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

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Citation for published version (APA):
Chapter 7 The designation of States for the enforcement of sentences

7.1 Introduction

‘In a typical prison the prisoners would be in a remand centre and then they would be brought to the prison; so you wouldn’t have dealt with the prisoners when they were still detainees. So our international supervisors, when the prisoners were detainees, had to be very supportive and say ‘there is hope’, ‘we believe in you, ‘do your best’. But once they’re sentenced and convicted then you’d still have to give them hope, but also tell them ‘now it’s a different stage of the process’.1

The international criminal tribunals do not have their own prisons. Their detention facilities were not established to enforce sentences.2 In this respect, the tribunals are dependent on the co-operation of States3 and have established specific procedures for designating States of enforcement. Taking a closer look at these procedures is justified first of all in light of the recognition underlying this research’s working hypothesis that some of the particularities of international detention entail difficulties that cannot be addressed by merely seeking conformity with international penal standards, since these are based on domestic penal law and practice. In this respect, it must have been a challenge for the solo-operating and small-scale tribunals to develop systems for the allocation of sentenced persons. The result may be an uncertain or fluctuating supply of prison cells, which in turn would influence the content and fairness of the designation procedures and affect the degree to which the inmates have a say in these

1 SCSL, interview conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.
procedures. Furthermore, the observations made in earlier Chapters regarding the (perceived) lack of independence and impartiality of the tribunals’ Presidents’/Presidency’s in exercising their administrative tasks, the democratic deficit, the immunities of the tribunals and their officials, the absence of ministerial accountability, the blending of judicial, legislative and administrative functions and the lack of an effective inspectorate are equally pertinent to designation procedures, which are carried out by the same officials. It should further be noted that the enforcement of sentences constitutes the backbone of any criminal justice system and may affect its legitimacy. As noted by Kress and Sluiter, ‘[a]s a corollary of the fundamental importance of enforcement within the international criminal system, the nature of the enforcement regime and its application in practice must form part of a complete judgement about the legitimacy of this system’. It may therefore be argued that a criminal justice system should retain ultimate control over enforcement matters. Accordingly, this Chapter will examine how the tribunals have dealt with the aforementioned difficulties and challenges (if they do indeed exist) and whether the tribunals have adequately addressed the potentially detrimental consequences of such difficulties and challenges for the inmates’ legal position. Before doing so, however, this Chapter will first focus on some of the more general issues surrounding the enforcement of sentences in the international context. These issues constitute the background against which the designation procedures examined in the Chapter’s second paragraph are to be viewed. The evaluation in this Chapter’s third paragraph is meant to discuss some of the more important findings in the preceding paragraphs in more depth.

The designation of States of enforcement does not concern the legal position of detainees, but rather that of prisoners. Since this research is concerned with the legal position of persons detained under the jurisdiction of the international criminal tribunals, it is appropriate to discuss the rights of such persons during the designation process.

6 See, in a similar vein, David Tolbert, *supra*, footnote 3, at 659.
Certain aspects of such persons’ post-transfer situation of confinement will also be looked at, but only insofar as those aspects play a role (or ought to play a role) in the designation procedures. In this regard, it should be recalled that the situation of imprisonment in the States of enforcement, including the supervision exercised by the tribunals, is beyond the scope of this study. The same applies to such issues as early release, pardon and commutation of sentence, as well as those relating to the post-release stage.

Due to the lack of case-law and of a detailed set of regulations on the matter, the STL designation procedure will not be discussed separately. It will only be mentioned insofar the STL’s legal framework differs from that of the other tribunals.
7.2 The designation of States for the enforcement of sentences

7.2.1 International penal standards

International penal standards, which were developed with the domestic prison context in mind, address certain aspects of the allocation of prisoners. First of all, pursuant to Rules 8(b) and 85(1) of the SMR and Principle 8 of the U.N. Body of Principles, (untried) detainees must be separated from (convicted) prisoners.\(^7\) In addition, Principle 20 of the U.N. Body of Principles provides that, ‘[i]f a detained person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence’.\(^8\) In this respect, Rule 17(1) of the EPR stipulates that ‘[p]risoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation’. Other standards that may be relevant are those aimed at the abolition of solitary confinement, maintaining and improving relations between a prisoner and his or her family,\(^9\) those that underline the need to respect the religious and cultural precepts of the group to which the prisoner belongs,\(^10\) and those that call for making facilities available for prisoners’ rehabilitation.\(^11\) Furthermore, Rule 45 of the SMR instructs the competent authorities to expose convicted persons to public view as little as possible during their transfer, to adopt proper safeguards to ‘protect them from insult, curiosity and publicity in any form’. The same provision prohibits the transportation of persons ‘in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship’.\(^12\)

In the report on its visit to Honduras, the SPT held that States must ‘ensure that all persons deprived of their liberty have the right to receive visits, to correspond with their family and friends, and to maintain contact with the outside world. Any measure that discourages visits that prisoners are entitled to should be avoided. [States parties]

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\(^7\) See, also, Rule 18(8)(a) of the EPR.
\(^9\) See, e.g., Rule 79 of the SMR and Rule 24 of the EPR.
\(^10\) See, e.g., Principle 3 of the U.N. Basic Principles and Rule 6(2) of the SMR.
\(^11\) See, e.g., Principle 8 of the U.N. Basic Principles, Rule 6 of the EPR and Rules 61, 66(1), 67(b) and 80 of the SMR.
\(^12\) See, also, Rule 32 of the EPR.
should examine the individual case of each prisoner and whenever possible arrange for transfer to a prison near the place where their family lives’.\textsuperscript{13}

The ECtHR and EComHR have held that ‘the Convention does not grant prisoners the right to choose the place of detention and that the separation and distance from [the prisoner’s] family are inevitable consequences of his detention’.\textsuperscript{14} The Court and Commission have nevertheless warned that ‘[t]he detention of a person at a distance from his family which renders any visit very difficult, if not impossible, may in exceptional circumstances constitute an interference with his family life, the possibility for members of the family to visit a prisoner being an essential factor for the maintenance of family life’.\textsuperscript{15} Moreover, paragraphs 2 and 3 of Rule 17 of the EPR provide (respectively) that ‘[a]llocation shall also take into account the requirements of continuing criminal investigations, safety and security and the need to provide appropriate regimes for all prisoners’ and that ‘[a]s far as possible, prisoners shall be consulted about their initial allocation and any subsequent transfer from one prison to another’. Finally, Rule 38 calls for special arrangements to be made to meet the needs of ‘prisoners who belong to ethnic or linguistic minorities’.

The CPT has also addressed the issue of allocating prisoners, holding, \textit{inter alia}, that ‘[h]umanitarian considerations, not to mention the objective of social rehabilitation, are arguments for offenders serving their sentences in the country or region with which they have family and social links’.\textsuperscript{16}

Finally, the European Commissioner for Human Rights has held in relation to the situation of ICC convicts that ‘[t]he rehabilitation of convicted persons should be the objective of prison policy. An effective rehabilitation policy must include efforts to preserve ties and contacts with the outside world whenever someone is imprisoned,

\textsuperscript{13} 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. 248. Footnote omitted.


\textsuperscript{16} 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, Strasbourg 19 July 1993, par. 177.
and especially family ties. It is important that every means should be employed to ensure that people deprived of their liberty do not feel completely cut off from their family and friends (unless the interests of the investigation so require). Thus preference must be given to the serving of sentences at establishments offering the most facilities for attaining this target, and in this context, proximity to detainees’ families and places of origin can and must be a factor to be taken into account by the responsible authorities’. 17

7.2.2 General observations

ICTY, ICTR, SCSL and STL

According to the Statutes of the ICTY, ICTR, SCSL and STL, States must indicate to the Security Council their willingness to accept convicted persons. 18 Bilateral enforcement agreements are then negotiated by the Registrars of the tribunals with such States. 19 Through the tribunals, the United Nations has concluded bilateral agreements for the enforcement of sentences with most of the States that have declared such willingness. 20 On the basis of such agreements, States have been designated as the State enforcing an individual convicted person’s sentence. 21

18 Article 27 of the ICTY Statute; Article 26 of the ICTR Statute; Article 29(1) of the STL Statute. Reflecting the hybrid or mixed nature of the SCSL, Article 22 of the Court’s Statute and Rule 103(A) of its RPE express a preference for enforcement of the Court’s sentences in Sierra Leone. If, however, ‘circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons’. The statutory provision further holds that the Court may ‘conclude similar agreements for the enforcement of sentences with other States’.
20 The ICTY has concluded enforcement agreements with Mali, Benin, Swaziland, France, Italy, Rwanda and Sweden. Senegal has indicated that, in principle, it is willing to accept ICTR prisoners, although no enforcement agreement has yet been concluded with this State; Hirondelle News Agency, News Report of 15 September 2003 ‘ICTR/Senegal – Senegal Accepts in Principle to Enforce Sentences’. The ICTY has concluded enforcement agreements with Albania, Poland, Slovakia, Estonia, Portugal, Ukraine, Belgium, the United Kingdom, Denmark, Spain, France, Sweden, Austria, Norway, Finland and Italy. It has further entered into ad hoc enforcement agreements with Germany, on the basis of which Germany accepted the convicts Tadić, Galić and Kunarac. The Governments of Croatia, Bosnia and
The enforcement agreements are based on Model Agreements drafted by the tribunals, which serve as a starting point during negotiations with States. The agreement concluded with one particular State does ‘not apply automatically but on a case-by-case basis, following consultations between the Parties concerning a specific convicted person’.23

The tribunals’ Statutes provide that ‘imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal’.24 The ad hoc tribunals’ RPE further provide that the enforcement of sentences is supervised by the tribunal or a body designated by it.25

Herzegovina, Pakistan and Iran have also indicated their willingness to accept ICTY prisoners, but no enforcement agreements have been concluded with these States. One may only speculate about the reasons thereof. Interestingly, Safferling states that ‘[f]or the same reasons why the home of the criminal cannot be the place of imprisonment, one has to avoid host states that have any particular links with the fatherland of the convicted. This is also true for regions and states that entertain any particular enmity. This need not necessarily be a belligerent ally of the enemy during the former conflict. It suffices if there are religious, ethnic, or cultural (embracing both historical and political) grounds for animosity. Take a simple example: if a Serb war criminal has been convicted of war crimes and crimes against humanity, maybe even genocide, especially because of his torturing, raping and murdering Muslims in a detention camp, how welcome will such an inmate be in a Pakistani prison? Far from being a shining sign of reconciliation, this would endanger the life of the prisoner dramatically to such an extent that would constitute a violation of Art. 6 ICCPR’; Christoph J.M. Safferling, Towards an International Criminal Procedure, Oxford University Press, 2001, p. 352-353.

The SCSL’s enforcement agreements were concluded directly by the Special Court, which raises the question of what will be the status of these agreements after the Court will be dissolved.

21 The ICTR has sent one prisoner (Ruggiu) to Italy; the other convicted persons were sent to Mali and Benin. The ICTY has sent convicts to Norway, Sweden, Finland, Estonia, Denmark, the United Kingdom, Germany, Belgium, France, Austria, Italy and Spain. The Preamble to the Agreement between the Government of Norway and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia underlines Norway’s willingness to accept only a limited number of convicted persons. At the time of writing, though, Norway is one of the States that have received the largest number of convicts.


24 See Article 27 of the ICTY Statute, Article 26 of the ICTR Statute, Article 22(2) of the SCSL Statute and Article 29(2) of the STL Statute.

25 See Rules 104 of the ICTY and ICTR RPE and Rule 175 of the STL Statute. See, also, ICTY, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), (S/25704), par. 121.
In *Erdemović*, the Trial Chamber explained that this system of enforcement is governed by the principle of primacy. This principle, which governs the issue of concurrent jurisdiction, is embedded in the Statutes of the ICTY and the ICTR. Article 9(2) of the ICTY Statute states that ‘[t]he International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal’. Article 8(2) of the SCSL Statute echoes Article 9(2) ICTY Statute, except that the Court’s primacy is limited to the national courts of Sierra Leone.

According to the Trial Chamber in *Erdemović*, it follows from the principle of primacy that States who enforce the tribunal’s sentences, do so on behalf of the tribunal and on the basis of international criminal law instead of domestic law. It follows that States may not ‘alter the nature of the penalty so as to affect its truly international character’. This ‘international character’ consists of two elements, both of which have implications for the supervision of sentences by the tribunal. These are ‘respect for the duration of the penalty and respect for international rules governing the conditions of imprisonment’. Regarding the former, the Trial Chamber emphasised that ‘no measure which a State might take could have the effect of terminating a penalty or subverting it by reducing its length’. As a consequence, although according to Article 28 of the ICTY Statute the law of the designated State governs the eligibility of a convicted person for pardon or commutation of sentence, it is the tribunal’s President who decides on these matters ‘on the basis of the interests of justice and the general principles of law’.

As to the conditions of imprisonment, the Trial Chamber considered that ‘the penalty imposed as well as the enforcement of such penalty must always conform to the

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28 The text is practically identical to that of Article 8(2) of the ICTR Statute.
32 *Ibid.*, par. 73.
minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons, which have *inter alia* been enshrined in article 10 of the International Covenant on Civil and Political Rights, article 5, paragraph 2 of the American Convention on Human Rights and, as regards penalties more specifically, article 5 of the Universal Declaration of Human Rights and article 3 of the European Convention on Human Rights’. It also referred to the SMR, the U.N. Basic Principles, the U.N. Body of Principles, the EPR and the ICTY Rules of Detention, and stressed that the ‘significance of these principles resides in the fact that a person who has been convicted of a criminal act is not automatically stripped of all his rights’. It subsequently held that penalties imposed by the tribunal may not be aggravated by the conditions of their enforcement.

In the tribunal’s subsequent practice, however, the Trial Chamber’s view has been nuanced. According to the tribunal’s Registry, the enforcement regime represents a balance between the principle of primacy and the need of enforcing States to conform to domestic legislation. Such recognition of States’ interests illustrates the difficulties that the tribunals face in contracting States to enforce their sentences. As a consequence, domestic authorities have been left a ‘certain degree of flexibility in enforcing the sentences of the Tribunal, subject to the supervision of the Tribunal’. Nonetheless, it is clear from the enforcement agreements that primacy governs both the duration of the sentence and the supervision of the conditions of imprisonment. Under no circumstances may States alter the duration of the sentence.

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33 *Id.*, par. 74. Footnotes omitted.
The enforcing State must notify the tribunal when, according to domestic law, the prisoner is eligible for early release, pardon or commutation of sentence, placement in a half-open or an open prison\(^{39}\) or for working activities outside the prison.\(^{40}\) If the tribunal’s President considers any of these measures to be inappropriate and the State concerned is not willing or able to continue to enforce the sentence under the same conditions,\(^{41}\) the enforcement agreements provide for the termination of the enforcement of the sentence in the State concerned and for the prisoner’s transfer back to the tribunal.\(^{42}\) Primacy is also apparent from the fact that the tribunals may at any time choose to end the enforcement of a particular sentence, in which case the prisoner will be transferred either to another designated State or back to the tribunal.\(^{43}\)

Some enforcement agreements contain a ‘national standard’, providing that the conditions of imprisonment of persons convicted by the tribunal shall be equivalent to those applicable to national prisoners.\(^{44}\) Furthermore, the enforcement agreement

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\(^{39}\) See Article 3(7) of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia.

\(^{40}\) See, e.g., Article 3(3) of the Agreement between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia.

\(^{41}\) In some agreements - e.g. in Articles 3 and 8 of the ICTY’s enforcement agreements with Ukraine, Austria and Finland - it is provided that it is the tribunal’s President who determines whether early release is appropriate if the prisoner becomes eligible for early release under domestic law. If the President deems early release inappropriate, the national authorities must act accordingly.

\(^{42}\) See, e.g., Article 3(4) of the Agreement between the United Nations and the French Republic on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia; and Article 8 of the Agreement between the Special Court for Sierra Leone and the Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone.

\(^{43}\) See, e.g., Article 9 of the Agreement between the United Nations and the Italian Republic on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda; and Article 9(2) of the Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone.

\(^{44}\) See, e.g., Article 3(8) of the Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia.
between the ICTY and Portugal states that the country will only enforce a sentence where its duration does not exceed the highest maximum sentence at the time for any crime under Portuguese law.\textsuperscript{45}

With respect to the conditions of imprisonment, almost all of the agreements declare international penal standards to be applicable.\textsuperscript{46} Additionally, most of the agreements’ Preambles refer to the SMR, the U.N. Body of Principles and the U.N. Basic Principles.\textsuperscript{47} The enforcement agreement between the ICTR and Rwanda even stipulates that ICTR prisoners may not be accommodated in any other prison than the one identified and agreed upon by the parties.\textsuperscript{48}

As an additional guarantee for the application of international penal standards,\textsuperscript{49} the enforcement agreements provide for inspection visits to the prisons in the States of enforcement. The inspectorate reports its findings to both the State of enforcement and the tribunal. It has been agreed upon by the contracting States that such organisations or bodies as the ICRC,\textsuperscript{50} the CPT,\textsuperscript{51} a judge or other official of the


\textsuperscript{46} See, \textit{e.g.}, Article 3(3) of the Accord entre le Gouvernement de la Republique Francaise et l’Organisation des Nations Unies concernant l’Execution des Peines Prononcees par le Tribunal Penal International pour le Rwanda; Article 4(4) of the Agreement between the Slovak Republic and the United Nations on the Enforcement of Sentences Imposed by the International Criminal Tribunal for the former Yugoslavia; and Article 3(3) of the Agreement between the Special Court for Sierra Leone and the Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone.

\textsuperscript{47} See, \textit{e.g.}, the Preamble to the Agreement between the Kingdom of Swaziland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda. The Preambles to the ICTY’s enforcement agreements with the United Kingdom and Austria do not refer to soft-law standards; Articles 3(3) of both Agreements stipulate that conditions of imprisonment must be in accordance with relevant human rights standards.


\textsuperscript{50} See, \textit{e.g.}, Article 6 of the Agreement between the Government of the Republic of Benin and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda; Article 6 of the Agreement between the International Criminal Tribunal for the
tribunals, or a body specifically established for that purpose consisting of representatives of both the tribunal and the State concerned, will be permitted, at any time and on a periodic basis, to inspect the conditions of detention and the treatment of persons convicted by the tribunals. Confidential reports are drawn up by the inspectorate, which constitute the basis for consultations between the State concerned and the tribunal.

It should be noted, however, that Article 5 of the ad hoc agreements between the ICTY and Germany regarding the imprisonment of Tadić and Kunarac, only allow for inspections by representatives of the tribunal. The letters of understanding accompanying these agreements stress that the term ‘representatives’ must be understood as referring only to individuals and not to organisations, thereby excluding the employment of such bodies as the CPT or the ICRC. By contrast, the ad hoc agreement between the ICTY and Germany regarding the enforcement of Galić’s sentence does allow for inspections by the CPT. Allocating the important task of inspecting prison conditions to tribunal officials is unfortunate. Such persons are not familiar with this type of work, which is likely to undermine the effectiveness of such inspections. The ICTY Manual on Developed Practices acknowledges that the establishment of so-called ‘Parity Commissions’ for the monitoring of prison conditions is ‘far from ideal’. It notes, in this respect, that independent monitoring ‘is

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52 Article 34(c) of the Special Court Agreement, 2002(Ratification) Act. The Act places a duty on the Sierra Leonean Government to ensure the facilitation of communications between the prisoner and the Court and to provide ‘any information, report or expert opinion as requested by the Special Court about the imprisonment of the Special Court prisoner’.

53 See Article 4 of the Agreement between the United Nations and the kingdom of Spain on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia.
an important means of maintaining institutional credibility and public confidence\textsuperscript{54} and states that there have been instances of prisoners petitioning the President, ‘complaining about the conditions of detention \textit{and} about the Tribunal’s officers’.\textsuperscript{55} According to the Manual, the President has in these cases ‘requested that the convicted accused be allowed to meet with an independent monitoring body such as the ICRC to investigate the alleged violations’.\textsuperscript{56}

Although primacy governs the relationship between the tribunals and States of enforcement, the co-operation regime governing the enforcement of the tribunals’ sentences is characterised by voluntariness, which differs from other forms of State co-operation under the tribunals’ legal frameworks. This is particularly so as regards the \textit{ad hoc} tribunals, which were established by the Security Council acting under Chapter VII of the U.N. Charter.\textsuperscript{57} Their Statutes contain obligations for States ‘to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the servicing of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial’.\textsuperscript{58} Under this so-called vertical co-operation regime, the tribunals may order States to co-operate.\textsuperscript{59} The horizontal co-operation regime governing the enforcement of sentences is laid down in Article 27 of the ICTY Statute and Article 26 of the ICTR Statute, and is based on ‘mutual consensus’, readiness and willingness.\textsuperscript{60} According to Stroh, the ‘idea of compulsion was rejected, since the execution of sentences is likely to cover a long period of time’.\textsuperscript{61} Furthermore, contrary to other forms of co-operation in

\textsuperscript{55} \textit{Ibid.} Emphasis added.
\textsuperscript{56} \textit{Ibid.}
\textsuperscript{60} \textit{Id.}, p. 65.
criminal matters, which usually involves a specific country being requested for assistance (e.g. for the collection of evidence or for confiscation purposes), in enforcement matters there exists a more collective responsibility, which makes it problematic to single out one specific or a limited number of States that would be obliged to enforce the tribunals’ sentences. 

Apart from cost implications, there may also be significant legal challenges for States willing to enforce the tribunals’ sentences. Often, domestic legislation must be amended. According to Tolbert, States may feel little enthusiasm to ‘agree to unfamiliar procedures which, in principle, override domestic law on such critical matters as parole and require that a state amends its legislation accordingly’. 62

The ICTY Manual on Developed Practices states that, in addition to geographical and legal requirements, ‘the negotiation of enforcement agreements is also subject to a number of constraints on the part of the States, such as the high costs of enforcement for developing or less developed countries, prevailing political/popular hostility towards foreigners, the corresponding unwillingness of Governments to take actions that may risk political/popular opposition, the reluctance of Governments to accept inspections of their prisons by external monitoring bodies, and a State’s lack of an appropriate socio-cultural environment in its prisons for persons from the former Yugoslavia (including the absence of other prisoners with similar socio-linguistic-cultural backgrounds’.

As a result of the voluntary co-operation regime, however, tribunals face the difficulty of persuading a sufficient number of States to enforce their sentences. This is further complicated by the fact that their Statutes do not place a residual obligation on the tribunals’ host States to accept convicted persons if no other State can be found to do so. The complicated, non-obligatory character of the co-operation regime, with its focus on primacy, has certainly affected the willingness of States to accept convicted persons. 64 This has undermined the individualisation of the designation process and the equitable distribution of prisoners, all in favor of the policy aim of effective enforcement.

62 David Tolbert, supra, footnote 3, at 666.
64 See, e.g., ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.11.
The question of what is to happen after the termination of the tribunals’ mandates has not been addressed in either the enforcement agreements or the tribunals’ Statutes and Rules. For a long time, it was unclear which body or agency would exercise the tribunals’ supervising powers in this regard and decide on issues relating to the prisoners’ external legal position. The same question applied to the termination of the enforcement of a sentence in a particular State and the transfer of the prisoner concerned to another State or back to the tribunal’s detention facility (if still in operation). The agreements concluded by the ad hoc tribunals, however, were concluded by the U.N., which implies that they continue to apply, even after the tribunals’ mandates come to an end. In 2010, the Security Council adopted a Resolution establishing a Residual Mechanism to finish the remaining tasks of both the ICTY and the ICTR after the completion of their mandates. Paragraph 4 of the Resolution provides that ‘all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force mutatis mutandis in relation to the Mechanism’.

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66 Göran Sluiter, supra, footnote 59, p. 66.
Because the ICC was established by treaty, the relationship between the Court and States is governed by the law of treaties and by the principle of *pacta sunt servanda*.  

The obligations of States parties to co-operate with the Court under Part IX of the Statute are of a more hierarchical, or vertical, nature than is usual in inter-State practice. Nevertheless, with respect to the enforcement of sentences dealt with in Part X of the Statute, an obligatory designation system, whereby States would recognise the ICC’s judgments as if they were rendered by their own courts, _i.e._ an enforcement regime which would be grounded in the principle of complementarity, proved unachievable during the Rome Statute’s negotiation process. The regime finally agreed upon is one based on voluntariness. According to Gartner, this appears to be justified in light of the costs incurred in the enforcement of prison sentences and the possible security risks involved in confining high profile leader figures.

Nevertheless, the Statute’s drafters considered the system governing the enforcement of sentences at the _ad hoc_ tribunals inadequate in light of the limited number of States...
that were willing to accept prisoners. In order to enhance the regime’s flexibility, the possibility was introduced for States to attach conditions to their acceptance of convicted persons. Such conditions must be in accordance with Part X of the Statute, and the Court retains the final say as to their acceptability. In addition, a residual obligation to accept convicted persons was placed on the host State, in order to accommodate the eventuality that no other State can be found to enforce a particular prison sentence. In 1999, Chimimba warned that, due to the circumstance that the Court bears the costs incurred in the enforcement of sentences in the host State, ‘the residual rule might (...) become the rule rather than the exception’. On the other hand, the Government of the Netherlands observed that this very arrangement will deter the Court from making wide use of the provision. Meanwhile, two States have already declared their willingness to enforce the Court’s sentences, which appears to prove Chimimba’s warning wrong. The Dutch Government also pointed to the principle of equitable distribution, as laid down in the Court’s RPE, and to the Government’s declaration at the Rome Conference, where it stressed that the residual provision must be seen as a last resort only. Moreover, Article 49(1) of the Headquarters Agreement provides that ‘[t]he Court shall endeavour to designate a State of enforcement in accordance with article 103, paragraph 1, of the Statute’, and further that, after the commencement of the enforcement of a sentence pursuant to Article 103(4), the Court must continue to search for a State of enforcement under Article 103(1)(a). In this regard, the Dutch Government has suggested that it would be reasonable for the Court to reconsider the continuation of the enforcement of a prison sentence in the Netherlands, after a substantial part thereof has been served. According to the Government, it would be a ‘natural moment’ for the Court to do so

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76 Trevor Pascal Chimimba, supra, footnote 69, at 350; William A. Schabas, supra, footnote 69, p. 1069.
77 Article 103(1)(b) of the ICC Statute; William A. Schabas, supra, footnote 69, p. 1069.
78 Article 103(4) of the ICC Statute.
79 Trevor Pascal Chimimba, supra, footnote 69, at 351.
80 Hans Bevers, Niels Blokker and Jaap Roording, supra, footnote 71, at 152.
81 Commentary of the Dutch Government to the ICC Implementation Act, supra, footnote 2, p. 12.
82 Headquarters Agreement between the International Criminal Court and the host State (with an exchange of letters), The Hague, 7 June 2007, Tractatenblad van het Koninkrijk der Nederlanden Jaargang 2007 Nr. 125.
83 Article 49(3) of the Headquarters Agreement.
after two thirds of a particular sentence have been served, in light of Article 110(3) of the Statute, which calls for the review of the sentence at such a moment.

According to Article 103(4) of the ICC Statute, the host State shall make a prison facility available in accordance with the conditions set forth in the Headquarters Agreement. The language of this provision is not clear as to the precise content of the obligation. At first glance, it may appear that the Netherlands is solely obliged to make a prison facility available, *i.e.* without having to actually enforce the sentence on behalf of the Court. Such a reading is, however, inconsistent with the Dutch Government’s interpretation of the provision. It has acknowledged its obligation under Article 103(4) to *enforce* the Court’s sentences. Furthermore, according to Article 69 of the Dutch ICC Implementation Act, prison sentences enforced pursuant to Articles 103(4) and 103(1)(a) ‘shall be carried out subject to the provisions laid down by or pursuant to the Criminal Code, the Code of Criminal Procedure, the Penitentiary Principles Act (*Penentiaire beginselenwet*) or any specific criminal statute relating to the enforcement of judicial decisions’. According to the Government’s official Commentary to the Act, Article 69 implies that the enforcement of the Court’s sentences shall be carried out in accordance with regular Dutch penitentiary law. Moreover, Article 49(4) of the Headquarters Agreement provides that conditions of imprisonment shall be governed by domestic law. Finally, it follows from Article 67(4) in conjunction with Article 68(2) of the Dutch ICC Implementation Act that sentences of imprisonment imposed under Article 103(4) of the Statute ‘shall be carried out by Our Minister on the recommendation of the public prosecutor at The Hague District Court’, which echoes Article 553 of the Dutch Code of Criminal Procedure governing the execution of prison sentences imposed by Dutch courts.

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86 *Id.*, p. 40.

87 *Id.*, p. 39.
The ICC Implementation Act\textsuperscript{88} regulates in further detail the co-operation between the Court and the Netherlands. The Act regulates the specific forms of co-operation that the Netherlands must provide as host State, as well as the general modes of co-operation that every State party must provide pursuant to the Statute.\textsuperscript{89} Articles 66 to 71 of the Act deal with the enforcement of prison sentences. Provision is made for both obligatory co-operation with the Court pursuant to Article 103(4) of the Statute and the enforcement of sentences by the Netherlands after indicating its willingness to do so in accordance with Article 103(1)(a).\textsuperscript{90} In the latter situation, it is the Dutch Minister of Justice who shall decide on whether to accept a particular designation by the ICC Presidency.\textsuperscript{91} In respect of the former, Article 68 of the ICC Implementation Act provides that such sentences shall ‘on the instructions of Our Minister, be enforced or further enforced in the Netherlands in accordance with the conditions set out in the headquarters agreement’. The Netherlands has chosen for a system of continued enforcement instead of an \textit{exequatur} procedure. Continued enforcement implies that a foreign judgment is directly enforceable within the domestic legal order, although there is room for adjustment of the foreign sentence to the maximum penalty that may be imposed for similar offences under domestic law. The \textit{exequatur} procedure would apply if the Netherlands was to accept ICTY convicts (after having declared its general willingness to do so). The \textit{exequatur} procedure is also applicable to the enforcement of other kinds of sanctions that may be imposed by the ICC, such as reparation orders and the imposition of fines.\textsuperscript{92} The \textit{exequatur} procedure prescribes the replacement of the foreign judgment, in this case the ICC’s judgment, by a domestic one. Only then may the foreign sentence be enforced in the national legal order. The reason for applying the \textit{exequatur} procedure to reparation orders and to

\textsuperscript{88} Rijkswet van 20 juni 2002 tot uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen, Staatsblad 314. (Uitvoeringswet Internationaal Strafhof).

\textsuperscript{89} See Hans Bevers, Niels Blokker and Jaap Roording, \textit{supra}, footnote 71, at 141.

\textsuperscript{90} Article 66 of the Dutch ICC Implementation Act. The Dutch Government states that it still needs to consider whether it will accept prisoners. It points to the fact that it is already obliged to accept sentenced persons pursuant to Article 103(4); Commentary of the Dutch Government to the ICC Implementation Act, \textit{supra}, footnote 2, p. 11.

\textsuperscript{91} Article 67(1) of the ICC Implementation Act.

\textsuperscript{92} See, further, Commentary of the Dutch Government to the ICC Implementation Act, \textit{supra}, footnote 2, p. 12.
fines imposed by the ICC is primarily that their enforcement will usually require a basis in law, as established by a Dutch court.93 The reason for opting for continued enforcement in respect of the enforcement of ICC prison sentences is the belief that the *exequatur* procedure would devalue the Court’s authority and that the ICC was viewed as a continuation of the Dutch legal order. Furthermore, due to a lack of precedents in the Dutch legal order, it was considered unclear what standards Dutch courts would need to apply when converting the Court’s sentences. Moreover, converting an ICC judgment into a domestic one was also felt to be contrary to Article 105 of the ICC Statute, pursuant to which States may not alter sentences imposed by the Court.94 According to Sluiter, however, the most important reason is that the residual obligation of the host State pursuant to Article 103(4) leaves no room for conditional acceptance of convicted persons.95

Article 70 of the Dutch ICC Implementation Act regulates the transfer of persons sentenced by the Court from the Netherlands to another State. Article 71 provides that communications between the Court and sentenced persons imprisoned in the Netherlands are unrestricted and confidential. The sentenced person may file documents with the prison governor, who must ensure that the document is dated and forwarded to the Court immediately. Provision is also made for persons (designated for that purpose by the Court) to have access to the sentenced person in accordance with the relevant provisions in the Dutch Penitentiary Principles Act. Moreover, requests by the Court for information that it needs in order to exercise its supervising powers will only be granted ‘to the extent possible’. According to the Government, the Minister needs in this respect to take into account the prisoners’ right to privacy, as well as such interests as the security within the prison.96

Finally, the temporary transfer of a sentenced person is provided for, provided the person concerned consents, ‘for the purpose of any investigation to be carried out by the ICC in connection with the enforcement’.97 According to the Government, an example of such an investigation is the procedure for the (re-)designation of a State of

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94 *Id.*, p. 13.
97 Article 71(4) of the ICC Implementation Act.
enforcement, which includes the sentenced person’s right to be heard.\textsuperscript{98} In this regard, the Government opined that the consent of the sentenced person is required in light of the Court’s lack of a legal title to imprison persons other than for the purpose of detention on remand.\textsuperscript{99}

Article 50(2) of the Headquarters Agreement states that, where it is necessary to change the designation of a State of enforcement, and the period pending transfer to the new State of enforcement does not exceed six months, the Court and the host State will consult whether the person in question can be placed in a prison facility made available by the host State pursuant to Article 103(4). If the period pending transfer exceeds six months, the person concerned must be transferred to such a prison facility in the host State upon the request of the Court.

The voluntary nature of the regular co-operation regime is particularly apparent from what has been referred to as the requirement of ‘double consent’.\textsuperscript{100} First, a State must have expressed its willingness to accept convicted persons before it may be placed on the list of potential States of enforcement.\textsuperscript{101} Secondly, a State designated in a particular case must inform the Court whether it accepts the Presidency’s designation.\textsuperscript{102}

In line with the other tribunals’ experiences, the ICC has sought to strike a balance between the interests of the States of enforcement and the notion of primacy.\textsuperscript{103} Primacy is foremost reflected in the prohibition on States of enforcement to modify the sentence imposed by the Court.\textsuperscript{104} Revising or reducing sentences are the Court’s prerogative. In Article 106 of the ICC Statute, a distinction is drawn between enforcement on the one hand and conditions of detention on the other. Enforcement appears to refer to the ‘nature’ of the sentence, including its duration and the convict’s participation in prison programmes, entailing him or her spending time outside of

\textsuperscript{98} Commentary of the Dutch Government to the ICC Implementation Act, supra, footnote 2, p. 41.
\textsuperscript{99} Ibid.
\textsuperscript{100} See, e.g., Claus Kress and Göran Sluiter, supra, footnote 84, at 1787.
\textsuperscript{101} Article 103(1)(a) of the ICC Statute.
\textsuperscript{102} Article 103(1)(c) of the ICC Statute.
\textsuperscript{103} Kimberly Prost, supra, footnote 69, at 675, 685. It must be noted that the notion of primacy does not govern jurisdictional matters at the ICC.
\textsuperscript{104} Article 105 of the ICC Statute. See, also, Article 4(1) of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, ICC-PRES/01-01-05, 26 November 2005.
prison. According to paragraph 1 of Article 106, the enforcement of sentences is subject to supervision by the Court and must comply with international standards. The conditions of imprisonment are governed by the law of the State of enforcement, but must be consistent with international standards.

The term ‘supervision’ is not used in respect of the conditions of imprisonment. Nevertheless, the requirement that detention conditions must be consistent with international standards implies some form of control. Furthermore, the ICC RPE deviate from the distinction made in Article 106. Rule 211(a) speaks of supervising enforcement and conditions of detention. In order to enable the Court to supervise conditions of detention, States of enforcement must establish adequate arrangements ‘for the exercise by any sentenced person of his or her right to communicate with the Court’. The Court may also request information, reports or expert opinions, or may designate a representative or a Judge to meet privately with the sentenced person, in order to hear his or her views. The Presidency may then allow the State in question to comment upon the views expressed by the sentenced person. Moreover, the Court may at any time decide to transfer a convict to another designated State’s prison.

Pursuant to Rule 200(5) of the ICC RPE, the Court may enter into bilateral agreements with States ‘with a view to establishing a framework for the acceptance of prisoners sentenced by the Court’. These agreements must be consistent with the Statute. At the time of writing, the Court has concluded enforcement agreements with

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105 Rule 211(2) of the ICC RPE. See, also, Article 6(3) of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court, ICC-PRES/01-01-05, 26 November 2005.
108 Rule 211 may be read in favour of a different interpretation of the distinction made in Article 106 between enforcement and conditions of detention. Enforcement would then be understood to include the conditions of detention mentioned in Paragraph 2; see Claus Kress and Göran Sluiter, supra, footnote 84, at 1804.
110 Article 104(1) of the ICC Statute.
Austria and the United Kingdom only. In the enforcement agreement concluded with Austria, the Court affirmed its right to inspect the conditions of imprisonment and the treatment of its convicts, either by carrying out such inspections itself, or by designating an agency to do so. Such inspections may take place at any time and on a periodic basis, ‘the frequency of visits to be determined by the Court’. The inspectorate must draw up a confidential report and submit it to both the State of enforcement and to the Presidency. The inspectorate’s findings then form the basis of further consultations between the Court and the State of enforcement. The Presidency may request the State of enforcement to ‘report to it any changes in the conditions of imprisonment suggested in the report’.

It is clear then that primacy also applies to the supervision of the conditions of imprisonment in the State of enforcement. However, the Court cannot issue binding orders regarding the domestic conditions of imprisonment.

An important question is which standards apply to the Court’s supervision. Earlier drafts of the Statute included references to such instruments as the SMR. During the Rome conference, a reference in the draft text to ‘internationally recognised minimum standards’ was replaced by the phrase ‘widely accepted international treaty standards governing treatment of prisoners’.

A ‘national standard’ was included in Article 106(2), stating that ‘[t]he conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement’. The inclusion of a national standard is in accordance with the principle of complementarity, which underlies the Court’s jurisdictional regime. Article 106(2) implies, however, that the arrangements in place at the ICTR and the

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113 Id., Article 7.
114 Claus Kress and Göran Sluiter, supra, footnote 84, at 1799-1800.
115 Trevor Pascal Chimimba, supra, footnote 69, at 352. See, further, Chapter 3.
116 Article 106(1); Trevor Pascal Chimimba, supra, footnote 69, at 352. See, further, Chapter 3.
117 Emphasis added.
SCSL, which have lead to the preferential treatment of international prisoners, are not feasible under the ICC’s legal framework. What may have been a legitimate attempt to make it more attractive for States to accept international prisoners may become an insurmountable obstacle to do so for States with less financial resources, which may in turn have negative implications for reconciliation and rehabilitation processes. Van Zyl Smit is more optimistic about the national standard, stating that ‘there will be an enormous pressure on countries that take these prisoners to operate their prison system entirely in terms of these international standards. They have to ensure that the treatment of the ICC prisoners, which has to conform to international standards, is not more (or less) favourable than that offered to their own prisoners convicted of similar offences. This parity can only be achieved if prison conditions in national systems meet international standards in all respects’.\footnote{Dirk van Zyl Smit, supra, footnote 84, at 376.} It is quite likely, however, that this very circumstance will cause States – both poor and rich – to shy away from accepting convicted persons. Moreover, the national standard is expected to lead to the unequal treatment of ICC convicts.

7.2.3 The tribunals’ designation procedures

ICTY

The only provision to refer to the designation procedure in the ICTY Statute is Article 27, which provides, in relevant part, that ‘[i]mprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons’.\footnote{Article 29(1) of the STL Statute stipulates that it is the President who designates the State in which imprisonment shall be served. See, also, Rule 174(A) of the STL RPE and Article 44 of the Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon.} Designation is further governed by Rule 103 of the RPE, which provides that ‘(A) Imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons. (B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed. (C) Pending the finalisation of
arrangements for his or her transfer to the State where his or her sentence will be served, the convicted person shall remain in the custody of the Tribunal’. There is no (residual) obligation on the host State to accept convicted persons.

In *Erdemović*, the Sentencing Chamber addressed the issue of enforcement in light of the possible effect of the place and conditions of enforcement on due process, the proper administration of justice and the equal treatment of convicted persons. In particular, it was ‘concerned about reducing the disparities which may result from the execution of sentences’. The Chamber endorsed the Secretary-General’s viewpoint that sentences must be served ‘outside the territory of the former Yugoslavia’, and explained that ‘because of the situation prevailing in that region, it would not be possible to ensure the security of the convicted person or the full respect of a decision of the International Tribunal in that regard’.

In light of both the altered political situation in the States formerly constituting Yugoslavia and the Rule 11bis referrals of criminal cases to those States, it may be argued that the Secretary-General’s viewpoint carries less relevance today. Nevertheless, the tribunal has chosen to abide by his

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120 See, in a similar vein, Rule 174 of the STL RPE. Before the 1998 amendments, Rule 103 of the ICTY RPE read ‘(A) Imprisonment shall be served in a State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons. (B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed’.

121 Dutch legislation implementing the ICTY Statute provides for the possibility that the Netherlands will decide to enforce the tribunal’s prison sentences. The Government of the Netherlands, however, has not yet declared its willingness to enforce the ICTY’s sentences. See Article 11 of the Provisions Relating to the Establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of international Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Amended Bill of 9 March 1994), available at http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation (last visited by the author on 9 August 2011) [Wet van 21 April 1994, houdende bepalingen verband houdende met de instelling van het Internationaal Tribunaal voor de vervolging van personen aansprakelijk voor ernstige schendingen van het internationale humanitaire recht, begaan op het grondgebied van het voormalige Joegoslavië sedert 1991]. Article 44(3) of the Headquarters Agreement concluded between the U.N. and the Netherlands concerning the headquarters of the STL provides that ‘[t]he host State shall be under no obligation to let persons convicted by the Tribunal serve their sentence of imprisonment in a prison facility on its territory’.


123 *Id.*, par. 70.

124 *Ibid*.

125 ICTY, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), (S/25704), par. 121.

instructions, and has pointed to the fact that Rule 11bis only applies to lower rank accused. Accordingly, the tribunals’ convicts, as the most senior leaders, should not be sent to those States.

According to the ICTY Manual on Developed Practices, “[f]or humanitarian reasons, agreements are negotiated mainly with European States. In identifying potential enforcement States, the Tribunal is particularly attentive to the geographical distance between the enforcement States and the former Yugoslavia. Geographical inaccessibility can hinder family and friends from visiting prisoners.” This argument, however, hardly appears to justify the transfer of convicts to Scandinavian countries.

In 1998, the ICTY President, pursuant to Article 27 of the Statute and Rules 19(B) and 103 of the ICTY RPE, issued a ‘Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment’. Paragraph 2 provides that ‘[u]pon the issuance of the trial judgement and conviction of an accused at first instance, the Registrar of the International Tribunal shall make a preliminary inquiry of one of the States that, pursuant to Article 27 of the Statute, have declared their willingness to accept convicted persons and have signed an agreement with the International Tribunal to that effect’. The phrase ‘[u]pon the issuance of the trial judgement and conviction of an accused at first instance’ was only inserted in 2009. Prior to this, the preliminary inquiry was not made until a sentence had become final.

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127 ICTY, Decision on Strugar’s Request to Reopen Appeal Proceedings, Prosecutor v. Strugar, Case No. IT-01-42-Misc.1, A. Ch., 7 June 2007, par. 15.
129 Id., p. 156.
130 Id., p. 152.
131 Rule 19(B) provides that “[t]he President may from time to time, and in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal’.
132 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009.
133 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137, 9 July 1998, par. 2. It is noted, in this respect, that Article 44(2) of the Agreement between the
the ICTY Manual on Developed Practices, ‘the practice has been for the Registrar to make a preliminary request prior to the final conviction of a particular accused, or conviction by a Trial Chamber’, which ‘has been prompted by the extended delays in State responses, and an effort to reduce as much as possible the time spent by a convicted person in the United Nations Detention Unit’.134

The Registrar provides the Government in question with a copy of the judgement, a copy of the Practice Direction, as well as with any other relevant information, including how much of the sentence has already been served.135 Another example of ‘other relevant information’ can be found in Aleksovski, where during the preliminary inquiry the Deputy Registrar informed the Governments concerned that the ICTY was considering ‘the possibility of having another accused with the same ethnical background as Mr. Aleksovski enforcing his sentence in the same State’.136 ‘Other relevant information’ may also relate to social assessment, behaviour in detention, threat and risk assessment and a prisoner’s medical/psychological status.137

After the Registrar has provided the aforementioned documents and information, the Government is requested to provide the Registry, before a certain date, with a preliminary indication as to whether it is prepared to carry out the sentence.138 A new Paragraph 3 was inserted in 2009, which states that, when selecting a State under

Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon stipulates that ‘[t]he President shall begin the process of designating a State of enforcement as soon as possible, based on the list referred to above, with a view to the immediate transfer of the convicted person for the purpose of serving a sentence of imprisonment imposed by the Tribunal’. Emphasis added.

134 ICTY Manual on Developed Practices, supra, footnote 2, p. 154. The Manual provides, however, that the efficacy of this arrangement ‘can be questioned under specific circumstances’ – i.e. where recognition of a judgement is required prior to enforcement of the sentence in the enforcement State.


136 Ibid.


138 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 2.
Paragraph 2, the Registrar must take certain criteria into account, such as the equitable distribution of convicted persons among all States, as well as the domestic law of the State concerned regarding such issues as pardon or the commutation of sentences and the maximum sentence enforceable. Although Paragraph 3(b) speaks of an equitable distribution of convicted persons among all the States, the number of States that have indicated their willingness to accept convicted persons under Article 27 are quite limited. The ICTY Manual on Developed Practices speaks of ensuring a ‘proper burden-sharing between States enforcing sentences in terms of both the number of convicted persons transferred and the lengths of the sentences imposed’. Finally, a confidential memorandum containing the results of the inquiry will be prepared by the Registrar and sent to the President.

The 2009 amendments increased the power of the Registrar in making the final determination, which appears to be more consistent with *Erdemović*. Whereas between 1998 and 2009 the Registrar had to prepare a list of potential enforcement States, since 2009 the Registrar suggests to the President only one particular State. According to the ICTY Manual on Developed Practices, this practice was prompted in an effort ‘to avoid the potential embarrassment from having more than one State agree to enforce a sentence and the Tribunal having to decline more than one offer’.

It should be noted that, before 1998, the State of enforcement was determined directly by the Registrar upon consultation with the President and the Sentencing Chamber’s Presiding Judge. If the Registrar was of the view that a sentence should be served in a particular State, he would request the national authorities to accept the convicted

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141 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137, 9 July 1998, par. 3.
142 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 4. See, also, the changes made to Paragraph 5. See, e.g., ICTY, Order Designating State in which Dragan Jokić is to Serve his Sentence, *Contempt Proceedings against Dragan Jokić*, Case No. IT-05-88-R77.1-ES, President, 6 July 2009, par. 4.
person. If the requested State agreed with the request, the Registrar would make the necessary arrangements for transferring the convicted person.\textsuperscript{145}

The confidential memorandum primarily contains personal information of the convicted person – \textit{e.g.} his marital and indigency status, family relations including their place of residence, whether he is expected to serve as a witness in any future proceedings before the tribunal or is expected to be relocated as a witness (in which case information must be provided about the States that have entered into relocation agreements with the tribunal), medical or psychological reports and his language skills. Other information included in the confidential memorandum relates to the domestic law of the State concerned regarding pardon and commutation of sentences and the general conditions of imprisonment.\textsuperscript{146} The indigency status of the convicted person was inserted in 2009. Before 2009, Paragraph 4(a) asked for information on the financial resources available to the convicted person’s relatives to visit him in prison, whilst no reference was made to the financial situation of the sentenced person himself.\textsuperscript{147}

The reference to ‘language skills’ echoes the \textit{Erdemović} Trial Chamber’s concerns that, ‘because persons found guilty will be obliged to serve their sentences in institutions which are often far from their place of origin, the Trial Chamber takes note of the inevitable isolation into which they will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees. The situation is all the more true in cases of convicted persons who have co-operated with the Prosecutor because it is not unreasonable to assume that they will also be excluded from the very group to which they should normally belong’.\textsuperscript{148}

On the basis of the information submitted by the Registrar and of any other inquiry he or she wishes to make, the President will then either approve or reject as inappropriate the State selected by the Registrar. In case of rejection, the President will instruct the Registrar to approach another State.

\textsuperscript{145} \textit{Ibid.}
\textsuperscript{146} ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 4.
\textsuperscript{147} ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137, 9 July 1998, par. 3(a).
As stated above, as of 2009, the Registrar no longer provides the President with a list of States to choose from. Rather, a preliminary selection is made by the Registrar. Nevertheless, the final determination on designation rests with the President. The Practice Direction prescribes that the President must give particular consideration ‘to the proximity of the convicted person’s relations’. It further states that the President may consult the Sentencing Chamber or its Presiding Judge. In this regard, the Practice Direction diverts from the *Erdemović* Trial Chamber’s instructions, where the Chamber held that ‘the place of enforcement of the sentence shall be decided by the Registrar upon consultation with the President of the International Tribunal and with the approval of the Presiding Judge of the Trial Chamber which delivered the sentence’. In none of the Presidential designation orders has it been acknowledged that either the Presiding Judge or the Sentencing Chamber had been consulted.

Paragraph 5 stipulates that the President *may* request the opinion of the Prosecution and that of the convicted person. The possible need for the Prosecution’s opinion must be viewed in light of Paragraph 4(b). The *Erdemović* Trial Chamber failed to mention the convicted person’s position and role in the designation procedure. In light of the requirements set by the principle of natural justice, which include the right of the person who is potentially affected by the decision concerned to be heard, the non-obligatory language of Paragraph 5 must be considered inadequate.

The enforcement agreement with Poland stipulates explicitly that enforcement shall also be possible when the convicted person ‘does not consent to the enforcement of the sentence in Poland’.

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149 See ICTY, *Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment*, IT/137, 9 July 1998, par. 4.
150 ICTY, *Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment*, IT/137/Rev.1, 1 September 2009, par. 5.
152 The provision states that the Registrar’s confidential memorandum must include information concerning ‘whether the convicted person is expected to serve as a witness in further proceedings of the International Tribunal’.
154 Article 3(2) of the Agreement between the Government of the Republic of Poland and the United Nations on the enforcement of sentences of the International Criminal Tribunal for the Former Yugoslavia.
The convicted person’s right to counsel does not appear to apply to the designation procedure, nor may an inmate appeal the President’s decision. In 2006, the President was seised of a request by Žigić to be sent to another State than the one designated by the President. The latter stressed that the tribunal’s legal framework does not confer a right on a convicted person to be heard on the issue of designation. According to the President, as a consequence, the convicted person also lacks the right to petition the President in this respect. 155 In Landžo, however, the President held in relation to the convicted person’s application to serve his sentence in an English-speaking State that, although at that time there existed no agreement with such a State, the convicted person would be permitted to renew his request in the event of the tribunal signing such an agreement. 156

The proximity to the convicted person’s relatives must be given particular consideration by the President in his or her final determination. Indeed, several of the designation orders make an explicit reference to this factor. 157 In Nikolić, the President focused on whether the convicted person was expected to serve as a witness in the tribunal’s further proceedings, 158 while in Delić no factor appeared to have been

155 ICTY, Decision on Request of Zoran Žigić, Prosecutor v. Kvočka et al., Case No. IT-98-30/1-ES, President, 31 May 2006.
156 ICTY, Order Designating the State in which Esad Landžo is to Serve his Sentence, Prosecutor v. Landžo, Case No. IT-96-21-ES, President, 29 April 2003.
157 ICTY, Order Designating the State in which Miodrag Jokić is to Serve his Prison Sentence, Prosecutor v. Jokić, Case No. IT-01-42/1-ES, President, 12 May 2006; ICTY, Order Designating the State in which Milomir Stakić is to Serve his Prison Sentence, Prosecutor v. Stakić, Case No. IT-97-24-ES, President, 31 August 2006; ICTY, Order Designating the State in which Blagoje Simić is to Serve his Prison Sentence, Prosecutor v. Simić, Case No. IT-95-9-ES, President, 23 January 2007; ICTY, Order Designating the State in which Miroslav Bralo is to Serve his Prison Sentence, Prosecutor v. Bralo, Case No. IT-95-17-ES, President, 10 July 2007; ICTY, Order Designating the State in which Radoslav Brdanin is to Serve his Prison Sentence, Prosecutor v. Brdanin, Case No. IT-99-36-ES, President, 10 July 2007; ICTY, Order Designating the State in which Dragan Jokić is to Serve his Prison Sentence, Prosecutor v. Jokić, Case No. IT-02-60-ES, President, 10 October 2007; ICTY, Order Designating the State in which Vidgoje Blagojević is to Serve his Prison Sentence, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-ES, President, 16 November 2007; ICTY, Order Designating the State in which Haradin Bala is to Serve his Prison Sentence, Prosecutor v. Haradin Bala, Case No. IT-03-66-ES, President, 7 February 2008; ICTY, Order Designating the State in which Stanislav Galić is to Serve his Prison Sentence, Prosecutor v. Galić, Case No. IT-98-29-ES, President, 3 November 2008; and ICTY, Order Designating the State in which Milan Martić is to Serve his Prison Sentence, Prosecutor v. Martić, Case No. IT-95-11-ES, President, 18 February 2009.
158 ICTY, Order Designating the State in which Dragan Nikolić is to Serve his Prison Sentence, Prosecutor v. Nikolić, Case No. IT-94-02-ES, President, 31 May 2006.
given particular weight at all. On a number of occasions, the particular considerations were kept confidential.

In general, the President’s orders may be criticised for their lack of transparency. Usually, the orders only contain the following information: the date of the final conviction, the sentence imposed, the legal grounds of the designation decision, the designated State’s willingness to enforce the sentence and the general statement that all of the criteria in the Practice Direction have been taken into account. Only in Landžo did the President acknowledge that the views of the convicted person had been taken into account. Landžo had submitted an application pursuant to Article 27 and Rule 103 in which he requested to be able to serve his sentence in an English-speaking State. In his request, he indicated that he had begun to study English in detention at the UNDU and that he had developed computer skills, which he wished to further develop ‘in order to complete a college education’.

The President’s final determination in designating the State of enforcement is then sent to the Registrar. The former may decide that the designation will not be made public. The Registrar must ‘in accordance with the relevant provisions of the agreement on the enforcement of sentences’ and ‘with the approval of the President’, officially request the designated State to enforce the convicted person’s sentence. The requested State must be provided with a certified copy of the judgement, a ‘statement indicating how much of the sentence has already been served, including information on any pre-trial detention’ and, ‘when appropriate, any medical or

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159 ICTY, Order Designating the State in which Hazim Delić is to Serve his Prison Sentence, Prosecutor v. Delić, Case No. IT-96-21-ES, President, 29 April 2003.
160 ICTY, Order Designating the State in which Momir Nikolić is to Serve his Prison Sentence, Prosecutor v. Nikolić, Case No. IT-02-60/1-ES, President, 14 December 2007.
161 ICTY, Order Designating the State in which Esad Landžo is to Serve his Sentence, Prosecutor v. Landžo, Case No. IT-96-21-ES, President, 29 April 2003.
162 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 6.
163 See, e.g., Article 2 of the Agreement between the United Nations and Ukraine on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia; Article 3(1) of the Agreement between the Slovak Republic and the United Nations on the enforcement of sentences imposed by the International Criminal Tribunal for the Former Yugoslavia.
164 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 7.
psychological reports on the convicted person, any recommendation for his or her further treatment in the requested State and any other factor relevant to the enforcement of the sentence’. In addition to the aforementioned information, the agreement with the United Kingdom provides that the tribunal must provide the requested State with ‘details of the offences to which the sentence of imprisonment relates’, as well as ‘the name, date and place of birth of the sentenced person together with any known family or other ties with the United Kingdom or any other reason for making the request’. The agreements with Sweden and Denmark stipulate that requests be accompanied by ‘any documents that the International Tribunal may have which show that the convicted person has strong ties’ with the respective State. The agreement with Slovakia specifically states that the costs of translating the supporting documents accompanying the request by authorised Slovak translators ‘shall be covered by the International Tribunal subject to the prior provision of an estimate of costs and upon submission of an invoice’. However, according to the ICTY Manual on Developed Practices, such costs are, in principle, to be borne by the State in question. Only where such costs are prohibitive are they to be paid for by the tribunal, ‘subject to the State’s willingness to provide an estimate of the costs and to the State’s willingness to have the work done by a certified translator’.


166 Article 2(3)(b) and (e) of the Agreement between the United Nations and the Government of the United Kingdom of Great Britain and Northern Ireland on the enforcement of sentences of the International Criminal Tribunal for the Former Yugoslavia.


168 Article 3(3) of the Agreement between the Slovak Republic and the United Nations on the enforcement of sentences imposed by the International Criminal Tribunal for the Former Yugoslavia.

In their implementation legislation, a number of States have laid down the procedures that must be followed in deciding upon the formal request, as well as the substantive criteria governing such decision making.\textsuperscript{170}

Most of the agreements provide that requests must be decided on promptly\textsuperscript{171} or at least that the tribunal must be promptly informed of the decision taken upon the request.\textsuperscript{172} The agreement with Belgium stipulates that, upon acceptance of the official request, Belgium shall ‘notify the International Tribunal of the dates of eligibility for early release’ and shall inform the tribunal ‘of any substantial alteration of these dates’.\textsuperscript{173}

After the formal request has been accepted by the designated State in accordance with its domestic law and the State has communicated its acceptance of the request, the Registrar will notify the President and, if appropriate, the Sentencing Chamber or its


\textsuperscript{172} See, \textit{e.g.}, Article 2(4) of the Agreement between the United Nations and Ukraine on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia; Article 2(4) of the Agreement between the United Nations and the Kingdom of Great Britain and Northern Ireland on the enforcement of sentences of the International Criminal Tribunal for the Former Yugoslavia; and Article 2(3) of the Agreement between the United Nations and the Kingdom of Spain on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia.

\textsuperscript{173} Article 3(3) of the Agreement between the United Nations and the Government of the Kingdom of Belgium on Enforcement of Sentences Handed Down by the International Criminal Tribunal for the Former Yugoslavia.
Presiding Judge accordingly. The Registrar must then take all necessary measures to facilitate the convicted person’s transfer to the designated State. Whereas the costs incurred by the enforcement of the sentence are borne by the designated State, in principle, the expenses related to transfer – both to and from the designated State – are borne by the tribunal.

Furthermore, the convicted person must be informed by the Registrar of the State designated, of other details in the enforcement agreement, and of any other relevant issues pertaining to the matter.

174 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 8.
175 See, e.g., ICTY, Order Designating the State in which Dragan Nikolić is to Serve his Prison Sentence, Prosecutor v. Nikolić, Case No. IT-94-02-ES, President, 31 May 2006; ICTY, Order Designating the State in which Miodrag Jokić is to Serve his Prison Sentence, Prosecutor v. Jokić, Case No. IT-01-42/1-ES, President, 12 May 2006; ICTY, Order Designating the State in which Blagoje Simić is to Serve his Prison Sentence, Prosecutor v. Simić, Case No. IT-95-9-ES, President, 23 January 2007; ICTY, Order Designating the State in which Haradin Bala is to Serve his Prison Sentence, Prosecutor v. Bala, Case No. IT-03-66-ES, President, 7 February 2008. See, also, the various enforcement agreements, e.g., Article 4(1) of the Agreement between the United Nations and Ukraine on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia; Article 5 of the Agreement between the Slovak Republic and the United Nations on the enforcement of sentences imposed by the International Criminal Tribunal for the Former Yugoslavia; Article 4 of the Agreement between the United Nations and the Government of the Kingdom of Belgium on Enforcement of Sentences Handed Down by the International Criminal Tribunal for the Former Yugoslavia; Article 4 of the Agreement between the United Nations and the Republic of Albania on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia; and Article 4 of the Agreement between the Government of Norway and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the former Yugoslavia.
176 See, e.g., Paragraph 10 of the Note between the ICTY Registrar and the Federal Republic of Germany on the enforcement of Mr. Stanislav Galić’s prison sentence; Article 12 of the Agreement between the Slovak Republic and the United Nations on the enforcement of sentences imposed by the International Criminal Tribunal for the Former Yugoslavia (Article 12 also stipulates that ‘[i]n the event costs associated with the enforcement of sentences rise unexpectedly and are such that further enforcement becomes impossible for the requested State, the procedure for transferring the convicted person back to the tribunal will be applicable’; Paragraph 10 of the Note of the ICTY Registrar to the Ambassador of the Federal Republic of Germany of 14 November 2002 on the enforcement of Mr. Dragoljub Kunarac’s prison sentence; and Article 11 of the Agreement between the United Nations and the Portuguese Republic on the Enforcement of sentences of the International Criminal Tribunal for the Former Yugoslavia.
177 ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev.1, 1 September 2009, par. 8. See, also, the various enforcement agreements, e.g., Article 4 of the Agreement between the International Criminal Tribunal for the Former Yugoslavia and the Government of Finland on the Enforcement of Sentences of the International Criminal Tribunal; Article 4 of the Agreement between the Government of the
Finally, Paragraph 9 of the Practice Direction stipulates that, if the Government rejects the request at this stage of the procedure, the matter will be referred back to the President, who will designate another State in accordance with Paragraph 5. The language of Paragraph 9 is identical to that of the pre-2009 version of Paragraph 8, which renders it inconsistent with the new language of Paragraph 5. As stated above, according to Paragraph 5, the Registrar no longer provides the President with a list of States to choose from; the President merely determines whether the preliminary selection made by the Registrar is appropriate. Therefore, Paragraph 9 should be amended as follows: if the designated State rejects the official request, the Registrar shall submit a new confidential memorandum to the President pursuant to Paragraph 4.

All of the President’s orders stipulate that, pursuant to Rule 103(C), the convicted person will remain in the custody of the international tribunal until his transfer to the designated State. The orders remain confidential until the convicted person’s transfer is completed.\(^\text{179}\)

At the ICTY, the time between a person’s final conviction and the issuing of a designation order varies considerably, from a number of weeks,\(^\text{180}\) to several months,\(^\text{181}\) and to up to two years.\(^\text{182}\) In Galić, the extraordinarily long period between

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\(^\text{178}\) ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137, 9 July 1998, par. 8.


\(^\text{180}\) See, \textit{e.g.}, ICTY, Order Designating the State in which Esad Landžo is to Serve his Sentence, \textit{Prosecutor v. Landžo}, Case No. IT-96-21-ES, President, 29 April 2003; ICTY, Order Designating the State in which Hazim Delić is to Serve his Prison Sentence, \textit{Prosecutor v. Delić}, Case No. IT-96-21-ES, President, 29 April 2003.

\(^\text{181}\) See, \textit{e.g.}, ICTY, Order Designating the State in which Momir Nikolić is to Serve his Prison Sentence, \textit{Prosecutor v. Nikolić}, Case No. IT-02-60/1-ES, President, 14 December 2007; ICTY, Order Designating the State in which Milomir Stakić is to Serve his Prison Sentence, 608
conviction and transfer to the State of enforcement may have had to do with the lack of enthusiasm among “willing” States to enforce life sentences. Another reason lies in the difficulties that Germany faced due to its federal structure. The Swedish investigators of UNDU calculated that sentenced persons had to wait for an average of 200 days before being transferred. Regarding such periods, the ICTY Manual on Developed Practices states that ‘the process is a diplomatic one and in most instances will take at least some months to complete. It could take more than a year before a final response is provided to the Tribunal when an 

*exequatur* procedure is required by the enforcement State’s legislation prior to enforcement of the sentence’. It also states that ‘[i]n some instances, accused with sentences of a few years only have been released from the detention unit, their sentence of imprisonment having been completed upon issuance of the appeals judgement or shortly thereafter’. 

In principle, the designation process laid down in the Practice Direction is also applicable to sentences imposed for contempt of court. Where a convicted person is already serving another sentence in a designated State, however, certain parts of the Practice Direction may be less relevant. For example, while Jokić was serving a sentence of nine years’ imprisonment in Austria, the tribunal also convicted him for contempt and sentenced him to another four months’ sentence, which was to run

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182 See, e.g., ICTY, Order Designating the State in which Stanislav Galić is to Serve His Prison Sentence, *Prosecutor v. Galić*, Case No. IT-98-29-ES, President, 3 November 2008; and ICTY, Order Designating the State in which Momir Nikolić is to Serve his Prison Sentence, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-ES, President, 14 December 2007.


184 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.11.


consecutively with the initial sentence. In this regard, the President considered it unnecessary ‘for the Registrar to have enumerated in his memorandum the factors relevant to the designation of the State in which Jokić is to serve his sentence, based upon the fact that Jokić is already currently serving his original sentence in Austria and based upon the fact that the former President of the Tribunal has already taken these factors into account when designating Austria as the enforcement State’.

When interviewed for the purpose of this research, ICTY detained persons made the following remarks about post-conviction transfer and imprisonment:

‘I don’t think about that. It is hard for me when I do. I don’t think I should even be in prison’.

‘[I would prefer to] go back to Serbia or Montenegro because my family is close and because of the costs faced by my family when they visit me’.

‘[My concerns in connection to transfer after conviction are] the distance from the place where my family lives; extremist groups in some prisons; and the possibility of ethnically motivated revenge’.

‘[I do not wish to be transferred to] East European countries – the prison system is at a low level (at least, that’s what I think), [or to] England, France and Italy – [because of the] many hard criminal groups’.

‘[I prefer to be transferred] to my own country – prison life is certainly “easier” in an environment you know (people, habits, customs and regulations)’.

‘[My main concerns are] the prison where I will serve my sentence and the language’.

ICTY, Order Designating State in which Dragan Jokić is to Serve his Sentence, Contempt Proceedings against Dragan Jokić, Case No. IT-05-88-R77.1-ES, President, 6 July 2009, par. 1-3.

Id., par. 5. Footnotes omitted.

ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.
‘[I would like to be transferred to] my own country because of family visits, expenses and the language; [or to] Russia because of the language’.

‘I don’t expect that transfer ever to happen. I don’t think about that. I am optimistic about the final decision’.

‘[My main concerns in this respect are] isolation, poor conditions, irregular visits by children, and Muslim extremists and bad people in the prison’.

‘[I do not wish to be transferred to] England, Ukraine, Estonia, Albania, Serbia, Spain, Italy and Germany because of prison conditions, overcrowding of the prisons, the presence of Islamic terrorists and isolation’.

‘I haven’t thought about it. The idea of transfer revolts me’.

‘[My main concerns in this regard are] the remoteness of the country and conditions in the prison’.

‘People who have been sentenced have the highest praise for Denmark and Sweden. That is where human rights are most respected and least violated. I have read that in Armenia, after serving the first part of their sentences, convicts are sent to monasteries to serve out the rest of their time. I think that is an excellent practice which should be introduced at this Hague Tribunal as soon as possible because there is a large number of believers for whom the only meaning of life has become faith, to live with and for the Lord. Praise him!’

ICTR

The ICTR Statute stipulates in Article 26, in relevant part, that ‘[i]mprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda’. Tanzania, the ICTR’s host State, has not indicated a willingness to accept persons convicted by the tribunal, nor is there a residual obligation on Tanzania to do so.
In Article 26, Rwanda is explicitly mentioned as a candidate to enforce the tribunal’s sentences. Whereas the co-operation of other States with the tribunal in enforcing sentences is based on voluntariness, Rwanda is under an obligation to co-operate in this regard.\textsuperscript{190} Although the Rwandan Government has consistently held that Article 26 must be understood as containing a preference for the tribunal’s sentences to be enforced in Rwanda, and has repeatedly protested against the transfer of convicted persons to such States as Mali and Benin,\textsuperscript{191} the tribunal’s President has rejected this interpretation of Article 26 and has interpreted the reference to Rwanda as non-mandatory.\textsuperscript{192}

The tribunal appears to have been primarily concerned with the question of whether potential States of enforcement, \textit{including} Rwanda, are willing and able to subscribe to the principles underlying its enforcement regime. In this regard, an ICTR official has noted that

‘Imprisonment is not just for punishing, it also serves to give a human being a second chance, to cleanse himself, to accept the process of going back to himself, reflect upon himself, upon his deeds, and recommitting himself by saying ‘yes I did this, I was punished, this punishment is a process for me to become a new person’. Is this going to be the same in Rwanda?’\textsuperscript{193}

\textsuperscript{190} See the Preamble to the Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda.


\textsuperscript{193} ICTR, interview by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
The detainees and prisoners themselves have vehemently protested against their possible transfer to Rwanda.194 According to Peter Robinson, defence counsel before the ICTR,

‘[The confined persons] are very preoccupied with that. I think everyone of them feels that if they were sent back to Rwanda they would be, if not killed, treated very badly. Also if they would be transferred to Rwanda, their families - who are in exile - cannot come and visit them, so they would be really isolated from their families. They also think that it’s the policy of the Rwandan Government to ensure that they will be never in a position to come back to power’.195

In this respect, Ben Gumpert, another defence counsel practicing before the ICTR has said that

‘I’ve been to Rwandan jails and they are horrific. I know that Rwanda has made promises to the international community about the conditions in which it would hold people which it convicted or who were transferred to Rwanda after their conviction at this Tribunal. Frankly, I don’t believe these promises can be trusted. The current Rwandan Government has shown itself to be opportunistic, dishonest, and I think that the kind of guarantees which the international community could extract from them would be insufficient. The Rwandan Government has been demonstrably obstructive to this Tribunal and I think would be obstructive to any attempt to interfere. They feel very strongly that this is their issue. You recall that in the end they voted against the setting up of the ICTR, they have overtly blackmailed the ICTR in the past by restricting the flow of witnesses, and I think if the western world tried to stick its nose into the conditions in which prisoners transferred there were being held the Rwandan Government would be extremely difficult and obstructive. I think they would say to themselves ‘given that the rest of the population has to put up with ghastly prison

195 ICTR, interview conducted by the author with Peter Robinson, defence counsel working before the ICTR, Arusha - Tanzania, 29 May 2008.
conditions because we can’t afford anything better, why should these people who are the guiltiest of all’ – as they see it – ‘get conditions of luxury?’.”

As to the position of Rwanda, a staff member of the ICTR Registry explained that

‘For them the paramount view is that this will help them with the reconciliation process. It would send a powerful message that impunity is ended; that those big guys who were in power are now in their prisons. This can have a powerful impact on the minds of their people’.

Rule 103 of the RPE provides that ‘[p]rior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda’ and that ‘[t]ransfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed’.

Notwithstanding this latter provision, some of the confined persons have spent years in the detention facility in Arusha after their final conviction, before being transferred to a State of enforcement. One of the reasons for the delay has been the need to upgrade prisons in the States that have expressed their willingness to enforce sentences of the tribunal in accordance with international standards. Another problem has been the ‘need to obtain resources to upgrade facilities and contribute to

196 ICTR, interview conducted by the author with Ben Gumpert, defence counsel working before the ICTR, Arusha - Tanzania, 26 May 2008.
197 ICTR, interview by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
198 Emphasis added.
the costs of enforcement of sentences in African countries that have agreed to assist
the Tribunal in this area but do not have the financial resources to do so’. 201 Thirdly, it
has been very difficult for the tribunal to find States that are willing, as a matter of
principle, to enforce the tribunal’s sentences. According to a staff member of the
ICTR Registry,

‘Even to get these countries sign this agreement was very difficult. Some of them
were really scared and thought that signing meant bringing these people who would
contaminate and plant the idea of genocide in the minds of their prisoners into their
prisons. Some were saying ‘what a shame to come here and ask us to accept those
killers. You do not give them a penalty which is severe enough. That is why they are
doing it. We don’t want them. How comes that the U.N. feels pity for these people?’
Others said that ‘if we agree, Rwanda will say that we are in favour of the
genocidaires and may create a situation as in the Congo.’ You know, it was highly
political. One government asked us to go to the parliament ourselves, to the MP’s, to
sell the idea. We had to prepare a note for a Minister of Justice for his presentation.
They would send the presentation to us and we revised it. The MP’s would say ‘who
is going to give the detainees food? Does it fall within our budget? With our own
prisoners, we don’t spend a large amount of money on this. You want these people to
eat three times? Our own prisoners eat only once a day. It is the family that brings the
food. So why are these prisoners not with their families in Rwanda? Why do you
want them to come here? Send them to Rwanda.’ So we had to negotiate with the
majority parties and lobby and get them around to vote for the ratification. It is not
sufficient to get just the government, but one also needs to convince the MP’s to
support the project. So we had to see the President, Ministers, MP’s and we had to
convince them by saying ‘the U.N. is very much into respect for human rights and
rule of law. You can attract attention which will help you to improve good
governance and improve detention facilities’. And one could even hear in some of the

201 ICTY, Report of the International Criminal Tribunal for the Prosecution of Persons
Responsible for Genocide and Other Serious Violations of International Humanitarian Law
Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and
Other Such Violations Committed in the Territory of Neighbouring States between 1 January
Hirondelle News Agency Report of 29 October 2003 ‘ICTR/Prisons – ICTR to Fund
Renovation of Convicted Persons Prison’. 615
parliamentary debates such remarks saying that the U.N. is engaged in lobbying to mobilise resources for those countries, for “certain things to be a combined”.

Another possible explanation for such delay is that the tribunal may have wished to keep the number of prisoner transfers to an absolute minimum in order not to endanger co-operation with Rwanda on matters relating to the criminal proceedings. It has already been mentioned that the result of all this has been the continued confinement of convicted persons in the U.N. remand centre in Tanzania, which was never meant to serve as a prison. Hence, the criticism raised by the Swedish investigators of UNDU directed at the long periods that convicted persons have had to stay at UNDU before being transferred to a State of enforcement is also very applicable to the situation at the ICTR.

The President, in consultation with the Bureau, Registrar and Prosecutor, and pursuant to Rule 19(B) of the RPE, has issued a ‘Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment’, which consolidated earlier practice. The designation procedure as laid down in the Practice Direction strongly resembles that of the ICTY. Paragraph 2 of the Practice Direction provides that, only after a sentence has become final, shall the Registrar ‘engage in a communication process with any of the States that have declared their willingness to accept convicted persons and have signed an agreement with the Tribunal to that effect pursuant to Article 26 of the Statute’. In this process, the Registrar asks the State or States concerned to indicate, before a certain date, whether they are ready to receive the convicted person. Upon receiving a positive response, the Registrar must provide the State concerned with ‘i) a certified copy of the judgement; ii) a statement indicating how much of the sentence has already been served, including information on pre-trial detention; iii) when appropriate, any medical or psychological reports on the convicted person, any recommendation for his/her further treatment in the receiving State, and any other

\(^{202}\) ICTR, interview by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.

\(^{203}\) See ICTR, Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (as revised and amended on 23 September 2008); ICTR, Decision on the Enforcement of Sentence. *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-A26, President, 13 February 2008, par. 7.
information relevant to the enforcement of the sentence; and iv) certified copies of
identification papers of the convicted person in the Tribunal’s possession’.204

On the basis of the preliminary inquiry, the Registrar will prepare a confidential
memorandum for the President that - besides providing a list of potential States of
enforcement – contains personal information of the convicted person, which may
relate to his marital status and family relations (including their place of residence and,
if appropriate, their financial resources to visit the convicted person), his language
skills, as well as information on whether the convicted person is expected to serve as a
witness in any of the tribunal’s future proceedings, on the general conditions of
imprisonment in the States in question, on the rules governing security and liberty in
the ‘willing and ready’ State(s) and any other considerations that are related to the
case.205

Out of the list of States drawn up by the Registrar, and on the basis of the information
provided and any other inquiry he or she deems necessary, the President then chooses
the State in which a particular sentence will be enforced.206 The ICTR Practice
Direction instructs the President to take into account ‘the desirability of serving
sentences in States that are within close proximity or accessibility of the relatives of
the convicted person’. 207 An ICTR spokesperson has reportedly said that a basic
criterion for designating States has been that any sentence of imprisonment may not
be aggravated by its conditions.208 In Ruggiu, the President emphasised the
significance of and the applicability of the SMR, the U.N. Body of Principles and the

204 Paragraph 2(b) of the Practice Direction on the Procedure for Designation of the State in
which a Convicted Person is to Serve his/her Sentence of Imprisonment (as revised and
amended on 23 September 2008). See, also, the various enforcement agreements, e.g. Article
2(2) of the Agreement between the Government of the Republic of Mali and the United

205 Paragraph 3 of the Practice Direction on the Procedure for Designation of the State in
which a Convicted Person is to Serve his/her Sentence of Imprisonment (as revised and
amended on 23 September 2008); ICTR, Decision on the Enforcement of Sentence,

206 Paragraph 4 of the Practice Direction on the Procedure for Designation of the State in
which a Convicted Person is to Serve his/her Sentence of Imprisonment (as revised and
amended on 23 September 2008).

207 Ibid.

208 See Jurist Legal News & Research, The UN-Rwanda Prisoner Agreement: The ICTR
(last visited by the author on 10 August 2011).
U.N. Basic Principles to the enforcement of sentences. Another principle that guides the President’s determination is that of individualisation, i.e. the taking into account of the individual circumstances of the convicted person. For example, in *Ruggiu*, the President considered the nationalities of the convicted person (Belgian and Italian), his religion, nutritional state and particular medical circumstances, which required ongoing medical care.

In Chapter 3, it was shown that the ICTR authorities tend to automatically segregate detained accused who enter a guilty plea for safety reasons. Surprisingly though, safety concerns are not mentioned in the Practice Direction as a criterion relevant to the allocation of prisoners. In this regard, complaints by Ruggiu of ‘several incidents of hostile reactions towards him on the part of other inmates’ may very well have constituted an additional ground for transferring him to Italy instead of Mali or Benin, together with the other convicts.

A principle which appears to have been largely overlooked in the designation process is that of social rehabilitation. In this regard, a senior staff member of the ICTR Registry has said that

> ‘Basically, all the agreements that we sign provide that enforcement is done in accordance with the national law of the enforcing State. Most of the national laws of the enforcing States provide for rehabilitation - they provide them with the opportunity to work on their rehabilitation while in prison, to be prepared for a new life when they come out. Certain prisons do not make such an offer, they don’t have the resources to make this offer; others do. Therefore, I have to confess, when you serve your sentence in Europe, you have a better chance, to get retrained, to get retooled, to get family visits, to get repose, to work in the library or whatever - it’s well organised. But prisons in Africa rarely apply the same level of standards. So this

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210 *Id.*, par. 12.
211 *Id.*, par. 13.
is something which depends on the development of the detention facilities in each country’. 213

Nevertheless, when asked about the philosophy underlying the tribunal’s enforcement regime, the same staff member explained that

‘We share the philosophy that detention is not meant to destroy. It is meant to provide you with a safe haven, to give you time to reflect on your past deeds, to give you sufficient time to recommit yourself, to reeducate yourself, to a new life and to learn to allow yourself to go through a retooling process, a relearning process to make you a better person. By so doing you are paying your dues to the society that you offended. That is the philosophy behind it. We don’t want prison to serve as a zoo, where one is exposed as a trophy. We don’t want prison conditions to be so harsh like in some countries where one doesn’t see the light and is put in complete isolation’. 214

According to the Practice Direction, it is up to the President to decide whether or not to consult the Sentencing Chamber, its Presiding Judge or the Registrar. Some Sentencing Chambers have formulated specific demands in respect of the conditions of imprisonment. In Serugendo, for instance, the Trial Chamber held that ‘it is clear that Serugendo is not in a position to serve a sentence under normal prison conditions. He has recently been diagnosed with a terminal illness, has very fragile health and a poor prognosis. The Tribunal must continue to ensure that he receives adequate medical treatment, including hospitalization to the extent needed’. 215 The Ruggiu designation order appears to be the only designation order to have been made public; it does not say whether either the Sentencing Chamber or its Presiding Judge was consulted.

Although not mentioned in the Practice Direction, according to a staff member of the Office of the Registrar, the President may also consult the Commanding Officer in order to obtain information on the convicted person’s behaviour and his capacity to

213 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
214 Ibid.
adjust. As a result, detainees and prisoners may be reluctant to exercise such procedural rights as the right to complain or to appeal disciplinary sanctions imposed by the Commanding Officer, since such conduct may affect future decisions on, *inter alia*, the designation of States of enforcement.

The President may also seek the views of the Prosecution and/or the convicted person. The Prosecution’s opinion may be relevant where there is a need for the convicted person to appear as a witness in future proceedings before the tribunal, or where arrangements have been made for his (or his relatives’) relocation as part of a witness protection program. The *Ruggiu* designation order does not say whether or not the convicted person was asked for his views and, if so, whether these were taken into consideration.

According to a senior staff member of the ICTR Registry, the sentenced person may write to the President, or may say a few words during sentencing, but is not actually heard by the President before the latter makes a designation determination.

In a letter to the President, counsel for Kambanda raised his client’s concerns regarding his future place of imprisonment, stating that ‘[i]n view of a fair treatment and a balanced decision-making on the place of detention it is desirable and in the interests of justice that Kambanda and his counsel shall be heard on this matter before a definite decision is made’. Defence counsel explained that ‘for safety-reasons Kambanda’s wife and children live on a continent far from Africa and that visiting rights will be illusionary if Kambanda is detained in Africa’. However, it remains unknown whether Kambanda or his Defence counsel were indeed heard on the matter and whether the latter consideration was taken into account.

According to Peter Robinson,

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216 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
217 ICTR, interview conducted by the author with UNDF authorities, Arusha - Tanzania, May 2008.
218 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
219 *Ibid*.
220 ICTR, Letter from Defence Counsel to the President of the ICTR: Concerning Mr. Jean Kambanda’s place of detention, 10 October 2001.
221 *Ibid*.
222 Kambanda was eventually transferred to Mali.
‘I think [The convicted persons] prefer to go close to where their families are. My client has family in France and Belgium so he prefers to be serving his sentence there. Others may have families in other African countries, so they may prefer to be serving their sentences in those countries. I really think it’s just the connection with their family. Especially if you’re sentenced to life, you’d like to be close to your family. If my client’s family was in Africa, I think he would prefer to be in Africa’.223

The detained and convicted persons’ main concerns appear to be the availability of facilities for them to work on review proceedings and for them to be close to their families. Detainees made the following remarks on their transfer and post-transfer imprisonment:

‘I am worried about being transferred to a country where I can be able to work on my case in order to prove my innocence through the review process. A transfer to Rwanda under the Kagame regime would nullify any possibility of getting my case reviewed in case I am not physically eliminated. I am also worried about being in touch with my family and relatives’.

‘My concerns are the absence of rules relating to reconsideration and revision of judgment, and communication with family members who are dispersed over all continents’.

‘I am waiting for a transfer because I have been convicted. I don’t know where the President will transfer me. I don’t know if he will send me near my two children who have got the Dutch nationality or near my wife and three children who have got the Belgium nationality. I wrote a letter to the President requesting to be transferred near the Netherlands and Belgium but these countries have not signed an agreement with the ICTR for the transfer of prisoners. I also want my judgment to be reviewed but have a problem concerning legal assistance’.

‘My wife and my four children live in France. They are all naturalised French citizens. I would like to be not far from them. Moreover, I am convinced that in this country the review of my unjust judgment will be possible’.

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223 ICTR, interview conducted by the author with Peter Robinson, defence counsel working before the ICTR, Arusha - Tanzania, 29 May 2008.
‘I am worried about being transferred to Rwanda where ICTR detainees are perceived as enemies of the regime and where the rights of detainees are not respected. I am further concerned about whether the President will take into account the proximity of my relatives and about being transferred to a country where family visits may then continue to be rare. A further concern is the current ICTR policy that does not allow for grace and commutation of sentence. Finally, I am worried about the absence of rules governing review of judgment after the Tribunal is closed’.

‘Je suis une personne déjà condamnée. Ma préoccupation est l’endroit où je devrai purger ma peine. J’ai déjà fait la demande d’être incarcéré dans un pays relativement proche de l’endroit où vit ma famille. Celle-ci est installée dans un pays européen. De plus, je suis préoccupé par la révision du jugement en appel. Cependant, tout est mis en œuvre pour m’empêcher de procéder à cette révision car le TPIR refuse de me commettre un avocat ad hoc et il n’autorise même pas que je puisse téléphoner à ceux qui acceptent de me défendre pro bono, sauf si je leur téléphone pendant seulement cinq minutes comme des amis!’

‘My concerns are: to be transferred close to my family, to be given a sign of hope, to be given counsel to assist me in review proceedings and to be treated with dignity’. 224

Convicted persons must be assumed not to have the right to appeal the President’s designation decision. In respect of an appeal against a decision by the President on early release, the Appeals Chamber in Rutaganira held that it could not find any legal basis for consideration of the appeal. It stated that ‘Article 27 of the Statute of the Tribunal places the ultimate decision on pardon and commutation of sentences in the exclusive discretion of the President of the Tribunal upon consultation with the Judges of the Tribunal. The Tribunal’s Statute and Rules of Procedure and Evidence do not provide for appellate review of such a decision. Finally, Article 10 of the Tribunal’s Practice Direction concerning the appropriate procedure for determination of applications for pardon, commutation, or early release of persons convicted by the

224 ICTR, interviews conducted by the author with ICTR detainees, Arusha - Tanzania, May 2008.
Tribunal makes clear that the President’s decision is final and not subject to appeal’. 225 The same arguments apply to the President’s designation orders.

As stated above, before designation, the President must notify the Government of Rwanda. 226

The President then transmits the designation decision to the Registrar and may determine that it will not be made public. 227 The Registrar must then officially request the State concerned to accept the convicted person. The request must be signed by both the President and the Registrar. 228 The enforcement agreements stipulate that the domestic authorities must promptly decide upon the request and inform the Registrar of the decision. 229

Upon the designated State’s acceptance of the request in accordance with its national law, the Registrar will notify the President and, if possible, the Sentencing Chamber or its Presiding Judge. The Registrar must communicate the contents of the agreement, as well as any other relevant information, to the convicted person. 230 Thereafter, the Registrar will make the appropriate arrangements for transfer. The transfer will be carried out in ‘secrecy’ and ‘tight security’. 231

225 ICTR, Decision on Appeal of a Decision of the President on Early Release, Prosecutor v. Rutaganira, Case No. ICTR-95-IC-AR, A. Ch., 24 August 2006, par. 3.
226 Rule 103(A) of the RPE; ICTR, Decision on the Enforcement of Sentence, Prosecutor v. Ruggiu, Case No. ICTR-97-32-A26, President, 13 February 2008, par. 6(iv). This requirement may be seen as an indication of the political sensitivities involved.
227 Paragraph 5 of the Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment [as revised and amended on 23 September 2008].
228 See the various enforcement agreements, e.g., Article 2(1) of the Agreement between the United Nations and the Government of Sweden on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda.
230 Paragraph 7 of the Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment [as revised and amended on 23 September 2008]. See, also, the various enforcement agreements, e.g., Article 4 of the Agreement between the Government of the Republic of Benin and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda.
The costs for transfer both to and from the designated State are borne by the tribunal.\textsuperscript{232} As to the costs incurred in the enforcement of sentences, the arrangements laid down in the ICTR’s enforcement agreements allow the ICTR to give direct or indirect financial assistance to (African) enforcement States.\textsuperscript{233} Finally, Paragraph 8 of the Practice Direction provides that, if the designated State declines the official request, the matter will be referred back to the President who will designate another State from the list of States included in the Registrar’s confidential memorandum.

The tribunal has had great difficulty in finding States that are willing and able to enforce its sentences.\textsuperscript{234} Convicted persons have been transferred to a rather limited number of States, in groups of up to nine persons, which raises doubts as to whether the principle of individualisation was duly respected.\textsuperscript{235} Due to the insufficient number of States that the President may choose from, it may even be difficult to speak of any real choice in the designation process.

\textbf{SCSL}

According to Article 22(1) of the SCSL Statute, ‘[i]mprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of

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\textsuperscript{232} See the various enforcement agreements, \textit{e.g.}, Article 11(1)(a) of the Agreement between the Kingdom of Swaziland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda.
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the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States. In June 2008, the Government of Sierra Leone informed the Special Court that it was ‘not in a position’ and ‘not willing’ to accept convicted persons. It informed the Registrar that the ‘sustenance of peace both in Sierra Leone and in the sub-region as well as the weakness in institutional arrangements in Sierra Leone preclude the enforcement of sentences imposed by the Special Court in Sierra Leone’.236

According to Rule 103(B) of the RPE, it is the President who determines the place of imprisonment for each convicted person. Pursuant to Rule 19(B) of the RPE, the President has established a designation procedure, which can be found in the Practice Direction for Designation of State for Enforcement of Sentence, closely resembling the ICTR’s Practice Direction on the matter.

After sentencing, the Registrar engages in a communication process with any of the States that have declared their willingness to accept convicted persons and have concluded an agreement with the Court on the matter.237 The State in question must, before a certain date, indicate whether it is ready to accept a convicted person. The Registrar must then provide that State with more details concerning the detained person in question. Furthermore, the Registrar must send the requested State ‘(i) a certified copy of the judgment; (ii) a statement indicating how much of the sentence has already been served, including information on pre-trial detention; (iii) when appropriate, any medical or psychological reports on the convicted person, any recommendation for his further treatment in the receiving State, and any other information relevant to the enforcement of the sentence; and (iv) certified copies of identification papers of the convicted person in the Special Court’s possession’.238

On the basis of the willingness and readiness on the part of the State concerned, the Registrar will draw up a confidential memorandum, which will be sent to the

236 SCSL, Order Designating State in which Issa Sesay is to Serve his Sentence, Prosecutor v. Sesay, Case No. SCSL-04-15-ES, President, 26 October 2009. See, also, SCSL, Seventh Annual Report of the President of the Special Court for Sierra Leone, June 2009 to May 2010, p. 9.

237 Article 2 of the Practice Direction for Designation of State for Enforcement.

238 Id., Article 3.
President.\textsuperscript{239} Besides a list of candidate States of enforcement, the confidential memorandum contains information on, \textit{inter alia}, conditions of imprisonment and rules governing security and liberty in the ‘willing and ready’ States, as well as personal information of the convicted person – \textit{e.g.} his marital status, family relations (including their place of residence and, if appropriate, their financial resources to visit the convicted person), the convicted person’s religious practices, his vocational and educational training, language skills and whether he is expected to appear in any future proceedings before the Court or to be relocated as a witness.\textsuperscript{240} It is noteworthy that the factors of vocational or educational training and that of religious practices do not appear in the ICTY’s or ICTR’s Practice Direction.

On the basis of the information provided in the confidential memorandum and any other inquiry he or she wishes to make, the President will determine the State of enforcement. Article 5 of the Practice Direction states that the President must take into account the ‘desirability of serving sentences in States that are within close proximity or accessibility of the relatives of the convicted person’. The various designation orders show that the sentenced person’s family situation is indeed taken into account in the designation process.\textsuperscript{241} Since Rwanda is the only African State that has concluded an enforcement agreement with the Special Court, the designation of Rwanda as the State in which the sentences of all the persons convicted thus far will be enforced appears to be at least \textit{de jure} in accordance with Article 5, notwithstanding the fact that it would be absurd, in this respect, to speak of the ‘close proximity to’ or ‘accessibility’ of the prisoners’ relatives.

The President may consult the Sentencing Chamber or its Presiding Judge and the Registrar. He or she may further request submissions from the convicted person and the Prosecutor’s Office. In respect of the convicted persons’ participation in the designation procedure, the Registrar’s legal adviser has said that the Registrar

‘consulted the prisoners on a number of occasions and provided them with an opportunity to put their request(s) in writing, for onward transmission to the

\textsuperscript{239} SCSL, Order Designating State in which Morris Kallon is to Serve his Sentence, \textit{Prosecutor v. Kallon}, Case No. SCSL-04-15-ES, President, 26 October 2009.

\textsuperscript{240} Article 4 of the Practice Direction for Designation of State for Enforcement.

\textsuperscript{241} See, \textit{e.g.}, SCSL, Order Designating State in which Augustine Gbao is to Serve his Sentence, \textit{Prosecutor v. Gbao}, Case No. SCSL-04-15-ES, President, 26 October 2009.
President (...) Subsequent to that, the Registrar met with the prisoners on several occasions, after their respective appeals were completed, to inform them that they might not be able to stay in Sierra Leone to serve their sentences and that the Registrar was in the process of negotiating with several States which would be willing and able to receive the convicted persons for service of sentences. The President was therefore informed of the prisoners' wishes and made her final decision taking their request, as well as a number of other important factors, into account.242

The convicted persons have been quite concerned about their transfer. When interviewed for the purpose of this research, one convicted person said that

‘All of us here have family members who wish to visit us after our transfer, but who do not have the money to do so. I myself come from a very poor family. The Statute says that after conviction, persons will serve their sentence in Sierra Leone. We do not know why this has changed. When they bring me to Rwanda, they will take me away from my loved ones’.243

He then stated that

‘We have asked what arrangements will be made for our children to visit us in Rwanda. The answer was that no provision had been made for that yet, but that there would be made arrangements for our family members to be able to visit us once a year. Now just two weeks ago, the Outreach said on the radio that the Court has no money for family members to be paying visits to the prisoners. You know, if I have to be punished that’s one thing, but to keep my children away from me that really frustrates me and it may also frustrate my family members’.244

In a similar vein, another detained person said that

242 SCSL, interview conducted by the author with the SCSL Acting Registrar and Principal Defender, Freetown - Sierra Leone, 23 October 2009.
243 SCSL, interview conducted by the author with a SCSL detainee, Freetown - Sierra Leone, October 2009.
244 Ibid.
‘My relatives visit me here, but some of them are refused entrance. More worrisome will be the situation after our transfer to Rwanda; how will our family members be able to visit us there?’

The same detainee also indicated that he was concerned about security in Rwanda and language barriers.

When interviewed for the purpose of this research, the authorities of the SCSL Detention Facility said in relation to the wishes of detained persons that

‘None of the prisoners want to go to an African country. They themselves recognise the underdevelopment of these countries. They would gladly go to a European prison’.

However, one of the convicted persons stated that

‘Honestly, I would prefer to serve my sentence in a Sierra Leonean prison. Most of our colleagues who were arrested in Freetown and who were kept in a national prison from 2000 to 2006 have already been released. And even with the prison conditions in Sierra Leone, at least I would have access to my family members; they could bring food for me. I would prefer that instead of being sent to Rwanda. I have fear of not seeing my children again when I’ll be sent to Rwanda. Will taking us to Rwanda bring about peace and reconciliation in Sierra Leone? I am a Sierra Leonean so I want to stay here’.

Only the Designation Orders in the RUF case (Sesay, Kallon and Gbao) have been made public. The Designation Orders against the other convicted persons issued earlier in 2009 remain confidential. It is therefore difficult to assess how much weight the President gives to the principle of individualisation.

245 Ibid.
246 SCSL, interview conducted by the author with the SCSL Chief of Detention, Freetown - Sierra Leone, 19 October 2009.
247 SCSL, interview conducted by the author with a SCSL detainee, Freetown - Sierra Leone, October 2009.
The President submits his or her designation decision to the Registrar and may decide that it shall not be made public.\textsuperscript{248} As noted, in the past the President has occasionally instructed the Registrar to lift the orders’ confidential status, but only after the completion of the convicted persons’ transfer to Rwanda.\textsuperscript{249} Thereafter, the Registrar will, in accordance with the enforcement agreement in question and with the President’s approval, officially request the designated State to enforce an individual convicted person’s sentence.\textsuperscript{250}

Besides the information provided to the States concerned in the earlier stages of the communication process, the enforcement agreement with the United Kingdom also obliges the Registrar to provide the requested State with ‘details of the offences to which the sentence of imprisonment relates’,\textsuperscript{251} as well as information on ‘any known family or other ties with the United Kingdom [of the convicted person] or any other reason for making the request’.\textsuperscript{252}

According to the various enforcement agreements, the requested State must either promptly decide upon the Court’s official request,\textsuperscript{253} or at least promptly inform the Court of the decision taken on the request.\textsuperscript{254} If the designated State accepts the official request, the Registrar will notify the President thereof and, where possible, the Sentencing Chamber or its Presiding Judge. Further, he or she must inform the

\textsuperscript{248} Article 6 of the Practice Direction for Designation of State for Enforcement.
\textsuperscript{249} See, \textit{e.g.}, SCSL, Order Designating State in which Augustine Gbao is to Serve his Sentence, \textit{Prosecutor v. Gbao}, Case No. SCSL-04-15-ES, President, 26 October 2009.
\textsuperscript{250} Article 7 of the Practice Direction for Designation of State for Enforcement. See, also, the various enforcement agreements, \textit{e.g.}, Article 2(1) of the Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone.
\textsuperscript{251} Article 2(3)(b) of the Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone.
\textsuperscript{252} \textit{Id.}, Article 2(3)(e).
\textsuperscript{253} Article 2(4) of the Agreement between the Special Court for Sierra Leone and the Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone; Article 2(4) of the Agreement between the Special Court for Sierra Leone and the Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone; Article 2(4) of the Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone.
\textsuperscript{254} Article 2(4) of the Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone.
The Registrar must then make all of the appropriate arrangements for the convicted and sentenced person’s transfer. According to Rule 103(C) of the RPE, the transfer of the convicted person to the place of imprisonment must be effectuated as soon as possible after his conviction has become final.

In *Sesay et al.*, Defence counsel for Sesay submitted an urgent application to the Appeals Chamber, in which it requested the judicial review of the Registrar’s decision to transfer the convicted person within the next seven days to Rwanda and to temporarily stay the transfer for a period of one month. The Appeals Chamber dismissed the Motion, stating that it should have been filed before the President pursuant to Rule 19(C) of the RPE. Either the President never rendered a decision on the Motion, or his decision was never made public, since it does not appear in the Court’s case-law database. In any case, the application by counsel for Sesay is public and provides some interesting insights in the particularities of the transfer process, some of which are addressed here.

Defence counsel’s criticisms were not so much directed at the designation of Rwanda as the State in which Sesay’s prison sentence was to be enforced, as at the limited time that Sesay was given to personally prepare for his transfer. According to the Defence, this amounted to cruel and inhumane treatment. Before the final judgment was handed down by the Appeals Chamber on 26 October 2009, the Registry had

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255 See the various enforcement agreements, e.g., Article 4 of the Agreement between the Special Court for Sierra Leone and the Government of Sweden on the Enforcement of Sentences of the Special Court for Sierra Leone.

256 See the various enforcement agreements, e.g., Article 4 of the Agreement between the Special Court for Sierra Leone and the Government of Finland on the Enforcement of Sentences of the Special Court for Sierra Leone.

257 See, also, Article 44(2) of the Agreement between the Kingdom of the Netherlands and the United Nations concerning the Headquarters of the Special Tribunal for Lebanon, which stipulates that ‘[t]he President shall begin the process of designating a State of enforcement as soon as possible, based on the list referred to above, *with a view to the immediate transfer of the convicted person* for the purpose of serving a sentence of imprisonment imposed by the Tribunal’. Emphasis added.


refused to provide Sesay’s counsel with information on the conditions of detention in the State in which Sesay’s prison sentence would in all likelihood be enforced upon conviction. According to Defence counsel, ‘[o]f particular concern to Mr. Sesay was the ability to see his family, including his two young children, while he is held in prison overseas’. The information requested was only given to Sesay after he had been convicted by the Appeals Chamber, when he was told that his transfer would take place within seven days. Although the Registrar did try to assure the convicted persons concerned that the terms of enforcement would be in alignment with international standards, such standards do not offer much guidance on the issues that are of particular concern to internationally confined persons. Only a day after the Appeals Judgement was delivered in Sesay et al., were the sentenced persons informed that ‘discussions are ongoing concerning the type of financial assistance that will be made available to at least one family member to travel to Rwanda once a year, for about a week’. The Defence concluded that, at that time, it was ‘still unclear whether the Court [would] provide funding for travel, visa and accommodation’, and held that ‘lack of provision of such assistance would render any promise of family visits illusory’ in light of the financial resources of Sesay’s family. It submitted that it could not be considered appropriate ‘to remove the convicted person from his country of birth, culture, family, friends and all support structures for the remainder of his life without providing a reasonable period for both practical and emotional arrangements to be made concerning that eventuality’ and complained that the Registrar’s decision sought ‘to deprive Sesay of any meaningful opportunity to bid farewell to most of his family, friends or acquaintances’. The Defence explained that Sesay was still attempting to arrange the legal adoption of his children by his sister and to ‘effect arrangements to

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261 Id., par. 15.
262 Id., par. 16; See, also, the Letter from the Deputy Chief of Detention and the Chief of Detention to the prisoners concerning ‘Transfer Logistics Notice’ dated 27 October 2009.
264 See the Acting Registrar’s letter to Wayne Jordash, lead counsel for Sesay, dated 27 October 2009, Ref/REG/573/2009/SG.
265 SCSL, Urgent Application to the President of the Court under Rule 19(C) for Judicial Review of the Decision of the Acting Registrar in relation to the Enforcement of Sentence and to Temporarily Stay the Transfer of Detainees to a Designated Enforcement State, Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, President, 30 October 2009, par. 15.
266 Id., par. 24.
allow his infirm and indigent father to visit him in Freetown’. The Defence alleged that, if transfer would occur within seven days, his children would be left without a legal guardian and, since his father was too ill to travel, Sesay would be deprived of a reasonable opportunity to see his father again.\textsuperscript{267} It stressed that to move a convicted person ‘to another country to serve a sentence which is likely to run for the rest of [his] natural life while affording less than 7 days’ notice is clearly inhumane, unfair, irrational and an abuse of process of the Court’.\textsuperscript{268} Nevertheless, on 31 October 2009, all of the convicted and sentenced persons, including Sesay, were transferred to Rwanda.\textsuperscript{269} As stated above, it remains unclear whether the President issued a decision on the Defence’s Urgent Application, or whether it was simply not made public.

There may be an inclination to dismiss the Defence’s complaints, as set out above, by arguing that persons such as Sesay had already spent years in confinement before being notified of their imminent transfer to a far-away country. During those years, they were well aware of the fact that, upon conviction, their transfer would soon follow. On the other hand, it is also true that the precise conditions of imprisonment and the arrangements for visits by relatives and financial support were unknown to the inmates until just a few days before their transfer to Rwanda. When it was eventually communicated to them – days before their transfer – that arrangements for financial support were still uncertain, they were left with insufficient time to make preparations and to properly say good-bye to their family and friends. It is, therefore, fair to say that the Special Court was rather slow either in securing the aforementioned financial arrangements, or in communicating to the inmates that those arrangements were uncertain and should not be relied upon.

The costs for transferring prisoners – both to and from the Court – are borne by the Court.\textsuperscript{270} For the transfer of the Court’s convicts to Rwanda, the Court cooperated with the United Nations Mission in the Congo. For this purpose, a military

\textsuperscript{267} Id., par. 25-26.
\textsuperscript{268} Id., par. 29.
\textsuperscript{269} SCSL Outreach and Public Affairs Office, Press Release, 31 October 2009.
\textsuperscript{270} See the various enforcement agreements, \textit{e.g.}, Article 11 of the Agreement between the Special Court for Sierra Leone and the Government of the United Kingdom and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone.
air transport plane and helicopter were placed at the Court’s disposal.\textsuperscript{271} As to the costs incurred by imprisonment, the enforcement agreements with Sweden, Finland and the United Kingdom stipulate that these are borne by the State of enforcement.\textsuperscript{272} The content of the enforcement agreement with Rwanda is different, in that it stipulates that the Special Court bears the expenses for ‘upkeep and maintenance costs (related to meals, sanitation and communications) as well as incidentals and special medical care which may entail extraordinary costs’.\textsuperscript{273}

Finally, Article 9 of the Practice Direction stipulates that if the State concerned declines the request, the matter will be referred back to the President, who will designate another State.

According to the Secretary-General, in his Report on the establishment of the SCSL, ‘[a]lthough an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State’.\textsuperscript{274} Both the SCSL and the ICTR appear to prefer for their sentences to be enforced on the African continent.\textsuperscript{275} Because no other African State than Rwanda has expressed its willingness to accept persons convicted by the SCSL, however, the President appears to have little choice in this regard. As such, it may appear pointless to allow the convicted persons to present their views on the matter during the designation process.

\textsuperscript{271} SCSL, Seventh Annual Report of the President of the Special Court for Sierra Leone, June 2009 to May 2010, p. 10.
\textsuperscript{272} The enforcement agreements with Sweden and Finland further provide in respectively Article 11(1)(b) and Article 12(1)(b) that the Court pays for the repatriation of a convicted person in case of his or her death. The Court’s agreement with Rwanda states in Article 11(b) that ‘in case of death, the cost of transportation and return of the body of the deceased to the family members of the deceased, for burial, or if and when necessary, the costs of the burial by the Rwanda authorities, in the event that the family of the deceased does not take possession of the body’.
\textsuperscript{273} Article 11(1)(c) of the Amended Agreement between the Special Court for Sierra Leone and the Government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone.
According to Article 103(1) of the ICC Statute, a sentence of imprisonment ‘shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons’. All of the Court’s functions under Part X of the Statute dealing with matters of enforcement are exercised by the Presidency. This has been justified by the need to treat all prisoners in a uniform manner.  

A list of ‘willing States’ is maintained by the Registrar. It is possible for States not party to the Rome Statute to be included on the list. It is the Presidency, however, that decides on whether or not to include a State in the list. The Presidency may, for instance, not agree with particular conditions that a State has attached to its acceptance of prisoners pursuant to Article 103(1)(b). The possibility of attaching conditions was included in order to offer States more flexibility and to make it more attractive for them to co-operate with the Court. Before taking a decision, the Presidency may, in this regard, request the State concerned for additional information.

Article 50(1) of the Headquarters Agreement states that, where the time remaining to be served pursuant to a Court’s sentence is less than six months, the Court will first consider whether that sentence may be enforced in the Court’s Detention Centre. It is

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276 Rule 199 of the RPE. See, also, Regulation 113 of the ICC RoC. See, further, Irene Gartner, supra, footnote 69, at 434.
277 Rule 200(1) of the RPE.
279 Kimberly Prost, supra, footnote 69, at 675; Claus Kress and Göran Sluiter, supra, footnote 84, at 1788.
280 Rule 200(2) of the RPE; Gerard A.M. Strijards, supra, footnote 69, at 1654. According to Strijards, ‘the proponents of this conditional acceptance referred to conditions linked with typical prerogatives of the Head of State of the administering party, like the right to pardon, abolition and amnesty’. Clark states that these conditions will most likely concern matters relating to the duration of imprisonment; see Roger S. Clark, supra, footnote 278, at 1662. Sluiter suggests that States may wish to use the provision in order to make co-operation conditional upon application of the exequatur procedure; Göran Sluiter, supra, footnote 95, at 168. See, further, Jan Christoph Nemitz, Execution of Sanctions Imposed by Supranational Criminal Tribunals, in: Roelof Haveman and Olaoluwa Olusanya (eds.), Sentencing and Sanctioning in Supranational Criminal Law, Intersentia, Antwerp 2006, p. 125-144, at 143-144.
slightly odd that this provision has been included in the Headquarters Agreement, which governs the relationship between the Court and the host State. During negotiations on the ICC Rules, however, it was unsuccessfully proposed that a rule should be included similar to the one found in extradition treaties, to the effect that ‘no transfer would take place if less than six months of the sentence remained to be served’. Some delegations were of the opinion that situations could arise where transfer would be desirable, notwithstanding the short time remaining to be served. This explains why the provision was included in the Headquarters Agreement.

When making the designation decision, the Presidency must take into account ‘(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence; (b) The application of widely accepted international treaty standards governing the treatment of prisoners; (c) The views of the sentenced person; (d) The nationality of the sentenced person; (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement’. As noted by Kress and Sluiter, these criteria each carry different weight. Conformity of a candidate-State of enforcement’s prison system with international standards, for example, must be considered obligatory, which cannot be said of the criterion listed under (d). According to Rule 201 of the RPE, the principle of equitable distribution includes ‘(a) The principle of equitable geographical distribution; (b) The need to afford each State on the list an opportunity to receive sentenced persons; (c) The number of sentenced persons already received by that State and other States of enforcement; (d) Any other relevant factors’.

The requirement of respect for ‘widely accepted international treaty standards governing the treatment of prisoners’ can also be found in Article 106 of the Statute, both in relation to the supervision of the enforcement of sentences and the conditions of imprisonment. Pursuant to Article 103(3), the Presidency must take these standards into account when determining the State of enforcement. As to their content, several scholars are of the view that they do not reflect such international soft-law standards

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281 Kimberly Prost, supra, footnote 69, at 680.
282 Ibid.
283 Article 103(3) of the ICC Statute.
284 Claus Kress and Göran Sluiter, supra, footnote 84, at 1788.
as the SMR, the U.N. Body of Principles and the U.N. Basic Principles. According to Strijards, reference to the SMR was objected to during negotiations on the Rome Statute ‘on the grounds that this would set the enforcement threshold so high, that only a very select club of penitentiary paragons would be fit to be designated for forthcoming decades’. Such soft-law standards would simply be too advanced for their application to be made compulsory. Clark states that it was his impression that several of the delegates were not sympathetic to international customary law. Since, in his words, the SMR are ‘widely regarded as reflective of customary law’, this may also explain the dismissal of the reference to the SMR.

Nevertheless, such human rights supervisory bodies as the Human Rights Committee and the European Court of Human Rights have interpreted the treaty obligations under the relevant provisions in the ICCPR and the ECHR with reference to such soft-law documents. Such interpretations provide authoritative guidance to the ICC when interpreting the applicable law pursuant to Article 21(3) of the Statute. Furthermore, if the Court does not abide by the jurisprudence of the aforementioned human rights supervisory bodies, it will place the Netherlands as host State in a rather awkward position. The Netherlands is bound by the treaty obligations as interpreted by these human rights supervisory bodies. In this respect, Sluiter notes that the Dutch Government has explicitly reserved ‘the right to review the consequences of transportation in light of its human rights obligations’.

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285 Trevor Pascal Chimimba, supra, footnote 69, at 353.
286 Gerard A.M. Strijards, supra, footnote 69, at 1656. See, also, Alexander Zahar and Göran Sluiter, supra, footnote 27, p. 321.
289 See, in more detail, supra, Chapter 2.
290 See, in a similar vein, Roger S. Clark, supra, footnote 288, at 1664; Dirk van Zyl Smit, supra, footnote 84, at 376; William A. Schabas, supra, footnote 60, p. 1082; Claus Kress and Göran Sluiter, supra, footnote 84, at 1802.
Moreover, the aforementioned interpretations and the soft-law standards may provide evidence of the existence and the content of customary international law, which is binding pursuant to Article 21(1) of the Statute.\footnote{See, in more detail, supra, Chapter 3.}

It is worth noting that the Preamble to the enforcement agreement with Austria \textit{does} include references to the SMR, the U.N. Body of Principles and the U.N. Basic Principles.

It may therefore be argued that the phrase ‘widely accepted international treaty obligations’ must not be interpreted as referring to a lower standard of human rights protection than that applicable to the treatment of persons convicted by the other tribunals.

The Presidency must notify the convicted person concerned in writing that it is addressing the issue of designation, which is consistent with the demands of the principle of natural justice. The Presidency will determine a time limit within which the person concerned may submit his views on the matter in writing or, if deemed appropriate by the Presidency, by making oral presentations.\footnote{Rule 203, Paragraphs (1) and (2) of the RPE.} These views do not, however, bind the Presidency in any way. The sentenced person has the right to be assisted by an interpreter and to ‘adequate time and facilities necessary to prepare the presentation of his or her views’.\footnote{Rule 203(3) of the RPE.}

The sentenced person does not have the right to counsel, which may be seen as proof of the fact that, in the international context, transfer is not grounded in serving the interests of the sentenced person,\footnote{Claus Kress and Göran Sluiter, supra, footnote 84, at 1789.} but rather in the policy aim of effective enforcement. France initially suggested the inclusion of a provision on the procedural rights of sentenced persons, which would include the right to counsel, and which would be applicable to all procedures under Part X of the Statute, including that of designation.\footnote{Kimberly Prost, supra, footnote 69, at p. 677; Irene Gartner, supra, footnote 69, at 435.} However, other delegations objected to this, stressing the difference in character between trial proceedings and enforcements procedures such as designation.\footnote{Kimberly Prost, supra, footnote 69, at p. 677.} Accordingly, it was decided that the rights of the sentenced persons...
would differ according to the specifics of each procedure and that the right to counsel would not apply to the designation procedure.298

Although the Court’s legal framework does not grant the sentenced person the right to appeal the Presidency’s decision, he or the Prosecutor may at any time submit an application to the Presidency to be transferred to another State.299 Nothing suggests that such an application may only be filed after the sentenced person has already been transferred. It is the Presidency who decides on these applications, making it unlikely that a different determination would be made without any new information. The applicant, whether it is the sentenced person or the Prosecutor, must submit the request in writing. The request must contain the grounds on which it is based.300

When deciding on the request, the Presidency ‘may (a) Request views from the State of enforcement; (b) Consider written or oral presentations of the sentenced person and the Prosecutor; (c) Consider written or oral expert opinion concerning, inter alia, the sentenced person; (d) Obtain any other relevant information from any reliable sources’.301 The term ‘may’ implies that the Presidency is not obliged to consider or seek for any of the aforementioned information. The applicant has, where appropriate, the right to be assisted by an interpreter and the right to time and facilities to prepare the presentation of his views.302 Also relevant in this respect is that Article 8 of the enforcement agreement with Austria states, in accordance with Article 106(3) of the Statute and Rule 211(1)(a),303 that all the communications between a sentenced person and the Court shall be ‘unimpeded and confidential’.304 If the Presidency rejects the application, it must inform the applicant, the Prosecutor and the Registrar

298 Irene Gartner, supra, footnote 69, at 435.
299 See Article 104 of the ICC Statute. Rule 209(1) of the RPE provides that ‘[t]he Presidency, acting on its own motion or at the request of the sentenced person or the Prosecutor, may at any time act in accordance with Article 104, paragraph 1’. See, also, Article 13 of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court.
300 Rule 209 of the RPE.
301 Rule 210(1) of the RPE. Emphasis added.
302 Rule 210(2) of the RPE.
303 Rule 211 instructs the Presidency, acting in consultation with the State of enforcement, to ‘ensure that in establishing appropriate arrangements for the exercise by any sentenced person of his or her right to communicate with the Court about the conditions of imprisonment, the provisions of article 106, paragraph 3, shall be respected’.
304 Article 8 of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court.
of its decision as soon as possible, as well as of the reasons for its decision.\textsuperscript{305} The Presidency must inform the State of enforcement of its decision on the request; however, reasons need not be provided.

The factors that the Presidency must take into account in its designation decision under Article 103(3)(e), \textit{i.e.}, the circumstances of the crime or the person sentenced, and the effective enforcement of the sentence – are ill-defined. Such factors as the sentenced person’s medical situation, the proximity of his relatives, and the relatives’ financial resources to visit him must be classed as the ‘circumstances of the sentenced person’. The reference to the policy aim of ‘effective enforcement of the sentence’ is unfortunate, because it may lead to diminished respect for the specific needs of the sentenced person. It is also unclear how the circumstances of the crime may affect the outcome of the designation decision, particularly in light of the contemporary penal principle that a prison sentence may not be aggravated by conditions of imprisonment that are not already inherent to the punishment imposed.

When the Presidency informs the State of its designation decision, it must also provide the State with ‘(a) The name, nationality, date and place of birth of the sentenced person; (b) A copy of the final judgement of conviction and of the sentence imposed; (c) The length and commencement date of the sentence and the time remaining to be served; (d) After having heard the views of the sentenced person, any necessary information concerning the state of his or her health, including any medical treatment that he or she is receiving’.\textsuperscript{306}

The enforcement agreement with Austria provides that the designated State shall promptly decide upon the Court’s designation decision.\textsuperscript{307} Further, the designated State must promptly inform the Court of whether it accepts the designation.\textsuperscript{308} If the

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\textsuperscript{305} Rule 210(3) of the RPE.  \\
\textsuperscript{306} Rule 204 of the RPE. See, also, Article 2 of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court. The requirement under (d), to obtain the views of the sentenced person, was included as a compromise. A French proposal according to which the \textit{consent} of the person concerned was required was objected to by other delegates; see Irene Gartner, \textit{supra}, footnote 69, at 436.  \\
\textsuperscript{307} Article 2(3) of the Agreement between the International Criminal Court and the Federal Government of Austria on the enforcement of sentences of the International Criminal Court.  \\
\textsuperscript{308} Article 103(1)(c) of the ICC Statute.
\end{flushleft}
designated State accepts the designation, the sentenced person and the Prosecutor will be informed thereof.\footnote{Rule 206(1) of the RPE.}

The transfer must take place as soon as possible after the designated State has accepted its designation,\footnote{Rule 206(2) of the RPE.} but not before the conviction and sentence have become final.\footnote{Rule 202 of the RPE.} The Registrar is responsible for the ‘proper conduct of delivery of the person in consultation with the authorities of the States of enforcement and the host State’.\footnote{Rule 206(3) of the RPE.} The costs of transfer are borne by the Court.\footnote{Rule 208(2) of the RPE.} The Rules furthermore contain a detailed provision on the issue of transit.\footnote{Rule 207 of the RPE.} If the designated State decides to reject the designation, the Presidency may designate another State.\footnote{Rule 205 of the RPE.}

Article 103(4) of the Statute contains a ‘safety mechanism’ in the event that no State declares itself ready or willing to accept a particular convict. In that case, ‘the sentence of imprisonment shall be served in a prison facility made available by the host State’.\footnote{Article 103(4) of the ICC Statute.} The Headquarters Agreement sets out the conditions of this residual obligation on the host State. The costs incurred in the enforcement of a sentence of imprisonment by the host State pursuant to Article 103(4) are borne by the Court.\footnote{Ibid.}

By contrast, the costs incurred in the enforcement of sentences in States designated pursuant to Article 103(1)(a) are borne by the States of enforcement.\footnote{Rule 208(1) of the RPE.}
7.3 Evaluation

7.3.1 The sentencing judges’ knowledge of prison conditions

In a domestic setting, it is the judiciary that decides on the length of a prison sentence, whereas the place of imprisonment is usually determined by the administration. In the international context, such uncertain factors as the availability of willing and ready States, possible political sensitivities and the possibility that some or all of the sentencing chamber’s judges may no longer be serving at the time of designation make it impossible to allow the sentencing judges to determine the State of enforcement. Designation thus takes place after sentencing and by different, administrative officials. Nevertheless, in order to ensure respect for the principles of proportionality, individualisation and the equal treatment of prisoners, such an allocation of responsibility presumes that the sentencing judges have a basic knowledge of the situation and general conditions of imprisonment. When sentencing, the judiciary must be able, in more or less detail, to foresee the severity of the enforcement regime.\footnote{Miranda Boone, ‘Ketenpartner’ of geketend? Rechterlijke bemoeienis met de tenuitvoerlegging van sancties, 88 Proces 2, 2009, p. 65-75, at 68.} Since, in the international context, the place of imprisonment is determined by the tribunals’ Presidents/Presidency only after sentencing, whilst the conditions of imprisonment are governed by the domestic laws of the different States of enforcement, the international judges’ knowledge of the post-transfer situation of imprisonment must be rather limited. It would, in this regard, be advisable for the tribunals’ sentencing judges to regularly undertake excursions to potential States of enforcement, in order to inspect and gain information on the prison situation there.

7.3.2 The need for an independent and impartial appeals adjudicator in designation procedures

The weakness of the international system for the designation of States of enforcement is, however, more fundamental. According to Weinberg de Roca and Rassi, whereas ‘incarceration practices have a greater effect on sentences at the tribunal than in domestic criminal systems (...) the judges are removed from the incarceration
practices of the tribunals; the incarceration regime is imposed separately and is dependent on the will of the international community’. Arguably, leaving designation wholly to the Presidents’/Presidency’s discretion places too much power in the administration. The possibility for the President to consult the Presiding Judge or Sentencing Chamber is a rather meager substitute for the requirement of obtaining the Presiding Judge’s approval stipulated in *Erdemović*. As argued above, when exercising their administrative functions, the institutions’ Presidents/Presidency cannot, for various reasons, be considered sufficiently independent and impartial.

Also, in designating States of enforcement, their task is of an administrative nature and may primarily be expected to serve the institution’s interests, as reflected in the guiding policy aim of ‘effective enforcement’. As a consequence, the personal circumstances and fundamental rights of the sentenced persons including their right to equal treatment may be at risk of being overlooked in favour of practical considerations. The difficulties that the tribunals have had and continue to have in securing enforcement agreements and finding prison cells may only make matters worse.

It should be recalled that persons convicted by the tribunals are often transferred to States far away from their homeland. This affects such persons’ social rehabilitation and reintegration into society, the accessibility of counsel and their right to family life. If it is foreseeable that after such transfer, the prisoners will be held in conditions that amount to their isolation, the prohibition of torture, inhuman and degrading treatment or punishment may even come into play. Although some of these aspects are listed in the tribunals’ Practice Directions as factors that need be considered during designation, the possible impact of transfer on the inmates’ fundamental rights gives rise to the question of whether an effective remedy is available to them.

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At the very least, the tribunals must be considered to be obliged to hear the sentenced persons on the place of their future imprisonment. It is in accordance with natural justice to notify the person who will be affected by a particular decision beforehand and to hear him on the matter. Furthermore, as noted by Kress and Sluiter, ‘it may be important to obtain his or her view to ensure that a penalty imposed on persons convicted by the ICTY or ICTR should not be aggravated by the place, nor by the conditions of enforcement’. As stated, where transfer decisions may be argued to affect the sentenced person’s enjoyment of his or her fundamental rights, an effective remedy must be available to the person concerned. Indeed, the right to an effective remedy would require either a means to prevent a violation from occurring, or the provision of redress for a violation that has already occurred. A violation of the right to an effective remedy under Article 13 of the ECHR is not dependent on the establishment of a breach of another Convention right. Furthermore, the official rendering the redress decision must be sufficiently independent of the authority that is responsible for the violation. At the tribunals, neither a redress procedure nor an independent adjudicator is available to offer relief. After all, sentenced persons lack the right to appeal the designating official’s determination. Furthermore, such a redress procedure must not merely provide theoretical guarantees; on a practical level it must be shown that it provides an effective remedy. Because of the very limited

324 For a critical appraisal of the ad hoc tribunals’ Practice Directions on the designation of States, particularly in respect of the limited role of the sentenced person in these procedures, see Jan Christoph Nemitz, supra, footnote 280, at 132.
325 Claus Kress and Göran Sluiter, supra, footnote 84, at 1776.
327 Id., p. 560.
329 In some States remedies are available to the international prisoner under the exequatur or continued enforcement decision by the domestic judge. See Article 55(2) of the German Gesetz über die internationale Rechtshilfe in Strafsachen and the discussion of Jan MacLean, supra, footnote 183, at 737. Some legislatures have excluded such forms of relief. See, for instance, Article 12 of the Dutch Wet van 21 april 1994, houdende bepalingen verband houdende met de instelling van het Internationaal Tribunaal voor de vervolging van personen aansprakelijk voor ernstige schendingen van het internationale humanitaire recht, begaan op het grondgebied van het voormalige Joegoslavië sedert 1991, which excludes the applicability of Article 32 of the Wet Overdracht Tenuitvoerlegging Strafvonnissen, which provides sentenced persons with the right to appeal a district court’s decision on a request for enforcement of a foreign sentence in the Netherlands directly to the Supreme Court.
330 See, supra, Chapter 5.
number of willing and accepting States, however, the tribunals’ practice of hearing a sentenced person on the matter of designation may be seen as mere window dressing.\textsuperscript{331} Often, the designations appear to be of a political character and to be guided by the policy aim of effective enforcement.

It was seen in this Chapter that some of the tribunals’ Presidents have denied sentenced persons the right to apply to them on the matter of designation. The obligation to consult the sentenced person in the ICC’s legal framework is a welcome improvement on the arrangements at the \textit{ad hoc} tribunals, where seeking the sentenced person’s view is entirely a matter of discretion for the President. However, merely offering prisoners the chance to be heard by the designating official, without including a right to appeal the administrative designation decision to an independent adjudicator, is far from adequate to secure the sentenced persons’ legal protection. Klip suggests, then, that a designation procedure should be devised in the pre-sentencing phase, which would underline ‘the interrelatedness of the sentence and the state which shall enforce it’.\textsuperscript{332} It is, however, unlikely that States will accept an individual convict without knowing the precise duration of the particular sentence.

In connection with the question of whether the administration or the judiciary is best positioned to decide on the allocation of prisoners, in the Netherlands,\textsuperscript{333} a compromise has been struck by granting prisoners the right to submit a complaint or request to the administrative organ rendering the initial allocation decision,\textsuperscript{334} with a right to appeal the decision taken on such a complaint to the Appeals Commission (\textit{Beroepscommissie}) of the Council for the Administration of Criminal Justice and Protection of Juveniles (\textit{Raad voor de Strafrechtstoepassing en Jeugdbescherming}).\textsuperscript{335}

\textsuperscript{331} Admittedly, the ICTY has, in more recent years, managed to conclude enforcement agreements with a significant number of States.
\textsuperscript{332} André Klip, \textit{supra}, footnote 170, at 156.
\textsuperscript{333} Also in the United Kingdom, prisoners may seek judicial review of decisions on the allocation of detainees, notwithstanding the reluctance felt by courts to intervene in such administrative decisions; see Dirk van Zyl Smit, \textit{Prisoners’ rights}, in: Yvonne Jewkes (ed.), \textit{Handbook on Prisons}, Willan Publishing, 2007, p. 566-584, at 574.
\textsuperscript{334} Article 17 of the Penitentiary Principles Act.
A similar arrangement is conceivable in the international context, where sentenced persons may be granted the right to complain to the President/Presidency about the designation decision, with a right to appeal the decision on the complaint to the external adjudicating body, whose establishment was suggested in Chapters 5 and 6. In light of the many practical difficulties involved in the designation of States, it would be best for such an external adjudicator to only scrutinise the legality and reasonableness of the President’s decision on the complaint – both the formal and substantive aspects – rather than substituting the President’s/Presidency’s designation decision with its own. In the event that the adjudicator considers the President’s/Presidency’s decision on the complaint to be unlawful or unreasonable, it should refer the matter back in order for the latter to render a new decision.

7.3.3 Establishing an international prison

Another option would be the establishment of an international prison or, as has been advocated by Penrose, a ‘cluster of facilities’ to enforce prison sentences imposed by international tribunals.\(^\text{336}\) The advantage of an international prison is that it would put an end to unequal treatment, both of prisoners sentenced by one and the same tribunal and of prisoners of the different tribunals compared \textit{inter se}.\(^\text{337}\) Regarding the latter aspect, Nemitz stresses in respect of the U.N. tribunals that ‘it is desirable that at least Tribunals which have been established by the same international legislator do not cause too much disparity, both when it comes to sentencing and in relation to the execution of their prison sentences’.\(^\text{338}\) Admittedly, it is doubtful whether sufficient support may be found among ICC States parties and U. N. member States for the

\(^{336}\) Mary Margaret Penrose, \textit{Lest We Fail: The Importance of Enforcement in International Criminal Law}, American University International Law Review 15, 1999-2000, p. 321-394, at 390; Mary Margaret Penrose, \textit{supra}, footnote 275, at 626. There were earlier proposals for establishing an international prison; see, e.g., Chester Leo Smith, \textit{The Probable Necessity of an International Prison in Solving Aircraft Hijacking}, 2 International Lawyer 5, 1971, p. 269-278; William A. Schabas, \textit{supra}, footnote 69, p. 1067-1068. According to Schabas, ‘[a]n enforcement mechanism whereby States would be responsible for detention of convicted persons was accepted by the International Law Commission. The Commission said ‘the limited institutional structure of the court, in its initial stages at least, would not include a prison facility’, implying that it did not exclude a dedicated prison operated by the Court itself at some point in the future’.

\(^{337}\) Mary Margaret Penrose, \textit{supra}, footnote 4, at 567.

\(^{338}\) Jan Christoph Nemitz, \textit{supra}, footnote 280, at 133.
establishment of an international prison. As held by Corell, ‘an international prison would be a very costly enterprise and very inflexible, because it would be difficult to assess to what extent prison space would be needed’.339

Nevertheless, Penrose advocates the creation of ‘an international prison wherein supervision, maintenance and financial responsibility are shared by the entire international community’.340 According to her, a permanent institution like the ICC in particular should not be dependent on an unreliable enforcement system.341 She states that ‘an international prison would ensure: (1) that each international prisoner has a prison cell available upon conviction; (2) that prisoners would be housed with similar offenders posing similar security risks; (3) that prisoners would be subjected to standard rules and regulations regarding confinement, and, ultimately, a uniform system for commutation; and, (4) perhaps most importantly, that prisoners and the international community would perceive a sense of permanence’.342 Another advantage would be that the convicted persons would be surrounded by persons with similar language, religious and cultural backgrounds.343 Penrose further states that ‘a single prison system would make the transition to control by an outside source or agency much easier if the concentration of prisoners is focused in only one area or a small number of areas’.344 Finally, she argues that, while some countries may find it difficult to make their prison systems meet international standards and other countries ‘discriminate in favor of these international prisoners that have been condemned for committing the most heinous acts catalogued by modern society’, establishing an international prison would guarantee enforcement in accordance with contemporary minimum penal standards.345 Its penitentiary structure might resemble either the singular one of Spandau and Sugamo, or may consist of regional prison facilities.346

Although, at least in respect of the ICTY, the co-operation of U.N. member States has been a bit more forthcoming than was the case in 1999 when Penrose first made her

339 Hans Corell, Nuremberg and the Development of an International Criminal Court, Military law Review 149, 1995, p. 87-100, at 97-98. According to Klip, establishing an international prison is ‘not a serious option, since the United Nations do not have the financial resources for that’; André Klip, supra, footnote 170, at 163.
340 Mary Margaret Penrose, supra, footnote 4, at 584.
341 Mary Margaret Penrose, supra, footnote 275, at 638.
342 Mary Margaret Penrose, supra, footnote 4, at 585.
343 Id., at 586.
344 Ibid.
345 Mary Margaret Penrose, supra, footnote 275, at 638-639.
346 Mary Margaret Penrose, supra, footnote 4, at 585.
point, the arguments in support of establishing an international prison are still valid. The overwhelming majority of U.N. member States and of the States parties to the Rome Statute have never communicated a willingness to accept convicted persons.

According to Penrose, a system with regional facilities would have the advantage of ‘the availability of guards and other prison staff who have some understanding of the linguistic, cultural and religious traditions of the inmates’.\(^{347}\) Inmates who are able to communicate with each other will feel less isolated. Furthermore, security is enhanced by improved communications between inmates and prison staff.\(^{348}\) Allocating international prisoners to regional facilities also facilitates the inmates’ access to relatives and other social support systems.\(^{349}\) Penrose points out that, in 1999, the ICTR and the ICTY had already exhibited a preference for designating States in Africa and Europe, respectively. She therefore argued that ‘a regional approach to imprisonment [had] already begun’.\(^{350}\) Another argument she adduces in support of establishing regional prison facilities is that existing regional human rights bodies and courts might then serve as complaints bodies.\(^{351}\) However, employing regional human rights bodies and courts as complaints adjudicators may lead to diverging law and practice among the different regional prison facilities. It would be preferable to assign the task of supervising the conditions of imprisonment to the external complaints adjudicator whose establishment was suggested in Chapters 5 and 6.

7.3.4 Inter-State co-operation on the transfer of prisoners and the tribunals’ designation regimes compared

At first glance, the tribunals’ enforcement regimes may resemble the inter-State co-operation on the transfer of convicted persons for the enforcement of sentences. At a closer look, however, they are altogether different. Usually, inter-State treaties on

\(^{347}\) Mary Margaret Penrose, *supra*, footnote 275, at 641.

\(^{348}\) *Ibid.*

\(^{349}\) *Ibid.*

\(^{350}\) *Ibid.* One may further point to the Secretary-General’s preference for enforcing the Special Court’s sentences in an East African country as conveyed in his Report: SCSL, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, par. 10.

\(^{351}\) Mary Margaret Penrose, *supra*, footnote 275, at 641.
transferring prisoners place the authority to decide on such extramural issues as early release, commutation of sentences and pardon in the hands of the receiving State, which is incompatible with the principle of primacy governing the enforcement of sentences in the international context. Also, the wide use of the *exequatur* procedure in inter-State practice – in which the foreign sentence is substituted by the courts of the receiving State with a sentence of its own – appears to be incongruous with the primacy concept.\(^{352}\)

In line with the ICTY Trial Chamber’s statement in *Erdemović*, it is fair to say that, after transfer, international convicts remain prisoners of the international tribunals. Stroh states that whereas the prime responsibility for enforcing an international sentence lies with the designated State, the ‘prisoner indirectly remains in custody of the Tribunal throughout the term of imprisonment’.\(^{353}\)

Furthermore, due to concerns for the prisoners’ safety and security, as well as for the effective enforcement of sentences, and in order to ensure that prisoners are treated with respect for their dignity, transfer to the convicted person’s country of nationality is often impossible in the international context, while this is the main ambition underlying prisoner transfers in inter-State practice.\(^{354}\) Regarding the sending back of an international prisoner to his home country to serve his sentence, Safferling notes

\(^{352}\) See, in a similar vein, David Tolbert, *supra*, footnote 3, at 660. The German *Jugoslawienstrafgerichtshof-Gesetz*, however, referring to the *Gesetz über die internationale Rechtshilfe in Strafsachen*, does not provide for a continued enforcement of sentences. As a result, the *exequatur* procedure had to be followed when Germany agreed to enforce the sentence imposed on *Tadić*. Moreover, the German *Grundgesetz* demands that a German judge decides on deprivation of liberty carried out by German authorities. The compromise eventually reached was to first let the tribunal submit an unofficial request on the basis of which the *exequatur* decision would be made. If the tribunal would consider the term of imprisonment imposed in the *exequatur* decision appropriate, the tribunal would officially request Germany to enforce the sentence. See, in more detail, Jan MacLean, *supra*, footnote 183, at 733, 735 and 739. The Dutch legislation regulating co-operation of the Netherlands with the ICTY declares the *exequatur* procedure applicable to the acceptance of ICTY prisoners. See Article 12 of the *Wet van 21 April 1994, houdende bepalingen verband houdende met de instelling van het Internationaal Tribunaal voor de vervolging van personen aansprakelijk voor ernstige schendingen van het internationale humanitaire recht, begaan op het grondgebied van het voormalige Joegoslavië sedert 1991*.

\(^{353}\) Dagmar Stroh, *supra*, footnote 61, at 263.

\(^{354}\) Drafts of the Rome Statute contained inflexible designation criteria that prevented such States as that of the nationality of the sentenced person and that in which the *locus delicti* is located from being designated as State of enforcement. Eventually, the majority of the delegates considered it desirable to award the ICC authorities more flexibility in this regard, particularly in light of the importance of the social rehabilitation of convicted persons. See Gerard A.M. Strijards, *supra*, footnote 69, at 1655. See, also, Claus Kress and Göran Sluiter, *supra*, footnote 84, at 1789.
that ‘[e]ither he ends up in an area which might almost treat him as a war hero, which would destroy any effect of the punishment, or his life expectancy might be severely reduced, if he found himself in an environment mainly governed by his former enemies. A return to his home state is therefore out of the question’.  

The tribunals’ designation decisions are not grounded on the notion of social rehabilitation, which has traditionally been one of the prime reasons for inter-State co-operation on the transfer of sentenced persons. As a consequence, there appears to be less need to ask for the sentenced person’s consent, a demand traditionally found in most inter-State practice regarding the continued enforcement of foreign sentences. Generally speaking, this particularity of the allocation of prisoners in the international context diminishes the sentenced person’s role in the designation process. Due to the focus on effective enforcement, the needs of individual sentenced persons also risk being overlooked.

7.3.5 The timing of the SCSL convicts’ transfer to Rwanda

From an exchange of letters between Wayne Jordash, Lead Counsel for Sesay, and Binta Mansaray, who was at the time the SCSL Acting Registrar, it appears that the Special Court has paid attention to a number of specific concerns in the designation process. According to the Acting Registrar, she had requested the Rwandan

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355 Christoph J.M. Safferling, supra, footnote 20, p. 352.
356 See, further, Hans Corell, supra, footnote 339, at 97.
357 See, in more detail, Michal Plachta, Transfer of Prisoners under International Instruments and Domestic Legislation, Eigenverlag Max-Planck Institut, Freiburg im Breisgau 1993, p. 166; Hanneke Sanders, De tenuitvoerlegging van buitenlandse strafvonnis sen [The enforcement of foreign criminal sentences], Intersentia, 2004, p. 15-19. See, e.g., the Preamble to the Convention on the Transfer of Sentenced Persons, Council of Europe, Strasbourg, 21 March 1983 (ETS No. 112), to its Additional Protocol of 18 December 1997 (ETS No. 167) and to CoE, Recommendation (92)18, concerning the practical application of the Convention on the Transfer of Sentenced Persons, adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers’ Deputies. See, however, Mulgrew who argues that the inter-State system moves away from its original objectives; Róisín Mulgrew, The International Movement of Prisoners, Criminal Law Forum 22, 2011, p. 103-143.
358 See, in a similar vein, Irene Gartner, supra, footnote 69, at 436. See, e.g., Article 3(1)(d) of the Convention on the Transfer of Sentenced Persons, Council of Europe, Strasbourg, 21 March 1983.
359 SCSL, Letter of 27 October 2009 sent by the Acting Registrar, Ms. Binta Mansaray, to Wayne Jordash, Lead Counsel of the Sesay Defence Team, Annex G to SCSL, Urgent Application to the President of the Court under Rule 19(C) for Judicial Review of the
authorities to grant the SCSL convicts the right to conjugal visits. She further said to have made arrangements for remunerating the prisoners for the products they will produce while imprisoned in Rwanda above the regular percentage (according to Rwandan law). According to her, the SCSL convicts were guaranteed the same level of care they received while detained at the Court’s Detention Facility and they would be entitled to (and be provided with the facilities needed to) pursue educational, vocational and recreational activities.360

Regarding family visits, the Acting Registrar stated that ‘the Court is committed to funding family visits after transfer’ and that the Rwandan Government would agree to ‘facilitate the access of families to the SCSL prisoners’. She confessed, however, that discussions were still ongoing as to the type of financial assistance ‘that will be made available to at least one family member to travel to Rwanda once a year, for about one week’. Although ‘the funding of family visits throughout the duration of each prisoner’s sentence [had been] been approved in principle, the exact amount made available to families on a yearly basis [was] subject to the Management Committee’s approval, and [would be] managed by the Residual Mechanism of the Court after completion of the Court’s mandate’.361

This exchange of letters occurred only one week before the prisoners’ transfer to Rwanda. It would, arguably, have been more appropriate for the President to have waited in designating Rwanda and in allowing the prisoners’ transfer until the precise implications of the transfer on such persons’ fundamental rights had been clarified.

7.3.6 The treatment of international prisoners as foreign prisoners

General observations

As mentioned previously, the tribunals’ prison sentences are enforced in accordance with the domestic law of the State of enforcement. The tribunals’ legal frameworks prescribe that the Registrar must report to the designating official on the domestic

Decision of the Acting Registrar in Relation to the Enforcement of Sentence and to Temporarily Stay the Transfer of Detainees to a Designated State, Prosecutor v. Sesay et al., SCSL-04-15-T, President, 30 October 2009.

360 Ibid.

361 Ibid.
penitentiary legislation in candidate States of enforcement. It may be argued, however, that, when looking into those States’ conditions of imprisonment, the tribunals’ Registrars and designating officials should pay specific attention to the manner in which foreign prisoners are treated in those countries’ prisons, since this may vary considerably from how countries treat their own nationals. Admittedly, in States of enforcement with limited financial resources, the tribunals’ prisoners may receive some form of preferential treatment, which is paid for by the tribunals.

Notwithstanding the Recommendation of the Council of Europe concerning foreign prisoners, which calls for treating foreign prisoners in a manner which is conducive to their social resettlement,362 in many European States there are significant differences between the treatment of nationals and foreigners.363 According to an extensive study carried out by Van Kalmthout, Hofstee-van der Meulen and Dünkell, ‘[f]oreign prisoners are in general excluded from placement in (semi) open penitentiary institutions with a more relaxed regime and (more) opportunities for work, education, re-integration programmes and contact with the outside world’.364

Even in countries where the general penitentiary regime applies equally to national and foreign prisoners, a lack of provisions catering to the latter group’s specific needs may generate ‘unequal opportunities for foreign prisoners taking into account the distance from relatives, differences in culture, religion and above all communication barriers’.365 Neither the tribunals’ designation orders nor their rules regarding designation pay specific attention to the legal position of foreign prisoners in candidate States of enforcement.

In scrutinising the penitentiary regimes in potential States of enforcement, the tribunals may be guided by the Council of Europe’s Recommendation concerning

362 See CoE, Recommendation (84)12, concerning foreign prisoners, adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers’ Deputies.
365 Ibid.
foreign prisoners of 1984. The reasons for adopting the Recommendation lay in the recognition of the special needs of foreign prisoners and in the wish to ensure that such prisoners are provided ‘opportunities equal to those accorded to other prisoners’. The member States were ‘[d]esirous of alleviating any possible isolation of foreign prisoners and of facilitating their treatment with a view to their social resettlement’, and recognised the challenges that foreign prisoners face ‘on account of such factors as different language, culture, custom and religion’.368

With regard to the allocation of foreign prisoners, the Recommendation stresses that nationality should not be the sole ground on which to base the allocation decision. Regard must also be had to the inmate’s specific needs, ‘particularly with regard to [his or her] communications with persons of the same nationality, language, religion or culture’.369 A natural way of facilitating communications between foreign prisoners and persons with the same background is to permit them to work, spend leisure time or take exercise together.370 Furthermore, the Recommendation states that ‘[e]very effort should be made to give foreign prisoners access to reading material in their language’.371 With respect to educational and vocational training, the Recommendation calls for equal access of foreign prisoners to facilities provided to national prisoners. It also stipulates, however, that ‘consideration should be given to the possibility of providing [foreign prisoners] with necessary special facilities’.372 This latter provision falls under the heading of ‘measures to reduce isolation and promote social resettlement’. Additionally, Article 10 of Section II.b, entitled ‘Measures to reduce language barriers’, states that, in order ‘to enable foreign prisoners to learn the language spoken in prison, appropriate opportunities for language training should be provided for them’. Also relevant to the right of prisoners to contact with the outside world is that the prison authorities are instructed to have regard for foreign prisoners’ special needs.373

366 CoE, Recommendation (84)12, concerning foreign prisoners, adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers’ Deputies.
367 Id., Preamble.
368 Ibid.
369 Id., Article 1.
370 Id., Article 2.
371 Id., Article 3.
372 Id., Article 5.
373 Id., Article 6.
The tribunals may further seek guidance from the recommendations for the treatment of foreign prisoners drawn up by Van Kalmthout, Hofstee-van der Meulen and Dünkel as part of their study of the treatment of foreigners in European prisons. Where foreigners cannot be transferred to a prison in their home country to serve their sentence, these scholars argue that the ‘host country has to develop special training and vocational programmes that help the integration in the future home country. In cases where the foreigner does not speak the language of the country where he/she will be expelled to, specific language courses could be provided’. It is therefore essential that the prisoner knows at an early stage of his imprisonment to which country he shall be transferred after the completion of his sentence.

Furthermore, Recommendation 20 states that ‘[p]roviding classes for foreigners to become more acquainted with the national language or English could be beneficial for both prisoners and staff’. It is also underlined that foreign prisoners must be provided with adequate information about their rights and duties in a language they understand.

In respect of the right of prisoners to contact with the outside world, Recommendation 15 provides that ‘[f]oreign prisoners should be lodged in penitentiary institutions located in the capital city in order to facilitate regular contact with diplomatic missions and relatively easy transportation from the airport when relatives from abroad pay a visit’. The authors of the recommendations also recognise, both in relation to admission procedures and to contact with the outside world more generally, that ‘foreign prisoners often have to make long distance calls and sometimes at odd hours, due to different time zones’. Also, under Recommendation 33, foreign prisoners should be allowed ‘more flexible visiting schemes in order to allow family and relatives to make the long trip worthwhile’.

Finally, it is noteworthy that Penrose calls for including such criteria in the designation process as ‘past human rights abuses by the receiving State, ease of access to State prisons by the International Community or a representative thereof (such as

374 A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkel, supra, footnote 364, p. 78-88.
375 Id., p. 78, Recommendation (1). See, also, Recommendation (72), p. 88.
376 Id., p. 78, Recommendation (4).
377 Id., p. 78, Recommendation(20).
378 Id., p. 78, Recommendation (5).
379 Id., p. 78, Recommendations (18) and (33).
the International Committee of the Red Cross), ease of access for counsel, family and friends, the immigration laws of the host State to the extent such laws affect family relations and visitations, the political stability of the receiving State, and, common languages (if any) of the host State and prisoner.380

The treatment of foreigners in Dutch prisons

In light of the Netherlands’ residual obligation under the ICC Statute to accept convicted persons, an examination of the treatment of foreigners in Dutch prisons is in order. In light of the national standard in Article 106(2) of the ICC Statute, it must be assumed that the ICC has not negotiated any kind of preferential treatment for its convicts.

It should, first of all, be noted that Dutch penitentiary legislation does not, in general terms, distinguish between the treatment of and facilities provided to Dutch and foreign prisoners.381 As a consequence, certain specific needs of foreigners are disregarded. Furthermore, foreign prisoners often do not have access to rehabilitation schemes and facilities. An example of disregard for the special needs of foreign prisoners can be found in the right to participate in educational courses or vocational training. Foreigners are not excluded from these facilities on the basis of their background.382 Because of the limited number of places available and the courses’ popularity, there are long waiting lists and only motivated individuals are permitted to attend,383 which provides an obstacle to both national and foreign prisoners. However, the level of the courses is, generally speaking, rather low,384 which may render them worthless to international prisoners, who frequently have quite a different educational and intellectual background than “domestic foreign” prisoners.

380 Mary Margaret Penrose, supra, footnote 4, at 569.
382 Id., at 646. Article 48(1) of the Penitentiary Principles Act.
383 Id., at 646. Article 48(1) of the Penitentiary Principles Act.
384 Anton van Kalmthout and Femke Hofstee – van der Meulen, supra, footnote 381, at 640, 646; Marieke Post, Detentie en culturele diversiteit (Detention and cultural diversity), Boom Juridische uitgevers, The Hague 2005, p. 237.
Although Dutch language courses are sometimes made available to foreigners,\(^{385}\) it is difficult to fathom how such courses could contribute to the social rehabilitation of persons who must (as a rule) leave the Netherlands after completing their sentence.\(^{386}\) Admittedly, it would be unreasonable to expect the Netherlands to provide courses catering to the individual needs of all categories of (foreign) prisoners. Were the ICC to request the Dutch authorities to facilitate the international prisoners’ attendance of educational or vocational courses that would contribute to their social rehabilitation, it would be no more than reasonable for the costs of doing so to be borne by the ICC. This would not necessarily entail an infringement upon the national standard, where the latter only requires that conditions of imprisonment of persons convicted by the tribunal shall be \textit{equivalent to} and not \textit{the same as} those applicable to national prisoners. Although the participation of international prisoners in Dutch language courses cannot be based on the rehabilitation principle, such participation can be grounded on other arguments. It has been acknowledged, in this respect, that language difficulties cause ‘feelings of social isolation, uncertainty and loneliness’ among foreign prisoners.\(^{387}\) Van Kalmthout and Hofstee–van der Meulen state that ‘[d]ue to the fact that prisoners do not understand, speak or read the Dutch language they are less able to communicate with others, they are less aware of the rules and procedures (…) and they are less able to participate in training courses’.\(^{388}\) Those scholars also stress that a ‘major disadvantage is the physical distance from family and friends and as a result foreign prisoners often feel lonely, uncertain and helpless’.\(^{389}\) It should be noted in this respect that the Dutch rules regarding prisoners’ contact with the outside world do not differentiate between foreign and national prisoners. Visits must be formally applied for. If the procedure for doing so has not been duly followed, visitors are not permitted entrance.\(^{390}\) Inmates are entitled to a minimum of one hour per week for receiving visits.\(^{391}\) In most institutions, the actual

\(^{385}\) Ibid.

\(^{386}\) See, in a similar vein, Marieke Post, \textit{supra}, footnote 383, p. 227, 238.

\(^{387}\) A.M. van Kalmthout, F.B.A.M. Hofstee - van der Meulen and F. Dünkel, \textit{supra}, footnote 363, p. 18.

\(^{388}\) Anton van Kalmthout and Femke Hofstee – van der Meulen, \textit{supra}, footnote 381, at 637.

\(^{389}\) Ibid.


\(^{391}\) Article 38(1) of the Penitentiary Principles Act.
time allocated does not exceed this minimum, which must be deemed insufficient for infrequent visitors travelling from afar.

The Penitentiary Principles Act stipulates that a prisoner is entitled to a minimum of ten minutes per week for making telephone calls.\footnote{Article 39(1).} This includes the time spent speaking to their lawyers and must be considered insufficient for foreign prisoners whose contact with relatives and friends may only be possible by phone.\footnote{Ibid.} Moreover, the costs incurred in making telephone calls are, in principle, borne by the inmate. Without financial assistance from relatives, it will be very difficult for foreigners to bear the high costs incurred in making international calls.\footnote{Id., p. 232.} Difficulties are also posed by time differences and by restrictions imposed on making use of the telephone in the late or early hours.\footnote{Gerard de Jonge and Hettie Cremers (eds.), \textit{Bajesboek - Handboek voor gedetineerden (Gaol’s book, Handbook for detainees)}, Papieren Tijger, Breda 2008, p. 76.}

As stated above, foreign prisoners often do not have access to rehabilitation schemes and facilities. The same goes for the so-called ‘detentiefasering’ (detention phasing), a scheme by which prisoners gradually obtain access to more open regimes and are provided more liberties as their term of imprisonment progresses.\footnote{Marieke Post, \textit{supra}, footnote 383, p. 244.} During the first phase of their sentence, prisoners are placed in ‘normaal beveiligde inrichtingen’ (regularly secured institutions), which offer limited opportunities for prison leave. Later on, they may be moved to ‘beperkt beveiligde inrichtingen’ (institutions with a lower security level) and, eventually, to ‘zeer beperkt beveiligde inrichtingen’ (institutions with a highly reduced security level).\footnote{Id., p. 232.} This system is aimed at preparing prisoners for their reentry into society. The criteria that must be fulfilled in order for a person to be moved to a regime with a lesser security level are laid down in the ‘Regeling Selectie, Plaatsing en Overplaatsing van Gedetineerden’ (Regulation Selection, Placement and Transfer of Detainees). According to Articles 2(2)(a) and 3(3)(a) of the Regulation, persons who are obliged to leave the Netherlands after the completion of their sentence do not become eligible for placement in institutions with a lower or highly reduced security level. This will constitute an insurmountable obstacle to international prisoners who wish to be transferred to a more open regime.

\footnote{Marieke Post, \textit{supra}, footnote 383, p. 231.}
International prisoners will also be unable to participate in so-called ‘penitentiaire programma’s’ (penitentiary programmes). Prisoners participating in these programmes attend educational courses or work on projects outside of prison. Prisoners are selected on the basis of both objective and subjective criteria. The latter consist of the persons’ motivation and his or her behaviour in prison. The objective criteria are partly listed in Article 7(3) of the ‘Penitentiaire Maatregel’ (Penitentiary Measure), which requires, *inter alia*, that the person in question has an ‘acceptable’ home address in the Netherlands. Furthermore, the nature, gravity and background of the crime must be compatible with participation in these programmes. Finally, Article 6(b) categorically excludes prisoners who must leave the Netherlands after serving their sentence from participating in the programmes.

The foregoing represents the Dutch ‘national standard’ as referred to in Article 106(2) of the ICC Statute, *i.e.* the regime that also applies to other prisoners incarcerated in the Netherlands who are convicted for similar crimes. It is clear from the foregoing that the tribunals should not merely scrutinise the general penitentiary regimes in potential States of enforcement, but should pay specific attention to the legal position of foreigners in those countries’ penitentiary systems.

**Concluding observations**

It may be possible to respond to the arguments adduced in this sub-paragraph by stating that a prisoner serving his sentence in a foreign country after being convicted by a *domestic* court may find himself in a similarly difficult situation. It may then be argued that there is no reason to feel more empathy towards international prisoners serving their sentence far away from their home country in challenging circumstances. However, as noted by Safferling, the former prisoner ‘chose to be there voluntarily and might have a social background in [that] State. In the context of the International Criminal Court the offender might have never left his country and is sent to a foreign prison solely on the grounds that he was unfortunate enough to end up before the

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398 Article 15 of the Penitentiary Principles Act (*Penitentiaire beginselenwet*).
399 Gerard de Jonge and Hettie Cremers (eds.), *supra*, footnote 396, p. 125.
400 Article 7(3)(b) *Penitentiaire Maatregel*.
401 Article 7(3)(c).
402 Article 7(3)(a).
International Criminal Court. The case of offenders who were convicted by foreign courts by virtue of the principle of universality likewise fall into another category; they also voluntarily submitted themselves to the foreign jurisdiction.\textsuperscript{403}

Safferling also points to the German ‘rule of law’ principles of security of law (\textit{Rechtssicherheit}) and reliability of law (\textit{Vertrauensschutz}), which mean that ‘it is prohibited to treat the criminal worse than he could have expected’.\textsuperscript{404} He even states in this respect that ‘[a] criminal in Western Europe can legitimately rely on the fact that, if prosecuted and sentenced, he will be in a prison in Western Europe and will not be sent to an Asian country where the prison regime might be more severe. It is not enough to point to the minimum human rights standard that is met by both the Western European and the Asian state. The sentenced offender could not possibly have foreseen the threat of becoming familiar with the inside of a Pakistani prison. He cannot therefore be sent to a country that has not an equal or higher standard of human rights protection as his country of origin’.\textsuperscript{405}

7.3.7 Transparency

Although the principle of individualisation appears (at least partly) to underlie the tribunals’ designation schemes, the extent to which the principle is adhered to in practice remains unclear. The tribunals’ designation orders fail to specify the factors taken into account in particular cases. The tribunals’ designating officials should realise that enforcement of sentences constitutes the backbone of the tribunals’ work.\textsuperscript{406} The rationales of reconciliation and combating impunity (retribution and prevention) call for transparency in dealing with the issue of designation. Political issues \textit{are} involved in the enforcement of the tribunals’ sentences.\textsuperscript{407} The resulting vagueness and lack of transparency that surround many of the designation orders may undermine the tribunals’ mandates. Further, if the tribunals fail to categorically demand that their sentences be enforced in line with the notion of social rehabilitation,

\begin{itemize}
\item\textsuperscript{403} Christoph J.M. Safferling, \textit{supra}, footnote 20, p. 354.
\item\textsuperscript{404} \textit{Id.}, p. 358.
\item\textsuperscript{405} \textit{Ibid.}
\item\textsuperscript{406} See, in a similar vein, M.J.M. Verpalen, \textit{supra}, footnote 334, at 250.
\end{itemize}
they violate one of the principles that must underlie their enforcement regimes.\textsuperscript{408} Indeed, the absence of any reference to the penal objectives or rationales of international punishment, either in the tribunals’ legal provisions regarding enforcement of sentences or in the different enforcement agreements, may be seen as proof of the immaturity of these criminal justice systems.

7.3.8 \textit{A lack of willing States}

As argued by Penrose, Weinberg de Roca and Rassi, ‘[i]n reality, the major consideration for both tribunals has (...) centered (...) on the larger problem relating to securing agreements from states to accept prisoners’.\textsuperscript{409} The tribunals’ enforcement regimes are grounded on voluntariness. U.N. member States or States parties to the Rome Statute are not obliged to accept prisoners. A system of ‘double consent’ governs co-operation between the ICC and States on the enforcement of sentences. This seriously undermines the tribunals’ sanctioning potential. Only two States have entered into enforcement agreements with the ICC. Although a residual mechanism is in place, it is only meant as a last resort. In this regard, States appear reluctant to take responsibility for what may be regarded as the backbone of the international criminal justice system.

As held by the European Parliament in its resolution on Support for the Special Court for Sierra Leone, a sufficient number of enforcement agreements is required ‘to ensure that all persons already convicted, and those that are standing trial and may face convictions, actually serve their sentences’, since the ‘failure to find appropriate detention facilities for persons convicted of the most egregious crimes imaginable would seriously undermine the efforts of the international community to effectively implement the fight against impunity’.\textsuperscript{410} The Parliament called upon the European Council and the member States of the European Union to ‘find a solution together with the SCSL in order to ensure that the persons convicted serve their sentences.

\textsuperscript{408} See, in more detail, Chapter 4. See, in a similar vein, Christoph J.M. Safferling, \textit{supra}, footnote 20, p. 353. See for a critical appraisal of the social rehabilitation of international prisoners Claus Kress and Göran Sluiter, \textit{supra}, footnote 5, at 1755.

\textsuperscript{409} Mary Margaret Penrose, \textit{supra}, footnote 335, at 388; Inês Mónica Weinberg de Roca and Christopher M. Rassi, \textit{supra}, footnote 320, at p. 44.

\textsuperscript{410} EU, European Parliament resolution of 24 April 2009 on support for the Special Court for Sierra Leone, P6_TA(2009)0310, par. F-G.
since without such a solution the effort of the SCSL and the credibility of the international community, including the Union, will be severely undermined’. 411 Among other things, a lack of available prison cells appears to have contributed to delays in transfer and to have resulted in disregard for the needs of sentenced persons in designation procedures. As argued by Strijards, it is not up to the administration to delay the enforcement of sentences due to logistics, available prison cells or other practical or political reasons. 412 The Swedish investigators of UNDU warned about the consequences of the long periods that persons sentenced by the tribunal had to wait for transfer. Firstly, they pointed out that international prison standards require convicted persons to be separated from remand detainees. Secondly, they said that confining a large number of convicted persons for long periods in UNDU creates security risks. According to their report, ‘[a]fter the trial is over it is no longer in [the convicted persons’] interest to maintain their possible innocence and they no longer hope to be cleared by the court. Strained relations can easily arise when mixing with the other detainees’. 413 Thirdly, the report stipulates that ‘a convicted person has the right to serve his or her sentence under completely different forms than can be offered at the Detention Unit. For reasons of mental hygiene those sentenced should be transferred as soon as possible to the country in which the sentence is to be served, where they can also plan realistically for the future’. 414

In response to the report, the President reportedly pushed for an expedited transfer process. 415 The 2009 amendment of the ICTY Practice Direction on designation of States of enforcement, which instructed the Registrar to start his or her preliminary inquiry upon the issuance of the trial judgement and conviction of an accused, should probably be viewed against this background.

411 Id., par. 2.
412 Gerard A.M. Strijards, supra, footnote 69, at 1648.
413 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.11.
414 Ibid.
7.4 Conclusion

The aim of this Chapter was to examine the procedures established by the international criminal tribunals for designating States for the enforcement of sentences. In the introduction, it was suggested that, because of the particularities of the international context, the tribunals might face difficulties in securing a sufficient number of prison cells. It was also suggested that such difficulties might influence the content and fairness of the designation procedures and affect the degree to which the inmates have a say in these procedures. On the basis of the ensuing examination of the tribunals’ designation practice, the existence of such difficulties was confirmed. Such difficulties certainly have not strengthened the convicted persons’ legal position in the tribunals’ designation procedures. In this regard, the Chapter’s third paragraph contains some criticisms and a number of recommendations.