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

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Chapter 5 Making and handling complaints

5.1 Introduction

‘The purpose of the disciplinary and grievance mechanisms in prison is, of course to maintain or restore order and safety in the institution. The system will be unable to achieve this if it relies entirely on coercion’.

Penal Reform International, Making Standards Work

This Chapter addresses the avenues available to persons detained at the detention facilities of the international criminal tribunals to complain about the conditions of their detention and about the treatment they receive. The premise of this Chapter is that, the mere establishment of such complaints mechanisms in accordance with international penal standards by the international criminal tribunals is not, by itself, sufficient to guarantee their effectiveness. As argued previously, such penal standards were developed with the experience and characteristics of national prisons in mind. Furthermore, whereas on the domestic level detainees and prisoners are, generally speaking, provided with a wide variety of avenues (national, regional or international; political, administrative or judicial (private law remedies or judicial review); formal or informal), to raise complaints, in the international context this is altogether different. This is because of, inter alia, the U.N.’s and the ICC’s immunity against civil claims before national courts and of the U.N. not being a party to such

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2 See, e.g., Hans Bevers, Niels Blokker and Jaap Roording, The Netherlands and the International Criminal Court: On Statute Obligations and Hospitality, Leiden Journal of International Law 16, 2003, p. 135-156, at 152-153 and the case-law cited there. See, also, the judgment of the Court of Appeal of The Hague of 30 March 2010, LJN: BL8979, Case Number 200.022.151/01. The ECtHR has held, however, that the immunity of international organisations is not absolute. In Beer and Ragan v. Germany, the Court held in relation to the immunity of an international organisation that ‘the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a
conventions as the ECHR and the (Optional Protocol to the) ICCPR which, in principle, makes it more difficult to raise intramural detention matters before international or regional human rights adjudicatory bodies. In addition, the international context’s ‘democratic deficit’ justifies taking a closer look at this particular aspect of detention or imprisonment. Further, whereas at the domestic level it is not unusual for non-governmental organisations or other external groups to actively promote and otherwise concern themselves with the wellbeing of prisoners and detained persons, there appears to be a blatant lack of such ‘external’ concern for individuals detained in the international context, particularly for persons already transferred to domestic prisons for the enforcement of their sentence. In this regard, Kelk has warned that where such outside concern is lacking, administrative avenues for submitting complaints and judicial review become more precarious.3

It may be assumed that a grievance mechanism with no built-in provision for any independent, outside review (which has already proven to be problematic in the national context) is wholly inadequate in a system where the executive bears no political accountability of any significance. This is even more worrisome in situations where the sole independent monitoring body (on the national level there is usually a plethora of both national and international inspection agencies) has no power to publish, let alone enforce its findings. Therefore, although it may appear misplaced to discuss inspection and grievance mechanisms together in a Chapter which concerns ‘making and handling complaints’, the co-dependency in the international context of complaints mechanisms for their effective functioning on the very few possibilities for

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outside control necessitates taking a closer look at those inspection mechanisms when examining complaints procedures.

In order to see what has been done by these institutions to repair the aforementioned areas of concern and deficits, it is crucial to consider how the tribunals’ internal grievance mechanisms have been set up and how they operate.

First, it is necessary to look at the theoretical underpinnings of internal grievance mechanisms. The term ‘internal’ does not necessarily imply that no form of review by an external agency or official to the first-line detention authorities is or can be built-in to the review. Rather it is used to distinguish such mechanisms from “extra-tribunal review”. On the basis of those theoretical underpinnings, the effectiveness and adequacy of the tribunals’ complaints mechanisms can be examined. Some of the points raised in the theoretical basis find support in the case-law of international and regional human rights bodies and in soft-law standards; both will be mentioned where relevant. After outlining the theoretical basis, the various avenues available to persons detained at the tribunals’ remand facilities to make complaints will be examined. The avenues available will be discussed separately, per distinct official or agency before which such complaints may be made. Each of these separate discussions will result in an ‘evaluation’, the purpose of which is to briefly highlight the most important findings and, on that basis, to make recommendations for the tribunals.

It is important to note that although this research focuses primarily on the legal position of detainees, the practicalities of prison life should not and cannot be neglected. Accordingly, where the paragraphs below solely appear to pay attention to how incarcerated persons’ perceive and evaluate the procedures available to them for making complaints, one should remain mindful of the need for grievance mechanisms to be supported and understood by detention staff. This can only be achieved if detention staff regards such mechanisms as fair and credible and if they genuinely recognise the adjudicator’s authority.
5.2 Complaints procedures: rationales and legal framework

5.2.1 Rationales

The most important reason for establishing grievance mechanism in places of confinement is, perhaps, to channel potentially disruptive emotions. Frustration, anger and anxiety may lead to violence or even riots, particularly when no mechanisms have been established to let off steam. Effective and credible systems for handling complaints may thus enhance security. Grievance mechanisms may also help administrators to identify security concerns before they develop into less-manageable situations. Furthermore, the very fact that detainees may complain to a higher organ may be an incentive for administrators to act more responsibly or act more carefully and may thus improve administrative decision-making. In this way, complaint mechanisms may help prevent abuse of power and arbitrary decision-making. The widespread use of discretion in total institutions increases the likelihood that such

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wrongs will occur.\(^9\) In conclusion then, complaints procedures may help achieve the ideal of the rule of law in closed institutions. Furthermore, through such complaints procedures, detention and prison law may be further developed and defined.\(^10\)

Another reason why (administrative) complaints procedures have been established in a domestic context lies in the fact that the judiciary has slowly abandoned its “hands-off” approach,\(^11\) which was characteristic of the way in which judges used to deal with prisoners’ complaints.\(^12\) Prior to adopting a more “hands-on” approach, the courts would deny jurisdiction in intramural matters and defer to the expertise of prison authorities.\(^13\) Since then, courts have slowly begun to acknowledge that prisoners retain their citizen’s rights, apart from those rights taken away by law either expressly or by necessary implication.\(^14\) Correctional authorities have generally questioned the appropriateness of courts dictating how “their” institutions must be run. In their view, courts lack the necessary expertise to make sound judgments on intramural matters.\(^15\)

Further, by establishing administrative complaints procedures, lengthy and costly court proceedings can be avoided. Moreover, from a detainee’s perspective, the courts’ aversion to deal with matters that do not amount to breaches of fundamental rights, also call for establishing procedures better fitted for dealing with intramural complaints.\(^16\)

The establishment of an administrative internal complaints procedure has often led to courts applying the ‘exhaustion doctrine’, \textit{i.e.} the requirement that the complainant


\(^14\) See Note and Comment, \textit{supra}, footnote 11, at 507 and the case-law cited there.


\(^16\) \textit{Id.}, p. 3; B. E. Bergesen III, \textit{supra}, footnote 4, at 9.
has exhausted the administrative grievance mechanism before the courts will accept
competence in intramural matters.\textsuperscript{17} Credible and effective internal grievance
mechanisms may reduce the amount of litigation in two ways: i) courts may make use
of the doctrines of exhaustion or abstention and defer to the administrative avenues
for submitting complaints; ii) the complainants themselves might opt for a more
effective administrative procedure.\textsuperscript{18} An accessory benefit – from the authorities’
point of view – may be that the complaint can be resolved ‘intramurally’, \textit{i.e.} before it
reaches the outside world.\textsuperscript{19} In some countries, the call for internal complaint
procedures also finds its origin in the emancipation of minorities in general society.\textsuperscript{20}
Another rationale for establishing such procedures may be thought to be in line with
such origins, \textit{i.e.} the procedures may benefit the rehabilitation of confined individuals
or at least may help prevent their deterioration\textsuperscript{21} by, \textit{inter alia}, increasing their self-
estee\textsuperscript{22} and by showing them how problems can be solved in a society governed by
the rule of law.\textsuperscript{23} Conversely, the lack of ‘adequate, credible and effective grievance
mechanisms may confirm (…) the inmate’s conception of a pervasively hostile un-
receptive environment’.\textsuperscript{24} This rationale is considered particularly poignant in
respect of total institutions, where the confined have lost control over even the most
trivial aspects of their lives and are governed to a considerable extent by discretionary
decision-making.\textsuperscript{25}

\textsuperscript{17} J. Michael Keating, JR., Virginia A. McArthur, Michael K. Lewis, Kathleen Gilligan
\textsuperscript{18} Van Swearingen, \textit{supra}, footnote 4, at 1359. See, also, Samuel Jan Brakel, 1982, \textit{supra},
footnote 4, at 118; Samuel Jan Brakel, 1983, \textit{supra}, footnote 4, at 395; Arthur L. Alarcón, 
\textit{supra}, footnote 5, at 594.
\textsuperscript{19} See, in a similar vein, Van Swearingen, \textit{supra}, footnote 4, at 1354.
\textsuperscript{20} J. Michael Keating, JR., Virginia A. McArthur, Michael K. Lewis, Kathleen Gilligan
footnote 4, 421.
\textsuperscript{22} Frieder Dünkel and Dirk van Zyl Smit, \textit{Conclusion}, in: Dirk van Zyl Smit and Frieder
Dünkel (eds.), Imprisonment Today and Tomorrow – International Perspectives on Prisoners’
425.
\textsuperscript{23} Note and Comment, \textit{supra}, footnote 11, at 524.
\textsuperscript{24} \textit{Id.}, at 525.
\textsuperscript{25} Stephen Livingstone, Tim Owen QC and Alison MacDonald, \textit{supra}, footnote 9, p. 41; J.
Serrarens, \textit{Het klacht- en beroepsrecht onder de Penitentiaire Beginselenwet [The right to
complain and appeal as laid down in the Penitentiary Principles Act]}, in: M. Boone and G. de
Legitimate complaints must also be able to be aired and heard from the perspective of fairness, justice or even dignity.\(^{26}\) In his book, ‘A Theory of Justice’, John Rawls cites justice as the prime virtue of social institutions: ‘[j]ustice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust’.\(^{27}\) In a similar vein, Van Zyl Smit refers to the Woolf Report (drawn-up in reaction to prison unrest in the United Kingdom in 1990),\(^{28}\) which stressed ‘the importance of perceptions of fairness in getting prisoners to accept the legitimacy of the exercise of authority in prison’. According to Van Zyl Smit, this finding ‘has been underlined by subsequent empirical research’.\(^{29}\) Fairness, as understood in the Woolf Report, includes the notion of due process or procedural justice and thus encompasses the fairness of procedures, including grievance procedures.\(^{30}\) In the Netherlands, one of the rationales underlying the establishment of complaints procedures in the Dutch prison system was that it may contribute to the humaneness of the enforcement of prison sentences. The right to complain ‘can serve as a means to safeguard and review the humaneness of detention and the quality of institutional policy’.\(^{31}\) In this respect, the Dutch Government took into account the relevant recommendations in the EPR.\(^{32}\)


\(^{28}\) See, in more detail, Prison Reform Trust, The Woolf Report, A Summary on the Findings and Recommendations of the Inquiry into Prison Disturbances, Prison Reform Trust, 1991. The foreword provides that ‘[t]he riot at Strangeways Prison in April 1990 and the protests and disturbances which followed at many more gaols during the same month, were the most serious in British penal history. On 6 April 1990, the then Home Secretary, David Waddington, appointed Lord Justice Woolf to head an Inquiry into the disturbances and to consider the wider implications for the prison system’.


\(^{32}\) J. Serrarens, supra, footnote 25, at 211.
Initially, the fear of being flooded by complaints by inmates – the ‘floodgate argument’ - was adduced by some domestic courts as a reason to stick with the aforementioned “hands-off” approach. Subsequent practice has largely proven such fears to be unfounded. It appears, in this respect, that most detainees do not abuse their right to make complaints.\(^\text{33}\) In respect of the abandoning of the “hands-off” approach by English courts, Wesley-Smith has stated that “[t]he floodgates argument was dismissed, and the fear that order and discipline would be undermined was outweighed by the inadequacy of any non-judicial remedy and the injustice which would be caused by the lack of resort to judicial review”\(^\text{34}\).

A further argument against establishing grievance mechanisms in prisons has been that any kind of review will undermine the authority of the person in charge of the day-to-day management of the penal institution.\(^\text{35}\) However, generally speaking, it is more likely that a fair grievance mechanism will improve administrative decision-making and thereby enhance the authority of the prison director. Nevertheless, it remains of paramount importance (for reasons of safety and security) that the adjudicator seriously considers the views of the prison administration.

Adjudicators may themselves feel that they lack the necessary expertise to decide on complex matters of prison administration.\(^\text{36}\) However, this problem may be avoided by ensuring that only persons with sufficient expertise are appointed as adjudicators, that such adjudicators remain conscious of the difficulties involved in prison administration and that they exercise restraint in deciding on matters which touch upon the administrators’ discretionary powers.\(^\text{37}\)

A further argument against judicial intervention in intramural matters is based on the idea of the separation of powers. The argument goes that since prisons operate under the responsibility of the executive, courts have no competence in intramural matters. This argument, however, is not convincing (even in a domestic context). It has been argued in this respect that ‘a mere grant of authority cannot be taken as a blanket

\(\text{33}\) In respect of the Netherlands, see J. Serrarens, \textit{supra}, footnote 31, at 227; F.W. Bleichrodt, \textit{supra}, footnote 6, at 392.

\(\text{34}\) Peter Wesley-Smith, \textit{supra}, footnote 12, at 323.

\(\text{35}\) ICTR, interviews conducted by the author with the UNDF detention authorities, Arusha - Tanzania, May 2008; ICTR, interviews conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008; Note and Comment, \textit{supra}, footnote 11, at 509.

\(\text{36}\) Peter Wesley-Smith, \textit{supra}, footnote 12, at 315.

\(\text{37}\) Note and Comment, \textit{supra}, footnote 11, at 523.
waiver of responsibility in its execution’. At the international criminal tribunals, where the Registry and the judiciary both act as the legislature when adopting or drafting prison rules and regulations, and where the Registry, as the ‘executive’, must answer to the President, who also forms part of the judiciary, the argument appears to carry no validity whatsoever. There simply is no adequate separation of powers.

According to the U.N. Manual on Human Rights Training for Prison Officials, ‘[i]t is in the interest of all concerned that the system for dealing with requests, complaints and grievances should include certain characteristics. These include accessibility, credibility, openness, reasonableness, objectivity, sensitivity, flexibility, efficiency and speed’. Admittedly, it is not easy to establish effective and, by extension, credible grievance mechanisms for prisoners. In order for such mechanisms to be effective and credible, they must be capable of leading to successful outcomes for litigants. The fact that detainees do actually make use of the system can be seen as a(n inconclusive) positive indication of effectiveness. Confined persons will only resort to internal grievance mechanisms if they consider them to be ‘fair, expeditious and impartial’ and if ‘relief will be afforded where justified’.

As to expeditiousness, it has been held that ‘[t]here is probably no institution in society where time is so central a consideration as it is in prison’. Mechanisms that do not deal with issues expeditiously are likely to confirm the detained persons’ distrust in the system. Moreover, the nature of most of the issues complained about in intramural grievance procedures, such as the quality or quantity of food or visiting rights, dictates that the complainant should not have to wait too long before a decision is taken on his or her complaint. It should be recalled in this regard that, in total institutions, confined persons are totally dependent on the detention authorities for things which appear to be mere trivialities to free persons. Therefore, time limits for decision-making should be established and complainants should be guaranteed a response to the grievances submitted by them.

38 See id., at 516 and the case-law cited there.
41 This was held by Judge Donald P. Lay, a former member of the U.S. Court of Appeals for the 8th Circuit; cited in id., p. 4.
42 Id., p. 14.
43 J. Serrarens, supra, footnote 25, at 212.
Provision must also be made for dealing with emergency problems, *i.e.*, disputes that concern rights which might prove irretrievable if the complainant is required to follow the regular complaints mechanisms. Regular mechanisms are not effective in dealing with issues that must be handled swiftly.\(^44\) In the Netherlands, for example, a complainant who has submitted a formal complaint to the Complaints Committee through the regular grievance mechanism may approach the President of the Appeals Committee with the request to partially or wholly suspend the administrative decision complained about.\(^45\) Suspension may also be requested by both the prison governor and the complainant of a decision of the Complaints Committee while appeal is pending.\(^46\) Requests for suspension are tested only ‘marginally’, which implies that there is only room for a temporary assessment as to whether the decision is in breach of a legal provision, or is so unreasonable or unfair that an urgent interest for suspension can be argued to exist.\(^47\) The President of the Appeals Committee is not empowered to impose a positive, substantive decision; he or she may only suspend another body’s or official’s decision.

Proceedings must comply with certain standards of quality in order for them to be able to serve the aforementioned rationales for adopting such mechanisms in the first place. In this regard, Van Swearingen warns that ‘[b]y having in place elaborate internal grievance procedures guaranteeing multiple levels of review, prisons may *signal* compliance with (…) standards when, in fact, their grievance procedures do not actually protect constitutionally defined rights. To the extent this is true, “cosmetic compliance” tends to benefit the prison, not the prisoner’.\(^48\) He argues that ‘prison guards and administrators are likely to interpret ambiguities or gaps in the rules in ways that enhance their own self-interested position over that of the prisoners. As complaint handlers repeatedly address similar situations, these gaps are likely to be filled in ways that solidify the preferred policies of those in power’.\(^49\) This is then reinforced by the usual inherent lack of equality between disputants in inmate

\(^{45}\) Article 66 of the Dutch Penitentiary Principles Act (*Penitentiaire Beginselenwet*).
\(^{46}\) *Id.*, Article 70.
\(^{47}\) See, *e.g.*, RSJ, 02/1182/SGA, 20 June 2002; RSJ, 02/1344/SGA, 10 July 2002; RSJ, 02/1025/SGA, 28 May 2002.
\(^{49}\) *Id.*, at 1365.
grievance procedures, as well as by the often encountered presumption among grievance adjudicators that official reports are more trustworthy than the inmate’s account of what happened or the presumption that official duties have been duly performed. Viewed in this light, fairness requires that proceedings are as adversarial as possible in order to minimise the negative effects of the aforementioned inequality between the disputants.

In order for grievance mechanisms to serve the aforementioned rationales, it is also necessary that reasoned decisions are given on complaints and all the parties involved are heard. Moreover, the requirements of impartiality and independence imply at the very least that matters can be brought before an agency outside of the correctional institution (first-line detention authorities). As noted by Van Swearingen, ‘prisons and correctional departments have a set of priorities that is so at odds with prisoners’ interests that a more neutral body might more effectively resolve inmate grievances’. His power-solidifying argument referred to above is an additional argument for bringing intramural matters before an adjudicator outside the (first-line) detention administration. In the previously mentioned Woolf Report it was stated that ‘the presence of an independent element within the Grievance Procedure is more than just an ‘optional extra’. The case for some form of independent person or body to consider grievances is incontrovertible. (…) A system without an independent element is not a system which accords with proper standards of justice’. Similarly, the U.N. Manual on Human Rights Training for Prison Officials states that prisoners should have access to an independent body for airing grievances. The suspicion with which detained persons view complaints mechanisms that are institutionally controlled can only be overcome by allowing them to raise a matter before an agency.

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51 Van Swearingen, supra, footnote 4, at 1372. See, also, supra, Chapter 4, footnote 17, where reference is made to the argument by Peters and Allan that adversarial proceedings can fulfill an important function in clarifying and interpreting the content of principles and thus their ‘vindication’ in accordance with their essentially protective function.
53 Id., p. 22, 27, 33; Penal Reform International, supra, footnote 1, par. 16, p. 33; Arthur L. Alarcón, supra, footnote 5, at 594; Van Swearingen, supra, footnote 4, at 1372, 1381.
54 Van Swearingen, supra, footnote 4, at 1354.
55 Cited in Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 9, p. 50.
independent of the executive, one that has the power to right institutional wrongs and
to make information public.57 Moreover, outside control is necessary to ensure that
procedural rules are taken into account, to ensure implementation of decisions taken
on complaints and to prevent reprisals for submitting complaints.58

Finally, it should be acknowledged that the ‘[s]uccessful implementation of a
grievance mechanism requires a strong administrative leadership committed to the
introduction of a program that will work’.59 According to the U.N. Manual on Human
Rights Training for Prison Officials, ‘[a]t the heart of any system of remedies there
must be the desire and a willingness on the part of all concerned to tackle issues
positively’.60

5.2.2 Legal framework

The right to an effective remedy for violations of fundamental rights has been laid
down in such provisions as Article 2(3) ICCPR and Article 13 ECHR. In addition,
Articles 13 and 16 of the Convention against Torture and Other Cruel, Inhuman or
Degrading Treatment of Punishment demand that State parties shall ensure that any
individual who alleges to have been subjected to torture or other cruel, inhuman or
degrading treatment or punishment ‘has the right to complain to, and to have his case
promptly and impartially examined by, its competent authorities’. Article 33 of the
U.N. Body of Principles provides in Paragraph 1 that ‘[a] detained or imprisoned
person or his counsel shall have the right to make a request or complaint regarding his
treatment (...) to the authorities responsible for the administration of the place of
detention and to higher authorities and when necessary, to appropriate authorities
vested with reviewing or remedial powers’. Paragraph 2 further states that in the event
that the detained person or his counsel is not capable of exercising this right, the
detainee’s relatives or any other person with knowledge of the case may exercise that
right. Confidentiality must be observed upon the complainant’s request.61 The U.N.

57 J. Michael Keating, JR., Virginia A. McArthur, Michael K. Lewis, Kathleen Gilligan
58 Id., p. 28.
59 Id., p. 27, 33.
132.
61 Principle 33(3) of the U.N. Body of Principles.
Body of Principles prescribes that requests and complaints must be dealt with promptly and replied to without undue delay and, further, that in case the request or complaint is rejected, or in case of inordinate delay, the complainant may bring the matter before a judicial or other authority. Finally, Principle 33 emphasises that the complainant shall not suffer prejudice for making requests or complaints. Rule 36 of the SMR provides that: ‘(1) Every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him. (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director or other members of the staff being present. (3) Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels. (4) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.’

Further, on the regional level, the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (‘The Robben Island Guidelines’) stipulate in Guideline 17 that States must ‘[e]nsure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment’. In addition, the EPR state that prisoners, both individually and collectively, must have ample opportunity to make requests or complaints to the director of the prison or any other competent authority. 62 Reasons must be provided to the complainant when his request or complaint is denied or rejected. The EPR also state that detainees have the right to appeal to an independent authority. Rule 70(7) explicitly provides for the right to seek legal advice about complaints and appeals procedures and to seek legal assistance ‘when the interests of justice [so] require’. The official Commentary to the EPR provides in respect of Rule 70 that complaints and requests should be dealt with promptly. In decisions, reasons should be given as to whether and which action will be taken. If a complaint is sent to an agency that lacks the power to deal with the issue itself, it must forward the complaint to the competent body. Further, it is stipulated

62 Rule 70(1) of the EPR.
that communication with the authority that decides on complaints and appeals shall be confidential.

In the tribunals’ case-law it has been recognised that the tribunals must ensure that detained persons have an effective remedy against any violation of their rights during their detention.\(^63\) The ECtHR has held that complaints procedures must comply with certain basic criteria in order to comply with the right to an effective remedy for arguable claims of breaches of fundamental rights. The right to an effective remedy under Article 13 has, generally speaking, been interpreted as not requiring any specific type of remedy. Nonetheless, where prevention of a specific type of violation cannot be ensured, ‘effectiveness’ demands adequate redress, including compensation.\(^64\) Further, the Court has held that ‘the nature of the right at stake has implications for the type of remedy the State is required to provide under Article 13. Where violations of the rights enshrined in Article 2 are alleged, compensation for pecuniary and non-pecuniary damage should in principle be possible as part of the range of redress available’.\(^65\)

In the case of *Rodic and three others v. Bosnia and Herzegovina*, the ECtHR noted that prison inspectors under the supervision of the Ministry of Justice of Bosnia and Herzegovina were mandated to supervise the treatment of prisoners and material conditions of detention. In determining whether such supervision constituted an effective remedy, which had to be exhausted by the applicants before submitting a complaint to the Court, it held that although a prison inspector is not a judicial authority, this ‘does not, of itself, render a petition to such an inspector ineffective’.\(^66\) It noted in this regard that the inspectors were obliged to act upon any petition and that their orders were legally binding. It also noted that the inspectors’ conduct was subject to review by the Constitutional Court. Nevertheless, it found that the available remedy was ineffective, holding that ‘[w]hile a petition to prison inspectors, in

\(^{63}\) See, e.g., STL, Order on Conditions of Detention, Case No. CH/PRES/2009/01/rev., President, 21 April 2009, par. 10 and the case-law cited there.
combination with a constitutional appeal, is capable of providing redress for the alleged breaches, the Government failed to demonstrate that it offered reasonable prospects of success: they were unable to produce a single report prepared by prison inspectors attached to the Ministry of Justice of the Federation of Bosnia and Herzegovina following a prisoner’s petition’.\(^\text{67}\) In other words, the procedure must not only provide theoretical guarantees; it must also be shown that such mechanisms actually provide an effective remedy. The fact that a procedure has never been beneficial to prisoners in enforcing their rights may be considered a conclusive negative indication in this regard.

It further follows from the Court’s case-law that a procedure must end with a final binding decision\(^\text{68}\) by an independent authority. It has been held that ‘the authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective’.\(^\text{69}\) In relation to the requirement of independence, the Court held in \textit{Silver and others v. the United Kingdom} that ‘[a]s for the Home Secretary, if there were a complaint to him as to the validity of an Order or Instruction under which a measure of control over correspondence had been carried out, he could not be considered to have a sufficiently independent standpoint to satisfy the requirements of Article 13 (…): as the author of the directives in question, he would in reality be judge in his own cause’.\(^\text{70}\)

Further, in \textit{Labita v. Italy}, the Court held that effective investigations should have been conducted into serious complaints concerning an alleged breach of Article 3. The Court considered that ‘where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation. As with an investigation under Article 2,

\(^{67}\) \textit{Id.}, par. 58-59.
\(^{68}\) \textit{ECtHR, Silver and others v. the United Kingdom}, judgment of 25 March 1983, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, par. 115.
\(^{69}\) \textit{Id.}, par. 113; \textit{ECtHR, Onoufriou v. Cyprus}, judgment of 7 January 2010, Application No. 24407/04, par. 121.
\(^{70}\) \textit{ECtHR, Silver and others v. the United Kingdom}, judgment of 25 March 1983, Application Nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, par. 116.
such investigation should be capable of leading to the identification and punishment of those responsible’. 71 Articles 2 and 12 to 16 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also demand that States ‘prevent, investigate, punish and redress acts of torture or cruel, inhuman and degrading treatment or punishment committed within their territories’. According to Penal Reform International’s handbook ‘Making standards work’, as the aforementioned provisions ‘affect the rights of prisoners, these obligations entail the establishment of an efficient prison review system for dealing with prisoner complaints’. 72

The requirements set forth in Article 6 ECHR, which concerns the right to a fair trial, are only relevant where a complaint concerns an alleged breach of a Convention right. Article 6 prescribes, inter alia, a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law. In 2009, the ECtHR issued an important judgment in this regard. 73 In the case of Enea v. Italy, the ECtHR held that the applicability of the right to access to (an independent an impartial) court under Article 6 depends on whether there is a ‘dispute’ over a ‘right’ and whether the right in question is a ‘civil’ one. 74 Firstly, a ‘dispute’ must be genuine and serious, which implies that it ‘may relate not only to the actual existence of a right but also to its scope and the manner of its exercise, and the outcome of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play’. 75 Secondly, as to whether the dispute in the Enea case concerned a ‘right’, the Court held that ‘most of the restrictions to which the applicant was allegedly subjected relate to a set of prisoners' rights which the Council of Europe has recognised by means of the European Prison Rules, adopted by the Committee of Ministers in 1987 and elaborated on in a Recommendation of 11 January 2006 (Rec(2006)2). Although this recommendation is not legally binding on the member States, the great majority of them recognise that prisoners enjoy most of the rights to which it refers and provide

71 ECtHR, Labita v. Italy, judgment of 6 April 2000, Application No. 26772/95, par. 131.
72 Penal Reform International, supra, footnote 1, p. 53, par. 88.
73 ECtHR, Enea v. Italy, judgment of 17 September 2009, Application No. 74912/01.
74 Id., par. 98.
75 Id., par. 99.
for avenues of appeal against measures restricting those rights’. On this basis it concluded that ‘a “dispute (contestation) over a right” for the purposes of Article 6 § 1 can be said to have existed in the instant case’. Finally, as to the question of whether the dispute concerned a ‘civil’ right, the Court simply held that ‘some of the restrictions alleged by the applicant – such as those restricting his contact with his family and those affecting his pecuniary rights – clearly fell within the sphere of personal rights and were therefore civil in nature’. It transpires from the Enea judgment that it can no longer be maintained that not all ‘rights’ recognised as such in the EPR can be considered rights proper. Hence, genuine disputes concerning alleged breaches of rights recognised as such in the EPR and which can be subsumed under a Convention right fall within the ambit of Article 6(1) ECHR.

In interpreting the ‘independence’ requirement under Article 6 ECHR, the ECtHR has held that ‘regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against extraneous pressure and the question whether the body presents an appearance of independence’. Impartiality has been argued by the Court to consist of two components. Firstly, ‘the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, must offer sufficient guarantees to exclude any legitimate doubt in this respect. Under the objective test, it must be determined whether, quite apart from the judges’ personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings’.

76 Id., par. 101.
77 Id., par. 102.
78 Id., par. 103.
79 See, also, J. de Lange and P.A.M. Mevis, De penitentiaire beklaag- en beroepsprocedures; recht op toegang tot onafhankelijke en onpartijdige rechter [Penitentiary complaints and appeals procedures; the right to access to an independent and impartial adjudicator], Sancties 6, Kluwer, 2009, p. 347-357.
80 ECtHR, Lormines v. France, judgment of 9 November 2006, Application No. 65411/01, par. 59.
81 Id., par. 60.
Where an adjudicating body also fulfills advisory or legislative functions, the appearance of bias may arise.\(^82\) The case of \textit{Ky v. Finland} concerned a judge who was also a member of parliament, \textit{i.e.} the combination of judicial and legislative functions in an individual.\(^83\) This raised the question of whether there was an appearance of bias under the objective impartiality test. The Court found that the person concerned had not ‘exercised any prior legislative, executive or advisory functions in respect of the subject matter or legal issues before the Court for Appeal for decision in the applicant company’s appeal’.\(^84\) The judicial proceedings could therefore not ‘be regarded as involving “the same case” or “the same decision”’ in breach of Article 6.\(^85\) In \textit{Procola v. Luxembourg}, the Court did find such an appearance of bias in respect of an organ fulfilling both advisory and judicial functions.\(^86\) In \textit{McGonnell v. the United Kingdom}, the Court found a breach of Article 6 regarding a combination of legislative and judicial functions, holding that ‘any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue’.\(^87\)

A further requirement for effective grievance mechanisms is that detained persons are duly informed of their (procedural) rights. Rule 36 of the SMR demands that, upon admission, every prisoner is provided with written information about ‘the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution’. If the prisoner is illiterate, such information should be conveyed orally. Similar demands can be found in Rule 30 of the EPR and in the CPT reports.\(^88\)

\(^82\) Id., par. 73.
\(^84\) Id., par. 34.
\(^85\) See, also, ECtHR, \textit{Kleyn and others v. the Netherlands}, judgment of 6 May 2003, Application Nos. 39343/98, 39651/98, 43147/98 and 46664/99.
\(^87\) ECtHR, \textit{McGonnell v. the United Kingdom}, judgment of 8 February 2000, Application No. 28488/95, par. 55.
\(^88\) See, \textit{e.g.}, CPT, Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001, CPT/Inf (2002) 6, published on 18 April 2002, par. 79.
5.3 Complaints procedures at the international criminal tribunals

5.3.1 Making complaints to the person in charge of the day-to-day management of the facility

The Definitions Section of the ICTY Rules of Detention define the term ‘Commanding Officer’ as the ‘official of the United Nations appointed as the head of the staff responsible for the administration of the detention unit, or his deputies, as appointed by the Registrar’. Rule 2 further states that ‘[u]nder the authority of the Registrar, the Commanding Officer shall be responsible for all aspects of the day-to-day management of the Detention Unit, including security and order, and may make all decisions relating thereto, except where otherwise provided in these Rules of Detention’.

In light of Rule 2, it is logical to assume that the Commanding Officer is the first point of reference for detainees in submitting requests or complaints relating to intramural issues. Moreover, the Rules of Detention provide that ‘[e]ach detainee may make a complaint to the Commanding Officer at any time’. The Regulations for the Establishment of a Complaints Procedure for Detainees provide that such a request or complaint may also be made to the Commanding Officer’s representative. Complaints may be made in writing or orally. Both the complaint itself and the action taken be recorded in a daily log.

In deciding on a complaint, the Commanding Officer may i) be of the opinion that the complaint concerns an issue of which the rectification falls outside his powers; ii) consider the complaint justified; or iii) consider the complaint unjustified. The Commanding Officer must inform the detainee accordingly. If the Commanding Officer considers a complaint justified, the situation must be rectified ‘as soon as practicable’. If the matter is considered to fall outside his rectifying powers, or if the Commanding Officer considers the complaint to be unjustified, the detainee may

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89 See, also, ICTY, Decision on the Prosecutor’s Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić, Prosecutor v. Delalić, Delić and Landžo, Case No. IT-96-21, T. Ch., 31 October 1996, par. 1.
make a *formal* complaint to the Registrar in accordance with the Regulations.\textsuperscript{90} The right to be assisted by counsel is explicitly limited to formal complaints, which implies that detainees are not entitled to legal assistance in their dealings with the Commanding Officer. In this regard, David Kennedy, the Commanding Officer of the UNDU, has stated that

‘The complaint has to come from the detainee. But if the detainee had had assistance from counsel to write the complaint I wouldn’t turn it away. I’d just deal with it as a complaint. They all have counsel, so if they want to, they can. But generally, what we’re talking about, is custodial level stuff and that would be directly from the detainee to me or to my Deputy, or to one of my assistants, depending on what the subject was’.

When asked about the number of complaints submitted to him, he said that

‘probably two to four [complaints] a week [are filed by the detainees], I would say. And there are peaks and troughs. Sometimes it depends on what position the person is in. Some people don’t complain at all, and some people put in a couple, and that’s natural. The issue is – and I’m not talking about any of the individuals concerned – the thing which detainees have in common is that they have time on their hands. And individuals, when they have a lot of time on their hands, will use different strategies to deal with that, whether it is becoming the best chess player in the unit, whether it is becoming the best tennis player, whether it is reading – you know, books you’ve always said you wanted to read and you never had the opportunity to – so everybody has a strategy. Some strategies are writing, and what better than to write to the Commanding Officer? That’s the way it works’.\textsuperscript{91}

\textsuperscript{90} The term ‘formal complaint’ appears to be reserved for complaints made to the Registrar in accordance with the Regulations.
\textsuperscript{91} ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the UNDU, The Hague – Netherlands, 17 June 2011.
As at the ICTY UNDU, under the ICTR Rules of Detention, the UNDF Commanding Officer is responsible for the administration of the Detention Facility. Rule 82 of the ICTR Rules of Detention provides that ‘[e]ach detainee may make a complaint to the Commanding Officer or his representative at any time’. The ICTR detention authorities have established regulations outlining the authorised methods of making complaints. These Regulations point to Rule 56 of the Provisional Rules of Detention as their legal basis. Rule 56 merely stipulates that information shall be provided to detainees concerning the approved methods for them to make complaints. Although these internal Regulations (to a large extent) reiterate the content of Rules 82 to 86 of the Rules of Detention, there are some minor discrepancies. For example, the right laid down in Rule 82 to make a complaint ‘at any time’ has, for practical reasons, been restricted to ‘Monday to Friday, from 9.30 a.m. to 4.30 p.m.’. Paragraph 4 of the Regulations states that ‘[n]o request or complaint will be censored...’

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92 Rule 3 of the ICTR Rules of Detention provides that ‘[s]ubject to the overriding jurisdiction of the Tribunal, the Commanding Officer shall have sole responsibility for all aspects of the daily management of the Detention Unit, including security and order, and may make all decisions relating thereto, except where otherwise provided in these Rules’. See, further, ICTR, Decision on “Appellant Hassan Ngeze’s Motion for Leave to permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays”, Nahimana et al. v. the Prosecutor, Case No. ICTR-99-52-A, A. Ch., 25 April 2005, par. 2; ICTR, Decision on Hassan Ngeze’s Motion to set Aside President Møse’s Decision and Request to Consummate his Marriage, Nahimana et al. v. the Prosecutor, Case No. ICTR-99-52-A, A. Ch., 6 December 2005; ICTR, Decision on Hassan Ngeze’s Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, Nahimana et al. v. the Prosecutor, Case No. ICTR-99-52-A, Pre-Appeal Judge, 12 December 2005; 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; ICTR, Decision on Ndayambaje’s Extremely Urgent Motion Regarding Permission for each of Ndayambaje’s Counsel to Bring a Laptop into the UNDF, Prosecutor v. Ndayambaje, Case No. ICTR-98-42-T, T. Ch. II, 23 November 2007, par. 20; ICTR, Decision on Hassan Ngeze’s Motions of 15 April 2008 and 2 May 2008, Ngeze v. the Prosecutor, Case No. ICTR-99-52-R, A. Ch., 15 May 2008, p. 3.

93 Complaints Procedure for Detainees, formulated pursuant to Rule 56 of the Provisional Rules covering the detention of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal (on file with the author).

94 Provisional Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, approved by the Tribunal on 9 January 1996, ICTR/2/L.3). Rule 56 of the Provisional Rules of Detention’s content is similar to that of Rule 56 of the Rules of Detention.

95 Paragraph 2 of the Complaints Procedure for Detainees stipulates that ‘[i]t shall be possible to make requests or complaints only at the times stipulated by the Commanding Officer. (0930h – 1630h Monday to Friday)’.
in any way, but it must be made in the proper form to the Commanding Officer’. Standard forms are made available to detainees for this purpose.

The right to make complaints has not been restricted in subject matter in Rule 82 of the Rules of Detention. No provisos are built in concerning the nature of the issue that may be complained about, which implies that it is irrelevant for the admissibility of a complaint whether or not it concerns a decision or a ‘de facto act’ or whether a decision was taken on behalf of or by the Commanding Officer or by any other staff member. It is therefore not inconceivable for complaints to be filed with the Commanding Officer that concern, for instance, matters falling squarely within the Medical Officer’s mandate.96 In addition, the right to complain is not limited to conditions of detention affecting detainees individually. As such, they appear to be permitted to complain about (general) rules and regulations or the institution’s general policy.

Rules 82 to 86 of the Rules of Detention do not mention the detainees’ right to make requests. This lacuna might easily be overcome by framing requests as complaints. However, the classification of minor requests as official complaints may trivialise or even undermine the right to make complaints. It would therefore be preferable for the right laid down in the Regulations to make complaints to be expanded to encompass the right to make requests to the Commanding Officer or his representative.

In respect of complaints made to the Registrar or to the President, Rule 86 prescribes that the receipt of such a complaint must be acknowledged within seventy-two hours. No such requirement exists in relation to complaints filed with the Commanding Officer or his representative. Nor has an explicit obligation been laid down for the Commanding Officer to respond to requests or complaints. However, it follows from Rule 83 that ‘not being satisfied with the Commanding Officer’s response’ is a constitutive requirement for filing a complaint with the Registrar. A regulation thus needs be inserted which equates the Commanding Officer’s failure to respond to a request or complaint within a certain time-frame with a denial or refusal. In the absence of such a provision, the phrase ‘[i]f not satisfied with the response from the Commanding Officer’ may be interpreted as covering the situation of a detainee being dissatisfied for receiving no response at all.

96 Rule 31 of the ICTR Rules of Detention.
Rule 86 refers only to complaints made to the Registrar. It states that ‘[e]very complaint made to the Registrar shall be acknowledged within seventy-two hours. Each complaint shall be dealt with promptly and replied within a reasonable period of time’. It was already noted that a similar notification requirement is lacking in the procedure before the Commanding Officer. The requirements set forth in the second sentence can be found in Paragraph 5 of the Regulations, which 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’. In the absence of (publicly accessible) case-law on the matter, the precise meaning of such terms as ‘evidently frivolous’, ‘promptly’, ‘a reasonable time’ or ‘without undue delay’ remains unclear. The absence of specific time-limits for responding to complaints or requests of detainees renders the lacuna signaled above in relation to non-responsiveness of detention authorities even more problematic. Although there is no case-law on the interpretation of such terms, it is reasonable to assume that the detention authorities’ conduct in this regard will be subject to judicial scrutiny (depending on the interest of the complainant in receiving a prompt reply). An example can be found in Nahimana. His appeal against the disciplinary sanction imposed on him by the UNDF authorities, involving a suspension of his telephone privileges for a period of two weeks, was filed by the UNDF authorities (on behalf of Nahimana) with the Registry after the sanction was already in its twelfth day of enforcement. Nahimana had already communicated his wish to appeal the disciplinary punishment on the fourth day of the enforcement of the sanction.97 The President strongly disapproved of the late filing by the UNDF authorities, holding that such practice was ‘inexcusable’.98 Although the case concerned disciplinary proceedings for which strict time-limits apply,99 it is reasonable to assume that the President, in circumstances that demand swift action, will scrutinise the promptness of the detention authorities in dealing with complaints.

The right of detainees to legal assistance is provided for in Rule 65 of the Rules of Detention. ICTR detainees have also made use of legal assistance in

97 ICTR, The President’s Decision on Ferdinand Nahimana’s Appeal Against the Disciplinary Measures Imposed on him by the UNDF, Prosecutor v. Nahimana, Case No. ICTR-96-11-T, President, 10 February 2003, par. 1.
98 Ibid.
99 See, in more detail, Chapter 6.
connection with intramural matters. Some detainees also claim to have been assisted by other inmates - ‘colleagues’ - in order to familiarise themselves with both substantive rights and how to make complaints. The Rules do not specify whether a detainee can be represented or assisted by counsel or, indeed, by another inmate, when preparing or presenting a complaint to the Commanding Officer. According to the Commanding Officer, usually a detainee will communicate his grievance to him personally. Various defence counsel claim to have occasionally represented their client before the Commanding Officer, in order to draw the authorities’ attention to their client’s grievance where the detained person did not feel that his complaint was taken seriously. For the detention authorities, the constant presence of high profile lawyers may not always be easy. Both the detention authorities of the ICTR UNDF and the SCSL Detention Facility have expressed discomfort in this regard. The SCSL detention authorities have said that

‘The access to lawyers was incredibly stressful for persons running this facility who constantly were writing reports saying ‘no, this did not happen’. There were complaints about food to the point that we got a person from the WHO to come and look at our menu. And yes, they got more than they deserved; it exceeds the international food guide or whatever it’s called. One day they wanted red apples; we got green apples in each day; it went to the press; it went to the Court. We composed the meal with the quantity of fruit required; we invited the Registry as well as members of the press to come and sample food. The detainees weren’t happy with the portions of rice; we give fourteen cups of rice to eight of them – they don’t even need it’. 

David Kennedy, the Commanding Officer of the ICTY UNDU, said however that

100 ICTR, interviews conducted by the author with persons detained at the UNDF, Arusha - Tanzania, May 2008; ICTR, interviews conducted by the author with Defence Counsel working before the ICTR, Arusha - Tanzania, May 2008.
101 ICTR, interviews conducted by the author with persons detained at the UNDF, Arusha - Tanzania, May 2008.
102 Ibid.
103 ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008; SCSL, interview conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.
104 SCSL, interview conducted by the author with the SCSL detention authorities, Freetown – Sierra Leone, October 2009.
‘it’s not stressful. It’s a fact of life that people are going to question how you run a detention unit. That’s the way it will always be. But I don’t have people coming into my office. Most contact would be formal either email or letter – hard copy. No, I don’t have that. There’s a book issued in the UK to governing governors and it says ‘judge on my shoulder’. It’s the same principle. Everything you do, you must be aware that at some point you may have to justify that in court in front of a judge. So you’ve got to be aware of all the different boundaries and limits on your behaviour and what you should be thinking about when you’re making decisions. I’ve operated with that for so long that it’s second nature now ‘if I was standing up in front of a judge would I what I’ve just done consider proportionate?’ You’ve got to be thinking that way; you can’t manage a custodial institution if you’re not thinking that way. No; I don’t have defence counsel coming in and telling me how I should be applying the rules’.105

The costs of legal assistance are, in principle, for the detainee. However, Rule 65 provides that counsel (and interpretation) is provided to indigent detainees. All detainees at the UNDF have been declared indigent. In respect of the right to legal assistance, a clear distinction must be made, however, between the situation before and the situation after final conviction. In Article 20(4)(d) of the ICTR Statute and Rule 42(A)(i) of the Rules of Detention the right to legal assistance is linked to the criminal proceedings. After termination of the proceedings before the Appeals Chamber or, if no appeal is lodged, before the Trial Chamber, imprisoned persons are no longer entitled to counsel.106 Several detainees have indicated that they perceive this to be highly problematic.107 This need not have been problematic, if the original

107 ICTR, interviews conducted by the author with persons detained at the UNDF, Arusha - Tanzania, May 2008.
purpose of setting up the ICTR’s Detention Facility had been abided by. When the UNDF was established, the authorities thought that the detainees would, after being sentenced, be transferred immediately to a designated State in accordance with Article 26 of the ICTR Statute. As late as July 2008, however, only five prisoners had been transferred to a designated State for the enforcement of their sentence. All other irrevocably sentenced detainees were imprisoned at the UNDF pending their transfer. Many of them were held at the UNDF for years. Such prisoners are not categorically denied any form of legal assistance. As argued by ICTR officials, in principle they may receive pro bono legal assistance. However, various defence counsel working at the ICTR have indicated their lack of enthusiasm for the idea of providing such services. In the words of one counsel:

‘The standard of the local bar from whom one might expect pro bono advice and representation to stem naturally is, although I can’t speak first hand, reputed to be relatively low, which is not surprising in one of the poorest countries in the world with a very small number of lawyers hardly any of whom have any international criminal law expertise. And certainly if I were asked if I were prepared to come pro bono from London to represent a man effectively in prison law, I would say ‘I’m very sorry but I can’t afford to do that’. And I suspect the same would be true of most other counsel here. If it happened to coincide with my being here for some other purpose then I would be prepared to do so. I think to say the problem is in hand because we will be able to secure pro bono representation and advice, may be a very shallow response and not a very thought through response. And I think to rely upon the Tanzanian bar to provide that kind of pro bono assistance is probably rather shortsighted.’

Although essentially a matter of prison discipline (which will be discussed separately in the next Chapter), it is worth noting here that the lack of legal assistance to prisoners in such proceedings may, under certain circumstances, violate human rights obligations under Article 6 ECHR.

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109 ICTR, interviews conducted by the author with Defence Counsel working before the ICTR, Arusha - Tanzania, May 2008.
Under the Rules of Detention, only individual detainees have the right to file a complaint with the Commanding Officer.\textsuperscript{110} The Rules do not confer this right on groups or associations of detainees. Moreover, the right is only granted to detainees -\textit{not} to other individuals or organisations.

The detainees’ right to make complaints to the UNDF authorities includes confidential access to the Commanding Officer where necessary. Although in Rule 85 of the Rules of Detention the right to confidential access to the authorities is limited to the authorities mentioned in Rule 83, \textit{i.e.} the Registrar and the President, paragraph 3 of the Regulations provides that ‘[t]he detainee shall have the opportunity to talk to the Commanding Officer in private if necessary’.

\textbf{SCSL}

Rule 1 of the SCSL Rules of Detention defines the term ‘Chief of Detention’ as ‘[t]he official of the Special Court appointed by the Registrar as head of the staff of the Detention Facility and responsible for its administration’. Rule 3 provides that ‘[u]nder the authority of the Registrar, the Chief of Detention shall have sole responsibility for all aspects of the daily management of the Detention Facility, including security and good order, and may make all decisions relating thereto, except where otherwise provided in the Rules’. Rule 59(A) of the SCSL Rules of Detention provides that ‘[e]ach Detainee or his Counsel may make a complaint to the Chief of Detention or his representative at any time’, and that ‘a log of all complaints made shall be kept by the Chief of Detention’.\textsuperscript{111}

Unlike at the ICTY, at the SCSL the formal complaints mechanism includes the procedure before the Chief of Detention. In the \textit{Norman} case, it was held that, before raising certain detention related problems in Court, these should be dealt with through the ‘appropriate channel’. This means that such issues must first be brought to the Chief of Detention’s attention, before bringing the issue before the Registrar if the detainee is not satisfied with the Chief of Detention’s response.\textsuperscript{112} The detainees make

\begin{enumerate}[\textsuperscript{110} See Rules 82 and 83 of the ICTR Rules of Detention.
\textsuperscript{111} It is not indicated precisely what kind of information the log must contain.
their complaints known to a so-called ‘international supervisor’, who then briefs the Chief of Detention or his Deputy on the complaint. Although the Chief of Detention and his Deputy have, for evidentiary reasons, emphasised the importance of putting everything - both the complaints and the responses to complaints - in writing, confined persons have reportedly proven reluctant to do so. Detained persons have instead indicated a preference to talk to the Chief of Detention or his Deputy in person. The Chief’s alleged unwillingness to have regular, “direct conversations” with the detainees appears to have caused frustration among detainees.113 One of the detainees has said in this respect that:

‘The former Chief used to come here; we could see he was interested in the welfare of the detainees. But the current Chief does not show interest in our welfare. Then one is not inclined to make complaints, just to avoid problems’114

This was contradicted by a senior member of the SCSL’s detention management, who said that

‘The Chief of Detention implemented a prisoner monthly meeting and initially designated Brima as their representative, but now they asked that each faction has its own representative. I think there was some politics amongst themselves. I said earlier that they do remarkably well as a team, a community, but obviously they had an issue and thought that matters might be better represented individually. The prisoner monthly meeting is attended by one representative of each faction’.115

Nevertheless, detained persons have indicated that they are not in any way barred from complaining to the Supervisor who brings the matter to the Chief’s attention.

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113 SCSL, interview conducted by the author with the SCSL Acting Registrar and the SCSL Principal Defender, Freetown - Sierra Leone, October 2009; SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
114 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
115 SCSL, interview conducted by the author with SCSL detention authorities, Freetown – Sierra Leone, October 2009.
They claim to have complained about such matters as visits, food, medical care and exercise.\textsuperscript{116}

As to whether they in any way felt hindered in submitting complaints to the Chief of Detention, one detainee indicated that because his earlier complaints never had any effect, he no longer trusted the system. The same sentiment was expressed in relation to the grievance procedure before the Registrar. In this regard, it should be recalled that the ECtHR has held that complaints mechanisms that never lead to positive results cannot be considered effective remedies.

The SCSL lacks administrative regulations spelling out in more detail the complaints procedure, such as those at the ICTR and ICTY. As a consequence, detained persons are left in the dark about their procedural rights.

\textbf{STL}

The STL Rules of Detention define the ‘Chief of Detention’ as ‘[t]he official of the Special Tribunal appointed by the Registrar as head of the staff of the Detention Facility and responsible for its administration’. Rule 3 provides that ‘[u]nder the authority of the Registrar, the Chief of Detention shall have sole responsibility for all aspects of the daily management of the Detention Facility, including security and good order, and may make all decisions relating thereto, except where otherwise provided for in the Rules of Detention’. Rule 6(A) sets out the Chief of Detention’s responsibilities in more detail and provides that he ‘shall be responsible for the secure custody of all Detainees, for their safe and humane treatment, for the safeguarding of their rights in accordance with international instruments governing detention and for the maintenance of discipline and good order within the Detention Facility’.

An individual detainee or his counsel may at any time make a complaint to the Chief of Detention.\textsuperscript{117} Of all the tribunals, only the STL and SCSL explicitly provide for counsel’s right to make complaints to the Chief of Detention. The STL’s Rules of Detention are unique in that they allow the detained person to make complaints in his own language.

\begin{flushleft}
\footnotesize\textsuperscript{116} SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.

\textsuperscript{117} Rule 83 of the STL Rules of Detention.
\end{flushleft}
The Rules oblige the Chief of Detention to keep a log of all complaints containing, *inter alia*, the name of the detainee, the date and time of receiving the complaint, the nature of the complaint and the details and reasons for the decision taken, including the date on which the decision took effect.

Rule 83(C) states that the Chief of Detention ‘shall investigate and deal with a complaint without undue delay’. If ‘undue delay’ cannot be avoided, the complaint must be dealt with within 7 days of its receipt ‘unless there are circumstances which justify a longer investigation period’. If it takes the Chief of Detention longer than seven days to deal with a complaint, he must inform the Registrar.

The Rules provide that the detainee – if not satisfied with the Chief of Detention’s response – may submit a complaint, without censorship, to the Registrar.\(^\text{118}\) It is noted, however, that the addendum ‘without censorship’ appears not to apply to complaints made to the Chief of Detention.

**ICC**

Regulation 90(2) of the ICC RoC states that the day-to-day management of the detention centre shall be delegated by the Registrar to the Chief Custody Officer. Sub-Regulation 2 further states that the Chief Custody Officer may, as appropriate, delegate specific functions to other persons. Regulation 187(1) of the ICC RoR presents a more detailed outline of the Chief Custody Officer’s responsibilities, stating that ‘[t]he Chief Custody Officer shall be responsible for the secure custody of all detained persons for their safe and humane treatment, for the safeguarding of their rights as determined by the Court and for the maintenance of discipline and good order within the detention centre’. This corresponds to the general obligation laid down in Regulation 91(1) of the RoC, that the detainees must be treated ‘with humanity and with respect for the inherent dignity of the human person’.\(^\text{119}\)

Regulation 106 of the ICC RoC provides that ‘[a] detained person shall have the right to file a complaint against any administrative decision or order or with regard to any other matter concerning his or her detention’. Sub-Regulation 106(B) stipulates

\(^{118} \text{Rule 83(D) of the STL Rules of Detention.}\)

\(^{119} \text{It was argued earlier that the notion of human dignity has, for the prison context, been elaborated upon, *inter alia*, in the SMR and EPR, both of which provide for a right to make complaints.}\)
that the procedure shall be further set out in the RoR and that it will include a right to address the Presidency.

Section 5 of the ICC RoR is dedicated to the complaints procedure available to detainees at the ICC Detention Centre. Detainees may make written or oral complaints to the Chief Custody Officer at any time on any matter concerning their detention. If a complaint is made orally, the Chief Custody Officer can ask the detainee to put it in writing. If the detainee is unwilling or unable to do so, the Chief Custody Officer may record the complaint in writing himself. According to Regulation 217(4) of the ICC RoR, a log of all complaints must be kept by the detention authorities containing such details as the name of the complainant, the date and time on which the complaint was received, the nature of the complaint, the details and reasons for the decision taken - including the date on which it took effect -, and the date and result of the final outcome of the complaint.

The ICC RoR provide for the possibility of submitting a ‘sealed written complaint’ to the Chief Custody Officer with the proviso that, if the complaint involves a staff member, it may be necessary to inform that person in order to duly investigate the matter.\(^\text{120}\)

Regulation 218(2) provides that, during the investigation of a complaint, the detainee shall be permitted to communicate freely to the Chief Custody Officer. In addition, at the ICC the assistance of counsel is not limited to the procedure before the Registrar or Presidency. Regulation 217 concerns the complaints procedure before the Chief Custody Officer and paragraph 6 states that the ‘detained person may be assisted by his or her counsel’. It further provides that ‘[w]here the detained person has no appointed counsel, he or she may be assisted by the duty counsel’. The latter arrangement is significant in view of the lack of such provision at, inter alia, the ICTR where convicted persons do not have counsel to assist them in intramural matters.

All complaints must be investigated ‘promptly and efficiently, seeking the views of all persons involved’.\(^\text{121}\) Regulation 219 prescribes that the complaint must, if possible, be dealt with within seven calendar days of its receipt and, in any event, within fourteen days. An exception is made in respect of complaints of a medical

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\(^{120}\) Regulation 217(5) of the ICC RoR.

\(^{121}\) Regulation 218(1) of the ICC RoR.
nature and in particular of complaints concerning the rejection of a detainee’s request to consult an external practitioner or concerning the refusal to administer treatment by the medical officer. In such cases, a complaint must be dealt with within three days after receipt.

The decision taken on a complaint must be communicated to the detained person concerned within five days of its receipt. Where the complaint is considered justified, action to rectify the situation on which the complaint is based must, if possible, be taken within 14 days. The detained person concerned must be notified thereof. Regulation 219(4) provides that, if a complaint is considered justified, but resolving the matter will take longer than fourteen calendar days, the Chief Custody Officer shall after consulting the Registrar inform both the complainant and the Presidency and shall keep both of them informed of the action being taken. This extension only applies to the action of rectification, not to the decision of whether or not the complaint is justified. With respect to the latter decision, the five day time-limit is absolute. Finally, if a complaint is found to be without merit, the detainee concerned and his counsel shall be informed in writing. The Regulations contain the explicit obligation to give reasons for rejecting the complaint.122

5.3.2 Making complaints to the Registrar

ICTY

According to former ICTY Deputy Registrar David Tolbert, ‘[w]hile it is clear that the Tribunal is in many senses, sui generis, a court without analogue and, thus, with many unique features, the Registry is particularly unusual in its construction. It is an amalgam of judicial management responsibilities, combining features of a Greffier in the civil-law system with some aspects of common-law clerk-of-court functions, and administrative duties imported from the UN system’.123 Rule 2 of the ICTY Rules of

122 Regulation 219(5) of the ICC RoR. 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 and Ngudjolo Chui, Case No. ICC-RoR221-02/09, Presidency, 17 September 2009, par. 8.
Detention provides, in relevant part, that ‘[u]nder the authority of the Registrar, the Commanding Officer shall be responsible for all aspects of the day-to-day management of the Detention Unit’.  

Rule 81 of the ICTY Rules of Detention stipulates that ‘[a] detainee, if not satisfied with the response from the Commanding Officer, has the right to make a written complaint, without censorship, to the Registrar, who shall inform the President’. Detainees are permitted to approach the Registry at all times without first having to bring the complaint before the Commanding Officer. The staff of the UNDU is not permitted to read or censor the complaint, which must be transmitted to the Registrar without undue delay. A complaint to the Registrar may, according to the Regulations, ‘concern detention conditions which includes but is not limited to an alleged breach of the Rules of Detention or of any of the Regulations adopted thereunder’. Complaints may be made at any time, but must be submitted within two weeks after the incident complained of occurred. Rule 84 of the ICTY Rules of Detention provides that every complaint must be acknowledged ‘without delay’. This has been specified in Regulation 6 of the Regulations for the Establishment of a Complaints Procedure for Detainees, which prescribes the acknowledgement of all formal complaints by the Registrar within twenty-four hours of receipt.

Counsel may only assist the complainant with ‘formal complaints’, which implies that legal assistance is not available in the procedure before the Commanding Officer. It is worth noting in this respect that Regulation 1 only entitles detainees and not their counsel to make complaints to the Commanding Officer. In principle, however, it appears possible for a detainee to submit a complaint on behalf of other inmates, although he would need to be authorised by the others to do so.

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124 Emphasis added.


126 Regulation 4 of the ICTY Regulations for the Establishment of a Complaints Procedure for Detainees (hereafter in this paragraph referred to as the ‘Regulations’).


128 ICTY, Decision on Šešelj’s Request that the ICTY President Order that Honourable Serbs in Detention and those who have arranged a Plea Bargain with the Prosecution and Agreed to Give False Testimony be Segregated in the Detention Unit and Prevented from Being Able to
Not every complaint addressed to the Registrar is actually dealt with by the Registrar. Depending on the nature of the complaint, the Registrar determines whether he must deal with it or the President. Administrative matters and matters of general concern are dealt with by the Registrar. Alleged breaches of the rights of detainees must be referred to the President. This is remarkable, since Rule 84 of the ICTY Rules of Detention demands that the Registrar consults the President on each complaint. Whilst according to the Rules the President is involved in every complaint, in practice he is not, i.e. the Registrar has his own area of competence. Admittedly, the Registrar’s obligation pursuant to Rule 81 to inform the President of any formal complaint corresponds to Regulation 7’s demand that the Registrar forward a copy of each and every complaint to the President. The Registrar’s obligation to consult the President as laid down in Rule 84, however, has not found its way into the practice direction. As a consequence, no independent review mechanism exists in respect of administrative matters and matters of general concern i.e. the areas of competence of the Registrar. It further implies that, in respect of complaints concerning an alleged violation of a detainee’s right, no separate stage of administrative review is available to the complainant.

Nevertheless, if the detainee is not satisfied with the Registrar’s qualification of the complaint, he or she can within one week of receipt of the Registrar’s qualification decision request the Registrar to submit the case to the President in order to review the qualification decision.

The Registrar must inform the detainee of the time-frame within which the determination of the complaint may be expected, which may not exceed two weeks. This implies that the Registrar is also obliged to inform the complainant of the qualification decision as soon as possible. This allows the complainant to object to such qualification without having to wait until the Registrar has taken a decision on the merits. An early notification of the Registrar’s qualification decision to the complainant could prevent both undue delay and unnecessary work for the Registrar (in the event of the President rejecting the Registrar’s qualification decision). Therefore, it would be preferable for the qualification decision to be made within the

Contact Each Other, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 15 June 2006, par. 6.
129 Regulation 7 of the Regulations.
same twenty-four hour period prescribed for the acknowledgement of the complaint and for it to be communicated to the complainant together with the complaint’s acknowledgement.

The investigation must be conducted ‘promptly and efficiently’. The Registrar must actively seek the views of all persons or bodies involved, which includes the Commanding Officer. It is further provided in the Regulations that the detainee may communicate freely and without censorship with the Registrar.

Whereas the Rules of Detention only stipulate that complaints must be dealt with promptly and that the detainee must be informed of the Registrar’s decision without undue delay, the Regulations provide that complaints must be responded to, if possible, within one week or, in any event, two weeks of their receipt. The rectification of the situations on which complaints that are considered justified are based must take place as soon as practicable. Within two weeks of the Registrar’s decision, a complaint considered justified must be rectified and the detainee must be informed of the steps taken. It may, however, be that rectification takes longer than two weeks. In that case, the detainee concerned and the President must be notified and be kept informed, on a weekly basis, of the action being taken. In respect of certain matters, specific time limits have been established. A complaint was made by Karadžić that there had been unreasonable delay by the Registrar in processing Karadžić’s request for media contact. It had taken three months to process the request. The President urged the Registrar ‘to ensure that requests for media contact from detainees at the Detention Unit are processed within 10 days of their receipt by the Registry or as early as possible thereafter’.

Regulation 10 states that rectification by the Registrar may include ‘cancellation, reversal or revision of a previous decision relating to the conditions of detention of the detainee’. If rectification is not possible, the Registrar, in consultation with the President, may ‘take whatever decision he sees fit and is empowered to

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130 Ibid; Rule 84 of the ICTY Rules of Detention. See, also, ICTY, Decision on Appeal against Decision Denying Permission for Legal Representatives to Visit the Detainee, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 25 May 2006, par. 2.
131 Regulation 7 of the Regulations; Rule 84 of the ICTY Rules of Detention.
132 Regulation 10 of the Regulations; Rule 84 of the ICTY Rules of Detention.
133 Regulation 9 of the Regulations; Rule 84 of the ICTY Rules of Detention.
exercise’. 135 If a complaint is held to be unfounded, the detainee must be notified in writing and informed of the reasons why the complaint was rejected. 136 The Regulations further state that a rejection of a complaint does not bar the detainee from raising the matter again. However, if such a new complaint does not raise any additional facts or circumstances, the Registrar may, after consulting the President, reject the new complaint without conducting any further investigation. 137 Complaints may also be dismissed without considering the merits due to their ‘insulting or otherwise offensive’ content. 138

In Kvočka et al., the Appeals Chamber set out the test for judicial review of administrative decisions. The test also provides insight into what the Appeals Chamber considers (as requirements of) good practice concerning administrative decision-making by the Registry. In doing so, the Appeals Chamber paid specific attention to the ‘propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it’. 139 The test’s first requirement is that the Registrar’s decision must be in accordance with the law, which includes the law’s proper interpretation. Second, the Registrar must observe any basic rules of natural justice 140 and act with procedural fairness towards the person affected by the decision. Third, the Registrar must take into account relevant material and leave out all irrelevant material. Fourthly, the Registrar’s decision must be reasonable, i.e. his conclusion must not be one which ‘no sensible person who would have properly applied his mind to the issue’ could have reached. 141 This “four-pronged Kvočka-test” has been recognised in subsequent case-law as the appropriate standard for administrative decision-making. 142

135 Regulation 10 of the Regulations; Rule 84 of the ICTY Rules of Detention.
136 Regulation 11 of the Regulations; Rule 84 of the ICTY Rules of Detention.
137 Regulation 12 of the Regulations.
138 ICTY, Decision on Šešelj’s Request that the ICTY President Order that Honourable Serbs in Detention and those who have arranged a Plea Bargain with the Prosecution and Agreed to Give False Testimony be Segregated in the Detention Unit and Prevented from Being Able to Contact Each Other, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 15 June 2006, par. 5.
139 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.
140 See, in more detail, Chapter 4.
141 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.
142 See, e.g., 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
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\(^{144}\) *Ibid.*

concerned ‘what was involved in the issue’, that the latter would be given the opportunity to respond to the relevant material and that the Registrar’s representative had recommended that the detainee seek assistance from counsel, was considered sufficient evidence that the right to be heard had been respected.\textsuperscript{146} In \textit{Lukić & Lukić}, the obligation to act in accordance with procedural fairness was held to include the requirements that ‘[a]ll parties were kept fully informed of developments’ and that the ‘[a]pplicant was properly advised of the [decision at issue] and his avenues of appeal in a timely manner’.\textsuperscript{147} In \textit{Karadžić}, it was added that blanket denials of requests or blanket prohibitions are contrary to the rule of procedural fairness.\textsuperscript{148} With respect to the third prong of the \textit{Kvočka} test, relevant materials that are sometimes overlooked in administrative decision-making are the specific behaviour or other personal circumstances of the detainee concerned or affected.\textsuperscript{149} The fourth prong includes the requirement of proportionate decision-making.\textsuperscript{150}

Where the Registrar fails to give reasons for his decision, the detainee’s right to appeal may be effectively frustrated. The U.N. Manual on Human Rights Training for Prison Officials notes in this respect that ‘[i]f prisoners are given proper reasons for any decision which materially and adversely affects them there will be fewer complaints and deep-seated grievances’.\textsuperscript{151} Although in \textit{Kvočka et al.} the directive on which the Registrar’s decision had been based explicitly demanded that a \textit{reasoned} decision was made, the Appeals Chamber’s statements in that case, arguably, should provide a standard for all

\textsuperscript{146} \textit{Id.}, par. 40.

\textsuperscript{147} 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. 10.


\textsuperscript{149} See, \textit{e.g.}, \textit{Id.}, par. 22. The Vice-President noted that the ‘Registrar ha[d] not cited any behaviour on the part of the Applicant which indicates that he intends to undermine the Tribunal’s mandate’ and had neither made an ‘excessive or unreasonable number of requests of this nature’.


administrative decision-making, in order to safeguard the detainees’ right to appeal. The Appeals Chamber held that the decision must i) make apparent in its reasons that the Registrar has considered the issues raised by the [detainee] and ii) reveal the evidence upon which the Registrar based his conclusion.\(^{152}\)

**ICTR**

Rule 82 of the Rules of Detention and Paragraph 6 of the Regulations regarding the complaints procedure at the UNDF stipulate that ‘[a] detainee, if not satisfied with the response from the Commanding Officer, has the right to make a written complaint, without censorship, to the Registrar, who shall forward it to the President’. According to several defence counsel, both they and their clients prefer, where possible, to solve intramural problems directly with the UNDF authorities. Nevertheless, situations may arise where a detainee wishes to address the Registrar, who is responsible for the administration of the tribunal under Rule 33(A) of the ICTR RPE.\(^{153}\)

Rule 83 requires that a complaint be filed in written form, for which purpose a specific form is made available. The form is stamped, a copy is provided to the complainant and the form is forwarded by the Commanding Officer to the Registry.\(^{154}\)

Rule 85 recognises the detainees’ right to confidential access to the Registrar and the President, which means that the content of the complaint may not be read by anyone other than the addressee.

Complaints must be acknowledged by the Registrar within seventy-two hours of receipt. Rule 86 stipulates that each complaint must be dealt with promptly and responded to within a reasonable time. In the absence of specific time-limits, however, it is up to the authorities to interpret these terms. Various detainees have complained about how long it takes before decisions are made on their complaints, particularly in respect of decisions that are forwarded to the President.\(^{155}\)

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\(^{152}\) 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.

\(^{153}\) See, also, ICTR, Decision on Ndayambaje’s Extremely Urgent Motion Regarding Permission for each of Ndayambaje’s Counsel to Bring a Laptop into the UNDF, *Prosecutor v. Ndayambaje*, Case No. ICTR-98-42-T, T. Ch. II, 23 November 2007, par. 42.

\(^{154}\) ICTR, interview conducted by the author with the UNDF detention authorities, Arusha - Tanzania, May 2008.

\(^{155}\) *Ibid.*
of occasions, it has taken half a year or longer for a decision to be rendered. Some detainees claim to have received no answer at all to (some of) their complaints. In 2007, the Ndayambaje Defence complained to the Trial Chamber that it had not received a reply from the Registrar to several requests for authorisation to visit Ndayambaje at the UNDF with their laptops. Eventually, a decision was rendered by the Registrar, but only six months after the initial request. Detainees have at times questioned whether complaints were forwarded to the President at all. On a number of occasions, the President has been asked to acknowledge that a specific complaint had indeed been forwarded by the Office of the Registrar. In 2006 Ngeze filed a motion of which the title is telling in this regard: 'Due to inordinate delay in receiving any decision on the Appellant Hassan Ngeze’s Motions filed before the President since August 2005, the Appellant Hassan Ngeze makes an extremely urgent personal request to the Honorable President to Order the Registry to confirm that his various motions have, in fact, been placed before the President'. In the aforementioned case of Ndayambaje, the Trial Chamber observed that the Registrar had not forwarded the complaint to the President when upholding the Commanding Officer’s decision.

Rule 83 does not specify whether it is the Registrar or the President who actually decides on complaints filed with the Registrar. It merely provides that the

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156 See, e.g., ICTR, Decision on Hassan Ngeze’s Application for Review of the Registrar’s Decision of 12 January 2005, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 14 September 2005. The President was seized of ‘Appellant Ngeze’s Application for Review of the Registrar’s Decision of 12.01.05 Denying Permission to Get Married at the ICTR Premises Pending the Determination of his Appeal’, which had been filed on 28 January 2005. It took 7 months after the filing of the complaint for the President to render a decision. 157 ICTR, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008. 158 This was also alleged by Ngeze in ICTR, Decision on Hassan Ngeze’s Motions of 8 and 26 August 2008, Ngeze v. the Prosecutor, Case No. ICTR-99-52-R, A. Ch., 28 October 2008, p. 326/H. 159 ICTR, Decision on Ndayambaje’s Extremely Urgent Motion Regarding Permission for each of Ndayambaje’s Counsel to Bring a Laptop into the UNDF, Prosecutor v. Ndayambaje, Case No. ICTR-98-42-T, T. Ch. II, 23 November 2007, par. 3-7, 47. 160 ICTR, The Appellant Hassan Ngeze Makes an Extremely Urgent Personal Motion to the Honorable President for Reversal of the Endless Prosecution Requests of Restrictive Measures pursuant to Rule 64 of the Rules of Detention, Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, President, 13 January 2006. 161 ICTR, Decision on Ndayambaje’s Extremely Urgent Motion Regarding Permission for each of Ndayambaje’s Counsel to Bring a Laptop into the UNDF, Prosecutor v. Ndayambaje, Case No. ICTR-98-42-T, T. Ch. II, 23 November 2007, par. 48.
Registrar shall forward the complaint to the President. In this respect, the Trial Chamber in the case of Ntabakuze pointed to Rule 19 of the ICTR RPE, which stipulates that the President supervises the Registry’s activities. According to the Trial Chamber, the established complaints procedure is ‘consistent with the International Criminal Tribunal for the Former Yugoslavia’s Regulations for the Establishment of a Complaints Procedure for Detainees (IT/96)’, which provides that the Registrar ‘shall examine the substance of the complaint and determine whether it should be dealt with by the Registrar, being a complaint about an administrative matter or a matter of general concern, or whether it relates to an alleged breach of the rights of the individual detainee, in which case it shall be referred to the President for consideration’. It is unclear, however, whether the ICTY’s practice in this regard has also been adopted by the ICTR or whether only the aforementioned division of labour between the Registrar and the President has been copied from the ICTY practice direction. It should be noted in this regard that no practice direction or regulations are in circulation at the ICTR that set out the applicable procedure, which implies that detainees are unaware of the precise arrangements. Although senior staff members of the ICTR Registry maintain that detainees have the right to address the President when dissatisfied with the Registrar’s qualification decision, it remains unclear whether in practice such right is communicated to detainees.

In the formal procedure before the Registrar there is, in principle, no oral hearing. Nevertheless, a senior staff member of the Office of the Registrar has indicated that ‘[o]n occasion, when we had disputes involving someone who is legally represented, we have invited the counsel to come here’. In theory, it is possible for the Registrar to suspend the Commanding Officer’s decisions pending the Registrar’s decision on the complaint, unlike the Commanding Officer’s disciplinary decisions, in respect of which it is explicitly stipulated in the Regulations governing Disciplinary Measures at the UNDF that these ‘will remain in place until the decision of the appeal is conveyed to the Commanding Officer’.

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163 Id., par. 4.
164 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
165 Regulation 12 of the ICTR Regulations governing Disciplinary Measures at the UNDF.
Despite the possibility of suspension, however, in practice the Commanding Officer’s decisions on detainees’ complaints have never been suspended. It appears that the ICTR Registry has tried not to hamper the Commanding Officer in his task of managing the UNDF, because it is afraid that suspending his decisions pending review would undermine his authority. As stated by a senior staff member of the ICTR Registry when interviewed for the purpose of this study, the Registrar will not intervene in any decision that he believes to be incorrect,

‘because the Commanding Officer needs to appear to be in charge. It would undermine the Commandant if every decision he makes could be countered or undermined by the Registrar just because the Registrar thinks he would have made a different decision. So there is a margin of appreciation’. 166

Nevertheless, in the review process before the Registrar, a distinction is made between administrative decisions on the one hand and issues of policy or the issuing of directions on the other. With regard to the latter category, the Commanding Officer does not have any discretionary powers and the Registrar will issue a decision according to what he considers to be reasonable. 167 With regard to purely administrative decisions, however, the Registrar allows the Commanding Officer a wide margin of appreciation.

There are two limbs to the test applied by the Registrar in the review process. Firstly, the Registrar must scrutinise the Commanding Officer’s decision by assessing whether the latter took ‘everything into account that he should have taken into account’ and whether ‘he dismissed things he should have dismissed’. Secondly, the Registrar must verify whether the Commanding Officer’s decision is a ‘decision that any reasonable Commandant could have made under the circumstances’. 168 Usually, the ICTR Registry does not publish its decisions on detainees’ complaints. 169

166 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
167 Ibid.
168 Ibid.
169 The only exception appears to be 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.
Apart from the formal complaints procedure established under Rule 83 of the Rules of Detention, an informal avenue for submitting complaints to the Registrar exists.\textsuperscript{170} Approximately once every two months, the Registrar or his Deputy visits the UNDF and receives the detainees’ representatives who inform him on or complain about issues relating to their detention conditions.\textsuperscript{171} When the detainees are particularly upset or distressed, the Registrar or his Deputy will speak to the detainees as a group and will try to resolve or at least alleviate their troubles. For example, after the Tribunal concluded an agreement with Rwanda for the enforcement of sentences in March 2008, the detainees were in much distress, fearful of being sent to Rwanda to serve their sentences. Some detainees went on hunger strike. The Registrar visited the detainees and explained to them what the agreement with Rwanda meant for them.\textsuperscript{172} In the words of a senior staff member of the Office of the Registrar,

‘what the Registrar does, when he visits the UNDF, is talk in plenary to the detainees, ask them if they have any complaints – usually this process takes a couple of hours, as a minimum. It basically allows the detainees complete freedom to express their views - although the Commanding Officer listens to the proceedings. The detainees have two representatives elected who address the Registrar, usually in the form of a written speech, with bullet points which they then hand to the Registrar. They address the specific points of their complaints and then the Registrar agrees to look into it. Discussion ensues on each topic and the Registrar will go back on a next occasion and give a result of the findings’.\textsuperscript{173}

The informal avenue of submitting complaints reflects the idea that it is better for both the detention authorities and the detainees to solve problems by communicating directly with each other, than to lodge formal complaints, which may exacerbate conflicts and deepen tensions.

\textsuperscript{170} ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.; ICTR, interviews conducted by the author with various defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
\textsuperscript{171} The detainees have organized themselves and have chosen representatives amongst themselves to communicate to the authorities.
\textsuperscript{172} ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
\textsuperscript{173} Ibid.
Regarding the content of detainees’ complaints, staff members of the ICTR Registry have said that

‘a number of complaints concerned the state of the water – it was said to be undrinkable, somebody said it was polluted, somebody else said it was poisoned. We had a considerable protest by the detainees who at one point refused to come to Court. There was a complaint about the distribution of clothing by the Commanding Officer – some complained that clothes were unequally distributed. We have had complaints about a lack of translation of judgments by detainees awaiting appeal. We have had complaints about the lack of referral of prisoners to places of imprisonment by those who had been at the UNDF for a considerable period of time. We have had complaints about the lack of a shop, lack of health products, lack of yoghurt, lack of cornflakes, etc. In fact, there have been constant requests and complaints about lack of conjugal visits, which was a matter that was dealt with directly by the Registrar on three separate occasions. Now a decision has been made – it is allowed now. So that was a matter that was entirely resolved by way of direct oral representations to senior officers in the Registry’.174

Although the substance of some of the complaints may seem to be of minor importance, it should be noted that mere trivialities tend to become magnified when a person is locked-up.

The right to make complaints is only applicable to the situation of confinement on the authority of the Rwanda Tribunal. This implies that when a detainee is transferred to the detention institution of another tribunal, the ICTR complaints procedure is not applicable. In Prosecutor v. Kambanda, the ICTR President stressed in connection to Kambanda’s transfer to the ICTY UNDU that ‘[t]hroughout his detention, Mr. Kambanda shall be considered a detainee of the ICTY; all matters relating to the conditions of detention of Mr. Kambanda shall be governed by the applicable rules, regulations and procedures of the ICTY as set forth in the Rules of Detention and all other related Regulations issued by the ICTY; and the authorities mentioned in these documents shall have exclusive competence in dealing with

174 Ibid.
questions concerning these conditions of detention, as appropriate’. 175 As a consequence, if ICTR authorities need information about the particularities of a detainee’s stay at UNDU, they must submit an official request for this purpose. 176 The non-applicability of the ICTR complaints procedure contrasts with the practice at the SCSL, where Taylor, while detained in the ICC Detention Centre in The Hague, was entitled to bring a complaint concerning intramural issues before the SCSL Registrar and President. ICTR detainees transferred to the ICTY UNDU do have the right to use the complaints procedure available under the ICTY Rules of Detention. 177

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175 ICTR, Order Issued by the President Regarding Special Measures for Detention on Remand, Following a request Filed by the Prosecutor, Prosecutor v. Kambanda, ICTR-97-23-DP, President, 25 November 1997. Emphasis added. It was noted, however, that ‘Mr. Kambanda shall not be considered as an “accused” of the ICTY. Therefore, the ICTY RPE would not apply to him or his detention as provided therein.’ The ICTR President stressed ‘the exclusive competence of the ICTR in relation to matters regarding substantive aspects of the judicial proceedings against Kambanda, pursuant to the rules of the ICT’. 176 See, e.g., ICTR, Prosecution’s Letter of 16 June 2000 to the Registrar of ICTY entitled “Jean Kambanda v. The Prosecutor, Case No: ICTR-97-23-A”, 23 June 2000, and the response of the ICTY Registrar in ‘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)” of 23 June 2000 (Memorandum dated 19 June 2000). Such forms of co-operation between international criminal tribunals are not based on bi- or multilateral agreements, as is the case with inter-State co-operation in criminal matters. In Kambanda, the President of the ICTY, in response to the ICTR’s request to detain Kambanda at the UNDU, stated, inter alia, that ‘the Security Council, in operative paragraph 4 of resolution 955 (1994) by which it established the ICTR, urged States and intergovernmental organisations, inter alia, to contribute services to the ICTR; that the Security Council moreover requested the Secretary-General in paragraph 5 of that same resolution to “make practical arrangements for the effective functioning of the international Tribunal”; considering therefore that, as a United Nations body, the ICTY can be requested to provide such assistance that may be required for the effective functioning of the ICTR’. Furthermore, the President pointed to the duty of States to co-operate with and provide judicial assistance to both the ICTY and the ICTR pursuant to Articles 29 and 28 of their respective Statutes. It was argued that by analogy ‘judicial assistance, if practically and legally feasible, should not be refused by either international tribunal if requested by the other pursuant to a judicial decision’. The ICTY President emphasised that the ICTY was also willing to provide assistance, since both the ICTY and ICTR have been established as ad hoc tribunals, i.e. subsidiary organs of the U.N. Security Council, and stressed that ‘the potential grave danger to Mr. Kambanda underscores the need to assist in providing high security protection [where] such protection can no longer be offered by the ICTR’ (emphasis in the original). See ICTY, Order of the President Concerning the Request for Assistance by the International Criminal Tribunal for Rwanda Regarding the Implementation of Special Measures for Detention on Remand, Case No. ITR-98-1-D, President, 28 April 1998 and ICTR, Corrigendum to Order of the President Concerning the Request for Assistance by the International Criminal Tribunal for Rwanda Regarding the Implementation of Special Measures for Detention on Remand, Case No. ITR-98-1-D, President, 5 May 1998.

177 Since they can only be detained in UNDU on the authority of the ICTY, the ICTY Rules of Detention are applicable to their detention. See, e.g., ICTY, Order of the President Concerning the Request for Assistance by the International Criminal Tribunal for Rwanda
transport to another institution, until the detainee’s arrival, the ICTR detainee remains
under the responsibility of the ICTR.\textsuperscript{178} The ICTR complaints procedure under Rules
82 and 83 of the Rules of Detention is thus fully applicable to everything that happens
during a detainee’s transfer.

**SCSL**

The Registrar is the person responsible for the management of the Detention
Facility.\textsuperscript{179} Rule 59(B) provides that if the detainee is not satisfied with the Chief of
Detention’s response, he may file a complaint with the Registrar. This can only be
done in written form. Censorship is not permitted. Further, Rule 59(C) provides that
the complaint shall be dealt with promptly and must be replied to without undue
delay. These terms are not further defined.

The term ‘detainee’ in Rule 59 of the SCSL Rules of Detention is defined as
‘[a]ny person detained awaiting trial or appeal before the Special Court or otherwise
detained on the authority of the Special Court’ and therefore also refers to persons
being detained on the Court’s authority elsewhere than at the Special Court Detention
Facility. This implies that such persons have the right to submit complaints under
Rule 59. It was seen earlier that in \textit{Taylor}, upon the accused’s transfer to the ICC
Detention Centre in The Hague, the Registrar ordered ‘that the rules of detention and
standards of the ICC were applicable to the detention of Taylor \textit{mutatis mutandis and}
that the complaints procedure set out in Rule 59 of the Rules of Detention of the
Special Court [were] applicable’.\textsuperscript{180} This implied that ‘the Registrar [was] empowered

\textsuperscript{178} ICTR, Order Issued by the President Regarding Special Measures for Detention on
remand, Following a request Filed by the Prosecutor, \textit{Prosecutor v. Kambanda}, ICTR-97-23-

\textsuperscript{179} Rule 3 of the SCSL Rules of Detention.

\textsuperscript{180} SCSL, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the
Accused to The Hague, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-1-PT, T. Ch. II, 23 June
2006; SCSL, Decision of the President on Public Defence Motion Requesting Review of the
Memorandum of Understanding between the International Criminal Court and the Special
Court of Sierra Leone Dated 13 April 2006 & Modification of Mr. Charles Taylor’s
Conditions of Detention, \textit{Prosecutor v. Taylor}, Case No. SCSL-03-01-PT, President, 19
March 2007. Article 6.4 of the Memory of Understanding concluded between the ICC and the
Special Court states that ‘[t]he Special Court shall retain full legal control and authority over
the Detainee and shall assume full legal responsibility for the custody of the Detainee. In
to make a decision with respect to any complaint lodged by the Applicant and then communicate his decision to the officials concerned in order to ensure that the Applicant’s complaint is dealt with promptly and without delay’.  

As at the ICTY and ICTR, there also exist more informal ways to complain about intramural matters. Family members and counsel of detained persons have at times spoken to the press and complained about their relative’s or client’s treatment, respectively. Furthermore, the Registrar ‘periodically’ visits the Detention Facility to speak with the detainees directly and to ask them whether they have any complaints. It is unclear how often such meetings take place. According to the Acting Registrar, ‘periodically’ in this context must not be confused with ‘often’. One of the confined persons observed in this regard that

‘Yes, sometimes the Registrar or now the Acting Registrar comes in. But she only comes in to inform us, for example, as recently, in connection to transfer arrangements’.  

Merely informing detainees about issues that are distressing to them of course differs from providing an informal forum to them for communicating grievances as an alternative to the formal complaints procedure.

Formal complaints do not give rise to an oral hearing. Similarly, in regard to a defence application for provisional release in the *Fofana* case, the Trial Chamber held

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183 SCSL Press and Public Affairs Office, Press Release, 7 April 2003; SCSL, interviews conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.

184 SCSL, interview conducted by the author with the SCSL Acting Registrar and the SCSL Principal Defender, Freetown - Sierra Leone, October 2009.

185 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.

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that it was not obliged to hear the parties in open court. It referred to the *Bizimungu* case, where the Trial Chamber held that ‘it was not compelled to proceed with an oral hearing and could decide solely on the basis of the written submissions of the parties if it were satisfied that it could make a determination of the said submissions without hearing the parties’. A requirement, however, is that the making of written submissions provides ‘a proper opportunity for both parties to respond and reply to each other’.187

Detainees can also submit requests to the Registrar. For example, Kanu’s Defence requested the Registrar to permit Kanu to visit his ailing mother. Although Kanu was not granted permission to leave the Detention Facility, the Registrar instead made arrangements for Kanu’s mother to visit her son at the Detention Facility.188

Convicted persons benefit from the presence of the Defence Office at the SCSL compound. As noted earlier, after the appeals process has come to an end at the ICTR, convicted persons are no longer entitled to legal aid (apart from legal assistance in review proceedings). By contrast, the presence of the Office of the Principal Defender and its lawyers at the SCSL’s compound - where also the Court’s Detention Facility is located - has resulted in regular contact between the Defence Office and confined persons.189 The Principal Defender sees the (Acting) Registrar on a daily basis and may inform the latter on the more serious matters that have been brought to her attention. Although this is not the same as a right to legal assistance in grievance procedures, at least there is a form of “outside” control by the visiting lawyers of the Defence Office. Particularly distressing or alarming intramural matters may thus be brought to the attention of the Registrar in an informal way. The Defence Office also assists the authorities on more complicated legal issues such as conjugal visits. Because of the many difficulties and sensitivities involved, the issue was

189 SCSL, interviews conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.
transmitted by the Chief of Detention to the Acting Registrar who requested the Defence Office for legal advice.\textsuperscript{190}

Nevertheless, confined persons have been critical about the effectiveness of the Defence Office in assisting them with intramural complaints.\textsuperscript{191} Such criticism has led to explicit requests for assistance from lawyers from outside the Defence Office. In support of such allegations of ineffectiveness of the Defence Office, the detainees pointed to what they perceived to be the isolation of one of their ‘colleague inmates’ for a period of four weeks, whereas according to the rules isolation may take no longer than two weeks. The Defence Office’s assistance would not have led to any tangible results. One of the detainees stated that:

‘She is not effective. I know this from mistakes that have been made in connection with my friends. The detention authorities do not listen to her.’\textsuperscript{192}

According to the Acting Registrar, the detainees do make use of the right to address her on intramural matters. They write to her mostly through the Office of the Principal Defender, but also directly when they feel that to do so would take too much time, or when they feel that the Defence Office cannot adequately assist them.\textsuperscript{193} They did so, for instance, in relation to the issue of enforcement of sentences. The detainees specifically asked for a lawyer from outside the Defence Office to assist them, a request which was eventually granted.\textsuperscript{194}

During trial, accused detainees benefit from having counsel, who may also assist them in connection to intramural complaints. As such, detainees regret losing counsel after their trial has come to an end. According to one of the detainees,

\textsuperscript{190} Ibid.
\textsuperscript{191} SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
\textsuperscript{192} Ibid.
\textsuperscript{193} SCSL, interview conducted by the author with the SCSL Acting Registrar and the SCSL Principal Defender, Freetown - Sierra Leone, October 2009.
\textsuperscript{194} Ibid.
‘Without counsel, the complaint will probably lack any effect. We are prisoners, you know, and the authorities will take the complaint more seriously if one has counsel’.195

Another detained person said:

‘Obviously I need a lawyer, because if I do not have a lawyer, the authorities will not respect the rules. A lawyer will prevent the authorities from breaking the rules, or will revolt against such violations’.196

The detainees also assist each other in their dealings with the detention authorities, although one detainee remarked that,

‘We help each other, yes, but the detention authorities are not always pleased with our meetings’.197

The detainees do, therefore, consider themselves in need of a professional lawyer at all times, also in relation to intramural complaints. They need legal assistance not only to draw the authorities’ attention to their grievances and to prevent the authorities from breaking the rules, but also to learn what rights they have, how these can be enforced and how to formulate the complaint.198

Besides the ICRC inspections which do not lead to binding decisions and other than the internal complaints mechanism, there is no other form of control over what happens at the Court’s Detention Facility. Since it is the Registrar herself who is the ultimate arbiter on complaints, it is understandable that the detainees doubt the impartiality, the credibility and, ultimately, the effectiveness of the grievance mechanism. International criminal tribunals can, of course, not be compared to States; they are smaller in terms of the number of persons working there and differ from States in both the geographical and institutional distance between the various authorities.

195 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
196 Ibid.
197 Ibid.
198 Ibid.
Moreover, it is the Registrar who acts as the (co-)legislature in drawing up and establishing the very detention regulations of which she – as the final arbiter in the complaints procedure – determines the validity and legitimacy. As noted at the beginning of this Chapter, this may in certain circumstances entail a breach of the objective impartiality test under Article 6 ECHR. On a domestic level, prisons may perhaps be able to get away with grievance mechanisms that only provide for internal administrative review without the involvement of an external adjudicator. In such circumstances, the combination of democratic control, ministerial accountability and the institutional remoteness between penitentiaries and supervisory administrative organs may be argued to provide sufficient safeguards against (the appearance of) partiality and a lack of independence, and thus contribute to the effectiveness of purely administrative complaints mechanisms. Effectiveness here refers to the aims and rationales of complaints procedures as recognised in this Chapter’s first paragraph. Where detainees do not make use of the available complaints procedures due to their perceived pointlessness, negative feelings are not channelled, the regime’s weak points may remain unnoticed, arbitrary decisions are not set straight and the prisoners’ rehabilitation is undermined. Therefore, the problem is more complex than “just” a lack of perceived impartiality.

The complaints procedure before the Registrar may further be argued to violate the principle of natural justice, more specifically the demand of nemo judex in causa sua. It was seen in Chapter 4 that the fact that a decision-maker has already been or will in the future be concerned with the case in another capacity may be considered to violate this aspect of natural justice. It does not require much imagination to envision such situation occurring at the SCSL where the Registrar carries the ultimate administrative responsibility for detention matters, has a legislating role in respect of detention rules and is the final arbiter on complaints.

Also relevant to the Registrar’s perceived neutrality is his or her personal and professional background. In this respect, one detainee has stated that,

‘Former Registrars would come to us, for example when we were detained at Bonthe island, and would tell me that they were not interested in whether or not the Court

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200 See, in more detail, Chapter 4.
would condemn me, but only in my welfare. But the current Registrar used to be the head of the Outreach Program and appeared on television; she is part of the system, our enemy. She just wants to see me imprisoned for the rest of my life. I don’t expect anything from her. (…) When she was on Outreach, she spoke negatively about us. Even a few months ago, she still did. Previous Registrars would never talk that way about us. The Registrar should remain neutral.²⁰¹

Another issue which may affect the effectiveness of the complaints procedure is a lack of confidentiality. One detained person indicated that he was well aware of his right to bring the matter to the Registrar’s attention, but said that

‘How would my complaint reach the Registrar? If I would give it to the authorities, they would also look at it.’²⁰²

Yet another factor affecting the mechanism’s effectiveness – a factor which is particularly pertinent to a two-staged complaints procedure – is the intensity and transparency of the review carried out. In this regard, the Acting Registrar stated that,

‘I am very careful in my dealings with sector Chiefs. I don’t use such language as ‘overturning decisions’. There have been instances where I had another vision than the Chief on how things should be done. However, at the end of the day, you don’t want to let the prisoners know that you are here to overrule. My management-style, with all the section Chiefs, is to empower them while informing them of the reasons why a specific decision of them cannot stand. That way, I encourage them to reverse the decision themselves, instead of using the heavy hand of power.’²⁰³

As a consequence of such a management style, however, detainees never experience ‘winning a case’. Outside the Registry, no one will know that a decision has been made by the Registrar on the complaint. The Acting Registrar’s remark that ‘since I have been Acting Registrar, I don’t remember the detainees bringing any matter

²⁰¹ SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
²⁰² Ibid.
²⁰³ SCSL, interview conducted by the author with the SCSL Acting Registrar and the SCSL Principal Defender, Freetown - Sierra Leone, October 2009.
before me that would require a written decision."\textsuperscript{204} is significant in this respect. This is in flagrant breach of the spirit of the relevant provisions of the Rules of Detention. The right to bring a complaint before a higher administrative organ implies the right to a decision by that organ. Furthermore, the Registrar’s approach violates the principles of rehabilitation and procedural fairness. It is reasonable to say that this is not a particularly dignified way of treating incarcerated individuals. Moreover, it undermines almost all of the rationales for establishing grievance mechanisms, as listed in this Chapter’s first paragraph. It also violates the right to an effective remedy as interpreted by the ECtHR. A grievance mechanism must be able to \textit{factually} provide an effective remedy. The fact that an existing procedure has never been helpful to inmates when trying to enforce their rights may, in this regard, be considered a conclusive negative indication.

A consequence of the Registrar’s management style is that actual remedies have never been and are likely never to be granted. In response to the question of whether compensation for any kind of loss had ever been granted to a detained person, the Principal Defender replied that ‘we have never had the situation in which there was a miscarriage of justice warranting compensation’.\textsuperscript{205} Although it may of course be that the detention conditions and the treatment of confined persons at the Court’s Detention Facility have been outstanding, it is somewhat unbelievable that in all those years, no human error has ever been made by the detention authorities warranting the granting of some kind of remedy to a complainant.

In light of the foregoing, it is understandable that the detainees do not place much trust in the system for bringing their grievances before the Registrar. As one detainee has said,

> ‘The Registrar is not here for our interest, so it does not make sense to go to her Office’\textsuperscript{206}

\textsuperscript{204} \textit{Ibid.}

\textsuperscript{205} \textit{Ibid.}

\textsuperscript{206} SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
STL

Rule 83(D) of the STL Rules of Detention provides that ‘[i]f not satisfied with the response from the Chief of Detention, the Detainee shall have the right to make a written complaint, without censorship, to the Registrar’. Complaints must be dealt with by the Registrar without undue delay. If undue delay is unavoidable, the complaint must be dealt with within 7 days after its receipt, unless there are circumstances which justify a longer period of investigation.207

ICC

The ICC official responsible for all aspects of the management of the Detention Centre is the Registrar.208 As one of the four organs of the Court, the Registry ‘is responsible for the non-judicial aspects of the administration. It is headed by the Registrar who is the principal administrative officer of the Court. The Registry provides judicial and administrative support to all organs of the Court; its work is characterised by the fact that it must remain a neutral organ at all times so as to ensure the support of all Court’s functions equally’.209 Detainees may address the Registrar regarding decisions by the Chief Custody Officer on their complaints.210 Presumably this includes situations in which the Chief Custody Officer fails to make a decision, although this raises difficulties in regard to the requirement that the complainant must address the Registrar within forty-eight hours of being notified of the decision taken by the Chief Custody Officer. One way to avoid such difficulty is to argue that, since there is no decision to be notified, the deadline of forty-eight does not apply. Another view is that the forty-eight hours rule does apply but only starts running from the moment that the Chief Custody Officer

207 Rule 83(E) of the STL Rules of Detention.
210 Regulation 220(1) of the ICC RoR.
should have informed the detainee of the decision, which is after three, seven or fourteen calendar days.\textsuperscript{211}

The complaint must be submitted in writing. Standard forms are made available for such purpose. Staff members of the Detention Centre – including the Chief Custody Officer - are not permitted to censor or to read the complaint made to the Registrar.\textsuperscript{212} The Chief Custody Officer has the duty to transmit to the Registrar all of the information he has collected during his own earlier investigation of the complaint. Upon receiving the complaint, the Registrar must transmit it to the Presidency without delay. This obligation applies to all complaints addressed to the Registrar and should therefore not be confused with the detainees’ right to address the Presidency on the Registrar’s decision on the complaint.

The Regulations provide that the complainant may be assisted by counsel. If he does not have counsel, assistance may be provided by duty counsel. Regulation 220(5) declares Regulations 217, 218 and 219, which govern the complaints procedure before the Chief Custody Officer, applicable \textit{mutatis mutandis} to the procedure before the Registrar. The implications of Regulation 220(5) are obvious in some respects. For example, the Registrar must investigate the complaint promptly and efficiently, seeking the views of all persons involved;\textsuperscript{213} the complaint shall, where possible, be dealt with within seven calendar days of its receipt and, in any event, within no more than fourteen calendar days (unless the complaint concerns a medical issue falling under Regulations 157(9) and (11), in which case it must be dealt with within three days after receipt and notification of the decision must be given within five days after its receipt);\textsuperscript{214} if a complaint is considered justified, the matter must be rectified within fourteen calendar days and the detained person shall be informed thereof;\textsuperscript{215} if the complaint is found to be unjustified, the detained person and his or her counsel shall be notified in writing of the reasons for rejecting the complaint.\textsuperscript{216}

The implications of Regulation 220(5) are, however, less obvious as regards Regulations 217-219, which refer explicitly to the Chief Custody Officer and to the

\textsuperscript{211} Regulation 219 of the ICC RoR.
\textsuperscript{212} Regulation 220(2) of the ICC RoR.
\textsuperscript{213} Regulation 218(1) of the ICC RoR.
\textsuperscript{214} Regulation 219(1) of the ICC RoR.
\textsuperscript{215} Regulation 219(3) of the ICC RoR.
\textsuperscript{216} Regulation 219(5) of the ICC RoR.
Registrar and/or the Presidency. For example, regarding Regulation 218(2), it cannot be assumed that the Regulations’ drafters wanted to confer on complainants the right to communicate freely with the Registrar or the Presidency (since to ‘communicate freely’ arguably means something else than the right to be heard). Similarly, as regards Regulation 219(4) should be applied, which provides that the Chief Custody Officer shall, where the rectification of a justified complaint takes longer than fourteen calendar days, after consultation with the Registrar notify both the detainee concerned and the Presidency thereof and shall keep them informed of the action being taken, it is uncertain whom the Registrar would need to consult – if anyone at all. In view of such difficulties, it might be that Regulation 220(5) simply means that the procedure before the Chief Custody Officer must be exhausted before a complainant may file a complaint with the Registrar. This is a very narrow interpretation of Regulation 220(5) and would have the highly dissatisfactory result that the Registrar is not bound to any time-limit or other procedural obligation laid down in those provisions.\footnote{217} Notwithstanding the aforementioned difficulties, the most plausible interpretation of Regulation 220(5) is that Regulations 217-220 are indeed applicable to the procedure before the Registrar, except where the latter procedure is governed by more specific provisions, or where applying the provision in question would lead to illogical results.

\footnote{217} It is noted that in domestic complaints procedures for inmates adjudicators are also bound to such procedural rules. In the Netherlands, for instance, the Supervisory Committees’ [Commissies van Toezicht] Complaints Committees [Beklagcommissies], that decide in first instance on complaints of inmates against decisions of the prison governor, must deliver their judgments ‘as soon as possible’, which has been interpreted as ‘within four weeks after receipt of the complaint’. This term can be extended with another four weeks in exceptional circumstances. See Article 67(1) of the Penitentiary Principles Act [Penitentiaire beginselenwet]. Further, the Appeals Commission [Beroepscommissie] of the Council for the Administration of Criminal Justice and Protection of Juveniles [Raad voor de Strafrechtstoepassing en Jeugdbescherming] must deliver its judgment ‘as soon as possible’. See Article 71(1) of the Penitentiary Principles Act.
5.3.3 Making complaints to the President/Presidency

ICTY

Pursuant to Rule 33 of the ICTY RPE, the Registrar is accountable to the President, also in his role as chief custodian. Rule 81 of the ICTY Rules of Detention provides that the Registrar is obliged to inform the President of any complaint that has been submitted to him. Rule 84 provides that ‘[e]ach complaint shall be dealt with promptly by the Registrar in consultation with the President and replied to without undue delay’. In Šešelj, the President stated that Rules 80 to 84 of the ICTY Rules of Detention do not grant detainees a right to address the President directly without first having submitted a complaint to the Commanding Officer. When dissatisfied with the Commanding Officer’s response, a detainee may complain to the Registrar, who will inform the President.

On the basis of the language of Rule 84, which requires that each complaint must be dealt with by the Registrar in consultation with the President, there appears to be a strict division of labour between the Registrar and the President in respect of all complaints. However, as noted earlier, Regulation 7 of the Regulations for the Establishment of a Complaints Procedure for Detainees provides that ‘[t]he Registrar shall examine the substance of the complaint and determine whether it should be dealt with by the Registrar, being a complaint about an administrative matter or a matter of general concern, or whether it relates to an alleged breach of the rights of the individual detainee, in which case it shall be referred to the President for consideration (…)’. Nevertheless, some safeguards have been built into this system. Firstly, the Registrar must forward each complaint to the President. Secondly, if not satisfied with the Registrar’s qualification of the matter, the detainee may ‘request the Registrar to put the matter to the President for a final decision as to who should handle the complaint’.

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218 See, also, ICTY, Decision on the Prosecutor’s Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić, Prosecutor v. Delalić, Delić and Landžo, Case No. IT-96-21, T. Ch., 31 October 1996, par. 29.
219 ICTY, Decision on Appeal against Decision Denying Permission for Legal Representatives to Visit the Detainee, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 25 May 2006, par. 2.
Regulation 8 states that the President must conduct a prompt and efficient investigation. ‘Promptness’ has not been further defined. Some of the ICTY detainees have complained, however, that the procedure before the President is very lengthy. All relevant persons, including the Commanding Officer, must be asked for their views. The detainee’s account of what happened must be transmitted to the President by the Registrar.

If the complaint is held to be unfounded, the detainee must be informed in writing of the reasons thereof. In principle, this does not bar the detainee from raising the issue again, although if no new facts or circumstances are raised, such a complaint may then be rejected by the Registrar, in consultation with the President, without any further inquiry. If the President considers the complaint to be justified, the matter must be rectified within two weeks. The detainee must be informed thereof. It is the Registrar who must implement the rectification. If rectification cannot be achieved within two weeks but the matter is in principle capable of being rectified, this must be done as soon as practicable. Both the detainee and the President must be kept informed of the action being taken on a weekly basis. According to Regulation 10, rectification may include ‘cancellation, reversal or revision of a previous decision relating to the conditions of detention of the detainee’ or, if the matter is not capable of rectification, any action that the Registrar (in consultation with the President) deems appropriate and is authorised to carry out.

Finally, it is worth mentioning that, according to Banning and de Koning, Judge Kirk McDonald visited detainees at the UNDU in 1997, after receiving a letter from the detainees about their detention conditions. According to Banning and Koning, she wanted to show that somebody was listening to them. The detained persons described her visits as ‘very important’ and Judge Kirk McDonald is reported

221 Regulation 11 of the ICTY Regulations for the Establishment of a Complaints Procedure for Detainees (hereafter in this paragraph referred to as the ‘Regulations’).
222 Regulation 12 of the Regulations.
223 Regulation 10 of the Regulations.
224 Regulation 9 of the Regulations.
225 Cees Banning & Petra de Koning, Balkan aan de Noordzee [The Balkans by the North Sea], Prometheus / NRC Handelsblad, Amsterdam / Rotterdam 2005, p. 117.
to have written a report on the visits, which contained a number of recommendations and was sent to the UNDU.\footnote{Id., p. 118.}

\textbf{ICTR}

Notwithstanding the Registrar’s obligation under Rule 83 to forward each complaint to the President,\footnote{Rule 83 provides, as far as relevant, that the Registrar shall forward the complaint to the President.} it is the Registrar who determines whether a complaint concerns an administrative matter or a matter of general concern. If it concerns either, the complaint will not be dealt with by the President. If, however, the complaint concerns an alleged breach of a detainee’s right, the complaint must be forwarded to the President. As said earlier, it would certainly benefit the detainees’ legal position if a separate right was conferred on them to contest the Registrar’s qualification decision. Further, although the division of labour between the President and the Registrar may, at first glance, appear to be in accordance with international human rights law, the particularities of the international context – most notably the lack of ministerial accountability, the democratic deficit and the fact that no other effective mechanism is in place to control intramural conditions – render the absence of an independent adjudicator on administrative complaints or complaints concerning general matters problematic.

Although according to Rules 19 and 33(A) of the ICTR RPE the President supervises the Registrar’s administrative tasks, the President has held that ‘[a]s the Registrar enjoys a margin of discretion in conducting the day to day administration of the Registry without undue interference by presidential review, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review’.\footnote{ICTR, Decision on Hassan Ngeze’s Application for Review of the Registrar’s Decision of 12 January 2005, \textit{Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, President, 14 September 2005, par. 4.} The President has further stated that ‘[t]he Tribunal case law has established that an application for review by the President of a Registry decision on the basis that it is unfair procedurally or substantively is admissible if the Applicant has a protectable right or interest, or if it is otherwise in the interests of justice. In this regard, the decision sought to be challenged must involve a substantive right that...
should be protected as a matter of human rights jurisprudence or public policy’.

In other words, if a right has not been duly recognised in human rights jurisprudence or under the vague term of ‘public policy’, the President will refuse to exercise his supervisory powers. It follows from the President’s ruling that the complaint must concern a decision by the Registrar, which in turn implies that a complaint regarding a de facto act by UNDF personnel is not subject to review. Another requirement stipulated by the President is that the complaint should not concern an issue that has already been subject to Presidential scrutiny.

When reviewing administrative decisions, the President has not limited himself to the substantive rights recognised in the Rules of Detention. According to the President, ‘the silence of the ICTR provisions does not exclude the possibility that (...) rights be recognized’. This implies that the President is willing to consider what human rights jurisprudence has to say on the issue even where the Tribunal’s Rules are silent on the matter.

The test applied by the President is two-pronged. Firstly, he must consider whether the decision under review violated any (international) legal norms. Secondly, he must verify whether the decision in question amounts to ‘unfairness which calls for presidential intervention’. As to the first prong, the President will intervene in case of an infringement on an established duty, obligation or prohibition. In Prosecutor v. Ngeze, for instance, the President held that, according to international legal instruments and practice, the Tribunal was not obliged to facilitate the consummation of marriages and conjugal visits. In Ngeze, the President found that the Registrar had not been under a duty to transfer Ngeze to The Hague on his request and thus refused to intervene. It is questionable, in this regard, whether the reviewing authorities, including the President, have been sufficiently mindful of the fact that the norms in the human rights instruments and, in particular, the SMR are only mere minima.

With respect to the second prong, there is only a very limited number of cases available in which the President intervened due to substantive unfairness. The ICTR

229 Ibid.
230 Id., par. 5.
231 Id., par. 5.
232 Id., par. 19.
233 See, also, id., par. 13.
234 See, also, id., par. 17.
President has indeed been very reluctant to intervene in the management of the UNDF. This may be due to tensions in the first years of the Tribunal’s existence between the Registry and the Office of the President, regarding the question of whether there existed an adequate legal basis for the President to supervise the Registrar’s administrative functions. Although the issue was eventually settled, it may have led the ICTR President to adopt a deferential approach.

The cases in which the President has intervened mostly concern situations in which the conditions of detention complained about had an impact or threatened to have an impact on the fair trial rights of accused persons in detention. In the case of *Ntakirutimana*, for example, the detainee complained about an imminent transfer to another cell. The President considered that the detainee was, at the time, working on his appeal brief which was to be filed soon thereafter and held that ‘[h]is immediate transfer to another cell may therefore cause a disruption to his work’.

The detainee must submit his complaint in writing to the Commanding Officer who in turn must transmit it to the Registry. The Registry must forward both the detainee’s complaint and the response of the Commanding Officer to the President. There is no oral hearing.

The President has on a number of occasions instructed his assistant to conduct an independent investigation into a complaint. In the case of *Rutaganda*, for instance, who had complained about the size of his cell, its sewage system and about some ‘persisting noxious smell’ which ‘would make the cell unsanitary’, the President noted that his assistant had inspected the cell and had affirmed the version of the Commanding Officer that ‘it met all requirements with regard to health and hygiene’. It is, however, not common for the President to order such independent investigations.

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235 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
236 ICTR, The President’s Decision on the Complaint Filed by Detainee Gérard Ntakirutimana, Case No. ICTR-96-17-0175, President, 18 June 2003.
237 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
238 ICTR, The President’s Decision on the Complaint Filed by Detainee Georges Rutaganda, Case No. ICTR-96-03-0850, President, 18 June 2003.
240 In the case mentioned, two other detainees had submitted similar complaints, which probably made the President pay some extra attention to the matter; see ICTR, The
As to the final decision, the President is free to order measures not explicitly sought by the parties. Where Ntakirutimana, in the case mentioned above, requested the President to reverse the Commanding Officer’s decision to transfer him to another cell, the President only postponed the transfer until the detainee had finished working on his appeal brief.241

Although it is reasonable to regard the President as a more independent and impartial – in terms of the objective impartiality test mentioned in this Chapter’s first paragraph – adjudicator than the Registrar, who, as the Commanding Officer’s direct superior, carries direct responsibility for the UNDF’s management, it is questionable whether he is in fact the appropriate official to deal with intramural complaints. Firstly, the President co-legislates the Rules of Detention, which makes it improper for him to decide on the validity or legitimacy of specific provisions in those Rules. Secondly, although according to Rule 19(A) of the ICTR RPE the President supervises the Registry’s activities, the review exercised by the President cannot be equated to judicial review proper. Rather, the President, in his role as the Registry’s supervisor, should be considered as the highest official in the Tribunal’s institutional hierarchy to carry responsibility for everything that occurs in the UNDF. In this administrative capacity, he is briefed by the Registry on a regular basis on all major issues including those concerning the Detention Facility and may, where necessary, employ any mode of managerial intervention. As part of the management team, his interests are primarily ‘managerial’. Moreover, matters brought to his attention in his “executive capacity” may sooner or later be brought before him in his role as the ultimate arbiter in the grievance mechanism.

It was argued above in relation to the Registrar’s adjudicating tasks that the make-up of the tribunals raises questions as to the independence and impartiality of internal adjudicators. Although the tribunals function as mini-States, the different branches of administration, legislature and judiciary operate at close proximity to one another,
both on an organisational and personal level.\textsuperscript{242} From the detained persons’ perspective, the different functionaries all appear to be serving one and the same purpose, which is putting and keeping the detainees behind bars and making sure that the detainees give them as little trouble as possible. All of this gives rise to the appearance of bias from the detainees’ perspective. An ICTY detainee, when interviewed for the purpose of this research, said that

\begin{quote}
‘I have noticed that some detainees are reluctant to make complaints because they think that a copy of the complaint will be forwarded to the Court and that this complaint, or these complaints, might be seen as an indication of their character when the decision is made on the indictment’.\textsuperscript{243}
\end{quote}

In the Netherlands, domestic detainees have often expressed their distrust in the impartiality of the ‘Complaints Committees’ (\textit{Beklagcommissies}), which, as part of the ‘Supervisory Committees’ (\textit{Commissies van Toezicht}) that operate at all penitentiary institutions, are entrusted with the task of adjudicating complaints.\textsuperscript{244} This lack of trust has been attributed to the close organisational proximity of prison administrations to these committees.\textsuperscript{245} The ‘Appeals Committee’ (\textit{Beroepscommissie}), which, as part of the Council for the Administration of Criminal Justice and Protection of Juveniles (\textit{Raad voor de Strafrechtstoepassing en Jeugdbescherming}) operates at the national level, is generally considered to be more impartial and thus more effective.

\textsuperscript{242} A situation where this was of direct relevance was the appointment of a former ICTR Deputy Registrar as a consultant or legal officer working for Chambers. The former Deputy Registrar had allegedly made certain controversial statements about the UNDF detainees at a symposium. According to several accused persons, ‘these statements exhibited bias against the Accused as former members of the Rwandan government’ and displayed a personal view held by the former Deputy Registrar on a legal matter relevant to the proceedings. See, ICTR, Decision on Mugiraneza’s Request for Certification to Appeal and Mugenzi’s and Bizimungu’s Requests for Reconsideration of the Decision on the Objections of Mugiraneza and Bicamumpaka to the Engagement of Mr. Everard O’Donnell as a Chambers Consultant Dated 28 August 2009, \textit{Prosecutor v. Bizimungu et al.}, Case No. ICTR-99-50-T, T. Ch. II, 23 September 2009, par. 1-7.

\textsuperscript{243} ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.

\textsuperscript{244} J. Serrarens, \textit{supra}, footnote 31, at 211; C. Kelk, \textit{supra}, footnote 3, p. 57; Gerhard Ploeg and Jan Nijboer, \textit{supra}, footnote 10, p. 20.

\textsuperscript{245} J. Serrarens, \textit{supra}, footnote 25, at 218; J. Serrarens, \textit{supra}, footnote 31, at 216.
Finally, as a consequence of the heavy workload of the tribunals’ Presidents, the seemingly trivial matters raised in the detainees’ complaints may be the first to suffer, in that other matters may be given more priority. This may explain why detainees have on occasion had to wait for several months – at times even half a year or longer - before receiving a decision on their complaint.\textsuperscript{246} As stated by an ICTY detainee,

\begin{quote}
‘The President of the Court is “too distant from us”. He is too surrounded by judicial bureaucracy, and so our problems and difficulties are far removed and he does not hear about them!’\textsuperscript{247}
\end{quote}

All of this undermines the effectiveness of the tribunals’ complaints mechanisms. The establishment of an external adjudicator may go some way to resolving this.

**SCSL**

Unlike the other tribunals’ legal frameworks, the SCSL Rules of Detention do not provide for a right to address the President as part of the regular grievance mechanism. According to Robin Vincent, ‘the intention was to reduce the potential workload on both the president of the court and his colleagues’\textsuperscript{248} Complaint proceedings end with the Registrar’s decision, unless the complaint in question concerns an issue which may impact on the fair trial rights of an accused person in detention. In that case, the latter can bring the matter to the Trial Chamber’s attention. In *Norman*, the President held that ‘[t]he Detention Rules give necessary powers to the Head of Detention, subject to direction by the Registrar. Judges have no part in administering or ordering these rules, although in three difficult or urgent situations the President does have a role to order a report into the death in custody of an indictee (Rule 24(c)); to approve any order by the Registrar for cell video surveillance which

\textsuperscript{246} See, e.g., ICTY, Letter by Dr. Radovan Karadžić to the Vice President Judge O-Gon Kwon, 3 February 2009.

\textsuperscript{247} ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.

order lasts longer than 14 days (Rule 26); and to hear appeals by a detainee from any decision to deny him contact with any person (Rule 48). These are serious situations where it is right that the President, as head of the Special Court, should oversee the Registrar. Otherwise, judges are not involved in administrative detention matters unless they impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence, when they may be raised by motion before the Trial Chamber judges who are best placed to make such a determination’. This interpretation of the Rules of Detention does not accord with the SCSL RPE. In Taylor, the Trial Chamber held that ‘Rule 19(A) of the Rules provides that the President shall supervise the Registry’s activities and that under Rule 33(A) of the Rules the Registrar shall carry out his responsibilities for the administration and servicing of the Special Court under the authority of the President’. Nor does the aforementioned interpretation accord with practice, as the Registrar briefs the President on a daily basis on all major administrative issues. On the basis of the available case-law, however, it may be concluded that the President interprets the supervisory powers referred to in Rule 19(A) very narrowly. The few occasions on which the President did intervene only concerned those limited issues that were recognised to be worthy of the President’s attention in Norman. As a consequence

249 See, e.g., SCSL, Decision of the president on Urgent and Public Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, President, 21 February 2007.
250 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.
251 Rule 19(A) of the SCSL RPE.
252 SCSL, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, Prosecutor v. Taylor, Case No. SCSL-03-1-PT, T. Ch. II, 23 June 2006; SCSL, Decision of the president on Urgent and Public Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, President, 21 February 2007, par. 27.
253 As was noted earlier, the President held in Norman that ‘Judges have no part in administering or ordering these rules, although in three difficult or urgent situations the President does have a role to order a report into the death in custody of an indictee (Rule 24(c)); to approve any order by the Registrar for cell video surveillance which order lasts longer than 14 days (Rule 26); and to hear appeals by a detainee from any decision to deny him contact with any person (Rule 48). These are serious situations where it is right that the President, as head of the Special Court, should oversee the Registrar. Otherwise, judges are not involved in administrative detention matters unless they impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence, when they may be raised by motion before the Trial Chamber judges who are best placed to make such a determination’; SCSL, Decision on Motion for Modification of the Conditions of Detention,
of the President’s narrow interpretation of his supervisory role, an independent complaints adjudicator appears to be lacking for intramural detention issues that do not fall in those special categories. In 2007 Taylor requested the President of the SCSL to order the Registrar to, *inter alia*, ‘[e]nsure that Mr. Taylor is granted equal and humane treatment consistent with [Special Court] detention rules and practices’.254 He also made a number of other requests that concerned the conditions of his detention. The President did not reject the complaint on the basis of a lack of competence, but held that the complainant had not strictly followed the formal complaints procedure and, on that basis, declared the motion inadmissible. It is unclear whether the President would have considered herself competent to deal with the issues had the formal complaints procedure been duly exhausted.

The lack of an independent adjudicator in the SCSL complaints procedure is alleviated to an extent by the Registrar’s practice of briefing the President on a daily basis on administrative matters.255 According to the Acting Registrar, the rationale for not involving the President in intramural detention matters lies in the separation of powers, *i.e.* in order for judges to remain ‘independent and autonomous’, they have distanced themselves from the rest of the institution.256 This attitude had an impact on the drafting of the Rules of Detention, which – as was seen earlier – do not attribute a role to the President in the formal complaints procedure.

Although the SCSL Registry claims that the President is *informally* involved in supervising the administration of detention, it has only been able to give one example of such actual involvement, which concerned the issue of conjugal visits. It furthermore appears that the President is wholly dependent on the Registrar for receiving information on what goes on in the Detention Facility, which does not


255 SCSL, interview conducted by the author with the SCSL Acting Registrar and the SCSL Principal Defender, Freetown - Sierra Leone, October 2009.

contribute to the objectiveness of such information. In this regard, the Acting Registrar has stated that

‘anything having to do with welfare – things that must be brought to the President’s attention, minor issues we don’t discuss – are briefed to the President’.\(^\text{257}\)

**STL**

Rule 32 of the STL RPE sets out the functions of the Special Tribunal’s President. The Rule provides under (C) that the President supervises the Registry’s activities. Sub-Rule 32 (D) adds that the President supervises the conditions of detention. As to the complaints procedure, Rule 83(F) of the Rules of Detention provides that, if a detainee is not satisfied with the Registrar’s decision on a complaint, he may appeal such decision to the President. Notice of such appeal must be given within seven days of receipt of the notification of the Registrar’s decision. The President is the final arbiter on all complaints, *i.e.* the division of labour between the Registrar and the President provided for at the other U.N. tribunals does not exist at the STL.

**ICC**

The President is the highest administrative organ responsible for the administration of detention at the ICC. Article 43(2) of the ICC Statute stipulates that the Registrar, as the principal administrative officer of the Court, exercises his or her functions under the authority of the Court’s President. Thus, although Regulation 90(1) of the RoC provides that ‘the Registrar shall have overall responsibility for all aspects of management of the detention centre, including security and order, and shall make all decisions relating thereto’, it is the *President* who has the final say on all matters pertaining to detention management.

Furthermore, the *Presidency*, which is an organ of the Court,\(^\text{258}\) is – broadly speaking – responsible for the proper administration of the Court (with the notable

\(^{257}\) *Ibid.*

\(^{258}\) Article 34 of the ICC Statute. It consists of the President and the First and Second Vice-Presidents, who are elected by the other Judges by majority vote.
exception of the Office of the Prosecution) and of all other matters conferred upon it in accordance with the Statute. Regulation 94(5) of the RoC provides an example of such conferred powers where it states in relation to inspections of the ICC Detention Centre, that the Presidency ‘may make any direction, decision or order that it considers appropriate’. As to the grievance mechanism, Sub-Regulation 106(2) of the RoC states that the complaints procedure, which must be further specified in the RoR, must include the right of the complainant to address the Presidency. The Presidency has itself clarified how its role in reviewing the Registrar’s decisions must be seen, holding that ‘the Presidency is an appellate court conducting judicial review of the Registrar’s decisions on a range of issues, including the conditions of detention and the rights of detained persons. The judgments of the Presidency are final, non-appealable judgments rendered by three independent judged elected by their peers to serve in the Presidency’.

Section 5 of the RoR provides in Regulation 221 that a detained person may address the Presidency on decisions taken by the Registrar pursuant to Regulation 220. The detainee must do so within 48 hours of being notified of the Registrar’s decision, making use of a standard form. Upon the Presidency’s request, the Registrar must make all information relating to the case available to the Presidency, including the information it has obtained during its earlier investigations. Sub-Regulation 221(3) declares (the relevant parts of) Regulations 217 to 220 applicable to the complaints procedure before the Presidency. If a complaint is considered justified, the Presidency may remit the matter (back) to the Registrar or the Chief Custody Officer for reconsideration. As held in Katanga and Ngudjolo Chui, ‘the Presidency remits the impugned visiting conditions to the Registrar for reconsideration. The Registrar, bearing overall responsibility for the management of the detention centre, in accordance with regulation 90 of the Regulations of the Court, is best positioned to determine the precise visiting conditions necessary to render the detainee’s right to family visits effective, in particular his ability to maintain family links, in light of resource capacity’.

259 Article 38 ICC Statute.
261 ICC, Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”,
Regulation 222 stipulates that the rejection of a complaint by the Chief Custody Officer, the Registrar or the Presidency does not bar the detainee from raising the issue again. However, such a complaint may be rejected without any further investigation if no new facts or circumstances are raised by the complainant.

Although according to Regulation 221(1) of the RoR the detained person must address the Presidency within forty-eight hours of being notified of the Registrar’s decision, the Presidency has on a number of occasions found in cases where detained persons have failed to comply with such time-limit that, ‘due to the importance of the issues raised therein, relating to the rights of detained persons to communicate with the outside world from the detention centre, and the effect of the Impugned Policy on all detained persons, the Presidency will accept the Application, being of the opinion that it is not in the interests of justice to deprive the detainee of the opportunity to challenge the Impugned Policy’. 262

As to the test for review applied by the Presidency, it was held in Bemba 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: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached’. 263

In Katanga and Ngudjolo Chui, the Presidency held that a detained person who wishes to file a complaint must, in principle, follow the three-step procedure laid down in the RoR. The Presidency held that ‘(i) A detained person may make an oral

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or written complaint on any matter concerning his detention to the Chief Custody Officer at any time. If the complaint is found to be without substance, the detained person and his counsel is notified in writing by the Chief Custody Officer of the reasons for the rejection of the complaint; (ii) The detained person may then address the Registrar concerning the decision taken by the Chief Custody Officer within 48 hours of notification of that decision; (iii) Following the decision of the Registrar on the complaint, the detained person may request the Presidency to review the decision of the Registrar within 48 hours of notification of that decision’. 264

Nevertheless, where an administrative decision is taken directly by or on behalf of the Registrar, or where a detained person ‘is within his rights to infer’ that a certain official has acted on behalf of the Registrar (for instance, where an official has on other occasions represented the Registrar in detention matters), the detained person need not first submit the complaint to the Registrar when dissatisfied with such decision, but may directly approach the Presidency. 265 It seems logical that, in such situations, the detainee is not required to first submit the complaint to the Chief Custody Officer, as ‘there would be no reasonable prospect of the Chief Custody Officer reversing the decision of his superior through the complaints procedure’. 266

Nevertheless, before addressing the Presidency, the detained person is required to put to the Registrar his or her arguments against the decision in question, and must be afforded the opportunity to do so in writing at any time. 267 This step ‘will allow the Registrar to review her own decision with the benefit of those arguments and thereafter to amend, reverse or confirm her decision. Following the issuance of the final decision of the Registrar, the detained person may thereafter seek judicial review of that decision from the Presidency’. 268 The Registrar must ‘notify the detained person and his counsel in writing of the decision on his complaint and the reasons therefor in line with the time limits set out in Regulations 219 and 220(5) of the Regulations of the Registry’. 269

264 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 and Ngudjolo Chui, Case No. ICC-RoR221-02/09, Presidency, 17 September 2009, par. 8.
265 Id., par. 9-10.
266 Id., par. 12.
267 Id., par. 15-16.
268 Id., par. 14.
269 Id., par. 16.
The Presidency has further held 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’.\textsuperscript{270}

Although the President and Presidency may be considered the highest official and organ, respectively, of the Court to deal with detention matters, Article 112(2)(b) of the ICC Statute states that the Assembly of States Parties provides ‘management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court’.\textsuperscript{271} The Assembly of States Parties is a diplomatic or political body that consists of representatives, alternates and advisers of each State Party, as well as observers of other States that have signed the Statute or the Final Act.\textsuperscript{272} This means that both the Court’s administrative officials and the Presidency are ultimately subordinate to a body whose primary interest may not be to strengthen the legal position of detained persons. In practice, this has indeed led to some of the Presidency’s decisions being “overturned” by the Assembly for non-legal considerations.\textsuperscript{273}

\textit{5.3.4 Evaluation}

\textbf{Informal avenues for making complaints}

The existence of informal avenues to make complaints at the ICTY, ICTR and SCSL must be considered a positive development. Resorting to formal proceedings entails the risk that issues are blown out of proportion and opposing views become further polarised.\textsuperscript{274} There is therefore much to say for first trying to resolve matters in a less formal manner, particularly in a “closed environment” where detention authorities and detainees have to continue dealing with one another after the complaint has been

\begin{footnotesize}
\textsuperscript{270} Id., par. 14.
\textsuperscript{271} See, also, ICC, Resolution ICC-ASP/8/Res.4, Family visits for indigent detainees, adopted at the 8th plenary meeting, 26 November 2009, by consensus.
\textsuperscript{272} Article 112(1) of the ICC Statute.
\textsuperscript{273} See, in more detail, Chapter 8.
\textsuperscript{274} Gerhard Ploeg and Jan Nijboer, \textit{supra}, footnote 10, p. 189; F.W. Bleichrodt, \textit{supra}, footnote 6, at 392.
\end{footnotesize}
decided on. Furthermore, the existence of informal avenues may prevent the formal avenues from becoming burdened with more trivial matters. Moreover, Birkinshaw emphasises that the role of judicial procedures and grievance mechanisms is ‘a largely ex post facto one’.

In other words, formal judicial procedures may only indirectly help to prevent wrongs.

Rule 70 of the EPR, which deals with requests and complaints, stresses in Paragraph 2 that, where appropriate, mediation should be tried before formal judicial procedures are followed. Also relevant in this respect is Rule 50 of the EPR, which states that prisoners ‘shall be allowed to discuss matters relating to the general conditions of imprisonment and shall be encouraged to communicate with the prison authorities about these matters’.

Penal Reform International’s handbook on good prison practice, ‘Making Standards Work’, advocates a ‘participatory system in which prisoners are involved in generating ideas for running the prison’, which is argued to have ‘the advantage of enhancing routine communication between staff and prisoners’. In order to formalise this practice, it is recommended that the tribunals’ rules of detention expressly set out the composition, tasks and rights of such ‘participatory committees of detainees’, and what facilities should be provided to them. Further, the rules should clarify the topics in relation to which such committees may present their views, the frequency of their meetings and at which level the discussions with them will take place. Currently, all of this is left to the discretion of the person in charge of the day-to-day management of the institutions, which may not be to the benefit of these committees’ functioning.

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276 Patrick Birkinshaw, Grievances, Remedies and the State, Sweet & Maxwell, London 1985, p. 3.


278 Penal Reform International, supra, footnote 1, p. 33.

279 Norman Bishop, supra, footnote 277, at 232.

Nevertheless, it should be stressed that informal procedures cannot substitute formal ones, as they do not produce enforceable decisions and lack any procedural safeguards.

**Independence and impartiality of the adjudicator**

The division of labour between the Registrar and the President in the ICTR’s and the ICTY’s complaints procedure cannot be traced back to the Rules of Detention and, in all likelihood, represents an attempt to attenuate the tribunals’ Presidents’ workload. As a result, in relation to some detention matters, the Registrar is the ultimate and sole arbiter. The complainant’s right to bring the Registrar’s qualification decision before the President – although it at least provides an opportunity for review - constitutes an additional obstacle for getting access to the *more* independent adjudicator (the President). The situation at the SCSL is in this regard more worrisome, in that the Registrar is the final arbiter on all complaints by detainees, except for the three categories mentioned in *Norman*.

The Registrar, as chief custodian, may be argued to be the author - either personally, or through the person in charge of the daily running of the facility - of all of the decisions that are brought before him. As noted by Van Zyl Smit, where ‘an official is called upon to balance the right[s] of detainees (…), [this] poses a potential risk to the rights of prisoners as the policy considerations might undermine the right entirely’.\(^\text{281}\)

This risk is exacerbated where the adjudicator has a managerial interest in the matter. Furthermore, where the chief custodian is the highest adjudicator in complaints proceedings, this will in all likelihood not contribute to the rethinking or balancing of ‘the relationship between prisoners’ rights and restrictions based on policies that do *not* concern the management of the facility but rather the wider objectives of the detention’.\(^\text{282}\) Moreover, to quote Jaffe, ‘[t]he availability of *judicial* review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid’.\(^\text{283}\)

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\(^\text{282}\) *Id.*, at 369. Emphasis added.
In addition, it was seen in this Chapter’s first paragraph that where civil rights are at stake, Article 6 ECHR demands a truly adversarial procedure before an independent and impartial adjudicator. Indeed, the grievance mechanisms that exist at the SCSL where a decisive role is attributed to the Court’s Registrar are difficult to reconcile with the demands formulated by the ECtHR under Articles 6, 2, 3 and 13 ECHR. It follows from Enea that the demands under Article 6 count for all of the detainees’ rights that have been recognised as such in the EPR where a dispute concerns a civil right.

The lack of an independent adjudicator becomes even more worrisome due to the particularities of the international context. In the domestic setting it has, in this regard, been recognised that adjudicatory functions may undermine or impinge upon inspecting tasks or vice versa when placed in the hands of one and the same official.284 This is relevant to the Registrars’ but also the President’s/Presidency’s role in handling complaints. Admittedly, they are not themselves inspecting agencies. Nevertheless, the fact that they exclusively are charged with deciding on whether or not recommendations made by the inspectorate must be implemented means that possible allegations of an ‘objective partiality’ cannot be easily brushed aside. If, for instance, a Registrar or President/Presidency decides on the basis of budgetary concerns that a specific facility recommended in the ICRC inspection report will not be provided, submitting a formal request or complaint in this regard to the same official will most certainly be ineffective.

International criminal tribunals can, of course, not be compared to States; they are smaller in terms of the number of persons working there and differ from States in respect of both the physical and institutional distance between the various organs.285 Moreover, it is the Registrar who acts as (co-)legislature in drawing-up and establishing the very detention regulations of which he – as the final arbiter in the complaints procedure – may have to determine the validity and legitimacy. As was shown in this Chapter’s first paragraph, this may in certain circumstances entail a breach of the objective impartiality test under Article 6 ECHR.

284 Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 9, p. 11; J. Serrarens, supra, footnote 25, at 218.
At a domestic level, it may be less harmful if grievance mechanisms only provide for internal administrative review without any involvement of an external adjudicator. There, the combination of democratic control, ministerial accountability and the institutional remoteness between the penitentiary’s administration and supervisory administrative organs may all be argued to provide for sufficient safeguards against (perceived) partiality and a lack of independence, and thus contribute to the effectiveness of such internal complaints mechanisms. ‘Effectiveness’, as used here, refers to the aims and rationales of complaints procedures as recognised in this Chapter’s first paragraph. Where detainees do not make use of the available complaints procedures due to their perception that such procedures are pointless, negative feelings are not channeled, the regime’s weak points may go unnoticed, arbitrary decisions are not set straight and the prisoners’ rehabilitation process is undermined.

Furthermore, at first glance, the aforementioned division of labour between the ICTY and ICTR Registrars and Presidents in such tribunals’ complaints procedures - depending on whether the complaint’s substance concerns a(n established) right - may appear to be in accordance with human rights law. It may, however, be argued to be an improper arrangement, in that it lacks any (other) form of effective and independent control of the administration.\(^{286}\) Besides the inspections carried out by the ICRC, which do not lead to binding or public decisions, there is no other form of control over what happens at the tribunals’ detention facilities, other than the internal complaints mechanism.

Furthermore, an internal complaints mechanism does not constitute a proper substitute for judicial review by a truly independent adjudicator.\(^{287}\) Since, judicial review of administrative intramural decisions is not provided for at the tribunals - apart from the opportunity afforded to \textit{accused} persons in detention to complain to Chambers about issues that might affect their right to a fair trial - the involvement of an outsider as an adjudicator in the grievance process is of paramount importance.

Indeed, it must be doubted whether the tribunals’ Presidents/Presidencies are really the appropriate officials (or organ) to deal with intramural complaints (although they are \textit{more} objectively impartial and independent than the Registrars). Firstly, the

\(^{286}\) See, \textit{infra}, p. 455-463.

\(^{287}\) See Van Swearingen’s ‘power solidifying argument’, \textit{supra}, p. 344.
President is the co-legislature of the Rules of Detention, making it improper for him to
decide on the validity or legitimacy of specific provisions in such Rules. Secondly, in
light of the President’s task of supervising the Registry’s activities, the review
exercised by the President does not constitute judicial review proper. Rather, the
Presidents are the highest officials in the tribunals’ institutional hierarchies
responsible for everything that occurs in their remand institutions. As part of the
management team, they may be expected to be primarily mindful of managerial
interests. Also, matters brought to their attention in their executive capacity may
sooner or later be brought before them in their role as the ultimate arbiter in the
grievance mechanisms. In conclusion, the particularities of the international context
and the tribunals’ make-up mean that the Presidents’ supervisory powers in detention
matters cannot be compared to domestic notions of judicial review.

As such, in relation to both the tribunals’ Registrars and Presidents, it may be
argued that the make-up of the tribunals raises certain difficulties concerning their
(perceived) independence and impartiality as internal adjudicators. Although the
tribunals function as mini-States, the different branches of administration, legislature
and judiciary operate at close proximity to one another, both in terms of organisation
and of personal relationships. From the detained persons’ perspective, the different
functionaries may all appear to be serving one and the same purpose, which is to put
and keep them behind bars and to make sure that they give the authorities as little
trouble as possible. All of this may make the functionaries appear to be biased from
the detainees’ perspective.

In conclusion, it is difficult to envisage the tribunals’ complaints procedures
operating effectively without the involvement of an external adjudicator that is not
linked to the tribunals’ management.

It could be argued that the situation at the ICC is different, where the President
is the highest organ in charge of the administration of detention, whilst the Presidency
is the final arbiter on intramural detention complaints. It should be noted, however,
that the President is still a member of the Presidency. Furthermore, the Presidency
may be ‘overruled’ by the Assembly of States Parties for non-legal reasons, as the
(groundbreaking) decision on providing financial assistance to detained persons for
family visits was done.\textsuperscript{288} Hence, the conclusion above regarding the other tribunals also applies to the ICC’s complaints procedure.

**Legal assistance**

Another area of concern is the lack of legal assistance provided to convicted inmates. It is not realistic to expect a layperson to be able to find his or her way through the maze of substantive and procedural rules and rights of (international) detention and prison law. This is exacerbated by the fact that some Registrars have placed a heavy onus on the complainants who themselves have to indicate which provisions they think support their applications.\textsuperscript{289} The complainant must find his or her way through the tribunal’s legal framework, international human rights law and jurisprudence and international and regional soft-law instruments.\textsuperscript{290} As was shown in Chapter 2, the international and regional norms aimed at guaranteeing that the confinement of persons complies with minimum standards of decency, are reflected in general principles of law and in customary law, are scattered over a myriad of conventions and soft-law standards and are subject to interpretation by a multitude of monitoring bodies. Such diffusion is not helpful when attempting to discern the relevant norms and their precise content. A possible solution would be to provide all complainants with legal assistance through the external adjudicator’s office, whose establishment is recommended in this Chapter.

**Transparency**

A point of criticism applying to all of the tribunals is the lack of transparency in their dealings with intramural complaints. Only a handful of these decisions are published on their websites. Apparently, the principle of transparency, which is recognised by

\textsuperscript{289} 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. 4.
\textsuperscript{290} Ibid.
these institutions, does not apply to intramural detention matters. Such an approach is difficult to reconcile with modern and democratic notions of ‘open government’.

Financial compensation

None of the tribunals’ legal frameworks provide for financial compensation upon violation of intramural detention rights. Apart from the ICC Statute, the tribunals’ Statutes do not contain an explicit legal basis for compensating a person for a miscarriage of justice, despite the fact that Article 14(6) ICCPR prescribes this. Although this does not imply that these institutions lack the power to award such damages – a legal basis may be found in the notion of inherent jurisdiction - the Presidents of the ICTR and the ICTY have deemed it necessary to ask the Security Council to amend the Statute in order for them to be able to provide financial compensation for situations of unlawful arrest or detention, wrongful prosecution or erroneous conviction.

None of the tribunals appear to have considered providing financial compensation to detainees or prisoners for the violation of their intramural detention rights. In the case of Prosecutor v. Rwamakuba, the Trial Chamber found that Rwamakuba had not been provided legal assistance during his first months in detention at the UNDF and was of the view that this delay had caused a further

292 See Article 85 of the ICC Statute.
295 ICTR, Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C, T. Ch. II, 12 December 2000. See, also, ICTR, Decision on Appeal against Decision on Appropriate Remedy, Rwamakuba v. the Prosecutor, Case No, ICTR-98-44C-A, A. Ch., 13 September 2007, par. 16.
delay in the detainee’s initial appearance.\textsuperscript{296} The Appeals Chamber stipulated in this respect that ‘any violation of the accused’s rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the [International Covenant on Civil and Political Rights].\textsuperscript{297} It recalled that it had previously ordered that an accused person whose fair trial rights have been violated must receive a reduction of the possible sentence imposed on him.\textsuperscript{298} It further pointed to the \textit{Semanza} and \textit{Barayagwiza} cases, in which it had found that, if the accused would be found not guilty, he would be entitled to financial compensation.\textsuperscript{299} The Trial Chamber eventually ordered the Registrar to pay Rwamakuba the amount of two-thousand US dollars,\textsuperscript{300} to apologise to him, to provide him with assistance in resettling with his family and in ensuring that his children would be provided continued education.\textsuperscript{301} The compensation was only awarded for the violation of Rwamakuba’s right to legal assistance, not for his ‘lengthy detention and prosecution on allegedly false and manipulative evidence’.\textsuperscript{302} As to the latter claim, the Trial Chamber was of the opinion that it did not have the power to provide compensation to an acquitted person, since: i) the legal framework of the ICTR does not provide for compensation to an acquitted person; ii) as to other international criminal jurisdictions, only the ICC Statute provides for this possibility, in certain, exceptional circumstances;\textsuperscript{303} and iii) there is no uniform practice in this


\textsuperscript{297} The Appeals Chamber cited: ICTR, Prosecutor’s Request for Review or Reconsideration, \textit{Prosecutor v. Rwamakuba}, Case No. ICTR-98-44C-A, A. Ch., par. 74-75 and referred to the case-law cited there.

\textsuperscript{298} The Appeals Chamber cited, \textit{inter alia}, ICTR, Prosecutor’s Request for Review or Reconsideration, \textit{Prosecutor v. Rwamakuba}, Case No. ICTR-98-44C-A, A. Ch., par. 74-75.

\textsuperscript{299} The Appeals Chamber cited, \textit{inter alia}, ICTR, Prosecutor’s Request for Review or Reconsideration, \textit{Prosecutor v. Rwamakuba}, Case No. ICTR-98-44C-A, A. Ch., par. 75.


\textsuperscript{301} \textit{Ibid}.


\textsuperscript{303} The Trial Chamber noted that the legal framework of the Special panels for Serious Crimes in East Timor provide for the right to compensation for unjust convictions and for unlawful
regard at the national and international levels. Hence, an acquitted person does not have a right to compensation under customary international law.\(^304\) The Appeals Chamber concurred with the findings of the Trial Chamber.\(^305\) It held that a remedy provided by a Chamber for violations of an accused’s fair trial rights ‘will almost always take the form of equitable or declaratory relief’,\(^306\) and recalled earlier decisions where it had ‘envisioned financial compensation as a form of effective remedy only in situations where, amongst other violations, an accused was impermissibly detained without being informed of the charges against him’, which, according to the Appeals Chamber, was ‘in line with Article 9(5) of the ICCPR which provides for an enforceable right to compensation in the event of an unlawful arrest or detention’.\(^307\) In light of the foregoing, it is highly unlikely that Rwamakuba provides a precedent for positively deciding on claims for compensation involving alleged breaches of intramural detention rights.

Although his arguments concern wrongful detention, prosecution and conviction, Beresford states that both moral and human rights-based arguments may be adduced in support of holding that the tribunals are under an obligation to award compensation.\(^308\) These arguments also apply (at least in part) to violations of intramural detention rights. Firstly, one may point to the ECtHR’s jurisprudence, as set out in this Chapter’s first paragraph. Secondly, although, as Nollkaemper notes, ‘[d]omestic institutions, notably courts, can play a role in upholding the rule of law at international level by scrutinizing whether international acts (in particular acts of international organizations) are compatible with fundamental rights’,\(^309\) the immunities of the tribunals and their officials render the prospect that breaches of rights will be remedied by domestic courts somewhat bleak.\(^310\) It is noted, in this

\(^304\) See ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-A, A. Ch., 13 September 2007, par. 21-25.
\(^305\) See ICTR, Decision on Appeal against Decision on Appropriate Remedy, Rwamakuba v. the Prosecutor, Case No, ICTR-98-44C-A, A. Ch. 13 September 2007, par. 10.
\(^306\) See id., par. 27 and the case-law cited in footnote 102.
\(^307\) Ibid.
\(^308\) Stuart Beresford, supra, footnote 293, at 633.
\(^309\) André Nollkaemper, The Internationalized Rule of Law, Hague Journal on the Rule of Law 1, 2009, p. 74-78, at 76.
\(^310\) Admittedly, immunity may be lifted in certain circumstances. See Sections 20 and 21 of the Convention on the Privileges and Immunities of the United Nations, adopted by the
regard, that the ECtHR, in *Lorsé and others v. the Netherlands*, considered that, taken together, the complaints proceedings before the Appeals Board of the Central Council for the Administration of Criminal Justice and the possibility of interim injunction proceedings provided detainees in the Netherlands with an effective remedy.\(^{311}\) Furthermore, as mentioned earlier, it was stipulated in *Enea v. Italy* in regard to Article 6 ECHR that ‘[a]ny restriction affecting (…) individual civil rights must be open to challenge in judicial proceedings’.\(^{312}\) Moreover, one may point to the case of *Wainwright v. the United Kingdom*, which concerned a complaint by relatives of a confined person that, during a prison visit, they had been subjected to searches that had been carried out in a humiliating and distressing manner. They also complained that English law did not provide for an effective remedy for breaches of their Convention rights. The ECtHR considered that ‘where an applicant has an arguable claim to a violation of a Convention right (…) the domestic regime must afford an effective remedy’. The Court noted the finding of the House of Lords (now the Supreme Court) that ‘negligent action disclosed by the prison officers did not ground any civil liability, in particular as there was no general tort of invasion of privacy’ and, on this basis, concluded that no effective remedy had been available to the applicants, which constituted a violation of Article 13 ECHR.\(^{313}\)

A solution may be to award damages as part of the grievance procedures. It is noted, however, that financial compensation should only be ordered as a last resort,

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\(^{312}\) ECtHR, *Enea v. Italy*, judgment of 17 September 2009, Application No. 74912/01, par. 106.

since it can never truly repair the infringement of a substantive right. Remedies should, as far as possible, ‘mirror’ the specific loss. A denied visit may thus be ‘remedied’ by awarding an additional visit, whilst lost exercise may be compensated by awarding an additional exercise session.
5.4 Medical complaints

5.4.1 Making complaints about medical care

ICTY

The organisation of medical services at the UNDU is outlined in the report on the findings of the inquiry into the circumstances surrounding the death of Milan Kovačević. According to the report, ‘[p]ursuant to Rule 29 (A), the medical services for the detainees at the UN Detention Unit, including psychiatric and dental care, are provided by the host prison under the general supervision of the Registrar. To this end a medical officer from the host prison has been assigned as the person responsible for the care of the physical and mental health of all detainees at the Detention Unit. Although, if necessary, he can refer a detainee to the care of the host prison hospital’. 

Neither the ICTY Rules of Detention nor the ICTY Regulations for the Establishment of a Complaints Procedure for Detainees mention a separate procedure for making complaints about the medical care provided at the UNDU. Specific appellate or investigatory procedures do exist, but not in connection to medical care in general. An example of such a specific procedure can be found in Rule 33(C), which provides that the President ‘may order an inquiry into the circumstances surrounding the death or serious injury of any detainee’. Another example is the right, under Rule 39(C)

315 Id., par. 19. See, also, the Swedish investigators’ report on UNDU, where it was outlined that ‘[a] doctor and two nurses are attached to the Detention Unit. The two nurses work full time there. The doctor works two days a week and states that otherwise he is available round the clock. The medical work is supported by the host prison’s hospital. There is also close cooperation with the Dutch health service through which access is obtained to any specialists that may be needed’; ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.9.
of the Rules of Detention, of the detainee whose cell is being monitored by video equipment to request the President to reverse decisions to this end by the Registrar. Otherwise, a detainee who wishes to complain about medical issues must follow the formal route for submitting complaints in accordance with Rules 80 to 84 of the Rules of Detention and the Regulations for the Establishment of a Complaints Procedure for Detainees. This means that he must first address the Commanding Officer and then the Registrar (who may in certain situations transmit the matter to the President).

Often, however, medical issues are raised before the Trial Chamber in the course of the criminal case against the accused detainee. As held by the Tolimir Trial Chamber, ‘it is in the interest of justice and good administration of the trial for the Chamber to be informed of the recent health developments in regard to the Accused’. The health issues brought to the attention of Chambers may concern the fitness of the accused to stand trial or the impact of detention on the medical condition of the detained person, including his or her mental condition. These examples do not strictly speaking concern intramural matters, but are relevant to the matter of provisional release. It is worth briefly mentioning in this regard that a high threshold must be met before a detainee becomes eligible for provisional release on such grounds. Being seriously ill does not suffice. Rather, the detainee must be

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terminally ill, the medical situation must be immediately life-threatening or it must be established that the detainee cannot receive effective treatment in the Host State. 323 This does not imply, however, that a Chamber must wait until the detainee in question is ‘on the verge of death’ or for a situation to develop into ‘an inhumane one’. 324 In the case of Momir Talić, 325 the Trial Chamber held that the principles of respect for human dignity, proportionality and the presumption of innocence must guide the Chamber in this respect. It stated that ‘[t]he Trial Chamber is certainly not insensitive to the concerns of the Prosecution and even more so to those of the victims and witnesses who may fail to understand as suggested by the Prosecution. It is the duty of the Trial Chamber, however, to emphasise that such concerns cannot form the basis of any decision of this Tribunal, which would be tantamount to abdicating from its responsibility to apply humanitarian law when this is appropriate. There can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies’. 326 Occasionally, provisional release has been granted in order to allow a detainee to undergo specialist medical treatment in another State. 327 In all such matters, Chambers will rely heavily on expert testimony, not only from the UNDU’s Medical Officer, but also from experts from outside the institution. 328

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325 Ibid.

326 Ibid.


328 See, e.g., ICTY, Decision on Defence Motion for Provisional Release, Prosecutor v. Drljaca and Kovačević, Case No. IT-97-24, T. Ch., 20 January 1998, par. 12-14; ICTY, Weekly medical report on the diagnosed health problems of Mr. Jovica Stanišić, from Dr. Eekhof, to the Registrar, of 17 June 2009.
Further, during Status Conferences, accused are asked whether there is anything they wish to say about their wellbeing.\textsuperscript{329} According to Rule 65\textit{bis} of the ICTY RPE, the purpose of Status Conferences is, \textit{inter alia}, to allow ‘the accused the opportunity to raise issues in relation [to his case], including [his or her] mental and physical condition’.\textsuperscript{330} Nevertheless, the usual reply by Chambers to any medical issue raised by an accused is that he must first bring the matter to the attention of the Commanding Officer and the Registrar through the ordinary complaints procedure.\textsuperscript{331}

There is, nevertheless, a close link between medical care and the trial proceedings. Occasionally, this has led to medical care no longer being regarded as a service in itself, but merely as a tool to serve the trial process.\textsuperscript{332} Chambers’ interest in and concern for accused persons’ medical condition has at times led to judicial interventions. In \textit{Šešelj}, for instance, the accused had complained during a Status Conference that he had been moved from a block of prison cells which had a ventilation system and where the windows could not be opened to a block where the windows could be opened and that, as a consequence, his asthma had been aggravated.


\textsuperscript{332} See 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, where it is held 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’; ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.7.2. The ICTY Manual on Developed Practices states that ‘[t]he health of detainees is a crucial consideration for any international court or tribunal, and an important factor for efficient trial proceedings’; ICTY, \textit{ICTY Manual on Developed Practices}, UNICRI, Turin 2009, p. 179, sub 8.
following the move. He requested to be moved back to the former block.\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. See, further, ICTY, Decision on Registry First and Second Requests for Extension of Time to File Expert Reports, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, T. Ch. II, 26 August 2005.} After ascertaining whether Šešelj had already raised the matter with the detention authorities\footnote{The accused had raised the matter verbally with the Commanding Officer, which was sufficient according to the Trial Chamber.} and whether it had been adequately addressed, the Trial Chamber was not wholly convinced that Šešelj’s health could not have been ‘adversely impacted by the environment in that block’.\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.} It therefore ordered the Registrar to appoint a medical expert in the field of allergic asthma as well as an environmental expert to report to the Trial Chamber regarding, \textit{inter alia}, ‘the air quality in the cell blocks used by UNDU, especially the cell blocks presently and previously housing the Accused, with specific reference to any allergen relevant to the Accused’s condition’, ‘the medical history of the Accused since his arrival at UNDU, concerning his asthmatic condition and the treatment he has been receiving’ and ‘the impact, if at all, that the movement of the Accused to a different cell block is having on the asthmatic condition of the Accused’.\footnote{\textit{Ibid}; ICTY, Decision on Registry First and Second Requests for Extension of Time to File Expert Reports, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, T. Ch. II, 26 August 2005.}

In situations where intramural matters did touch upon the accused’s fair trial rights, Trial Chambers have occasionally intervened in detention management, at the expense of order, security and even the detainees’ health. As the Swedish investigators of the UNDU noted, ‘[s]ometimes, the Chambers’ court orders have adverse consequences for good prison practice’.\footnote{ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.4.} The investigators referred, \textit{inter alia}, to the situation in which a detainee was ‘permitted to conduct his own defence, which involved extensive external contacts and a large number of visits’. The special arrangements provided for in this regard made it difficult to maintain sufficient control over visits and telephone conversations.\footnote{\textit{Ibid}.} The investigators recommended ‘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’. In a similar vein, Judge Parker, in his report on the circumstances surrounding the death of Milošević at the UNDU, stated that ‘[i]n December 2005 a memorandum from the Commanding Officer of UNDU, expressing concern at his inability to adequately prevent unauthorised medications reaching Mr. Milošević because of the “privileged” arrangements for visitors and an office at UNDU, was sent to the Trial Chamber by the Deputy Registrar. These arrangements had been provided pursuant to an order of the Trial Chamber to enable Mr. Milošević to work on his defence case.’ Those arrangements consisted, *inter alia*, of the assistance of “legal associates” (...) with whom the Accused enjoyed “privileged” communications and a ‘room in UNDU which is secure, thus providing him with a place to interview witnesses and work with and review documents and materials relevant to his defence. This was also to be used for proofing of witnesses, meetings between the Accused and his legal associates and meetings with others relevant to his defence; the Accused was the only individual with access to that room’. Blood tests conducted on Milošević indicated the use of medication not prescribed by UNDU’s Medical Officer. In this regard, Judge Parker noted that ‘[n]on-prescribed medications and other unauthorised substances were found on several occasions in Mr. Milošević’s “privileged” office allocated to him for work on his Defence, and in his cell in UNDU’, and concluded that ‘it is necessary, with other detainees who conduct their own defences, to seek to avoid any repetition of such conduct’. The ICTY Manual on Developed Practices contains similar remarks. It states that ‘detention issues are routinely raised in the judicial arena and the UNDU management can and must react quickly to judicial issues that arise’. Since arrangements ordered by the judicial authorities may affect order, security and safety, the Manual

341 *Id.*, par. 114.
342 *Id.*, par. 72-75.
343 *Id.*, par. 105. See, further, the paragraphs 106, 108 and 111.
344 *Id.*, par. 130 and the ‘Findings and Recommendations’ section, under 12.
recommends prior consultation with the UNDU before Court orders are issued, in order to identify possible risks and to examine their feasibility.\(^\text{347}\)

The medical issues that over the years have arisen at the ICTY include, *inter alia*, different physical injuries sustained during the war,\(^\text{348}\) anxiety and depression (linked to, *inter alia*, the prospect of being sentenced, recalling wartime experiences when giving testimony,\(^\text{349}\) having to live together with former political and military opponents,\(^\text{350}\) the extremely long periods of remand detention at the international tribunal, or to the detainees’ uncertainty about their future),\(^\text{351}\) hypertension,\(^\text{352}\) cardiac rhythm disturbances,\(^\text{353}\) suicide attempts,\(^\text{354}\) post-traumatic stress disorder\(^\text{355}\) and hunger strikes.\(^\text{356}\) For example, according to Judge Kevin Parker’s Report on the circumstances surrounding Milan Babić’s suicide in UNDU, ‘a psychological examination of Mr. Babić (...) identified "a mild stress-related disorder with depressive features as a reaction to continuing separation from... familiar ties and activities"’.\(^\text{357}\) In addition, some of the detained persons were paraplegics who needed additional and special medical care and assistance.\(^\text{358}\)

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\(^\text{349}\) ICTY, Report to the President, Death of Milan Babić, Judge Kevin Parker Vice-President, 8 June 2006.
\(^\text{350}\) Ibid.
\(^\text{353}\) Ibid.
\(^\text{354}\) ICTY, Report to the President Death of Milan Babić Judge Kevin Parker Vice-President, 8 June 2006.
\(^\text{357}\) ICTY, Report to the President Death of Milan Babić Judge Kevin Parker Vice-President, 8 June 2006.
Another issue concerns the position of the Medical Officer, who should be neutral in order to ensure a relationship of trust with his or her patients. As held by the CPT, ‘the health-care staff in any prison is potentially a staff at risk. Their duty to care for their patients (sick prisoners) may often enter into conflict with considerations of prison management and security. This can give rise to difficult ethical questions and choices. Whatever the formal position under which a prison doctor carries out his activity, it is essential that prison doctors’ clinical decisions should be governed only by medical criteria’. In this regard, the ICTY Manual warns that, ‘detainees/patients perceive that disclosure can be made without their consent, even though compelled by court order, the trust relationship can be undermined. This risk is mitigated if independent medical experts (not in the treating pathway) are appointed to examine the detainee and submit a report to the Chambers and/or parties. This procedure is available pursuant to Rule 74bis of Rules of Procedure and Evidence.’

Complaints on medical issues have concerned storage space in the detainees’ cells (the lack of which allegedly caused or aggravated anxiety and depression), the quality of the food (the Swedish investigators of UNDU recognised that ‘there is completely unnecessary frustration surrounding the detainees’ food, due partly to the central role that food plays in all closed institutions and partly to the cultural differences between Balkan food and the Dutch cuisine’), the availability of a psychiatrist ‘with [only] the same ethnicity and the same native language as most [but not all] of the detainees’, the presence in UNDU of a psychiatrist from Belgrade for only part of the month, but who can be called to The Hague if the need arises (this

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360 CPT, Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and inhuman and Degrading Treatment or Punishment from 23 May to 3 June 2005, CPT/Inf(2006)24, par. 128.
362 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. 5.
363 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.8.1. The audit report states that ‘transition to allowing the detainees to prepare their own food using produce paid for by the Detention Unit and purchased after consultation with the detainees could solve the problem, while offering a very desirable opportunity for occupation’.
364 Id., par. 2.9. The report further states that ‘[a]s regards this type of treatment in particular it is of great importance that it can be carried out without an interpreter. Consideration should be given to making the same service available to other ethnic groups’.
arrangement has been argued to cause delay in detainees’ treatment or the review of their condition);\(^{365}\) insufficient consultations and examinations from specialised doctors;\(^{366}\) nightly monitoring;\(^{367}\) and the limited availability of a dentist at UNDU.\(^{368}\) One detainee complained about the presence of an interpreter during consultations with the Medical Officer. He said that ‘the problem is that I don’t speak English, so an interpreter has to be present and one therefore cannot talk about confidentiality’.\(^{369}\)

When discussing medical issues, it is important to remain mindful of the characteristics of UNDU’s detention population, which differs significantly from that in domestic penitentiaries and remand centers. The Swedish independent investigators of UNDU recognised the ‘unusual make-up of the group of inmates’, which is ‘characterised by a lack of a sense of criminal identity, relatively high average age, substantial resources and the trauma associated with the situation in which they find themselves’.\(^{370}\) The Swedish report further 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’.\(^{371}\) Similar remarks can be found in the ICTY’s Manual on Developed Practices.\(^{372}\) It notes that ‘[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 in length to that of ordinary penitentiaries. This

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365 ICTY, Report to the President Death of Milan Babić Judge Kevin Parker Vice-President, 8 June 2006.
366 ICTY, internal memorandum from Judge Liu Daqun to the Deputy Registrar, 19 January 2010.
367 ICTY, Order Regarding the Nightly Monitoring of the Accused, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, T. Ch. II, 25 August 2010, par. 8; ICTY, statement by Tolimir in accordance with the Trial Chamber Decision of 25 August 2010, IT-05-88/2-T, D9124-D9123, 1 September 2010.
368 ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.
369 Ibid.
370 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.3.
371 Id., par. 2.7.2.
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. Also, 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 the UNDU with various pre-existing health problems due to their age. In particular, the factors of age and trauma will have an effect on medical care.

A situation in which the President directly intervened was Šešelj’s hunger strike. During his hunger strike, Šešelj had consistently refused to be examined by UNDU’s Medical Officer or any Dutch doctor. As a consequence, his medical condition could not be assessed. Šešelj had been advised that he had the right to consult a doctor of his own choice, the costs of which would (exceptionally) be borne by the tribunal. He responded that he would stick to his refusal to see a Dutch doctor or the Medical Officer, but that ‘he may at some future time be willing to consult a doctor of Serbian, French and or Russian nationality’. The President noted Šešelj’s remarks and ordered the Registrar ‘to immediately identify a doctor of Serbian, French and or Russian nationality’.

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373 See, id., p. 179, sub 8.
374 See, also, ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.9; ICTY, Transcripts, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch., 27 November 2006, Pre-Trial Conference, page 839, lines 2 – 24.
375 ICTY, Order to the Registrar, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 29 November 2006. Šešelj had requested permission to receive unmonitored visits by his wife, requested additional facilities for the preparation of his defence and the recognition of his legal associates. He had further demanded that the Tribunal would approach an unspecified State and request it to unfreeze assets he held in overseas bank accounts. See ICTY, Press Release, RH/MOW/1132e, The Hague, 30 November 2006; ICTY, Statement by Judge Fausto Pocar, President, International Criminal Tribunal for the Former Yugoslavia 15 December 2006, MO/1136e annex, The Hague, 15 December 2006. See, in more detail, Göran Sluiter, Compromising international criminal justice: How Šešelj runs his trial, 2 Hague Justice Journal 1, 2007, p. 58-60.
376 ICTY, Order to the Registrar, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 29 November 2006.
medical consultation [ordered] pursuant to Rule 35(C) of the Rules of Detention, the immediate transfer of Mr. Šešelj to a hospital facility outside of the UNDU’. In a press release issued the following day it was announced 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 allow for his health to be monitored more closely and to guarantee prompt medical intervention should a medical necessity arise’. Šešelj had refused to see a French doctor flown in to The Hague. Since he had not been willing or able to identify another doctor whom he would allow to assess him medically, he was hospitalised immediately. A week later, however, the tribunal reported that a team of doctors from Russia, Serbia and France chosen by Šešelj had accepted the tribunal’s invitation and had come to The Hague to examine Šešelj. Two weeks later, the President stated that Šešelj had by then ‘ceased his refusal to take food or medicine and following his recovery in a Dutch hospital facility has been returned to the Detention Unit’. Throughout the situation, the ICTY President kept the President of the Security Council and the U.N. Secretary-General abreast of all developments. The tribunal also maintained contact with the ICRC and other ‘leading international experts on detention’, and invited the former to come to The Hague in order to ensure that the tribunal was abiding by international detention norms.

ICTR

As at the ICTY, no specialised complaints procedure is provided for at the ICTR to deal with medical complaints. Pursuant to Rule 31 of the Rules of Detention, the Medical Officer is responsible for the care of the physical and mental health of the

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377 Ibid.
380 Ibid.
detainees. The Commanding Officer has no competence in this field. 382 It was stated by a senior staff member of the ICTR Office of the Registrar that

‘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 Registrar].’ 383

If a detainee is not satisfied with the medical treatment administered by the Medical Officer, he may file a complaint with the Registrar pursuant to Rule 83 of the Rules of Detention. 384 In practice, the Registrar has never disagreed with the Medical Officer’s medical decisions. According to one senior official, ‘it would be a very unusual event for [the Registrar] to disagree with the Medical Officer’. 385 Since medical decisions require medical expertise, it would indeed be ‘unusual’ for the Registrar to disagree with the expert’s opinion. In one situation, however, there was a difference of opinion between the Registrar and the Medical Officer. The difference of opinion did not concern the diagnosis, but expenditures, i.e. the expenses involved in the medical treatment of a prisoner in another country. According to a Registry official:

‘The Medical Officer believed that one particular detainee should be transferred to some State for treatment. In all the cases we dealt with in the past, we sent people to Kenya. But on the treatment of the last person who was sent to Kenya, we basically had to spend our whole budget. We had to take care of security in Kenya all the time, so we were constantly rotating security staff between Tanzania and Kenya, to keep an eye on him. It was extremely expensive. So we could not afford another case like that. So when we got the next recommendation for someone to receive treatment in Kenya, we opposed it and said that the only treatment that could be obtained had to be

382 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
383 Ibid.
384 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. This was confirmed during interviews the author conducted with staff members of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
385 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
obtained in the Host State. There was no complaint. (...) But we still got several requests for medical treatment in Western countries and in each case we have made a decision refusing such requests on the ground that there is no budgetary provision for that’. 386

If explicitly requested, the Registry will usually authorise a second medical opinion. The Medical Officer will first be asked whether he objects to such a second opinion being sought. In practice, however, no such objections appear to have been made. 387 If the detainee can afford it, he or she can ‘fly in a specialist from anywhere in the world’. 388 Where an indigent detainee submits a request for a second opinion, a medical expert from either Kenya or from Moshi (Tanzania) will be invited to the UNDF. 389 Whereas the Registry’s practice is to grant requests for second opinions, Chambers have at times denied such requests. 390 Since decisions on such requests require some level of medical expertise, such decisions should arguably not be left to judges (or to a Registrar).

For both medical and non-medical complaints, the formal procedure laid down in Rules 82 and 83 must be exhausted before a complainant may approach Chambers. 391 After exhausting the regular procedure, an accused person in detention may then approach the Chamber seised of his or her case, including the Appeals Chamber. The Appeals Chamber has held, however, that it only has jurisdiction to review a Registrar’s or President’s decision if the issue is closely related to the

386 Ibid.
387 Ibid. Arguably, the Medical Officer’s consent should not carry too much weight. A patient’s right to a second opinion is too important; requests thereto should not easily be denied, except perhaps if it is evident that a detainee will not benefit in any way from the requested second opinion.
388 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008. See, also, Rule 28 of the ICTR Rules of Detention, which provides that ‘[d]etainees may be visited by and consult with a doctor or dentist of their choice at their own expense’.
389 ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
390 This applies both to Trial Chambers and the Appeals Chamber when seized of a medical complaint or request. See, e.g., ICTR, Decision on Motion for Partial Enforcement of Sentence, Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, T. Ch. I, 22 June 2006; and 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.
391 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.
fairness of the proceedings. 392 It held in Ngeze that ‘medical, psychological and psychiatric examinations pursuant to Rule 74bis are typically ordered to establish the accused’s fitness to stay in custody, his ability to stand trial, his mental state at the time of the acts charged, as well as sentencing considerations such as ability to be reintegrated in society’. 393 Ngeze had not ‘demonstrated that any of these concerns [were] implicated and more specifically [had] not demonstrated any threat to the fairness of the proceedings on appeal’. 394 Hence he had ‘not demonstrated the need for an independent psychological examination under Rule 74bis’. 395

The need for a Trial Chamber to intervene in medical issues may also arise at the sentencing stage, pursuant to defence submissions relating to the conditions of (post-sentencing) imprisonment. For example, due to the accused’s ‘very fragile health and poor diagnosis’, the Trial Chamber in Serugendo acknowledged the ‘need for a modified regime of detention and accordingly instructed the Registry to ensure that Serugendo continued to receive adequate medical treatment, including hospitalization to the extent needed’. 396

Related to the issue of medical complaints is the inquiry provided for in Rule 30 of the Rules of Detention. It stipulates that, in case of death of a detainee, ‘an inquest will be conducted in accordance with the legal requirements of the Host State’, which refers to the administrative duties of the Registrar in such a situation. The final sentence of Rule 30 makes it possible for ‘[t]he President [to] order an inquiry into the circumstances surrounding the death or serious injury of any detainee’. Although persons have died during detention at the UNDF, 397 no reports on

392 Ibid.
393 Ibid. The Appeals Chamber cited such earlier decisions as ICTY, Decision on defense Motion to Obtain the Assignment of Experts for the Accused Miroslav Kvočka, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, T. Ch., 12 May 2000, p. 2-3; ICTY, Decision on defense Request for Assignment of Experts for the Accused Dragoljub Prcač, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, T. Ch., 18 May 2000, p. 2; ICTY, Decision on defense Request for Assignment of Medical and Psychiatric Experts for the Accused Zoran Žigić, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, T. Ch., 21 June 2000, p. 2; ICTY, Decision on Defense Additional Motion for Psychological Evaluation of the Accused Dragoljub Prcač, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, T. Ch., 14 December 2000, p. 2.
394 Ibid.
395 Ibid.
397 See http://www.un.org/News/briefings/docs/2003/db012403.doc.htm (last visited by the author on 13 July 2011). Serugendo died while awaiting transfer to a designated State for the
the circumstances surrounding their deaths have been published. It is therefore unclear whether such inquiries were actually conducted, either by the Registrar or as ordered by the President.

SCSL

No specific procedure has been established at the SCSL for dealing with medical complaints. Detainees or prisoners held at the SCSL Detention Facility must therefore make use of the formal complaints procedure laid down in Rule 59 of the Rules of Detention. This implies that medical issues must be brought before the Chief of Detention, with a right to bring the matter to the attention of the Registrar if the detainee is not satisfied with the Chief of Detention’s response. When asked how and by whom medical complaints are dealt with, the Medical Officer responded that

‘I could only imagine that an independent panel would have to be formed to decide on that. However, Freetown is very small – everyone knows everyone - which makes it difficult to find an unbiased doctor. Something like that happened in the situation concerning Hinga Norman’s hip replacement. A Jordanian doctor was being flown into Sierra Leone’.398

Special procedures do exist on the investigation of deaths occurring in detention. Rule 22 provides that ‘[t]he President may order an inquiry into the circumstances surrounding the death, serious illness or serious injury of any Detainee. The President shall appoint the person or authority to conduct such an inquiry’. This was done after Sankoh and Norman died in detention.399 The President appointed Appeals Court Justice Renate Winter to conduct an inquiry into the circumstances surrounding enforcement of his sentence; see http://69.94.11.53/ENGLISH/newsletter/aug06/aug06.pdf (last visited by the author on 13 July 2011).

398 SCSL, interview conducted by the author with the SCSL Medical Officer, Freetown - Sierra Leone, October 2009.
Norman’s death. Only the key findings of this inquiry were made public. In this respect, the SCSL’s detention authorities stated that

“We had to send two detainees to Senegal for medical treatment, Norman and Sesay. Mr Norman was very clever. Somehow he managed to let the media know that he was in the worst prison in the desert of Senegal; all the media picked it up; it seemed that we sent them there to die. I contacted the ICRC and asked them whether they didn’t mind going to Dakar and inspect the prison where the detainees were being held and bring a doctor from Geneva to make sure that they were doing everything correct. The ICRC told us that they didn’t like to be told when to go and where to go, but in this case they did go. This was beneficial when Norman died and President Winter made a report; she couldn’t publish the report but at least she had information that the prison in Dakar and medical treatment the detainees received there were fine’.

When Sankoh died, the President appointed the Registrar to conduct an inquiry. However, the Registrar – as the Chief Custodian – can hardly be considered to be an independent investigator. The President should have selected someone unconnected to the detention administration, preferably someone from outside. Furthermore, the results of the inquiry do not appear to have been made public, not even the key findings, which may undermine the detainees’ trust in their safety and in the institution’s medical services.

Other medical issues that have arisen include hunger strikes, cases of malaria, depression – particularly during the detainees’ detention at Bonthe

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401 SCSL, interview conducted by the author with SCSL detention authorities, Freetown – Sierra Leone, October 2009.
island\textsuperscript{406} -, anxiety caused by, for instance, the detainees’ prospect of being sent to Rwanda for the enforcement of their sentences (which would in all likelihood imply that they would not see their relatives again or at least not for very long periods)\textsuperscript{407} -, Norman’s hospitalisation for a hip replacement,\textsuperscript{408} and the medical consequences of the stroke Sankoh suffered before he was transferred to the Court.\textsuperscript{409} As to cases of depression, the Court’s Medical Officer has said that

‘They’ve been locked up now for some seven years. That is why they are just unhappy; they don’t appreciate what’s being done to them. They told me they’d rather be begging in the streets then having plenty of food while being detained. That’s the psychological aspect of them being locked up, which has nothing to do with the way they are being treated. Further, some of them feel that they shouldn’t be here. Some - like the CDF - say they were fighting for the country, for the Government. Some say ‘I was the one who asked my boys to surrender, so why am I here?’ That is also why some of them are easily enraged when you talk to them’.\textsuperscript{410}

The Rules of Detention provide in Rule 19(B) that the Medical Officer is also responsible for the mental health of the detainees. The Court has made use of Sierra Leonean and Dutch psychiatrists.\textsuperscript{411} For some reason, it has proven difficult for the SCSL to keep a psychiatrist readily available in Freetown to provide his services.

Occasionally, detainees have complained about (what may seem to an outsider to be) trivial matters. The Medical Officer has noted in this regard,

‘They have complained about the food – we have been changing caterers until we finally decided to prepare the food ourselves. I think it’s all because of their frustrations caused by being locked up. A detainee would come to me with a slice of

\textsuperscript{406} SCSL, interview conducted by the author with the SCSL Medical Officer, Freetown - Sierra Leone, October 2009.
\textsuperscript{407} SCSL, interviews conducted by the author with SCSL detention authorities and with detainees, Freetown - Sierra Leone, October 2009.
\textsuperscript{410} SCSL, interview conducted by the author with the SCSL Medical Officer, Freetown – Sierra Leone, October 2009.
\textsuperscript{411} SCSL Press and Public Affairs Office, Press Release, 21 March 2003; SCSL, interview conducted by the author with SCSL detention authorities, Freetown – Sierra Leone, October 2009.
pineapple and say ‘doctor, look at this’. I said ‘yes, it’s pineapple’. They’d say ‘don’t you see some brownish spot there’. So I asked ‘what’s wrong with it?’ So he said ‘you ask me what’s wrong with it?’ and he left with the slice of pineapple still on my desk. Another time I wanted to measure a detainee’s height and weight – as I usually tend to do when I examine a patient. He told me ‘no, you’re not going to measure my height – you are doing that to get the measures for my coffin’. Detention makes them blow up the smallest things. Little things occupy their minds that would not worry one who is not confined. You’d think that they would worry more about their defence or their case in general than about such small things. Little things occupy their minds that would not worry a free person’.412

A serious issue is the lack of expert medical treatment in the Host State. Situated in Freetown, Sierra Leone, the SCSL can hardly rely on the medical expertise available in the Host State. As one of the poorest countries in the world, the Sierra Leonean health care system cannot be expected to offer the kind of medical care that should be provided by an international tribunal (particularly in view of the involvement of the U.N. in the Court’s establishment).

This problem is exacerbated by the unwillingness of other States to allow Special Court detainees to come to their country in order to undergo expert medical treatment. For example, whilst in the Court’s custody, Sankoh was suffering from the consequences of a stroke that occurred before his transfer to the Court. He was incapable of talking, walking or feeding himself.413 Because his condition was deteriorating, the Court’s authorities, together with Sankoh’s relatives, appealed to the international community for help on humanitarian grounds.414 A proper diagnosis of his condition could not be made in Sierra Leone, which prevented him from receiving adequate treatment.415 Another problem that had to be resolved before Sankoh could undergo medical treatment elsewhere was that, during the war, the Security Council’s Sanctions Committee had imposed a travel ban on Sankoh, which was still in effect

412 SCSL, interview conducted by the author with the SCSL Medical Officer, Freetown - Sierra Leone, October 2009.
414 Ibid. Sankoh’s wife reportedly ‘called on the international community to practice what it preaches’ and said that ‘“[m]y husband is accused of committing crimes against humanity but now to allow him to just wither away and die, where is the humanity in that?”’.
415 It also prevented the Court from examining Sankoh in order to determine whether he was fit to stand trial. See SCSL Press and Public Affairs Office, Press Release, 22 July 2003.
during his detention at the SCSL Detention Facility. The Court’s Registrar was of the opinion that the Sanctions Committee could probably be persuaded to lift the ban if a country would accept him to undergo medical treatment. It proved impossible to find such a State. The Court’s President even wrote a letter to the Secretary-General, requesting a Security Council resolution under Chapter VII obliging U.N. member States to co-operate with the Court. Eventually, Sankoh died in Freetown, with the travel ban still in place. No State had been willing to accept him to undergo medical treatment. According to the SCSL detention authorities,

‘There was no adequate medical treatment available for the detainees in Sierra Leone. Sankoh had a stroke when he was in police custody. When he was detained here, we tried to organise medical treatment for him in another country but not one wanted him. Ultimately, he was taken to a hospital in Freetown, but there was no treatment there and he just died’.

Years later, in the Norman case, the Court made use of the Senegalese Government’s offer to accept Hinga Norman to undergo medical treatment there. Norman died in Senegal, while recovering from surgery. In her findings on the circumstances surrounding Norman’s death, Judge Winter recommended that ‘the Registrar continue 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”’.

Medical issues have also been raised before Chambers, particularly during status conferences. Rule 65bis of the SCSL RPE provides that status conferences serve to ‘organize exchanges between the parties so as to ensure expeditious trial

419 SCSL, interview conducted by the author with SCSL detention authorities, Freetown – Sierra Leone, October 2009.
proceedings’ as well as to ‘review the status of [the accused’s] case and to allow the accused the opportunity to raise issues in relation thereto’. Judges have held that medical issues belong to the second category. They have also held that the formal complaints procedure must be exhausted before medical matters may be raised in court. In Norman, the Trial Chamber added that, even where the formal complaints procedure has been exhausted, the Court’s involvement is only acceptable in “special circumstances”, although it did not define such circumstances.

According to the Medical Officer, there have been virtually no complaints about the medical care provided to detainees. SCSL detainees have confirmed this. Nor have detainees requested second opinions. Any such request made are said to have come from the Medical Officer himself, who in this respect has said that

‘What helps in this respect, is that the detainees have been fairly healthy. Their age is an important factor; they are younger people, in their thirties and early forties. Also, I have not been too rigid in denying them the medication they’ve asked for – of course these are simple things like paracetamol or codeine that I’m talking about. If I refuse to prescribe certain medication, I always try to give them the reasons for the denial. For example, I didn’t give them tranquillisers like diazepam; I would get them something less strong; but they’d complain that it didn’t work. Actually, they don’t complain much about medication. The thing they do complain a lot about is food.’

According to the Medical Officer, the Registrar and the Chief of Detention always follow the Medical Officer’s instructions on medical issues. The Medical Officer has
in this respect stated that: ‘My advice is always followed. I don’t have to fight other, non-medical opinions’. 429

STL

At the STL, detainees who wish to complain about medical issues must make use of the formal procedure laid down in Rule 83 of the Rules of Detention. A specific procedure only exists in relation to the investigation of cases of death or serious injury of detainees.430 Rule 26 regulates the liability of external medical practitioners.

ICC

Regulation 103 of the ICC RoC instructs the Registrar to make arrangements for the protection of the health and safety of detainees. Sub-Regulation 103(7) states that ‘in the event of death or serious illness or injury of a detained person, the Presidency may order an inquiry into the circumstances’. Regulation 106 confers on detainees the right to complain ‘against any administrative decision or order or with regard to any other matter concerning his or her detention’. To this end, Sub-Regulation 106(2) states that the complainant has the right to address the Presidency, and that a detailed complaints procedure must be provided for in the RoR.

A complaints procedure which deals specifically with medical complaints has not been established. Sub-Regulation 157(9) of the RoR explicitly provides that ‘[i]n the event that a detained person’s request to consult an external medical practitioner is rejected, the former may file a complaint in accordance with the complaints procedure set out in section 5 of this chapter’. Sub-Regulation 157(10), stipulates that the Medical Officer may refuse to administer any treatment recommended by an external medical practitioner where, in his opinion, such treatment would be detrimental to the detainee’s welfare. The Medical Officer must provide the Registrar, the detainee and the Chief Custody Officer with reasons for such refusal. Sub-Regulation 157(11) states, more generally, that where the Medical Officer refuses to administer treatment, a detainee may file a complaint in accordance with the regular complaints procedure.

430 Rule 28(C) of the STL Rules of Detention.
According to Sub-Regulation 158(2) of the RoR, where there is disagreement as to the necessity or the method of medical treatment, ‘a second opinion may be sought from another medical practitioner’. This, however, concerns the disagreement between the Medical Officer and an external medical practitioner, and should not be confused with the detainee’s right to a second opinion. That right is governed by Sub-Regulation 156(1) and is recognised as an absolute right only insofar the detainee is willing to bear the costs. Indigent detainees must approach the Chief Custody Officer with such a request, who will bring the matter before the Registrar. The Registrar may then ask the Medical Officer to first examine the detainee and to identify the kind of medical expertise required. The Rules do not indicate on what grounds a(n indigent) detainee’s request may be rejected. In light of the principle of equality, it is recommended that the Registrar exercises caution in turning down requests for a second opinion submitted by indigent detainees.

Finally, it is noted that Regulation 159 regulates the liability of external medical practitioners.

5.4.2 Evaluation

Establishing a complaints procedure that deals specifically with medical complaints

The official Commentary to the EPR provides in relation to Rule 70 that ‘[i]deally, national law should allow prisoners also to complain against the decisions, conduct or inactivity of medical personnel to existing national medical disciplinary bodies’. Penal Reform International’s handbook ‘Making Standards Work’ states that ‘[c]omplaints procedures should include provisions about involvement of independent health (complaints) bodies, who are competent in matters of medical care. These bodies should be competent to review decisions, to order second opinions or treatment by another physician, to advise authorities about necessary improvements of health services and access procedures and about measures to be taken to ensure professional quality and conduct of health personnel’. Specific procedural rules should be in

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431 Regulation 156(2) of the ICC RoR.
432 Penal Reform International, supra, footnote 1, p. 93.
place in order to prevent that a detention official who lacks any medical expertise from deciding on such complaints.

None of the tribunals have established specific mechanisms for dealing with complaints about medical care. Although in practice, the tribunals’ authorities may choose to call in an external medical expert to advise on a specific matter, this should be mandatory. In any case, it is inappropriate to allow the same official who is responsible for the institution’s budget to decide on detainees’ hospitalisation and other aspects of medical care.

In the Netherlands, a separate complaints procedure has been established to deal with ‘medical complaints proper’. In Articles 28 to 34 of the Penitentiary Measure [Penitentiaire Maatregel], a two-staged procedure is provided for. According to Article 29, the complainant must first submit a written request for mediation to the Medical Advisor of the Justice Department. If mediation does not lead to satisfactory results, he may lodge an appeal with the Medical Appeals Committee [Medische Beroepscommissie] of the Council for the Administration of Criminal Justice and Protection of Juveniles [Raad voor de Strafrechtstoepassing en Jeugdbescherming, or RSJ]. The ‘Medical Appeals Commission’ consists of three members, two of whom are medical experts and one a lawyer. A similar procedure, which need not necessarily include mediation, could be established in the international context, including a right to appeal to the independent adjudicator’s office, the establishment of which is recommended elsewhere in this Chapter, consisting for this purpose partly of medical experts.

Deaths in custody

Although the issue has little to do with the handling of detainees’ complaints, the power of the President to order investigations into deaths in custody was included

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434 Article 30(1) of the Penitentiaire Maatregel.
above in order to provide a more complete picture of the Presidents’ involvement in ‘medical’ issues. The Presidents’ task reflects the obligation of detention and prison authorities to conduct effective investigations into the circumstances surrounding deaths in custody.\textsuperscript{435}

Such obligation is laid down in Principle 34 of the U.N. Body of Principles. Further, in \textit{Jordan v. the United Kingdom}, the ECtHR held in relation to Article 2 that ‘[w]here the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation’.\textsuperscript{436} The ECtHR set out the criteria that govern the instigation of such investigations, where it stated that ‘[t]he essential purpose (…) is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures’.\textsuperscript{437} The Court further held that the person(s) ‘responsible for and carrying out the investigation’ must be ‘independent from those implicated in the events’.\textsuperscript{438} This requires both the absence of a ‘hierarchical or institutional connection’ and a ‘practical independence’. With respect to the latter criterion, the Court referred to the case of \textit{Ergi v. Turkey}, ‘where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the

\textsuperscript{436} ECtHR, \textit{Jordan v. United Kingdom}, judgment of 4 May 2001, Application No. 24746/9, par. 103.
\textsuperscript{437} \textit{Id.}, par. 105.
\textsuperscript{438} \textit{Id.}, par. 106.
gendarmes implicated in the incident’. 439 ‘Effectiveness’ was interpreted by the ECtHR as requiring, *inter alia*, that the investigation must be capable of leading to a determination of whether the State agents’ acts were justified in the circumstances and to ‘the identification and punishment of those responsible’. 440 This, entails ‘not an obligation of result, but of means. (…) The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (…). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard’. 441 The investigation must be conducted promptly and expeditiously, which, according to the ECtHR, is ‘essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts’. 442 Finally, the Court has emphasised the need for ‘a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory’. 443 It stated in this respect that although the ‘degree of public scrutiny required may well vary from case to case’ in all cases ‘the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests’. 444

The obligation of the authorities to conduct an inquiry in cases of death in custody flows not only from the right to life, but also from the right to an effective remedy. 445 Such inquiry must involve ‘a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure’. Additionally, the right to an effective remedy requires ‘the payment of

441 *Ibid*.
442 *Id.*, par. 108.
443 *Id.*, par. 109.
444 *Ibid*.
compensation where appropriate’. As noted by Van Dijk et al., ‘according to the Court’s reasoning, the scope of positive obligations under Article 13 hinges on the nature and gravity of the interference complained of under the Convention rights, especially the nature of the rights guaranteed under Articles 2 and 3. The non-derogable nature of Articles 2 and 3 rights are more susceptible to a separate and stringent appraisal of the requirements of Article 13 than in instances involving other provisions’. In Keenan, the ECtHR held that ‘in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies’. In this regard, the HRC has ruled that the rights of the next of kin must also be respected, which includes a right to information and, where appropriate, to reparations for anguish suffered.

Earlier on in this Chapter, it was argued that the tribunals’ Presidents/Presidencies do not qualify as truly independent adjudicators in intramural grievance mechanisms. That conclusion also has a bearing on the Presidents’/Presidency’s role in investigating the circumstances surrounding deaths in custody. It is, therefore, appropriate that the tribunals’ Presidents have appointed other judges to conduct such inquiries.

The SCSL Registrar’s appointment to conduct the investigation into the circumstances surrounding Sankoh’s death is, however, highly unfortunate. The situation in which a person who is detained on the authority of a tribunal established by the international community is prevented from receiving adequate medical treatment due to a travel ban imposed by the Security-Council and because no State is willing to accept him is clearly unacceptable. Where such a situation leads to the detainee’s death, a proper investigation by an independent authority is essential. Furthermore, the full report of

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446 ECtHR, Keenan v. the United Kingdom, judgment of 3 April 2001, Application No. 27229/95, par. 123.
447 Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, supra, footnote 64, p. 1013.
448 ECtHR, Keenan v. the United Kingdom, judgment of 3 April 2001, Application No. 27229/95, par. 130.
such an investigation must be made public. This may lead to the identification of the problems involved in order to prevent similar situations from occurring again. Equally worrisome is the fact that, to date, no inquiries appear to have been conducted at the ICTR – let alone their findings published - into the deaths occurring at the Detention Facility.

It is further noted in respect of all of the tribunals that their immunity and that of their staff members render the prospect that breaches of rights will be remedied by domestic courts rather bleak. Furthermore, as was said earlier, the tribunals’ legal frameworks and case-law do not provide for the possibility of remedying intramural wrongs by means of financial compensation. Therefore, it would appear very difficult for relatives to obtain financial compensation for violations of the right to life by the tribunals’ authorities, which is inconsistent with human rights case-law.450

450 Stuart Beresford, supra, footnote 293.
5.5 Making complaints to the inspectorate

5.5.1 Complaining to the inspectorate at international criminal tribunals

ICTY

Regulation 13 of the ICTY Regulations for the Establishment of a Complaints Procedure for Detainees provides that ‘a detainee may, at any time during an inspection of the detention unit by inspectors appointed by the Tribunal, raise a complaint concerning the conditions of his detention with the inspectors and shall be entitled to talk with such inspectors out of the sight and hearing of the staff of the detention unit’. Rule 6 of the ICTY Rules of Detention provides that: ‘(A) The Bureau may, at any time, appoint a Judge or the Registrar of the Tribunal to inspect the Detention Unit and to report to the Bureau on the general conditions of implementation of these Rules of Detention and of the Regulations or of any particular aspect thereof with a view to ensuring that the Detention Unit is operated in accordance with the Rules of Detention and Regulations. (B) There shall be regular and unannounced inspections by inspectors whose duty it is to examine the manner in which detainees are treated. The Bureau shall act upon all such reports as it sees fit, in consultation with the relevant authorities of the Host State where necessary.’ The Bureau is a body that consists of the President, the Vice-President and the Presiding Judges of the Trial Chambers. In order to implement the second Paragraph of Rule 6, in 1995 President Cassese appointed the ICRC as the inspection agency.451 In a letter addressed to the ICRC’s President, President Cassese proposed ‘that the International Committee of the Red Cross (the "ICRC"), being an independent and impartial humanitarian organisation of long-standing experience in inspecting conditions of detention in all kinds of armed conflicts and internal strife throughout the world, undertake, in accordance with the modalities set out below, the inspection of conditions of detention and the treatment of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal in the Penitentiary

451 ICTY, Appointment of Inspecting Authority for the Detention Unit, Exchange of Letters between Antonio Cassese President of the ICTY and Cornelio Sommaruga President of the ICRC, 28 April and 5 May 1995.
Complex or in the holding cells located at the premises of the Tribunal (the "Detention Unit"). In carrying out this task, the ICRC focuses on the tribunal’s compliance with internationally accepted detention and prison standards. It appears from press releases that the ICRC visits UNDU approximately twice a year. It has unrestricted access to all areas within UNDU and to all of the information that it needs access to in order to carry out its task. As laid down in Regulation 13, the detainees have the opportunity to talk to members of the ICRC delegation out of the sight and hearing of staff members of the Detention Unit. Visits by the ICRC are unannounced, although under specific circumstances the tribunal may also invite the ICRC inspectors to visit UNDU, as it did in the situation of Šešelj’s hunger strike.

After each visit, the ICRC draws up a confidential report, which is sent to the tribunal. It is the Registrar who communicates with the ICRC. Paragraph 9 of the Agreement between the ICRC and the tribunal stipulates that the ‘ICRC may, if it deems necessary, communicate its observations to the Commanding Officer (as defined in the Rules of Detention) and the Registrar of the Tribunal immediately after the visit. The Registrar shall immediately pass along any such communication to the President’. Paragraph 10 of the Agreement emphasises the confidentiality of all of the information gathered by the ICRC inspectors during their visits, while Paragraph 8 declares that the reports drawn up after each visit are confidential. However, Paragraph 11 provides that ‘[t]he Tribunal may, after securing the ICRC’s agreement, have the report, together with the comments of the Tribunal, made public’, with the proviso that ‘[i]n no event shall personal data relating to the detainees be published without the express written consent of the person concerned’.

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452 Ibid.
453 ICTY, Press Release, RH/MOW/1111e, The Hague, 20 September 2006. According to David Kennedy, UNDU’s Commanding Officer, the ICRC visits the UNDU annually, i.e. one visit per year; ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.
455 See Paragraph 12 of the Agreement between the ICRC and the ICTY; ICTY, Appointment of Inspecting Authority for the Detention Unit, Exchange of Letters between Antonio Cassese President of the ICTY and Cornelio Sommaruga President of the ICRC, 28 April and 5 May 1995.
456 ICTY, Appointment of Inspecting Authority for the Detention Unit, Exchange of Letters between Antonio Cassese President of the ICTY and Cornelio Sommaruga President of the ICRC, 28 April and 5 May 1995.
It is unfortunate that the ICRC inspection reports have never been made public, particularly because the ICRC can only make (non-imperative) recommendations. Without public scrutiny, there is little incentive for the tribunal’s authorities to implement the ICRC’s findings. Whereas in a domestic context an inspectorate’s lack of binding powers may be attenuated by petitioning rights, democratic control and ministerial responsibility, such mechanisms are absent in the international context. In other words, it is up to the institutions’ functionaries to act upon any such recommendations. Moreover, the inspectors apply the minimum norms of the international penal standards, which are not very demanding, which were developed with the domestic context in mind and which are often vague and subject to interpretation. Because the findings of the ICRC have never been published, it is unclear how the ICRC interprets these norms. In this respect, the Chief of Detention of the SCSL’s Detention Facility has noted that

‘If we just meet the standards we’re ok. The international minimum standards are basic. For example, in respect to sanitary facilities - giving them a bucket in the cell means meeting the minimum standards. We exceed the standards in most cases here, but if we didn’t it would be ok. The Red Cross recognises that. In respect to exercise, if we give them one hour a day that’s all they need to have; that’s in accordance with the basic requirements, whereas in Canada, depending on the classification of prisoners, some prisoners get lots of hours of exercise while others get the minimum’.457

Furthermore, the ICRC is the only truly independent inspecting agency that performs regular inspections of the UNDU. This is a very limited arrangement as compared to the various domestic,458 regional and international agencies459 that carry out inspections of domestic prisons and remand centers.

457 SCSL, interview conducted by the author with SCSL detention authorities, Freetown – Sierra Leone, 19 October 2009,
458 In the Netherlands, for instance, the Inspectie voor de Sanctietoepassing visits all prisons and remand centers on a regular basis and publishes its audit reports on such visits. See http://www.inspectiesanctietoepassing.nl (last visited by the author on 13 July 2011).
459 The SPT has visited places of confinement in, inter alia, Mexico, Benin, Paraguay, Cambodia and Honduras. See SPT, Second Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment of Punishment,
Apart from the inspections carried out by the ICRC, there has been one other independent inspection of the UNDU, which was carried out by Swedish investigators shortly after the deaths of Slobodan Milošević and Milan Babić. The ICTY Registrar requested the Swedish Government to conduct an independent audit of the UNDU. Although the Swedish Government facilitated the audit, the findings were the inspectors’ own and not attributable to the Swedish Government. Unlike the ICRC reports, the report of the Swedish audit was published on the tribunal’s website, notwithstanding the critical tone of the report. In order to remedy one of the points of criticism raised by the Swedish investigators, in 2006 the President ordered the separation of non-convicted and convicted persons within UNDU. The Swedish investigators also recommended the establishment of an ‘expedited process for transfer of convicted persons from the custody of the UNDU to States where they are to serve their sentence’.

CAT/C/42/2, 7 April 2009. See, also, Article 11 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.


ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 1.1.

ICTY, Order to the Registrar to Separate Convicted and Non-Convicted Detainees held in the Detention Unit, Case no. IT-06-89-Misc. 1, President, 15 June 2006. It is unclear whether the other points of concern raised in the audit report were addressed by the tribunal. Although a working group of representatives of the Judges, Registry and the detention administration was established to address such other issues, there is no detailed information available as to the implementation of the report’s other recommendations. See Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. A/61/271-S/2006/666, 21 August 2006, par. 100; ICTY, Letter dated 15 November 2006 from the President 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, addressed to the President of the Security Council, U.N. Doc. S/2006/898, 16 November 2006, par. 6. According to the President’s Letter (par. 7), ‘the Working Group found it important to reiterate that the report found the conditions of the UNDU to be of the very highest standards but also considered that the majority of recommendations made by it were reasonable and feasible’. Emphasis added. See also ICTY, Statement by Judge Fausto Pocar, President, International Criminal Tribunal for the Former Yugoslavia 15 December 2006, MO/1136e annex, The Hague, 15 December 2006.

The fact remains, however, that the ICRC reports remain unpublished. The publication of a single report that was drawn up on the basis of a single independent audit, which was conducted over a couple of days, hardly repairs this situation. Moreover, the very fact that, as late as 2006, non-convicted and convicted persons were housed together in UNDU, which constitutes a clear violation of international detention norms, may be seen as an indication of the ineffectiveness of ICRC inspections in bringing about changes to the detention regime. Perhaps unsurprisingly, detainees at both the SCSL and the ICTR, have generally shown a lack of trust in the ICRC inspectors’ effectiveness to bring about real changes to their situation.

In addition to the inspections referred to above, inspections have occasionally been undertaken on an ad hoc basis, by and on the personal initiative of a judge pursuant to specific complaints. In Šešelj, for instance, the Pre-Trial Judge visited UNDU to ‘ensure that Vojislav Šešelj (“the Accused”) fully enjoys facilities enabling him to organise and prepare his defence on his own’. 464 The Pre-Trial Judge based his inspecting powers on ‘Articles 20(1) and 21(4)(b) of the Statute of the Tribunal by which the Trial Chamber, here represented by the pre-trial Judge, is to ensure that the rights of the accused are fully respected, including the right “to have adequate facilities for the preparation of his defence”’. 465 During such visits, special safeguards will be in place, in accordance with principles of criminal procedure. The detainee in question will, for instance, be forbidden to speak to the Trial Judge during his visit. 466 It is clear that such inspections may only benefit detainees who wish to complain about matters that may affect their fair trial rights.

ICTR

Rule 6 of the ICTR Rules of detention provides that the Bureau may appoint a Judge or the Registrar to inspect the UNDF and report on the implementation of the Rules of Detention, in order to ensure that the UNDF is administered in accordance with those Rules. It is unclear why the Bureau would need to appoint the Registrar, who already supervises the administration of the Detention Facility pursuant to Article 8(C) of the

464 See ICTY, Protocol on the Visit of the Pre-Trial Judge to the Detention Unit, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Pre-Trial Judge, 25 October 2007.
465 Ibid.
466 Id., Disposition, sub iv.
Directive for the Registry.\(^{467}\) In practice, Rule 6 has never been used to appoint the Registrar to carry out inspections.\(^{468}\) Pursuant to his supervisory task, the Registrar or his Deputy regularly visit the UNDF.\(^{469}\) Rule 6 further provides that ‘there shall be regular and unannounced inspections by inspectors whose duty is to examine the manner in which the detainees are treated’. In this respect, Rule 33 states that ‘[a] competent authority appointed by the Tribunal pursuant to Rule 6 shall regularly inspect the Detention Unit and advise the Commanding Officer and the Registrar upon: a. The quantity, quality, preparation and serving of food; b. The hygiene and cleanliness of the Detention Unit and of the detainees; c. The sanitation, heating, light and ventilation of the Detention Unit; d. The suitability and cleanliness of the detainees’ clothing and bedding’. Rules 6 and 33 refer to inspections by the ICRC. The ICRC’s inspections are, however, not limited to the issues listed in Rule 33. Paragraph 1 of the Agreement between the ICRC and the ICTR provides that ‘[t]he role of the ICRC shall be to inspect and report upon all aspects of conditions of detention including the treatment of persons held in the Penitentiary Complex or in the holding cells located at the premises of the Tribunal (the “Detention Unit”), to ensure their compliance with internationally accepted standards of human rights or humanitarian law’.\(^{470}\)

The ICRC visits the UNDF approximately twice a year.\(^{471}\) Between visits, there is ongoing communication between the tribunal and the ICRC. The ICTR may report irregularities to the ICRC, such as detainees going on a hunger strike,\(^{472}\) which may provide cause for the ICRC to visit the UNDF.\(^{473}\) Although Rule 6 of the Rules of Detention and Paragraph 6 of the Agreement between the ICRC and the ICTR stipulate that visits are unannounced, the ICRC informs the UNDF authorities of a

\(^{467}\) Directive for the Registry of the International Criminal Tribunal for Rwanda, Judicial and legal Services Division, Court management Section, approved by the Judges on 8 June 1998.

\(^{468}\) ICTR, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.

\(^{469}\) Ibid.

\(^{470}\) Attached to the Letter of Dr. Cornelio Sommaruga, President of the International Committee of the Red Cross of 15 February 1996, ICTR/JUD-11-1-097.

\(^{471}\) ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008. Paragraph 5 of the proposition to an agreement between the ICRC and the ICTR provides that ‘[t]he inspections shall take place on a periodic basis. The frequency with which such visits will occur will be determined by the ICRC’.

\(^{472}\) ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008.

\(^{473}\) Ibid.
pending visit approximately two weeks in advance.\footnote{Ibid.} During visits, detainees are permitted to talk to the inspectors out of the sight and hearing of detention staff.\footnote{Rule 84 of the ICTR Rules of Detention. See also Paragraph 7 of the document ‘Complaints Procedure for Detainees’ (document on file with the author).} The ‘ICRC may communicate freely with any person whom it believes can supply relevant information’.\footnote{Proposition to an agreement between the ICTR and the ICRC, attached to Letter of Dr. Cornelio Sommaruga, President of the International Committee of the Red Cross of 15 February 1996, ICTR/JUD-11-1-097.} Paragraph 2 of the Agreement between the ICTR and the ICRC provides that the ICRC has unlimited access to the UNDF and has the right to move around inside the premises without restriction, as well as the right to information on the practice and operation of the Detention Facility, or any ‘other information which is available to the Tribunal and necessary for the ICRC to carry out its inspections’.

Rule 34 of the Rules of Detention provides that the Registrar shall take immediate steps to implement ICRC recommendations \textit{if} he concurs with those recommendations. If he does not, he must submit to the President a report containing his position and a copy of the recommendations. In light of the President’s general supervisory powers, the President may require the Registrar to implement the recommendations, notwithstanding the latter’s objections. Apart from the Registrar’s obligation to report to the President in case he does not concur with the ICRC’s recommendations, Paragraph 8 of the Agreement between the ICRC and the ICTR adds that the ICRC’s observations must immediately be forwarded to the President. Rule 6 further provides that the \textit{Bureau} ‘shall act upon all such reports as it sees fit, in consultation with the relevant authorities of the Host State where necessary’.

Unfortunately, the reports of the ICRC are not made public.\footnote{See F.L. Leeuw and S. Bogaerts, \textit{De Inspectie voor de Sanctietoepassing (IST): positionering, onderzoek en betekenis [The Inspection for the Enforcement of Sanctions (IST): position, research and meaning]}, Sancties 1, Kluwer, 2008, p. 32-43, at 40. These scholars argue against making inspection reports publicly available, because this might only present a selective and distorted account of the actual situation within an institution.} In this regard, the UNDF authorities have pointed to the ICRC’s general policy to not publish the findings of their inspections.\footnote{ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008.} It is indeed the ICRC’s general policy not to publish its findings, in order to be able to gain repeated and unrestricted access to detainees in
all sorts of conflict situations. Elsewhere, though, the ICRC had identified situations in which it may nonetheless be appropriate to publish its findings, including where i) detainees’ conditions of detention are not improved after repeated requests; ii) the ICRC’s procedural rules for visits are not respected; and iii) the detaining authorities themselves publish only a part of a report. This last criterion may apply to the UNDF, since the authorities, in response to allegations by detainees of ill-treatment, have referred to the (unpublished) ICRC reports, in which specific conditions of detention were allegedly held to be ‘perfectly fine’. Furthermore, the Agreement between the ICTR and the ICRC explicitly provides for the possibility of such reports being published by the tribunal, a possibility which has never been used.

The (unpublished) recommendations of the ICRC inspectors are not binding on the ICTR authorities. Although it may very well be that, in practice, the authorities take such recommendations seriously, the detainees themselves do not foster high expectations in this respect. It would appear that the detainees’ initial enthusiasm to meet with ICRC delegates has faded over the years. This is not surprising, in view of the findings above that the inspectorate has no binding powers and that its reports remain undisclosed.

481 See the ICRC website at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5FMFN8 (last visited by the author on 14 July 2011).
482 ICTR, The President’s Decision on the Complaint Filed by Detainee Georges Rutaganda, President, 18 June 2003; ICTR, The President’s Decision on the Complaint Filed by Detainee Laurent Semanza, President, 18 June 2003; ICTR, The President’s Decision on the Complaint Filed by Detainee Gérard Ntakirutimana, 18 June 2003.
483 Paragraph 10 of the proposition to an agreement between the ICRC and the ICTR, attached to Letter of Dr. Cornelio Sommaruga, President of the International Committee of the Red Cross of 15 February 1996, ICTR/JUD-11-1-097. Paragraph 10 states that the ICTR must first secure the ICRC’s permission when it wants to make a report public.
484 ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008; SCSL, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008.
Rule 60 of the SCSL Rules of Detention provides for the right of detained persons to communicate freely and confidentially with the ‘ICRC or any other inspecting authority designed under Rule 4’. Rule 4 provides that: ‘(A) The International Committee of the Red Cross (hereinafter the “ICRC”) or other competent inspecting authority shall regularly inspect the Detention Facility and advise the Chief of Detention and the Registrar upon the observance of the Rules and relevant Regulations, including, but not limited to: (i) the quantity, quality, preparation and serving of food; (ii) the hygiene and cleanliness of the Detention Facility and of the Detainees; (ii) the sanitation, heating, lighting and ventilation of the Detention Facility; and (iv) the suitability and cleanliness of the Detainees’ clothing and bedding. (B) The Registrar shall, if he concurs with the recommendations made by the ICRC or other competent inspecting authority, take immediate steps to give effect to those recommendations’. Rule 4(B) does not mention the President. It appears to allow the Registrar total freedom in determining whether and how to act upon the ICRC’s recommendations. The Acting Registrar has said that the Registry’s practice is to send such reports to the President. In light of the President’s ultimate responsibility under Rule 19(A) of the RPE for the Registry’s administrative tasks, as well as the necessity of providing for some form of “external” control over the implementation of ICRC recommendations, it is surprising that the Rules do not contain an explicit reporting duty to the President.

There have been various independent inspections of the Court’s Detention Facilities in Freetown and on Bonthe Island besides those conducted by the ICRC. Amnesty International conducted an assessment in May 2003. Earlier inspections were carried out by the Human Rights Section of the Sierra Leone U.N. peacekeeping force UNAMSIL and the Human Rights Committee of Sierra Leone Parliamentarians. In 2006, Antonio Cassese published the findings of his inquiry into the efficiency of the Special Court’s functioning. In the report, he briefly

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485 SCSL, interview conducted by the author with the SCSL Acting Registrar and the Principal Defender, Freetown - Sierra Leone, October 2009.
discussed some aspects of the conditions of detention at the Court’s Detention Facility.\footnote{SCSL, Report on the Special Court for Sierra Leone – Submitted by the Independent Expert Antonio Cassese, 12 December 2006, p. 46-47.}

It was argued above in relation to the other tribunals that the reports of the inspectorate should be made public. It was also mentioned that the detainees have expressed a lack of trust in the effectiveness of ICRC inspections. One Special Court detainee, however, has said that complaints to the ICRC about hospital facilities and medical care more in general have had a positive effect.\footnote{SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.} As at the ICTR, the fact that inspections have been carried out by independent observers and that the reports have been largely positive has occasionally been used by the detention authorities to rebut allegations by detainees, their relatives or counsel that detention conditions are inadequate.\footnote{SCSL Press and Public Affairs Office, Press Release, 27 May 2003.}

**STL**

Like the other tribunals, the STL has concluded an agreement with the ICRC for it to inspect the STL remand institution.\footnote{Agreement between the Special Tribunal for Lebanon and the International Committee of the Red Cross on Visits to Persons Deprived of their Liberty pursuant to the Jurisdiction of the Special Tribunal for Lebanon. The Agreement greatly resembles the one concluded between the ICRC and ICC, the details of which will be discussed further below.} The ICRC has also signed a Protocol with the Lebanese Government, which allows the ICRC to carry out visits in Lebanon to detained persons who may later be transferred to the STL’s remand facility.\footnote{Id., Preamble.}

Rule 4 of the STL Rules of Detention deals with inspections of the STL Detention Facility and closely resembles Regulation 94 of the ICC RoC. Pursuant to paragraph (A), the ‘Council of Judges may, at any time, appoint a Judge or the Registrar of the Special Tribunal for Lebanon to inspect the Detention Facility and to report on the conditions of detention and the administration of the Detention Facility’. Besides such inspections, pursuant to paragraph (B), the President will appoint an Inspecting Authority to conduct regular unannounced visits to the Detention Facility, for the purpose of ‘examining the manner in which the Detainees are being held and treated
and ensure compliance with human rights and international humanitarian law as well as other internationally accepted standards’. As the Registrar is (already) directly in charge of the first-line detention authorities, it is reasonable to assume that he need not be appointed by the Council of Judges in order to inspect the Detention Facility. The Chief of Detention and the Registrar must facilitate the Inspecting Authority’s work and provide it with all relevant information.\textsuperscript{493} Both the Registrar and the President are listed as the recipients of the confidential report drawn up by the Inspecting Authority after each visit.\textsuperscript{494} The Rules oblige the Registrar to act upon the Inspecting Authority’s recommendations. Pursuant to Rule 4(E), the Registrar, in consultation with the President and, if necessary, the Head of the Defence Office, must ‘take steps to give effect to the recommendations of the Inspecting Authority’.

Besides the inspecting authorities referred to in Rule 4(A) and (B), Rule 5 provides that ‘the President and the Pre-Trial Judge may, at any time, visit the Detention Facility’. Nevertheless, as far as the right of detainees to make complaints is concerned, only the Inspecting Authority referred to in Rule 4(B) is relevant, since Rule 84 of the Rules of Detention states that ‘[e]ach Detainee shall have the right to communicate freely and in full confidentiality with the Inspecting Authority designated under Rule 4 of the Rules of Detention. During inspections, such communications shall be out of the sight and the hearing of the staff of the Detention Facility’.

\textbf{ICC}

Regulation 222(3) of the ICC RoR provides that detainees may, at any time during the inspecting authority’s visit, communicate with its representatives out of the sight and hearing of the staff of the Detention Centre. Regulation 94 of the ICC RoC deals with inspections of the Detention Centre. Pursuant to Sub-Regulation (94)1, the Presidency may appoint a judge to inspect the detention centre. Under Sub-Regulation (94)2, the Presidency must appoint an independent inspecting authority to carry out regular and

\textsuperscript{493} Rule 4(C) of the STL Rules of Detention.
\textsuperscript{494} Rule 4(D) of the STL Rules of Detention. The confidentiality is also prescribed by Article 11(3) of the Agreement between the Special Tribunal for Lebanon and the International Committee of the Red Cross on Visits to Persons Deprived of their Liberty pursuant to the Jurisdiction of the Special Tribunal for Lebanon.
unannounced inspections, which is ‘responsible for examining the manner in which detained persons are being held and treated’. The right conferred on detainees in Regulation 222(3) only applies to the inspecting authority referred to in Regulation 94(2) of the ICC RoC. To implement this Regulation, the ICC has concluded an agreement with the ICRC, which deals with inspections of both the Detention Centre and of the places of confinement where ICC sentences are enforced. 495

Section Two of the Agreement deals with inspections of the Court’s Detention Centre. 496 Article 3 of the Agreement states that the purpose of the inspectorate’s visits is to ensure ‘that all Detainees are treated humanely and in conformity with widely accepted international standards governing the treatment of persons deprived of liberty’.

At the end of each visit, a meeting is held between the ICRC inspectors and the Registrar or another staff member designated for that purpose, during which the inspectors communicate their findings and recommendations and take note of the replies. 497 After the visit, the inspecting authority submits a confidential report containing its findings and recommendations to both the Presidency and the Registrar. 498 Pursuant to Sub-Regulation (94)4, the Registrar, upon receiving the recommendations and findings, shall take such action as he considers appropriate, where necessary in consultation ‘with the relevant authorities which have made the detention centre available to the Court’. If the Registrar does not concur with the inspectorate’s recommendations, he must submit a reasoned report to the Presidency. 499 Pursuant to Sub-Regulation (94)5, the Presidency may make any direction, order or decision that it considers appropriate.

As to the content of the recommendations, Article 11 of the Agreement states that ‘[t]he ICRC recommendations shall aim at supporting the ICC’s efforts to take measures to improve, if deemed necessary, the conditions of detention and treatment

495 ICC, Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, Signed: 29 March and 13 April 2006, entry into force: 13 April 2006.
496 ‘Detention Centre’, according to the definition in Article 1 of the Agreement, refers to ‘all premises where detainees are held by the ICC’.
497 Article 7(1)(d) of the Agreement between the ICC and the ICRC.
498 Regulation 94(3) of the ICC RoC. See, also, Articles 3(2) and 11 of the Agreement between the ICC and the ICRC.
499 Regulation 94(4) of the ICC RoC.
of the Detainees in conformity with widely accepted international standards governing the treatment of persons deprived of liberty’. The formulation of this provision may be interpreted as implying that detention conditions should not be developed beyond international minimum standards, which may prevent the ICC Detention Centre from adopting a front-runner position in detention management. Moreover, the phrase ‘if deemed necessary’ raises the question of whether the Agreement’s drafters considered adherence to ‘widely accepted international standards governing the treatment of persons deprived of liberty’ as obligatory.

The Registrar and Chief Custody Officer are obliged to facilitate the ICRC’s work and provide it with all of the relevant information in their possession.\(^{500}\) Pursuant to Article 4 of the Agreement, the ICRC inspectors have unlimited access to the detainees and to all parts of the Detention Centre. They are entitled to speak privately with those detainees selected for that purpose by the ICRC.\(^ {501}\) In addition, the place of interview is chosen by the ICRC inspectors. Finally, the Agreement states that the detainees ‘shall have the right to express themselves freely and without restraint’.\(^ {502}\)

The frequency of the visits, the number of inspectors and the composition of the inspecting teams are determined by the ICRC. There is an ongoing dialogue between the Court and the ICRC on matters ‘of humanitarian concern’ that have been raised in the ICRC reports.\(^ {503}\) Furthermore, the Court must keep the ICRC informed on whether any new detainees have been admitted into custody or transferred from the Detention Centre, as well as on any cases of release, escape or death in custody.\(^ {504}\) The Court must also keep the ICRC informed on the measures taken to implement the latter’s recommendations,\(^ {505}\) as well as on a person’s detention in a custodial State, in order to enable the ICRC to determine whether it will visit the person concerned (if granted permission by the national authorities).\(^ {506}\)

During an ICRC visit, the Registry must provide the ICRC with a list of all detainees, data on transfers and on the stage of the criminal proceedings against the individual

\(^{500}\) Regulation 150 of the ICC RoR.
\(^{501}\) Article 8(1) of the Agreement between the ICC and the ICRC.
\(^{502}\) Article 8(2) of the Agreement between the ICC and the ICRC.
\(^{503}\) Article 11(2) of the Agreement between the ICC and the ICRC.
\(^{504}\) Article 12(2) of the Agreement between the ICC and the ICRC.
\(^{505}\) Article 11(2) of the Agreement between the ICC and the ICRC.
\(^{506}\) Article 11(3) of the Agreement between the ICC and the ICRC.
detainees, as well as with internal regulations.\textsuperscript{507} In addition, information on the operations and practices of the Detention Centre and on any legal or organisational changes made that may affect the conditions of detention must be provided to the ICRC.\textsuperscript{508} The Chief Custody Officer or a staff member designated by the Chief Custody Officer must, during a tour of the Detention Centre, answer all of the ICRC inspectors’ queries.\textsuperscript{509} Inspections are unannounced and unrestricted in duration. There are different types of visits: i) complete visits, which involve a ‘thorough and detailed inquiry into the Detainees’ living conditions and treatment’;\textsuperscript{510} ii) follow-up visits, during which the ICRC inspectors ‘check on any problem noted during previous visits or study particular cases’;\textsuperscript{511} and iii) \textit{ad hoc} visits, which ‘deal with specific problems of a humanitarian nature involving either individual Detainees or the detained population as a whole’.\textsuperscript{512} Interviews are conducted with detainees for the purpose of recording the identity of the detainees and ‘to gather information on the conditions of detention and treatment and to understand the nature and the gravity of the Detainees’ individual problems’.\textsuperscript{513} The Agreement contains a specific provision on medical examinations. Pursuant to Article 9(1), the ICRC’s medical delegates may both converse with and examine detainees in private. Space must be made available specifically for that purpose. The medical delegates shall receive assistance from the Detention Centre’s medical staff; the staff must furthermore provide them with all of the information they may need. The medical delegates also have access to the medical records.\textsuperscript{514} The Agreement further provides that the ICRC may contact the detainees’ families in order to obtain relevant information. Where contact with family members has been lost, the ICRC may offer to help to restore contact, although any messages between detainees and family members must be checked by ICC staff.\textsuperscript{515} The Agreement also

\begin{flushleft}
\textsuperscript{507} Article 7(1)(a) of the Agreement between the ICC and the ICRC.
\textsuperscript{508} Article 12(1) of the Agreement between the ICC and the ICRC.
\textsuperscript{509} Article 7(1)(b) of the Agreement between the ICC and the ICRC.
\textsuperscript{510} Article 6(2)(a) of the Agreement between the ICC and the ICRC.
\textsuperscript{511} Article 6(2)(b) of the Agreement between the ICC and the ICRC.
\textsuperscript{512} Article 6(2)(c) of the Agreement between the ICC and the ICRC.
\textsuperscript{513} Article 7(1)(c) of the Agreement between the ICC and the ICRC.
\textsuperscript{514} Article 9(2) of the Agreement between the ICC and the ICRC.
\textsuperscript{515} Article 10 of the Agreement between the ICC and the ICRC.
\end{flushleft}
envisages the ICRC making proposals to the ICC to provide assistance to detainees ‘to improve the physical and psychological conditions of their detention’.\footnote{Article 13 of the Agreement between the ICC and the ICRC.}

Besides such proposals, Article 11(2) of the Agreement states that ‘[t]he ICC shall make every effort to implement the ICRC’s recommendations’.

The Agreement stresses that the ICRC’s reports must remain confidential.\footnote{Article 11(4) of the Agreement between the ICC and the ICRC.} The principle of confidentiality is binding on both the ICRC and the ICC. The Agreement states that in ICRC or ICC press releases, only the dates of the visits and the number of detainees visited may be disclosed. Unfortunately, the Agreement does not provide for any exceptions to the rule of confidentiality. It was mentioned earlier on that even in the conflict situations in which the ICRC operates, confidentiality is not absolute. According to the ICRC, confidentiality may be lifted ‘if violations are serious and repeated, if the approaches undertaken by the ICRC have failed to end them, if public denunciation is in the best interests of those deprived of their liberty and if delegates have directly witnessed the violations or if their veracity and amplitude have been documented in a verifiable and trustworthy way’.\footnote{See http://www.icrc.org/web/eng/siteeng0.nsf/html/5ZYGTF (last visited by the author on 14 July 2011).} Furthermore, it was observed in relation to the ICRC’s agreements with other tribunals, that such agreements appear to allow for the publication of the ICRC’s reports, if explicitly requested by those tribunals.

The ICRC’s rule of confidentiality is founded on the will to maintain contact with confined persons and on the fear that it will no longer be admitted to places of confinement after publicly criticising the detention conditions in such places.\footnote{Ibid.} In the context of international criminal justice, however, where any other form of independent outside control is lacking, transparency is essential. If the ICRC maintains its policy on confidentiality in the tribunals’ context, it cannot be considered to be the proper agent for inspecting those institutions.

\footnote{Ibid.}
5.5.2 Evaluation

The inspection of penitentiary and remand centers is intrinsically linked to the right of confined persons to make complaints. The link was recognised by the CPT in its Second General Report, where it held that ‘[e]ffective grievance and inspection procedures are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority. The CPT attaches particular importance to regular visits to each prison establishment by an independent body (eg. a Board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises. Such bodies can inter alia play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general’.\(^{520}\) Inspections may be used to verify whether the basic conditions for detainees to exercise their right to complain are present, such as the availability of information about how and to whom to make complaints.\(^{521}\) Furthermore, whilst inspections allow grievances to be heard, complaints procedures before first-line detention authorities may be seen as a form of ‘horizontalised’ inspection or of ‘self-monitoring’, a form of inspection that does not involve ‘governmental’ echelons.\(^{522}\)

In closed environments, complaints may easily be suppressed or go unheard. As Harding notes, ‘[c]losed institutions (...) pose accountability challenges for democratic societies. An effective inspections system seems on balance to be the best model’.\(^{523}\) Further, Van Zyl Smit and Snacken refer to the experiments carried out by Milgram and Zimbardo, which show ‘how deprivation of liberty can lead to extreme forms of dependency, which entail an endemic risk of excesses, from abuse of power

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to torture to extermination’. They also point to more recent cases of abuse, such as those at Abu Ghraib prison, which confirm that it is the very nature of closed institutions that lead to such excesses, whilst arguing that abuses also occur in more liberal regimes. In 1958, Sykes warned against the ‘defects of total power’ and wrote that ‘[t]he custodians have the right not only to issue and administer the orders and regulations which are to guide the life of the prisoner, but also the right to detain, try, and punish an individual accused of disobedience – a merging of legislative, executive, and judicial functions which has long been regarded as the earmark of complete domination’. Hence, inspections constitute an indispensable supplement to internal grievance mechanisms. Inspections, more so than complaints procedures, may help to prevent wrongs from occurring. Furthermore, whereas complaints procedures tend to focus on the grievance of an individual complainant, inspections have a more general effect. Moreover, not all complaints can be couched in terms of rights. Where a complaint is dismissed on the ground that no legal provision has been breached or that the detention authorities have not acted unfairly or unreasonably, inspections that aim at contributing to a humane detention regime and at improving detention conditions may still respond to such grievances. Furthermore, as observed by former SCSL and STL Registrar Robin Vincent, ‘[i]t is inevitable that there will be any amount of ill-informed or occasionally malicious criticism of the conditions and regime in place. Thus every effort should be made from the outset, first and most importantly, to engage with the International Committee of the Red Cross (ICRC) to seek their advice and, subsequently, their assessment of the institution’s detention facility and associated arrangements’. The inspecting agency must be autonomous which, according to Harding, means that ‘it does not report to or through the department or agency responsible for prison operations nor depend on it for funding (…) Otherwise, there is an extreme likelihood that its findings and recommendations will only be taken seriously if they happen to coincide substantially with what the operational arm already thinks or wants to

525 Ibid.
Although ICRC inspections are not dependent on funding from the tribunals, the ICRC’s reporting practice does not conform to Harding’s former criterion. In light of the finding made earlier on in this Chapter that *not even the President* may properly be regarded as the appropriate official to have the final say on implementing the inspectorate’s recommendations, the arrangement at the SCSL, where the ICRC reports directly and exclusively to the Registrar is incomprehensible.

It may further seem surprising that the tribunals have asked the ICRC to inspect their remand institutions. According to Klip, ‘it seems to be rather strange that the ICRC has been entrusted with this task, having no experience whatsoever in supervising the treatment of prisoners in penitentiary institutions. The enormous expertise gathered by the ICRC under totally different circumstances, the treatment of prisoners of war in armed conflicts, does not qualify as a competent board of visitors. The situation in penitentiary institutions cannot be compared so easily to the situations for which the ICRC is competent under the Geneva Conventions. In addition to that, the law applicable to the detention of these prisoners, domestic penitentiary law and international criminal law is far away from the ICRC’s core activities. A suitable alternative consist of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, very well experienced in supervising prison conditions. The convention by which this committee was established provides for a useful framework’. 529 The CPT is a regional body which may, according to some, disqualify it from inspecting the *international* tribunals’ remand institutions. Furthermore, at the time of the tribunals’ establishment, the SPT was not yet functioning. In this light, it is understandable why the tribunals opted for the ICRC. Furthermore, the ICRC *does* have extensive experience in visiting prisons in order to improve detained persons’ conditions of detention.530 Nonetheless, Klip is right in arguing that the situation in the countries that the ICRC visits as part of its mandate is altogether different from that of the international criminal tribunals. In

528 Richard Harding, *supra*, footnote 523, at 548.
530 The ICRC reports that its delegates ‘visit some 440.000 detainees in approximately 2.000 places of detention in over 70 countries each year’. Such places also include regular prisons. See http://www.icrc.org/eng/assets/files/other/icrc_002_0543.pdf (last visited by the author on 18 July 2011).
accordance with its mandate under the 1949 Geneva Conventions and the 1977 Additional Protocols, the ICRC offers its services in situations of international or non-international armed conflicts, as well as in situations of internal tension or disturbances or ‘in other situations such as serious disruptions of law and order or the lack of minimum guarantees of individual safety’. The inspections of prisons in situations other than armed conflict are based on the Statute of the International Red Cross, which ‘give[s] mandate to the ICRC to work for the faithful application of humanitarian law and to ensure protection of an assistance to military and civilian victims of armed conflicts or other situations of violence’.

It appears that the standards used by the ICRC inspectorate are primarily the SMR, which contain many vaguely-defined and minimum rules. According to the SCSL detention authorities, the use of buckets as toilets in cells at the SCSL Detention Facility had been acknowledged by the ICRC not to be in breach of such international minimum standards. As such, the practice went on for years. Only after Cassese vehemently opposed this practice in his publicly available report on the SCSL’s functioning were toilets built in each cell. In this regard, the Court’s detention authorities said that

‘We used to give the detainees a bucket to use as a toilet. We used to have that situation here. In some of the blocks were showers and toilets at the end of the

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531 See Alain Aeschlimann, Protection of detainees: ICRC action behind bars, 87 International Review of the Red Cross 857, p. 83-122, at 86, 87. See, further, Frits Kalshoven and Liesbeth Zegveld, supra, footnote 480, p. 73, 151, 198-199. According to the document ‘The ICRC Its Mission and Work (which is available at http://www.icrc.org/eng/assets/files/other/icrc_002_0963.pdf (last visited by the author on 18 July 2011)), p. 7, footnote 9, ‘[i]nternational humanitarian law expressly confers certain rights on the ICRC, such as that of visiting prisoners of war or civilian internees and providing them with relief supplies, and that of operating the Central Tracing Agency (see Arts 73, 122, 123 and 126, GC III, and Arts 76, 109, 137, 140 and 143, GC IV). In addition, international humanitarian law recognises the ICRC’s right of initiative in the event of armed conflict, whether international or non-international (Art. 3 and Arts 9/9/9/10 common to the four Geneva Conventions). The ICRC’s role is confirmed in Art. 5 of the Statutes of the Movement. In situations falling below the threshold of international humanitarian law, this article of the Statutes alone recognises that the ICRC has a mandate to take action’.


533 Preamble to the Agreement between the Special Tribunal for Lebanon and the International Committee of the Red Cross on Visits to Persons Deprived of their Liberty pursuant to the Jurisdiction of the Special Tribunal for Lebanon. See Article 4(1)(d) and 4(2) of the Statutes of the International Committee of the Red Cross.

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hallway but not in the cells. The ICRC was quite happy with that because it met the basic standards. Cassese said ‘yes, it meets the standards, but a Court of this nature should exceed the standards’. So based on his reports we now put toilets and sinks in each one of the prisoners’ cells, except in B block. But, having said that, before that happened, on an ICRC visit the detainees to make their point had saved their waste for three days and brought their buckets full of waste to the meeting with the inspectors and sat there for half a day; during the second half of the meeting the ICRC said ‘we got your point; could you please now take that stuff away’. But again the ICRC in their report following that visit basically said that we had complied with the standards’.

This incident demonstrates how important it is to publish the inspectorate’s findings and to establish reporting duties to officials not linked to the prison management.

Principle 29(1) of the U.N. Body of Principles states that ‘[i]n order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment’. Paragraph 2 adds that detainees have the right to communicate ‘freely and in full confidentiality’ with the inspectors. Rule 55 of the SMR contains similar demands. In the EPR, the requirement of governmental and independent monitoring is declared a basic principle in Rule 9. More detailed provisions can be found in Rules 92 and 93.

The official Commentary to Rules 92 and 93 of the EPR provides that ‘[r]eports by national and international NGOs, the findings of the CPT and various decisions of the ECtHR show that, even in countries with well developed and relatively transparent prison systems, independent monitoring of conditions of detention and treatment of prisoners is essential to prevent inhuman and unjust treatment of prisoners and to enhance the quality of detention and of prison management’. The requirement of national independent and governmental monitoring agencies is an ‘essential additional guarantee for the prevention of maltreatment of prisoners’ and appears to be compatible with the requirements under the U.N. Optional Protocol to the Convention

534 SCSL, interview conducted by the author with SCSL detention authorities, Freetown – Sierra Leone, October 2009.
535 See, also, Penal Reform International, supra, footnote 1, p. 168.
Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

As to the requirement of governmental inspections, Rule 92 states that such inspections must take place on a regular basis in order to assess whether places of confinement ‘are administered in accordance with the requirements of national and international law, and the provisions of these rules’. The official Commentary to the EPR provides in respect of Rule 92 that the essence of such a national inspecting agency is that ‘it is established by, and reports to, the highest authorities’ and that the results of its inspections ‘are made accessible to other interested parties without undue delay’.537 According to Van Zyl Smit and Snacken, the requirement in Rule 92 reflects the more general duty of national democratic governments to ensure that all State institutions are run in accordance with the rule of law.538 According to these scholars, the requirement of making the results of such governmental inspections available to the public reflects the principle of open government.539

As to the international tribunals, no such governmental (or equivalent) inspections exist, nor are their remand facilities subject to scrutiny by specialist governmental agencies, such as national public health or industrial safety inspectors.540

Rule 93 of the EPR addresses independent monitoring.541 Its first paragraph requires that any findings made in this regard must be made public. This has not been the practice of the international criminal tribunals, with the notable exception of the audit report of the Swedish independent investigators of UNDU. Rule 93(2) clarifies what the term ‘independent bodies’ means: ‘[s]uch independent monitoring body or bodies shall be encouraged to co-operate with those international agencies that are legally entitled to visit prisons’. In other words, ‘independent bodies’ must be distinguished from international agencies such as the ICRC. The EPR do not prescribe one specific form of monitoring, although the Commentary does provide that the inspectorate should be ‘supported by a qualified staff’ and that it should have ‘access to

536 Ibid.
537 Id., p. 169, 174.
538 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 524, p. 117.
539 Id., p. 118.
540 It is noted, however, that in the Netherlands, in order to be permitted to carry a medical title and perform medical operations, one must be registered. All registered medical practitioners are subject to medical disciplinary rules. See Article 2, 35 and 36 in conjunction with Article 47 of the Wet op de beroepen in de individuele gezondheidszorg. These rules also apply to such persons when practicing their profession inside an international remand institution.
541 In this research, the terms monitoring and inspecting are used interchangeably.
independent experts’. The Commentary recommends that the inspectorate’s reports be forwarded to the international agencies mentioned in Paragraph 2. It states that ‘[b]ecause of their limited financial resources and the increase of the number of states to be visited, international bodies must rely increasingly on communication with independent national monitoring bodies’.

Although the ICRC is a well-respected, professional and independent inspecting agency, its powers are inadequate to repair the deficiencies in the international context as identified in the first paragraph of this Chapter. Its recommendations are not binding, nor are its findings made public. Therefore, positive action to repair such deficiencies depends on the goodwill of the detention authorities. As observed by Penal Reform International in its handbook ‘Making Standards Work’, the ‘[i]mplementation of international as well as national rules about treatment of prisoners can be promoted and improved by regular, competent and intensive inspections, provided that these inspections have consequences’.542

It is recommended, firstly, that the inspectorate’s reports are sent directly to the Presidents as the tribunals’ officials most responsible for detention administration. Secondly, the inspectorate must also report directly to the ICC’s Assembly of States Parties or, in respect of the ad hoc tribunals or where the U.N. is involved in a tribunal’s establishment or operation, to the U.N. Secretary-General and the U.N. Security Council. Thirdly, the tribunals should publish the inspectorate’s reports,543 which may be done without infringing on the privacy of individual detainees.544 If the ICRC resolutely objects to such practice, the tribunals should ask another body, for instance the SPT, to take over the ICRC’s work.

Finally, it should be noted that, apart from inspections and complaints procedures, there are other ways to supervise detention authorities in the discharge of their duties. One way is to attribute specific powers or duties exclusively to a particular authority, as for example at the ICTR, where the Commanding Officer alone may impose disciplinary punishments.545 Review may also be carried out by

542 Penal Reform International, supra, footnote 1, p. 167.
543 Ibid.
545 See, e.g., Paragraph 3 of the document ‘Disciplinary Sanctions at the UNDF’ (on file with the author).
imposing reporting duties. The ICTR Commanding Officer, for instance, is obliged to report to the Registrar on certain matters. For example, Rule 41 of the ICTR Rules of Detention states that “[t]he Commanding Officer shall review all cases of individual segregation of all detainees at least once a week and report to the Registrar thereon.”546 Rule 48 obliges the Commanding Officer to report on all accidents involving the use of instruments of restraint,547 whilst pursuant to Rule 51 the Commanding Officer must report the use of force against a detainee to the Registrar. Reporting duties can also be found in the administrative regulations548 and may be established by Chambers on an ad hoc basis in order to ensure that a specific decision is duly implemented by the detention authorities.549

546 Emphasis added.
547 This only concerns the situation where an accident has occurred due to the use of instruments of restraint; SCSL, interview conducted by the author with a senior staff member of the ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
548 See, e.g., Regulation 19 of the ICTR Regulations governing Visits and Communications with Detainees (on file with the author).
5.6 Making complaints to Trial and Appeals Chambers

5.6.1 Detained accused persons’ complaints about intramural matters to Trial and Appeals Chambers

ICTY

It was already mentioned that, during status conferences or initial appearances, accused persons may raise matters concerning their health or the conditions of their detention. In such situations, however, the judges have consistently referred complainants to the formal complaints procedure in the Rules of Detention. In Nikolić, the Trial Chamber held that ‘according to the jurisprudence of this Tribunal, the Registrar and the Chamber are separate, independent organs of this Tribunal. Usually, the correct approach is that the counsel should exhaust all the means at his proposal to get any assistance from the warden of the Detention Unit. If there is any problem, if it poses some serious problems in the conducting of the proceedings, only at that time the Trial Chamber will lend its assistance and its support’. Detained accused may only complain about intramural detention matters to Chambers if such issues affect the fairness of the criminal proceedings against them and after

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having exhausted the formal grievance mechanism. The Blagojević Appeals Chamber argued that ‘[t]he only inherent power that a Trial Chamber has is to ensure that the trial of an accused is fair; it cannot appropriate for itself a power which is conferred elsewhere’. Article 20(1) of the ICTY Statute provides in this respect that ‘[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due respect for the protection of victims and witnesses’. The issue of authority was clarified in Šešelj. Regarding the monitoring of communications between detained persons and counsel within the meaning of Rule 65(B) of the ICTY Rules of Detention, the Trial Chamber acknowledged that the President is empowered to reverse such decisions by the Registrar. Therefore, the Trial Chamber considered that ‘it is not part within its remit to substitute itself for the President of the Tribunal and reverse the Contentious Decision and possibly replace it with another measure’. Nevertheless, the majority held that it did have ‘jurisdiction to review whether the Contentious Decision has the effect of infringing on the Accused’s right to a fair trial, ensured by the Chamber pursuant to Article 20(1) of the Statute’. It subsequently held that ‘[t]he fact that this jurisdiction of the Chamber is not expressly provided for in Rule 65(B) of the Rules of Detention does not remove the Chamber’s inherent jurisdiction pursuant to the Statute, since the Rules of Detention should be interpreted in light of the Statute which is superior to them’. Thereafter, the Registrar filed an urgent submission to

553 ICTY, Decision on the Interlocutory Appeal Concerning the Denial of a Request for a Visit to an Accused in the Detention Unit, Prosecutor v. Šešelj, Case No. IT-03-67-AR73.2, A. Ch., 29 January 2004.
554 ICTY, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, Prosecutor v. Blagojević, Case No. IT-02-60-AR73.4, A. Ch., 7 November 2003, par. 7. The case did not concern an intramural detention matter, but concerned a request by the accused for the withdrawal of counsel under Article 19 of the ICTY Directive on Assignment of Defence Counsel. Article 19 confers the power to decide on such requests on the Registrar, and grants the accused the right to appeal the Registrar’s decision to the President.
555 See, also, ICTY, Order Regarding the Disclosure of Information on the Health of the Accused, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, T. Ch. II, 29 October 2010.
557 Ibid.
558 Id., par. 20.
559 Id., par. 20.
the President seeking the latter’s direction regarding the Trial Chamber’s decision.\textsuperscript{560} The Registrar submitted that ‘the Trial Chamber may intervene if the issue affects the Accused’s fair trial rights (…) but only after the remedies available under relevant provisions (…) have been exhausted’.\textsuperscript{561} However, the President held that ‘[w]hile I clearly have the authority to issue decision that bind the Registrar in accordance with my power to supervise the activities of the Registry pursuant to Rule 19(A) of the Rules of Procedure and Evidence and other specific Tribunal regulations, such as Rule 65(B) of the Rules of Detention, as President, I have no authority to issue decisions that bind a Trial Chamber. This is a power that is exclusively conferred upon the Appeals Chamber pursuant to Article 25 of the Statute of the International Tribunal. The only avenue to challenge the Impugned Decision is therefore through the filing of an appeal before the Appeals Chamber’.\textsuperscript{562} The Registrar filed such an appeal\textsuperscript{563} and a decision was rendered in April 2009. The Appeals Chamber held that ‘[t]he jurisprudence on the issue of review of administrative decisions of the Registrar is well-established’.\textsuperscript{564} It pointed to the \textit{Krajišnik} case, where it was held that, where a power to review a Registrar’s decision is vested in the President, ‘a Chamber may only step in thereafter under its inherent power to ensure that its proceedings are fair’.\textsuperscript{565} The Appeals Chamber concluded that ‘[w]hile mindful of the Trial Chamber’s fundamental duty to ensure the fairness of the proceedings before the Tribunal, the Appeals Chamber recalls that in a case of review of an administrative decision, a Trial Chamber may only step in under its inherent power to ensure that proceedings are fair once all available remedies have been exhausted. Accordingly, the fact that the Statute is superior to the Rules of Detention is of no consequence. Finally, with regard to the issue of concurrent jurisdiction, the Appeals Chamber

\textsuperscript{560} ICTY, Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President Regarding the Trial Chamber’s Decision of 27 November 2008, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 1 December 2008.

\textsuperscript{561} ICTY, Decision on Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President on the Trial Chamber’s Decision of 27 November 2008, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 17 December 2008, par. 8.

\textsuperscript{562} Id., par. 9. Footnotes omitted.

\textsuperscript{563} ICTY, Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, A. Ch., 17 February 2009.

\textsuperscript{564} ICTY, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, A. Ch., 9 April 2009, par. 15.

\textsuperscript{565} \textit{Ibid}. The Appeals Chamber also cited decisions in the cases against \textit{Nahimana}, \textit{Ngeze} and \textit{Blagojević}.
agrees that the Trial Chamber, by accepting to review the Registrar’s Decision of 29 September 2008, implicitly created a “dual competence on the matter”. Such concurrent jurisdiction to review decisions of the Registrar is not consistent with the exercise of a Trial Chamber’s inherent power to ensure that proceedings are fair only once all available remedies have been exhausted’. The Appeals Chamber’s ruling has been followed in subsequent case-law.

Occasionally, depending on the subject matter of the motion in question, Trial Chambers have themselves referred motions directly to the President, without obliging the accused to first raise the matter with the first-line detention authorities. Also, Judges have at times asked the Registrar to inform accused and their counsel of the applicable procedures. Chambers have recognised that all kinds of intramural matters may have an impact on the criminal proceedings against an accused person in detention. For example, the defence’s claim that Šešelj’s move to another cell block had affected his asthmatic condition was sufficient for the Trial Chamber to accept competence. This relates to the issue discussed earlier concerning the potentially detrimental effect of Court orders on the institution’s safety and security. Some of the Chambers’ interventions - particularly when granting requests for additional intramural facilities for self-representing accused - have jeopardised core policy aims of detention management.

In other cases, however, Chambers have been less “generous”. In Krajišnik, for instance, the self-representing accused complained that he had insufficient facilities to

566 ICTY, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, A. Ch., 9 April 2009, par. 20-21.
567 See, e.g., ICTY, Decision on the Accused’s Motion Concerning the Restrictions on his Communication with Radovan Karadžić, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 27 April 2009; ICTY, Decision on the Accused’s Oral Request to Reinstate Messrs. Zoran Krasic and Slavko Jerkovic as Privileged Associates, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 10 February 2010.
568 See, e.g., ICTY, Decision on Defence Motion Concerning Conditions of Detention, Prosecutor v. Halilović, Case No. IT-01-48-PT, President, 12 February 2004, par. 1. Since the modification of conditions of detention is the President’s prerogative, the Trial Chamber was correct in referring the matter directly to the President.
569 ICTY, internal memorandum from Judge Liu Daqun to the Deputy Registrar, 19 January 2010.
570 ICTY, Order to Registry and Commanding Officer of the United Nations Detention Unit, Prosecutor v. Šešelj, Case No. IT-03-67-PT, T. Ch. II, 11 July 2005.
571 See, supra, p. 304.
properly work on his appeal. The Appeals Chamber held that ‘[a]s to Mr. Krajišnik’s request for 24-hour access to a telephone, scanner, fax, and photocopier, the Appeals Chamber considers that the Registry’s denial of such resources is reasonable. While in the absence of designated legal associates, some variation from standard UNDU procedures may be warranted to enable an accused adequate means of exchanging appropriate information with his defence team, 24-hour access to such means of communication goes far beyond what is necessary to ensure the provision of adequate facilities’.

ICTR

Detainees and their counsel have often raised issues concerning the conditions of detention before Trial or Appeals Chambers. In this regard, the Appeals Chamber has held that ‘the exercise of such jurisdiction (…) should not be used as a substitute for a general power of review which has not been expressly provided by the Rules of Detention’. In most instances, therefore, Chambers have required complainants to first exhaust the formal complaints procedures under Rules 82 and 83 of the Rules of Detention. Moreover, Chambers have only accepted competence in intramural


ICTY, Decision on Krajišnik Request and on Prosecution Motion, Prosecutor v. Krajišnik, Case No. IT-00-39-A, A. Ch., 11 September 2007, par. 46. Footnote omitted.

ICTY, Decision on Hassan Ngeze’s Motion to set Aside President Møse’s Decision and Request to Consummate his Marriage, Nahimana, Barayagwiza and Ngeze v. the Prosecutor, Case No. ICTR-99-52-A, A. Ch., 6 December 2005, citing ICTY, Decision on Interlocutory Appeal on Motion for Additional Funds, Prosecutor v. Milutinović et al., Case No. IT-99-37-AR.73.2, A. Ch., 13 November 2003, par. 20; ICTR, Decision on Hassan Ngeze’s Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, Nahimana et al. v. the Prosecutor, Case No. ICTR-99-52-A, Pre-Appeal Judge, 12 December 2005; 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.


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matters in so far as such matters may affect the fairness of the criminal proceedings.\textsuperscript{576}

Nevertheless, exceptions have been made to the rule that the formal complaints procedure must first be exhausted. The Trial Chamber in \textit{Prosecutor v. Nahimana et al.} concurred with the Registrar that Ngeze had ‘directly seized the Trial Chamber without submitting a written complaint to the Commanding Officer’ and noted that the detainee should have followed the procedures laid down in Rules 82 and 83 of the Rules of Detention. It nevertheless acknowledged that, although the defence motion dealt with administrative matters falling squarely within the competence of the Registrar, under Rules 54 and 73 of the ICTR RPE the Defence was entitled to approach the Chamber to seek relief. The Trial Chamber continued to consider the case on its merits.\textsuperscript{577} In \textit{Nahimana et al.}, the Appeals Chamber formulated the criterion for making an exception to the general rule, where it held that the Defence had neither established that the request would be treated ‘unfairly or not timely’ if not immediately placed before the Appeals Chamber.\textsuperscript{578}

Usually, however, a Chamber will first point to the Commanding Officer’s primary responsibility for all aspects of the daily management of the UNDF.\textsuperscript{579} Secondly, it


\textsuperscript{578} 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.

\textsuperscript{579} ICTR, Decision on “Appellant Hassan Ngeze’s Motion for Leave to permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays”, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 25 April 2005, par. 2; ICTR, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 3 May 2005, par. 6; ICTR, Decision on Hassan Ngeze’s Motion to set Aside President Møse’s Decision and Request to Consummate his Marriage, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 6 December 2005; ICTR, Decision on Hassan Ngeze’s Request to Grant him Leave to Bring his Complaints to the Appeals Chamber, \textit{Nahimana et al. v. the Prosecutor}, Case No. ICTR-99-52-A, Pre-Appeal Judge, 12 December 2005; ICTR, Decision on Hassan Ngeze’s Request for a Status Conference, \textit{Nahimana et al. v. the Prosecutor}, Case No. ICTR-99-52-A,
will outline the formal procedure for making complaints as laid down in Rules 82 and 83, and mention that, pursuant to Rule 19 of the RPE, the President supervises the activities of the Registry.\footnote{ICTR, Decision on Ntabakuze’s Motion Regarding Access to the United Nations Detention Facility, \textit{Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva}, Case No. ICTR-98-41-T, T. Ch. III, 10 June 2002, par. 3. See, also, ICTR, Decision on Hassan Ngeze’s Motion Seeking Leave to Marry, \textit{Nahimana et al. v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 28 September 2004; ICTR, Decision on Hassan Ngeze’s Motion Appealing the Registrar’s Denial of Marriage Facilities, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 20 January 2005; ICTR, Decision on “Appellant Hassan Ngeze’s Motion for Leave to permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays”, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 25 April 2005, par. 2; ICTR, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 3 May 2005, par. 6.} Thirdly, it will take note of the fact that, in the case before it, the formal procedure has not been followed and, as such, will refuse to consider the case on its merits.\footnote{ICTR, Decision on “Appellant Hassan Ngeze’s Motion for Leave to permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays”, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 25 April 2005, par. 3, citing: ICTY, Decision on Interlocutory Appeal on Motion for Additional Funds, \textit{Prosecutor v. Milutinović, Ojdanić & Šainović}, Case No. IT-99-37-AR73.2, A. Ch., 13 November 2003, par. 19-20. See, also, ICTR, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 3 May 2005, par. 7; 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.} Occasionally, Chambers have explicitly held that ‘if, after having gone through the prescribed procedure, the Appellant still considers that his right to fair proceedings is being infringed (…), he can raise the matter with the (…) Chamber, which has the statutory duty to ensure the fairness of the proceedings (…)’.\footnote{Rule 73(F) of the ICTR RPE.}

If the Chamber is of the view that the motion is frivolous due to the fact that the formal complaints procedure has not been followed,\footnote{Rule 73(F) of the ICTR RPE.} it may order the Registrar to
It appears that a Chamber will only instruct the complainant to raise the matter with the Chamber again (after he has exhausted the formal complaints procedure) where there is, *prima facie*, reason to assume that the complaint has merit. In such cases Chambers will not declare the motion frivolous.

Another test applies where the detainee requests a Chamber to call a status conference. In *Ngeze*, the defence requested a status conference ‘to challenge the restrictive measures to which [Ngeze] has been subjected by the Commanding Officer of United Nations Detention Facilities’. The Pre-Appeal Judge noted that ‘pursuant to Rule 65bis (B) of the Rules of Procedure and Evidence, “the Appeals Chamber or an Appeals Chamber Judge may convene a status conference” to organise exchanges between the parties so as to ensure expeditious proceedings’. Since Ngeze had not shown how the requested status conference ‘would be useful to ensure that [his] case proceeds with any further unnecessary delay’, his request was denied.

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585 See ICTR, Decision on “Appellant Hassan Ngeze’s Motion for Leave to permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays”, *Nahimana, Barayagwiza and Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, A. Ch., 25 April 2005. Ngeze requested the Appeals Chamber to ‘issue an order “to permit his counsel to communicate with [him] any time whenever the counsel requires to do so in connection with the preparation of his pending Appeal as was the practice during the trial proceedings”’. The decision ICTR, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, *Nahimana, Barayagwiza and Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, A. Ch., 3 May 2005, concerned requests by Nahimana for permission to be visited by his Defence team’s legal assistants and to meet them confidentially in the absence of Counsel.


As at the ICTY and the ICTR, at the SCSL detained persons have raised intramural detention matters before Trial and Appeals Chambers. In *Norman et al.*, the accused persons complained to the Trial Chamber about a lack of exercise facilities, the plastic buckets that the detainees had to use as toilets between 10 am and 7 p.m., visiting rights, the change of bed linen, medication, a labour fee and food. Requests have also been made to Chambers for laptops, internet and email access and a phone for personal use. Other complaints have concerned strip searches of detainees, visiting policies, the transport of detainees, the use of instruments

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of restraint,\textsuperscript{597} the change of security regimes\textsuperscript{598} and an alleged lack of consideration for cultural particularities of the detainee population.\textsuperscript{599}

Among other things, status conferences allow accused persons to raise any matter concerning their detention or their health before Chambers.\textsuperscript{600} Chambers have emphasised, however, that defendants must first exhaust the formal procedure before submitting complaints under the Rules of Detention.\textsuperscript{601} According to Robin Vincent, ‘[i]t is totally unnecessary for a court to have to deal with such matters in the majority of instances, and is also likely to distract the court from its more important responsibilities’.\textsuperscript{602} It was held in Sesay et al. that ‘when it comes to what happens in the detention facilities, there is a tradition of judicial non intervention. Unless something happens there that shocks the conscience of the Court, then the Court is called upon to intervene. But we are not called upon to intervene if there's every infraction, minor or major, of prison rules. The hierarchy there gives the administration supervisory jurisdiction over that. (...) I mean, you should only come to us when you've exhausted the other channels that are provided and you don't have any remedy, then the Court sees its way clear to intervene’.\textsuperscript{603} In Taylor, the Trial Chamber stressed that ‘it is well established that a Trial Chamber does not have jurisdiction to instruct the Registrar in administrative matters that are within his primary competence, except where such matters affect the fundamental right of an accused to a fair trial’.\textsuperscript{604} During a status conference in Norman et al., counsel for one

\textsuperscript{602} Robin Vincent, \textit{supra}, footnote 248, p. 74.
of the accused complained about a lack of adequate exercise facilities. The Presiding Judge asked the defence counsel whether he had first raised the issue with the Chief of Detention and the Registrar: ‘I'm inquiring of problems that may have been solved if they had been raised through the appropriate channel. So the channel is not the Court, per se; it's the chief of detention if there is a problem. If it doesn't resolve in any action to your satisfaction, then it can be brought to the attention of the Registrar. The Court is not essentially running the detention, as you know’. After counsel confirmed that he had made use of the administrative channel, the Trial Chamber accepted competence and asked the Chief of Detention to report back on the matter.

In *Brima et al.*, a complaint was raised in Court concerning events that allegedly took place during the visit of a potential Defence witness. It was alleged that the potential witness had been interfered with ‘in a way likely to bring the administration of justice into disrepute’. The persons responsible for the alleged transgressions were agents of the Government of Sierra Leone and personnel of the Special Court. The Defence asserted that, upon arrival at the Court, the potential witness had been arrested and detained for a couple of hours while his private premises were searched by military police. In addition, the premises of a defence clerk had been searched and the clerk himself appeared untraceable. After investigating the matter, the Trial Chamber concluded that ‘the given facts do not entitle us to find that any potential Defence witness was interfered with or intimidated, or that any security officer of the Special Court misused information given by the visitors or exceeded his or her authority in any way’. It did not find any potential infringement of fair trial rights and on that
basis denied competence. In this regard it noted that the matter had not first been brought to the attention of the Chief of Detention or the Registrar.\textsuperscript{609}

An example of a situation in which a remedy was awarded by a Trial Chamber for the detention administration’s breach of a Presidential order can be found in the \textit{Taylor} case. Camera surveillance equipment had been installed in the room at the ICC Detention Centre where Taylor met with his counsel, which was argued to hinder the preparation of Taylor’s defence. A Presidential order on the issue had not been complied with for eighteen days. The remedy awarded by the Trial Chamber consisted of an additional eighteen days preparation time being granted.\textsuperscript{610}

Chambers have been very keen to protect the integrity of the Court’s public image. The case of \textit{Sesay et al.} is worth discussing in this regard, as it sheds light on the Court’s dealings with sensitive, intramural issues. It also explains the division of labour between Chambers and Registry in handling intramural detention complaints. In that case, the Trial Chamber reproached one of the detainee’s defence counsel for making unfounded or unchecked accusations in Court. The wife of one of the detainees [it was not really clear whether it concerned the detainee whose counsel made the accusations in court] had claimed that, during a visit to the Detention Facility ‘she had been stripped to her underwear and subject (...) to a "vaginal search"’.\textsuperscript{611} The detainee’s counsel brought the matter to the Court’s attention. After the detention authorities’ had contradicted the woman’s allegations, the Court angrily addressed defence counsel: ‘do you think it was normal, (...) as counsel, (...), appearing here to make such allegations before ascertaining, (...) the truth at least and even identifying those family members? You say you talked of family members, I mean, was it normal for you to make such an allegation that has -- was spreading, (...) so widely? And do you think that it was normal (...) for you to make such an allegation before even verifying the truth from interviewing your client and the family members who were supposed to have been subjected to the intimate search?’\textsuperscript{612} The Presiding Judge said that ‘[i]t is a very serious issue when allegations like this are made. This -- the officer who is in charge of the detention is -- if you look at him he is

\textsuperscript{609} \textit{Id.}, par. 29, 31.
\textsuperscript{612} \textit{Id.}, at page 13, lines 4–9.
a very, very -- he trails behind him a great experience, you know, in penitential administration and if he has to come here and has to live with such dirty remarks in an, you know, of misconduct. That's misconduct, in an establishment which he controls, so you can understand his control. I mean, he has come here on loan from the Northern Island -- Ireland and, I mean, how do you expect that he would come here and you would start rubbing mud, you know, on him'. In other words, the Court’s main concern appears to have been the public exposure and the integrity of the Court’s image. It stressed that the counsel should have properly investigated the matter’s truthfulness ‘before you make such an allegation, you know, in front of this Bench and to the world, to the world. I mean, the gallery is there and you know what has been published in the papers about that allegation’. The Presiding Judge added that ‘[t]he only comment I have to make is that we are sitting in an open session and that whatever we say or do here is directly transmitted, you know, to the public, to both the national and the international audience, and that I think we need to be very, very, very, very careful’.

The report drawn up by the detention authorities and the Chief of Detention’s statement before the Trial Chamber, in which he stated that conducting intimate searches is not Detention Facility policy and that such searches were considered impermissible, were considered conclusive evidence that the search had not occurred. Counsel’s objection that all parties should be heard on the matter was disregarded.

The judges appear to have been far too concerned with the ‘feelings’ of a public official who, as a matter of principle, should always be prepared to come to Court and defend or explain policies for which he is responsible, even following allegations that turn out to be unfounded. This is particularly so in a context where all other forms of effective, independent control are lacking. The defence counsel in question apparently deemed the allegations to be of such seriousness that he decided to raise the matter before the judges immediately. He was reproached for not raising the issue first with the detention authorities. Although it may be normal and common practice for parties to raise issues with one another out of court in order to put them on notice as to

613 Id., at page 18, lines 31-37.
614 Id., at page 14, lines 2-4.
615 Id., at page 20, lines 8-10.
616 Id., at page 21, lines 8-9.
certain matters, it may appear to some as though the judges preferred the sensitive intramural matter to remain undisclosed.

As to the question of whether the matter needed any further investigation, the Presiding Judge suggested to counsel that ‘[y]ou are a very experienced practitioner, and I don't think you require any advice on this matter. But if I -- you wanted to do yourself and your client a service, I think the service, you know, has -- the road you should -- the path you should walk on, you know, has been traced by your colleagues in their interventions. We followed them, you know, very, very carefully, (...) I think in situations like this you are an adult you should just know how to let a matter rest’. 617 Later on during the session, however, the judges argued that this would not preclude the Chief of Detention from dealing with the matter administratively. 618

Detained accused have often raised matters relating to their detention conditions in court during status conferences. 620 In Katanga & Ngudjolo Chui, it was held by the Registrar that ‘qu’il était important (...) de rappeler que continuer de soumettre à la Chambre des questions de nature administrative n’était pas sans créer un risque d’engorgement de l’activité juridiciare de la Chambre’, 621 which reflects the aforementioned ‘floodgates argument’ against judicial intervention in prison administration.

617 Id., at page 21, lines 14-20.
618 Id., at page 24, line 33.
619 Because of the lack of relevant case-law, STL practice will not be separately discussed here.
5.6.2 Evaluation

It is common for prison administrators to not look favourably upon judicial intervention in intramural affairs. An argument often adduced in this regard is that ‘security, good order or discipline would irretrievably break down if governors and prison officers ha[ve] to perform their duties with a judge looking over their shoulders’. 622 Another argument against judicial intervention is the belief that courts become inundated with prisoners’ applications. Some States’ judiciaries have addressed that risk by demanding that complainants first exhaust internal grievance mechanisms before turning to the courts.

However, where complaints involve disputed issues of fact, it should be noted that internal grievance mechanisms usually operate to the disadvantage of the complainant. When it is a prison officer’s words against an inmate’s, the former is more likely to be believed. Purely internal grievance mechanisms, therefore, cannot be considered to be a proper alternative to court proceedings.

At the tribunals, Chambers have constantly stressed the need for complainants to exhaust the regular complaints mechanism. Moreover, they have held that their competence is limited to matters that may affect the fairness of the criminal proceedings against an accused person in detention. As a consequence, their concern for detention conditions cannot repair the deficiencies of the tribunals’ complaints procedures as identified earlier in this Chapter, which are caused by the particularities of the international context.

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622 Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 9, p. 100.
5.7 Conclusion

If the rationales of complaints procedures, which are, in essence, protective mechanisms, are lost sight of, practical considerations may soon compromise the effectiveness, credibility and fairness of such mechanisms. Furthermore, it is a premise of this research that international penal standards, which were developed with the domestic context in mind, have been automatically transposed to the international context, despite the fact that the particularities of that context may very well call for different or additional arrangements, in order not to render such standards a dead letter.

In this Chapter, then, the rationales for establishing grievance mechanisms and this research’s premise have constituted the normative framework for evaluating complaints procedures at the tribunals.

5.7.1 An independent complaints adjudicator

One of the characteristics of the tribunals’ detention administrations is the involvement of many different officials. The detention facilities operate under the responsibility of the Registrar and, ultimately, the President. Such officials have been attributed legislative powers, are ultimately responsible for security, safety and order, and have further been awarded important functions in the inmate grievance procedures. This bears upon the (perceived) independence and impartiality of their role as adjudicators. The close proximity of the various ‘branches of government’ at the tribunals only exacerbates this concern. Furthermore, the heavy workload of these officials and the need to prioritise may result in intramural complaints, which seemingly concern more trivial matters, receiving less attention than they should or, at least, in being dealt with less expeditiously. Furthermore, effective forms of independent review of the administration of detention are absent. The only inspections carried out on a regular basis are those by the ICRC. Although the ICRC is a highly respected independent and professional organisation, it lacks any binding powers and its findings remain confidential. Moreover, the immunities of the tribunals and their officials render the prospect that breaches of rights will be remedied by domestic

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623 See, in a similar vein, Dirk van Zyl Smit, supra, footnote 281, at 368.
courts rather bleak. It is further noted that the tribunals are not parties to international or regional human rights conventions, which implies that complaints by the tribunals’ detainees to the adjudicating bodies established under those conventions will not be admissible, at least where such complaints are directed against the tribunals themselves. Admittedly, the tribunals’ Chambers provide some relief, but only where the issue concerned may affect the fairness of the criminal proceedings.

It is therefore recommended that a truly independent and impartial complaints adjudicator be established. Aside from such an adjudicator having to be an ‘outsider’, ‘in order to prevent command influence in fact or appearance’, 624 Robertson lists three other conditions that must be satisfied for adjudicators to be considered impartial. ‘They must be well versed in the dynamics of prison life’. According to Robertson, ‘[i]f adjudicators are not knowledgeable of the prison community, they will become dependent upon prison staff and thereby act in accordance with the latter’s biases’. 625 Thirdly, ‘adjudicators must be knowledgeable of due process safeguards and committed to impartiality’. 626 Fourthly, ‘one should be mindful that non-adjudicative tasks assigned to “outsiders” can impart the very institutional bias and institutional knowledge that is so damaging to impartiality, Accordingly, their “involvement” in the institution should be limited to deciding disciplinary cases and reviewing (…) administrative decisions’. 627

It would be most practical to see whether such bodies as the HRC, or the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment would be willing to take up such a role. Both the HRC and the U.N. Special Rapporteur operate at the international level. The advantage of vesting such powers in the HRC lies in its familiarity with handling intramural complaints. The U.N. Special Rapporteur has experience in reviewing prison conditions as a result of undertaking country visits.

The procedure before the external adjudicator may be a very simple one. In light of the importance of resolving intramural conflicts at the lowest possible level, the tribunals’ current complaints procedures should remain unchanged in as far as they

625 Ibid.
626 Ibid.
627 Id., at 334.

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require issues to first be raised with the person in charge of the daily management of
the institution, with a right to administrative review by the Registrar. The final
decision would then be taken on appeal by the external adjudicator. The division of
labour between the President and the Registrar in some of the tribunals’ complaints
procedures based on the substance of the complaint should be abolished. Within the
tribunals, the Registrars would become the final arbiters on all complaints. The
Registrar would nonetheless be obliged to report all complaints to the President, since
the latter supervises the Registrar’s administrative tasks. All complainants would,
within a certain time-limit, have the right to file a written appeal to the external
adjudicator, unless the complaint concerns a matter of general policy, rather than the
detention situation of the individual complainant. Complaints concerning general
policy issues would be inadmissible, unless it would not be in the interests of justice
to deprive the complainant of the opportunity to challenge the impugned policy due to
the importance of the issue, for example, if it does affect the fundamental rights of the
person concerned.
In regular complaints cases, the adjudicating body should consist of three lawyers
with expertise in the fields of human rights law, with at least one lawyer specialised in
prison law. In complaints concerning medical issues, two of the adjudicators should
be medical practitioners.
In light of the immunity of the tribunals and their personnel before domestic courts,
the independent complaints adjudicator should be entitled to award financial
compensation in cases of negligence, breaches of fundamental rights, lost property
claims, assault, battery and misfeasance in public office.628
Provision must also be made for dealing with emergency complaints. If not, the cases
for which damages may be sought should be extended to that of false imprisonment
(to repair cases of wrongful isolation). To quote Ploeg and Nieboer, ‘an effective
mechanism to deal with emergency problems can help to prevent issues of
compensation from arising; the awarding of damages renders the need for a
mechanism dealing with emergency problems less urgent’.629 For that reason, the
adjudicating body should have a President, whose role it is to decide on emergency

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629 Gerhard Ploeg and Jan Nijboer, supra, footnote 10, p. 184.
complaints. Pending a final decision on the complaint, the complainant would be entitled to approach the adjudicating body’s President directly in order to request the suspension of a particular decision of the Chief Custody Officer or the Registrar. The President would only be empowered to suspend a decision where such decision constitutes a clear breach of a legal provision, or is manifestly unreasonable or unfair.

5.7.2 Complaints about medical care

Specific procedural rules should be established that govern medical complaints proceedings. It is unfortunate that at the ICTR the same authorities that are responsible for the institution’s budget may decide on a detainee’s hospitalisation and on other aspects of medical care. Moreover, it is difficult to see how a Registrar or President, who lack medical expertise, can decide on complaints involving medical treatment. Although in practice such anomalies may have been recognised and dealt with by, for instance, requesting second opinions, it is recommended that such practice is be provided for in clear and binding rules.

5.7.3 Legal assistance in complaints procedures

Another point of concern is the difficulty with which convicted persons may obtain legal assistance in complaints proceedings. As, for instance, in the Netherlands, the SCSL detainees may be assisted by a colleague inmate. Nevertheless, it is generally speaking difficult to see how such assistance may be truly beneficial to the complainant, other than providing moral support and assistance to illiterate persons in understanding certain basic rights and policies. It is difficult for a lay person to formulate convincing legal arguments on the basis of vaguely defined and multi-interpretable detention rules. Moreover, as is apparent from the many instances in which complaints were declared inadmissible by Chambers, the procedures for making complaints are far from straightforward.

630 Article 65 of the Penitentiary Principles Act [Penitentiaire Beginselenwet] provides that a detainee has the right to be assisted by a ‘legal aid professional’ or by a ‘confidential counsellor’ [vertrouwenspersoon]. The latter could be another inmate.
From interviews with various defence counsel working before the tribunals, however, it became evident that they are far from enthusiastic about offering their services to convicted persons in matters concerning prison law. Domestic lawyers, on the other hand, may have insufficient knowledge of prison law (at the tribunals) and human rights law. It may be possible, however, to attach a legal aid office to the office of the independent complaints adjudicator, whose establishment was recommended above. Legal aid should then be available in all the stages of the complaints procedure.

5.7.4 Inspections

To quote Harding, ‘[a]utonomous inspection of prisons and closed institutions is an essential part of the fabric of a mature democracy’. Publishing the inspectorate’s findings, then, could help to achieve the aim mentioned in Rule 90(1) of the EPR, i.e. to ‘continually inform the public about the purpose of the prison system and the work carried out by prison staff in order to encourage better public understanding of the role of prison in society’. This resonates particularly strongly in the international context, where any real connection between “civil society” and confined persons is largely absent. In this regard, Hoogerkamp argues that, in the Netherlands, an important basis for such a connection lies in the fact that as many as forty thousand persons per year experience prison life as prisoner or detainee. Through them, large segments of the general population are confronted with life in penitentiary institutions. Moreover, thousands of professionals working in the judicial and penitentiary fields come in to contact with detained persons and visit places of confinement. This informal mode of ‘monitoring’ is absent in the international context, which makes the international places of confinement even more ‘closed’ than domestic ones.

It is indeed unfortunate that the inspection reports have never been made public. This is particularly so in light of the fact that the ICRC can only make (non-binding) recommendations. Without public scrutiny, there is little pressure on the tribunal’s authorities to implement the ICRC’s findings. Whereas in a domestic context an

631 Richard Harding, supra, footnote 523, at 561.
632 G. Heres Hoogerkamp, Toezicht op het gevangeniswezen [Supervising the prison system], Sancties 1, Kluwer, 2000, p. 22-32, at 22-23.
The inspecting agency must also be autonomous, which, according to Harding, means that ‘it does not report to or through the department or agency responsible for prison operations nor depend on it for funding (…) Otherwise, there is an extreme likelihood that its findings and recommendations will only be taken seriously if they happen to coincide substantially with what the operational arm already thinks or wants to hear’. Although ICRC inspections comply with the “funding criterion”, the ICRC’s reporting practice does not conform to Harding’s criterion that inspectorates should not report to or through the department or agency responsible for prison operations.

Although the ICRC is a well-respected, independent and professional inspecting agency, its current powers are inadequate to repair the deficiencies identified in the international context, as set out above in this Chapter’s first paragraph. It should be recalled that the ICRC is the only truly independent inspecting agency that performs regular inspections of the international remand centers. This is a meager arrangement compared to the various domestic, regional and international agencies that carry out inspections of domestic prisons and remand centers.

It is therefore recommended that, firstly, the inspectorate reports are sent directly to the Presidents, as the highest bodies responsible for detention administration at the tribunals. Secondly, the inspectorate must report directly to the ICC’s Assembly of States Parties or, in respect of the ad hoc tribunals or where the U.N. are involved in a tribunal’s establishment or operating, to the U.N. Secretary-General and the U.N. Security Council. Thirdly, the tribunals must publish the inspectorate’s reports, which may be done without infringing on the privacy of individual detainees. If the ICRC resolutely objects to making public the results of

633 Richard Harding, supra, footnote 523, at 548.
634 Penal Reform International, supra, footnote 1, p. 167.
635 In respect of the situation in the Netherlands, see Y.A.J.M. van Kuijk, supra, footnote 544, at 173.
its examinations, the tribunals should ask another body, for instance the SPT, to take over the ICRC’s work.