreover, no special provision is made for the detention of juvenile delinquents.

It is not claimed here that ‘international detention law’ should be recognised as a separate body of law. According to the study group on the fragmentation of

27 With respect to jurisdiction and sentencing, however, Article 7 of the SCSL Statute provides that ‘1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child. 2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies’. Article 7 appears to have never been applied in actual practice though. Article 26 of the ICC Statute states that ‘[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the alleged commission of a crime’.
28 Some legal scholars have reserved the term ‘international penitentiary law’ for the inter-State context. Strijards argues that substantive international penitentiary law consists of the material guarantees and standards that regulate the treatment of detainees and prisoners, i.e. the international minimum norms governing domestic penal systems; G.A.M. Strijards, Hoofdstuk XVII Het internationaal penitentiaire recht [the international penitentiary law], Suppl. 42 (augustus 1995), in: W.H.A. Jonkers, laatstelijk onder redactie van J.P. Balkema/ G.J.M. Corstens/ P.C. Vegter, Het penitentiair recht, strafrechtelijke sancties in Nederland, losbladig, Gouda Quint, Deventer, p. 27.
international law of the International Law Commission, such denominations as ‘international criminal law’ or the ‘law of international criminal procedure’ ‘emerge from the informal activity of lawyers, diplomats, pressure groups, more through shifts in legal culture and in response to practical needs of specialization than as conscious acts of regime-creation. Such notions mirror the functional diversification of the international society or, more prosaically, the activities of particular caucuses seeking to articulate or strengthen preferences and orientations that seem not to have received sufficient attention under the general law’.

It is important to note that no such activities, shifts, or responses appear to have been undertaken or made in respect of the law governing the modalities of detention at the various international criminal tribunals’ remand facilities. However, in Chapter 4 a number of principles have been identified, which govern all of the tribunals’ law of detention. This has been possible due to the many overlaps and parallels between the different tribunals’ detention law. According to a senior staff member of the ICTR Office of the Registrar,

‘There is a body of international detention law. It’s not a unitary body; and I would hesitate to say it is applied in the same way in all systems, it is not. My own visits to other systems have taught me that. I think, in an African context, our system works very well. It would not work, it would not be accepted I think, in a European, a North-American or an Asian context. There is an important cultural component to the United Nations Detention Facility in Tanzania which is not present, in my experience, in the European systems - the two systems in The Hague’.

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30 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
1.4 Methodology

‘Studying how things are helps to explain how things can be, and studying how they can be is indispensable for assessing how they ought to be’. Jonathan Wolff

The primary purpose of this study was said to be to set out the law of detention of the different international criminal tribunals. In pursuing this purpose, the standard method of legal research has been adopted, i.e. an examination of the tribunals’ legal instruments and case-law. As stated above, since a significant number of legal instruments regarding detention matters were not publicly available, it was necessary to visit the tribunals to collect copies of such documents. Human rights law (including the decisions of monitoring bodies) and international penal standards constitute the study’s primary normative framework. In addition, the specific aspects of detention law and practice discussed in Chapters 5 to 8 have been evaluated on the basis of their own underlying rationales. These rationales are mainly derived from penological and criminological literature. As noted by Foucault, ‘[t]oday, criminal justice functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-juridical systems’.32

According to Scholten, legal scholarship calls for applying an interpretative method, due to the nature of its object: its starting point is not sensory perceptions, but rather ‘complicated, multi-interpretable societal situations, combined with legal texts’.33 Scholten further argues that legal rules are incomprehensible when isolated from their societal context and from the concrete situations in which they are being applied.34 Accordingly, in order to provide an insight into the context in which the

34 Ibid.
tribunals’ detention law is being applied, the results of interviews conducted for the purpose of this study with the tribunals’ detention authorities, the detention facilities’ other staff members, internationally detained persons and defence counsel working before the tribunals, have been incorporated in this study. These interviews were conducted at the ICTY, the ICTR and the SCSL. 

In Tanzania, 8 senior staff members of the ICTR Office of the Registry (including the United Nations Detention Facility’s Commanding Officer) and 8 defence counsel were interviewed. Face-to-face interviews with detained persons were not permitted. The interviews with such persons were conducted in writing, in the form of questionnaires. Completed questionnaires were received from 8 detainees.

In Sierra Leone, 2 detainees out of a total detention population of 8 were interviewed face-to-face. In addition, interviews were conducted with 11 senior staff members of the SCSL Office of the Registrar, including the Acting Registrar, with the SCSL’s remand facility’s detention authorities and with the Special Court’s Principal Defender.

In The Hague, interviews with detained persons were conducted in writing (face-to-face interviews were not permitted). Out of a total detention population of 37, 10 detained persons participated in the research. Furthermore, both the ICTY Registrar and UNDU’s Commanding Officer were interviewed.

The purpose of including the results of these interviews was not to add an empirical dimension to this study. No definite conclusions have been drawn on the basis of the information received. The intention has merely been to illustrate the context in which the positive law is being applied.

Finally, the (few) references to domestic detention law and practice were included for the purpose of suggesting possible solutions to difficulties encountered in the international detention context. In this regard, Dutch detention and prison law is particularly relevant, since the Netherlands is host to three international criminal tribunals (the ICTY, including the shared Appeals Chamber of the ICTY and ICTR,

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35 A similar request to conduct interviews was sent to the ICC Registry but was never responded to.
36 The UNDF authorities distributed the questionnaires among 19 detainees of a total detention population of approximately 60 persons. It is not clear on the basis of what criteria the 19 detainees were selected by the UNDF authorities.
37 The author is indebted to Prof. Fred J. Bruinsma for providing interview-training.
the ICC and the STL). Moreover, three detention units (the ICTY UNDU, the ICC Detention Centre and the STL Detention Facility) are located on Dutch territory.

1.5 Structure of the study

Part I of the study presents a general overview of the sources of detention law of the international criminal tribunals. It consists of three chapters (Chapters 2, 3 and 4). Chapter 2 sets out the protection of detainees and prisoners under international law, including a general insight into relevant human rights law and international penal standards. Chapter 3 examines whether those norms may be considered legally binding on the international criminal tribunals. More generally, Chapter 3 provides an overview of the international criminal tribunals’ detention regimes. Firstly, this requires examining the tribunals’ own legal frameworks. Secondly, the exceptions to the regular detention regimes must be considered. Thirdly, it will be seen whether and, if so, how human rights law is applicable to the tribunals’ detention regimes and what the status is of soft-law penal standards. It should be recognised, in this regard, that human rights law and soft-law penal standards only provide for minimum guarantees and contain lacunae and multi-interpretable norms. As a consequence, the tribunals may choose for a more or less ‘contextual’ approach towards their detention regimes: from a strictly international to a more regional or even domestic, and from a more conservative to a progressive approach. In Chapter 4, it will be argued that such “contextual margins of appreciation” and the discretionary powers vested in the tribunals’ detention authorities are subject to a number of principles that underlie and constitute the core elements of the law governing detention at the international criminal tribunals. Included is a definition of ‘legal principles’, which was necessary in order to explain how the notion of ‘principles’ has been employed in this study and how principles are understood to form part of the different tribunals’ detention law.

Parts II and III examine some more specific aspects of the tribunals’ detention law and practice. Part II examines the legal position of international detainees and prisoners in complaints procedures (Chapter 5), in disciplinary procedures (Chapter 6) and in the procedures that the tribunals have established for designating States for the enforcement of prison sentences (Chapter 7). Part III consists of only one chapter (Chapter 8), which examines international detainees’ and prisoners’ contact with the
outside world. It is the only substantive right of detainees and prisoners that is dealt with extensively in this study. Chapters 5 to 8 all have a similar structure. First, they set out the rationales underlying and the legal framework (human rights law and penal standards) governing the specific aspect of detention law under discussion. Second, they examine the different tribunals’ detention law and practice. Third, the more important findings in respect of that law are evaluated on the basis of the aforementioned rationales and legal framework. Besides evaluating the tribunals’ law and practice, a number of recommendations have been made.

Finally, Chapter 9 contains concluding observations and recommendations. It will also attempt to answer the third question central to this study, i.e. whether in light of the particularities of the international context, additional efforts must be made on the part of the international detention authorities to ensure that detainees are able to enjoy their intramural rights.

1.6 Use of instruments and case-law

The research for this study was concluded on 1 May 2011. Any developments in the tribunals’ detention law and practice after this date have not been taken into account. Furthermore, the author was involved in a limited number of decisions used for and referred to in this research. Such involvement consisted of doing background research and drafting submissions for the defence teams of Mr. Katanga (ICC) and Dr. Karadžić (ICTY). He did this as an academic; not as a member of those defence teams.38

38 ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, Prosecutor v. Karadžić, Case No IT-95-05/18-PT, Vice-President, 12 February 2009; ICTY, Decision on Request for Reversal of Limitations of Contact with Journalist, Prosecutor v. Karadžić, Case No. IT-95-05/18-PT, Vice-President, 21 April 2009; ICTY, Decision on Radovan Karadžić’s Request for Reversal of Limitations of Contact with Journalist: Russia Today, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Acting President, 6 November 2009; ICTY, Decision on Radovan Karadžić’s Request for Reversal of Limitations of Contact with Journalist: Le Monde, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Acting President, 28 October 2009; ICTY, Decision on Request for Reversal of Decision to Monitor Telephone Calls, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, President, 21 April 2011. The decisions in the Katanga case have not been used for or referred to in this research.