Prisoners of the international community: the legal position of persons detained at international criminal tribunals

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Chapter 4 Principles of law governing detention at the international criminal tribunals

4.1 Introduction

Whereas Chapter 3 described the law governing detention at the tribunals in an essentially positivistic manner, the current Chapter adopts a principled approach to such law. Nevertheless, the principles set out here have been recognised or are implied in the tribunals’ positive law. These principles provide guidance on how the law should be applied and on how it should develop. Detention law provides for the rights of detainees and for the corresponding duties of detaining authorities. Given, however, the open character of detention rules and regulations, the possible lacunae in the written law, the vague norms (rules which contain such terms as, for instance, ‘reasonable’ and ‘significant’) and the broad discretion of detaining authorities, all of which may result in the detainees’ legal position being undermined in certain respects, the applicability of legal principles in this area is essential.

Such a body of principles reflects a view on detention and imprisonment that focuses not, in the words of Kelk, on the ‘traditionally restrictive implications’ of confinement, but rather on the ‘legal quality of the position of persons placed in confinement’. Such an approach does not blindly follow practice in this area, but extracts from such practice legally autonomous principles that in turn form the foundation of detention law. As such, positive law and actual practice must reflect the values intrinsic to the specific field of law. The administration of justice consists of the following three components: (substantive) criminal law, the law of criminal procedure and penitentiary law. The latter encompasses both detention and imprisonment. As Kelk argues, one essential function common to all three components is that of protecting the individual’s interests against the extensive powers and purpose-oriented policies of the State. In substantive criminal law, this function is reflected in, inter alia, the principle of legality, whilst in the law of criminal procedure, this is reflected in the rights of accused persons. In the field of

1 C. Kelk, Recht voor gedetineerden [Law for detainees], Samson Uitgeverij, Alphen aan den Rijn 1978, p. 3.
2 Ibid.
3 Id., p. 9-11.
detention, however, this function is frequently overlooked. As a consequence, the legal position of detained persons tends to be underdeveloped, with the emphasis instead being placed on a smooth administration of the penal institution. This, in turn, is exacerbated by the tendency of bureaucratic organisations to dehumanise their objectives. Accordingly, although the detention context may also be characterised by a conflict of interests between the individual and the justice system, generally speaking, such conflict is more readily recognised in the context of criminal procedure, where the powers of prosecuting and investigating authorities are restricted by the rights of the accused and where an adversarial or inquisitorial process is standardised by procedural rules. By contrast, this Chapter will proceed on the assumption that the conflict referred to above is equally applicable to the field of detention, i.e. that confined individuals have a legitimate interest in being protected from the system (or State).

The notion of principles, as employed in this research, refers to the core elements of the law governing detention at the tribunals. A related question is whether such a body of law can be said to exist, i.e. whether the law governing detention at the different international criminal tribunals is too fragmented in order to be able to distill principles common to the detention law of all of those tribunals. The different tribunals all have their own body of legal norms governing detention. Although their detention rules converge in important respects, there are considerable differences too. Divergences are most clearly visible when comparing the ICC detention regulations with the detention rules of the other tribunals. But disparities also exist between the detention rules of the ICTR and the ICTY and even more so between the rules of these tribunals on the one hand and those of the SCSL on the other. Further differences have arisen as a result of amendments to the rules by the different tribunals. Nevertheless, the claim made in this Chapter is a modest one and need not

4 Id., p. 10.
5 Zygmunt Bauman, De moderne tijd en de Holocaust [Modernity and the Holocaust], Boom, Amsterdam 1998, p. 131. Of course, one must recognise the important positive effects bureaucratisation processes may have on the treatment of persons entrusted to the care of institutions. As held by Feeley and Van Swearingen, ‘[e]ven as it protects and limits against arbitrary power, bureaucracy can also enhance and mask authority’ (p. 466). They state that ‘[a]lthough bureaucracy is an effective way to improve safety, security and services for prison inmates, and for tightening supervision and accountability of correctional officers, it also enhances the capacity to control’ (p. 435); Malcolm M. Feeley and Van Swearingen, The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications, 24 Pace Law Review 2, 2004, p. 433-475.
conflict with the existence of such divergences. The sole aim here is to review the law’s *most elementary* norms, which are common to all of the said institutions. This can be done without claiming that the tribunals’ law of detention, as it stands today, qualifies as a distinct field of law, *i.e.* that it possesses a ‘sufficiently developed identity and cohesion’.6 Nevertheless, the notion of principles, as employed here, assumes the existence of a minimal degree of cohesion: the principles themselves may be considered the very embodiment of such cohesion. Fragmentation on the level of rules does not necessarily undermine such cohesion. Indeed, fragmentation may very well be appropriate or inevitable in order for the different tribunals to comply with the mandates under which they operate and to effectively deal with the particularities of their context. As held by the Study Group of the ILC in its report on the fragmentation of international law: ‘[i]n conditions of social complexity, it is pointless to insist on formal unity. A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously’.7 In this way it may be said that the abstract character of these principles and the ‘vagueness’ of their content allow for their fragmentation on the rule-level.

As to the question of whether ‘international detention law’ qualifies as a distinct field of law, it should be noted that the current law would appear to lean too heavily on ‘domestically-inspired’ norms in order to confidently qualify it as such. As long as the tribunals’ detaining authorities continue to solely apply ‘domestically-inspired’ rules, a truly ‘international detention law’ cannot be said to exist. Only when the current law adequately takes into account the contextual particularities of international detention will such a body of law be able to develop. The application and interpretation of relevant principles may be instrumental to such a development. As will be explained in the next paragraph, a fundamental characteristic of principles is their open-


endedness. In order for them to be able to continue to fulfill their task of providing a critique that is internal to the system, they can never be fully concretised. It is precisely this character trait which allows for their *continuously evolving* concretisation in accordance with the specificities of the context in which they operate. In order to explain how the notion of principles, as employed in this research, is understood, how principles may operate and how they may be understood to form part of the tribunals’ detention law, it is first necessary to define this notion. Following this, a number of concrete principles governing the law of detention at the international criminal tribunals will be examined. It should be noted that the list of principles included in this Chapter is not intended to be an exhaustive one.
4.2 Principles defined

“No social institutions as complex as those involved in the administration of criminal justice serve a single function or purpose. Social institutions are multi-valued and multi-purposed”.

Francis A. Allen

The aim of the current paragraph is to provide the definition of the term ‘principles’, as employed for the purposes of this research. It is not the purpose of the following paragraph to provide a general overview of the various theories on legal principles. Essentially, the notion of principles does not imply the existence of a separate source of the law governing detention at the tribunals, nor must it be confused with the term ‘general principles of law’ as referred to in Article 38(1)(c) of the ICJ Statute. The law, as derived from the various sources which were set out in the previous Chapter, already incorporates these norms as core values. Indeed, these principles constitute the very essence, the rational foundation and a coherent conception of that law. They are the (highly abstract) norms that form the backbone of and permeate the law and which provide the rationale, coherence and justification for more concrete rules. In other words, rules, then, concretise the underlying principles. As noted by Lazarus in respect of Germany’s Prison Act, rules must be ‘interpreted purposively in

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9 H.J. Hommes, De betekenis van de Algemene Rechtsbeginselen voor de Rechtspraktijk [The practical relevance of general principles of law], Calvinistische Juristen Vereniging 3 mei 1967, p. 6. See, also, ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682, 13 April 2006, par. 29, where the Study Group noted that ‘the general or earlier principle may be understood to articulate a rationale or a purpose to the specific (or later) rule’.
line with [the Act’s fundamental principles]. Principles may either be laid down explicitly,[14] or ‘lay hidden’ in concrete rules until recognised either in the case-law or doctrine.

In order for them to continue to function as tools of reflection and critique, principles can never be completely concretised, and are ‘open-ended’. This means that, whilst rules may be more or less completely defined by concrete circumstances, principles may only be realised to a greater or lesser extent.[15] They are never wholly ‘filled in’, neither by legislation nor by case-law.[16] This prevents them from being incorporated into dogmatism and, as a consequence, from losing their usefulness as tools of reflection and critique.[17] Peters argues that principles, in accordance with their raison d’être as ‘regulative ideas’, transcend positive law provisions and can lead to ‘no more than a partial realization’. Foqué and ‘t Hart, in this regard, emphasise the need for principles to preserve their ‘symbolic external position’.[19]

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[14] See, for instance, Article 2 of the Dutch Penitentiary Principles Act [Penitentiaire beginselenwet]. Pursuant to Article 2(2), the principle of reintegration or resocialisation governs both detention and imprisonment. Paragraph 3 stipulates the principle of expeditiousness, which governs the enforcement of sentences. Furthermore, Paragraph 4 provides for the principle of minimal restrictions. It is held there that prisoners and detainees will not be subjected to other restrictions than those necessitated by the aim of incarceration, or necessary in the interest of maintaining order or security within the institution.
[17] Peters states that, as a consequence of the great codification movement, many principles lost much of their critical function when it was assumed after their codification that they were already discounted in the positive law. The judges’ task was perceived as being limited to applying the written law. According to Peters, ‘due to the fact that the principles were severed from their initial source of inspiration, the system degenerated into an instrument that could be employed at will’ (translation D.A.). Peters recognises, however, that in more recent times, on the one hand, the written law, and, on the other, the totality of law, which includes principles, have come to relate to each other in terms of a ‘dialectic opposition’, and argues that adversarial proceedings may be able to fulfill an important role in this regard; A.A.G. Peters, supra, footnote 15, p. 4, 5, 16. This comes close to what is stated by Allan where he discusses Fuller’s work. He holds that ‘the traditional form of adversarial adjudication at common law can be seen to embody, in a particularly pure form, the rationality and respect for persons which the idea of law entails. The rational discourse characteristic of adjudication consists in the clarification and articulation of shared human purposes’; T.R.S. Allan, Procedural justice and the Duty of Respect, Oxford Journal of Legal Studies 18, Autumn 1998, p. 497-515, at 504.
As outlined by Peters, all this will depend on how one approaches the law. If one adheres to a concept of law that corresponds to the idea of a ‘totality of regulations, which epitomise a society’s normative structure’, or as an ‘instrument to regulate social order and the common good’, the ‘tendency is likely to exist that one identifies the two notions of law and State’.²⁰ However, when one adheres to another concept of law, a distinction is made between these two notions. On this understanding law is perceived as a domain of values and principles, a domain which must be differentiated from the common good or the social order. The existing order is considered to be intrinsically problematic and must legitimise itself on the basis of values and principles.²¹ It appears more appropriate to apply the latter viewpoint to the detention situation, in view of the fact that the law of detention is part of criminal law, in view of criminal law’s essentially protective function and, finally, in view of the unnatural, dependent and vulnerable position of detained persons. This is particularly so in an international context where it is less easy to use such concepts as ‘the common good’ or the ‘social order’ in a meaningful way when talking about detention.

The open-endedness of principles does not, however, mean that principles are by definition too vague to use.²² They are always being applied in and as part of a particular legal context by professional practitioners who are positioned in the sociological roles they fulfill.²³ As noted by Scholten, principles are immediately evident to practitioners “within” a certain jurisdiction.²⁴ Moreover, Scholten explains that, in order for principles to fulfill their specific function, they do not need to be

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²⁰ A.A.G. Peters, supra, footnote 15, p. 15. Translation by the author.
²¹ Ibid.
²² Peters acknowledged that principles risk being ignored. According to him, this may be prevented by institutionalizing their critical role in adversarial proceedings; id., p. 36, 37.
²³ R. Foqué and A.C. ’t Hart, supra, footnote 10, p. 393. As held by these scholars, “[t]he interpreter himself stands as theoretician with his experience and observation in the midst of reality, which he interprets observantly and experiencing. To be able to do just that, he nevertheless needs an eccentric position, but the eccentric aspect of that position is symbolic in nature’. See, further, ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682, 13 April 2006, par. 35, where it is stated that ‘[l]egal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as part of some human effort or purpose (…) systematic thinking penetrates all legal reasoning, including the law-application by judges and administrators. This results precisely from the “clustered” nature in which legal rules and principles appear. But it may also be rationalized in terms of a political obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer’.
²⁴ P. Scholten, supra, footnote 12, p. 269.
formulated as precisely and conclusively as rules do. Whereas a rule is applied when factual circumstances arise that correspond to its definition, principles are applied more indirectly and, when applied, do not lead to concrete results.25

It is evident from the foregoing that principles are inherently ambiguous in nature: on the one hand, they are internal to and constitute the very essence of the law; on the other, they function as standards for reflection and critique with respect to the law. The former quality is indispensable to the latter function, since a normative framework must be grounded in the specific practice it serves to standardise. At the same time, the open-endedness and abstractness of principles serve to maintain the distance necessary for them to function as standards for critique. Such standards are necessary in the context of bureaucratic organisations which, according to Bauman, have a tendency to dissociate from the moral and human implications of their undertakings.26 The constant use of expert terminology and the rational formulation of institutional aims render it difficult for persons forming part of such organisations to remain mindful of the human dimensions of their acts.27 Another reason lies in the characterisation of detention facilities as ‘total institutions’ and the troubling aspects of such institutions.28 Critical principles may help to counteract such negative aspects of bureaucratic organisations and total institutions and strengthen the legal position of detained persons. They may also act as a guide to authorities.

Another characteristic of principles, which is related to that of open-endedness, is non-conclusiveness. This means that their application to a specific situation does not lead to concrete results.29 From the relatively high level of abstraction on which they operate, they merely offer ‘peremptory guidance’ to practitioners in their interpretational activities and decision making. So, although principles have a distinctive ‘effect’, the term ‘application’ may be less appropriate to describe their mode of operation.30

25 Id., p. 270.
26 ‘Dehumanisation’ would be inextricably linked to the rationalising tendency of modern bureaucracy; see Zygmunt Bauman, supra, footnote 5, p. 127–134.
27 Id., p. 133.
28 On total institutions see, supra, p. 182.
29 Prof. mr. G.J. Scholten, supra, footnote 11, p. 25, 26.
Their high degree of abstraction, inconclusiveness and open-endedness enable principles to be relevant in different situations and contexts and still “apply” fully. Principles transcend possible conflicts on the rule level and bring cohesion and structure to the law. Once “applicable” to a concrete situation, principles, being the law’s core values, cannot clash and may not be compromised, balanced or weighed against one another.\(^{31}\) Rather, they demand full respect in all situations to which they are relevant and must be adhered to without exception,\(^{32}\) which is possible because of their ‘tolerant’ or ‘diplomatic’ attitude towards each other.\(^{33}\) For example, it might be detrimental to detainees’ legal position to argue that the presumption of innocence or respect for due process rights may conflict with other principles, because it might lead to the conclusion that the former carry more or less weight than the latter depending on the factual circumstances of a situation. Where a principle is “applied” in part only, the legitimacy of the decision, rule or act to which it is applied is equally diminished.

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\(^{31}\) See, for an opposing view, Prof. mr. G.J. Scholten, *supra*, footnote 11, p. 3, who speaks about the ‘constantly altering proportion *inter se* of their weights’, and Ronald Dworkin, *supra*, footnote 30, p. 26, 27, who attributes the aspect of weight to principles. He states that ‘[w]hen principles intersect (…) one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or how weighty it is’. The difference between these scholars’ views and the definition provided in this study may possibly be explained by the fact that both Eikema Hommes and Dworkin write about principles in domestic legal systems. As held by Cassese, ‘[m]ost States have written constitutions which lay down the fundamental principles regulating social intercourse’, whilst ‘[t]he position is different in the world community. When it came into existence, no State or other authority set forth any fundamental principles for regulating international dealings’. Cassese states that the international legal principles ‘differ from the general principles of national legal systems’ in that they are ‘merely theoretical constructions, reached through an inductive process based on the examination of international rules and the generalization of some of their distinguishing traits’; Antonio Cassese, *International Law in a Divided World*, Clarendon Press, Oxford 1986, p. 126. As a consequence, international legal principles might be regarded as even more abstract than domestic legal principles and “less weighty”.

\(^{32}\) This follows from the rank principles occupy in the law’s normative hierarchy. Rules are lower in hierarchy, hence they cannot override a principle. Furthermore, principles relate to each other in a tolerant way, *i.e.* they do not clash. Since principles provide for the law’s justification and rationale, making exceptions to their “applicability” would erode the decision’s or rule’s constitutional basis. See Sergey Vasiliev, *supra*, footnote 6, p. 53.

\(^{33}\) J.H. Nieuwenhuis, *supra*, footnote 10, p. 3.
As stated above, principles constitute the rationale of and justification for concrete rules. As such, when applying a rule, one also, indirectly, “applies” the underlying abstract norm(s).34

The concept of principles, as employed here, does not encompass the policy aims of preserving order, safety and security within the institution itself, which are of prime importance to any custodial setting. As stated above, the concept of law adhered to in this study is that of a domain of values and principles, which must be differentiated from the common good or the social order. It was argued that the existing order is considered to be intrinsically problematic and that it must legitimise itself on the basis of values and principles.35 Accordingly, principles have a protective quality, which is consistent with the law of detention being part of criminal law and this law’s essentially protective function. Principles’ protective quality is also important in view of the unnatural, dependent and vulnerable position of detained persons and to provide a counterweight to the negative aspects of bureaucratic organisations and total institutions. As a consequence, principles do not refer to (purpose oriented) policies. Nonetheless, principles are sufficiently abstract to allow for such policy aims being taken into account at the rule level without violating the more abstract value.

As stated above, the principles of the law governing detention at the tribunals do not constitute a separate source of law, not are they identified on the basis of the legal source from which they are derived. Rather, they are an inherent element of that law and, as such, are derived from that law’s various sources. Accordingly, principles can be deduced from any of the “sources” of law identified in the previous Chapter, i.e. soft-law standards,36 customary law, general principles of law, or the rules and regulations laid down in the tribunals’ own legal frameworks. Moreover, the principles’ normative power and authority are independent from the source of law from which they are derived. Rather, such power and authority rests on the principles’

35 A.A.G. Peters, supra, footnote 15, p. 15. Translation by the author.
36 In Chapter 3, soft-law was recognised as a source of the law governing detention at the international tribunals. Hence the term ‘source’ as used in this research does not refer to the sources of international law as promulgated in Article 38 of the ICJ Statute.
normative, hierarchical rank within the law as a system,\textsuperscript{37} as the law’s core and justifying elements.\textsuperscript{38}

Principles provide binding guidance to the authorities in their decision making and help justify their decisions. This applies both to the day-to-day organisational aspects of detention and to the review of administrative decisions.\textsuperscript{39} Such direction is indispensable both in relatively clear-cut cases, \textit{i.e.} when it appears that it is a simple matter of applying a rule, and in more complicated cases, \textit{i.e.} where there are lacunae in the law or where rules and principles appear to conflict. It should be noted, however, that it is never a simple matter of applying a rule. This is due to \textit{rules’} ‘open texture’,\textsuperscript{40} their more or less general character, their possible vagueness and the fact that principles must always underlie such rules.

A further matter that requires addressing here is the methodology to be employed in deducting principles from general law. From the requirement that normative frameworks are not altogether alien to actual practice it follows that the best mode to establish principles is through such practice:\textsuperscript{41} principles must be abstracted from the rules and decisions of practitioners, including case-law. Where principles are explicitly laid down in legal provisions, it is important to remain mindful of their open-endedness. Explicit provisions must be justified on a more abstract normative level. In this way, the content of the underlying value is

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\textsuperscript{38} See, in a similar vein, A.A.G. Peters, \textit{supra}, footnote 15, p. 14. See, also, Sergey Vasiliev, \textit{supra}, footnote 6, p. 72. As outlined by Vasiliev on p. 77-78, ‘[the law’s] various levels – from the most abstract principles to the most specific rules – are engaged in relations of super- and sub-ordination, in which the former impose the interpretive value-based framework on, and direct the legal content of the latter. At the same time, the more specific rules serve for the realisation of the commandments of the former by providing conclusive answers to the concrete legal situations. This complex net has nothing in common with and rests undisturbed by, the ‘hierarchy’ of the categories of legal sources that denotes the order of resort to codified sources, customary law and general principles of law’ (emphasis omitted). See, also, ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission – Finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682, 13 April 2006, par. 18, 19.

\textsuperscript{39} This is also the role of fundamental principles in German law; see Liora Lazarus, \textit{supra}, footnote 13, p. 78. See, also, C. Kelk, \textit{supra}, footnote 1, p. 134.


\textsuperscript{41} R. Foqué and A.C. ‘t Hart, \textit{supra}, footnote 10, p. 385, 386.
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265
safeguarded against institutional dogmatism, in order to ensure that the principles’ function as a standard for critique is preserved. Hence principles which have been laid down in specific provisions refer to ‘something bigger then themselves’. The methodology of abstraction, in other words, does not imply that the ‘general’ merely exists by virtue of the ‘specific’. Principles, as elementary norms, are not an invention of the legislature or of an administrative or judicial body (although a legislature or other body or organ may recognise the existence of a principle in a specific provision or decision). Principles are fundamental notions which ‘transcend (…) the legislature’s will’. As argued by Foqué and ‘t Hart, these abstract concepts transcend the level of situational and concrete decision making.

The methodology of abstracting principles is outlined by Dworkin as follows: ‘if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle (even better if the principle was cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it). Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found, the more weight we could claim for the principle. Yet we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle (…).’ Although the existence of a particular principle may not be backed by some form of ‘ultimate proof’ (meaning that there may always be disagreement on particular findings), it may nonetheless be traced by searching through, generalizing and abstracting from sources of the law and by analysing case-law. As held by the ICTY Kupreškić Trial Chamber, ‘[g]eneral principles of international criminal law,

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42 Id., p. 384-385.
43 P. Scholten, supra, footnote 12, p. 270.
44 C. Kelk, supra, footnote 1, p. 136. See, in a similar vein, Ronald Dworkin, supra, footnote 30, p. 40. Dworkin states that ‘[t]he origin [of legal principles] lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained’. See, further, R. Foqué and A.C. ‘t Hart, supra, footnote 10, p. 386.
45 R. Foqué and A.C. ‘t Hart, supra, footnote 10, p. 383.
46 Ronald Dworkin, supra, footnote 30, p. 40.
whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon'.

4.3 Principles of law governing detention at the international criminal tribunals

4.3.1 The notion of ‘principles’ as employed by international tribunals

As argued in the previous paragraph, principles may be explicitly recognised in written law. For instance, the ICTY Rules of Detention contain eight ‘Basic Principles’. A brief look at these provisions, however, reveals that the definition of ‘principles’ employed therein differs significantly from the one provided above for the purposes of this research. The term ‘Basic Provisions’, as employed in the ICTR, STL and SCSL Rules of Detention to describe the same rules, would appear to be more appropriate, since not all these rules represent the most elementary or abstract values of the law governing detention at the tribunals. Rule 7 of the ICTY Rules of Detention, for example, provides that the Rules of Detention and other detention regulations ‘shall be made readily available to the staff of the Detention Unit in the two working languages of the Tribunal’. Although essential for a smooth and ordered running of a detention facility, it does not qualify as an essential, basic element of the law. Such a view is supported by the fact that none of the other tribunals’ detention rules provide for this norm in their ‘Basic Provisions’ sections. Nevertheless, some of these rules may reveal an underlying principle. For example, when Rule 6, which prescribes that the UNDU must be regularly inspected by different agencies,48 and Rule 2, which outlines the detention administration’s hierarchical structure,49 are read together with other sections of the Rules of Detention setting out disciplinary and complaints procedures, a picture emerges of a detention administration bound by the rule of law. Against this backdrop, principles (as defined for the purposes of this research) may be found in, for example, Rule 5, which prescribes the presumption of innocence50 and in Rule 3, which prescribes non-discrimination and equal treatment.51

In addition, the Preamble to the Rules of Detention provides that the ‘primary

48 See, also, Rule 6 of the ICTR Rules of Detention and Rule 4 of the SCSL Rules of Detention.
49 See, also, Rules 3 of the ICTR and SCSL Rules of Detention.
50 See, also, Rule 5 of the ICTR Rules of Detention. The SCSL Rules of Detention do not stipulate the applicability of the presumption of innocence in a separate provision. However, the principle is referred to in the Rules’ Preamble.
51 See Rules 2(B) of the ICTR, STL and SCSL Rules of Detention.
principles on which these Rules of Detention rest reflect the overriding requirements of humanity, respect for human dignity and the presumption of innocence'.

According to the SCSL Registrar in the case of Norman, the (SCSL) Rules of Detention envisage ‘a balanced weighing of a detainee’s individual rights with that of the institutional duties and obligations of the Special Court (…) in certain situations where conflicting interests become apparent’ and ‘whilst the Rules of Detention ensure the continued application and protection of individual rights of persons in detention, the application of its provisions relating to communication and visits also require that the interests of the administration of justice and the purposes of the Agreement and Statute of the Special Court be considered’. Similar remarks were made in the ICTY cases of Šešelj and Milošević. The balancing exercise to which the Registrar refers, occurs at the rule level. At that level (of rules being created or

52 The Preambles to the ICTR and SCSL Rules of Detention state that the drafters were ‘[m]indful of the need to ensure respect for human rights and fundamental freedoms particularly the presumption of innocence’. The Preamble to the STL Rules of Detention speaks in this respect about the ‘imperative need to ensure respect for human rights’.


55 ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 11 December 2003; ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 11 December 2003; ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 8 January 2004; ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 8 January 2004; ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 6 January 2004; ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 6 February 2004; ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 8 April 2004; ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 9 June 2004. See, also, ICTY, Transcripts, Prosecutor v. Krajišnik, Case No. IT-00-39-A, A. Ch., 2 November 2007, Status Conference, page 122, line 23 – page 123, line 3, where Judge Meron said to Krajišnik: ‘I can assure you that the Bench is very much interested in your having the -- in the circumstances in the Detention Unit, bearing in mind the requirements of security, confidentiality and the general rules of the Detention Unit, we would like you to have the best conditions in which you could work on your appeal’. See, further, ICTY, Decision on Milan Lukić’s Appeal against the Registrar’s Decision of 18 November 2008, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Vice-President, 28 November 2008, par. 13.
all of the different interests can be taken into account. Due to their abstractness, principles leave the authorities sufficient room to take into account all legitimate interests at the rule level. Policy aims such as safety, security and order, all of which are positioned at the rule level, cannot be weighed against principles, which are positioned at a higher hierarchical level within the law. Although, policy aims may cause the authorities to adopt a certain rule or take a certain decision, no such rule or decision may conflict with a principle, since this would undermine the justification.

Principles have been employed by the tribunals in detention matters to make up for lacunae in the legal frameworks and to assist them in interpreting existing rules. In most cases in which principles have been employed, however, the source of such principles is not specified. One exception is the ICTY case of 

56 In specific rules balances may be struck between various (opposing) interests and rationales. See, for instance, in respect of Rule 66 of the Rules of Detention, 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. See, also, SCSL, Decision on Motion for Modification of the Conditions of Detention, Prosecutor v. Norman, Case No. SCSL-2003-08-PT, President, 26 November 2003, par. 5, where it was held that ‘[t]he actual administration of the conditions of detention must comply with the Rules of Detention, which are designed to provide for a regime of humane treatment for unconvicted prisoners, subject to restrictions and discipline necessary for security, good order, and for the fairness of ongoing trials’.

57 Practitioners and others have at times expressed their own ideas on how principles operate. See, for instance, the Swedish independent investigators’ report on their visit to the UNDU, where they stated, in respect to the presumption of innocence, that ‘[w]hether the principle is followed fully in an individual detention facility is not easy to determine. In certain cases local rules, particularly the rules referring to order and discipline, may conflict with the presumption of innocence principle’; ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.10. See, further, the statement made by a Senior Information Officer of the ICTY during a press briefing, that ‘the gist was that a better balance must be struck between the principles of ensuring fair trials and allowing accused to defend themselves, and not compromising the security of the detention unit’; ICTY, Weekly Press Briefing, 31 May 2006.

58 See, e.g., ICTY, Decision of the President on the Application for pardon or Commutation of Sentence of Pavle Strugar, Prosecutor v. Strugar, Case No. IT-01-42-ES, President, 16 January 2009, par. 5, 6.

59 See, e.g., ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, where the principles of natural fairness or procedural justice that were recognised in Kvočka (ICTY, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, A.Ch., 7 February 2003, par. 13) were used to interpret Rule 64bis of the ICTY Rules of Detention.
principal legal systems’.60 Another exception can be found in the case of Norman et al., where the SCSL Appeals Chamber held that ‘[t]he presumption of innocence is a principle to which this court’s statute and customary international law both require adherence’.61

Finally, the *modus operandi* of Article 21(3) of the ICC Statute perhaps comes closest to the manner in which principles were defined in this Chapter’s former paragraph.62 As explained in more detail in Chapter 3, Article 21(3) does not provide for another source of law, but prescribes that the interpretation of all law must be consistent with internationally recognised human rights.63 This might even lead to a rule’s inapplicability where such a consistent interpretation is impossible. Of course, such analogy between Article 21(3) of the ICC Statute and the definition of principles presented in this study only concerns the *modus operandi* of Article 21(3), not the nature of the two categories of norms. Finally, it is noted that although many of the principles that are recognised below may show a close link with or closely resemble certain human rights, the differences lie in principles’ open-endedness and abstractness and in the fact that they operate at a hierarchically higher level, providing imperative direction and guidance to practitioners.

4.3.2 Primary principles: respect for human dignity and the rule of law

‘Every man is supposed to be incapable of losing human dignity. Yet some seem to be losing it by doing things which are below human dignity.’

Herbert Spiegelberg64

Although principles differ from rules in their degree of abstractness, principles also vary in this respect *inter se*. Some principles are more abstract than others. Harlow

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60 ICTY, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, A.Ch., 7 February 2003, par. 13.
62 See, in a similar vein, Sergey Vasiliev, *supra* footnote 6, p. 76.
63 *Id.*, p. 80.
identifies as the two ultimate legitimizing principles of (Western) administrative law systems, the ‘twin ideals of democracy and the rule of law’. These form the ‘central background theory against which the principles of administrative law operate’. A similar set of ideals may be identified in the context of the law governing detention at the tribunals as respect for human dignity on the one hand and respect for the rule of law on the other. All of the other, secondary principles are derived from and ultimately find their justification in these two higher norms. According to this line of reasoning, the imperative to treat detained persons in accordance with the presumption of innocence, to provide them with adequate medical care and to facilitate accused persons in preparing their criminal case is ultimately grounded in respect for human dignity. By contrast, the principle of respect for the rule of law typically lies at the heart of, inter alia, the principle of natural justice or procedural fairness and respect for the rights of detainees in complaints or disciplinary procedures, although there is some overlap with the former primary principle. The ‘justifying’ quality of principles is grounded in and enhanced by their interrelatedness. As Dworkin notes, ‘[w]e are morally responsible to the degree that our various concrete interpretations achieve an overall integrity so that each supports the others in

66 Ibid.
69 See, e.g., Oscar Schachter, Human Dignity as a Normative Concept, 77 The American Journal of International Law 4, October 1983, p. 848-854, at 851, where Schachter states that the notion of human dignity has ‘a “procedural” implication in that it indicates that every individual and each significant group should be recognized as having the capacity to assert claims to protect their essential dignity’. See, also, Berta Esperanza Hernandez-Truyol, The Rule of Law and Human Rights, Florida Journal of International Law, 16, 2004, p. 167-194, at 181. See, further, the ICJ’s 1959 Declaration of Delhi, where it held that ‘the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised’. 272
a network of value that we embrace authentically’.  

Subsidiary principles, in turn, contribute to the realisation of both primary principles. For example, the (secondary) principle of respect for detainees’ rights in complaints and disciplinary procedures, procedures which, in turn, accord with the demands set by the (secondary) principle of natural justice, both of which principles are typically associated with respect for rule of law, also contribute to treating detainees in a dignifying manner, i.e. to respect for human dignity. At the same time, it may be argued that respect for human dignity entails the right to lodge a complaint or disciplinary appeal before a higher authority in accordance with procedures which comply with the principle of procedural fairness. Through respect for the rule of law, a person’s fundamental interests are both formally recognised and enforced. 

According to Raz, ‘observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future (…) Deliberate violation of the rule of law affects (…) one’s very ability to decide, act or form beliefs about the future. A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behaviour through affecting the circumstances of their action. It thus presupposes that they are rational autonomous creatures and attempts to affect their actions and habits by affecting their deliberations (…) Violations of the rule of law affect one’s fate by frustrating one’s deliberations, by making it impossible for a person to plan his future to decide on his action on the basis of a rational assessment of their outcome. The rule of law provides the foundation for the legal respect for human dignity’. 

The recognition of the twin principles of respect for human dignity and respect for the rule of law as ‘primary’ is not arbitrary. The tribunals have themselves recognised that such principles are the two basic values that justify not only their actions, but also their very existence. In Tadić, the ICTY Appeals Chamber was faced

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72 Joseph Raz, supra, footnote 67, at 204-205. On the other hand, it is recognised that a naked rule of law, one which is severed from the principle of human dignity, does not guarantee that the institution concerned will deal with persons in a substantively respectful manner. The prime example here is Nazi Germany.
with the question of whether the accused’s right to have the criminal charges against him determined by a tribunal ‘established by law’ pursuant to Article 14(1) ICCPR and 6(1) ECHR had been duly respected. According to the Appeals Chamber, although the domestic connotation of a ‘division of powers’ does not apply to the international context, ‘[t]his does not mean, however, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law".‘ Established by law’ in the international context thus requires that the institution’s establishment be in accordance with the rule of law, i.e. ‘it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments’. The Preamble to the ICTY Rules of Detention declares these twin principles in less explicit terms. According to the Preamble, ‘[t]he purpose of these Rules of Detention is to govern the administration of the detention unit for detainees (...) to ensure the continued application and protection of their individual rights while in detention’. The principle of respect for the rule of law is difficult to define, which is in line with the open-endedness of principles. As Nollkaemper argues, ‘the rule of law

73 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. 41.
74 Id., par. 42.
75 Ibid. Emphasis added.
76 Id., par. 45.
77 Regulation 89 of the ICC RoC provides that ‘the detention of persons detained by the Court under the Statute shall be governed by the provisions of this chapter’. Regulation 90(1) attributes to the Registrar the ‘overall responsibility for all aspects of management of the detention centre’ and stipulates that this responsibility must be read subject to Statute, Rules and Regulations. The SCSL, ICTR and STL all acknowledge, in the preambles to their rules of detention, the need to establish rules for the management of their detention centers.
78 See Berta Esperanza Hernandez-Truyol, supra, footnote 69, at 168. The purpose here is not to present an overview of or to partake in the discussion about the content of the rule of law, rule by law or Rechtsstaat idea. As argued below, the domestic administrative law understanding of the rule of law principle is considered relevant for the international detention context. This choice does not entail some claim about the content or meaning of the principle in other (international) contexts.
79 According to the International Commission of Jurists ‘[w]ithin the changing pattern of human relations resulting from progressive social and economic advancement, the concept of the Rule of Law undergoes such adaptation and expansion as is necessary to meet new and challenging circumstances’; ICJ, The Rule of Law and Human Rights – Principles and
was never conceived of as an accurate description of reality, but rather and perhaps primarily as an ambition’. 80 Harlow argues that under “classical administrative law systems”, ‘the rule of law normally requires that the government acts always within its powers; follows the proper procedures; and provides equality of access to courts and other machinery for adjudication’. 81 In this regard, she argues that the prime function of administrative law is the ‘control of public power’ 82 and that ‘administrative law subjects officialdom to the rule of law, prescribing behaviour within administrative organizations’. 83 According to this view, since detention law may be considered a special branch of administrative law, 84 ‘control of authoritative power’ may be considered that field of law’s prime function. This is how the principle of respect for the rule of law is understood in the context of this research. It reflects an essentially domestic understanding of the principle. Although Nollkaemper notes that ‘whereas at the domestic level the rule of law primarily (though not exclusively) involves protection against the public power of the state, there is in the international legal order no equivalent to such centralized power’, 85 such centralised power does exist in the context of detention at the international criminal tribunals. Indeed, the very aspect of ‘controlling the administration’ has been acknowledged in the tribunals’ case-law in the context of, inter alia, judicial review of administrative decisions. (Under the first limb of the so-called ‘Kvočka-four limb test’, 86 it must be
examined whether the administrative authorities have complied with the legal rules on the matter.\textsuperscript{87} In this study, a “narrow” ‘rule of law’ is employed, one which ‘requires that government officials and citizens are bound by and act consistent with the law’, whilst excluding any direct reference to substantive (human) rights or democracy.\textsuperscript{88} The choice for this “narrow” understanding of the principle is based on a number of findings in the tribunals’ case-law, including for example the finding in the ICC case of\textit{Bemba}, according to which, ‘in order to exercise his or her power to refuse, or to monitor, a visit, the Chief Custody Officer or Registrar must have reasonable grounds to believe that one or more of the grounds listed in regulations 180(1) or 184(1) exist in a particular case.\textit{That test forms a safeguard against the arbitrary exercise of power}.’\textsuperscript{89}

With respect to the principle of respect for human dignity, it is widely acknowledged that detention may have a detrimental effect on the wellbeing of detained persons.\textsuperscript{90} In 1958, writing on the United States’ penal system, Sykes argued that ‘in examining the pains of imprisonment as they exist today, it is imperative that we go beyond the fact that severe bodily suffering has long since disappeared as a significant aspect of the custodians’ regime, leaving behind a residue of apparently less acute hurts such as the loss of liberty, the deprivation of goods and services, the frustration of sexual desire, and so on. These deprivations or frustrations of the

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\textsuperscript{87} See, \textit{e.g.}, ICTY, Decision on Milan Lukić’s Appeal against the Registrar’s Decision of 18 November 2008, \textit{Prosecutor v. Lukić & Lukić}, Case No. IT-98-32/1-T, Vice-President, 28 November 2008, par. 8.

\textsuperscript{88} See, in more detail, Brian Z. Tamanaha, \textit{A Concise Guide to the Rule of Law}, Florence Workshop on the Rule of Law, in: Neil Walker & Gianluigi Palombella (eds.), Hart Publishing Company, 2007; St. John’s Legal Research Paper No. 07-0082. Available at SSRN: http://ssrn.com/abstract=1012051 (last visited by the author on 6 July 2011). According to Tamanaha, the “thin” rule of law ‘entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms’ (p. 3).


\textsuperscript{90} This has been recognised in the tribunals’ case-law. See, \textit{e.g.}, ICTY, Order Denying a Motion for provisional Release, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, T. Ch., 20 December 1996. See, also, Jim Murdoch, \textit{The treatment of prisoners – European standards}, Council of Europe Publishing, Strasbourg 2006, p. 175, who says that ‘[t]he consequences for a remand prisoner can often include loss of reputation (which can in certain instances also affect persons closely connected to the detainee); the severing of family ties; loss of work, company insolvency or the jeopardising of the detainee’s career; and the undermining of physical and mental health’.
\end{footnotesize}
modern prison may indeed be the acceptable or unavoidable implications of imprisonment, but we must recognise the fact that they can be just as painful as the physical maltreatment which they have replaced. He stressed that, although psychological pains are less noticeable than the effects of physical maltreatment, ‘the destruction of the psyche is no less fearful than bodily affliction’. Sykes recognised as pains of imprisonment the deprivation of liberty, goods and services, of heterosexual relationships and of autonomy and security. The detrimental effects of detention on the well-being of detained persons have also been acknowledged by Goffman, who refers to penitentiaries and jails as ‘total institutions’. Such institutions are defined as ‘place[s] of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life’. As such, this definition also applies to mental hospitals, convents, abbeys, army barracks, concentration camps, homes for the aged, ships and boarding schools. According to Goffman, the central feature of total institutions is the absence of the usual barrier between the different spheres of a person’s life: a person no longer ‘sleeps, works and plays’ in ‘different places’, with ‘different co-participants’, ‘under different authorities’, and ‘without an overall rational plan’. Such a total dependency on a bureaucratic organisation has far-reaching consequences. From the moment of admission onwards, the incarcerated person is slowly stripped of his ego or self, a process referred to by Goffman as ‘mortification’. The legal equivalent of mortification is reflected in the notion of the mort civil, which entails the abrogation of all the rights the confined citizen would have in free society. The principle of respect for human dignity, which is grounded on the premise that rights inhere in the person and are inalienable, is the antithesis of

92 Ibid.
93 Id., p. 65-78.
95 Id., p. 17.
96 Id., p. 24.
97 Id., p. 25.
98 See Herbert Spiegelberg, supra, footnote 64, at 56, where he states that human dignity ‘refers to the minimum dignity which belongs to every human being qua human. It does not admit of any degrees. It is equal for all humans. It cannot be gained or lost’. See, also, Oscar Schachter, supra, footnote 69, at 853.
such an attitude towards detained persons and their rights. As a legal principle, it seeks to correct the negative consequences that custody may have on a detained person.

The Preamble to the EPR stresses that prison conditions must never infringe upon human dignity.\(^99\) The EPR further stipulate as a basic principle that ‘[a]ll persons deprived of their liberty shall be treated with respect for their human rights’.\(^100\) A third basic principle prescribes that detainees retain all rights that have not lawfully been suspended by the sentencing or remanding decision.\(^101\) Van Zyl Smit argues that the EPR’s first three basic principles reflect the notion that persons are sent to prison as punishment, not for punishment, \(i.e.\) that ‘the deprivation of liberty is a sufficient punishment in itself, and that no additional pains or restrictions should be inflicted upon prisoners’.\(^102\) The CoE’s official Commentary on Rule 2 of the EPR states that the loss of liberty does not automatically legitimise the curtailment of other rights. The retention of rights also implies that infringements upon such rights must be kept to a minimum. Although the Council of Europe has acknowledged that certain rights will be compromised by the very fact of incarceration, it has held that any restriction of such rights must be necessary, kept to a minimum and proportionate to the legitimate aim pursued, thereby echoing the relevant ECtHR jurisprudence.\(^103\) Since the \textit{Golder} case, the ECtHR has held that prisoners retain their Convention rights and that restricting such rights demands justification in each case.\(^104\)

In respect of the question of how respect for human dignity relates to respect for human rights, Van Zyl Smit and Snacken note that, in the prison context, the former may be given the more narrow purpose of avoiding inhuman and degrading treatment in accordance with Article 3 ECHR, or of prescribing forms of treatment that

\(^99\) See, also, Principle 1 of the U.N. Body of Principles, which stipulates that detainees must be treated ‘in a humane manner and with respect for the inherent dignity of the human person’, and Principle 1 of the U.N. Basic Principles, which provides that ‘[a]ll prisoners shall be treated with the respect due to their inherent dignity and value as human beings’. See, further, \textit{inter alia}: the Preamble to the U.N. Charter; the Preamble to and Articles 1 and 22 of the UDHR; the Preambles to the ICESCR and ICCPR; Article 10(1) ICCPR; and Principle VII of the Helsinki Accords.

\(^100\) Rule 1 of the EPR.

\(^101\) Rule 2 of the EPR.


\(^103\) Rule 3 of the EPR.

\(^104\) ECtHR, \textit{Golder v. the United Kingdom}, judgment of 21 February 1975, Application No. 4451/70, par. 43-45.
‘guarantee (…) the human rights of prisoners’.

The later vision is adhered to in this study. It was embraced in Principle VII of the Helsinki Final Act, pursuant to which the participating States committed themselves to ‘promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development’. The same vision underlies the ICTY Trial Chamber’s approach in *Furundžija*, according to which ‘[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law’.

Like the principle of respect for the rule of law, the principle of human dignity reflects the open-endedness of principles. As argued by Schachter, ‘[d]rawing upon the conception of human dignity and the intrinsic worth of every person, we can extend and strengthen human rights by formulating new rights or construing existing rights to apply to new situations’. Schachter observes that ‘human dignity’ is undefined in the plethora of instruments that refer to or make use of the concept and explains that ‘[i]ts intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors. When it has been invoked in concrete situations, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined’.

The principle of respect for human dignity is central to the detention rules and practice of the different tribunals. This is apparent both from the Preamble to their rules of detention and from specific provisions in those Rules. The Preambles to the ICTR, STL and SCSL Rules of Detention state that the drafters intended ‘to ensure

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105 Dirk Van Zyl Smit and Sonja Snacken, *supra*, footnote 102, p. 100.
110 Oscar Schachter, *supra*, footnote 69, at 853.
the continued application and protection of [detainees] individual rights while in Detention’ and that they were ‘[m]indful of the need to ensure respect for human rights and fundamental freedoms’. Regulation 91(1) of the ICC RoC states that ‘[a]ll detained persons shall be treated with humanity and with respect for the inherent dignity of the human person’. In addition (and as stated above), the application and interpretation of ICC law must, pursuant to Article 21(3) of the ICC Statute, be consistent with internationally recognised human rights and be non-discriminatory. The Preamble to the ICTY Rules of Detention stipulates that ‘[t]he primary principles on which these Rules of Detention rest reflect the overriding requirements of humanity, respect for human dignity and the presumption of innocence’. Moreover, in granting a detainee’s request for ‘seven hours of fresh air per week, to be taken in the garden of his quarters’, the ICTY President referred to 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 of the presumption of innocence’. 111 In Brđanin et al., the ICTY Trial Chamber, seised of a request by Talić for provisional release on humanitarian grounds, referred to ‘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 of the presumption of innocence’. 112 In Ngeze, the ICTR Registrar explicitly referred to Principle 5 of the U.N. Basic Principles, which provides that ‘[e]xcept 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, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants’. 113

113 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. Emphasis added.
The element of proportionality, which may be argued to be inherent to respect for human rights, has also been recognised in the tribunals’ case-law. In *Norman*, it played a role in the assessment of the legitimacy of the punishment imposed on a detained person for sending a non-approved letter from the SCSL Detention Facility. In *Ngeze*, it placed boundaries on restrictions that were imposed on visits by Ngeze’s wife and played a role in the application of the right to equal treatment. Seised of an appeal against the Registrar’s decision not to allow Karadžić to have an interview with the media, the ICTY President ruled that ‘the Registrar’s failure to meaningfully consider alternative means of communication which would allow preservation of the interests in Rule 64bis contravenes the basic rules of procedural fairness and leads to an unreasonable and disproportionate restriction on the Applicant’s freedom of expression’. In a later decision on media contact, the Acting ICTY President held that ‘[a]ny decision of the Registrar limiting a detainee’s right must follow the general provisions of proportionality’. Furthermore, in the ICTY case of *Lukić & Lukić*, the Registrar defended his decision to grant the Prosecutor’s request pursuant to Rule 64 of the ICTY Rules of Detention to suspend the detained person’s non-privileged communications for a period of two weeks, by arguing, *inter alia*, that such measure was proportionate. In *Bemba*, the ICC Presidency held that ‘the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the

114 See, *e.g.*, STL, Order on Conditions of Detention, Case No. CH/PRES/2009/01/rev., President, 21 April 2009, par. 19, 26. Further, in par. 24, the President held that ‘[t]he power of prison authorities to order the segregation of a detainee must be justified on well-founded principles and be proportionate to the need for the isolation’ (emphasis added).
117 *Id.*, par. 16.
outcome of that decision. It involves a consideration of whether the Registrar has: [inter alia] acted in a disproportionate manner'.

In addition, the principle of ‘least intrusiveness’, which arguably is also inherent to respect for human rights, has been recognised in the tribunals’ case-law. In Stakić and Brđanin and Talić, for instance, the principle was considered to fall under the principle of proportionality. According to the ICTY trial chamber, ‘if it is sufficient to use a more lenient measure, it must be applied’. In Šešelj, the Acting President approvingly noted that the Registrar had ‘acted in an appropriate and restrained manner in suspending, pursuant to Rule 65(B) of the Rules of Detention, the Accused’s privileged communications with his legal associates’. Further, the STL President has held that restrictions of the right to communicate freely and privately with counsel may only be admissible if ‘they are proportionate to the exigency that warrants them (that is, they are commensurate to and do not exceed the fulfillment of such exigency – this may imply that the restriction be of limited duration’. In Ndindiliyimana, the detained person had submitted a request to the ICTR President for a reversal of a decision of the Registrar in which his request for a visit by two of his friends to the UNDF had been denied following objections by the


122 Rule 3 of the EPR.


Prosecutor. The Prosecutor, ‘contact between the accused and his intended visitors, could prejudice or otherwise affect the outcome of the proceedings against the detainee or any other investigations’. The President noted, however, that a complete prohibition of contact was not the only option available 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 that case, I reversed the decision prohibiting the accused from being visited, and ordered that the visit take place in the presence of an official of the UNDF, and that neither the accused nor the visitor be permitted to discuss his case. In imposing these conditions, I addressed the Prosecutor’s concerns and at the same time respected the accused’s visiting rights’. In Ngudjolo Chui, the ICC Pre-Trial Judge ruled that the imposition of a prohibition of all contact between Chui and Katanga (as requested by the Prosecution) was not justified, because less restrictive measures were sufficient to mitigate the risks raised by the Prosecution. In addition, the principle of ‘least intrusiveness’ regulates the use of force against detainees under all tribunals’ rules of detention. In Bemba, the ICC Presidency held that the Chief Custody officer must ‘put his mind to alternative measures available and feasible in the circumstances, which would be less restrictive to the detainee’.

126 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. Ndindiliyimana, Case No. ICTR-2000-56-T, President, 25 November 2002.
127 Id., par. 7.
129 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.
130 See, e.g., SCSL, Press Release – Press and Public Affairs Office, 4 February 2008, where Raymond Cardinal, the Special Court’s Chief of Detention, stated that ‘a prison officer may be called upon to use “a minimal amount of force” to prevent injury to both the staff member and the detainee, which is done in a professional manner using both verbal and physical contact’. Ray Cardinal explained that ‘[t]he force used is just enough to meet the threat and control the incident. At all times the use of minimum force must be justified and within the rules of detention and the rule of law’.
131 ICC, Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Presidency, 5 December 2008, par. 52. Furthermore, in par. 56, the Presidency held that ‘whilst the implementation of the monitoring regime is left entirely to the discretion of the Chief Custody Officer, the latter should endeavour, in so far as possible, to apply the least
4.3.3 A selection of secondary principles

The presumption of innocence

According to the Preamble to the ICTY Rules of Detention, the presumption of innocence is one of the most important principles to govern the tribunal’s law of detention.132 In addition, Rule 5 states 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’.133 Article 21(3) of the ICTY Statute refers to the right of accused persons to be ‘presumed innocent until proved guilty according to the provisions of the present Statute’.134

The presumption of innocence is provided for in numerous legal instruments.135 Of particular importance is Article 10(2)(a) ICCPR, which provides that ‘[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons’.136 In this regard, the HRC stated in its General Comment on intrusive measures necessary to safeguard the interests that the monitoring regime seeks to protect’. See, also, ICC, Decision on the Application of Mr Germain Katanga in respect of the new policy in the detention centre on the registration of telephone contacts, Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-RoR221-02/09, Presidency, 17 September 2009, par. 63.

132 See, also, the Preamble to the ICTR Rules of Detention, which provides that the drafters were ‘[m]indful of the need to ensure respect for human rights and fundamental freedoms particularly the presumption of innocence’. Emphasis added. See, also, the Preambles to the SCSL and STL Rules of Detention.

133 See, also, Rule 5 of the ICTR Rules of Detention.

134 Article 20(3) of the ICTR Statute; Article 17(3) of the SCSL Statute; Article 16(3)(a) of the STL Statute; Article 66(1) of the ICC Statute.

135 See, inter alia, Article 6(2) ECHR; Article 14(2) ICCPR; Article 8(2) ACHR; Article 21(3) ICTY Statute; Article 20(3) ICTR Statute; Article 17(3) SCSL Statute; Article 16(3)(a) STL Statute; and Article 66 ICC Statute.

136 Emphasis added. See U.N., Press Release, Special Rapporteur on Torture Concludes Visit to Togo, HR/07/63, 18 April 2007; and United Nations High Commissioner for Human Rights, Statement by Manfred Nowak, Special Rapporteur on Torture at the 18th Session of the Commission on Crime Prevention and Criminal Justice, Vienna 24 April 2009. The Special Rapporteur underscored the requirement to separate pre-trial and convicted prisoners in light of the presumption of innocence. See, also, Stefan Trechsel, Human Rights in Criminal Proceedings, Oxford University Press, 2005, p. 181. See, further, ICTY, Decision Denying a Request for Provisional Release, Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, T. Ch., 23 January 1998, par. 3, where the Trial Chamber acknowledged that ‘the justification for provisional release must be seen as emanating from or as the corollary of the principle of
Article 10(2) that ‘[t]he reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons’. Segregating convicted persons from remand detainees is not sufficient for the purposes of Article 10(2)(a). Rule 84(2) of the SMR merely states that ‘[u]nconvicted prisoners are presumed to be innocent and shall be treated as such’. Principle 8 of the U.N. Body of Principles provides that ‘[p]ersons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, wherever possible, be kept separate from imprisoned persons’. Furthermore, Principle 36 stipulates that ‘(1) A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden’. The section of the EPR entitled ‘untried prisoners’ deals with the treatment of persons ‘remanded in custody by a judicial authority prior to trial, conviction or sentence’. Rule 95(1) of that section provides that ‘[t]he regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future’. The remaining part of the section prescribes a number of specific rights of untried prisoners, including the right to wear their own clothing and the right to be informed of their right to legal advice. In addition, Rule 101 provides that a detained person, who submits an explicit request in this regard, must as far as possible be subjected to the regime that the presumption of innocence. Thus provisional release must accord with the presumption of innocence, and this principle applies until such time as the final decision has been taken. In any case in respect of questions of individual freedom, the Trial Chamber considers that an accused must be able to turn to it at any time’ (emphasis added).  

138 Rule 94(1) of the EPR.  
139 See Rule 97(1) of the EPR.  
140 See Rule 98(1) of the EPR.
applies to convicted persons. 141 Rule 95 of the EPR is based on the jurisprudence of the ECtHR. In the case of Iwanczuk v. Poland, the Court held in respect of Article 3 ECHR that ‘a person detained on remand, and whose criminal responsibility has not been established by a final judicial decision, enjoys a presumption of innocence. This assumption does not apply only to his or her procedural rights in the criminal proceedings, but also to the legal regime governing the rights of such persons in detention centres, including the manner in which a detainee should be treated by prison guards. It must be further emphasised that the authorities exercise full control over a person held in custody and their way of treating a detainee must, in view of his or her vulnerability, be subjected to strict scrutiny under the Convention’. 142 In other words, the Court does not adhere to the narrower point of view that the principle of the presumption of innocence is merely an aspect of the right to a fair trial. In its 2006 ‘Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse’, the CoE’s Committee of Ministers held that, as a general principle, ‘[r]emand prisoners shall be subject to conditions appropriate to their legal status; this entails the absence of restrictions other than those necessary for the administration of justice, the security of the institution, the safety of prisoners and staff and the protection of the rights of others and in particular the fulfillment of the requirements of the European Prison Rules and the other rules set out in Part III of the present text’. 143 The Committee of Ministers emphasised the ‘irreversible damage that remand in custody may cause to persons ultimately found to be innocent or discharged and of the detrimental impact that remand in custody may have on the maintenance of family relationships’ and resolved to ‘ensure that persons remanded in custody are held in conditions and

141 This creates difficulties in the international context where it is usually unknown, during a person’s remand detention, to what State the person will be sent to serve his sentence after possible conviction.
143 CoE, Recommendation (2006)13, on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies, par. 5. Part III stipulates a number of minimum conditions of remand in custody, including the continuation of medical treatment, the right to correspond with the outside world, voting rights and avenues to lodge complaints.
subject to a regime appropriate to their legal status, which is based on the presumption of innocence’. 144

As mentioned above, the principle of the presumption of innocence has sometimes been interpreted more narrowly. According to the SCSL Appeals Chamber, for example, ‘[t]he “presumption of innocence” is no more (but no less) than the principle that the Prosecution must prove beyond reasonable doubt the guilt of the defendant. It is a fundamental right directed to serving the overriding end that the trial itself is fair. This principle has felicitously been described as the golden thread that runs through the criminal law: in effect, its governing principle’.145 It has been noted that this narrower version has both an internal function in governing the conduct of judicial organs and an external function in controlling the depiction of accused persons in the media.146 According to the broader understanding of the presumption of innocence, the principle also governs the way persons are treated while in remand custody, i.e. before their guilt has been legally established.147

A few months prior to the Iwanczuk judgment, the ECtHR in the case of Peers v. Greece found that Article 6(2) ECHR cannot be understood to demand separate treatment for unconvicted persons.148 It follows from Iwanczuk, however, that the question of whether a detained person has been treated in accordance with his status as a remand detainee has a bearing upon the determination of possible violations of Article 3. This is also how the CoE interpreted Iwanczuk when drafting the 2006

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144 CoE, Recommendation (2006)13, on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers’ Deputies.
147 Trechsel distinguishes between the ‘outcome-related and the reputation-related aspects of the guarantee’. He places the treatment of remand detainees under the heading of the reputation-related aspects of the guarantee, which, according to him, refer ‘to situations in which the acts or a statement of a public authority imply that it believes a person to be guilty of an offence before that person has been convicted, even if the act or statement is not instrumental in the determination of the eventual judgment’. These reputation-related aspects of the guarantee, then, aim to protect the good reputation of the individual concerned and would, therefore, be more related to Article 8 than to Article 6 ECHR. See Stefan Trechsel, supra, footnote 136, p. 163-164, 178.
version of the EPR. Such an interpretation corresponds to the ruling of the Israeli High Court of Justice in *Yassin v. Commander of Kziot Military Detention Camp*, which concerned a joint complaint lodged by detainees being held in Kziot detention camp regarding the conditions of their detention. In outlining the normative framework of the case, the Court addressed the possible claim that ‘since the detainees being held in Kziot Camp are terrorists who have harmed innocent people, we should not consider their detention conditions’, an argument which may well reflect the sentiments often felt towards persons detained in connection with international criminal proceedings. The Court, however, held that ‘[t]his argument is fundamentally incorrect. Those being detained in the Kziot Camp have not been tried; needless to say, they have not been convicted. They still enjoy the presumption of innocence.’ It subsequently held that ‘[n]ot only should we not allow the detention conditions of administrative detainees to fall short of those of convicted prisoners, we should also strive to ensure that the conditions of detainees surpass those provided to prisoners’. However, neither the ECtHR nor the Israeli High Court explained how remand detainees should be treated differently to convicted persons. In this regard, the Co-Investigating Judges of the ECCC have held that the presumption of innocence requires detainees to be treated in accordance with international standards and any punitive element to be absent. This remark, however, also begs the question of how the treatment of detainees in accordance with international standards would differ from the treatment of convicted persons. The ICCPR, SMR and U.N. Body of Principles only require that remand detainees be separated from prisoners. The clearest guidance on the issue can thus be found in the EPR, which, as stated above, contain a specific section on how remand detainees must be treated. Paragraph 1 of Rule 95 stipulates as a general principle that ‘[t]he regime for untried prisoners may not be influenced by the possibility that they may be convicted of a criminal offence in the future’, whereas Paragraph 3 states that detainees should be permitted to participate in the activities provided to prisoners. Rule 96 provides that detainees

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150 *Id.*, par. 7.
151 *Ibid*.
152 *Ibid*.
should in general and as far as possible be ‘given the option of accommodation in single cells’. Rule 97 states that detainees ‘shall be allowed to wear their own clothing if it is suitable for wearing in prison’. Paragraph 2 adds that clothing distinct from that provided to sentenced persons shall be provided to untried persons who have no clothing of their own. Rule 98(1) states that detainees must be informed of the right to legal advice. Paragraph 2 states that detainees must be provided with all facilities necessary for them to prepare their case and must be permitted to meet with defence counsel. Furthermore, Rule 99 states that, in the absence of a ‘specific prohibition for a specified period by a judicial authority in an individual case, untried prisoners a. shall receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners; b. may receive additional visits and have additional access to other forms of communication; and c. shall have access to books, newspapers and other news media’. Further, Rule 100 provides that, although remand detainees may not be compelled to work, they must be offered the opportunity to do so. Finally, Rule 101 states that if a detainee requests to participate in the regime for prisoners, such a request must, as far as possible, be granted. Essentially, these provisions of the EPR appear to be based on the idea that ‘[b]ecause of the legislative presumption of innocence, pre-trial detainees may be subjected only to those restrictions that serve the purposes of the detention or the maintenance of security and order’.154 This understanding of the presumption of innocence was formulated as such by Gratz, Hels and Pilgram while writing on the Austrian prison system. According to them, the manifestation of the principle in the Austrian penal system is apparent from the fact that ‘[i]nteraction with the outside world is in principle controlled by the investigating judge [and that] [p]re-trial detainees are not obliged to work and the legislation puts them in a better position in some respects than ordinary prisoners’.155 Similarly, Trechsel notes that ‘[d]epriving a person presumed innocent of his or her liberty does not allow for any restriction that goes beyond what is strictly necessary to

achieve the aim pursued, which is mainly the prevention of flight, recidivism, and interference with the evidence’. 156

The principle of the presumption of innocence is sufficiently abstract as to allow for the imposition of measures aimed at maintaining order in detention facilities and safeguarding the administration of justice. On this understanding, Rule 48 of the ICTR Rules of Detention, which empowers the Prosecutor to request either the Registrar or, in case of emergency, the Chief of Detention, to prohibit, regulate or set conditions for contact between a detainee and a third party, does not violate the presumption of innocence. In Norman, the SCSL Acting President held that ‘[t]he presumption of innocence is unaffected by the imposition of restrictions under Rule 48 which are simply regulatory and precautionary’. 157 The same also transpires from the rules on provisional release. Indeed, that facility finds its ultimate basis in the presumption of innocence. On this basis it has been held that an accused must be able to submit a request to provisional release to a Trial Chamber or an Appeals Chamber at any time. 158 Nonetheless, other considerations may be taken into account on the rule level that may lead to the request being refused, but this does not necessarily mean that the principle does not govern such situations. 159 The SCSL Appeals Chamber’s remark in Norman et al. that the presumption of innocence has no relevance at all to the preconditions of bail is, therefore, incorrect. 160 Other tribunals’

156 Stefan Trechsel, supra, footnote 136, p. 181.
157 SCSL, Decision on Motion to Reverse the Order of the Registrar under Rule 48(C) of the Rules of detention, Prosecutor v. Norman, Case No. SCSL-04-14-PT, Acting President, 18 May 2004, par. 12.
159 Were the existence and application of certain rules to undermine the principle to such an extent that a certain principle can no longer be said to govern the situation, this may rather be viewed as evidence of the principle being violated.
160 SCSL, Appeal against Decision Refusing Bail, Prosecutor v. Norman, Fofana and Kondewa, Case No. SCSL-04-14-AR65, A. Ch., 11 March 2005, par. 37. The Appeals Chamber referred to the U.S. Supreme Court case of Bell v Wolffish ((1979) 441 U.S. 520, 533) where it was held that ‘the presumption of innocence is a doctrine that allocates the burden of proof in criminal trials (…) but it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun’. This reference is particularly flawed in light of the wording of the Preamble to the Special Court’s own Rules of Detention.
decisions on provisional release make explicit reference to the presumption of innocence.161

Rather, detention personnel must, in all their dealings with detainees, be guided by the presumption of innocence,162 which ‘create[s] a presumption in favour of granting [detainees’] rights’,163 thereby providing an argument for adopting a liberal or progressive approach to detention conditions.

Much evidence can be adduced in support of the claim that the presumption of innocence governs the administration of detention at the international tribunals.164 In Kambanda, for instance, the ICTR Prosecutor had requested the ICTY Registrar to provide it with information on Kambanda’s temporary stay at the ICTY Detention Unit. The ICTY Registrar, however, replied that due to, inter alia, the presumption of

161 See, e.g., ICTY, Decision Granting Provisional release to Enver Hadžihasanović, Prosecutor v. Hadžihasanović, Alagić and Kubura, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 2; ICTY, Decision Granting Provisional Release to Mehmed Alagić, Prosecutor v. Hadžihasanović, Alagić and Kubura, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 2; ICTY, Decision Granting Provisional Release to Amir Kubura, Prosecutor v. Hadžihasanović, Alagić and Kubura, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, par. 2. See, also, ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, Prosecutor v. Brđanin and Talić, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, where the Trial Chamber stressed that ‘the rationale behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence. This fundamental principle is enshrined in Article 21, paragraph 3 of the Statute and applies at all stages of the proceeding, including the trial phase’. The Trial Chamber explained that it had ‘carefully balanced two main factors, namely the public interest, including the interest of victims and witnesses who have agreed to co-operate with the Prosecution, 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 of the presumption of innocence’.


163 In a similar vein, see in respect of the principles guiding the German prison administration, Liora Lazarus, supra, footnote 13, p. 85.

innocence, he was not able to honour the request.\footnote{ICTR, Prosecution Motion under Rules 54 and 117 for an Order for Information from the Registrar of the ICTY Concerning the Detention of Kambanda, \textit{Prosecutor v. Kambanda}, ICTR-97-23-A, A. Ch., 23 June 2000, par. 6. The ICTY Registrar explained that ‘the Rules and Regulations permit the Registrar to intercept and censure telephone calls as well as regulate visits, but the purpose of this is to ensure the administration of detention – hereunder ensure safety and security – and not any investigative purposes’.} He further held that ‘although their presence in the UN Detention Unit is on the basis that evidence exists in support of the crimes of which they are accused, it is a fundamental tenet of justice that detainees – other than those who have been convicted on appeal – are to be presumed innocent and to be treated as such at all times’.\footnote{ICTR, Internal Memorandum from the Registrar of ICTY to Solomon Loh of 19 June 2000 entitled “Jean Kambanda v. The Prosecutor (Case No: ICTR-97-23-A), 23 June 2000 (Memorandum dated 19 June 2000). See, also, Hirondelle News Agency, ICTR/Prisoners – ICTR Authorises Conjugal Rights for Detainees, 4 July 2008, available at http://www.hirondellenews.com/content/view/11276/517/ (last visited by the author on 4 July 2011).} In \textit{Blaškić}, ICTY President Cassese stated that a balance must be struck between ‘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’ and ‘the imperatives of security and order’.\footnote{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; ICTY, Press Release, CC/PIO/146-E, The Hague, 13 January 1997; ICTY, Decision on the Conditions of detention of General Blaškić, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, President, 26 May 1997.} The ICTY Manual on Developed Practices confirms that ‘[t]he UNDU operations are governed by the presumption of innocence’.\footnote{ICTY, \textit{ICTY Manual on Developed Practices}, UNICRI, Turin 2009, p. 178, par. 6.} In their report of 2006, Swedish independent investigators of the UNDU noted that ‘[t]he presumption of innocence is fundamental to all DU operations and is regarded as characteristic of a legal system based on democratic values. This also entails that detainees and convicted detainees must not be mixed’.\footnote{ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.10.} The investigators also wrote that ‘the [Commanding Officer] and his closest staff strongly emphasised that the presumption of innocence principle is exactly what directs the operations. The review of the regulations confirmed the CO’s statement. Nor did talks with the staff give any reason for believing otherwise. As far as we could see the detainees are treated with respect
and addressed politely and they did not themselves state anything other than that the
staff’s behaviour was correct’.\textsuperscript{170}

Furthermore, in the SCSL case of Norman, a Judge held that ‘[a]s Designated Judge, I
also deem it my judicial obligation to emphasise that an application (…) with far-
reaching implications for a constitutionally guaranteed and internationally recognised
right, (…) cannot be granted as a matter of course and without sound legal
justification especially in a context where the presumption of innocence is a
competing, if not compelling, juridical imperative’.\textsuperscript{171}

Moreover, during interviews conducted with the UNDF’s detention authorities for the
purposes of this research, the latter stated that

‘When a person is admitted into detention at UNDF, we don’t look into his file. We
don’t want to know what he allegedly did, what happened. Of course, we know about
the genocide. But if you are going to read the individual files, you may no longer
want to deal with or talk to that person. For us, there are the rules and regulations
which we have to implement. All the detainees are equal. The presumption of
innocence makes us consider these persons as equal and as innocent. Also, we don’t
treat them with regard to their former functions or status. Whether someone used to
be a Major, General, Minister or \textit{Bourgmestre} - all to us are equal. There is no
discrimination’.\textsuperscript{172}

In a similar vein, David Kennedy, Commanding Officer of the UNDU, stated that

‘It’s a remand establishment I’m in, so there is total presumption of innocence. That
position also applies to detainees who have finished their appeal process. They are
still treated exactly the same as everybody else in there; we just run the one regime
for everybody (…) You’ve got to be able to leave your personal feelings at the front
gate. That’s the huge advantage of the custodial setting. We aren’t the judges. We
don’t treat people differently; we shouldn’t treat people differently but treat

\textsuperscript{170} Ibid.
\textsuperscript{171} SCSL, Decision on Inter Partes Motion by Prosecution to Freeze the Account of the
Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra
Leone, \textit{Prosecutor v. Norman, Fofana and Kondewa}, Case No. SCSL-04-14-PT, Designated
\textsuperscript{172} ICTR, interview conducted by the author with the UNDF authorities, Arusha - Tanzania,
May 2008.
everybody the same and make sure that we’re fair with everybody, that everybody gets the same benefits or disadvantages that being in a custodial setting puts on them. So you have to be straight down the middle. You don’t make a judgment in prison, you can’t. If I was to have any leanings towards, for instance, a violent situation, if I was to have any leanings towards one group or other, that would be very quickly discovered by the prisoners and you can’t then operate as a manager. So it’s got to be a level playing field for every detainee. It has to be. Otherwise it doesn’t work. 173

It should however be noted that overly emphasising the presumption of innocence carries the risk that punitive sentiments surface in respect of the treatment afforded to convicted and sentenced persons. The ICTR case of Ngeze may be an example of this. In 2005, Ngeze submitted a request to the ICTR Registrar to ‘marry at the UNDF, to consummate the marriage immediately after the wedding ceremony and to allow conjugal visits after the wedding’. 174 The Registrar noted, however, that ‘[t]he Applicant (…) was convicted on various counts he has been charged with before the Tribunal and sentenced by the Tribunal to imprisonment for the remainder of his life. He has appealed against that decision. But until the Appeal is decided, I have to take cognizance of the present state of affairs relating to the Applicant’. 175 The President, in reviewing the Registrar’s decision, opined that the Registrar had neither erred by taking into account Ngeze’s conviction and sentence, nor ‘by not according particular significance to the fact that Hassan Ngeze is currently at the UNDF pending appeal’. 176 It is difficult to understand the remarks of the Registrar and the President. Since the punitive aspect of imprisonment may, as a matter of principle, solely lie in restricting one’s physical liberty, it is unclear how Ngeze’s conviction or sentence could affect the decisions on his requests to marriage and conjugal visits. Finally, as Nemitz observes, it is unclear whether at the tribunals the presumption of innocence also governs the conditions of a person’s detention pending appeal.

174 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. 1.
175 Id., par. 11.
According to Nemitz, ‘while in common law jurisdictions the presumption of innocence is no longer afforded to a convicted person, although this person has appealed the verdict, civil law jurisdictions still presume that he is innocent until proven guilty’.\textsuperscript{177}

\textbf{Equal treatment\textsuperscript{178} and non-discrimination}

The primary purpose here is not to examine in depth the highly complex concepts of equal treatment and the prohibition of discrimination. The purpose of this sub-paragraph is, however, to establish whether these notions may be said to govern detention law and practice of the different tribunals as principles. Proof thereof is abundant. Rule 3 of the ICTY Rules of Detention, for instance, provides that the Rules of Detention ‘shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth, economic or other status’. Rule 3 echoes Rule 6(1) of the SMR, adding only the words ‘ethnic’ and ‘economic’. The same provision can be found in Principle 5 of the U.N. Body of Principles and Principle 2 of the U.N. Basic Principles. Moreover, the SPT in its Report on its visit to Honduras, called for ‘respect for the principle of equal treatment, whereby the prison regime must be the same for all prisoners, without differences in treatment or discrimination against individuals for financial or other reasons’.\textsuperscript{179} Article 21(1) of the ICTY Statute, which spells out the rights of accused persons, provides that ‘[a]ll persons shall be equal before the International Tribunal’.\textsuperscript{180} Furthermore, Article 21(3) of the ICC Statute


\textsuperscript{178} On another level, equal treatment appears to be at odds with the very nature of detention. As held by Crewe, ‘[b]oth as an institution within society, and one with its own social world, the prison illustrates many of the discipline’s primary concerns: power, inequality, order, conflict and socialization’. See Ben Crewe, \textit{The sociology of imprisonment}, in: Yvonne Jewkes (ed.), Handbook on Prisons, Willan Publishing, 2007, p. 123.

\textsuperscript{179} SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, U.N. Doc. CAT/OP/HND/1, 10 February 2010, par. 212(e).

\textsuperscript{180} See, in a similar vein, Article 20(1) of the ICTR Statute; Rule 2(B) of the ICTR Rules of Detention; Article 17(1) of the SCSL Statute and Article 16(1) of the STL Statute (these
prescribes that ‘[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’. Moreover, Regulation 91(2) of the ICC RoC stipulates that ‘[t]here shall be no discrimination of detained persons 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. Measures 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’. 181

The prohibition of discrimination and the right to equal treatment are at the very core of international human rights law and have been laid down in numerous international and regional instruments. 182 Indeed, most fundamental rights may be said to presuppose that persons may not be discriminated against and must be treated equally. 183

The right to equal treatment may also entail positive obligations. Since not all detained persons have the same national, economic, cultural or linguistic background, and may thus not equally be able to enforce their rights, detaining authorities are arguably under a duty to actively ensure that such persons are able to do so. 184 The EPR appear to support such a view by, on the one hand, incorporating a separate provisions stipulate that all accused shall be equal before the Special Court); Rule 2(B) of the SCSL Rules of Detention; Rule 2(B) of the STL Rules of Detention.

181 Article 21 of the ICC Statute, which outlines the Court’s applicable law, provides in Paragraph 3 that ‘[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’.

182 See, inter alia, the Preamble to and Articles 1 and 2 of the UDHR; Articles 2(1) and 26 ICCPR; Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Convention on the Elimination of All Forms of Discrimination against Women; Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

183 C. Kelk, supra, footnote 84, p. 119.

provision on impartial treatment and non-discrimination while, on the other, emphasising that specific categories of prisoners and detainees have special needs, including women, children and infants, foreign nationals and ethnic or linguistic minorities. According to the CoE’s official Commentary to Rule 13 of the EPR, outlawing discrimination ‘does not mean that formal equality should triumph where the result would be substantive inequality. Protection for vulnerable groups is not discrimination, nor is treatment that is tailored to the special needs of individual prisoners unacceptable’. Linguistic, religious and cultural differences as well as differences in age and health and the corresponding special needs that they entail must be recognised. For example, detention rules and regulations as well as other information regarding the position of detained persons must, as far as possible, be made available to detainees in a language they understand.

The ECtHR has held in relation to Article 14 that equal treatment means that like cases must be treated alike, unless there is an objective and reasonable justification for differential treatment respecting the principle of proportionality between the aim sought and the means employed. Treating detained suspects differently from accused persons, therefore, does not necessarily imply a violation of the principle of equal treatment. This was the ICTR President’s line of reasoning in Ngeze in denying Ngeze’s request to get married and to consummate his marriage inside the

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185 Rule 13 of the EPR.
186 Rule 34 of the EPR.
187 Rules 35-36 of the EPR.
188 Rule 37 of the EPR.
189 Rule 38 of the EPR.
190 This point of view corresponds to the Aristotelian concept of distributive justice, according to which equal distribution must be done in accordance with the principle of proportionality according to the different circumstances persons find themselves in. See C. Kelk, supra, footnote 1, p. 194.
191 See, e.g., ECtHR, Coster v. the United Kingdom, judgment of 18 January 2001, Application No. 24876/94, par. 141.
192 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, par. 10, where it is held 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’. According to an ICTR detainee, ‘[t]he practice is that the detainees who are not yet convicted, and those who are convicted live in separate compounds. In this regards, the Commanding Officer might make an exception if there is good reason’; ICTR, interview conducted by the author with UNDF detained persons, Arusha - Tanzania, May 2008.
UNDF. Prior to the referral of the matter to the ICTY President, the Registrar had denied the second part of the request, which, according to the Ngeze, amounted to discrimination ‘as it denied ICTR detainees access to detention facilities which are provided to detainees before the International Criminal Tribunal for the Former Yugoslavia’.

The President held that ‘[h]uman rights provisions prohibiting discrimination do not mandate identical treatment between all individuals in the exercise of protected rights where objective and reasonable conditions exist to justify differential treatment’. The President explained that constructing facilities for conjugal visits (which, at the time, did not exist at the UNDF), would have budgetary and administrative implications and, although permitted in Dutch prisons, were not allowed in Tanzanian prisons. Therefore, the treatment afforded to Ngeze was not discriminatory. Nevertheless, where no such ‘objective and reasonable conditions exist to justify differential treatment’, the tribunals’ detainees must be treated equally. This was also the ICTY Trial Chamber’s line of reasoning in Erdemović where it held that ‘[t]he Trial Chamber considers it possible to deduce from the principle of equal treatment before the law that there can be no significant disparities from one State to another as regards the enforcement of penalties pronounced by an international tribunal. It therefore recommends that there be some degree of uniformity and cohesion in the enforcement of international criminal sentences’.

It has been recognised in the domestic prison context that detainees themselves consider equal treatment to be one of the most important principles, a sentiment that appears to be shared by persons detained at the tribunals. In Ntahobali, for instance, the Defence claimed that the Nyiramasuhuko Defence had been given more
access to its client when presenting its case. It complained that ‘through their discriminatory attitude, the UNDF authorities have infringed upon the rights of the Accused’. Furthermore, in an interview conducted for the purposes of this research, a senior staff member of the ICTR Registry stated that there had been complaints by detainees regarding (what they perceived to be) the unequal distribution of clothing by the Commanding Officer. Nevertheless, all of the ICTR detainees interviewed in the context of this research agreed that the principle of equal treatment governs the UNDF’s detention regime. According to most of them, that principle was being applied correctly by the authorities. One detained person, however, pointed to the differences in treatment between detainees and convicted persons. He held that:

‘[d]etainees who are still on trial are well treated (medically / general care) as their lawyers may bring the case before the Court. Convicted ones have no longer lawyers to represent them; it seems they deserve less care’.

Another issue was raised by the independent Swedish investigators of the UNDU. They noted that the psychiatrist working at the UNDU was of the same ethnicity and spoke the same language as most of the UNDU detainees. In regard to this issue, the investigators emphasised that psychiatry needs be provided without the assistance of an interpreter and therefore concluded that the same medical service must be made available to the other ethnic groups of detained persons in the UNDU. The different tribunals’ detention authorities have on several occasions affirmed that the principle of equal treatment governs the facilities’ regimes. For example, in

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199 ICTR, Decision on Arsène Shalom Ntahobali’s Extremely Urgent Motion for Greater Access to the Accused at UNDF, Prosecutor v. Ntahobali and Nyiramasuhuko, Case No. ICTR-97-21-T, T. Ch. II, 3 March 2006, par. 3.
200 Ibid.
201 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
202 ICTR, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008.
203 Ibid.
204 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.8.
205 Ibid.
206 See, e.g., ICTR, Decision on Arsène Shalom Ntahobali’s Extremely Urgent Motion for Greater Access to the Accused at UNDF, Prosecutor v. Ntahobali and Nyiramasuhuko, Case No. ICTR-97-21-T, T. Ch. II, 3 March 2006, par. 12. This was confirmed by the UNDF
response to allegations in the media by Norman’s relatives and counsel that Norman was being ill-treated, the SCSL Registrar stressed that ‘[a]ll accused are treated equally before the law’.  

An example of how the principle of equality has been “applied” in the tribunals’ case-law can be found in Strugar. The ICTY President, seised of a request by the Strugar Defence for pardon or the commutation of Strugar’s sentence, noted that Strugar was not serving his sentence in a so-called designated State, but was still imprisoned in the UNDU. Article 28 of the ICTY Statute provides, however, that ‘when a convicted person becomes eligible for early release under the law of the State in which he is serving his sentence, the enforcement State shall notify the International Tribunal accordingly, and the President of the International Tribunal shall determine whether a grant of early release is appropriate’.  Nevertheless, the President held that ‘in the event of a request for early release from a convicted person in the UNDU, the same procedure should be followed as that which applies to prisoners serving their sentences in enforcement States’.  In this regard, he stressed that ‘[g]iven the need to treat prisoners equally, the fact that Mr. Strugar has served two-thirds of his sentence is relevant in considering this Request’.  Another example can be found in the ICC Assembly of States Parties’ Resolution on family visits for indigent detainees, in which the Assembly decided that the Court may subsidise such detention authorities during interviews with the author. They said that ‘[a]ll the detainees are equal. (…) Also, we don’t treat them with regard to their former functions or status. Whether someone used to be a Major, General, Minister or Burgomaster - all to us are equal. There is no discrimination’; ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.

208 ICTY, Decision of the President on the Application for pardon or Commutation of Sentence of Pavle Strugar, Prosecutor v. Strugar, Case No. IT-01-42-ES, President, 16 January 2009, par. 5, 6. See, also, ICTY, Order of the President on the Application for the Early Release of Milan Simić, Prosecutor v. Simić, Case No. IT-95-9/2, President, 27 October 2003 and ICTY, Order of the President on the Application for the Early Release of Simo Zarić, Prosecutor v. Zarić, Case No. IT-95-9, President, 21 January 2004. These latter two Orders both concern prisoners who were held in the UNDU after being convicted and sentenced. The President considered that ‘the conditions for eligibility regarding early release applications should be applied equally’.
209 ICTY, Decision of the President on the Application for pardon or Commutation of Sentence of Pavle Strugar, Prosecutor v. Strugar, Case No. IT-01-42-ES, President, 16 January 2009, par. 6.
210 Id., par. 9.
visits ‘following the application of clear criteria determining: [inter alia] equal treatment of detainees’. 211

The principle of equal treatment arguably overlaps (to a large extent) with the principle of impartial treatment. The latter notion, however, also carries another connotation, specific to the detention situation. As stated by the ICTY Registrar, ‘in her capacity as head of the UN Detention Unit in The Hague, the Registrar must perform independently and impartially under supervision of the President of the Tribunal and should not be regarded as a functionary of the Office of the Prosecutor’. 212 The Registrar stressed that ‘the staff of the UN Detention Unit must not be seen to be assisting or co-operating with the work performed by the Office of the Prosecutor’. 213

It should finally be noted that the principle of equal treatment has on occasion been used as an argument for denying certain requests by detainees. 214 Authorities may argue that granting a particular request would set a precedent, which may give rise to logistical or budgetary difficulties. For example, the ICTY Registrar in Karadžić, faced with a request to have an interview with a journalist, held, inter alia, that ‘to grant the request would place an “undue burden on the UNDU administration”, both in terms of the one-off logistical arrangements and the prospect of other detainees making similar requests’. 215

211 ICC, Resolution ICC-ASP/8/Res.4 Family visits for indigent detainees, adopted at the 8th plenary meeting, on 26 November 2009, by consensus, par. 5.
213 Ibid.
214 See, e.g., the Report of the independent Swedish investigators on UNDU, where they pointed to the risk that ‘privileges the Chambers give to individual detainees (...) may become standard practice in that other detainees demand the same rights’; ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.4.
Natural justice and procedural fairness

According to De Smith, Woolf and Jowell’s, ‘procedural justice aims to provide individuals with a fair opportunity to influence the outcome of a decision’.216 According to Allan, ‘[p]rocedures are fair to the extent that they lead to fair treatment, determined by the authoritative legal standards applicable to each form of process’.217 Natural justice, then, consists of two primary norms: \textit{nemo judex in causa sua} and \textit{audi alteram partem}.218 The former consists of different components. An adjudicator or administrative decision maker must, for instance, not have a personal or proprietary interest in the outcome of a case and there must not be a reasonable suspicion of bias,219 as would be the case where the person making a decision has already been, or will in the future be involved in the case in some other capacity.220 The second norm of the principle of natural justice prescribes that persons who can reasonably be expected to be affected by a specific decision must be given prior notice thereof221 and must be given the opportunity to be heard on the issue.222 This does not necessarily mean that the hearing should be conducted orally.223 The principle allows for exceptions where prior notice cannot be given, or where it is impossible or impracticable to hold a prior hearing, such as where secrecy is required due to privacy, security or safety concerns, or where a particularly pressing situation demands that a decision is taken without further delay.224

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221 De Smith, Woolf and Jowell’s, \textit{supra}, footnote 216, p. 312-318. At p. 314, these scholars argue that ‘[a]s the reason for imposing an obligation to give prior notice is usually to afford those who will be affected an opportunity to make representations, the notice must be served in sufficient time to enable representations to be made effectively’.
Although natural justice is, essentially, a common law concept, according to the ICTY Appeals Chamber, its underlying values ‘rest on general principles of law derived from the principal legal systems’.\textsuperscript{225} Natural justice is a rather vague concept and one that is liable to exceptions, which is consistent with the definition of principles provided above. Furthermore, its content is very much dependent on the context in which it is being invoked.\textsuperscript{226} As held by De Smith, the principle of natural justice merely contains minimum standards which must be observed in procedural decision-making. Such standards do not directly concern the substantive content of the decision. In other words, a decision may be substantively unjust, while the principle of natural justice has been duly respected.\textsuperscript{227} The principle does have a wide application. It applies to most forms of administrative decision making, including the administration of remand centers and prisons.\textsuperscript{228}

According to De Smith, basic components of the \textit{audi alteram partem} rule are that notice must be adequate to enable a person to prepare the presentation of his views, that sufficient time must be given for the making of such presentations, that relevant information must be disclosed,\textsuperscript{229} that a person be allowed to call witnesses\textsuperscript{230} and, if the hearing is in person, that the affected person is entitled to be legally represented.\textsuperscript{231} It should be noted, however, that exceptions to these components may be justifiable in light of the particularities of the context.\textsuperscript{232} Giving reasons for a particular decision is usually not considered one of the principle’s basic requirements.\textsuperscript{233}

\textsuperscript{225} ICTY, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, \textit{Prosecutor v. Kvočka et al.}, Case No. IT-98-30/1-A, 7 February 2003, par. 13.
\textsuperscript{226} S.A. de Smith, \textit{supra}, footnote 218, p. 557; H.W.R. Wade, \textit{supra}, footnote 218, p. 474; De Smith, Woolf and Jowell’s, \textit{supra}, footnote 216, p. 245, 311. Or, as Yardley puts it, ‘[c]ommon sense often indicates where the \textit{audi alteram partem} requirement has been satisfied’; D.C.M. Yardley, \textit{supra}, footnote 67, p. 96; T.R.S. Allan, \textit{supra}, footnote 17, at 503.
\textsuperscript{227} S.A. de Smith, \textit{supra}, footnote 218, p. 568.
\textsuperscript{229} See, in a similar vein, De Smith, Woolf and Jowell’s, \textit{supra}, footnote 216, p. 323-327.
\textsuperscript{230} See, in a similar vein, De Smith, Woolf and Jowell’s, \textit{supra}, footnote 216, p. 333-334.
\textsuperscript{231} S.A. de Smith, \textit{supra}, footnote 218, p. 566-567.
\textsuperscript{232} See, for example, De Smith, Woolf and Jowell’s, \textit{supra}, footnote 216, p. 326-327; see, also, \textit{id.}, p. 361-394.
The principle of natural justice is not explicitly mentioned in the detention rules of the different tribunals. On a closer reading, however, a number of rules appear to fall within the principle’s purview. For instance, Rule 64 of the ICTY Rules of Detention, which empowers the Prosecutor to 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 in the situations listed under Rule 64(1)(i-iv), stipulates in Paragraph B that the detainee shall immediately be informed of the fact of such a request234 in order to enable him to make use of the right to request the President to deny or reverse the request pursuant paragraph (C). Furthermore, pursuant to Regulation 101(3) of the ICC RoC, ‘a detained person shall be informed of any request of the Prosecution under regulation 101(2) of the Regulations “to prohibit, regulate or set conditions for contact between a detained person and any other person”; that the detained person shall be given the opportunity to be heard or to submit his or her views unless “in exceptional circumstances such as in an emergency, an order may be made prior to the detained person being informed of the request”; and that in such a case “the detained person shall, as soon as practicable, be informed and shall be given the opportunity to be heard or to submit his or her views”’.235

The duty to abide by rules of procedural fairness has been recognised in the tribunals’ case-law on detention matters. This is a welcome development, since decisions made in accordance with basic requirements of procedural fairness will, generally speaking, be more acceptable to the person affected by it.236 A further argument for adhering to rules of procedural fairness is that decisions made in accordance with those rules will often be of a better quality.237 Thirdly, as noted by Allan (referring to Galligan): ‘administrative decision-making generally takes place

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234 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. 11.
235 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. Katanga, Case No. ICC-01/04-01/07, T. Ch. I, 7 February 2008, p. 4.
236 See, e.g., ICTR, Réplique de la Défense à la Réponse du Procureur à la Requête de la Défense Demandant le Changement des Conditions de Détention de l’Accusé, Procureur c. Munyakazi, Affaire No. ICTR-97-36-I, Défense, 14 décembre 2004, where the detainee expressed his frustration that ‘[i]l n’a pas été attendu au sujet de cette mesure prise contre lui. Pour la Défense, cette violation est telle qu’elle rend toute décision rendue nulle et non avenue meme si elle était justifiée sous certains aspects’.
237 H.W.R. Wade, supra, footnote 218, p. 414; De Smith, Woolf and Jowell’s, supra, footnote 216, p. 246.
under conditions of uncertainty, complexity, and incommensurability, where inquiry, argument, and deliberation are highly desirable; and the duty of respect requires that attention should be paid to the person’s special case, where misjudgment is not simply a social cost but an act of injustice’. 238 According to Allan, ‘[r]espect for the person requires his involvement as the necessary means to an accurate and reliable judgment’. 239

On various occasions, the tribunals’ administrative authorities have themselves expressed their belief of being bound by rules of procedural fairness. 240 In addition, the different tribunals’ Presidents and Chambers have affirmed that the principle governs the tribunals’ administrative practices. In Šešelj, for instance, the ICTY President stated in respect of paragraph (B) of Rule 64 (which only establishes a duty to notify a detainee of a Prosecutor’s request to prohibit, regulate or set conditions for contact between a detainee and any other person if such requests are made directly to the Commanding Officer) that ‘I do not consider that it is consistent with principles of natural justice not to have advised Šešelj of the allegation brought and allowed him an opportunity to respond. If an accused is required to be so advised when a request is made urgently to the Commanding Officer, I can see no reason why this could not apply as well when a request is made on a less than urgent basis to the Registrar. It 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 request made’. 241 In a similar vein the President in Ntahobali emphasised in respect of an appeal filed by the detained person against the ICTR Registrar’s decision to deny his request to have an interview with Rutaganda, that ‘[t]he Registry is obliged, in fairness to Mr Rutaganda, to inform him of the requested visit, the objections raised by the Prosecutor, and the reasons for these objections. This places Mr Rutaganda in a

238 T.R.S. Allan, supra, footnote 17, at 500.
239 Id., at 506.
240 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. 9; ICTY, Decision on Milan Lukić’s Appeal against the Registrar’s Decision of 18 November 2008, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Vice-President, 28 November 2008, par. 8.
241 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. 11. Emphasis added.
position to challenge these objections, should he so choose’. In Kvočka, the ICTY Appeals Chamber noted that ‘[a] judicial review of an administrative decision made by the Registrar (...) is concerned initially with the propriety of the procedure by which Registrar reached the particular decision and the manner in which he reached it’ and proceeded to set out the standards for judicial review of administrative decisions. According to the Appeals Chamber, an administrative decision will ‘be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision’.

242 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. 6. Emphasis added.

243 ICTY, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, 7 February 2003, par. 13.

Bemba, the ICC Presidency held that ‘the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: [inter alia] failed to act with procedural fairness’.245

The requirements set by the principle of natural justice were affirmed by the ICTY Vice-President in Lukić & Lukić, where he stated that detainees must be fully informed of the developments in their case, notified of any decisions affecting their rights and advised of the avenues open to them to appeal such decisions, all of which must be done in a timely manner.246 Furthermore, the Vice-President in Karadžić, regarding a request by Karadžić pursuant to Rule 64bis of the ICTY Rules of Detention to reverse the Registrar’s denial of his request to contact the media, qualified the Registrar’s decision as a ‘blanket denial of all interactive contact with the media’.247 According to the Vice-President, such practice, i.e. ‘the Registrar’s failure to meaningfully consider alternative means of communication which would allow preservation of the interests in Rule 64bis’,248 ran ‘contrary to the principle of procedural fairness’.249 In Kvočka, the Appeals Chamber held in respect of the withdrawal of legal aid that where an administrative decision which is ‘detrimental to an accused is contemplated, procedural fairness dictates that the accused be afforded

Registrar, in exercising his discretion, acted unreasonably, based his decision on irrelevant material, or failed to take account of relevant material’. The Trial Chamber ignored the other requirements set out in Kvočka.


246 ICTY, Decision on Milan Lukić’s Appeal against the Registrar’s Decision of 18 November 2008, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Vice-President, 28 November 2008, par. 10. This corresponds to Rule 30(3) of the EPR, which demands, inter alia, that detainees shall be informed about any legal proceedings in which they are involved.

247 ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, par. 18.

248 Id., par. 23.

249 Id., par. 18.
the right to be heard’. The Appeals Chamber held that ‘[b]earing in mind that the withdrawal of legal aid may well impact negatively upon the accused’s ability to conduct his defence in the relevant criminal proceedings in the Tribunal, such a right entitles the accused to be given (a) notice of the allegations against him, (b) notice in reasonable detail of the nature of the material upon which the contemplated action is to be based, and (c) the opportunity to respond to that material’. Having scrutinised the minutes of the proceedings, the Appeals Chamber was satisfied that ‘the Registrar’s representative [had] adequately explained to [the appellant] what was involved in the inquiry, and that, by the questions he asked, the representative gave [the appellant] a fair opportunity to respond fully to the material which the Registrar had obtained. [The appellant] was also recommended to seek legal advice from his assigned counsel concerning the Registrar’s inquiry’.

Surprisingly, though, the ICC Presidency in *Katanga & Ngudjolo Chui* held that, unless explicitly provided for in the Court’s Regulations, the Registrar is not required to seek the views of a detained person prior to taking a decision affecting him. This would appear to be the sole decision in the tribunals’ case-law in which this major aspect of the principle of natural justice has been explicitly denied. As such, this decision must be considered to be incorrect.

The first component of the natural justice principle, *i.e. nemo judex in causa sua*, has also been recognised in the tribunals’ case-law. Mention was made above of the situation in which a decision-maker has already been or will in the future be involved in the case in some other capacity. This situation arose in *Lukić & Lukić*, where the ICTY President, in accordance with Rule 15(A) of the ICTY RPE, ‘withdrew from considering the application, owing to a conflict of interest with his role as presiding judge on the Applicant’s case’.

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251 *Ibid*.

252 *Id.*, par. 40. Footnote omitted.


withdrew from deciding on a complaint ‘owing to a conflict of interest with his prior role as presiding judge on the Applicant’s pre-trial bench’.\footnote{ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, \textit{Prosecutor v. Karadžić}, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, par. 1.}

Although giving reasons for a particular decision is not always considered a requirement of the second component of the principle of natural justice, Wade warns that ‘an administrative authority may be unable to show that it has acted lawfully unless it explains itself’.\footnote{H.W.R. Wade, \textit{supra}, footnote 218, p. 486.} Furthermore, according to De Smith, Woolf and Jowell, the duty to give reasons generally helps to improve the quality of decisions as it ‘encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making’.\footnote{De Smith, Woolf and Jowell’s, \textit{supra}, footnote 216, p. 344.} Moreover, giving reasons provides guidance on the decision-maker’s future decisions and ‘protect[s] the [decision maker] from unjustified challenges, because those adversely affected are more likely to accept a decision if they know why it has been taken’.\footnote{\textit{Id.}, p. 345.} Giving reasons may indeed help the affected person to accept the decision. Finally, reasoned decision-making plays an important role in the context of the right to appeal. It assists the appellate body in reviewing the original decision and provides the affected person with a basis upon which he can decide whether or not he has a ground for appeal.\footnote{\textit{Id.}, p. 345-346.}

The tribunals’ case-law is unclear on the extent to which their detention authorities are under a duty to give reasons to a detained person for a particular decision. In \textit{Kvočka}, the ICTY Appeals Chamber argued that ‘[b]ecause administrative functions are different in kind from judicial functions, administrative decision makers are not usually required to give reasons for their decisions in the way courts are required. The \textit{imposition by the Directive of an obligation} upon the Registrar to give a reasoned decision when withdrawing legal aid should not therefore be interpreted in the same way as the obligation upon a Chamber of the Tribunal to give reasons for its decision’.\footnote{ICTY, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, \textit{Prosecutor v. Kvočka et al.}, Case No. IT-98-30/1-A, A. Ch., 7 February 2003, par. 50. Emphasis added.} In that case, the applicable Directive explicitly imposed a duty to give reasons. \textit{Kvočka} therefore fails to shed light on the question of whether such duty
exists per se, i.e. in the absence of such an explicit legal obligation. In Ntahobali, this question was answered in the affirmative. The ICTR President grounded the Registrar’s obligation to inform Rutaganda of the fact that Ntahobali had requested a visit, the objections raised by the Prosecutor and the reasons for these objections, on the requirements of fairness.\(^\text{261}\) In Katanga & Ngudjolo Chui, the ICC Presidency held in connection with the rights of detainees to appeal decisions of the Registrar to the Presidency that ‘the advantages to be derived from this process presuppose that the Registrar shall provide sufficiently clear reasons for her initial decision at the time of its taking, to enable the detained person affected to understand its factual and legal basis and properly exercise his right to seek review’.\(^\text{262}\)

The Appeals Chamber in Kvočka did, however, clarify what giving reasons entails where an explicit duty does exist. The Registrar was obliged to ‘make (...) apparent in its reasons that he ha[dl] considered the issues raised by the accused’ and ‘reveal (...) the evidence upon which he has based his conclusion’.\(^\text{263}\)

Respect for the right of detained persons to complain about intramural matters (to a higher authority)

It is well established in international and regional penal instruments that detained persons have the right to submit complaints or requests, to appeal against decisions on such complaints or requests and to appeal disciplinary punishment. It follows from Rule 36 of the SMR that detained persons have the right to make requests and complaints to the authority in charge of the facility (Paragraph 1), to higher

\(^\text{261}\) 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. 6. Emphasis added. In respect of the providing of reasons between the tribunals’ organs inter se, the ICTR President in Ndindilyimana held that where a specific rule such as, for instance, Rule 64 of the ICTY Rules of Detention, obliges a tribunal’s organ to provide reasons to another organ, ‘[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 to enable the [requested organ] to make an informed decision’; 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. Ndindilyimana, Case No. ICTR-2000-56-T, President, 25 November 2002, par. 9.


\(^\text{263}\) ICTY, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, A. Ch., 7 February 2003, par. 50.
authorities, *i.e.* either a higher administrative body operating at some institutional
distance from the first-line authorities or a judicial body (Paragraph 3), and to the
inspectors of the facility (Paragraph 2). Rule 35 provides that, upon admission,
detained individuals must be provided with written information on, *inter alia*, ‘the
authorized methods of seeking information and making complaints’. Paragraph 4 of
Rule 36 states that ‘[u]nless it is evidently frivolous or groundless, every request or
complaint shall be promptly dealt with and replied to without undue delay’.
Furthermore, Principle 33 of the U.N. Body of Principles provides for the right of
detained individuals to make complaints and requests, while adding that counsel or, in
certain circumstances, a relative of such persons may also be permitted to make such
requests or complaints. Paragraph 3 of Principle 33 also provides that
‘[c]onfidentiality concerning the request or complaint shall be maintained if so
requested by the complainant’. Paragraph 4 provides for an unqualified right to appeal
the decision on a request or complaint before a higher authority or a judicial body,
either where the request or complaint has been rejected or in case of ‘inordinate
delay’. In addition, a more general right to make complaints and requests is provided
for in Rule 70 of the EPR. Paragraph 3 stipulates that the appellate body must be an
independent authority, whilst Paragraph 7 states that ‘[p]risoners are entitled to seek
legal advice about complaints and appeals procedures and to legal assistance when the
interests of justice require’.

It follows from Article 13 ECHR and the ECtHR’s corresponding
jurisprudence that procedures for lodging complaints must meet some basic
requirements in order for them to be regarded as effective remedies. Article 13
requires that the remedy is effective ‘in practice as well as in law’. Relevant factors
in this regard include the length of the proceedings and the powers of and
guarantees afforded by the body that decides on the complaint.

In *Yankov v. Bulgaria*, the ECtHR considered that, at the relevant time, Bulgarian law
did not provide for judicial appeals against the disciplinary confinement of a prisoner
in an isolation cell. It observed that ‘[a] disciplinary order could only be challenged by

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265 *Id.*, 147.
way of an administrative appeal to the General Director of Prisons and Detention Facilities, through the prison governor who had issued the order. The Deputy Minister of Justice in charge of prisons also exercised supervision. However, these administrative appeals did not suspend the execution of punishments. Furthermore, there were no satisfactory procedural safeguards’.267 In Lorsé v. the Netherlands, the ECtHR observed that the Dutch Appeals Board of the Central Council for the Administration of Criminal Justice (the appellate organ that deals with detained persons’ intramural complaints) was empowered to take binding decisions (although not on matters concerning the regime as such). It also observed that persons detained in the Netherlands were permitted to institute judicial interim injunction proceedings. The Court was satisfied that taken together, such mechanisms ‘provided the applicants with an effective remedy’.268

The right to appeal disciplinary punishment is laid down in Principle 30(2) of the U.N. Body of Principles. Rules 56 to 62 of the EPR concern matters of discipline and punishment. Rule 57(2)(e) of the EPR provides that national law shall determine ‘access to and the authority of the appellate process’.

Rules 80 to 84 of the ICTY Rules of Detention are concerned with complaints by inmates and provide for a general right to make complaints to the Commanding Officer of the Detention Unit, to lodge appeals against the Commanding Officer’s decisions with the Registrar (who, in turn, has a duty to inform the President thereof), to have privileged communications with the inspecting authority, and further provide that complaints shall be acknowledged and dealt with without undue delay. Rule 41 prescribes that the Commanding Officer (in consultation with the Registrar) shall issue regulations which, pursuant to Rule 41(v), shall provide for a right to appeal to the President of the tribunal in disciplinary matters. Similar provisions are found in the legal frameworks of the other tribunals.269

267 ECtHR, Yankov v. Bulgaria, judgment of 11 December 2003, Application No. 39084/97, par. 156.
268 ECtHR, Lorsé and Others v. the Netherlands, judgment of 4 February 2003, Application No. 52750/99, par. 96.
269 See Rules 82 to 86 of the ICTR Rules of Detention. Rule 83 stipulates, in contrast to the ICTY Rules of Detention, that the Registrar shall forward the complaint directed to him to the President. See, further, Rules 59 and 60 of the SCSL Rules of Detention, which essentially provide for the same rights. A particular feature of the SCSL complaints procedure is that the President is not mentioned in Rule 59(B) of the SCSL Rules of Detention, which appears to imply that the Registrar is not under an obligation to inform the President of complaints by
In light of the foregoing it may be concluded that the tribunals’ detention law reflects the principle that detained persons’ right to complain about intramural matters to a higher authority must be respected. The expression of this principle in the case-law and practice of the tribunals is discussed further in Chapters 5 and 6 below.

Respect for the fair trial rights of accused persons in detention

One of the prime reasons for the tribunals to detain accused persons is ‘to guarantee the presence of the accused during the court proceedings’. Due to the fact that the notion of fair trial is essential to (international) criminal proceedings and given that conditions of detention may undermine that notion, the impact of detention conditions on the fair trial rights of accused persons in detention has been a constant matter of concern for the tribunals. This, in turn, has had an impact on the conditions of detention in their remand facilities. The impact of fair trial concerns on the tribunals’ detention regimes is increased as a consequence of the ‘close proximity of detainees, or forward such complaints to him. Different arrangements have been laid down in Rules 83 and 84 of the STL Rules of Detention. If not satisfied with the decision of the Chief of Detention, the detainee may address the Registrar. Additionally, Rule 83(F) provides that ‘[i]f the Detainee is not satisfied with the response from the Registrar, he may further appeal to the President within 7 days from the notification of the response’. See, also, Rule 106 of the ICC RoC and the relevant provisions in Section 5 of the ICC RoR. The latter Section sets out the complaints procedure. Similar to the STL Rules of Detention, the ICC RoR provide a right to appeal, both to the Registrar and to the Presidency. See, further, the administrative regulations issued by some of the tribunals setting out the complaints procedure for detainees, such as ICTY, United Nations Detention Unit - Regulations for the Establishment of a Complaints Procedure for Detainees, IT/96, issued by the Registrar in April 1995. In respect of the right to appeal decisions imposing disciplinary punishment, see Rule 36(d) of the ICTR Rules of Detention, Rules 34(F) and (G) and 36 of the STL Rules of Detention, Rule 25(B)(iv) of the SCSL Rules of Detention and Regulations 215 and 216 of the ICC RoR. The ICC RoR provide detainees with a right to appeal a decision on a complaint both to the Registrar and to the Presidency. See, also, the administrative regulations issued by the tribunals setting out disciplinary procedures for detainees, such as ICTY, United Nations Detention Unit - Regulations for the Establishment of a Disciplinary Procedure for Detainees, IT/97, issued by the Registrar in April 1995 and ICTR, United Nations Detention Facility, Regulations for the establishment of Disciplinary Procedure for Detainees, issued by the Registrar in June 1996.

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270 Jan Christoph Nemitz, supra, footnote 177, at 138.
272 See, e.g., ICTY, Order, Prosecutor v. Milošević, Case No. IT-02-54-T, T. Ch., 16 April 2002; ICTR, Decision on Matthieu Ndirumpatse’s Motion to Vary his Conditions of Detention, Prosecutor v. Ndirumpatse, Case No. ICTR-98-44-T, President, 24 June 2010, par. 6.
the tribunals’ organs and the tendency of the high profile accused and their counsel to raise detention issues in court.\footnote{ICTY, \textit{ICTY Manual on Developed Practices}, UNICRI, Turin 2009, p. 180, par. 17; ICTY, Decision on the Accused’s Motion Concerning the Restrictions on his Communication with Radovan Karadžić, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, T. Ch. III, 27 April 2009, p. 2.} In response to the question of whether the international justice context poses different problems to detention authorities than the domestic context does, David Kennedy (Commanding Officer of the UNDU) stated that

‘From a Chief Officer perspective and my previous term as a Governor’s perspective, is poses no extra problems apart from relationships with the judiciary. In a domestic situation, in the UK at least, there is a break in between the judiciary and the detention facilities through the different ministries. In the international context of the ICTY, which is the only one I am experienced with, there is no such break, so there is the potential for judicial contribution to the detention process. I think that is the main difference’. \footnote{ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.}

On numerous occasions, persons detained by the tribunals have complained about the facilities provided to them for the preparation of their cases or about other detention issues (such as issues related to health care), which they claim have had a negative impact on their fair trial rights.\footnote{See, e.g., SCSL, Transcripts, \textit{Prosecutor v. Norman, Fofana and Kondewa}, Case No. SCSL-04-14-T, T. Ch. I, 18 June 2004, Continued Trial, 09:37 A.M., page 50, line 2 – page 53, line 31; SCSL, Transcripts, \textit{Prosecutor v. Taylor}, Case No. SCSL-2003-01-T, T. Ch. II, 19 August 2008, 9:30 A.M., page 14068, lines 1-20. See, also, ICTR, Decision on Jean-Bosco Barayagwiza’s Urgent Motion Requesting Privileged Access to the Appellant without Attendance of Lead Counsel, \textit{Nahimana et al. v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 17 August 2006, where Barayagwiza requested that the Defence’s Legal Assistant would be granted privileged access to him at the UNDF, in the absence of Lead Counsel, for a specified period of three weeks. The President noted that ‘the Registrar, mindful of the fact that the Appellant is not represented by the same Defence team as at trial, has already allowed frequent visits of the Appellant’s Lead Counsel, Co-Counsel and Legal Assistant to the UNDF’. See, also, \textit{Ngeze}, where the ICTR President, seized of a request for ‘review of the prohibition of contact enforced by the Commanding Officer of the United Nations Detention Facility (“UNDF”) and for unmonitored family visits’, ruled that ‘the restrictive measures have not encroached on Mr. Ngeze’s right to prepare his appeal. He has consulted with his counsel on a regular basis and continues to do so’; ICTR, Decision on Requests for Reversal of Prohibition of Contact, \textit{Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, President, 25 October 2006, par. 7. See, further, ICTY, Decision on Milan Lukić’s Appeal against the...}
such issues.\textsuperscript{276} The facilities made available to such persons include granting access to computers (sometimes by placing computers in the detainees’ cells) and providing computer courses to them.\textsuperscript{277} When asked whether the provision of facilities to detainees in order to guarantee their fair trial rights is a more difficult issue in the international than in a domestic setting, the UNDU’s Commanding Officer responded that ‘For court appearances? Well, yes, that’s not really an issue. Any detainee who is going through the court process can use as much time as they wish to prepare and deal with that, whether it’s somebody who’s represented or not represented. I wouldn’t interfere in that at all. In fact, part of the job over the last 18 months is to ensure that the IT that allows that link is introduced as smoothly as possible. And that’s been problematic, because we’re talking about cutting-edge IT and very few people in the custodial setting are on the ball with cutting-edge IT. I’m lucky that I actually got somebody who is an expert, so that for me I’m not involved in cutting-edge IT. And I think that’s something that national systems will take out of our context and will look at in the future, that the individuals had electronic links with the


\textsuperscript{276} See, \textit{e.g.}, ICTY, Decision, \textit{Prosecutor v. Milošević}, Case No. IT-02-54, Deputy Registrar, 6 February 2004. See, also, ICTY, Statement by Tribunal President Judge Fausto Pocar to the Security Council 7 June 2006, The Hague, 7 June 2006, where it is stated that ‘[u]nique arrangements were made available to Mr. Milošević by order of the Trial Chamber in September 2003 for “privileged communications” with legal associates and witnesses in order to allow him to effectively conduct his own defence. Thus, Mr. Milošević had a private room with a telephone, computer and facsimile machine’. See, further, ICTY, Decision on Krajinić Request and on Prosecution Motion, \textit{Prosecutor v. Krajinić}, Case No. IT-00-39-A, A. Ch., 11 September 2007; ICTY, Protocol on the Visit of the Pre-Trial Judge to the Detention Unit, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, Pre-Trial Judge, 25 October 2007; ICTY, Transcripts, \textit{Prosecutor v. Krajinić}, Case No. IT-00-39-A, A. Ch., 2 November 2007, Status Conference, page 122, line 8 – page 123, line 3; ICTY, Motion for Interview of Defence Witness, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18-PT, T. Ch. III, 11 December 2008, par. 17; ICTY, Decision on the Interlocutory Appeal by the Amicus Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, \textit{Prosecutor v. Milošević}, Case No. IT-02-54-AR73.6, A. Ch., 20 January 2004, par. 19; ICTY, Report to the President - Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 112.

judicial process. It’s *that* cutting-edge stuff for a custodial setting. I think we’re probably the only people doing it*. 278

There are, however, limits to what may reasonably be expected from the detention authorities in this regard. In Šešelj, for instance, the Trial Chamber held that ‘it is not the duty of the staff of the UNDU to make copies for the Accused as he has chosen to defend himself and thereby has taken it on himself to organise his defence, so that in the event the Accused wishes to make copies it is his responsibility to make necessary arrangements, either by providing his own photocopier for his use in the UNDU or by having assistance outside the UNDU to do his photocopying’. 279

Occasionally, the principle of respect for the fair trial rights of accused persons in detention has been referred to as that which is required by ‘the interests of justice’. In Nyiramasuhuko et al., for instance, the ICTR Trial Chamber, after noting that visits to detained persons by defence investigators and legal assistants are not covered by the privilege provided for in Rule 65 of the ICTR Rules of Detention, considered it ‘to be in the interests of justice the practice of the Registrar to authorise meetings between an accused and members of the Defence team where, *inter alia*, Defence Counsel can demonstrate that he cannot access his client for an essential purpose without an unreasonable delay or expenditure of funds’. 280

The principle of ‘respect for the fair trial rights of detained persons’ must, however, be distinguished from ‘safeguarding the administration of justice’, a *policy* rationale often adduced to *restrict* rights of detained persons 281 and which can be

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278 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the UNDU, The Hague – Netherlands, 17 June 2011.
281 See, e.g., 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. Ndindiliyimana*, Case No. ICTR-2000-56-T, President, 25 November 2002, par. 3. See, further, ICTR, Request for reversal of the Prohibition of Contact, *Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, President, 29 July 2005, where the Prosecutor asserted that Ngeze had abused his right to contact ‘to subvert the course of justice and to jeopardize the integrity of the proceedings’. According to the Prosecutor, there was evidence that Ngeze had repeatedly breached a witness protection order. The President ruled that Ngeze had indeed violated the said order. 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.
found in various provisions of the tribunals’ rules of detention. It envisages a detention regime which optimally supports the smooth running of the justice apparatus. ‘Safeguarding the administration of justice’ also covers the post-conviction phase. One of the considerations involved in the distribution of convicted persons among the various States of enforcement, for instance, concerns the future cooperation of the convicted person with the Prosecutor’s Office. In a similar vein, this policy rationale determines the choice of location when a detained person is temporarily transferred to another penal institution for prosecutorial purposes. It may even determine the location of a particular detained person within the different areas, wings or blocks of a detention facility. When Semanza complained about his transfer to a new cell within the UNDF, the Commanding Officer responded that this was done ‘in the interests of effective management and administration of the Tribunal’s Detention Facility’. The Commanding Officer explained that Semanza

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6-7, where the President held that Ngeze ‘had not been prevented from telephoning or receiving visits from members of his family. Such contact, however, must take place in accordance with measures to ensure that his case is not discussed, that the safety and security of protected witnesses are not put at risk, and that the interests of justice are not compromised’. See, in a similar vein, ICTY, Decision, Prosecutor v. Delić, Landžo, Mucić and Delalić, Case No. IT-96-21-T, Registrar, 23 May 1997. In this case, the Registrar issued a monitoring order regarding all non-privileged visits to Zejnil Delalić as requested by the Prosecutor. This was done to prevent any interfere with pending investigations or trial proceedings. The Registrar concluded that such a measure was necessary in the interests of the administration of justice. See, also, ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 11 December 2003; ICTY, Decision on Appeal against Decisions of the Registry of 20 August 2004; and 30 January 2006, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 11 April 2006, par. 5; ICTY, Decision on Vojislav Šešelj’s Request for Review of Registrar’s Decision of 10 September 2009, Prosecutor v. Šešelj, Case No. IT-03-67-T, Acting President, 21 October 2009, par. 21; ICTY, Decision on Radovan Karadžić’s Request for Reversal for Limitations of Contact with Journalist: Russia Today, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Acting President, 6 November 2009, par. 26, 32.

282 See, e.g., Rule 64bis (B) of the ICTY Rules of Detention, which ‘obliges the Registrar to have regard to two factors when deciding whether to grant such permission: (i) whether such communication could disturb the good order of the UNDU, or (ii) whether such communication could interfere with the administration of justice or otherwise undermine the Tribunal’s mandate’. Emphasis added. See ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, par. 3.

283 See, e.g., 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, IT/137, President, 9 July 1998, par. 3(b).

284 ICTR, Order for the Continued Detention of Jean Kambanda in the ICTY Detention Facilities at The Hague, Kambanda v. the Prosecutor, ICTR-97-23-A, President, 18 June 2001. The President held that Kambanda’s co-operation with the OTP would be best facilitated if ‘he is temporarily incarcerated in a prison close to the Office of the Prosecutor’.

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would ‘not be required for any court proceedings for some time, and therefore he and three other detainees [were] being transferred to new cells in an effort to facilitate the easy access and movement of other detainees who [were] required for court proceedings’. Occasionally, the tribunals’ Chambers have instructed the detention authorities to co-operate with the Prosecution. In *Bizimungu et al.*, for instance, the ICTR Trial Chamber ruled that the Prosecutor should be given all personal items belonging to Bicamumpaka, which were at that moment in the custody of the Commander of the UNDF.

At times, the scope of this policy rationale has been interpreted excessively. Even the tribunals’ duty to safeguard the detainees’ health and wellbeing has on occasion been brought within its scope. In the ICTY’s 2004 Annual Report, it was stated that ‘[t]he Detention Unit serves the judicial process in ensuring the physical and mental well-being of the accused in order that they may answer the counts against them in the court of law’. The involvement of the detention authorities in safeguarding the administration of justice may, however, undermine those authorities’ perceived neutrality, which is essential to the smooth running of a detention facility. The neutral position of the ICTY Registry *vis-à-vis* the Prosecution was emphasised in *Stakić*. The Trial Chamber was seised of a Prosecution motion requesting that the UNDU be subpoenaed to provide the Prosecution with such documents as medical records, non-

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287 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/59/215-S/2004/627, 16 August 2004, par. 365. See, also, the remarks made by the Swedish investigators in their report following their visit to the UNDU: ICTY, *Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia*, 4 May 2006, par. 2.7.2. The investigators stated that ‘[t]he task of the DU is to attempt, within the framework of adequate security, to keep the detainees in a mental and physical condition that allows a trial to be carried out in conditions that can be described as a ‘fair trial’. Judge Parker, in his Report on the circumstances surrounding the death of Milošević, held that ‘[t]here is a clear expectation that this Tribunal will ensure the provision of proper medical care of detainees. It is also obvious from experience of this case that the health of a patient can materially affect the capacity of the Tribunal to efficiently conduct the trial of a detainee’; see ICTY, *Report to the President Death of Slobodan Milošević*, Judge Kevin Parker Vice-President, 30 May 2006, par. 140.
privileged letters hand-written by Stakić and his driver’s license or passport. In its motion, the Prosecution admitted that ‘the UNDU cannot be expected to release the requested materials solely on the basis of a request from the Prosecution’, which the Trial Chamber confirmed: ‘the Registry of the Tribunal, responsible for the management of the UNDU, is a neutral organ and therefore that it cannot be expected to provide the requested materials solely on the basis of a request from the Prosecution’. Notwithstanding such a cautious approach by the Stakić Trial Chamber and the OTP, the (perceived) neutrality of detention authorities is always at stake where there is a strong emphasis on securing the unhindered administration of justice. For example, in Ngeze, the detained person requested the Commanding Officer for permission for his family to visit him at the UNDF. At the time the request was submitted, an earlier order for restrictive measures which prohibited such contact had already expired, while the Prosecutor had not yet requested a renewal of such measures. Ngeze had immediately requested to make a phone call to his family and asserted that, ‘apparently, when he was filling in a phone form request, somebody from UNDF informed the OTP of the expiring of the restrictive measures Order’. Immediately thereafter, Ngeze was informed of the late renewal of the restrictive measures. He submitted that it was ‘unfair and wrong to see the UNDF authorities who are supposed to help the Prisoner, being in a hurry going to the Prosecution office reminding them for late signing of such document’ and noted (somewhat cynically) that ‘in this situation [he] [was] having difficulties to differentiate the Prosecution and the UNDF Authority’. The case of Lukić & Lukić is an example of a situation in which the fair trial rights of a detained accused and the policy rationale of safeguarding the administration of justice were both relevant considerations. The Vice-President noted that ‘[i]n arriving at the Impugned Decision, the Registrar weighed the wellbeing of the witness and her family against the Applicant’s access to

288 ICTY, Order to the Registry of the Tribunal to Provide Documents, Prosecutor v. Stakić, Case No. IT-97-24-T, T. Ch. II, 5 July 2002.
289 Ibid.
290 ICTR, Appellant Hassan NGEZE Urgent Complaint against UNDF Authorities addressed to Mr. Saidu Guindo, The Commanding Officer of UNDF and Copied to The ICTR President, Appeal Judges, the Registrar, under Rules – 82 and 83 of the Detention Rules and other enabling provisions governing the rights of detainees, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, Defence, 13 December 2005.
291 Ibid.
292 Ibid.
unrestricted telephone calls. In doing so, the Registrar considered the concern of further interference with witnesses in this case, the Prosecutor’s intention to investigate the matter further, and the fact that the restriction was imposed for a limited two week period. The Registrar contends that the Impugned Decision does not hamper the Applicant’s ability to prepare his case, as he retains access to full and free communication with his Counsel’.293

Apart from providing guidance to the detention authorities in their decision-making, the principle of respect for the fair trial rights of detained accused also constitutes the basis for the Trial and Appeals Chambers’ power to review decisions of the detention authorities.294

Zahar and Sluiter distinguish between the general right to a fair trial on the one hand and the specific rights falling thereunder on the other and argue that even where none of the specific rights have been violated, it does not necessarily follow that the trial as a whole can be regarded as fair. In a manner consistent with the open-ended character of principles, they argue that ‘[t]his residual function of the general right to a fair trial serves the useful purpose of making the concept of a fair hearing a dynamic and living reality, capable of adjusting to changing views on fairness and of rectifying omissions that may occur in the law and practice of international criminal courts’.295

A possible negative side-effect of a detention regime which single-mindedly attempts to concretise the principle of respect for the rights of accused persons in detention (one which already appears to have materialised at the ICTY), is that

293 ICTY, Decision on Milan Lukic’s Appeal against the Registrar’s Decision of 18 November 2008, Prosecutor v. Lukic & Lukic, Case No. IT-98-32/1-T, Vice-President, 28 November 2008, par. 13. Footnotes omitted. In par. 14, the Vice-President held that ‘[n]otwithstanding the assistance provided by the Applicant’s Counsel, I consider that the Impugned Decision does restrict preparation which the Applicant may wish to undertake independent of, or in cooperation with, his Counsel. In addition, the Applicant has communicated to the Acting Commanding Officer that he is affected by not being able to communicate with his family. Given the lack of evidence of the Applicant’s intent to intimidate the witness, as well as the fact that the Applicant was not put on notice of the inappropriateness of such conduct before the Impugned Decision was issued, I find a two week restriction on his non-privileged calls to be somewhat excessive’ (footnotes omitted).

294 See, e.g., ICTR, Decision on Hassan Ngeze’s Motion for a Psychological Examination, Nahimana et al., v. the Prosecutor, Case No. ICTR-99-52-A, A. Ch., 6 December 2005, where the Appeals Chamber held that, ‘had the procedure of the Detention Rules been followed, [it] would only have jurisdiction to review a Registrar’s or President’s decision if the issues in question were closely related to the fairness of the proceedings on appeal’. See, further, ICTR, Decision on Hassan Ngeze’s Request for a Status Conference, Nahimana et al. v. the Prosecutor, Case No. ICTR-99-52-A, Pre-Appeal Judge, 13 December 2005.

insufficient attention is paid to demands of safety and security within the remand institution. In this regard, the Swedish independent investigators of UNDU signaled in 2006 that ‘Chambers can give the Registrar instructions for individual detainees, in the form of court orders, without consulting the Registrar or the management of the DU in order to investigate the potential implications of the instructions or whether it is possible to implement them while continuing to meet safety and security requirements’. The Swedish investigators noted that in one case, ‘a detainee was permitted to conduct his own defence, which involved extensive external contacts and a large number of visits. Additional complications arose when another detainee at the DU was to participate as a witness. The consequences of this special arrangement were that it became difficult to maintain sufficient control over visits and telephone conversations’. The same picture emerges from Judge Parker’s 2006 report on the circumstances surrounding the death of Slobodan Milošević. In the report, Judge Parker drew attention to the Trial Chamber’s Order of 17 September 2003, according to which ‘the [self-representing] Accused must be provided with facilities in a privileged setting to confer with witnesses and others and work with documents and material relevant to his defence, logistical support with regard to witnesses and facilities to prepare for the presentation of his case’. The facilities provided to Milošević included a secure room in UNDU (he was the only person to have access to that room) for proofing and interviewing witnesses, to prepare his defence and to hold meetings with his legal associates and others. He was also provided with a privileged telephone line in order to enable him to contact potential witnesses. According to Judge Parker, the Commanding Officer of the UNDU repeatedly expressed concern ‘at his inability to adequately prevent unauthorised medications reaching Mr. Milošević because of the “privileged” arrangements for visitors and an office at UNDU’. It was reported that non-prescribed medications and ‘other unauthorised

296 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.4, 2.7.2.
297 Id., par. 2.4.
298 ICTY, Report to the President - Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 113. See, also, ICTY, Statement by Tribunal President Judge Fausto Pocar to the Security Council, The Hague, 7 June 2006.
299 ICTY, Report to the President - Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 114.
substances’ had been found on several occasions. The Commanding Officer was reported to have warned that he could no longer adequately ensure safety and security inside UNDU.

Neither the Swedish investigators nor Judge Parker were blind to the Trial Chambers’ role in safeguarding the fair trial rights of detained accused. Nonetheless, the Swedish investigators pressed for ‘a review of arrangements for administrative court orders’ and called ‘for such court orders to be issued after consultation with the Registrar, so as to ensure that they are possible to implement in a manner that does not jeopardise the operations and security of the DU’. Judge Parker was also of the view that ‘the unique arrangements established at UNDU to enable Mr. Milošević to conduct his own defence compromised the security at UNDU’ and recommended, inter alia, that ‘regard be given to the experience of this case in determining arrangements in future cases where a detainee conducts his own defence’.

In a similar vein, the ICTY Manual on Developed Practices states that it would be preferable for Trial and Appeals Chambers to consult the UNDU on specific detention issues before issuing orders, in order to address matters of safety and security. In the words of an ICTY spokesperson in reaction to Judge Parker’s report: ‘a better balance must be struck between the principles of ensuring fair trials and allowing accused to defend themselves, and not compromising the security of the detention unit’. When asked whether the situation had improved following the publication of the two reports, the UNDU’s Commanding Officer responded that

‘There are decisions which have impact upon the custodial setting and continue to, and part of my job is to manage that and ensure that the people who are making those

300 Id., par. 70, 105, 115.
301 Id., par. 115.
302 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.4.
303 ICTY, Report to the President - Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, Findings and recommendations, par. 11. See, also, ICTY, Statement by Tribunal President Judge Fausto Pocar to the Security Council, The Hague, 7 June 2006.
decisions know that there is a potential impact when that decision is implemented. I don’t know what it was like around the Swedish report, the Milošević time, and I’ve seen some of the paperwork, obviously, when I took over the job. It’s something that I’m aware of and I suppose it could cause any concern, but I am listened to when I say that this will have a negative impact on custody. Generally, there is a fairly good relationship at the senior management level. I suspect because of those two reports, the judiciary have noticed that they need to be careful and they’re making decisions which could affect what we do day-to-day in the Detention Unit’. 307

Preserving the health of detained persons

It was mentioned above in relation to the principle of respect for human dignity that confinement can have severe detrimental effects on the wellbeing of detained individuals. Nevertheless, the experiences of domestic prison populations should not automatically be transposed to the international context. It should be noted, in this regard, that persons detained by the tribunals do not, generally speaking, belong to the more disadvantaged groups of society and do not show high rates of substance dependency. Nevertheless, there is clear evidence at the tribunals that the health of the detained persons may be negatively affected as a direct result of their confinement. 308

Also relevant in this regard is the fact that the average age of the tribunals’ detention population is significantly higher than that of domestic prison populations. According to David Kennedy, the Commanding Officer of the UNDU

‘In the context of the ICTY, the age of the population makes a huge difference. Most prison populations are average mid to late twenties in general. The prison population that I’m dealing with is mid to late fifties average population age’. 309

308 See ICTY, Decision on Appeal against Refusal to Grant Provisional Release, Prosecutor v. Mrksić, Case No. IT-95-12/I-AR65, A. Ch., 8 October 2002, par. 24; ICTY, Report to the President Death of Milan Babić Judge Kevin Parker Vice-President, 8 June 2006 (par. ‘Risk of suicide’); ICTY, Decision on Defence’s Rule 74BIS Motion; Amended Trial Schedule, Prosecutor v. Krajišnik, Case No. IT-00-39-T, T. Ch. I, 27 February 2006, par. 7.
309 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the UNDU, The Hague – Netherlands, 17 June 2011.
It has been noted, in this respect, that ‘the average age of a detainee at the UNDU is currently 57 years, which is significantly higher than in national detention facilities. Most detainees arrive at UNDU with various pre-existing health problems due to their age’.310

Also relevant to the wellbeing of detained persons is the length of the criminal proceedings against them. According to the ICTY Manual on Developed Practices, ‘[e]ven though the UNDU is a remand institution, the average period of detention is significantly longer than that of most national remand institutions, and possibly closer to length of ordinary penitentiaries. This situation has a detrimental effect upon the mental state of the detainees as they work their way through trials and appeals over an extended period of time. The conditions can cause long term stress and can induce or exacerbate health conditions’.

The Manual further notes that Post Traumatic Stress Disorder as well as other psychiatric disorders are very common amongst ICTY detainees.311 This also is apparent from the report of the independent Swedish investigators of UNDU, which states that ‘[m]any of the detainees initially have to go through a personal process. There are a number of difficult factors to come to terms with, among them unfamiliarity with loss of liberty and being far from their family. One factor that makes life particularly difficult is that, in certain cases, the actions they are now being prosecuted for were earlier regarded as heroic deeds in their own ethnic group; another is that they sometimes regard themselves as innocent. The psychological state of the detainees affects operations and hence also security’.312 In a manner consistent with these findings, the report by Judge Parker on the circumstances surrounding the suicide of Milan Babić at UNDU noted that ‘a psychological examination of Mr Babić, made at the request of the Office of Legal Aid and Detention of the Tribunal,

312 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.7.2.
identified "a mild stress-related disorder with depressive features as a reaction to continuing separation from… familiar ties and activities". What is also apparent from the fragments of the Swedish investigators’ report quoted above, is that the specific profile of the tribunals’ detention population and the fact that they are detained at a significant distance from their social support systems (both of which are particular to the international context) influence such persons’ well-being. In addressing States representatives at a diplomatic seminar, the ICTY Registrar stated that ‘[i]n the case of the UNDU, its international character and unique detainee population raise (…) difficulties in terms of health care. Indeed, the particular profile and specific personal circumstances of ICTY detainees, being in many instances former high ranked political and military leaders, can aggravate the adverse impact of prison environment on their health. The distance from the detainees’ family and the familial social support network, as well as the detainees’ lack of familiarity with the surroundings, inevitably impact on the health condition of the detainees’.  

Article 12 of the ICESCR establishes the right of every person to enjoy the highest attainable standard of physical and mental health. Principle 24 of the U.N. Body of Principles, in addition to stating that a detained person must be medically examined upon admission, provides that medical care and treatment must be provided

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313 ICTY, Report to the President - Death of Milan Babić Judge Kevin Parker Vice-President, 8 June 2006. See, also, ICTY, Transcripts, Prosecutor v. Stanišić & Simatović, Case No. IT-03-69, P.-T. Ch., Open Session, 8 April 2008, p. 829, lines 15-22, p. 830, line 25- p. 831, line 3. Stanišić reportedly suffered from a deep depression and showed suicidal inclinations. On p. 837, lines 20 to 24, it is said that Dr. De Man told the Pre-Trial Chamber that ‘I think the prospect of severe sentence being given and prolonging of what he experienced - - experiences as being banished from his own country is certainly a very severe burden and contributive factor to the clinical state of Mr. Stanišić, there’s no doubt about that’. See, also, ICTY, Transcripts, Prosecutor v. Stanišić & Simatović, Case No. IT-03-69, P.-T. Ch., Open Session, 14 April 2008, p. 868, lines 13-14; ICTY, Decision on Start of Trial and Modalities for Trial, Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-PT, T. Ch. I, 29 May 2009, par. 7; ICTY, Weekly medical report by Dr. Michael Eekhof, Reporting Medical Officer, to the Registrar, Case No. IT-03-69-PT, 2 June 2009; ICTY, Weekly medical report by Dr. Michael Eekhof, Reporting Medical Officer, to the Registrar, Case No. IT-03-69-PT, 9 June 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 6 July 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 15 July 2009.

to detained persons whenever necessary and free of charge. Principle 25 provides for
the right of detained persons to request a second opinion. Furthermore, Principle 9 of
the U.N. Basic Principles states that ‘[p]risoners shall have access to the health
services available in the country without discrimination on the grounds of their legal
situation’.

Rule 22(1) of the SMR demands that at each penitentiary or remand institution
qualified medical services must be available. It further stipulates that ‘medical
services should be organised in close relationship to the general health administration
of the community or nation. They shall include a psychiatric service for the diagnosis
and, in proper cases, the treatment of states of mental abnormality’. Paragraph 2
requires that specialist treatment be made available to prisoners, either in well-
equipped and supplied specialised institutions, or in civic hospitals.315 In addition,
Paragraph 3 states that ‘[t]he services of a qualified dental officer shall be available to
every prisoner’.316 Rule 24 provides that the medical officer has a duty to see
detainees as soon as possible after admission and thereafter as necessary.317 This
provision is elaborated on in Rule 25, which states that the medical officer should see
sick prisoners on a daily basis. He must report to the detention or prison authorities
whenever a person’s health may be ‘injurally affected’ by imprisonment.318

Moreover, Rule 26 imposes on the medical officer the task of inspecting hygiene and
food and obliges the detention authorities to either implement the medical officer’s
findings or submit the report to a higher authority.

Part III of the EPR is dedicated to health issues. First of all, Rule 39 states that
‘[p]rison authorities shall safeguard the health of all prisoners in their care’.319 The

315 See, in a similar vein, CPT, The CPT Standards – “Substantive” sections of the CPT’s
316 See, in a similar vein, id., par. 35.
317 See, in a similar vein, id., par. 33, 34.
318 See the U.N. Principles of Medical Ethics relevant to the Role of Health Personnel,
particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other
Cruel, Inhuman or Degrading Treatment or Punishment, adopted by U.N. G.A. resolution
37/194 of 18 December 1982. For the guidelines that were established by the World Medical
Association such as the Declaration of Tokyo (‘Guidelines for Physicians Concerning Torture
and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention
and Imprisonment’), see the WMA’s website at http://www.wma.net/e/ (last visted by the
author on 4 July 2011).
319 See, also, Office of the United Nations High Commissioner of Human Rights, Human
Rights and Prisons – Manual on Human Rights Training for Prison Officials, Professional
official Commentary to the EPR states in respect of Rule 39 that, in light of the vulnerable position of detained persons,\(^\text{320}\) ‘[w]hen a state deprives people of their liberty it takes on a responsibility to look after their health in terms both of the conditions under which it detains them and of the individual treatment that may be necessary’. The Commentary emphasises that detained persons should not leave the institution in a worse condition than when they entered it and that this especially bears upon health care.

The CPT Standards also confirm the existence of an obligation on prison authorities to safeguard the health of detained persons. The CPT warns that ‘[a]n inadequate level of health care can lead rapidly to situations falling within the scope of the term “inhuman and degrading treatment”’\(^\text{321}\) and emphasises that ‘prisoners are entitled to the same level of medical care as persons living in the community at large. This principle is inherent in the fundamental rights of the individual’.\(^\text{322}\) The CPT further stresses that health care in penal institutions should not be understood as being limited to treating sick persons. Rather, conditions of detention must also contribute to the prevention of illness.\(^\text{323}\) In addition, it has been recognised by the ECtHR that ‘in the light of Article 3 of the Convention, the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured, with the provision of the requisite medical assistance and treatment’.\(^\text{324}\)

\(^{320}\) See, also, \textit{id.}, p. 65.


\(^{322}\) \textit{id.}, par. 31, 38.

\(^{323}\) \textit{id.}, par. 52. A wealth of information on the topic has been made available by the WHO’s Regional Office for Europe’s as part of its ‘Health in Prisons Project’, which was set up in 1995 to support States in ‘improving public health by addressing health and health care in prisons, and to facilitate the links between prison health and public health systems at both national and international levels’; see http://www.euro.who.int/prisons (last visited by the author on 4 July 2011).

The principle that detention authorities must safeguard the health of the persons entrusted to their care has been concretised in the different tribunals’ legal frameworks and case-law.\textsuperscript{325} In \textit{Norman}, the SCSL Registrar responded to accusations by the detainee’s counsel and relatives of ill treatment of SCSL detainees by stressing that ‘[t]he welfare of all detainees is a responsibility which is taken seriously by the Registrar. The 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’.\textsuperscript{326} The case-law of the Special Court,\textsuperscript{327} the ICTR,\textsuperscript{328} the ICTY\textsuperscript{329} and the ICC\textsuperscript{330} echoes this same concern. In Šešelj, for instance,


\textsuperscript{330}ICC, Decision on “Mr Matthieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, \textit{Prosecutor v. Katanga & Ngudjolo Chui}, Case No. ICC-RoR-217-02/08, Presidency, 10 March 2009, par. 35.
the ICTY Trial Chamber emphasised that ‘in the management of UNDU, it is necessary to take into account the medical condition of each detainee’.\footnote{ICTY, Order to Registry and Commanding Officer of the United Nations Detention Unit, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, T. Ch. II, 11 July 2005.} Furthermore, the \textit{Tolimir} Trial Chamber considered that ‘both the Statute and the Rules require a Chamber to concern itself with the physical and mental well-being of an Accused detained in the UNDU. This power, in order to be exercised effectively, necessarily entails the power of the Chamber to issue orders it considers indispensable, following medical examinations it has the power to order’.\footnote{ICTY, Order Regarding the Nightly Monitoring of the Accused, \textit{Prosecutor v. Tolimir}, Case No. IT-05-88/2-T, T. Ch. II, 25 August 2010, par. 19.} Judge Mindua, in his Separate and Concurring Opinion, opined in this respect that ‘[t]he Chamber’s responsibility for the health and safety of a detainee stems primarily from the rights and interests of the individual accused who is presumed innocent until proven guilty. Moreover, the Chamber has a responsibility to protect the health and wellbeing of accused so that justice may be done – not only justice for the accused, but also justice for the alleged victims and the international community as a whole’.\footnote{ICTY, Judge Antoine Mindua’s Separate and Concurring Opinion on the Order Regarding the Nightly Monitoring of the Accused, par. 3; Annex to: ICTY, Order Regarding the Nightly Monitoring of the Accused, \textit{Prosecutor v. Tolimir}, Case No. IT-05-88/2-T, T. Ch. II, 25 August 2010.} According to Judge Mindua, ‘the Chamber and the Registry share an obligation to ensure the health and safety of those in custody at the UNDU’.\footnote{\textit{Id.}, par. 2.} In \textit{Milutinović et al.}, it was held in relation to the extramural issue of provisional release that such release ‘may be ordered on medical grounds where it is shown that the medical needs of the Applicant are such that no adequate treatment is available at the United Nations Detention Unit’.\footnote{ICTY, Preliminary Order on Sreten Lukić’s Emergency Motion Seeking Provisional Release, \textit{Prosecutor v. Milutinović et al.}, Case No. IT-05-87-PT, T. Ch., 19 July 2005; ICTY, Decision on “Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions”, \textit{Prosecutor v. Strugar}, Case No. IT-01-42-A, A. Ch., 8 December 2005; ICTY, Decision on “Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro”, \textit{Prosecutor v. Strugar}, Case No. IT-01-42-A, A. Ch., 16 December 2005.} When Šešelj went on hunger strike in 2006, the Tribunal issued a press release in which it declared that ‘[i]n view of the Tribunal’s obligation and commitment to safeguard the physical well-being of persons placed into its custody, Šešelj was yesterday moved from the Detention Unit to the adjoining Dutch prison hospital where additional medical facilities and staff are available. This was done to

334 \textit{Id.}, par. 2.
allow for his health to be monitored more closely and to guarantee prompt medical intervention should a medical necessity arise’. 336

The importance of preserving the health of detainees was recently articulated by a senior member of the ICTR Office of the Registrar as follows:

‘The Medical Officer is in charge of all matters relating to health. The Commanding Officer may not make any independent decision on any matter of health. If the Medical Officer says one thing and the Commanding Officer disagrees then it’s the Medical Officer whose view will prevail. It’s as simple as that. If there is any dispute between them - occasionally there are differences of opinion about how certain prisoners should be treated, certain diet issues that arise or certain health issues - then the matter will be referred up to the Office of the Registrar. The latter has never disagreed with the Medical Officer. It would be a very unusual event for the Registry to disagree with the Medical Officer’. 337

In order to be able to carry out their work properly, it is crucial that Medical Officers hold a neutral position towards the tribunals’ organs. It should be noted in this regard that the tribunals’ Medical Officers may have both the task of providing medical care to detainees and of reporting to Chambers on the medical condition of detainees. 338

337 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
338 See, e.g., ICTY, Decision Amending Modalities for Trial, Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-PT, T. Ch. I, 9 June 2009, par. 7; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 10 June 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 16 June 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 23 June 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 29 June 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 30 June 2009; ICTY, Reasons for Denying the Stanišić Defence Request to Adjourn the Hearings of 9 and 10 June 2009 and Have Jovica Stanišić Examined by a Psychiatrist Before the Start of Trial and for Decision to Proceed with the Court Session of 9 June 2009 in the Absence of the Accused, Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-T, T. Ch. I. 2 July 2009, par. 3; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 6 July 2009; ICTY, Jovica Stanišić – Non-Attendance in Court, IT-03-69-T, 7 July 2009, par. 5; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 7 July 2009; ICTY, Weekly medical report on the diagnosed health problems of Stanišić by Michael Eekhof, Reporting Medical Officer to the Registrar, 15 July 2009; ICTY,
Although an accused may refuse to consent to the disclosure of such information to Chambers, even where consent is provided this may very well undermine the trust that the detained patients place in the Medical Officers. Moreover, Rule 34(D) of the Rules of Detention provides for an exception to the requirement of consent, where it states that ‘[i]nformation contained in the detainee’s medical records may be consulted or disclosed: i. for medical reasons only with the consent of the detainee, or ii. in the interest of justice and the good administration of trial, by order of a Judge or Chamber of the Tribunal, after consultation with the medical officer’. It may, therefore, be preferable to consult an external medical practitioner where it is deemed necessary for a detained person to be examined to report to Chambers, in order for the Medical Officer to maintain his neutral position.

Another factor that complicates the provision of healthcare by the tribunals is their dependency on domestic health care systems and facilities. At times, the tribunals have had difficulties in finding States that are willing to accept detainees to undergo medical treatment. For example, shortly after he was transported to Dakar Senegal in order to undergo hip replacement surgery, the SCSL detainee Norman died in the Senegalese hospital from a myocardial infarction. Justice Winter noted in the report on the circumstances surrounding Norman’s death that ‘apart from Senegal, no country had volunteered to provide medical assistance to treat Mr. Norman’s hip problem. The Special Court therefore had no other option than to transfer Mr. Norman, with his consent, to L’Hopital Aristide le Dantec in Dakar’. She recommended that ‘the Registrar continue[s] to try and conclude an agreement with foreign states willing to provide medical assistance where such medical assistance is not available in Sierra Leone “well before the occasion to transfer a detainee may arise”’. In another SCSL case, the detainee Sankoh needed to be transported

339 See, e.g., ICTY, Registry Submission Pursuant to Rule 33(B) Concerning the Accused’s Statements on 19 October 2010, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, T. Ch. II, 22 October 2010, par. 4.
outside of Sierra Leone in order to receive medical treatment, but no country was willing to (temporarily) admit him for such purposes. Besides this problem, Sankoh’s travel ban, which had been imposed by the Security Council during the armed conflict, was still in effect. Eventually, having not received the medical treatment sought and the travel ban remaining in place, Sankoh died in a hospital in Freetown.

Social rehabilitation

Although the principle has older roots, in the first half of the twentieth century rehabilitation gained ground as a policy rationale governing the administration of correctional facilities in Europe and the United States. This development was linked to the emergence of the behavioral sciences and the notion that criminals could be treated and cured of their inclination to commit crimes. The classic understanding of rehabilitation centers on the strive to cure offenders and the strive against recidivism. In some States, this included the ambition to increase prisoners’ self-respect, their feelings of social responsibility and their self-assertiveness. Widespread criticism of the principle led to a rapid decline in popularity in the 1970s. Major grounds of criticism were, inter alia, that i) the principle is built on a

348 Clive R. Hollin and Charlotte Bilby, supra, footnote 345, p. 608-609; Liora Lazarus, supra, footnote 13, p. 60; S. van Ruller, Geschiedenis van de vrijheidsbeneming [History of
deterministic understanding of human nature, which is contrary to liberal notions of responsibility; ii) the principle condones paternalistic intrusions into citizens’ lives by the State; iii) a penitentiary policy governed by rehabilitation would make the criminal justice system look too ‘soft’; iv) rehabilitation programmes, particularly those directed at the prison population as a whole instead of specific categories of prisoners did not lead to a decrease in recidivism rates; v) rehabilitative programmes have financial implications which societies are not always willing to pay for; vi) treatment-oriented sentencing would result in inconsistencies in sentencing; and vii) rehabilitation as a sentencing rationale does not incorporate the principle of proportionality in respect of either the duration of the sentence or the severity of the prison regime.

In many States, the expectation that offenders might be cured was replaced by the more modest ambition that prisoners were not to leave prison in a worse state than when they arrived. This meant that the damaging aspects of imprisonment had to be mitigated as far as possible. This more modest understanding of the principle of rehabilitation, which ultimately finds its basis in the principle of respect for human dignity, is referred to in this research as ‘social rehabilitation’. The meaning of this principle is well-articulated in the Commentary to Rule 6 of the EPR, which speaks of keeping prisoners physically and mentally healthy, providing work and educational

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350 S. van Ruller, supra, footnote 348, p. 34. Boone cites Franke where she says that, in the Netherlands, the principles of resocialisation and minimal infringements totally merged; Miranda Boone, supra, footnote 347, p. 237.


352 In this study, the term ‘social rehabilitation’ must thus be understood as referring to the non-treatment related aspect of Article 10(3) ICCPR and to the value underlying the English notion of reintegration and that of ‘resocialisation’ in German and Dutch penitentiary law. Although there are differences between these notions, the basic underlying and corresponding value appears to be that, during their confinement, imprisoned persons must be prepared for their return to society.
opportunities and, in relation to long-term prisoners, minimising the damaging effects of incarceration and providing prisoners with opportunities to ‘make the best possible use of their time’. Furthermore, in order for (social) rehabilitation to be successful, it is generally considered essential that prisoners maintain links with their social support systems outside the prison, particularly with their relatives.353 Livingstone, Owen and Macdonald argue, in this respect, that ‘with the decline of faith in the rehabilitative capacity of prison itself, contact with the outside world as a means of reducing the debilitating effects of institutionalization has come to be seen as perhaps the most important rehabilitative strategy in the prison context’.354

In the same way that the presumption of innocence creates a presumption in favour of granting rights to detained persons, the principle of social rehabilitation creates such a presumption of respect for prisoners’ rights.355 According to Kelk, in light of the penal institutions’ duty to respect and even strengthen the prisoners’ autonomy (a task which, in his view, is intrinsic to the resocialisation ideal), the resocialisation principle in the Dutch penal system ‘tends towards participation of the confined individual in the law’.356 Kelk refers to this participation as ‘rechtsburgerschap’. The principle thereby assumes broader dimensions of legal protection of and respect for the autonomy of imprisoned persons.357 In this regard Nelissen warns against solely having regard for resocialisation’s original meaning as a crime prevention rationale where this may result in disregard for its essentially protective content.358

The concrete implementation of the principle of social rehabilitation depends on the personal circumstances of the inmate concerned, including his or her age, criminal past, the type(s) of crime(s) committed, the length of the sentence and his or

353 Miranda Boone, supra, footnote 347, p. 237.
355 Lazarus notes, in this respect, that in Germany ‘the constitutional resocialization requirement’ and its realization in the Prison Act 1976 has led to important rights for prisoners in Germany’; Liora Lazarus, supra, footnote 13, p. 43, 49, 78 and 79.
357 Ibid.
358 P. P. Nelissen, supra, footnote 346, p. 6.
her personality. On this basis, it might be argued that the exclusion of a person serving a life sentence from participation in rehabilitative programmes would not violate the rehabilitation principle. However, in view of the (mere) prospect in such cases of a pardon or commutation of sentence being granted, such persons are also entitled to the basic requirements set by such principle.

Due to the ‘vague’ content of the rehabilitation principle, it is not easy to ascertain which aspects of detention regimes fall within its ambit. In line with what was mentioned above, there may be confusion as to whether the principle concerns only those aspects that may lead to a decrease in recidivism, or whether it governs all aspects of the detention regime that may contribute to improving a prisoner’s behaviour and attitudes. International criminal justice deals with ‘system criminality’, which is defined by Nollkaemper as ‘the phenomenon that international crimes – notably crimes against humanity, genocide and war crimes – are often caused by collective entities in which the individual authors of these acts are embedded’. As a consequence, ‘treating’ an individual offender who formed part of such a collective may be considered an irrelevant and ineffective tool in the prevention of recidivism. As Kress and Sluiter note, ‘Article 10(3) of the ICCPR seems, at first sight, to provide a clear answer, in that it states that the essential aim in

360 This would apply, for instance, were international prisoners to serve their life sentence in the Netherlands (if the Netherlands were ever to conclude an enforcement agreement with an international criminal tribunal, or pursuant to the residual responsibility under Article 103(4) of the ICC Statute). In the Netherlands, one of the requirements for participating in a so-called *penitentiair programma* is that the remaining part of the sanction does not exceed one year. See Article 4(2)(b) of the Penitentiary Principles Act. Another excluding factor would be Article 6(b) of the Penitentiary Measure (*Penitentiaire Maatregel*), which provides that persons who must leave the Netherlands after having served their sentence, or persons who will be extradited, are excepted from participating in such a *penitentiair programma*. See in more detail Miranda Boone, *supra*, footnote 347, p. 231-248. Boone basically argues that, nowadays, in the Netherlands, rehabilitation is used in a very selective manner, since whole categories of persons are being excluded from rehabilitative programmes.
361 Article 28 ICTY Statute; Article 27 ICTR Statute; Article 30 STL Statute; Article 23 SCSL Statute.
362 Allen states that ‘[t]he rehabilitative ideal is itself a complex of ideas which, perhaps, defies completely precise statement’, which is consistent with the definition of principles presented in this Chapter. See Francis A. Allen, *supra*, footnote 8, p. 181.
the treatment of prisoners shall be their reformation and social rehabilitation. But the appropriateness of this goal in cases of so-called ‘macro-criminality’ (Makrokriminalität), i.e. criminality in which the State or some similar entity is directly involved, has been radically questioned in modern criminology. It has been said that it would be manifestly inappropriate, if not absurd, to apply the concept of social rehabilitation to criminal State leaders such as Adolf Hitler, Josef Stalin, Pol Pot, Idi Amin, and Saddam Hussein. In such cases, so the provocative thesis goes, ‘the most radical desolidarization’ (radikalste Desolidarisierung) vis-à-vis the criminal could be legitimate. Another burning issue is how to apply the concept of social rehabilitation to criminals who do not deviate from but rather act in conformity with the policy of ‘their State’. To be sure, social rehabilitation in the international justice context appears only to make sense when understood as ‘normalisation of life in prison’ and the prevention of personal harm caused by incarceration. In the end, this may not be entirely different to how the concept has been interpreted in some domestic contexts. Nelissen, for instance, argues that the focus of the Dutch penal system in implementing the principle of resocialisation has been not so much on the prevention of recidivism, as on making imprisonment more humane and on preventing confined person from being damaged as a result of imprisonment. The rationale behind this is that both inhumane treatment and damage done to persons as a result of their confinement hinders their successful reintegration into society. ‘Treatment’ has, according to Nelissen, played only a peripheral role in Dutch prison regimes.

In a domestic context, the principle of social rehabilitation only applies to imprisonment regimes. Since this research focuses on the legal position of persons detained by the tribunals prior to being transferred for the enforcement of their sentence, it may come to a surprise to find social rehabilitation listed here among the principles that govern the tribunals’ law of detention. To be sure, the detention facilities of the ICTY, ICTR, STL, SCSL and the ICC were never meant to be used as

366 P. P. Nelissen, supra, footnote 346, p. 39, 40, 42, 45, 46.
367 See HRC, General Comment 21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), of 10 April 1992, par. 10. See, also, Rule 65 of the SMR.
prisons. The (initial) purpose of such facilities was to detain persons accused of international crimes during their trials before these tribunals. Nevertheless, in practice a significant number of persons are kept in such facilities for months or even years after their final conviction, until their transfer to a national prison in a designated State to serve their sentence. Such persons, therefore, undergo part of their sentence in the tribunals’ remand facilities. Social rehabilitation must be assumed to govern the treatment of convicted persons in such institutions and the conditions of their imprisonment. In addition, it may be argued that the particularities of the international justice context demand that the principle also governs pre-conviction detention at the tribunals’ remand institutions. It was noted earlier that the EPR prescribe ‘reintegration efforts’ in respect of both prisoners and remand detainees. Further, as a consequence of the duration of international criminal proceedings, the length of pre-trial detention in connection to such proceedings is comparable to that of prison sentences served in domestic jurisdictions. Engaging in rehabilitative efforts after a person has already spent a decade in remand detention is likely to be ineffective, since he may have suffered irreversible damage as a result of being detained for so long. Such an approach, where it hampers post-conviction rehabilitative endeavours, may be argued to violate the principle of social rehabilitation.

In light of the fact that the tribunals’ detention centres were only meant to serve as remand institutions, it is hardly surprising that the different tribunals’ detention rules do not mention the principle of rehabilitation as such. Nevertheless, the principle can be found in many of the other “sources” of the tribunals’ law of detention. Article 10(3) ICCPR provides that ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’. The SMR builds on Article 10(3) by stating in Rule 65 that ‘[t]he treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility’. Rule 66(1), in turn, concretises Rule 65 by providing that ‘[t]o these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral
character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release’. In addition, social rehabilitation underlies many of the more specific rights of prisoners. For example, Rule 80 of the SMR provides that ‘from the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation’. Furthermore, Principle 8 of the U.N. Basic Principles provides that ‘conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families’, whilst Principle 10 provides that ‘with the participation and help of the community and social institution, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions’. Also relevant in this regard is the HRC’s General Comment on Article 10 ICCPR, which sheds some light on how Paragraph 3 of that article may be realised. To this end, the Committee has requested from States parties ‘specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside’. Social rehabilitation thus bears upon many different aspects of detention regimes. Indeed, the HRC has held that ‘in order to determine whether the principle set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, e.g., how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations’.

369 Id., par. 12.
On the regional level, Rule 5 of the EPR provides that ‘[l]ife in prison shall approximate as closely as possible the positive aspects of life in the community’, while Rule 6 stipulates that ‘[a]ll detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty’. Accordingly, Rule 6 ‘recognises that prisoners, both untried and sentenced, will eventually return to the community and that prison life has to be organised with this in mind. Prisoners have to be kept physically and mentally healthy and provided with opportunities to work and educate themselves. Where it is known that prisoners are going to serve long terms, these have to be carefully planned to minimise damaging effects and make the best possible use of their time’. In 2008, the European Parliament stipulated in its resolution on the situation of women in prisons that, ‘the role of penal institutions, beyond the punishment of illegal activities, should be to aid social and professional reintegration’. Moreover, in 2008, when asked by the ICC Registry for his views on family visits to detained person, the Council of Europe’s Commissioner for Human Rights answered that ‘a successful policy on detention should entail measures to facilitate prevention, rehabilitation and social integration of people in difficulty. In this context, key institutions of socialization, such as the family, should be actively involved. These requirements and the respect for family ties are essential elements of a policy of detention in line with international human rights standards’. He then stated that ‘[t]he rehabilitation of convicted persons should be the objective of prison policy. An effective rehabilitation policy must include efforts to preserve ties and contacts with the outside world whenever someone is imprisoned, and especially family ties. It is important that every means should be employed to ensure that people deprived of their liberty do not feel completely cut off

from their family and friends (unless the interests of the investigation so require). Thus preference must be given to the serving of sentences at establishments offering the most facilities for attaining this target, and in this context, proximity to detainees’ families and places of origin can and must be a factor to be taken into account by the responsible authorities’.  

Upon being interviewed in the context of this research, not all the tribunals’ detention authorities appeared to be convinced that their management of the detention facilities ought to be guided by the rehabilitation principle. In this regard, a senior staff member of the ICTR Office of the Registrar observed that:

‘Firstly, the ICTR prisoners are guilty of the gravest crimes that human beings are capable of; they are far more serious and far graver than any crimes pursued in national jurisdictions. Our prisoners, unlike the ICTY’s prisoners, have usually committed genocide. Many of them, as a result of their sentences, will die in custody; and that is deliberate. Even in respect to the very few who have been given short sentences, matters of rehabilitation do not arise as these are politicians who have been instrumental, in one form or another, in committing genocide. Under those circumstances it seems to me no deficit to have no rehabilitation programme whatsoever. These are people for whom the very word rehabilitation is a joke. There is no question of rehabilitation. Some of them may stray back into their refugee status. Most of these people want to continue to avoid being seen by the Rwandan government, whom they see as being involved in continued interest in assassinating or in some way doing nasty things to them’.  

From a more practical point of view, the ICTY Commanding Officer observed that,

‘That’s a huge issue of course, in this context particularly. Because of the presumption of innocence, how do you introduce any rehabilitation? That in most systems is left till after conviction. In our situation, because of the small numbers, it’s not after conviction: it will be in the enforcement State. So rehabilitative programs aren’t introduced here, we don’t have them. It’s a huge difference as well because of where actually the detainees are. What sort of rehabilitative programs can you set up

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373 Id., par. 13.
374 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
for some of the issues that we’re dealing with? Personally, I think that would be (...) opening Pandora’s box. Are we then enforcing sentences? That’s not part of our mandate and not part of our agreement with the Dutch. So that’s another issue, the political aspect’. 375

Nonetheless, a more positive attitude towards rehabilitation is also discernable in the tribunals’ practice. In Bagaragaza, for instance, the ICTR Prosecution concluded an agreement with the accused person regarding the latter’s co-operation with the OTP. As part of the agreement, Bagaragaza promised, inter alia, to ‘state the truth and cooperate as to the administration of justice at ICTR; (...) [d]isclose what he knows about the crimes in which he participated to ICTR investigators and investigators of national courts outside Africa; [and] (...) [t]estify before the International Criminal Tribunal for Rwanda, as often as it may be required, to the facts disclosed to the investigators, including by video-conferences’. In turn, the Prosecution undertook, inter alia, ‘[t]o relocate the repentant witness elsewhere, other than on the African continent and in the country where he will be tried at the end of legal proceedings and of his release and bear the full cost of his security and reintegration into the society depending on the host country, for a maximum period of two years, following his final relocation’. Further, in Katanga & Ngudjolo Chui, the ICC Presidency recognised that ‘[t]he maintenance of family ties through family visits facilitates a detained person’s reintegration into society in the event of an acquittal or his social rehabilitation upon release in the event of conviction’. It held, in this respect, that such right coincided ‘with the obligation upon the Registrar to fulfill her duty of care to maintain the physical and psychological well-being of detained persons’. Moreover, in its ‘Report of the Court on family visits to indigent detained persons’, the ICC held that ‘the need to ensure an easy social reintegration or rehabilitation

375 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the UNDU, The Hague – Netherlands, 17 June 2011.
377 Id., p. 2-3, sub (H). Emphasis added.
378 ICC, Decision on “Mr Matthieu 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 & Ngudjolo Chui, Case No. ICC-RoR-217-02/08, Presidency, 10 March 2009, par. 35.
379 Ibid.
which is possible through family visits would support such policy, especially if the detained person is acquitted’, thereby affirming the policy of providing financial assistance to family members of detained persons to enable them to visit their detained loved ones.\footnote{ICC, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008, par. 45.}

In addition, educational programmes, such as computer and language courses, are provided by the tribunals to their detainees, although the prime purpose of such support is to assist accused persons to prepare their cases.\footnote{See, e.g., ICTY, Transcripts, \textit{Prosecutor v. Djordjevic}, Case No. IT-05-87/1-PT, T. Ch., 22 February 2008, Status Conference, p. 33, 41 and 42; ICC, Transcripts, \textit{Prosecutor v. Katanga}, Case No. ICC-01/04-01/07, P.-T. Ch., I, 21 January 2008, Status Conference, p. 4, lines 6-20.} Nevertheless, in an interview conducted for the purposes of this research, the SCSL detention authorities stated that, as part of the detention facility’s rehabilitation programme,

‘There are programs for education and vocational training. Initially, when I arrived here, the Chief had hired a Sierra Leonean teacher, and I asked him whether he could provide me with the educational levels of the prisoners. They function at primary level 1, 3, 4 and 5. Brima attended the technical institute of Congo Cross in Freetown and we actually have this program developed by our CITS for him. It’s self-directed learning, but each faction has its own computer – stand alones that are not connected to the internet. Kanu, another AFRC, is attempting to upgrade to the point where I think he’d like to pursue a degree. The two CDF came here with the most basic level of education. They are taking English lessons now. I know it’s about reintegration, but for us it’s also about anything we can do to keep them hopeful. We also brought in a tailoring shop, so they can learn how to sow. Now they sow pillows and they sell them. They receive funds for anything they sell. I just take off the money it costs me to buy the materials. The CDF give it all to the families; they don’t spend anything on stuff for themselves in the shop. Because some of their family members live in the provinces and could not afford to come visit them, the Acting Registrar set up a system to assist the family members in visiting the detainees here. This was set up when they were all detainees and were therefore considered innocent. Their family members visited them at an unprecedented level’.\footnote{SCSL, interview conducted by the author with the SCSL detention authorities, Freetown – Sierra Leone, 19 October 2009.}
The ICTY Commanding Officer likewise said that,

‘We have computer classes, we have English and French classes and they’re popular because of their participation in the court process. We’ve got various things: we’ve got creative activities – pottery, painting. We don’t have work. We are looking at potentially introducing it. We have – in some detainees’ cases - a long period in between conviction, appeal and enforcement; so we’re looking at the possibility of [introducing it]. It’s occupying people who are no longer heavily occupied by the court proceedings, that’s the reason we’re looking at it. If you’ve got this intense period of thirty, thirty-six months on average while they’re heavily involved in the court, and then that finishes, certainly you haven’t got this to occupy your mind. So that’s one of the reasons we’re looking at it. That’s a quite difficult question as well; also from a space point of view. Where are we going to put it? And, at the moment it’s not funded, and introducing work would have funding implications.’

It is important to distinguish between rehabilitation as a sentencing rationale and social rehabilitation as a principle governing detention management. Rehabilitation as a sentencing rationale was referred to by the ICTY Sentencing Chamber in Rutaganira when it spoke of ‘the need to take into account the ability of the person found guilty to be rehabilitated; such rehabilitation goes hand in hand with his reintegration into society’. According to the ICTY Judges, rehabilitation as a sentencing rationale requires them to take into account ‘the circumstances of reintegrating the guilty accused into society’. In Čelebići, the ICTY Appeals Chamber held that rehabilitation usually has a role to play in sentencing ‘when younger, or less educated, members of society are found guilty of offences. It therefore becomes necessary to re-integrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and

should, be relevant considerations in this respect’. That rehabilitation constitutes a sentencing rationale at the tribunals is further reflected in the recognition of certain mitigating factors. In Kordić and Čerkez, for instance, the ICTY Appeals Chamber pointed to Čerkez’s ‘extraordinarily good behaviour at UNDU’, which according to the Appeals Chamber, indicated good rehabilitative prospects. Although the ICTY Trial Chamber in Erdemović strongly mitigated the role of rehabilitation as a sentencing purpose, the sentencing Judges cited various circumstances in favour of the accused’s successful rehabilitation, such as his personal characteristics, his expression of remorse and admission of guilt, his co-operation with the Prosecution and the duress under which he had committed the crimes. Moreover, rehabilitation has been taken into account in the tribunals’ extramural decisions on early release or the commutation of sentences. In Strugar, for instance, the ICTY President noted that ‘[t]he “Behaviour Report” of the Acting Commander of the UNDU attests to Mr. Strugar’s good behaviour during his detention at the UNDU. According to this Report, Mr. Strugar has “at all times shown good respect for the management and staff of the unit and has complied with both the Rules of Detention and the instructions of the guards.” In addition, he has been “cordial with his fellow detainees”. This good behaviour, particularly considering Mr. Strugar’s prompt surrender to the International Tribunal in October 2001, demonstrates a degree of rehabilitation’.

386 ICTY, Judgement, Prosecutor v. Delalić et al., Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 805.
387 ICTY, Judgement, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1091.
390 See, e.g., Rule 125 of the ICTY RPE.
391 ICTY, Decision of the President on the Application for pardon or Commutation of Sentence of Pavle Strugar, Prosecutor v. Strugar, Case No. IT-01-42-ES, President, 16 January 2009, par. 10. Footnote omitted.
Nevertheless, the ICTY Appeals Chamber in Čelebići also emphasised the serious nature of the crimes falling under the tribunals’ jurisdiction and that the cases before it could simply not be compared to domestic criminal cases. Accordingly, it held that rehabilitation cannot ‘play a predominant role in the decision-making process of a Trial Chamber of the Tribunal’ and ‘cannot be given undue weight.’ Although rehabilitation may, as noted by Schabas, be an important consideration in sentencing perpetrators of human rights violations due to ‘the need for ‘reconstruction and reconciliation’ in the affected societies’, the ICTY Appeals Chamber’s position appears to be reasonable. As a result of the horrific nature of the crimes that are prosecuted before the tribunals, these trials often result in the imposition of life sentences or long fixed terms of imprisonment. It is not surprising, then, that the relevance of the principle of rehabilitation to the tribunals’ sentencing practice is limited. The SCSL Trial Chambers have repeatedly endorsed the Čelebići Appeals Chamber’s approach in this regard. In Sesay, Kallon and Gbao, for example, the Trial Chamber held that ‘[r]ehabilitation as a goal of punishment means the restoration of the convicted person to a state of physical, mental and moral health through treatment and education, so that he can become a useful and productive member of society. However, the Chamber recognises that despite its importance as an objective of punishment, rehabilitation is more relevant in the context of domestic criminality than international criminality’. Nevertheless, although the ICTY Appeals Chamber in Furundžija reiterated that retribution and deterrence form the

392 ICTY, Judgement, Prosecutor v. Delalić et al., Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 806; ICTY, Judgement, Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1079; ICTY, Judgement on Sentencing Appeal, Prosecutor v. Deronjić, Case No. IT-02-61-A, A. Ch., 20 July 2005, par. 136. It was held in Blaškić that rehabilitative considerations may be of limited relevance in the ICTY’s sentencing practice, in light of the gravity of the crimes dealt with under its jurisdiction; see ICTY, Judgement, Prosecutor v. Blaškić, Case No. IT-95-14-T, T. Ch., 3 March 2000, par. 782.

393 William A. Schabas, supra, footnote 388, p. 503. Schabas argues that ‘[i]t may be difficult or impossible for society to reconcile and rebuild without serious rehabilitation efforts undertaken within the context of effective action against impunity.’


main purposes of international sentencing,\textsuperscript{396} it also expressed ‘support for rehabilitative programs in which the accused may participate \textit{while serving his sentence}.’\textsuperscript{397} The Appeals Chamber was right to distinguish between rehabilitation’s role in penal management and its function as a sentencing rationale\textsuperscript{398} and it may be concluded that rehabilitation remains in full force as a principle governing the tribunals’ prison and detention law, notwithstanding its less prominent value in sentencing international crimes.\textsuperscript{399} This analysis also appears to underlie the Swedish investigators’ report on their visit to the UNDU, according to which ‘a convicted person has the right to serve his or her sentence under completely different forms than can be offered at the Detention Unit. For reasons of mental hygiene those sentenced should be transferred as soon as possible to the country in which the sentence is to be served, where they can also plan realistically for the future’.\textsuperscript{400}

\footnotesize

\begin{itemize}
  \item \textsuperscript{396} ICTY, Judgement, \textit{Prosecutor v. Furundžija}, Case No., IT-95-17/1-A, A. Ch., 21 July 2000, par. 291; ICTY, Judgement on Sentencing Appeal, \textit{Prosecutor v. Deronjić}, Case No. IT-02-61-A, A. Ch., 20 July 2005, par. 136. See, also, ICTY, Judgement, \textit{Prosecutor v. Kordić and Cerkez}, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1079, where it was held that ‘[i]t would violate the principle of proportionality and endanger the pursuit of other sentencing purposes if rehabilitative considerations were given undue prominence in the sentencing process’.
  \item \textsuperscript{398} Also Lazarus’ argument that the prominence of the German resocialisation ideal at a time when in other parts of the world rehabilitation had already lost greatly in popularity may be explained by the circumstance that the German resocialisation principle ‘refers to the purpose of prison administration, as distinct from the purpose of punishment in general’ may be understood this way; Liora Lazarus, \textit{supra}, footnote 13, p. 62.
  \item \textsuperscript{399} See, in a similar vein, Róisín Mulgrew, \textit{On the enforcement of sentences imposed by international courts - Challenges Faced by the Special Court for Sierra Leone}, Journal of International Criminal Justice 7, May 2009, p. 373-396, at 387-388.
  \item \textsuperscript{400} ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.11.
\end{itemize}
4.4 Conclusion

Chapter 3 described the legal regimes governing detention at the tribunals. It was argued there that detention management is characterised by a high level of discretionary decision making.\textsuperscript{401} In this Chapter, it has become apparent that the detention authorities’ discretionary powers are subject to the principles that underlie and constitute the core elements of the law governing detention at the international criminal tribunals. As observed by Liebling, ‘[t]he discretionary use of very high levels of power without recourse to a set of principles to guide its use leaves a wide legitimacy deficit’.\textsuperscript{402} Similarly, Rubin has stated that, ‘[t]he most interesting feature of super-strong discretion is that it is unknown in the modern administrative state. To be given authority to do anything one chooses, or authority subject to no standards at all, is to be in the position of an absolute monarch’.\textsuperscript{403} As such, the law’s principles provide guidance to the detention authorities in interpreting their obligations under the law, when confronted with lacunae in the law and when formulating or interpreting policy aims.

It has furthermore been argued that the problems involved in contextualising the tribunals’ detention regimes cannot be resolved by looking solely to the international or regional penal standards, since such standards were developed with the domestic prison context in mind. Indeed, if ‘contextualising’ is understood as ‘adapting to and taking into account the particularities of the international justice context’, the remaining Chapters of this research will advocate such an approach towards detention at the international criminal tribunals, in respect of both procedural and substantive rights of detained persons. In light of the principles’ open-endedness and their essentially protective function, they are perfectly suited to give direction to such a contextual interpretative approach.

\textsuperscript{401} See Alison Liebling, \textit{Prison Officers, Policing and the Use of Discretion}, Theoretical Criminology 4, 2000, p. 333-357, at 343.
\textsuperscript{402} \textit{Id.}, at 349.