Prisoners of the international community: the legal position of persons detained at international criminal tribunals
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Chapter 3 The legal regimes governing detention at the international criminal tribunals

3.1 Introduction

The classic doctrine of individual rights centered on the relationship between the individual and the State\(^1\) and on the age-old dichotomy of the notion of fundamental rights as safeguards against arbitrary State power versus a Machiavellian trust in sovereign State-power. Classic rights theory did not, however, envisage the creation of international criminal tribunals vested with far-reaching powers over the individual, \textit{i.e.} over persons detained at their behest. Nor did practice offer any meaningful guidance on the rights of persons detained in an international context at the time when the tribunals were established.\(^2\) Although the Spandau prison rules were recently made accessible,\(^3\) the same cannot be said for the Nuremberg prison’s remand regulations; information on detention conditions in both institutions is sparse. Moreover, the prisons at Spandau, Nuremberg and Sugamo (in Tokyo) were not truly international institutions in the way that the ICTY, ICTR, SCSL, STL and the ICC are.\(^4\) It should further be noted that human rights law regarding the treatment of

\(^1\) H. Lauterpacht, \textit{An International Bill of the Rights of Man}, Columbia University Press, New York 1945, p. 16; Ian Brownlie, \textit{The Place of the Individual in International Law}, 50 Virginia Law Review 3, 1964, p. 435-462; Pieter N. Drost, \textit{Human Rights as Legal Rights}, A.W. Sijthoff’s Uitgeversmij N.V., Leiden 1951, at p. 56. Drost stated back in 1951 that ‘[t]he person derives his rights from international law; the state rests under international obligations. The international community may provide procedures to protect those rights and to enforce those obligations, yet no human rights relationship between the individual and the international community arises. It remains in all cases the state and the individual who together form the two parties to the relationship’.


detained persons has developed significantly since the end of WWII. All of this undermines the value of Nuremberg’s and Spandau’s detention and prison as a point of reference for discussing the rights of international detainees.

The purpose of the present Chapter is to provide an overview of the legal frameworks that govern the tribunals’ detention regimes. Whereas the former Chapter examined the protection of detainees and prisoners under international law, the questions central to this Chapter are whether and, if so, how those international norms “enter” the jurisdictions of the various tribunals, and whether these institutions are obliged to respect and apply those norms.

In respect of the tribunals’ legal regimes, it is possible to distinguish between norms stipulated explicitly in the tribunals’ own legal frameworks, *i.e.* in their Statutes, Rules of Procedure and Evidence (RPE) and all other administrative regulations, and relevant norms of international human rights law that are stipulated elsewhere, *i.e.* in the different sources of international law. In addition, the soft-law norms discussed above in Chapter 2 dealing with the protection of detained persons under international law need to be looked at in order to see whether the tribunals are obliged to respect

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5 Spandau prison was only closed when Rudolf Hess died in 1987. Its regime, however, could hardly be considered consistent with international or regional human rights standards, much due to Soviet insistency on a harsh prison regime for “archenemy Hess”.

6 To some scholars, the answers to such questions are self-evident: detainees’ and prisoners’ rights are fully applicable to the international criminal tribunals’ detention facilities’ legal regimes and such tribunals are bound by them. It is questionable, however, whether it is this straightforward. See, *e.g.*, Antonio Cassese, *International Criminal Law*, Second edition, Oxford University Press, 2008, p. 431-432. Cassese holds in relation to post transfer imprisonment that ‘[o]f course, imprisonment of convicted persons must be in conformity with the general laws and regulations applicable in the relevant state. However, conditions of detention of those persons must also accord with international standards. This requirement, although not explicitly laid down in the Statutes of the ICTY, the ICTR, and other tribunals, is implicit in the whole system of international courts: these judicial bodies are bound to respect international standards on human rights (…)’. See, in a similar vein, Erik Møse, *Impact of human rights conventions on the two ad hoc Tribunals*, in: Morten Bergsmo (ed.), Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide, Martinus Nijhoff Publishers, Leiden/Boston 2003, p. 179-208, at 204. Andrew Coyle and Dirk van Zyl Smit focus on the stage of enforcement and, in respect thereto conclude that ‘(…) the fact that the statutes deal with all these questions is already an indication that when the international community decides to intervene directly it is itself constrained by a body of human rights principles that has growing regulatory significance in the area of punishment’; Andrew Coyle and Dirk van Zyl Smit, *Editorial: The International Regulation of Punishment, Punishment & Society* 2, 2000, p. 260. See, also, Safferling, who states that ‘[o]f course the international community when punishing must comply with the set of rules deriving from its own institutions’; Christoph J.M. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, 2001, p. 349.
them. Accordingly, in discerning the different “sources” of the law of international detention, this Chapter will first discuss the detained persons’ legal position under the tribunals’ own legal frameworks. Second, it will examine the applicability of human rights law to the tribunals’ legal regimes. Third, it will examine whether the aforementioned soft-law instruments must be applied by these institutions. Finally, in respect of both international law and soft-law, this Chapter will consider how the tribunals apply these different kinds of “law”.

However, before examining the legal position of persons detained by the tribunals, the notion of ‘legal position’ and how it relates to the situation of detention must first be considered. Kelk identifies three elements which together constitute a legal position which provides adequate legal protection to confined individuals. These (interrelated) elements are (i) a maximum number of legal norms, which are formulated in as much detail as possible, from which detainees can derive implementable material rights; (ii) an effective adversarial procedure, which contains sufficient legal safeguards; and (iii) adequate and sufficient information on both the material norms and the available procedures.7 A characteristic of detention and prison law is the large number of vague or ill-defined norms, which leave much room for discretion to the practitioners in the field and which are therefore appropriately referred to by Kelk as ‘instruction norms’.8 Their vagueness must be compensated, arguably in the form of more detailed procedural provisions. As such, it is possible to speak of a three-pronged test for ascertaining the adequacy of the detained persons’ legal position in a particular jurisdiction. Only after gaining insight into how these different elements take shape in the context of international detention, will it be possible to draw more reliable conclusions as to the adequacy of the legal position of internationally detained persons.

In his earlier work ‘Recht voor gedetineerden’, Kelk identifies a number of particularities of substantive legal norms of detention or prison law which may similarly apply to the legal regimes of the international detention facilities.9 These particularities entail the need to mitigate the unshakeable belief in legal norms as the main protectors of confined persons and to readjust (high) expectations in this regard.

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8 *Id.*, p. 34, 35.
The first particularity is that such norms often have an essentially ‘restricting and prohibiting character’, focusing on the situation of the incarcerated, ‘unfree’ person. According to Kelk, this is why, usually, detention law does not primarily consist of a catalogue of subjective rights for incarcerated persons, but rather contains a list of ‘prohibitive norms’ directed at the confined persons and ‘instruction norms’ addressed to the competent authorities. The second is that many of such ‘instruction norms’ are vaguely formulated, leaving the authorities much scope for discretionary decision-making. Apart from being formulated vaguely, some norms do not refer to the detained person as the holder of the subjective right in question, which creates uncertainty as to the enforceability of these norms. As a consequence, their implementation depends to a large extent on the sensitivities of the person in charge of the facility. In this regard, Banning and De Koning note that, prior to McFadden becoming Commanding Officer of UNDU in 1997, the detainees were locked up for twenty-two hours per day. Although McFadden’s appointment was not accompanied by a change of the Rules of Detention or the issuance of judicial orders, his governance led to a complete regime change. The cell doors stood open for almost the entire day, the inmates could socialise, they were allowed to play tennis, soccer and volleyball, to prepare their meals together, to receive conjugal visits and to phone their families for seven minutes each day. McFadden is reported to have said that he wished to provide the detained persons a humane treatment and a qualitatively good life. As a consequence, the (largely congruent) legal systems governing detention at the ad hoc tribunals, the STL and the SCSL may differ significantly in terms of the aforementioned norms’ implementation. A third particularity of detention or prison

10 Id., p. 37.
11 See, e.g., Rule 27(B) of the ICTY Rules of Detention, which provides that ‘[w]here possible, arrangements may be made with the General Director for use by detainees of indoor and outdoor sporting facilities outside the Detention Unit but within the host prison’.
12 See, e.g., Rule 27(B) of the ICTY Rules of Detention and Rule 69, which holds that ‘[t]he Commanding Officer, after consultation with the General Director, and as far as is practicable, shall institute a work programme to be performed by detainees either in the individual cell units or in the communal areas of the Detention Unit’. Further, Rule 73 provides that ‘[b]y arrangement with the General Director, detainees may use the library and such vocational or other facilities of the host prison as may be made available’.
14 C. Kelk, supra, footnote 9, p. 37-38.
law, as recognised by Kelk, is that it regulates all aspects of a detained person’s life.15 Fourth, the legal norms governing international detention are derived from a complex web of legal sources, a web which contains both overlaps and lacunae.16 It is, therefore, not easy for detained persons to obtain a full and clear picture of their legal position. Fifth, Kelk stresses that in total institutions,17 it is difficult to distinguish between the normative and factual aspects of detention. How norms are perceived by practitioners and the incarcerated alike is highly dependent on such factual elements as logistics, human resources, location (relating both to the geographical location and the (quality of the) accommodation) and financial resources. Kelk speaks, in this respect, of a ‘couleur locale’, which is ‘highly influential on the social reality of the detention situation’, and of the ‘interrelatedness of norm and fact’ (verwevenheid van norm en feit).18 For example, he argues that providing for the right to physical exercise is pointless where no facilities are available for such purpose. In the international context, the right to work provides another example in this respect. Such right is not easy to implement in remand facilities that oftentimes hold highly educated persons of a more advanced age and which may be located in some of the poorest countries of the world, in areas where industrial activity is barely existent and where the average wages of free citizens are very low. Kelk’s argument in this regard may thus be construed as a warning against laying down detainees’ rights which cannot be enjoyed without the provision of additional facilities. Another aspect of the ‘interrelatedness of norm and fact’ is that the factual situation is often perceived as normative, as obligatory,19 which may hinder the improvement of detention conditions. In conclusion, it is important to be mindful of the aforementioned particularities when examining the tribunals’ detention regimes and of the fact that the provision of detained persons’ rights in legal rules does not automatically improve detention conditions and the treatment of detained persons.

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15 Id., p. 38.
16 Ibid.
17 On total institutions, see, infra, p. 191.
18 C. Kelk, supra, footnote 9, p. 40, 41.
19 Id., p. 41.
3.2 The institutions’ legal frameworks

The first place to look in order to determine the legal position of internationally detained persons is the tribunals’ own legal frameworks. In the first place, the Statutes of these institutions need to be examined and secondly, the tribunals’ Rules of Procedure and Evidence (RPE). Finally, other administrative regulations adopted by such institutions regarding detention matters need to be scrutinised.

3.2.1 Statutes

The ICTY, ICTR, SCSL and STL 20

The Statutes of the international criminal tribunals may be regarded as their primary law or “constitution”, which in turn implies that all secondary “legislation” must be consistent with the relevant statutory provisions. 21 In this way, the tribunals’ RPE were adopted pursuant to those Statutes and remain subordinate to the latter, 22 whilst the various administrative regulations are similarly subordinate to the RPE and the Statute. 23 In Šešelj, the Trial and Appeals Chambers explicitly held that the ‘Rules of Detention should be interpreted in light of the Statute which is superior to them’. 24 Therefore, to the extent that the statutory norms either directly stipulate or more indirectly affect the rights of detained persons, such norms are of paramount

20 Because of the great similarity between the different tribunals’ statutory provisions, the current paragraph focuses on the legal regime of the ICTY. Other tribunals will be mentioned only as far as their regimes differ from the ICTY’s.
23 Daryl A. Mundis, supra, footnote 21, at 195.
importance to the detainees’ legal position and may prove helpful both in ascertaining the validity of and in interpreting the secondary “legislation”.

At first glance, however, the Statutes do not appear to devote much attention to intramural detention matters. They address neither the issue of conditions of detention or pre-transfer imprisonment, nor the intramural rights of persons held detained at the institutions’ premises.

Article 21 of the ICTY Statute solely refers to the rights of the accused. The value of this Article and similar ones in the other tribunals’ Statutes for the detention situation therefore depends on how such terms as ‘accused’ and ‘in the determination of any charge’ are understood. If ‘accused’ is interpreted as referring solely to persons accused of international crimes before these institutions, such provisions bear only a limited significance to the intramural position of confined persons. Pursuant to such an interpretation, the relevance of such provisions lies in the fact that detention may hinder the enjoyment by accused persons of their due process rights, i.e. detention conditions may lead to infringements upon (some of) the rights of accused persons, e.g. the right to contact with counsel and the right to adequate facilities for the preparation of one’s defence. In other words, Article 21 stipulates important due process rights, which may (indirectly) affect the legitimacy of conditions of detention of accused detainees. Since Article 21 addresses all of the tribunal’s organs (as meant in Article 11), Article 21 obliges the Registrar and the detention authorities subject to the former’s authority to respect the norms laid down in that provision in their dealings with detained accused.

In the ICTY RPE, the term ‘accused’ has been defined as ‘[a] person against whom one or more counts in an indictment have been confirmed in accordance with Rule 25 See, e.g., in regard of the right to communicate freely and confidentially with counsel, ICTR, Decision on the Defence Urgent Motion for Relief under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice, Prosecutor v. Mugiraneza et al., Case No. ICTR-99-50-T, T. Ch. II, 19 September 2001. See, also, ICTR, Decision on the Defence Motion to Protect the Applicant’s Right to Full Answer and Defence, Prosecutor v. Bizimungu, Case No. ICTR-99-50-I, T. Ch. II, 15 November 2002; ICTR, Decision on the Defence Motion for Access for Investigators and Assistants to the Accused in the Absence of Counsel, Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-97-21-T (Case No. ICTR-98-42-T), T. Ch. II, 20 November 2002. In respect of the SCSL, see SCSL, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, Prosecutor v. Taylor, Case No. SCSL-03-1-PT, T. Ch. II, 23 June 2006; SCSL, Decision of the President on Urgent and Public Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, President, 21 February 2007.
It is clear that this definition does not apply to persons accused of disciplinary offences in the detention setting. A consistent interpretation of the tribunal’s legal framework thus leads to the conclusion that Article 21 does not cover intramural procedural rights. Although scholars have argued for an extensive interpretation of Article 21, relying on fragments of the U.N. Secretary-General’s Report pursuant to Paragraph 2 of Security Council Resolution 808, it should be noted that this Report refers solely to the rights of accused persons and strictly focuses on the criminal proceedings against such persons. Such statutory provisions must, after all, be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Nevertheless, the definition of the term accused in Rule 2 sub (A) refers only to its use in the RPE, while the RPE must be read subject to the Statute. Moreover, the Secretary-General’s Report does not rule out a more extensive interpretation of Article 21. As an example of such an extensive interpretation, it may thus be possible to apply the safeguards of Article 21 to disciplinary proceedings. It is noted, in this respect, that the ECtHR has interpreted the term ‘criminal charge’ autonomously, i.e. independent of its meaning under domestic law, and has in certain circumstances, depending on the nature of the offence and the degree of severity and nature of the

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26 Rule 2 sub (A) of the ICTY RPE.
27 Article 21 only stipulates a limited number of rights. It was left to the Judges to establish the further details of the law of criminal procedure. See Article 15 of the ICTY Statute and Article 14 of the ICTR Statute, which vest the tribunals’ Judges with the power to adopt the RPE for all ‘appropriate matters’.
28 Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 at par. 106, U.N. Doc. S/25704 (1993). It is noted that the Secretary-General uses the term ‘in particular’ when referring to Article 14 ICCPR and when holding that internationally recognised standards regarding the rights of accused persons must be fully respected. It may be argued that the Secretary-General and the Security Council were suggesting the application of a broader catalogue of due process rights than the ones explicitly listed in the Statute; see Lorenzo Gradoni, International Criminal Courts and Tribunals: Bound by Human Rights Norms ... or Tied Down?, Leiden Journal of International Law 19, 2006, p. 847-873, at 853.
29 See Article 31 of the 1969 Vienna Convention on the Law of Treaties. The Statutes are not treaties stricto sensu. It has been widely acknowledged, though, that the rules of treaty interpretation are relevant to interpreting the tribunals’ Statutes. See, for example, ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch., 10 August 1995, par. 18. See, further, Göran Sluiter, supra, footnote 21, p. 25, footnote 45. Further, it is noted that the rules of treaty interpretation of the Vienna Convention are generally considered part of customary international law; see I.C.J., Case Concerning the Gabčíkovo-Nagymaros Project, 1997 I.C.J. Reports 7, p. 38.
sanction imposed, applied due process rights to prison disciplining. Although the ECtHR’s interpretation of Article 6 is not binding on the tribunal - at least in as far as such interpretation does not form part of the customary norm underlying Article 6 ECHR - it may provide authoritative guidance on the interpretation of Article 21 of the Statute.

Apart from such procedural guarantees, a narrow interpretation of Article 21 would also lead to the inapplicability to the intramural detention situation of the principle of equality and the presumption of innocence, as laid down in the Paragraphs (1) and (3), respectively.

In practice, the tribunals do not appear to have applied these statutory norms to the intramural rights of detained persons. Although they have occasionally referred to statutory provisions when deciding on detention issues, they have only done so in situations which involved the due process rights of detained accused in the criminal proceedings against them. In intramural disciplinary proceedings, however, it is not common for the tribunals to refer to statutory due process rights.

ICC

Like the other tribunals’ Statutes, the ICC Statute does not directly address the internal legal position of detained persons. Contrary to those other Statutes,

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33 The Statute does contain provisions which deal with the external legal position of detainees, such as Article 55(d), which states in respect of investigations that persons ‘[s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute’. Article 60(3) provides that ‘the Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require’. See, also, Article 78 which concerns sentencing. Other provisions which relate to the external legal
however, the ICC Statute explicitly sets out the different sources of law governing the Court’s legal regime in Article 21. This provision is similar to Article 38 of the ICJ Statute and the corresponding customary norm. The question is whether Article 21 also applies to the ICC’s detention regime.

The Statute’s primacy over the RPE and the administrative regulations regarding detention matters is made explicit in a number of provisions. Rule 51(5) provides that ‘[i]n the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail’. Regulation 1 of the Regulations of the Court (RoC) states that those Regulations must be read subject to the Statute and the RPE. Similarly, Regulation 1 of the Regulations of the Registry (RoR) provides that the latter ‘shall be read subject to the Statute, the Rules and the Regulations of the Court’. Further, in Chapter 6 of the RoC, which deals specifically with detention matters, Regulation 90 provides that the Registrar’s overall responsibility for the management of the detention centre is subject to the Statute and the ICC RPE.

Moreover, the RoC and the RoR were adopted pursuant to provisions in the Statute and the RPE and must thus be regarded as subordinate to the latter two instruments. As was said in relation to the Statutes of the other tribunals, the ICC Statute governs all of the institution’s secondary “legislation” as a “constitution”. This argument is

position of detainees are the Articles 81(3)(b), 81(3)(c)(i) and 89(3)(e). The Statute also contains provisions on sanctioning. See, e.g., the Articles 70(3) and 77. See, further, the provisions dealing with the enforcement of sentences (post-transfer imprisonment), which are found in Part 10 of the Statute. Article 106, for example, provides that ‘[t]he conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners’.


35 The Regulations of the Court were adopted pursuant to Article 52, which provides, as far as relevant, that the RoC must be ‘in accordance with the Statute and the Rules of Procedure and Evidence’.

36 The RoR were adopted pursuant to Rule 14 of the RPE which provides that ‘[i]n discharging his or her responsibility for the organization and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry’.

37 This was explicitly held by the Appeals Chamber in Tadić. In respect of the question whether the U.N. Security Council was subject to restrictions imposed by the U.N. Charter, it held that the Security Council was indeed subject to such ‘constitutional limitations’; see ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, par. 28. See, also, Göran Sluiter, supra, footnote 21, p. 24; and Daryl A. Mundis, supra, footnote 21, at 195.
even stronger in respect of the ICC Statute, which directly represents the “general will” of the States parties that established the organisation, rather than expressing a decision by an international organisation’s organ, as is the case with the ad hoc tribunals. All of the foregoing implies that the ICC’s detention regime is governed by Article 21 of the ICC Statute.

The sources of law in Article 21 are listed in hierarchical order. Paragraph 1 (a) lists as the prime sources of law the Statute, the Elements of Crimes and the RPE. Paragraph 1 (b) prescribes that, where appropriate, the ICC shall apply ‘applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’. Paragraph 1 (c) refers to ‘general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards’. Further, Paragraph 2 provides that the Court may apply principles and rules of law as interpreted in its previous decisions. Of particular relevance to the rights of detained persons is the Article’s third Paragraph which does not provide for an additional source of law as such, but according to which both the application and the interpretation of the sources of law stipulated in Article 21’s other Paragraphs must be consistent with internationally recognised human rights. Also relevant to the internal legal position of persons confined at the tribunals’ remand institutions are those statutory provisions that address the designation of

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39 Such a hierarchical order is contrary to the common understanding of Article 38 of the ICJ Statute, according to which the three main sources of law (i.e. treaties, customary rules and general principles of law) are accorded equal weight. In case of conflicts between the different sources, one must resort to the general principles of law according to which such hierarchical order depends on the date of entry into force or of the formation of the law in question, and on the norm’s grade of specificity. To the extent that the ICC Statute is unclear on issues of hierarchy, these same general principles must be applied. See Alain Pellet, *supra*, footnote 38, p. 1078. See, further, ICC, Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, P.-T. Ch. I, 8 November 2006, par. 8-9.
States for the enforcement of sentences. In this regard, Article 103 of the ICC Statute provides that ‘[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons’. This Article sets out the procedure that must be followed in designating States for the enforcement of sentences, and lists the factors that must be taken into account by the Court.

3.2.2 Rules of Procedure and Evidence

The ICTY, ICTR, SCSL and STL

Several Rules of the tribunals’ RPE are relevant to the detention situation, although they tend to be geared more towards the external than to the internal legal position of detained persons. In accordance with Article 15 of the ICTY Statute, the RPE were drafted and adopted by the tribunals’ judges (in 1994) and have since been amended. Among other things, the RPE provide the structure for the functioning of the different organs of the tribunals. In his First Annual Report to the U.N. General Assembly and Security Council, the ICTY President wrote that ‘in drafting the rules, the judges of the Tribunal tried to capture the international character of the Tribunal. Only measures on which there is broad agreement have been adopted, thus reflecting concepts that are generally recognized as being fair and just in the international

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40 Although the post-transfer situation falls outside the scope of this research, the legal position of convicted persons confined in the tribunals’ remand facilities pending transfer is included in this study.
41 See, in more detail, infra, Chapter 7.
42 Because of the great similarity between the different tribunals’ RPE, this paragraph focuses on the legal regime of the ICTY. Other tribunals will be mentioned in as far their RPE differ from the ICTY’s.
43 See, e.g., Rule 65 which deals with provisional release. Rule 99 concerns the legal position of acquitted persons. Further, Rule 101 addresses issues related to sentencing, including that of applicable penalties. Rule 118(A) provides in connection to the enforcement of sentences, that ‘[a] sentence pronounced by the Appeals Chamber shall be enforced immediately’. Moreover, Part 9 of the RPE contains regulations on pardon and the commutation of sentences.
44 Article 15 states that ‘[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters’. Article 14 of the ICTR Statute adds that the ICTR judges shall adopt the RPE of the ICTY ‘with such changes as they deem necessary’.
In doing so, the Judges also took into account the particular context in which the tribunal operates. In this regards, particular consideration was given to the particularities of the armed conflict in the former Yugoslavia, including the multi-party nature of the conflict, its ethnic and religious dimensions and the resulting widespread terror and deep-felt anguish among victims, whilst acknowledging that such factors may cause victims to shy away from giving testimony in court.

As to those provisions that are particularly relevant to the detention situation, Rule 40bis (H) deals with the rights of suspects detained at the tribunal’s detention premises and declares the Rules regarding the detention of accused applicable mutatis mutandis to the provisional detention of suspects. Further, with respect to the right to be assisted by (and thus have access to) counsel, Rule 97 states that ‘[a]ll communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial’. Regarding detention regimes and the distribution of detained persons, Rule 64 provides that ‘[u]pon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside of the host country. The President may, on the application of a party, request modification of the conditions of detention of an accused’. On the basis of this provision, the detention conditions of an individual detainee may be modified, which may involve the re-location of such person to another tribunal’s detention facility, or the placement of such person in a safe-house.

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46 Id., par. 75.
47 It is noted, in this regard, that the ICC legal framework does not employ the same distinction between suspects and accused. Pursuant to Article 61(9) of the ICC Statute, after the charges have been confirmed, the person charged is referred to as the ‘accused’; before that, the person is referred to as ‘the person charged’ (Article 61(2)), ‘the person during an investigation’ (Article 55) or ‘the person for whom a warrant of arrest has been issued’ (Rule 112(1) of the ICC RPE).
Rule 103 sets out the regulations governing transfer of convicted persons to a designated State and stipulates under (A) that ‘[i]mprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons’. Paragraph (B) provides that ‘[t]ransfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed’, whereas (C) provides that ‘[p]ending the finalisation of arrangements for his or her transfer to the State where his or her sentence will be served, the convicted person shall remain in the custody of the Tribunal’.

Regarding the use of instruments of restraint, Rule 83 provides that these ‘shall be used only on the order of the Registrar as a precaution against escape during transfer or in order to prevent an accused from self-injury, injury to others or to prevent serious damage to property. Instruments of restraint shall be removed when the accused appears before a Chamber or a Judge’.

Rule 90bis (A) concerns the transfer of detained witnesses. The Rule is mainly relevant to persons who have already been convicted and are serving their sentence in a designated State. Pursuant to that Rule, such persons will be temporarily detained in the tribunal’s detention facilities for the period they remain in the host State for the purpose of giving testimony in court: ‘[a]ny detained person whose personal
appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on the person’s return within the period decided by the Tribunal’. Paragraph C adds that ‘[t]he Registrar shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar’. Finally, Paragraph (D) provides that ‘[t]he Registrar shall ensure the proper conduct of the transfer, including the supervision of the witness in the detention unit of the Tribunal; the Registrar shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the detention unit and, as promptly as possible, shall inform the relevant Judge or Chamber’.

ICC

According to Article 21(1)(a) of the ICC Statute, the Court’s RPE form part of its applicable law. It follows from Article 51, Paragraph 4, that the RPE must be consistent with the Statute. Some of the ICC RPE may be relevant to the treatment of detainees.

Rule 117 concerns detention in the custodial state but does not deal with substantive detention matters as such. Rather it relates to procedural issues such as the requirement of handing over of a copy of the arrest warrant to the arrested person.

Rule 118 concerns pre-trial detention at the Court, but only deals with the issue of interim release, which concerns the detainees’ external legal position.

Of more direct interest is Rule 192, which deals with the temporary transfer of persons to the Court’s premises for purposes of identification or of obtaining testimony or other assistance pursuant to Article 93(7) of the Statute. Sub-Rule 192(1) provides that such transfer must be arranged ‘by the national authorities concerned in liaison with the Registrar and the authorities of the host State’. According to Paragraph 2, the Registrar is responsible for the ‘proper conduct’ of the transfer, which implies that he or she must make the necessary arrangements with the State concerned. The Registry’s supervision of the person in question, however, only
applies to the period in which such person is in the custody of the Court. Paragraph 3 provides that ‘[t]he person in custody before the Court shall have the right to raise matters concerning the conditions of his or her detention with the relevant Chamber’. The latter provision must be understood as providing a mechanism by which complaints may be made or requests submitted, on top of that provided by Regulation 106 of the RoC. Regulation 106 provides for the right of all persons detained on the authority of the Court to submit complaints and states in Sub-Regulation (2) that ‘[t]he complaints procedure shall be set out in the Regulations of the Registry and shall include a right for the detained person to address the Presidency’. Regulation 2 of the RoC defines ‘detained person’ as ‘any person detained in a detention centre’, which includes persons in the Court’s custody pursuant to Article 93(7) of the Statute in conjunction with Rule 192 of the RPE. Finally, Paragraph 4 of Rule 192 provides that, when the purposes of the transfer, as set out in Article 93(7), have been fulfilled, the Registrar ‘shall arrange for the return of the person in custody to the requested State’. The provision only speaks of ‘arranging’ the transfer and is silent on the division of responsibilities between such States and the Court. Whereas Rule 192 speaks more generally of transfer of persons in custody, Rule 193 specifically concerns the temporary transfer of a person from a designated State for the purpose of giving testimony or lending other forms of assistance. Unlike Rule 192, this provision is silent on the ability of such persons to raise issues concerning the conditions of detention with a Judge or Chamber.

Chapter 12 of the RPE, which covers the enforcement of sentences, is, in principle, beyond the scope of this research. Nevertheless, parts of this Chapter address the designation of States of enforcement, which is relevant to this research. Rule 199 provides that the Court’s functions under Part 10 (of the Statute) are exercised by the Presidency. Rules 200 to 210 deal with such issues as the Registrar’s task to maintain a list of States of enforcement, including any conditions stipulated by such States, the possibility for the Court to ‘enter into bilateral agreements with States with a view to establishing a framework for the acceptance of prisoners sentenced by the Court’, the possibility for the sentenced person to give his or her views on the issue of

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49 Paragraph 3 provides that ‘[t]he entire period of detention spent at the seat of the Court shall be deducted from the sentence remaining to be served’. 

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designate, and further provide for the principle of equitable distribution of convicted persons.\footnote{See, in more detail, infra, Chapter 7.}

Of particular interest to confined persons may be Rule 223(a), which provides in relation to reviews concerning the reduction of sentence pursuant to Article 110, Paragraphs 3 and 5 of the Statute\footnote{Article 110(3) provides, in this respect, that ‘[w]hen the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced’.} that the Judges shall, \textit{inter alia}, take into account the conduct of the sentenced person while in detention, in order to discern whether such conduct ‘shows a genuine dissociation from his or her crime’. It should further be noted that detained persons’ conduct may, under the heading of the mitigating circumstance mentioned in Rule 145(2)(a)(ii), also directly affect the sentence imposed by a Chamber. The other tribunals have considered the intramural conduct of detained persons in decisions on early release\footnote{See, \textit{e.g.}, ICTY, Order of the President on the Application for the Early Release of Milan Simić, Case No. IT-95-9/2, President, 27 October 2003, and Denis Abels, \textit{Commentary}, in: André Klip and Göran Sluiter, Annotated Leading Cases of International Criminal Tribunals Volume XV: The International Criminal Tribunal for the former Yugoslavia 2003, Intersentia, Antwerp, 2008, p. 796-800.} and in sentencing.\footnote{See, \textit{e.g.}, ICTY, Sentencing Judgement, \textit{Prosecutor v. Bralo}, Case No. IT-95-17-S, T. Ch., 7 December 2005, par. 82; ICTY, Sentencing Judgement, \textit{Prosecutor v. Jokić}, Case No. IT-01-42/1-S, 18 March 2004, par. 100.} It should be noted, however, that any emphasis on the detainee’s intramural conduct, particularly in the context of early release, may be problematic since ‘adjusted social behaviour’ (to the situation of detention) does not necessarily present a reliable account of future behaviour of the person concerned after release.\footnote{J.F. Nijboer, \textit{Vervroegde invrijheidsstelling onder voorwaarden [Conditional early release]}, Ars Aequi Libri, Nijmegen 2002, p. 17.}
3.2.3 Administrative regulations regarding detention matters

The ICTY, ICTR, SCSL and STL

Rules of detention

By far the most important source of detainees’ rights are the tribunals’ Rules of Detention, which were adopted by the Judges. The Preamble to the ICTY Rules of Detention outlines that these Rules are founded on principles which ‘reflect the overriding requirements of humanity, respect for human dignity and the presumption of innocence’. The Rules govern the administration of the Detention Facilities and are aimed at ensuring the continued application and protection of the confined persons’ rights while in detention. They are principally based on the prison and detention standards adopted over the years by the United Nations, i.e. the SMR, the U.N. Body of Principles and the U.N. Basic Principles. The drafters of the ICTY Rules of Detention also took into account, wherever possible, the 1987 European Prison Rules, which have been acknowledged to contain higher standards than those in the SMR.

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55 Because of the great similarity between the different tribunals’ Rules of Detention, the current paragraph focuses on the legal regime of the ICTY. Other tribunals will be mentioned in as far their detention rules differ from the ICTY’s.


57 See the Preamble to the ICTY Rules of Detention.

58 See the Preamble to the ICTY Rules of Detention.

59 Id., par. 99. See, also, ICTY, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/58/297-S/2003/829, 20 August 2003, par. 327, where it is held that ‘[t]he Detention Unit still has the capacity to hold
In addition, the ICTY Trial Chamber in Erdemović cited the EPR as relevant to the Tribunal’s supervising powers under Article 27 of the ICTY Statute. As the reasons for taking into account the EPR, the drafters of the ICTY Rules of Detention pointed to the location of the ICTY detention premises in a member State of the Council of Europe and to the circumstance that the conflict took place on European soil. Both arguments involve a contextual or regional approach to the detention regime. To be sure, contextual arguments were adduced in favour of tuning the regime to the Dutch prison system in some respects. The drafters ‘took care to ensure that the regime it prepared for the Detention Unit was consistent with the Dutch prison system in all relevant aspects’. They considered in this regard that, although the Detention Unit is subject to ‘the exclusive control and supervision of the United Nations’, the facilities are located in the Netherlands and, more specifically, in a Dutch prison. Regarding the application of the EPR to the detention regimes of the international criminal tribunals, another argument adduced was that the EPR offered a higher standard of protection. This is not a contextual argument, but rather a policy choice. If ‘optimal protection’ is the prime argument, a more progressive or liberal interpretation of the Rules of Detention may be in order, in light of recent ECtHR case-law and the 2006 amendments to the EPR, as well as of the (even more) detailed standards and guidance found in CPT reports. In addition, the tribunal’s regard for the Dutch prison system might provide cause for the tribunals to keep track with new developments in the Dutch penal system.

The unique features of the international context were also considered to be important by the drafters of the ICTY Rules of Detention. In this regard, particular attention was paid to the ‘ethnic mix of persons’ who would appear before the Tribunal and to the gravity of the crimes with which the future detainees were likely to be charged. In

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62 Contextual arguments were adduced, however, for the subsequent application of the EPR to the ICTY’s penal regime.
view of the fact that the presumption of innocence is one of the basic principles underlying the Rules of Detention, the ‘gravity of the crimes’ argument may only be adduced to justify specific security requirements. By recognising that the origins of the Balkan conflicts were of an ethnic nature, the ICTY chose for individual facilities for detainees, in order to ensure that ‘detainees of one ethnic background are not placed at risk by others of a different ethnic background’.

The Statute is silent on the legal basis of the Rules of Detention (it does not mention the Rules of Detention in any way). Article 15 merely instructs the Judges to adopt the RPE ‘for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters’. In the ninth revision of the Rules of Detention (as approved by the Judges), the ICTY Registrar referred to the Statute in more general terms, to Security Council Resolution 827, and to the first version of the Rules of Detention as adopted by the Tribunal’s Judges in 1994. Rule 24 of the ICTY RPE stipulates under (v) that the Tribunal’s Judges shall meet in plenary to determine or supervise the conditions of detention. As such, this provision, together with Article 15 of the ICTY Statute, constitutes the legal basis for adopting the Rules of Detention and other administrative regulations regarding detention matters.

According to a former ICTY President, ‘[a]n attempt has been made to produce a flexible regime which strikes a balance between the rights of the accused pending trial and the need to ensure the security and safety of everyone involved in the trial process while taking account of the facilities actually available in the Detention Unit’. This quotation illustrates the complex mix of values, objectives, norms and facts permeating and characterising the situation of confinement.

The U.N. detention centres in Arusha and in The Hague may house not only persons detained on remand and persons convicted by the tribunals for international crimes, but also persons being tried or who have been convicted for contempt or

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65 Id., par. 103.
66 Daryl A. Mundis, supra, footnote 21, at 195.
perjury. At the ICTR and SCSL, in particular, a number of convicted persons have had to wait for many years before being transferred to a State designated for the enforcement of their sentence (despite the fact that some States had already indicated their willingness to accept such persons).\textsuperscript{68} Regarding the ICTR, this may well have had something to do with the fact that the Rwandese Government had previously indicated to the Tribunal’s authorities that the transfer of their ‘archenemies’ to other states “would not be appreciated”.\textsuperscript{69} As a result of such delayed transfers, convicted individuals have been imprisoned in institutions that are not intended for such purpose.\textsuperscript{70} In this regard, it may be argued that the principle of social rehabilitation, which is laid down in the ICCPR and in various soft-law instruments, has been compromised.\textsuperscript{71}

The normal situation is that persons convicted by the ICTY, ICTR and STL are held in the remand institutions for at least 30 days after conviction, the purpose of which is to enable them to file a notice of appeal.\textsuperscript{72}

The Rules of Detention do not distinguish between convicted prisoners or remand detainees in respect of their legal position. Neither is a distinction drawn on the basis of the gravity or nature of the offence(s) for which persons are convicted. This implies that a prisoner convicted to a sentence of 3 months’ imprisonment for contempt of court is subject to the same prison regime as an inmate who is convicted for crimes against humanity, war crimes or genocide. In the ICTY and ICTR Rules of Detention, ‘detainee’ is defined as ‘any person detained awaiting trial or appeal before the Tribunal, or being held pending transfer to another institution, and any other

\textsuperscript{68} ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.

\textsuperscript{69} Ibid.

\textsuperscript{70} This needs not be problematic where detention authorities establish adequate social rehabilitation or reintegration programmes for such prisoners. See, in this respect, Rule 101 of the EPR which provides that ‘[i]f an untried prisoner requests to be allowed to follow the regime for sentenced prisoners, the prison authorities shall as far as possible accede to this request’.

\textsuperscript{71} ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.

\textsuperscript{72} See Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. A/49/342 – S/1994/1007, 29 August 1994, par. 102. See, further, Rule 103(B) in conjunction with Rule 108 of the ICTY and the ICTR RPE, and Rule 174(B) in conjunction with Rule 177(B) of the STL RPE. At the SCSL, the period is limited to a maximum duration of fourteen days; see Rule 103(C) in conjunction with 108(A) of the SCSL RPE.
person detained on the authority of the Tribunal’. The definition used by other tribunals closely resembles this formulation.\textsuperscript{73} It follows from such definition, from the full title of the Rules of Detention\textsuperscript{74}, and from the Preamble to the Rules of Detention\textsuperscript{75} that the regular detention regime does not reflect the particularities of an individual detained person and the reasons for his or her detention. Hence, the term ‘detainee’, as used in the various Rules of Detention, refers to both convicted persons before their transfer to a designated State and remand detainees. This also follows from the wording of Rule 5 of the ICTY Rules of Detention, which provides that ‘[a]ll detainees, other than those who have been convicted by the Tribunal, are presumed to be innocent until found guilty and are to be treated as such at all times’.\textsuperscript{76} Such distinction between convicted persons held by the tribunals and those transferred to designated States, appears contrary to the viewpoint of the ICTY Trial Chamber in \textit{Erdemović}, where it held that the Rules of Detention are also relevant to the tribunals’ supervising powers in respect of the enforcement of sentences under Article 27 of the Statute and Rule 104 of the RPE.\textsuperscript{77} However, the Trial Chamber’s finding appears to be irreconcilable with Article 27 of the Statute, according to which ‘imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal’ (emphasis added). Moreover, a closer look at the Rules of Detention reveals that these are not meant to be applied to post-transfer imprisonment in domestic jurisdictions. Rule 1 is particularly illuminating in this regard, according to which the ‘Rules of Detention are to be applied in conjunction with the relevant provisions of the Statute, the Rules of Procedure and Evidence and of the Headquarters Agreement entered into between the Host State and the United

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\textsuperscript{73} The SCSL Rules of Detention define ‘detainee’ as ‘[a]ny person detained awaiting trial or appeal before the Special Court or otherwise detained on the authority of the Special Court’. In the STL Rules of Detention, a ‘detainee’ is defined as ‘[a]ny person detained according to a valid warrant of arrest or order for transfer and provisional detention issued by the Special Tribunal and awaiting trial or appeal before the Special Tribunal or otherwise detained on its authority’.

\textsuperscript{74} The Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal.

\textsuperscript{75} The Preamble states that their purpose is ‘to govern the administration of the detention unit for detainees awaiting trial or appeal at the Tribunal or any other person detained on the authority of the Tribunal and to ensure the continued application and protection of their individual rights while in detention’.

\textsuperscript{76} Emphasis added.

Nations and, in particular, the Annex on matters relating to security and order’. No reference is made to domestic law or to the bilateral agreements concluded with the States of enforcement. Such a reading further follows from the tribunals’ case-law regarding the transfer of detained persons to other international remand institutions. For example, after the temporary transfer of Kambanda from the ICTR UNDF to the ICTY UNDU, the President of the ICTY declared that ‘[t]hroughout his detention, Mr. Kambanda shall be considered a detainee of the ICTY; all matters relating to the conditions of detention of Mr. Kambanda shall be governed by the applicable rules, regulations and procedures of the ICTY as set forth in the Rules of Detention and all other related Regulations issued by the ICTY; and the authorities mentioned in these documents shall have exclusive competence in dealing with questions concerning these conditions of detention, as appropriate’.78

As a general principle, it may be said that the same legal regime applies to all persons confined under the rooftop of a particular international remand institution.79 Nevertheless, there are exceptions to this general principle. In respect of an individual detainee, the detention regime may be modified pursuant to Rule 64 of the ICTY RPE, Rule 64 of the ICTY Rules of Detention, or specific provisions in judgements or orders by Chambers.80 Such modifications may entail, *inter alia*, a detainee’s transfer to a safe house81 or to a remand facility of another tribunal,82 his placement in a

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78 ICTY, Order of the President Concerning the Request for Assistance by the International Criminal Tribunal for Rwanda Regarding the Implementation of Special Measures for Detention on Remand, Case No. ITR-98-1-D, President, 28 April 1998.

79 See, for instance, STL, Order on Conditions of Detention, Case No. CH/PRES/2009/01/rev, President, 21 April 2009, par. 22, where STL President Cassese, in respect of the detention conditions of the persons then confined in the Lebanon on the authority of the STL, held that ‘the Rules of Detention are not expressly applicable to a person detained by State authorities’. He did took into account Rule 42 concerning the segregation of detainees, though, which he justified by stating that ‘this provision enshrines a more general rule relevant to the present circumstances’.

80 See, e.g., ICTR, Judgement and Sentence, *Prosecutor v. Serugendo*, Case No. ICTR-2005-84-I, T. Ch., 12 June 2006, par. 70-74 and 94. In the latter paragraph, the Trial Chamber held that ‘it is clear that Serugendo is not in a position to serve a sentence under normal prison conditions. He has recently been diagnosed with a terminal illness, has very fragile health and a poor prognosis. The Tribunal must continue to ensure that he receives adequate medical treatment, including hospitalization to the extent needed’.


separate wing of the detention facility, or hospitalisation. Requests under Rule 64 of the RPE are often based on security and safety concerns. Further, Rule 64 of the Rules of Detention provides that ‘[t]he Prosecutor may request the Registrar or, in cases of emergency, the Commanding Officer, to prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact: i. is for the purposes of attempting to arrange the escape of the detainee from the Detention Unit; ii. could prejudice or otherwise affect the outcome of: a) the proceedings against the detainee; or b) any other investigation; iii. could be harmful to the detainee or any other person; or iv. could be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber pursuant to Rule 53 or Rule 75 of the Rules of Procedure and Evidence’. Application of this provision may entail the placement of an individual detained person in a separate wing of the detention facility or unit, or modifying a person’s legal position regarding his right to contact with the outside world and with other inmates.

There are also a number of categorical exceptions to the general principle articulated above. Suspects and accused may be placed in separate parts of the detention premises in order to prevent them from exchanging information. In this regard, a senior ICTR

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83 See, e.g., Interoffice Memorandum, from Alessandro Calderone, Chief of LDFMS, Detention of Suspects at UNDF, and the Complaint of Casimir Bizimungu in this Regard, 2 February 2000.
84 See, e.g., ICTR, Decision on Motion for Partial Enforcement of Sentence, Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, T. Ch. I, 22 June 2006, par 1. This paragraph refers to the modified detention regime as imposed by the Trial Chamber in its Judgement because of Serugendo’s ‘very fragile health and poor diagnosis’. See ICTR, Judgement and Sentence, Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, T. Ch., 12 June 2006, par. 70-74 and 94.
85 See, e.g., ICTR, Order Issued by the President Regarding Special Measures for Detention on remand, Following a request Filed by the Prosecutor, Prosecutor v. Kambanda, ICTR-97-23-DP, President, 25 November 1997, which deals with the request to transfer Kambanda to The Hague for security reasons. See, also, ICTR, Defence request for a Modification of the Conditions of Detention of the Accused Pursuant to Rule 64 of the Rules, Case No. ICTR-97-32-T, Defence, 23 July 1999.
86 ICTR, Interoffice Memorandum, from Alessandro Calderone, Chief of LDFMS, Detention of Suspects at UNDF, and the Complaint of Casimir Bizimungu in this Regard, 2 February 2000, par. 7.
87 Admittedly, the use of the term ‘may’ renders the exception hardly categorical. See ICTR, Interoffice Memorandum, from Alessandro Calderone, Chief of LDFMS, Detention of Suspects at UNDF, and the Complaint of Casimir Bizimungu in this Regard, 2 February 2000. Calderone explained that the detention conditions of Bizimungu had been modified pursuant to Rule 64 of the Rules of Detention, and stated that the reason behind the Prosecutor’s request to separate suspects and accused was the ongoing formal investigation (par. 9). It
official has explained that ‘[t]he conditions of detention for suspects are identical for those in the wing reserved for suspects, as for those in the main part of the UNDF. The only difference is that they do not have contact with each other, all activities, including mealtimes being carried out separately’.  

Further, although the SMR and the EPR clearly stipulate that convicted persons and remand detainees should be kept separate, the ICTY has not complied with this norm at all times. The 2006 report on the Swedish independent audit of the ICTY UNDU stated that ‘[s]everal detainees thought that social conditions could be improved if detainees who have already been convicted were separated from those who are involved in intensive preparations before or during their trial’. Nevertheless, the Swedish investigators acknowledged that ‘[a]ll differentiation between detainees entails logistical and capacity problems’ and that ‘[t]he need to separate convicted from non-convicted detainees should be met primarily by a more prompt transfer of convicted detainees to host countries’. On receiving the report in June 2006, the ICTY President acknowledged that ‘it is consistent with principles of human rights for convicted detainees to be separated from non-convicted detainees and that such separation should be in place in the United Nations Detention Unit as a matter of principle’. The President consequently ordered the Registrar to separate convicted and non-convicted individuals at the UNDU. Remand detainees’ interests’ differ in some respects from those of convicted persons. Of particular importance to the former group is access to counsel and, more generally, to be furnished with adequate facilities for the preparation of their defence. Of further importance to such persons is the

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88 ICTR, Interoffice Memorandum, from Alessandro Calderone, Chief of LDFMS, Detention of Suspects at UNDF, and the Complaint of Casimir Bizimungu in this Regard, 2 February 2000, par. 10.
89 See Rule 8(b) of the SMR and Rule 18.8(a) of the EPR.
90 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the former Yugoslavia, 4 May 2006, par. 2.8.5.
91 ICTY, Order to the Registrar to Separate Convicted and Non-Convicted Detainees held in the Detention Unit, Case No. IT-06-89-Misc.1, President, 15 June 2006.
92 Ibid.
neutral and independent position of the detention authorities and that the decisions of such authorities are not dictated by the prosecutor’s office.93

It should further be noted that, as a matter of course, the presumption of innocence no longer applies to the detention regime of convicted persons. Despite the theoretical similarity of the legal regimes governing the detention of convicted persons and remand detainees, the inapplicability of the presumption of innocence to the former group may affect the treatment these persons receive (this also concerns the legal position of persons convicted in first instance pending their appeal).94 For example, pending Ngeze’s appeal in the criminal proceedings against him, he applied to the ICTR President for a review of the decision of the Registrar denying him permission to marry on the UNDF premises and to consummate that marriage. The President considered that, according to international standards, the tribunal was not obliged to facilitate the consummation of marriages and conjugal visits, particularly not with regard to ‘persons serving sentences for international crimes’.95 In other words, the request may have been treated differently had it been submitted by a remand detainee.

In this regard, it should be noted that treating remand detainees with full respect for their presumed innocence entails the risk that the detention authorities adopt a more punitive approach towards convicted persons. This may be particularly so in institutions which accommodate both convicted persons and remand detainees. This, then, would undermine respect for the well-established penal idea that ‘offenders are sent to prison as punishment instead of for punishment’. In this regard, the ICTY President’s remarks in the 1994 report to the Security Council and the General Assembly that the fact that the tribunal is concerned with prosecuting and adjudicating grave international crimes played a role in the drafting of the Rules of Detention,96 may be problematic, particularly since no further explanation is provided.

94 ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008. The detention authorities said that these categories of confined persons are not treated differently.
The same may be said in respect of his remark that ‘as most of the inmates of the detention unit will be detained on remand, pending trial or, possibly, appeal, special attention has been given to the human rights aspects of detention’.\textsuperscript{97} Such statements might easily be misunderstood as implying that the tribunal is less concerned about the human rights of prisoners.

Since 2001, female detainees have been separated from the male population at the UNDU. In that year Plavšić - who was the first woman to be indicted by the ICTY – requested to no longer be detained at the UNDU and to be placed in a safe house (under house arrest) or to be transferred to a detention facility in Republika Srpska, on the grounds that the UNDU contained no ‘unit or facility for women which \textit{inter alia} protects their privacy’.\textsuperscript{98} The ICTY President denied the request, but ordered the modification of the conditions of her detention: she was to be guarded solely by female guards and to be detained in a section of the UNDU especially set aside for women. In addition, the President ordered that she would be permitted, upon her request, to meet the other (male) detainees during various activities organised by the UNDU, in order to prevent her isolation as the only woman detained at the UNDU (at the time).\textsuperscript{99} At the ICTR UNDF, Ms. Nyiramasuhuko has been detained in conditions comparable to those arranged for female detainees at UNDU.\textsuperscript{100}

The ICTY Rules of Detention begin with a number of Basic Principles. Next, they address several issues which relate to the management of the UNDU, such as admission, accommodation of detainees, the detainees’ personal hygiene and clothing, food, sports facilities and medical services. Other provisions concern discipline and the use of force. Rule 57 provides that, in certain circumstances, the Rules may be suspended. A separate section of the Rules is devoted to the rights of detainees. Such rights include the right to communications and to visits, legal assistance, spiritual

\begin{footnotes}
\item[97] \textit{Id.}, par. 105.
\item[98] ICTY, Order of the President on the Defence Request to Modify the Conditions of Detention of the Accused, \textit{Prosecutor v. Plavšić}, Case No. IT-00-39 & 40/1, President, 18 January 2001.
\item[100] As witnessed by the author during his visit to the UNDF in May 2008.
\end{footnotes}
welfare, work, recreational activities and the right to submit complaints. The fact that such rights are explicitly listed does not imply that this catalogue of rights was meant to be exhaustive. In *Ngeze*, the President was seised of a request of a prisoner to marry and to consummate the marriage inside the UNDF. The President noted, in this respect, that the tribunal’s constituent instruments did not contain any provisions on the matter, which had led the Registrar to deny Ngeze’s requests. Nonetheless, the President opined that ‘the silence of the ICTR provisions does not exclude the possibility that these rights be recognized’, and subsequently turned to ICTY practice and international human rights law in order to determine the issue. Finally, the Rules contain some provisions on the transport of detainees, and stipulate the procedure that must be followed in amending the Rules.

Other administrative regulations regarding detention matters

The ICTY and ICTR have regulated some aspects of detention that might easily infringe upon the fundamental rights of detained persons in a number of administrative regulations. First, concerning the issue of discipline, Rule 41 of the ICTY Rules of Detention provides that the ‘Commanding Officer, in consultation with the Registrar, shall issue regulations a. Defining conduct constituting a disciplinary offence; b. Regulating the type of punishment that can be imposed; c. Specifying the authority that can impose such punishment; d. Providing for a right of appeal to the President’. These requirements reflect the demands set by the principle of legality. Rule 15 of the Rules of Detention adds that ‘each detainee shall on admission be provided with written information in the working languages of the

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101 Actual UNDF and UNDU practice does not provide detainees with the possibility to work.


103 *Id.*, par. 5.

104 See, in a similar vein, Rule 36 of the ICTR Rules of Detention. The SCSL Rules of Detention provide in Rule 25(B) that ‘[t]he Chief of Detention, in consultation with the Registrar, shall issue regulations: (i) defining conduct constituting a disciplinary offence; (ii) regulating the type and duration of punishment that can be imposed; (iii) specifying the authority that can impose such punishment; and (iv) providing for a thorough investigation and a right of appeal’. The STL Rules of Detention do not demand that a separate set of regulations on disciplining are adopted, but stipulate the various disciplinary offences (Rule 33), the possible types of punishment and the duration thereof (Rules 38 and 39) themselves, and directly address the issues of authority and appeal.
Tribunal or in his own language concerning [inter alia] disciplinary requirements of the Detention Unit’. Rule 41(iv)\textsuperscript{105} further provides that ‘[t]he disciplinary regulations shall provide a detainee with the right to be heard on the subject of any offence which he is alleged to have committed’. Rule 41 was implemented following the adoption of the UNDF ‘Regulations for the Establishment of a Disciplinary Procedure for Detainees’ in June 1996.\textsuperscript{106} Second, in respect of the right to contact with the outside world, Rule 58 of the Rules of Detention states that ‘[s]ubject to the provisions of Rule 64, detainees shall be entitled, under such conditions of supervision and time constraints as the Commanding Officer deems necessary, to communicate with their families and other persons with whom it is in their legitimate interest to correspond by letter and by telephone at their own expense. In the case of an indigent detainee, the Registrar may agree that the Tribunal will bear such expenses within reason’. Further, Rule 59 stipulates that ‘[t]he Commanding Officer, in consultation with the Registrar, shall lay down conditions as to the inspection of correspondence, mail and packages in the interests of maintaining order in the Detention Unit and to obviate the danger of escape’. Moreover, Rule 61(A) provides that ‘[d]etainees shall be entitled to receive visits from their family, friends and others, subject only to the provisions of Rules 64 and 64\textsuperscript{bis} and to such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may impose (…’). The conditions and restrictions referred to in these Rules are further defined in the ‘Regulations to Govern the Supervision of Visits to and Communications with Detainees’, which were issued by the ICTY Registrar and the Commanding Officer in April 1995.\textsuperscript{107} The Preamble to these Regulations provides that such Regulations must be read subject to the Rules of Detention and the relevant RPE, and points specifically to Rule 64 of the Rules of Detention, which permits the Prosecutor in certain circumstances to request the Registrar or, in an emergency, the Commanding Officer, to ‘prohibit, regulate or set conditions for contact between a detainee and any other person’. These Regulations consist of three parts, the first one dealing with the detainees’ mail, the second with telephone calls, and the third with visits. Third, in April 1995 the ICTY Registrar issued the ‘Regulations for the Establishment of a Complaints Procedure for

\textsuperscript{105} See Rule 37 of the ICTR Rules of Detention; Rule 25(D) of the SCSL Rules of Detention.
\textsuperscript{106} These were issued by the Registrar. See, also, the similarly named ICTR Regulations.
\textsuperscript{107} See, also, the similarly named ICTR Regulations. At the SCSL, the Rules of Detention have been elaborated upon in so-called Detention Operational Orders.
In this respect, Rule 80(A) of the Rules of Detention provides that ‘[e]ach detainee on admission shall be provided in a language which he understands the Regulations for the Establishment of a Complaints Procedure for Detainees’.

Fourth, the ICTY Registrar issued a document entitled ‘House Rules for Detainees’, which contains some basic information for UNDU detainees. The document is directly addressed to detained persons and opens with the following statement: ‘[y]ou are now in the United Nations detention unit for persons awaiting trial or appeal before the International Criminal Tribunal for the Former Yugoslavia’. The purpose of the House Rules is to acquaint detainees with such matters as the right to legal assistance and the facilities provided at the Detention Unit to such purpose, interpretation facilities, discipline, medical services and to provide them with basic information on such issues as food, clothing, spiritual welfare, personal possessions, recreational activities, mailing and telephone facilities, regulations regarding visits and the formal complaints procedure. Although no such document exists for the ICTR UNDF, the authorities there do provide inmates with such basic information in a document entitled ‘General Information for Detainees’, in a document which contains information on telephone facilities and in a document entitled ‘Programme des Activités-UNDF’.

Fifth, the Presidents of both the ad hoc tribunals have, pursuant to Rules 19(B) and 103 of the RPE, issued a Practice Direction on the ‘Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment’.109

108 Similar Regulations have been issued by the ICTR Registrar, which have not been made publicly available on the tribunal’s website.

109 See the (ICTY) Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, of 9 July 1998. See, also, the (ICTR) Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, as revised and amended on 23 September 2008.
The Regulations of the Court (RoC) were adopted pursuant to Article 52 of the ICC Statute, which provides, in relevant part, that ‘[t]he judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning’. Regulation 1 provides that the RoC must be read subject to the Statute and the Rules. Regulation 2 contains a catalogue of definitions of terms used in the RoC, such as ‘Chief Custody Officer’, ‘detained person’, ‘detention centre’, ‘host state’ and ‘Presidency’. Chapter 6 of the RoC is specifically concerned with detention matters and is divided in two sections, entitled ‘General Provisions’ and ‘Rights of a detained person and conditions of detention’, respectively. The former section contains provisions which are concerned with such issues as the (daily) management of the Detention Centre, the confidentiality of detention records, information provided to detainees upon admission, and inspections of the Detention Centre. Regulation 91 lists a number of principles that govern the treatment of detained persons. For example, ‘[a]ll detained persons shall be treated with humanity and with respect for the inherent dignity of the human person’. Paragraph 2 prohibits discrimination ‘on grounds of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’, with the proviso that ‘[m]easures applied under these Regulations and the Regulations of the Registry to protect the rights and special status of particular categories of detained persons shall not be deemed to be discriminatory’. Regulation 95 addresses the issue of discipline and prescribes in Sub-Regulation 1 that ‘[d]iscipline and order shall be maintained by the Chief Custody Officer in the interests of safe custody and good administration of the detention centre’. Sub-Regulation 2 provides that further details of the disciplinary procedure must be laid down in the RoR. It also prescribes that such a disciplinary procedure ‘shall provide a detained person with the right to be heard on the subject of any offence alleged to have been committed, and shall include a right for the detained person to address the Presidency’. The final Regulation of the first Section referred to
above provides for the possibility of suspending the RoC in the event of a ‘serious disturbance or other emergency occurring within the detention centre’.

Section 2 focuses on the rights of detained persons. The RoC and RoR together provide for a layered approach to detainees’ rights. In this way, the second section of the RoC lays down the more general framework, which is further elaborated upon in the RoR. Specific Regulations of the RoC instruct the Court’s authorities to further regulate the issues covered in the RoR. In this regard, Regulation 1 of the RoR provides that the RoR must be read subject to the RoC. Regulation 97 provides for the right of detained persons to privileged communications with counsel and states in this respect that the services of an interpreter are provided for if necessary. Regulation 98 sets out the right to diplomatic and consular assistance. Regulation 99 states, *inter alia*, that detained persons have the right to participate in a work programme, to have in his or her possession some personal items and clothing, to procure reading and writing materials, to keep themselves informed of the news through newspapers, radio and television, to a minimum of one hour exercise per day, to engage in sports, to receive mail and to communicate by letter or telephone with relatives and other persons. Sub-Regulation 99(2) provides for the imposition of restrictions, stating that ‘[t]he relevant details for the application of sub-regulation 1 shall be set out in the Regulations of the Registry, including any restrictions necessary in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre’. Further, Regulation 100 recognises the right of detainees to receive visits, and states that they must be informed of the identity of visitors and that they may refuse to see any visitor. Sub-regulation 100(3) provides that further conditions, restrictions and supervision requirements, which may be necessary ‘in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre shall be set out in the Regulations of the Registry’. Moreover, Regulation 101 states that access to the news and detainees’ contact with others may be restricted at the request of the Prosecutor. Other Regulations address such issues as spiritual welfare of detained persons, their health and safety, the care of infants and accommodation. Finally, Regulation 106 stipulates that ‘[a] detained person shall have the right to file a complaint against any administrative decision or order or with regard to any other matter concerning his or her detention’. It further provides, in Sub-
regulation 106(2) that a complaints procedure must be laid down for in the RoR, which will ‘include a right for the detained person to address the Presidency’.

Regulations of the Registry

The Regulations of the Registry (RoR) were adopted pursuant to Rule 14 of the RPE, which reads in Paragraph 1 that ‘[i]n discharging his or her responsibility for the organisation and management of the Registry, the Registrar shall put in place regulations to govern the operation of the Registry. In preparing or amending these regulations, the Registrar shall consult with the Prosecutor on any matters which may affect the operation of the Office of the Prosecutor. The regulations shall be approved by the Presidency’. Regulation 1 prescribes that the Regulations must be read subject to the Statute, the Rules and the Regulations of the Court. Further, like Regulation 2 of the RoC, Regulation 2 contains a list of definitions of terms used in the RoR. Chapter 5 of the RoR deals with detention matters and consists of six sections. The first section contains only one provision, which provides that ‘[t]he Registrar and the Chief Custody Officer shall facilitate the work of the independent inspecting authority and provide it with all relevant information in their possession’. The second section is concerned with the ‘rights of detained persons and conditions of detention’ and elaborates upon the rights stipulated in the RoC. The next set of Regulations is concerned with detainees’ welfare and such activities as work, recreation and sports. Other Regulations in section two are concerned with detained persons’ right to contact with the outside world by correspondence, telephone and through receiving visits. The third section of Chapter 5 of the RoR deals with such management related matters as admission procedures, the responsibilities of the Chief Custody Officer and such privacy related issues as personal searches, searches of cells and cell monitoring. Other Regulations concern such basic matters as personal hygiene, clothing and food, or are devoted to the segregation and transport of detainees. The final two Regulations of section three deal with the use of force and instruments of restraint within the Detention Centre. Section four of Chapter 5 of the RoR addresses the issues of discipline and control. In accordance with Regulation 106 of the RoC, section five of Chapter 5 of the RoR sets out the formal complaints procedure. The final section of Chapter 5 of the RoR is entitled ‘[d]etention at the seat of the Court after conviction
and before transfer to the State of enforcement’ and consists of one Regulation only, Regulation 223, which provides that the RoR and all other Regulations on detention matters ‘shall apply mutatis mutandis during the period in which a detained person remains in the detention centre after conviction and before transfer to the State of enforcement’.
3.3 Exceptions to the regular detention regimes

3.3.1 The modification of detention conditions

As stated earlier, the tribunals’ detention regimes are governed by what may be referred to as a ‘rooftop principle’, according to which the detention of each person detained under the roof of these remand institutions should, in principle, be administered in accordance with the general detention regime as set out in their Rules of Detention. Nevertheless, specific procedures exist at the tribunals in order to modify the substantive (standard) conditions of a particular person’s detention. In practice, such modifications have had a major impact on the detention of individual detainees, particularly in cases where the person concerned has been transferred to another institution (as a consequence of which almost the whole regime will be changed), where a detainee has been placed in a so-called safe-house or where the detainee has been segregated from all other detainees. Such modifications concern (aspects of) the internal legal position of detained persons and must, therefore, not be confused with such practices as provisional release.110

In describing the tribunals’ detention regimes, it is impossible not to also examine such regime modifications. Another justification for examining in closer detail this aspect of detention lies in the working hypothesis central to this research, that the particularities of international detention may entail particular difficulties that cannot be addressed by merely applying standards that were developed with the domestic prison context in mind. To be sure, the small-scale and standalone character of the tribunals’ remand facilities poses challenges for authorities confronted with the need to modify the conditions of a detainee’s or prisoner’s detention due to, for example, safety and security concerns or the wish to reward such a person for his or her voluntary surrender. In light of the diplomatic sensitivities, costs and security concerns involved, the tribunals are not in a position to demand unilaterally that host States set up separate detention facilities for individual detainees whose detention conditions are modified.111

110 See, supra, Chapter 1, p. 33 and this Chapter, infra, p. 146.
111 This also follows from provisions in the various Host State Agreements which hold that the tribunals must ‘observe all security directives as agreed with the host country or as issued, in coordination with the United Nations Security Service, by the competent authorities
The modification of detention conditions at the various tribunals

ICTY

The ICTY UNDU is an autonomous remand facility. Although located within a Dutch prison, the Detention Unit’s management is the tribunal’s responsibility alone. Since November 1997, Rule 64 of the ICTY RPE has provided that ‘[u]pon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside of the host country. The President may, on

responsible for security conditions within the penitentiary institution where the Tribunal area for detention is located’; Article XXI(3) of the Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda of 31 August 1995 and Article XXI(3) of the Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. See, also, Article 23(3) of the Headquarters Agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone, Article 34(5) of the Headquarters Agreement between the International Criminal Court and the Host State (ICC - BD/04 - 01 - 08, of 1 March 2008) and Article 30(5) of the Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon. Article 30(2) of the STL Headquarters Agreement (likewise Article 34(2) of the ICC Headquarters Agreement) adds that ‘[t]he Tribunal and the host State shall cooperate on security matters, taking into account the public order and national security of the host State’, which appears to imply a horizontal relationship. Indeed, Article 41 of the STL Headquarters Agreement and Article 46 of the ICC Headquarters Agreement explicitly provide that ‘1. The host State shall cooperate with the Tribunal to facilitate the detention of persons and to allow the Tribunal to perform its functions within its detention centre. 2. Where the presence of a person in custody is required for the purpose of giving testimony or other assistance to the Tribunal and where, for security reasons, such a person cannot be maintained in custody in the detention centre of the Tribunal, the Tribunal and the host State shall consult and, where necessary, make arrangements to transport the person to a prison facility or other place made available by the host State’ (emphases added). It follows that the co-operation relationship between the Netherlands as host State and the STL and the ICC regarding the detention of accused or suspects is horizontal in nature. In respect of the detention of other persons whose presence at the STL or ICC is necessary for them to provide assistance to these tribunals, special detention arrangements may be made upon the tribunals’ consultation with the Dutch competent authorities. Although, still, the character of the co-operation relationship is a horizontal one, the sole possibility of detention within the tribunals’ formal detention premises as it applies to the detention of suspects and accused does not apply to the confinement of the latter category of detained persons.

112 See ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.4; ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 125.
the application of a party, request modification of the conditions of detention of an accused’. The Rules’ revision on 12 November 1997 ensured that the provision’s language was gender neutral, to not only refer to male accused persons. A more significant amendment of Rule 64 was made on 25 July 1997, when the provision’s second sentence was inserted, known as the ‘exceptional conditions’ criterion. This criterion has been strictly adhered to in the tribunal’s practice and appears to apply to requests for detention both out- and inside the host State. In 2005, in the Halilović case, the President noted in this regard that Rule 64 motions had been granted only twice before.

Applications under Rule 64 can only be made by one of the parties to the criminal proceedings. Regarding the admissibility of such requests, the phrase ‘modification of the conditions of detention of an accused’ has been interpreted narrowly, requiring that the accused actually be detained at the moment of the modification decision. In Halilović, for instance, the accused requested, while on provisional release, the President to modify the conditions of his detention, and to be placed in a “‘safe-house” or apartment in The Hague under conditions set by the Trial Chamber’. His request was dismissed due to the fact that he was not detained at the moment of the decision on the application.

Several issues relating to the application of Rule 64 and the implementation of such orders arose in the Blaškić case and were addressed by former ICTY President Antonio Cassese. After Blaškić had surrendered voluntarily to the ICTY, his Defence requested that he be granted certain privileges ‘to have better conditions than he would have in a normal detention’. The Defence requested that Blaškić ‘be

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113 Before these amendments were made, the provision read ‘[u]pon his transfer to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused’.
114 ICTY, Order of the President on the Renewed Defence Motion Concerning Conditions of Detention During Trial, Prosecutor v. Halilović, Case No. IT-01-48-PT, President, 24 January 2005.
115 ICTY, Decision on Defence Motion Concerning Conditions of Detention, Prosecutor v. Halilović, Case No. IT-01-48-PT, President, 12 February 2004, par. 1.
116 Id., par. 4-5. A renewed Motion was filed on 30 December 2004. See ICTY, Order of the President on the Renewed Defence Motion Concerning Conditions of Detention During Trial, Prosecutor v. Halilović, Case No. IT-01-48-PT, President, 24 January 2005, par. 1-3.
117 ICTY, Transcripts, Prosecutor v. Blaškić, Case No. IT-95-14 25, T. Ch., 25 April 1996, page 10, lines 26-28; ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64
accommodated outside the detention unit and that he be allowed to communicate with
his wife by telephone, and that he also be enabled to have some physical exercise and
other things which are normally available in a usual residence as opposed to the
detention unit of the United Nations’. 118 For his part, Blaškić promised to ‘abide by
all conditions imposed by the President and (…) agreed neither to seek political
asylum in the Netherlands nor to have contact with the media or the press’. 119 The
Prosecution further demanded that Blaškić would cover all the costs incurred by the
special detention conditions.

Initially, there was some confusion as to whether the motion should have been filed
pursuant to Rule 64 or to Rule 65 of the ICTY RPE.120 To be sure, the mere
modification of detention conditions under Rule 64 must be sharply distinguished
from the provisional release envisaged by Rule 65. The President underlined that
applications pursuant to Rule 65 for provisional release may only be decided upon by
a Trial Chamber and not by the President. Further, pursuant to Rule 64, the person
concerned remains in the custody of the tribunal. In the Halilović case, the President
pointed to the different factors governing the two provisions and their distinct
rationales. Whereas Rule 65 had been ‘designed specifically to protect the liberty
interest of indictees in balance with the considerations of public welfare’, 121 ‘Rule 64
is not necessarily employed to safeguard the liberty interests of the Accused’. 122

Further, ‘Rule 64 permits the President to modify the conditions of detention to meet
specific needs of the Accused or Prosecution, but the presumption – based on
consideration of costs to the International Tribunal, costs to The Netherlands, safety
of the Accused, and the desire to maintain standard conditions of detention for

President, 3 April 1996, par. 1.

page 10, lines 29-37.

119 ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of
Procedure and Evidence, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, President, 3 April
1996, par. 3.

120 *Id.*, par. 2.

121 ICTY, Order of the President on the Renewed Defence Motion Concerning Conditions of
Detention During Trial, *Prosecutor v. Halilović*, Case No. IT-01-48-PT, President, 24 January

122 *Id.*, par. 17.
indictees – is for detainees to be held at the Detention Unit. This presumption is only
overcome in exceptional circumstances’.123

In Blaškić, the President further explained that the measure of ‘compulsory
residence’ (assignation à residence), which is provided for in the Croatian legal
system, must be considered as a mode of provisional release, which (therefore) cannot
be sought pursuant to Rule 64. He held that ‘compulsory residence’ ‘is not a form of
detention, but rather a precautionary measure taken against persons who (i) have
allegedly committed offences which do not automatically entail remand in custody
and (ii) are not likely to engage in behaviour (such as interference with investigations,
repetition of crime, danger to public order) requiring that a custodial measure be
taken. Compulsory residence is destined to ensure that an indictee shall not abscond
before the initiation of trial thereby evading justice’.124 The President distinguished
this form of provisional release from ‘house arrest’ (arrêt domiciliaire), a mode of
detention which ‘would constitute a middle-of-the-road measure between what is
regarded by the Rules as the norm, namely detention on remand (Rule 64) and the
exception, i.e., provisional release (Rule 65)’.125 While noting that the ICTY’s legal
framework does not explicitly provide for the possibility of house arrest, the President
noted that ‘nothing in the Statute or the Rules prevents or prohibits such house arrest
as an alternative to pretrial incarceration (or for that matter, to imprisonment to serve
a sentence)’.126 He further pointed to the Council of Europe’s view that detention on
remand must be seen as an exceptional measure and that, where possible, other, less
intrusive measures must be adopted.127 On the basis of the practice of various
domestic legal systems, the President identified a number of shared elements of the
concept of ‘house arrest’. Factors weighing against house arrest include ‘the risk that

123 Ibid.
124 ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of
Procedure and Evidence, Prosecutor v. Blaškić, Case No. IT-95-14-T, President, 3 April
1996, par. 12.
125 Id., par. 13.
126 Ibid.
127 See, in this respect, CoE, Recommendation (2006)13 of the Committee of Ministers to
member states on the use of remand in custody, the conditions in which it takes place and the
 provision of safeguards against abuse, adopted on 27 September 2006. According to the
Recommendation’s Preamble, its paragraphs are intended, inter alia, to ‘set strict limits on the
use of remand in custody’ and ‘encourage the use of alternative measures wherever possible’.
In the ‘[d]efinitions and general principles’-section, among the various forms of ‘alternative
measures’, one finds the possible requirement ‘to reside at a specified address, with or without
conditions as to the hours to be spent there’.
the detainee might escape, the likelihood that he might tamper with or destroy evidence or endanger possible witnesses; the likelihood that he might continue his criminal behaviour; [and the] potential danger to public order and peace’. 128 Factors in favour of the measure include the serious mental or physical illness of a detained person, old age, the likelihood that standard detention conditions would seriously ‘jeopardize [the detained person’s] life or mental health, or when there are special circumstance[s] warranting house arrest as a measure [for] rewarding particular behaviour of the accused (e.g., he has voluntarily offered evidence going beyond what had been requested by the prosecutor or investigating judge)’. 129 Further, according to the President, the specific conditions under which house arrest may be imposed may vary from case to case and may include that the detained person ‘(a) be allowed to live in a flat or house with his family without being permitted to receive or meet with anybody other than his legal counsel or medical doctor, or (b) be allowed to leave his place of residence at fixed hours per day, and for a short period of time, to engage in a working activity, or (c) [be allowed to] leave his place of residence for short and pre-established periods of time for specified purposes other than a working activity, on condition that he should report regularly to police before and after leaving his residence’. A common feature of house arrest was further found to be the detained person’s right ‘to live with his family and to see his counsel in his place of detention’. The President held that ‘[i]t is with regard to the last-mentioned conditions that house arrest can be regarded as a privileged or preferential form of detention’. 130 He also noted that one of the factors weighing against house arrest was particularly relevant to the Blaškić case, stating that ‘his presence on Dutch territory is likely to pose a danger to public order and peace, if only because of the presence in the Netherlands of thousands of refugees from the former Yugoslavia’ – while neither of the positive preconditions of old age or illness were met’. 131 The President, therefore, declined to grant Blaškić’s request for ‘house arrest’. 132

129 Ibid.
130 Id., par. 20.
131 Id., par. 21.
Nevertheless, on the condition that ‘that all costs related to such modification be covered by, or on behalf of, the accused’, the President granted the Defence request for modification of detention conditions and ordered that Blaškić be detained in a safe-house outside UNDU, subject to a number of restrictions. In doing so, the President took into account Blaškić’s voluntary surrender and pointed to the maxim of *in dubiis benigniora praef erenda sunt*, meaning that ‘in doubtful cases the more liberal treatment must always be preferred’. According to the Registrar, if Blaškić were to commit a serious breach of the conditions, the former would be authorised to order his immediate confinement at the UNDU. The distinction between his placement in a safe-house and ‘house arrest’ was clarified in *Halilović*, where the President wrote that ‘house arrest provides more protection to the Accused’s liberty interests by allowing him to live with his family and to see counsel in his place of...
detention, whereas detention at a safe house does not necessarily allow these conditions, but allows the Accused to live in the dwelling of his choice’.

With respect to the legal regime governing Blaškić’s detention in the safe-house, the President declared UNDU’s legal regime applicable *mutatis mutandis*, unless explicitly departed from in the modification order. In respect of the right to make complaints and requests, the President held that the detained person may submit these to the Registrar in writing, with a right to appeal to the President.

Two weeks later the President, upon the request of the Defence, issued another order pursuant to Rule 64, in which he amended some aspects of his earlier decision. A week after such amendments were made, the Registrar informed both the President and Blaškić that it was impossible for him to implement the President’s orders. He stated, firstly, that Dutch law did not permit the domestic authorities to ‘participate in being involved in the detention of someone who has been

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139 The President modified his earlier decision by holding that ‘1. General Blaškić will be moved from his present place of detention to a more appropriate place designed by the Registrar, after consultation with the Dutch authorities. He will be allowed to have a television and a radio available to him at his own cost, in accordance with the Rules of Detention. 2. Sub-paragraph 24(c) of the Decision is replaced by the following wording: “He shall be authorised to leave his residence only to meet his Counsel, the diplomatic and consular representatives of the Republic of Croatia accredited in the Netherlands, his family and friends. The meetings and visits will take place in the United Nations Detention Unit in accordance with the Rules of Detention. However, meetings with his wife and children as well as with his Counsel, may take place in any other place deemed appropriate by the Registrar after consultation with the Dutch authorities, and for such duration as the Registrar considers appropriate in accordance with the Rules of Detention. In addition the Accused is entitled, once a month, to spend the night with his wife and children”. 3. Sub-paragraph 24(i) of the Decision is replaced by the following wording: “He shall be allowed to make telephone calls (outgoing calls) from his place of detention, subject to Rule 66 of the Rules of Detention, and also to paragraph 6 of the section of the Regulations to Govern the Supervision of Visits to and Communications with Detainees (IT/98), concerning telephone calls”. 4. All the other conditions of detention as set out in the Decision remain unaltered’; ICTY, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaškić, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, President, 17 April 1996; ICTY, Press Release, AMcD/P/O/063-E, The Hague, 23 April 1996.

140 ICTY, Letter from the Registrar to the President, 23 April 1996.

held by another jurisdiction which is not the one of the Netherlands’.\footnote{Id., page 16, lines 13-17.} Banning and De Koning have since cited Strijards – the Dutch Government’s contact person for the ICTY – as saying that the Dutch authorities had not been made aware beforehand of the pledges made to Blaškić. The Dutch authorities had yet to find an adequate house for Blaškić and to make all the necessary security arrangements.\footnote{Cees Banning & Petra de Koning, supra, footnote 13, p. 103.} Secondly, the tribunal had yet to consider under what authority it could detain a person in non-U.N. facility, and how to deal with the Registry’s lack of authority over non-U.N. personnel.\footnote{ICTY, Transcripts, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14 25, T. Ch., 25 April 1996, page 16, lines 22-33.} In order to resolve these issues, the President’s decisions were forwarded to the U.N. Secretary-General’s legal office in New York.

Nevertheless, the President’s initial orders for detention in a safe-house and corresponding conditions were ultimately implemented. Such detention lasted for approximately one year in total, before Blaškić eventually returned to the UNDU. During this time, Blaškić changed houses three times, his detention conditions being modified in May 1996\footnote{ICTY, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaškić, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, President, 9 May 1996.} and again in January 1997.\footnote{ICTY, Press Release, CCPIO/146-E, The Hague, 13 January 1997; ICTY, Decision on Motion of the Defence Seeking Modification of the Conditions of Detention of General Blaškić, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, President, 9 January 1997.} On the latter occasion, the President emphasised the importance of the host State’s co-operation in these matters, the imperative of security and order, and ‘the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and the presumption of innocence’\footnote{\textit{Ibid.}}. Blaškić is reported by Banning and De Koning as having said upon arrival back at the the UNDU, that he had not been better off at the safe-house. The sole advantage of such detention was that his wife and children had been permitted to visit and to stay with him for a week at the safe-house.\footnote{Cees Banning & Petra de Koning, supra, footnote 13, p. 113.} In December 1996, the Trial Chamber denied Blaškić’s request for provisional release, noting that ‘the modification of the conditions of detention
granted to the accused in part relieve the usual effects of incarceration”149 and, in that light, found that ‘the arguments raised by the Defence concerning the beneficial effect which his presence in Zagreb would have both to prepare his defence and to meet his family obligations are not relevant to the case in point’.150

The ICTY’s use of “privileged detention” in Blaškić must be distinguished from the use of safe-houses by the ICTR.151 The latter use serves investigative, security or safety purposes only and is not intended as a reward to detained persons for good behaviour.

The ICTY President’s other orders pursuant to Rule 64 (not involving a detainee’s placement in safe-houses) have served other ends as well though. In Plavšić, the Defence complained that ‘the conditions in the Detention Unit which has been designed as a detention unit for men is unacceptable because it is inappropriate for the detention of a woman, in this case Ms. Plavšić. In all prisons in the world, there are separate facilities for men and women’.152 It noted, however, that ‘[s]hould an area be appropriately adjusted for Ms. Plavšić, she would still be living in a male environment and, in fact, she would be in absolute isolation, and we all know what that would mean for the accused because solitary detention is punishment and this is something that has not been envisaged in this particular case’.153 Therefore, the Defence requested that Plavšić ‘be held in a safe house (under house arrest) or in a detention facility in Republika Srpska’.154 The Dutch authorities acknowledged the difficulty of the situation and agreed to ‘bear the costs arising from the detention of Ms. Plavšić in a safe house and to provide security, on the understanding that if an optimal level of security can no longer be guaranteed, the accused will have to return to the United Nations Detention Unit’.155 The Registrar warned, however, that placing Plavšić in a safe-house would contribute to her isolation. Furthermore, the Prosecution and Registry both opposed the request that she be transferred to the Republika Srpska,

149 ICTY, Order Denying a Motion for provisional Release, Prosecutor v. Blaškić, Case No. IT-95-14-T, T. Ch., 20 December 1996.
150 Ibid.
151 See, infra, par. 152.
153 Ibid.
154 ICTY, Order of the President on the Defence Request to Modify the Conditions of detention of the Accused, Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, President, 18 January 2001.
155 Ibid.
on the grounds that this would require the conclusion of an agreement between the tribunal, the Republika Srpska, and Bosnia-Herzegovina, and would necessitate the permanent stationing of a representative of the Registry in the region. Such a transfer would further pose problems to the organisation of meetings between Plavšić and the Office of the Prosecutor and, as a consequence, would complicate the preparation of Plavšić’s trial. Eventually, Plavšić withdrew her request to be held either in a safe-house or in the Republika Srpska and said that she wished to remain at UNDU. Referring to the SMR and various recommendations by the Council of Europe, President Jorda subsequently ordered the modification of the conditions of Plavšić’s detention in UNDU pursuant to Rule 64, stipulating that she was to be ‘held in the section of the United Nations Detention Unit which (...) is set aside for women and entirely separate from that for men; that she must be guarded by only women; and that she must be able to access the recreation and exercise rooms, the outside exercise yard and the library without male detainees being present’. In order to prevent her isolation, the President added that she ‘may, if she so expressly requests, meet the other detainees during the various activities organised by the Detention Unit, subject to restrictive measures taken by the competent authorities in accordance with the rules applicable to all detainees’. Finally, regarding Plavšić’s complaint of having to prepare her trial in a room used exclusively by men, the President permitted her to use an ‘additional cell directly accessible from her own’.

As noted in Halilović, detention conditions have been modified pursuant to Rule 64 in only two cases, i.e. in Plavšić and Blaškić. According to the ICTY

157 ICTY, Order of the President on the Defence Request to Modify the Conditions of Detention of the Accused, Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, President, 18 January 2001.
158 Ibid. Footnote omitted. See, also, the remarks by Terry Jackson, Chief Custody Officer of the ICC Detention Centre, on the issue where he held that ‘[i]nternational standards require segregation of male and female detained persons in terms of “living accommodation”. If, however, for example we have one female detained person, we must ensure that she has contact with other people. We would look at the situation in terms of her spending recreational time with the other detained persons, but in terms of living accommodation, she would have her own accommodation’; FAQ about Detention put to Terry Jackson Chief Custody Officer of the ICC, ICC Newsletter, No. 7, April 2006, p. 3.
159 ICTY, Order of the President on the Defence Request to Modify the Conditions of Detention of the Accused, Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, President, 18 January 2001.
President in *Halilović*, the applicability of this provision in such cases centered on i) the presence of ‘specific reasons why detention at the Detention Unit fails to meet the minimum standards of detention or recognized special needs of the Accused’, and ii) the wish to reward the detained person for his conduct – e.g. the voluntary surrender to the tribunal – by granting him a form of privileged detention, subject to certain restrictions, and on the condition that the detainee concerned bears the costs of the privileged detention conditions.

In 2005, the *Ljubičić* Trial Chamber proposed, after concluding that in that case the criteria for granting provisional release were not fulfilled, a wider application of Rule 64, arguing that ‘in view of the substantial period of time spent in pre-trial detention, a more lenient measure than pre-trial detention in the United Nations Detention facilities may be more appropriately applied to the Accused, such as his placement under house arrest. Such a determination is however not of the competence of this Trial Chamber’. However, a Defence request to that effect, *i.e.* for *Ljubičić* to be placed under house arrest in his wife’s apartment in Mostar, was denied on the ground that ‘the facilities in which an accused shall be detained upon transfer to the seat of the Tribunal are to be provided by the host country or another country. If an accused is to be housed in a facility other than the United Nations Detention Unit, then that other facility must be one provided by the host country, or the other country to which the accused seeks to be detained. The accused has failed to establish that the authorities of BiH have provided the facility as is required under the Rule. The Rule does not permit an accused to be detained in a private dwelling solely nominated by the accused himself’.

In their Report of 2006, the Swedish investigators of UNDU noted that several detained persons took issue with the fact that convicted persons were not separated

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161 *Id.*, par. 22.
from remand detainees. According to the investigators, detainees tended to spend a lot of time working on their cases, and had communicated to the investigators their need for ‘peace and quiet so as to be able to concentrate, while the other group needs more activity and contact while awaiting placement in another country’. Although the Swedish investigators noted that such concerns would be met by promptly transferring convicted persons to a State designated for the enforcement of their sentence, they also noted the tribunal’s long waiting time for transfer and, as a practical measure, called for the separation of the two groups within UNDU.

ICTR

Rule 64 of the ICTR RPE provides that ‘[u]pon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused’. Hence, the authority to modify detention conditions lies exclusively with the President. Such requests have been made by either the Prosecutor or the defence and have concerned issues relating to security and safety, the health-care provided to a particular detainee or have served investigative interests. There have been requests for the transfer of particular detained persons to the ICTY UNDU, to place them in an annex to the UNDF, in safe-houses, or to transfer them successively between several safe-houses at regular intervals.

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164 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.8.5.
165 Id., par. 2.8.5.
166 Ibid. See, further, Chapter 7.
167 ICTR, Interoffice Memorandum from Alessandro Calderone Chief of LDFMS. Detention of Suspects at UNDF and the Complaint of Casimir Bizimungu in this Regard, 2 February 2000.
168 See, e.g., ICTR, Order Issued by the President Regarding Special Measures for Detention on remand, Following a request Filed by the Prosecutor, Prosecutor v. Kambanda, ICTR-97-23-DP, President, 25 November 1997, which dealt with the request to transfer Kambanda to The Hague for security purposes. See, also, ICTR, Defence request for a Modification of the Conditions of Detention of the Accused Pursuant to Rule 64 of the Rules, Prosecutor v. Ruggiu, Case No. ICTR-97-32-T, President, 23 July 1999; ICTR, Decision on Matthieu Ngitumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, President, 3 March 2009.
Nevertheless, the President has stressed that Rule 64 applies in exceptional circumstances only, *i.e.* ‘circumstances which imperatively demand the modification of the conditions of detention’.[173] Such circumstances may, for instance, arise where there is an increased risk to the safety of the detained person concerned and where the less drastic measure of segregating him or her from the other inmates is considered inadequate. In *Ruggiu*, for instance, the Defence requested a modification of the conditions of Ruggiu’s detention, claiming that his safety situation had deteriorated ‘owing to the aggressive attitude of most of the other detainees’ following Ruggiu’s decision to co-operate with the ICTR Prosecution, to meet with the Prosecutor of the Italian Republic of Bari and ‘to participate actively and positively in the request for evidence’. [174] Although an earlier decision to segregate Ruggiu from the other inmates in order to ensure his safety had been effectively implemented, the separate facility to which he was moved was located next to the other inmates’ facility. Further, total separation from the other detainees was not considered feasible in light of ‘both the disposition of the premises and the organization of the shared facilities’. [175] Some months after his transfer to a safe-house, Ruggiu again argued that the (newly modified) detention conditions no longer sufficed to adequately protect him. His Defence argued that Ruggiu, ‘who has spent several months at the Detention Facility, knows how good information can be therein: the indiscretion, deliberate or naïve, of certain members or junior staff is fully exploited by very clever detainees’ and claimed that Ruggiu ‘(…) was told long ago that the location of safe houses used in the judicial process was well known to the detainees, some of their counsel or

[175] Ibid.
allies’. As such, the Defence requested that Ruggiu be successively transferred between several safe-houses at regular intervals in order to improve his security.

Since Ruggiu, it has become UNDF policy to immediately segregate detained persons who enter a guilty plea or who indicate that they are considering entering such a plea from the other inmates. It should be noted, however, that requests for segregation must be made under Rule 40 of the ICTR Rules of Detention, not under Rule 64 of the RPE. Moreover, complaints relating to segregation cannot be brought before the President pursuant to Rule 64, but must be submitted through the regular complaints procedure set out in Rules 82 and 83 of the Rules of Detention. As will be explained in Chapter 5, a detained accused who does not agree with the outcome of such procedure may only bring this to a Trial or Appeals Chamber’s attention where such detention conditions potentially infringe on the fairness of the criminal proceedings.

The reason for granting Rule 64 requests in exceptional circumstances only is the ICTR’s dependency on co-operation by other institutions such as the ICTY and by host States for the implementation of modification orders. In order for an ICTR detainee to be held at UNDU, the ICTY President needs to issue an order to this end, since ‘no person may be detained in the detention facilities of the ICTY without a warrant of arrest or an order for detention duly issued by a Judge or Chamber of the ICTY’. Further, it may be that the host State of the receiving institution is only prepared to authorise the transfer under certain conditions. In Kambanda, for instance, the Government of the Netherlands demanded that i) the accused sign a statement waiving his rights to applying for asylum in the Netherlands’ and further stipulated

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177 Ibid.
178 ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
179 ICTR, Order Issued by the President Regarding Special Measures for Detention on Remand, Following a request Filed by the Prosecutor, Prosecutor v. Kambanda, ICTR-97-23-DP, President, 25 November 1997.
that, ii) ‘the transfer of the accused did not imply that he would eventually be detained in the Netherlands’; iii) ‘the accused’s family or relatives would not be admitted to the Netherlands’; and iv) the accused “[would] be treated in conformity with the ICTY penitentiary regime, i.e. not receive special treatment”’.181

The Prosecution’s Office has repeatedly made requests to the President under Rule 64, mainly to enable its staff members to visit a particular detained person without the knowledge of the other inmates. This is to prevent other inmates from attempting to exert pressure on detained accused persons who are potential witnesses, or on detainees who are considering entering into a plea bargain agreement with the Prosecution.182 In Kambanda, it was held that the accused, ‘in his capacity as Prime Minister of the Interim Government of Rwanda at the time of the events of 1994, is an essential witness for the Prosecutor with whom he has accepted to cooperate; that this cooperation will be known and that he would consequently be the object of threats and that there are serious reasons to believe that his safety would be seriously threatened’.183 In such circumstances, it was considered ‘necessary for the Prosecutor [1] to ensure that Jean Kambanda had a place of detention offering all the necessary guarantees for safety, [2] while allowing the investigators of the Prosecutor’s Office constant and confidential access to the accused, without attracting the attention of other detainees’.184

184 ICTR, Order Issued by the President Regarding Special Measures for Detention on Remand, Following a request Filed by the Prosecutor, Prosecutor v. Kambanda, ICTR-97-23-DP, President, 25 November 1997.
In addition, both the Prosecution and the defence have requested the transfer of detained persons to the ICTY UNDU, or for extending the stay of earlier transferred detainees at the UNDU. Regarding such requests, the President has stipulated that possible security concerns must be assessed within the context of the accused person ‘testifying as a Prosecution witness and his anticipated assistance in investigations to be conducted by the Office of the Prosecutor and by national authorities’. In other words, “mere” safety and security concerns will not easily suffice. Indeed, it appears from the available case-law that, as soon as the investigative interest in keeping an accused in The Hague disappears, security arguments lose their (seemingly overriding) importance and the person is transferred back to the UNDF.

Medical reasons may, in principle, also necessitate transfer to the ICTY UNDU or another institution. In 2009, Ngirumpatse requested the modification of the conditions of his detention in order to be transferred to The Hague for medical treatment. The President confirmed that in certain circumstances such transfer may be justified. He pointed to the fact that, at the time of filing the request, Ngirumpatse was already being detained in modified conditions due to his medical condition, i.e. he was hospitalised outside Tanzania. With respect to such hospitalisation, the

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185 See, e.g., ICTR, Decision on Rule 11bis Appeal, Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, A. Ch., 30 August 2006, par. 4.
188 ICTR, Decision on Matthieu Ngirumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, President, 3 March 2009, par. 9.
189 Id., par. 2.
President addressed another of Ngirumpatse’s complaints concerning his lack of privacy due to security arrangements. He held in this regard that while ‘Ngirumpatse is being treated for a serious illness in hospital, (...) he remains a detainee of the Tribunal. Such a situation presents unique challenges (...). [T]he situation is multifaceted and includes issues of Ngirumpatse’s personal security, his medical treatment and his status as a detainee’. Nevertheless, without providing further details, he instructed the Registrar to review the arrangements and report back to him.

As to Ngirumpatse’s request to be transferred to the ICTY, the President held that Ngirumpatse had failed ‘to provide evidence that either the ICTY or the Government of the Netherlands have agreed to his transfer and detention’. Secondly, the President noted an earlier finding of the Trial Chamber that Ngirumpatse had ‘received sustained and adequate medical treatment in his current place of hospitalisation’ and the opinion of the UNDF’s Medical Officer who provided assurance that ‘Ngirumpatse was receiving the same level of medical care that he would receive elsewhere’. On the basis of these two arguments, the President denied Ngirumpatse’s Motion.

Later, on the basis of the Registrar’s report on Ngirumpatse’s detention conditions in the hospital outside Tanzania, the President issued a modification order pursuant to which Ngirumpatse was transferred to a safe-house, where he underwent medical treatment by the UNDF’s Medical Officer. The purpose of such transfer (back to Arusha) was to ‘address the concerns expressed by Ngirumpatse regarding his security and privacy and facilitate his return to good health’. In December 2009, the Registrar proposed that Ngirumpatse be returned to the UNDF. There no longer existed any medical reasons to keep him at the safe-house, whilst further submitting that special arrangements and facilities would be put in place at the UNDF ‘to ensure continuous monitoring of his condition, exempt him from domestic chores, and

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190 Id., par. 10.
191 This requirement may very well render the possibility for a detained person to be transferred to the ICTY for medical reasons on his own request a purely theoretical one. ICTR, Decision on Matthieu Ngirumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, President, 3 March 2009, par. 11.
192 Id., par. 12.
193 ICTR, Decision on Matthieu Ngirumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Ngirumpatse, Case No. ICTR-98-44-T, President, 24 June 2010, par. 4.
provide a special diet’. Ngirumpatse responded by challenging the report on his improved health and argued that the transfer to the UNDF would ‘impact on his ability to enjoy his rights to a fair trial’. The President decided to defer his decision on the transfer without providing further details. In June 2010, Ngirumpatse himself requested to be transferred to the UNDF. Although the President welcomed the request and immediately ordered the transfer, he strongly objected to some of Ngirumpatse’s remarks on the detention conditions at the safe-house. The President held that ‘the application contains allegations that the detention at the safe-house displeased Ngirumpatse as, inter alia, it imposed conditions of solitary confinement on him. These submissions could not have been made in good faith. It should be recalled that Ngirumpatse was evacuated from UNDF because of serious illness in August 2008. Since then, the conditions of his detention were varied to allow him to have the best medical treatment and care available, not only in Arusha but in East Africa. By mid-2009, his condition no longer required hospitalisation, and he could have been returned to the UNDF. The more costly and logistically complicated arrangement for his care in a safe-house was decided upon in the best interests of Ngirumpatse. The President was also aware that Ngirumpatse had unsuccessfully applied for provisional release. Detention in a safe-house seemed to approximate release with the added benefit to Ngirumpatse that the Tribunal continued to bear the full responsibility for the cost of his medical treatment, board and lodging, personal security and other elements of care. At all times, the provision of the best available medical and other care was the primary motivation for the variations in the terms of detention’. It is interesting that, in making such findings, the President appears to have viewed the placement of detainees in a safe-house pursuant to a modification order as a possible alternative for provisional release.

Although the President may, according to Rule 64, issue a modification order on the application of a party, in Nzirorera the President instructed the Registrar to make an inquiry into Nzirorera’s medical situation proprio motu, with a view to

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194 Id., par. 5.
195 Id., par. 6.
196 Id., par. 8.
197 The organisation of provisional release raises particular difficulties in an international context. The issue concerns the external legal position of detainees and, therefore, falls outside the scope of this research.
possibly modifying his detention conditions pursuant to Rule 64. The President did so after receiving a copy of a letter from Nzirorera’s family to his Lead Counsel, which raised concerns about Nzirorera’s health, the treatment he was receiving, his diet and the possible need for his transfer to another institution.

SCSL

In the early years of the Special Court’s existence, detained persons were held at a detention facility on Bonthe island. On 10 August 2003, they were relocated to the reconstructed Detention Facility in Freetown. Rule 64 of the SCSL RPE holds that ‘[u]pon his transfer to the Special Court, the accused shall be detained in the Detention Facility, or facilities otherwise made available pursuant to Rule 8(C). The Registrar, in a case where he considers it necessary, may order special measures of detention of an accused outside the Detention Facility. The order of the Registrar shall be put before the President for endorsement within 48 hours of the order being issued’. As will be seen below in the chapters on complaints and disciplinary procedures, the SCSL Registrar has significantly broader powers than the other tribunals’ Registrars. Although the President must as a rule endorse the SCSL Registrar’s modification orders, in most cases the President will simply defer to the Registrar’s determination. In Norman, the President explained that ‘in keeping with the policy that detention is a matter for administrative rather than judicial decision, any order for such exceptional measures should be made by the Registrar’. He further held that ‘[t]he Detention Rules give necessary powers to the Head of Detention, subject to direction by the Registrar. Judges have no part in administering

199 Id., par. 3.
201 SCSL, Press Release - Press and Public Affairs Office, Freetown Sierra Leone, 11 August 2003. According to the Registry, ‘[t]he land was previously occupied by the Prisons Department and contained prison cell blocks, staff quarters and recreation facilities on it. Most of the buildings were structurally unsound and are being demolished’. Two existing prison blocks were renovated to house the accused. See SCSL, Press Release - Press and Public Affairs Office, Freetown Sierra Leone, 11 October 2002.
or ordering these rules, although in three difficult or urgent situations the President
does have a role to order a report into the death in custody of an indictee (Rule 24(c));
to approve any order by the Registrar for cell video surveillance which order lasts
longer than 14 days (Rule 26); and to hear appeals by a detainee from any decision to
deny him contact with any person (Rule 48). These are serious situations where it is
right that the President, as head of the Special Court, should oversee the Registrar.
Otherwise, judges are not involved in administrative detention matters unless they
impact significantly upon the right under Article 17(4)(b) of the Statute to adequate
preparation of the defence, when they may be raised by motion before the Trial
Chamber judges who are best placed to make such a determination’. 203

In Brima et al., the Registrar held that ‘in exercising his discretion under Rule
64 of the Rules he would need to take into account the particular circumstances of the
situation, including the security and good order of the Detention Facility, the health
and safety of the accused and the rights and fundamental freedoms of the accused’. 204
However, apart from Charles Taylor, whose situation is discussed in more detail
below, not one detained persons appears to have been held outside the SCSL
Detention Facility on the basis of an Article 64 order.

In 2003, the Norman Defence applied for a modification of Norman’s conditions of
detention pursuant to Rule 64. 205 More specifically, it requested that Norman be
placed under ‘house arrest’. According to the President, however, the Defence’s
request had to be understood as a request for house arrest ‘under conditions (e.g. to
reside at the house at all times, surrender his passport, and to have no contact with
witnesses or the media)’ which are normally associated with a grant of bail’. 206 As a
consequence, the President was of the view that the request should have been brought
pursuant to Rule 65 and, therefore, proceeded to deal with it as an application for
provisional release. In doing so, the President acknowledged the ambiguity of the
term ‘house arrest’ and held that ‘[s]ome “house arrests” involve round-the-clock
guards from the detaining power, albeit in the more comfortable surrounds of a

203 Id., par. 5.
204 SCSL, Decision on the Defence Motion for the Temporary Provisional Release to Allow
the Accused Santigie Borbor Kanu to Visit his Mother’s Grave, Prosecutor v. Brima, Kamara
and Kanu, Case No. SCSL-04-16-T, T. Ch. II, 18 October 2005, par. 10.
205 SCSL, Decision on Motion for Modification of the Conditions of Detention, Prosecutor v.
Norman, Case No. SCSL-2003-08-PT, President, 26 November 2003.
206 Id., par. 1.
private house rather than a prison cell. The other form of “house arrest”, for example that served in Britain by General Pinochet, requires residence in a private house outside the control of any prison authority, but subject to conditions such as the surrender of passport and reporting to police. It is this second, Pinochet-style form of “house arrest” that the applicant seeks and it is of course (as in Pinochet’s case) a form of conditional bail rather than a “special measure of detention”. The essential distinction between “house arrest” and conditional bail involving a form of house arrest is the presence or absence of the detaining authority as the power controlling the movements of the detainee.207 He added that Rule 64 applications involving a modification of the place and conditions of detention should be accompanied by ‘any approval to [the] desired course from the Head of Detention’, whose ‘ability to operate a control regime would be essential’.208

Whereas in Norman the application for provisional release had been wrongly submitted pursuant to Rule 64, the reverse was the case in Brima et al. In October 2005 the Kanu Defence mistakenly submitted a motion pursuant to Rule 65 for Kanu’s temporary provisional release in order to visit his mother’s grave.209 Earlier that year, the Defence had sought the Registrar’s permission for Kanu to visit his ailing mother. Although permission was denied, the Registrar made alternative arrangements, which enabled Kanu’s mother to visit him in the Detention Facility. When his mother was no longer capable of travelling, a new request was submitted for Kanu to visit his mother outside the Detention Facility. According to the Defence, the Registrar never responded to that request. In September of that year, Kanu’s mother died. The Defence’s request for permission for Kanu to attend the funeral was denied: ‘in view of the risk assessment made in respect of the security arrangements which would need to be in place to ensure both his custodial status and his safety, it is not recommended that he be allowed out of the Detention Facility’.210 Following this, the Defence filed a motion before the Trial Chamber for Kanu’s temporary provisional release in order to enable him to visit his mother’s grave. The Registry objected to the motion being brought before the Trial Chamber pursuant to Rule 65 and expressed its

207 Id., par. 4.
208 Ibid.
209 SCSL, Decision on the Defence Motion for the Temporary Provisional Release to Allow the Accused Santigie Borbor Kanu to Visit his Mother’s Grave, Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T, T. Ch. II, 18 October 2005.
210 Id., par. 1.
view that it should be treated as an application pursuant to Rule 64. The Trial Chamber concurred with the Registry, noting that the Motion did ‘not seek permission to release Mr. Kanu from the custody and detention of the court whilst visiting his mother’s grave. Quite to the contrary, Mr. Knoops [defence counsel for Kanu] suggests that “any potential security risks relating to Mr. Kanu’s custodial status and safety could be circumvented by having two security officers accompany the accused, and even having the accused handcuffed to one of the officers. In that way, return to the Detention facility on that same day would have been guaranteed”’. The Trial Chamber interpreted the application as ‘one for an order for special measures of detention outside the Detention Facility under Rule 64’ and noted that ‘the proper functionary to make such an order is the Registrar with the approval of the President’.

In Taylor, the President ordered both the change of the venue of the proceedings and the transfer to and detention of Charles Taylor in The Hague. The legal basis for the change of venue was Article 10 of the Special Court Agreement. The President’s powers to make such an order were based on Rule 4 of the RPE which provides, in relevant part, that ‘[a] Chamber or a Judge may exercise their functions away from the Seat of the Special Court, if so authorized by the President’. The legal basis for the transfer to and detention in the ICC Detention Centre in The Hague was found in Rules 54 and 64 of the SCSL RPE. Rule 54 provides that ‘[a]t the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial’. Whereas the President ordered Taylor’s transfer to and detention in The Hague, the order for modification of the conditions of Taylor’s detention was issued by the

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211 Id., par. 12.
212 Ibid.
214 Article 10 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone provides that ‘[t]he Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other’.
Registrar pursuant to Rule 64,\textsuperscript{215} which concerned Taylor’s intramural detention conditions only and did not address Taylor’s transfer and detention as such. It appears, therefore, that an order by the Registrar pursuant to Rule 64 (as endorsed by the President) is not an adequate legal basis for either a detainee’s transfer or his detention at another institution, for which a distinct Presidential Order appears to be required.\textsuperscript{216} At the ICTY and the ICTR, where Rule 64 orders are issued by the President, such orders themselves constitute an adequate legal basis for both the modification of the conditions of a person’s detention and for transfer to and detention at another institution.\textsuperscript{217}

The Registrar’s order in \textit{Taylor}, as endorsed by the President, stipulated, \textit{inter alia}, that ‘the rules of detention and standards of the ICC shall be applicable to the detention of the Accused \textit{mutatis mutandis} and that the complaints procedure set out in Rule 59 of the Rules of Detention of the Special Court (“Rules of Detention”) shall be applicable’.\textsuperscript{218} According to the President, his role in changing the venue of proceedings was to be viewed as an administrative and diplomatic one.\textsuperscript{219} When Taylor requested him to reconsider the order changing the venue of the proceedings, he declared the request inadmissible, stating that ‘the authority vested in the President and properly exercised in this matter is administrative in nature’ and further holding that ‘the Rules do not provide the Applicant an avenue for “reconsideration” or review before the President’.\textsuperscript{220} Hence, in respect of orders for transfer to and detention at another penal institution, no legal remedies are available to the person concerned to


\textsuperscript{216} See, also, SCSL, Decision of the President on Public Defence Motion Requesting Review of the Memorandum of Understanding between the International Criminal Court and the Special Court of Sierra Leone Dated 13 April 2006 & Modification of Mr. Charles Taylor’s Conditions of Detention, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-01-PT, President, 19 March 2007.

\textsuperscript{217} In order to legitimately detain the person concerned, it will also be necessary for the receiving institute to issue an order to that effect.

\textsuperscript{218} SCSL, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-1-PT, T. Ch. II, 23 June 2006.

\textsuperscript{219} SCSL, Decision on Urgent Defence Motion Against Change of Venue, \textit{Prosecutor v. Taylor}, Case No. SCSL-2003-01-R72, A. Ch., 29 May 2006, par. 8.

complain of a possible breach of his (fundamental) rights. That such actions may involve breaches of a detained person’s rights is apparent from Taylor, where his Defence Counsel complained, inter alia, that ‘the accused, at his own expense - from the family expense - had arranged for his wife and his sisters and brother-in-law to come to Sierra Leone. He was given no warning of the movement. They are here in this country. They do not have visas for the Netherlands. There is no Dutch embassy in Freetown. There is no Dutch embassy in Liberia. The closest embassies are in Accra and Dakar. There is no procedure in place -- the Registry does not know the route by which visas are to be obtained. It cannot be right that because of backroom discussions and this holy grail of security concerns, which is untried, untested in any judicial body, that an accused can be deprived of the support and solace of his family, an accused, of course, that is declared innocent at this moment in time’. With respect to the conditions of detention, a detained person can seek relief via the regular complaints procedures, i.e. via both the designated procedure of the receiving institution and via the one laid down in the SCSL Rules of Detention. Such procedures will not, however, necessarily repair any rights violation caused directly by the President’s order for detention and transfer. The risk of rights being violated is exacerbated where the person affected by such orders is not heard on the issues concerned, as was the case in Taylor. By not hearing him on his future detention at and transfer to the ICC Detention Centre, the Court arguably failed to act in accordance with the principle of natural justice and procedural fairness. According to Mr. Khan, Defence Counsel for Taylor, ‘the very day after the President's decision the accused was whisked away to The Hague. And so, in fact, as a matter of legal principle, any observations that the Defence may have wished to make on the issue of venue have been rendered moot by the administrative or diplomatic functions that have taken place thus far. (...) As far as legal safeguards are concerned, it cannot be

221 A Trial or Appeals Chamber will only intervene if and to the extent necessary to ensure the fairness of the trial proceedings; see SCSL, Decision on Urgent Defence Motion Against Change of Venue, Prosecutor v. Taylor, Case No. SCSL-2003-01-R72, A. Ch., 29 May 2006, par. 7.


223 Id., at page 3, lines 9-29.

224 See, infra, Chapter 4.
right that any decisions of a President are unimpeachable, that they are without challenge, judicial review’. 225

STL

Rule 101(G) of the STL Rules of Detention provides that ‘[i]f an order is made to detain a person, he shall be detained in a detention facility of the Tribunal. In exceptional circumstances, the person may be held in facilities outside the Host State. The President may, on the application of a Party, request modification of the conditions of detention’. In 2009, President Cassese ordered the modification of the conditions of detention of four persons who were being held in the Lebanon under the legal authority of the tribunal. 226 After the Lebanese authorities deferred the Hariri case to the STL in March 2007, the persons concerned were held pursuant to an order by the Pre-Trial Judge. 227

After the tribunal’s Head of the Defence Office had visited the detained persons in Lebanon, he requested the President to order that ‘meetings between the lawyers and their clients be privileged and confidential, without any prison staff or other persons being able to listen to, or record, the communication’, and that ‘the detainees be allowed to meet each other, subject to reasonable security restrictions, for a period of two hours a day’. 228

Because the detainees were being held by national authorities outside the tribunal’s direct control, the President considered it necessary to first examine his competence to act upon the aforementioned requests. First, he held that ‘[i]n order to ensure that the detained persons have an effective remedy against any violation of their rights during their detention by the Lebanese authorities on behalf of the Tribunal, the Tribunal must be able to exercise some form of supervision over their detention. Without such supervision by the Tribunal, the rights of the detained persons may be gravely

227 STL, Order Regarding the Detention of Persons Detained in Lebanon in Connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, P.-T. J., 29 April 2009, par. 3.
compromised and they may be left without any effective remedy against a potential violation of their rights’. 229 He further pointed to the powers conferred upon him by Rules 32(D) and 101(G) of the RPE. The former Rule stipulates in general terms that the President shall supervise the conditions of detention. According to the President, it follows from this provision that Rule 101(G) must be deemed applicable to such exceptional detention circumstances as those in the case before him. 230

As to the merits of the request, the President noted that the STL Rules of Detention are ‘not expressly applicable to a person detained by State authorities’. 231 Nonetheless, after examining international human rights jurisprudence, other tribunals’ case-law and such international standards as those laid down in the SMR and the U.N. Body of Principles, he concluded that the Rules of Detention are either based in customary international law, 232 or ‘enshrine[d] a more general rule relevant to the present circumstances’. 233 He subsequently granted the requests 234 and instructed the Registrar to notify the Lebanese authorities of the order and ‘to request their assistance in notifying it to the detained persons’. 235

ICC

The ICC’s legal framework does not appear to contain an express provision on the modification of the conditions of detention. 236 However, Article 46(2) of the Headquarters Agreement provides in respect of specific categories of confined persons that special detention conditions may be arranged for. It states that ‘[w]here the presence of a person in custody is required for the purpose of giving testimony or other assistance to the Court and where, for security reasons, such a person cannot be

229 Id., par. 10. Footnote omitted.
230 Id., par. 11.
231 Id., par. 22.
232 This finding concerned the Head of the Defence Office’s first request – i.e. that ‘meetings between the lawyers and their clients be privileged and confidential, without any prison staff or other persons being able to listen to, or record, the communication’; id., par. 16.
233 Id., par. 22.
234 See, also, STL, Annual Report (2009-2010), March 2010, par. 98.
236 Section IV of the RPE is entitled ‘[p]rocedures in respect of restriction and deprivation of liberty’. The Section does include a provision on provisional release, but fails to mention the possibility of modifying detention conditions.
maintained in custody in the detention centre of the Court, the Court and the host State shall consult and, where necessary, make arrangements to transport the person to a prison facility or other place made available by the host State’. The provision only refers to persons whose custody at the Court’s premises is required for the purpose of providing some form of assistance to the Court and does not appear to apply to persons detained on remand, who fall under Article 46(1) of that Agreement.237 The detention of a person in the custodial State as envisaged by Rule 117 of the RPE is solely possible pursuant to requests under Articles 89 and 92 of the Statute. Such requests may concern a person’s arrest and surrender to the Court or the provisional arrest of a person pending the request for surrender. After surrender, therefore, remand detainees are held exclusively at the Court’s Detention Centre.238 This does not necessarily imply that detaining a person at some other location is wholly inconceivable or legally impossible. In supervising the conditions of detention, it should be noted, the Presidency has broad discretionary powers. As to the possible reactions of the Presidency to the inspectorate’s recommendations, Regulation 94(5) of the RoC provides, for instance, that it ‘may make any direction, decision or order that it considers appropriate’. In theory, then, such broad powers may be used to issue orders comparable to the other tribunals’ Presidents’ or Registrars’ modification orders.

Evaluation

The privileged form of detention outside the UNDU granted to Blaškić must be distinguished from the use of safe-houses by the ICTR. Rule 64 of the ICTY RPE was employed to reward Blaškić for his voluntary surrender to the tribunal. Such an approach may be justified given the ICTY’s lack of an own police force and its dependency on domestic authorities. However, in light of the principle of equality, the

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237 Article 46(1) holds that ‘[t]he host State shall cooperate with the Court to facilitate the detention of persons and to allow the Court to perform its functions within its detention centre’. Emphasis added.

condition that the person concerned must cover all of the costs of such privileged detention is problematic.\(^{239}\)

The *Blaškić* case highlights the many difficulties surrounding the implementation of modification orders: the dependency of the tribunals on the host State’s cooperation,\(^{240}\) the questionable authority of the tribunal over non-U.N. personnel and the costs, safety and security concerns involved. In *Halilović*, the President explained in this regard that the UNDU is part of a tribunal ‘which sits in The Hague without being fully and automatically integrated into a State government administration with the capabilities to monitor and ensure the safety of the Accused at large’,\(^{241}\) and stressed that, only in exceptional circumstances are detained persons not held under standard conditions in UNDU.\(^{242}\)

A worrisome aspect of the ICTR modification orders is the justification adduced for transferring detained persons to and from the ICTY UNDU. The grounds put forth for issuing such orders are safety or security concerns and investigative interests. The safety concerns, however, only appear to carry weight in determining the necessity of a person’s transfer to the ICTY UNDU. As soon as the Prosecution’s investigative interest in shielding the person concerned from other ICTR inmates has disappeared, safety and security concerns are not sufficient to justify the concerned person’s detention at the ICTY UNDU. As a consequence, the person concerned may very well feel betrayed and view the President’s orders under Rule 64 as part of prosecutorial policies, which in turn might subvert the President’s appearance of


\(^{240}\) According to Banning and De Koning, Strijards suggested that the prime reason underlying the termination of Blaškić’s privileged detention conditions was that the Dutch Justice Department was fed up with the whole situation. (Another point was that Blaškić would not have been sufficiently careful over the telephone giving away information that might disclose the exact location of the place of his detention.) Cees Banning & Petra de Koning, *supra*, footnote 13, p. 106.


\(^{242}\) Ibid.
impartiality and independence. For such reasons, it would be preferable for the investigative interests to be regarded as an independent ground for modifying detention conditions.

Whereas at the other tribunals it is the President/Presidency that decides on requests for the modification of detention conditions, at the SCSL it is the Registrar who issues such orders, which then need to be endorsed by the SCSL President. However, as argued below in Chapter 5, neither the tribunals’ Presidents/Presidency, nor their Registrars can be considered as independent and impartial adjudicators. It should further be noted that avenues for detainees whose detention conditions will be or have been modified to seek relief for possible violations of their rights are lacking, which in turn is in breach of their right to an effective remedy. It was seen in the Taylor case that, as a consequence of the President’s powers in changing the venue of proceedings being of an administrative and diplomatic nature, motions for review of the President’s orders were inadmissible. Where such orders infringe on a detained person’s rights, proper remedies must be available. It is recommendable, in this regard, that the tribunals grant detained persons a right to appeal the administrative official’s (Presidents/Presidency or Registrars) order to an independent, outside adjudicator (the establishment of which is suggested below in Chapter 5).

When modifying the conditions of Taylor’s detention, the SCSL Registrar declared the Special Court’s intramural complaints procedure applicable to Taylor’s detention in The Hague.243 Article 6.4 of the Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone is also worth noting in this regard, which provides that “[t]he Special Court shall retain full legal control and authority over the Detainee and shall assume full legal responsibility for the custody of the Detainee. In particular, the Special Court shall remain fully responsible for all aspects arising out of the provision of the day to day detention services and facilities under this Article including the well-being of the Detainee”. Further, in Taylor, the President held that ‘the Registrar is empowered to make a decision with respect to any complaint lodged by the Applicant and then communicate his decision to the officials concerned in order to ensure that

the Applicant’s complaint is dealt with promptly and without delay”. 244 By contrast, such arrangements are lacking in the orders for the transfer of detainees from the ICTR UNDF to the ICTY UNDU.

In view of the vulnerability of persons who are transferred to institutions far away from their social support systems and to countries that are culturally very different from their home countries and in view of the negative impact that such a situation potentially has on such persons’ enjoyment of their (fundamental) rights, the supplementary legal safeguard provided by the SCSL is a very welcome one. The fact that such a mechanism is apparently necessary is supported by the fact that a number of Taylor’s complaints about the conditions of his detention at the ICC Detention Centre were upheld by the SCSL Registrar and President. 245

3.3.2 The prohibition or regulation of contact of detainees with other persons

Under the tribunals’ general regimes applicable to remand detainees, such detainees have the right to contact, both with the outside world and with other inmates. 246 This paragraph sets out the specific procedures by which restrictions may be imposed on that right, either at the detention authorities’ initiative (at the SCSL), and/or as requested by a Judge, Chamber or the Prosecutor (as applies to all tribunals). 247 Since

244 SCSL, Decision of the President on Public Defence Motion Requesting Review of the Memorandum of Understanding between the International Criminal Court and the Special Court of Sierra Leone Dated 13 April 2006 & Modification of Mr. Charles Taylor’s Conditions of Detention, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, President, 19 March 2007.
246 The substantive right to contact with the outside world is examined in closer detail in Chapter 8.
247 Segregation measures as provided for in the tribunals’ rules of detention that may be imposed by the detention authorities are exempted from this paragraph’s discussion. Such measures are generally of much shorter duration than the measures discussed here, are usually based on different rationales and, importantly, do not lead to changes of the legal regime under which such persons are detained. Segregated persons, as a matter of principle, retain all the substantive rights laid down in the tribunals’ rules of detention, including the right to
the STL legal framework is largely identical to that of the SCSL in this regard, it will not be discussed separately.

The prohibition or regulation of contact at the various tribunals

ICTY

The ICTY Rules of Detention provide in Rule 64(A) that the Prosecutor may request the Registrar or, in case of emergency, the Commanding Officer ‘to prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact: i. is for the purposes of attempting to arrange the escape of the detainee from the Detention Unit; ii. could prejudice or otherwise affect the outcome of: a) the proceedings against the detainee; or b) any other investigation; iii. could be harmful to the detainee or any other person; or iv. could be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber pursuant to Rule 53 or Rule 75 of the Rules of Procedure and Evidence’. Where an emergency request is filed with the Commanding Officer, the Prosecutor must immediately inform the Registrar of the request and of the reasons for it. The Prosecutor must also notify the detained person of ‘the fact of any such request’.248 Rule 64(C) provides that the detained person concerned may ‘at any time request the President to deny or reverse’ the Prosecutor’s request. In Šešelj, the President described Paragraph (C) as striking ‘a careful balance between the need to respond quickly in the event a detainee is making improper communications and the need to give a detainee the opportunity to contest communication restrictions imposed upon him’.249 For a detainee’s request under Rule 64(C) to be admissible, the restrictions to which the detained person is objecting must still be in place. If not, such contact with the outside world. See the Rules 42-44 of the ICTY Rules of Detention, Rules 38-42 of the ICTR Rules of Detention, Rules 26-29 of the SCSL Rules of Detention, Rules 41-46 of the STL Rules of Detention and Regulations 201-202 of the ICC RoR.

248 Rule 64(B) of the ICTY Rules of Detention.

249 ICTY, Decision on “Request of the Accused Asking President of the Tribunal Theodor Meron to Reverse the Decision of the Deputy Registrar Prohibiting Dr Vojislav Šešelj from Communicating with Anyone and Receiving Visits for at least 60 Days”, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 21 September 2005, par. 3.
request, in principle, ‘becomes moot’.\textsuperscript{250} Although according to Rule 64(C), the President is the only official authorised to decide on such requests by detained persons, detained persons have occasionally submitted such requests to the Registrar who, after hearing the Prosecutor, has acted upon thereupon.\textsuperscript{251} The reference to ‘any other person’ in Rule 64(A) also refers to other inmates.\textsuperscript{252} In Čelebići, for instance, the Prosecutor requested under this provision that ‘none of the defendants (…) be permitted to have contact, either oral or written, with any other defendant, and that they not be permitted to have contact with common visitors’.\textsuperscript{253} Thereupon, the Registrar decided that Belalic, Mucić, Delić and Landžo, were not permitted to ‘have any contact, either written or oral, amongst themselves or with any other detainee’.\textsuperscript{254}

As to how much discretion is left to the Registrar in deciding upon Prosecution requests pursuant to Rule 64, the Registrar argued in Šešelj that Rule 64 ‘requires him to grant a request of the Prosecutor provided that he is satisfied that that request is "prima facie reasonable and legitimate"’.\textsuperscript{255} He opined that the provision ‘leaves him with "little or any, discretion" to deny a request of the Prosecutor made pursuant to this Rule’.\textsuperscript{256} The Registrar further argued that ‘it is the Prosecutor and not the Registrar who must have reasonable grounds for believing that contact between a detainee and a certain individual will result in one of the circumstances identified in Rule 64(A) and "[i]n the absence of manifest unreasonableness, the Registrar must rely on the assessment of the Prosecutor when the said provision is invoked by her"’.\textsuperscript{257} Šešelj, however, claimed that the Registrar should have verified the Prosecutor’s allegations.\textsuperscript{258} The President in that case subsequently held that ‘it is for the Prosecutor to assess, in making such a request to the Registrar, whether there is a reasonable basis for conditions to be attached to an accused’s contacts with others.

\begin{footnotes}
\footnote{250 ICTY, Decision on Appeal against the Registrar’s Decision of 19 October 2006, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, President, 23 November 2006, par. 5.}

\footnote{251 ICTY, Decision, \textit{Prosecutor v. Delić, Landžo, Mucić and Delalić}, Case No. IT-96-21-T, Registrar, 18 February 1997.}

\footnote{252 See, e.g., ICTY, Decision, \textit{Prosecutor v. Delić, Landžo, Mucić and Delalić}, Case No. IT-96-21-T, Registrar, 8 July 1997.}

\footnote{253 ICTY, Decision, \textit{Prosecutor v. Delić, Landžo, Mucić and Delalić}, Case No. IT-96-21-T, Registrar, 17 July 1996.}

\footnote{254 \textit{Ibid}.}

\footnote{255 ICTY, Decision on Appeal against the Registrar’s Decision of 19 October 2006, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, President, 23 November 2006, par. 3.}

\footnote{256 \textit{Ibid.}, par. 7.}

\footnote{257 \textit{Ibid}.}

\footnote{258 \textit{Ibid.}, par. 2.}
\end{footnotes}
However, the Registrar does have an obligation to satisfy himself that the request of the Prosecutor is not arbitrary and is made on the basis of credible information. It is not sufficient for the Registrar to take any such Request made by the Prosecutor at face value, rather the Registrar has an obligation to ensure that any request which would result in the infringement of the rights of the accused is justified and made on reasonable grounds. He added, in connection with alleged breaches of protective measures, that the Registrar may base his or her judgment of the (un)reasonableness of the Prosecutor’s request on the ‘failure of the Prosecutor to [simultaneously] advise the Chamber of such an allegation’. In later decisions on the matter, the test applied by the Registrar has been whether he was ‘satisfied that in the circumstances the Prosecutor’s request is justified and made on reasonable grounds’. Šešelj further complained that he had not been heard on the issue before the decision was made, which had ‘denied him the opportunity to petition the President to deny the request of the Prosecutor pursuant to Rule 64(C)’. The Registrar held that in arriving at the contested decision, he had ‘complied with the standard for administrative decision making’, including the principles of natural justice or procedural fairness. In this regard, he stated that Šešelj had been ‘served with a copy of the Impugned Decision in a language that he understands on the date it was issued and "well before he received a visit from his wife"’. The President, however, whilst acknowledging that Rule 64 does not require the Registrar to inform the detained person of a request by the Prosecutor, considered that ‘it was inconsistent ‘with principles of natural justice not to have advised Šešelj of the allegation brought and [not to have] allowed him an opportunity to respond’. He explained that ‘[i]t is only by informing an accused and allowing him or her an opportunity to be heard that the Registrar can make a fully informed decision as to the reasonableness of the

259 Id., par. 10.
260 Ibid.
261 ICTY, Decision, Prosecutor v. Lukić et al., Case No. IT-98-32/1-T, Deputy Registrar, 18 November 2008.
262 ICTY, Decision on Appeal against the Registrar’s Decision of 19 October 2006, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 23 November 2006, par. 2.
263 Id., par. 3.
264 Id., par. 9.
265 Ibid.
266 Id., par. 11.
request made’.\textsuperscript{267} It appears that, in later decisions under Rule 64, the Registrar at least notified the detained person concerned of the Prosecutor’s request prior to taking the decision.\textsuperscript{268}

Finally, the principle of ‘least intrusiveness’ also appears to govern the Registrar’s discretionary powers. In Čelebići, for instance, the Prosecutor requested a total prohibition of contact with non-privileged visitors. The Registrar, however, decided that detained persons would still be permitted to enjoy their right to receive visits, but that such visitors would only be allowed to visit one specific detainee.\textsuperscript{269} He further held that the detainees would still be permitted to receive visits from their defence counsel, diplomatic and consular visits, as well as ‘bona fide pastoral visits’, although he stipulated that such a ‘religious or spiritual representative shall only be permitted to visit one detainee’.\textsuperscript{270} Some months later, the Prosecution itself requested a partial relaxation of the order. The Registrar decided that ‘except in the following circumstances, the detainees Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, shall not have any contact, either written or oral, amongst themselves or with any other detainee. The exceptions being: (1) Hazim Delić may have contact with Dusko Tadić; (2) Hazim Delić and Esad Landžo may have contact with each other for a maximum of one hour per day. However, no written material may be exchanged during such contact’.\textsuperscript{271} Moreover, in Šešelj, the Registrar held that the measure of (live) monitoring the communications between Šešelj and his wife ‘was imposed to address the Prosecutor’s concerns while placing minimum restrictions on the rights of Šešelj’, noting ‘that the ability of Šešelj to communicate with others, and to receive visits was not affected’.\textsuperscript{272}

At times, detainees have confused the practical impossibility of communicating with another detainee as a result of their placement in another wing,
with a segregation or prohibition of contact order. In Šešelj, for instance, a request was submitted to the Trial chamber to lift the restriction (purportedly) imposed on Šešelj’s communications with Karadžić. The former claimed that, since the arrival of Karadžić at the UNDU, he had been banned from communicating with Karadžić and stated that this hindered the preparation of his defence. He argued that he needed to speak to Karadžić in order to determine whether to call him as a defence witness. The Registry, however, responded that no segregation measures or communication restrictions had been imposed in this regard and that Šešelj could, therefore, at any time request the detention authorities to arrange a meeting with Karadžić. It further held that ‘even if segregation measures were imposed, it could nevertheless organise a meeting between the Accused and another detainee in order to enable the Accused to evaluate whether the detainee should be called as a defence witness, specifying that in such a case, additional measures would need to be adopted to safeguard the legitimacy and integrity of such a meeting’.

Also noteworthy, in this respect, is the warning by the STL President that a distinction must be made between regulating or prohibiting a detained person’s contact with a specific other inmate (on the basis of a prosecutorial request) on the one hand and a detainee’s segregation from all other inmates on the other. The latter is a ‘classic’ segregation or isolation measure, is governed by rationales different from those governing restrictions on communications and is separately regulated in the

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273 In this regard, one may think of the remarks by Robin Vincent, a former Registrar of the SCSL and the STL, that ‘[i]n the construction or provision of a detention facility, regard must be given to the nature of the conflict and the likelihood that those detained will represent different warring factions. Where this is the case, it is sensible to plan for the need to segregate detainees and provide self-contained areas, including meal and recreation facilities’; Robin Vincent, An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions, International Center for Transitional Justice, 2007, p. 71-72. Several ICTY detainees, when interviewed for the purpose of this study, complained about the fact that special procedures need be followed if they wish to associate with persons detained on other floors of UNDU; ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.

274 ICTY, Decision on the Accused’s Motion Concerning the Restrictions on His Communication with Radovan Karadžić, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 27 April 2009.

275 Ibid.

276 According to the STL President, the latter are often ‘predicated on the need to prevent collusion between persons’ or based on the ‘need to prevent one defendant from putting pressure on another co-defendant, or from conspiring to obstruct the proceedings’. These rationales he contrasted with the grounds for segregation listed in Rule 42(A) of the STL Rules of Detention which apart from administration of justice concerns also include the (j)
tribunals’ rules of detention. Such a measure may, according to the STL President, amount to inhuman or degrading treatment if prolonged\(^{277}\) and must therefore be ‘justified on well-founded grounds and be proportionate to the need for the isolation (...) must be reviewed on a frequent basis by a judicial authority and be terminated as soon as the exceptional grounds for imposing it have come to an end’.\(^{278}\)

**ICTR**

Pursuant to Rule 64 of the ICTR Rules of Detention, the Prosecutor may request the Registrar or, in case of emergency, the Commanding Officer,\(^{279}\) to ‘prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact is for the purposes of attempting to arrange the escape of the detainee from the Detention Unit, or could prejudice or otherwise affect the outcome of the proceedings against the detainee, or of any other investigation, or that such contact could be harmful to the detainee or any other person or may be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber pursuant to Rule 53 or Rule 75 of the Rules of Procedure and Evidence’.

Under Rule 64, a detained person has the right to, at any time, request the President to deny or reverse the Prosecutor’s request.\(^{280}\) In *Ngeze*, where restrictions

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\(^{277}\) Id., par. 21-23.

\(^{278}\) Id., par. 24.


\(^{280}\) See also, e.g., ICTR, Ordonnance, *Procureur c. Ntagerura*, Affaire No.ICTR-99-46-T, le Président, le 21 mai 2002; ICTR, Extremely Urgent Motion to Deny or Reverse a Request of the Prosecutor for Prohibition of Contact Between a Detainee and a Defense Witness in Virtue of Section 64 of the Rules Covering the Detention of Persons Awaiting Trial or Appeal or Otherwise Detained on the Authority of the Tribunal, *Prosecutor v. Ntagurera*, Case No. ICTR-96-10A-T, Defence, 21 May 2002; ICTR, The President’s Decision on a Defence Motion to Reverse the Prosecutor’s Request for Prohibition of Contact Pursuant to Rule 64, *Prosecutor v. Ndimbilyimana*, Case No. ICTR-2000-56-T, President, 25 November 2002; ICTR, Interoffice Memorandum, from Alessandro Calderone, Chief of LDFMS, Detention of Suspects at UNDF, and the Complaint of Casimir Bizimungu in this Regard, 2 February 2000, par. 7; ICTR, The President’s Decision on the Appeal filed Against the Registrar’s Refusal to permit a Confidential Interview with Georges Rutaganda, *Prosecutor v. Niдобali*, Case No. ICTR-87-21-T, President, 6 June 2005, par. 5; ICTR, The Prosecutor’s Response to the
were imposed on the detainee’s contact with the outside world due to his attempts to interfere with witnesses, the President held that, in reviewing the Registrar’s decision, he had ‘weighed the impact of the restrictive measures against the rights of protected witnesses’. The restrictions on Ngeze’s communications were imposed for the first time in July 2005, for a period of thirty days, which had been consistently extended. The measures prohibited private unmonitored visits, except by counsel, telephone communications, except with immediate family and counsel, and included the monitoring of all authorised telephone conversations and of all written communications, except those with counsel. In 2007, Ngeze requested the President to lift the measures. However, the President was satisfied that ‘reasonable grounds remain[ed] for believing that unsupervised contact with Mr. Ngeze by individuals not detained at the UNDF could prejudice or affect the outcome of ongoing investigations and perhaps even threaten the safety and security of some witnesses’. He was also satisfied that ‘each of the Prosecutor’s requests was supported by satisfactory evidence justifying the need for continuing the restrictions’ and concluded that there had been ‘no automatic extension of the restrictive measures’. Accordingly, Ngeze’s request was denied.

Ngeze had further complained that the prolonged duration of the measures amounted to inhuman and degrading treatment. However, the President noted that Ngeze was still ‘allowed access to his family by means of supervised visits and telephone calls, so that the restriction[s] which have been imposed cannot be said to amount to “inhumane and degrading treatment” under international standards’. He also held that ‘[n]othing in Rule 64 or elsewhere in the Rules of Detention indicate a time frame for the imposition of restrictive measures. The principle, as stipulated in Rule 64, is that so long as there are still reasonable grounds for believing that such contact could prejudice or otherwise affect the outcome of the proceedings against the detainee or

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281 See, e.g., ICTR, Decision on Request for Reversal of Prohibition of Contact, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 23 November 2006.
284 Id., par. 7.
285 Id., par. 16.
286 Id., par. 11.
any other investigation, or that such contact could be harmful to any other person or may be used by the detainee to breach an order for non-disclosure made by a Judge or a Chamber, then restrictive measures are warranted’.

When submitting a Rule 64 request, the Prosecutor must provide reasons for such a request, in order for the Registrar to be able to make an informed decision. In *Ntagerura*, the President noted ‘qu’aux termes de l’article 64 du Règlement portent sur la détention, le Procureur doit informer le Greffier, en indiquant les motifs de la demande’. According to the President, ‘[s]uch reasons should not constitute a mere repetition of the empowering rule, but should specify the particular threat or prejudice that is feared and be substantiated by information (…)’. Where the Prosecutor is of the opinion that such reasons concern a matter that is not subject to disclosure, he must at least specify which (sub)provision he is relying upon. Contrary to the approach adopted at the ICTY, the requirement of providing information in order to enable the Registrar to make an informed decision does not appear to imply any powers on his part to determine the validity of the Prosecutor’s reasons. In 2005, the President stipulated that, ‘[a]s a neutral entity servicing the courts and the parties, it is not the Registry’s role to determine the validity of the Prosecutor’s objections. It is the President who may consider the validity of these objections, but as stated above, only at the request of the detainee concerned (…)’.

The Prosecutor must also inform the detained person concerned of any request made under Rule 64 and of the reasons for it, in order to enable that person to make an informed decision as to whether to address the President. In *Prosecutor v. Ntahobali*, the President emphasised that also ‘[t]he Registry is obliged, in fairness to Mr. Rutaganda, to inform him of the requested visit, the objections raised by the

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287 *Id.*, par. 13.
291 *Id.*, par. 9.
292 ICTR, The President’s Decision on the Appeal filed Against the Registrar’s Refusal to permit a Confidential Interview with Georges Rutaganda, *Prosecutor v. Ntahobali*, Case No. ICTR-87-21-T, President, 6 June 2005, par. 7.
293 *Id.*, par. 6.
Prosecutor, and the reasons for these objections. This places Mr. Rutaganda in a position to challenge these objections, should he so choose’.294

The ICTR President has further ruled that requests by a detained person to deny or reverse the Prosecution’s request must be dealt with promptly. Seised of such a request by Ngeze, the President noted that the Prosecutor and Registrar had not yet filed their responses and held that ‘in view of the nature of the request, a decision needs to be taken without further delay’.295 Notwithstanding the President’s attentiveness in Ngeze, decisions on appeals by detained persons under Rule 64 appear not always to have been rendered expeditiously. In a subsequent motion, Ngeze complained about the timing of the President’s decision on the request he had filed.296 Ngeze argued that ‘[b]y the time the President gave the said decision, the period for which the restrictive measures were ordered, that was for 30 days, almost expired’,297 which according to him, ‘resumed his remedy to take the said matter before the Appeals Chamber’.298

The right to file an appeal with the President under Rule 64 is only open to detained persons, not to visitors who are denied entrance to the UNDF.299 Nevertheless, where such a visit may be considered necessary for the preparation of the visitor’s defence and the refusal of the visit might infringe upon such visitor’s right to a fair trial, the visitor may bring the issue to the attention of the Chamber dealing with his case.300

As with the ICTY, the principle of ‘least intrusiveness’ applies to Prosecution requests pursuant to Rule 64. Pursuant to such principle, the ICTR President has in a number of cases considered whether the Prosecutor should have sought less intrusive measures. In Ntagerura, for instance, the President, seised of the detainee’s request to authorise a Defence witness to visit him at the UNDF after the latter would have

294 Ibid.
295 ICTR, Request for reversal of the Prohibition of Contact, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 29 July 2005.
296 ICTR, Appellant Hassan Ngeze’s extremely urgent request for dealing his pending matters relating to issues of Restrictive Measures and Consummation of Marriage at the Hague Detention Center on urgent basis, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, Defence, 22 September 2005, par. 5.
297 Ibid.
298 Ibid.
299 ICTR, The President’s Decision on the Appeal filed Against the Registrar’s Refusal to permit a Confidential Interview with Georges Rutaganda, Prosecutor v. Ntabohali, Case No. ICTR-87-21-T, President, 6 June 2005, par. 5.
300 Id., par. 8.
finished giving testimony in court, consulted the Deputy Registrar and the Prosecutor in order to consider ‘the possibility of permitting the visit under conditions which will satisfy the concerns of the Prosecutor’. Eventually, the President ruled that ‘the said visit must take place in the presence of a representative of the UNDF’, and prohibited Ntagerura and the witness from discussing the case during the visit. Further, in Ndindiliyimana, the President stressed that there were other options that had to be considered than a complete prohibition of contact, and held that ‘[t]he Registrar may impose conditions under which the requested visit is to take place, to cater for the Prosecutor’s concerns as well as the interests of the safe administration of the UNDF. These conditions may be along the lines ordered in the Ntagerura case’. In doing so, the President emphasised that a balance had to be struck between the Prosecutor’s concerns and the detained person’s visiting rights.

ICTR case-law allows for ‘humanitarian exceptions’ to measures imposed pursuant to Rule 64. In Ngeze, for example, the detainee requested the reversal of a prohibition of contact with the outside world. Although the President denied the request for a complete reversal, he did grant Ngeze’s request for permission for his children to visit him at the UNDF. The President stressed that ‘[t]he present ruling does not preclude the Commanding Officer from allowing this visit, based on humanitarian reasons, provided that necessary arrangements are put in place to ensure that no discussions are held in respect of the Applicant’s case (for instance requiring that Tribunal staff be present during the visit).’

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302 Ibid.  
303 Ibid. See, also, ICTR, Decision on Requests for Reversal of Prohibition of Contact, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 25 October 2006, par. 7.  
305 Ibid.  
306 ICTR, Request for reversal of the Prohibition of Contact, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 29 July 2005.
According to Rule 47(A) of the SCSL Rules of Detention, the Registrar may at his own initiative or acting upon the request of a Judge, Chamber or the Prosecutor ‘prohibit, regulate or set conditions for communications, including the monitoring of telephone calls, and may prohibit, regulate or set conditions on visits between a Detainee and any other person’. Paragraph (A) requires that ‘there are reasonable grounds for believing that such communications and visits: (i) are for the purposes of attempting to arrange the escape of any Detainee from the Detention Facility; (ii) could prejudice or otherwise undermine the outcome of the proceedings against any Detainee or any other proceedings; (iii) could constitute a danger to the health and safety of any person; (iv) could be used by any Detainee to breach an order made by a Judge or a Chamber, or otherwise interfere with the administration of justice or frustrate the mandate of the Special Court; or (v) could disturb the maintenance of the security and good order in the Detention Facility’. In case of an emergency, the request may be made to the Chief of Detention. The applicant must, however, immediately inform the Registrar of the request and of the reasons for it. Rule 47(E) provides that the Registrar must review the Chief of Detention’s decision ‘as soon as practicable’. If considered necessary and proportionate to the aim of the measure, arrangements may be made ‘for any communication to or by any or all Detainees to be intercepted’. The restrictive measures may be imposed for as long as the Registrar believes them to be necessary and proportionate to the aim of such measures, but with a maximum of six months. Extension for a further six months is possible, if the Registrar believes

307 See, in a similar vein, Rule 70 of the STL Rules of Detention.
308 Rule 47(A).
309 See, in a similar vein, Rule 70(E) of the STL Rules of Detention.
310 Rule 47(B).
311 See, in a similar vein, Rule 70(C) of the STL Rules of Detention. See, also, STL, Order on Conditions of Detention, Case No. CH/PRES/2009/01/rev., President, 21 April 2009, par. 26-27, where the STL President referred to ICC and ECCC case-law that professes the same viewpoint. He noted that the ECCC has even held that ‘limitations of contacts can only be ordered to prevent pressure on witnesses or victims when there is evidence reasonably capable of showing that the charged person might collide with other charged persons to exert pressure while in detention. With the passage of time, the threshold becomes higher as the investigation progresses and the risk necessarily decreases’ (citing ECCC, Decision on Nuon
that they remain necessary on the above mentioned grounds and proportionate to the aim of such measures.\textsuperscript{312} When reviewing the proportionality of the duration of the arrangements, the President’s review is limited to the consideration of whether such duration has the appearance of being ‘manifestly disproportionate’.\textsuperscript{313}

In respect of requests submitted by the Prosecutor, the SCSL has held that the latter ‘is under a duty to show that he has reasonable grounds to believe that such contact might result in one or other of the instances envisaged in the said Rule’.\textsuperscript{314} Further, the Registrar or the Chief of Detention ‘must be satisfied that the Prosecutor has reasonable grounds for so believing’.\textsuperscript{315}

Any decision under Rule 47 and the reasons for such decision must be communicated to the detained person concerned ‘within twenty-four hours of such decision’.\textsuperscript{316} Paragraph (G) provides that ‘[t]he detained person may, at any time, request the President to reverse a decision made by the Registrar under this rule’ (emphasis added). Unlike the ICTR and ICTY Rules of Detention, Paragraph (G) is silent on the detained persons’ right to request the President to deny a request made to the Registrar pursuant to Rule 47. Similarly, Paragraph (F) states that the detained person must only be informed of the Registrar’s final decision, \textit{i.e.} not of the Prosecutor’s request to the Registrar. Therefore, on a strict reading of the Rules of Detention, detained persons do not appear to be able to prevent measures from being imposed pursuant to Rule 47. Nevertheless, in 2004 the President ruled that ‘[a]lthough it is not stated in the Rule that notification of a request by the Prosecutor must be given to the detainee prior to the notification of the Order of the Registrar, it is implicit in the Rule

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\textsuperscript{312} Rule 47(C).
\textsuperscript{314} SCSL, Decision on Motion to Reverse the Order of the Registrar under Rule 48(C) of the Rules of detention, \textit{Prosecutor v. Hinga Norman}, Case No. SCSL-04-14-PT, Acting President, 18 May 2004, par. 6.
\textsuperscript{315} \textit{Id.}, par. 7.
\textsuperscript{316} Rule 47(F). See, in a similar vein, Rule 70(F) of the STL Rules of Detention.
that the Registrar or Chief of Detention has the duty to inform the detainee of the request. Such notification will give an opportunity to the detainee to ask that the President deny or reverse the request of the Prosecutor.

However, the Registrar is not required to hear the detained person on the request, which may well constitute a violation of the principle of natural justice. The right to ‘immediate notification’ may be outweighed by certain circumstances which necessitate swift action. In such a situation, the Registrar must demonstrate that he or she had reasonable grounds for believing that immediate action was necessary.

As stated above, the Registrar must specify the ‘reasonable grounds’ on which the decision is based, both in order to enable the President to decide on a possible request under Paragraph (G) and to ensure that the detained person clearly understands the reason for the arrangements. The President has held that such specification must include, inter alia, the source of the information relied on and the available evidence.

Where the arrangements objected to by the detained person are no longer in place at the time of the President’s decision, the detained person’s request to the President does not automatically become moot. In Norman, the President held that ‘[w]hile the relief sought (…) [has] been overtaken by events, the Applicant is entitled to a consideration of the issues raised in the Motion (…), especially in cases where possible breaches of rules concerning the basic rights of detainees are alleged. In these cases the detainee has the right to have the matter reviewed even after the prohibition or restriction has been lifted or has lapsed’.

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317 SCSL, Decision on Motion to Reverse the Order of the Registrar under Rule 48(C) of the Rules of detention, Prosecutor v. Hinga Norman, Case No. SCSL-04-14-PT, Acting President, 18 May 2004, par. 10.
318 Id., par. 11.
319 See, infra, Chapter 4.
320 SCSL, Decision on Motion to Reverse the Order of the Registrar under Rule 48(C) of the Rules of detention, Prosecutor v. Hinga Norman, Case No. SCSL-04-14-PT, Acting President, 18 May 2004, par. 10.
321 Id., par. 12.
323 Id., par. 13.
324 SCSL, Decision on Motion toReverse the Order of the Registrar under Rule 48(C) of the Rules of detention, Prosecutor v. Hinga Norman, Case No. SCSL-04-14-PT, Acting President, 18 May 2004, par. 4.
At the ICC, it is not the administration but the judiciary, i.e. the Chamber seised of the case, that decides on requests by the Prosecutor to ‘prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel’. Such measures may be imposed ‘if the Prosecutor has reasonable grounds to believe that such contact: (a) Is for the purposes of attempting to arrange the escape of a detained person from the detention centre; (b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation; (c) Could be harmful to a detained person or any other person; (d) Could be used by a detained person to breach an order for nondisclosure made by a judge; (e) Is against the interests of public safety; or (f) Is a threat to the protection of the rights and freedom of any person’. In a similar vein, the Chamber may under Sub-regulation 101(1), ‘at the request of the Prosecutor, order that access to the news be restricted, if it is considered necessary in the interests of the administration of justice, in particular, if unrestricted access could prejudice the outcome of the proceedings against that detained person or the outcome of any other investigation’. In line with the principle of natural justice, Regulation 101(3) provides that the detained person concerned must be notified of the prosecution request and be heard on the issue prior to a decision being made. In case of emergency, notification of the detained person may occur after the issuance of the order by the Chamber. In such a situation, both the notification and the hearing of the detained person in question must take place ‘as soon as practicable’.

In anticipation of the transfer of Ngudjolo Chui to The Hague, the Prosecution on 6 February 2008 requested the Single Judge to temporarily segregate Ngudjolo Chui ‘in order to prohibit contacts between him and Germain Katanga’. In her oral decision, the Single Judge granted the Prosecutor’s request by provisionally ordering the prohibition of contact between the two detainees until she decided otherwise. The Prosecution was ordered to file its application in writing and the Registry to file its

325 Regulation 101(2) of the ICC RoC.
326 Ibid.
327 Regulation 101(3) of the ICC RoC.
328 ICC, Decision on the Prosecution’s Urgent Application pursuant to Regulations 90, 99(2) and 101(2) of the Regulations of the Court, Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/07, P.-T. Ch. I, 7 February 2008.
observations. One day later, after Ngudjolo Chui’s transfer to The Hague, the Single Judge issued her written Decision on the request. She noted that, under Regulation 101(3) of the RoR, a detained person must be informed of a prosecution request for prohibition of contact and must be given the opportunity to be heard or to submit his views, although she also recognised that, in exceptional circumstances, an order may be issued prior to such notification and the hearing of the person concerned. She considered that, in such a situation, the detainee must ‘as soon as practicable, be informed and shall be given the opportunity to be heard or to submit his or her views’. In this regard, she noted that Ngudjolo Chui had not yet been assigned Defence Counsel. In light of the potentially detrimental implications of the prosecution request for the detention regimes of both Katanga and Ngudjolo Chui, she emphasised the ‘need to ensure that Mathieu Ngudjolo Chui is in a position to make fully informed observations on the Prosecution’s Urgent Applications’, which could only be realised by hearing Ngudjolo Chui after he had been assigned Defence Counsel. Nevertheless, she also realised that ‘if the allegations made by the Prosecution in the Prosecution’s Urgent Application were to be founded, allowing communication between Mathieu Ngudjolo Chui and Germain Katanga in relation to any public or confidential aspects of their cases, particularly if they are allowed to exchange case-related materials, could make the Prosecution’s Urgent Application meaningless’. In order to prevent this from happening, a provisional detention regime had to be set up until the request could properly be addressed by defence counsel for both detainees. The Single Judge held that this situation qualified as an ‘emergency’ within the meaning of Regulation 101(3) of the RoR. Instead of the total prohibition of contact between the two detainees requested by the Prosecution, she opined that the Prosecution’s concerns could be met by ‘(i) active enforcement of the prohibition to exchange case-related materials between Mathieu Ngudjolo Chui and Germain Katanga; and (ii) a general prohibition for both detainees to communicate in relation to any public or confidential aspects of their respective cases’. She held, in this respect, that ‘given the current set up of the Detention Center, as described in the Registry’s Observations, the implementation of any additional measures requested by

329 Ibid.
330 Ibid.
331 Ibid.
the Prosecution, and in particular the temporary prohibition of any contact between Mathieu Ngudjolo Chui and Katanga, will require severe restrictions on the detention regime for both detainees; and that the provisional imposition of such restrictions before the hearing scheduled in the present case is not justified because the above-mentioned less restrictive measures are, in the view of the Single Judge, sufficient to prevent the Prosecution’s Urgent Application from becoming moot’, her earlier oral decision needed to be revised.\(^{332}\) Hence, apart from providing an example of what may qualify as an emergency situation under Regulation 101(3), this Decision confirms that the principles of proportionality and ‘least intrusiveness’ apply to decisions made pursuant to Regulation 101.

On 10 March 2008, the ICC Pre-Trial Chamber decided to join the cases of Katanga and Ngudjolo Chui. After the latter accused was assigned counsel, defence counsel for both detainees, the Prosecution and the Registry were all invited to submit their views on the matter to the Single Judge. The Prosecution submitted that it had reasonable grounds to believe that contact between Katanga and Ngudjolo Chui ‘could prejudice or otherwise affect the outcome of the proceedings against each of the Detainees, adversely impact ongoing or further investigations, harm victims or witnesses or any other person, or be used by the Detainees to breach an order for non-disclosure made by a Judge’.\(^{333}\) The Registrar, \textit{inter alia}, suggested that Ngudjolo Chui be moved to the ICTY UNDU or to a cell in the (Dutch) Host Prison. The Single Judge noted, however, that this would result in a \textit{de facto} segregation of Ngudjolo Chui from the other ICC detainees, which was not provided for under Regulation 101 of the RoR.\(^{334}\) In respect of the other proposed measures to restrict the communication and contact between Germain Katanga and Mathieu Ngudjolo Chui that would not amount to a \textit{de facto} segregation regime,\(^{335}\) she considered, \textit{inter alia}, that i) the measures sought were not based on any previous violation of the detention regime by

\(^{332}\) \textit{Ibid}.


\(^{334}\) The Single Judge contrasted the measure of prohibiting contact under Regulation 101 to segregation measures pursuant to Regulation 201 of the RoR and noticed that segregation between detainees on the basis of the latter provision can only be based on two grounds: i) ‘preventing the detained persons in question from creating or contributing to any potential conflict in the detention center; or avoiding danger to the detained persons in question’; \textit{ibid}.

\(^{335}\) The nature of these proposed measures was kept confidential.
either Katanga or Ngudjolo Chui; and ii) that the ‘measures requested constitute an important restriction of the rights provided for by the detention regime set forth in the Regulations and the RoR to Germain Katanga and Mathieu Ngudjolo Chui, and therefore they can only be imposed if the requirements of necessity and proportionality are met’.\footnote{ICC, Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, \textit{Prosecutor v. Katanga and Ngudjolo Chui}, Case No. ICC-01/04-01/07, P.-T. Ch. I, 13 March 2008.} In this light, the Single Judge held that the Prosecution had failed to substantiate its allegations and that such allegations were ‘purely speculative’. In the ‘absence of any concrete evidence that Germain Katanga and Mathieu Ngudjolo Chui are fabricating testimony or evidence’, the Single Judge did not consider that the exercise of the fundamental rights of accused persons pursuant to Article 67(1) of the Statute ‘can prejudice in any way or otherwise affect the outcome of the proceedings against any of them’.\footnote{Ibid.} She therefore concluded that there was no need to impose any restrictive measures.

It follows from this decision, then, that (i) measures imposed pursuant to Regulation 101 are governed by the principle of proportionality and that such measures must not amount to a \textit{de facto} segregation of the detainee concerned from other inmates, since segregation is governed by other regulations and rationales, (ii) detained accused’ fair trial rights must be respected when imposing such measures, (iii) in determining whether a restrictive measure may be imposed pursuant to Regulation 101, any previous violation of the detention regime by the inmate concerned is a relevant consideration, and (iv) prosecutorial requests must be substantiated.
3.4 Applying human rights law

3.4.1 The applicability of international human rights law

The rationales for applying international human rights law

In Kanu, the SCSL Registrar held that, when exercising his discretionary powers, ‘he would need to take into account the particular circumstances of the situation, including the security and good order of the Detention Facility, the health and safety of the accused and the rights and fundamental freedoms of the accused’. In other words, where the tribunals’ rules on detention matters lack precision or contain lacunae, human rights law may provide valuable guidance in interpreting the content of these rules or in making policy decisions. In this regard, it is also worth noting Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, which provides that the procedures before the Extraordinary Chambers ‘shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level’.

As to the reasons for such lack of precision and lacunae, it is important to note that, for any legislature, it is impossible to foresee each and every problem which may arise in actual practice. The drafters of the tribunals’ detention regulations are no exception in this regard. Detention institutions are, moreover, ‘total institutions’, meaning that intramural decision-making touches on every aspect of the detained persons’ life. All aspects of their lives, including the most trivial of matters, are subject to regulation by institutions’ authorities. The rules of detention of the various tribunals are hardly

338 SCSL, Decision on the Defence Motion for the Temporary Provisional Release to Allow the Accused Santigie Borbor Kanu to Visit his Mother’s Grave, Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T, T. Ch. II, 18 October 2005, par. 10. Emphasis added.
339 According to Goffman, ‘[a] basic social arrangement in modern society is that the individual tends to sleep, play and work in different places, with different participants, under
the appropriate place to regulate each and every matter that arises in the detention situation.\textsuperscript{340} Prisons are, perhaps more than any other bureaucratic organisation, characterised by the notion of ‘discretionary powers’ or ‘freies Ermessen’.\textsuperscript{341} As they are generally considered to be complex institutions (in that they are governed by conflicting rationales), their authorities require a substantial amount of freedom of action. In order to prevent arbitrary decision-making, however, principles and standards are necessary in order to guide the authorities when exercising their discretionary powers. It is generally recognised that human rights law’s primal function has been to delineate the limitations to the legitimate use of state power. As such, as far as the aforementioned principles and standards are concerned, it seems logical to fall back on the standards that have been formulated by the monitoring bodies established under the various human rights treaties. In the ICTY case of Furundžija, Judge Robinson recognised that, where there is inconsistency between a statutory norm and international law, the statutory norm may nonetheless be applicable.\textsuperscript{342} He stated that ‘[a] relevant rule of customary international law does not necessarily control interpretation. For the Statute may itself differen...
derogate from customary international law (…)’. However, this does not necessarily apply to the tribunals’ administrative regulations regarding detention matters. Although such regulations are ultimately based on the Statute, because they have been drafted by the institutions’ Judges or Registrar rather than by the U.N. Security Council or the ICC Assembly of States Parties, the mentioned ‘derogation rule’ appears to lose much of its legitimacy in respect of such regulations. International (human rights) law (as customary norms or general principles of law), then, may be argued to play a role in regard of all three of the functions recognised in Article 12(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea.

The applicability of international human rights law

There is an ongoing debate in the field of international criminal law concerning the role of human rights law at the various international criminal tribunals. According to one viewpoint, human rights law functions merely as an external tool for evaluating the institutions’ practices, whereby these justice systems are perceived as ‘self-contained regimes’.

Gradoni criticises Zappalà for adhering to this viewpoint and

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343 See ICTY, Declaration of Judge Robins on, Prosecutor v. Furundžija, Case No. IT-95-17/1-A, 21 July 2000, par. 279. See, also, ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, Case No. IT-95-14-AR108bis, A. Ch., par. 26, where it is noted in respect of the tribunal’s powers under Article 29 of the ICTY Statute that ‘[t]he exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be “ordered” either by other States or by international bodies)’.

344 See Lorenzo Gradoni, supra, footnote 28, at 848. See, on self-contained regimes, Bruno Simma, Self-Contained Regimes, Netherlands Yearbook of International Law Volume XVI, Martinus Nijhoff Publishers, 1985, p. 111-136. See, in more detail, Report of the Study group of the International law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682/Add.1, 2 May 2006, par. 11-16. In par. 11 of that Report, it is provided that ‘[a] group of rules and principles concerned with a particular subject matter may form a special regime (“self-contained regime”) and be applicable as lex specialis. Such special regimes often have their own institutions to administer the relevant rules’. In its par. 14, it is stated that such a special regime ‘may derogate from general law under the same conditions as lex specialis generally’. The Report, subsequently, explains that, according to the view that ‘self-contained regimes are completely cocooned outside international law’, ‘general international law would be applicable only if specifically incorporated as part of the special regime’ (par. 176-177). However, the Report holds (in par. 174) that the ‘Special Rapporteurs
for arguing that the decision of the drafters of the tribunals’ Statutes to recognize human rights law’s applicability to the international justice context was merely a moral or policy choice, rather than a necessity under international law. Gradoni, like other scholars, basically argues that, as international institutions, the international tribunals are obliged to apply and respect international human rights law. A number of arguments support this viewpoint.

Firstly, to the extent that detention conditions may affect or infringe upon rights of accused persons - e.g. the rights to contact with counsel or to adequate facilities to prepare one’s defence - the provisions in the tribunals’ Statutes that stipulate or imply such rights are directly applicable to the detention situation. In this regard, it should be noted that Article 21 of the ICTY Statute practically verbatim repeats Article 14 ICCPR.

In respect of the ICC, Article 21(3) ICC Statute should be regarded as governing detention matters, which in turn implies that the decisions of all the Court’s organs, including those of the Registrar and the Presidency, must be consistent with ‘internationally recognized human rights’ (and with the principle of non-discrimination). Paragraph 1(b) of Article 21 further provides that the Court may,

never considered self-contained regimes or subsystems as “closed legal circuits” in the sense that they would completely and finally exclude the application of general law and explains that international law may have a gap-filling role also in respect of such special regimes (par. 15, 179 and 192-193 of the Report). Therefore, even self-contained regimes should not be understood as wholly autonomous or closed legal systems.

345 Lorenzo Gradoni, supra, footnote 28, at 849. See Salvatore Zappalà, Human Rights in International Criminal Proceedings, Oxford University Press, 2003, p. 14, where Zappalà states that ‘[i]n the international legal order each subsystem tends to be self-contained and to operate as a ’monad’ (footnote omitted). See, further, Salvatore Zappalà, The Rights of the Accused, in: Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court – A Commentary, Oxford University Press, 2002, p. 1327-1328. Here, Zappalà advances the more pragmatic argument that since ‘both in the system of the ad hoc Tribunals and in the ICC Statute, the organs of the Tribunals and the Court are bound to fully respect the rights of the accused’, the ‘question of whether due process guarantees provided for by international instruments could be other than applied to international tribunals has only theoretical relevance, if any’.


347 In a similar vein, see Article 17 of the SCSL Statute, Article 20 of the ICTR Statute and Article 16 of the STL Statute.

348 See Article 34 of the ICC Statute.
‘where appropriate’, apply ‘applicable treaties’, which may include such human rights
treaties as the ICCPR or the ECHR.

However, as at least one commentator has observed, it is difficult to see how such
treaties might directly enter the tribunals’ jurisdiction. The tribunals themselves are
not parties to the various human rights treaties and are therefore not directly bound by
them. According to this view, if such human rights norms are to enter the tribunals’
jurisdictions, it could only be through rules of international law, i.e. customary law or
general principles of law. Such argument only makes sense, however, in relation to
directly applicable ‘sources of law’ (as referred to in (the customary norm underlying)
Article 38 of the ICJ Statute). After all, Article 21(3) of the ICC Statute does not
provide for a separate source of law, but rather provides an ‘interpretative yardstick’
in regard to the sources of law mentioned elsewhere in Article 21. Such an approach
appears to have been adopted by the ICC Appeals Chamber in Lubanga. After
referring to Article 21(3), the Appeals Chamber examined case-law of the ECtHR in
order to determine the content of the law applicable to the case before it. Also in
Lubanga, in connection to the right to legal representation, the Appeals Chamber
stipulated that ‘[s]uch a right is a universally recognized human right (see article 21
(3) of the Statute) that finds expression in international and regional treaties and
conventions’, and referred directly to the ICCPR, the ECHR, the ACHPR and the
ACHR. More generally, the ICC has stressed in respect of the applicability of
human rights on the basis of Article 21(3), that ‘[this provision] stipulates that the law

349 See, e.g., Alain Pellet, supra, footnote 38, p. 1068. Pellet states that ‘[t]he reference to
treaties among the sources of law to be applied by the Court was seldom raised during the
preparatory debates (...) Nor does it seem to have been questioned by any delegation during
the Conference. That is not to say that it is clearly indispensable, or even useful’.
350 In a similar vein, see Alain Pellet, supra, footnote 38, p. 1068.
351 However, it neither defined the international legal status of the ECHR norms, nor provided
a justification for taking into account the case-law of the ECtHR. ICC, Judgment in the appeal
of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the
consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e)
agreements and the application to stay the prosecution of the accused, together with certain
other issues raised at the Status Conference on 10 June 2008", Prosecutor v. Lubanga, Case
No. ICC-01/04-01/06 OA, 13, A. Ch., 21 October 2008, par. 46-47. See, also, ICC, Decision
on the Final System of Disclosure and the Establishment of a Timetable, Prosecutor v.
352 ICC, Reasons for "Decision of the Appeals Chamber on the Defence application ‘Demande
de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau
Conseil de la Défense' filed on 20 February 2007' issued on 23 February 2007, Prosecutor v.
Lubanga, Case No. ICC-01/04-01/06 OA8, A. Ch., par. 12.
applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights (...).\(^{353}\)

It is difficult to say generally which norms fall under the notion of ‘internationally accepted human rights’. Zahar and Sluiter argue that, in light of the ICC’s ‘universal aspiration’, the notion must primarily be understood to refer to universal human rights law, as prescribed by the ICCPR, the CAT and the Convention on the Rights of the Child. In respect of regional human rights law, they note that such treaties ‘play, in principle, a less prominent role, but may frequently be applied in practice, because of the highly developed character of certain regional human rights systems, such as the ECHR’.\(^{354}\)

It appears to follow from the ICC’s case-law that the Court has opted for a broad interpretation of the provision,\(^{355}\) according to which such regional conventions as the ACHR,\(^{356}\) the ECHR\(^{357}\) and the ACHPR\(^{358}\) are placed on an equal footing with the

\(^{353}\) ICC, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, \textit{Prosecutor v. Lubanga}, Case No. ICC-01/04-01/06 OA(4), A. Ch., 14 December 2006, par. 37.


\(^{355}\) Though not as broad as some would like; human rights law does not appear to be directly applicable, but is merely an interpretive yardstick. The author is indebted to Ms. Kelly Pitcher for drawing his attention to this point.

\(^{356}\) See, \textit{e.g.}, ICC, Decision on the Application for the interim release of Thomas Lubanga Dyilo, \textit{Prosecutor v. Lubanga}, Case No. ICC-01/04-01/06, 18 October 2006, footnote 14; ICC, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6, Situation in the Democratic Republic of Congo, Situation No. ICC-01/04, 31 March 2006, par. 34.

\(^{357}\) See, \textit{e.g.}, ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, \textit{Prosecutor v. Lubanga}, Case No. ICC-01704-01/06, T. Ch., 13 June 2008, par. 58; ICC, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, \textit{Prosecutor v. Katanga}, Case No. 01/04-01/07 (OA 3), A. Ch., 27 May 2008, par. 43; ICC, Decision on the Application for the interim release of Thomas Lubanga Dyilo, \textit{Prosecutor v. Lubanga}, Case No. ICC-01/04-01/06, 18 October 2006, footnote 14; ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at
ICCPR. Such themed conventions as the Convention on the Rights of the Child\textsuperscript{359} have also been referred to by the Court. Moreover, the case-law, communications and observations of the monitoring bodies established under those conventions have been recognised as providing guidance in defining the content of the corresponding international human rights norms. This applies to decisions of, for example, the HRC,\textsuperscript{360} the I-ACtHR,\textsuperscript{361} the ECtHR\textsuperscript{362} and the Committee on the Rights of the


The Pre-Trial Chamber in the case of *Bemba Gombo* stated that Article 21(3) requires the Court to determine a case ‘in conformity with internationally recognized human rights and related jurisprudence’. In other instances, the Court has been more cautious when referring to regional Conventions or the decisions of monitoring bodies. In *Bemba Gombo*, for instance, the Court held that ‘[t]he legal texts of the Court must be applied consistently with internationally recognised human rights, pursuant to Article 21(3) of the Rome Statute. Under this ground for judicial review, *without passing judgment on their applicability*, the Presidency will have regard to the European Convention and the jurisprudence of the European Court on Human Rights (…) as the detainee has alleged a breach of that Convention’.

The question of whether the phrase ‘internationally accepted human rights’ encompasses soft-law standards, has been answered in the affirmative. In *Lubanga*, for instance, the Trial Chamber made express reference to the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, as well as the UDHR (although this may have been based on the UDHR’s customary law status). In other decisions, the Court has referred to, *inter alia*, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the SMR, the EPR, the U.N. Body of Principles and the

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367 ICC, Decision on the applications by victims to participate in the proceedings, *Prosecutor v. Lubanga*, CC-01/04-01/06, T. Ch., 15 December 2008, par. 47-48; ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, *Prosecutor v. Lubanga*, Case No. ICC-01704-01/04-01/06, T. Ch., 13 June 2008, par. 58. Although the UDHR must be regarded as a non-binding instrument, the norms underlying the UDHR’s provisions are generally recognised to constitute part of customary international law.
368 William A. Schabas, *supra*, footnote 238, p. 400. Schabas cites ICC, Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Situation No. ICC-01/04, P.-T. Ch. I, 17 January 2006, par. 115; and ICC, Fourth Decision on Victims’
views of the U.N. CAT. Indeed, where Article 21(3) does not refer to legally binding international human rights, the recognition of certain (non-binding) rights by universal bodies such as the U.N. General Assembly or ECOSOC may bring them within the scope of Article 21(3).

An analogy may be drawn between Article 21(3) of the ICC statute and Article 106(2) of the Statute, which addresses, inter alia, the conditions of post-transfer imprisonment. It provides in relevant part that ‘[t]he conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners’ (emphasis added). The phrase refers solely to treaty standards, since numerous representatives at the Rome Conference were opposed to the applicability of soft-law standards, at least in this specific context. In this respect, Sluiter and Zahar have noted that ‘[t]his is basically a step backwards from the practice of the ad hoc tribunals, as it excludes all the UN recommendations and leaves us basically with the lower standard of Article 10 of the ICCPR’. However, Article 106 does not explicitly exclude the applicability of soft-law standards. Moreover, there are no solid arguments for not applying the customary norms contained in or underlying some of those standards or for not using such instruments where they provide authoritative guidance on the Participation, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, P.-T. Ch. III, 12 December 2008.

ICC, Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-RoR-217-02/08, Presidency, 10 March 2009, par. 27.

Id., par. 27; 38.

Id., par. 27.

Ibid.

Kress and Sluiter note that ‘the question of which international standards should be respected by the State of enforcement was the object of some debate and a number of drafting proposals. It became clear that a considerable number of delegations were adamant in rejecting the obligation for the State of enforcement to comply with the full set of international standards of a recommendatory nature which have been referred to by the ICTY. The way out was to require consistency with ‘widely accepted international treaty standards governing the treatment of prisoners’ in Article 106(1) and (2). It was understood that the treaty standards referred to are to be derived from international human rights instruments. The question, however, of which human rights instruments were specifically meant was deliberately left open’ (footnotes omitted); Claus Kress and Göran Sluiter, *supra*, footnote 4, at 1799. See, also, *id.*, p. 1802.


See, in a similar vein, Christoph J.M. Safferling, *supra*, footnote 6, p. 350, arguing that Article 106 must be understood as referring both to human rights treaties and to the SMR.
content of the obligations and prohibitions under Articles 7 and 10 of the ICCPR, as well as those under Article 3 ECHR and Article 5 ACHR. The latter view is advocated by Clark, where he states specifically in relation to Article 106 that, notwithstanding the explicit reference to ‘treaty standards’, ‘the essence of the Standard Minimum Rules and similar instruments is effectively assimilated to general treaty provisions such as the Covenant on Civil and Political Rights’.  

Although Article 106 is silent on the applicability of soft-law standards to conditions of post-transfer imprisonment, an important indication of such applicability can be found in the agreements that the ICC has concluded with States for the enforcement of sentences. Whereas Articles 4(2) and 6(1) of the ‘Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court’ partly repeat Article 106 of the Statute providing that conditions of imprisonment ‘shall be consistent with widely accepted international treaty standards governing treatment of prisoners’ (emphasis added), in the Preamble to the Agreement the phrase ‘international treaty standards governing the treatment of prisoners’ is referred to as including the SMR, the U.N. Body of Principles and the U.N. Basic Principles.

In the Agreement that the ICC entered into with the United Kingdom on the enforcement of sentences, the term ‘treaty standards’ is left out altogether. The Agreement provides in Article 5 that ‘[t]he conditions of imprisonment shall be (…) in accordance with relevant international human rights standards governing the treatment of prisoners, including any obligations of the United Kingdom under the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950 as it applies to the United Kingdom’ (emphasis added).

Although no reference is made to the SMR, the reference to the United Kingdom’s obligations under the ECHR may be argued to set an even higher standard in light of

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the use made by the ECtHR of the EPR and CPT Standards in determining member States’ obligations under the ECHR.

Moreover, in the Agreement between the ICRC and the ICC,\(^ {379}\) which provides for inspection visits by the ICRC both to detainees held by the ICC in its Detention Centre and to sentenced persons after their transfer to a State for the enforcement of their sentences,\(^ {380}\) Articles 3 and 11 do not refer to ‘treaty standards’ but to ‘widely accepted international standards governing the treatment of persons deprived of liberty’. Such standards undoubtedly include the SMR, the U.N. Body of Principles and the U.N. Basic Principles. Accordingly, the term ‘treaty standards’ in Article 106(2) can be regarded as having an autonomous meaning, one which includes soft-law standards. In conclusion, where the ICC demands from the States enforcing the sentences it imposes that the conditions of imprisonment in such States are consistent with international penal standards, it is reasonable to argue that the Court must abide by those same standards under Article 21(3) of the ICC Statute in the context of detention on remand and pre-transfer imprisonment at the ICC Detention Centre.

With regard to the sources of the applicable law, Article 21(1), Paragraphs (b) and (c), stipulate that customary rules and general principles are part of the Court’s legal regime. Under (b), customary rules are ‘principles and rules of international law’,\(^ {381}\) and under (c), general principles are ‘general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards’.\(^ {382}\) In other words, human rights standards that have attained the status of customary rules or general principles of law may also be applicable pursuant to the aforementioned provisions. Nevertheless, the Pre-Trial Chamber in *Bashir* held that the sources under

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\(^{379}\) Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, ICC-PRES/02-01-06 of 19 March 2006 and 13 April 2006, entry into force on 13 April 2006.

\(^{380}\) Id., Article 2.

\(^{381}\) See, Alain Pellet, *supra*, footnote 38, p. 1070-1076. According to Pellet, the term ‘custom’ has in all likelihood been avoided by the drafters because of the term’s negative connotation concerning the principle of legality. The phrase ‘principles and rules of international law’ in Article 21(1)(b) must, according to Pellet, be regarded as a ‘verbal tic’, referring to customary international law.

\(^{382}\) See, for a different view, William A. Schabas, *supra*, footnote 238, p. 393.
Article 21(1)(b) and (c) can ‘only be applied when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria provided for in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute’.  

It is further noted that Article 21 of the ICC Statute takes a hierarchical approach to the different sources of law and, therefore, customary rules and general principles of law are placed lower in rank than the Court’s own legal framework – with the notable exception of peremptory norms of international law. Article 21(3) becomes an important safeguard, then, as it guarantees that also the primary sources mentioned under Paragraph 1 sub (a) must be interpreted consistently with internationally accepted human rights.

Secondly, in light of the international criminal tribunals’ image as the ‘protectors of human rights’, such tribunals are arguably under an obligation to respect and apply human rights law themselves. The tribunals were primarily established with the aim of fighting impunity of perpetrators of egregious human rights violations. Like all institutions vested with far-reaching powers over individuals, however, such institutions may easily turn out to be rights violators themselves. Further, the manner in which the international community treats its detainees will have a bearing upon the final assessment of both the legitimacy and the achievements of these institutions. In this regard, it is worth noting the public indignation caused by the treatment of the Nuremberg convicts at Spandau. The

384 Pellet, in this respect, states that some kind of ‘super-legality’ governs the ICC’s legal regime; see Alain Pellet, supra, footnote 38, 1079-1082.
386 Alexander Zahar and Göran Sluiter, supra, footnote 354, p. 276.
387 Claus Kress and Göran Sluiter, supra, footnote 4, at 1753.
388 Norman J.W. Goda, supra, footnote 3.
harsh conditions of imprisonment in Spandau prison,\textsuperscript{389} did not contribute to a positive assessment of the punishment of the major Nazi criminals.\textsuperscript{390}

A third argument in support of the view that international tribunals are obliged to apply and respect international human rights law, as noted in the I.C.J. Advisory Opinion on \textit{Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt}, is that ‘[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them \textit{under general rules of international law}, under their constitutions or under international agreements to which they are parties’.\textsuperscript{391} This finding is also implicit in the I.C.J.’s Advisory Opinion in the \textit{Reparation for Injuries} case, where the U.N. were recognised as a subject of international law and, as such, capable of possessing international rights and duties.\textsuperscript{392}

International institutions can thus be argued to be under an obligation to apply international human rights law to the extent that such law forms part of customary law,\textsuperscript{393} or constitutes a general principle of law,\textsuperscript{394} unless the matter concerned is specifically dealt with in an institution’s own legal framework (peremptory norms do derogate from such explicit provisions though).\textsuperscript{395}

\begin{itemize}
\item \textsuperscript{389} This was much due to Soviet insistence on a harsh prison regime and deadlocks caused by Cold War contingencies. See Norman J.W. Goda, \textit{supra}, footnote 3.
\item \textsuperscript{390} As noted earlier, from the moment of release of the other remaining Spandau prisoners on 1 October 1966 onwards, Rudolf Hess was kept in what practically amounted to solitary confinement, which lasted until Hess’s death in 1987. See EComHR, \textit{Ilse Hess v. The United Kingdom}, Final (Inadmissibility) Decision of 28 May 1975, Application No. 6231/73, in: Council of Europe, Yearbook of the European Convention on Human Rights 1975, Martinus Nijhoff, The Hague 1976, p. 146-177, at 148.
\item \textsuperscript{394} See Philippe Sands and Pierre Klein, \textit{supra}, footnote 391, p. 458-459. See, further, Alexander Zahar and Göran Sluiter, \textit{supra}, footnote 354, p. 277. The latter scholars give various examples of case-law of the European Court of Justice in which it recognised the existence of obligations incumbent on international institutions under international law. They argue that there is no reason for not applying those findings to the responsibilities of the U.N. Security Council and its subsidiary organs.
\item \textsuperscript{395} Göran Sluiter, \textit{supra}, footnote 342, p. 937. It is generally recognised that in international human rights law there exists no hierarchy between the different sources of law, with the exception of \textit{jus cogens} norms.
\end{itemize}
Sands and Klein cite case-law of the European Court of Justice, the ICTY and national courts as well as resolutions of the U.N. Security Council and legal opinions of U.N. secretariats as evidence of the existence and recognition of international organisations’ obligations under international law.\(^{396}\)

Accordingly, the international criminal tribunals, as subjects of international law,\(^{397}\) may thus be argued to be bound by international law.

A fourth argument, which at least applies to the ad hoc tribunals, may be found in the commentary of the U.N. Secretary-General to Article 21 of the ICTY Statute, subsequently approved of by the Security Council in adopting the Statute.\(^{398}\)

The Secretary-General held that ‘[i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings’.\(^{399}\) To the extent that conditions of detention may infringe upon rights of accused detainees, the Secretary-General’s statement is directly relevant to the detention context. Moreover, the term ‘axiomatic’ expresses a certain sense of inevitability as regards the applicability of human rights standards. It is reasonable to argue that such ‘inevitability’ applies not only to due process rights in international criminal proceedings but to all aspects of such proceedings, including the detention context.

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\(^{398}\) Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993), par. 106. As held by Zahar and Sluiter, ‘[g]iven the practically identical language of Article 20 of the ICTR Statute, the commentary by the Secretary-General to Article 21 of the ICTY Statute is equally applicable to the ICTR provision’; Alexander Zahar and Göran Sluiter, *supra*, footnote 354, p. 277, footnote 6. See, also, Göran Sluiter, *supra*, footnote 21, p. 26, where Sluiter opines that the Secretary-General’s Report’s subsequent approval by the Security Council endows it with a significance beyond that of ordinary *travaux préparatoires* because the latter are usually not approved of by the negotiating parties.

Fifth, as subsidiary organs of the United Nations’ Security Council, the ad hoc Tribunals are under an obligation to respect human rights pursuant to the general obligation to do so under the U.N. Charter. In addition to the Preamble of the U.N. Charter which proclaims the ‘reaffirmation of faith in human rights and in the dignity and worth of the human person’, Paragraph 3 of Article 1 stipulates as one of the U.N. organisation’s main objectives the promotion and encouragement of respect for human rights and fundamental freedoms. Further, Article 55(c) states that the United Nations shall promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all’. Article 24(2) provides that, in discharging its duties, the Security Council ‘shall act in accordance with the Purposes and Principles of the United Nations’. Although not strictly speaking subsidiary organs of the U.N. organisation, that organisation’s significant involvement in their establishment and operation arguably imposes on the SCSL, the Special Panels for Serious Crimes in East Timor, the Kosovo panels, the ECCC and the STL, an obligation to respect human rights.

The general provisions in the U.N. Charter, however, raise many questions. The Charter is silent on the content, scope of application, the definition of the rights declared therein and on such rights’ relationship *inter se*. As a consequence, it is hard to discern any concrete obligations in the Charter’s provisions. As noted above, however, the UDHR may be regarded as authoritative in the interpretation of the U.N. Charter’s provisions.

In respect of the SMR, more specific ‘institutional arguments’ may be adduced for considering the tribunals obliged to respect these Rules. Procedure 9 of the Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of

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400 A subsidiary organ is, in principle, placed in a hierarchically inferior position *vis-à-vis* its parental organ. The tribunals as subsidiary organs form part of the U.N. organisation and must be considered to be endowed with legal personality as derived from that of their parental organisation. See Göran Sluiter, *supra*, footnote 21, p. 20-21. The Tribunals have emphasised their specifically judicial nature though. See ICTY, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, T. Ch., 18 July 1997, par. 23.


403 Göran Sluiter, *supra*, footnote 21, p. 31-32.
Prisoners, which were approved of and endorsed by the General Assembly, instructs the U.N. Secretary-General to ‘ensure the widest possible reference to and use of the text of the Standard Minimum Rules by the United Nations in all its relevant programmes, including technical cooperation activities’. The U.N. General Assembly later requested the Secretary-General to ‘discharge fully his tasks in connection to the implementation’ of the SMR, ‘particularly with regard to procedures 7, 8, 9 and 10’. Article 98 of the U.N. Charter provides for the authority of the General Assembly to entrust the Secretary-General with specific functions. In this respect, Sloan explains that it makes no difference whether a General Assembly resolution is cast in the form of a decision or a recommendation. It is equally unimportant whether the General Assembly “requests”, “discharges”, “instructs” or “orders” the Secretary-General. The obligatory effect of all such resolutions is already grounded in the hierarchical relationship. Since the Registrars of both the ICTY and the ICTR are directly subordinate to the U.N. Secretary-General, it is self-evident that they are equally obliged to apply the SMR. It should further be noted that the SMR’s Preliminary Observations provide that they ‘represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations’. Therefore, whereas States may argue that soft-law standards do not legally bind them - to the extent that such standards do not reflect customary law or general principles of law - the same cannot be said of the U. N. organs in view of such organs’ institutional commitments.

Where Zahar and Sluiter note that ‘[t]hese [soft-law] instruments do not represent binding law, but it is difficult for UN institutions to ignore them’, the argument appears to be based on moral, non-legal reasoning only. Indeed, such moral reasoning constitutes a persuasive argument for the application of other soft-law instruments adopted in the framework of the U.N.

405 Emphasis added.
408 Id., p. 32.
409 Emphasis added.
In practice, the tribunals have applied soft-law standards, although often without making explicit the legal status of those instruments.\(^{411}\) The tribunals appear to consider themselves bound by such standards.\(^{412}\) In *Ruggiu*, for instance, the ICTR President held in relation to the enforcement of sentences that, apart from the tribunal’s own legal framework, ‘other instruments also apply to the enforcement of sentences decided by the Tribunal established by the United Nations, namely: the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners’.\(^{413}\) Although the President acknowledged that those instruments are usually considered non-binding on States, he opined that, as the tribunal was part of the U.N., an organisation whose primary focus is the promotion and encouragement of respect for human rights, it was obliged to adhere to such standards.\(^{414}\) Further, when asked by a Trial Chamber Judge about his responsibilities at the SCSL Detention Facility, the SCSL Chief of Detention responded that his tasks were ‘[t]o keep those detained in custody until they are tried


\(^{412}\) This appears to follow from ICTY, Redacted Version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex” Filed on 27 November 2008, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T. Ch. III, 1 December 2008, par. 28; 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, par. 31, and was affirmed during interviews the author conducted with ICTR staff members: ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008. See, also, *FAQ about Detention put to Terry Jackson Chief Custody Officer of the ICC*, ICC Newsletter, No. 7, April 2006, p. 3 and Rule 4(B) of the STL Rules of Detention, which provides that '[t]here shall be regular and unannounced visits by the Inspecting Authority appointed by the President. This authority shall be responsible for examining the manner in which the Detainees are being held and treated and ensure compliance with human rights and international humanitarian law as well as other internationally accepted standards’ (emphasis added). See, also, ICC, Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-RoR-217-02/08, Presidency, 10 March 2009, par. 7, 9.


\(^{414}\) *Id.*, par. 9-10.
by the Court, and to treat them according to the Rules of Detention based on the minimum standards which would be accepted internationally’.\footnote{SCSL, Transcripts, \textit{Prosecutor v. Sesay, Kallon and Gbao}, Case No. SCSL-04-15-T, T. Ch. I, 23 July 2004, 3:03 P.M., Continued Trial, at page 8, lines 19-20. See, also, SCSL, Press Release - Press and Public Affairs Office, 11 October 2002, where it is emphasised that the detained persons will have ‘individual cells built in accordance with international standards’; and SCSL, Press Release– Press and Public Affairs Office, 7 April 2003, where it is stated that ‘[t]he Rules of Detention for the Special Court respect international standards of detention and the Court is committed to meeting those standards, now and in the future’.
\footnote{ICTY, Order of the President on the Defence Request to Modify the Conditions of detention of the Accused, \textit{Prosecutor v. Plavšić}, Case No. IT-00-39 & 40/1, President, 18 January 2001.}
\footnote{\textit{Ibid}. Emphasis added.}
\footnote{ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006.}
\footnote{ICTY, Order to the Registrar to Separate Convicted and Non-Convicted Detainees held in the Detention Unit, Case no. IT-06-89-Misc. 1, President, 15 June 2006.}
\footnote{ICTY, Order to the Registrar to Separate Convicted and Non-Convicted Detainees held in the Detention Unit, Case no. IT-06-89-Misc. 1, President, 15 June 2006.} In Plavšić, the ICTY Registrar asserted that ‘the conditions of detention for a woman within the United Nations Detention Unit are wholly consonant with the minimum international rules for the protection of detainees, especially United Nations resolution 43/173 adopted by the General Assembly on 9 December 1988 entitled “Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment” and Council of Europe Recommendation No. R (87) 3 adopted by the Committee of Ministers on 12 February 1987’.\footnote{ICTY, Order of the President on the Defence Request to Modify the Conditions of detention of the Accused, \textit{Prosecutor v. Plavšić}, Case No. IT-00-39 & 40/1, President, 18 January 2001.} In response to the Registrar, the ICTY President held that ‘in accordance with the United Nations minimum rules for the protection of detainees, “[m]en and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate”’, and that ‘\textit{in consequence}, Ms. Plavšić must be held in the section of the United Nations Detention Unit which, according to the Registrar’s Memorandum of 16 January 2001, is set aside for women and entirely separate from that for men; that she \textit{must} be guarded by only women; and that she \textit{must} be able to access the recreation and exercise rooms, the outside exercise yard and the library without male detainees being present’.\footnote{\textit{Ibid}. Emphasis added.} Moreover, when the Swedish independent investigators advised the ICTY to separate convicted from non-convicted individuals,\footnote{ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006.} the ICTY President responded that ‘it is consistent with principles of human rights for convicted detainees to be separated from non-convicted detainees and that such separation should be in place in the United nations Detention Unit as a matter of principle’.

\footnote{ICTY, Order to the Registrar to Separate Convicted and Non-Convicted Detainees held in the Detention Unit, Case no. IT-06-89-Misc. 1, President, 15 June 2006.}
Although this fifth argument applies primarily to the U.N. tribunals, it should be noted that the ICC is in many ways related to the U.N. organisation. Firstly, under Article 13(b) of the ICC Statute, the U.N. Security Council acting under Chapter VII of the Charter may refer to the ICC Prosecutor a situation in which one or more of the crimes referred to in Article 5 of the Statute appears to have been committed. Secondly, Article 16 of the ICC Statute provides that the Security Council may adopt a resolution under Chapter VII of the Charter in which it may request the Court not to commence or proceed with an investigation or prosecution. Thirdly, where a matter before the Court was referred by the Security Council and a State fails to co-operate with the Court, the Court may inform the Security Council of such failure under Article 87 paragraphs (5)(b) and (7). Fourthly, the U.N. Secretary-General has been attributed a number of administrative responsibilities under the ICC Statute. Fifthly, the U.N. General Assembly in its Resolution 58/79 called for the conclusion of a relationship agreement between the U.N. and the ICC. The ensuing Negotiated Relationship Agreement between the International Criminal Court and the United Nations provides in Article 3 that the organisations shall ‘cooperate closely, whenever appropriate’ and ‘in conformity with the respective provisions of the Charter and the Statute’. Such co-operation may entail, inter alia, the exchange of information and documents of mutual interest ‘to the fullest extent possible’, the temporary interchange of staff, the establishment of ‘common facilities or services in specific areas’, and the statutory arrangements outlined above. As to the organisations’ general relationship, Article 2 provides that the ICC recognises the responsibilities of the U.N. under the Charter. Further, the Preamble to the Relationship Agreement recalls that the ICC Statute ‘reaffirms the Purposes and Principles of the Charter of the United Nations’. With regard to the possibility of engaging in forms of co-operation that are not specifically provided for in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations:

420 See the Articles 121(1), (4) and (7), 122(1), 123(1) and (2), 125(2) and (3), 126(1), 127(1) and 128 of the ICC Statute.
422 Article 5 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.
423 Id., Article 8.
424 Id., Article 9.
425 Id., Article 17.
Agreement, Article 15(2) provides that such co-operation is permitted if compatible with the provisions of both the U.N. Charter and the ICC Statute.

On the basis of the foregoing, it appears reasonable to conclude that the fifth argument set out above, according to which, as subsidiary organs of the United Nations’ Security Council and because of its institutional position within the U.N.,\(^{426}\) the ad hoc tribunals are under an obligation to respect human rights and the SMR, also applies to the ICC, particularly (but not exclusively) where the involvement of the U.N. in ICC operations is more direct, such as where the Security Council has referred a situation to the ICC Prosecutor. This argument finds support in a number of instances in which the U.N. has been involved in setting-up or running a criminal justice system. On such occasions, the international penal standards and human rights were declared applicable. An example of more direct U.N. involvement can be found in the establishment and functioning of the ECCC.\(^{427}\) The Agreement between the U.N. and Cambodia stresses that the ECCC must comply with ‘international standards of justice’,\(^{428}\) which the ECCC has subsequently acknowledged in its case-law.\(^{429}\) The Preamble to the ECCC Rules of Detention,\(^{430}\) which are part of domestic law,\(^{431}\) sets out the general requirement of ‘respect for human rights and fundamental freedoms in accordance with the International Covenant on Civil and Political Rights, the United

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\(^{426}\) A subsidiary organ is, in principle, placed in a hierarchically inferior position vis-à-vis its parental organ. The tribunals as subsidiary organs form part of the U.N. organisation and must be considered to be endowed with legal personality as derived from that of their parental organisation. See Göran Sluiter, *supra*, footnote 21, p. 20-21. The Tribunals have emphasised their specifically judicial nature though; see ICTY, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, T. Ch., 18 July 1997, par. 23.


\(^{428}\) See, in particular, the Articles 12(2) and 13(1) of the Agreement. Article 28 provides that ‘[s]hould the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement’.


\(^{430}\) Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Extraordinary Chambers in the Courts of Cambodia.

\(^{431}\) 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 recalled that ‘the ECCC Detention Facility is under the authority of the Royal Government of Cambodia and subject to Cambodian law’.
Nations Standard Minimum Rules for the Treatment of Detainees and the United Nations Basic Principles for the Treatment of Prisoners’. Another example is found in Rule 11bis of the ICTR and ICTY RPE, which provides for the referral of cases to national jurisdictions by the ad hoc tribunals. The Referral Benches must be satisfied that national detention conditions satisfy international standards. An even more direct form of U.N. involvement can be found in the establishment and operation of the United Nations Transitional Administration in East Timor (UNTAET) and in the United Nations Interim Administration Mission in Kosovo (UNMIK). UNTAET Regulation 2001/23 on the Establishment of a Prison Service in East Timor prescribes that every penal institution must be operated ‘in accordance with International Human Rights Conventions (…) as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners, the United Nations Basic Principles for the Treatment of Prisoners, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Principles of Medical Ethics relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture’. UNMIK Regulation 2001/28 on the Rights of Persons Arrested by Law Enforcement Authorities notes that, in setting out these regulations, their drafters looked to, inter alia, the ICCPR, the ECHR, the Convention on the Rights of the Child, the U.N. Body of Principles and the SMR.

432 See, e.g., ICTY, Decision on Referral of Case under Rule 11 BIS, Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Referral Bench, 17 May 2005, par. 54, 67 and ICTY, Decision on Rule 11BIS Referral, Prosecutor v. Stanković, Case No. IT-96-23/2-AR11bis.1, A. Ch., 1 September 2005, par. 34, where the Appeals Chamber held that ‘[t]he condition of detention units in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction’s criminal justice system. And that is an inquiry squarely within the Referral Bench’s mandate’. See, also, ICTY, Decision on Appeal against Decision on Referral under Rule 11bis, Prosecutor v. Ljubičić, Case No. IT-00-41-AR11bis.1, A. Ch., 4 July 2006.


434 See UNMIK/REG/2001/28 of 11 October 2001. See, also, the Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on technical arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. See, further, Elizabeth Abraham, The Sins
An example of more indirect involvement of the U.N. can be found in Charles Taylor’s transfer from the SCSL to The Hague and his subsequent detention in the ICC Detention Centre. In light of the involvement of the U.N. in the establishment and operation of the SCSL, as well as in creating a legal basis for Taylor’s detention in The Hague, it is reasonable to argue that the SCSL was under the obligation to ensure that the treatment of Taylor in The Hague accorded with U.N. penal standards. The SCSL’s more general responsibility for Taylor’s detention situation was recognised by the SCSL’s Registrar and President. They recognised the applicability of the complaints procedure under Rule 59 of the SCSL Rules of Detention to Taylor’s detention in The Hague. The President noted that Article 6(4) of the Memorandum of Understanding between the ICC and the SCSL provides that the SCSL shall ‘retain full control and authority’ over the detainee, assumes ‘full legal responsibility’ for his custody, and ‘[i]n particular, (...) shall remain fully responsible for all aspects arising out of the day to day detention services and facilities under this Article including the well-being of the Detainee’. 

See the Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone, ICC-PRERS/03-01-06 of 13 April 2006 (entry into force on the same date). Article 6 (1) of the Memorandum provides that ‘[t]he relevant regulations and agreements concluded by the ICC setting out the operational framework of the ICC Detention Centre including but not limited to the Regulations of the ICC and of the Registry of the ICC shall apply mutatis mutandis to the Special Court Detainee’. Further, on 19 June 2006, the SCSL Registrar pursuant to Rule 64 of the RPE ordered that the ICC regulations relating to detention were applicable mutatis mutandis to the detention of Charles Taylor; SCSL, Endorsement Pursuant to Rule 64, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, 19 June 2006, cited in SCSL, Decision of the President on Public Defence Motion Requesting Review of the Memorandum of Understanding between the International Criminal Court and the Special Court of Sierra Leone Dated 13 April 2006 & Modification of Mr. Charles Taylor’s Conditions of Detention, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, President, 19 March 2007. See, also, SCSL, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, T. Ch. II, 23 June 2006.
A sixth reason for considering the tribunals to be bound by international human rights law lies in the argument, as formulated by Schermers and Blokker, that ‘[a]ccording to the principles of state succession, a new state is often bound by the obligations of its predecessor. By analogy, an organisation formed by states will be bound by the obligations to which the individual states were committed when they transferred powers to the organization’. Hence where the States that established a tribunal are bound to respect and apply human rights law, the tribunals are not relieved of such obligation.

It is further noted that the ECtHR has held that the States parties themselves retain a residual responsibility when transferring powers to third parties. The States Parties might be held in violation of their obligations under the ECHR if the international criminal tribunals fall short of the Convention’s norms. During the deliberations in Dutch Parliament on the implementation of the Rome Statute, the Dutch Minister of Justice held in connection to issues of domestic co-operation with and assistance to the ICC that, in principle, the Dutch courts may not review acts by ICC organs and that the Dutch judiciary could fairly assume that the judicial processes before the ICC are in accordance with the provisions of the ICCPR and ECHR. These remarks echo the findings of the ECtHR in the case of Naletilić v. Croatia, in which the applicant had complained that his extradition and transfer to the ICTY UNDU would violate Article 6 ECHR because the ICTY did not qualify as an impartial and independent tribunal established by law. The ECtHR, however, held that ‘[i]nvolved here is the surrender to an international court which, in view of the content of its

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440 See ECtHR, *Soering v. The United Kingdom*, judgment of 7 July 1989, Application No. 14038/88, par. 86. The case concerned a detainee’s extradition to Virginia (U.S.A.) where he risked being given the death sentence and being placed on death row. In respect of the latter risk, the Court held that ‘it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant’s complaints. (…) These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction’. See, also, ECtHR, *Chahal v. The United Kingdom*, judgment of 15 November 1996, Application No. 22414/93; ECtHR, *Jabari v. Turkey*, judgment of 11 July 2000, Application No. 40035/98.
441 Handelingen van de Eerste Kamer, 32e vergadering, 18 juni 2002.
442 *Id.*, 32-1529.
Statute and Rules of procedure, offers all the necessary guarantees including those of impartiality and independence’. During the aforementioned deliberations, the Dutch Minister of Justice recognised that the Netherlands had transferred jurisdiction to the ICC as a supranational institution. In doing so, he acknowledged that such a transfer did not imply that the Netherlands, as a party to the ECHR, bears no responsibility at all for what happens before the ICC. Although such residual responsibility concerns that of the power-transferring State(s) and not that of the tribunals, it may have consequences for the tribunals’ operations, were these to violate human rights law. The tribunals are in many respects dependent on the co-operation of States. Where these States risk being held liable for human rights violations committed by the tribunals, they may choose to no longer co-operate fully with the tribunals.

3.4.2 Sources of law and the tribunals’ practice

Agreements, customary law and general principles of law

International agreements

The following international agreements are of direct relevance to the treatment of detainees at the tribunals: host State agreements,

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Agreements concluded by the

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1. ECHR, Naletilić v. Croatia, admissibility decision of 4 May 2000, Application No. 51891/99. More specifically, in Milošević v. the Netherlands, the applicant argued, inter alia, that detention on the territory of the Netherlands lacked a basis in domestic law and that the Dutch authorities’ co-operation with the ICTY had been unlawful. Milošević had, however, not exhausted all the domestic remedies, which led the Court to declare the case inadmissible; ECHR, Milošević v. the Netherlands, admissibility decision of 19 March 2002, Application No. 77631/01.

444 See, in a similar vein, Alexander Zahar and Göran Sluiter, supra, footnote 354, p. 276.

445 See, e.g., the Agreement between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1999, Letter Dated 14 July 1994 from the Secretary-General Addressed to the President of the Security Council. In respect of the ICC, see the Report on the draft headquarters agreement between the International Criminal Court and the host State, ICC-ASP/5/25 of 9 November 2006 and the Basic principles governing a headquarters agreement to be negotiated between the Court and the host country, ICC-ASP/1/3.
tribunals with the inspecting authority, security agreements that the tribunals have entered into with the host States and co-operation agreements between the different tribunals and between tribunals and other organisations. (In relation to post-transfer imprisonment, a topic which in principle is beyond the scope of this research, the enforcement agreements concluded with States that are willing to receive individual convicts need be mentioned.) All of the aforementioned agreements are governed

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447 See, e.g., the Agreement on Security and Order of 14 July 1994, signed between the ICTY and the Netherlands. With respect to post-transfer imprisonment, the various agreements on the enforcement of sentences concluded by the tribunals with various States are highly relevant.

448 See the Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone, ICC-PRES/03-01-06, of 13 April 2006 (entry into force on the same date). See, further, the Negotiated Relationship Agreement with the United Nations, ICC-ASP/3/Res.1, entry into force on 22 July 2004, and adopted on 4 October 2004.

by international law. By contrast, contracts between the tribunals and States concerning, for example, the supply of electricity or gas and the purchase of goods are governed by domestic law.\textsuperscript{450}

With respect to such human rights treaties as the ICCPR, the U.N. Convention against Torture and the ECHR, it follows from the \textit{adagium pacta sunt servanda} that only the signatories to such treaties are legally bound. Accordingly, in order for the norms of such treaties to be binding on the tribunals, either the tribunals or, in regard of the U.N. tribunals, the United Nations must be party to those treaties.\textsuperscript{451} As noted by Judge Shahabuddeen at the ICTY, ‘internationally recognised human rights instruments were made by states for states. The Tribunal is not a state and is not party to those instruments. There is no way, for instance, by which the Tribunal can become a party to the Optional Protocol to the International Covenant on Civil and Political Rights. In an important sense, the United Nations Human Rights Committee set up in part IV of the Covenant is part of the judicial structure of states parties to the Covenant’.\textsuperscript{452}
Customary law and general principles of law

Notwithstanding the *pacta sunt servanda* rule, where the norms laid down in human rights conventions have become part of customary international law or constitute general principles of law, and where the tribunals appear, in principle, to be bound by such sources, international law should be deemed to be part of the tribunals’ legal regimes, both fulfilling a gap-filling role and being instrumental in questions of interpretation.

Such an understanding runs contrary to the notion that the tribunals may be regarded as ‘self-contained regimes’, i.e. as wholly autonomous or closed legal systems. Reference to domestic and regional legal concepts, then, is also permitted, but only to the extent that they form part of international law, i.e. customary law or general principles of law. Cassese calls, in this regard, for a ‘wise’ approach, as opposed to a ‘wild’ one. He defines the ‘wise’ approach as ‘a rigorous legal conception of the role and functions of international tribunals and the sources of law from which they may draw’, which implies that ‘international criminal judges may only use national

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453 As held by Judge Robinson in *Furundija*, ‘[a] relevant rule of customary international law does not necessarily control interpretation. For the Statute may itself derogate from customary international law (…)’; see ICTY, Declaration of Judge Robinson, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, 21 July 2000, par. 279. See, also, ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, A. Ch., par. 26, where it is noted in respect of the tribunal’s powers under Article 29 of the ICTY Statute that ‘[t]he exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies)’. This derogation rule does not apply to the application of *jus cogens* norms of customary law.

454 C.F. Amerasinghe, *supra*, footnote 393, p. 20, 386. See, further, Göran Sluiter, *supra*, footnote 21, p. 36 and Henry G. Schermers & Niels M. Blokker, *supra*, footnote 439, p. 999. The latter scholars hold that where international organisations are bound by treaty norms without their consent, ‘the legal foundation of this obligation lies not in its character as an international treaty but rather in its character as a general principle of law codified by treaty’.

455 See Lorenzo Gradoni, *supra*, footnote 28, at 850.


and international case-law as a “supplementary means of determining” an international legal rule (…) Consequently, the judges in question may only refer to such case-law (or even, where necessary, national legislation), in order to establish (i) whether a customary international rule has formed, or (ii) whether a general principle of international law exists, or to determine (iii) whether the interpretation of an international rule adopted by another judge is convincing and, if so, applicable’. 458

Similarly, ‘international criminal judges may only take account of the case-law of the Strasbourg Court if it helps to show the existence of a rule or principle of international law that may be applied by those judges, or if it contains an interpretation of an international rule that the judges in question consider to be convincing’. 459 Such an approach would reduce the risk of arbitrary decision-making and would increase the foreseeable ability of judicial decisions. 460

By contrast, according to the ‘wild approach’, international judges make use of ‘case-law of other international and national courts, not in order to establish the existence of a rule of customary international law or a general principle of law, but rather directly to resolve the legal problem before them’. 461

Cassese stresses that the ‘wild’ approach is wholly unjustified ‘because it does not take account of the facts, (1) that international tribunals belong to a totally distinct legal system from that of national courts, a legal sphere with its own rules, time-frame and institutions, and (2) that even where international criminal tribunals apply the case law of other international courts, such as the European Court, international criminal proceedings display their own specific characteristics which cannot be ignored’. 462

In resorting to international human rights law in order to fill lacunae in the tribunals’ detention regulations and to interpret such regulations’ broadly formulated norms, it is important for tribunals to recognise human rights law’s status as

458 Antonio Cassese, supra, footnote 346, at 20.
459 Id., at 21.
460 Ibid.
461 Ibid. Cassese says that, occasionally, the tribunals’ judges ‘have simply quoted national or international judgements in support of a conclusion that they had already reached by other means of legal reasoning, without indicating (or even so much as raising the question of) the value or significance of their reference to the case-law of other national or international courts’.
462 Antonio Cassese, supra, footnote 346, at 22. See, in respect of the second argument, the discussion further down this Chapter on contextual particularities.
customary law or as general principles of law.\textsuperscript{463} In line with Cassese’s ‘wise’ approach, the ICTR Appeals Chamber in\textit{Barayagwiza} held that that ‘[t]he International Covenant on Civil and Political Rights is part of international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal’s applicable law. Thus they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom’.\textsuperscript{464} Further, in\textit{Kupreškić}, the ICTY Trial Chamber held that ‘[b]eing international in nature and applying international law\textit{principaliter}, the Tribunal cannot but rely upon the well-established sources of international law (…)’,\textsuperscript{465} and that ‘any time the Statute does not regulate a specific matter, and the\textit{Report of the Secretary-General} does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible \textit{lacunae} must be filled by having recourse to that body of law’.\textsuperscript{466} Moreover, in the\textit{Brima et al.} case, the SCSL Trial Chamber stated that ‘[l]ike the Special Court, the ICTY and the ICTR are bound to apply customary international law, and their decisions do, as a matter of principle, apply customary international law. It is for this reason that this Court applies persuasively decisions

\begin{footnotesize}
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\item \textsuperscript{463} See Philippe Sands and Pierre Klein, \textit{supra}, footnote 391, p. 458-459.
\item \textsuperscript{464} ICTR, Decision, \textit{Barayagwiza v. the Prosecutor}, Case No. ICTR-97-19-A, A. Ch., 3 November 1999, par. 40. See, also, ICTR, Judgment, \textit{Kajelijeli v. The Prosecutor}, Case No. ICTR-98-44-A-A, A. Ch., 23 May 2005, par. 209, where the Appeals Chamber stated that it relied ‘upon the relevant provisions found in the sources of law for this Tribunal, \textit{i.e.} its Statute, the Rules and customary international law as reflected \textit{inter alia} in the International Covenant on Civil and Political Rights (“ICCPR”). The Appeals Chamber will also refer to the relevant provisions found in regional human rights treaties as \textit{persuasive authority and evidence of international custom}, namely, the African Charter of Human and Peoples’ Rights (“ACHPR”), the European Convention on Human Rights (“ECHR”), and the American Convention on Human Rights(“ACHR”). Footnotes omitted. Emphasis added.
\item \textsuperscript{465} ICTY, Judgement, \textit{Prosecutor v. Kupreškić}, Case No. IT-95-16-T, T. Ch., 14 January 2000, par. 540.
\item \textsuperscript{466} \textit{Id.}, par. 591.
\end{itemize}
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taken at the ICTY and ICTR. (...) The Trial Chamber observes that decisions of both Tribunals are based on recognised sources of law consistent with Article 38 of the Statute of the International Court of Justice. 467

The tribunals’ case-law on detention matters appears to reflect Cassese’s ‘wild’ approach. In such case-law, reference is frequently made to international and regional human rights law, other international tribunals’ case-law and legal frameworks, 468 national law, 469 as well as soft-law instruments, 470 without actually explaining the legal status of such law or instruments. In this way, the tribunals have applied provisions of, inter alia, the UDHR, 471SMR, 472 U.N. Body of Principles, 473

467 SCSL, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-PT, T. Ch, 1 April 2004, par. 24. See, also, ICTY, Joint Separate Opinion of Judge McDonald and Judge Vorah, Prosecutor v. Erdemović, Case No. IT-96-22-A, A. Ch., 7 October 1997, par. 40.

468 See, e.g., with regard to ECtHR references: ICTR, Decision on Hassan Ngeze’s Application for Review of the Registrar’s Decision of 12 January 2005, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 14 September 2005, par. 9; ICTY, Redacted Version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex” Filed on 27 November 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 1 December 2008, par. 22. See, also, ICC, Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07, P.-T. Ch. I, 13 March 2008, p. 11, where the Pre-Trial Chamber’s Single Judge took into account ICTY and ICTR jurisprudence. In ‘ICC, Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, Prosecutor v. Katanga and Ngudjolo Chui, Case No. ICC-RoR-217-02/08, Presidency, 10 March 2009, par. 27, 39 and 52’, the ICC Presidency took into account jurisprudence of the ECtHR and case-law, detention regulations and the practice of the ICTY, ICTR and SCSL. In par. 52, the Presidency assessed the ICC Registrar’s practice concerning the funding of family visits on the basis of the funding provided to ICTY detainees (as well as on the basis of domestic practice).


470 See, e.g., ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, Prosecutor v. Blaškić, Case No. IT-95-14-T, President, 3 April 1996, par. 15, where the President refers to Council of Europe resolution (65)11; and ICTY, Order of the President on the Defence Request to Modify the Conditions of detention of the Accused, Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1, President, 18 January 2001, where the President refers to CoE resolution (87)3.

471 See, e.g., ICTR, Registrar’s Decision Pursuant to Article 8(3(C) on the Request for Marriage and Other Reliefs, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, Registrar, 12 January 2005, par. 10.
U.N. Basic Principles, ECHR, ACHR, ACHPR, and the ICCPR to various detention matters. The result is an ad hoc approach to the determination of the applicable law in detention matters, an approach that contributes neither to the foreseeability of the law, nor to the perceived fairness of decisions. Notable exceptions are the STL President (Cassese)’s Order of 21 April 2009 where, after noting that the detainees’ right to privileged access to their lawyer is laid down in Rule 93 of the SMR, he held that such right is accepted in customary international law and ICTY President Robinson’s Decision of 21 April 2011 in the Karadžić case, where he held that ‘the Tribunal does not regard ECtHR jurisprudence as binding, but rather persuasive’.

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474 See, e.g., ICTR, Registrar’s Decision Pursuant to Article 8(3)(C) on the Request for Marriage and Other Reliefs, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, Registrar, 12 January 2005, par. 12.


477 Ibid.

478 Ibid.


3.4.3 Difficulties in applying human rights law

Although human rights law does apply to the tribunals’ legal regimes, such applicability is not without difficulties. Firstly, difficulties have arisen in identifying the norms that form part of customary law or constitute general principles of law. Second, difficulties have arisen in establishing the precise content of norms of international law (treaty norms do not always accurately reflect the underlying international law) and in determining their scope of application.\(^{481}\) It should be noted, in this regard, that identifying international norms is time-consuming and carries the risk of being based on subjective selectivity.\(^{482}\) In *Barayagwiza*, the ICTR Appeals Chamber held that the ICCPR is part of international law and argued that the case-law of regional supervisory bodies must be considered ‘authoritative as evidence of international custom’.\(^{483}\) The Mrđa Trial Chamber simply understood both the ICCPR and the ECHR to be part of international law and reasoned that, as a consequence, the provisions of the ICTY’s legal framework must be read in light these Conventions’ provisions and their supervisory bodies’ jurisprudence.\(^{484}\) It considered that, ‘[a]s regards the ICCPR, it should be taken into account that the following parts of the former Yugoslavia are now United Nations Member States: Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Slovenia and Serbia and Montenegro. Amongst 149 States, they are parties to the ICCPR. As a tribunal of the United Nations, the Tribunal is committed to the standards of the ICCPR, and the inhabitants of Member States of the United Nations enjoy the fundamental freedoms within the framework of a United Nations court. As regards the ECHR, Croatia, Bosnia and Herzegovina, Slovenia, the former Yugoslav Republic of Macedonia and Serbia and Montenegro are Member States of the Council of Europe. The Council of Europe represents, at present, 45 pan-European countries. Apart from Serbia and


Montenegro, who recently signed the ECHR, all Member States have ratified the Convention’.485

Nevertheless, the determination of the precise content of the international norms and the scope of application of these norms remain problematic in a non-domestic context. For example, the clauses in the ECHR which permit derogation from human rights to the extent that these have been defined ‘in accordance with law’ or are ‘necessary in a democratic society’ are not easily transposed to a non-domestic context.486

With respect to general principles of law, it was noted above that the tribunals may not apply national legislation directly, but may apply ‘principles of law derived by the Court from national laws of legal systems of the world’. This is stipulated explicitly in Article 21(1)(c) of the ICC Statute. The wording of Article 21 of the ICC Statute does not appear to require a review of all national legal systems. Arguably, a survey of the most prominent legal systems would suffice.487 According to Pellet, ‘the general principles of law require a triple operation: a comparison between national systems, the search for common ‘principles’, and their transposition to the international sphere’.488 In Lubanga, the ICC Pre-Trial Chamber held in connection with the issue of witness-proofing that national practice on the matter varied widely and that witness-proofing ‘would be either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, to give just a few examples, whereas in other national jurisdictions, particularly in the United States of America, the practice of witness proofing along the lines advanced by the Prosecution is well accepted, and at times even considered professional good practice’.489 As a consequence, it held that witness-proofing was not embraced by a general principle of law. A year later, the ICC Trial Chamber opined that a general principle of law that allowed for the substantive preparation of witnesses prior to their testimony could not be derived ‘from national legal systems

485 Id., par. 25-26.
486 Göran Sluiter, supra, footnote 21, p. 37.
487 M. Fedorova and G. Sluiter, supra, footnote 482, p. 9 – 56, at 27. In a similar vein, see Alain Pellet, supra, footnote 38, p. 1073.
488 Alain Pellet, supra, footnote 38, p. 1073.
worldwide, pursuant to Article 21(l)(c) of the Statute’. The Trial Chamber held that ‘[a]lthough this practice is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists’, and noted that ‘the prosecution's submissions with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system’. Besides the problem of identifying and defining such general principles, a further complication lies in the fact that general principles are, compared to rules of law, of a more abstract nature and may thus provide less guidance in a concrete case. General principles that have been recognised by the international criminal tribunals include the protection of human dignity and the principle of nullum crimen sine lege.

Another difficulty concerning the applicability of human rights law at, more specifically, the ICC, relates to Article 21(3) of the ICC Statute, which provides that the application and interpretation of all the Court’s law must be consistent with ‘internationally recognized human rights’. Neither the human rights themselves, nor their source is identified in Article 21. The only right explicitly mentioned is the right to non-discriminatory treatment. Apart from issues relating to identification and definition, questions remain as to the scope of and limitations to the application of

490 ICC, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, T. Ch. I, 30 November 2007, par. 41.
491 Ibid.
492 See, in this regard, the distinction between rules and principles as recognised by Dworkin. He states that '[t]he difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. (...) But this is not the way (...) principles (...) operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met'; Ronald Dworkin, Taking Rights Seriously, Harvard University Press, Cambridge Massachusetts 1977, 1978, p. 26-27.
494 See, e.g., ICTY, Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-Perpetration, Prosecutor v. Ojdanić, Case No. IT-05-87-PT, T. Ch., 22 March 2006, par. 15 and ICTY, Judgment, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 44.
such rights. This also goes for the rights entering the Court’s legal regime via Article
21(1) under (b) and (c) of the ICC Statute.

In respect of the scope of and limitations to the application of human rights law, it
should be noted that the conventions themselves allow for reservations to be made in
this regard\textsuperscript{495} and provide for the possibility of derogating from certain rights in
certain situations of emergency.\textsuperscript{496} Further, limitations clauses in such treaties provide

\textsuperscript{495} Reservations that are contrary to the object and purpose of a particular treaty are not
permitted under Article 19(c) of the Vienna Convention on the Law of Treaties. Further, the
HRC in its General Comment 24, has held that ‘[a]lthough treaties that are mere exchanges of
obligations between States allow them to reserve inter se application of rules of general
international law, it is otherwise in human rights treaties, which are for the benefit of persons
within their jurisdiction. Accordingly, provisions in the Covenant that represent customary
international law (and a fortiori when they have the character of peremptory norms) may not
be the subject of reservations. Accordingly, a State may not reserve the right to engage in
slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment,
to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny
freedom of thought, conscience and religion, to presume a person guilty unless he proves his
innocence, to execute pregnant women or children, to permit the advocacy of national, racial
or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to
minorities the right to enjoy their own culture, profess their own religion, or use their own
language. And while reservations to particular clauses of article 14 may be acceptable, a
general reservation to the right to a fair trial would not be’. See HRC, General Comment 24,
General comment on issues relating to reservations made upon ratification or accession to the
Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of
the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, par. 8. Emphasis
added. See, also, par. 19 of the General Comment, where the HRC stresses that reservations
must be ‘specific and transparent’, which means that they ‘may thus not be general, but must
refer to a particular provision of the Covenant and indicate in precise terms its scope in
relation thereto’. Further, ‘States should also take into consideration the overall effect of a
group of reservations, as well as the effect of each reservation on the integrity of the Covenant
(…). So that reservations do not lead to a perpetual non-attainment of international human
rights standards, reservations should not systematically reduce the obligations undertaken
only to those presently existing in less demanding standards of domestic law. Nor should
interpretative declarations or reservations seek to remove an autonomous meaning to
Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as
they are identical, with existing provisions of domestic law’. Fedorova and Sluiter argue that
‘it does not fit within the general aims and purposes of the establishment of international
criminal courts to endow them with the competence of making ‘reservations’ similar to states’
and that, therefore, ‘in the absence of an explicit deviation from a rule of general international
law in the constituent documents of an organization, it obviously cannot unilaterally derogate
from that rule’; M. Fedorova and G. Sluiter, supra, footnote 482, at 36. Their view is thus
opposed to that of Judge Shahabuddeen as expressed in Rutaganda where he considered it to
be legitimate that the tribunals derogate in their practice from general human rights law,
because these institutions are unable to make reservations; ICTR, Separate Opinion of Judge
Shahabuddeen, Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, A. Ch., 26 May 2003.

\textsuperscript{496} The possibility of suspending rights of detained persons in emergency situations is already
provided for in the tribunals’ Rules of Detention. Rule 57(A) of the ICTY Rules of Detention
provides that ‘[i]f there is serious danger of disturbances occurring within the Detention Unit
or the host prison, the Commanding Officer or the General Director, as appropriate, may

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for justified restrictions of certain rights. It is, however, unclear what this means for
the customary norms applied by the tribunals.

Aside from such general difficulties, Livingstone identifies a number of
problems relating specifically to the application of human rights norms to the
detention situation. Firstly, human rights norms are of a general character and, as
such, not adapted to the particularities of the penal context.\footnote{497} Livingstone argues that
the drafters of the conventions were not mindful of potential addressees who do not
comply with the characterisation of autonomous, equal and free citizens.\footnote{498} Apart
from this, penal institutions are guided by differing and often opposing objectives.
This problem has two sides to it: not only may a confined person’s possibilities for
realising his or her rights be negatively affected, Livingstone also stresses that the
‘[f]ull implementation of the Convention guarantees would render it almost
impossible for prison authorities to ensure security and control in anything like the
form that currently exists’.\footnote{499}

Secondly, Livingstone argues that the general treaties often lack provisions on
cultural, social and economic rights, which are of most relevance to ‘total
institutions’.\footnote{500} When provided for, the nature of such cultural, social and economic
rights is generally considered to differ from that of political rights. Whereas the latter
group of rights contains obligations, the former is usually regarded as having an
‘aspirational’ quality only. Further difficulties arise as to the universal enforceability

\footnote{See, in a similar vein, Dirk van Zyl Smit and Sonja Snacken, \textit{Principles of European

\footnote{Stephen Livingstone, \textit{supra}, footnote 340, p. 312.}

\footnote{Ibid.}

\footnote{Ibid.}
of cultural, social and economic rights. For their implementation, they depend heavily on social, cultural and economic factors. By contrast, the HRC has held in respect of Article 10 ICCPR, which is a political right, that this provision’s application ‘as a minimum, cannot be dependent on the material resources available in the State party’.\footnote{HRC, General Comment 21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), of 10 April 1992, par. 4.} In the case of \textit{Kuznetsov v. Ukraine}, the ECtHR noted the fact that the ‘Ukraine [had] encountered serious socio-economic problems in the course of its systemic transition and that (…) the prison authorities were both struggling under difficult economic conditions and occupied with the implementation of new national legislation and related regulations’. Nonetheless, it observed that a ‘lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention’.\footnote{ECtHR, \textit{Kuznetsov v. Ukraine}, judgment of 29 April 2003, Application No. 39042/97, par. 128.}

Thirdly, the limitations clauses in human rights treaties often leave a wide ‘margin of appreciation’ to national authorities. This raises the question of whether similar ‘margins’ should be left to the tribunals’ detention authorities. As noted above, it is not clear whether and, if so, how the conventions’ limitation clauses may be applied to the international context. Conversely, the infringement of certain human rights may be justified in the international penal context, particularly where those justifications are based on the general aims\footnote{This term is borrowed from Hart. See H.L.A. Hart, \textit{Punishment and Responsibility, Essays in the Philosophy of Law}, Oxford University Press, 1968.} for establishing international criminal tribunals.

As noted earlier, the applicability of the jurisprudence and decisions of human rights monitoring bodies to the tribunals is not self-evident.\footnote{In the same line, see Lorenzo Gradoni, \textit{supra}, footnote 28, at 855.} In \textit{Tadić}, for example, the ICTY Trial Chamber emphasised the unique characteristics of the ICTY as an \textit{international} tribunal, arguing for the interpretation of the provisions of its legal framework ‘within the context of the "object and purpose" and unique characteristics of the Statute’.\footnote{ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, \textit{Prosecutor v. Tadić}, Case No.IT-94-1, T. Ch., 10 August 1995, par. 26.} In relation to due process requirements, it held that ‘[a]s such, the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the
context of their legal framework, which do not contain the same considerations’, and argued that ‘the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies’. Nevertheless, the tribunals have frequently referred to the human rights bodies’ decisions in identifying and interpreting the applicable law under their Statutes. This is hardly surprising given the need of such institutions to, in the words of Gradoni, ‘keep alive the dialogue’ with other human rights monitoring bodies, in order to live up to and further develop their image as human rights role models. Another rationale for applying such decisions can be found in Furundžija. In that case, Judge Robinson held that ‘in seeking to ascertain whether there is a relevant rule of customary international law, the Tribunal, being a court, albeit an international one, would no doubt be influenced by the decisions of other courts and tribunals. Decisions of national courts are, of course, not binding on the Tribunal. However, it is accepted that such decisions may, if they are sufficiently uniform, provide evidence of international custom’. The interpretation of human rights norms by other courts and bodies has thus been considered by the tribunals to provide authoritative guidance on the content of such norms. In Mrđa the Trial Chamber

506 Id., par. 27.
507 Id., par. 28.
508 See, e.g., in respect of the ICTY, 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, par. 31.
509 Lorenzo Gradoni, supra, footnote 28, at 855.
510 See the statement by ICTR spokesperson Mr. Amoussouga, available at Hirondelle News Agency, ICTR/Prisoners – ICTR Authorises Conjugal Rights for Detainees, 4 July 2008, available at http://www.hirondellenews.com/content/view/6281/1187/ (last visited by the author on 1 June 2011). See, also, ICC, Report of the Bureau on family visits for detainees, ICC-ASP/7/30, 6 November 2008, par. 10, sub i), where it is reported that delegates to the ‘The Hague Working Group’ of the Court’s Bureau ‘suggested further arguments in favour of funding family visits, including (...) [the Court’s] innovative practices and aspirations to establish best practices’.
511 Footnotes omitted. Judge Robinson defended the tribunals’ practice of seeking guidance in domestic jurisprudence. He held that ‘[i]t is perfectly proper (...) to examine national decisions on a particular question in order to ascertain the existence of international custom. The Tribunal should not be shy to embark on this exercise, which need not involve an examination of decisions from every country. A global search, in the sense of an examination of the practice of every state, has never been a requirement in seeking to ascertain international custom, because what one is looking for is a sufficiently widespread practice of states accompanied by opinio juris’; see ICTY, Declaration of Judge Robinson, Prosecutor v. Furundžija, Case No. IT-95-17/1-A, 21 July 2000, par. 281.
512 As held by Walter Sunttinger in respect of HRC decisions, ‘[n]either the decisions of the HRC on individual complaints nor the results of the reporting procedures are legally binding.
recognised both the ICCPR and the ECHR as forming part of international law and accordingly held that the provisions of the ICTY’s legal framework must be read in light of the ICCPR and ECHR and the relevant jurisprudence.\textsuperscript{513}

Because the identification of the content of international norms is time-consuming, reliance on the monitoring bodies’ case-law and decisions is an attractive prospect.\textsuperscript{514} Cassese has recognised some additional reasons for the tribunals to apply the case-law of the ECtHR (in particular). Firstly, since the ECtHR is an international court applying international law, its judgments belong to the same category as decisions by the tribunals. Secondly, since it is axiomatic that the tribunals fulfill their missions with respect for fundamental rights, it is ‘perfectly natural that international judges should take inspiration from the experience of the European Court’. Thirdly, because the member States of the Council of Europe come from both civil and common law traditions, the Court’s case-law ‘represents an extremely interesting “sample of legal systems” from the comparative law viewpoint’ (emphasis omitted). In this light, the ECtHR’s jurisprudence may be considered ‘of great significance in elucidating the general principles of criminal justice common to the major legal systems of the world’.\textsuperscript{515} Although the final argument is relevant mainly to issues relating to criminal procedure and is thus only relevant to detention matters to the extent that such matters may affect the due process rights of accused detainees, the first two of Cassese’s arguments apply fully to the detention context.

Nevertheless, reliance on the monitoring bodies’ decisions creates new challenges, particularly where such decisions are contradictory or inconsistent.\textsuperscript{516} Further, the


\textsuperscript{514} In a similar vein, see M. Fedorova and G. Sluiter, \textit{supra}, footnote 482, p. 9 – 56, at 46. See, also, Göran Sluiter, \textit{supra}, footnote 21, p. 38 and Göran Sluiter, \textit{supra}, footnote 342, at 938.

\textsuperscript{515} Antonio Cassese, \textit{supra}, footnote 346, p. 24-25.

relevance of those decisions to the tribunals’ detention practice may not always be self-evident. Their casuistic approach may make it difficult for the tribunals to rely on them. Moreover, the decisions of the HRC in respect of Articles 7 and 10 ICCPR concerning conditions of detention have at times appeared inconsistent.\(^{517}\) Sometimes, violations of the obligations arising from the two Articles are discussed together. As a consequence, it is impossible to tell which facts and actual forms of ill-treatment entail violations of which provision.\(^{518}\) Further, given that the interpretation of treaty obligations by the HRC, the CAT and the ECtHR may diverge, regard must be had to the (difficult issue of) the hierarchical relationship between the various monitoring bodies.\(^{519}\) On a regional level, interpretation and standards may also diverge. In this regard it should be noted that, in the European context, the ECtHR and the CPT have different objectives and working methods.\(^{520}\)

Asbjørn Eide, Marinus Nijhoff Publishers, Leiden/Boston 2003, p. 665-682, at 666, 671 and 677. Möller holds that ‘[i]t has proven difficult (…) for the Committee to be consistent in determining what constitutes violations of Article 7, what constitutes violations of Article 10(1) and what constitutes violations of both Article 7 as well as Article 10(1). The case law appears to reveal a blurred borderline between the two Articles, or no borderline at all’.

\(^{517}\) As mentioned earlier, comparable detention conditions are at times discussed under the heading of Article 10 while, at other times, under Article 7. See Walter Suntinger, supra, footnote 512, p. 147-148.


\(^{519}\) No hierarchical relationship appears to exist between the legal regimes of different human rights treaties, which implies that the general principles regarding interpretation would be applicable, such as those based on the grade of specificity and on the date of establishment. In light of the degree of specificity of Article 10 ICCPR in comparison to Article 3 ECHR, Article 10 appears to have some prima facie primordial ranking. A second argument would lie in the fact that the ICCPR relates to the ECHR as a lex posteriori (without having regard to some of the ECHR’s Protocols). The specificity principle may also be adduced in support of the argument that Article 10 is placed above provisions of the U.N. CAT. On the lack of hierarchy between different international courts, see ICTY, Judgement, Prosecutor v. Kupreškić et al., Case No., T. Ch., 14 January 2000, par. 540. See, also, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1, A. Ch., 2 October 1995, par. 11, where it is stated that ‘[i]nternational law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided)’.

3.5 Applying soft-law penal standards and beyond

Soft-law may take many forms. Of particularly relevance to this research are the resolutions, declarations, guidelines, standards and principles containing norms related to the penal field, which have been formulated by organs of such international organisations as the United Nations and the Council of Europe. Those organs lack any law-making capacity, as a result of which the instruments they adopt constitute soft-law. The classic, binary approach towards law involves a distinction between legal and binding norms on the one hand and non-legal and non-binding norms on the other. This distinction has been challenged by different scholars who argue, inter alia, that treaty law and customary law fail to adequately reflect both the increased number and variety of actors on the international plane and such specialist fields of international concern such as human rights violations and environmental

where Murdoch states that ‘[a]t the heart of the matter is the interpretation of ‘torture’ and ‘inhuman or degrading treatment or punishment’. These key phrases are found in both Conventions and thus the potential for conflict in interpretation is most acute. (...) It is clear that these terms have been accorded different meanings for the related but distinct purposes of prevention (essentially proactive) and adjudication (involving condemnation of past breaches), and it is in this area that there is maximum scope for conflict between the two treaties’. See, also, Jim Murdoch, The Treatment of Prisoners - European Standards, Council of Europe Publishing, 2006 p. 47. It is recognised, though, that, in more recent times, the work of the CPT and the case-law of the ECtHR appear to be increasingly harmonious.

Chinkin mentions the following criteria for determining whether an instrument must be regarded as soft-law. It would concern instruments which (i) are ‘articulated in non-binding form according to traditional modes of law-making’; (ii) ‘contain vague and imprecise terms’; (iii) which ‘emanate from bodies lacking international law-making authority’; (iv) are ‘directed at non-state actors whose practice cannot constitute customary international law’; (v) ‘lack any corresponding theory of responsibility’; and (vi) which ‘are based solely upon voluntary adherence, or rely upon non-juridical means of enforcement’; Christine Chinkin, Normative Development in the International Legal System, in: Dinah Shelton (ed.), Commitment and Compliance, the Role of Non-Binding Norms in the International Legal System, Oxford University Press, 2000, p. 21-41, at 30.

This concerns the U.N. G.A., with the exception of certain internal matters under Articles 17, 19 and 5 of the U.N. Charter; Jan Klabbers, An Introduction to International Institutional Law, Cambridge University Press, 2002, p. 207.

This does not mean that U.N. G.A. recommendations lack any legal effect whatsoever. Sloan points, inter alia, to the ‘duty to consider a recommendation in good faith’ and the ‘duty to cooperate in good faith’ (particularly in order to achieve ‘the objectives of the organization’), duties which are inherent to U.N. membership. See Blaine Sloan, supra, footnote 407, p. 28-30. See, further, Hartmut Hillgenberg, A Fresh Look at Soft Law, 10 European Journal of International Law 3, p. 499-515, at 515.

deterioration. They, therefore, argue that it would be preferable to regard law as consisting of either an infinite variety of degrees or a continuum of ‘bindingness’. Supporters of the binary view hold on firmly to the norm laid down in Article 38 of the ICJ Statute and argue that the recognition of new categories of law may put the stability of the international legal order at risk. It is not the purpose of this research to take a specific stance on or to examine the debate on soft-law outlined above in further detail. Rather, this research will proceed on the understanding that although soft-law cannot be considered legally binding (consistent with the binary view) - because it would be impossible for legal rules to be ‘more or less binding’ - there are, arguably, a number of compelling reasons for tribunals to apply soft-law.

Firstly, as Chinkin argues, the importance of soft-law instruments is that they ‘generate expectations about the future behavior and attitudes of international actors, providing a measure of stability within the evolving system’. Secondly, the norms laid down in soft-law instruments may reflect customary law (lex lata), directly precede the forming of new customary law (in statu nascendi), or help further develop – for instance through consolidating political consensus – certain norms for

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526 Jan Klabbers, supra, footnote 524, at 167.
528 The notable exception are the SMR in respect of which it was argued earlier that they cannot be regarded as mere non-binding norms, at least not as far as the U.N. tribunals are concerned. The binding quality of other soft-law penal standards relevant to the tribunals’ detention regimes has, however, not been established.
531 Whereas custom may lack precision as it is derived from ‘diffuse practice’, resolutions may ‘define, formulate, reformulate, clarify, specify and authenticate a text and corroborate the rule contained therein. Where in fact a text does exist as in the case of the Nuremberg Principles, resolutions affirm or confirm, and thus remove doubts concerning its legal status’; see Blaine Sloan, supra, footnote 407, p. 69. Footnotes omitted..
532 As explained by Sloan, a norm may ‘have been in the process of development through the regular procedures of customary law, and a resolution of the General Assembly may give it the final impetus to crystallize it into a rule of law’; see Blaine Sloan, supra, footnote 407, p. 69.
these to later become part of customary law (de lege ferenda). In order to determine the status of norms, it is important to carefully scrutinise both state practice and opinio iuris, as required in Article 38(1)(b) ICJ Statute. It was argued in Chapter 2 that certain norms in the soft-law penal standards reflect customary international law, whilst others may be in statu nascendi, or may fall under the category of de lege ferenda. It was further argued in relation to the SMR that, in light of the implementation of these standards in many domestic jurisdictions, they might also be regarded as general principles of law.

Thirdly, Shelton points to the importance of the supportive relationship between soft and hard law. She argues that ‘[s]oft law can be used to fill in gaps in hard law instruments or supplement a hard law instrument with new norms. Conversely, a soft law instrument may be adopted as a precursor to a treaty’. Fourthly, some soft-law instruments may further be considered to provide authoritative guidance on the interpretation of treaty obligations, as, for instance, those in the U.N. Charter. The authority of such guidance is, in turn, based on the authority of the U.N. organ adopting the soft-law instrument concerned. Opinions of the General Assembly may, for example, carry substantive weight. It is, however, important to acknowledge that, as regards resolutions of the General Assembly, many participants in the vote do not intend to create binding obligations. As such, in determining the weight of such resolutions, regard must be had to the number of

533 Such norms must be considered de lege ferenda, but may nonetheless ‘become the basis for State practice, and thus be transformed into customary international law’ (footnote omitted); Blaine Sloan, supra, footnote 407, p. 70.
534 Dinah Shelton, Normative Development in the International Legal System, in: Dinah Shelton (ed.), Commitment and Compliance, the Role of Non-Binding Norms in the International Legal System, Oxford University Press, 2000, p. 21-41, at 32; Christine Chinkin, supra, footnote 530, at 856-857; Hartmut Hillgenberg, supra, footnote 523, at 501; Martin Dixon, Textbook on International Law, 6th Edition, Oxford University Press, 2007, p. 50. Sloan also mentions the theory of ‘instant custom’ as set out by Professor Bin Cheng. According to this theory, some resolutions might directly declare new law. This would apply, in particular, to entirely new fields of law such as that of outer space law; Blaine Sloan, supra, footnote 407, p. 70.
537 Jan Klabbers, supra, footnote 522, p. 208.
abstentions, the reservations made and, of course, the text of the instrument. The final determination in this regard will also depend on the question of whether or not the resolution concerned was intended to further clarify an existing obligation under the U.N. Charter.

Human rights monitoring bodies have often used soft-law standards to determine the content of treaty obligations. The penal standards that were adopted by the U.N. may, in this regard, be seen as a catalogue of obligations that are implied in Articles 7 and 10 of the ICCPR. The HRC confirmed this view, *inter alia*, in *Herbert Thomas Potter v. New Zealand*. Whereas the Government of New Zealand in that case had argued that the complainant had relied on alleged violations of the SMR, while ‘the Committee is only competent to examine alleged violations of the rights set forth in the International Covenant on Civil and Political Rights’, the HRC refuted such argument by stressing that ‘the United Nations Standard Minimum Rules for the Treatment of Prisoners (…) constitute valuable guidelines for the interpretation of the Covenant’. In *Leon R. Rouse v. The Philippines*, the Committee even held in relation to Article 7 ICCPR that ‘States parties are under an *obligation* to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 (2) of the Standard Minimum Rules for the Treatment of Prisoners’.

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538 Reservations may also be made to soft-law instruments; see Christine Chinkin, *supra*, footnote 521, at 40.


542 *Id.*, par. 6.3. See, for an opposing view, the Individual Opinion by Committee Member Nisuke Ando to HRC, *Abdool Saleem Yasseen and Noel Thomas v. Guyana*, Communication No. 676/1996, U.N. Doc. CCPR/C/62/D/676/1996, views of 30 March 1998. The Committee Member stated that ‘I recognize that the authors attempted to base their allegation of a violation of article 10, paragraph 1, of the Covenant on the U.N. Standard Minimum Rules for the Treatment of Prisoners (see paragraph 6.7). In my view the standard may well represent “desirable” rules concerning the treatment of prisoners and, as such, the Committee may ask a State party to the Covenant to do its best to comply with those rules when it considers a report of that State party. Nevertheless, I do not consider that the rules constitute binding norms of international law which the Committee must apply in deciding on the lawfulness of allegations of each individual author of communications’.


Fifthly, moral arguments can be adduced for applying soft-law penal standards.\footnote{See Office of the United Nations High Commissioner for Human Rights, \textit{supra}, footnote 93, p. 7, where it is stated that ‘[t]he value of these instruments rests on their recognition and acceptance by a large number of States and, even without binding legal effect, they may be seen as declaratory principles that are broadly accepted within the international community. What is more, some of their provisions, particularly relevant to the purpose of this Manual, are declaratory of elements of customary international law and are thus binding’. See, also, Adam C. Bouloukos and Burkhard Dammann, \textit{supra}, footnote 534, p. 760.} Such standards aim at the prevention of ill-treatment and are based on the notion of respect for human dignity. If the international criminal tribunals take their image as human rights protectors seriously, it becomes difficult for them to argue that they need not apply such standards. Rotman argues that ‘[t]he respect of the rights of prisoners flows from the paradigm shift brought about by the accountability for major international crimes: to place human life and dignity above ideological policies that justify their destruction. If international criminal justice failed to respect these values,
inherent in the rights of prisoners, it would contradict its very foundations’. 548

According to David Kennedy, UNDU’s Commanding Officer, the SMR and EPR are important to the management of the UNDU,

‘in this context probably more because it’s the UN Minimum Rules; so we must ensure that we are a guiding light in applying those rules. It would be very hypocritical for us to expect other prison systems to apply that if we didn’t ourselves. So we go beyond the minimum rules. The European Prison Rules, because of my background, apply. But, a lot of these rules are just common sense in making sure that the establishments are run ‘healthy’. But, of course, those are the boundaries within which we operate’. 549

The Council of Europe has held in respect of the EPR that these express a ‘European legal conscience’. 550 According to De Jonge, acting contrary to such ‘shared conscience’ may ethically disqualify member States’ Governments. 551 Moreover, where the tribunals demand conditions of imprisonment in the States enforcing their sentences to be consistent with the SMR and other standards, 552 it is difficult to see

549 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.
550 CoE, Resolution 62(2), Electoral, civil and social rights of prisoners, adopted by the Ministers’ Deputies on 1 February 1962, par. 2.
551 Gerard de Jonge, De betekenis van de herziene Europese Gevangenisregels voor het Nederlandse gevangeniswezen [the importance of the amended European Prison Rules for the Dutch penitentiary system], Proces 6, 2006, p. 212.
how they could not apply such norms to their own detention regimes. Although the tribunals have expressed respect for the SMR and for other U.N. soft-law standards, they have often too easily assumed that the soft-law status of such standards implies they are not all equally binding on the tribunals. In *Ruggiu*, for example, the ICTR President held in relation to the SMR, the U.N. Basic Principles and the U.N. Body of Principles that ‘[a]lthough these instruments are not binding acts, and the rules and principles therein stated are not in effect in all states, they nonetheless constitute what the States have agreed on being the minimum best practices in imprisonment’. In support of their moral persuasiveness, he stressed that ‘[t]he United Nations is a universal organization where the States have agreed: (...) to achieve international cooperation (...) in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and (...) [t]o be a center for harmonizing the actions of nations in the attainment of these common ends’ (footnote omitted), and that ‘[c]onsequently, the United Nations as an international actor, and its agencies, especially International Criminal Tribunals, ought to adhere to these agreed standard minimum rules’. Also in both the *Ndindilyimana* and *Ngeze* case, the ICTR President referred to the U.N. soft-law penal standards. Further, the ICTY Trial Chamber in the *Erdemović* Sentencing Judgement held ‘that the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the rights of convicted persons’, referring to the SMR, the Basic Principles, the Body of Principles, the EPR and the tribunal’s own Rules of Detention. The Trial Chamber further

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554 *Id.*, par. 9.

555 *Id.*, par. 10.


considered that ‘[t]he significance of these principles resides in the fact that a person who has been convicted of a criminal act is not automatically stripped of all his rights. The Basic Principles for the Treatment of Prisoners state that “except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights” (paragraph 5), and that ‘[t]he penalty imposed on persons declared guilty of serious violations of humanitarian law must not be aggravated by the conditions of its enforcement’. The findings of the Trial Chamber in relation to the treatment of convicted individuals must, a fortiori, count for remand detainees who are presumed innocent.

Other standards of significance to the detention context are those set by the U.N. Special Rapporteur on Torture and the CPT. The CPT’s objective was outlined in its First General Report, where it stated that the Committee ‘must ascertain whether (...) there are general or specific conditions or circumstances that are likely to degenerate into torture or inhuman or degrading treatment or punishment, or are at any rate conducive to such inadmissible acts or practices’. The U.N. Special Rapporteur on Torture has, in this regard, stated that it is important to ‘be aware (...) that torture is only the final link in a long chain. The seeds of torture are sown whenever a society tolerates situations where respect for the human dignity of fellow citizens is taken lightly’. Such objectives must perforce be subscribed to by any well-willing detention authority. It is recalled specifically in relation to the CPT, that the ECtHR has increasingly made use of CPT findings, both in its factual evaluations of detention situations and in determining the content of the obligations under the ECHR. A further reason for the tribunals to pay close attention to the CPT Standards is that they

558 Ibid.
reflect contemporary penal policy. In addition, the CPT reports and Standards are more detailed than most other soft-law standards, as a result of which they may be helpful in interpreting provisions in the SMR, EPR and other soft-law instruments.

The tribunals’ detention authorities should be particularly alert to situations which may result in human right violations and should strive for the best protection of confined persons as practicable. This is particularly important in view of the fact that the tribunals’ detention regimes are not democratically legitimised, lack any form of democratic political control and are not subject to any form of independent supervision by a human rights supervisory body. To this end, the use of detailed, ‘proactive’ and contemporary standards and continuing efforts to ensure the optimal protection of and respect for confined persons is recommended as a first step to filling up such ‘control vacuums’. Moreover, in view of the fact that such general human rights conventions as the ICCPR and the ECHR were not drafted with the particularities of confinement in mind, it is essential that the tribunals’ detention regimes fully respect the soft-law standards that were adopted for this exact reason.

It follows from the foregoing that there are strong reasons why the tribunals should apply the soft-law penal standards, including the more contemporary, regional ones. Such an approach cannot be expected to solve all of the difficulties involved in applying human rights law. For example, beyond the duty to apply human rights norms, the tribunals are free to adopt a more or less contextual approach towards their detention regimes. It should be recalled, in this regard, that both human rights law and

See Gerard de Jonge, supra, footnote 551, p. 208. According to De Jonge, due to increasingly progressive ECtHR case-law and CPT standards, the European Committee on Crime Problems instructed the Council for Penological Co-operation to revise the European Prison Rules consistent with such case-law and standards.

See, e.g., the term ‘adequate’ as used in Rules 12 and 13 of the SMR; ‘necessary’ as used in Rule 92 of the SMR and ‘as far as possible’ in Rule 17(1) of the EPR. See, in respect of the U.N. Body of Principles, Tullio Treves, The UN Body of Principles for the Protection of Detained or Imprisoned Persons, 84 American Journal of International Law, 1990, p. 578-586, at 586.

Stephen Livingstone, supra, footnote 340, p. 309. The notable exception is, of course, Article 10 of the ICCPR.

Dirk van Zyl Smit, Humanising Imprisonment: A European Project?, 2 European Journal on Criminal Policy and Research 12, June 2006, p 109; Stephen Livingstone, supra, footnote 340, p. 312. Livingstone, in this regard, notes that ‘[p]rison officials who are unhappy with prisoners invoking general rights to challenge practices within the prison may be more content with such standards drawn up specially for the prison environment, just as soldiers seem more comfortable with humanitarian than human rights law.’
the soft-law penal instruments set out minimum standards only. This is apparent from the derogation clauses in the various human rights conventions and has, moreover, repeatedly been acknowledged by the international criminal tribunals. In Šešelj, for example, the ICTY Trial Chamber held that ‘[t]he right to self-representation and the appointment of standby counsel do not exclude the right of the Accused to obtain legal advice from counsel of his own choosing. The human rights referred to earlier in this Decision are by their nature only minimum rights. It would be a misunderstanding of the word “or” in the phrase “to defend himself in person or through legal assistance of his own choosing” to conclude that self-representation excludes the appointment of counsel to assist the Accused or vice versa’. Besides allowing for contextual policy-making, the soft-law penal standards also allow for contextual interpretation, since their norms are often vaguely and sparsely formulated. There is, therefore, plenty of room for contextual policy choices: from strictly international to more regional or even domestic, and from progressive to more conservative.

It has been argued by some scholars that the tribunals fail to relate ‘their forms of justice to their local contexts’. Henham argues, in this regard, that ‘establishing some connection between the commission of acts alleged as international crimes and the perception of what might be considered an appropriate penal response by individuals, states or the so-called international community is hugely problematic. To begin with, the fact that the meanings of deviance and law are culturally relative

566 This has been recognised by the tribunals. See, e.g., ICTY, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, Prosecutor v. Šešelj, Case No. IT-03-67-PT, T. Ch. II, par. 29; ICTY, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, Prosecutor v. Milošević, Case No. IT-02-54, T. Ch., 4 April 2003, par. 29-30.

567 Article 5(2) ICCPR, for instance, provides that ‘[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Convention does not recognize such rights or that it recognizes them to a lesser extent’. See, also, Article 53 ECHR, which holds that ‘[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party’.

568 ICTY, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, Prosecutor v. Šešelj, Case No. IT-03-67-PT, T. Ch. II, 9 May 2003, par. 29. Emphasis added.

renders the concept of universal justice problematic’. According to Mégret, underlying this issue, ‘is the problem of determining who, of a given society or the international community, has the most valid claim in any one case’ or ‘[w]ho do international crimes belong to?’ Indeed, the tribunals may choose to submit to the particularities of the penal systems of the host States or the conflict area. Relevant, in this respect, may be the notion of less eligibility, according to which ‘the standard of living within prisons (as well as for those dependent on the welfare apparatus) must be lower than that of the lowest stratum of the working class, so that, given the alternative, people will opt to work under these conditions, and so that punishment will serve as a deterrent’. The relevance of the notion transpires from the fact that the UNDF has been sneered at as ‘the Arusha Hilton’, or ‘the place with the best cook in town’ and the UNDU as the ‘Scheveningen Hilton’. Such jeers are based on an oversimplified picture of these remand regimes, and may perhaps be simply disregarded as expressions by persons stuck in *jus talionis* reasoning. According to David Kennedy, UNDU’s Commanding Officer,

‘that’s nothing different than any other prison system. Every prison system deals with the media who say today that my prison is a holiday camp by the sea-side, and tomorrow it’s a hell-hole and that I’m not doing my job properly; and it depends where the journalist wants to come from for that story. That is the same all the time, in every prison system, whether it’s the populist approach to dealing with sex-offenders, violent individuals…so that’s nothing new’.

Foucault, in connection to the treatment of convicted persons, says in this regard that ‘[t]he criticism that was often leveled at the penitentiary system in the early nineteenth century (imprisonment is not a sufficient punishment: prisoners are less hungry, less cold, less deprived in general than many poor people or even workers) suggests a

570 Ralph Henham, *supra*, footnote 569, at 452.
postulate that was never explicitly denied: it is just that a condemned man should suffer physically more than other men. It is difficult to dissociate punishment from additional physical pain. What would a non-corporal punishment be?\textsuperscript{574}

In light of the tribunals’ obligation to respect human rights law, domestic or regional contextualisation may not lead to detention regimes being fully based on the notion of less eligibility. Further, the notion belongs to the deterrence theories\textsuperscript{575} and is, therefore, only relevant to post-conviction confinement. This, however, is not the only problematic aspect of applying this notion to the detention regimes of the tribunals. By analogy to the problems posed by the application of the notion of ‘normalisation’ of prison life, as adduced by Feest, one needs to answer such questions as ‘what conditions outside of prison may be regarded as the ‘eligible’ ones?’, ‘what conditions inside prison are inherent to imprisonment?’ and ‘does (this particular form of) deterrence work, also in the context of system-criminality?’\textsuperscript{576} These questions are particularly difficult to answer in the international context.

The U.N. tribunals’ Statutes do not pay attention to the domestic/regional contextualisation of the detention regimes. When drafting the Rules of Detention, however, the ICTY Judges ‘took care to ensure that the regime it prepared for the Detention Unit was consistent with the Dutch prison system in all relevant aspects’,\textsuperscript{577} in light of the Tribunal’s location in the Netherlands. Since these Rules of Detention and the ICTY’s other administrative regulations regarding detention matters were adopted almost verbatim by the ICTR and the ICTR’s rules, in turn, by the SCSL, the drafting of the ICTR and SCSL Rules of Detention does not appear to have been influenced by the penal regimes of such tribunals’ Host States.

As to the ICTY’s case-law, in \textit{Tolimir}, the ICTY Trial Chamber held in relation to the medical care provided to UNDU detainees (after noting that such care is provided by the Host State) that ‘[g]iven that the Netherlands, besides being a member State of the United Nations, is a member state of the Council of Europe, the Chamber considers it appropriate to examine the present situation under the UN- as well as the European


\textsuperscript{575} Yvonne Jewkes, \textit{supra}, footnote 572, at 456.

\textsuperscript{576} Johannes Feest, \textit{supra}, footnote 572, at 100-101.

system regarding the treatment of prisoners. In this respect, the Chamber is of the opinion that the European Prison Rules and the UN Standard Minimum Rules of the Treatment of Prisoners ("Standard Minimum Rules") provide useful guidance in considering the issue at hand. It further examined the relevant CPT standards, the Council of Europe’s Recommendation concerning the Ethical and Organisational Aspects of Health Care in Prison as well as the standards laid down in Penal Reform International’s document, ‘Making Standards Work’. In Karadžić, however, the President held that ‘while the Tribunal indeed “took care to ensure that the regime it prepared for the Detention Unit was consistent with the prison system of the Netherlands in all relevant respects”, the Tribunal is nonetheless not bound by, nor required to tailor its policy provisions to conform in their entirety with Dutch Law. Hence, the UNDU, though located “for security purposes” within a Dutch Prison Facility, is nonetheless “subject to the exclusive control and supervision of the United Nations”. The ICTR appears in recent years to have abandoned ‘regional contextualising’. The ICTR UNDF started to allow conjugal visits in 2008. Before that, requests for such visits were denied on the basis of the contextual argument that neighbouring countries were opposed to or were not familiar with the practice. In 2005 the Registrar held in Ngeze that ‘[i]n Tanzania and the surrounding region there is no law allowing inmates to marry and consummate such marriages while they are under incarceration’, and stated that he could not ‘ignore the practice that is observed within the region and in the host country when it comes to the question whether an inmate has a right to marry, consummate such a marriage and have conjugal rights while under incarceration’.

578 ICTY, Order Regarding the Nightly Monitoring of the Accused, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, T. Ch., II, 25 August 2010, par. 21.
579 Id., par. 21-22.
581 ICTR, Registrar’s Decision Pursuant to Article 8(3(C) on the Request for Marriage and Other Reliefs, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, Registrar, 12 January 2005, par. 12.
In 2008, the ICTR’s authorities changed their view, arguing that the ICTR was, after all, an international tribunal, which allowed for a more progressive detention regime. Although it may appear that internationalised criminal tribunals are more likely to domestically or regionally contextualise their activities, the SCSL’s detention regime is truly international in nature and, as such, appears to have been subject to the same criticisms by the local population as those of the ad hoc tribunals.

As to the ICC, Article 21(1)(c) of the ICC Statute provides that general principles of law must be derived from ‘national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime’, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards’ (emphasis added). It is highly doubtful whether this provision guarantees due respect for the domestic legal systems referred to or for contextualisation in this regard. It contains a number of qualifications and does not oblige the Court to consider the systems referred to. Further, general principles of law occupy the lowest rank in the provision’s hierarchy. More importantly, any influence by contextual norms is subject to Paragraph 3’s requirement of consistency with internationally recognised human rights. In respect of the ICC, the principle of complementarity which governs the Court’s jurisdiction may constitute an argument for adapting the ICC detention regime, to some extent, to that of the State that would normally exercise jurisdiction over the crime. Although primarily viewed as an instrument to solve jurisdiction disputes between States and the Court on the basis of the criteria listed in Article 17 of the ICC Statute, the principle has been argued to have other dimensions as well. Under the heading of ‘positive complementarity’, it has been held that ‘the ICC and domestic jurisdictions form mutually supportive forums of justice’ and are ‘meant to

583 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008. Admittedly, another rationale underlying the granting of requests for conjugal visits in 2008 was the tumult caused by the conclusion of the Agreement between the ICTR and Rwanda for the enforcement of the tribunal’s sentences. Several of the detainees went on hunger strike, whereas the Office of the Registrar, in an attempt to calm things down, started experimenting with granting additional privileges including conjugal visits.
act as partners, rather than competitors in the enforcement of justice’. Nonetheless, in light of the remarks made above on Article 21(1)(c), such ‘partnership’ does not mean that the Court is expected to deliver some form of ‘proxy justice’ for the State concerned. Moreover, unlike most other tribunals, it is practically impossible for the ICC to contextualise detention regimes. Since the Court’s jurisdiction is not limited geographically, it may need to detain persons from all parts of the world and from a wide variety of contexts.

Adopting a conservative contextual approach may undermine the tribunals’ image of human rights role models. On the other hand, liberal detention regimes may put the tribunals’ functioning at risk, in light of their need for close co-operation with domestic authorities that may regard such “lenient regimes” as undermining the tribunals’ mandate of combating impunity, general prevention and reconciliation.

It may be argued, however, that the correctness of this assertion depends on the way in which the said notions are to be understood in the context of international criminal justice, interpretations which may very well be reconcilable with progressive prison regimes. In respect of reconciliation, for example, staff members of the ICTR Office of the Registrar, when interviewed for the purposes of this research, argued that in asking Rwanda to adapt its prisons to international standards in order for it to

586 See, e.g., the Rwandan President Kagame’s remarks where he said that ‘I’m sure there are even Rwandese who are innocent who would want to live in those prisons because they will live better than they do here when they are not prisoners’; cited in W.A. Schabas, *The U.N. International Criminal Tribunals – The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006, p. 578.
587 The ICTY Trial Chamber, in *Erdemović* held that ‘[t]he International Tribunal’s objectives as seen by the Security Council – i.e. general prevention (or deterrence), reprobation, retribution (or “just deserts”), as well as collective reconciliation – fit into the Security Council’s broader aim of maintaining peace and security in the former Yugoslavia’; ICTY, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-T, T. Ch., 29 November 1996, par. 58.
588 It is noted, in this respect, that the tribunals have contextually interpreted some of the sentencing rationales. See, with regard to general deterrence, e.g., ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 29 July 2004, par. 678 and ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1078. As to retribution, see ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000 par. 185; and ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1075, where it is stated that ‘retribution should not be misunderstood as a way of expressing revenge or vengeance’.

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be able to receive ICTR convicts, the tribunal was trying to help Rwanda to overcome feelings of revenge.\textsuperscript{589}

It has been noted by Roberts and McMillan that the solution may lie in communicating a coherent penal message to the conflict area.\textsuperscript{590} The issue was well captured by the late Robin Vincent, a former Registrar of both the STL and the SCSL, who observed that an ‘important issue when dealing with detention is that of the respective perceptions of both the national and international communities. It is likely that the standards required for the operation of an internationally assisted institution's detention facility will exceed by some way the standards and conditions in national detention facilities. The local public perception may well be that those seen as responsible for the dramatic decline in the population's standards of living during a conflict are, in fact, a good deal better off in custody than those facing the daily challenges of survival outside the facility. In particular, the availability of a balanced diet, medical services and recreational pursuits may be seen as akin to luxury. That perception needs to be addressed by the institution concerned, if only to convey an understanding of the various responsibilities that detention in compliance with human rights standards entails. As with all other aspects of an institution's operations, transparency and a willingness to recognise and address issues of public concern are vital. Turning to the perception of the international community, the issues may well differ. (…) any disparity between local detention or prison conditions and the institution's facility will not necessarily be a matter of concern. Indeed there is likely to be pressure to enhance or upgrade the standards in the detention facility.'\textsuperscript{591}

Another unwelcome consequence of ‘conflict area contextualising’ is the unequal treatment of the different tribunals’ detention populations.\textsuperscript{592} Further, it must be

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\textsuperscript{589} ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
\textsuperscript{591} Robin Vincent, \textit{supra}, footnote 273, p. 66.
\textsuperscript{592} According to Hirondelle News Agency, the ICTR’s 2008 decision to allow conjugal visits was partly based on the wish to harmonize its rules with the ICTY’s legal framework; Hirondelle News Agency, ICTR/Prisoners – ICTR Authorises Conjugal Rights for Detainees, 4 July 2008, available at http://www.hirondellenews.com/content/view/6281/1187/ (last visited by the author on 1 June 2011).
\end{footnotesize}
recalled that the facilities in question are remand institutions, the populations of which must be presumed innocent. To speak of retribution in the context of such institutions, or to criticise their detention regimes as being too lenient, is therefore essentially inappropriate and may very well undermine truly reciprocal reconciliation.

In conclusion, there is more to say for adopting a liberal contextual approach than for a conservative one. In the end, however, this remains a matter of policy choice. Chapter 4 will examine the principles underlying the law of international detention that direct such policy choices.

When applying soft-law penal standards, it is important to be mindful of the fact that they have been developed with the domestic penal context in mind. With regard to the law of criminal procedure, the tribunals have been well aware of the particularities of the international context and have applied international norms in accordance with the context’s particular demands. For example, in Tadić the Trial Chamber emphasised the unique international character of the Tribunal and, subsequently, held that ‘the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies’ ⁵⁹³ In the ICTY case of Furunzija, Judge Robinson outlined both the rationales of and the limits to contextual interpretation by stating that ‘in interpreting the Statute and Rules due account must be taken of the influence of context and purpose on the ordinary meaning to be given to a particular provision. Contextual interpretation calls for account to be taken of the international character of the Tribunal, in contradistinction to national courts from whose jurisdictions many of the provisions in the Statute and Rules are drawn. However, contextual interpretation highlighting this difference should not be taken too far, at any rate, not so far as to nullify fundamental rights which an accused has under customary international law. Teleological interpretation calls for account to be taken of the fundamental purpose of the Statute, to ensure fair and expeditious trials of persons charged with violations of international humanitarian law so as to contribute to the restoration and maintenance

of peace in the former Yugoslavia’.\textsuperscript{594} The ICC Registry, in its ‘Report of the Court’ on funding for family visits, held that the Court ‘does not intend to implement mutatis mutandis or replicate the practices of other international tribunals or national judicial systems, but rather seeks the comparison in order to develop, if it is deemed appropriate, a “model” which would take into account its own realities, the realities of the detained persons under the custody of the Court, and realities which might differ or even oppose those inherent or related to national or other international practices/policies’.\textsuperscript{595}

McIntyre warns, however, against the possible backlashes of (over-)emphasising the particularities of the international context. She argues that it would be a clear contradiction in terms for the institutions that were established with a view to vindicating international humanitarian law to diverge from internationally established human rights principles.\textsuperscript{596} McIntyre further warns that such approach may lead to the development of a new hierarchy in human rights law, which may result in the universality of those norms being undermined\textsuperscript{597} and that distinguishing between States on the one hand and the tribunals on the other leads to fragmentation and thereby undermines the notion of the international community.\textsuperscript{598} Finally, she argues that such approach may negatively affect the legitimacy of the tribunals’ practices. She expresses doubt as to whether the methods used in arriving at ‘proper international standards’ justify the claim that those standards may be qualified as such.\textsuperscript{599}

It should be noted, in this respect, that no human rights monitoring body supervises the tribunals’ functioning, as a consequence of which it is unclear how such bodies would deal with international contextual particularities. Nonetheless, in relation to the

\textsuperscript{595} ICC, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008, par. 28.
\textsuperscript{597} Gabrielle McIntyre, \textit{supra}, footnote 596, at 194. McIntyre states that ‘[b]y justifying departure from universal principles recognised by the international community, it is arguable that the Tribunal establishes a hierarchy of law to which those universal norms can be subverted’.
\textsuperscript{598} \textit{Ibid}.
\textsuperscript{599} \textit{Ibid}.
punishment of international crimes, the EComHR has held that ‘[w]hereas the Applicant is imprisoned in execution of a sentence imposed on her for crimes against the most elementary rights of men; whereas this circumstance does not however deny her the guarantee of the rights and freedoms defined in the Convention for the Protection of Human Rights and Fundamental Freedoms’, 600 and took a similar stance in the case of Jentzsch v. the Federal Republic of Germany. 601 In the case of Papon v. France, the French Government emphasised the ‘extreme seriousness of the offences of which the applicant had been convicted, offences which undermined the very values of humanity’. 602 The ECtHR, however, stressed that ‘the fact that the applicant was prosecuted for and convicted of aiding and abetting crimes against humanity does not deprive him of the guarantee of his rights and freedoms under the Convention’. 603 Nonetheless, according to the working hypothesis that is central to this research, the fact that the international criminal tribunals have in their legal frameworks recognised that detained persons retain their rights (in accordance with international standards), does not guarantee these rights’ effectiveness in the international context. The importance of this hypothesis is examined below in relation to a number of specific rights of detained persons.

600 EComHR, Ilse Koch v. the Federal Republic of Germany, decision of 8 March 1962, Application No. 1270/61, in: Yearbook of the European Convention on Human Rights 5, Martinus Nijhoff, The Hague 1963, p. 134. Ilse Koch had been married to Karl Koch, the SS-Officer who was the commander of concentration camp Buchenwald. She herself had been found criminally liable for incitement to murder, attempted murder and inflicting grievous bodily harm, and had been convicted by the German Assize Court for crimes against humanity and was sentenced to life imprisonment.

601 EComHR, Jentzsch v. the Federal Republic of Germany, report of the Commission of 6 October 1970, Application No. 2604/65, par. 10. The applicant, Heinz Jentzsch, had been convicted of the murder of at least twenty civilian detainees in 1941 and 1942 in the concentration camp of Güsen, which was a subsidiary camp of the Mauthausen concentration camp.

602 ECtHR, Papon v. France, judgment of 25 July 2002, Application No. 54210/00, par. 88. Papon had held office under the Vichy regime and had been found guilty of aiding and abetting the unlawful arrest and false imprisonment of Jews who were deported in transports of 1942 and 1944. He had been sentenced by a French Assize court to ten years’ imprisonment.

603 Id., par. 98.
3.6 Conclusion

This Chapter has outlined the law governing detention at the international criminal tribunals. After looking at the relevant norms contained in these institutions’ legal frameworks, the applicability of human rights law to their detention regimes and the status of soft-law penal standards were examined. It was demonstrated that the tribunals are at least bound to apply general human rights law and the SMR. As regards general human rights law, numerous problems were identified regarding its application. For this reason, compelling arguments were adduced in favor of using other penal standards. Nevertheless, the problems of dealing with detention matters with due respect to the particularities of the international context and that of discretionary decision making, require further scrutiny. As stated above, the former issue finds expression in this research’s working hypothesis and, as such, constitutes all of the remaining chapters’ leitmotiv. In respect of the latter issue, Chapter 4 will examine whether such discretionary powers are nonetheless subject to principles which underlie and constitute the core elements of the law governing detention at the international criminal tribunals.

It was further shown that the tribunals’ remand facilities are governed by what may be referred to as the ‘rooftop principle’, meaning that the detention of each person detained under the roof of these remand institutions is, in principle, administered in accordance with the regular detention regimes set out in their Rules of Detention. Nonetheless, the tribunals have established specific procedures that must be followed if a detained person or the prosecution seeks the modification of the substantive conditions of a particular person’s detention, or where the prosecution seeks the prohibition of contact between a detained person and some other person.

It was further seen that the modification of detention conditions has been employed by the tribunals to reward detainees for positive behaviour, for investigative purposes or as a result of the venue of proceedings changing, and for safety, security or medical reasons. A problematic aspect of the ICTY’s use of modification orders to reward detainees for voluntary surrender in light of the principle of equality, lies in the demand that the person concerned must volunteer to cover all the costs incurred for such privileged form of detention. Further, where the ICTR adduces a mix of safety or security concerns and investigative interests to justify the transfer of
detained persons to the ICTY UNDU, it was noted that safety concerns appear to carry weight only in deciding upon the necessity of a person’s transfer to the ICTY UNDU. Apparently, as soon as the Prosecution’s investigative interest in keeping the person in The Hague has disappeared, safety concerns do not carry sufficient weight for not transferring the person back to the UNDF. Since this may appear to make the President a mouthpiece of the Prosecution, his other supervisory tasks which require an appearance of impartiality and independence may suffer. It was recommended, in this respect, that the investigative interests be regarded as an independent ground for modifying detention conditions.

Moreover, it was seen in Taylor, that when modifying the conditions of Taylor’s detention, the Special Court’s intramural complaints procedure were declared applicable to Taylor’s detention in The Hague. It was noted with some concern that such arrangements are lacking in the orders for the transfer of detainees from the ICTR UNDF to the ICTY UNDU. It was further noted that, in light of the vulnerability of persons who are transferred to institutions that are located far away from their social support systems and in countries that are culturally very different from their own, and in light of the possible negative effect of such a situation on these persons’ enjoyment of their (fundamental) rights, the supplementary legal safeguard provided by the SCSL should be considered a very welcome one.

Finally, as was mentioned in the introduction to this Chapter, it is important to remain mindful of the limitations to and the inadequacy of an exclusively legal approach to the detention situation. Although this research examines the legal position of persons detained by the tribunals, it should be acknowledged that other, non-legal value-systems are also of fundamental importance to detention. Detained persons may even perceive such other systems as more important to their situation. In a situation in which persons are totally dependent on detention personnel, such relationships are essential to the intramural social climate, but cannot be captured in legal definitions and rules. Significant, in this regard, is the notion of ‘fairness’, which partly overlaps with many of the principles listed in the next chapter, but which also has a broader, extra-legal meaning. According to Liebling, this value, which is essential to imprisonment, bears upon, inter alia, the prison regime, the facilities for making
complaints and the treatment afforded by staff.\footnote{Alison Liebling, Prisons and Their Moral Performance, Oxford University Press, 2004, p. 260.} The former two may well be described in legal terms and are laid down in substantive and procedural rights. However, in respect of the third issue, a purely legal approach is inadequate. Liebling describes how ‘staff treatment fairness’ encompasses such aspects as the fair distribution of privileges (which, contrary to rights, do not vest claims in detainees), the availability of staff members to talk to, the degree of separation between staff and detainees, staff members showing concern and understanding to detainees, staff members treating detainees respectfully and with kindness, the detained persons’ feelings of trust towards them, the perceived honesty and integrity of staff members and staff members rendering some form of support or assistance to detainees who need it.\footnote{\textit{Id.}, p. 264, 278, 280.} All of this demonstrates the need to nuance a lawyer’s claim that detention conditions may be improved solely by strengthening the detained persons’ legal position.