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

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Chapter 6 Discipline

6.1 Introduction

‘The cornerstone of the disciplinary system should no longer be the prison as the Leviathan but rather one that permits the maximum degree of liberty that is compatible with the fact of confinement’.  

This Chapter examines the procedural rights of detainees connected to the tribunals’ detention facilities’ disciplinary proceedings. As in the previous Chapter, the premise of the current Chapter is that the tribunals’ detention rules echo international penal standards that do not address the specific situation of internationally detained individuals and that the particularities of the international context may warrant a different approach to that in the domestic context. It should be recalled that domestic and international prison populations are not identical. Furthermore, in contrast to the wide variety of bodies or officials, i.e. judicial or administrative, national, regional or international, which supervise detention and prison institutions in a domestic context, in the international context no effective inspectorate exists.  

Other features of the international detention context that have repercussions for the legal position of detainees concern, inter alia, the immunities of the tribunals and their personnel, the absence of political accountability and the blending of judicial, legislative and administrative functions. Moreover, it is essential that disciplinary systems contain safeguards against abuse of power and arbitrary decision making. All of this justifies taking a closer look at the disciplinary systems at the tribunals.

This Chapter will first examine the rationales underlying disciplinary punishment in penal institutions and the standards that must be observed. Secondly, it will set out how the various tribunals deal with discipline. Finally, the tribunals’ disciplinary systems will be evaluated on the basis of the aforementioned rationales and standards, whilst taking into account the background of the particularities of the international detention context.

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2 See, in more detail, Chapter 5.
6.2 Prison discipline: theoretical underpinnings and legal framework

6.2.1 Theoretical underpinnings

One way to maintain order in closed institutions is by sanctioning misconduct. Disciplining has been ‘the traditional means of controlling troublesome prisoners’, and has been acknowledged as contributing to the safety of both prisoners and staff. Nevertheless, as Livingstone, Owen and MacDonald note, ‘the operation of the discipline system in prisons has its own potential for disorder, growing out of inmates’ perception that the rules they are charged with breaking are highly arbitrary and the procedures employed to convict them significantly unfair’. These scholars refer to the Woolf Report, which states that ‘the manner of how discipline is administered can have a very significant impact on how prisoners view the fairness of the prison system as a whole. A strong perception of unfairness can be an important factor in the creation of disturbances’. Hence, in order to ensure that prison discipline does not undermine its very raison d’être, it is essential that the proceedings are fair. The perceived fairness of such proceedings will be seriously impaired where, for instance, they are controlled by prison officials ‘whose ability to manage their prisons is heavily dependent on retaining the support of the prison officers who bring the

5 SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, U.N. Doc. CAT/OP/MDV/1, 26 February 2009, par. 196.
7 Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 6, p. 378. See, in a similar vein, Dirk van Zyl Smit and Sonja Snacken, supra, footnote 6, p. 42-43; William Bennett Turner, supra, footnote 4, at 495; Penal Reform International, supra, footnote 3, p. 30, par. 7. See, also, supra, p. 341, footnote 28.
charges’. According to Livingstone, Owen and MacDonald: ‘[t]o preserve the appearance and reality of fairness such a situation cries out for independent scrutiny of the exercise of disciplinary powers, the type of scrutiny which the judiciary, with its training and expertise in matters of procedure and fact-finding, is ideally placed to provide’. In small-scale institutions, staff members are often familiar with the inmates and their individual history, which may lead to bias towards them in disciplinary proceedings. Furthermore, staff members who rule on disciplinary charges may be tempted to back-up other staff members, a tendency which is ‘particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member’. Therefore, some form of review by an independent and impartial adjudicator must be available in order to prevent abuse of power and arbitrary decision making, and to ‘rectify any abuses or injustices that occur in the administration of discipline in prisons’. Regarding the Canadian system, Manson states that due to the employment of outside adjudicators, ‘the system of formal discipline only rarely produces significant controversies’.

Fairness also means that certain procedural guarantees and principles must be respected. In this regard, the concept of ‘due process’ represents an attempt to ‘balance the need for administrative discretion with the individual’s right to protect his interests from governmental interference’. According to Peters, structuring proceedings in an adversarial manner contributes to the ‘adequate establishing and critical assessment of facts’. For this reason, Peters suggests that lawyers should participate more in important decision-making, in order to ensure that the interests of his or her client and the latter’s environment are brought to the forefront. Moreover,

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8 Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 6, p. 378.
9 Ibid.
10 Harvard Center for Criminal Justice (Edward J. Dauber, William Falik, James Vorenberg, Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 210, 213.
11 Penal Reform International, supra, footnote 3, p. 52, par. 85.
13 Harvard Center for Criminal Justice (Edward J. Dauber, William Falik, James Vorenberg, Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 204.
the principles of natural justice or procedural fairness, legality, proportionality, ‘least intrusiveness’, guilt\textsuperscript{15} and \textit{ne bis in idem}\textsuperscript{16} serve to limit the prison authorities’ powers.

As to the principle of proportionality, it has been recognised that ‘\textit{w}hile deference to the discretionary actions of prison authorities is clearly necessary in the realm of discipline, the application of a rule requiring that the punishment be roughly commensurate with the seriousness of the offense may serve as an important check on prison abuses’.\textsuperscript{17} In this respect, the distinction between ‘ordinal’ and ‘cardinal’ proportionality is essential. Ordinal scaling of punishment concerns the question of how severe offences should be punished in relation to one another (or, as stated by Henham, ‘the relative severity of the sentences which should be awarded for different offences, and more particularly, for different degrees of seriousness of a specific offence’).\textsuperscript{18} Ordinal proportionality requires that persons convicted for criminal acts of comparable gravity should receive punishments of comparable severity.\textsuperscript{19} Cardinal scaling refers to the ‘overall levels of onerousness that should be chosen to anchor the system of penalties’\textsuperscript{20}. Cardinal proportionality, then, requires the gravity of a sanction to reflect the seriousness of the offence. Both aspects of proportionality must be respected. In this regard, it is important to be mindful of the fact that confined persons may perceive the severity or leniency of penalties differently to free persons. According to Kelk, ‘in a context in which freedom is already seriously reduced any additional restriction of liberty carries weight in a disproportionate manner’\textsuperscript{21}.

\begin{itemize}
  \item \textsuperscript{15} See, \textit{e.g.}, Article 51(5) of the Dutch Penitentiary Principles Act, which holds that no punishment can be imposed if a detainee cannot be held accountable for the alleged acts.
  \item \textsuperscript{17} Note and comment, \textit{Beyond the ken of the courts: a critique of judicial refusal to review the complaints of convicts}, Yale Law Journal 72, 1963, p. 506-558, at 537. See, also, Penal Reform International, \textit{supra}, footnote 3, p. 46, par. 63.
  \item \textsuperscript{20} \textit{Ibid}.
\end{itemize}

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Also, in order for disciplinary systems to have any preventive function, detained persons must be duly informed of which conduct is prohibited and of its consequences. In addition, informing detainees about disciplinary rules is required by the principle of legality or *lex certa*.\(^\text{22}\) Various scholars have stressed the importance of the latter principle for the prison setting, where open norms or lacunae in legal frameworks are often interpreted to the detriment of inmates’ liberties.\(^\text{23}\) ‘Catch-all’ prison rules, which vest broad discretionary powers in the adjudicatory official, may lead to abuse of discretion, arbitrary decision making and perceived unfairness.\(^\text{24}\) Where penalties are imposed on the basis of such catch-all provisions, it is particularly important that the adjudicator gives reasons for his decisions.\(^\text{25}\)

It is further essential to distinguish disciplinary penalties from security measures. Whereas the former constitute a response to deviant behaviour, primarily have a punitive purpose and must be ‘determined in relation to deviancy’,\(^\text{26}\) the latter have an essentially preventive function.\(^\text{27}\)

Besides the punishment of misconduct and maintaining order and security, another aim of prison discipline is to rehabilitate or educate the offender.\(^\text{28}\) It has, in


\(^{24}\) See, in more detail, James E. Robertson, *supra*, footnote 1; Charles H. Jones, Jr. and Edward Rhine, *supra*, footnote 22, at 96.


\(^{27}\) *Ibid.*

this respect, been argued that ‘[t]he handling of difficult disciplinary cases is a psychological and psychiatric problem which requires more than routine custodial attention. (...) The problem is to understand the prisoner’s reason for his resistance to authority and to help him move from infantile emotional positions to a mature status in which he can function normally’. According to Jones and Rhine, disciplinary proceedings may ‘advance the rehabilitative goals of the institution by fostering change in “the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released”’. Whatever the current validity of these arguments and their applicability to perpetrators of system-criminality, it is fair to expect that ‘[a] prisoner who received what he perceived as unfair treatment most likely would be a difficult subject for rehabilitation and a possible threat to prison security’. Another aspect of the relationship between rehabilitation and discipline is the ‘tendency to evaluate the prospects of successful adjustment outside the prison on the basis of an inmate’s lack of misconduct reports in the prison’.

It must be emphasised, however, that besides discipline there are other instruments that may be employed to control inmates. Indeed, discipline should, arguably, be considered an ultimum remedium or, at the very least, should be applied with great reticence. The Council of Europe in its ‘Recommendation on the management by prison administrations of life sentence and other long-term prisoners’ stipulates that maintaining control in prisons should instead be based on ‘dynamic security’, which is described as ‘the development by staff of positive relationships

29 Vernon Fox, supra, footnote 28, at 325.
31 See, supra, p. 317.
33 Vernon Fox, supra, footnote 28, at 321. The same can be said about some of the tribunals’ practice on early release. See, for instance, ICTY, Order of the President on the Application for the Early Release of Milan Simić, Case No. IT-95/2, President, 27 October 2003 and Denis Abels, Commentary, in: André Klip and Göran Sluiter (eds.), Annotated Leading Cases of International Criminal Tribunals, Volume 15, Intersentia, Antwerp 2008, p. 796-800, at 798.
with prisoners based on firmness and fairness, in combination with an understanding of their personal situation and any risk posed by individual prisoners’. Van Zyl Smit and Snacken refer to studies that illustrate that the role that discipline fulfills varies, depending on the types of social interaction between prisoners and staff. Further, Huff states that ‘[d]iscipline is actually a plural concept. If we attempt to portray it in a single act with a single concept we confuse the picture. It would then appear to be a simple rather than a complex thing; a discrete rather than a form of continuous measure’. As noted by Gratz, Held and Pilgram, ‘[t]he security of a prison cannot be measured merely in terms of the height of the walls and the number of guard posts. It is also determined by a wide range of measures that together serve to improve security’. These last scholars emphasise the distinction between the ‘active’ and ‘passive’ side of security. The latter refers to the range of measures intended to prevent breaches of security and that may relate to the prison buildings, organisation and technicalities. The ‘active’ side of security is served, in particular, by ‘the respectful treatment of the occupants, appropriate supervision (…) and the sensible relaxation of imprisonment conditions’. In this regard, it has been recognised that inadequate living conditions and the absence of training and recreational programs constitute a serious threat to prison order. Fox states that ‘[p]unishment techniques have a constructive function in prison discipline, but they have to be applied in a carefully diagnostic and well-chosen manner or they can cause more damage than they ameliorate. The most desirable motivation for group order lies in good morale, good food, a challenging and interesting program, and excellent spontaneous communication and relations’. He adds that ‘athletic events, psychological services,

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35 CoE, Recommendation (2003)23, on the management by prison administrations of life sentence and other long-term prisoners, adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers’ Deputies, par. 18.a.
36 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 6, p. 45-47.
39 Ibid.
40 Ibid.
42 Vernon Fox, supra, footnote 28, at 322. Footnote omitted.
food, religion, school, industry, farms, radio and TV, library, recreation, and other facilities are all designed to achieve total group order.43 Prison discipline may then be understood as the ‘ultimate manifestation of the general levels and quality of the custodial relationship’.44

6.2.2 Legal framework

Human rights jurisprudence

According to the case-law of human rights monitoring bodies and courts, disciplinary charges must, in certain circumstances, be regarded as criminal charges, which implies that due process rights apply. In its General Comment to Article 14 of the ICCPR, the HRC notes that ‘[t]he right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity’.45 Furthermore, in the case of Baena-Ricardo et al. v. Panama, the I-ACtHR held that ‘[j]ustice, done through the due process of law, as a legally protected true value, must be ensured in all disciplinary proceedings, and the States cannot evade such obligation based on the argument that due guarantees of Article 8 of the American Convention do not apply in the case of disciplinary and not penal sanctions. Allowing the States to make such interpretation would be equivalent to leaving up to their free will the decision of whether or not to observe the right of all persons to a due process’.46 The I-ACtHR referred to two landmark decisions of the ECtHR, one of which concerned prison disciplining. The first case was that of Engel et al. v. the Netherlands, which

43 Id., at 323.
44 Id., at 324. Emphasis added.
dealt with military discipline. In that case, the ECtHR stressed that the notion of ‘criminal charge’ must be understood as having an autonomous meaning. Under the Convention, States are allowed to make a distinction between criminal law and discipline but ‘only subject to certain conditions’. The ECtHR held that ‘[i]f the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (...) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention’.47

The crucial question, then, is how to discern whether a charge must be regarded as a ‘criminal charge’ as referred to in Article 6 ECHR. In this regard, the ECtHR held that

‘[i]n this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently.

This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import (...).

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so’.48

47 ECtHR, Engel and others v. the Netherlands, judgment of 8 June 1976, Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, par. 81.
48 Id., par. 82. See, also, ECtHR, Weber v. Switzerland, judgment of 22 May 1990, Application No. 11034/84, par. 29-35; ECtHR, Demicoli v. Malta, judgment of 27 August
The second and third criteria are not cumulative but alternative, which ‘does not exclude that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a “criminal charge”’. 49

In the cases of Campbell and Fell v. the United Kingdom and Ezeh and Connors v. The United Kingdom, the ECtHR applied the Engel-criteria to prison disciplining. 50 It accepted that in a prison setting ‘there are practical reasons and reasons of policy for establishing a special disciplinary regime, for example security considerations and the interests of public order, the need to deal with misconduct by inmates as expeditiously as possible, the availability of tailor-made sanctions which may not be at the disposal of the ordinary courts and the desire of the prison authorities to retain ultimate responsibility for discipline within their establishments’. 51 It observed, however, that ‘justice cannot stop at the prison gate’ and underlined the fundamental character of the guarantees provided in Article 6 ECHR. Although it declared the principles in Engel applicable to the prison context, the Court made ‘due allowance for the different context’ and for the ‘“practical reasons and reasons of policy” in favour of establishing a special prison disciplinary regime’. 52

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50 See also ECtHR, Young v. the United Kingdom, judgment of 16 January 2007, Application No. 60682/00, par. 31-39; and ECtHR, Stitic v. Croatia, judgment of 8 November 2007, Application No. 29660/03, par. 47-63.

51 ECtHR, Campbell and Fell v. the United Kingdom, judgment of 28 June 1984, Application Nos. 7819/77; 7878/77, par. 69.

52 Ibid; ECtHR, Ezeh and Connors v. the United Kingdom, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 85.
The ECtHR has emphasised that the first *Engel* criterion carries relatively little weight.\(^{53}\) As to the second one, *i.e.* the nature of the offence, the Court has recognised that the misconduct of detainees may ‘take different forms’, that i) some matters are more serious than others; and ii) ‘the illegality of some acts may not turn on the fact that they were committed in prison: certain conduct which constitutes an offence under [rules governing prison discipline] may also amount to an offence under the criminal law’.\(^{54}\) Although these factors do not necessarily render the misconduct ‘criminal’, they do give such conduct ‘a certain colouring which does not entirely coincide with that of a purely disciplinary matter’.\(^{55}\) Other factors that have been brought under the second prong of *Engel* are the nature of the legal provision infringed, *i.e.* whether the legal rule in question is directed towards all citizens and not towards a given group which possesses a special status,\(^{56}\) and the purpose of the penalties concerned. The latter factor concerns the difference between the rationale of maintaining order inside prison on the one hand and punitive and deterrent purposes on the other.\(^{57}\)

An example of an offence, the nature of which, according to the Court, renders the charge non-disciplinary, can be found in the case of *Ezeh and Connors v. The United Kingdom*. Mr. Ezeh had allegedly threatened to kill his probation officer. In this respect the ECtHR ‘would not exclude that the facts surrounding the charge of violent threats against the first applicant could also lend themselves to criminal prosecution’.\(^{58}\) Nevertheless, in *Stitic v. Croatia*, where the applicant had been


\(^{55}\) ECtHR, *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Application Nos. 7819/77; 7878/77, par. 71.


charged with attempt to introduce illegal drugs into the prison, the Court opined that, although the offence in question could have been the subject of both criminal and disciplinary proceedings, this alone did not suffice to conclude that Article 6 was applicable to the disciplinary proceedings.\footnote{ECtHR, \textit{Stitic v. Croatia}, judgment of 8 November 2007, Application No. 29660/03, par. 57-60.}

In connection to the third \textit{Engel} criterion, the Court has placed particular emphasis on the severity of the punishment that the offender \textit{risked} incurring, \textit{i.e.} the maximum penalty that might have been imposed.\footnote{ECtHR, \textit{Ezeh and Connors v. the United Kingdom}, judgment of 15 July 2002, Application Nos. 39665/98 and 40086/98, par. 87; ECtHR, \textit{Ezeh and Connors v. the United Kingdom}, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 120.} In \textit{Campbell and Fell}, such punishment entailed, \textit{inter alia}, a loss of all of the remission of sentence available to the offender, which was slightly less than three years’ imprisonment. The applicant had, in fact, been awarded 570 days’ loss of remission. The Court was of the opinion that this consequence was so serious that the punishment had to be regarded as ‘criminal’. In \textit{Ezeh and Connors}, the maximum number of additional days that could be awarded was 42 for each offence. Ezeh and Connors had been awarded forty and seven additional days, respectively, which according to the Court could not ‘be considered sufficiently unimportant or immaterial to displace the presumed criminal nature of the charges against them’.\footnote{ECtHR, \textit{Ezeh and Connors v. the United Kingdom}, judgment of 15 July 2002, Application Nos. 39665/98 and 40086/98, par. 97; ECtHR, \textit{Ezeh and Connors v. the United Kingdom}, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 129.} In \textit{Campbell}, the Court found that Article 6 was applicable to the disciplinary adjudication, in light of the character of the offences and the nature and severity of the penalties.\footnote{ECtHR, \textit{Campbell and Fell v. the United Kingdom}, judgment of 28 June 1984, Application Nos. 7819/77; 7878/77, par. 73.} Thus, where deprivation of liberty may be \textit{or} is imposed, there is a presumption that the charge is ‘criminal’, which can only be rebutted exceptionally, \textit{i.e.} only where the deprivation of liberty cannot be considered ‘appreciably detrimental’ given its nature, duration or manner of execution.\footnote{ECtHR, \textit{Young v. the United Kingdom}, judgment of 16 January 2007, Application No. 60682/00, par. 37; ECtHR, \textit{Ezeh and Connors v. the United Kingdom}, judgment of 15 July 2002, Application Nos. 39665/98 and 40086/98, par. 95.}

In \textit{Young v. The United Kingdom}, the Court found that the deprivation of liberty that \textit{could} have been imposed (42 days) and that actually imposed (3 days) could not be
regarded ‘as sufficiently unimportant or inconsequential as to displace the presumption as to the criminal nature of the charge’. 64

According to the Court, the question of whether a further loss of liberty is ‘appreciably detrimental’ cannot be determined by reference to the length of the sentence already (being) served, because this will lead to arbitrary results. 65

It appears to follow from the Court’s remarks in Ezeh and Connors that penalties other than the imposition of additional days or the loss of remission do not easily qualify as ‘criminal’, because such sanctions are not likely to be considered severe enough. 66 In Stitic v. Croatia, the applicant had been sentenced to a suspended penalty of seven days’ solitary confinement. The Court noted that the ‘deprivation of liberty liable to be imposed as a punishment was, in general, a penalty that belonged to the “criminal” sphere. However, in the present case the legal basis for the applicant’s deprivation of liberty was his original conviction for criminal offences. Although the disciplinary sanction added a new element – imposition of seven days’ solitary confinement – it did not in any way extend the applicant’s prison term. Furthermore, the seriousness of the sanction was lessened by its conditional character’. 67 The Court opined that, since the sanction did not extend Stitic’s prison term or aggregate the terms of his prison conditions, the ‘sanction stayed entirely within the “disciplinary” sphere’. 68 This, of course, does not imply that sanctions other than the loss of remission or the imposition of additional days may never fall within the ambit of Article 6 ECHR. According to Snacken and Van Zyl Smit, Article 6 should apply to cases of solitary confinement ‘particularly if the ‘offence’ for which it is imposed is akin to a criminal offence and the harsh penal impact of a penalty such as solitary confinement is recognized’. 69

In Campbell and Fell the ECtHR found that the requirement under Article 6 that the decision must be made public had been breached. Although it acknowledged

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64 ECtHR, Young v. the United Kingdom, judgment of 16 January 2007, Application No. 60682/00, par. 38.
66 ECtHR, Ezeh and Connors v. the United Kingdom, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 88.
67 ECtHR, Stitic v. Croatia, judgment of 8 November 2007, Application No. 29660/03, par. 56.
68 ECtHR, Stitic v. Croatia, judgment of 8 November 2007, Application No. 29660/03, par. 61.
69 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 6, p. 303.
that the form of publication must be assessed ‘in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 para. 1 (art. 6-1) in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial’, it noted that in the case in issue, no steps at all had been taken to publish the decision and therefore concluded that Article 6 had been violated.\(^70\) Another complaint in that case concerned the alleged lack of adequate time and facilities to prepare the defence. Campbell had been informed of the charges against him five days before the hearing, which the Court considered adequate.\(^71\) Nevertheless, although it noted that Campbell had himself chosen not to attend the hearing, the Court stressed that ‘a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing’. Since such assistance had not been made available, there had been a breach of Article 6.\(^72\) Furthermore, it follows from the case of Weber v. Switzerland that the person charged with a disciplinary offence has the right to be heard, which appears to imply that some form of hearing must take place, instead of conducting the proceedings wholly in written form.\(^73\) Moreover, the proceedings must not take too long.\(^74\)

Relevant considerations regarding the requirement that the adjudicator be independent and impartial are the manner of his or her appointment and the existence of guarantees against external pressure. According to the ECtHR, ‘[w]hat is at stake is the confidence which such tribunals in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused’.\(^75\) The

\(^{70}\) ECtHR, Campbell and Fell v. the United Kingdom, judgment of 28 June 1984, Application Nos. 7819/77; 7878/77, par. 91-92.
\(^{71}\) Id., par. 98.
\(^{72}\) Id., par. 99. See, also, ECtHR, Ezeh and Connors v. the United Kingdom, judgment of 15 July 2002, Application Nos. 39665/98 and 40086/98, par. 103-106; ECtHR, Ezeh and Connors v. the United Kingdom, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 131-134; ECtHR, Whitfield and others v. the United Kingdom, judgment of 12 April 2005, Application Nos. 46387/99, 48906/99, 57410/00 and 57419/00, par. 47-48. See, also, ECtHR, Bell v. the United Kingdom, judgment of 16 January 2007, Application No. 41534/98, par. 51-54 and ECtHR, Young v. the United Kingdom, judgment of 16 January 2007, Application No. 60682/00, par. 43-44.
\(^{75}\) ECtHR, Whitfield and others v. the United Kingdom, judgment of 12 April 2005, Application Nos. 46387/99, 48906/99, 57410/00 and 57419/00, par. 43.
subjective point of view of the accused is, however, not decisive; his or her doubts must be ‘objectively justified’. According to the Court ‘there are two aspects to the question of “impartiality”: the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint in that it must offer sufficient guarantees to exclude any legitimate doubt in this respect’. 76 In *Whitfield and others v. The United Kingdom*, the ECtHR ruled that there had been a lack of structural independence between officials with prosecuting and those with adjudicating roles and, on that basis, found a breach of Article 6.77

The relevance of human rights law to prison discipline is not limited to fair trial considerations. In the case of *Onoufriou v. Cyprus*, the ECtHR set out the conditions that must be met before isolation may be used in prisons. It first recalled that ‘complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason’. 78 Secondly, it held that, although ‘prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of Article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned’. 79 Thirdly, there must be sufficient procedural safeguards in place to guarantee the prisoner’s welfare and the proportionality of the measure. According to the Court, ‘[f]irst, solitary confinement measures should be ordered only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the European Prison Rules. Second, the decision imposing solitary confinement must be based on genuine grounds both *ab initio* as well as when its duration is extended. Third, the authorities’ decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner’s circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly

76 Ibid.
77 Id., par. 45. See, also, ECtHR, *Bell v. the United Kingdom*, judgment of 16 January 2007, Application No. 41534/98, par. 51-54 and ECtHR, *Young v. the United Kingdom*, judgment of 16 January 2007, Application No. 60682/00, par. 43-44.
detailed and compelling as time goes by. Finally, a system of regular monitoring of
the prisoner’s physical and mental condition should also be put in place in order to
ensure that the solitary confinement measures remain appropriate in the
circumstances’.80 The Court observed that Onoufriou had been put in isolation for
reasons that had never been explained to him, that the duration of the measure was
uncertain and that there was no evidence that the authorities had assessed all relevant
factors before ordering his isolation. It therefore held that the measure ‘was not
attended by any of the procedural safeguards required in order to protect against the
arbitrary application of excessively restrictive conditions of detention, regardless of
the duration of the confinement’.81 The Court also referred to the CPT’s remarks in its
report on its visit to Cyprus, where it stated that ‘any person placed in solitary
confinement should be informed in writing of the reasons for his confinement. He
should be given an opportunity to express his views and there should be a possibility
to appeal to authorities outside the prison should he wish to challenge the decision to
place him in solitary confinement or to extend the duration of such confinement.
Further, the confinement should be re-examined at regular intervals and should cease
when no longer merited’.82 Other requirements set by the CPT concern the
opportunity of disciplined persons to leave their cells, to benefit from outdoor exercise
and to have contact with the outside world beyond their daily dealings with prison
staff.83 Finally, the Court observed that the EPR emphasise the need for ‘clear
procedures when applying solitary confinement measures’ .84

In Yankov v. Bulgaria the applicant complained that his hair had been shaved
off before he had been placed in an isolation cell.85 The Court considered that ‘[a]
particular characteristic of the treatment complained of, the forced shaving off of a
prisoner’s hair, is that it consists in a forced change of the person’s appearance by the
removal of his hair. The person undergoing that treatment is very likely to experience
a feeling of inferiority as his physical appearance is changed against his will.
Furthermore, for at least a certain period of time a prisoner whose hair has been

80 Id., par. 70.
81 Id., par. 73.
82 Id., par. 72.
83 See, id., par. 78 and the references cited there.
84 Id., par. 72.
85 ECtHR, Yankov v. Bulgaria, judgment of 11 December 2003, Application No. 39084/97,
par. 108.
shaved off carries a mark of the treatment he has undergone. The mark is immediately visible to others, including prison staff, co-detainees and visitors or the public, if the prisoner is released or brought into a public place soon thereafter. The person concerned is very likely to feel hurt in his dignity by the fact that he carries a visible physical mark. Furthermore, where a complaint is lodged pursuant to Article 3 ECHR, the question of whether the required minimum threshold of severity has been reached depends on the circumstances of the case, including the personal circumstances of the person concerned (such as his or her age and health), the context in which the measure is applied (in Yankov, this concerned disciplining a detained person for writing critically about prison staff and its aim (punitive versus other, e.g. hygienic, purposes).

With respect to the right to family life and privacy in Article 8 ECHR, the ECtHR in Onoufriou held that the absolute prohibition on visits from family and friends during the detainee’s isolation constituted a violation of the Convention. In Sergey Volosyuk v. Ukraine, the prisoner-applicant had been placed in a disciplinary cell to punish him for ‘sending a letter through an unauthorised channel’. Since the punishment had been intended to influence the manner in which Volosyuk would subsequently send his correspondence, it had interfered with his right to respect for his correspondence under Article 8 ECHR. Although the Court accepted that the interference had pursued the legitimate aim of preventing disorder and crime, it noted that the letter in question, which had been addressed to the State Authority responsible for the detention centre, ‘did not give rise to any risk of the applicant’s obstructing the course of justice’. It also noted that Volosyuk had been awarded the severest penalty for a relatively minor offence. This infringed on the principle of proportionality.

In Volosyuk, the Court also observed that the applicant had had no remedy to effectively challenge the disciplinary penalty. Under human rights law, there is a

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86 Id., par. 112-113.
87 Id., par. 114. See, in more detail, supra, Chapter 2.
88 ECtHR, Onoufriou v. Cyprus, judgment of 7 January 2010, Application No. 24407/04, par. 91-97.
89 ECtHR, Sergey Volosyuk v. Ukraine, judgment of 12 March 2009, Application No. 1291/03, par. 88.
90 Ibid.
91 Id., par. 91-92.
right to an effective remedy for arguable claims of breaches of fundamental rights.92 This implies, *inter alia*, that the person seeking review of a disciplinary decision - where such a decision may affect his fundamental rights - must not be provided with mere theoretical guarantees, but must have a reasonable prospect of success. Furthermore, the final determination must be made by an independent adjudicator and adequate compensation must be available. Moreover, where a credible claim is made that the right to life or the prohibition of torture has been infringed upon, human rights law requires that an effective investigation is carried out, which is capable of leading to the identification and punishment of those responsible.93

Where the *Engel* criteria are not met and the charge in question may not be regarded as a ‘criminal charge’ within the meaning of Article 6 ECHR, the tribunals’ disciplinary proceedings are nevertheless governed by the principle of natural justice or procedural fairness.94 It was argued in Chapter 4 that the demands set by this principle may vary, depending on the circumstances of the case. According to the ‘United Nations Manual on Human Rights Training for Prison Officials’, the demands set by this principle include, at the very least, ‘the rights to know the charge which one is facing and who is making the charge, to present one’s defence and to question witnesses’.95 As noted by Bennett Turner, ‘[a]lthough the precise due process requirements may vary somewhat depending on the balance between the seriousness of the punishment and the prison’s need for speedy procedures, most of the traditional elements of procedural fairness should be afforded’.96 Regarding the disciplinary system in South African prisons, Van Zyl Smit has argued that ‘[t]he fundamental requirement of fairness (…) means that due process rights such as the right to call witnesses is restored, as is the right to legal representation if solitary confinement, for example, is considered’.97

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92 See, *supra*, Chapter 5.
93 *Ibid*.
95 *Id.*, p. 93.
Penal standards

Rules 27 to 32 of the SMR deal with, *inter alia*, prison discipline. Rule 27 provides that ‘[d]iscipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life’. The Rules forbid a prisoner to be employed in any disciplinary capacity. Rule 29 stipulates that a competent authority shall determine by law or regulation a) the conduct constituting a disciplinary offence; b) the types and duration of punishment which may be inflicted; and c) the authority competent to impose such punishment.98 Principle 30 of the U.N. Body of Principles adds that such regulations must be duly published. Rule 30 of the SMR provides that ‘[n]o prisoner shall be punished except in accordance with the terms of such law or regulation, and never twice for the same offence’. It also states that a prisoner must be informed of the charge against him and be given a proper opportunity to make his defence. If necessary, he must be provided with the services of an interpreter. The adjudicating authority must conduct a thorough examination of the case. Principle 30(2) of the U.N. Body of Principles states that a detainee has the right to bring a disciplinary decision to higher authorities for review.

As to the modes of disciplinary punishment, Rule 31 of the SMR stipulates that ‘[c]orporal punishment,99 punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences’. Principle 7 of the U.N. Basic Principles provides that ‘[e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged’. Close confinement and reduction of diet may, according to the SMR, only be imposed if the medical officer has examined the prisoner and certified his or her fitness to undergo such punishment. The latter requirement applies to all modes of punishment that may be prejudicial to a prisoner’s health. The medical officer must, on a daily basis, visit detainees undergoing such forms of punishment. If he or she considers the alteration or

98 See, in a similar vein, SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, U.N. Doc. CAT/OP/PRY/1, 7 June 2010, par. 200.

99 See, also, HRC, General Comment 20, Article 7, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), 10 March 1992, par. 5 Footnote added.
termination of the measure necessary on medical grounds, the medical officer must advise the prison authorities thereof. The ‘UN Manual on Human Rights Training for Prison Officials’ recognises that the medical officer’s involvement in certifying the detainee’s fitness to undergo certain forms of punishment is ‘a sensitive issue’. The Manual stresses that the relationship between medical officer and detainee is primarily that of doctor to patient, which implies that medical officers ‘should not play any role which could be interpreted as taking a part in the imposition of punishment’.

In its report on its visit to Honduras, the SPT recommended ‘the establishment of a uniform system for recording disciplinary actions, in which the identity of the offender, the penalty imposed, its duration and the officer who ordered it should be indicated’. It further urged the Government of Honduras to establish disciplinary regulations in accordance with the SMR and to provide each prisoner with a copy. It also held that persons charged with a disciplinary offence have the right to be heard and to appeal to a higher authority.

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100 Rule 32 of the SMR.
103 SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, U.N. Doc. CAT/OP/HND/1, 10 February 2010, par. 241, 310. See, also, SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico, U.N. Doc. CAT/OP/Mex/1, 31 May 2010, par. 194, 324; SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, U.N. Doc. CAT/OP/PRY/1, 7 June 2010, par. 200, 303.
104 SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, U.N. Doc. CAT/OP/HND/1, 10 February 2010, par. 241, 310; SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, U.N. Doc. CAT/OP/PRY/1, 7 June 2010, par. 200, 303.
Subcommittee condemned practices of flogging and other forms of corporal punishment,\(^{105}\) as well as restrictions on inmates’ contact with the outside world.\(^{106}\) The SPT has further stressed the need for independent monitoring of prison discipline.\(^{107}\) Measures of isolation or other more extreme restrictions must, according to the Subcommittee, be reviewed on a regular basis in order to assess the necessity of their continuation.\(^{108}\) The SPT has emphasised the need to pay close attention to inmates held under restrictions, particularly to those placed in isolation. In its report on its visit to Sweden, the Subcommittee observed in relation to the treatment of persons placed in isolation that ‘the time spent outside cells, including outdoor exercise, and contacts with outside world are limited, and staff have little or no time to talk with the detainees. It is also difficult to offer educational, work or other activities for this category of persons. In addition, the lack of information on the progress of the investigation process as well as on the reasons for restrictions may adversely affect the well-being of a detainee’.\(^{109}\) It further observed that ‘[p]rolonged stays under restrictions in a remand prison, with limited contact with the outside world and especially without the possibility of association, may not only have detrimental psychological effect on the detainees concerned but also negatively influence the management and conditions of prison life. In certain circumstances it can even amount to inhuman and degrading treatment’.\(^{110}\)

Rules 56 to 63 of the EPR address the issue of prison disciplining. The EPR stipulate that discipline shall be a mechanism of last resort and that preference should be given to mechanisms of restoration and mediation. The official Commentary to the EPR recalls that prisons are closed institutions in which large groups of persons are held against their will and states that, in such an environment, it is inevitable that rules and regulations will at times be breached.\(^{111}\) Another principle which, according to

\(^{105}\) SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, U.N. Doc. CAT/OP/MDV/1, 26 February 2009, par. 29, 269.

\(^{106}\) Id., par. 225, 343.

\(^{107}\) Id., par. 196, 331.

\(^{108}\) Id., par. 198, 332.


\(^{110}\) Id., par. 127.

\(^{111}\) CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 56.
the EPR, must govern prison discipline is that of *ne bis in idem*, pursuant to which no person may be punished twice for the same act.\(^\text{112}\)

Rule 57(2) of the EPR states that ‘[n]ational law shall determine: a) the acts or omissions by prisoners that constitute disciplinary offences; b) the procedures to be followed at disciplinary hearings; c) the types and duration of punishment that may be imposed; d) the authority competent to impose such punishment; and e) access to and the authority of the appellate process’. The EPR’s official Commentary stresses that offences should be defined as precisely as possible and calls for procedures that respect the principles of justice and fairness. It further states that confined persons should be made familiar with the institution’s rules and regulations. The Commentary also states that only conduct which is likely to constitute a threat to good order, safety or security may be considered a disciplinary offence.

The EPR require that allegations of misconduct constituting a disciplinary offence must be reported promptly to the authority competent to conduct an investigation, that such investigation must be carried out without undue delay and that inmates shall not be employed in any disciplinary capacity.\(^\text{113}\) Under Rule 59, persons charged with a disciplinary offence must ‘a) be informed promptly, in a language which they understand and in detail, of the nature of the accusations against them; b) have adequate time and facilities for the preparation of their defence; c) be allowed to defend themselves in person or through legal assistance when the interests of justice so require; d) be allowed to request the attendance of witnesses and to examine them or to have examined them on their behalf; and e) have the free assistance of an interpreter if they cannot understand or speak the language used at the hearing’.

The official Commentary provides that ‘[i]n some countries independent magistrates or specialist judges are appointed, which brings judicial independence and a greater likelihood that proper procedures will be observed (…) Where disciplinary hearings are conducted by prison management it is important to ensure that they have received appropriate training and that they have not had any prior knowledge of the case that they are to hear’.\(^\text{114}\) Rule 61 of the EPR expressly provides that ‘[a] prisoner who is

\(^{112}\) Rule 63 of the EPR.

\(^{113}\) Rule 62 of the EPR.

found guilty of a disciplinary offence shall be able to appeal to a competent and independent higher authority’.

As to the penalty that may be imposed, the Rules provide that its severity must be proportionate to the gravity of the offence and ‘shall not include a total prohibition on family contact’. The official Commentary further stipulates that restrictions on family contact may only be imposed ‘where the offence relates to such family contacts or where staff are assaulted in the context of a visit’. However, the SPT has condemned restrictions on inmates’ contact with the outside world as a mode of disciplinary punishment, arguing that ‘maintaining contact with the outside world and, in particular, sustaining family and other affective ties is an important element of custodial care and crucial for the eventual re-integration of prisoners into society without re-offending. Moreover, the ability to communicate with family and friends can be a safeguard against ill-treatment, which tends to flourish in closed establishments’. In respect of the use of informal warnings as a mode of punishment, the Commentary to the EPR states that ‘care must be taken to ensure that the use of such warnings is fair and consistent and does not give rise to a system of unofficial sanctions’. The use of instruments of restraint, including handcuffing, is not permitted as a form of punishment.

Under the EPR, collective punishments are forbidden, as are all other modes of punishment listed in Rule 31 of the SMR. With respect to solitary confinement, Rule

115 Id., sub Rule 60.
118 In a similar vein, see SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, U.N. Doc. CAT/OP/MDV/1, 26 February 2009, par. 207.
119 In a similar vein, see SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, U.N. Doc.CAT/OP/HND/1, 10 February 2010, par. 241; SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, U.N. Doc.CAT/OP/MDV/1, 26 February 2009, par. 196.
60(5) of the EPR provides that it may only be used ‘in exceptional cases and for a specified period of time, which shall be as short as possible’. Solitary confinement refers to ‘all methods of removing prisoners from association with other prisoners by placing them alone in a cell or a room’. The official Commentary explains that ‘[t]here are various forms of solitary confinement. The most extreme occurs when an individual is held entirely on his or her own and is subject to sensory deprivation by lack of access to light, sound or fresh air in what are often called “dark cells”. This form of isolation should never be imposed as a punishment’. The other form of solitary confinement entails the prisoner being ‘held in a single cell with access to normal light and air and can hear prisoners moving in adjacent areas. This type of punishment should only be used in exceptional circumstances and for short periods of time’. The EPR refer to findings of the CPT on the matter, providing that, in certain circumstances, solitary confinement may amount to inhuman and degrading treatment. The EPR also stress that the right to daily outdoor exercise also applies to persons who have been put in isolation and that, like prisoners that are placed in high security regimes, they should be provided with reading materials.

The CPT has repeatedly addressed the issue of prison disciplining. In its Standards and its Second Annual Report, the CPT stresses the need for clear disciplinary procedures where ‘any grey zones in this area involve the risk of seeing unofficial (and uncontrolled) systems developing’. Alleged offenders must be heard on the charge, should be enabled to call and examine witnesses, must be provided with adequate time to prepare their defence, have the right to appeal to a higher authority and should be informed of that right in writing. The CPT further

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120 CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 60.
121 See, in more detail, J. de Lange, Detentie genormeerd [Detention regulated], Wolf Legal Publishers, Nijmegen 2008. See, also, Jim Murdoch, supra, footnote 78, p. 250.
123 CPT, Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2, 29 March 2001, par. 128.
124 Ibid.
recommends awarding prisoners ‘the right to appeal to an authority outside the prison establishment concerned against any sanctions imposed’.\textsuperscript{127} Prisoners must be provided a copy of the disciplinary decision\textsuperscript{128} and, if necessary, be offered the services of an interpreter.\textsuperscript{129} The CPT also advocates granting inmates the right to legal representation in disciplinary proceedings.\textsuperscript{130}

The CPT has condemned the use of such penalties as placement in a dark cell\textsuperscript{131} and the denial of daily outdoor exercise.\textsuperscript{132} With respect to solitary confinement, the CPT has underlined the applicability of the principle of proportionality, holding that ‘a balance [needs] be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible’.\textsuperscript{133} The CPT emphasises the important role of medical officers where solitary regimes are imposed.\textsuperscript{134}

\textsuperscript{126} CPT, Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 17 October 1997, CPT/Inf (99) 2, 23 February 1999, par. 162.
\textsuperscript{127} CPT, Report to the Government of Bosnia and Herzegovina on the visit to Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 April to 9 May 2003, CPT/Inf (2004) 40, 21 December 2004, par. 110.
\textsuperscript{128} CPT, Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 to 30 September 2003, CPT/Inf (2005) 6, 27 April 2005, par. 76.
\textsuperscript{129} CPT, Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 May to 6 June 1997, CPT/Inf (2001) 18 [Part 1], 13 September 2001, par. 176.
\textsuperscript{130} CPT, Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 30 May 2000, CPT/Inf (2003) 1, 15 January 2003, par. 40.
\textsuperscript{131} CPT, Rapport au Conseil fédéral Suisse relatif à la visite du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) effectuée en Suisse du 21 au 29 juillet 1991, CPT/Inf (93) 3, 27 janvier 1993, par. 84.
\textsuperscript{132} CPT, Report to the Government of the Federal Republic of Germany on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 20 December 1991, CPT/Inf (93) 13, 19 July 1993, par. 159.
6.3 Discipline at the international criminal tribunals’ detention facilities

6.3.1 Discipline at the various tribunals

ICTY

The legal provisions governing discipline at the UNDU can be found in the ICTY Rules of Detention and the ‘UNDU Regulations for the Establishment of a Disciplinary Procedure for Detainees’ (hereafter referred to as ‘Regulations’).135 Rule 40 of the Rules of Detention states that ‘[d]iscipline and order shall be maintained by the staff of the Detention Unit in the interests of safe custody and the well-ordered running of the Detention Unit’. Rule 41 instructs the Commanding Officer, in consultation with the Registrar, to ‘issue regulations: i. defining conduct constituting a disciplinary offence; ii. regulating the type of punishment that can be imposed; iii. specifying the authority that can impose such punishment; iv. providing a detainee with the right to be heard on the subject of any offense which he is alleged to have committed against these Rules and/or the Regulations; v. providing for a right of appeal to the President’. Detainees are informed about what conduct is prohibited at the UNDU upon admission. According to UNDU’s Commanding Officer,

‘It’s included in the admission procedure, so a translation of the disciplinary procedure is given to the detainees as they arrive at the Unit, which includes the way the process works and what I can do if the charge is upheld’.136

The aforementioned Regulations were issued by the Commanding Officer and the Registrar pursuant to (current) Rules 40 and 41. Regulation 1 sets forth two principles governing discipline, i.e. the principle of legality and the ne bis in idem principle. This implies that a detainee may only be punished in accordance with the Regulations and never twice for the same act. Regulation 2 sets out the conduct constituting a disciplinary offence, listing i) ‘failure to obey an order or instruction given by a

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135 ICTY, United Nations Detention Unit Regulations for the Establishment of a Disciplinary Procedure for Detainees, IT/97, issued by the Registrar, April 1995.
member of the staff of the detention unit’; ii) ‘verbal abuse directed against a member of the staff of the detention unit, another detainee or any lawful visitor to the detention unit’; iii) ‘violent behaviour or aggression towards a member of the staff of the detention unit, another detainee or any lawful visitor to the detention unit’; iv) ‘possession of any illegal object or substance’; and v) ‘repeated misconduct after a warning has been given pursuant to paragraph 7 of these Regulations’. Although Regulation 1 expressly provides for the principle of legality, which also underlies Regulation 2, the use of vague terms such as ‘verbal abuse’ and ‘misconduct’ undermines its practical effect.

Regarding the offence of ‘refusing to obey an order’, Regulation 3 provides that, in such a situation, ‘the Commanding Officer shall be called immediately and, in accordance with these Regulations, shall determine whether the detainee is justified in refusing to obey such order or instruction’. It further provides that ‘[t]he Commanding Officer’s determination may be formally challenged by way of the complaints procedure’. It is unclear why reference is made to the formal grievance procedure instead of the appeals procedure laid down in Regulation 9.

Regulation 4 provides that ‘[a]ll instances of misconduct shall be reported to the Commanding Officer immediately and a record shall be kept of the time and full details of the offence’. The language of the provision is slightly inconsistent with Regulation 2(v), according to which repeated misconduct only qualifies as an offence after a warning has been given pursuant to Regulation 7.

The staff member who witnesses conduct which, in his or her view, constitutes a disciplinary offence, may impose temporary punishment until the Commanding Officer or the senior officer on duty arrives. Such temporary punishment may include restriction to the detainee’s cell or removal of an offending item, but may not exceed one hour during daytime or eight hours at night. Temporary punishment may, however, be extended by the Commanding Officer or the senior officer on duty to a maximum of in total twelve hours, pending the examination of the incident. The use of the term ‘temporary punishment’ is unfortunate here. It would be preferable to speak of ‘temporary measures for the purpose of restoring order, security and safety’. The term punishment should be reserved for definite penalties, imposed by the Commanding Officer after establishing the guilt and wrongdoing of the offender.
The Commanding Officer must explain the alleged incident to the detained person – if necessary, through an interpreter – and the alleged offender must be ‘given the opportunity to explain his behaviour’.\(^{137}\) In this regard, the Commanding Officer has said that

‘All of the rules of process are involved: the right to question witnesses, the right to question the evidence, the right to know why I’ve made the decision I’ve made; that’s all the stuff I go through when we’re doing it. And they get a written report at the end stating why and what I or my Deputy took into account to come to the conclusion we came to. So all of that, it’s reasoned’.\(^{138}\)

After conducting a thorough examination of the incident, the Commanding Officer may impose ‘any punishment’.\(^{139}\) ‘Any’ is limited to the modes of punishment listed in Regulation 7. The Rules of Detention stipulate in Rule 43(C) that segregation shall not be used as a disciplinary measure. It follows from Rule 45(A)(iii), however, that isolation \(\text{can be imposed under Rule 41(ii).}\)

Regulation 7 provides that the Commanding Officer may impose ‘any of the following punishments, or all or any combination thereof, as he thinks fit: confiscation of an offending item; removal or reduction of privileges or use of personal possessions, e.g., television, radio, books, for a period not exceeding one week; oral or written warning; written notice of suspended punishment to come into effect immediately upon a further breach of these regulations within a period of not more than two weeks from the date of the initial offence; monetary fine, to be paid from the detainee’s personal funds; confinement in isolation, subject to the express provisions of Rules 45 - 49 of the Rules of Detention’.

In \(\text{Blaškić},\) a warning was issued as a disciplinary penalty. The detainee Rajić was attacked by Blaškić in the UNDU. The incident was brought to the attention of the Registrar, who ordered an examination of the matter. On the basis of the results of the examination, the Commanding Officer warned Blaškić that ‘another incident of this

\(^{137}\) Regulation 6.

\(^{138}\) ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.

\(^{139}\) Regulation 6.
nature would result in the withdrawal of his privilege’. In order to prevent reoccurrence and for the sake of his safety, Rajić was placed in another part of UNDU.

The punishment imposed must be recorded and explained to the detainee in a language he or she understands. The detainee must immediately be given a written copy of the punishment including reasons in one of the working languages of the tribunal. If the detainee does not understand the language used, a translation must be provided ‘as soon as possible and, in any event, not later than twelve hours after the imposition of the punishment’. Under Regulation 9, the inmate may appeal to the President ‘both against the determination of a disciplinary offence and against the punishment imposed’. It follows from Regulation 3, however, that an inmate may not appeal the Commanding Officer’s determination that the detainee was unjustified in refusing to obey an order or instruction directly to the President. In that situation, the detained person will need to follow the formal complaints procedure.

The detained person must inform the Commanding Officer of his or her wish to appeal the latter’s decision ‘within twenty-four hours of the incident or of the punishment being imposed, whichever is later’. The inmate may give such notice orally and the Commanding Officer must ‘record the request and notify the Registrar immediately’. The Registrar must forward ‘details of the appeal’ to the President within twenty-four hours. It is up to the President to decide whether to conduct the appeal proceedings orally or in writing. Only in the appeals phase may the inmate receive legal assistance from counsel. However, this does not mean that an inmate who does not have counsel will be provided one. Regarding the question of whether detainees may receive legal assistance in disciplinary proceedings, the UNDU’s Commanding Officer has said that

‘Not in the disciplinary process, no. They have in the appeal, if they appeal afterwards, if they’re unhappy with what happened, then they will, but not at the

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141 Regulation 8.
142 Regulation 9.
143 Regulation 10.
disciplinary level; not at my level. Although they can take advise outside of the room. I wouldn’t have anybody other than the detainee in the room. It’s between me and the detainee, or between the Deputy and the detainee. I’ve never been asked for it either’.

No procedure has been established to deal with emergency disputes. In this respect, Regulation 11 explicitly provides that ‘[a]ny punishment imposed by the Commanding Officer shall continue in full force and effect pending appeal’.

Within three days of receiving the appeal, the President must notify the detainee in writing of his or her decision on the appeal in a language the inmate understands. The President may ‘order the restoration of confiscated articles or privileges, repayment of any fine imposed, cancellation of any warning or suspended sentence or immediate release from isolation’, or may ‘take any other action he sees fit in the circumstances’.

Rules 45 to 49 of the Rules of Detention deal with isolation, either as a mode of punishment or when imposed pursuant to Rule 45(A)(i) and (ii). These provisions stipulate, *inter alia*, that a record must be kept, containing details of ‘all events concerning a detainee confined to the isolation unit’. The Medical Officer has an important role in safeguarding the detained person’s health. Cases of isolation must be reported to the Medical Officer, who must confirm the detained person’s fitness to undergo isolation. The isolated person must be visited by the Medical Officer as often as the latter deems necessary and may at any time request such a visit, which must then take place ‘as soon as possible and, in any event, within twenty-four hours of the request’. The Registrar must be informed of all cases of isolation and must in turn report such cases to the President. The President may ‘order the release of a detainee from the isolation unit at any time’. In principle, isolation may not be imposed for longer than seven consecutive days. If, after those seven days, the continued isolation is deemed necessary, the Commanding Officer must notify the Registrar and the Medical Officer. The Medical Officer must again examine the isolated person. To

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144 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.
145 Regulation 12.
146 Rule 46(B).
147 Rule 47.
148 Rule 48.
continue isolation for another period of seven days, the Medical Officer must confirm the inmate’s physical and mental fitness to undergo isolation. Each subsequent extension is subject to the same procedure.\textsuperscript{149}

Relations between staff members and inmates at the tribunals’ detention facilities are, generally speaking, quite good. This was affirmed by both staff members and detained persons at the SCSL and the ICTR.\textsuperscript{150} The independent Swedish investigators of UNDU came to the same conclusion in respect of the ICTY UNDU.\textsuperscript{151} They noted that the detainees tend to behave quite well.\textsuperscript{152} In addition, relationships between detained persons appear to be good, which may be surprising given that they were once at war with each other. Nor did the Swedish investigators observe any signs of ethnic antagonism.\textsuperscript{153} They observed that ‘[t]his somewhat remarkable situation is probably partly due to detainees understanding that conflicts between them would lead to isolation and poorer conditions for all. The relatively high social skills of most of the detainees and their strong internal discipline have made this orderly situation possible’.\textsuperscript{154}

In this respect, the UNDU’s Commanding Officer, David Kennedy, has said that he encounters disciplinary conduct only rarely. He said that

‘It’s a mature and intelligent population. They don’t answer things with their fists, so it’s very rare. I have had, on occasion, had to write to people and say ‘don’t do this again; this is not appropriate’, but that’s sort of informal rather than formal, and I will have a discussion with the individual about it. But that’s even rarer actually, when I think about that (…) The behaviour isn’t such that it’s applied that often. We’re talking about – again as I was saying – people who are at the highest level in their country generally behaving in a manner which wouldn’t attract disciplinary action in a prison’.\textsuperscript{155}

\textsuperscript{149} Rule 49.
\textsuperscript{150} ICTR, interviews conducted by the author with ICTR staff members and detained persons, Arusha - Tanzania, May 2008; SCSL, interviews conducted by the author with SCSL staff members and detained persons, Freetown - Sierra Leone, October 2009.
\textsuperscript{151} ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.7.2.
\textsuperscript{152} Ibid.
\textsuperscript{153} Ibid.
\textsuperscript{154} Ibid.
\textsuperscript{155} ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.
An UNDU detainee, when interviewed for the purpose of this study, stated in this regard that,

‘We who have been brought here are not criminals, although we are sometimes represented as being that. We are therefore not the type to cause incidents. We don’t need guards. Children could look after us’.

Other detainees said in this respect that,

‘Disciplinary proceedings have been initiated twice: due to an argument with another detainee during a sporting activity. Proceedings were on one occasion initiated for keeping “prohibited” items in the cell’.

‘No disciplinary proceedings have been initiated against me, except that I was banned from using the telephone for seven days, and the Court established that this telephone ban had been unjustified (…) I was satisfied with the Court’s decision with regard to my appeal. It hurt me that I was banned from contacting my family or anyone else by phone only to be told that I had not broken the rule. I was not given any compensation in the Court’.

Another reason for the detainees’ relatively good behaviour may lie in their awareness that their misconduct may affect the outcome of future decisions relating to their external legal position. The behaviour of the detained or imprisoned person inside the detention facility is a relevant factor in sentencing decisions156 and decisions on early release.157 In the Strugar case, for instance, the President held that ‘[t]he “Behaviour

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157 See, e.g., ICTY, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Dragan Jokić of 8 December 2009, Prosecutor v. Jokić and Contempt Proceedings against Dragan Jokić, Case No. IT-02-60-ES and IT-05-88-R77.1-ES, President, 13 January 2010, par. 15; ICTY, Decision of President on Early Release
Report” of the Acting Commander of the UNDU attests to Mr. Strugar’s good behaviour during his detention at the UNDU. According to this Report, Mr. Strugar has “at all times shown good respect for the management and staff of the unit and has complied with both the Rules of Detention and the instructions of the guards.” In addition, he has been “cordial with his fellow detainees”. This good behaviour, particularly considering Mr. Strugar’s prompt surrender to the International Tribunal in October 2001, demonstrates a degree of rehabilitation'.

ICTR

Rules 35 to 37 of the ICTR Rules of Detention deal with disciplining at the ICTR UNDF. Rule 35 stipulates that ‘[d]iscipline and order shall be maintained by the staff of the Detention Unit in the interests of safe custody and the well-ordered running of the Detention Unit’. Rule 36 provides that the ‘Commanding Officer, in consultation with the Registrar, shall issue regulations: a. Defining conduct constituting a disciplinary offence; b. Regulating the type of punishment that can be imposed; c. Specifying the authority that can impose such punishment; d. Providing a right of appeal to the President’. Finally, Rule 37 provides that ‘[t]he disciplinary regulations shall provide a detainee with the right to be heard on the subject of any offence which he is alleged to have committed’.

Disciplinary measures may only be imposed by the Commanding Officer and never twice for the same act.

of Momcilo Krajsik [sic], Prosecutor v. Momcilo Krajišnik, Case No. IT-00-39-ES, President, 26 July 2010, par. 24. See, also, Article 3(b) of the ICTY, Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev.2, 1 September 2009.


Paragraph 3 of the document ‘Disciplinary Measures at the UNDF’, 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, providing guidelines regarding the disciplinary measures in operation at the UNDF. The document is on file with the author.

Regulation 1 of the Regulations for the Establishment of a Disciplinary Procedure for Detainees, issued by the Commanding Officer and the Registrar pursuant to Rules 36-37 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal
The different modes of punishment are listed in Paragraph 5 of the document titled ‘Disciplinary Measures at the UNDF’.\textsuperscript{161} The conduct constituting a disciplinary offence has been defined in Paragraph 2 of the Document.\textsuperscript{162} The Commanding Officer has full discretionary powers both in deciding whether or not to impose punishment and on the kind(s) of punishment. Cumulative penalties are permitted under Regulation 7 of the ‘ICTR Regulations for the Establishment of a Disciplinary Procedure for Detainees’\textsuperscript{163} In addition, the Commanding Officer may ‘impose such sanctions as he believes necessary’,\textsuperscript{164} or ‘as he thinks fit’.\textsuperscript{165}

Paragraph 3 of the Document states that the Commanding Officer must thoroughly examine the facts of a case before taking a decision.\textsuperscript{166} Regulation 5 of the Regulations provides that the staff member witnessing a detainee’s misconduct must write ‘a report on the incident and report it to the Commanding Officer’. Upon the

\begin{footnotes}
\footnote{161}Hereafter in this subparagraph referred to as ‘the Document’ (on file with the author).
\footnote{162}Paragraph 5 of the Document provides that ‘[t]he following sanctions may be imposed:
- confiscation of the prohibited article;
- removal or reduction in the detainee’s privileges or use of his personal effects;
- cancellation of visits and correspondence for a period of not more than two weeks;
- written or oral warning;
- a written notice that a sanction will be introduced if the violation occurs within two weeks of the first act;
- isolation, under Rules 43 and 47 of the Provisional Rules covering detention’.
\footnote{163}See, also, Regulation 7 of the Regulations for the Establishment of a Disciplinary Procedure for Detainees. It is stipulated in Paragraph 6 that ‘[t]he use of Corporal punishment, punishment by placing in a dark cell, and all other cruel, inhumane or degrading punishments are completely prohibited and shall not be utilised’.
\footnote{164}Paragraph 2 of Document provides that ‘[t]he following constitute a breach of discipline:
  a) Refusal to follow an order or instruction given by a member of staff at the UNDF;
  b) Verbal abuse against a member of staff at the UNDF, another detainee or any authorised visitor to the detention facility;
  c) Violent or aggressive behaviour towards a member of staff, another detainee or any authorised visitor to the UNDF;
  d) Possession of any contraband object or substance;
  e) Repetition of a breach of discipline despite an oral or written warning;
  f) Any behaviour which poses a threat to the good order and discipline of the Detention Facility’.
\footnote{165}See, also, Regulation 2 of the Regulations for the Establishment of a Disciplinary Procedure for Detainees.
\footnote{166}Hereafter in this subparagraph referred to as ‘Regulations’ (on file with the author). See ICTR, The President’s Decision on Ferdinand Nahimana’s Appeal Against the Disciplinary Measures Imposed on Him by the UNDF, \textit{Prosecutor v. Nahimana}, Case No. ICTR-96-11-T, President, 10 February 2003, par. 3.
\footnote{164}Paragraph 3 of the Document.
\footnote{165}Regulation 7.
\footnote{166}See, also, Regulation 6.
\end{footnotes}
detained person’s request, the Commanding Officer may call witnesses – including other inmates – in the former’s defence.\textsuperscript{167} It is further stipulated in the Regulations that the procedure before the Commanding Officer must take place ‘as early as possible after the alleged event’.\textsuperscript{168}

With respect to the punishments of close confinement and the reduction of diet, the Document requires the Medical Officer to give his or her advice on the matter prior to the execution of such punishment. The Medical Officer must examine whether the detainee is fit to undergo such forms of punishment.\textsuperscript{169} Under Paragraph 8 of the Document, the Medical Officer must pay visits to detainees undergoing such forms of punishment and advise the Commanding Officer on the continuation or termination of the punishment.\textsuperscript{170} It should be noted in this respect that the official Commentary to the EPR provides in relation to Rule 43 that, ‘[m]edical practitioners or qualified nurses should not be obliged to pronounce prisoners fit for punishment but may advise prison authorities of the risks that certain measures may pose to the health of prisoners’. It further provides that ‘[i]t is now widely held that a reduction of diet is a form of corporal punishment and constitutes inhuman treatment; this reflects professional opinion that has developed in recent years’.\textsuperscript{171}

In respect of the proceedings, the Document provides that ‘[w]here necessary and practicable the detainee shall be allowed to make his defence through an interpreter’.\textsuperscript{172} It is difficult to understand how non-practicability would provide an excuse for denying interpretation services to a detainee who is not proficient in the tribunal’s official languages. The right to be heard would become a dead letter in such cases.

The Commanding Officer must draw up a disciplinary report containing the reasons for his decision. Paragraph 9 of the Document states that the detainee must be

\textsuperscript{167} ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
\textsuperscript{168} Regulation 5 of the Regulations.
\textsuperscript{169} Paragraph 7 of the Document.
\textsuperscript{170} Paragraph 8 of the Document.
\textsuperscript{172} Paragraph 4 of the Document. Regulation 6 of the Regulations provides that ‘the alleged incident of misconduct shall be explained to the detainee by the Commanding Officer, through an interpreter if necessary, and the detainee shall be given the opportunity to explain his behaviour’. Emphasis added.
provided a written copy of the punishment.\textsuperscript{173} Paragraph 9 of the Document and Regulation 8 of the Regulations provide that ‘[a]ll sanctions shall be communicated to the detainee in a language which he speaks and understands’. According to Regulation 8 of the Regulations, if the detainee does ‘not understand the language in which the statement of the punishment is written, a translation into a language he understands shall be provided to the detainee as soon as possible and, in any event, not later than twelve hours after the imposition of the punishment’.

A detainee may choose to appeal any disciplinary sanction imposed by the Commanding Officer to the President.\textsuperscript{174} Paragraph 10 of the Document provides that ‘[t]he detainee must inform the Commanding Officer of his intention to appeal within 24 hours of the punishment being given’.\textsuperscript{175} It was held by the President in \textit{Nahimana} that ‘[s]uch notice may be given orally and the Commanding Officer shall record the request and notify the Registrar immediately’.\textsuperscript{176} According to the UNDF authorities, however, detainees tend to refrain from appealing any imposed punishment. The detainees fear the possible consequences of such an appeal for future decisions relating to their external legal position. Indeed, the Commanding Officer’s reports on a detained person’s behaviour inside the UNDF are taken into account when sentencing\textsuperscript{177} and when designating States for the enforcement of sentences.\textsuperscript{178} The Commanding Officer must notify the Registrar immediately of an inmate’s wish to appeal a disciplinary decision. Regulation 9 provides that the Registrar must forward the appeal to the President within twenty-four hours.\textsuperscript{179}

In \textit{Nahimana}, the President reproached the UNDF authorities’ late forwarding of Nahimana’s appeal.\textsuperscript{180} The detainee’s appeal was filed with the Office of the Registrar

\begin{footnotes}
\textsuperscript{173} See, also, Regulation 8 of the Regulations.
\textsuperscript{174} See Rule 36(d) of the Rules of Detention and Paragraph 10 of the Document.
\textsuperscript{175} See, also, Regulation 9 of the Regulations.
\textsuperscript{176} ICTR, The President’s Decision on Ferdinand Nahimana’s Appeal Against the Disciplinary Measures Imposed on Him by the UNDF, \textit{Prosecutor v. Nahimana}, Case No. ICTR-96-11-T, President, 10 February 2003. See, also, Regulation 9 of the Regulations.
\textsuperscript{177} See, \textit{e.g.}, ICTR, Defence Motion for Admission of the Written Declaration Made by the Commanding Officer of the United Nations Detention Facility in Lieu of Oral Statement (Rule 92\textit{bis} (A) and (B)), \textit{Prosecutor v. Bisengimana}, Case No. ICTR-00-60-I, T. Ch. II, 20 January 2006.
\textsuperscript{178} ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
\textsuperscript{179} See, also, ICTR, The President’s Decision on Ferdinand Nahimana’s Appeal Against the Disciplinary Measures Imposed on Him by the UNDF, \textit{Prosecutor v. Nahimana}, Case No. ICTR-96-11-T, President, 10 February 2003.
\end{footnotes}
only two days before Nahimana’s fourteen-day punishment was completed. It appeared from the date and receipt stamp on the copies of the appeal which Nahimana had in his possession that the UNDF authorities had received the appeal ‘four days into the Detainee’s two-week punishment’. The President qualified the late filing by the authorities as ‘inexcusable’.\textsuperscript{181}

According to the Regulations, counsel may assist a detainee in the disciplinary appeal.\textsuperscript{182} The right does not apply to the procedure before the Commanding Officer. According to the UNDF authorities, admitting defence counsel to the disciplinary procedure before the Commanding Officer ‘would only obstruct an effective and swift procedure’.\textsuperscript{183} Paragraph 11 of the Document states that defence counsel for the detained person may provide assistance. This is not a right, however, and does not imply that a detainee will be provided counsel for this purpose, which may be detrimental to the legal position of those persons convicted on appeal who no longer have counsel.

Rule 37 does not require the inmate to be heard before the Commanding Officer \textit{and} before the President. In practice, the Commanding Officer invites the alleged offender to his office in order to listen to what he has to say in his defence.\textsuperscript{184} Although Regulation 9 of the Regulations provides that the appellate proceedings may be conducted orally ‘as the President may determine’,\textsuperscript{185} in practice the appeals phase is conducted in writing.\textsuperscript{186}

In determining whether the alleged misconduct constitutes a disciplinary offence, the President will defer to the Commanding Officer’s factual findings.\textsuperscript{187} In \textit{Nahimana}, the President held that ‘[i]t appears from a reading of Paragraph 9 of the Regulations,

\textsuperscript{180} \textit{Ibid.}
\textsuperscript{181} Id., par. 1.
\textsuperscript{182} Regulation 10 of the Regulations.
\textsuperscript{183} ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
\textsuperscript{184} ICTR, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008; ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
\textsuperscript{185} See ICTR, The President’s Decision on Ferdinand Nahimana’s Appeal Against the Disciplinary Measures Imposed on Him by the UNDF, \textit{Prosecutor v. Nahimana}, Case No. ICTR-96-11-T, President, 10 February 2003.
\textsuperscript{186} ICTR, interview conducted by the author with a senior staff member of ICTR Office of the Registrar, Arusha - Tanzania, May 2008.
\textsuperscript{187} ICTR, The President’s Decision on Ferdinand Nahimana’s Appeal Against the Disciplinary Measures Imposed on Him by the UNDF, \textit{Prosecutor v. Nahimana}, Case No. ICTR-96-11-T, President, 10 February 2003, par. 4.
that a detainee may only appeal against the punishment imposed by the Commanding Officer and not on the question of whether his alleged conduct constituted a disciplinary offence’. In other words, no remedy is available against the Commanding Officer’s factual findings.

The President will consider whether the punishment imposed can be considered ‘reasonable, justifiable and commensurate with the disciplinary offence committed by the Detainee’. Regulation 12 of the Regulations stipulates that the President ‘shall notify the detainee of the outcome of the appeal in writing in a language he understands, within three days of receipt by him’. It is further provided that ‘the President may order the restoration of the confiscated articles or privileges, cancellation of any warning or suspended sentence or immediate release from isolation. The President may take any other action he sees fit in the circumstances’. On one occasion, the President intervened when an inmate had been punished by removing the computer from his cell for a specific period. The President told the Commanding Officer that the stage of the criminal proceedings against the person concerned did not allow for this specific punishment.

The President may also react to an imposed disciplinary penalty proprio motu, i.e. without the inmate concerned having filed an appeal. The Commanding Officer reports to the Registrar about any irregularities that have arisen inside the UNDF. The Registrar reports these matters to the President. Because these reports are drawn up by or on the basis of the findings of the Commanding Officer, this reporting duty does not constitute a proper substitute for a suspension provision. In this regard, Paragraph 12 of the Document provides that the sanction imposed by the Commanding Officer

188 Ibid.
189 Id., par. 6.
190 Paragraph 13 of the Document provides that ‘[t]he President of the Tribunal will inform the detainee of his decision, in writing in a language which he understands, within three days of making the said decision’.
191 Paragraph 13 of the Document stipulates that ‘[t]he President may order the restitution of confiscated items, the restoration of privileges, the annulment of any warning, conditional warning, or isolation’.
192 ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
193 Ibid; ICTR, interview conducted by the author with staff members of the Office of the Registrar, Arusha - Tanzania, May 2008.
194 Ibid.
‘will remain in place until the decision of the appeal is conveyed to the Commanding Officer’. Appealing a disciplinary penalty does not automatically suspend its enforcement. The UNDF authorities are of the opinion that suspending disciplinary penalties would seriously undermine their authority.

As noted, punishment may take the form of withdrawing ‘privileges’. A former ICTR Deputy Chief of Security has said that privileges ‘could eventually be withdrawn as a disciplinary measure should this become necessary’. The term ‘privileges’, however, has not been defined. In Nahimana, the detainee’s telephone “privileges” were suspended for a period of two weeks. Under the Rules of Detention, however, the detainees have the right to communicate with their families and other persons by telephone. Since withdrawing rights is not listed as a mode of punishment in Regulation 7, it is difficult to see how this sanction could have been legitimately imposed on Nahimana.

SCSL

Rule 25 of the SCSL Rules of Detention governs disciplining at the Special Court’s Detention Facility. Paragraph A states that ‘[d]iscipline and control shall be maintained by the staff of the Detention Facility with firmness but with no more restriction than necessary in the interests of security and good order of the Detention Facility’. The Chief of Detention, in consultation with the Registrar, is entrusted with the task of issuing regulations ‘(i) defining conduct constituting a disciplinary offence; (ii) regulating the type and duration of punishment that can be imposed; (iii) specifying the authority that can impose such punishment; and (iv) providing for a thorough investigation and a right of appeal’. Rule 25(C) stipulates that punishment

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195 See, also, Regulation 11 of the Regulations.
196 ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
198 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.
199 Rule 58 is located in the Section of the Rules of Detention entitled ‘Rights of Detainees’.
200 Rule 25(B).
can only be imposed in accordance with such regulations. No person may ever be punished twice for the same act.  \footnote{Rule 25(D).}

Detainees awaiting adjudication by the Chief of Detention must be provided reading material upon their request. \footnote{SCSL, Detention Operational Order No. 12:1, issued on 14 October 2004 by Barry Wallace, Chief of Detention.} The inmate must be informed of the charge against him and be given a ‘proper opportunity for presenting his defence’. \footnote{Rule 25(D).} The inmate has the right to counsel ‘throughout the disciplinary proceedings’ and must be informed of this right. If necessary, the inmate must be provided with the services of an interpreter. \footnote{Rule 25(D).}

As to the Medical Officer’s role, Rule 25(F) states that ‘\[p\]rior to any punishment that may be prejudicial to the physical or mental health of a Detainee, the Medical Officer must first have examined the Detainee and certified in writing the physical and mental health of the Detainee to sustain such punishment. The Medical Officer shall visit daily the Detainees undergoing such punishments and shall advise the Chief of Detention and the Registrar if he considers the termination or alteration of the punishment necessary for the physical or mental health of the Detainee’.

In accordance with Rule 31 of the SMR, Paragraph 25(E) provides that ‘\(c\)orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman and degrading punishments shall be prohibited as punishments for disciplinary offences’. The imposition of solitary confinement is explicitly provided for in Rule 30. In principle, isolation may take no longer than seven days. If the Chief of Detention wants to prolong isolation, an order to that effect must be given by the Registrar. It is held under (A) that ‘\[t\]he Chief of Detention may order that a Detainee be confined to the isolation unit as a result of disciplinary proceedings’. The Chief of Detention must report such cases to both the Registrar and the Medical Officer. Rule 30, constituting a \textit{specialis} of Rule 25(F), states that the Medical Officer must, before or within twenty-four hours of a detained person’s isolation, examine the detainee ‘and confirm in writing that he is physically and mentally fit to sustain it’. Besides determining the detainee’s fitness to undergo isolation, the Medical Officer must visit
the isolated person on a daily basis. If he or she considers the termination or alteration of isolation necessary on medical grounds, the Medical Officer must advise the Chief of Detention accordingly. The isolated person may at any time request a visit by the Medical Officer, which must be acted upon as soon as practicable.

A record must be kept of all events that concern an isolated detainee. Furthermore, persons who are put in isolation retain the right to communicate with and be visited by their counsel. Rule 32(B) provides that ‘[t]he Registrar may order the release of a Detainee from the isolation unit at any time’. It is also provided that an isolated person must be offered one hour of exercise each day and must ‘wash and shave daily’. It is stressed in Operational Order 12:1 that isolated detainees will not lose any of their privileges other than those specified in the punishment imposed by the Chief of Detention.

Isolation may only be used as a form of disciplinary punishment. In order to preserve security and good order within the Detention Facility, to protect a detained person or other persons, or to prevent any prejudice to the criminal proceedings, the Chief of Detention or the Registrar may segregate a detained person from all or some of the other detained persons. The measure of segregation has a preventive, non-punitive purpose and cannot be imposed as a disciplinary measure (and, as such, should not be confused with isolation). It follows from its underlying rationale and character that it may be necessary to prolong a measure of segregation if the initial justification for imposing it is still present and cannot be dealt with in a less intrusive manner. In this regard, Rule 29 provides that ‘[t]he Chief of Detention shall review all cases of segregation of Detainees at least once a week and report to the Registrar thereon’.

Since isolation may only be used as a form of punishment, it is unfortunate that the Rules provide for the possibility of prolonging isolation on the basis of necessity. The Chief of Detention must report such perceived necessity before the end of the

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206 Rule 31(A).
207 Rule 31(B).
209 Rule 30(A).
210 Rule 26(D).
211 Rule 32(A).
seven-day term. In addition, the Medical Officer must confirm the detained person’s fitness to undergo isolation for a further period of seven days.

Pursuant to Rule 25, the Chief of Detention and the Registrar have issued a document entitled ‘discipline and control’ which contains regulations governing disciplining. According to that document, ‘safe custody’ and the ‘well-ordered running of the Detention Facility’ are the rationales underlying discipline and control. The Regulations’ third paragraph governs disciplinary charges. It is stated there that ‘charges must be laid in writing within 48 hrs of the discovery of the offence save in exceptional circumstances’. At least twenty-four hours before the hearing by the Chief of Detention, the detained person must be informed both of the charge and the grounds on which it is made, in order ‘to enable him to consider any defence he may wish to make’. The detainee must also be informed before the hearing about the procedure and the purpose of the hearing.

If considered necessary by the Chief of Detention, the person charged with a disciplinary offence may be kept apart from the other inmates pending the hearing. Detention Operational Order 11:14 holds that ‘[w]hen a detainee is charged with an offence against discipline, he should not normally be removed from his normal location to await adjudication. If an incident is of a more serious nature and it is

212 Hereafter referred to as ‘the Regulations’. Document on file with the author. One paragraph of the Regulations concerns supervision more in general and holds that where, in principle, the supervision of detainees may be carried out by officers of either sex, ‘in circumstances where privacy would be expected’ an officer of the same sex will supervise a detainee. See Regulations 2.1 and 2.2. A situation ‘where privacy would be expected’ is the full body search of detainees. Contrary to the regulations governing rub-down searches (SCSL, Detention Operational Order No. 4:7, issued on 30 July 2004 by Barry Wallace, Chief of Detention (document on file with the author)), the Operational Order on the full search dictates that ‘[s]earch staff must be of the same sex as the detainee being searched’ (SCSL, Detention Operational Order No. 4:9, issued on 10 August 2004 by Barry Wallace, Chief of Detention. Emphasis in the original. (Document on file with the author.) See, on the full search, SCSL, Detention Operational Order No. 4:8; issued on 10 August 2004 by Barry Wallace, Chief of Detention. (Document on file with the author.) See also Rule 32 of the STL Rules of Detention.
213 Regulation 1.2.
214 SCSL, Discipline and Control, par. 3 (Laying of disciplinary charges), Regulation 1. Document on file with the author.
215 Regulation 3.2. The United States Supreme Court in the case of Wolff et al. v. McDonnell, held that ‘written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee’; USA Supreme Court, Wolff, Warden et al. v. McDonnell, 418 U.S. 539 (1973), p. 564.
216 Regulation 3.3.
considered that the removal of the detainee is necessary in the interests of safety and/or good order, then the International Detention Supervisor in charge will obtain the Chief of Detention’s authority before affecting such a move’. The Operational Order further states that in such a case, the removed inmate ‘will not be deprived of any privileges to which he is normally entitled’ and will be placed ‘on special observation’ until the moment of the hearing.

Like Rule 25, Regulation 5 provides that a detainee has the right to counsel throughout the disciplinary proceedings and must be ‘provided with the services of an interpreter if necessary’. The detention authorities have confirmed that assistance by counsel is provided for in disciplinary procedures. When a person no longer has counsel, the SCSL Office of the Principal Defender will step in and provide duty counsel.217 In contrast to the other tribunals’ detention regulations, which merely provide that a detained person may be assisted by his or her counsel in disciplinary appeals proceedings, the SCSL’s legal framework explicitly recognises a right to counsel in all disciplinary proceedings. Indeed, since Regulation 3(5) is part of Paragraph 3 of the Regulations, which is entitled ‘[l]aying of disciplinary charges’, it must be assumed that the alleged offender has the right to counsel from that moment onwards.

In this regard, the Chief of Detention has said that

‘they have a right to representation; this could be counsel or another prisoner. They always choose a lawyer, but they could choose for someone else’. 218

It should be noted, however, that it may not always be easy for first-line detention authorities to deal with the high-profile counsel working before the Special Court. According to the Chief of Detention,

‘When I was Deputy Chief here, I had one of the detainees in front of me for a disciplinary offence and I had three of their top criminal lawyers from the UK sitting across from me. I asked them what they were doing here and they said they were assisting their client. I told them I only needed one of them and that two of them

217 SCSL, interview conducted by the author with the SCSL detention authorities, Freetown - Sierra Leone, 19 October 2009.
218 Ibid.
An officer reporting misconduct has the task of initiating the charge. A form entitled ‘Notice of Report Against Discipline and Control’ must be filled in by a supervisor. The latter takes down the details as provided by the reporting officer and indicates which offence appears to have been committed. The detained person may reply to the charge in writing on the form itself and may also write down the names of witnesses he may wish to call. He must further indicate whether he wants to exercise his right to counsel and make use of the services of an interpreter during the hearing. Both the supervisor and the officer who witnessed the misconduct must sign the form. Pursuant to Detention Operational Order 11:14, the supervisor must himself when filling in the charge form ascertain whether there is \textit{prima facie} evidence that the underlying disciplinary offence has been committed and that the charge has been made under the Rules’ correct paragraph.

The same Operational Order provides that all inmates must be fully searched before being admitted to the room where the hearing is to take place. The hearing is conducted by the Chief of Detention and must be conducted within seventy-two hours of laying the charge. In exceptional circumstances, the Chief of Detention may deviate from the seventy-two hours rule, for instance, where the charge is laid during weekends, public holidays or ‘a day of religious observance for the detainee in accordance with his registered religious denomination’.\textsuperscript{220} The hearing may be adjourned, unless it would unfairly prejudice the detainee’s interests. Reasons must be given for such adjournments and must be recorded. A record must be kept of the hearings; it must contain the charge, the alleged facts, a summary of the evidence as presented, the Chief’s findings and, if the hearing results in the charge being upheld, the penalties awarded against the detained person.\textsuperscript{221} In addition, the names of any

\textsuperscript{219} \textit{Ibid}.
\textsuperscript{220} Regulation 4.2.
\textsuperscript{221} Regulation 5.1.
witnesses must be recorded. 222 If the person charged with the offence refuses to attend the hearing, he must be informed that the hearing will proceed in his absence. 223 The Chief of Detention or officer authorised to conduct the hearing must then satisfy him-or herself that the detainee is aware that the hearing will be conducted in his absence and must record the detainee’s refusal to attend. 224

During the hearing, the Chief of Detention must ‘satisfy himself that the detainee has had sufficient time to prepare his defence’. The alleged offender must be provided ‘full opportunity of hearing what is alleged against him and of presenting his own case’. 225 Regulation 2 of Paragraph 5 of the Regulations allows the Chief of Detention to fall back on a lesser charge, provided that he or she records the reasons for doing so.

Incidents may, in theory, be brought to the attention of domestic authorities. When interviewed for the purpose of this research, the detention authorities stated that

‘At one time, drugs were smuggled in and we called in the Sierra Leonean authorities but, unfortunately, they couldn’t get the drugs analysed, whether it was cocaine or whatever. The whole thing was a mess - how the investigation was conducted; they wouldn’t release my prison officers, who were witnesses but were considered suspects until they were cleared. I had an hour-long confrontation with the inspector over there. In this country, if you are a witness, you’re considered a suspect. My officers who seised the drugs were terrified to go there because they would need to be bailed out’. 226

Paragraph 6 of the Regulations contains a detailed list of conduct constituting a disciplinary offence. 227 Although, at first glance, the detailed nature of the list appears

225 It holds that ‘a detainee shall be guilty of an offence against discipline if he’; 1. ‘assaults an officer or other member of staff’; 2. ‘commits an assault causing injury to any person including other detainees’; 3. ‘commits any other assault’; 4. ‘disobeys any lawful order’; 5. ‘disobeys or fails to comply with any rule or regulation applying to him’; 6. ‘refuses to work

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to be in accordance with the principle of legality, such catch-all provisions as the prohibition to act ‘in any way which offends against good order and discipline’ appear to be at odds with that principle.

Moreover, according to detained persons, they are not provided a copy of the Regulations. They even deny having knowledge of the Regulations’ existence. Their account finds support in the form ‘Notice of Report Against Discipline and Control’, where it is held that the Regulations must be provided to the alleged offender together with the form. Nothing suggests that the Regulations are handed to detainees before that moment. To quote the U.N. Manual on Human Rights Training for Prison Officials: ‘[i]t is important that prisoners be made aware of all the rules and regulations which affect them in prison. If a prisoner then commits a breach of prison discipline, his or her case should be heard under a set of procedures which have been publicised in advance. If found guilty, the prisoner may be subjected to a range of punishments which will be laid down in the same set of procedures’. The Manual further states that ‘[i]n each prison or place of detention there should be a published

when required to do so, or intentionally fails to work properly’; 7. ‘fights with any person or other detainee’; 8. ‘is disrespectful to any person or uses threatening, abusive, or insulting words or behaviour’; 9. ‘commits an indecent or obscene act’; 10. ‘endangers the health or personal safety of any person or persons, including detainees, through intentional or reckless conduct’; 11. ‘intentionally or recklessly sets fire to any part of the unit or any property, whether or not his own, or, destroys or damages any part of the unit or other property not being his own’; 12. ‘has in his possession any unauthorised article, or a greater quantity of any article that is not authorised to have’; 13. ‘sells or delivers to or receives from any person any unauthorised article, or sells, or without permission, delivers to any person any article which he is allowed to have only for his own use’; 14. ‘takes improperly any article belonging to another person or to another detainee’; 15. ‘prepares, manufactures, consumes, inhales or administers to himself or any other person, with or without their consent, any intoxicating substance or drug, or buys, sells, passes or possesses any such item’; 16. ‘intentionally obstructs an officer in the execution of his duty or any other person going about his authorised duties within the unit’; 17. ‘bribes or attempts to influence any officer or other person going about their authorised duties within the unit’; 18. ‘denies access to any part of the unit to any officer or other authorised person’; 19. ‘detains any person against his will’; 20. ‘absents himself from any place where he is required to be or is present at any place where he is not authorised to be’; 21. ‘mutinies or commits any act of collective indiscipline’; 22. ‘escapes from detention or legal custody’; 23. ‘in any other way offends against good order and discipline’; or 24. ‘attempts to commit, incites another detainee to commit, or assists another detainee to commit or attempt to commit any of the foregoing offences’.

228 Document on file with the author.  

list of acts which constitute breaches of discipline. All prisoners should have access to this list.  

A number of serious incidents have occurred inside the Court’s Detention Facility. When interviewed for the purposes of this research, the detention authorities said, for example, that

‘The last hearing I had was with [REDACTED]. He had threatened to take one of the international supervisors hostage. In the incidence reports that the officers wrote, [REDACTED] actually was reported to have made the supervisor sit on the ground. Then he threatened to gauge out the eye of the national supervisor who had kept giving him my memos. You must remember that some of the inmates are convicted for crimes against humanity. Some of the things that come out of their mouths are extremely terrifying for a lot of the officers, even the national ones. Mind you that the nationals have been terrorised by them. The same prisoner hit a chair over the head of an officer. At one point, two of the detainees terrorised our officers so much that we couldn’t get the officers so far to lock their cell-doors. They were terrified’.  

The Chief of Detention added that

‘I have been here for almost six years. I’ve heard the most serious threats from the inmates. If I’d tell you, you wouldn’t even believe it. But they’ve lived it, they’ve experienced it, and I know that they could actually do such things if they’d pick the right opportunity. So when a staff member got threatened recently, we took it very seriously. The prisoner was segregated; he actually is under a special security regime (…) The prisoner concerned had reached a point at which he told himself that he had nothing to lose. He had been imposed a [long] sentence (…) and had an attitude of ‘what are you going to do to me?’ So we made him realise he did have something to lose. He didn’t like being isolated; he didn’t like having no visits; so we started relaxing the regime little by little up to the point – about ten days ago – that we let him visit his pals on the other side’.  

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230 Ibid.
231 SCSL, interview conducted by the author with the SCSL detention authorities, Freetown - Sierra Leone, 19 October 2009.
232 Ibid.
The modes of punishment that may be imposed are laid down in Paragraph 7 of the Regulations. These are: i) a caution; ii) the loss of remission not exceeding 28 days; iii) the stoppage of earnings for a period not exceeding 28 days, where a detainee receives payment for work, as meant in Rule 53; iv) the stoppage of any or all privileges for a period not exceeding 28 days; and v) the confinement in an isolation unit for a period not exceeding 7 days (Rule 30).

As at the other tribunals, a detainee’s misconduct inside the remand facility or prison is taken into account in sentencing and in decisions on early release and, as a consequence, may influence the duration of a detainee’s confinement. Nevertheless, the SCSL is the only tribunal which allows for the loss of remission. This penalty may, in theory, be imposed for all offences. It follows from the human rights case-law mentioned in this Chapter’s first paragraph that the disciplinary charges laid under such a regime are likely to qualify as ‘criminal charges’ referred to in Article 6 ECHR, which implies that the fair trial rights under that Article are fully applicable to the proceedings.

If the alleged offender is found guilty of more than one charge arising out of the same incident, several penalties may be imposed to run consecutively. However, isolation may not run any longer than seven days, while loss of remission of sentence may not exceed fifty-six days. These limitations only apply to sanctions imposed under charges arising out of one and the same incident. In theory, therefore, loss of remission may exceed fifty-six days where a sanction is imposed for charges arising out of distinct incidents.

Although according to Rule 30, the Medical Officer must examine the detainee and confirm the latter’s fitness to undergo the sanction, either before or within twenty-four hours after the penalty of isolation being imposed, Paragraph 7 of the Regulations requires the Medical Officer to certify the detained person’s fitness before isolation is given effect. In this regard, Detention Operational Order 11:14 provides that the detained person must be medically examined on the day of the hearing, an entry of which must be made on the charge form. Operational Order 12:2 states that the detainee must be examined by the Medical Officer and ‘will be passed
medically fit for confinement to a cell prior to the hearing’ and that ‘[i]solation **will not** take effect until a detainee is passed medically fit by the Doctor’.\footnote{233}{Emphasis in the original.}

Furthermore, the Chief of Detention or his or her Deputy must visit an isolated detainee at least once every day.\footnote{234}{SCSL, Detention Operational Order No. 12:1, issued on 14 October 2004 by Barry Wallace, Chief of Detention. Document on file with the author.} An ‘appropriate officer’ must make such visits at intervals of no more than three hours during the day. In addition, ministers of religion that are contracted by the Court are permitted to pay visits to isolated detainees,\footnote{235}{SCSL, Detention Operational Order No. 12:3, issued on 10 August 2003 by Terry Jackson, Chief of Detention. Document on file with the author.} while legal counsel may visit his or her isolated client in the sight but out of hearing of staff members of the Detention Facility.\footnote{236}{Ibid.}

Finally, isolation does not automatically imply that a person’s right to visits is curtailed. This will only be the case where an explicit direction to this effect is made by the Chief of Detention.\footnote{237}{Ibid.} In this respect, the U.N. Manual on Human Rights Training for Prison Officials states that visiting rights should not be removed for disciplinary reasons, although it recognises that it may at times be necessary to subject such visits to certain conditions.\footnote{238}{Office of the United Nations High Commissioner for Human Rights, *supra*, footnote 94, p. 122. See, in a similar vein, Penal Reform International, *supra*, footnote 3, p. 102, 106.}

Paragraph 8 of the Regulations provides for the imposition of ‘suspended punishment’. The Paragraph’s first Regulation provides that ‘[t]he power to make a disciplinary award (other than a caution) shall include power to direct that the award is not to take effect unless, during the period specified in the direction (not being more than six months from the date of the direction), the detainee commits another disciplinary offence and a direction is given under [the paragraph’s second regulation]’. Regulation 2 provides that, if the person mentioned in Regulation 1 commits a disciplinary offence in the period specified in the suspended sanction, the authorities dealing with the new offence ‘may a. direct that the suspended award shall take effect; or b. reduce the period or amount of the suspended award and direct that it shall take effect as so reduced; or c. vary the original direction by substituting for the period specified therein a period expiring not later than 6 months from the period of variation; or d. give no direction in respect of the suspended award’.

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\footnote{233}{Emphasis in the original.}
\footnote{234}{SCSL, Detention Operational Order No. 12:1, issued on 14 October 2004 by Barry Wallace, Chief of Detention. Document on file with the author.}
\footnote{235}{SCSL, Detention Operational Order No. 12:3, issued on 10 August 2003 by Terry Jackson, Chief of Detention. Document on file with the author.}
\footnote{236}{Ibid.}
\footnote{237}{Ibid.}
Rule 25(B)(iv) vests in the disciplined detainee the right to appeal, but fails to specify the official to whom such appeals must be directed. However, the Regulations provide that appeals against disciplinary punishments imposed by the Chief of Detention or his authorised representative must be made to the Registrar.\footnote{Regulation 9.1.} Regulation 2 of Paragraph 9 of the Regulations limits this right to appeals alleging that ‘a) the facts established did not justify a finding of guilt; b) the Chief of Detention misapplied the rules of detention or failed to follow the principles of natural justice; c) the award was more severe than was merited by the findings; and d) any combination of the above’. The ‘misapplication of the Regulations’ is not listed under (b).

The appeal must be dealt with and a response sent to the appellant ‘as soon as possible’.\footnote{Regulation 9.3.} Paragraph 10 of the Regulations sets out the remedies that may be awarded by the Registrar. He may ‘quash any finding of guilt or remit any award or mitigate it’, or direct the Chief of Detention to remit or mitigate any punishment imposed by another officer of the Detention Facility. As argued before,\footnote{See, supra, Chapter 5.} the tribunals’ Registrars do not qualify as truly independent and impartial adjudicators.

The role awarded to the SCSL Registrar in the disciplinary appeals proceedings is particularly problematic given that, on the basis of the ECtHR’s \textit{Engel} criteria, the SCSL’s disciplinary regime may be considered to fall within the ambit of Article 6 ECHR.

\textbf{STL}

The STL Rules of Detention address disciplining in the section entitled ‘security and good order’. That section first stipulates the principle of ‘least intrusiveness’, stating that discipline and control must be maintained with no more restriction than is necessary for security and good order.\footnote{Rule 32.} Two other principles governing disciplining have been laid down in Rule 40, which provides that disciplinary punishment may only be imposed in accordance with due process and that no one shall be punished twice for the same act.
Rule 33 sets out the conduct constituting a disciplinary offence.\textsuperscript{243} The officer involved in or witness to the conduct which he or she considers to constitute a disciplinary offence must inform the Chief of Detention immediately. If the Chief of Detention decides that a charge will be laid, this must be done within forty-eight hours from the time of discovery of the alleged offence.\textsuperscript{244} The laying of the charge must be recorded in the detainee’s record and be reported immediately to the Registrar. The detained person must be informed of the charge against him, while the Chief of Detention must satisfy himself that the detainee understands the charge.

Depending on the seriousness of the charge and the circumstances of the case, either the Chief of Detention or the Pre-Trial Judge will handle the case. The decision on who will handle the case is made by the Registrar in consultation with the Chief of Detention.\textsuperscript{245} If a case has been qualified as falling under the Chief of Detention’s authority, the detained person concerned has a right to appeal the ‘qualification decision’ to the Pre-Trial Judge, who shall hold a \textit{de novo} hearing ‘as soon as possible’.\textsuperscript{246} If the Registrar refers a case to the Pre-Trial Judge, the latter may refer it back to the Chief of Detention if he does not concur with the Registrar’s qualification. The detained person then retains his or her right to appeal the Chief of Detention’s final decision to the Pre-Trial Judge.\textsuperscript{247} Decisions by the Pre-Trial Judge involving appeals (of the qualification decision) and cases that are handled directly by him may be appealed to the President.\textsuperscript{248} In addition, both in appeals and cases that are handled

\textsuperscript{243} The offences are: ‘(i) Failure to obey an order or instruction given by a member of the staff of the Detention Facility; (ii) Violent behaviour or aggression towards a member of staff of the Detention Facility, another Detainee or any visitor to the Detention Facility; (iii) Possession of any prohibited item or substance, as set out in Rule 11(A); (iv) Repeated misconduct after a warning has been given pursuant to Rule 38(A)(c); (v) Escape or attempted escape from custody; (vi) Verbal abuse directed at a member of staff of the Detention Facility, another Detainee or any visitor to the Detention Facility; (vii) Intentionally hindering a member of staff of the Detention Facility, or any other person at the Detention Facility for the purpose of working there, in the proper execution of his duties or the performance of his work; (viii) Destroying or damaging any part of the Detention Facility or any property thereof, other than his own; (ix) Inciting or attempting to incite another Detainee to commit any of the foregoing; and (x) Any act prejudicial to the health and safety of other Detainees, detention staff or any visitor, or to the good order and discipline of the Detention Facility’.

\textsuperscript{244} Rule 34(B).

\textsuperscript{245} Rule 34(E).

\textsuperscript{246} Rule 34(F) in conjunction with Rule 36(A).

\textsuperscript{247} Rule 34(G).

\textsuperscript{248} Rule 36(B).
directly by the Pre-Trial Judge, the decision of whether or not to grant the detainee legal representation depends on ‘the circumstances and complexity of the case’. 249

In cases that are handled by the Chief of Detention, the detained person must be given the opportunity to present his or her defence. The Rules stipulate that the detainee must be informed of the charge against him and of the evidence supporting the charge at least twenty-four hours before the hearing, in order to enable him to prepare a defence. 250 The detainee must be given the opportunity to explain his or her behaviour, to call and question witnesses and, if necessary, to make use of the services of an interpreter. 251

The Chief of Detention may, if deemed necessary, decide to temporarily segregate the alleged offender. However, he must first consult the Registrar, who must also be notified immediately of any variation or revocation of such a temporary segregation measure pending the completion of the investigation by the Chief of Detention. The Registrar, in turn, must report all cases of temporary segregation, variations thereof or revocation decisions to the President.

According to the Rules, segregation may not be imposed as punishment. 252 Rule 38 sets out the penalties that may be imposed by the Chief of Detention, ‘in any combination as he or she sees fit’. 253 Rule 39(A) sets out the various modes of punishment that may be imposed by the Pre-Trial Judge, in any combination he or she sees fit. 254

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249 Rule 34(G).
250 Rule 35(B).
251 Rule 35(C).
252 Rule 42(D).
253 These are: ‘a) Confiscation of a dangerous item; b) Removal or reduction of privileges or use of personal possessions, such as television, radio or books, and use of shopping facilities for a period not exceeding 14 days; c) Oral or written warning; d) Written notice of suspended punishment to come into effect immediately upon further breach of the Rules within a period of 3 months; e) Loss of earnings, if applicable, for 14 days; f) Confinement to an isolation cell; g) Confinement to the Detainee's own cell for a period not exceeding 7 days. This shall mean that the privilege of evening association with others after 17:00 will be curtailed for the designated period’.
254 These are: ‘a) Confiscation of a dangerous item; b) Removal or reduction of privileges, including visits with family and friends or use of personal possessions, such as television, radio or books and use of shopping facilities for a period not exceeding 28 days; c) Written warning; d) Written notice of suspended punishment to come into effect immediately upon further breach of the Rules within a period of 180 days; e) Loss of earnings, if applicable, for up to 90 days; f) Confinement to an isolation cell; and g) Confinement to the Detainee's own cell for up to 28 days. This shall mean that the privilege of evening association with others after 17:00 will be curtailed for the designated period’.
With respect to sanctions that may be detrimental to a detained person’s health, prior to enforcement thereof, the Medical Officer must examine the person concerned and certify ‘in writing, the physical and mental health of the Detainee to sustain such punishment’. The Medical Officer must visit such persons on a daily basis and advise both the Registrar and the Chief of Detention ‘if [s]he considers the termination or alteration of the punishment necessary for the physical or mental health of the Detainee’. Where a case is handled by the Pre-Trial Judge, such advice must be given to the Pre-Trial Judge.

**ICC**

Regulation 95(1) of the ICC RoC provides that ‘disciplinary and order shall be maintained by the Chief Custody Officer in the interests of safe custody and good administration of the detention centre’. Sub-Regulation 95(2) of the RoC provides that details of the disciplinary procedure for detainees must be laid down in the ICC RoR and that such procedure must include the detained person’s right to be heard on the charge and the right to address the Presidency.

Section four of the RoR sets out in more detail the procedure governing disciplining at the ICC Detention Centre. Regulation 206 stipulates that ‘no disciplinary measures shall be imposed on a detained person without due process in accordance with these Regulations’. It further provides that no one may be punished twice for the same act. Regulation 207 sets out the kinds of conduct constituting a disciplinary offence. The officer witnessing conduct that, according to him or her, constitutes a disciplinary offence must report immediately to the Chief Custody Officer, who will decide

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255 Sub-Rules (B) and (C) of Rules 38 and 39.
256 It mentions: '(a) Failure to obey an order or instruction given by a member of the staff of the detention centre; (b) Violent behaviour or aggression towards a member of staff of the detention centre, another detained person or any visitor to the detention centre; (c) Possession of any prohibited item or substance, as referred to in regulation 166, sub-regulations 2 or 7, or in regulation 167, sub-regulation 2; (d) Repeated misconduct after a warning has been given pursuant to regulation 211, sub-regulation 1 (c); (e) Escape or attempted escape from custody; (f) Verbal abuse directed at a member of staff of the detention centre, another detained person or any visitor to the detention centre; (g) Intentionally obstructing a member of staff in the execution of his or her duty, or any person who is at the detention centre for the purpose of working there, in the performance of his or her work; (h) destroying or damaging any part of the detention centre or any property, other than his or her own; or (i) Inciting or attempting to incite another detained person to commit any of the foregoing offences'.
whether a charge will be laid. The charge must be laid within forty-eight hours of the alleged offence or of the moment of discovery thereof. The Chief Custody Officer must report all cases of misconduct to the Registrar and keep a log thereof. If necessary, the Chief Custody Officer may decide to temporarily segregate the alleged offender from the other detainees.

At least twenty-four hours before the hearing, the alleged offender must be informed of the charge against him and of the evidence on which it is based, in order to enable him to prepare a defence. At the hearing, the Chief Custody Officer must satisfy him- or herself that the alleged offender ‘understands the charge and has had sufficient time to prepare his or her defence or explanation’. The detained person must be given the opportunity to call witnesses, to give an explanation for his behaviour and to question witnesses who testify against him. If necessary, the services of an interpreter must be made available. Written records of the hearing must be kept, containing the charge, verbatim details of the evidence presented, the defence made, the findings and the sanction imposed, including the reasons thereof.

Regulation 211 lists the different modes of punishment that may be imposed. The punishment mentioned under (f), ‘confinement to a cell’, should according to the Regulations not be confused with isolation, which is explicitly excluded. In Katanga & Ngudjolo Chui, the Presidency underlined the Chief Custody Officer’s discretion, both ‘as to whether to commence disciplinary proceedings against a detained person suspected of committing a disciplinary offence’ and to the form of punishment in Regulation 211 to impose.

A copy of the eventual decision must be handed to the detained person in one of the Court’s working languages. If the detained person does not understand the

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257 Regulation 208(1) of the RoR.
258 Regulation 210(3) of the RoR.
259 Regulation 214(1) of the RoR.
260 These are: ‘(a) Confiscation of an offending item; (b) Removal or reduction of privileges or of the use of personal possessions, e.g. television, radio or books, for a period not exceeding one week; (c) Oral or written warning; (d) Written notice of suspended punishment to come into effect immediately upon a further breach of these Regulations within a period of three months of the date of the initial offence; (e) Loss of earnings, if applicable; and (f) Confinement to a cell’.
261 Regulation 212(1) of the RoR.
262 ICC, Decision on the Application of Mr Germain Katanga in respect of the new policy in the detention centre on the registration of telephone contact, Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-RoR221-02/09, Presidency, 17 September 2009, par. 65-69.
Within twenty-four hours of being notified of the imposed punishment, the detained person must inform the Chief Custody Officer of whether he wishes to bring the matter before the Registrar. A detainee has the right to address the Registrar both on the determination of the offence and on the penalty imposed. It is stated that counsel may assist the detainee with such a request. A contrario, it follows that the detainee may not be assisted by counsel before the Chief Custody Officer. Duty counsel may provide assistance to a detainee who does not have appointed counsel. The Chief Custody Officer must record the detained person’s request and inform the Registrar immediately thereof. The Registrar must render a decision within three days of receiving the request. That decision must be notified to the detainee concerned in a language he fully understands.

The Registrar may ‘order the restoration of confiscated items or privileges, repayment of any fine imposed, cancellation of any warning or suspended disciplinary measures or end of confinement to the cell’, or ‘take any other action he or she sees fit in the circumstances’. Disciplinary penalties imposed by the Chief Custody Officer remain in place pending the Registrar’s decision. It is not possible for a detained person to procure the suspension of the enforcement of a disciplinary penalty pending appeal.

The detained person also has the right to address the Presidency on the Registrar’s decision. Upon the Presidency’s request, the Registrar must make available the record of his investigations. The Presidency must make a decision within three days of receipt of the detainee’s request.

263 Regulation 214(2) of the RoR.
264 Regulation 215(1) of the RoR.
265 Regulation 215(5) of the RoR.
266 Regulation 215(3) of the RoR.
267 Regulation 215(8) of the RoR.
268 Regulation 216 of the RoR.
6.3.2 Evaluation

Review by an external adjudicator

In Ezeh and Connors, the United Kingdom argued it to be ‘anomalous that the guarantees of Article 6 should apply because a State had introduced into its law a more transparent and legally certain system for the benefit of prisoners but which provided for the grant of awards of additional days’ detention, whereas such guarantees would not be applicable to a less transparent system involving the grant and loss of discretionary periods of remission’. Such less transparent systems can be found at some of the tribunals, where the (mis)conduct of inmates is taken into account in sentencing decisions, in decisions on early release and in designating States for the enforcement of sentences. Hence, their behaviour has an impact on the total duration of their confinement. In Ezeh and Connors, the ECtHR did not rule on the applicability of the Engel criteria to such regimes. However, whether or not the Engel criteria are applicable, the very fact that the outcome of disciplinary proceedings may affect the duration of one’s confinement calls for fair procedures, which include a right to review by an independent and impartial adjudicator. If the penalty imposed may be argued to infringe upon one’s fundamental rights, such a right to review is also called for in light of the right to an effective remedy.

In the institutional setting of a prison, it may be difficult to find prison personnel that are capable of acting as independent and impartial adjudicators in disciplinary proceedings. Complainants should, therefore, be granted the right to appeal to an agency outside the penitentiary institution. It should be noted, in this regard, that

\[\text{Source: ECHR, Ezeh and Connors v. the United Kingdom, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 89.}\]


\[\text{See, e.g., ICTY, Order of the President on the Application for the Early Release of Milan Simić, Case No. IT-95/2, President, 27 October 2003; Denis Abels, Commentary, in: André Klip and Göran Sluiter (eds.), Annotated Leading Cases of International Criminal Tribunals, Volume 15, Intersentia, Antwerp 2008, p. 796-800, at 798.}\]

\[\text{ICTR, interviews conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008.}\]
prison governors conducting disciplinary hearings have close relationships with the officers bringing the charges. 273 This is particularly so at the tribunals, in view of the close proximity between first-line detention administrators and the tribunals’ Registrars on the one hand, and Registrars and Presidency/Presidents on the other. 274 Also problematic is the Registrars’ and Presidents'/Presidency’s multitasking in the field of detention management. 275 These officials fulfill important functions in monitoring detention conditions, adopting and drafting prison legislation, handling detainees’ complaints, deciding on the inspectorate’s recommendations and in deciding on disciplinary appeals.

Admittedly, in many domestic systems, prison administrators carry out adjudicating tasks. In support of such arrangements, Robertson argues that outsiders (courts) would lack the necessary expertise to deal with prison discipline and that outside (judicial) intervention would undermine the prison management’s authority. 276 In domestic practice, however, the first of these arguments has been tackled by introducing forms of review that reflect the administrators’ know-how and discretionary powers. 277 It should be noted in this regard that external adjudicators may always request expert advice on specific issues. With respect to second argument, it has been argued that “[a]lthough such outsiders may initially be viewed as a threat to the administrative staff of the correctional institution, their continued presence, in helping to secure the integrity of the disciplinary process, might eventually lend authority and greater respect for correctional personnel.” 278 Authority is, of course, not an end in itself, but merely a managerial quality which serves order, safety, security and a humane prison regime. As argued above, 279 the right to appeal to an impartial adjudicator assists in ‘monitoring the internal operations of the prison’ 280 and therefore contributes to an

273 Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 6, p. 397.
274 See, supra, Chapter 5.
275 See, in a similar vein, Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 6, p. 380.
277 Harvard Center for Criminal Justice (Edward J. Dauber, William Falik, James Vorenberg, Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 201.
278 Id., at 222.
279 See, supra, Chapter 5.
280 Harvard Center for Criminal Justice (Edward J. Dauber, William Falik, James Vorenberg, Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 222.
effective prison management. Furthermore, it follows from studies carried out in the
domestic context that disciplinary appeals hardly encroach upon either the
administrators’ discretionary powers or on prison-security.281

In addition, the phenomena of ‘institutional knowledge’ and ‘institutional bias’ call
for the right of inmates to appeal disciplinary decisions to an external adjudicator. The
tribunals’ Commanding Officers or Chief Custody Officers, and the Registrars and
Presidents/Presidency) ‘will have some knowledge of the incident or the accused’,
which may lead to ‘judgments based on the accused’s character, “attitude” and
previous rule violations attributed to him or her. Knowledge of this sort undermines
impartiality’.282 ‘Institutional knowledge’, a phenomenon which is common to closed
institutions,283 is very likely to be encountered in small-scale institutions.284 If
disciplinary decisions are made or reviewed by outsiders, this phenomenon is less
likely to play a significant role.285 Due to ‘institutional bias’, the inmate is often not
taken on his word when giving his account of the incident leading to the disciplinary
charge, particularly when his version of what happened conflicts with that of the
officer reporting the incident.286 Furthermore, an insider adjudicator may try to
prevent ‘disrupting staff morale’ and, for that reason, choose sides with the reporting
officer.287 Besides, irrespective of whether the inmate actually has reason to suspect
the insider adjudicator’s impartiality, it is only natural for a confined person to
perceive an outsider as less biased and, as a consequence, the outcome of proceedings
conducted before such an outsider as less unfair.288 An external adjudicator may also

281 See, e.g., N.E. Schafer, Discretion, Due Process, and the Prison Disciplinary Committee,
Criminal Justice Review 11, 1986, p. 37-46, at 43-44. See, also, Charles H. Jones, Jr. and
Edward Rhine, supra, footnote 22, at 101, where they argue that ‘experience has shown that
providing inmates with [the due process guarantee to confront and cross-examine witnesses]
has not undermined prison security’.

282 James E. Robertson, supra, footnote 276, at 324. See, also, Harvard Center for Criminal
Justice (Edward J. Dauber, William Falik, James Vorenberg, Lloyd E. Ohlin and Elinor
Halprin), supra, footnote 3, at 225.

283 Ibid.

284 James E. Robertson, supra, footnote 276, at 327.

285 See, in a similar vein, Harvard Center for Criminal Justice (Edward J. Dauber, William
Falik, James Vorenberg, Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 221.

286 See, e.g., James E. Robertson, supra, footnote 276, at 320-321.

287 Harvard Center for Criminal Justice (Edward J. Dauber, William Falik, James Vorenberg,
Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 221-222; Charles H. Jones, Jr. and
Edward Rhine, supra, footnote 22, at 98.

288 Harvard Center for Criminal Justice (Edward J. Dauber, William Falik, James Vorenberg,
Lloyd E. Ohlin and Elinor Halprin), supra, footnote 3, at 222.
be expected to be more successful in fact-finding, because ‘inmates with relevant information may be less fearful of retaliatory action than they would be when revealing possibly self-incriminatory evidence to administrative staff’. Finally, as argued above, the particularities of international detention call for external adjudicators. Such particularities include the lack of ministerial accountability, the democratic deficit, the lack of an effective inspectorate, and the circumstance that the tribunals are not parties to international or regional human rights conventions, as a result of which complaints of inmates directed against the tribunals will be held inadmissible by the adjudicating bodies established under those conventions.

The arrangements at the SCSL, where disciplinary appeals must be lodged with the Registrar as the final arbiter, are particularly problematic. The Registrar is also the administrative official directly in charge of and responsible for detention management. Hence, such appeals ‘remain within the detention administration’, which seriously undermines the proceedings’ perceived fairness. This is exacerbated by the fact that the Registrar’s disciplinary decisions are not made public and that, over the years, no appellant ever appears to have been proven right. Only at the SCSL is loss of remission listed among the possible modes of punishment (and applicable to all types of misconduct). As argued above, this circumstance provides a strong indication that disciplinary charges must be viewed as ‘criminal charges’ as referred to in Article 6 ECHR. As a consequence, fair trial rights including the right to be heard by an impartial and independent tribunal should be deemed applicable to the SCSL’s disciplinary proceedings.

With respect to the other tribunals, it may be argued that making the Presidents/Presidency the final arbiter in disciplinary proceedings is not an ‘efficient or even practicable expenditure of judicial resources’ given the ‘limitations on judicial time’. Moreover, as a result of these officials’ close proximity to the other detention authorities, as well as their tasks in dealing with the inspectorate’s recommendations, the inmates may perceive them to be institutionally biased.

289 Ibid.
290 See, supra, Chapter 5.
291 Ibid.
In Chapter 5, it was argued that the particularities of international detention, together with the rationales underlying and the legal framework governing grievance mechanisms, call for the establishment of a truly independent, external complaints adjudicator. This also goes for the tribunals’ disciplinary proceedings. Again, it would be advisable 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 fulfill such a role.

Robertson warns, however, that attracting an adjudicator from the outside - albeit a necessary first step - does not automatically guarantee impartiality. He mentions a number of conditions that must be fulfilled before impartiality may be guaranteed.\footnote{James E. Robertson, supra, footnote 276, at 333.} Firstly, in order to prevent ‘command influence in fact or appearance’, the external adjudicator’s ‘nomination, selection and evaluation should be removed from the normal chain of command’.\footnote{Ibid.} Secondly, the external adjudicator must be knowledgeable about the ‘distinctive social arrangements’ of prison life and communities. If not, he will ‘become dependent upon prison staff to interpret and evaluate conflicts between inmates and staff and thereby act[s] in accord with the latter’s biases’.\footnote{Ibid.} Thirdly, the external adjudicator must have knowledge of and be experienced in applying due process safeguards and be ‘committed to impartiality’.\footnote{Ibid.} Fourthly, the external adjudicator must not be given any other tasks within the institution than hearing and deciding upon disciplinary charges (and inmates’ complaints). Robertson warns in this respect that ‘non-adjudicative tasks assigned to outsiders can impart the very institutional bias and institutional knowledge that is so damaging to impartiality’.\footnote{Ibid.} Fifthly, he argues that it is preferable to assign the external adjudicator to a ‘central, state-wide disciplinary panel, rather than a particular prison, to ensure their independence from prison authorities and to enhance the appearance of impartiality’.\footnote{Id., at 334.} In this regard, it is recommended that all international criminal tribunals employ the same outside agency to decide on disciplinary appeals and inmates’ complaints.
Finally, it should be recalled here that the tribunals’ and their officials’ immunities make it unlikely that breaches of international detainees’ rights will ever be remedied by domestic courts. This makes it necessary to introduce the awarding of damages in disciplinary (appeals) proceedings.

Legal assistance

As noted by Livingstone, Owen and MacDonald, the presence of lawyers at disciplinary hearings not only benefits persons who are not used to arguing before an adjudicator, but also brings ‘a genuinely external element into the closed world of prison discipline and put[s] [the adjudicator] on notice that the quality of [his or her] adjudications [is] under scrutiny’.299 These scholars note that the presence of lawyers may change ‘the character of disciplinary proceedings’, since adjudicators are ‘likely to listen to their arguments with greater respect’.300 These arguments must be viewed against the background of the inequality that is inherent to power relations between staff and prisoner.301 Regarding more serious cases of misconduct, Jones and Rhine argue that some form of legal representation is needed ‘due to the increasing complexity of the procedural rules governing such proceedings, the severity of the sanctions that may result, and the marked inability of many inmates to adequately articulate and present their defense’.302 It is therefore worrying that, at some of the tribunals, it is difficult or even impossible for inmates, especially convicted persons, to receive legal assistance in disciplinary proceedings.

Legal representation or assistance may not be necessary in all disciplinary cases irrespective of the nature of the charge,303 as this may render prison administration unworkable. The U.N. Manual on Human Rights Training for Prison Officials and the official Commentary to the EPR state, in conformity with the human rights case-law discussed in this Chapter’s first paragraph, that legal representation must be made

299 Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 6, p. 400.
300 Ibid.
301 C. Kelk, supra, footnote 34, p. 194.
302 Charles H. Jones, Jr. and Edward Rhine, supra, footnote 22, at 99.
303 Penal Reform International, supra, footnote 3, p. 41, par. 45.
available in ‘more complex cases’.\textsuperscript{304} According to Penal Reform International, to ‘avoid arbitrariness in the exercise of this discretion, the conditions under which legal representation may be granted in disciplinary hearings should be clearly defined in the prison regulations or manual’.\textsuperscript{305} In respect of disciplinary appeals proceedings,\textsuperscript{306} however, it states that ‘[d]espite the difficulties and constraints that may exist, governments have a duty to establish facilities through which prisoners may receive legal assistance in pursuing judicial oversight over the conduct of prison administrations’, concluding that ‘[l]egal aid should be available to prisoners for this purpose’.\textsuperscript{307}

**Emergency proceedings**

Since cases of wrongful punishment (e.g. isolation) cannot be repaired after their (partial) execution, the need for emergency proceedings is particularly pressing in the context of prison disciplining. In Chapter 5, Ploeg and Nieboer were quoted as saying that ‘an effective mechanism to deal with emergency problems can help prevent issues of compensation from arising; the awarding of damages renders the need for a mechanism that deals with emergency problems less urgent’.\textsuperscript{308} It was noted above that damages have never been and are likely never to be awarded by the tribunals for breaches of detainees’ intramural rights.\textsuperscript{309} The tribunals also fail to provide for the suspension of the execution of an imposed disciplinary sanction pending appeal.\textsuperscript{310}

\begin{itemize}
\item \textsuperscript{305} Penal Reform International, \textit{supra}, footnote 3, p. 41, par. 47.
\item \textsuperscript{306} In the Netherlands, for example, detained persons have the right to legal assistance before both the complaints committee (first instance) and the appeals committee. It follows from Articles 65(1) and 69(3) of the Dutch Penitentiary Principles Act that an appellant has the right to legal assistance by a legal adviser or any other ‘person of trust’ [\textit{vertrouwenspersoon}] who has received permission thereto by the complaints committee (first instance) or the appeals committee. The ‘person of trust’ may, for instance, be a prison minister or another inmate.
\item \textsuperscript{307} Penal Reform International, \textit{supra}, footnote 3.
\item \textsuperscript{308} Gerhard Ploeg and Jan Nijboer, \textit{Klagers achter slot en grendel [Complainants behind bars]}, Kriminologisch Instituut Groningen, 1983, p. 184.
\item \textsuperscript{309} See, \textit{supra}, Chapter 5.
\item \textsuperscript{310} See, in respect of the Polish legal system, Barbara Stando-Kawecka, \textit{Poland}, in: Dirk van Zyl Smit and Frieder Dünkel (eds.), \textit{Imprisonment Today and Tomorrow}. International
In Chapter 5, it was seen that, in the Netherlands, pending the decision on a complaint submitted to the Complaints Commission, an inmate may address the President of the Appeals Commission to request the partial or total suspension of the administrative decision complained about. Suspension may further be requested, either by the prison governor or the inmate, of the decision of the Complaints Commission pending appeal. Such emergency proceedings may also be resorted to by an inmate seeking the suspension of the execution of a disciplinary penalty.

Similar arrangements are conceivable in the international context. The external appeals adjudicator whose establishment was suggested earlier on in this research may then make ‘a temporary assessment as to whether the decision is in breach of a legal provision or is of such unreasonableness or unfairness that an urgent interest for suspension can be argued to exist’.

Solitary confinement and reduction of diet

Solitary confinement is employed as disciplinary punishment at some of the tribunals. In the domestic context, however, it has been recognised as a ‘controversial mode of punishment’, one that should only be used ‘infrequently and exceptionally’. It has been argued that solitary confinement may lead to ‘serious psychological deterioration’ and ‘creates anger, hostility, aggression, and finally serious mental illness’. Penal Reform International’s handbook ‘Making standards work’ stresses

311 See, supra, Chapter 5.
312 See, supra, Chapter 5, p. 360, footnote 47, and the case-law cited there.
313 Penal Reform International, supra, footnote 3, p. 47, par. 66. See, also, Dirk van Zyl Smit and Sonja Snacken, supra, footnote 6, p. 304; Stephen Livingstone, Tim Owen QC and Alison MacDonald, supra, footnote 6, p. 411; William Bennett Turner, supra, footnote 4, at 493-495.
that ‘[e]fforts addressed to the abolition of solitary confinement as a punishment or to
the restriction of its use should be undertaken and encouraged’. 316

The international criminal tribunals, as human rights role models, should apply this
mode of punishment only exceptionally, if at all. If they do employ it, they should do
so with the highest caution. It is therefore surprising that the SCSL Rules of Detention
provide for the prolonging of isolation ad infinitum, merely on the basis of necessity.
Such provision is not in accordance with contemporary penal standards and should be
altered.

Equally worrisome is the listing of ‘reduction of diet’ as a mode of punishment in the
ICTR Document on Disciplinary Measures. This form of punishment has been
recognised by the Council of Europe to constitute inhuman treatment. 317

Final observations

A further cause for concern is the impact that the inmates’ behaviour inside the
detention facilities may have on the total duration and modalities of their confinement.
As a consequence, inmates may choose not to appeal an administrator’s disciplinary
decision, due to the possible detrimental consequences of lodging such appeals.

A final point of critique concerns the circumstance that the tribunals tend not
to publish disciplinary decisions. This might easily be done without compromising the
privacy of the individuals concerned. Disclosure would provide other detainees with a
better understanding of their legal position, would be an important incentive for
detention administrators to abide by the rules, and would be beneficial to the
development of (international) detention and prison law.

316 Penal Reform International, supra, footnote 3, p. 47, par. 66. The handbook (in par. 73)
prescribes medical officers not to assist the prison administration in certifying a detainee’s
fitness to sustain any punishment, since this would entail a violation of medical ethics.
317 CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to
member states on the European Prison Rules, sub Rule 60.
6.4 Conclusion

This Chapter examined the tribunals’ disciplinary proceedings. It started from the premise that, although the tribunals' detention rules echo international penal standards, those standards do not address the specific situation of internationally detained individuals, whilst the particularities of international detention may warrant an approach different to that in the domestic context. Against the background of such particularities, the tribunals’ disciplinary systems were evaluated on the basis of the rationales underlying disciplinary proceedings in prisons and of human rights law and penal standards. The Chapter’s third paragraph contains some criticisms and a number of recommendations.

A final comment must be made. Strengthening the legal position of inmates in disciplinary proceedings is likely to benefit the effectiveness of the proceedings. Nevertheless, it is important to remain mindful of the specific context in which disciplinary proceedings operate. The effectiveness of disciplinary proceedings depends to a large extent on prison staff. If staff members are opposed to the disciplinary system, this may lead to ‘superficial compliance (…) while the status quo in a prison is still generally maintained’.318 It will be practically impossible for such a system to function in a fair and efficient manner. Further, where the prison administrators themselves conduct the disciplinary hearings, such hearings risk being one-sided: the inmate’s account of the incident is often not believed; the adjudicator is faced with the need to preserve staff morale; and the standard of proof is less demanding than the standard employed in criminal proceedings, i.e. ‘beyond reasonable doubt’.319 Notwithstanding the introduction of additional procedural safeguards, then, conviction rates in disciplinary proceedings in prisons are likely to remain high and acquittals rare.