Prisoners of the international community: the legal position of persons detained at international criminal tribunals
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Chapter 8 Contact with the outside world

8.1 Introduction

Both international and regional human rights law dictates that detained and imprisoned persons retain their fundamental rights. Incarceration, in itself, entails the loss of (the right to) personal liberty, but does not justify the violation of a detained person’s other basic rights. In its General Comment on Article 10, the HRC held that ‘[p]ersons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment’. In the case of *Fongum Gorji-Dinka v. Cameroon*, the Committee stated that ‘persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners (1957)’. Further, Principle 5 of the U.N. Basic Principles provides that ‘[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of human Rights, and, where the State concerned is a party, the

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2 Feest defines the penal notion of ‘normalisation’ stating that ‘[p]risoners retain all their human, civil, social and political rights, except those necessarily restricted by imprisonment’; Johannes Feest, *Imprisonment and prisoners’ work. Normalisation or less eligibility?*, Punishment Society 1, 1999, SAGE publications, p. 99-107, at 100.


International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants’. Prior to the ECtHR’s 1975 judgment in Golder v. the United Kingdom, the Commission and Court applied the so-called ‘inherent limitations doctrine’, according to which the deprivation of liberty automatically entails the loss of other rights. As a consequence, prisoners were excluded from the protections guaranteed under the ECHR. In Golder, the Court rejected the inherent limitations doctrine and assessed the impugned domestic restrictions on the right to correspondence on the basis of the limitations clause of Article 8(2).5 Since then, the Court has repeatedly affirmed that confined persons “‘continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty’”.6 Moreover, according to Rule 2 of the EPR, ‘[p]ersons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody’. The official Commentary to the EPR states in respect of Rule 2 that ‘the undoubted loss of liberty that prisoners suffer should not lead to the assumption that prisoners automatically lose their political, civil, social, economic and cultural rights as well. Inevitably, rights of prisoners are restricted by their loss of liberty, but such further restrictions should be as few as possible (…) Any further restrictions should be specified in law and should be instituted only when they are essential for the good order, safety and security in prison. Restrictions of their rights that may be imposed should not derogate from the rules’. Also, Article 1 of the Kampala Declaration on Prison Conditions in Africa provides that ‘the human rights of prisoners should be safeguarded at all times’. Further, in the case of López-Álvarez v. Honduras, the I-ACtHR held in relation to Article 5 that ‘the restriction of the rights of the detainee, as a consequence of the deprivation of liberty or a collateral effect of it, must be rigorously limited; the restriction of a human right is only justified when it is absolutely necessary within the context of a democratic society’.7 In its 2007 Annual Report, the Commission reiterated in respect of the Venezuelan prison system that

5 ECtHR, Golder v. the United Kingdom, judgment of 21 February 1975, Application No. 4451/70.
6 See, e.g., ECtHR, Ciorap v. Moldova, judgment of 19 June 2007, Application No. 12066/02, par. 107; ECtHR, Hirst v. the United Kingdom (No. 2), judgment of 6 October 2005, Application No. 74025/01, par. 69.
7 I-ACtHR, López-Álvarez v. Honduras, judgment of 1 February 2006, par. 104.
‘[i]n keeping with the jurisprudence constante of the system, the Commission must again assert that when the State deprives an individual of his freedom, it becomes the guarantor of that individual’s rights. The obligation it undertakes when incarcerating an individual is such that the institutions of the State and its agents must refrain from engaging in any acts that could violate the inmates’ fundamental rights. Both the institutions and agents of the State must endeavor, by every means possible, to ensure that a person deprived of his liberty is able to enjoy his other rights’.8

This Chapter focuses on the right of internationally detained persons to contact with the outside world, a right which finds protection in the prohibition of ill-treatment and such fundamental rights as those to family and private life, respect for correspondence and freedom of expression. Further, the detained persons’ right to contact with their counsel is, depending inter alia on the mode of communication and the stage and subject-matter of the proceedings, guaranteed by the rights to a fair trial, correspondence and access to a court to challenge the lawfulness of detention.

The right to contact with the outside world is the only substantive right of internationally detained persons to specifically be examined in this research. The justification for examining this right lies in the working hypothesis employed throughout this research, i.e. the mere fact that the international criminal tribunals have in their legal frameworks, in accordance with existing international standards, recognised that detained persons retain certain rights, does not yet guarantee the effectiveness of such rights in the international context. The domestic pedigree of such international standards, which formed the blueprint for the tribunals’ own detention rules and regulations, may lead to unfortunate results when applied directly to the international context. The international detention situation differs significantly from the domestic one, especially as far as the possibilities for detained persons to stay in contact with family and friends are concerned. The latter usually live far away from the international detention facilities, which makes staying in touch with detained loved ones a costly and time-consuming activity. Another reason for looking closely at this right is that confined persons tend to regard separation from their families as the most distressing aspect of detention. Apart from relationships with relatives and friends, detainees’ contact with the outside world also concerns access to the media –

in order to impart and to receive information – and access to their lawyers. Although
the examination of the detainees’ contact with their lawyers and with the media does
not follow directly from the aforementioned hypothesis, in order to provide a full
picture of the right of international detainees to contact with the outside world, both
issues are included in this Chapter.
Not included in this Chapter, however, is a discussion of the restriction of a detained
person’s contact with any other person upon the request of the prosecutor, a chamber
or a judge.\footnote{Regulation 101 of the ICC RoC; Rule 64 of the ICTY Rules of Detention; Rule 64 of the
Officials, ‘[t]here are major differences between jurisdictions in the way in which
untried prisoners are dealt with. In legal systems which stress the presumption of
innocence and use an adversarial process to determine guilt, untried prisoners usually
have more frequent visiting rights than sentenced prisoners. In legal systems in which
guilt or innocence is determined through an inquisitorial process, visiting is often at
the discretion of the investigating magistrate or procurator’.\footnote{Office of the United Nations
High Commissioner for Human Rights, Human Rights and
Prisons, Manual on Human Rights Training for Prison Officials, Professional Training Series
No. 11, United Nations, New York and Geneva 2005, p. 122.} The international
tribunals are a mix of these two systems, which is apparent in the recognition of both
a separate right to contact through visits, correspondence and by phone in the
tribunals’ detention rules and the power of the prosecution to request restrictions on
such facilities. Such restrictions, which are imposed at the instigation of officials other
than the detention authorities, must be regarded as deviations from the general
communications regime and are, therefore, more appropriately examined in the
context of regime changes (which are addressed in Chapter 2, above). Moreover, these
prohibitions, regulations or conditions not only concern contact with the outside
world, but may also concern a detained person’s contact with any other person,
including other detainees. Such contact does not easily lend itself to examination in
the context of the right of detained persons to contact with the outside world.\footnote{An exception is made in
respect of Rule 47 of the SCSL Rules of Detention as far as this
Rule makes possible the restriction or regulation of contact at the Registrar’s own initiative.
This, then, concerns a measure imposed by the highest detention authority, and should not be
regarded as a regime change imposed by an “outside official” (President, Judge, Chamber or
Prosecutor) and, therefore, will be discussed as far as relevant in this Chapter.}

\footnote{Regulation 101 of the ICC RoC; Rule 64 of the ICTY Rules of Detention; Rule 64 of the
ICTR Rules of Detention.}

\footnote{Office of the United Nations High Commissioner for Human Rights, Human Rights and
Prisons, Manual on Human Rights Training for Prison Officials, Professional Training Series
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Prosecutor) and, therefore, will be discussed as far as relevant in this Chapter.}
Due to the (virtual) absence of relevant case-law and of a detailed set of regulations, the STL practice and legal framework will only be examined insofar as these deviate from or have something important to add to those of the other tribunals. Also excluded – although certainly linked to the issue of contact – are in-depth discussions on such matters as marriage in prison and the right to procreate. It appears that the latter topic has not generated much debate at any one of the tribunals. The former has only been raised at the ICTR; the relevant case-law will be referred to below in the subparagraph on contact through visits.

Finally, different activities in the detention and prison context – e.g. education, work and religious activities - may all be related to a confined person’s contact with the outside world. Nonetheless, these topics will not be examined in this research, since they are not easily linked to the central working hypothesis.

In this Chapter, the detainees’ contact with the outside world is subdivided into distinct categories, on the basis of the different kinds of interlocutors, i.e. family and friends, lawyers and media. Each category is discussed in a separate paragraph. Each sub-section starts with the theoretical and legal underpinnings of the detainees’ relevant right to contact, which will constitute the normative framework for assessing the adequacy of the arrangements at the different international tribunals. Then, such arrangements will be examined. While each paragraph concludes with a discussion of the major findings, the general conclusion at the end of this Chapter briefly summarises the core conclusions and formulates a number of recommendations.


8.2 Contact with family and friends

8.2.1 Contact with family and friends: rationales and legal requirements

‘My wife’s visit has once again thrown everything into turmoil. Her presence makes me realize that it was not only I who was sentenced in Nuremberg, but she also. It is hard to say which of us suffers more’.

Albert Speer.\(^{15}\)

Rationales

It is well-established that contact with the outside world, particularly with family members and close friends, may attenuate the harmful effects that confinement has on confined individuals.\(^{16}\) As Easton notes, ‘[f]or individuals confined within a total institution where all activities are undertaken within the prison walls, any contact with the outside world can reduce the impact of isolation on the prisoner’s sense of self’.\(^{17}\) The separation of persons from their social support system has proven to result in high levels of stress\(^{18}\) and has in various studies been recognised as the most difficult aspect of incarceration.\(^{19}\)


Contact, especially through visits and by phone, may assist detained persons to maintain their morale and even their mental sanity, and may assist detained persons to develop closer or, at least, maintain relationships with the outside world.

Maintaining relationships will, in turn, contribute to the normalisation of prison or detention life and support the detainees’ social rehabilitation. As argued by Livingstone, Owen and MacDonald, ‘with the decline of faith in the rehabilitative capacity of the prison itself, contact with the outside world as a means of reducing the debilitating effects of institutionalization has come to be seen as perhaps the most important rehabilitative strategy in the prison context’.

Specifically in relation to remand detainees, the permitting and facilitating of contact finds support in the presumption of innocence. As to the post-conviction phase, Lippke argues that ‘retributivism requires that legal punishment be structured so that it treats and addresses offenders as rational moral beings. This entails that the losses or restrictions punishment imposes must not be permitted to erode or destroy offenders’ capacities for responsible citizenship. Were it to do so, it would transform

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20 Iddings stresses the importance of contact by phone, particularly for illiterate persons; see Ben Iddings, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates*, in: 8 North Carolina Journal of Law & Technology 1, Fall 2006, p. 159-203, at 168.
21 Helen Codd, *supra*, footnote 19, p. 25.
them into beings for whom retributive legal punishment is not appropriate’. 27 It should be noted, in this regard, that the various international criminal tribunals have recognised ‘just desert’ or retribution as the primary sentencing principle. 28 It has further been argued that contact, particularly through visits, may be beneficial to the maintenance of order inside the prison or remand center, by easing tensions among the incarcerated persons, 29 and may also contribute to diminishing recidivism. 30 As to the latter possible effect, it has been noted that family relationships play an important role in a prisoner’s successful reentry into society. 31 Since family relationships ‘are not established at the moment of release’, 32 the development and maintenance of these relationships must be promoted and supported during incarceration. 33 In respect of the effect that inmates’ contact with the outside world may have on prison order, the U.N. Manual on Human Rights Training for Prison Officials states that ‘[p]roper visiting arrangements are beneficial not only to prisoners, but also to staff. Prisoners will be more contented and reassured, and staff will learn more about the prisoners in their custody and care’. 34 Another argument is found in the harmful effect that incarceration has on the social environment, in particular on the families of detained and imprisoned persons, and the

28 ICTY, Judgement on Sentencing Appeal, Prosecutor v. Bralo, Case No. IT-95-17-A, A. Ch., 2 April 2007, par. 81.
31 Jennifer J. Harman, Vernon E. Smith and Louisa C. Egan, supra, footnote 18, at 795; Alice Mills and Helen Codd, supra, footnote 24, at 674-675.
33 More difficult to imagine, however, is how family relationships may play a role in preventing recidivism where it concerns system criminality as dealt with by international criminal justice.
34 Office of the United Nations High Commissioner for Human Rights, supra, footnote 10, p. 121.
manner in which contact, especially in the form of visits, may ease their suffering. In this regard, various scholars emphasise the deleterious effect of a parent’s detention on the child, an effect which can be attenuated by visits. Mills and Codd argue that ‘[t]he psychological consequences of imprisonment for children of prisoners can include depression, emotional withdrawal, anxiety, low self-esteem and ‘acting in’ or ‘acting out’ at home or at school’ and that ‘[i]ncarceration has been argued to increase the impact of other factors that adversely affect children’s growth and development’. Murray adds that children may suffer from or show such behaviour as ‘hyperactivity, aggressive behaviour, (…) regression, clinging behaviour, sleep problems, eating problems, running away, truancy and poor school grades’. In respect of the partners of detained persons, Murray points to such negative consequences as ‘[l]oss of income, social isolation, difficulties of maintaining contact, deterioration in relationships, and extra burdens of childcare’. Furthermore, it has been argued that visits and other means of contact may be seen as a form of “inspection” of the prison or detention situation. In this regard, Easton argues that ‘links to the outside world (…) provide a key element of security for prisoners in protecting against poor conditions or poor treatment inside prison’. Moreover, Christian states that family members often feel that visits enable them to monitor the detention situation. According to her, families ‘believe that when a

35 Richard Tewksbury and Matthew DeMichele, supra, footnote 23, at 297; Johnna Christian, supra, footnote 16, at 33-34.
37 Alice Mills and Helen Codd, supra, footnote 24, at 686.
38 Joseph Murray, supra, footnote 19, at 446. See, in further detail, Helen Codd, supra, footnote 19, p. 71-72.
39 Joseph Murray, supra, footnote 19, at 444. See, also, Helen Codd, supra, footnote 19.
40 Susan Easton, supra, footnote 17, p. 141. See, in a similar vein, Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 212.
prisoner does not receive visits, it is a sign that no one cares about him, which gives prison personnel free license to treat him however they wish.  

In order to advance the aforementioned rationales, contact must be promoted and facilitated. Also relevant in this regard are the conditions under which contact is permitted. Contact visitation, for example, allows the visitor and the detainee to touch. The U.N. Manual on Human Rights Training for Prison Officials states that ‘[i]t is important that prisoners and their visitors can touch, and that children can be held’. According to London Rogal, ‘[e]xperts in prison psychology have stated that the allowance of physical touching leads to better morale among the prison population’. He further argues that contact visitation strengthens the aforementioned positive effects of visits, both for detainees and family members.

Also relevant is the manner in which visitors, including children, are treated. Feelings of stigmatisation are not uncommon among detainees’ family members and may result in detainees receiving fewer visits. Other factors affecting a detained person’s right to contact with the outside world is the distance between the remand center and his family’s place of residence, as well as the related issue of the availability of financial resources to relatives and friends for

41 Johnna Christian, supra, footnote 16, at 41.
42 Office of the United Nations High Commissioner for Human Rights, supra, footnote 10, p. 121. See, also, Penal Reform International, supra, footnote 1, p. 106.
43 James London Rogal, supra, footnote 16, at 229.
44 Id., at 230, 236; Pamela Lewis, supra, footnote 24, at 103; Benjamin Guthrie Stewart, supra, footnote 36, at 172.
45 Benjamin Guthrie Stewart, supra, footnote 36, at 172.
46 Joseph Murray, supra, footnote 19, at 444.
47 Richard Tewksbury and Matthew DeMichele, supra, footnote 23, at 297-298. Comfort, in this regard, even speaks of ‘mortification of prison visitors through the systematic devaluation of their time and the rigorous curtailing of their bodily comfort and presentation under the guise of an institutional rhetoric of “security”’; Megan L. Comfort, In the Tube at San Quentin, The “Secondary Prisonization” of Women Visiting Inmates, in: 1 Volume of Contemporary Ethnography 32, Sage Publications, 2003, p. 77-107, at 80, 82, 101, 102. At page 103, Comfort states that ‘[w]hile the ostensible function of the prison when handling visitors is that of a “people-processing organization” (...) the cumulative dishonors it inflicts — the routinization of long and unpredictable waits, containment in an inhospitable and inscrutable environment, interference with self-presentation, the denial of private belongings — make it akin to a “people-changing organization” (...) that defines and profoundly transforms the public and personal identities of women’. See, further, Alice Mills and Helen Codd, supra, footnote 24, at 683, 684; Helen Codd, supra, footnote 19, at 59.
48 Alice Mills and Helen Codd, supra, footnote 24, at 680; Joseph Murray, supra, footnote 19, at 454.
maintaining such contact. In this light, it is, for example, important that costs for outgoing calls should be kept at a minimum and that prisoners and detainees should be placed as close to their family as possible. Also relevant, particularly for detained persons whose families live far away from the remand center or prison, are such practical arrangements as the times at which detainees are permitted to make and receive telephone calls, the permitted duration of these calls, the hours set aside for and the duration of visits, the availability of transport to the remand center or prison, the availability of child-care during visits, the availability of adequate information on regulations regarding contact, security controls during visits – of both the visitor and the detained person - and the condition of the visitation area. According to the U.N. Manual on Human Rights Training for Prison Officials, ‘[i]f visits are to play a real part in maintaining a prisoner’s connection with the community and in his or her eventual rehabilitation, then they need to be sufficiently frequent and of reasonable length. They should take place in decent conditions of sufficient privacy to permit meaningful and constructive communication to take place’. Also relevant is the issue of monitoring communications. Although some measure of control may be necessary, censorship and other forms of monitoring may have a negative effect on the benefits of detainees’ contact with the outside world. In this


50 Ben Iddings, supra, footnote 20, at 169.


52 Alice Mills and Helen Codd, supra, footnote 24, at 679.

53 Joseph Murray, supra, footnote 19, at 445.

54 Alice Mills and Helen Codd, supra, footnote 24, at 680; Joseph Murray, supra, footnote 19, at 445.

55 Alice Mills and Helen Codd, supra, footnote 24, at 681; Joseph Murray, supra, footnote 19, at 455; Alison Liebling, supra, footnote 16, p. 326; Office of the United Nations High Commissioner for Human Rights, supra, footnote 10, p. 121.

56 Alice Mills and Helen Codd, supra, footnote 24, at 681; Joseph Murray, supra, footnote 19, at 445, 455; Penal Reform International, supra, footnote 1, p. 106.

regard, Van Zyl Smit and Snacken stress that the ‘[i]nterception and registration of telephonic conversations is a far-reaching intervention into the private life of the prisoner, which seriously hampers communication about personal issues and may lead to emotional isolation of the prisoner’.58 The U.N. Manual on Human Rights Training for Prison Officials states in respect of correspondence that it is usually not necessary to censor detainees’ or prisoners’ mail,59 although it recognises that ‘[i]t may be appropriate to open incoming mail – in the presence of prisoners – to ensure that no forbidden items are enclosed’.60 Although ‘[v]isits are a more powerful medium of external social relations than letters or telephone conversation’,61 the latter are important modes of communication with the outside world. The U.N. Manual suggests that States should supply indigent detainees with writing materials and postage.62 As to telephone communications, the Manual provides that these ‘can serve as a substitute for a letter or a visit, or can clear the way to make a visit or letter more productive’.63 Telephone communications are particularly important for foreign prisoners, who will have great difficulty in receiving visits, and for illiterate persons.64 Although the SMR are silent on the matter of telephone contact, according to Penal Reform International’s document ‘Making Standards Work’, telephone communications should be treated in a similar way as correspondence.65

Another type of visits is that of private or conjugal visits, which have been defined as the ‘meeting of prisoners and their spouses in private for the purpose of engaging in sexual relations’.66 However, spouses are not necessarily the only persons eligible for such visits and ‘engaging in sexual relationships’ need not be the (sole)

58 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 227.
59 See, in a similar vein, Penal Reform International, supra, footnote 1, p. 105.
61 Penal Reform International, supra, footnote 1, p. 106.
62 See, in a similar vein, id., p. 105.
64 Ibid.
65 Ibid.
purpose of such visits. Under various conjugal visitation schemes, the detainees’ parent(s), partner and even children may be eligible as visitors. The purpose of these visits, then, lies in maintaining and strengthening family bonds. The crucial distinctive element of conjugal visits as compared to other forms of visits is that the former are not supervised. In general, they also tend to last significantly longer than regular visits.

The arguments adduced in favour of conjugal visits are that they may be used as an instrument for influencing behaviour of detainees (rewards for good behaviour); they allow inmates and their partners sexual and emotional release; they help male prisoners to maintain their ‘masculine self-image’; through such visits the right to found a family may be exercised; intimacy is regarded as vital for healthy relationships; such visits may contribute to detained persons’ social rehabilitation by improving family relationships; such visits may reduce recidivism; such visits ease

70 The right to sexuality has been recognised by the ECtHR as an element of the right to private life. See Dirk van Zyl Smit and Sonja Snacken, *supra*, footnote 14, p. 242 and the case-law cited there.
tensions among inmates and thereby contribute to maintaining order; and such visits advance the normalisation of life within the prison or detention centre. According to Foucault, not allowing prisoners to have sexual intercourse must be seen as a form of bodily suffering. It has also been stated, particularly in the context of US prison culture, that conjugal visits ‘may reduce the incidence of homosexual violence within prisons’. Furthermore, Wurzer-Leenhouts argues that sexual contact constitutes an essential aspect of human life and points to the presumption of innocence and to the principles of social rehabilitation and ‘least intrusiveness’. In the international context, a further argument for allowing conjugal visits lies in the fact that, at most tribunals, requests for temporary or provisional release are usually denied.

**Legal framework**

International human rights instruments and supervisory bodies on contact with the outside world

According to the U.N. Manual on Human Rights Training for Prison Officials, ‘[t]he international instruments make it clear that contact with family is a right, not a privilege to be earned’. In addition, Penal Reform International’s document ‘Making Standards Work’ stresses that ‘[p]risoners’ outside contacts must be seen as entitlements rather than as privileges’. These statements find support in a wide range of international and regional human rights instruments, which provide for the rights to

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supra, footnote 68, at 143; Helen Codd, supra, footnote 19, p. 157; Susan Easton, supra, footnote 17, p. 169.
76 Ann Goetting, supra, footnote 68, at 143; Susan Easton, supra, footnote 17, p. 169.
77 Megan L. Comfort, supra, footnote 30, at 486; Christopher Hensley, Sandra Rutland and Phyllis Gray-Ray, supra, footnote 69, at 139.
78 Megan L. Comfort, supra, footnote 30, at 487; Susan Easton, supra, footnote 17, p. 171; Penal Reform International, supra, footnote 1, p. 107.
80 James London Rogal, supra, footnote 16, at 238; Christopher Hensley, Sandra Rutland and Phyllis Gray-Ray, supra, footnote 69, at 139; Note, supra, footnote 66, at 398; Thomas M. Bates, supra, footnote 68, at 130; Rachel Wyatt, supra, footnote 67, at 597-598; Ann Goetting, supra, footnote 68, at 142.
82 Office of the United Nations High Commissioner for Human Rights, supra, footnote 10, p. 121.
83 Penal Reform International, supra, footnote 1, p. 102.
family and private life, the right to marry and found a family and the prohibition of arbitrary or unlawful interference with correspondence. Article 12 of the UDHR provides, in relevant part, that ‘[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence’. Articles 17 and 23 of the ICCPR set forth, *inter alia*, the rights to privacy, family life and the right to found a family. Article 17 prohibits arbitrary or unlawful interference with privacy, family, home and correspondence. According to the HRC, ‘[e]ven with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis’.\(^\text{84}\) Also relevant in this regard is Article 9(3) of the Convention on the Rights of the Child, which provides that ‘States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests’.

In its Report on its visit to the Maldives, the SPT held that ‘maintaining contact with the outside world and, in particular, sustaining family and other affective ties is an important element of custodial care and crucial for the eventual reintegration of prisoners into society without re-offending. Moreover, the ability to communicate with family and friends can be a safeguard against ill-treatment, which tends to flourish in closed establishments’.\(^\text{85}\) In its Report on Honduran prisons, it recommended that the Government should take measures ‘to 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’ and stated that ‘[a]ny measure that discourages visits that prisoners are entitled to should be avoided’.\(^\text{86}\) The Subcommittee has further held that rules regarding visits must be


\(^{86}\) 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.
clear and accessible, and that ‘[d]isciplinary measures should not include limiting
contacts with the outside world’. In its Report on its visit to Mexico, it stated more
generally that ‘[t]he more a detainee is isolated from contact with the outside world,
the greater the risk of torture and ill-treatment’. Further, in its Report on its visit to
Paraguay, it called for an adequate number of working telephones in each prison.
The importance of detainees’ and prisoners’ contact with the outside world has also
been recognised by the CAT and the U.N. Special Rapporteur. In his Report on his
visit to Spain, the Special Rapporteur made special note of the difficulties that
families of prisoners faced when they wished to visit their confined relative as a result
of the distance between their place of residence and the prison. The same concern
was expressed in relation to the situation in Kazakhstan.

According to Rule 37 of the SMR, ‘[p]risoners shall be allowed under
necessary supervision to communicate with their family and friends at regular
intervals, both by correspondence and by receiving visits’. In relation to foreign
prisoners, Rule 38 of the SMR states that they ‘shall be allowed reasonable facilities
to communicate with the diplomatic and consular representatives of the State to which
they belong’. In relation to remand detention, Rule 92 of the SMR provides that a
detained person ‘shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution’. Further, the part of the SMR entitled ‘social relations and after-care’ provides that ‘[s]pecial attention shall be paid to the maintenance and improvement of such relations between a prisoner and his family as are desirable in the best interests of both’ and that ‘[f]rom the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation’. Moreover, Principle 10 of the U.N. Basic Principles instructs the competent authorities to create favourable conditions ‘for the reintegration of the ex-prisoner into society under the best possible conditions’, while Principle 19 of the U.N. Body of Principles stipulates that ‘[a] detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations’. In addition, Principle 15 provides that, in principle, ‘communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days’. Furthermore, Principle 16 (1) of the U.N. Body of Principles provides that, promptly after admission, the detained or imprisoned person has the right to notify, or have notified, his relatives or other appropriate persons of his whereabouts. Such notification shall be ‘made or permitted to be made without delay’. Delays are

charge of their interests or any national or international authority whose task it is to protect such persons’. See, in a similar vein, Principle 16(2) of the U.N. Body of Principles.

95 Rule 79 of the SMR.
96 Rule 80 of the SMR.
98 Principle 16(1) of the U.N. Body of Principles. See, also, Rule 24(8) and (9) of the EPR.
99 Principle 16(4) of the U.N. Body of Principles.
solely permitted ‘for a reasonable period where exceptional needs of the investigation so require’.100

Finally, the U.N. Body of Principles recognises the need for privileged communications with delegates of the prison inspectorate. Principle 29(2) states that detainees and prisoners are entitled to communicate freely and in full confidentiality with such persons, subject only to ‘reasonable conditions to ensure security and good order in such places’.

Regional instruments and supervisory bodies on contact with the outside world

As to the regional human rights instruments, Articles 11 and 17 of the ACHR protect the rights to private and family life and the rights to marry and raise a family, respectively. The right to family life is also laid down in Article 18 of the ACHPR. In the European context, the rights to family and private life and respect for correspondence are protected under Article 8 ECHR, whereas the rights to marry and found a family are guaranteed under Article 12.101 Although extreme cases of isolation may incur breaches of Article 3,102 the focus of the present paragraph will be on the rights to family life and private life and to respect for correspondence under Article 8.

- Prison visits and the ECHR

a. General framework

In Messina v. Italy, the ECtHR observed that ‘any detention which is lawful for the purposes of Article 5 of the Convention entails by its nature a limitation on private and family life’.103 It subsequently noted, however, that ‘it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in

100 Principle 16(4) of the U.N. Body of Principles.
101 As stated in the introduction, the present Chapter will not focus on the right to marry and found a family. The discussion below will, therefore, not concern ECtHR case-law on these rights.
102 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 213, 217.
103 ECtHR, Messina v. Italy (No. 2), judgment of 28 September 2000, Application No. 25498/94, par. 61.
maintaining contact with his close family’. In Klamecki v. Poland, the Court held that ‘[s]uch restrictions as limitations put on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime of special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision’. The ECtHR has held that, under Article 8 of the Convention, it must examine whether interferences with the rights to private and family life are in accordance with the law, pursue one of the legitimate aims mentioned in Article 8(2) and can be regarded as being necessary in a democratic society. In relation to the last criterion, the Court has explained that this means that interferences ‘must correspond to a pressing social need and, in particular, must remain proportionate to the legitimate aim pursued’. In determining whether the interference is necessary, the Court will leave a margin of appreciation to States.

As noted by Murdoch, the requirement that the infringement pursues a legitimate aim will ‘seldom if ever pose a problem, as invariably any interference can readily be held to fall under one or more of the listed aims such as public safety, prevention of disorder or crime, protection of health, and protection of the rights of others’. The case of Ostrovar v. Moldova sheds some light on the first requirement, i.e. that the interference must be ‘in accordance with the law’. In that case, the complaint of the applicant concerned the prohibition of visits by his wife and daughter and the interception of correspondence with his mother during his detention on remand. The Court found that these restrictions had not been ‘in accordance with the law’, because the national legislation had not indicated ‘with reasonable clarity the scope

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105 ECtHR, Klamecki v. Poland (No. 2), judgment of 3 April 2003, Application No. 31583/96, par. 144.
106 ECtHR, Messina v. Italy (No. 2), judgment of 28 September 2000, Application No. 25498/94, par. 65.
109 ECtHR, Ostrovar v. Moldova, judgment of 13 September 2005, Application No. 35207/03.
and manner of exercise of discretion conferred on the public authorities so as to ensure to individuals the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society’. Although there was no problem with the regulations’ accessibility, the Court found with regard to their foreseeability that no distinction had been drawn ‘between the different categories of persons with whom the prisoners could correspond. Also [the national legislation] did not lay down any principles governing the grant or refusal of authorization (…). It is also to be noted that the provision failed to specify the time-frame within which the restriction on correspondence could apply. No mention was made as to the possibility of challenging the refusal to issue an authorisation or as to the authority competent to rule on such a challenge’. For these reasons, the Court ruled that both the restrictions on visits and on correspondence had not been in accordance with the law and, therefore, violated Article 8.

In the case of *Estrikh v. Latvia*, the Court held that, in order to determine whether an infringement was ‘in accordance with the law’, a three-pronged test must be applied. It stated that ‘[f]irst, it must be established that the interference with the right has some basis in national law’. In this respect the Court recalled that ‘in certain conditions instructions, which do not themselves have the force of law, may be taken into account in assessing whether the criterion of foreseeability was satisfied (…’.

‘Secondly, the law must be accessible and, thirdly, the law must be formulated in such way that a person can foresee, to a degree that is reasonable in the circumstances, the consequences which a given action will entail’. The first requirement, i.e. that the infringement must have some basis in domestic law, includes the requirement that the procedure prescribed by domestic law must be abided by. Unlawfulness under domestic law will thus entail a breach of Article 8. In *Estrikh*, the Court further considered that the national legislation on which the restrictions had been based were ‘internal normative acts’ and ‘had not been published in such a way as to make them

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110 Id., par. 107, 98.
111 Id., par. 100. These findings were also applicable to the regulations regarding visits.
113 Id., par. 167.
publicly known’. The second prong of the test had thus been breached. Further, it considered that, as a result, it could not be assumed that a person would be able to foresee the consequences of action based on the national internal acts.

In Vlasov v. Russia, the applicant complained that during his detention, he had not been permitted to receive family visits for seventeen months. Regarding the third prong of the test, the foreseeability requirement, the Court held that ‘the expression “in accordance with the law” does not merely require that the impugned measure should have a basis in domestic law but also refers to the quality of the law in question. The law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to the impugned measures. In addition, domestic law must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law for legal discretion granted to the executive to be expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, in order to give the individual adequate protection against arbitrary interference’. The Court found that the Russian legislation on which the restrictions on family visits had been based, fell short of the foreseeability requirement, in that it ‘conferred unfettered discretion on the investigator in this matter but did not define the circumstances in which a family visit could be refused. The impugned provisions went no further than mentioning the possibility of refusing family visits, without saying anything about the length of the measure or the reasons that may warrant its application. No mention was made of the possibility of challenging the refusal to issue an authorisation or whether a court was competent to rule on such a challenge (…). It follows that the provisions of Russian law governing family visits did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities, so

115 ECtHR, Estrikh v. Latvia, judgment of 18 January 2007, Application No. 73819/01, par. 171.
116 Id., par. 173.
117 ECtHR, Vlasov v. Russia, judgment of 12 June 2008, Application No. 78146/01, par. 124.
118 Id., par. 125.
that the applicant did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society’.\textsuperscript{119}

Further, in the case of \textit{Onoufriou v. Cyprus}, the applicant complained that for forty-seven days he had been detained under a stringent security regime, which involved a total prohibition on visits.\textsuperscript{120} The Court applied the three-pronged test of the ‘in accordance with the law’ demand. Regarding the relationship between the foreseeability requirement and the concept of discretionary powers awarded in prison regulations, it recognised the ‘impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity’ and stated that ‘[m]any laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice’.\textsuperscript{121} Nonetheless, the Court found that the domestic law did not contain definitions of specific legal terms and did not provide guidance on how prison directors should make use of their discretion in a particular case. In this respect, it took into account that the applicant had not been informed of the suspension of his visiting rights and had not been provided with the reasons for doing so. As a result, it had been ‘not clear why and under what authority the applicant’s visitation rights were suspended’.\textsuperscript{122} Hence, the Court was of the opinion that the domestic law did ‘not indicate with reasonable clarity the scope and manner of the exercise of any discretion conferred on the relevant authorities to restrict visitation rights’\textsuperscript{123} and, on that basis, found a breach of Article 8 ECHR.

In line with the latter two cases, in which the Court focused on the rule of law rationale underlying the foreseeability demand, in \textit{Shalimov v. Ukraine} the three-pronged test was rephrased as requiring ‘firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question,

\textsuperscript{119} Id., par. 126. See, in a similar vein, ECtHR, \textit{Moiseyev v. Russia}, judgment of 9 October 2008, Application No. 62936/00, par. 250.
\textsuperscript{120} ECtHR, \textit{Onoufriou v. Cyprus}, judgment of 7 January 2010, Application No. 24407/04.
\textsuperscript{121} Id., par. 94.
\textsuperscript{122} Id., par. 95. See, in a similar vein, ECtHR, \textit{Shalimov v. Ukraine}, judgment of 4 March 2010, Application No. 20808/02, par. 88.
\textsuperscript{123} ECtHR, \textit{Onoufriou v. Cyprus}, judgment of 7 January 2010, Application No. 24407/04, par. 96.
requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law’. 124

b. Restrictive measures

In *Messina*, the applicant complained about the conditions under which visits had been permitted, which prevented direct contact (they were non-contact visits; detainees and visitors were separated by a glass partition) and about the number of visits (detainees were permitted a maximum of two visits per month). The Court accepted the restrictive measures’ necessity in light of the type of crimes for which the applicant was being imprisoned, stating that ‘it took into account the specific nature of the phenomenon of organised crime, particularly the Mafia type, in which family relations often play a crucial role’. 125 The Court accepted that, in general, high-security measures may be necessary in respect of dangerous prisoners. It also took note of the measures’ long duration – the special regime to which the applicant had been subjected had lasted for four and a half years – but noted that each extension had been ‘assessed with the greatest care by the relevant authorities’ and that reasons had been given for such extensions. 126 The Court further considered that the restrictions on family visits had not been in place throughout the entire period of the applicant’s detention. In both *Messina* and the 2009 case of *Enea*, the Court inferred from the temporary suspensions of the restrictive measures and the use of conscientious extension procedures that the national authorities had attempted to strike a fair balance between the applicant’s rights and the aims they had sought to achieve. 127 It also follows from other cases that an important aspect of the proportionality requirement (as an aspect of the necessity requirement) under Article 8 is whether domestic authorities have considered alternative, less intrusive means, to advance

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127 Id., par. 73; ECtHR, *Enea v. Italy*, judgment of 17 September 2009, Application No. 74912/01, par. 128, 129.
their objectives, particularly where restrictive measures are imposed for a considerable period of time. As in Messina, in the case of Lorsé and others v. the Netherlands, the applicant, who was detained in a Dutch maximum security institution, complained about not being permitted to have (more) physical contact with his nuclear family during visits. Apart from the one contact-visit per month, visits took place behind a glass partition. He further complained about the monitoring of all conversations. The case differed from Messina, however, in that the maximum security regime was directed at preventing escape, rather than being aimed at cutting all ties with the prisoner’s criminal environment outside of prison. As a consequence, the applicant concerned was allowed more contact with the outside world. In this light, the Court found that the measures did not go beyond what was necessary in a democratic society.

In Klamecki v. Poland, restrictions were imposed on a detainee’s visits by his wife ‘to eliminate the risk of the applicant and his wife acting in collusion’. The Court assessed whether the authorities had struck a fair and proportionate balance between Klamecki’s right to family life and ‘the needs to ensure the process of obtaining evidence’. In this light, it noted the long duration of the restrictions on visits, which had lasted for a year, and the fact that these were combined with a prohibition on making telephone calls and the monitoring of correspondence. Although the Court accepted that, initially, these measures might have been necessary, ‘with the passage of time and given the severity of those consequences, as well as the authorities’ general obligation to assist the applicant in maintaining contact with his family during his detention, the situation called, in the Court’s opinion, for a careful review of the necessity of keeping him in a complete isolation from his wife’. The Court noted, in this regard, that the national court that had imposed the restrictions had neither given reasons for doing so, nor considered ‘any alternative means of ensuring that

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129 ECtHR, Lorsé and others v. the Netherlands, judgment of 4 February 2003, Application No. 52750/99, par. 83.
130 Id., par. 85-86.
131 ECtHR, Klamecki v. Poland (No. 2), judgment of 3 April 2003, Application No. 31583/96, par. 147.
132 Id., par. 150.
their contact would not lead to any collusive action or otherwise obstruct the process of taking evidence, such as, for instance, subjection of their contact to supervision by a prison officer (…) or to other restrictions as to the nature, frequency and duration of contact.\textsuperscript{133}

The case of \textit{Ciorap v. Moldova} also concerned restrictions on a prisoner’s visiting rights, \textit{i.e.} visits by his relatives and girlfriend.\textsuperscript{134} The applicant complained that he had been denied ‘meetings with his wife and sister in a separate room and they had to meet in one of the glass cabins and he was separated from his visitors by a glass partition’.\textsuperscript{135} The Court held that ‘[s]ubject to necessary security measures, detainees should be allowed to meet not only their relatives but also other persons wishing to visit them’.\textsuperscript{136} It considered, in this regard, that ‘it is “an essential part of both private life and the rehabilitation of prisoners that their contact with the outside world be maintained as far as practicable, in order to facilitate their reintegration in society on release, and this is effected, for example, by providing visiting facilities for the prisoners' friends and by allowing correspondence with them and others”’.\textsuperscript{137} As to the necessity of the restrictive measures, the Court observed that in justifying the arrangements, the national courts had only pointed to a perceived general need to preserve the safety of both the visitors and the applicant. No evidence had been adduced as to any threat posed by the applicant. It therefore held that ‘[i]n the absence of any demonstrated need for such far-reaching restrictions on the applicant’s rights, the domestic authorities failed to strike a fair balance between the aims relied on and the applicant’s rights under Article 8’.\textsuperscript{138}

In \textit{Moiseyev v. Russia}, the applicant submitted that during certain periods of his detention he had been denied family visits, while in other periods such visits were limited to two one-hour visits per month.\textsuperscript{139} He also complained that during these visits, he had always been separated from his visitors by a glass partition. The Court

\textsuperscript{133} \textit{Id.}, par. 151.
\textsuperscript{134} ECtHR, \textit{Ciorap v. Moldova}, judgment of 19 June 2007, Application No. 12066/02.
\textsuperscript{135} \textit{Id.}, par. 111.
\textsuperscript{136} \textit{Id.}, par. 107.
\textsuperscript{137} \textit{Ibid.}
\textsuperscript{138} \textit{Id.}, par. 117-118.
\textsuperscript{139} ECtHR, \textit{Moiseyev v. Russia}, judgment of 9 October 2008, Application No. 62936/00, par. 247.
found that the denial of family visits had not been ‘in accordance with the law’.140 Regarding the limited frequency and duration of family visits during the remaining period of the applicant’s detention, the Court noted that the case was different to Messina, where a special regime had been imposed, which aimed at limiting the detained person’s contact with the outside world and, in particular, with close relatives, in light of the special features of Mafia organisations. The Court observed that the domestic legislation had ‘restricted the maximum frequency of family visits to two per month in a general manner, without affording any degree of flexibility for determining whether such limitations were appropriate or indeed necessary in each individual case’.141 It did not discern any necessity for the imposed restrictions and held that there had been a breach of Article 8. As to the glass partition between visitors and the applicant, the Court recalled that, generally speaking, such a measure may be necessary due to security considerations. Nonetheless, it considered that in the circumstances, no such considerations applied and noted that ‘the applicant was denied any physical contact with his visitors for the entire duration of his detention, that is, for more than three and a half years. The effect of such a long period of time, which must have taken a heavy toll on the applicant and his family, is a further factor weighing in favour of a finding that the contested measure was disproportionate’.142

c. Distance between the prison and the family’s place of residence

The case of Selmani v. Switzerland concerned the effect of the distance between the place of residence of a detainee’s relatives and the prison in which he or she is being held.143 In that case, the Yugoslav family members were ordered to leave Switzerland, while one of their relatives was imprisoned in that country. The family members alleged a breach of their right to family life, since they would not be able to see their detained relative for at least one and a half year. However, the Court held that ‘the Convention does not grant detained persons the right of choosing their place of detention, and that the separation and distance from [the prisoner's] family are

140 Id., par. 250-251.
141 Id., par. 255.
142 Id., par. 258.
inevitably consequences of his detention’. Nonetheless, it stressed that ‘the detention of a person in a prison 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’.

d. Treatment of visitors

The case of Wainwright v. the United Kingdom concerned the strip-searching of visitors during a prison visit. The applicants had submitted that the searches violated both Article 3 and Article 8 of the ECHR. Although the Court accepted that the ‘treatment undoubtedly caused the applicants distress’, it was of the opinion that – in the present case - the minimum level of severity as required under Article 3 had not been reached. Nonetheless, it considered that ‘[w]here a measure falls short of Article 3 treatment, it may, however, fall foul of Article 8 of the Convention which, inter alia, provides protection of physical and moral integrity under the respect for private life head’. Regarding the searches of the visitors, the Court considered that, although in specific circumstances such searches may be regarded as ‘legitimate preventive measures’, ‘the application of such a highly invasive and potentially debasing procedure to persons who are not convicted prisoners or under reasonable suspicion of having committed a criminal offence must be conducted with rigorous adherence to procedures and all due respect to their human dignity’. Although domestic internal procedures had not been abided by, the national courts had ruled that these breaches did not disclose any unlawfulness, which was accepted by the Court. However, regarding the requirement that the interference be ‘necessary in a democratic society’, it ‘was not satisfied that the searches were proportionate to th[e] legitimate aim in the manner in which they were carried out. Where procedures are laid down for the

144 Ibid. See, in a similar vein, ECHR, Plepi et al. v. Albania and Greece, Admissibility Decision of 4 May 2010, Application No. 11546/05; 33285/05; 33288/05.
146 ECHR, Wainwright v. the United Kingdom, judgment of 26 September 2006, Application No. 12350/04.
147 Id., par. 43.
148 Id., par. 44.
proper conduct of searches on outsiders to the prison who may very well be innocent of any wrongdoing, it behoves the prison authorities to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched from being assailed any further than is necessary’. On that basis, the Court found a breach of Article 8. The applicants (i.e. the visitors) had further complained that English law did not provide for an effective remedy for breaches of their Convention rights. The Court considered that ‘where an applicant has an arguable claim to a violation of a Convention right (...) the domestic regime must afford an effective remedy’. In light of the finding of a breach under Article 8, it held that such claim had certainly been ‘arguable’ and, subsequently, assessed whether a remedy had been available to the applicants. The Court took note of the finding by the House of Lords that ‘negligent action disclosed by the prison officers did not ground any civil liability, in particular as there was no general tort of invasion of privacy’ and, on that basis, concluded that no effective remedy had been available to the applicants in breach of Article 13 ECHR.

e. Conjugal visits

In *Aliév v. Ukraine*, the applicant complained, *inter alia*, that during his imprisonment he had been denied permission to receive intimate visits from his wife. The Court, while speaking approvingly of ‘reform movements in several European countries to improve prison conditions by facilitating conjugal visits’, held that ‘the refusal of such visits may for the present time be regarded as justified for the prevention of disorder and crime within the meaning of the second paragraph of Article 8 of the Convention’. Four-and-a-half years later, in *Dickson v. the United Kingdom*, the Court noted that ‘more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions)’. Subsequently, however, it stated that ‘while the Court has expressed its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention

149 *Id.*, par. 48.
150 *Id.*, par. 55.
152 *Id.*, par. 188.
153 ECtHR, *Dickson v. the United Kingdom*, judgment of 4 December 2007, Application No. 44362/04, par. 81.
as requiring Contracting States to make provision for such visits (…) Accordingly, this is an area in which Contracting States could enjoy a wide margin of appreciation’. \(^{154}\) Finally, it should be noted that, apart from being linked to the right to family life under Article 8, conjugal visits may also relate to the right to found a family under Article 12. \(^{155}\)

- Correspondence and telephone communications under the ECHR \(^{156}\)

a. General framework

In assessing the legitimacy of infringements on the right to respect for correspondence under Article 8, the ECtHR has adopted the same approach as it does to prison visits. The Court will assess whether such interference has been ‘in accordance with the law’, whether it pursues one of the aims that are legitimate pursuant to Article 8(2) and whether the interference can be regarded as necessary in a democratic society. \(^{157}\) With respect to the requirement that the interference be ‘in accordance with the law’, the Court has applied the three-pronged test referred to in the former sub-paragraph. \(^{158}\) Further, when applying the necessity requirement, the Court takes note of i) the State’s margin of appreciation, ii) whether there was a pressing social need for the infringements, iii) whether the infringements were proportionate to the aims pursued, and iv) the ‘ordinary and reasonable requirements of imprisonment’. \(^{159}\) As to

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\(^{154}\) *Ibid*. Emphasis added.

\(^{155}\) This topic was excluded from this study; see, *supra*, p. 650. See, in more detail, Dirk van Zyl Smit and Sonja Snacken, *supra*, footnote 14, p. 245.

\(^{156}\) Correspondence and telephone communications are discussed together in this sub-paragraph as the ECtHR’s case-law has held that these modes of communication attract the same protection. See *id.*, p. 227 and the references cited there. See, further, Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, Second Edition, Oxford University Press, 2009, p. 381, where it is held that ‘[i]n telephone-tapping cases, the literal meaning of ‘correspondence’ has been expanded to include telephone communications’. See also the case-law cited there.

\(^{157}\) ECtHR, *Silver and others v. the United Kingdom*, judgment of 25 March 1983, Application No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, par. 84.


\(^{159}\) ECtHR, *Silver and others v. the United Kingdom*, judgment of 25 March 1983, Application No. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, par. 97-98.
the last aspect, the Court has held that ‘some measure of control over prisoners’ correspondence is called for and is not of itself incompatible with the Convention’.160

b. Censorship and monitoring

In Boyle and Rice v. the United Kingdom, Mr. and Mrs. Boyle complained that their correspondence had been routinely censored by the prison authorities during Mr. Boyle’s imprisonment.161 On this basis, the Court found (in relation to Article 13) no arguable claim of a violation of Article 8, thereby affirming that supervision over prisoners’ correspondence is, in principle, legitimate. In Lorsé and others v. the Netherlands, the detained person, who was subjected to a maximum security regime, also complained about censorship of his correspondence and the monitoring of his telephone conversations.162 The Court accepted that these measures were necessary to prevent the applicant’s escape, and considered that it was not the Court’s task to assess the accuracy of the domestic authorities’ assertion that Lorsé might escape.163

It follows from the case of Puzinas v. Lithuania, that minor disciplinary punishments involving a temporary restriction on the right to receive items by mail may be permitted.164 The applicant in that case had sent a complaint about his prison conditions through unauthorised channels. For that reason, the national authorities had denied the applicant the right to receive parcels during one prison visit. Regarding the necessity of this infringement, the Court held that ‘the ordinary and reasonable requirements of imprisonment may justify a system of internal inquiry into prisoners’ complaints about their treatment and conditions of detention (...) With that aim in mind, some measure of control over prisoners’ correspondence, such as sporadic screening (other than letters involving domestic or Convention judicial business), may be called for and may not of itself be incompatible with the Convention’.165 However, the Court warned that this did not imply ‘that correspondence may either be stopped

160 Id., par. 98.
161 ECHR, Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Application No. 9659/82; 9658/82, par. 61.
162 ECHR, Lorsé and others v. the Netherlands, judgment of 4 February 2003, Application No. 52750/99, par. 83.
163 Id., par. 85-86.
164 ECHR, Puzinas v. Lithuania (No. 2), judgment of 9 January 2007, Application No. 63767/00.
165 Id., par. 33. Emphasis added.
for raising complaints about prison matters or delayed until such complaints have first been examined by the prison administration’. 166 It noted, though, that the applicant’s complaints had received ‘adequate judicial review’, that the penalty imposed was of ‘a minor nature’ and that the applicant had not shown that ‘his possible fear of censorship was a valid excuse for circumventing an apparently legitimate prison rule regarding the channels of complaint’. 167 It concluded that there had been no breach of Article 8.

In *Messina v. Italy*, the Court *did* find a violation of Article 8, holding that the infringement, which consisted of the monitoring of the applicant’s correspondence with, *inter alia*, his family, had not been ‘in accordance with the law’. 168 It held that the domestic legislation on which the monitoring had been based failed to ‘lay down rules on either the period of validity of the measures for monitoring prisoners’ correspondence or the reasons which may warrant them, [and] does not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the public authorities in the relevant sphere’. 169

The case of *Ciapas v. Lithuania* concerned the routine censorship of correspondence of prisoners. 170 The applicant complained that his letters to his wife were opened and read in his absence. 171 Regarding the necessity of the infringements, the Court observed that ‘the censorship was carried out at the stage of pre-trial investigation in the context of two sets of criminal proceedings for robbery and blackmail. While certain forms of censorship of some letters to or from the applicant’s acquaintances - especially his correspondence with previous convicts or persons of dangerous character - may have been justified in order to protect the witnesses or victims in the impugned criminal cases, censorship of other private correspondence - especially that with his wife - may have unjustly divulged certain elements of his personal or family life. The interference that occurred in the present case may have thus been justified,

167 ECtHR, *Puzinas v. Lithuania* (No. 2), judgment of 9 January 2007, Application No. 63767/00, par. 34.
169 *Id.*, par. 81.
171 *Id.*, par. 24.
but required a more specific justification’. 172 It then noted that the authorities had failed to explain why the routine monitoring had been ‘indispensable’. According to the Court, the resulting censorship amounted to a ‘carte blanche for the authorities to have an excessive hold on the applicant’s communication with the outside world’. 173 The Court further stipulated the ‘need for the national law authorising such measures to be drafted with precision, and for regular review of censorship orders as to their nature and length’. 174 In the case of Petrov v. Bulgaria, the applicant had complained that all of his incoming and outgoing correspondence was monitored, including that with counsel. 175 The Court found that the national legislation, which formed the basis for the automatic monitoring, failed to distinguish between the different categories of persons with whom detainees correspond. It further noted that the domestic law did not lay down time limits for the monitoring, nor were the authorities obliged to give reasons for monitoring in a particular case. 176 The Court concluded that, since the domestic authorities had not explained why the monitoring regime was ‘indispensable’, there had been a violation of Article 8. 177 Although the Court was obviously most concerned about the monitoring of the applicant’s correspondence with his lawyer, the requirements of laying down time limits and giving reasons for the monitoring, as well the requirement that the monitoring be ‘indispensable’ were equally applicable to the routine monitoring of (his) other correspondence. Further, in Moiseyev v. Russia, the applicant complained that all of his correspondence, both incoming and outgoing, had been subject to censorship. 178 The Court found a breach of Article 8, because the infringements had not been ‘in accordance with the law’. The domestic legislation allowed for the routine monitoring of all correspondence, but failed to ‘indicate with sufficient clarity the scope of any discretion conferred on the competent authorities and the manner of its exercise’. 179 The Court recalled that ‘a form of censorship, which effectively [gives] the remand prison administration an open license for

172 Id., par. 25.
173 Ibid.
174 Ibid.
175 See, more in detail, infra, p. 840.
176 ECtHR, Petrov v. Bulgaria, judgment of 22 May 2008, Application No. 15197/02, par. 44.
177 Id., par. 44-45.
178 ECtHR, Moiseyev v. Russia, judgment of 9 October 2008, Application No. 62936/00.
179 Id., par. 266.
indiscriminate and routine checking of all of the applicant’s correspondence, [is] incompatible with Article 8 of the Convention’. It took specific note of the fact that the domestic law did not distinguish between different categories of correspondents. However, it stressed that the law in question had also failed in not defining the length and scope of the restrictions, in not demanding reasons for their application, in not stipulating their manner of exercise and in not making provision for independent review. The Court concluded that the national provisions had failed to ‘afford a measure of legal protection against arbitrary interference by public authorities with the applicant’s right to respect for his correspondence’. Similarly, in *Enea v. Italy*, the Court found that the monitoring of a prisoner’s correspondence had not been ‘in accordance with the law’, since domestic law did not ‘regulate either the duration of measures monitoring prisoners’ correspondence or the reasons capable of justifying such measures, and [did] not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the authorities in the relevant sphere’. Another violation of the ‘in accordance with the law’ demand was established in the case of *Savenkovas v. Lithuania*, which concerned the censorship of all correspondence to and from detained persons. The Court criticised the domestic law for not laying down criteria that might legitimise routine censorship. As a consequence, prisoners were not able to foresee infringements on their right to respect for their correspondence. The Court held that the poor quality of the domestic law constituted a breach of Article 8. Moreover, the Court stated that, even if it would not have found a breach on the grounds that the interference was not ‘in accordance with the law’, the authorities had failed to adduce sufficient reasons for the censorship, which raised problems under the ‘necessity’ requirement. It may thus be concluded that the Court objects to routine forms of censorship where, *inter alia*, the domestic law fails to discriminate between different correspondents, where it does not state the specific grounds on which the censorship may be based, and where the national authorities do not explain why such measures are ‘indispensable’ in a concrete case.

180 Ibid.
181 Ibid.
184 Id., par. 97.
Hence, both grounds (the legitimate aims pursued and the quality of the law (accessibility and foreseeability)) and reasons (the necessity test) are required.\(^\text{185}\) The same follows from the case of Onoufriou v. Cyprus, where the Court recalled that domestic law will be considered deficient if in the context of, \textit{inter alia}, automatic screening regimes domestic authorities are not obliged to give a reasoned decision as to why such interference is necessary and which specifies the grounds for doing so.\(^\text{186}\) It stressed that ‘where measures interfering with prisoners’ correspondence are taken, it is essential that reasons be given for the interference, such that the applicant and/or his advisers can satisfy themselves that the law has been correctly applied to him and that decisions taken in his case are not unreasonable or arbitrary’.\(^\text{187}\)

In Onoufriou, the Court also noted that the categories of detained persons’ correspondents whose mail, both incoming and outgoing, would be subject to routine screening were not defined with sufficient precision under domestic law.\(^\text{188}\) In this regard, it strongly objected to the interference with the applicant’s letters to the Cyprian Ombudsman and emphasised ‘the Ombudsman’s role as guardian of human rights and fundamental freedoms, and the importance of respect for the confidentiality of correspondence of prisoners since it could (...) concern allegations against the prison authorities’.\(^\text{189}\) In its Report on its 2002 visit to Azerbaijan, the CPT similarly held that ‘remand prisoners should be allowed to correspond in confidence with (...) the authorities empowered to supervise places of detention’.\(^\text{190}\)

In Vlasov v. Russia, the domestic authorities had refused to post the applicant’s letters to his wife and mother. The Court found that these restrictions had not been ‘necessary’, as there was no evidence that those letters had contained ‘information on the criminal case or offensive language’.\(^\text{191}\) It further reiterated that ‘a prohibition on private correspondence “calculated to hold the authorities up to contempt” or employing “improper language against prison authorities”’ is not

\begin{footnotes}
\footnotetext[185]{Dirk van Zyl Smit and Sonja Snacken, \textit{supra}, footnote 14, p. 224.}
\footnotetext[186]{ECtHR, \textit{Onoufriou v. Cyprus}, judgment of 7 January 2010, Application No. 24407/04, par. 109, 112.}
\footnotetext[187]{\textit{Id.}, par. 109, 113.}
\footnotetext[188]{\textit{Id.}, par. 110.}
\footnotetext[189]{\textit{Id.}, par. 109, 113.}
\footnotetext[190]{CPT, Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002, CPT/Inf(2004)36, Strasbourg, 7 December 2004, par. 139.}
\footnotetext[191]{ECtHR, \textit{Vlasov v. Russia}, judgment of 12 June 2008, Application No. 78146/01, par. 138.}
\end{footnotes}
considered ‘necessary in a democratic society’. In respect of ‘offensive language’, the Court has held that prisoners have the right to criticise authorities. In Yankov v. Bulgaria, the Court stipulated that ‘[i]n a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it’.  

Regarding contact by telephone, the applicant in Petrov v. Bulgaria also raised the complaint that, unlike married prisoners, he had not been permitted to use the telephone to call his ‘long-time partner with whom he had a child’. The Court held that ‘telephone conversations, whether they be made from a person’s home or from other premises, are covered by the notions of “private life” and “correspondence” within the meaning of Article 8 § 1’. In 2002, the Court had held that Article 8 ‘cannot be interpreted as guaranteeing prisoners the right to make telephone calls, in particular where the facilities for contact by way of correspondence are available and adequate’. Nevertheless, where telephone facilities are provided, ‘these may – having regard to the ordinary and reasonable conditions of prison life – be subjected to legitimate restrictions’. Where such restrictions constitute an infringement of the right to private life or respect for one’s correspondence, they are subject to the regime of Article 8(2).

In the case of Doerga v. the Netherlands, the interference with the applicant’s right to private life consisted of the tapping and recording of his telephone

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192 Ibid.
195 ECHR, Petrov v. Bulgaria, judgment of 22 May 2008, Application No. 15197/02, par. 46. The applicant relied on Article 14 in conjunction with Article 8.
196 Id., par. 51.
197 ECHR, A.B. v. the Netherlands, judgment of 29 January 2002, Application No. 37328/97, par. 92. Van Zyl Smit and Snacken state in connection to this remark by the Court, that ‘in the light of the overall trend of the Court’s decisions towards strengthening the right of communication with the outside world, this cannot be regarded as an irreversible rule’; Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 227.
199 Ibid.
conversations and the retention of those recordings by the prison authorities. In connection to the ‘in accordance with the law’ requirement, the Court held that ‘[i]n the context of interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with the rights protected by Article 8 of the Convention’. More specifically, it stated that ‘tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a ‘law’ that is particularly precise. It is essential to have clear, detailed rules on the subject’. In this respect, the Court found that the domestic regulations lacked clarity and detail, as they failed to ‘give any precise indication as to the circumstances in which prisoners’ telephone conversations may be monitored, recorded and retained by penitentiary authorities or the procedures to be observed’. Domestic courts had interpreted the impugned regulations as allowing for the retention of recordings of intercepted telephone conversations ‘for as long as the danger giving rise to the recording exists’. In _Doerga_, this amounted to a period of eight months. While the Court accepted that, ‘having regard to the ordinary and reasonable requirements of imprisonment’ the monitoring of detained persons’ telephone conversations may be necessary, it found that the domestic law failed to ‘afford appropriate protection against arbitrary interference by the authorities’.

- Other European instruments and supervisory bodies on contact with the outside world

Rule 24(1) of the EPR stipulates that detained persons must be permitted ‘to communicate as often as possible by letter, telephone or other forms of

201 _Id_., par. 45.
202 _Id_., par. 50.
203 _Id_., par. 52.
204 _Id_., par. 53. It took until 2011 for the decision to be implemented in the Dutch legal order; see _Besluit van 23 september 2010, houdende wijziging van het Reglement justitiële jeugdinrichtingen, Reglement verpleging ter beschikking gestelden en de Penitentiaire maatregel, in verband met regels over het bewaren en verstrekken van opgenomen telefoongesprekken (Besluit toezicht telefoongesprekken justitiële inrichtingen)_, of 7 October 2010.
communication with their families, other persons and representatives of outside organizations and to receive visits from these persons’. The Council of Europe has called for a liberal interpretation of the term ‘family’ to include relationships which are akin to formally established family relationships. In relation to untried persons, the EPR plead for extra visits and additional access to other modes of communication. Although the Council acknowledges that it may be necessary to place restrictions on or monitor communications and visits, it stresses that ‘for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime’, such restrictions must ‘allow an acceptable minimum level of contact’. The Commentary stresses that the restrictions on contact must be kept to a minimum, must be the least intrusive justified by the threat, and that monitoring should at all times be proportionate to the threat posed by such communications. More generally, it is stated that all restrictions on a detainee’s contact with the outside world must comply with the demands of Article 8 ECHR. As to the lex certa requirement, the Commentary requires that restrictions in domestic law must be spelt out clearly and not leave discretion to the detention authorities. According to the Commentary, the ‘necessity’ requirement implies that alleged threats to safety or security, which serve as the basis for restrictions, must be provable. This in turn implies that indefinite periods of censorship are not permitted. Finally, restrictions ‘should be particularly carefully limited’ where they concern the contact of remand detainees with the outside world. The Council warns that detention authorities should be particularly cautious when imposing restrictions in order to safeguard the integrity of the criminal proceedings and/or to protect witnesses. It argues that detention authorities may not always be in the best position to judge the necessity of such restrictions and that it

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206 Rule 99 sub (b) of the EPR.
207 Rule 24(2) of the EPR.
209 Ibid.
210 Ibid.
211 Ibid.
may therefore be good policy to require court orders before imposing restrictions on those grounds.\textsuperscript{212}

The EPR further instruct national authorities to regulate in their national law with whom, or with which institutions - both national and international - the detained persons are permitted to communicate \textit{without restrictions}.\textsuperscript{213}

As to the type of visits permitted under domestic law, the EPR only provide that these must be such ‘as to allow prisoners to maintain and develop family relationships in as normal a manner as possible’.\textsuperscript{214} Although the EPR make no explicit reference to conjugal or private visits, such references can be found in the Commentary. The Commentary even calls for extending intimate family visits over longer periods. It speaks approvingly of the practice in various eastern European States, where such visits are reported to last as long as seventy-two hours.\textsuperscript{215} Moreover, in its 1998 Recommendation concerning the ethical and organisational aspects of health care in prison, the Committee of Ministers found that ‘[c]onsideration should be given to the possibility of allowing inmates to meet with their sexual partner without visual supervision during the visit’.\textsuperscript{216}

The Council of Europe recognises that, in order to safeguard the effectiveness of the detainees’ right to contact with the outside world, detention authorities must facilitate such contact. The EPR provide that detainees must be assisted in ‘maintaining adequate contact’ and must be provided with ‘the appropriate welfare support to do so’.\textsuperscript{217} The term ‘adequate’, then, should be interpreted in light of the prison authorities’ duty to ‘strive to create the circumstances to allow [detainees] to maintain [contact] as best as possible’.\textsuperscript{218} It should be reiterated, in this regard, that contact is essential in order to counteract the deleterious effects of incarceration on detained persons.

\begin{footnotesize}
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\item \textsuperscript{212} \textit{Ibid}.
\item \textsuperscript{213} Rule 24(3) of the EPR.
\item \textsuperscript{214} Rule 24(4) of the EPR.
\item \textsuperscript{215} CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 24.
\item \textsuperscript{216} CoE, Recommendation (98)7, concerning the ethical and organisational aspects of health care in prison, adopted by the Committee of Ministers on 8 April 1998 at the 627th meeting of the Ministers’ Deputies, par. 68.
\item \textsuperscript{217} Rule 24(5) of the EPR.
\item \textsuperscript{218} CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 24.
\end{itemize}
\end{footnotesize}
The European Parliament has stressed that the maintenance of family ties is an essential means of fighting recidivism and of advancing the social reintegration of detained persons. It has held that family contact is the right of all prisoners, their children and other family members. The Explanatory Statement to the ‘Motion for a resolution on the situation of women in prison and the impact of the imprisonment of parents on social and family life’ pointed to various studies affirming the role that family contact might play in reducing recidivism and in promoting social rehabilitation. It furthermore stressed that ‘visits are a vital way of maintaining family relationships’.

A similar view was expressed by the European Commissioner for Human Rights in 2008, who further held that ‘every effort should be made to ensure that prisoners are able to receive visits under the best possible conditions’ and that particular attention should be given to ‘the situation of children of detainees who should not be deprived of their right to maintain contact with their detained parent’.

In its Second Annual Report, the CPT held that it is important ‘for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations’. The Committee has stressed the importance of prisoners’ maintenance of contact with the outside world in light of their social rehabilitation. It has further called for welcoming visiting areas, clear

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219 EU, European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life, 2009/ C 66 E/09, par. J.
224 See, e.g., 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. 168; CPT, Report to the Bulgarian Government
regulations on prison visits and the proper treatment of visitors. The Committee has emphasised ‘the need for some flexibility as regards the application of rules on visits and telephone contacts vis-à-vis prisoners whose families live far away (thereby rendering regular visits impracticable). For example, such prisoners could be allowed to accumulate visiting time and/or be offered improved possibilities for telephone contacts with their families.’ Also where prisons are located in isolated areas, ‘supplementary burdens’ to visitors should be prevented by establishing ‘special rules on the length of, and arrangements for, visits and forms of assistance to families’. The CPT has frequently called for allowing long-term visits. As to conjugal visits, the CPT has stated that allowing such visits is a ‘commendable step, provided such visits take place in conditions which respect human dignity’. De Lange observes that, under CPT standards, infringements may solely be justified on the basis of security considerations, the administration of justice or a lack of resources. He further

on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 26 March to 7 April 1995, CPT/Inf(95)1[Part 1], Strasbourg, 25 September 1995, par. 156. 
225 See, e.g., 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. 171.
226 Id., par. 172.
227 Ibid.
228 CPT, Second General Report on the CPT’s activities covering the period 1 January to 31 December 1991, CPT/Inf (92) 3, 13 April 1992, par. 51. See, further, 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. 170, 174.
229 Ibid., par. 173.
230 See, e.g., CPT, Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002, CPT/Inf(2004)36, Strasbourg, 7 December 2004, par. 140. Azerbaijani sentenced prisoners ‘could receive up to four short visits (2 hours) per month and one long visit (72 hours) up to four times per year.
231 See, e.g., 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. 176; CPT, Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment from 14 to 26 April 1996, CPT/Inf(97)9[Part 1], Strasbourg, 17 July 1997, par. 174; CPT, Report to the Government of Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 April to 9 May 2003, CPT/Inf(2004)40, Strasbourg, 21 December 2004, par. 102.
observes that infringements must be restricted to a specified period, the duration of which must be as short as possible.\textsuperscript{232} The CPT also requires a regular assessment of whether a situation still warrants the application of restrictions on contact, having regard to the grounds on which such restrictions may justifiably be applied.\textsuperscript{233} Moreover, regarding telephone contact, the CPT has stated that ‘all prisoners, including those on remand, should in principle have regular access to a telephone.’\textsuperscript{234} This is particularly important in the case of prisoners who do not receive regular visits from their families because they live a long way from the prison’.\textsuperscript{235} In its Report on its 2008 visit to Azerbaijan, the Committee found the provision of two fifteen-minute telephone calls per months inadequate and, in respect of persons serving life-imprisonment, called for at least one visit per month.\textsuperscript{236} As to correspondence, the CPT has stressed that remand detainees should be allowed to send and receive letters ‘without restrictions, except when expressly prohibited by the competent investigator or court, for a clearly determined period of time, in cases duly justified by the requirements of the case’.\textsuperscript{237}


\textsuperscript{233} \textit{Ibid}.

\textsuperscript{234} See, also, CPT, Report to the German Government 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 20 November to 2 December 2005, CPT/Inf(2007)18, Strasbourg, 18 April 2007, par. 150.

\textsuperscript{235} CPT, Report to the German Government 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 14 to 26 April 1996, CPT/Inf(97)9[Part 1], Strasbourg, 17 July 1997, par. 173; CPT, Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 26 March to 7 April 1995, CPT/Inf(97)1[Part 1], Strasbourg, 25 September 1995, par. 159; CPT, Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002, CPT/Inf(2004)36, Strasbourg, 7 December 2004, par. 67; CPT, Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 23 May to 3 June 2005, CPT/Inf(2006)24, Strasbourg, 12 July 2006, par. 135.

\textsuperscript{236} CPT, Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 8 to 12 December 2008, CPT/Inf(2009)28, Strasbourg, 26 November 2009, par. 43.

\textsuperscript{237} CPT, Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002, CPT/Inf(2004)36, Strasbourg, 7 December 2004, par. 139.
8.2.2 Contact with family and friends at the various tribunals

ICTY

Rule 12 of the ICTY Rules of Detention stipulates that a detainee may, as soon as is practicable after his admission into custody, notify, *inter alia*, his relatives of his whereabouts.238 Apart from this initial ‘notification right’, the detainees’ right to correspondence, communications by phone and visits are regulated in a separate part of the Rules of Detention, entitled ‘communications and visits’.239

Correspondence and telephone

Rule 58 recognises the right of detainees to ‘communicate with their families and other persons with whom it is in their legitimate interest to correspond by letter and by telephone’.240 In principle, the costs of such communications are borne by the detainee. In the case of indigent detained persons, however, the ‘Registrar may agree that the Tribunal will bear such expenses within reason’. Pursuant to Paragraph (A),

238 See, on this ‘notification right’, Penal Reform International, *supra* footnote 1, p. 103-104. See, further, SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Maldives, U.N. Doc CAT/OP/MDV/1, 26 February 2009, par. 101, where it is stated that ‘[a] person held without anyone knowing his whereabouts is more vulnerable to abuse. The right to notify someone on the outside about the fact of one’s deprivation of liberty is an important safeguard against ill-treatment; those who might otherwise resort to ill-treatment may be deterred by the knowledge that someone outside has been notified and may be vigilant about the detained person’s well-being’. See, in a similar vein, SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico, U.N. Doc CAT/OP/MEX/1, 31 May 2010, par. 124-125; 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. 151; CAT, Report of the Committee Against Torture, Twenty-fifth session (13-24 November 2000), Twenty-sixth session (30 April-18 May 2001), General Assembly, Official Records, Fifty-sixth session, Supplement No. 44 (A/56/44), par. 39.

239 Rules 58 to 64bis of the Rules of Detention.

240 See, in a similar vein, Rule 57(A) of the STL Rules of Detention. Rule 68(A) of the STL Rules of detention adds that ‘[t]elephone calls may be made by a Detainee between the hours of 9 a.m. and 5 p.m. (The Hague time), subject to the reasonable demands of the Tribunal and of the schedule of the Detention Facility and any financial limits established by the Registrar in accordance with Rule 57(C)’. Paragraph (C) adds that ‘[i]n exceptional circumstances, the Chief of Detention may permit Detainees to make calls outside the hours set out in paragraph (A)’. 706
the Commanding Officer may lay down conditions of supervision and impose time-restraints governing detainees’ communications. Regarding telephone communications, Paragraph (C) holds that the ‘Registrar may order that non-privileged telephone conversations be recorded or monitored as provided for in the Regulations to govern the supervision of visits to, and communications with detainees’. As to the detainees’ correspondence, Rule 59(A) requires the inspection of all mail and correspondence ‘for explosives or other irregular material’. Paragraph (B) stipulates that ‘[t]he Commanding Officer, in consultation with the Registrar, shall lay down conditions as to the inspection of correspondence, mail and packages in the interests of maintaining order in the Detention Unit and to obviate the danger of escape’. Such conditions can be found in the ‘Regulations to Govern the Supervision of Visits to and Communications with Detainees’, which were issued by the Registrar and the Commanding Officer in 1995 and were revised several times thereafter.241 These Regulations must be read subject to the Rules of Detention and, where relevant, to the ICTY RPE. They are further subject to any order restricting a detainee’s contact with any other person pursuant to a request thereto by the Prosecutor, or any order restricting a detained person’s communications with the media.242 The reference to restrictions on contact with the media was only inserted in 2009.

- Correspondence

The detainees’ right to correspondence is set forth in Regulation 1. As stated above, costs for correspondence are, in principle, borne by the detainee. This includes the costs for both postage and writing materials. Where the Registrar has determined that a particular detainee is indigent, postage and materials are provided for by the tribunal.243 The Registrar may, however, impose ‘reasonable limits’ on the amount and weight of correspondence sent by indigent detainees.244 If a detainee wishes to

241 United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev.4 (hereafter in this sub-paragraph referred to as ‘the Regulations’).
242 See the Preamble to the Regulations. See, further, Rules 64 and 64bis of the ICTY Rules of Detention.
243 Regulation 5(A).
244 Regulation 5(B).
object to the limits set by the Registrar, he may address the President on the issue.\footnote{Regulation 5(C).} Such ‘reasonable limits’ only concern the correspondence of indigent persons. Limits may further be imposed by the Registrar as to the quantity and weight of parcels received by non-indigent and indigent persons alike.\footnote{Regulation 14(B).}

Security checks on incoming mail, which are carried out by both the host prison and UNDU, constitute a further restriction on correspondence. All mail and parcels entering, as well as all mail leaving UNDU, are ‘inspected for explosives or irregular material by using X-ray and metal and explosives detectors’.\footnote{Regulation 2 in conjunction with Regulation 14(A). Regulation 14(A) does not give detained persons the right to send parcels from UNDU.} Any item which, according to the Commanding Officer, ‘constitutes a threat to: i. the security or good order of the detention unit or the host prison; or ii. the health or safety of any person therein’ may be confiscated.\footnote{Regulation 4(A).}

Rule 14 of the Rules of Detention, which concerns the retention by UNDU of the detainees’ personal possessions, is applicable to items confiscated under Regulation 4.\footnote{Regulation 4(B).} As to parcels, Regulation 14(C) stipulates that items contained therein which, ‘in the sole discretion of the Commanding Officer pose a threat to safety or to the maintenance of security and good order in the detention unit, shall be confiscated and their contents retained or disposed of in accordance with Rule 14 of the Rules of Detention and the detainee informed accordingly’.

Apart from such security checks, restrictions also apply to the content of the correspondence. Censorship is carried out by the Registrar and concerns all incoming and outgoing mail,\footnote{The Prison Regulations of Spandau Allied Prison stipulated that ‘[t]he Governorate will supervise all correspondence of prisoners. Copies of all correspondence to and from prisoners will be kept in their personal files’; Cited in Norman J.W. Goda, \textit{Tales from Spandau, Nazi Criminals and the Cold War}, Cambridge University Press, 2007, Appendix, p. 290.} except for those items addressed to or received from i) counsel, ii) the tribunal, iii) a Judge or the Registrar when specifically appointed by the tribunal’s Bureau as ‘Inspecting Authority’ under Rule 6(A) of the Rules of Detention, or iv) a diplomatic or consular representative.\footnote{Regulation 6(A).} Before 2009, Regulation 6 referred to the privileged institution mentioned under iii) as the ‘Inspecting Authority’, which encompassed the inspectorate referred to in Rule 6(B) of the Rules of Detention, \textit{i.e.} the ICRC. In 2009, Regulation 6 was amended, which now refers to

\begin{footnotesize}
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\item Regulation 5(C).
\item Regulation 14(B).
\item Regulation 2 in conjunction with Regulation 14(A).
\item Regulation 4(A).
\item Regulation 4(B).
\item The Prison Regulations of Spandau Allied Prison stipulated that ‘[t]he Governorate will supervise all correspondence of prisoners. Copies of all correspondence to and from prisoners will be kept in their personal files’; Cited in Norman J.W. Goda, \textit{Tales from Spandau, Nazi Criminals and the Cold War}, Cambridge University Press, 2007, Appendix, p. 290.
\item Regulation 6(A).
\end{itemize}
\end{footnotesize}
‘the Inspecting Authority under Rule 6(A) of the Rules of Detention’. This excludes the Inspectorate mentioned in Rule 6(B). Since 2009, a detained person’s correspondence with the ICRC is, apparently, no longer considered privileged. In the former paragraph, it was seen that both the ECtHR and the CPT have stressed that detained persons must be enabled to communicate confidentially with the authorities empowered to supervise places of detention.

Save for items of mail sent to or coming from the abovementioned privileged persons and institutions, all detainees’ mail is forwarded by the Commanding Officer to the Registrar for the purpose of review. The former must keep a log of all items ‘with details (if known) of the name of the addressee, the name of the sender, the date of transmission and receipt and any other relevant information’. Whereas prior to the 2009 amendment to the Regulations, Regulation 7(C) provided that a ‘copy of each entry must be given to the detainee concerned in a language he understands’, this obligation was removed in the 2009 amendments. This is unfortunate, since it places detainees in an impossible position if they wish to complain to the Registrar or the President about correspondence gone missing or been posted overdue.

Regulation 8(A) stipulates that ‘[t]he Registrar, or a person authorised by him, shall, within twenty-four hours of receipt, open and read, or have read, each item of mail’. The provision thus entails the routine monitoring of all non-privileged correspondence of detainees.

According to Sub-Regulation 8(B), items must be delivered to the detained person or posted immediately after having been reviewed. This does not apply if the item ‘(i) is in breach of: (a) the Rules of Detention; (b) these Regulations; or (c) an Order of the Tribunal; or (ii) gives reasonable grounds to the Registrar, or a person authorised by him, to believe that the detainee may be attempting to: (a) arrange escape; (b) interfere with or intimidate a witness; (c) interfere with the administration of justice; or (d) otherwise disturb the maintenance of security and good order in the detention unit’. If, when reviewing an item, the Registrar – or the person authorised by him – finds a breach of the Rules of Detention, the Regulations or an Order of the tribunal, ‘an

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252 This used to be explicitly provided for in Regulation 7(A) of the pre-2009 version of the Regulations, but was deleted in 2009.
253 Regulation 6(B).
offending item of: (i) outgoing mail shall be returned to the detainee together with a note from the Registrar, in a language the detainee understands, giving the reasons for refusal to post the offending item; and (ii) incoming mail shall, in the sole discretion of the Registrar, either be returned to the sender or retained by the Registrar and the detainee shall be informed accordingly.\textsuperscript{254} The detained person concerned may, at any time, approach the President to request the reversal of a decision of the Registrar under (i) or (ii).\textsuperscript{255} The detained person must also be given the opportunity to rewrite the letter, omitting the part that was found to be offending.\textsuperscript{256} The Registrar must keep a copy of each offending item. He is further entitled to confiscate an offending item and to notify the Prosecutor or the Dutch authorities ‘of the breach and the nature of the offending item’.\textsuperscript{257} Confiscated items must be retained and ‘shall not be handed over to the Prosecutor as evidence of contempt of the Tribunal pursuant to Rule 77(A) of the Rules of Procedure and Evidence without prior notice and disclosure to counsel for a detainee’.\textsuperscript{258}

Regulation 13 reiterates that detained persons whose correspondence has either been intercepted or confiscated may make a formal complaint under Rules 80 to 84 of the Rules of Detention.\textsuperscript{259} As stated above, where this concerns a decision of the Registrar under Regulation 9(A), the detained person may directly submit a request for reversal of such a decision to the President.

In relation to the situation of Blaškić, whose detention conditions had been modified pursuant to Rule 64 of the RPE and who was consequently located to a residence in the Netherlands outside UNDU, the President’s Decision provided that all correspondence both to and from Blaškić ‘shall be addressed to the United Nations Detention Unit and shall be dealt with according to the Rules of Detention’.\textsuperscript{260}

\begin{footnotes}
\item[254] Regulation 9(A).
\item[255] Regulation 10.
\item[256] Regulation 9(B).
\item[257] Regulation 9(C) and (D).
\item[258] Regulation 12.
\item[259] See, in more detail, \textit{supra}, Chapter 5.
\end{footnotes}
• Telephone

In principle, persons from outside UNDU cannot make a direct call to a detained person. Incoming calls are received by the detention authorities, who must record details of the call including ‘the name and telephone number of the caller and the time and date of the call’. These details are passed on to the detainee. In an emergency, however, the Commanding Officer may permit a detained person to receive an incoming call.

Regarding both incoming and outgoing calls, Regulation 15 provides that the ‘Commanding Officer may, in consultation with the Registrar, place such restrictions upon the time that a detainee may spend on any one telephone call as are reasonable for the good order of the detention unit’. As to outgoing calls, these may be made on workdays between 9 a.m. and 5 p.m., upon request to the Commanding Officer and as ‘subject to the reasonable demands of the daily schedule of the detention unit’. Outside these hours, the Commanding Officer may, in exceptional circumstances, permit a detained person to make calls, ‘unless the calls of the detainee are being monitored by order of the Registrar made in accordance with Regulation 21’.

The costs of telephone calls are borne by the detained person, unless he has been determined indigent by the Registrar and if the Registrar has confirmed that the tribunal will pay for these costs. The Registrar may ‘impose reasonable limits on the number and duration’ of calls made by indigent detainees. Where the detained person in question objects to such limitations, he may address the President on the issue.

261 Regulation 16(A).
262 Regulation 16(B). See, in a similar vein, Rule 68(B) of the STL Rules of Detention. See, also, Office of the United Nations High Commissioner for Human Rights, supra, footnote 10, p. 123.
263 Regulation 17(A).
264 Regulation 17(B).
265 Regulation 18(A).
266 Regulation 18(B).
267 Regulation 18(C).
All calls may be terminated by the Commanding Officer if he ‘believes he has reasonable grounds for intervention’. In that case, he must advise the detained person of his reasons for so doing\textsuperscript{268} and is obliged to report such cases to the Registrar.\textsuperscript{269}

The remaining part of the Regulations regarding telephone communications deals with issues related to the recording and monitoring of calls.

An important amendment was made to the Regulations in 2009. The principle that there would be no recording unless there were reasonable grounds for believing that the detained person in question may be attempting to escape, interfere with or intimidate a witness, interfere with the administration of justice or otherwise disturb the maintenance of good order in the detention unit was abandoned.\textsuperscript{270} This negative presumption was replaced by a more neutral one. Regulation 20(A) provides that in certain situations the Registrar may order that telephone conversations be recorded or monitored. Regulation 20 now holds that such order may be given ‘(A) to ensure the detainee does not attempt to: (i) arrange escape; (ii) interfere with or intimidate a witness; (iii) interfere with the administration of justice; or (iv) otherwise disturb the maintenance of security and good order in the detention unit; or (B) if an order for non-disclosure has been made by a Judge or a Chamber pursuant to the Rules of Procedure and Evidence’. This list is exhaustive. The requirement that there must be ‘reasonable grounds’ for the authorities’ suspicions has been removed, as well as the need for ‘beliefs’ that there are grounds for issuing a monitoring order. Although not explicitly stated in Regulation 20, as a consequence of its amendments the Registrar is given a blank license to monitor and record all telephone conversations, notwithstanding the fact that the House Rules explicitly provide that ‘[t]elephone calls will not usually be monitored or recorded’, but solely ‘if there is reason to believe that [a particular detainee] may be abusing this freedom’.\textsuperscript{271} As a consequence of the foregoing, Regulation 21(C) does not require reasons to be given to the detainee or his counsel for the recording or monitoring of his telephone communications or for an extension order.

\textsuperscript{268} Regulation 19.
\textsuperscript{269} Ibid.
\textsuperscript{270} See Regulation 20(A) of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3.
Prior to 2009, when ‘reasons’ for monitoring were still required, numerous monitoring orders were issued in respect of individual detained persons. In Delić et al., for example, the Registrar justified such order by stating that ‘the Registry has received information indicating that the names of potential witnesses have been disclosed to the public’. He subsequently held that, as a result, there were ‘reasonable grounds for believing that Mr. Zejin Delalić may interfere with or intimidate witnesses or otherwise disturb the maintenance of good order in the detention unit’. In Šešelj and Milošević, the Registrar justified the monitoring orders by pointing to the need to prevent media exposure. In Lukić et al., all non-privileged communications were suspended pursuant to allegations by the Prosecutor that ‘the accused Milan Lukić (“Accused”) may have called and intimidated the family of a Prosecution witness from the United Nations Detention Unit’. However, during later review proceedings the President lifted the ban, considering that ‘the Impugned Decision does restrict preparation which the Applicant may wish to undertake independent of, or in cooperation with, his Counsel. In addition, the Applicant has communicated to the Acting Commanding Officer that he is affected by not being able to communicate with his family. [footnote omitted] Given the lack of evidence of the Applicant’s intent to intimidate the witness, as well as the fact that the Applicant was not put on notice of the inappropriateness of such conduct before the Impugned Decision was issued, I find a two week restriction on his non-privileged calls to be somewhat excessive. Noting that ten days have elapsed, I consider this to be appropriate and thereby find that the continued restriction on the Applicants calls is not warranted.

Another change made to Regulation 20 in 2009 concerns the deletion of former Paragraph (C), which provided that conversations were not to be recorded unless

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274 ICTY, Decision, Prosecutor v. Lukić et al., Case No. IT-98-32/1-T, Deputy Registrar, 18 November 2008. See, also, ICTY, Decision on Milan Lukić’s Appeal against the Registrar’s Decision of 18 November 2008, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Vice-President, 28 November 2008.
‘specifically requested by the Prosecutor following the disclosure to the defence of the names of witnesses pursuant to Rule 67 of the Rules of procedure and Evidence’.

Conversations with counsel and diplomatic representatives are excluded from the recording and monitoring regime of Regulation 20.276

It follows from Regulation 21(A) that the list of grounds277 in Regulation 20 is meant to be exhaustive. Since some of these grounds are formulated in a very broad, catch-all manner, encompassing practically every scenario imaginable, the list of grounds hardly provide a safeguard against abuse. In this respect it should be recalled that Regulation 20 does not require any objective justification, not even suspicions or beliefs for issuing a monitoring or recording order. The abstract grounds listed there automatically apply to any person detained in UNDU. Therefore, although Regulation 21 refers to these grounds as ‘situations’, in light of there being no need for them to be based on concrete circumstances, the term ‘grounds’ is to be considered a more appropriate one and will be used in this research.

The duration of monitoring or recording decisions made pursuant to Regulation 20 may not exceed thirty days, although renewals – again for a maximum duration of thirty days - may be ordered by the Registrar.278 Such renewals must be reported to the President.279 Moreover, the detained person and his counsel must be notified of the monitoring or recording decision, as well as of any continuation order within twenty-four hours.280 The reporting duty to the President demonstrates the administrative, hierarchical relationship between President and Registrar in these matters, and may be argued to undermine the former’s position as an independent and impartial adjudicator in subsequent complaints proceedings on the same issues.

Such complaints proceedings, then, need not take the formal route provided for in the Rules of Detention. Regulation 22 states that the detained person concerned may directly address the President on monitoring, recording or continuation orders made by the Registrar.

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276 Regulation 21(A).
277 Regulation 21 refers to these grounds as ‘situations’. However, in light of the abstract language of Regulation 20, there is no need at all for them to pertain to concrete circumstances. Hence the term ‘grounds’ is to be considered a more appropriate one and will be used in this study.
278 Regulation 21(A) and (B).
279 Regulation 21(B).
280 Regulation 21(C).
The Commanding Officer must keep a log of all recorded or monitored calls, including ‘details of the name of the detainee, the number called, the name of the other party if known, the reason for recording or monitoring and the date on which the Registrar made the relevant order’. The Commanding Officer is obliged to provide the detained person with a copy of each entry in the log.

Before 2009, the Commanding Officer and the Registrar were mentioned as the two officials authorised to decide on whether to monitor a detainee’s telephone conversations. In 2009, amendments were made to the Regulations, as a consequence of which it is now unclear who is empowered to carry out the review. Prior to the amendment, the Regulations held that the Commanding officer must forward details of all recorded and monitored calls to the Registrar. The latter had to determine whether a review was necessary and, if so, he or she was the one to carry out the review. Apart from such a ‘forwarding duty’, the Commanding Officer did not play a role in the actual review. Since 2009, the Commanding Officer must within five working days and in respect of each recorded call make an initial determination as to whether it is necessary to listen to, or to have transcribed and read such call. Although there is no explicit mention of the Commanding Officer in connection to the actual review process, as a result of the amendments made in 2009, Regulation 25 now makes it possible for the Registrar to delegate his reviewing powers to any person. Given that the Commanding Officer is now responsible for making the initial determination, he or she may also be expected to conduct the actual review (upon delegation by the Registrar). Arguably, this would undermine the neutral position of first-line detention authorities, particularly since transcripts of intercepted conversations may end up on the desk of the Prosecutor, pursuant to both Regulation 26(B) and Regulation 27(B). The latter provision provides that a ‘transcription shall not be handed over to the Prosecutor as evidence of contempt of

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281 Regulation 23(A).
282 Regulation 23(B). Such copy must be formulated in a language the detainee understands.
283 See Regulation 20(A) of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3.
284 *Id.*, Regulation 24.
286 Regulation 24.
287 Regulation 25 of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3 read, as far as relevant: ‘If, having reviewed a call, the Registrar determines that there has been no breach of the Rules of Detention (...)’.
the Tribunal pursuant to Rule 77(A) of the Rules of Procedure and Evidence without prior notice and disclosure to counsel for the detainee’. Also worrisome is the fact that, whereas the initial review must be carried out by the Commanding Officer within five working days, no deadline is set for the actual review.

If the Registrar or the person authorised by him, determines after reviewing a call that there has been ‘no breach of the Rules of Detention, these Regulations or an order of the Tribunal and the call does not provide any other reason for further action’, the recording must be erased within forty-eight hours.288 Only the Registrar himself is authorised to rule that there has been such a violation.289 In that case, the ‘offending’ conversation must be transcribed by the Registry and, where necessary, translated into one of the working languages of the Tribunal’.290 The Registrar may further choose to notify the Prosecutor and ‘if deemed necessary, the Dutch authorities of the nature of the breach’.291 Before 2009, the Regulations provided that the Registrar may in such a case also notify the Commanding Officer. The reference to the Commanding Officer was deleted in 2009, which reinforces the assumption that it is indeed the Commanding Officer who carries out the actual review. The Regulations further stipulate that the Registrar must retain ‘[a]ny offending call which is transcribed’.292 Finally, Regulation 28 provides that ‘[a] detainee whose calls have been monitored may make a formal complaint in accordance with the Complaints Procedure’.293

In relation to the situation of Blaškić, whose detention conditions had been modified pursuant to Rule 64 of the RPE and who was consequently located to a residence in the Netherlands outside UNDU, the President held in his initial Decision that Blaškić was not to ‘make or receive telephone calls from his place of detention, all telephone calls being regulated by the Rules of Detention’.294 This decision was subsequently altered, the new order stating that Blaškić ‘shall be allowed to make telephone calls (outgoing calls) from his place of detention, subject to Rule 66 of the

288 Regulation 25.
289 Regulation 26(A).
290 Regulation 26(A).
291 Regulation 26(B).
292 Regulation 27(A).
293 Regulation 28.
Rules of Detention, and also to paragraph 6 of the section of the Regulations to Govern the Supervision of Visits to and Communications with Detainees (IT/98), concerning telephone calls’.

Furthermore, during Šešelj’s hunger strike in 2006, when he was moved from UNDU to a Dutch prison hospital, he was reportedly provided 24-hour access to a telephone. During a press briefing, it was clarified that the regular monitoring regime also applied to the situation of Šešelj’s hospitalisation. In this regard, it was stated that ‘[i]n terms of communication, all accused have the right to monitored communication. In technical terms, the accused could purchase a phone card allowing them to call whomever they want, as long as it was not in breach of the Rules’. It was explained that ‘[u]nmonitored communication was limited to those who the accused has the right to contact in a privileged way and these would be the legal associates or consular representatives. This would be ensured through technical means. The accused could not just pick up the unmonitored telephone and call whoever they would like’.

In 2011, Karadžić complained to the President about the Registrar’s decision to renew the order for the recording and monitoring of his non-privileged telephone communications and the ‘general monitoring of all calls of all detainees during the entire period of their detention’. Karadžić explained that the Registrar had ‘as a matter of routine, ordered the recording and monitoring of all telephone conversations of all detainees except those which are covered by attorney-client or diplomatic privilege’. He argued that ‘[t]he practice of the Registrar has been to issue such a letter [containing an extension order] every 30 days to every detainee and to record all non-privileged telephone conversations from the moment they arrive at the detention unit, without exception’. Karadžić complained, inter alia, that this regime infringed 

295 ICTY, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaškić, Prosecutor v. Blaškić, Case No. IT-95-14-T, President, 17 April 1996.
298 Id.
299 ICTY, Registrar’s Submission Pursuant to Rule 33(B) Regarding Radovan Karadžić’s Request for Reversal of Decision to Monitor Telephone Calls, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, President, 17 February 2011, par. 5.
301 Id., par. 7.
upon his right to privacy. Also, he objected to the Registrar’s lack of reasoning, *i.e.* the latter had not explained why the decision was deemed necessary, and argued that Article 8 ECHR had been violated.\(^{302}\) In relation to the latter argument, he stressed that his behaviour had given no cause for the monitoring and recording.\(^{303}\) He further argued that ‘[t]he fact that a regime exists whereby the Registrar must justify the monitoring and recording of telephone calls of detainees, must renew the authorization every 30 days, and where a right of appeal of such decisions lies to the President indicates that the blanket recording of all calls of all detainees during the entire period of their detention is unreasonable even under ICTY standards’ and, in conclusion, stated that the ‘Registrar’s administration of this wholesale monitoring and recording is arbitrary and should be reversed’.\(^{304}\)

In his submissions, the Registrar justified the decision by pointing to the grounds for monitoring and recording telephone communications listed in Regulation 20(A) and 20(B), arguing that ‘[a] review of the development of the Tribunal’s Rules and Regulations of Detention demonstrates that the need for systematic monitoring has been accepted by the Judges’.\(^{305}\) In support of the latter argument, he held that the changes made to Rule 58(C) of the Rules of Detention and Regulation 20 were meant to provide ‘for the systematic monitoring of non-privileged calls’.\(^{306}\) He further argued that the rules and regulations did not require him to give reasons when issuing a monitoring decision.\(^{307}\)

The President rendered his Decision on 21 April 2011,\(^{308}\) in which he denied Karadžić’s motion in its entirety. In his Decision, the President accepted the Registrar’s argument that the amendment of Regulation 20 had excluded the ‘previous requirement that reasonable grounds be demonstrated as a prerequisite to the Registrar’s issuance of an order authorising the monitoring or recording of a detainee

\(^{302}\) *Id.*, par. 16.

\(^{303}\) *Id.*, par. 8.

\(^{304}\) *Id.*, par. 23.


\(^{306}\) *Id.*, par. 18.

\(^{307}\) *Id.*, par. 19-20.

He held that Regulation 20 permits the Registrar to monitor telephone conversations as a safeguard to ‘forestall the attempted commission of’ one of the ‘four offences’ mentioned in Regulation 20(A) or where a non-disclosure order is in force and argued that no ‘further preconditions’ are required and no other criteria need be fulfilled. He observed that ‘[t]he preventative purpose of Regulations 20 and 21 would (...) be frustrated by inferring a requirement that detainees must first be shown to have attempted, or committed one of the Four Offences, or breached or attempted a breach of a Non-disclosure Order, as a prerequisite to the Registrar’s ability to issue a Monitoring Order designed to prevent such occurrences in the first place’. The President noted that the Regulations contained adequate safeguards against arbitrary decision making, since i) communications with counsel are not subject to the monitoring regime, ii) monitoring orders are restricted in duration to a maximum of thirty days, iii) the “specific circumstances” mentioned in Regulation 20(A), which form the bases of the monitoring decision, are communicated to the detained person and his counsel pursuant to Regulation 21(C) and iv) the detained person affected by the Registrar’s decision may appeal to an independent adjudicator, i.e. the President. Before examining the Strasbourg cases cited by Karadžić in support of his case, the President emphasised that the ICTY ‘does not regard ECtHR jurisprudence as binding but rather persuasive’. He then observed that those cases were ‘circumstantially distinguishable from the current case’. According to the President, those cases had concerned ‘the more stringent measure of restricting or completely prohibiting detainee communications’ while ‘[i]n the instant case, no such limitations or prohibitions have been imposed’. In respect of the Jankauskas and Popov decisions, the President noted that those cases concerned the indiscriminate monitoring of a detainee’s communications, i.e. including conversations with counsel. He stressed, in this regard, that at UNDU

309 Id., par. 11.
310 Id., par. 32.
311 Id., par. 20, 21.
312 Id., par. 20, 21.
313 Id., par. 29.
314 Id., par. 23, 28.
315 Id., par. 24.
316 Ibid.
317 Id., par. 25.
censorship only applied to non-privileged communications and reiterated that the other safeguards against arbitrary decision making required by the ECtHR were in place at the ICTY. The President concluded that the regime ‘serves a necessary supervisory function demonstrably necessitated by the fact of incarceration’ and rejected the motion in its entirety.  

The President’s Decision is not convincing. Firstly, the President’s observation that the stringent limitations on detainees’ communications in the ECtHR cases were not relevant to the case before him is, arguably, incorrect. It was seen earlier that such penal experts as Van Zyl Smit and Snacken have stressed that the ‘[i]nterception and registration of telephonic conversations is a far-reaching intervention into the private life of the prisoner, which seriously hampers communication about personal issues and may lead to emotional isolation of the prisoner’. Secondly, regarding the observation that ‘[t]he preventative purpose of Regulations 20 and 21 would (…) be frustrated by inferring a requirement that detainees must first be shown to have attempted, or committed one of the Four Offences, or breached or attempted a breach of a Non-disclosure Order, as a prerequisite to the Registrar’s ability to issue a Monitoring Order designed to prevent such occurrences in the first place’, it is noted that Karadžić never asked for such a requirement to be read into the Regulations. What he asked for was for the authorities to give some concrete reasons for monitoring his telephone conversations, in line with ECtHR jurisprudence. Such reasons must relate to his particular situation, his person, his behaviour or his case, but need not be as narrowly defined as suggested by the President, leaving much more scope for the authorities’ discretion. As held by the ICC Presidency in Bemba in connection to monitoring visits, such a test of ‘reasonable belief’ ‘requir[es] something less than knowledge on the part of the Chief Custody Officer or the Registrar’. Thirdly, in his interpretation of such Strasbourg decisions as Jankauskas and Popov, the President focused solely on the fact that those cases also concerned the monitoring of communications with counsel, and noted that the tribunal’s Regulations respected the confidentiality of lawyer-client communications. As a result, he may

318 Id., par. 32, 34.
319 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 227.
have paid less regard to the other requirements stipulated in those decisions. The argument that the ICTY’s legal framework adequately distinguishes between the detainees’ various correspondents is incorrect, which will be demonstrated below. Regarding the “safeguard” that monitoring orders are restricted in duration to a maximum period of thirty days is, of course, no more than a formality, considering that all UNDU’s detainees’ telephone conversations are routinely monitored from their admission onwards. Further, the President’s remark that the “specific circumstances” mentioned in Regulation 20(A) that form the bases of the monitoring decision are communicated to the detained person and his counsel is not correct, since Regulation 20(A) does not refer to specific circumstances, but rather to general grounds or reasons, which need not relate to any concrete circumstance at all. As to the final “safeguard”, i.e. that of independent review, it is noted that an interesting aspect of this case is that it demonstrates the validity of the conclusions reached in Chapter 5. In the Registrar’s Submissions, it was submitted that the ‘need for systematic monitoring has been accepted by the Judges. Following extensive debate between the Judges, the President and the Registrar, on 21 July 2005, the Judges adopted Rule 58(C) of the Rules of Detention (…). After the adoption of Rule 58(C) of the Rules of Detention, the Registrar was asked to bring Regulation 20 in line with standard prison practice, allowing for the systematic monitoring of non-privileged calls’. This, then, is an example of a situation in which the President, as the final arbiter, determines the validity of a practice, which was established in close co-operation with and perhaps even at the instigation of the President and the other Judges. The President, in these cases, is the highest administrative authority and legislator and adjudicator. As a result, there is an apparent lack of objective impartiality, which may undermine the trust that detained persons may have in the formal complaints procedure and in the system as a whole. This in turn undermines the rationales, as set out in Chapter 5, for establishing such procedures in the first place. This appearance is exacerbated by the fact that all of the Registrar’s monitoring decisions are already submitted to the President as part of the administrative decision

making procedure; hence, he has already given his approval for the implementation of such measures.323

When interviewed for the purpose of this research, ICTY detainees made the following remarks about the regime governing telephone contact:

‘Our only connection with the outside world is by telephone. We are not allowed emails, although all our computers are monitored by the detention unit and the court. Telephoning is also very expensive. I don’t have any kind of income and it is hard to get hold of cards, but I would give my last euro to hear the voices of my loved ones. Ban Ki Moon sends us three ten-euro cards every month. I thank him’.

‘The telephone is too expensive. How much I call depends on how much money I have. I am not allowed to use email. I spend more money on the telephone than on food. Calling people who are dear to me is nicer than eating until I am full. They could provide me with a few more cards. We get three cards a month and we buy the rest if we make more phone calls. Since I have small children and aging parents, I give a lot of money for the telephone’.

Several detained persons complained about the high costs of making telephone calls.

Visits

The right of detained persons to receive visits is recognised in Rule 61(A).325 This provision further provides that this right may only be restricted in three situations: i) where the Registrar or, in case of emergency, the Commanding Officer has prohibited, regulated or set conditions for contact pursuant to a request thereto by the Prosecutor under Rule 64 of the Rules of Detention;326 ii) if the sole purpose of the detainee’s

323 The author wishes to thank Peter Robinson for drawing his attention to the fact that the President may have been motivated by the perceived need to protect witnesses.
324 ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.
325 In a similar vein, see Rule 59(A) of the STL Rules of Detention. The Prison Regulations of Spandau Allied Prison stipulated that ‘[a] prisoner will be permitted to receive one visitor in each period of two calendar months unless the Governorate withdraws this privilege for sufficient reason’; cited in Norman J.W. Goda, supra, footnote 250, Appendix, p. 288.
326 See, in more detail, supra, Chapter 3.
use of communication facilities is to contact the media, whether directly or indirectly; according to Rule 64bis such communications shall be subject to the Registrar’s approval;[327] and iii) where such restrictions or supervision are imposed by the Commanding Officer in consultation with the Registrar. According to Rule 61(B), the restrictions and supervision listed under iii) ‘must be necessary in the interests of the administration of justice or the security and good order of the host prison and the Detention Unit’. Further, Rule 61(E) provides that ‘[i]n the interests of security and good order of the Detention Unit, the Registrar may refuse to allow a former detainee to visit any other detainee at the Detention Unit’.

Detained persons are not under a general duty to receive visitors. In this respect, Rule 62 provides that the detainee must be informed of the visitor’s identity and may refuse to see him or her.[328] However, an exception is made in respect of representatives of the Registry and the Prosecution; visits by such persons cannot be refused.[329]

One category of persons the detained persons are entitled to communicate with, inter alia during visits, is separately mentioned in Rule 63. This category concerns the diplomatic and consular representatives that are accredited to the host State ‘of the State to which they belong, or in the case of detainees who are without diplomatic or consular representation in the Host State and refugees or stateless persons (…) the diplomatic or consular representative accredited to the Host State of the State which takes charge of their interests or of a national or international authority whose task it is to serve the interests of such persons’. [330] Rule 12, which stipulates the right of

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[327] See, in more detail, this Chapter, infra, p. 909. See, also, Rule 61(B), which provides that ‘[t]he Registrar shall refuse to allow a person to visit a detainee if he has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media. Rule 64bis(C) shall apply mutatis mutandis to decisions taken by the Registrar under this Sub-Rule’.

[328] The Prison Regulations of Spandau Allied Prison stipulated that ‘[i]f a person applies for permission to visit a prisoner the latter shall be asked whether he wishes to see such person’; Cited in Norman J.W. Goda, supra, footnote 250, p. 289.

[329] See, also, Regulation 36.

[330] Rule 63. See, also, ICTY, Decision, Prosecutor v. Delić, Landžo, Mucić and Delalić, Case No. IT-96-21-T, Registrar, 17 July 1996. See, in a similar vein, Rule 64 of the STL Rules of Detention. See, further, Rule 38 of the SMR and Article 36 of the Vienna Convention on Consular Relations. The latter provision states in Paragraph 1 that ‘[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post
detainees to notify upon admission their relatives of their whereabouts, also recognizes such a right with respect to ‘the appropriate diplomatic or consular representative’. Detainees may also ask for their diplomatic representative to be informed of their admission by UNDU, which must then be done ‘without delay’. The House Rules state that ‘a list of representatives in the Netherlands is available in the detention unit’. Apart from diplomatic and consular representatives, detainees at UNDU have also received visits from Ministers of the Government of their country of origin.

Representatives of a detained person’s religion not accredited as such by the Registrar pursuant to Rule 66 of the Rules of Detention are not recognized as a separate or privileged group of visitors. When Šešelj sought the Appeals Chamber’s permission to receive a visit by ‘Bishop Filaret of Mileševo’, the Appeals Chamber – apart from stating that the request should have been submitted to the Registrar and that Chambers lacked competence to decide on such issue – made clear that the regime governing a possible visit by the Bishop was the regular one applicable to visits from family and others. Earlier, the Trial Chamber had held that a detainee’s right to access to a representative of his own religion ‘is not an unlimited one and certainly does not encompass the right of an accused to select himself the representative of the orthodox Christian Church, but rather that he is entitled to establish contacts with “the ministers or spiritual advisers of the host prison” as regulated by the relevant Rules’.

of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action’.

332 Ibid.
334 ICTY, Decision on the Interlocutory Appeal Concerning the Denial of a Request for a Visit to an Accused in the Detention Unit, Prosecutor v. Šešelj, Case No. IT-03-67-AR73.2, A. Ch., 29 January 2004.
335 ICTY, Decision on Motion Number 19, Prosecutor v. Šešelj, Case No. IT-03-67-PT, T. Ch. II, 30 September 2003.
Regulation 29 provides that ‘[t]he Commanding Officer shall, in consultation with the Registrar, fix the daily visiting hours for all visitors, taking into account the reasonable demands of the daily schedule of the detention unit and the facilities and staff available’. Visitors, except for counsel or a representative of the tribunal, must first request the Registrar permission to visit a particular detainee. Such a request must be submitted in writing in one of the working languages of the tribunal, and ‘not later than ten working days prior to the day a visit is requested’. The ten day notice requirement is not surprising in view of the fact that, ‘in the Netherlands, visitors to the ICTY UNDU [are] all screened by the Dutch Intelligence Service for security purposes’. In principle, permission is granted, unless ‘the Registrar or the Commanding Officer has reasonable grounds for believing that the detainee may be attempting to: (i) arrange escape; (ii) interfere with or intimidate a witness; (iii) interfere with the administration of justice; or (iv) otherwise disturb the maintenance of security and good order in the detention unit’. Permission may further be denied if ‘the Registrar has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media’. If permission is granted, the Registrar must provide the applicant with a written permit for a one-time visit, or one for regular visits. The Commanding Officer is forwarded a copy of each permit issued by the Registrar. Where permission is denied, the Registrar must notify both the detained person and the applicant in writing. Such a notification must include the reasons for the refusal. Only the detained person, however, is entitled to address the President and ask him to reverse the Registrar’s decision.

Since UNDU is located in a Dutch prison and it is thus necessary to travel through that prison to reach UNDU, visitors are required to comply with the demands set for visitors by the host prison. In this regard, Rule 61(C) states that such demands may include ‘personal searches of clothing and X-ray examination of possessions on entry

336 Regulation 32(A).
337 Regulation 32(B).
339 Regulation 33(A).
340 Regulation 33(B).
341 Regulation 33(C).
342 Regulation 33(D).
343 Regulation 34.
344 Regulation 35.
to either or both of the Detention Unit and the host prison’. Any person, including defence counsel and diplomatic or consular representatives, who refuses to comply with such requirements, may be denied entrance. The Agreement on Security and Order concluded between the ICTY and the Government of the Netherlands regulates the security controls carried out by the host prison in more detail. Article 3 of that Agreement stipulates that security controls may also include the search of clothing. It provides in this regard that ‘[s]earch of clothing of men shall be carried out by male officials only; search of clothing on women shall be carried out by female officials only’. The arrangements were described by Judge Kevin Parker in his Report on the circumstances surrounding the death of Milošević: ‘UNDU is a separate institution, but is physically located within the Dutch Penitentiary at Scheveningen. A visitor to UNDU must first pass through the security system maintained by the Dutch Penitentiary for all visitors. This includes scanning by X-ray machines and electronic screening of the visitors themselves to detect metallic and electronic objects. Random physical searches are also performed. Having passed through the security system of the Dutch Penitentiary, visitors to UNDU then pass through the UNDU security system which also involves electronic screening of visitors and objects and an inspection of belongings. Brief cases, bags, boxes and other containers are subject to physical inspection’. When arriving at either the host prison or the UNDU premises, in order to gain access, the visitor must produce the Registrar’s written permission and an official identification. If a person, after being granted access to the host prison, is refused entrance to UNDU, the host prison will provide assistance to UNDU to have the person in question removed. The General Director of the host

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345 See, also, Regulations 38 and 39(A) as well as the Articles 2, 3 and 13 of the Agreement on Security and Order. Rule 62(B) of the STL Rules of Detention states that ‘[a]ll visitors shall comply with the separate requirements of the visiting regime of the Detention Facility. These restrictions may include searches of clothing, personal searches and electronic scanning of possessions on entry to the Detention Facility. Such searches shall not infringe or violate the dignity of the individual and shall be conducted only in accordance with a published operational order issued by the Chief of Detention and only where it is strictly necessary for the security and good order of the Detention Facility’.
346 Rule 61(D); Article 4 of the Agreement on Security and Order.
347 Agreement on Security and Order, signed 14 July 1994.
348 Article 3 of the Agreement on Security and Order.
349 ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 125.
350 Regulation 37.
351 Article 14 of the Agreement on Security and Order.
prison or any person designated by him is further entitled to ‘have any person who is not detained in, or employed as a UN official or an official of the Netherlands at, the PC and who causes disturbances or poses an acute risk to security or order in the PC removed from, or denied access to, the premises of the PC’. 352

Any property brought along by the visitor, which he or she intends to take into the prison, is subject to security controls by both the host prison and UNDU. 353 Permission will be denied by the host prison if the item in question ‘may constitute either of itself or in combination with other property a danger to the security or order within the PC’. 354 Letters are ‘inspected for explosives or other irregular material, but shall not be read or photocopied by the personnel carrying out the property control’ when entering the host prison. 355 As to goods meant for consumption, these may be refused access to the host prison ‘without further control’. 356 The Regulations state that ‘[a]ny items intended for a detainee must be handed to the staff of the detention unit on entry’. 357 Such items are subject to Rules 75 and 76 of the Rules of Detention which regulate the receiving of goods from outside UNDU by detained persons and, to Rule 14, which governs the retention of goods by the tribunal. Rule 75(B) further provides that ‘[t]he Commanding Officer or the General Director may refuse to receive any item intended for consumption by detainees’.

If, during the visit, ‘the Commanding Officer believes that he has reasonable grounds for intervention, or that these Regulations are being breached in any way, he may immediately terminate the visit and advise the detainee and the visitor for so doing’. 358 The visitor may then be summoned to leave UNDU. The Commanding Officer must report such cases to the Registrar. 359 Visits are conducted within the sight of the staff of UNDU. 360 In exceptional circumstances, more privacy may be granted by the Commanding Officer in

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352 Article 9 in conjunction with Article 20 of the Agreement on Security and Order.
353 As to the UNDU, see Regulation 39(A).
354 Article 5 of the Agreement on Security and Order.
355 Article 6 of the Agreement on Security and Order.
356 Article 7 of the Agreement on Security and Order.
357 Regulation 40(B).
358 Regulation 42(A).
359 Regulation 42(B).
360 Rule 59(B) of the STL Rules of Detention, as far as relevant, provides that ‘all visits shall be conducted within the sight and hearing of the staff of the Detention Facility’. The Prison Regulations of Spandau Allied Prison stipulated that ‘[c]onversations between visitors and
consultation with the Registrar.\footnote{Regulation 43(A).} Usually, conversations will not be ‘listened to or recorded’.\footnote{United Nations Detention Unit, House Rules for Detainees, as amended June 1995, IT/99, issued by the Registrar April 1995.} Restrictions are only imposed ‘if there is reason to believe’ that a particular detainee is ‘abusing this freedom’.\footnote{Ibid.} During a press briefing in 2001, when ‘[a]sked to confirm that Mr. Milošević was not able to see his family without the presence of ICTY staff members and whether this was a standard rule’, a spokesperson for the Registry explained UNDU’s visiting regime, stating that ‘this was a standard rule for all accused who received visits from their families. Those visits could be conducted within the sight and hearing of the management of the Detention Unit. This did not necessarily mean someone was leaning over his shoulder or sitting right next to him during the visit, however, there was sometimes a presence in the room’.\footnote{ICTY, Weekly Press Briefing, 31 October 2001.}

It was further said that, as a matter of course, this did not apply to conjugal visits.\footnote{Ibid.} Conjugal or private visits are ‘permitted but [must] be requested’.\footnote{Ibid.} In this respect, at least until May 2008,\footnote{Only from May 2008 onwards, the ICTR detention authorities have allowed conjugal visits.} ICTY detainees had a clear advantage over ICTR detainees. As a result of the Netherlands allowing its prisoners conjugal visits, UNDU - being situated in a Dutch prison - has its own conjugal visiting rooms.\footnote{Inès Mónica Weinberg de Roca and Christopher M. Rassi, Sentencing and Incarceration in the Ad Hoc Tribunals, in: Stanford Journal of International Law 44, 2008, p. 1-62, at 47.}

According to David Kennedy, the Commanding Officer of UNDU,

‘We would generally allow the morning or the afternoon to be a private time so that the family or the man and wife can sit in a room together without supervision. (…) It can be the whole family. It can be a private time for the whole family. (…) It’s not common in a prison system, and it is quite popular. One of the issues for having people a long way from their home is maintaining family contact and relationships which makes somebody psychologically stronger. So it’s healthy; it’s good for them. That I think is the logic behind allowing that facility. And that’s at my discretion,'
that’s something that I apply, and I would do that on the basis that there was a previous relationship, a relationship prior to custody. (…) The visits facility is very liberal and it’s very good compared to any national system’.369

An explicit order by the Registrar is required for the monitoring or recording of conversations between a detained person and his visitor (during regular visits). The grounds for such order listed in Regulation 43(B) are: ‘(i) to ensure the detainee does not attempt to: (a) arrange escape; (b) interfere with or intimidate a witness; (c) interfere with the administration of justice; or (d) otherwise disturb the maintenance of security and good order in the detention unit; or (ii) if an order for non-disclosure has been made by a Judge or a Chamber pursuant to the Rules of procedure and Evidence’. Before 2009, another ground for monitoring or recording conversations was where this was ‘specifically requested by the prosecutor following the disclosure to the defence of the names of witnesses pursuant to Rule 67 of the Rules of Procedure and Evidence’.

As was observed above in connection to the telephone monitoring regime under the revised version of Regulation 20, the grounds mentioned in Regulation 43(B) are broadly and – some of them – vaguely formulated. Further, although Regulation 43 refers to them as ‘situations’, their highly abstract language and the fact that the Registrar does not need not have reasonable grounds to believe that the detained person’s behaviour or any other circumstance in any way justifies or necessitates the issuance of such an order, mean that they can only be understood as ‘grounds’ and not as justifications for issuing an order in a concrete situation. These grounds always tend to apply to the situation of any person detained at UNDU. The assumption that Regulation 43 was intentionally couched in such broad terms in order to make routine monitoring possible is confirmed upon a closer inspection of the amendment to this provision in 2009. Before 2009, Sub-Regulation 43(B) provided that ‘[d]iscussions between the detainee and the visitor shall not be recorded unless (…)’, which implies that the regular situation was that discussions were not monitored or recorded.370 Since 2009, Sub-Regulation 43(B) stipulates that ‘[t]he Registrar may order that

369 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.
370 Regulation 43(B) of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3.
discussions between the detainee and the visitor be recorded or monitored’ for one of the aims listed under (i) and (ii). Notwithstanding the language of Regulation 44, which provides for the issuance of monitoring or recording orders only in the ‘situations listed in Regulation 43(B)’, by amending the Regulations the Registrar was given a blanket permit to routinely monitor all non-privileged conversations between detained persons and their visitors.

The recording or monitoring regime of Regulations 43 and 44 does not apply to conversations between a detained person and diplomatic representatives or his counsel.\(^ {371}\)

According to Regulation 44(A), the Registrar may issue a monitoring or recording order ‘at the request of the Commanding Officer or otherwise’, while such order may only be imposed for a period not exceeding seven days. Renewal orders – each for a maximum duration of seven days – must be reported to the President.\(^ {372}\) As stated above in relation to the monitoring and recording regime governing telephone conversations, the involvement of the President in these renewal orders undermines his position as an independent and (objectively viewed) impartial adjudicator in possible complaints proceedings. The detained person and his counsel must be notified of the monitoring and recording or the renewal order, as well as of the Commanding Officer’s request for any of such order, within twenty-four hours.\(^ {373}\)

Regulation 45 stipulates that the detained person may submit a request to reverse the Registrar’s decision directly to the President.

The Commanding Officer must keep a log of all recorded or monitored conversations ‘with details of the name of the detainee, the name and address of the visitor, the reason for recording or monitoring the visit and the date on which the Registrar made the relevant order’.\(^ {374}\) The detained person must be provided a copy of each entry in a language he understands.\(^ {375}\)

The Commanding Officer must review the ‘details of all recorded visits’ within five working days, and ‘shall make a determination whether to listen to, or have

\(^ {371}\) Regulation 44(A).
\(^ {372}\) Regulation 44(B).
\(^ {373}\) Regulation 44(C).
\(^ {374}\) Regulation 46(A).
\(^ {375}\) Regulation 46(B).
transcribed and read, each individual recorded visit’. Before 2009, the Commanding Officer was obliged to forward such details to the Registrar within twenty-four hours, in order for the Registrar to make such an initial determination. If after reviewing the conversation, the Registrar or the person authorised by him finds that there has been no violation of the Rules, the Regulations or an order issued by the tribunal, ‘and the recorded visit does not provide any other reason for further action’, Regulation 48 requires that ‘the recording of the recorded visit shall be erased within forty-eight hours’. Before 2009, Regulation 48 did not allow the Registrar to delegate the task of reviewing conversations. As noted above in connection to the post-2009 regime governing the monitoring and recording of telephone conversations, delegating this task to the Commanding Officer would arguably jeopardise the neutral position of first-line detention authorities, particularly since the transcripts might very well end up upon the Prosecutor’s desk, pursuant to either Regulation 49(A) or Regulation 50(B). The Registrar is the only official with the power to establish a breach of the Rules, the Regulations or a tribunal’s order. If this is the case, ‘the offending conversation will be transcribed by the Registry and, where necessary, translated into one of the working languages of the Tribunal’. The Registrar may further decide to notify the Prosecutor and, ‘if deemed necessary, the Dutch authorities of the nature of the breach’. Before 2009, Regulation 49 also referred to the Commanding Officer as one of the persons who may be notified by the Registrar. The deletion of the reference to the Commanding Officer reinforces the assumption that he is the one carrying out the actual review. After all, if he indeed conducts the review, it would make no sense for the Registrar to later notify him of the nature of the breach. Transcripts must be retained by the Registrar and ‘shall not be handed over to the Prosecutor as evidence of contempt of the Tribunal pursuant to Rule 77(A) of the Rules of Procedure and Evidence without prior notice and

376 Regulation 47.
377 Regulation 47 of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3.
378 Regulation 48 of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3.
379 Regulation 49(A).
380 Regulation 49(A)
381 Regulation 49(B).
382 Regulation 49(B) of United Nations Detention Unit, Regulations to Govern the Supervision of Visits to and Communications with Detainees, IT/98/Rev. 3.
disclosure to counsel for the defence’. Finally, Regulation 51 reiterates that ‘[a] detainee whose visits have been recorded or monitored by order of the Registrar may make a formal complaint in accordance with the Complaints Procedure’.

Visits to UNDU detainees have been monitored, for example, where the Registry had ‘received information indicating that the names of potential witnesses have been disclosed to the public’. It has occasionally been decided that persons from outside were only permitted to communicate with one particular inmate only. Moreover, in Šešelj, in 2006, visits from the detainee’s wife were restricted for a 30-day period following ‘an allegation made by the Prosecution that he disclosed the names of some eight protected witnesses through his wife’.

With respect to the situation of Blaškić, whose detention conditions had been modified pursuant to Rule 64 of the RPE and who was consequently located to a residence in the Netherlands outside UNDU, the President’s Decision of 17 April 1996 provided that ‘meetings with his wife and children (…) may take place in any other place [than UNDU] deemed appropriate by the Registrar after consultation with the Dutch authorities, and for such duration as the Registrar considers appropriate in accordance with the Rules of Detention. In addition the Accused is entitled, once a month, to spend the night with his wife and children’. In May of that year, when it turned out that certain legal and practical obstacles prevented the implementation of the President’s Modification Order and the location of Blaškić outside UNDU, the President considered that ‘the difficulties encountered so far in the implementation of the Decisions should however not prevent, in the meantime and whenever possible, the application to the Accused of special conditions of detention’. He subsequently ordered that ‘General Blaškić shall be allowed to meet with his wife and children as

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383 Regulation 50.
385 ICTY, Decision, Prosecutor v. Delić, Landžo, Mucić and Delalić, Case No. IT-96-21-T, Registrar, 8 July 1997.
386 ICTY, Decision on Appeal against the Registrar’s Decision of 19 October 2006, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President, 23 November 2006, par. 2.
388 ICTY, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaškić, Prosecutor v. Blaškić, Case No. IT-95-14-T, President, 9 May 1996.
often as reasonable practicable at the United Nations Detention Unit for a duration deemed appropriate by the Registrar, and under conditions where he can enjoy privacy, it being understood that warders will provide security by standing outside the room where such visits take place'. In January 1997, the conditions of Blaškić’s detention were modified once again. The President decided that Blaškić would ‘be permitted to receive the visit of his wife and children “for up to seven consecutive days per month”’. The UNDU detainees have complained about the accommodation of visits by both family and counsel at UNDU. The independent Swedish investigators of UNDU observed that being detained far away from their families is a significant factor of hardship for detainees. Further, psychological examinations of detainees have occasionally shown stress-related disorders ‘with depressive features as a reaction to continuing separation from (…) familiar ties and activities’. The Swedish investigators warned that ‘protracted isolation combined with uncertainty about the future could lead to such mental complications as to jeopardise the trial’. Nevertheless, in 1997, the tribunal reported that ‘[o]wing to the long periods detainees spend in detention, the Unit has made an effort to provide activities for the detainees. Agreements have been concluded with the Netherlands Red Cross and the Free University of Amsterdam to provide visitors to the Detention Unit. These visits take place weekly and have been much appreciated by the detainees’. During the Swedish investigators’ interviews with detainees, the detainees reportedly gave ‘concrete examples where the involvement of the staff had influenced their

389 Ibid.
392 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.7.2.
393 ICTY, Report to the President Death of Milan Babić Judge Kevin Parker Vice-President, 8 June 2006.
394 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.7.2.
opportunities for more generous family visits in cases of sickness and similar cases’. 396

Nonetheless, such issues as ‘travel expenses for visitors’ and the conditions of ‘visiting rooms’ have been complained about. 397 The detainees reportedly ‘regard the high costs for families to travel to and stay in the Netherlands as a major problem’, notwithstanding the fact that ‘[s]ome of the detainees’ countries of origin provide a small amount as a contribution towards visiting expenses’. 398 In this respect, the Swedish investigators considered that ‘[f]or the UN, the location of the detention facility in the Netherlands is an advantage not least for security reasons. It should be considered whether the Tribunal, with a view to achieving fair conditions for the detainees and to keep them well-balanced, should not help towards covering reasonable travel expenses for members of the detainees’ families’. 399

As to the visiting facilities available at UNDU, the tribunal itself reported in 1998 that ‘[d]ue to the increased number of detainees being held in the UNDU, the number of visits by relatives, friends and counsel has risen sharply and the Detention Unit has occasionally faced overbooking of its visiting rooms’. 400 Further, in 2006 the Swedish investigators wrote that ‘[p]rivate visits, including intimate relations, take place in a relatively small room. Other visits take place in a visiting hall furnished with groups of tables and chairs. There is a specially arranged play corner for children in one corner of the visiting hall’. 401 As to the room for private or conjugal visits, it was observed that ‘in terms of furnishings and condition, the room (...) is shabby and downright unpleasant’. 402 As to the visiting hall, without adducing any further details, this was said ‘not [to be] conducive to a pleasant atmosphere for visits either’. 403 The

396 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.8.
397 Ibid.
398 Id., par. 2.8.2.
399 Ibid.
401 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.8.2.
402 Ibid.
403 Ibid.
investigators recommended that ‘[s]pecial visiting apartments should be set up for family visits’.404

Another complaint regarding visits concerned the alleged non-issuance of visas by the Dutch authorities. Milošević, for example, complained before the Trial Chamber in February 2002 that ‘the Dutch Foreign Ministry will not, this time, issue a visa to my wife, which it regularly did beforehand at a written request from your Registry and the Detention Unit's administration’.405 He asked the Trial Chamber to intervene, stating that ‘this is ill-treatment once again, mistreatment of me, because I will be completely isolated. My visits are usually not allowed, and this time my wife's visit has been curtailed’.406 However, the Presiding Judge noted that the Chamber had no powers in relation to the matter, but said that the Judges had heard his complaint and would raise the issue with the Registry.407

When interviewed for the purpose of this research, ICTY detainees made the following remarks about the regime governing visits:408

‘This right is absolutely restricted. Only members of the immediate family are allowed to visit and we are thus, slowly but surely, losing contact with the outside world. Detailed checks are also sought on all those who want to visit us. These last quite a long time and so people lose all will to visit us. Our “security” has been raised to an exceptionally high level for no particular reason. I have been waiting for a friend to visit me since last August and do not know if this will come about in May. The problem is that a lot of people are queuing up to deprive us of as many rights as possible, and not [sic] to make our life in prison, although we have not yet been found guilty, as hard as possible’.

‘We asked for permission to be photographed with visitors, which used to be allowed before it was stopped. We are growing old and wasting away, and many close and distant relatives have already forgotten us’.

404 Ibid.
406 Id., p. 658, lines 2-12.
407 Id., p. 658, lines 21-23.
408 ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.
'My family and I are in a very difficult financial situation. NATO and my persecutors have destroyed everything I had. Both my sons are students. My parents are both 82 years of age. My sons visit me every six months, but my parents once in three years’.

'[My family members] cannot because of the high costs of travel and accommodation in The Hague’.

‘This is an important right. Receiving visits has made my life as a detainee in the detention unit much better. I think that the possibility to receive visitors is an important aspect of the humanitarian treatment of detainees’.

‘It is correct here in comparison to other detention centres, since I was arrested in Argentina and was in a remand centre. It was correct there, but here it is much more correct for visiting. You can see that this is the Kingdom of the Netherlands and that it is also Europe. (…) [However, my family members] cannot because of the financial situation. (…) [The Court] doesn’t help me and I don’t know how I could. If they could just pay me the costs of tickets and [accommodation]. The Court could do that if it wanted’.

‘Potential visitors are intimidated by procedural rules on visits; I avoid visits’.

‘The receiving of visits is too restrictive (as regards visits by persons who are not relatives or members of the family)’.

ICTR

General framework

Rules 58 to 64 of the ICTR Rules of Detention set out the Detention Facility’s basic legal regime governing the detainees’ contact with the outside world. Rule 58 provides for the right to communicate by letter and telephone with their ‘families and other persons with whom it is in their legitimate interest [to communicate]’. Regarding the latter category of persons, Rule 63 recognises the right of detainees to
receive visits of and communicate with diplomatic or consular representatives.\textsuperscript{409} The right laid down in Rule 58 is subject to ‘such conditions of supervision and time constraints as the Commanding Officer deems necessary’, as well as to prohibitions, regulations or conditions set for contact at the request of the Prosecutor pursuant to Rule 64 of the Rules of Detention. The costs of such communications are borne by the detainees, unless the detainee is indigent and the Registrar has agreed that the tribunal will pay for such costs ‘within reason’.\textsuperscript{410} According to a senior staff member of the ICTR Registry,

‘They got free telephone calls to their family members. There’s a system in place, which the Commanding Officer runs, allowing free telephone calls; they can receive telephone calls from the various family members according to a certain rate, they don’t pay for them. There are certain extra calls that they may make. And for any communications with lawyers it’s all free. All post, all other methods of sending or receiving are free’.\textsuperscript{411}

As to correspondence, Rule 59 prescribes that all mail and packages entering the UNDF must be inspected for explosives or other restricted materials. It further instructs the Commanding Officer, in consultation with the Registrar, to ‘lay down conditions as to the inspection of correspondence, mail and packages in the interests of maintaining order in the Detention Unit and to obviate the danger of escape’.

Rules 61 to 63 concern prison visits. The detainees’ right to receive visits at regular intervals is laid down in Rule 61(i) and is subject to ‘such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary’. As a consequence of the UNDF being situated within the premises of a Tanzanian prison, Rule 61(ii) states that all visitors must comply with the security requirements of the host prison. It provides that ‘[t]hese restrictions may include personal searches of clothing and X-ray examination of possessions on entry to either or both of the Detention Unit and the host prison. Any person, including Defence Counsel for a

\textsuperscript{409} See, also, Rule 10, which provides that detainees, ‘[a]s soon as practicable after admission’, the detainee must be given to notify, \textit{inter alia}, ‘the appropriate diplomatic or consular representative’.

\textsuperscript{410} Rule 58.

\textsuperscript{411} ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
detainee or a diplomatic or consular representative accredited to the Host State, who refuses to comply with such requirements, whether of the Detention Unit or of the host prison, may be refused access’. It is further provided that detained persons are not obliged to meet visitors, except for representatives of the Prosecutor, and ‘must be informed of the identity of each visitor’.412

The provisions of the Rules of Detention that govern detainees’ contact with the outside world are elaborated upon in the ‘Regulations to Govern the Supervision of Visits to and Communications with Detainees’, which must be read subject to the Rules of Detention, the RPE and any order issued pursuant to Rule 64 of the Rules of Detention.413 It is important to note, however, that these Regulations are not accessible to detainees or their defence counsel, which is problematic. In this regard, the Ntabakuze Defence complained that ‘the Commander’s Regulations are not part of the Basic Documents, are not available anywhere, not even on the Tribunal’s website, and (...) the Defence does not have a copy thereof; (...) further (...) the said Regulations form the basis of the Decision of the Trial Chamber, which took their validity for granted’.414 Hence it appears that, where these Regulations place restrictions on detainees’ fundamental rights, they do not comply with the ‘in accordance with the law’ requirements, which were outlined earlier on in this Chapter.

Correspondence

Regulation 1 of the section of the Regulations entitled ‘correspondence’ sets forth the right of detainees to receive and send mail to or from any person. All such mail is subject to security checks by way of X-ray and explosive detectors.415 The Commanding officer is authorised to confiscate any item ‘which, in his opinion, constitute[s] a threat to the security or good order of the detention unit or the host

412 Rule 62.
413 Regulations to Govern the Supervision of Visits to and Communications with Detainees, established by the Registrar (issued by the Registrar and the Commanding Officer) in May 1996. (Hereafter: Regulations’.) The Regulations are on file with the author.
415 Regulation 2 of the section of the Regulations entitled ‘correspondence’.

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prison, or to the health or safety of any person therein.\textsuperscript{416} Such items must be retained by the Commanding Officer in accordance with Rule 12 of the Rules of Detention.\textsuperscript{417} Similarly, if parcels contain items that in the opinion to the Commanding Officer ‘pose a threat to the safety and good order of the detention unit’, such items will be confiscated and retained in accordance with Rule 12.\textsuperscript{418} Moreover, all non-privileged incoming and outgoing mail is subject to review by the Registrar. To this end, the Commanding Officer must forward all items, except for privileged mail, to the Registrar.\textsuperscript{419} Privileged mail is any item sent to or received from defence counsel, the tribunal, the Inspecting Authority or diplomatic or consular representatives.\textsuperscript{420} The term ‘Inspecting Authority’ is not further defined and should therefore be understood as referring to the agencies mentioned in Rule 6 of the Rules of Detention, \textit{i.e.} a Judge or the Registrar specifically appointed by the Bureau to inspect the UNDF, as well as the ICRC (‘inspectors whose duty it is to examine the manner in which detainees are treated’ and for that reason ‘carry out regular and unannounced inspections’). In response to the question of whether the possibility of appointing the Registrar or a Judge to inspect the UNDF had ever been used, staff members of the ICTR Registry stated that, to their knowledge, this was not the case.\textsuperscript{421} In reality then, the term ‘Inspecting Authority’ refers only to the ICRC inspectors.

The Commanding Officer must keep a log of all mail forwarded to the Registrar for review. The log must contain such details as the names of the detainee, the sender or the addressee and the date on which the item was forwarded. A copy of each entry must be given to the detainee in question in a language he understands.\textsuperscript{422}

\begin{footnotesize}
\begin{enumerate}
\item Regulation 4 of the section of the Regulations entitled ‘correspondence’.
\item Rule 12 stipulates that ‘[a]n inventory shall be taken and recorded of all money, valuables, and other effects belonging to a detainee which, under these Rules or the rules of the host, he is not permitted to retain. The record of inventory shall be signed by the detainee. All such items shall be placed in safe custody or at the request and expense of the detainee, sent to an address provided by him. If the items are retained with the Detention Unit, all reasonable steps shall be taken by the staff of the Detention Unit to keep them in good order. If it is found necessary to destroy an item, this shall be recorded and the detainee informed’.
\item Regulation 14 of the section of the Regulations entitled ‘correspondence’.
\item Regulation 7 of the section of the Regulations entitled ‘correspondence’.
\item Regulation 6 of the section of the Regulations entitled ‘correspondence’.
\item ICTR, interview conducted by the author with staff members of the ICTR Registry, Arusha - Tanzania, May 2008.
\item Regulation 7 of the section of the Regulations entitled ‘correspondence’.
\end{enumerate}
\end{footnotesize}
The Registrar must, within 24 hours of receipt, ‘open and read, or have read, each item of mail’.\footnote{Regulation 8 of the section of the Regulations entitled ‘correspondence’} If the Registrar finds that the item is not in breach of the Rules of Detention, the Regulations, an order issued by the tribunal, or ‘gives no reasonable grounds otherwise (...) to believe that the detainee may be attempting to arrange escape, interfere with or intimidate a witness, interfere with the administration of justice or otherwise disturb the security and good order of the detention unit’, the item must be handed to the detainee or posted ‘immediately thereafter and the detainee informed accordingly’.\footnote{Ibid.} If the Registrar does find such a breach or the presence of such grounds, an outgoing item will be returned to the detainee in question ‘together with a note from the Registrar, in a language the detainee understands, giving the reasons for refusal to post the item’.\footnote{Regulation 9 of the section of the Regulations entitled ‘correspondence’} The detainee must be given the opportunity to rewrite the item, omitting the part that was found to be offending.\footnote{Ibid.} In respect of incoming mail that is found to be offending, the Registrar may decide to retain such item or return it to the sender. The detainee must be informed of the decision made by the Registrar.\footnote{Ibid.} A copy of the offending item must be kept by the Registrar. The latter may then notify the Prosecutor, the Commanding Officer and, where necessary, the Tanzanian authorities ‘of the breach and the nature of the offending item’.\footnote{Ibid.} The detainee concerned may, at any time, choose to address the President directly with a request to reverse a decision by the Registrar concerning the review of mail.\footnote{Ibid.} Items that have been found to be offending may be handed over to the Prosecutor as evidence of contempt of the tribunal. In such cases, prior notice and disclosure to the detained person’s counsel is required.\footnote{Ibid.} When interviewed for the purpose of this study, Christopher Black, defence counsel before the ICTR, said in relation to the monitoring of detainees’ private correspondence:

‘My client had sent a letter to his wife. It was censured. They look at that. And that is not right. These guys are not convicted prisoners. I don’t think they have the right to

\footnote{Regulation 10 of the section of the Regulations entitled ‘correspondence’\footnote{Regulation 12 of the section of the Regulations entitled ‘correspondence’.}
do that. And their regulations say ‘we have the right to make sure that the place is secure’ - which is very general – I accept that – but I don’t see what the detainees could do here in the middle of the savannah.\footnote{ICTR, interview conducted by the author with Mr Black, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.}

The costs for writing materials and postage are borne by the detained person, unless the Registrar has confirmed with regard to a particular indigent person that such costs will be borne by the tribunal.\footnote{Regulation 5 of the section of the Regulations entitled ‘correspondence’.} In relation to mail sent by indigent detainees, the Registrar may impose ‘reasonable limits’ as to the quantity and weight of such mail. If the detainee concerned objects to such restrictions, he may choose to address the President directly on the matter.\footnote{Ibid.} Further, in relation to both indigent and non-indigent detainees, the Registrar may impose restrictions as to the number and weight of parcels received.\footnote{Regulation 14 of the section of the Regulations entitled ‘correspondence’.} Moreover, a detainee who wishes to complain about any issue relating to confiscated or intercepted items of correspondence may file a complaint in accordance with the formal complaints procedure.\footnote{Regulation 13 of the section of the Regulations entitled ‘correspondence’.}

**Telephone**

As stated above, Rule 58 of the Rules of Detention recognises the right of persons detained at the UNDF to communicate by telephone with their relatives and any other person with whom they have a legitimate interest to communicate. However, restrictions may be imposed on the time detainees spend on the telephone by the Commanding officer in consultation with the Registrar. The criterion, in this regard, is what is ‘reasonable for the good order of the UNDF’.\footnote{Regulation 1 of the section of the Regulations entitled ‘telephone calls’.} The Commanding Officer has issued a note outlining further regulations in this respect.\footnote{‘Note to all Security Officers & Detainees’, amended: February 2004 (on file with the author).} In relation to outgoing calls to family members, relatives and investigators, the note states that the maximum duration of a call is 5 minutes and that such a call may only be made once per week. As to incoming calls, the maximum duration is 10 minutes. The restriction that calls
may only be made once per week is not applicable to incoming calls.\textsuperscript{438} Outgoing calls may be made between 9 a.m. and 5 p.m., ‘subject to the reasonable demands of the detention unit’ and to permission by the Commanding Officer.\textsuperscript{439} Outside these times, the Commanding Officer may, in exceptional circumstances, permit a detainee to make a telephone call, ‘unless the calls of the detainee are being monitored by order of the Registrar’.\textsuperscript{440}

When interviewed for the purpose of this research, detained persons made the following remarks about the regime governing telephone contact:

‘The Detention Facility allows me weekly five minutes of outgoing calls to my family members; in addition, it allows me weekly fifteen minutes of outgoing calls to my counsel. Outgoing calls to my friends are not permitted.’\textsuperscript{441}

‘[I am insufficiently able to stay in contact with my relatives by phone.] I am only given fifteen minutes per week with which I call my family and it is obviously not enough, also for them. My family members and friends are permitted to call me and are given ten minutes for each call’.\textsuperscript{442}

‘Ceux que j’ai mis sur la liste de personnes pouvant me téléphoner, me contactent sans aucun problème. J’ai aussi droit de téléphoner pendant 5 minutes par semaine’.\textsuperscript{443}

‘Five minutes a week by telephone is not sufficient to maintain contact. Contact by mail is also very difficult, since it takes a long time for mail to arrive.’\textsuperscript{444}

‘We have five minutes per week to make phone calls. I use them to greet my wife. [This is] insufficient [to keep contact]’.\textsuperscript{445}

\textsuperscript{438} Ibid.
\textsuperscript{439} Regulation 3 of the section of the Regulations entitled ‘telephone calls’.
\textsuperscript{440} Ibid.
\textsuperscript{441} ICTR, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008.
\textsuperscript{442} Ibid.
\textsuperscript{443} Ibid.
\textsuperscript{444} Ibid.
\textsuperscript{445} Ibid.
‘I usually telephone to my wife once a week, so, time is insufficient to contact all family members. Email contact could help keep friendship up’.446

‘I’m allowed to make one call of 5 minutes per week and receive unlimited 10-minute calls. The problem is that my family cannot afford to call as often as they would like’.447

Incoming calls are received by the UNDF staff. In case of an emergency and at the Commanding Officer’s discretion, incoming calls may be received directly by a detainee. Usually, the staff member will note the details of the call, including the name and telephone number of the caller and the time and date of the call, which will be passed to the detained person.448

As stated above, Rule 58 provides that the Registrar may decide that the tribunal will pay for the telephone costs of indigent persons. In that case, the Registrar may impose reasonable restrictions on the number and duration of the calls. The indigent person who wishes to object to such restrictions may address the President directly.449

The Commanding Officer may at any time terminate a telephone call if he believes that there are reasonable grounds for intervention. He must then advise the detainee concerned of the reasons for so doing and report the matter to the Registrar.450

In principle, telephone calls are not monitored or recorded. However, it is possible for the Commanding officer or the Registrar to do so if he or she has reasonable grounds to believe ‘that the detainee may be attempting to arrange escape, interfere with or intimidate a witness or otherwise disturb the maintenance of good order in the detention unit or where an Order for non-disclosure has been made by a Judge or a Chamber’.451 In such cases, the Registrar may issue an order for the monitoring of all of a particular detainee’s phone calls, except for conversations with counsel, for a period not exceeding one month.452 Renewals of these orders must be reported to the

446 Ibid.
447 Ibid.
448 Regulation 2 of the section of the Regulations entitled ‘telephone calls’.
449 Regulation 4 of the section of the Regulations entitled ‘telephone calls’.
450 Regulation 5 of the section of the Regulations entitled ‘telephone calls’.
451 Regulation 6 of the section of the Regulations entitled ‘telephone calls’.
452 Regulation 7 of the section of the Regulations entitled ‘telephone calls’.
President. Further, the detained person in question must be notified of the Registrar’s decision within 24 hours. Regulation 8 stipulates that a detainee whose calls are monitored may at any time address the President with the request to reverse a decision by the Registrar. It was already noted in respect of the ICTY’s monitoring regime that the Registrar’s reporting obligation with respect to (renewals of) monitoring orders to the President may undermine the latter’s appearance of impartiality in the context of any subsequent complaints proceedings on the issue. A log of all monitored calls must be kept by the Commanding Officer, ‘with details of the name of the detainee, the number called, the name of the other party if known, the reason for monitoring and the date on which the Registrar made the relevant order’. A copy of each entry must be given to the detained person in a language he understands. The Commanding Officer must further forward the details of each monitored call to the Registrar within 24 hours. The latter will then make an initial determination as to ‘whether to listen to, or have transcribed and read, each individual recorded call’. If, after having reviewed the call, the Registrar finds that there has not been a violation of the Rules or Regulations and that ‘the call does not provide any other reason for further action’, the recording must be erased within 48 hours. In case the Registrar does identify a breach of the Regulations or of an order, the call will be transcribed and, if necessary, translated into French or English (as the working languages of the ICTR). The Registrar may further choose to inform the Prosecutor, the Commanding Officer and, if necessary, the Tanzanian authorities ‘of the nature of the breach’. Transcribed calls must be retained by the Registrar and may only be handed over to the Prosecutor as evidence of contempt of the tribunal after having given notice and been disclosed to the detainee’s counsel. Finally, Regulation 14 states that detainees whose calls have been monitored may file a complaint in accordance with the formal complaints procedure under the Rules of Detention. During interviews

453 Ibid.
454 Regulation 9 of the section of the Regulations entitled ‘telephone calls’.
455 Ibid.
456 Regulation 10 of the section of the Regulations entitled ‘telephone calls’.
457 Regulation 11 of the section of the Regulations entitled ‘telephone calls’.
458 Regulation 12 of the section of the Regulations entitled ‘telephone calls’.
459 Ibid.
460 Regulation 13 of the section of the Regulations entitled ‘telephone calls’.
conducted for the purposes of this research, the UNDF’s detention authorities described the practice of monitoring telephone calls as follows:

‘The Rules are very clear on that. They say, with regard to the private calls, that if there is any reason to believe that a detainee is attempting to escape, or there exists in any way a threat against the prison, we can monitor these calls; but that is only when we have received permission to do so from the President. This approval would indicate that for a certain period of time the conversations of this detainee will be monitored. The conversations with the counsel are privileged; and so, they are not monitored’.\(^{461}\)

**Visits**

It was stated above that the right to receive visits at regular intervals is laid down in Rule 61(i) and is subject to ‘such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary’. Such restrictions may, for example, have to do with the ‘reasonable demands of the early schedule of the detention unit and the facilities available’\.\(^ {462}\) The Commanding Officer has, in consultation with the Registrar, fixed daily visiting hours for non-privileged visitors\.\(^ {463}\) Pursuant to the ‘Brief to All Other Persons Regarding Visits to Detainees’ (hereafter: ‘Brief’),\(^ {464}\) ‘permission to visit a detainee will only be granted provided that there is sufficient space to accommodate the visitor’\.\(^ {465}\)

Non-privileged visitors must first ask the Registrar for permission to visit a particular detainee\.\(^ {466}\) This must either be done in writing - in English or French - or in person, and ‘not later than the working day prior to which the visit is requested’\.\(^ {467}\) However, according to the Brief, which must be read subject to the Regulations, ‘[a]ll visitors must contact the Tribunal no less than 48 hours prior to the intended visit to allow

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\(^ {461}\) ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008.

\(^ {462}\) Regulation 1 of the section of the Regulations entitled ‘visits’.

\(^ {463}\) Ibid.

\(^ {464}\) The Brief is on file with the author.

\(^ {465}\) Article 1 of the Brief.

\(^ {466}\) Rule 60(A) of the STL Rules of Detention stipulates in respect to such requests that ‘[t]he Registrar shall give specific attention to the visits by the family of Detainees, with a view to maintaining relationships’.

\(^ {467}\) Regulation 4 of the section of the Regulations entitled ‘visits’.
time for an investigation to be made. This investigation will confirm the information
given by the proposed visitor. Any visitor failing to give at least 48 hours notice will
be denied the right to visit a detainee’.468 During a meeting of the ICTR Detention
Committee in 1996, it was discussed how and by whom such investigation should be
conducted. It was suggested that, ‘[o]bliging the visitors to fill out some kind of
standard formula would facilitate such screening process, particularly if the ICTR for
such screening would be assisted by Interpol or the Tanzanian Intelligence’.469
In principle, requests for visits will be granted, ‘unless the Registrar or the
Commanding Officer has reasonable grounds for believing that the detainee may be
attempting to arrange escape, interfere with or intimidate a witness or otherwise
disturb the maintenance of good order in the detention unit’.470 As a matter of course,
hospitalised detainees and prisoners are also entitled to receive visits.471 When
Serugendo was hospitalised in Kenya, the Trial Chamber observed that the Registry
was ‘making all efforts to facilitate Mrs. Serugendo’s travel to Nairobi in the Republic
of Kenya so that she may rejoin her husband’.472
The Registrar must provide the Commanding Officer with a copy of all requests
granted.473 If the request is denied, the Registrar must notify both the visitor and the
detainee thereof in writing, giving reasons for the refusal.474 The detainee may
approach the President directly with a request to reverse the Registrar’s decision.475
If the request is approved, in order to be permitted entrance into both the host prison
and the UNDF, visitors must submit the written permit together with an official
identification document.476

468 Article 2 of the Brief.
469 Letter from Frederik Harhoff, Call for 2nd Meeting in detention Committee, Wednesday
21 August 1996, ICTR/JUD 11-2, 19 August 1996, Minutes of the first meeting in the
470 Regulation 5 of the section of the Regulations entitled ‘visits’.
471 See, e.g., ICTR, Decision on the Request Submitted by the Defence, Prosecutor v.
Rutaganda, Case No. ICTR-46-S-T, T. Ch., 25 September 1996; ICTR, Decision on Motion
for Partial Enforcement of Sentence, Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, T.
Ch. I, 22 June 2006.
472 ICTR, Decision on Motion for Partial Enforcement of Sentence, Prosecutor v. Serugendo,
473 Regulation 5 of the section of the Regulations entitled ‘visits’.
474 Regulation 6 of the section of the Regulations entitled ‘visits’.
475 Regulation 7 of the section of the Regulations entitled ‘visits’.
476 Regulation 9 of the section of the Regulations entitled ‘visits’.
Detainees are not obliged to receive visitors, except for representatives of the Prosecutor, and must be informed of the identity of the visitor.\footnote{\textit{Regulation 8} of the section of the Regulations entitled ‘visits’.} Visitors are subject to the security checks of both the host prison and the UNDF, which may include personal searches of clothing and X-ray examinations.\footnote{\textit{Regulation 10} of the section of the Regulations entitled ‘visits’.} During the visit, the visitor is not permitted to hand over any item to the detainee. Items must be passed to the staff of the UNDF on entry and will be dealt with in accordance with Rules 77 and 78 of the Rules of Detention.\footnote{\textit{Regulation 12} of the section of the Regulations entitled ‘visits’.} Visits are conducted in ‘visiting booths’, in sight of the staff of the UNDF.

Further, conversations between visitors and detainees are monitored at all times,\footnote{\textit{Article 9} of the Brief.} but not recorded ‘unless the Commanding Officer has reasonable grounds for believing that the detainee may be attempting to arrange escape, interfere with or intimidate a witness or otherwise disturb the maintenance of good order in the detention unit or where an order for non-disclosure has been made by a Judge or a Chamber pursuant to Rule 75 of the Tribunal’s Rules of Procedure and Evidence’.\footnote{\textit{Regulation 15} of the section of the Regulations entitled ‘visits’.} In the latter situations, the Registrar may order that the conversations of detainees with non-privileged visitors be recorded for a maximum period of seven days. The detainee must be notified of such a decision by the Registrar. If the decision is made at the request of the Commanding officer, the detainee must be informed of such a request within twenty-four hours.\footnote{\textit{Regulation 16} of the section of the Regulations entitled ‘visits’.} The detainee in question may appeal the Registrar’s decision directly to the President.\footnote{\textit{Regulation 17} of the section of the Regulations entitled ‘visits’.} A log of all monitored visits must be kept by the Commanding Officer. The log must include such details as the ‘name of the detainee, the name and address of the visitor, the reason for monitoring and the date on which the Registrar made the relevant order’.\footnote{\textit{Regulation 18} of the section of the Regulations entitled ‘visits’.} The Commanding Officer must provide the detainee with a copy of each entry in a language he understands.\footnote{\textit{Ibid.}} Within forty-eight hours of the visit, the Registrar must make a determination as to ‘whether to listen to, or have transcribed
and read, the record of each individual visit’. 486 In making this determination, the Registrar must take into account ‘the status and identity of the other party (where known), the security risk posed by the detainee and the stated reasons for monitoring’. 487 During a 1996 meeting of the ICTR Detention Committee, one of the members ‘expressed strong reservations on the issue of censoring the visits’. 488 The member stressed that routine censorship had not been contemplated by the drafters of the Rules of Detention. She therefore argued that censorship should be ‘the exception rather than the rule, i.e. censorship could be imposed only where the Commanding Officer had strong reasons to believe that the visit would impinge on security or justice, and was able to substantiate his belief’. 489 In support of this argument she pointed to Rule 15 of the Regulations, pursuant to which ‘discussions between the detainee and the visitor shall not be recorded unless the Commanding Officer has reasonable grounds to believe that the detainee may be attempting to arrange (…)’. 490 If the Registrar establishes a breach of the Regulations or of an order, the conversation will be transcribed. 491 If necessary, the Registrar will inform the Tanzanian authorities of the nature of the breach. 492 Transcribed conversations must be retained by the Registrar and may not be passed on to the Prosecutor as evidence of contempt of the tribunal ‘without prior notice and disclosure to counsel for the defence’. 493 Finally, the Regulations state that a detained person whose visits have been recorded may make a formal complaint in accordance with the complaints procedure laid down in the Rules of Detention. 494

During a visit, the Commanding Officer may at any time, if he ‘believes that he has reasonable grounds for intervention, or that these Regulations are being breached in any way’, terminate a visit. 495 He must then advise the detainee and the

486 Regulation 19 of the section of the Regulations entitled ‘visits’.
487 Ibid.
489 Ibid.
490 Ibid. Emphasis in the original.
491 Regulation 20 of the section of the Regulations entitled ‘visits’.
492 Ibid.
493 Regulation 21 of the section of the Regulations entitled ‘visits’.
494 Regulation 22 of the section of the Regulations entitled ‘visits’.
495 Regulation 14 of the section of the Regulations entitled ‘visits’.
visitor of the reasons for so doing and may summon the visitor to leave the premises.\textsuperscript{496} He must further report such cases to the Registrar.\textsuperscript{497}

One would imagine that the ICTR UNDF’s location far away from the place of residence of the detainees’ and prisoners’ relatives and friends might place such persons at a disadvantage compared to their counterparts in domestic jurisdictions as regards their ability to maintain contact with their loved ones. However, according to the UNDF detention authorities, this is ‘not really the case’,

‘since we offer a lot of facilities for them to be in touch with their families when compared to national jurisdictions. In here they can make a telephone call once a week at the Tribunal’s expense. They can receive calls from their families as many times as the families can afford. They can write and receive letters. We also allow them to have family visits. We even facilitate their travels by assisting their families in obtaining visas to enter Tanzania, because most of the time these families are refugees who do not have the required legal status to come to this country. These are some of the measures we take to minimise difficulties associated with their separation from their families. And this has, to a large extent, brought them reasonably close to their families.’\textsuperscript{498}

A senior staff member of the ICTR Registry stated that

‘We ship the visitors to and from the Tribunal; we have a bus service which ships them out to the Detention Facility and back again. We assist them with getting visas, if they need assistance. We have a very fast access to visas so there is nobody who cannot come here.’\textsuperscript{499}

Notwithstanding such optimism, it appears that, due to the high costs involved, many detained persons are very much hampered in their ability to maintain contact with the outside world. Regarding visits, it should be noted that the tribunal does not provide

\textsuperscript{496} \textit{Ibid.}
\textsuperscript{497} \textit{Ibid.}
\textsuperscript{498} ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008.
\textsuperscript{499} ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
them with any financial assistance.\footnote{ICTR, interview conducted by the author with Christopher Black, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.} When asked how this affects the right of detained persons to receive visits, Christopher Black, defence counsel before the ICTR, said that

‘[the right] doesn’t exist. Well, they can receive visitors but they are so far away and cannot afford the tickets.’\footnote{Ibid.}

Ben Gumpert, another defence counsel practicing before the ICTR, was milder in his opinion on the opportunities for visits. He stated that

‘It is true that many of their families are thousands of miles away. But in practice I think most of the detainees and convicted prisoners have had visits from their families. I think that people at this Tribunal tend to try to facilitate that sort of thing. I was thinking of giving you concrete examples but I think I’d better not because I haven’t spoken to the people concerned. But I know of a case where a counsel here - who had formerly acted as a legal assistant in a case of a man who was convicted on a plea of guilty and remains in the UNDF - facilitated the visit made by that convicted man’s daughter. She lived in a West-African country where she had found refugee status and she came to visit her father for two weeks and the counsel concerned, although she no longer had any connection to this case at all, went out of her way to make that journey and that stay here easier. And as I say, although my experience extends only to one defendant, my belief is that the very large majority if not every detainee / convicted person has practically been able to exercise his rights to receive visitors. (…) The detainees are thousands of miles from their nearest and dearest, so getting visits is a problem. But there is really nothing that can be done about that. I mean, their families are now typically spread over the world, preponderant in Belgium in Europe. That’s the choice which they have made - a very sensible choice I’d say. In making that choice they have put themselves thousands of miles from the detainees with whom they are concerned’\footnote{ICTR, interview conducted by the author with Ben Gumpert, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.}
Yet according to Chief Taku, another defence counsel practicing before both the SCSL and the ICTR,

‘In my opinion, compared to national jurisdictions, the conditions here are far better. Compared to the SCSL, I think the conditions at the SCSL are better. At the Special Court, visiting rights, especially for relatives and counsel, are better arranged for in the sense that there are very little restrictions’.503

He also mentioned a specific problem related to non-privileged visits:

‘When someone comes from Europe, for example, he or she may not be able to see the person within a reasonable time. This may be due to bureaucracy or security concerns. The visitors may even need to return without actually seeing the detainee’.504

When asked about the need for the detainees to receive financial assistance to make visits possible, Ben Gumpert responded that

‘Yes, of course it would. That’s perfectly right; in an ideal world – given the huge distances involved - there would be some kind of fund within the Tribunal’s financial attributions which could be allotted equally or fairly between the prisoners so that they could put that right into practice. But, on the other hand, I can understand that in a situation where funds are very tight, the Registry will say “we have to consider what our priorities are”. All they could really do is go back to the donor countries and say we don’t need just X what you promised us, but we need X plus Y for this specific reason. How receptive the donor-countries would be to that, or the United Nations eventually, I don’t know. Not very receptive I suspect, after the Tribunal has been in operation for some 13 or 14 years and still hasn’t concluded the majority of the work which has been given to it. So the Tribunal may have made life difficult for itself in that respect, by its inefficiency. Yes, in an ideal world you’re absolutely right. If that right [to family life] is there it should be made concrete. No doubt if we were dealing with a domestic situation, in the Netherlands or in the United Kingdom, it’s a matter

503 ICTR, interview conducted by the author with Chief Taku, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
504 Ibid.
which would be taken up, would have been litigated by means of what in my country we would call judicial review, and the High Court in England would pronounce on it and probably say “yes, this is improper treatment and this is not giving efficacy to rights which are more theoretical than practical”. But therein lies the difference between an international tribunal which is not backed by a State. There is no judicial review of the practical, executive decisions, the non-judicial decisions. There isn’t a Court to go to. You can’t go to the Human Rights Committee. I think it would be awfully difficult to persuade them that you would have a right to audience against a non-State. I don’t know of any practical route that anybody here has elucidated whereby you can go to an outside judicial body, a court, and say “the United Nations, through its organ, the ICTR, is treating me unfairly”. I don’t think that has been worked out in UN law or UN practice’.⁵⁰⁵

Peter Robinson, another defence counsel practicing before the tribunals, said that

‘No one has their family in Arusha. People have to travel long distances to visit their family members who are incarcerated, so yes, if there was financial assistance they would receive a lot more visits’.⁵⁰⁶

Chief Taku was of the opinion that there should be some form of financial assistance.⁵⁰⁷

This idea has not been received well by the tribunal’s Registry. When interviewed for the purpose of this study and in response to the question of whether the tribunal would be willing to assist the detainees financially in making family visits possible, a senior staff member of the Registry responded as follows:

‘No way. Thank you very much. We are not paying for anyone to bring their spouses here to visit. We have enough difficulty operating within the budget we have and adding to that – these people are by and large I would say, fairly wealthy; their families are wealthy; they’re sitting on money. Most of these families are living in

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⁵⁰⁵ ICTR, interview conducted by the author with Ben Gumpert, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
⁵⁰⁶ ICTR, interview conducted by the author with Peter Robinson, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
⁵⁰⁷ ICTR, interview conducted by the author with Chief Taku, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
Europe; they are refugees. You have to remember who they are; they are high status elite people. They usually have access to their money. Some of them don’t; but their families still have access to money. For example, dear old Mr. Elizan Ntakirutimana, when he was released - he was bothered that no State wanted to take him back - so his son shipped in his mother – Mr. Ntakirutimana’s wife - and the son turned out to be a surgeon; a highly paid surgeon in the United States. These people are enormously wealthy.508

Although this may be true in respect of certain detainees, it does not appear to apply to all of them. Many detained persons, when interviewed, complained about how difficult it is for them to receive visitors notwithstanding the tribunal’s administrative assistance. Some of their remarks are cited below.

‘The [request for] permission for visit is made by the detainee at least three days before the requested visit is to take place. The visitor must comply with Tanzanian immigration rules. In some cases the social officer intervenes to obtain visas for detainee’s family visitor. When it is done, in general, administration does not object to the request. I had a first visit after more or less eight years of detention because of my family’s lack of financial means. After the visit, I felt myself psychologically empowered for facing solitary confinement (…) I have been visited around three times now with an average duration of two to three hours per visit. I could have spent more time with them, but my relatives did not have the means for staying longer’.509

‘Visits are vital for a prisoner because it is a matter of seeing, not talking over the phone. Both my relatives and I need to know how the other is doing at firsthand. [We are not sufficiently assisted by the tribunal in making visits possible], although we raised the problem with the Red Cross. My family members are not able to visit me here often enough. The last time my children visited me was in June 2002. My wife managed to come here, though, early 2008. [When they are here, they can only stay for] a very short time [because of a lack of means]’.510

508 ICTR, interview conducted by the author with senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
509 ICTR, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008.
510 Ibid.
‘Je trouve que les droits à recevoir des visites sont respectés. La mise en pratique de ces droits est généralement bonne. Quelques fois, il manqué de places pour recevoir tous les visiteurs car il n’y a que trois parloirs à l’UNDF. Vu le nombre de détenus qui ont droit aux visites, ces parloirs ne suffisent pas. Le service en charge des affaires sociales de l’UNDF intervient pour l’obtention des visas d’entrée en Tanzanie pour les membres de ma famille qui me rendent visite. Pour certains, vu leur statut de réfugiés, il n’aurait pas été facile de me visiter si ce service n’était pas intervenue ou n’intervenait pas. De façon générale, ma femme et mes enfants, quand ils viennent me visiter, ils restent avec moi pendant environ 4 heures par jour, pendant une période de 10 jours par visite’.  

‘The right to receive visits from friends is very limited. My family members live far away from UNDF, so their visits are very irregular. Due to a lack of sufficient financial means, it doesn’t take less than two years to have a visit’.  

‘The right to receive visitors is an essential right, notably when one is detained far from his family members. When a detainee sees one of his friends, or members of his family, that helps him morally, even if the time he passes with them is limited. In the UNDF it is possible to organise visits without any problem. [However] my children who live in Western Europe did not ever visit me, because they are not able to come. I am in UNDF since 2001. My wife does not work. She tries to come here and is assisted by friends of our family. [Her visits last for] two weeks’.  

‘A visit for a detainee is an important moment for himself and for his family. There is no legal problem hindering visits; if relatives cannot afford to visit, it is generally linked to shortage of family budget’.  

‘It is difficult to receive visitors who are not family members (i.e. brothers, sisters, wife, children). The only assistance [my relatives get in visiting me here] is securing visas for those who have a refugee status. There is no financial assistance. During my

511 Ibid.  
512 Ibid.  
513 Ibid.  
514 Ibid.
twelve years of detention, I was able to see my children only once. The youngest child was one year old when I was arrested’.  

Virtually all of the detained persons interviewed recognised the ‘long distance separation’ from their families and the difficulties involved in receiving visits as the most painful aspects of international remand detention.

At the UNDF, conjugal or ‘private’ visits are permitted, but only as from May 2008. When interviewed in 2008 for the purpose of this research, Ben Gumpert said that

‘Up until now, as I understand it, although their wives have been allowed to come and visit them, there’s been no arrangement for overnight stays, sex is what we are talking about here, which between man and wife seems a reasonable thing, since these are non-convicted people – and some of them have been inside for 12 years; my client for nine years. These people may still be found not guilty. Indeed, they are presumed not guilty. When the American judges came here - I didn’t meet them myself; they were, not doing some academic research, but more some fact-finding trip to monitor conditions - they secured to speak to detainees. They spoke to my client, he was put forward as a model detainee, and he was asked many questions. But I don’t think he had much to complain about, apart from, I suspect his diet, as a diabetic. More in particular, he complained that he did not understand why the detainees are not allowed conjugal visits. The facilities are plainly here for it to happen and it seems to be an unfair intrusion into the rights of married men who are unconvicted. They obviously took up this point because - I think only one week afterwards - it was announced that conjugal visits would be allowed after all. And I’m just in the process of arranging a time that my client's wife can come and visit him for exactly that purpose - it should not interfere with his trial.’

As to the new arrangements, he said that

515 Ibid.
516 ICTR, interview conducted by the author with Ben Gumpert, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
‘My understanding is that what’s allowed now is that during the course of a visit for several days, they are allowed at least one night together.’\textsuperscript{517}

The situation as it existed before May 2008 can be described by reference to some of the decisions in the \textit{Ngeze} case. In 2005, Ngeze applied to the Registrar for permission to marry at the UNDF or at any other place the Registrar deemed fit.\textsuperscript{518} He also applied to be allowed to ‘consummate the marriage immediately after the wedding ceremony’.\textsuperscript{519} Ngeze further asked ‘in the event that the Tanzanian legislation [would] not allow what is applied for, [to be transferred] to the United Nations Detention Centre of the ICTY in The Hague for the purpose of the marriage, where the Government does not oppose such marriages’.\textsuperscript{520} In his decision, the Registrar referred to both international human rights law and Tanzanian prison law. Regarding the latter, he considered that ‘the practice by Prison Authorities in Tanzania and the region is that inmates are not allowed to exercise their right to marry and consummate such marriages while they are serving their sentence’.\textsuperscript{521} The problem, according to the Registrar, lay not so much in the marriage request, but with the request for conjugal visits which, according to him, went beyond his authority.\textsuperscript{522}

With respect to the request for marriage, considering that at the time of the request Ngeze was convicted in first instance to a life sentence, the Registrar noted that the right to get married ‘may be fettered for those persons who are under limitation by a Court Order’.\textsuperscript{523} He then held that the two requests were ‘intrinsically tied together in this application and (…) cannot be separated’.\textsuperscript{524} In conclusion, he observed that ‘[i]n view of the absence of definite legal provisions within the Basic documents of the Tribunal sanctioning the provision by the Registrar of the matters that the Applicant raises in his application, and in view of the absence of universal international practice by the prison authorities allowing inmates to what the Applicant is requesting the

\textsuperscript{517} \textit{Ibid.}\textsuperscript{518} ICTR, Registrar’s Decision Pursuant to Article 8(3(C) on the Request for Marriage and Other Reliefs, \textit{Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, Registrar, 12 January 2005, par. 1.\textsuperscript{519} \textit{Ibid.}\textsuperscript{520} \textit{Ibid.}\textsuperscript{521} \textit{Id.}, par. 16.\textsuperscript{522} \textit{Id.}, par. 5.\textsuperscript{523} \textit{Id.}, par.11.\textsuperscript{524} \textit{Id.}, par. 16.
Registrar to do, my view is that a decision to allow marriage, consummation thereof and subsequent conjugal rights for an Applicant who has been sentenced to imprisonment for the remainder of his life but who is awaiting appeal from such decision will require the amendment of the Rules pertaining to detention’. As to the alternative request to be transferred to the ICTY UNDU, the Registrar noted that he did not have the authority to issue such an order.

Ngeze then filed an appeal against the Registrar’s decision with the Appeals Chamber, which was dismissed because he had not exhausted the formal complaints procedure. Eight months later, the President ruled on Ngeze’s appeal. Regarding the legal bases for the requests, the President argued that ‘the silence of the ICTR provisions does not exclude the possibility that these rights be recognised. The fact that conjugal visits are allowed under the similar provisions of the ICTY confirms this interpretation. Consequently, the Application raises the question whether other legal provisions confer these rights’. He considered, in this respect, that the rights to family life, to get married and to found a family are not absolute and may be restricted under human rights law and noted, on the one hand, that ‘the jurisprudence concerning these rights in relation to detainees is still evolving,’ and, on the other, that ‘national practice on the issue of conjugal visits is far from uniform’. He observed that a ‘refusal to grant conjugal visits does not amount to a departure from internationally recognized minimum standards in this area’. The President understood Ngeze’s alternative request to be transferred to The Hague as an allegation of a breach of the statutory demand of equal treatment of all persons under Article 20(1) of the Statute. He held, in this regard, that that provision ‘focuses on procedural equality’ and said that it is ‘difficult to see how it can form a basis for comparing conditions of detention in Arusha and The Hague, respectively’. He continued by stating that ‘[h]uman rights provisions prohibiting discrimination do not mandate

525 Id., par. 17.
526 Id., par. 18.
527 ICTR, Decision on Hassan Ngeze’s Motion Appealing the Registrar’s Denial of Marriage Facilities, Ngeze et al. v. the Prosecutor, Case No. ICTR-99-52-A, A. Ch., 20 January 2005.
529 Id., par. 7-8.
530 Id., par. 12.
531 Id., par. 13. Emphasis added.
532 Id., par. 16. Footnotes omitted.
identical treatment between all individuals in the exercise of protected rights where objective and reasonable conditions exist to justify differential treatment. In this regard, there are observable differences between the detention regimes in The Hague and Arusha. One such difference is that there are no facilities for conjugal visits at the UNDF in Arusha. The construction of such facilities would have budgetary and administrative implications. Another difference is that conjugal visits are permitted in Dutch prisons but not in Tanzanian prisons. The Tribunal’s treatment of Ngeze therefore cannot be said to be discriminatory’.\footnote{Ibid.}

As stated above, in 2008, the ICTR changed its policy by allowing conjugal visits for both detained and convicted persons.\footnote{Hirondelle News Agency, 4 July 2008, ICTR/Prisoners – ICTR Authorises Conjugal Visits for Detainees, http://www.hirondellenews.com/content/view/11276/517/ (last visited by the author on 18 March 2011).} This was reportedly done ‘in a move to harmonise rules with its sister tribunal in ex-Yugoslavia (ICTY) and widen the scope of basic human rights’.\footnote{Ibid.} It was further reported that this ‘move ha[d] been under consideration since the Chamber’s [sic] decision to deny convicted Hassan Ngeze, ex-editor of Kangura newspaper, to a right to get married at the ICTR premises (and thereafter conjugal visits) in late 2005’.\footnote{Ibid.} Regarding the grounds for introducing the policy, the ICTR spokesperson reportedly stated that ‘the conjugal visits are exercised within set out regulations under the rules of detention’, that ‘[t]he detained persons are presumed innocent and convicted persons must only be deprived of the right to move freely’ and, further, that ‘the UN Court had a pioneering role in spreading some human right advancements in terms of right of the defence’.\footnote{Ibid.} Hirondelle News Agency also reported on the procedure applicable to conjugal visits stating that ‘[a]ccording to ICTR sources, the visitor, among others, may be required to undergo a background check, and the inmate must also be free of any sexually transmitted diseases. As a matter of procedure, both visitor and inmate are searched before and after the visit, to ensure that the visitor has not attempted to smuggle any items in or out of the facility. The conjugal meetings at the detention facility, on the outskirts of Arusha town, are allowed for maximum of three hours, and must not disrupt or distract the neighbourhood. No detainee, the source said, may be allowed to have'}
more than one conjugal meeting within a period of two successive months; except in case of a detainee whose spouse is resident in a distant country, outside Tanzania. Also in such a case, there will be one conjugal visit in the first week and second meeting during last week of the family visit’. 538

When interviewed for the purpose of this research and asked how the Tanzanian Government felt about the 2008 arrangements, a staff member of the ICTR Registry said that

‘[t]he Tanzanians think the whole thing is a joke, that anyone should even contemplate having conjugal visits. The fact that we took it seriously and the fact that we were establishing a regime for conjugal visits is regarded by the Tanzanians as absurd.’ 539

According to Hirondelle News Agency, ‘Rwandan Prosecutor General, Martin Ngoga, reacted with anger to the announcement by the ICTR to authorize these visits’. 540 He is reported to have labeled the decision as ‘ridiculous’. He is also reported to have stated that ‘this practice does not exist in Rwanda. This country fears that the decision of the ICTR will constitute a new reason not to authorize the transfers of prisoners towards his country’. 541

SCSL

Correspondence and telephone

Rule 40(A) of the SCSL Rules of Detention sets forth the right of persons detained at the SCSL Detention Facility to communicate with relatives and others by letter or telephone. This right is subject to ‘such conditions of supervision and time-restraints

539 ICTR, interview conducted by the author with a senior staff member of the ICTR Registry, Arusha - Tanzania, May 2008.
541 *Ibid*. 

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as the Chief of Detention deems necessary’, as well as to Rules 46 and 47 of the Rules of Detention. Rule 46 states that ‘(A) All letters and packages shall be inspected in accordance with Rule 55 of the Rules. (B) Telephone calls may be monitored only in the circumstances set out under Rule 47 of the Rules’. According to Rule 55(A), all items received from outside the Detention Facility are subject to security controls. Items intended for detainees may be refused by the Chief of Detention if he is of the opinion that the item may ‘constitute a danger: (i) to the security and good order of the Detention Facility; (ii) to the health and safety of the Detainee, any other Detainee, or any member of the staff of the Detention Facility; or (iii) of attempted escape by a Detainee from the Detention Facility’. Items coming from the outside will be ‘removed or destroyed’ in accordance with Rule 9 ‘unless intended and permitted under the Rules for use during detention’. Contrary to the ICTR and ICTY legal frameworks, the SCSL Rules do not provide for the retention of refused items received from the outside. The security controls referred to in Rule 55 are elaborated upon in a number of Detention Operational Orders. These Orders are not publicly available, nor are they distributed among the detainees. It is highly doubtful, in this regard, whether the broad language of Rule 55(A) and the inaccessible Operational Orders comply with the foreseeability and accessibility requirements of Article 8 ECHR.

Detention Operational Order No. 3:6 provides that ‘[a]ll Correspondence, packages and parcels coming into or out of the Detention Centre are to be opened, read and examined, except those to and from Counsel and all communications with ICRC’. Further, Detention Operational Order No. 11:13 provides that all mail, both incoming and outgoing, must be recorded in a log which must contain details as to

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542 Rule 55(B) of the SCSL Rules of Detention.
543 Rule 55(C) of the SCSL Rules of Detention.
544 Rule 9 stipulates that ‘(A) On reception at the Detention Facility, the Chief of Detention shall order that a Detainee’s body and clothes be searched for items that may constitute a danger to: (i) the security and good order of the Detention Facility; or (ii) the health and safety of the Detainee, any other Detainee or any member of the staff of the Detention Facility. (B) Any such items which, in the opinion of the Chief of Detention, fall within paragraph (A) shall be removed and/or destroyed. A record shall be kept of any item removed or destroyed and the Detainee shall be informed in writing thereof by the staff of the Detention Facility’.
how it was disposed of.\textsuperscript{546} This obligation also applies to packages and parcels.\textsuperscript{547} All parcels will be checked by metal detectors or X-ray machines.\textsuperscript{548} Specifically in relation to newspapers, books, magazines and other literature, it is provided that these will be assessed on their individual content.\textsuperscript{549} As to outgoing mail, Detention Operational Order No. 11:13 states that ‘[a]ll detainees’ outgoing letters and cards will be recorded and maybe opened and checked’.\textsuperscript{550} If outgoing mail contains ‘matters of an objectionable nature such as information regarding another detainee or a member of staff’, the letter will be put in the detainee’s file and he will be instructed to re-write it.\textsuperscript{551} It will be indicated to the detained person concerned precisely which part of the letter is found to be objectionable, and he will be advised about or assisted with re-writing.\textsuperscript{552} If, according to the detention officer concerned, the item of outgoing mail ‘contains material which has security implications or criminal intent [sic]’, the matter must be referred to the Chief of Detention for determination.\textsuperscript{553} It should be noted, in this regard, that the review of correspondence at the SCSL takes place at a lower level than at the other tribunals, where the Registrar or the Commanding Officer carries out the (initial) review and only the Registrar may make the determination as to whether a mail item is in breach of the relevant rules or regulations. At the SCSL, the initial determination is made by a detention officer, whereas the actual review is carried out by the Chief of Detention. With respect to incoming mail, it is provided that all such items will be ‘opened, checked and recorded’.\textsuperscript{554} It is also stated that ‘[i]ncoming mail which is either objectionable in content, contains material which has security implications, or criminal intent, will be referred to the Chief of Detention for determination’.\textsuperscript{555} In relation to food being

\textsuperscript{546} SCSL, Detention Operational Order No. 11:13, issued on 10 August 2003 by Terry Jackson, Chief of Detention. Emphasis in the original. Document on file with the author.

\textsuperscript{547} SCSL, Detention Operational order No. 3:6, issued on 22 July 2004 by Barry Wallace, Chief of Detention. Document on file with the author.

\textsuperscript{548} SCSL, Detention Operational Order No. 11:13, issued on 10 August 2003 by Terry Jackson, Chief of Detention. Emphasis in the original. Document on file with the author.

\textsuperscript{549} SCSL, Detention Operational order No. 3:6, issued on 22 July 2004 by Barry Wallace, Chief of Detention. Document on file with the author.

\textsuperscript{550} SCSL, Detention Operational Order No. 11:13, issued on 10 August 2003 by Terry Jackson, Chief of Detention. Emphasis in the original. Document on file with the author.

\textsuperscript{551} Ibid.

\textsuperscript{552} Ibid.

\textsuperscript{553} Ibid.

\textsuperscript{554} Ibid.

\textsuperscript{555} Ibid.
imported into the Detention Facility, ‘good hygiene practices’ are prescribed.\textsuperscript{556} As to parcels, these are only received and checked at the reception area on Wednesdays, Saturdays and Sundays. Deliveries on other days are not accepted.\textsuperscript{557}

The costs of a detainee’s communications, either by letter or telephone, are, in principle, borne by the detained individual. As is the case at the ICTR and the ICTY, in respect of indigent detainees, the costs of their communications may be paid for by the Court if permitted by the Registrar.\textsuperscript{558}

As provided for in Rule 46(B), the monitoring of telephone conversations is only allowed in the situations listed in Rule 47. Since that provision also stipulates the grounds for restricting visits to detainees, it will be discussed separately and in more detail below.

Detention Operational Order No. 10:3 provides that ‘[a]lthough telephone calls will be recorded in so far as the person called and the name of the person, no call may be listened to or audio recorded without the direct authority and instruction of the Registrar of the Special Court. Any breach of this direction will have disciplinary consequences’.\textsuperscript{559} It further stresses that ‘[t]he telephone system is seen as an important primary method of communication between the detainee and his family/friends and his defence counsel. Its confidentiality and integrity are to be respected at all times’.\textsuperscript{560} Nevertheless, Detention Operational Order No. 3:1, which was issued in July 2008, provides in relation to incoming and outgoing non-privileged calls that these ‘will be monitored and recorded as per the direction and authority of the Registrar’.\textsuperscript{561} By contrast, privileged calls ‘will not be recorded without the direct authority and direction of the Registrar’.\textsuperscript{562} It thus appears that this difference in formulation allows for the routine monitoring of non-privileged communications.

\textsuperscript{556} SCSL, Detention Operational order No. 3:6, issued on 22 July 2004 by Barry Wallace, Chief of Detention. Document on file with the author.
\textsuperscript{557} SCSL, Detention Operational order No. 3:5, issued on 21 July 2004 by Barry Wallace, Chief of Detention. Document on file with the author.
\textsuperscript{558} Rule 40(B) of the SCSL Rules of Detention.
\textsuperscript{559} SCSL, Detention Operational Order No. 10:3, issued on 20 October 2003 by Barry Wallace, Chief of Detention. Document on file with the author.
\textsuperscript{560} \textit{Ibid.}
\textsuperscript{561} SCSL, Detention Operational Order No. 3:1, issued on 18 July 2008 by Ray Cardinal Chief of Detention. Document on file with the author.
\textsuperscript{562} \textit{Ibid.}
Each detained person has his own mobile phone and each phone has been allocated an extension number. Before 2008, a detainee who wished to make a non-privileged call had to phone an operator who dialled the number and hung up once connected. In 2008, the instruction to hang up once connected was removed. This strengthens the assumption that the 2008 arrangements were intended to make possible the routine monitoring of non-privileged calls. The 2008 document further instructs the operator to ‘record the number and person to be called on a log’. Incoming calls by non-privileged persons are made to the operator at the Detention Facility who connects the caller with the extension number of the detainee’s telephone. Nowhere is it outlined at what times detainees may make telephone calls. According to one detainee, outgoing calls may be made from 7 a.m. until 9 p.m. Each detainee ‘has been allocated a call time limit of 300 minutes per month’. This is a much more generous arrangement than the one in place at the ICTR UNDF. The operator must advise a detainee when he has used 150 minutes and thus has a balance left of 150 minutes for the remainder of the month.

One complaint regarding telephone facilities concerned the reported availability of just one line. During a status conference in the Norman, Fofana and Kondewa case defence counsel complained that ‘[o]ur understanding is that there is only one set line and because there are so many detainees, sometimes calls, in fact, have to be aborted because one detainee may be on the line whilst others are receiving calls from outside. We believe that there was a slightly better situation earlier on and that that situation

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563 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
565 Ibid. Emphasis added.
566 The prescription that calls ‘will be monitored and recorded as per the direction and authority of the Registrar’ is reiterated in respect of incoming calls by non-privileged persons. See SCSL, Detention Operational Order No. 3:1, issued on 18 July 2008 by Ray Cardinal Chief of Detention. Document on file with the author.
567 Ibid.
569 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
571 Ibid.
Another complaint concerned the fact that one of the detainee’s medical condition made it difficult for him to reach the phone area. It was argued by his counsel that ‘his [client’s] present medical condition, I think, is well known, but the availability of materials or facilities is causing him some problem. For example, in connection with the availability of the telephone line, he has to walk long distances every time he has a telephone call, and in view of the problems with his hip and also his swollen foot, that is causing a lot of discomfort and it goes to augment the request for more telephone lines, especially one that would be easily accessible to him in his present condition’. 573

Unlike at the ICTY and ICTR, at the SCSL the right to notify one’s family, counsel and a diplomatic or consular representative upon admission is formulated as the right to request Duty Counsel or the staff of the Detention Facility to do so. 574 It therefore appears that a detainee is not permitted to notify such persons himself as to his whereabouts. 575 Nor is it clearly stated precisely when after admission such a request may be made and, more importantly, how soon such request must be acted upon by the requested staff member.

Visits

The right to receive visits from relatives and others at regular intervals is laid down in Rule 41. This right is subject to prohibitions imposed or regulations set pursuant to Rule 47 and to ‘such restrictions and supervision as the Chief of Detention, in consultation with the Registrar, may deem necessary in the interests of the administration of justice or the security and good order of the Detention Facility’. 576 Rule 47 will be discussed in more detail below. Until 2008, visits were possible on Fridays, Saturdays and Sundays, from 9:30 a.m. until 12:30 and from 14:00 until

573 Id., p. 43, lines 6-14.
574 Rule 8(B) of the SCSL Rules of Detention.
575 See, also, Rule 10(B) of the STL Rules of Detention, which provides that ‘[t]he Detainee is entitled to request that the representative of the Head of the Defence Office or the person designated by him contact the Detainee’s family, a legal representative or an appropriate diplomatic or consular representative’.
576 Rule 41(A) of the SCSL Rules of Detention.
From 2008 onwards, visits were also allowed on Wednesdays. However, ‘operational circumstances’ may dictate changes in the duration of visits. According to one detained person,

‘Robin Vincent [the former Registrar] first gave us three days for visits. Our children are attending school so they cannot visit us here during weekdays, only in weekends. So they allowed us to let the children visit us on Saturdays’.

Detainees are permitted to receive a maximum of four visits per week. Each visit may consist of up to three adult persons and three children. All children below the age of eighteen must be accompanied by a parent or guardian. Detainees who are held in isolation are, in principle, allowed to receive visits. Persons wishing to visit a particular detainee must submit a formal request for this purpose. They must fill in ‘a Visitors Declaration and Application Form, wherein the visitor provides personal information such as his or her name, address, date and place of birth, the name of the Detainee to be visited, his or her relationship to the Detainee, as well as proof of identity and a declaration as to criminal antecedents. By signing the Form, the visitor also certifies that all information is true and that any omission or false information will result in the immediate denial of the visiting application’. The applicant is then interviewed by investigators of the Sierra Leone Police, who must determine the

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577 SCSL, Detention Operational Order No. 8:1, issued on 12 October 2004 by Barry Wallace Chief of Detention. Document on file with the author.
579 Ibid.
580 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
582 SCSL, Detention Operational Order No. 3:1, issued on 18 July 2008 by Ray Cardinal Chief of Detention. Document on file with the author. It provides that ‘[i]n consideration of local custom and traditions, a guardian is the caregiver of the children who may be under the age of eighteen years’.
applicant’s identity and confirm the reported place of residence.\textsuperscript{586} Once the Sierra Leone Police has completed its investigation, a Visitors Review Board, which consists of both security and detention staff, will be convened by the Chief of Security.\textsuperscript{587} The Board will determine whether or not to approve the application.\textsuperscript{588} A list of approved and not approved visitors is then made available to the visits reception. When confronted with a complaint about the formalities surrounding a request for visiting the Detention Facility, the Trial Chamber in \textit{Brima et al.} responded that ‘it would be unreasonable for any visitor to expect to be shown a red carpet straight through to the Detention Facility without having to undergo any formalities’.\textsuperscript{589} Former Registrar Robin Vincent has stated that ‘[t]he Sierra Leone experience with visits demonstrated the difficulties of ‘vetting’ or screening those wanting to visit detainees, especially when there is no reliable means of identification, criminal records or generally credible information or intelligence. This resulted in some visitors being found subsequently not to have been who they claimed to be’.\textsuperscript{590} The visitor needs a visiting permit and a Special Court identity card to enter the premises. These will be issued by a Visits Officer, after he has verified both the visitor’s official identification and the Board’s approval.\textsuperscript{591} All visits, including legal ones, must be recorded in a log.\textsuperscript{592} If the Chief of Detention suspects that the purpose of a person visiting the Detention Facility is ‘adverse to the security and good order of the Detention Facility’, he may refuse such person entrance.\textsuperscript{593} The detained person affected by that decision may file a formal complaint through the complaints procedure.\textsuperscript{594} Unlike the UNDF and

\textsuperscript{587} \textit{Ibid}.
\textsuperscript{588} \textit{Ibid}.
\textsuperscript{592} SCSL, Detention Operational order No. 3:4, issued on 20 February 2006 by Barry Wallace, Chief of Detention. Document on file with the author.
\textsuperscript{593} Rule 41(C) of the SCSL Rules of Detention.
\textsuperscript{594} \textit{Ibid}.

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UNDU, the SCSL Detention Facility is not located within a host prison, which explains the absence of references to security checks by a host prison. Upon entering the Detention Facility’s premises, visitors are required to comply with the Detention Facility’s security checks, which may consist of personal searches of clothing, X-ray examinations, as well as intimate searches.\(^{595}\) It should be noted that the other tribunals’ Rules of Detention and Regulations do not provide for the carrying out of intimate searches. It is provided in Rule 41(D) that ‘[i]ntimate searches shall not infringe or violate the dignity of the individual and shall be conducted only in accordance with a published operational order and where strictly necessary for the security and good order of the Detention Facility’. Although Rule 41(D) speaks of a \textit{published} operational order, as a matter of fact, the order concerned has not been made public. Nevertheless, it transpires from Rule 41(D)’s language that routine intimate searches are not permitted, but must be justified in the circumstances. Visitors are searched by in a ‘general rub-down procedure’.\(^{596}\) According to Detention Operational order 1:2, only the Chief of Detention may order a ‘special search’.\(^{597}\) The procedures that must be adhered to by staff carrying out the distinct kinds of searches are described in detail in the relevant Operational Orders. In July 2004, in the \textit{Sesay et al.} case, defence counsel complained to the Trial Chamber that one of the accused detainees’ wives had paid a visit to the Detention Facility and had on that occasion been subjected to an intimate search or, more precisely, a vaginal search.\(^{598}\) It was alleged that the said search had not been authorised and had been carried out by national prison staff without an international supervisor being present.\(^{599}\) The Chief of Detention, who was asked to explain to the Court what had happened, said that the records showed that the wife in question had not paid a visit to the detainee concerned on the day when the alleged facts were said to have occurred.\(^{600}\) As to the searches carried out that day, he stated that ‘[v]isitors on that day were searched as a consequence of concerns raised with me that articles, including medication, were

\(^{595}\) Rule 41(D) of the SCSL Rules of Detention.
\(^{597}\) \textit{Ibid.}
\(^{599}\) \textit{Id.}, p. 9, lines 16-19.
\(^{600}\) \textit{Id.}, p. 9, lines 22-23.
being taken out of the detention facility by visitors. I instructed my deputy to consult with security section and to put in place arrangements for an unannounced search of visitors as they left the detention facility at their discretion. The search was conducted, as Your Honour has said, in the temporary courthouse. It was supervised by an international detention officer and was conducted by those staff who carry out the daily searches at the entrance who have been trained and know the correct procedures. At no time was any visitor asked to remove any clothing or subjected to an intimate internal search. Articles were found on their possession in the bags that they carried, including medication, cigarettes and bars of soap. Medication caused me considerable concern and it was one of the issues that prompted me to introduce the search of visitors leaving. It had been noted that the supply of medication to detainees was extra-ordinarily high and that having been issued should have been lasting longer than they claimed. My concern was that such medication being passed and consumed by others for whom it was not prescribed and may prove dangerous. I wanted to stop the practice’. 601 The Chief of Detention further stressed that no visitor had on that day, or on any day in the past, been subjected to an internal intimate search. 602 He stated that ‘[a]ny search which involves the invasion of someone's intimate areas is unlawful, certainly for any of my staff. That would never be condoned by me and any officer that I found actually who carried out such a search would be subjected to severe disciplinary action. It is unlawful and should only be carried out under medical supervision and you would need strong grounds to even consider it’. 603 It would appear, therefore, that insofar as Rule 41(D) allows for visitors to be subjected to intimate searches, it is a dead letter. The Special Court should therefore have another look at this provision in order to determine whether it is necessary for it to be incorporated in the Rules.

Any person who refuses to comply with the aforementioned security controls will be refused access. 604 Any unauthorised items brought in by the visitor ‘shall be returned

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601 Id., p. 9, line 23, to p. 10, line 2.
602 Id., p. 10, lines 8-10.
603 Id., p. 10, lines 18-21.
to the visitor upon [his] departure from the facility’. Cameras, radios, phones and recording devices are prohibited and may only be brought into the detention premises upon the explicit approval of the Chief of Detention. According to one detained person, food may not be brought in by visitors.

A specific category of possible visitors is mentioned in Rule 43. It provides that ‘[d]etainees who are not Sierra Leonean nationals shall be allowed to communicate with and receive visits from the diplomatic and consular representative of the State of which they are a national’. Detainees are not required to meet with any visitor. Rule 45, in this regard, stipulates that ‘[a] Detainee shall be informed of the identity of each visitor and may refuse to see any visitor’. Contrary to the ICTR and ICTY Rules, Rule 45 does not make an exception for representatives of the Prosecutor’s Office (ICTY and ICTR) or of the Registry (ICTY). When taken for a visit, the detainee must be searched before entering the visiting area.

Contrary to the Rules of the ICTY and the ICTR, the SCSL Rules explicitly provide that visits are to be conducted in the sight and within hearing of the staff of the Detention Facility. Detention Operational Order No. 3:8 states that ‘[a]n International Detention Supervisor shall be present at all times in the visits area to monitor and supervise the staff, visitors and detainees’. The visitor is escorted from the reception area to the visitation room. A table will be designated and the detained person must sit opposite the visitor at all times. A log with details of the

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607 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
608 Rule 43(B) provides that ‘[d]etainees who are nationals of States without diplomatic or consular representation in the Host Country and refugees and stateless persons shall be allowed to communicate with the diplomatic representative of the State which takes charge or their interests or the national or international authority whose task is to serve the interest of such persons’.
610 Rule 41(B) of the SCSL Rules of Detention.
611 SCSL, Detention Operational order No. 3:8, issued on 20 February 2006 by Barry Wallace, Chief of Detention. Document on file with the author.
613 SCSL, Detention Operational order No. 3:8, issued on 20 February 2006 by Barry Wallace, Chief of Detention. Document on file with the author.
beginning and end of each visit will be kept by a Visits Officer.\textsuperscript{614} No items may be passed between visitors and detainees.\textsuperscript{615} At the end of each visit, the detained person must be ‘positively identified using the security photograph’.\textsuperscript{616} In this regard ‘[i]t is of the utmost importance that supervising staff clearly identify the detainee and ensure he is not given the opportunity to switch with his visitors’.\textsuperscript{617} The visitor must also be identified before being escorted back to the gates and may be searched before leaving the premises.\textsuperscript{618} Any incidents that occur during a visit must be reported to the Chief of Detention.\textsuperscript{619}

In the Court’s early period, when its detainees were held at Bonthe Island, it was difficult for their family members to visit them. Bonthe Island was only accessible by boat or helicopter. Things improved when they were transferred to the newly built Detention Facility at the Court’s premises in Freetown.\textsuperscript{620} Occasionally, complaints have been raised by defence counsel alleging that visitors were refused entrance to the Detention Facility,\textsuperscript{621} or were treated in an inappropriate manner. As to the former kind of complaints, one detainee stated that

‘My sister’s husband, he came here twice, and he was turned down. He was refused entrance for security reasons, because he is a police man. He is my family though. In Africa, family is really important; we take care of each other. My complaints on the matter had no effect (…) But it was not only me complaining about the implementation of visiting rights. All of us have complained about this’.\textsuperscript{622}

Regarding the latter kind of complaints, counsel for Norman told the Trial Chamber that ‘[t]he detainees are quite unhappy about some of the procedures that have been

\textsuperscript{614} Ibid.
\textsuperscript{615} Ibid.
\textsuperscript{616} Ibid.
\textsuperscript{617} Ibid.
\textsuperscript{618} SCSL, Detention Operational Order No. 3:9, issued on 20 February 2006 by Barry Wallace, Chief of Detention. Document on file with the author.
\textsuperscript{619} SCSL, Detention Operational Order No. 3:7, issued on 12 October 2004 by Barry Wallace, Chief of Detention. Document on file with the author.
\textsuperscript{622} SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
adopted and the application of some of those procedures has caused embarrassment and, in one particular case, even harassment to some of the visitors’. Another counsel told the Chamber about his ‘concerns that the security personnel show some amount of cultural sensitivity to the relatives of the third accused. He is a provincial, he is illiterate. Most of the visitors that come to him speak neither English, nor Krio, and a lot of times they are treated rather offhandedly by the security personnel and that is a little irritating to them and down right embarrassing’. In 2006, defence counsel for Taylor told the Trial Chamber that his client missed his family who were in Liberia, that he was in need of their moral support and, therefore, requested that ‘every necessary facility in that regard to facilitate his family being able to have access to him be provided’. Upon his client’s transfer to The Hague, counsel for Taylor complained to the Trial Chamber that ‘the accused, at his own expense - from the family expense - had arranged for his wife and his sisters and brother-in-law to come to Sierra Leone. He was given no warning of the movement. They are here in this country. They do not have visas for the Netherlands. There is no Dutch embassy in Freetown. There is no Dutch embassy in Liberia. The closest embassies are in Accra and Dakar. There is no procedure in place -- the Registry does not know the route by which visas are to be obtained. It cannot be right that because of backroom discussions and this holy grail of security concerns, which is untried, untested in any judicial body, that an accused can be deprived of the support and solace of his family, an accused, of course, that is declared innocent at this moment in time’. Counsel requested the Chamber to ‘give the appropriate directions [to the Registry to take all necessary steps to ensure] (...) that visas be issued to those members of the family that already have security clearance here in Freetown, without delay, so Mr. Taylor may meet them’.

624 Id., p. 43, lines 1-15.
625 SCSL, Transcripts, Prosecutor v. Taylor, Case No. SCSL-2003-01-PT, T. Ch. II, 3 April 2006, Initial Appearance, 3:00 p.m., p. 18.
627 Id., p. 8, 11.
Other detained persons have also indicated that contact with their families is very important to them.\textsuperscript{628} Compared to the ICTY and ICTR, the SCSL has, generally speaking, been relatively generous in assisting detainees’ relatives who wished to visit the Detention Facility. At times, special arrangements were made. In 2005, for example, the Kanu Defence requested permission from the Registrar for Kanu to visit his ailing mother. Although Kanu was ‘not granted permission to leave the Detention Unit of the Special Court, the Registrar instead made arrangements for Mr. Kanu’s mother to visit her son at the Detention Unit’.\textsuperscript{629} Moreover, unlike the ICTY and ICTR, the SCSL ‘has provided regular funding for family visits over a number of years’.\textsuperscript{630}

According to one detainee,

‘My family members visit me here on Wednesdays, Fridays, Saturdays, Sundays. Some of them live in Freetown, some live in the provinces. For the ones who live in the provinces, the Court made a provision. The Court gives each detainee 298,000 Leones to pay for their transport. It used to be sufficient, but now that things have gotten so expensive in Sierra Leone because of inflation, it is not enough anymore. The Registrar told us that there is not more money available for that. The facility exists since 2004 or 2005. Before that time, most of our family from the provinces could not come here. So it does make a huge difference.’\textsuperscript{631}


\textsuperscript{629} SCSL, Decision on the Defence Motion for the Temporary Provisional Release to Allow the Accused Santigie Borbor Kanu to Visit his Mother’s Grave, \textit{Prosecutor v. Brima, Kamara and Kanu}, Case No. SCSL-04-16-T, T. Ch. II, 18 October 2005, par. 1.

\textsuperscript{630} SCSL, Letter of 27 October 2009 from Binta Mansaray, Acting Registrar of the SCSL, to Wayne Jordash, Lead Counsel for Sesay, Ref/REG/573/2009/SG, Annex G to 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, \textit{Prosecutor v. Sesay et al.}, Case No. SCSL-04-15-T, President, 30 October 2009. The Acting Registrar also wrote that the Court had endeavored ‘to ensure that families will be able to effectively continue to visit SCSL prisoners [and had thereto] committed to continue funding such visits even after transfer’. She stated that ‘[p]risoners’ right to family visits will not be taken away after conviction, and the Government of Rwanda has also committed to facilitate the access of families to the SCSL prisoners’.

\textsuperscript{631} SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
Another detainee interviewed for the purpose of this research said that,

‘Financial assistance exists for those relatives who live in the provinces. The Court gives us an allowance for those relatives to visit us here. (…) The amount used to be sufficient for travelling, perhaps, but our relatives will need to stay in a hotel in Freetown for those three or four days, which is not possible for the 298.000 Leones that we receive in total every month’. 632

In this respect, the SCSL detention authorities stated that,

‘Because some of [the detainees’] family members live[d] in the provinces and could not afford to come visit them, the Acting Registrar set up a system to assist the family members in visiting the detainees here. This was set up when they were all detainees and were therefore considered innocent. Their family members visited them at an unprecedented level. They were all considered innocent. That was part of the reason why the Special Court funded for their families to come visit them; that’s all in the Family Visits Document. In light of them being presumed innocent, it was held that the stress of their detention without their families could compromise their ability to defend themselves.’633

During the final period of the detainees’ and prisoners’ stay in Freetown before their transfer to Rwanda, they were allowed to receive conjugal visits. Earlier requests thereto had been denied. 634 The SCSL detention authorities contacted their colleagues at the ICC Detention Centre to see how they dealt with the issue.635 Like the ICTY and ICTR legal frameworks, the SCSL Rules of Detention do not make any reference to the detainees’ right to conjugal visits. Only the STL and ICC legal frameworks

632 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009. In August 2011, 300.000 Leones amounted to approximately 70 U.S. Dollars or 50 Euros.
633 SCSL, interviews conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.
635 SCSL, interview conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.
contain such explicit references. Rule 66 of the STL Rules of Detention is entitled ‘Private Visits’ and provides that ‘[a] place within the Detention Facility may be made available for the Detainee to meet with his spouse or partner. The responsibility lies with the Detainee to provide identification details of his partner or spouse and proof of his marital state or stable relationship. After having spent three months in the Detention Facility, a Detainee shall be granted private visits on request subject to the requirements of Rule 62’. The arrangements at the SCSL are laid down in Detention Facility Order No. 21:1, which provides that the ‘Conjugal Visiting Program (…) provides eligible prisoners, their spouses or significant partner and children a private area within the Detention Facility to foster and maintain their family contact and support’. The objective of the program is to ‘encourage prisoners to develop and maintain their relationship and to decrease the negative impact of incarceration on a family relationship especially in light of the upcoming transfers out of country for sentence enforcement purposes’. All prisoners are eligible for conjugal visits, except for those ‘who are: a. assessed as being currently at risk of becoming involved in family violence; b. assessed as being a security risk to the Facility or others’. The available facilities allow for two prisoners to have conjugal visits simultaneously. It is provided that the ‘visits will be booked on an equal rotational basis amongst the prisoners’. Further, prisoners may not receive more than one conjugal visit per month. Moreover, because the area used for the conjugal visits program may also be used for the isolation or segregation of detainees, it is provided that ‘[w]hen the designated building of the visit is occupied for security related reasons such as segregation or isolation the Conjugal Visit program will be stopped until the area is no longer required for security related purposes’. As to the eligibility of the visitors, Article 4 of the Detention Facility Order states that only one spouse or ‘significant supportive other’, as well as the prisoner’s children under the

636 See Regulation 185 of the ICC RoR.
637 Rule 62 of the STL Rules of Detention stipulates that visitors are subject to identification and other security requirements.
639 Id., Article 2.
640 Id., Article 3.
641 Id., Article 6.
642 Ibid.
643 Ibid.
644 Id., Article 11.
The availability of food is the responsibility of the visitor and the prisoner. A kitchen is available for the preparation or heating of food. The visitor participating in the program is thus permitted to bring the necessary items into the premises. Prior to the visit, the visitor must hand in a list of items he or she intends to bring for approval.

Finally, Article 13 of the Detention Facility Order stresses that ‘Conjugal Visits may be refused or suspended for any reasons such as: security risk to self or others, security related concerns such as segregation, isolation or maintenance related concerns for the visit’. The detained person in question will be provided reasons for the Chief of Detention’s refusal or suspension within three working days.

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645 Id., Article 4.
646 Id., Article 5.
647 Id., Article 6.
648 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
650 Ibid.
651 Id., Article 13.
652 Ibid.
Rule 47

As stated above, the detainees’ rights to receive visits and to communicate by letter and by telephone are subject to prohibitions imposed or regulations set pursuant to Rule 47. This provision, in essence, echoes Rules 64 of the ICTR and ICTY Rules of Detention, which are discussed in Chapter 2. The difference between Rules 64 and Rule 47 of the SCSL Rules of Detention is that, whereas the former do not authorise the Registrars of the ICTY and ICTR to act on their own initiative, Rule 47 states that the SCSL Registrar may, *proprio motu* as well as pursuant to a request by a Judge, Chamber or Prosecutor, ‘prohibit, regulate or set conditions’ for communications and visits of detainees.653 The Registrar may only issue an order pursuant to Rule 47 ‘if there are reasonable grounds for believing that such communications and visits: (i) are for the purposes of attempting to arrange the escape of any Detainee from the Detention Facility; (ii) could prejudice or otherwise undermine the outcome of the proceedings against any Detainee or any other proceedings; (iii) could constitute a danger to the health and safety of any person; (iv) could be used by any Detainee to breach an order made by a Judge or a Chamber, or otherwise interfere with the administration of justice or frustrate the mandate of the Special Court; or (v) could disturb the maintenance of the security and good order in the Detention Facility’.654 Rule 47(B) further states that such a measure ought to be proportionate to the aim(s) sought to be achieved.655 The measure may be imposed for a maximum duration of six months, but must be terminated as soon as the Registrar believes that it is no longer necessary or proportionate to the aims sought to be achieved ‘whichever is the earlier’.656 The Registrar may prolong the measure, if considered ‘necessary on the grounds set out in Paragraph A of this Rule and proportionate to what is sought to be

653 See, in a similar vein, Rule 70(A) of the STL Rules of Detention, which provides, as far as relevant, that ‘[t]he Registrar, acting on his own initiative or at the request of the Pre-Trial Judge, a Chamber, the Prosecutor or the Head of the Defence Office may prohibit, regulate or set conditions for communications, including the active monitoring of telephone calls, and may prohibit, regulate or set conditions for visits between a Detainee and any other person (…)’.
654 Rule 47(A) of the SCSL Rules of Detention.
655 See, in a similar vein, Rule 70(B) of the STL Rules of Detention.
656 Rule 47(C) of the SCSL Rules of Detention.
achieved’. Intercepted material may be retained for a period not exceeding three months ‘unless the Registrar is satisfied that continued retention is necessary on the grounds specified in Paragraph A of this Rule and is proportionate to what is sought to be achieved by continued retention’. If the material is retained for more than three months, the situation must be reviewed by the Registrar every three months. The detained person must be notified of a monitoring decision and of the reasons for the decision within twenty-four hours of the decision. Further, the detainee may at any time approach the President directly to request the reversal of the Registrar’s decision.

In Norman, in 2004, the detainee’s right to contact his family was restricted, due to suspicions that he was using the Court’s contact facilities for purposes that would frustrate the mandate of the Special Court. In June 2005, the Acting Registrar again decided to suspend Norman’s ‘rights to visits and communication for the next 28 days from the date of the letter, because it had come to his attention that the Applicant was responsible for the writing and sending out of the Detention Facility a letter “To all South Easterners of Sierra Leone and all Kamajors, Family and Friends”. Norman had not abided by the prescribed procedures for sending mail from the Detention Facility, by giving it to a visitor who had taken the letter with him or her when leaving the Facility. Norman submitted a request to the President to reverse the Acting Registrar’s decision, in which he argued, inter alia, that ‘[t]he power granted to the Registrar under RD47 to prohibit visits are specific and not generic in nature and may be exercised only in respect of specified visitors, but not to prohibit visits generally’. He further complained that the sanction was ‘excessive and disproportionate’. With respect to the former argument, the President found

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657 Ibid.
658 Rule 47(D) of the SCSL Rules of Detention. See, in a similar vein, Rule 70(D) of the STL Rules of Detention.
659 Ibid.
660 Rule 47(F) of the SCSL Rules of Detention.
661 Ibid.
664 Id., par. 4.
665 Ibid.
that ‘[t]he Applicant does not provide for any authority supporting the submission that the power to prohibit, regulate or set conditions on visits and communications shall be exercised only in respect of specified visits or visitors, but not to prohibit visits generally. References in the Rule to “communications” and to “any other person” are, in the opposite, very broad and give support to general interdictions of the kind ordered by the Registrar in the Decision, which was therefore perfectly grounded’.\textsuperscript{666} As to the need for a reasoned decision, the President noted that ‘the “reasonable grounds” supporting a decision to prohibit, regulate or set conditions for visits and communications shall be specified, in order to provide the President with the reasons of the decision for his determination on the request to reverse’.\textsuperscript{667} Reasons must be given, according to the President, ‘in order to make sure that the reasons of the sanction [are] clearly understood by the Applicant and to provide the President with sufficient information for his determination on a potential request to reverse pursuant to Rule 47(G) of the Rules of Detention’.\textsuperscript{668} Although the Registrar had erred in law by failing to state reasons, the President held that the error did not invalidate the decision.\textsuperscript{669} In relation to the proportionality of the measure, the President found that ‘[t]he Decision is consistent with the dispositions of Rule 47(A) of the Rules of Detention as regards the nature of the sanction applicable to the breach, namely the suspension of the right to visits and communication. The quantum of the sanction, namely the next 28 days from the date of the letter, was under the discretion of the Acting Registrar and does not appear to be manifestly disproportionate’.\textsuperscript{670} He continued that ‘the Applicant was previously warned about unauthorised communications and had also had visits suspended for 28 days by order of the Registrar on 8 November 2004 for the same reason. Although Rule 47 of the Rules of Detention does not require previous warnings before a decision to sanction the conduct of a detainee is rendered, those previous warnings and sanction are sufficient to justify the Decision of the Acting Registrar to sanction the Applicant alone, without any appearance of bias resulting from it’.\textsuperscript{671} It should be noted that the President’s continuous use of the term ‘sanction’ in this context is incorrect. After all, Rule 47

\textsuperscript{666} Id., par. 10.
\textsuperscript{667} Id., par. 12.
\textsuperscript{668} Id., par. 17. Emphasis added.
\textsuperscript{669} Ibid.
\textsuperscript{670} Id., par. 19.
\textsuperscript{671} Id., par. 21.
measures may not be imposed as disciplinary punishments. Apparently, he also assessed the proportionality of the “sanction” on the basis of this wrong assumption, which invalidates its outcome. When determining the proportionality of punishment, such variables as the offender’s guilt must be considered, issues which are irrelevant when examining the proportionality of a preventive measure.

ICC

Correspondence

Detainees are, pursuant to Regulation 99(1)(i) of the RoC, entitled to correspond with their relatives and other persons. The right to receive mail and parcels is provided for in Regulation 99(1)(h). Regulation 170(2) of the RoR provides, with regard to packages, that these ‘may be limited in content, weight and quantity, as decided by the Chief Custody Officer’.

All mail received by the Detention Centre is subject to inspections. The Chief Custody Officer keeps a log of all mail, which contains such details as the name of the detained person, the name of the sender or addressee, and the date on which the item of mail was sent or received.

Apart from inspections, all incoming and outgoing mail is reviewed by the Chief Custody Officer. This regime of routine censorship, however, does not apply to mail sent to or received from counsel, officers of the Court, the inspectorate and the diplomatic or consular representative. After being reviewed, items of mail must be posted or delivered immediately, unless the item ‘(a) Is in breach of: (i) [The] Regulations [of the Registry]; (ii) The Regulations of the Court; (iii) Any other regulation relating to detention matters; or (iv) An order of a Chamber; (b) Gives reasonable grounds to the Chief Custody Officer to believe that the detained person may be attempting to: (i) Arrange an escape; (ii) Interfere with or intimidate a

673 Regulation 169(2) of the RoR.
674 Regulation 169(1) of the RoR. See, also, Regulation 170(1) of the RoR.
675 Regulation 169(1) of the RoR.
witness; (iii) Interfere with the administration of justice; (iv) Otherwise disturb the maintenance of the security and good order of the detention centre; or (c) Jeopardises public safety or the rights or freedom of any person’.\textsuperscript{676} As to outgoing mail, where in the opinion of the Chief Custody Officer one of those situations exists, the item of mail will be returned to the detainee ‘together with a note, in a language that the detained person fully understands and speaks, giving the reasons for refusing to let the item leave the detention centre’.\textsuperscript{677} The detainee concerned must be given the opportunity to rewrite the item, omitting the part that was found to be offending.\textsuperscript{678} In respect of incoming mail, the item will either be returned to the sender or retained by the Detention Centre, at the discretion of the Chief Custody Officer. The detainee must be informed of any such decision.\textsuperscript{679} A copy of each item that is found to be offending must be sent to the Registrar.\textsuperscript{680} The offending item may itself be confiscated.\textsuperscript{681} The Registrar may choose to inform the Presidency and, where necessary, the Host State’s authorities\textsuperscript{682} and may hand the item over to the Prosecution as evidence of contempt of Court. In the latter situation, prior notice and disclosure to the detained person’s counsel is prescribed.\textsuperscript{683} It is provided that a ‘detained person whose mail has been intercepted or confiscated may file a complaint in accordance with the [formal] complaints procedure’.\textsuperscript{684} Regulation 171 stresses that ‘[m]aterial or information obtained as a result of the examination of a detained’s person mail or property, or by any other means, shall not be divulged to anyone other than the Registrar and the Chief Custody officer or to any other person that may be granted this right by virtue of [the RoR], upon authorization of the Registrar’. In light of the 2011 Wikileaks affair in the Karadžić case before the ICTY,\textsuperscript{685} it is unfortunate that a similar explicit provision is lacking in the other tribunals’ legal frameworks.

\textsuperscript{676} Regulation 169(3) of the RoR.
\textsuperscript{677} Regulation 169(4)(a) of the RoR.
\textsuperscript{678} Regulation 169(5) of the RoR.
\textsuperscript{679} Regulation 169(4)(b) of the RoR.
\textsuperscript{680} Regulation 169(6) of the RoR.
\textsuperscript{681} \textit{Ibid}.
\textsuperscript{682} Regulation 169(7) of the RoR.
\textsuperscript{683} Regulation 169(8) of the RoR.
\textsuperscript{684} Regulation 169(9) of the RoR.
\textsuperscript{685} See, \textit{infra}, p. 923.
Costs for outgoing mail are, in principle, borne by the detained persons.\(^{686}\) In case of indigent persons, those costs will, ‘to the extent decided by the Registrar’, be borne by the Court.\(^ {687}\) Moreover, Regulation 172(3) states that ‘[t]he Chief Custody Officer may impose limits on the amount and weight of correspondence sent by an indigent detained person’.\(^ {688}\) Since it is already provided that the Registrar will determine the extent to which the Court will pay for an indigent person’s outgoing mail, it is unclear why additional restrictions to such persons’ outgoing mail imposed by the Chief Custody Officer under Regulation 172(3) are necessary.

Telephone

Upon a detainee’s admission, an officer of the ICC Registry must ‘[e]nsure that the detained person is given the opportunity to inform his or her family, his or her counsel, the appropriate diplomatic or consular representative and, at the discretion of the Chief Custody Officer, any other person, at the expense of the Court’.\(^ {689}\) Further, during a person’s detention at the ICC Detention Centre, he is entitled to communicate by telephone with his family and other persons.\(^ {690}\) Pursuant to Regulation 173(2) of the RoR, ‘[i]ncoming and outgoing calls may be received or made by a detained person at any time between 9 a.m. and 5 p.m. The Hague time each day, subject to the reasonable demands of the daily schedule of the detention centre and to any financial limits imposed by the Registrar’. In exceptional circumstances, the Chief Custody Officer may permit a detainee to receive incoming and make outgoing calls outside of these hours.\(^ {691}\) Detainees do not make or receive their incoming calls directly.\(^ {692}\) The Chief Custody Officer keeps a log of all calls,

\(^{686}\) Regulation 172(1) of the RoR.
\(^{687}\) Regulation 172(2) of the RoR.
\(^{688}\) Pursuant to Regulation 172(4), a detained person may file a complaint in accordance with the formal complaints procedure if he objects to restrictions imposed by the Chief Custody Officer under the same Regulation.
\(^{689}\) Regulation 186(2)(h) of the RoR.
\(^{690}\) Regulation 99(1)(i) of the RoC.
\(^{691}\) Regulations 173(3) and (4) of the RoR.
incoming and outgoing, which contains such details as the name and telephone number of the caller and the date, time and duration of the call.\textsuperscript{693} The detained persons are only permitted to make telephone calls to and receive calls from those numbers that are registered on a list of approved telephone numbers, for which purpose they must fill in a “telephone number form”.\textsuperscript{694} On the form, the detainee is required to provide such details as the ‘caller/callee’s telephone number; the caller/callee’s nationality; the caller/callee’s date and place of birth; the caller/callee’s country and city/village of residence; the nature of the detained person’s relationship to the caller/callee; the languages spoken during the conversation and the names of any additional persons to whom the detained person may speak on each registered telephone number’.\textsuperscript{695} The information provided by the detainee is subject to review by the Registrar, which takes fifteen days to complete. In 2009, Katanga complained about the detailed nature of the information that must be provided on the form, stating, \textit{inter alia}, that ‘[i]t is unreasonable in that the extensive and private information required by the Registrar is not the sort that can be expected to be known by the detainee. It is disproportionate in that the information required by the Registrar may reduce the number of persons with whom the detainee can remain in contact, as people may be reluctant to provide the requisite information or the detainee may be embarrassed to request it’.\textsuperscript{696} The Registrar submitted that the policy aimed at addressing ‘the “inconsistency or lack of clarity in the information provided to date by certain detained persons about their telephone contacts” and to establish a procedure for the registration of telephone contacts which is transparent and accountable’. The policy was further aimed at preventing the abuse that had occurred under the old policy, where ‘detained persons associated several names with a single telephone number registered on their telephone contact list and spoke to parties other than the original registered caller/callee’, a practice that was ‘allegedly used to give instructions to persons who may interfere with the administration of justice’.\textsuperscript{697} Katanga had also complained about the fifteen day waiting period before approval is

\begin{itemize}
\item\textsuperscript{693} Regulation 173(1) of the RoR.
\item\textsuperscript{694} ICC, Decision on the Application of Mr Germain Katanga in respect of the new policy in the detention centre on the registration of Telephone contacts, \textit{Prosecutor v. Katanga and Ngudjolo}, Case No. ICC-RoR221-02/09, Presidency, 17 September 2009, par. 19.
\item\textsuperscript{695} \textit{Id.}, par. 20.
\item\textsuperscript{696} \textit{Id.}, par. 26.
\item\textsuperscript{697} \textit{Id.}, par. 33.
\end{itemize}
given in respect of new numbers. In this regard, the Registrar held that ‘the fifteen-
day waiting period is warranted considering the specific situation of mobile telephone
users in [the Congo], where the use of private fixed-line telephones is “virtually
inexistent…[and a]s a result, most Congolese people use mobile telephones”’. 698
The Presidency, when deciding on Katanga’s application, examined whether the
Registrar’s new policy was in accordance with the law, whether it pursued a
legitimate aim, and further examined its necessity and proportionality.699 All
questions were answered in the affirmative. The Presidency accepted that ‘the
personal details requested in the telephone information form (…) are those that will
enable the verification of the identities of contacts through a general background
check prior to authorising their inclusion in a detained person’s telephone contact list
and in the event of any subsequent monitoring measures’. 700 As to the fifteen-day
waiting period, the Presidency held that ‘simply requiring detained persons to submit
a telephone number form without an attendant procedure to confirm the veracity of
the information provided would be of little value’.701 It noted that the Registrar had
‘committed to issuing a decision before the fifteen-day waiting period has elapsed
wherever possible’ and stipulated that ‘[t]he Registrar is expected to provide reasons
to a detained person for any decision not to approve a contact for inclusion in their
telephone contact list [and] to allow calls to be made on an emergency basis within
the fifteen-day waiting period where appropriate’.702

Returning to the ICC’s legal framework, it is explicitly provided therein that
all telephone conversations are passively monitored,703 except for those with counsel,
diplomatic or consular representatives, representatives of the inspectorate or officers

698 Id., par. 35. The Registrar further argued that ‘the fifteen-day waiting period is reasonable,
being identical to the period reserved for the analysis of information provided in application
forms for visits’; see, id., par. 36.
699 According to the Presidency, this test is ‘in line with that previously applied by the
Presidency’ and ‘noting the terms of article 21(3) of the Rome Statute, is consistent with that
applied by the European Court of Human Rights in considering the legitimacy of interference
by detaining authorities with the right of a detained person to respect for his private and
family life under article 8 of the European Convention’; id., par. 45.
700 Id., par. 56.
701 Id., par. 60.
702 Id., par. 63.
703 This indeed appears to be the actual practice at the Court’s Detention Centre. See ICC,
Public Redacted Version of ICC-01/05-01/08-95-Conf “Request for Clarification of the “First
Decision on the Prosecutor’s request for redactions””, Prosecutor v. Bemba, Case No. ICC-
01/05-01/08, P.-T. Ch. III, 5 September 2008, par. 5.
of the Court. Passive monitoring is defined in Sub-Regulation 174(2) as ‘the recording of telephone calls without simultaneous listening’. Sub-Regulation 174(3) states that detainees must be informed that their telephone conversations are being monitored. Finally, all records must be erased after the completion of the proceedings.

The active monitoring of telephone conversations is only possible pursuant to an order thereto by the Registrar and may entail two distinct processes. Either it finds its basis in Regulation 174(2) of the RoR, which allows for the post factum listening to passively monitored recordings in the cases listed under Regulation 175(1) of the RoR, or it finds its basis in Regulation 175(2), in which case the active monitoring entails a ‘simultaneous listening (real time) of the conversation’. The Presidency held in Katanga that ‘[t]he detention regime allows for the routine recording of the telephone conversations of detained persons and does not allow the recordings to be listened to without just cause’.

An order pursuant to Regulation 175(2) may be issued for a period not exceeding fourteen calendar days and must be reported to the Presidency. Calls to and from counsel, diplomatic or consular representatives, representatives of the inspectorate or officers of the Court may not be actively monitored.

The Chief Custody Officer takes the initiative in these matters by reporting to the Registrar that he has ‘reasonable grounds to believe that the detained person may be attempting to: (a) Arrange an escape; (b) Interfere with or intimidate a witness; (c) Interfere with the administration of justice; (d) Otherwise disturb the maintenance of the security and good order of the detention centre; (e) Jeopardise the interests of public safety or the rights or freedom of any person; or (f) Breach an order for non-disclosure made by a Chamber’ and by asking for the Registrar’s permission to

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704 Regulation 174(1) of the RoR.
705 These are the grounds for active monitoring, which are listed further below.
707 ICC, Decision on the Application of Mr Germain Katanga in respect of the new policy in the detention centre on the registration of Telephone contacts, Prosecutor v. Katanga and Ngudjolo, Case No. ICC-RoR221-02/09, Presidency, 17 September 2009, par. 53.
708 Regulation 175(2) of the RoR.
actively monitor the detainee’s telephone conversations. The Chief Custody Officer must state the reasons for such request. During the passive monitoring process, where a situation listed under (a) to (f) arises, the Chief Custody Officer may at all times terminate a call and must then advise the detainee concerned of the reasons for so doing. Such a situation must be reported to the Registrar, accompanied by a request to actively monitor the detainee’s calls.

The Registrar’s order must, prior to its implementation, be notified to both the detainee and his counsel. Regulation 175(4) of the RoR provides that ‘at the end of the 14-day period, the Registrar shall review the situation in consultation with the Chief Custody Officer, and may decide to extend the period of active monitoring for up to another 14 calendar days or return to passive monitoring of the detained person’s telephone calls. The subsequent order of the Registrar shall be reported to the Presidency and shall be notified to the detained person and to his or her counsel prior to its implementation’. The Chief Custody Officer must keep a log of all actively monitored calls, which must contain the reasons for monitoring and the date on which the Registrar made the order to do so.

A copy of each recording must be sent to the Registrar, who will carry out the review. All records must be erased after the completion of the proceedings. If the Registrar finds that there has been a breach of the RoR, any other regulation relating to detention matters, or an order by a Chamber, the Registry will transcribe the offending call and, if necessary, translate it into English or French. A finding of such a breach and its nature must be reported to the Presidency and, where necessary, to the Host State’s authorities. Transcripts of offending conversations must be retained by the Registrar and may not be handed over to the Prosecution as evidence of contempt of Court, unless the detained person’s counsel is previously notified and the transcript has been disclosed to counsel. It is provided in Regulation 175(11) of

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710 Regulation 175(1) of the RoR.
711 Ibid.
712 Ibid.
713 Regulation 175(3) of the RoR.
714 Regulation 175(5) of the RoR.
715 Regulation 175(6) of the RoR.
716 Regulation 175(7) of the RoR.
717 Regulation 175(8) of the RoR.
718 Regulation 175(9) of the RoR.
the RoR that a detainee whose phone conversations have been actively monitored may file a complaint in accordance with the formal complaints procedure.

In *Bemba*, the Registry remarked that simultaneous monitoring has an impact on a detainee’s daily regime and on the daily schedule of the Detention Centre. Special arrangements therefore need to be made to ensure the detained person is not deprived of his basic rights.

When in June 2008 the names of some witnesses were disclosed fully to the defence, the Single Judge in *Bemba* ordered the Registry to actively monitor Bemba’s non-privileged telephone conversations. The Registrar requested clarification from the Single Judge on certain aspects of the Order, *i.e.* whether it entailed a ‘post factum listening regime on a random basis or a simultaneous listening regime’, the ‘applicability by the Registry of a broader monitoring regime to include non-privileged visits and possible prohibition of private visits’, ‘any specific action to be taken in respect of incoming and outgoing correspondence’ and ‘restrictions on contact with co-detained persons’. In this respect, the Registrar argued that if there is reasonable suspicion that a detained person may attempt to engage in impermissible activities, an all-encompassing monitoring regime is most effective. He noted that ‘whereas telephone monitoring could be a safeguard to avoid dissemination of confidential information, its effectiveness would be compromised by the fact that, the order for monitoring does not seem to extend to other forms of communication’. The Registrar’s remarks highlight the interrelatedness of the different modes of communications and forms of contact and the frequently encountered need to apply different monitoring or even segregation regimes simultaneously.

Costs for outgoing calls are borne by the detainee, unless such a person has been declared indigent by the Registrar, in which case the Court bears such costs ‘to an extent decided by the Registrar’. Regulation 176(3) further states that ‘[t]he Chief Custody Officer may impose limits on the number and duration of calls made

720 *Id.*, par. 14, 15.
722 *Id.*, par. 17.
723 *Id.*, par. 18.
724 Regulation 176(1) and (2) of the RoR.
by an indigent person’.\textsuperscript{725} As was also stated in relation to correspondence, since the Registrar already determines the extent to which the Court pays for an indigent person’s telephone conversations, it is not clear why further restrictions as to the number and duration of calls specifically in connection to calls made by indigent persons is necessary.\textsuperscript{726} The provision only appears to make sense if the restrictions imposed by the Chief Custody Officer are solely meant to ensure that the limitations to indigent persons’ calls as determined by the Registrar are not exceeded.

Visits

The right of detainees to receive visits is set forth in Regulation 100 of the RoC. It is provided in this respect that detained persons are not required to meet with any visitor, including representatives of the Registry or the Prosecutor’s Office, and must be informed of the visitor’s identity.\textsuperscript{727} Regulation 100(3) further states that ‘[t]he relevant conditions for visits as well as restrictions and supervision that may be necessary in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre shall be set out in the Regulations of the Registry’. The Registry is responsible for setting the daily visiting hours, ‘taking into account the demands of the daily schedule of the detention centre and the facilities and staff available’.\textsuperscript{728} According to Terry Jackson, former Chief Custody Officer of the ICC Detention Centre, the ICC Registry sees its ‘situation as different from anything that has happened before, because we do not know exactly from where in the world visitors will come. It is essential that we try to optimize the time visitors have here and show as much consideration and sympathy as we can. This could mean making visits available over the weekend where that is justifiable. We will have to be reasonably flexible in this area in order for the families to get the best from the time that they have since they will not generally be able to travel back and forth

\textsuperscript{725} Regulation 176(4) of the RoR provides that a detained person who objects to such restrictions imposed by the Chief Custody Officer may file a complaint in accordance with the formal complaints procedure.
\textsuperscript{726} Regulation 176(3) of the RoR.
\textsuperscript{727} Regulation 110(2) of the RoC.
\textsuperscript{728} Regulation 177 of the RoR.
frequently’. According to the Registrar, the difficulties involved in making visits possible, *i.e.* ‘détermination de la période de la visite en fonction de l'emploi du temps du quartier pénitentiaire, coordination avec les bureaux extérieurs, disponibilité des fonctionnaires de la Cour sur le terrain, arrangement du transport intérieur et international, hébergement, demande de visa et durée de traitement de la dite demande, possibilité de reports, etc.’ — only allow for one visit at a time. In *Katanga and Ngudjolo*, both detainees had made requests for visits. In light of the foregoing, the Registrar held that, since Katanga had not seen his family for a long time, his requested visit to him should precede Ngudjolo’s.

Non-privileged visitors must request the Registrar for permission to visit a detained person. The Registrar is instructed to ‘give specific attention to visits by family of the detained persons with a view to maintaining such links’. The request must be made in writing, in English or French, using an approved standard form, and must be submitted ‘not later than 15 calendar days prior to the day of the proposed visit’. Applications will be granted, unless ‘an order of the Chamber has been issued in accordance with regulation 101 of the Regulations of the Court, the detained person has refused to see the person, [or] pursuant to regulation 100, sub-regulation 2, of the Regulations of the Court, or the Registrar or the Chief Custody Officer has reasonable grounds to believe that (a) A detained person may be attempting to: (i) Arrange an

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731 Ibid.
732 Privileged visitors are counsel, diplomatic or consular representatives, representatives of the independent inspecting authority and Officers of the Court. See Regulation 179(1) of the RoR.
733 Ibid.
734 Sub-Regulation 179(3) of the RoR provides that ‘[w]here the application is submitted in a language other than a working language of the Court, the Registry shall either contact the person, requesting him or her to obtain a translation in a working language of the Court, or request the interpretation and translation service to translate such application’.
escape; (ii) Interfere with or intimidate a witness; (iii) Interfere with the administration of justice; or (iv) Otherwise disturb the maintenance of the security and good order of the detention centre; (b) The visit jeopardises public safety or the rights or freedom of any person; or (c) The purpose of the visit is to obtain information which may be subsequently reported in the media’. 736 If permission is granted, the Registrar will issue a permit and notify the Chief Custody Officer thereof. 737 If the visit is denied, both the detained person concerned and the visitor must be notified by the Registrar, including reasons for the refusal. 738 A detained person whose request for a visit has been denied may file a complaint in accordance with the formal complaints procedure. 739

The *Bemba* case provides an example of a situation in which visits were denied. A number of persons had applied to the Registrar for permission to visit Bemba at the Detention Centre. However, it had appeared from the monitoring of Bemba’s telephone conversations that he had ‘been using aliases and code names in order to avoid identifying people, locations, properties and amounts of money’. 740 This, according to the Registrar, provided an ‘indication and reasonable grounds to believe that [Bemba] may be attempting to interfere with the administration of justice [classified], and/or to jeopardise the interests of public safety or the rights or freedom of any person’. 741 The Registrar further noted that it appeared from information on the identities of the applicants that they may be assisting Bemba in such conduct. He also stated that he had ‘reasonable grounds to believe that the aliases and code names identified in the non-privileged communications which were monitored could be agreed upon during visits taking place at the detention centre and that those visits may, unlike the telephone conversations who are listened to since the beginning of the monitoring, serve as alternative means to interfere with the administration of justice, and/or jeopardise the interests of public safety or the rights or freedom of any

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736 Regulation 180(1) of the RoR.
737 Regulation 180(2) of the RoR.
738 Regulation 180(3) of the RoR.
739 Regulation 180(4) of the RoR.
person’.\textsuperscript{742} He therefore i) decided not to grant permission for private or conjugal visits for a period of fourteen calendar days, ii) reminded the Chief Custody ‘to continue the regular review of the incoming and outgoing mail of Mr. Jean-Pierre Bemba Gombo, in accordance with regulation 169 of the Regulations of the Registry, and to take the time necessary for a careful review’, iii) ordered the Chief Custody Officer ‘to continue implementing the monitoring of the nonprivileged [telephone] communications of Mr. Jean-Pierre Bemba Gombo’, iv) ordered the Chief Custody Officer to implement for a period of fourteen calendar days the ‘monitoring of all visits to detained persons and if necessary, to reduce the number of such visits, for an efficient and effective management of the detention centre’ and, finally, v) ordered the Chief Custody Officer to ‘provide a report on the review of the incoming and outgoing correspondence and on the monitoring of both nonprivileged communications and visits at the end of the period of 14 calendar days’.\textsuperscript{743} Thereupon, the Chief Custody Officer sent a memorandum to Bemba in which he informed him ‘of the restricted duration and frequency of non-privileged visits and the way in which the monitoring of those visits would be effected’.\textsuperscript{744} Bemba was informed ‘that the duration of his non-privileged weekly visits would be limited to one hour, where the language used is Lingala, or two hours, where the language used is English or French’, that, ‘in addition to family visits taking place during the week, his spouse and children could pay him a visit every other weekend for one hour, where the language used is Lingala, or for two hours, where the language used is English or French’.\textsuperscript{745} Bemba was further told that he ‘was required to inform the Chief Custody Officer, at least 48 hours before each visit, of the language that he and his visitors intended to use during the visit’ and was informed ‘that an interpreter and a custody officer would be present during the visit, which would be terminated if the language spoken did not correspond to the language indicated to the Chief Custody Officer or if statements contravening the applicable provisions of the Regulations

\textsuperscript{742}\textsuperscript{}\textit{Ibid.}
\textsuperscript{743}\textsuperscript{}\textit{Ibid.}
\textsuperscript{745} ICC, Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008,\textit{ Prosecutor v. Jean-Pierre Momba Gombo}, Case No. ICC-01/05-01/08, Presidency, 5 December 2008, par. 17.
were made’. Bemba applied to the Presidency for a review of the decision and its implementation by the Chief Custody Officer. He argued, *inter alia*, that ‘the considerable reduction in the duration of family visits without explanation, from half a day to one or two hours, diminishes the value of visits from his spouse and five children, who travel from Belgium especially’, that ‘the restrictions in duration do not allow for real family interaction, especially considering the number of children’ and that ‘the monitoring of such visits is likely to disrupt the relaxed atmosphere and the privacy of the family, to which the children in particular are entitled’. He held, in this regard, that ‘except for his eldest daughter, who has barely exceeded the age of minority (eighteen years of age), all of his children are minors falling squarely within the ambit of the Convention on the Rights of the Child, which prohibits the infliction upon children of punishment on the basis of their parents' "activities or choices"’. The Presidency noted in respect of the monitoring of visits that ‘in order to exercise his or her power to refuse, or to monitor, a visit, the Chief Custody Officer or Registrar must have reasonable grounds to believe that one or more of the grounds listed in regulations 180(1) or 184(1) exist in a particular case. That test forms a safeguard against the arbitrary exercise of power’. It continued that ‘[w]hether its conditions are satisfied in any particular case is essentially a question of fact depending on all the circumstances and is for the Chief Custody Officer or Registrar to determine. The test is in part subjective, in that the Chief Custody Officer or Registrar must have formed a genuine belief in his or her own mind that, inter alia, the detained person may be attempting to interfere with the administration of justice or to jeopardise public safety or the rights or freedom of any person or that the private visit jeopardises public safety or the rights or freedom of any person. It is in part an objective test, in that there must also have been reasonable grounds for such a belief. The objective limb of the test does not require the Presidency to look beyond what was in the mind of the Chief Custody Officer or Registrar when the power was exercised. The information acted upon by the Chief Custody Officer or Registrar may have been within his or her personal knowledge or may have been reported to him or her and the reasonable belief may be based on information which turns out later to be

747 *Id.*, par. 23.
748 *Id.*, par. 24.
749 *Id.*, par. 28.
The Presidency took note of the monitoring reports and noted that the Registrar had been ‘entitled to come to the conclusion to which she came in the instant case; her decision not being an irrational one’. It considered, in this regard, that ‘the test set out in regulations 180(1) and 184(1) is one of reasonable belief, requiring something less than knowledge on the part of the Chief Custody Officer or the Registrar’.  

Bemba had further complained that the restrictions imposed on his visits violated Article 8 ECHR. The Presidency confirmed that ‘[t]he legal texts of the Court must be applied consistently with internationally recognised human rights, pursuant to article 21(3) of the Rome Statute’. It cautiously held that ‘[u]nder this ground for judicial review, without passing judgment on their applicability, the Presidency will have regard to the European Convention and the jurisprudence of the [ECtHR] as the detainee has alleged a breach of that Convention’. The Presidency affirmed that the non-authorisation of private visits and the monitoring of non-privileged visits constituted an interference with Bemba’s right to private and family life. However, it found no violation of this right. It noted that ‘[t]he curtailment of the right of a person in pre-trial detention to private visits with his or her spouse or partner and the monitoring of non-privileged visits are not, in themselves, incompatible with Article 8’. As to the foreseeability and the accessibility requirements under Article 8 ECHR, it held that the RoR are ‘public and accessible to detained persons by virtue of regulation 93(1) of the Regulations of the Court which provides that “[w]hen a detained person arrives at the detention centre, he or she shall be provided with a copy of (...) the Regulations of the Registry relevant to detention matters in a language which he or she fully understands and speaks”’ and that, ‘[f]urthermore, the regulations relevant to detention are formulated with sufficient clarity and do not confer upon the Registrar an unfettered discretion in relation to the issues at hand, as they define, in regulations 180(1), 184(1), 184(2) and 185(2), the circumstances in

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750 Ibid.
751 Id., par. 29-30.
752 Id., par. 30.
753 Id., par. 34, 45.
754 Id., par. 34.
755 Id., par. 39.
756 Ibid.
which visits may be refused or monitored’. The Presidency further held that the restrictions pursued legitimate aims that were compatible with those listed in Article 8(2) ECHR. As to the necessity and thus also the proportionality of the infringements, the Presidency - responding to Bemba’s submission that ‘the monitoring of his visits denie[d] him the right to receive visits from his family in private’ - noted that ‘such visits are not, in any case, ordinarily of a private character. Non-privileged visits, including family visits, are always subject to supervision in accordance with regulation 183(1), which provides, in relevant part, that "[visits should be conducted within the sight and hearing of the staff of the detention centre and shall be monitored by video surveillance". This is to be contrasted with "private visits" (i.e. conjugal visits) between a detained person and his or her spouse or partner, pursuant to regulation 185, which, by their very nature and by virtue of regulation 183(1), may not be supervised. It is noted that, in the instant case, whilst the detainee may not receive private visits from his spouse, he may still receive visits from the latter and has not been prohibited from receiving visits from his family, albeit under increased surveillance. As such, it cannot be said that the interference in the instant case destroys the essence of the detainee's right to a private and family life.

In light of all the above, the Presidency finds that the decision of the Registrar not to grant private visits to the detainee and to monitor all non-privileged visits to the detainee was proportionate to the legitimate aims pursued’. Bemba had further complained that the measures were in breach of the Convention on the Rights of the Child. As to the argument that his children were being punished for his alleged activities, the Presidency considered that ‘the monitoring measures taken by the Registrar in relation to the detainee's visits do not constitute a form of punishment; rather, they constitute a security measure, which has been deemed proportionate to the legitimate aims pursued’.

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757 Ibid.
758 Id., par. 40.
759 Id., par. 42.
760 Article 2(2) of the Convention on the Rights of the Child provides that ‘States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members’.
761 ICC, Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, Prosecutore v. Jean-Pierre Mamba Gombo, Case No. ICC-01/05-01/08, Presidency, 5 December 2008, par. 46.
The Registrar’s decision was upheld. Bemba was, however, successful in his complaint concerning the implementation measures laid down in the Chief Custody Officer’s memorandum. That complaint concerned the frequency of weekend visits and the fact that he was required to notify the detention authorities ‘48 hours in advance of a visit of the language or languages to be used by him and his visitors during the visit’, even where the language to be used with his visitor was French or English. In this regard, the Presidency considered that ‘it has not been adequately made out that a custody officer requires the support of a language assistant if the visit between the detainee and his visitor(s) is conducted in a language in which the custody officer present is proficient. Furthermore, in light of the requirement that the detainee notify the Chief Custody Officer at least 48 hours in advance of the language to be used during a visit, it has not been adequately explained why the monitoring of the detainee's visits could not be planned in such a way as to only require the presence of a custody officer fluent in French or English’. In light of the fact that ‘two custody officers [were] fluent in French while the others [were] fluent in English’ the said requirement was, according to the Presidency, ‘not adequately explained’. It also found that ‘it is not clear from the reasoning contained in the Explanation of the Registrar, whether the Chief Custody Officer put his mind to alternative measures, available and feasible in the circumstances, which would be less restrictive to the detainee’.

Finally, the Presidency addressed the complaint raised by Bemba concerning the manner in which the monitoring of the visits had been carried out. Bemba had asserted that ‘the language assistant, equipped with a tape recorder, placed herself at close proximity to the detainee and his spouse, which was degrading and

762 *Id.*, par. 53, 57.
humiliating’\footnote{\textit{Id.}, par. 55. Footnotes omitted.} and that ‘during [another] visit (…), the language assistant, equipped with a tape recorder, placed herself between the detainee and his children, which the detainee claim[ed] was traumatising for them, taken together with the fact that they were told that the visit would be terminated if they failed to speak French and articulate distinctly’.\footnote{\textit{Ibid.} Footnotes omitted.} In this regard, the Presidency stated that ‘[w]hilst the implementation of the monitoring regime is left entirely to the discretion of the Chief Custody Officer, the latter should endeavour, in so far as possible, to apply the least intrusive measures necessary to safeguard the interests that the monitoring regime seeks to protect’.\footnote{\textit{Id.}, par. 56.}

Returning to the ICC’s legal framework regarding visits to the Detention Centre, it is provided in the RoC that detainees are entitled to communicate with and receive visits from consular or diplomatic representatives.\footnote{Regulation 98(1) of the RoC.} Communications during such visits are confidential.\footnote{Regulation 98(2) of the RoC. Since this provision speaks about communications being conducted ‘within the sight but not the hearing’, it appears that the right to privileged communications applies only to conversations during visits and not to telephone conversations.} Further, Regulation 152(3) of the RoR states that the Registrar must make facilities available for such communications. All visitors are subject to security checks.\footnote{Regulation 182(1) of the RoR.} Any person who refuses to comply with such demands may be denied access.\footnote{Regulation 182(3) of the RoR.} During a visit, visitors are not permitted to pass items over to detained persons.\footnote{Regulation 182(4) of the RoR.} Moreover, all items brought into the Detention Centre are subject to security controls and may only be transported through the facility by a member of staff.\footnote{Regulation 167(1) of the RoR.} Items brought into the Detention Centre meant for use or consumption by detainees may be refused or confiscated if such item ‘constitutes a threat to: (a) The security or good order of the detention centre; or (b) The health and safety of detained persons or of any other person in the detention centre’.\footnote{Regulation 167(2) of the RoR.} The retention or disposal of such items must occur in accordance with the relevant Regulations. The Chief Custody Officer must inform both the Registrar and the
detained person concerned of any such decision. Detainees and visitors, particularly the detained persons’ relatives, must be informed of the ‘nature and type of items prohibited’. In light of the logistical planning that precedes a visit, it would appear logical for such information to be provided at the time the Registrar grants a request for permission to visit a particular detainee.

Visits are conducted within the sight and hearing of the staff of the Detention Centre and are monitored by video-surveillance. This does not apply to visits from counsel and counsel’s legal assistants, consular or diplomatic representatives, representatives of the ICRC and officers of the Court, which are conducted ‘within the sight but not the hearing, either direct or indirect, of the staff of the detention centre’. With regard to conversations with ICRC representatives, it is highly doubtful whether the phrase ‘within the sight’ complies with Article 4(c) of the Agreement between the ICRC and the ICC, which provides that, in order ‘[t]o guarantee the effectiveness and credibility of its visits, the ICRC shall: (...) [h]ave the possibility to speak in private (without witnesses) with Detainees of the ICRC’s choosing’. Arguably, any kind of supervision may undermine the ICRC’s mandate. It is, therefore, recommended that this provision is amended accordingly.

Another category of visits excluded from the regular monitoring regime is private or conjugal visits, which are not supervised at all.

If the member of staff supervising a visit believes that there has been a breach of any regulation regarding detention matters, the visit may be terminated and the visitor and the detained person separated. Such cases must be reported immediately to the Chief Custody Officer, who will determine whether the staff member’s decision was correct. If so, the Chief Custody Officer must report the matter to the Registrar immediately.

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777 Regulation 167(3) of the RoR.
778 Regulation 167(4) of the RoR.
779 Regulation 183(1) of the RoR.
780 Ibid.
781 See, also, Article 4(c) of the Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, ICC-PRES/02-01-06, signed on 29 March 2006 and 13 April 2006, entry into force on 13 April 2006.
782 Regulation 183(1) of the RoR.
783 Regulation 183(2) of the RoR.
784 Regulation 183(3) of the RoR.
785 Ibid.
The video-surveillance monitoring regime referred to above, which is laid down in Regulation 183 of the RoR, entitled ‘Supervision of visits’, should be understood as entailing visual monitoring only, and should be distinguished from the regime provided for in Regulation 184 of the RoR, which provides for the audio monitoring (recording) of communications during visits by non-privileged persons. The latter provision provides in Sub-Regulation (1) that ‘[w]here the Chief Custody Officer has reasonable grounds to believe that the detained person may be attempting to: (a) Arrange an escape; (b) Interfere with or intimidate a witness; (c) Interfere with the administration of justice; (d) Otherwise disturb the maintenance of the security and good order of the detention centre; (e) Jeopardise public safety or the rights or freedom of any person; or (f) Breach an order for non-disclosure made by a Chamber, he or she shall provide the Registrar with his or her reasons for asking for the visits to be monitored and shall seek the permission of the Registrar to do so’. The Registrar may then order that ‘all or certain visits to the detained person concerned be monitored’. Such an order must be reported to the Presidency and notified to both the detained person concerned and his counsel. The Registrar, in consultation with the Chief Custody Officer, must review the order after fourteen calendar days. An order to extend the fourteen day period must, prior to its implementation, be reported to the Presidency and notified to the detainee concerned and to his counsel. The Presidency held in Bemba that ‘[t]he review of the necessity of continuing to monitor the non-privileged visits of the detainee (…) requires a careful assessment by the Registrar of whether grounds for a renewed decision exist. The Registrar must subject all circumstances surrounding the case to rigorous scrutiny’.

787 These are counsel and counsel’s legal assistants, consular or diplomatic representatives, representatives of the ICRC and officers of the Court.
789 Regulation 184(2) of the RoR.
790 Sub-Regulations 184(2) and (3) of the RoR.
791 Regulation 184(4) of the RoR.
792 ICC, Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, Prosecutor v. Jean-Pierre Mamba Gombo, Case No. ICC-01/05-01/08, Presidency, 5 December 2008, par. 57.
The Chief Custody Officer must keep a log of all monitored visits, ‘with details of the name of the detained person, the name and address of the visitor, the reason for monitoring the visit and the date on which the Registrar made the relevant order’. Moreover, he must forward each recorded conversation to the Registrar, including a report containing details of the visit. If the Registrar finds that there has been a breach of the RoR, any other regulation regarding detention matters or an order of a Chamber, the Registry must transcribe the conversation. If necessary, the transcript must be translated into English or French. Records of monitored visits must be erased after completion of the proceedings. The Registrar is further obliged to inform the Presidency and, if necessary, the Host State’s authorities, of the breach and its nature. The transcript must be retained by the Registrar. It may only be handed over to the Prosecution as evidence of contempt of Court after disclosure to and notification of counsel for the detained person concerned. Further, it is stipulated that a detained person whose visit has been monitored may file a complaint in accordance with the formal complaints procedure. Finally, if the Chief Custody Officer believes that the RoR or any other regulations pertaining to detention matters are being breached, he ‘may immediately terminate the visit and advise the detained person and the visitor of his or her reasons for doing so’. It that case, the visitor may be summoned to leave the premises and the matter must be reported to the Registrar.

It was already mentioned that private or conjugal visits are not subject to any form of supervision. Regulation 185(1) further provides that ‘[a] place within the detention centre may be made available for the detained person to meet with his spouse or partner’. The category of visitors eligible for participating in the ICC’s conjugal visiting programme is more limited than at the SCSL, where the detainees’ children can partake in the programme. As to the detainees’ eligibility for partaking in

793 Regulation 184(5) of the RoR.
794 Regulation 184(6) of the RoR.
795 Regulation 184(8) of the RoR.
796 Regulation 184(7) of the RoR.
797 Regulation 184(9) of the RoR.
798 Regulation 184(10) of the RoR.
799 Regulation 184(11) of the RoR.
800 Regulation 181(5) of the RoR.
801 Regulation 181(5) of the RoR.
802 Regulation 183(1) of the RoR.
the programme, Sub-Regulation (2) provides that ‘[a]fter having spent one month in
the detention centre, a detained person shall be granted private visits upon request,
subject to regulation 180, sub-regulation 1’.803 With respect to the review of refusals
of private visits, the Presidency noted in Bemba, that ‘[w]hile there is no express (…) 
obligation, in the Regulations, upon the Registrar to review decisions refusing
authorisation of private visits, the latter has correctly recognised (…) the need for a
regular review of such decisions’.804 It further held that ‘[t]he review of the necessity
of continuing (…) the non-authorisation of private visits requires a careful assessment
by the Registrar of whether grounds for a renewed decision exist. The Registrar must
subject all circumstances surrounding the case to rigorous scrutiny’.805

The ICC has provided assistance to detainees’ family members who wished to
visit the Detention Centre in various ways. It has, for example, in close contact with
national authorities, seen to it that passports were issued to the visitors in their home
country.806 In this regard the Registry has noted that ‘the families either live in areas
where it is difficult to obtain passports or to access passport authorities or do not have
the necessary financial means to apply for a passport themselves. In such cases, the
Registry ensures, via its field presence, that papers and documents are transmitted to
the relevant department (…) and supports the application by sending a letter from the
Registrar to the competent authorities when (…) there have been difficulties in
obtaining passports’.807 The Registry has also facilitated the issuance of visas to
visitors.808 In this regard, Article 39(1) of the Headquarters Agreement between the

803 Regulation 185(2) of the RoR.
804 ICC, Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre
Bemba Gombo of 10 and 11 November 2008, Prosecutor v. Jean-Pierre Membam Gombo,
Case No. ICC-01/05-01/08, Presidency, 5 December 2008, par. 57.
805 Ibid.
806 See, e.g., CPI, Deuxième rapport du Greffe sur l'état d'avancement des demandes de
passeports pour les familles des personnes détenues, le Procureur c. Katanga & Ngudjolo,
Affaire No. ICC-01/04-01/07, La Chambre Prélinaire I, le 25 septembre 2008; CPI,
Troisième rapport du Greffe sur l'état d'avancement des demandes de visas pour les familles
des personnes détenues dans le cadre des visites familiales, le Procureur c. Katanga &
807 ICC Registry, First Seminar of the Registry on Detention Matters, “Family Visits”,
on file with the author.
808 CPI, Deuxième rapport du Greffe sur l'état d'avancement des demandes de passeports pour
les familles des personnes détenues, le Procureur c. Katanga & Ngudjolo, Affaire No. ICC-
01/04-01/07, La Chambre Préliminary I, le 25 septembre 2008; CPI, Troisième rapport du
Greffe sur l'état d'avancement des demandes de visas pour les familles des personnes détenues
ICC and the Netherlands stipulates that ‘[v]isas for visitors who are family members of a person detained by the Court shall be processed promptly and, where appropriate, free of charge or for a reduced fee’. During a status conference, defence counsel for Katanga mentioned that there were problems in securing visas and obtaining passports for Katanga’s relatives, who wanted to visit him in The Hague. According to counsel, this was particularly problematic in view of the fact that it had been over a year since Katanga had received his last visit. Another counsel explained that ‘at this point in Congo there are no passports to be had. Most Congolese who wish to obtain them have a lot of trouble doing so’. The representative of the Registry affirmed that ‘[i]n this specific case both counsel have directly identified the problem, namely that there's a shortage of paper to print the passports in the DRC’ and explained that ‘[w]hat we're doing at the moment is that we have a person from our field office liaising directly with the DRC authorities to see how soon we can get the passports issued for the family’.

- Financial assistance to family members of detained persons

In May 2008, the Registry in the case of Katanga and Ngudjolo clarified its point of view concerning the funding of family visits. It stated that ‘the States Parties who finance us have raised the issue of the funding of family visits. The position of the Registry has always been very clear to date. We have supported the funding of family visits to our current detainees. In certainty when these people are indigent. The Assembly of States Parties will be resolving this issue in November/December of this year. In the interim we shall be working to facilitate such visits quite independently of the financial arrangements to fund those visits. We are looking at other ways of


809 Headquarters Agreement between the International Criminal Court and the host State, 7 June 2007.


811 Id., p. 4, lines 19-21.

812 Id., p. 6, lines 1-7.
financing that travel off-budget’. Notwithstanding the silence of the ICC’s legal framework on the issue, the Registry had begun to finance family visits on its own initiative in 2006. Regarding the basis for such arrangements, the Registry pointed to Regulation 100 of the RoC and Regulation 179(1) of the RoR and, in particular, to the instruction that ‘[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links’. It further stressed the ‘need to safeguard the well-being of detained persons’, pointed to the indigence of certain detainees and underlined its intention to ‘give meaning or practical substance to regulation 179(1)’. Pursuant to the practice of the Registrar, only the financial situation of the detainee and not that of his family was taken into account in determining a detainee’s eligibility to receive financial assistance for visits. Further, no distinction was drawn between convicted persons and detained persons. As to the visitors, only the detainee’s spouse and children were eligible. In 2008, the Registry reported that, up to that point, it had only financed one such visit, by Lubanga’s family. Lubanga had, according to the Registry, ‘arrived in The Hague after spending three years in detention without seeing his family, disoriented and with no points of reference, in a climate to which he was unaccustomed and alone at the Detention Centre’. Considering ‘his duty under the [RoC] and the [RoR] to ensure the detained person’s physical and psychological well-being’, the Registrar had decided to allow and fund five family visits between 2006 and 2008. However, ‘in view of the potentially costly nature of such visits’, it was decided by the Committee on Budget and Finance that the Assembly of States Parties would have to decide on

817 Ibid. This remark was, of course, a purely theoretical one, since no person had at the time been convicted by the Court.
818 Ibid.
820 ICC, Proposed Report, p. 3. The costs in 2006 and 2007 amounted to 16000 and 29300 euros respectively. For 2008, the budget approved was 31700 euros. For 2009, the proposed budget amounted to 84600 euros ‘for family visits from no more than 7 persons’; id., p. 5.
the ‘practical, legal and financial implications’. The Assembly of States Parties, in December 2007, adopted Resolution ICC-ASP/6/Res.2 in which it invited the Court, ‘to present to the Assembly at its next session an updated report on family visits, in consultation with relevant organizations, including the International Committee of the Red Cross and the Office of the United Nations High Commissioner for Human Rights, to assess, inter alia, the legal and policy aspects, as well as the human rights dimension and budgetary impact of family visits’. Although it was stressed during a meeting in 2008 of the ‘The Hague Working Group’ of the Bureau of the Assembly of States Parties that ‘the right to family visits did not carry a corresponding legal right to have such visits funded by the Court’, it was also noted that ‘the location of the Court away from the country in which the alleged crimes had occurred could give rise to a unique situation, distinct from other tribunals’. However, the Working Group was concerned about ‘the unilateral nature of the Court’s [i.e. the Registrar’s] decision to fund family visits, and queried why, in light of the discussions during the sixth session of the Assembly, the Court had continued to implement the practice’. Notwithstanding the fact that ‘the decision of the Assembly at its sixth session had been carefully drafted to allow the Registry to continue’, it was stressed by some delegates that this had been done ‘on the understanding that it would not constitute a precedent’ and that the Assembly had not endorsed such practice.

a. The seminar and the Proposed Report

At the time, the Registry was consulting representatives of the ad hoc tribunals, experts in the field and international legal associations, as requested by the Assembly

822 Paragraph 14 of Resolution ICC-ASP/6/Res.2, adopted by the Assembly of States Parties at the 7th plenary meeting, on 14 December 2007, by consensus.
824 Ibid.
of States Parties. In July 2008, the Registry held a seminar on family visits. Presentations were held on such issues as the legal basis for family visits, family visits from the perspective of the rights of the child, the positive and negative implications of financing family visits and the question of whether there existed a right to family visits. In a Proposed Report, the Registry set out the human resources implications of family visits by stating that the Court may have to assist relatives in obtaining passports and other necessary documents in the relatives’ home countries, in making visa applications to the Dutch authorities and in ‘making a member of staff available to the family to look after any children, particularly in the case of conjugal visits’. Regarding the financial implications, the Registry noted its need to pay for the relatives’ travel within the home country to the international airport, for their accommodation in the town of departure and for a daily subsistence, for their return ticket to The Hague, their travel and accommodation in the Host State and for the costs of medical insurance for the duration of their stay. It stated that those costs were only its ‘core investment in organising family visits’, explaining that depending on the circumstances, ‘it may be necessary to provide additional assistance or resources: purchase of winter clothing, temporary assistance to facilitate familiarisation with the area or to resolve potential difficulties with the Dutch immigration authorities, travel and transport arrangements between the hotel and the Detention Centre’. The seminar’s core issue was ‘whether or not the Court has an obligation to fund family visits for indigent detained persons’. In this respect, it first had to be established whether a right to family visits does exist. A majority of the seminar’s

827 Ibid. The legal associations and experts included the Office of the United Nations High Commissioner for Human Rights, the United Nations Economic and Social Council, the United Nations Children’s Fund, the Council of Europe, the African Council of Women, the ICRC, Amnesty International and the International Bar Association (id., footnote 1).
829 Id., p. 4. The participants also recommended funding for a ‘dignity allowance for the family’s daily subsistence’ for the duration of their stay in the Host State. The recommended amounts were 24 euros per adult and 12 euros per child. Idem, p. 16, par. 33.
830 Id., p. 4. As to the necessity for such additional assistance, it was later added that ‘[t]his assistance is especially essential for a very first visit since the differences relating to language, culture and other practical questions between the country of origin of the family and The Netherlands are a hindrance to their temporary stay in The Hague’; ICC, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008, par. 7.
831 ICC, Proposed Report, p. 5, par. 5.
participants recognised that there indeed exists such a legal right to family visits. It was considered that this right ‘may be subject to restrictions, but that any restrictions must observe the principle of proportionality [stating that] there can be no absolute restriction, since to prevent all visits could have negative consequences on the health of the detained person – distress and anxiety which may amount to psychological torture - and on his or her ability to participate actively in the proceedings before the Court [with possible] significant financial implications for the Court’. Therefore, the participants considered that ‘[g]iven that the ICC seeks to be a model of international criminal justice (...) it is bound to take account of any consequences that could have the practical effect of making family visits for detained persons impossible’. The participants also sought to define the eligibility of the visitors. However, it was difficult to reach consensus on such concepts as family, partner, children etc. ‘as cultural and sociological attitudes differ in different parts of the world or States where the Court may be called upon to act’. However, all participants recognised on the basis of such international instruments as the Convention on the Rights of the Child, that children should be taken into account and that they are entitled to family visits. With regard to the situation where a detainee has several wives or partners, it was recommended that ‘only the wife or partner considered the “legal” spouse should be eligible for visits’. Further, regarding the possibility that a detained person may no longer have a family, it was observed by some delegates that other persons close to him should be allowed to visit.

834 Id., p. 6, par. 6. Footnotes omitted. As to the latter argument, it was recognised that ‘difficulties currently experienced at the Detention Centre – incidents and refusals to appear at hearings – are limited to those detained persons who have not received a visit from members of their immediate families’; id., p. 13, par. 26.
835 Id., p. 6, par. 6.
836 Id., p. 6, par. 7. Also the issue of polygamous marriages was discussed. Observed, in this respect, was the Court’s ‘reluctance to become involved in what might be regarded as human trafficking’; id., p. 7, par. 7.
837 Id., p. 6-7, par. 7.
838 Id., p. 15, par. 33.
In this regard, the ICRC reportedly called for a ‘case-by-case approach based on the specifics of the detained person’s family situation’.839

Next, the issue was addressed of whether the Court is under an obligation to fund family visits; the debate centered on the concept of ‘positive obligations’ and its scope.840 It was noted that, according to this concept as developed by the ECtHR, States are required ‘to find effective and immediate means to guarantee the rights of detained persons, according to the particular circumstances of each situation’.841 The representative of the Commissioner for Human Rights of the Council of Europe reportedly held that the ‘recognition of the right to family visits on the basis of the [ECHR] entails not only the effective exercise of this right, but also implies a positive obligation for the State’.842 This recognition of the existence of a positive obligation was placed against the background of the specific position of the ICC. It was noted, in this regard, i) that the Court ‘is geographically removed from the countries of origin of its detained persons’, ii) that, ‘given the specific context of the ICC and its sui generis nature, the need to fund the family visits of indigent detained persons must be accepted’, and iii) that ‘[t]his position is supported by financial, legal and sociological considerations’.843 As to the negative financial implications, the participants recognised that ‘a lack of financial resources could not be used to justify a restriction on the exercise of basic rights – in the present case, a refusal to fund family visits’.844 It was held that a refusal to fund family visits, to which the detainees were entitled, would be inconsistent with the presumption of innocence. Another principle taken into account was that of social rehabilitation. It was held in this regard that ‘it must be possible for a detained person to reintegrate into his or her society of origin in the event of acquittal’ and that ‘[t]his is generally made easier if family links have been maintained through family visits’.845 Other factors taken into account were the

839 Id., p. 7, par. 7. With respect to such situations, the Registry later suggested using the concept of ‘close relatives’. It stated that the choice as to which persons would fall within this category ought to be made by the detained person himself, whilst ensuring that ‘such a possibility does not turn into what could be regarded as human trafficking’; ICC, Assembly of States Parties, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008, par. 18.
841 Ibid.
842 Ibid.
843 Id., p. 7-8, par. 9.
844 Id., p. 8, par. 10.
845 Id., p. 9, par. 15.
complexity of the criminal proceedings and their relatively long duration. According to the representative of the U.N. High Commissioner for Human Rights, ‘the duration of the detained person’s separation from his or her family is (...) an important factor to be taken into consideration’. The criminal proceedings were also considered relevant in another respect. The participants found that ‘where the well-being of a detained person is ensured, the proceedings can be carried out smoothly. A frustrated or disaffected person may refuse to appear in court thereby delaying and negatively affecting the proceedings’. It was considered that ‘[t]he costs related to such delays may be far more onerous for the Court’. The participants further took note of the ‘considerable distance between the Court and the place of residence of the detained persons’ families’. As to the ICC’s distance to the detainees’ relatives’ places of residence, the participants observed that the detainees’ cultural isolation also ‘calls for a particular approach with respect to the funding of family visits’. According to the Proposed Report, ‘[a] detained person’s separation from his family, compounded by the distance separating the Court and the detained person’s country of origin, both serve to heighten the cultural isolation of the detained person, who in his new environment, may have to contend with differences in cuisine, language, religion and certain customs’. Moreover, the Commissioner for Human Rights of the Council of Europe reportedly held that ‘it is for States to find practical solutions to the problems of the distance separating the place of detention and the place of residence of the families, by providing transport, for example’. Another argument in support of funding family visits at the ICC was found in the principle of ‘complementarity’. In this regard, it was held that ‘persons detained at

846 Id., p. 8, par. 11.
847 Id., p. 10, par. 18.
848 Id., p. 8, par. 12.
849 Ibid.
850 Id., p. 8, par. 11.
851 Id., p. 10, par. 17.
852 Id., p. 10, par. 17.
853 Paragraph 10 of the Preamble to and Article 1 of the Rome Statute provide that the ICC is complementary to national criminal jurisdictions. The jurisdiction of the Court can be triggered under Article 17 when the national criminal system is either unable or unwilling to deal with a case. This is different from the primacy concept applicable to the jurisdiction regimes of the ad hoc tribunals, according to which it is not required to demonstrate any failure or inability on the side of the domestic authorities to proceed with the case. See, in more detail, William A. Schabas, An Introduction to the International Criminal Court, Third Edition, Cambridge University Press, 2007, p. 174-175. Complementarity can also be
the national level have easier access to their families and at lower cost compared with persons detained in The Hague’. 854

Consideration was further given to both national and international practice. As to the former, attention was paid to the assisted prison visits service in Great Britain and Northern Ireland, which assists low-income families of prisoners in financing travel costs and, in certain circumstances, accommodation costs. 855 With respect to the latter, it was noted that the SCSL had ‘implemented a policy whereby a budget is provided each year to the Detention Unit to fund family visits for the detained persons in Freetown: each detained person receives a monthly allowance of US$100 for that purpose’. 856 Although both the ICTY and the ICTR do not fund family visits, 857 it was

interpreted as having a positive connotation, in the sense that the ICC and domestic jurisdictions co-operate with each other in putting an end to impunity. This is probably how complementarity must be understood as referred to in the Proposed Report. I am indebted to Professor Dr. Harmen Van der Wilt for drawing my attention to this point.

855 Id., p. 11, par. 21.
856 Id., p. 11, par. 22. It was later added that ‘the families of some detained persons have made the decision to live closer to their detained relative, by moving to Freetown’ and that ‘[i]t also appears that those sentenced would benefit from such funding’; ICC, Assembly of States Parties, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008, par. 24.
857 Hirondelle News Agency, Arusha, 21 July 2008, International Courts Brainstorm Conjugal Rights for Prisoners, available at http://www.hirondellenews.com/content/view/6306/517/ (last visited by the author on 30 March 2011); ICC, Assembly of States Parties, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008, par. 25-26. It was added in par. 27 of the Report of 5 November 2008 that ‘both the ICTY and the ICTR did however receive some support from the ICRC at the very beginning to fund family visits to detained persons; yet it was never undertaken as a general, sustainable practice’. According to Aeschlimann, the ICRC more generally ‘tries to trace detainees’ families and may decide to facilitate visits by organizing the logistics for them, as it does for the families of Palestinian detainees imprisoned in Israel and the occupied territories. This service provided by the ICRC is often the only link with the outside world’; see Alain Aeschlimann, Protection of detainees: ICRC action behind bars, 87 International Review of the Red Cross 857, p. 83-122, at 116. On 12 May 2011, the Washington Post reported that the ‘Pentagon was considering allowing the families of detainees held at Guantanamo Bay to visit them’ stating that ‘[t]he International Committee of the Red Cross (ICRC), which monitors conditions at the military prison in Cuba and facilitates videoconferences between detainees and their families, has been in serious discussions with the Pentagon about a visitation program’; see http://www.washingtonpost.com/national/guantanamo-bay-detainees-family-members-may-be-allowed-to-visit/2011/05/11/AFGAMtsG_story.html (last visited by the author on 11 August 2011). Article 10 of the Agreement between the Special Tribunal for Lebanon and the International Committee of the Red Cross on Visits to persons Deprived of Liberty pursuant to the Jurisdiction of the Special Tribunal for Lebanon provides that ‘[i]n the event of loss of contact between the Detainees and their families the ICRC may offer the exchange of Red Cross messages in order to re-establish and maintain family communications. Their content shall be checked by the Chief of Detention’. 807
noted that, at the ICTY, ‘the ability of accused persons to pay for family visits is taken into account in determining whether or not they are able to pay for their defence’ and ‘a number of Balkan States [‘as well as associations supportive of their “war heroes”’] have chosen to fund family visits for their nationals who voluntarily surrendered to the Tribunal; the arrangements varied from State to State and generally included return airfare to The Hague and accommodation, and even a daily substance allowance’. Furthermore, the participants ‘pointed out that failure to fund family visits may have adverse effects, leading certain accused persons to resort to ploys or to take advantage of other procedural devices’. In this regard, it was reported that, at the ICTR, certain accused persons had ‘employed family members as investigators on their defence team, or called close relatives or friends as witnesses’. It was held that, this situation, ‘as a result of special agreements between the ICTR and certain States, (...) has enabled detained persons to bring to Tanzania family members who were themselves in an irregular situation in their host country’. As a consequence, ‘funds that were budgeted for witness support were used to indirectly finance family visits since the Tribunal had to pay for the travel costs and living expenses of the family members testifying’. In later reports it was added that ‘the absence of policies on funding family visits might have led to a fee-bargaining practice between potential defence team members and the accused’.

The participants stressed that funding family visits for ICC detained persons would not set a precedent or impose legal obligations on States under their own national law. In light of the presumption of innocence, the need for a detainee to be fit for trial and the fact that the enforcement agreements take into account national

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859 ICC, Proposed Report, p. 11, par. 22.
860 Id., p. 12, par. 22.
862 ICC, Proposed Report, p. 12, par. 22.
864 Ibid.
865 ICC, Proposed Report, p. 11, par. 20.
legislation, it was further observed that a distinction had to be made between the pre and post conviction stages.\textsuperscript{866}

Alternatives to family visits were also considered, such as making use of (tele)communication facilities. However, in light of the high costs of those facilities and the fact that the participants considered them not to constitute a ‘meaningful substitute for the contact which is a particular feature of visits’, it was found that such facilities could at best complement visits.\textsuperscript{867}

As to the practical aspects of organising family visits, it was stressed that ‘every visit is different and requires a case-by-case analysis, taking into account the family’s composition, the distance between the country of origin and the seat of the Court, the circumstances in the country of origin, individual needs, even the climate’.\textsuperscript{868}

Moreover, the Registry recommended that the method for determining indigence under the Court’s legal assistance scheme should not be used to determine the eligibility of detainees and their families for family visits.\textsuperscript{869} It was suggested that a

\textsuperscript{866} Id., p. 10, par. 16.
\textsuperscript{867} Id., p. 15, par. 32.
\textsuperscript{868} Id., p. 13, par. 27.
\textsuperscript{869} In respect of the determination of an accused’s financial means, Regulation 84(2) of the RoC provides that ‘[t]he means of the applicant shall include means of all kinds in respect of which the applicant has direct or indirect enjoyment or power freely to dispose, including, but not limited to, direct income, bank accounts, real or personal property, pensions, stocks, bonds or other assets held, but excluding any family or social benefits to which he or she may be entitled. In assessing such means, account shall also be taken of any transfers of property by the applicant which the Registrar considers relevant, and of the apparent lifestyle of the applicant. The Registrar shall allow for expenses claimed by the applicant provided they are reasonable and necessary’. Under the scheme of Regulation 84, the financial resources of the accused’s family members are not taken into account. In the Proposed Report, the Registrar suggested reviewing those modalities for determining detainees’ and their families’ means for travelling to The Hague. The following criteria were suggested to be included in such a new scheme: ‘the situation of both the detained person and his/her family; the detained person is deemed indigent and receives legal assistance paid by the Court; the income of the family is determined on the basis of the lowest wage of a UN staff member in the country where the family lives; the costs of 3 visits per year by the members of the nuclear family (2 persons per visit); in principle, there will be a visit every 4 months; the cost for each visit would be divided by 4 in order to determine the monthly family income necessary to fund one visit; if the available monthly family income necessary to fund one visit is equal to the lowest wage of a UN staff member in the country where the family lives, the family would not be deemed indigent; if the available monthly family income is below the lowest wage of a UN staff member in the country where the family lives, the family would be deemed partially indigent and will pay part of the costs related to the visit’; id., p. 14, par. 29.
new system be developed, which would take into account the financial means of the entire family.  

On the basis of the said consultations, the Registry recommended three visits per year by two members of the nuclear family at the ‘most suitable time’ and ‘particularly at key moments for the detained person and his/her family’. The participants eventually recommended ‘three visits a year (two persons per visit: one adult and one child under the age of 18, two adult children, one adult child and one child under the age of 18), or two visits a year (three persons per visit: one adult and two children)’. Moreover, it was held that, if a detained person could show that he had not seen his family for at least eighteen months, he should be entitled to receive visits from all members of his nuclear family in the first year of his detention. It was further recommended that ‘any detained person with an extended family should, over a period of 2 years, be able to see all members of his or her family’. On the basis of these recommendations, the costs per visit to a detained person would come down to 4500 Euros.

b. The Report of the Court and the Bureau’s Report

Notwithstanding the outcome of the consultations, in public, the Registry maintained that no obligation to finance and organise family visits could be inferred from the instruction stipulated in Regulation 179(1) of the RoR, to ‘give specific attention to visits by family of the detained persons with a view to maintaining such links’. It

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870 Id., p. 13-14, par. 29.
871 Id., p. 15, par. 31.
872 Id., p. 15, par. 33.
873 Id., p. 16, par. 33.
874 Ibid.
875 Id., p. 17.
876 CPI, Deuxième rapport du Greffe sur l'état d'avancement des demandes de passeports pour les familles des personnes détenues, le Procureur c. Katanga & Ngudjolo, Affaire No. ICC-01/04-01/07, La Chambre Préliminaire I, le 25 septembre 2008; CPI, Troisième rapport du Greffe sur l'état d'avancement des demandes de visas pour les familles des personnes détenues dans le cadre des visites familiales, le Procureur c. Katanga & Ngudjolo, Affaire No. ICC-01/04-01/07, La Chambre Préliminaire I, le 3 novembre 2008. In November, the Registry warned that certain demands made by the defence for financing visits could pose a threat to the continued existence of the system of assistance that was in place at the time (‘sur le délicat sujet du financement des visites familiales, le Greffier a toujours pris soin de soulever l’inexistence d’une obligation positive à sa charge et qu’il était utile de rappeler à la défense que le greffe ne saurait faire l’objet de pressions de quelque nature que ce soit sur ce point ;
reiterated that, at that moment in time, it was conducting further consultations and preparing a report, as requested by the Assembly of States Parties in December 2007.\footnote{CPI, Deuxième rapport du Greffe sur l'état d'avancement des demandes de passeports pour les familles des personnes détenues, le Procureur c. Germain Katanga & Mathieu N. Ngudjilo, Affaire No. ICC-01/04-01/07, La Chambre De Première Instance II, le 25 novembre 2008.} This official report of the Court – ‘the result of the Court’s study on the issue of family visits’ - was eventually sent to the Secretary of the Assembly of States Parties at the end of October 2008.\footnote{ICC, Assembly of States Parties, Report of the Court on family visits to indigent detained persons, ICC-ASP/7/24, 5 November 2008 (hereafter referred to in this paragraph as ‘Report of the Court’).} For the most part, the Report of the Court echoed the content of the Proposed Report. The Report of the Court first of all stressed that the funding provided to Lubanga could be considered as ‘having contributed to ensuring his well-being, as well as good order and security at the Detention Centre’ and as having ‘enabled effective family links to be maintained’.\footnote{\textit{Id.}, par. 12.} As to the existence of the right to family visits, the Registry held that ‘[i]t is established that the family is the natural and fundamental group unit of society and is entitled to protection. With regard to the legal nature of family visits, the dominant opinion which is shared by the Court is that there is a legal right to family visits as established, inter alia, by various international instruments, and discussed in the literature and in the reports of organizations specialising on detention issues’.\footnote{\textit{Id.}, par. 14. Footnotes omitted.} Contrary to the outcome of the consultations, the Registry held that the Court was not under a positive obligation to fund family visits.\footnote{\textit{Id.}, par. 16.} It stressed that ‘[i]n the absence of jurisprudence, customary law, or general principle recognizing the right of an indigent detained person to have his/her family visits financed by the detaining authority, there is no obligation for the Court to fund family visits to indigent detained persons under its jurisdiction’.\footnote{\textit{Id.}, p. 19.} Nevertheless, the Registry recognised the benefits of funding...
family visits, both for the Court and for the detainees, as well as for their families.\footnote{Ibid.} In addition to the points raised in the Proposed Report, it argued that ‘[t]he prison environment, the separation from the family and friends and the sudden loss of liberty can result in aggressive behaviour, depression or even self-harm by the detained person, causing potential obstacles in the day-to-day management of the Detention Centre’.\footnote{Id., p. 22.}

In the Report of the Court, specific attention is paid to possible alternatives to family visits. It was noted, in this regard, that ‘[v]ideo conferences, internet, telephone or other means of telecommunication can be interesting tools to take into consideration as alternatives to visits but are ruled out for several reasons relating to security, logistics and cost considerations; in addition to the Court’s conviction, also shared by many organizations during the consultations, that those means cannot replace family visits but should only supplement them’.\footnote{Id., p. 31.} As to such security and costs concerns, it was explained that the ‘[u]se of the Internet raises security concerns, such as, inter alia, interfering with witnesses and jeopardising investigations. In light of those potential threats, the use of certain communication or electronic equipments including internet are forbidden in the Detention Centre. A well designed video-conference system, on the other hand, is very expensive, as it requires special electronic materials, designed and equipped rooms which can cost hundreds of thousands of Euros. Moreover, in some countries, and African countries in particular, it is difficult, if not impossible and exceedingly expensive to get a high quality connection that is fast enough for a video conference of reasonable quality. Furthermore, the system will have to be backed by technical support teams who can provide fast assistance when required, which entails further expenses’.\footnote{Id., p. 32.}

Although in its Report the Registry stated that the Court was not under a positive obligation to fund visits, it recommended to do fund visits but then on the basis of a policy decision, one which ‘would not create an obligation upon States in their own legal system and may be adapted to the realities faced by the Court’.\footnote{Id., par. 40.} This policy decision would ‘be based on grounds that would take into account the
specificity of the Court as a sui generis institution and hence, of its procedures, the humane consideration associated with detaining the person in an isolated place from his family and country of origin, and the ability of the detained person and his family to fund the visit (indigence)’. Specific consideration was also given to the negative impact of a person’s detention on that person’s family members and to the principle of social rehabilitation.

The Registry further recommended that ‘[s]uch funding be strictly restricted to persons detained under the jurisdiction of the Court and exclude persons under provisional release and persons who are serving their sentence in a State that has agreed to receive them’. It seems that the Registry’s main concern in drawing up its Report was to forestall any possible criticism within the Assembly directed at the possible creation of precedent. It appears to follow from both the rejection of the idea that a positive obligation exists – the outcome of the consultations was the confirmation that such a positive obligation exists – and the recommendation for adopting a policy decision strictly focused on the Court’s sui generis nature and specific context, that the Registry did not want to put other tribunals in an awkward position or to alienate itself from those States in the Assembly that were afraid of the legal implications of funding family visits at the ICC for its own domestic situation.

The Court’s Bureau also drew up a report, on the basis of informal consultations, for the Assembly’s seventh session in November 2008. In its Report, it set out the main views expressed during those consultations, including that i) ‘[t]he scope of the right to family visits does not include, according to existing international and human rights law (be it conventional or customary international law or general principles of law), a positive obligation for the detaining authority to finance such visits’, ii) ‘[a]t the national level (...) some States have in place assistance programmes to fund visits of family members to prison facilities within the same country of residence and that such programs are implemented by the Social Security

888 Id., par. 41. Footnote omitted.
889 Id., par. 42, 45.
890 Id., par. 58.b.
892 Id., par. 10.b.
system” and iii) ‘the fact that that the Court did finance several family visits, should not be seen as creating a new right or expanding existing rights. In particular, it cannot constitute a precedent at the domestic or international level (...)’. According to the Report of the Bureau, it had been observed by Working Group delegations that there was insufficient time to properly deal with the issue. As a consequence, it would not be possible to take a decision at the Assembly’s seventh session and it was suggested that the matter be further examined in the course of 2009. A final decision might then be taken by the Assembly at its eighth session.

Indeed, the Assembly of States Parties did not take a final decision on the matter during its seventh session. In November 2008, the Registry informed the Pre-Trial Chamber that the Assembly had made temporary arrangements for ‘the delicate matter’ of financial assistance. It further reported to the Presidency that, in late 2009, the Assembly of States Parties would take a final decision ‘as to whether the Court intends to continue funding family visits and, if so, under what conditions’.

c. The Presidency’s Decision in the Ngudjolo case

Simultaneously to the aforementioned developments, Ngudjolo applied to the Registrar for permission for his wife and six children to visit him, which was granted. In October, the Registrar informed him that ‘during the course of one calendar year the Registrar would fund either two visits from three members of the detainee’s family or three visits from two members of the detainee’s family’. Ngudjolo then filed a complaint in accordance with the formal complaints procedure, arguing, inter alia, that the Registrar’s decision ‘did not allow him to maintain his family ties in

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893 Id., par. 10.e. The Report referred to Spain and the United Kingdom.
894 Id., par. 10.f.
895 Id., par. 10.j.
899 Id., par. 2.
accordance with regulation 179(1), nor did it respect the entitlement of his children to visit their father several times a year’. The complaint was eventually brought before the Presidency, which, in March 2009, rendered its groundbreaking decision, which will be discussed in detail below.

Ngudjolo further argued that ‘[n]oting that authorisation was given for all members of his family to visit him (…) it is meaningless to distinguish (…) between authorising a visit to an indigent detained person and funding such a visit’, and submitted that ‘in the case of indigent detained persons the issues of authorising and funding family visits must be addressed concurrently’. He stressed that the right of family visits, if given a practical and effective interpretation, implies that the costs of these visits must be borne by the Court, ‘or else the right [would be] rendered theoretical or illusory’. Ngudjolo further complained that the costs incurred by family visits were the result of his transfer to The Hague, for which he could not be held responsible and that the Registry’s practice ‘reveal[ed] an inconsistency, in that the Court funds the travel to The Hague of the family of witnesses appearing before it to provide psychological or emotional support to their relative’.

The Registrar recognised in his submissions that detained persons have a right to family visits. However, he stressed that such right did not entail a positive obligation on the detaining authorities to fund such visits. The Registrar interpreted the instruction in the SMR for authorities to ‘facilitate’ visits, as only requiring ‘the provision of visiting space, the providing of information to help the family of the detained person travel to the detention centre and, as in the instant case, assistance in obtaining passports or visas’. However, notwithstanding the (alleged) absence of a positive obligation, he had decided to fund visits ‘on a discretionary basis’ and ‘in consideration of [the detainees’] personal situation’. Since the Assembly of States Parties had not decided on the funding issue during its seventh session, but would

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900 Id., par. 3.
901 Id., par. 13.
902 Id., par. 14.
903 Id., par. 15.
904 Ibid.
905 Id., par. 7-8.
906 Id., par. 9.
907 Id., par. 10, 20.
only take a final decision in late 2009, the Registrar was of the opinion that he could merely guarantee the two or three visits from three or two persons respectively.\footnote{Id., par. 23.}

The Presidency interpreted the application as relating ‘to the existence of a right of detained persons to receive family visits and the scope of any such right, in particular, whether such scope includes a legal obligation upon the Court to fund family visits to detained persons’.\footnote{Id., par. 25.} As to the former question, the Presidency noted that the right to receive visits as laid down in Regulation 100(1) of the RoC encompasses the right to family visits, the particular importance of which is emphasised in Regulation 179(1) of the RoR.\footnote{Id., par. 26.} In light of Article 21(3) of the ICC Statute, it further recognised that the right has been ‘clearly acknowledged’ in international human rights law.\footnote{Id., par. 27. The Presidency based its finding on the SMR, the U.N. Body of Principles, the EPR, observations of the United Nations Committee Against Torture, the Standards formulated by the CPT, case-law of the ECtHR, the ICTY and the ICTR, the Rules of Detention of the ICTY, ICTR, SCSL and on the ICC’s legal documents.}

With respect to the scope of the right to family visits and the existence of a positive obligation to fund such visits, the Presidency considered the case-law of the ECtHR, which demands an effective and practical interpretation of fundamental rights. On that basis the Presidency accepted Ngudjolo’s argument that ‘in his particular circumstances “his right to receive family visits can…only be effective and tangible” if the costs of these visits are borne by the Court’.\footnote{Id., par. 31.} It considered, in this regard, the distance of Ngudjolo’s place of detention to his home in the Congo, his own indigence and that of his family, the high costs of a visit to The Hague. It further took into account the presumption of innocence and the likely long duration of the criminal proceedings against Ngudjolo.\footnote{Id., par. 32-34.} In respect of the presumption of innocence the Presidency noted that the cases considered by the ECtHR – in which the ECtHR had not interpreted the right to family visits as entailing a positive obligation to fund such visits – concerned convicted persons. It held that ‘this distinction is significant since international and national law grant unconvicted detained persons greater entitlement to family visits in comparison to convicted persons’.\footnote{Id., par. 38.}
argument that the ECtHR had not recognised such a positive obligation, the Presidency further responded by saying that those cases had mainly concerned the question of whether an imprisoned person has a say in the choice of his or her place (and State) of detention, in order to be close to his or her family, a matter which involved complicated deportation and immigration issues.915

The Presidency further recognised that ‘[t]he right to receive family visits fundamentally affects the well-being of the detained person; his connection to his family being a central component of his identity’916 and that family visits facilitate ‘a detained person's re-integration into society in the event of an acquittal or his social rehabilitation upon release in the event of conviction’.917 It further took into account both the cultural isolation of detainees, who are incarcerated at a long distance from their country of origin, and the negative effect that detention has on other individuals than the detainee, particularly his children.918 Alternative forms of communication were held not to constitute a fully-fledged substitute for face-to-face visits.919

The Presidency took into account the SCSL’s practice of financially assisting detainees’ families in order to enable them to visit their detained relative, the practice of various Balkan States of providing financial assistance for visits to ICTY detainees, the national practice in the United Kingdom and noted a ‘growing international support for positive action on the part of detaining authorities in order to enable detained persons to exercise their rights’.920

Although the Presidency recognised that international human rights instruments and the ICC’s legal framework do not recognise such a right to funding, the Presidency concluded that ‘in the instant case, a positive obligation to fund family visits must be implied in order to give effect to a right which would otherwise be ineffective in the particular circumstances of the detainee’ and held that the Registrar had erred in law in holding that no positive obligation existed.921 Nonetheless, the Presidency subsequently held that the right to funded family visits is not ‘unlimited’,

915 Ibid.
916 Id., par. 35.
917 Ibid.
918 Ibid.
919 Id., par. 36.
920 Id., par. 39-40.
921 Id., par. 37.
but is necessarily restricted by resource restraints, which are only legitimate ‘to the extent that the right to family visits is still rendered effective’.\textsuperscript{922} 

Next, the Presidency turned to the question of whether the Registrar’s practical funding arrangements adequately provided for an effective right to family visits. First, it noted that the Registrar had been correct in not distinguishing between a detainee’s natural and adopted children\textsuperscript{923} and in taking into account the duration of the separation between a detainee and his family prior to the former’s transfer to The Hague.\textsuperscript{924} It also concurred with the Registrar’s use of the criterion of ‘family circumstances’ in determining the visiting conditions in a concrete case, since ‘it is a flexible and broad criterion, potentially encompassing a range of relevant factors, inter alia the ability of family members to travel, the size of the family, any special needs of the family, the existence of any key moments in the life of the family or the detainee and the status of family relationships’.\textsuperscript{925} In this respect, it was held that the Registrar must apply a ‘balancing test when determining the appropriate visiting conditions [striking] a fair balance between safeguarding resources and ensuring that family links are maintained’.\textsuperscript{926}

The Presidency was of the opinion that the Registrar had failed to give sufficient weight to the family circumstances of Ngudjolo, in particular the size of his family, and had failed to properly exercise his discretion. It held that ‘[s]ince there are seven members of the detainee’s nuclear family and the detainee is only allowed six family visitors per year, the Impugned Decision would not even allow the detainee to see all of his family members in one year’ and found that, compared to those made by various Balkan States for ICTY detainees, the Registrar’s arrangements did not provide for sufficient face-to-face family contact.\textsuperscript{927} Although it recognised that the Registrar was ‘best positioned to determine the precise visiting conditions’ and, therefore, remitted the matter to the Registrar for reconsideration, it provided some guidance by stipulating that ‘it is to the benefit of the detainee to receive several family visits in the course of a year’ and that ‘where a detained person is unable to receive frequent visits from their families, they should be able to accumulate visiting

\textsuperscript{922} Id., par. 42. 
\textsuperscript{923} Id., par. 44. 
\textsuperscript{924} Id., par. 48. 
\textsuperscript{925} Id., par. 47. 
\textsuperscript{926} Id., par. 51. 
\textsuperscript{927} Id., par. 52.
Finally, the Presidency ruled that the Registrar should ‘engage in a continuous review of the visiting conditions adopted, considering any relevant changes in the circumstances of the detained person or his family and whether methods of making the right more effective are within her means’.  

d. The aftermath of the Presidency’s Decision and the Resolution of the Assembly of States Parties

The Presidency’s Decision confronted the Registry and the Assembly of States Parties with a fait accompli. The Registry drew up a report on the financial implications of the Presidency’s Decision for the Assembly’s eighth session. In light of the sharp increase in annual costs, the Registry suggested to keep costs down by, inter alia, adopting a different method for calculating indigence. The Bureau also wrote a new report for the Assembly’s eighth session on the basis of consultations by the Bureau’s ‘The Hague Working Group’. A number of delegations to the Working Group reportedly expressed ‘strong reservations as regards the legal basis and the status of the Decision which they considered of an administrative nature, not a judicial one, since the Presidency’s Decision reviewed an administrative decision of the Registrar’. Some of them wished to stick to the consensus reached in 2008 in

928 Id., par. 54.
929 Id., par. 55.
931 The annual costs went up from 40500 Euros to 81500 Euros.
934 Id., par. 11. The Presidency has itself clarified its judicial/legal functions by stating that ‘the Presidency is an appellate court conducting judicial review of the Registrar’s decisions on a range of issues, including the conditions of detention and the rights of detained persons. The judgments of the Presidency are final, non-appealable judgments rendered by three independent judges elected by their peers to serve in the Presidency”; ibid.
Working Group that no legal obligation to fund family visits existed, and were of the opinion that the Decision had ‘deviated from human right standards’. Eventually, the Working Group considered that ‘the Decision which had far-reaching policy and budgetary implications, could not be legally challenged by the Registrar or the States Parties’. However, it stressed that ‘a decision of an administrative nature addressed to the Registrar and not to States could not impose upon States a legal obligation that was not recognized in treaty’. Nevertheless, it considered that the Decision left the Assembly enough room for discussion on the topic and therefore decided to focus on the practical issues arising therefrom. In this respect, the delegates considered that ‘since the decision was of an administrative nature limited to a particular case, the prerogative of the Assembly to set a policy was not restricted thereby’. In particular, the Working Group recommended that, at its eighth session, the Assembly should ‘[t]ake the appropriate measures to limit the impact of any decision to finance family visits as a precedent for national jurisdictions or for cases other than those of detainees in the Court’s custody’, by inter alia stressing that no legal obligation to fund family visits exists. It was further recommended not to pre-establish a minimum frequency of visits and to keep searching for alternative modes of communications for detainees to maintain family contact. It concluded with the suggestion that ‘on the issue of family visits to indigent detainees, for the sake of transparency and ease of reference a stand-alone resolution be adopted by the Assembly of States Parties at its eighth session’.

The Bureau also invited Professor Piet Hein van Kempen to discuss the Presidency’s Decision. Firstly, Van Kempen explained that the Court had adopted a different approach to the issue of the effect of distance between a detainee and his family on the detained person’s family life to that of the human rights bodies. He explained that such bodies had tried to solve the issue not by focusing solely on (the frequency of) family visits (as the Court had done), but by ‘demanding such measures

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935 Id., par. 11, 26.
936 Id., par. 27.
937 Id., par. 15.
938 Ibid.
939 Id., par. 16, 18.
940 Id., par. 26.
941 Id., par. 32.a.ii.
942 Id., par. 32.d and 32.e.
943 Id., par. 33.
that included providing for extended visits, ensuring imprisonment as close as possible to the family, remanding the prisoner to his home country to await trial in another State and permitting extra telephone calls and extra correspondence, both funded by the detaining State'. 944 Indeed, upon examination of the case-law of, for example, the ECtHR, one observes that family visits are treated under the broader right to family life, rather than as an independent, separate right. 945 Nevertheless, the total prohibition of family visits has been found ‘unecessary in a democratic society’. 946 Hence, it may be argued that the ECtHR implicitly recognises an absolute minimum of such a core “right to family visit”, a minimum which cannot be compensated in any way.

It is obvious from the language of the Decision in Ngudjolo that the Presidency drew its inspiration directly from the contents of the Proposed Report and the Report of the Court, at times repeating verbatim fragments of such Reports. Insofar as it affirms the existence of an independent right to family visits (rather than discussing the issue under the more general right to family life), the Presidency’s Decision finds support in, *inter alia*, the views of the delegates to the ICC Seminar, the Registry’s submissions in the Ngudjolo case, in the Proposed Report and in the Report of the Court. Moreover, the Presidency based its conclusion that a core right to family visits exists not primarily on human rights law, but mainly on the Court’s own legal framework and, in particular, Regulation 179(1) of the RoR. Once an independent right to family visits is established, it becomes difficult to legitimise infringements on the core minimum of such a right by allowing contact through other means. Instead, the focus should be on safeguarding the essence of that right to family visits.

The foregoing may also explain why the Presidency did not recognise the authorities’ ‘margin of appreciation’. It can be argued that, since the Presidency was solely concerned with guaranteeing the core minimum of the right to family visits, little margin of appreciation was left to the authorities. In this regard, Van Kempen also noted that the Presidency had diverged from ECtHR case-law in not applying a full ‘fair balance test’ ‘between the interest of the individual and the interests of the community’. Instead, the interests of the Registry had been restricted to budget

944 *Id.*, Annex II, par. 2.
946 *Id.*, p. 237.
considerations only. Thus, in determining the practical implementation of the core minimum of the right to family visits, only resource considerations could still play a role.

Van Kempen further warned that ‘if a positive obligation were recognized, it could then be argued that the responsibility would not only be that of the Registrar but also that of the State of enforcement, or of the transferring State, especially if the latter was the State of nationality’. He held that, then, ‘the right would apply not only to the prisoner but also to each family member’. This, however, need not necessarily be so, since the Presidency primarily based its finding on the existence of a right to family visits and a positive obligation on the Court’s own detention regulations, which are not binding on domestic authorities. In response to the question as to how the Court might forestall the creation of precedent, Van Kempen suggested that the Assembly might consider i) questioning the competence of the Presidency and rejecting the Decision; ii) stressing that ‘the right to funded family visits is not a human right standard’; and iii) arguing that, ‘even if it were a human rights standard, then the human rights framework would apply, i.e. a fair balance test should be applied, and a greater margin of appreciation should be granted’.

On 26 November 2009, at its eighth session, the Assembly of States Parties adopted a resolution on family visits for indigent persons. In its Preamble and in Paragraph 2, it did recognise that detained persons have a right to family visits, but held that this right ‘does not comprise a co-relative legal right to have such visits paid for by the detaining authority’. It took note of the Presidency’s Decision, but stressed ‘the management oversight role of the Assembly as enshrined in article 11, paragraph (2)(b), of the Rome Statute, together with its decision-making role in respect to the Court’s budget enshrined in article 112, paragraph (2)(d) of the Rome Statute’.

Although it re-emphasised that no legal obligation to fund visits exists, the Assembly

948 Id., par. 6.
949 Ibid.
950 Id., par. 9.
952 See the Preamble to the Resolution.
decided, in the case of indigent detainees, to fund family visits ‘on purely humanitarian grounds’, pending the establishment of a voluntary system of funding family visits.\textsuperscript{953} Finally, it underlined that ‘such assistance is applicable exclusively in the case of an indigent detainee in the Court’s custody and is not applicable in any other circumstance, such as but not limited to the case of a detainee under temporary release in a third country, a convicted person serving sentence of imprisonment in the host State pending the designation of a State of enforcement by the Court and until its implementation, or a convicted person serving sentence in a third country’.\textsuperscript{954}

8.2.3 Evaluation

Accessibility of regulations and detention orders

According to former SCSL Registrar Robin Vincent, ‘[a]ll concerned (…) from detention and security staff to the detainees, their families and their attorneys – should have a very clear understanding of those procedures: [i] Visiting days and times. [ii] Those permitted to visit and maximum numbers. [iii] Items and materials permitted/not permitted to be brought in and taken out. [iv] Search requirements. [v] Conditions under which visits will be conducted (such as clarifying the differences between family and legal visits). [vi] The sanctions that will apply if there is a proven breach of the visitation procedure’.\textsuperscript{955} In respect of several tribunals, however, it appears that the accessibility of the rules allowing for infringements on the detained persons’ right to contact with the outside world has been far from ideal.

With respect to the ICTR, it was stated above that the basic legal regime of the Rules of Detention has been elaborated upon in the ‘Regulations to Govern the Supervision of Visits to and Communications with Detainees’.\textsuperscript{956} A major problem regarding these Regulations is that they are inaccessible to detainees and their defence counsel. As complained by the \textit{Nibakuze} Defence, ‘the Commander’s Regulations are not part of

\textsuperscript{954} See Paragraph 7 of the Resolution.
\textsuperscript{955} Robin Vincent, \textit{supra}, footnote 590, p. 72.
\textsuperscript{956} Regulations to Govern the Supervision of Visits to and Communications with Detainees, established by the Registrar (issued by the Registrar and the Commanding Officer) in May 1996. (Hereafter: Regulations’.) The Regulations are on file with the author.
the Basic Documents, are not available anywhere, not even on the Tribunal’s website, and that the Defence does not have a copy thereof; it further observes that the said Regulations form the basis of the Decision of the Trial Chamber, which took their validity for granted.  

It appears that, where these Regulations place restrictions on detainees’ fundamental rights, they fail the tests of being ‘in accordance with the law’ or ‘prescribed by law’, as stipulated in Articles 8 and 10 ECHR respectively. Further, it was seen as regards the SCSL that the Rules in the Court’s Rules of Detention dealing with the detainees’ contact with the outside world have been elaborated upon in a number of Detention Operational (or Facility) Orders. These Orders are not publicly available, nor are they distributed among the detainees. The detained persons interviewed for the purpose of this research were only given copies of the Rules of Detention, the RPE and the Statute. Due to the broad manner in which the relevant Rules of Detention have been formulated and the inaccessible Operational Orders, it is doubtful whether infringements based on these Rules and Orders comply with the accessibility requirements under Article 8 ECHR.

It would be advisable for all tribunals to develop a set of accessible and understandable House Rules, which are regularly updated. In any case, such House Rules must keep track of amendments to the Rules of Detention, Orders or Regulations. This did not happen at the ICTY, as a result of which the informative value of its House Rules was undermined.

Foreseeability of infringements on detainees’ rights

Another aspect of the ‘in accordance with the law’ requirement under Article 8 ECHR is at stake in the context of the routine monitoring and recording of non-privileged telephone conversations at the ICTY UNDU. Although UNDU’s Commanding Officer does notify the detainees of the issuance and prolongation of a monitoring order, the Rules of Detention or the Regulations do not make clear that monitoring is the norm instead of the exception.

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957 ICTR, Urgent Motion by Ntabakuze’s Defence Seeking an order for the Registrar to Lift Some of the Measures Restricting Access by Defence Investigators to the Detention Facility, Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva, Case No. ICTR-99-41-I, T. Ch. III, 30 April 2002, par. 21 sub (b).
Preferable, in this regard, is the situation at the STL and the ICC. At the STL, Rule 69 of the Rules of Detention stipulates that ‘[a]ll telephone conversations of Detainees, with the exception of those with counsel, diplomatic or consular representatives, representatives of the Inspecting Authority or Officers of the Special Tribunal, shall be passively monitored’ and that ‘[d]etainees shall be informed of the practice of monitoring of telephone calls under this Rule’. As to the question of what passive monitoring entails, Rule 69(B) states that it entails ‘the digital recording of telephone calls without simultaneous listening. These recordings may be listened to subsequently in accordance with the provisions of Rule 70’. It follows from Rule 70 that recorded telephone conversations may only be listened to ‘if there are reasonable grounds for believing that such communications (...) are : (i) for the purposes of attempting to arrange the escape of any Detainee from the Detention Facility; or (ii) could prejudice or otherwise undermine the outcome of the proceedings against any Detainee or any other proceedings; (iii) could constitute a danger to the health and safety of any person; (iv) could be used by any Detainee to breach an order made by the Pre-Trial Judge or a Chamber, or otherwise interfere with the administration of justice or frustrate the mandate of the Special Tribunal; or (v) could disturb the maintenance of security and good order in the Detention Facility’.

Similarly, Regulation 174 of the ICC RoR stipulates that all telephone conversations, except for those with privileged persons and institutions, are passively monitored. These recordings may only be listened to in the circumstances listed in Regulation 175(1) of the RoR, i.e. where ‘the Chief Custody Officer has reasonable grounds to believe that the detained person may be attempting to: (a) Arrange an escape; (b) Interfere with or intimidate a witness; (c) Interfere with the administration of justice; (d) Otherwise disturb the maintenance of the security and good order of the detention centre; (e) Jeopardise the interests of public safety or the rights or freedom of any person; or (f) Breach an order for non-disclosure made by a Chamber’. Further, Regulation 174(3) of the RoR provides that ‘[t]he detained person shall be informed

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959 Rule 69(A) of the STL Rules of Detention.
960 Rule 69(C) of the STL Rules of Detention.
961 Rule 70 stipulates that the Registrar at his own initiative or acting upon the request of a Pre-Trial Judge, Chamber, Head of the Defence Office or of the Prosecutor, may ‘prohibit, regulate or set conditions’ for a detainee’s communications with any other person.
of the monitoring of telephone calls’. 962 Hence the STL and ICC regimes provide for foreseeable infringements on the rights of detained persons, whilst restricting the possibility of making more far-reaching infringements on those rights to circumstances in which this may be considered justified.

The ICTY Regulations may be interpreted in a way that allows for the routine monitoring of telephone conversations, but this practice is not made explicit. Admittedly, the ICTY Regulations do indicate the maximum duration of the monitoring measure, the general grounds or aims that may warrant its application and provide for the possibility of challenging such a measure before the President. As to the “safeguard” that monitoring orders are restricted in duration to a maximum period of thirty days, however, it was already argued that this is no more than a mere formality, since all of the detainees’ telephone conversations, from their admission in UNDU onwards, are routinely monitored and all monitoring orders are automatically extended (the Registrar is not even required to provide reasons for such prolongation). Regarding the prolongation of measures that infringed upon a detainee’s right to contact with the outside world, in Messina the ECtHR held that such prolongations must be assessed with the greatest care by the relevant authorities and noted approvingly that the domestic authorities had given reasons for the prolongation decision. It was seen, however, that in Karadžić no reasons were given by the Registrar for extending the monitoring regime (which, admittedly, does not come as a surprise, given that the Regulations no longer require the existence of concrete reasons for either the initial monitoring decision or the prolongation of that decision). Further, the mere general grounds laid down in Regulation 20(A) need not relate to concrete circumstances. As the ICC Presidency noted in relation to the monitoring of visits: ‘in order to exercise his or her power to refuse, or to monitor, a visit, the Chief Custody Officer or Registrar must have reasonable grounds to believe that one or more of the grounds listed in regulations 180(1) or 184(1) exist in a particular case. That test forms a safeguard against the arbitrary exercise of power’. 963 It is precisely this test that was removed from the ICTY Regulations in 2009, which, as a result, leave room for arbitrary decision making. As to the safeguard of independent review,

962 See, in respect of active monitoring, Regulation 175(3) of the RoR.
it was argued in Chapter 5 that the tribunals’ Presidents cannot be regarded as independent and impartial adjudicators in prison litigation. This argument carries extra weight in respect of the ICTY Regulations: as the final arbiter in complaints procedures, the President has to determine the validity of a regime, which was established in close co-operation with and perhaps even at the instigation of the President and the other Judges. In other words, the President is a legislator, an adjudicator and the highest administrative authority. As a consequence, he lacks objective impartiality in fulfilling his task as complaints adjudicator. In respect of the review of monitoring decisions, this lack of objective impartiality is exacerbated by the fact that all of the Registrar’s monitoring decisions are routinely submitted to the President as part of the administrative decision making procedure, which may give rise to the impression that he has already given his approval for implementing those measures.

As will be discussed in more detail below, the ICTY legal framework also fails to adequately discriminate between the detained persons’ various correspondents (either by telephone or by mail). Admittedly, communications with counsel and diplomatic or consular representatives are privileged under the rules and regulations. This, however, does not appear to apply to all forms of the detainees’ communications with the ICRC. According to ECtHR case-law, the fact that the privileged nature of detainees’ communications with the inspectorate is inadequately recognised under the ICTY’s legal framework makes that the ‘categories of detainees’ correspondents are ill-defined’.

For the above reasons, it may be argued that, in numerous aspects, the ICTY Regulations fail to indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the authorities. Infringements based on those Regulations are, therefore, not foreseeable. However, a solution would not simply lay in stating what is really going on, i.e. that recording and monitoring is the norm and not the exception, since this would raise problems under the requirement that the measure be ‘necessary in a democratic society’ under Article 8 ECHR, as will be argued below.
The necessity of the infringements

The ICTY regime regarding the monitoring of telephone conversations also fails to satisfy the requirement that infringements on the right stipulated in Article 8 must be ‘necessary in a democratic society’ (this criticism also applies to the routine censorship of all incoming and outgoing mail at the ICC by the Chief Custody Officer).964

Whereas the general grounds for recording telephone conversations are explicitly provided for (although they are formulated in a broad, all-encompassing manner), no justification is required for ex-post listening to such intercepted communications in a particular case.

Further, the presence of ‘reasonable grounds’ or ‘beliefs’, which the Regulations required before their amendment in 2009, in order to allow for the recording of telephone conversations in a particular case, is no longer required. The ECtHR has repeatedly held, in dealing with intramural measures that infringe on Article 8, that domestic authorities may not merely point to some perceived general need to apply such measures. Infringements may only be justified if the authorities can indicate the specific reasons for doing so, reasons that are linked to the circumstances and particularities of the case concerned.965 The ECtHR has even required that the authorities indicate why such a measure is ‘indispensable’.966 According to the Council of Europe, the ‘necessity’ requirement entails that alleged threats, which serve as the basis for restrictions, must be provable and that indefinite periods of censorship are not allowed.967

It is recommended that the ICTY adopts the practice of either the STL or the ICC, where routine recording is permitted, but where such recordings may only be

964 See Regulation 169(1) of the RoR. See, also, Regulation 170(1) of the RoR.
listened to if this is justified on the basis of the circumstances of the case. As the ICC Presidency held in *Katanga*, ‘[t]he detention regime allows for the routine recording of the telephone conversations of detained persons and does not allow the recordings to be listened to without just cause’. The routine censorship of all incoming and outgoing mail at the ICC also violates the necessity requirement under Article 8 ECHR. It is recommended that the relevant regulations be amended in such a way that censorship only be permitted where this is justified on the basis of the circumstances of the case.

**Retention of recordings**

The STL Rules of Detention provide that ‘[r]ecordings of telephone conversations shall be erased after the completion of proceedings’. In a similar vein, Regulations 174(4) and 175(7) of the ICC RoR provide that ‘[r]ecords of telephone conversations shall be erased after the completion of the proceedings’. Surprisingly, such a provision appears to be lacking in the legal frameworks of the ICTY, the ICTR and the SCSL. Regulation 25 of the relevant ICTY Regulations and Regulation 11 of the ICTR Regulations do provide that ‘[i]f, having reviewed a call, the Registrar determines that there has been no breach of the Rules of Detention, these Regulations or an Order of the Tribunal and the call does not provide any other reason for further action, the tape recording of the call shall be erased within forty-eight hours’. However, these provisions do not indicate at what moment recordings must be erased where such a breach has been established. In light of the ruling of the ECtHR in the case of *Doerga v. the Netherlands*, which was discussed above, it is recommended that all tribunals adopt such a provision as found in the STL and ICC legal frameworks.

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969 Rule 69(D) of the STL Rules of Detention.
970 See, in a similar vein, Regulation 184(7) of the RoR, which provides that ‘[r]ecords of monitored visits shall be erased after completion of the proceedings’.
971 See, however, Rule 47(D) of the SCSL Rules of Detention.
Financial assistance for family visits

‘Of course, there will be particular circumstances when power overrides authority. On such occasions we will not have decision-making that we can term lawful’.

R. Higgins972

The often financially awkward predicament of families of detained and imprisoned persons has been acknowledged in the domestic context. It was mentioned earlier on that families often experience significant financial losses when a member of their household gets imprisoned.973 This situation is only exacerbated when families must incur expenses in order to maintain contact with their detained loved ones, either by paying visits or by making telephone calls. It is not just the costs of making calls and undertaking visits that weigh on the family budget; often families wish to provide their confined relatives with all sorts of items that are sparse in prison, such as toiletries, food, clothes, books etc.974 For these reasons, various States have chosen to provide low-income families with financial assistance.975

It may be expected that families of internationally detained persons will incur even higher costs in maintaining contact with their detained relative than families in a domestic prison context. Such high costs, which are primarily the consequence of the long distance between the remand center or prison and the families’ place of residence, may have serious repercussions on these families’ enjoyment of the right to family life. Budgetary concerns and fears for precedent setting, however, have done much to undermine a supportive, or rights-based, approach to the issue at the international tribunals. In this regard, the following observation was made by the SCSL detention authorities in relation to the post-transfer enforcement situation in Rwanda:

973 See, e.g., Alice Mills and Helen Codd, supra, footnote 24, at 683.
974 Ibid. See, also, Joseph Murray, supra, footnote 19, at 445; Helen Codd, supra, footnote 19, p. 52, 56.
975 Alice Mills and Helen Codd, supra, footnote 24, at 680.
‘As to the distance to the families after transfer - there are some funds for a skype connection, which would then be available for two hours a week. Exceptions will be made if more time is needed and funded; Rwanda will then come to the Court or the residual Court for more money. There is also a proposal which hasn’t been approved yet for paying for one family visit per year. Some countries are vehemently opposed to that – inter alia Canada and England. Canada is afraid of the effect this may have on the national situation.’

The ICC Presidency was correct in recognising the existence of a positive obligation on the Court to fund family visits. As argued by Van Kempen, ‘[w]here the assurance of a human right to a free individual often only demands that the State does not breach a right (a negative duty), in case of a prisoner this will usually also require that the authorities actively shape the preconditions under which the prisoner can actually enjoy the right (a positive duty)’. The ECtHR in Dickson v. the United Kingdom held that ‘although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life’. It subsequently recognised that the boundaries between negative and positive obligations ‘do not lend themselves to precise definitions’, and stressed that ‘regard must be had to the fair balance to be struck between the competing interests’. Further, it acknowledged that regard must be had to the margin of appreciation left to the relevant authorities, particularly when dealing with issues on which there exists little to no conformity among member States. The ECtHR has based positive obligations on the language of Article 8(1), which does not merely require the authorities to refrain from infringing on the rights mentioned there, but also to respect these rights.

976 SCSL, interview conducted by the author with SCSL detention authorities, Freetown - Sierra Leone, October 2009.
977 Piet Hein van Kempen, supra, footnote 1, at 21.
978 ECtHR, Dickson v. the United Kingdom, judgment of 4 December 2007, Application No. 44362/04, par. 70.
979 Ibid.
980 Id., par. 78.
981 Harris, O’Boyle & Warbrick, supra, footnote 156, p. 362.
Without the recognition of such a positive duty, the right to family visits will become illusory for indigent internationally detained persons and their low-income families. Further, it is no more than reasonable to attribute the responsibility of facilitating family contact to the institution causing the infringement on the detained persons’ fundamental right in the first place. The infringements in question are the direct result of confinement carried out under the tribunals’ responsibility. This viewpoint corresponds to the remark of the Inter-American Commission on Human Rights that, ‘[i]n keeping with the jurisprudence constante of the system, the Commission must again assert that when the State deprives an individual of his freedom, it becomes the guarantor of that individual’s rights. (…) Both the institutions and agents of the State must endeavor, by every means possible, to ensure that a person deprived of his liberty is able to enjoy his other rights’. 982 According to Van Zyl Smit and Snacken, ‘prisoners may have special needs in respect of contact with the outside world. These needs may arise from factors as diverse as lengthy sentences or the location of their homes. The authorities have a duty to seek to meet the needs of such prisoners by making special arrangements for them wherever possible’. 983

It is consistent with ECtHR jurisprudence to argue that infringements of the ‘core minimum guarantee’ of a fundamental right, which cannot be regarded as ordinary or reasonable requirements of imprisonment and which are not necessitated by security concerns or the maintenance of good order within the institution, should be compensated by the responsible authorities. 984 Admittedly, the answers to the questions of what ‘ordinary and reasonable requirements of imprisonment’ are and as to ‘what constitutes the minimum guarantee of a certain right in a prison or detention context’ are, in part, subjective and may be deemed subject to the authorities’ margin of appreciation. 985 The Presidency’s recognition of the existence of a(n independent) right to family visits under the right to family life was not an invention of the Presidency, but found support in the Registrar’s submissions in the Ngudjolo case, the Report of the Court and in the majority opinion of the delegates to the ICC seminar on

983 Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 214.
984 See, in a similar vein, Piet Hein van Kempen, supra, footnote 1, at 25; Jim Murdoch, supra, footnote 108, p. 241.
985 See Piet Hein van Kempen, supra, footnote 1, at 26.
family visits, an opinion which was based, _inter alia_, on the SMR, the U.N. Body of principles, the UDHR, the ICCPR and ICESCR, CPT reports, as well as on literature and reports published by national parliaments.  

According to the majority of the delegates to the Registry’s seminar on family visits, this right ‘may be subject to restrictions, but (…) any restrictions must observe the principle of proportionality [and] there can be no absolute restriction, since to prevent all visits could have negative consequences on the health of the detained person – distress and anxiety which may amount to psychological torture’.  

According to the majority’s view, the right to family visits possesses a core substance which may not be violated. Where an indigent detained person risks not receiving any family visits at all, the core substance or the minimum guarantee of the right to family _visits_ will by definition be affected. This corresponds to the Presidency’s reasoning that the right to funded family visits is not ‘unlimited’, but is by necessity restricted by resource restraints which are only legitimate ‘to the extent that the right to family visits _is still rendered effective_.’  

It is also consistent with ECtHR case-law, according to which ‘the detention of a person in a prison 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’.  

Moreover, the Presidency based its decision that ICC detainees have the right to family visits not only on human rights law, but primarily on the Court’s own legal framework and, in particular, Regulation 179(1) of the RoR. Once the existence of an independent right to family _visits_ has been established, it becomes difficult to legitimise infringements on the core minimum of such a right by compensating a complete lack of visits with contact through other means.

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987 _Id._, p. 6, par. 6. Footnotes omitted. As to the latter argument, it was recognised that ‘difficulties currently experienced at the Detention Centre – incidents and refusals to appear at hearings – are limited to those detained persons who have not received a visit from members of their immediate families’; _id._, p. 13, par. 26.
As to the ‘unavoidable consequences of confinement’, it may be argued that the costs incurred in funding such visits are relatively low – and therefore not avoidable – in view of the total yearly budget of the international criminal tribunals. Also, as held by the majority of the delegates to the ICC seminar on family visits, ‘a lack of financial resources [may] not be used to justify a restriction on the exercise of basic rights – in the present case, a refusal to fund family visits’.990

The recognition of the Court’s positive obligation to fund family visits also finds support in the rationales mentioned in this Chapter’s first paragraph, i.e. the principle of social rehabilitation and the presumption of innocence. Moreover, the existence of a positive obligation in this regard, flows from the notion that any right, including the right to family visits, must not be illusory, i.e. must be effective.

Another argument can be found in the fact that, at most tribunals, requests for temporary or provisional release are usually denied, whilst the duration of remand detention can be very long, particularly when compared to domestic jurisdictions. In this regard, the U.N. Manual on Human Rights Training for Prison Officials recognises that prisoners or detained persons who are not eligible for home leave should be compensated with special arrangements.991 It has also been recognised in literature that ‘[i]solation may be particularly severe for foreign national prisoners, for whom visits and family contact may be difficult and infrequent’.992 Further, the U.N. High Commissioner’s Manual recognises that ‘visitors will often have to travel long distances to visit prisoners’ and stipulates in this regard that visitors may therefore need ‘[a]ssistance in paying their travel costs’ and ‘[a] place to stay overnight’.993

Moreover, the Swedish investigators of UNDU considered that ‘[f]or the UN, the location of the detention facility in the Netherlands is an advantage not least for security reasons. It should be considered whether the Tribunal, with a view to achieving fair conditions for the detainees and to keep them well-balanced, should not help towards covering reasonable travel expenses for members of the detainees’

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990 ICC, Proposed Report, p. 8, par. 10.
992 Susan Easton, supra, footnote 17, p. 161. See, also, Penal Reform International, supra, footnote 1, p. 108.
families’. Further, in the context of decisions on early release, pardon or commutation of sentence, some tribunals take into account whether a detainee has maintained good contact with his family members. Accordingly, it is only fair for these tribunals to promote and facilitate such contact as much as possible and to provide indigent persons with the necessary means to maintain contact with their relatives.

The CPT has demanded that States actively promote contact of detained persons with the outside world. In its Report on its 1992 visit to Finland, it noted that the ‘new Hämeenlinna Local Prison has been built in the countryside at a considerable distance (over 40 kilometers) from the existing town centre site’. It requested the authorities to provide the Committee with information ‘about any planned special arrangements to assist visitors to travel to the new prison and about the existence of any such special arrangements elsewhere in Finland’.

The Bureau’s Working Group’s delegates and the delegates to the Assembly of States Parties who objected to the Presidency’s decision, did not adduce any convincing arguments. Their objection to the Presidency’s ruling appeared to be based on political unwillingness and fears of precedent setting and customary law creation. Nevertheless, the eventual policy decision of the Assembly of States Parties to do fund family visits does have a positive practical effect. Above all, the arrangements in place at the ICC are far more preferable than those at the ICTY, which depend on the benevolence of the detainees’ States of origin, or those at the ICTR, where no arrangements for funding family visits appear to exist at all.

994 ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.8.2.
995 ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, Prosecutor v. Tadić, Case No. IT-95-9, President, 3 November 2004, par. 6.
996 CPT, Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 May 1992, CPT/Inf(93)8, Strasbourg, 1 April 1993, par. 135. See, also, J. de Lange, supra, footnote 232, p. 162.
997 CPT, Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 May 1992, CPT/Inf(93)8, Strasbourg, 1 April 1993, par. 135.
998 In June 2011, counsel for Mladić argued that Serbia has to pay for the travel costs of his client’s relatives in order for them to be able to visit him in The Hague. See the NRC newspaper’s webpage of 18 June 2011 at http://www.nrc.nl/nieuws/2011/06/18/servie-moet-kosten-verdediging-Mladić-vergoeden/ (last visited by the author on 8 September 2011).
It is recommended that all of the tribunals start funding family visits to indigent detainees and prisoners, thereby taking into account the family circumstances of the individual indigent detainee, particularly the size of his family, and the minimum entitlement of seeing all members of the nuclear family in the course of one year.

Communications with the inspectorate

The ICTR Regulations and Rules of Detention, the STL and SCSL Rules of Detention and the ICC Regulations explicitly recognise the right of detainees to communicate confidentially with representatives of the inspecting authority. Rule 60 of the SCSL Rules of Detention provides that ‘[e]ach Detainee shall have the right to communicate freely and in full confidentiality with the ICRC or any other competent inspecting authority designated under Rule 4 of the Rules’. In a similar vein, Rule 84 of the ICTR Rules of Detention stipulates that ‘[e]ach detainee may freely communicate with the competent inspecting authority. During an inspection of the Detention Unit, the detainee shall have the opportunity to talk to the inspector out of the sight and hearing of the staff of the Detention Unit’. It was seen in the former paragraph that the right of UNDF detainees to free and privileged correspondence with the inspectorate is laid down in the relevant ICTR Regulations. However, since it is unclear whether the phrase ‘communicate freely’ also refers to telephone conversations with ICRC representatives and whether it implies that such communications are fully confidential, it is recommended that a provision as clear as Rule 60 of the SCSL Rules of Detention is inserted in the ICTR Rules of Detention.

Rule 4(B) of the STL Rules of Detention provides that ‘[t]here shall be regular and unannounced visits by the Inspecting Authority appointed by the President. This authority shall be responsible for examining the manner in which the Detainees are being held and treated and ensure compliance with human rights and international humanitarian law as well as other internationally accepted standards’. To implement Rule 4(B), in June 2009 former STL President Cassese concluded an agreement with ICRC President Kellenberger, thereby designating the ICRC as the STL Detention

999 Admittedly, this sub-paragraph is a bit out-of-place in a paragraph that deals with the contact of detainees with their relatives and friends.
Facility’s Inspecting Authority.1000 Rule 60(A) of the STL Rules of Detention stipulates that ‘[a]ll visitors, other than counsel, diplomatic or consular representatives, representatives of the Inspecting Authority or Officers of the Special Tribunal shall first seek the permission of the Registrar, in writing, to visit a Detainee’ (emphasis added). Further, the grounds for refusing requests for visits of non-privileged persons are not applicable to visits by counsel, diplomatic or consular representatives, representatives of the Inspecting Authority or Officers of the Special Tribunal.1001 Rule 67(A) provides in relevant part that ‘[v]isits with counsel and diplomatic or consular representatives, or with officers of the Special Tribunal will be conducted within the sight and not the hearing of detention staff’. Moreover, Paragraph B prescribes that both private visits and ‘visits of representatives of the Inspecting Authority’ are not supervised at all, i.e. these must take place out of the sight and the hearing of the detention staff. Finally, Rule 69 of the STL Rules of Detention stipulates that ‘[a]ll telephone conversations of Detainees, with the exception of those with counsel, diplomatic or consular representatives, representatives of the Inspecting Authority or Officers of the Special Tribunal, shall be passively monitored’.1002

With respect to the ICC, it follows from Regulations 174(1) and 175(2) of the RoR that telephone conversations with ICRC representatives are exempted from the regular monitoring regime. Further, items of detainees’ mail sent to or received from the ICRC are not subject to review by the Chief Custody Officer.1003 Moreover, the regime governing the application of requests for permission for visits is not applicable to visits by ICRC representatives.1004 Such visits are conducted within the sight but not the hearing of detention staff and are not governed by the monitoring regime of Regulation 184 of the RoR.1005 However, where ICRC representatives are only permitted to talk to detained persons ‘within the sight’ of the detention staff, this may undermine the ICRC’s mandate. Moreover, this is not in conformity with Article 4(c) of the Agreement between the Special Tribunal for Lebanon and the International Committee of the Red Cross on Visits to Persons Deprived of Liberty pursuant to the Jurisdiction of the Special Tribunal for Lebanon, signed in June 2009.

1000 Rule 60(B) of the STL Rules of Detention.
1001 Rule 67(A) of the STL Rules of Detention.
1002 Rule 69(A) of the STL Rules of Detention.
1003 Regulation 169(1)(c) of the RoR.
1004 Regulations 179(1) and 180(1) of the RoR.
1005 Regulation 183(1) of the RoR; Regulation 184(2) of the RoR.
of the Agreement concluded between the ICC and the ICRC. It is recommended, therefore, that the relevant provisions in the RoR are amended, or that a provision similar to those in the SCSL, ICTR and STL Rules of Detention is inserted in the ICC Regulations.

Rule 82 of the ICTY Rules of Detention provides that ‘[e]ach detainee may freely communicate with the competent inspecting authority. During an inspection of the Detention Unit, the detainee shall have the opportunity to talk to the inspector out of the sight and hearing of the staff of the Detention Unit’. Worrisome and, if translated to practice, totally unacceptable, are the alterations that were made to the relevant ICTY Regulations in 2009. Regulation 6 was altered, which now refers to ‘the Inspecting Authority under Rule 6(A) of the Rules of Detention’, which excludes the Inspectorate mentioned in Rule 6(B) of the Rules of Detention. It follows that, since 2009, a detained person’s correspondence with the ICRC is according to the Regulations no longer considered privileged.\footnote{However, this was denied by UNDU’s Commanding Officer during an interview conducted for the purpose of this study. According to him, all communications of detainees with the ICRC are privileged; ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.}

Further, whereas Regulation 21 declares the regime governing the monitoring of telephone conversations inapplicable to detainees’ communications with counsel and diplomatic representatives, no mention is made of communications of detainees with ICRC delegates. As a consequence, telephone calls to and from ICRC representatives fall under the automatic monitoring regime.

In view of relevant ECtHR jurisprudence and CPT findings, it is strongly recommended that a provision similar to Rule 60 of the SCSL Rules of Detention is inserted in the ICTY Rules of Detention, in order to ensure that all forms of communication between ICTY detainees and ICRC delegates will be treated as fully confidential.

Private visits

A positive development within the detention law of the tribunals is the fact that all tribunals have established ‘conjugal’ or ‘private’ visiting programmes.
In addition to the rationales for allowing conjugal visits mentioned in this Chapter’s first paragraph, a particularly compelling reason to allow such visits lies in the fact that requests by international detainees for temporary or provisional release are often denied, whilst the duration of remand detention can be very long when compared to that in domestic situations.

Conjugal visits are common practice in a large number of countries,\textsuperscript{1007} which proves that ‘prisons can run smoothly and incorporate [private visits] without jeopardising security or lessening the importance of prison as a punishment in the eyes of the judicial system and the public’.\textsuperscript{1008}

\textsuperscript{1007} Among the States that have adopted some sort of conjugal visiting programmes, Wyatt mentions such culturally divergent countries as Sweden, Denmark, Spain, Brazil, Mexico, Kenya, the Philippines and Egypt; Rachel Wyatt, \textit{supra}, footnote 67, at 602-604.

8.3 Contact with counsel

8.3.1 Contact with counsel: rationales and legal framework

Rationales

A detained person’s ability to contact the outside world, including counsel, is curtailed by the detention situation. To prevent a detainee’s right to prepare his defence or, more generally, a confined person’s right to access to the courts from becoming illusory, detention authorities need to actively facilitate contact between confined persons and their counsel or legal representative. As far as detained accused persons are concerned, ‘facilitating’ must be interpreted in the light of their entitlement to be afforded adequate time and facilities to prepare their criminal case. In turn, the meaning of the term ‘adequate’ will have to be construed on the basis of the circumstances and complexities of the case. In this respect, Temminck Tuinstra observes that ‘[i]n an international context, where counsel and accused may come from different cultures and may not speak the same language, the importance of ample opportunity for communications is emphasized’. Further reason is found in the relatively high complexity of international criminal cases. Moreover, a broad interpretation of the term ‘adequate’ is called for in respect of detained accused who wish to represent themselves, since the absence of ‘freedom of action or facilities available to counsel’ exacerbates the difficulties of preparing a defence in a situation of confinement.

Merely facilitating contact between counsel and a detained client does not, however, suffice to guarantee the adequate preparation of a defence. Additionally,
A prerequisite for a workable and effective relationship between lawyer and client is trust. Such trust can only thrive in a situation in which confidentiality is guaranteed. In other words, the client must be confident that nothing he conveys to his counsel may, without his permission, be conveyed to the prosecuting and adjudicating authorities or used against him.

Confidentiality also extends to an accused person’s communications with his counsel through other means than face-to-face contact, such as telephone communications and correspondence. It is noted, in this regard that, in the international context, telephone contact may be a particularly important alternative to visits in light of the long distance between the seat of the Court and the location of the international defence counsel’s firm.

Legal framework

Pursuant to Article 14(3)(b) ICCPR, accused persons must be afforded adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. According to the HRC in its General Comment 13, ‘what is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be

1015 Stefan Trechsel, supra, footnote 1013, p. 278; Taru Spronken, supra, footnote 1014, p. 20; Taru Spronken, supra, footnote 1009, p. 334.
1017 See, in a similar vein, Taru Spronken, supra, footnote 1009, p. 356.
able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter'. Furthermore, in its General Comment 32, the Committee held that '[t]he right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications'.

Moreover, the HRC has on several occasions found breaches of the Covenant where a detained accused had been unable to ‘communicate with his appointed counsel and was, therefore, unable to prepare his defence’, ‘was not granted sufficient time to prepare his defence and communicate with counsel’, or was prevented from seeing counsel confidentially. In Little v. Jamaica, the HRC held that the right to have adequate time and facilities for the preparation of one’s defence is a basic element of the right to a fair trial and ‘a corollary of the principle of equality of arms’.

In his Note of 2008 to the General Assembly ‘on the protection of human rights and fundamental freedoms while countering terrorism’, the U.N. Secretary-General stated that ‘[d]ue to the importance of the role of counsel in a fair hearing, and of the chilling effect upon the solicitor-client relationship that could follow the
monitoring of conversations, such monitoring should be used rarely and only when exceptional circumstances justify this in a specific case’. He stated that if restrictions are justified in a concrete case, such restrictions should only concern the monitoring of the conduct of the consultations, whereas ‘communication between lawyer and client should be in sight but not in hearing of the authorities’.

Further, the SPT has stressed that persons deprived of their liberty must be ‘provided with reasonable facilities to consult a lawyer in private’. In its Report on its visit to Mexico, the Subcommittee held that it considered access to a lawyer an important safeguard against torture and other forms of ill-treatment.

Rule 93 of the SMR provides that ‘[f]or the purposes of his defence, an untried prisoner shall be allowed to (…) receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official’. Further, Principle 18 of the U.N. Body of Principles provides that ‘[a] detained or imprisoned person shall be entitled to communicate and consult with his legal counsel’ and must ‘be allowed adequate time and facilities’ for such consultation. The Principles underline that ‘[t]he right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order’. Specifically in relation to visits, it is

1025 Ibid.
1028 Principles 18(1) and (2) of the U.N. Body of Principles. Emphasis added.
1029 Principle 18(3) of the U.N. Body of Principles.
stressed that ‘[i]nterviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official’.1030

Finally, the U.N. Basic Principles on the Role of Lawyers state that ‘[a]ll arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials’.1031

As to regional human rights instruments and supervisory bodies, Article 8(2) of the ACHR lays down the right of accused persons to adequate time and facilities for the preparation of a defence1032 and further provides that an accused person has the right ‘to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel’.1033 In, for example, the case of Suárez-Rosero v. Ecuador, the I-ACtHR found a breach of Article 8(2)(c) of the Convention, since the applicant had been kept in incommunicado detention for thirty-six days, during which he had not been able to prepare his defence or contact a lawyer with whom he could communicate freely and privately.1034

Article 6 (3)(b) and (c) of the ECHR provide that everyone charged with a criminal offence has, as a minimum, the right ‘to have adequate time and facilities for the preparation of his defence’ and ‘to defend himself in person or through legal assistance of his own choosing’. In Lanz v. Austria, the ECtHR held that it is implied in these provisions ‘as a basic requirement of a fair trial in a democratic society’ that an accused person is entitled to communicate with his defence counsel1035 ‘out of hearing of a third person’.1036 It stated that ‘[i]f a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his

1030 Principle 18(4) of the U.N. Body of Principles.
1032 Article 8(2)(c) of the ACHR.
1033 Article 8(2)(d) of the ACHR.
assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective'.

Further, in *Campbell and Fell v. the United Kingdom*, Fell complained that during his detention, he had been refused permission to consult his solicitors out of the hearing of a prison staff member, for a period of about two months. The Court held that although ‘there may well be security considerations which would justify some restriction on the conditions for visits by a lawyer to a prisoner’, the Government of the United Kingdom had failed to show that such considerations applied to Fell’s case and the Court therefore found a violation of Article 6. The Court has held that ‘the relationship between the lawyer and his client should be based on mutual trust and understanding’. It further recognises that ‘it is not always possible for the State to facilitate such a relationship’ since i) ‘there are inherent time and place constraints for the meetings between the detained person and his lawyer’ and ii) ‘in exceptional circumstances the State may restrict confidential contacts with defence counsel for a person in detention’. However, it has also said that ‘any limitation on relations between clients and lawyers, whether inherent or express, should not thwart the effective legal assistance to which a defendant is entitled. Notwithstanding possible difficulties or restrictions, such is the importance attached to the rights of the defence that the right to effective legal assistance must be respected in all circumstances’.

Restrictions on confidentiality may, according to the Court, only be imposed in exceptional circumstances. In such a case, justifications must be given for the interference. In *Lanz*, restrictions were imposed due to an alleged risk of collusion. The Court noted, however, that this risk had already been the reason for the remand detention and held that restrictions on contact with counsel require further

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1038 ECtHR, *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Application No. 7819/77; 7878/77, par. 111.
1039 *Id.*, par. 113.
1040 ECtHR, *Sakhnovskiy v. Russia*, judgment of 2 November 2010, Application No. 21272/03, par. 102.
1041 *Ibid*.
1042 *Ibid*.
arguments. In *Brennan v. the United Kingdom*, the Court indicated that where restrictions are imposed on the right to access to a solicitor, the question is ‘whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing’. In that case, a police officer had been present within hearing distance at one particular meeting of Brennan with his solicitor. Notwithstanding the very limited duration of the infringement, the Court ruled that ‘the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him’. On this basis, the Court found a breach of Article 6. In *Öcalan*, a visit to the applicant by his counsel had taken place in the presence of others, *i.e.* members of the security forces and a judge. Subsequent visits had taken place within hearing distance of members of the security forces. As to the Government’s argument that the supervision was meant to ensure counsel’s security, the Court observed that ‘the lawyers had been retained by the applicant himself and that there was no reason to suspect that they had threatened their client’s life. They were not permitted to see the applicant until they had undergone a series of searches. Mere visual surveillance by the prison officials, accompanied by other measures, would have sufficed to ensure the applicant’s security’. In the case of *S. v. Switzerland*, the applicant complained *inter alia* that the authorities had monitored his meetings with his counsel. According to the Swiss courts, there had been indications that a risk of collusion existed ‘in the person of the defence counsel’. It was believed that counsel for the applicant would collaborate with counsel for another accused in order to ‘co-ordinate their defence strategy’. According to the Court, however, such a possibility ‘notwithstanding the seriousness of the charges against the applicant, cannot (...) justify the restriction in issue and no other reason has been

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1044 Ibid.
1046 Id., par. 62.
adduced to do so’. 1050 It stated that ‘[t]here is nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy’. 1051 In this case, the Court also took into account the duration of the restrictions. 1052

In *Sarban v. Moldova*, the applicant raised a complaint under Article 8 of the ECHR, alleging infringements by the authorities of the confidentiality of his communications with his counsel. 1053 Although the Court dismissed the complaint due to lack of evidence, it stated that while a complaint concerning the confidentiality of communications with counsel ‘would normally be examined under Articles 5 or 6 of the Convention - which have not been raised by the applicant in this context -, it cannot be excluded that an issue could arise under Article 8, especially where it is being alleged that the authorities were listening in to their conversations’. 1054

Where a detained person’s consultations with his counsel relate to proceedings concerning the right to personal liberty, the ECtHR has held that complaints concerning the conditions under which such consultations take place are appropriately considered under Article 5(4) of the Convention. 1055 In *Castravet v. Moldova*, the Court (seised with a complaint under Article 5 (4)) reiterated that ‘[o]ne of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected. This privilege encourages open and honest communication between clients and lawyers’. 1056 It explained that ‘an interference with the lawyer-client privilege and, thus, with a detainee's right to defence, does not necessarily require an actual interception or eavesdropping to have taken place. A genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient, in the Court's view, to limit the effectiveness of the assistance which the lawyer could provide. Such a belief would inevitably inhibit a free discussion between lawyer and

1050 *Id.*, par. 49.
1051 *Ibid*.
1052 *Ibid*.
1054 *Id.*, par. 128.
client and hamper the detained person's right effectively to challenge the lawfulness of his detention'.

As to the required number and the length of the visits by counsel, this will depend on the circumstances of each case. In Öcalan, the ECtHR took into account the ‘highly complex charges’, which had ‘generated an exceptionally voluminous case file’. It observed that, after the first two visits by Öcalan’s counsel, contact had been restricted to two one-hour visits per week. The Court considered that ‘in order to prepare his defence to those charges the applicant required skilled legal assistance equal to the complex nature of the case’ and found that ‘the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hourly meetings per week with his lawyers in order to prepare for a trial of that magnitude’. Responding to the Government’s argument that visits had been scheduled in accordance with the frequency and departure times of ferries between the island where Öcalan was being held and the coast, the Court said that, while it was logical for Turkey to confine Öcalan on a well-secured island in light of exceptional security considerations, ‘restricting visits to two hourly visits a week is less easily justified’. It noted that the Government had failed to explain ‘why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport, thereby increasing the length of each individual visit, when such measures were called for as part of the “diligence” which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner’. In the case of Sakhnovskiy v. Russia, where the applicant had only been able to consult his client for fifteen minutes before the start of his trial, the Court considered that ‘given the complexity and seriousness of the case, the time allotted was clearly not sufficient for the applicant to

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1057 Id., par. 51.
1059 Id., par. 152.
1060 Id., par. 154.
1061 Id., par. 155; ECtHR, Öcalan v. Turkey, judgment of 12 May 2005, Application No. 46221/99, par. 137.
discuss the case and make sure that Ms A.'s knowledge of the case and legal position were appropriate.\textsuperscript{1062}

Further, in respect of the conditions in place for visits by counsel, the Court has held that, in itself, a glass partition between counsel and client does ‘not impede [an] accused from mounting an effective defence’.\textsuperscript{1063} However, it has criticised situations in which, in the absence of apparent security risks, such partitions prevented lawyer and client from easily exchanging documents.\textsuperscript{1064}

The duty to facilitate a detained person’s contact with counsel may, in case of indigent accused, entail a positive obligation under Article 8 to provide a detained accused with writing materials, postage and envelopes.\textsuperscript{1065} In respect of correspondence with counsel more generally, although confidentiality may fall under fair trial provisions, it is, as noted by Trechsel, ‘more natural and easier’ to address such issues under Article 8.\textsuperscript{1066}

In \textit{Golder v. the United Kingdom}, the applicant complained that he had been stopped from consulting a solicitor.\textsuperscript{1067} The Court noted that the refusal by the Home Secretary to allow the applicant to do so, ‘had the direct and immediate effect of preventing Golder from contacting a solicitor by any means whatever, including that which in the ordinary way he would have used to begin with, correspondence. While there was certainly neither stopping nor censorship of any message, such as a letter, which Golder would have written to a solicitor – or vice-versa - and which would have been a piece of correspondence within the meaning of paragraph 1 of Article 8 (art. 8-1), it would be wrong to conclude therefrom, as do the Government, that this text is inapplicable. Impeding someone from even initiating correspondence constitutes the most far-reaching form of "interference" (paragraph 2 of Article 8) (art. 8-2) with the exercise of the "right to respect for correspondence"; it is inconceivable

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\item[1062] ECtHR, \textit{Sakhnovskiy v. Russia}, judgment of 2 November 2010, Application No. 21272/03, par. 103.
\item[1066] Stefan Trechsel, \textit{supra}, footnote 1013, p. 281.
\item[1067] ECtHR, \textit{Golder v. the United Kingdom}, judgment of 21 February 1975, Application No. 4451/70.
\end{enumerate}
\end{footnotesize}
that should fall outside the scope of Article 8 (art. 8) while mere supervision indisputably falls within it'.

The Government argued that the right to respect for correspondence was – apart from those restrictions mentioned in Article 8(2) – subject to implied limitations resulting from the very situation of imprisonment. However, the Court rejected the concept of ‘implied limitations’ and examined the infringements under Article 8(2). The Court noted that ‘the "necessity" for the interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The "prevention of disorder or crime", for example, may justify wider measures of interference in the case of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of Article 5 (art. 5) does not fail to impinge on the application of Article 8’.

In the case of Campbell v. the United Kingdom, the applicant complained, inter alia, that his correspondence to and from his solicitor had been opened and read by the prison authorities. Since the monitoring of correspondence had been conducted in accordance with domestic law and served a legitimate aim, the core question was whether it had been necessary in a democratic society. The Court recalled that ‘the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued’. It further held that ‘[i]n determining whether an interference is "necessary in a democratic society" regard may be had to the State’s margin of appreciation’. It reiterated the point made in its earlier case-law that ‘some measure of control over prisoners’ correspondence is called for and is not of itself incompatible with the Convention, regard being paid to the ordinary and reasonable requirements of imprisonment’. It underlined that ‘[i]n assessing the permissible extent of such control in general, the fact that the opportunity to write and to receive letters is sometimes the prisoner’s

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1068 Id., par. 43.
1069 Id., par. 44.
1070 Id., par. 45.
1072 Id., par. 44.
1073 Ibid.
only link with the outside world should, however, not be overlooked’. The Court referred to its earlier case-law in which it had established that communications between an imprisoned person and his lawyer are confidential. According to the Court, this is particularly so where the correspondence relates – as it did in the *Campbell* case – to claims and complaints against prison authorities. Further, it did not see any reason to make a distinction between mail of a general nature and that related to (contemplated) litigation and considered that any correspondence with lawyers must be regarded as privileged. The Court recognised that security concerns may demand the opening of letters to and from counsel to check whether they contain any illicit enclosure. Nevertheless, it stressed that letters should only be opened and not read. As a guarantee that security controls do not extend to reading, it suggested that letters should be opened in the presence of the prisoner concerned. Reading letters to or from lawyers is, according to the Court, only permitted ‘in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused’. As to the Government’s argument that the opening of Campbell’s correspondence did not prevent him from having privileged communications with his solicitor during prison visits, the Court stressed that correspondence is a distinct mode of communication which is ‘afforded separate protection under Article 8’ and held that ‘the objective of confidential communication with a lawyer could not be achieved if this means of communication were the subject of automatic control’. It further recognised that ‘[t]he right to respect for correspondence is of special importance in a prison context where it may be more difficult for a legal adviser to visit his client in person because (…) of the distant location of the prison’.

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1074 *Id.*, par. 45.
1075 *Id.*, par. 47.
1076 *Id.*, par. 48.
1077 *Ibid*.
1078 *Ibid*.
1079 *Id.*, par. 50.
1080 *Id.*, par. 50.
The case of *Jankauskas v. Lithuania* concerned the issue of routine monitoring, *i.e.* opening and reading of all of the detained person’s correspondence, including correspondence with counsel.\(^{1081}\) The Court found that the practice had a basis in domestic law and pursued a legitimate aim. As to the necessity requirement, however, it held that the Government had not explained why the routine opening of Jankauskas’ correspondence had been ‘indispensable’.\(^{1082}\) As to the reason put forward by the Government – the fear of Jankauskas’ ‘absconding or influencing trial’ – the Court admitted that such a reason may have justified his remand detention, or the opening of some non-legal correspondence, or correspondence with ‘certain persons of dangerous character’.\(^{1083}\) The Court noted, however, that such fear could not justify the routine monitoring of all of Jankauskas’ correspondence. This was particularly so as regards Jankauskas’s correspondence with his counsel of which ‘the confidentiality must be respected – save for reasonable cause’.\(^{1084}\) The case of *Boris Popov v. Russia* also concerned the issue of routine monitoring of correspondence.\(^{1085}\) The Court considered that it could ‘not discern any justification for routinely inspecting [Popov’s] correspondence’, holding that ‘there was no question of security risks or collusion between the applicant and his correspondent, for instance in relation to any pending proceedings at national level, or of any criminal activity or conduct’.\(^{1086}\) More specifically in connection to Popov’s correspondence with his counsel, the Court reiterated its ‘quite stringent standards as regards the confidentiality of prisoners’ legal correspondence’ and found that there had been a violation of Article 8.\(^{1087}\)

Rule 23 of the EPR recognises that ‘[a]ll prisoners are entitled to legal advice’ and states that the prison authorities must provide them with ‘reasonable facilities for gaining access to such advice’.\(^{1088}\) According to the official Commentary to the EPR, such facilities may consist of providing detainees with writing materials and postage


\(^{1082}\) *Id.*, par. 21.

\(^{1083}\) *Ibid*.

\(^{1084}\) *Id.*, par. 22.


\(^{1086}\) *Id.*, par. 108.

\(^{1087}\) *Id.*, par. 111.

\(^{1088}\) Rule 23(1) of the EPR.
for letters with lawyers in case of indigent detainees.\textsuperscript{1089} Furthermore, the EPR state that ‘[p]risoners may consult on any legal matter with a legal adviser of their own choice and at their own expense’.\textsuperscript{1090} All such consultations and communications, including correspondence about legal matters, are confidential.\textsuperscript{1091} Only in exceptional circumstances and only where a judicial authority deems it necessary may restrictions be imposed on such confidentiality, in order to ‘prevent serious crime or major breaches of prison safety and security’.\textsuperscript{1092} The Commentary points to the fact that the right to confidential communications and correspondence is well established in the jurisprudence of the ECtHR. As to restrictions to confidentiality, it states that ‘the specific reasons for the restrictions must be stated and the prisoner should be provided with these in writing’.\textsuperscript{1093} In relation to remand detainees, Rule 98(2) of the EPR provides that such persons must be provided with all of the necessary facilities to assist them in ‘prepar[ing] their defence and to meet with their legal representatives’. Further, the importance of lawyer-client confidentiality has also been stressed by the CPT, both during visits and in relation to correspondence.\textsuperscript{1094}

In 2005, the African Commission on Human and Peoples’ Rights issued principles and guidelines on the rights to a fair trial and legal assistance.\textsuperscript{1095} In the part of the document entitled ‘independence of lawyers’, it is provided that States must ‘recognize and respect that all communications between lawyers and their clients within their professional relationship are confidential’. Furthermore, Part M, which is

\begin{footnotes}
\footnotetext{1089}{CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 23.}
\footnotetext{1090}{Rule 23(2) of the EPR.}
\footnotetext{1091}{Rule 23(4) of the EPR.}
\footnotetext{1092}{Rule 23(5) of the EPR.}
\footnotetext{1093}{CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 23.}
\footnotetext{1095}{African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX) 247, reprinted in 12 International Human Rights Reports 1180, 2005.}
\end{footnotes}
entitled ‘provisions applicable to arrest and detention’, provides in relevant part that States ‘must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer’. Part N of the Principles and Guidelines is dedicated to ‘proceedings related to criminal charges’. In relation to the right to adequate time and facilities for the preparation of a defence, it is provided that accused persons are entitled to communicate with their counsel and must be accorded adequate time and facilities for the preparation of their defence. Further, Paragraph 1(d) states that such facilities include the right to communicate with counsel and to (access to) materials necessary for the preparation of the defence. As to the lawyer-client privilege, the same Section N states that i) ‘[a]ll arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality’, ii) ‘[t]he right to confer privately with one’s lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel’, and iii) ‘States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential’.

8.3.2 Contact with counsel at the various tribunals

ICTY

As soon as practicable after admission, a detained person must be given the opportunity to notify his defence counsel of his situation, at the tribunal’s expense. During detention at UNDU, ‘[e]ach detainee shall be entitled to communicate fully and without restraint with his legal representative, with the assistance of an interpreter where necessary’. The term ‘communications’ in the Rules of Detention must be

\(^{1096}\) Ibid.
\(^{1097}\) Ibid.
\(^{1098}\) Rule 12(B) of the ICTY Rules of Detention.
\(^{1099}\) Rule 65(A) of the ICTY Rules of Detention. The right to contact with counsel also applies to the post-conviction stage. Different was the situation at Spandau prison. According to Goda, ‘[t]he prison directors never once allowed a lawyer to visit Funk, nor did they allow Funk to correspond with [lawyers] by mail, nor did they allow him to sign a power of attorney
understood as referring to communications by both letter and telephone. It was affirmed by the Appeals Chamber in *Krajišnik* that ‘[p]rivilege stems from the attorney-client relationship, as indicated in Article 21(4)(b) of the Statute and as set forth in Rule 97 of the Rules, which provides that all “communications between lawyer and client shall be regarded as privileged”*. The costs incurred by such communications are borne by the detained person, unless the legal representative has been provided by the tribunal.

Visits must be pre-arranged with UNDU’s Commanding Officer, as regards both the time and the duration of the visit, and are subject to the same security checks that apply to non-privileged visits. Rule 65(E) provides that ‘interviews with legal representatives and interpreters shall be conducted in the sight but not within the hearing, either direct or indirect, of the staff of the Detention Unit’.

There are a number of exceptions to the principle of privileged communications at the ICTY, *i.e.* where ‘the Registrar has reasonable grounds to believe that the privilege is being abused in an attempt to: i. arrange an escape; ii. interfere with or intimidate witnesses; iii. interfere with the administration of justice; or iv. otherwise endanger the security and safety of the Detention Unit’. Before the implementation of a decision to monitor counsel-client communications, the detained person and his counsel must be notified of the decision and provided with the reasons for the decision. The detainee may at any time request the President to reverse the Registrar’s monitoring decision. The monitoring regime of Rule 65 applies to the two forms of communication mentioned above, as well as to communications with counsel during visits.

so that they might somehow pursue his case’. Goda explained this by saying that ‘[c]rucial is the fact that the Soviets would allow nothing to occur in Spandau that might threaten the legitimacy of the verdicts including discussions with lawyers or petitions to higher authorities’ and stated that ‘in his ten years in Spandau, Funk was never allowed a word of spoken or written communication with his attorneys’; Norman J.W. Goda, *supra*, footnote 250, p. 65.

100 See, *e.g.*, Rule 58(A) of the ICTY Rules of Detention.
102 Rule 65(C) of the ICTY Rules of Detention.
103 See Rule 65(D) in conjunction with Rule 61 of the ICTY Rules of Detention.
104 Rule 65(B) of the ICTY Rules of Detention.
Correspondence with counsel

In relation to detainees’ correspondence with counsel, Regulation 11 stipulates that ‘[c]orrespondence addressed to or from counsel for the detainee shall not be interfered with in any manner’. The House Rules affirm that detainees may freely write their lawyer as often as they want and ‘receive mail from him without it being opened and inspected’. 1106

The Regulations allow for interference in a number of situations, i.e. where ‘the Commanding Officer or the Registrar has reasonable grounds for believing that this facility is being abused in an attempt to: (i) arrange escape; (ii) interfere with or intimidate a witness; (iii) interfere with the administration of justice; or (iv) otherwise disturb the maintenance of security and good order in the detention unit’. 1107 The criterion of ‘the maintenance of security’ under (iv) was only added in 2009. The term ‘interfered with’ is rather broad. Nevertheless, the Regulations do not appear to give a basis for censorship of such correspondence, since Regulation 6 provides that items of mail addressed to or sent by counsel shall not be subject to review by the Registrar. Rather, the meaning of ‘interference’ under 11(A) must be interpreted on the basis of the remaining Sub-Regulations. The Commanding Officer’s role consists of immediately forwarding the unopened item in question to the Registrar. The former must further make an entry in the log and is obliged to notify the detained person concerned. 1108 The Registrar may not immediately open the item in question, but must first contact counsel and request him to open the item in the Registrar’s presence. 1109 Counsel may then ‘be required to explain to the Registrar, in one of the working languages of the Tribunal, the nature of the item and to hand over any offending item or enclosure’. 1110 Censorship of correspondence with counsel may thus solely be based on Rule 65. In light of the demand of the foreseeability of such infringements, it would be recommendable for Regulation 6 to contain an exception-clause, which refers to the situations mentioned in Regulation 11(A).

1107 Regulation 11(A).
1108 Regulation 11(B).
1109 Regulation 11(C).
1110 Regulation 11(D).
Telephone contact with counsel

The recording and monitoring regime provided for in Regulation 20, which concerns telephone conversations, is not applicable to calls to and from counsel. 1111 However, as stated above, the legal basis for recording and monitoring those calls can be found in Rule 65 of the Rules of Detention. The House Rules state that such calls ‘are not monitored or recorded’. 1112 Where the exception in Rule 65 applies, Rule 65(B) prescribes that the detained person and his counsel must be notified both of the decision to monitor counsel-client communications and the reasons thereof, prior to the implementation of such an order. 1113 As stated above, in light of the fact that infringements on detainees’ rights under Article 8 are subject to a foreseeability requirement, it would be advisable for a provision to be inserted in the Regulations that provides for the possibility of monitoring counsel-client communications in exceptional circumstances, also laying down the applicable procedure.

Visits by counsel

Rule 61(C) of the Rules of Detention states that ‘[a]ll visitors must comply with the separate requirements of the visiting regime of the host prison. These restrictions may include personal searches of clothing and X-ray examination of possessions on entry to either or both the Detention Unit and the host prison’. Paragraph (D) adds that any person, including defence counsel and diplomatic or consular representatives, who refuses to comply with such requirements, may be denied entrance. 1114 The security requirements for entering both UNDU and the host prison, which were discussed above in the context of non-privileged visits, 1115 are also applicable to visits by counsel. Article 6 of the Agreement on Security and Order affirms that the host prison’s regime governing property control also applies to counsel. Documents held by counsel will thus be inspected for explosives or ‘other irregular material, but shall

1111 Regulation 21(A) of the Regulations.
1113 Rule 65(B) of the ICTY Rules of Detention.
1114 Rule 61(D).
1115 See, supra, p. 705.
not be read or photocopied’. Further, the Regulations that stipulate the requirements for entering UNDU contain a number of provisions which specifically apply to visits by counsel. Whereas other visitors are bound by the daily visiting hours as determined by the Commanding Officer in consultation with the Registrar pursuant to Regulation 29, counsel may visit their clients from Monday to Friday from 9 a.m. to 5 p.m. The Commanding Officer may further decide to grant a detained person’s request for a visit by counsel outside of these hours or at weekends. Prior to the visit, counsel must make the necessary arrangements with the Commanding Officer by telephone. Further, whereas non-privileged visitors are in principle issued with a permit for each visit, Regulation 31(A) provides that ‘[t]he Registrar shall automatically issue defence counsel with a written regular permit as soon as such counsel is entered on the record or assigned by the Tribunal’. Prior to the accused’s initial appearance, then, the Registrar ‘may issue permits to counsel for one-time visits (…) based on a written request from the detainee, identifying the counsel in question’. As regards access to UNDU, counsel are subject to the same security checks as non-privileged persons. In respect of documents held by counsel, it is provided that security searches shall not extend to reading or photocopying those documents, although in practice there has been uncertainty as to ‘the extent to which guards might properly inspect the contents of brief cases, bags and the like, and the various articles brought to UNDU by the many privileged visitors’. The Deputy Registrar tried to clarify the matter by issuing a memorandum which stated that ‘the contents of brief cases, etc, could be inspected’. However, reportedly ‘the heart of the uncertainty remained because guards were still required to respect the privileged nature of documents, etc. The practical effect of this was to limit the extent

1116 Article 6 of the Agreement on Security and Order.
1117 Regulation 30(A).
1118 Regulation 30(B).
1119 Regulation 30(A).
1120 Regulation 33(C).
1121 Regulation 31(B).
1122 Regulation 39(A).
1123 Regulation 39(B).
1124 ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 126.
1125 Ibid.
to which guards could effectively search bundles, folders and boxes of documents and
the like'.

Unlike regular visitors, counsel are permitted to pass ‘written materials and
documents’ to detainees. Regulation 41(A) further provides that ‘[a]ny quantity of
documents which is too large to be physically passed over by counsel to the detainee
at the visiting facility shall be handed to the Commanding officer who shall pass them
unopened and unread to the detainee’. The Regulations governing the detainees’
correspondence, including Regulation 11, apply to ‘documents passed to and from a
detainee in this manner’.

The Commanding Officer may, if he ‘believes that he has reasonable grounds for
intervention, or that these Regulations are being breached in any way (...) immediately
terminate the visit and advise the detainee and [counsel] of his reasons for doing so’. Counsel may then be summoned to leave UNDU. The Commanding Officer
must report such cases to the Registrar.

Regulation 43(A) stipulates that all visits, i.e. including those by counsel, must take
place in the sight of the staff of UNDU, ‘save in exceptional circumstances and at the
discretion of the Commanding Officer in consultation with the Registrar’. Nevertheless, the regime governing the monitoring and recording of non-privileged
visits is not applicable to visits by counsel. Interferences with the confidential
correspondence of such visits, therefore, must be based directly on Rule 65(B) of the Rules
of Detention.

Special visiting arrangements have at times been made for self-representing
accused. In Milošević, for example, the detained accused was granted “privileged
arrangements” for visitors and an office at UNDU’ to prepare his defence. ‘Unprecedented facilities’ were made available to Milošević, which included a
secured room in UNDU where he could interview and proof witnesses, work with

\footnotesize
\begin{enumerate}
\item cited.
\item Regulation 40(A); United Nations Detention Unit, House Rules for Detainees, as amended
\item Regulation 41(B).
\item Sub-Regulations 42(A) and (C).
\item Regulation 42(B).
\item Regulation 44(A).
\item ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-
President, 30 May 2006, par. 70.
\end{enumerate}
documents and meet with his legal associates. Such arrangements have created enormous difficulties for the detention authorities in guaranteeing both security and the detained person’s well-being. On several occasions the Commanding Officer and Medical Officer expressed concern at their ‘inability to adequately prevent unauthorised medications reaching Mr. Milošević’ and at taking ‘full responsibility for the maintenance of Mr. Milošević’s health’. Judge Parker, who investigated the circumstances surrounding Milošević’s death at UNDU, observed that ‘[n]on-prescribed medications and other unauthorised substances were found on several occasions in Mr. Milošević’s “privileged” office allocated to him for work on his Defence, and in his cell in UNDU’. For example, during one inspection of Milošević’s privileged office, ‘medications that had not been prescribed for him and a bottle of whisky were found’. The medications were reported to have been brought into the office by one of Milošević’s legal associates. Although it ‘was contended that these medications were never intended for Mr. Milošević’, blood samples taken from Milošević showed remnants of those drugs in his blood. As to the bottle of whisky, it was noted that ‘the normal metal cap on the bottle had been replaced by a plastic cap which would not register on the metal detection equipment at the entrance’. Further, although never proven, there were suspicions that Milošević or his legal associates were misusing a privileged telephone ‘for non-defence purposes’. Increased security measures were subsequently introduced, including the installment of ‘a one way viewing window and posting security to observe Mr. Milošević at all times whilst he is in the privileged office’. In light of such difficulties and alleged abuse, Judge Parker recommended in his report ‘that regard be given to the experience of this case in determining arrangements in future cases where

1133 Id., par. 112-114; ICTY, Statement by Tribunal President Judge Fausto Pocar to the Security Council 7 June 2006, The Hague, 7 June 2006; ICTY, Order Concerning the Preparation and Presentation of the Defence Case, Prosecutor v. Milošević, Case No. IT-02-54-T, T. Ch., 17 September 2003, par. 10.
1135 ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 70, 115, 116, 120, 122.
1136 Id., par. 105.
1137 Id., par. 106.
1138 Ibid.
1139 Ibid.
1140 Id., par. 117, 119.
1141 Id., par. 119.
a detainee conducts his own defence’. He held that ‘[t]he experience of this case (...) indicates that it is necessary, with other detainees who conduct their own defences, to seek to avoid any repetition of such conduct. It must also be kept in mind that the safety of other detainees may be compromised by breaches of the security at UNDU. Each case where an accused person wishes to conduct his own defence is likely to present distinctive features and, therefore, can be expected to lead to differences in the arrangements which are appropriate to provide to the accused for the conduct of his defence. It is suggested that it will be important in such cases, for the Trial Chamber, the Registrar and the Commanding Officer of UNDU to have close regard to the experience of this case, in determining arrangements in such future cases’. When interviewed for the purpose of this research, Christopher Black, international defence counsel, stated in relation to the right to confidential communications with his clients that

‘At the ICTY it was shocking to me - as a scandal, a world scandal – that Milošević was never given a right to speak to counsel confidentially, privately. Not one visit. The authorities had a girl sitting next to us who took down every word we said. He had one meeting for one hour and a half with Ramsey Clark once, they allowed one private visit. All the other visits by counsel – and I think I visited him more than anybody else outside his legal team working with him each day – were always monitored. And Milošević is a very friendly guy; the girl would come in every time and he would say “Ok it’s your job”, “you can tell the fascists that we don’t care”. She would write down every word we said, every meeting’. In another interview conducted for the purpose of this research, a senior staff member of the ICTY Registry denied this account of the treatment afforded to Milošević. Furthermore, in relation to Blaškić, whose detention conditions had been modified pursuant to Rule 64 of the RPE and who was consequently located to a residence in

1142 Id., ‘Findings and recommendations’, par. 12.
1143 Id., par. 130.
1144 ICTR, interview conducted by the author with Christopher Black, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
1145 ICTY, interview conducted by the author with a senior staff member of the ICTY Registry, The Hague – Netherlands, July 2011.
the Netherlands outside UNDU, the initial arrangement was that visits by counsel were to take place in UNDU, where he was escorted to for that purpose.\textsuperscript{1146} After two weeks, this arrangement was amended. The new Presidential Order stated that ‘meetings with his wife and children as well as with his Counsel, may take place in any other place deemed appropriate by the Registrar after consultation with the Dutch authorities, and for such duration as the Registrar considers appropriate in accordance with the Rules of Detention’.\textsuperscript{1147}

‘Legal representative’

As mentioned above, detainees are ‘entitled to communicate fully and without restraint with [their] legal representative, with the assistance of an interpreter where necessary’.\textsuperscript{1148} The term ‘legal representative’ has, in the case of self-representing accused, been given a broader meaning than that of ‘defence counsel’. For example, in order to ensure that Milošević, who was representing himself, would receive a fair trial, the Trial Chamber granted his request to be assisted by ‘legal associates’.\textsuperscript{1149} While it noted that the tribunal’s legal framework does not provide for the situation in which an accused represents himself, on the basis of accused persons’ right to adequate facilities for the preparation of their defence the Trial Chamber held, inter alia, that it would be in the interests of a fair trial for such an accused to be able to communicate freely with his lawyers.\textsuperscript{1150} It subsequently recognised that Milošević would be entitled to communicate ‘fully and without restraint’ with two lawyers designated for that purpose, and that ‘all correspondence and communications between them and the accused shall be privileged’.\textsuperscript{1151} The procedure which must be followed for the designation of such persons as legal representatives, is laid down in

\textsuperscript{1147} ICTY, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaškić, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, President, 17 April 1996 (emphasis added).
\textsuperscript{1148} Rule 65(A) of the ICTY Rules of Detention. Emphasis added.
\textsuperscript{1149} ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 112.
\textsuperscript{1150} ICTY, Order, \textit{Prosecutor v. Milošević}, Case No. IT-02-54-T, T. Ch., 16 April 2002.
\textsuperscript{1151} \textit{Ibid.}
Rule 44(A) of the RPE.\footnote{1152 See ICTY, Decision on Motion Number 19, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, T. Ch. II, 30 September 2003.} Such persons must promise ‘to be bound by the relevant Tribunals Rules and Regulations, and to respect the confidentiality of sensitive information’.\footnote{1153 See ICTY, Prosecution’s Response to oral Request for Reconsideration of Restrictions on Privileged Communication with Zoran Krasic and Slavko Jerkovic, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, T. Ch. III, 25 August 2009, par. 2.} As a consequence, Milošević was permitted to meet with his legal associates in a privileged setting.\footnote{1154 ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 114.} As mentioned earlier, although never proven, there were suspicions that some of his legal associates were misusing the privileged regime and were smuggling materials into and out of UNDU.\footnote{1155 \textit{Id.}, par. 117; ICTY, Statement by Tribunal President Judge Fausto Pocar to the Security Council 7 June 2006, The Hague, 7 June 2006.} Additional security measures were subsequently introduced which included the searching of the legal associates ‘(while respecting privileged material) as thoroughly and frequently as possible’.\footnote{1156 ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 119.} 

The question has come up as to whether lawyers that represent a detained person in other proceedings than those before the tribunal are also entitled to privileged communications, and whether they must satisfy the same qualification criteria as ‘legal representatives’. In 2006, Šešelj complained to the President about a decision by the Registrar in which the latter denied Šešelj’s request to be visited by his self-appointed legal representatives who were assisting him in preparing a case against his assigned counsel before the Dutch Bar Association.\footnote{1157 ICTY, Decision on Appeal against Decision Denying Permission for Legal Representatives to Visit the Detainee, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, President, 25 May 2006, par. 1.} The Registrar had denied the request ‘on the basis that [the two lawyers] were not otherwise eligible to engage in privileged communications with Šešelj’ and because the Board hearing had been postponed.\footnote{1158 \textit{Id.}, par. 6.} It was argued that since the two lawyers had previously addressed the media with respect to matters related to Šešelj’s case, they were disqualified from acting as designated legal representatives.\footnote{1159 \textit{Ibid.}} The Registrar did advise Šešelj that if he ‘wished to meet with a legal representative prior to any future scheduled hearing before the Raad van Discipline Board, he would be permitted to do so provided two
conditions were fulfilled. The first is that he [would] execute a power of attorney authorising a person to act on his behalf before the Raad van Discipline Board. The second is that the person be someone eligible to engage in privileged communications with him’. With regard to the second condition, the Registrar set out the applicable criteria, which echoed Rule 44(A) of the RPE, while adding that such persons ought not have ‘an interest in divulging confidential information’ and must have ‘signed an undertaking prepared by the Registry consenting to represent Šešelj before the Raad van Discipline Board and agreed to abide by the Rules of Detention and act consistently with the Statute of the Tribunal, the Rules of procedure and Evidence, the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, and any other Rules and Regulations of the Tribunal and all applicable judicial orders’. In view of the postponement of the hearing, the President considered that Šešelj had not suffered any prejudice as a result of the Registrar’s decision. Nor had the Registrar erred in requiring Šešelj to ‘sign a power of attorney giving those persons the legal authority to represent him’. However, regarding ‘the condition that those persons verify their qualifications as legal representatives for the purpose of permitting Šešelj to engage in privileged communications with them’, the President noted that ‘persons appearing before the Disciplinary Council are not required to be legally qualified’. He further took into account the fact that Šešelj had not sought privileged communications with those lawyers. The President held that ‘[i]n these circumstances, the Registrar should reconsider its condition that in order to meet with Šešelj for this purpose, [the lawyers in question] meet certain qualifications normally required for legal counsel’.

Problems have also arisen in situations where no legal associates were designated to assist a self-representing accused. In Krajišnik, the self-representing accused complained to the Appeals Chamber about not being permitted direct contact with defence investigators. He claimed that ‘in order to be on equal footing with represented accused, he should “be allowed to contact all members of [his] Defence

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1160 Ibid.
1161 Ibid.
1162 Id., par. 8.
1163 Ibid.
1164 Id., par. 8, 11.
team directly\textsuperscript{1165}. He also complained that ‘standard methods of communication with investigators is not adequate because the mail takes a long time and because “other prisoners use the standard [telephone] line” which in any event is costly’\textsuperscript{1166}. The Registry responded by saying that access to those persons had not been denied. Krajišnik was permitted to ‘communicate with his investigators and others in “accordance with standard procedures” at the United Nations Detention Centre’\textsuperscript{1167}. Privileged access, however, \textit{had} been denied, since the Registry considered that this would ‘damage “the security and good order of the UNDU” as well as pose risks to “the integrity of the appellate proceedings”’\textsuperscript{1168}. Krajišnik had reportedly been offered privileged access to ‘up to three legal associates, provided that these individuals meet certain “minimum qualification requirements” that the Registry deem[ed] “fundamental and necessary to safeguard the integrity of the proceedings and the security, and good order of the UNDU”’\textsuperscript{1169}. The Registry also indicated that it had offered Krajišnik ‘access to a privileged telephone and fax line for communication with designated legal associates and the ability to exchange electronic documents with such associates’\textsuperscript{1170}. According to the Appeals Chamber, there was ‘no error in the Registry’s determination that Mr. Krajišnik may have privileged access to up to three designated legal associates (and presumably to team members who visit the accused in the company of these associates), but to no one else’\textsuperscript{1171}. It explained that, since ‘[p]rivilege stems from the attorney-client relationship, as indicated in Article 21(4)(b) of the Statute and as set forth in Rule 97 of the Rules, which provides that all “communications between lawyer and client shall be regarded as privileged”’\textsuperscript{1172}, ‘[w]here an accused has opted to self-represent instead of to have counsel represent him, the basis for the privilege is removed. Mr. Krajišnik accordingly has no entitlement to privileged communications’\textsuperscript{1173}. The Appeals Chamber concluded that ‘[s]ince the Registry has no obligation to provide him with privileged access to

\textsuperscript{1165} ICTY, Decision on Krajišnik Request and on Prosecution Motion, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-A, A. Ch., 11 September 2007, par. 4. Footnote omitted.

\textsuperscript{1166} \textit{Id.}, par. 19.

\textsuperscript{1167} \textit{Id.}, par. 14.

\textsuperscript{1168} \textit{Ibid.} Footnote omitted.

\textsuperscript{1169} \textit{Ibid.} Footnote omitted. At the time of the appeal, no such legal associates had been designated.

\textsuperscript{1170} \textit{Id.}, par. 18.

\textsuperscript{1171} \textit{Id.}, par. 33. Footnote omitted.

\textsuperscript{1172} \textit{Ibid.}

\textsuperscript{1173} \textit{Ibid.}
anyone, Mr. Krajišnik has no basis for objecting to the Registry’s willingness to provide him with privileged access to up to three designated legal associates’. \(^{1174}\) Nonetheless, it noted that the Registry had ‘authorized Mr. Krajišnik to have unlimited communications with any designated legal associates, and Mr. Krajišnik [could] contact all other persons (e.g., investigators) in accordance with standard procedures at the UNDU’. \(^{1175}\) The Chamber was of the opinion that these arrangements were reasonable if legal associates would have been designated, because ‘[i]n this situation, pursuant to the Registry’s approach a self-represented accused is limited only to the standard UNDU procedures for communication with the outside. If these procedures do not provide a self-represented accused with sufficient opportunity to exchange appropriate information with team members outside the UNDU during the preparation of his case, then this may amount to a lack of “adequate time and facilities for the preparation of his defence” in violation of Article 21(4)(b) of the Statute’. \(^{1177}\) It subsequently instructed the Registry ‘in the event that no legal associates are designated’, to ‘ensure that Mr. Krajišnik has adequate means of communicating with his defence team while he is preparing his appeal and his reply brief’. \(^{1178}\) The Appeals Chamber did not specify what such ‘adequate means’ entailed.

As to ‘Krajišnik’s specific request for 24-hour access to a telephone, scanner, fax, and photocopier’, the Chamber considered that ‘[w]hile in the absence of designated legal associates, some variation from standard UNDU procedures may be warranted to enable an accused adequate means of exchanging appropriate information with his

\(^{1174}\) Ibid. Footnote omitted.
\(^{1175}\) Id., par. 35.
\(^{1176}\) Ibid.
\(^{1177}\) Id., par. 36.
\(^{1178}\) Ibid.
defence team, [footnote omitted] 24-hour access to such means of communication goes far beyond what is necessary to ensure the provision of adequate facilities.'

Another complaint raised by Krajišnik concerned the fact that he, like the other detainees, could designate only one telephone number per designated legal associate on which he would be allowed to have privileged communications. He argued that ‘if there is just this one telephone number that I can call, and regardless of who I choose as my assistant, and if I choose a person -- a lawyer who is in court all day long, then I can only get in touch with that person in the evenings, when he's at that phone number’. He added that ‘I need to get in touch with that person wherever the person is whatever – or, rather, close to whatever telephone line that person is, wherever in Belgrade’ and ‘I should be allowed to make calls during the day to several numbers so that I can locate my advisers’. He further argued that making use of the regular telephone line was not an option since ‘[t]here are ten inmates on the floor. People are nervous. If I occupy the line for 15 to 20 minutes, they get nervous. First of all, I'm spending a lot of money, and there are people queuing up. And they tell me, "Why are you using this line, when you have the privileged one? I'm trying to talk to my family and you're just sitting on the phone." I tried to do that, and people were not forthcoming, but it was not fair from my side because I took their time away during which they should have been able to talk to their families’. Although the Presiding Judge was not convinced that Krajišnik was indeed in need of more than one phone line, he advised Krajišnik to submit a request to the Registrar if he really thought that one line was inadequate.

In Naletilić, the Defence requested ‘that the Defence investigator, Stipan Udiljak, be able to hold meetings with the accused, Mladen Naletilić, without being monitored by a member of the Detention Unit’s staff’. As the Appeals Chamber had done in Krajišnik, the President held that (i) ‘the privilege of confidential

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1179 Id., par. 46.
1181 Id., p. 126, lines 20-24.
1182 Id., p. 127, lines 8-11.
1183 Id., p. 130, lines 4-5.
1184 Id., p. 131, lines 10-16.
1186 ICTY, Order of the President on the Complaint of Defence Counsel for the Accused Naletilić, Prosecutor v. Naletilić and Martinović, Case No. IT-98-34, President, 5 June 2001.
communication applies only between Defence Counsel and client’; (ii) ‘pursuant to Rule 67 of the Rules of Detention, the privilege of confidentiality applies only to conversations between Defence Counsel and client and therefore does not apply to meetings between investigator and accused’; and (iii) ‘in accordance with Regulation 43 of the Regulations to Govern the Supervision of Visits to and Communications with Detainees, all visits including those by investigators must be conducted within the sight of the staff of the Detention Unit’.1187

In Šešelj, the self-representing accused filed an appeal with the President against a decision by the Registrar in which the latter allegedly denied a request by Šešelj ‘to have certain persons assigned to him as legal associates to assist in the conduct of his defence’.1188 The President noted that the Registry had not actually issued a decision on the matter, but had only invited Šešelj to ‘nominate up to three persons to serve as legal associates and to provide it with the information it requests in relation to them’, and had set out the requirements that must be fulfilled for the designation of legal associates.1189 The President cited the Registry as having stated that ‘its requirement that a legal associate satisfy the requirements of Rule 44 “reflects the responsibilities and entitlements of a legal associate to a self-represented accused”. A legal associate, while not granted a right of audience before the court, will be granted other entitlements of counsel, such as privileged access to the accused. Furthermore, the Registry claims that abuse of this entitlement may place into jeopardy the safety of the accused and other detainees in the United Nations Detention Unit (“UNDU”). Upon this basis, the Registry argues that it is reasonable to regulate the appointment of legal associates through Rule 44 and to “balance the Accused’s right to legal assistance, against the Tribunal’s obligation to ensure the safety of all persons detained at the UNDU and the security of the UNDU”.1190

In 2008, the Registrar in Šešelj decided to monitor the privileged communications of the detained accused with his legal associates. The latter had previously been designated by the Registrar as legal representatives. The Registrar claimed that Šešelj had used ‘his privileged communications for political

1187 Ibid.
1188 ICTY, Decision on Appeal Against the Decision of the Registry of 20 January 2006, Prosecutor v. Šešelj, Case No. IT-03-67-PT, President. 7 April 2006, par. 1.
1189 Id., par. 2.
1190 Id., par. 2. Emphasis added. Footnote omitted.
purposes’.\footnote{ICTY, Redacted Version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex” Filed on 27 November 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 1 December 2008, par. 14.} There were further indications that Šešelj had used the privileged phone line ‘to facilitate interference with or intimidation of witnesses’.\footnote{ICTY, Decision on Vojislav Šešelj’s Request for Review of Registrar’s Decision of 10 September 2009, Prosecutor v. Šešelj, Case No. IT-03-67-T, President, 21 October 2009, par. 6.} Šešelj complained about the matter to the Trial Chamber. The Trial Chamber stipulated that according to international and regional human rights instruments, the right of an accused to confidential communication with his counsel is part of the essence of the right to a fair trial. It further noted, on the basis of the legislation of a variety of national jurisdictions, that restrictions on this right are permitted, but only where this is ‘done under judicial supervision and in very limited cases’.\footnote{ICTY, Redacted Version of the “Decision on Monitoring the Privileged Communications of the Accused with Dissenting Opinion by Judge Harhoff in Annex” Filed on 27 November 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 1 December 2008, par. 22-25.} As to the status of the members of Šešelj’s defence team, the Trial Chamber held that ‘[i]he fact that [these members] who are entitled to a privileged status do not have the status of counsel for the Accused, because he is defending himself, and are thus not registered on the list of defence counsel authorised to appear before the Tribunal, should not lead to excluding the application of the fundamental principle of the confidentiality of communications between an accused and his counsel’.\footnote{Id., par. 26.} It noted, in this regard, that it had been the Registry that had ‘decided to apply the same standard to members of the Accused’s defence team who are entitled to a privileged status as that applied to defence counsel’.\footnote{Ibid. Emphasis in the original.} As a consequence, it assessed whether the reasons for monitoring the communications as relied upon by the Registrar complied with the criterion of ‘exceptionality’. While noting that the measures imposed by the Registrar were of an ‘indeterminate duration’, the Chamber was of the opinion that the measures would prevent Šešelj from ‘defending himself effectively in a delicate phase’ of the proceedings and would seriously infringe his right to a fair trial.\footnote{Id., par. 33.} It subsequently invited the Registrar to ‘draw all the necessary inferences from the Chamber’s conclusions’.\footnote{Id., par. 34.}
The Trial Chamber’s disposition was phrased in vague terms, which probably had something to do with the sensitive, competence-related issues surrounding the Chamber’s jurisdiction. The Registrar had argued that it was not the Trial Chamber but the President who was competent to deal with the matter. As a reaction to the Trial Chamber’s Decision, the Registrar made a submission to the Chamber on the same day that the Decision was rendered, in which he stated that, notwithstanding the vague formulation of its Disposition, he understood the Decision as expressing the wish that the monitoring be discontinued. He also indicated that he would seek the President’s instructions on the matter, in light of the President’s task of supervising the Registrar’s activities. In the meantime, he would permit privileged communications between Šešelj and the one legal associate in respect of whom the Registrar possessed no information that he had breached the confidentiality undertaking to be resumed on a temporary basis. As to the two other associates, in respect of whom the Registrar did have such adverse information, he submitted that privileged communications would not be allowed. However, the President found that he had ‘no authority to issue decisions that bind a Trial Chamber’ and held that the only avenue available to the Registrar was to appeal the Trial Chamber’s Decision to the Appeals Chamber. The Registrar did file such an appeal, which was granted by the Appeals Chamber for lack of jurisdiction on the part of the Trial Chamber.

The case was again brought before the President after a new request by Šešelj to a privileged visit by his legal associates was denied by the Registrar in respect of two of

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1198 See, in more detail, ICTY, Registry Submission Pursuant to Rule 33(B) Seeking the Direction from the President Regarding the Trial Chamber’s Decision of 27 November 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, President, 1 December 2008.
1199 ICTY, Registry Submission Pursuant to Rule 33(B) Regarding the Trial Chamber’s Decision on Monitoring of Vojislav Šešelj’s Communications, Prosecutor v. Šešelj, Case No. IT-03-67-T, T. Ch. III, 1 December 2008, par. 7-8.
1200 Id., par. 9.
1201 ICTY, Decision on Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President on the Trial Chamber’s Decision of 27 November 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, President, 17 December 2008, par. 9.
1202 See ICTY, Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, A. Ch., 17 February 2009.
1203 ICTY, Decision on the Registry Submission Pursuant to Rule 33(B) Following the President’s Decision of 17 December 2008, Prosecutor v. Šešelj, Case No. IT-03-67-T, A. Ch., 9 April 2009.
them.\textsuperscript{1204} In his submissions, while sketching the case’s background, the Registrar took note of the fact that both the privileged communications with and the acceptance of the lawyers concerned as legal associates in the first place had been granted to Šešelj ‘in an effort to accommodate the Accused in the context of his hunger strike’.\textsuperscript{1205} The Registrar reiterated that by allowing the privileged communications, he had only ‘\textit{de facto} extended the application of attorney-client privilege, which normally exists only between a client and his or her counsel, to cover defence-related communications between the Accused and persons who were not technically his defence attorneys’.\textsuperscript{1206}

In his Decision, the President noted as significant that the Registrar had not left Šešelj without any legal assistance, since he had granted the request for a privileged visit with another legal associate.\textsuperscript{1207} He concluded that the Registrar had ‘acted in an appropriate and restrained manner in suspending, pursuant to Rule 65(B) of the Rules of Detention, the Accused’s privileged communications with his legal associates (…) in order to safeguard the administration of justice’.\textsuperscript{1208} He explained that ‘[a] Registrar has a duty to act in order to prevent the intimidation of witnesses and the disclosure of confidential information. When [the Registrar] came into possession of information showing that his decision to allow privileged communications between the Accused and the above-mentioned legal associates was being abused, it was appropriate – even required – for him to counteract the detrimental interference with the administration of justice and prevent any interference with or intimidation of witnesses’.\textsuperscript{1209}

In 2010, Šešelj submitted another request, now to the Trial Chamber, to reinstate the two legal associates whose privileged status had been revoked in 2008, as

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\item \textsuperscript{1204} See, in more detail, ICTY, Professor Vojislav Šešelj’s Reply to the Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Submission No. 425, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 16 October 2009.
\item \textsuperscript{1205} ICTY, Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Submission No. 425, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 23 September 2009, par. 6. See, also, ICTY, Decision on Vojislav Šešelj’s Request for Review of Registrar’s Decision of 10 September 2009, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 21 October 2009, par. 2.
\item \textsuperscript{1206} ICTY, Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Submission No. 425, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 23 September 2009, par. 6.
\item \textsuperscript{1207} ICTY, Decision on Vojislav Šešelj’s Request for Review of Registrar’s Decision of 10 September 2009, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-T, President, 21 October 2009, par. 20.
\item \textsuperscript{1208} \textit{Id.}, par. 21.
\item \textsuperscript{1209} \textit{Id.}, par. 21.
\end{itemize}
\end{footnotesize}
his privileged associates. Šešelj argued that now the Trial Chamber would have jurisdiction to assess whether his rights had been violated and to reinstate the two legal associates. Although the Trial Chamber affirmed its competence to deal with the issue, it considered that the Registrar’s refusal had not violated Šešelj’s right to a fair trial.

**ICTR**

According to the ICTR Rules of Detention, a detainee must, upon admission, be given the opportunity to notify his defence counsel of his whereabouts. Furthermore, the right of detained persons to privileged communications with their defence counsel, ‘with the assistance of an interpreter where necessary’, is laid down in Rule 65. The right applies to both correspondence and other modes of communication. The costs incurred in such communications are borne by the detained person, unless counsel has been provided by the tribunal on the basis of the detainee’s indigence.

Rule 65 speaks not of ‘legal representative, but of ‘defence counsel’, which implies that in order for a detainee to be granted the right to privileged communications with a lawyer, such a person must be appointed counsel pursuant to Rule 44(A) and Rule 45bis of the RPE.

An earlier noted problem, which is worth recalling here, is that indigent persons, after termination of the criminal proceedings, no longer have defence counsel. According to the UNDF’s authorities,

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1210 ICTY, Decision on the Accused’s Oral Request to Reinstate Messrs. Zoran Krasic and Slavko Jerkovic as Privileged Associates, Prosecutor v. Šešelj, Case No. IT-03-67-T, Trial Chamber III, 10 February 2010, par. 1-3.
1211 Id., par. 8. This time Šešelj had exhausted the procedure before the Registrar and the President.
1212 Id., par. 16.
1213 Rule 10; Article 1 of the document ‘General information for Detainees’ (on file with the author).
1214 Rule 65.
1215 See ICTR, Decision on Hassan Ngeze’s Motions of 25 February 2008 and 6 and 19 March 2008, Ngeze v. the Prosecutor, Case No. ICTR-99-52-R, A. Ch., 11 April 2008, footnote 5. Rule 44(A) of the RPE stipulates that ‘Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of law’. Rule 45bis provides that ‘Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal’.

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‘the status of indigence is related to the trial. When the trial is over, the Tribunal no longer pays the lawyer. So after the appeal process before the tribunal, the mandate of the lawyer will end, except if the lawyer accepts to represent those individuals as pro bono counsel.’ 1216

Correspondence with counsel

Non-privileged mail is at all times subject to review by the Registrar. 1217 Mail addressed to or received from counsel may only be interfered with if ‘the Commanding Officer or the Registrar has reasonable grounds for believing that this facility is being abused in an attempt to arrange escape, interfere with or intimidate a witness or otherwise disturb the good order of the detention unit’. 1218 In such a situation, the Commanding Officer must forward the item of mail unopened to the Registrar and inform the detained person accordingly. The Registrar must then contact counsel for the detained person and request him or her to open the item in the Registrar’s presence. Thereupon, counsel ‘may be required to explain to the Registrar, in one of the working languages of the Tribunal, the nature of the item and to hand over any offending item or enclosure’. 1219

When asked about the privileged nature of correspondence of detainees with counsel, the UNDF detention authorities stated that

‘The rules are very clear on this. All correspondence between lawyer and client is privileged. So we are not allowed to read documents; we can just check whether there is nothing dangerous or prohibited inside before delivery to the addressee’. 1220

They further held that the opening of items of mail to or from counsel occurs in front of the detained person concerned.

1216 ICTR, interview conducted by the author with UNDF detention authorities, Arusha - Tanzania, May 2008.
1217 See Regulation 6 of the section of the Regulations entitled ‘correspondence’.
1218 See Regulation 11 of the section of the Regulations entitled ‘correspondence’.
1219 Ibid.
1220 ICTR, interviews conducted by the author with the UNDF detention authorities, Arusha - Tanzania, May 2008.
Telephone contact with counsel

The regime governing detainees’ telephone communications with counsel is quite strict. Although official calls may be made from Monday to Thursday from 9 a.m. to 5 p.m. and on Fridays from 9 a.m. to 2 p.m., their duration, whether in-coming and out-going, is set at a maximum of 15 minutes. Out-going calls are only permitted once per week and are subject to prior approval by the Commanding Officer. The monitoring regime set out in Regulation 6 of the Regulations is not applicable to telephone conversations with counsel.1222

It is unclear whether the right to telephone contact with counsel also applies to convicted persons in connection to (the preparation of) review proceedings or prison issues. It is noted, in this regard, that in 2008 and ‘for the purpose of contacting his legal assistants, lawyer and [pro bono] Counsel’, Ngeze sought the Appeals Chamber’s ‘authorization to make telephone calls at the Tribunal’s expense or, in the alternative to purchase a mobile phone and make telephone calls at his own expense and in the presence of UNDF staff’.1223 The Appeals Chamber dismissed the motion without deciding on its merits, since Ngeze had not exhausted the formal complaints procedure.1224

According to Chief Taku, defence counsel at both the SCSL and the ICTR,

‘Things are much easier at the Special Court. I can phone my client at any time and for as long as I want. I cannot do that here. If I phone, they will not let me talk to my client. Now, of these two detention centres, the one in Sierra Leone follows international norms scrupulously in respect of any right of the accused. The detention centres are both run by the UN, but in Sierra Leone the rules are correctly applied. Here, as lead-counsel, I cannot even call my client at this moment while, on paper, he has the right to adequate time and facilities to prepare his trial. In the weekends, I am

1221 The document ‘Note to all Security Officers & Detainees’, which sets out the telephone regime at the UNDF, distinguishes between, on the one hand, personal calls by or to family members, relatives and investigators and, on the other, official calls by or to defence counsel, co-counsel and assistants.
1222 See Regulation 7 of the section of the Regulations entitled ‘telephone calls’.
1224 Ibid.
permitted to visit my client on Saturday mornings, but I cannot phone him in weekends. If I’m not in Tanzania and need to talk to my client in the weekends I cannot phone him. (…) Also, at the SCSL, I can stay with my client for a much longer period, I think until 9 p.m. Here, the Tribunal closes at 5.30 p.m. so the lawyers must start leaving at 5’.\textsuperscript{1225}

Visits by counsel

The Registrar automatically issues each counsel who is entered on the record or assigned by the tribunal with a ‘written permit for unlimited visits’. Prior to an accused detainee’s first appearance, the Registrar may issue permits to counsel for individual visits on the basis of an individual request thereto by the detained person.\textsuperscript{1226} This means that counsel are not bound by the general rule governing non-privileged visits, according to which visitors must seek the Registrar’s permission to visit a particular detainee prior to a visit. Hence, the requirement pursuant to Rule 65 that ‘arrangements’ must be made by counsel with the Commanding Officer prior to a visit to the UNDF must be distinguished from the requirement to ask permission. Such prior arrangements with the Commanding Officer concern ‘the time and duration of the visit’. It is provided that the Commanding Officer may not refuse a request for such a visit ‘without reasonable grounds’. Such reasonable grounds should, arguably, lie in the rationale for the ‘prior arrangements’ requirement, \textit{i.e.} ‘[d]ue to the fact that the number of Defence Counsels wishing to visit the Facility (…) increase[ed] and that there is only limited space, an appointment schedule [was] devised to accommodate the visits of Defence Counsels. The Commanding Officer of the Detention Facility retains the right to refuse a meeting on the grounds that there is insufficient space available’.\textsuperscript{1227} The ‘prior arrangements’ must be made at least 6 hours before the planned visit.\textsuperscript{1228} Counsel are even advised to inform the UNDF’s Duty officer when they are about to leave town – Arusha –, ‘in order that

\textsuperscript{1225} ICTR, interview conducted by the author with Chief Taku, defence counsel working before both the SCSL and the ICTR, Arusha - Tanzania, May 2008.
\textsuperscript{1226} Regulation 3.
\textsuperscript{1227} Article 1 of ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’(on file with the author).
\textsuperscript{1228} \textit{Id.}, Article 2.
arrangements can be made to give them access to the Centre’. 1229 It is stipulated that transport to and from the UNDF are counsel’s own responsibility. 1230 It was seen earlier that the Commanding Officer has set fixed hours for visits by persons other than counsel. 1231 Counsel may visit his or her client from Monday through Thursday from 9 a.m. to 5 p.m. and on Fridays from 9 a.m. to 1.30 p.m. Counsel may further wish to visit his or her client on Saturdays between 9 a.m. and 12.30 p.m. Visits may also be allowed outside of these hours, but must be specifically requested to the Commanding Officer, who may grant such requests ‘at his sole discretion’, provided that a valid reason is given. 1232 Such permission may also be given by the Registrar, President or by way of a tribunal’s order.

Rule 65 stresses that visits by counsel are subject to the same security requirements as those imposed pursuant to Rule 61. As mentioned previously, Rule 61(ii) of the ICTR Rules of Detention obliges all visitors, including defence counsel, to comply with the security requirements of the host prison, including personal searches of clothing and X-ray examination of possessions upon entry. 1233 Regulation 11 provides, in this regard, that such security checks shall not extend to the reading or copying of documents held by counsel. It if further stipulated that ‘the compound in which the Detention Facility is located is the property of the host Government. It is considered a high security area and therefore photography or sketching is strictly prohibited. Any such behaviour which might cause offence should be avoided’. 1234

In 2007, the Ndayambaje Defence requested the Trial Chamber, inter alia, ‘to order that they have permission to enter the UNDF with two laptops’, submitting that ‘in early December, Ndayambaje’s Defence Counsel were refused entry to the United Nations Detention Facility (“UNDF”) with both their laptops, on the basis of the Interoffice Memorandum of 11 February 2005 limiting counsel to one laptop per team

1229 Id., Article 3.
1230 Id., Article 5.
1231 See Regulation 1 of the Part of the Regulations entitled ‘Visits’.
1232 See Regulation 2 of the Part of the Regulations entitled ‘Visits’; Article 1 of ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’.
1233 Regulation 10.
1234 Article 6 of ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’.

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at the UNDF’. 1235 It argued, in this respect, that the UNDF’s position violated the accused’s right to adequately prepare his defence.1236 According to the Defence, communications within the tribunal were increasingly in electronic form ‘with the result that the Defence uses almost no paper documents’.1237 It further stated that ‘it is counterproductive to have two Defence counsel visit the Accused when only one has access to a laptop given the complex and extensive nature of the case as it leads to inefficiency and duplication’.1238 The Registrar explained that the rationale underlying the Memorandum was that the privilege of entering the UNDF with laptops had been abused, in that unauthorised devices allowing communication with the outside world had been brought in.1239 It further argued that ‘the increasing number of laptops made it difficult for the UNDF staff to undertake screening’.1240 The Trial Chamber dismissed the motion without ruling on the merits, since the formal complaints procedure had not been exhausted.1241

In a motion filed by the Ntahobali Defence in 2006, it requested the Trial Chamber to ‘facilitate its access to the Accused at the UNDF’. 1242 It complained that on a Sunday, when visiting his client at the UNDF, counsel had at first been denied access. Later, he was granted access, but only until 1 p.m. The Defence then met with the Detention Management Section of the Registry, who granted the Defence access to the UNDF ‘every evening and week-end for the duration of presentation of its case’.1243 The UNDF authorities reportedly acted upon the agreement between the Registry and the Defence by allowing the latter access until 6.30 or 6.15 p.m.1244 In this regard, the Defence complained that the defence of another accused detainee had been given more access to its client when it was presenting its defence.1245 The

1236 Id., par. 12.
1237 Id., par. 15.
1238 Id., par. 18.
1239 Id., par. 22.
1240 Ibid.
1241 Id., par. 40-49.
1243 Id., par. 5.
1244 Ibid.
1245 Id., par. 6.
Registrar stated that ‘the Commanding Officer of the UNDF consents to provide the Defence Team of Ntahobali with exceptional access to the Detention Facilities depending on staffing and security issues. Until the end of the Accused’s testimony, visits to the Accused outside of normal visiting hours (...) are allowed. Sunday visits cannot be allowed due to lack of staff. Any requests for visits outside the prescribed time frames should be made at least 24 hours prior to such visit’. It subsequently stressed that the Ntahobali Defence had been ‘given the same facilities to access its client as other teams’. The Trial Chamber dismissed the motion without ruling on the merits, since the Defence had not exhausted the formal complaints procedure.

Further, a relevant remark was made by the Registrar in the Barayagwiza Appeal, where he submitted that ‘mindful of the fact that the Appellant is not represented by the same Defence team as at trial, [he] has already allowed frequent visits of the Appellant’s Lead Counsel, Co-Counsel and Legal Assistant to the UNDF’. Conversations between counsel and detained persons during visits must be conducted ‘in the sight but not within the hearing, either direct or indirect, of the staff of the Detention Unit’. Counsel may only have contact with his own client and not with other detainees, unless specifically authorised by the Registrar or the Commanding Officer. It is provided, in this respect, that ‘[a]ny efforts to liaise with detainees other than their assigned clients will be reported to the Registrar and visits may be terminated if the counsel persists in attempting to speak to detainees other than his assigned client’.

Unlike other visitors, counsel are permitted to pass papers to their client during visits. Regulation 13 provides in relevant part that ‘[a]ny quantity of documents which is too large to be physically passed over by counsel to the detainee at the visiting facility shall be handed to the Commanding Officer who shall pass them unopened and unread to the detainee’. It is further provided that ‘[a]ll documents passed to the detainee by Counsel, during the visit,

1246 Id., par. 11.
1247 Id., par. 12.
1248 Id., par. 15-19.
1249 ICTR, Decision on Jean-Bosco Barayagwiza’s Urgent Motion Requesting Privileged Access to the Appellant without Attendance of Lead Counsel, Nahimana et al. v. the Prosecutor, Case No. ICTR-99-52-A, A. Ch., 17 August 2006.
1250 Rule 65.
1251 See Article 12 of ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’.
1252 Regulations 12, 13.
must be related directly to the detainee’s case before the Tribunal. Any other unrelated items (e.g., food, money, electronic equipment, personal toiletries, etc) must be handed to the Detention Facility Duty Security Officer for censoring. Any documents not directly related to the detainee’s case will be treated as mail under the (...) Rules of Detention. After censoring the items will then be passed to the detainee’. In 2008, Ngeze submitted a motion to the Appeals Chamber in which he alleged that staff members of the UNDF had confiscated ‘documents that he had provided to his counsel during working sessions in preparation of a motion for review’. The Appeals Chamber dismissed the motion without ruling on its merits, since Ngeze had not exhausted the formal complaints procedure.

The Commanding officer may terminate a visit if he ‘believes that he has reasonable grounds for intervention, or that these Regulations are being breached’. He must then advise both counsel and the detainee as to the reasons for doing so and must report the matter to the Registrar. Counsel may then be summoned to leave the UNDF.

It follows from Regulation 16 that the general recording and monitoring regime of conversations between visitors and UNDF detainees under Regulation 15 is not applicable to visits by counsel. Nevertheless, Article 11 of the ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’ provides that ‘visits by Defence Counsel to their clients shall not be monitored by the Detention Facility, unless the Commanding Officer has reasonable grounds for believing that the detainee may be attempting to arrange escape, interfere with or intimidate a witness or otherwise disturb the maintenance of good order in the

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1253 See Article 10 of ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’.
1255 Ibid.
1256 Regulation 14.
1257 Ibid.
1258 Regulation 16 provides, as far as relevant, that, in the situations mentioned in Regulation 15, ‘the Registrar may, at the request of the Commanding Officer or otherwise, order that all visits to that detainee, other than by counsel, be recorded for a period not exceeding seven days’. Emphasis added.
Detention Unit’. Article 11 refers to Regulation 15 as its legal basis. This is clearly incorrect, for which reason Article 11 must be considered legally void.1259

Defence investigators and legal assistants

‘When I’m back to Canada – the authorities won’t let my legal assistants in to see the prisoners without a lawyer present. That is a waste of resources. Legal assistants and investigators usually stay in Arusha area or close by. They would have more easily access to the client, but they are refused entrance to UNDF’.1260

‘At the UNDF the authorities have at times been very difficult in respect to visits by counsel or members of the defence team. In the absence of counsel and co-counsel, it is very difficult for a member of the defence team to visit a client at the UNDF. The UNDF will not allow a legal assistant or investigator to visit a client on his own. This may be in accordance with the rules on the matter, but I think this inhibits the accused’s right to free and unfettered access to his defence. The defence team does not only consist of the counsel, but also of other members of the defence team. That for me is difficult to understand’.1261

Two specific but related issues that have been raised by ICTR accused are the need to receive visits from defence investigators and defence assistants at the UNDF, and the need for privileged communications with those persons during visits.

With respect to the former issue, in 1997, the Rutaganda defence submitted a request to the Trial Chamber for Rutaganda to be permitted to receive visits in the UNDF from his defence team’s investigator.1262 The latter had been ‘denied access at several occasions by the Commanding Officer to the premises of the Tribunal’s Detention

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1259 Furthermore, it is explicitly provided in the relevant legal provisions that ‘Defence Counsel are reminded that the Detention Facility provides meals to detainees only, therefore those who plan to spend the day with their client at the Detention Facility should bring their own lunch’; see Article 14 of ‘Note to lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’. Emphasis in the original.
1260 ICTR, interview conducted by the author with Christopher Black, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
1261 ICTR, interview conducted by the author with Chief Taku, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
1262 ICTR, Decision on the Defence’s Motion Requesting Permission for Its Investigator to Visit the Accused in the Detention Facilities, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, T. Ch. I, 11 June 1997.
Facilities for lack of any documentations of his employment issued by the Tribunal’.1263 The Trial Chamber noted that ‘only visits to the detainees by their Defence Counsels and by representatives of the Prosecutor can be rendered without any restriction or supervision’ and that ‘in contrast, all other visits to a detainee by his “families, friends and others” would have to be granted in each case and monitored by the Commanding officer according to Rule 61 of the Rules of Detention, subject to the standard restrictions and measures of supervision imposed by the Commanding Officer after consultation with the Registrar’.1264 It also considered that, in respect of non-privileged persons, the Commanding Officer ‘keeps a record of the identity of those family members, friends and others who may request permission to visit each accused, to the effect that persons whose names do not appear on this list will have to be scrutinized by the Commanding Officer before any decision is taken on whether or not they can be granted the visit’.1265 It concluded that ‘all visits rendered by a private investigator to the accused without being accompanied by the Defence Counsel shall be granted by the Commanding Officer upon documentation issued by the Registrar confirming the proper engagement as an investigator by the Defence, and subject to the restrictions and measures of supervision normally applied to visits of “others” within the meaning of Rule 61 of the Rules of Detention’.1266 For that reason, it granted the Defence’s request for its investigator to meet with Rutaganda in the UNDF, upon producing the documentation mentioned, and subject to the usual restrictions and measures of supervision applicable to non-privileged visits.1267

This requirement of official documentation issued by the Registrar confirming the proper engagement as an investigator by the defence has also found its way into

1263 Ibid.
1264 Ibid.
1265 Ibid.
1266 Ibid. The Defence in Ntabakuze noted that the Rutaganda Decision did not relate to its situation, since that Decision was rendered under a different regime whereby ‘investigators [were] hired under the Tribunal’s authority and paid by the Registrar’. At the time of the Ntabakuze Decision in 2002, ‘investigators and legal assistants [were] members of the Defence teams, under the authority of the Tribunal’ and, according to the Defence, ought therefore to ‘be treated (...) not merely as private investigators’; ICTR, Urgent Motion by Ntabakuze’s Defence Seeking an order for the Registrar to Lift Some of the Measures Restricting Access by Defence Investigators to the Detention Facility, Prosecutor v. Bagosora, Kabiliyi, Ntabakuze and Nsengiyumva, Case No. ICTR-99-41-I, T. Ch. III, 30 April 2002, par. 19.
1267 ICTR, Decision on the Defence’s Motion Requesting Permission for Its Investigator to Visit the Accused in the Detention Facilities, Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, T. Ch. I, 11 June 1997.
the legal framework governing visits by counsel. Article 4 of the ‘Note to Lawyers Regarding Legal Visits to Detainees at the United Nations Detention Facility’ provides that ‘Defence Counsel are not permitted to conduct a meeting with their client in the presence of any other person unless they are officially authorized to do so by the Office of the Registrar of the Tribunal’.

As to the issue of privileged communications during visits, in the ICTR’s practice, investigators employed by the defence ‘can only meet with the accused without any restrictions or measures of supervision imposed by the Commanding Officer if he is accompanied by the Defence Counsel in person’.1268 The underlying rationale is that ‘it is far from clear that the Registry can or should repose the same degree of trust in the Investigators [as in Counsel]. They are not members of a profession which can regulate their behaviour or sanction it if necessary’.1269 With regard to correspondence, this implies that ‘transmission of any item to the Accused, including privileged correspondence from Counsel, is to be carried out by the Registry, following the applicable procedure in this respect. Transmission of any item directly to the Accused is only allowed when Counsel in person brings such items’.1270 This, of course, does not imply that in such a situation communications between counsel and client are no longer confidential.1271 It does mean, however, that persons other than counsel are not permitted to pass such correspondence directly to the accused detainee.

In Mugiraneza, the detained accused submitted that ‘Defence Investigators should be granted the same privileges as Defence Counsel in regard to visits to the Accused at the United Nations Detention Facility’, more specifically, that they should be authorised to personally hand over communications from Counsel to Accused and that the ‘contents of such privileged correspondence should never be inspected by the UNDF Security Officers, including when brought in by the Investigators’.1272 The incident complained about concerned a visit by a Defence investigator who was

1268 Ibid.
1269 ICTR, Decision on the Defence Urgent Motion for Relief under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice, Prosecutor v. Mugiraneza et al., Case No. ICTR-99-50-T, T. Ch. II, 19 September 2001, par. 9.
1270 Id., par. 6.
1271 Id., par. 7.
1272 Id., par. 2.
searched and ‘subsequently forbidden to take into UNDF a computer diskette containing confidential information related to the Accused’s case’. The Trial Chamber reiterated that the ‘right to communicate freely and confidentially with Counsel is a fundamental right with respect to the preparation of an accused’s defence and the fairness of the proceedings before the Tribunal, notably pursuant to Articles 19 and 20 of the Statute’. It stressed, in this respect, that the contents of privileged correspondence and communications may not be inspected or retained by the Security Officers. However, it noted that the language of Rule 65 is ‘self-explanatory’ where it ‘does not entitle a detainee to communicate fully and without restraint with any other person than his Defence Counsel, including, for that matter, with a Defence Investigator’. In respect of the Defence’s request for the investigator to be entitled to pass confidential documents to the detained accused, the Trial Chamber stipulated that for communications and correspondence from counsel to detainees to be treated as privileged, which means that contents shall neither be examined nor censored, two conditions need to be fulfilled: (i) the correspondence should be clearly identified as emanating from counsel; and (ii) the correspondence should be secured in such a way as to prevent persons other that the detainee from seeing the contents of the communication or correspondence. It subsequently held that the content of all communication or correspondence brought into the UNDF by other persons than Defence Counsel that does not fulfill these conditions, may be inspected by the Security Officers. As to the incident complained about by the Defence, the Trial Chamber found that, since the investigator was not accompanied by counsel and since it had not been sufficiently indicated on the diskettes that the information it contained was correspondence from detainee to counsel (they were not marked in any way), the Security Officers had acted lawfully by searching the investigator and by asking him ‘to leave the diskette at the Security Desk “for subsequent handling over to the detainee Prosper Mugiraneza, following censorship” (…) “with a view to [the

1273 Id., par. 15.
1274 Id., par. 8.
1275 Ibid.
1276 Id., par. 10. Emphasis in the original.
1277 Id., par. 12.
1278 Id., par. 13.
Commanding Officer’s] checking whether the contents were materials relating to the detainee’s defence”’.

In 2002, the Ngeze Defence submitted a motion to the Trial Chamber in which it requested permission for a Defence investigator and assistant to visit Ngeze in the UNDF. The Trial Chamber reiterated that, since Rule 65 only refers to counsel and not to assistants or investigators, the latter two ‘do not have the same rights and privileges as Counsel’.

Since it appears that the defence had only requested access to the accused detainee by the said persons – it did not request privileged access –, the Trial Chamber’s Decision is not comprehensible in light of the aforementioned Decision in the Rutaganda case.

Another complaint raised by the Ngeze Defence in the same motion concerned the interception of a package from Ngeze addressed to his counsel. The UNDF staff member who had intercepted the package had proposed to carry out the inspection in the presence of counsel. The Registrar, in his submissions, had indicated that he had ‘reasonable belief’ that the contents of the package might be in violation of the relevant rules. In a letter previously sent to the Registrar, Ngeze had threatened to send a large number of letters at the Registry’s expense but outside the latter’s knowledge. This was accepted by the Trial Chamber as sufficient basis for the Registry’s ‘reasonable belief’. Moreover, according to the Trial Chamber, since the said letter had disclosed the content of the package, the lawyer-client privilege was thereby waived.

In April that year, the Ntabakuze Defence submitted a motion to the Trial Chamber in which it ‘challenge[d] the Registry’s administrative policy restricting access of Defence team’s legal assistants and investigators to the United Nations

1279 Id., par. 16-20.
1281 Ibid.
1282 Ibid.
1283 This was based on Article 8(2)(b) of the Code of Professional Conduct for Defence Counsel, which stipulates that the lawyer-client privilege is affected ‘[w]hen the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure’; ibid.
Detention Facility (the “UNDF”). It was particularly concerned with the memorandum dated 26 March 2002 from the Chief of Lawyers and Detention Management Section ["Section"] to all Defence Counsel, advising them that visits to the detainees outside of the presence of lead counsel or co-counsel by defence team members are considered “private” in nature pursuant to Rule 61(i) of [the Rules of Detention] and therefore are not accorded the privilege of confidentiality pursuant to Rule 65. The memorandum stated that (i) “Visits of Defence team members to the accused person[s] in the absence of the Lead Counsel or the co-Counsel are considered as private visits” (emphasis added); (ii) “The privilege of confidentiality is only granted to Counsel as per Article 65 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal”; (iii) “[A]s a consequence and in normal circumstances, visits of assistants and investigators to accused persons in the absence of Counsel are considered as private visits falling within the ambit of Article 61 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal”; and (iv) “They will be granted by the administration of UNDF under such restrictions and supervision as the Commanding Officer may deem necessary.”

The Section had applied various restrictive measures and other security controls to visits by unaccompanied investigators and legal assistants. According to the Defence, “[p]ursuant to the said measures, a Defence investigator or legal assistant is sometimes allowed access to the Detention Facility upon presentation of their approved work plan without being accompanied by the Lead Counsel or co-Counsel, in which case the visit is considered as “private” (not privileged) (...); sometimes, in addition to a working plan, the investigator is required to be accompanied by Counsel in order to be allowed access to the Detention Facility, in which case the visit is not considered as “private” (...). Moreover, there have been instances when investigators have been refused access to the Detention Facility for

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1285 Id., par. 1.
failure to produce a duly approved work plan, despite being accompanied by counsel'. The reason invoked by the Registrar for such measures were abuses ‘by members of some Defence teams, who visited detainees at the Detention Facility and exchanged documents with them, without written authorization from Counsel’. The Ntabakuze Defence, however, suggested that a simple solution for this problem might have been the requirement that ‘investigators furnish a written authorization from Counsel when going to work with an accused and exchange documents with him’. The requirement of work plans approved by the Registrar had, according to the Defence, resulted in delays which, in turn, resulted in curtailments. The basic argument of the Defence, however, was that ‘[g]iven the distance between the seat of the Tribunal and Counsel’s law offices, as well as the limited number of work plans requiring Counsel to be present at Arusha, [investigators and assistants] constitute the channel through which Counsel communicate with their client, submit draft briefs and motions on the defence strategy, obtain the client’s feedback and instructions on how to pursue investigations, transmit their views and information regarding the case and, in brief, build and organize the defence’. In this respect, the Defence noted that ‘[u]nder the new policy, Counsel would have to be present at Arusha in order to safeguard the confidentiality of contacts between the Investigator and the Accused. That is impossible. First, Counsel have other obligations in their respective countries, and secondly, the Registrar approves only a limited number of work plans for Counsel. Moreover, there is a greater need for meetings or contact between the Accused and the investigator (or legal assistant) when Counsel is away from Arusha’. It was further argued that ‘[f]or ethical reasons, Counsel refrain de facto from discussing confidential matters on the telephone; the investigator and the legal assistant serve as a link between the Counsel and the Accused’. According to the Defence, it was essential for the preparation of its case that its investigator and legal

1289 Id., par. 27.
1290 Ibid.
1291 Id., par. 7.
1292 Id., par. 8.
1293 Id., par. 9.
1294 Id., par. 8.
assistant would have free access to the UNDF and to Ntabakuze.\(^\text{1295}\) The non-privileged nature of such visits, if allowed, had, according to the Defence, resulted in them becoming ‘risky and of little use’, since ‘nothing of significance can be said or exchanged there. They are simply a humanitarian gesture’.\(^\text{1296}\) Finally, it was argued by the Defence that, in Common Law countries, the lawyer-client privilege ‘extends to his employees or associates, including investigators and legal assistants’, and that this should likewise be the case at the ICTR.\(^\text{1297}\) Although the Registry reiterated that ‘investigators and legal assistants are not considered to be counsel and therefore cannot have the same privileged and confidential rights of communication with the Accused’ it conceded that ‘in exceptional circumstances, it is possible that confidential visits may be permitted between the Accused and an unaccompanied investigator or legal assistant’.\(^\text{1298}\) The Trial Chamber itself did not decide on the merits, as it found that the formal complaints procedure laid down in the Rules of Detention had not been exhausted.\(^\text{1299}\) Nonetheless, the Registrar’s statement is remarkable in that it appears to offer an opening that was not provided in Mugiraneza.

The Bizimungu Defence submitted a similar motion to the Trial Chamber in May 2002.\(^\text{1300}\) It complained that the UNDF authorities had denied the team’s investigator a work visit with Bizimungu, instead allowing for a non-privileged visit.\(^\text{1301}\) It stated, \textit{inter alia}, that ‘preventing members of the Defence team from


\(^{1297}\) \textit{Id.}, par. 23, 34.


\(^{1299}\) \textit{Id.}, par. 5.


conducting privileged meetings with the Accused: a. Violates the Accused’s rights to “adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her choosing”, pursuant to Article 20 of the Statute; b. Violates the Accused’s right to privileged communication with Defence Counsel pursuant to Rule 65 of the Rules of Detention; c. Is contrary to purpose and objective of the Rules of Detention; d. makes it impossible for Defence Counsel to fulfill her duty of representing the Accused “at reasonable cost”; (…). 1302 It further argued that investigators should be granted the same privileges as Counsel under Rule 65, since ‘investigators and assistants work under the supervision of Counsel, that Counsel is answerable for the acts of Defence team members and that Defence Counsel can be sanctioned for the improper action of an investigator by the bar and the Tribunal’.1303 As to the costs implications, the Defence held that ‘in order to discharge [his] obligation Counsel must delegate tasks to assistants, including investigators’.1304 The Registrar again submitted that ‘the current policy is necessary to “limit the potential for members of the Defence teams to meet and exchange communications with the Accused without the express permission or even knowledge of Counsel”’.1305 The Registrar also reiterated that ‘the Tribunal’s practice allows for communication between the Defence team and an accused to benefit from privilege in “certain very exceptional circumstances” the existence of which the Defence must demonstrate’.1306 As to the regime governing correspondence, it was noted by the Registrar that ‘the confidentiality of documentation and materials sent to an accused detainee by counsel will be respected if clearly marked’.1307 Notwithstanding the fact that, again, the formal complaints procedure had not been exhausted by the complainant, this time, the Trial Chamber did rule on the merits. It stipulated that ‘both the lead Counsel and the co-Counsel have a duty to be available whenever they are needed to enable them to represent the Accused pursuant to Rule 45ter of the Rules’.1308 It outlined the regime applicable to visits by assistants and investigators by

1302 Id., par. 2.
1303 Id., par. 3.
1304 Id., par. 8.
1305 Id., par. 17.
1306 Id., par. 19.
1307 Id., par. 20.
1308 Id., par. 26. Rule 45ter of the RPE provides that ‘(A) Counsel and Co-Counsel, whether assigned by the Registrar or appointed by the client for the purposes of proceedings before the
holding that communications between a detained person and an investigator are not privileged and that ‘[n]either the fact of an investigator’s appointment by the Registry nor the obligation of Lead Counsel to supervise the work of the Defence team has bearing on the applicability of this privilege’. ¹³⁰⁹ It further noted that ‘Defence investigators and assistants may visit a detainee in the presence of Counsel and that such visits will be covered by the confidentiality provisions of Rule 65 of the Rules of Detention. Legal assistants and investigators can also meet an accused outside the presence of Counsel subject to the requirements set forth by the UNDF, which fall under the administrative authority of the Registry. Furthermore, Regulation 11 of the Regulations protects the confidentiality of “[c]orrespondence addressed to or from Counsel” for the detainee’. ¹³¹⁰ The Trial Chamber also took specific note of the Registrar’s submissions that “in certain very exceptional circumstances [when] counsel and co-Counsel are unavoidably absent from Arusha, yet need to be able to communicate with the Accused on a confidential basis for the continued preparation of the Defence”, the Registrar will allow for visits by non-Counsel members of the Defence team’. ¹³¹¹ In this respect, the Chamber found that it is ‘in the interests of justice (…) to authorise meetings between an accused and members of the Defence team where inter alia, Defence Counsel can demonstrate that he cannot access his client for an essential purpose without an unreasonable delay or expenditure of funds’. ¹³¹² The Trial Chamber’s formulation – in particular the term ‘inter alia’ – appears to leave more room for exceptions than the Registrar’s formulation.

In November of that year, the Nyiramasuhuko Defence complained to the Trial Chamber about ‘a problem of access to the UNDF for the investigators and the assistants working with the defence teams as the current rules require that they be
accompanied by counsel when meeting with their client’.\footnote{ICTR, Decision on the Defence Motion for Access for Investigators and Assistants to the Accused in the Absence of Counsel, \textit{Prosecutor v. Nyiramasuhuko et al.}, Case No. ICTR-97-21-T (Case No. ICTR-98-42-T), T. Ch. II, 20 November 2002, par. 1.} The Defence argued that ‘this practice raises problems of availability of counsel for the preparation of the case as well as budgetary issues of paying for two people to be present when, for instance, a conversation is taking place between the investigator and the client in Kinyarwanda, a language that counsel does not understand’.\footnote{\textit{Id.}, par. 2.} Counsel for five other detained accused supported the motion. One of them added that ‘if assistants and investigators were to be granted such access, they should be allowed to bring along their working equipment, such as computers’.\footnote{\textit{Id.}, par. 5.} In its submissions on the matter, the Registry argued that ‘in the past [\textit{i.e.}, before the letter and the memorandum of 26 March 2002] there had been some leniency in allowing investigators and assistants access to the accused to facilitate the tasks of the Defence. However due to abuses of the judicial assistance programme, the Registry had returned to a strict application of the Rules’.\footnote{\textit{Id.}, par. 7.} Nevertheless, it reiterated that ‘when clear circumstances were submitted by counsel, in specific cases, such strict provisions could be set aside if necessary’.\footnote{\textit{Id.}, par. 8.} The Trial Chamber, deciding on the merits, pointed to its findings in the case-law cited above and, on that basis, dismissed the motion.\footnote{\textit{Id.}, par. 9-13.}

In 2005, the Defence in \textit{Nahimana} requested the Appeals Chamber to ‘authorize the Appellant’s legal assistants to meet him confidentially in the absence of Counsel’.\footnote{ICTR, Decision on Appellant Ferdinand Nahimana’s Motion for Assistance from the Registrar in the Appeals Phase, \textit{Nahimana, Barayagwiza and Ngeze v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 3 May 2005.} However, the Appeals Chamber noted that the formal complaints procedure had not been exhausted and, therefore, dismissed the motion in this respect.\footnote{\textit{Id.}, par. 6-7.} For the same reasons, a motion submitted to the Appeals Chamber by the \textit{Barayagwiza} Defence in 2006 in which it requested to grant its legal assistant privileged access to Barayagwiza in the UNDF was dismissed.\footnote{ICTR, Decision on Jean-Bosco Barayagwiza’s Urgent Motion Requesting Privileged Access to the Appellant without Attendance of Lead Counsel, \textit{Nahimana et al. v. the Prosecutor}, Case No. ICTR-99-52-A, A. Ch., 17 August 2006.}
the same reasons, was Ngeze’s motion of 2008 in which he requested ‘privileged access to the UNDF and “professional communication” with him for two legal assistants and one lawyer who would assist Mr. Dev Nath Kapoor, acting as pro bono Counsel (“Counsel”), in the preparation of a motion for review of the Appeal Judgement (…) and in connection with matters relevant to his detention’.1322

The ICTR’s reluctance in allowing investigators to visit the UNDF detainees, may lie in the reported instances of abuse concerning the employment of family members of detainees as investigators. During the ICC seminar on family visits, it was ‘pointed out that failure to fund family visits may have adverse effects, leading certain accused persons to resort to ploys or to take advantage of other procedural devices’.1323 In this regard, it was said that, at the ad hoc tribunals, certain accused persons had ‘employed family members as investigators on their defence team, or called close relatives or friends as witnesses’.1324 It was further reported that ‘as a result of special agreements between the ICTR and certain States’, this situation ‘has enabled detained persons to bring to Tanzania family members who were themselves in an irregular situation in their host country’.1325

According to Temminck Tuinstra, the ICTR’s disinclination to allow investigators privileged access to detained accused may even have something to do with the majority of the investigators being Hutu’s and with uncorroborated allegations that one investigator would have participated in the atrocities.1326

SCSL

Rule 44(A) of the SCSL Rules of Detention provides that ‘[e]ach Detainee shall be entitled to receive visits from his Counsel and Legal Assistant and to communicate fully and without restraint by letter or telephone with his Counsel and Legal Assistant,

1324 Ibid.
1325 Ibid.
1326 Jarinde P.W. Temminck Tuinstra, supra, footnote 1011, p. 70.
with the assistance of an interpreter where necessary'. It further provides that ‘[a]ll such communications shall be privileged, unless otherwise ordered by a Judge or a Chamber’. Detained persons have their own mobile telephones, which may be used to receive and make telephone calls to both counsel and non-privileged persons. Regarding phone calls to and from counsel, it is provided that these are free from charge. If the detained person wishes to call his counsel, he needs to call an operator who will dial the number and, once connected, is obliged to hang up the phone. The detained person may also directly make a call to one registered speed dial number, as allocated to each defence team. If counsel wants to speak to his client over the phone, he may directly call the operator and mention a code word by which the operator can identify the legal office that counsel represents. The operator will then connect counsel to the client’s telephone’s extension number and must immediately hang up once connected. It is stressed both in connection to incoming and outgoing privileged calls that ‘[t]hese will not be recorded without the direct authority and direction of the Registrar’. No time schedules are indicated, either with respect to incoming or outgoing telephone calls.

A complaint concerning telephone contact between counsel and client was raised in the Taylor case immediately following the latter’s transfer to The Hague. Defence counsel for Taylor complained to the Trial Chamber that he had not been able to reach his client since he arrived in The Hague, stating that ‘[n]othing could be more serious, in my respectful submission, to the administration of justice than an

1327 Also, Rule 97 of the SCSL RPE prescribes that ‘[a]ll communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless: (i) The client consents to such disclosure; or (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. (iii) The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance’.
1329 Ibid.
1330 Ibid.
1331 Ibid.
1332 Ibid.
1333 It is noted, in this regard, that Chief Taku, international defence counsel who has worked before both the ICTR and the SCSL, was very appreciative of the possibilities to contact his client detained at the SCLS Detention Facility by telephone; ICTR, interview conducted by the author with Chief Taku, defence counsel working before the SCSL and the ICTR, Arusha - Tanzania, May 2008.
accused who is whisked away and held, in effect, de facto incommunicado’. 1334 He added that he had ‘left a message today after ringing around as an investigator, some kind of Sherlock Holmes, trying to find a relevant phone number. I left a message finally with the head of the ICC detention facility; he wasn't available. I then, with various assistance, got the number of a member of the Court Management staff (...) I was told something extremely remarkable, in my submission. I was told that my client was not allowed to receive telephone calls’. 1335 Two days later, the Trial Chamber issued a decision in which it recognised that ‘the fact that the Accused and his Counsel could not communicate with one another contravenes the right of the Accused under Article 17(4)(b) of the Statute to communicate with his counsel, an issue related to the right of the Accused to a fair trial’. 1336 It subsequently ordered the Registrar ‘to ensure as a matter of urgency that facilities are in place to enable the Accused to communicate fully with his counsel’. 1337

Legal visits may take place on any day of the week, from 9:30 a.m. to 12:30 and from 14:00 to 16:30. 1338 Requests for visits outside these hours may be made to the Chief of Detention. 1339 The visit must be made ‘by prior arrangement with the Chief of Detention as to the time and duration of the visit’. 1340 Counsel or the detained person must give at least a twenty-four hours notice of such a visit. 1341 It is provided that visits may not be possible due to a lack of available interview rooms. 1342 In that case, where legal visits are urgent, these may take place in the regular visits area. 1343 Furthermore, it is provided that the Chief of Detention may ‘not refuse a request for

1335 Id., p. 8.
1336 SCSL, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, Prosecutor v. Taylor, Case No. SCSL-03-1-PT, T. Ch. II, 23 June 2006.
1337 Ibid.
1338 SCSL, Detention Operational Order No: 3:10, issued on 28 July 2004 by Barry Wallace, Chief of Detention; SCSL, Detention Operational Order No. 8:1, issued on 12 October 2004 by Barry Wallace Chief of Detention. Both documents are on file with the author.
1340 Rule 44(C) of the SCSL Rules of Detention.
1342 Ibid.
1343 Ibid.
such a visit without reasonable grounds’.

Moreover, Detention Operational Order 3:10 states that a visiting permit is not required (such visiting permits are regulated in Detention Operation Order No. 3:4, which states that permits are issued by a Visits Officer ‘after verification of identification and approval to visit’). Nevertheless, all legal representatives must be identified as such by the Visits Supervisor upon entering the visits area. Further, details of the visits must be entered in a register. The visitor must comply with the security controls that apply to regular visits. However, Rule 41(B) does not apply. Instead, Rule 44(D) provides that ‘[v]isits from Counsel and Legal Assistants shall be conducted in the sight of but not within the hearing of the staff of the Detention Facility’. In principle, these legal visits take place not in the open visiting area, but in interview rooms that are provided for this purpose.

It is further provided that a legal representative may not interview more than one detainee simultaneously, even if the detainees concerned are ‘jointly charged’, ‘unless the legal representative of the other detainees have been informed and have granted consent’.

The language of Rule 44(D) implies that, contrary to what was seen in the former paragraph in relation to the ICTR, the right to confidential communications during visits at the SCSL extends to legal assistants. In this regard, Paragraph (E) adds that such legal assistants ‘must be admitted to practice law in a State’. No reference is made to the designation or appointment of legal assistants in accordance with Rule 44 of the SCSL RPE, which governs the appointment and qualifications of counsel, or to the signing of an undertaking.

1344 Rule 44(C) of the SCSL Rules of Detention.
1347 Ibid.
1348 Rule 41(B) prescribes that ‘[a]ll visits shall be conducted in the sight and within hearing of the staff of the Detention Facility’.
1351 Ibid.
The costs incurred in visits by and communications with counsel and legal assistants are paid for by the detained person, unless the latter is found to be indigent. In that case, the Court pays for these expenses.\textsuperscript{1352}

In the first period after the Court’s establishment, when the detained persons were held at Bonthe Island, it was more difficult for their lawyers to visit them. Bonthe was only accessible by boat or helicopter. Things improved significantly when the detainees were moved to the Court’s premises in Freetown in August 2003.\textsuperscript{1353}

It was mentioned above that, as a matter of principle, all communications between counsel and his or her client are confidential. Nonetheless, Rule 44(A) states that a Chamber or a Judge may decide otherwise. Neither the grounds and justifications for such restrictions, nor the duration for which they may be imposed are indicated. In Norman, where the communications of the detainee were restricted because he was suspected of using the Court’s contact facilities for purposes that would frustrate the mandate of the Court, the restrictions did not apply to Norman’s communications with his counsel on the condition that such contact would not be used to contact the media.\textsuperscript{1354} Although this decision was rendered by the Registrar in lieu of a Judge or Chamber, it appears that, in certain circumstances, contact with the media via counsel would constitute one of the grounds for restricting the counsel-client privilege.

In November 2006, the Taylor Defence submitted a motion to the Trial Chamber in which it demanded the immediate """"(...) removal of the surveillance camera from any conference room used for legal consultations by Mr. Taylor."""" The Trial Chamber held that the motion was premature as the Defence had not exhausted the formal complaints procedure.\textsuperscript{1355} The matter was then brought before the President. He took note of the Registrar’s decision (which had not yet been implemented by the ICC detention authorities) that the use of video-surveillance of the legal consultations of the Detainee Charles Taylor with his Counsel must be discontinued, and directed him both to ‘communicate [his decision] forthwith to the

\textsuperscript{1352} Rule 44(B) of the SCSL Rules of Detention.
\textsuperscript{1354} SCSL, Decision Prohibiting Communications and Visits, Prosecutor v. Hinga Norman, Case No. SCSL-2003-08-PT, Registry, 20 January 2004.
\textsuperscript{1355} SCSL, Decision of the President on Urgent and Public Defence Motion Requesting Cessation of Video Surveillance of Legal Consultations, Prosecutor v. Taylor, Case No. SCSL-03-01-PT, President, 21 February 2007, par. 1.
relevant ICC authorities in The Hague’ and to ‘ensure that his said Decision is complied with forthwith’. 1356

STL

The STL Rules recognise the detained persons’ right to confidential communications, both with respect to correspondence and telephone conversations with lead and co-counsel. The assistance of an interpreter is provided where necessary. Only a Judge or Chamber is authorised to restrict the privileged nature of such contact. 1357 Rule 65(A) of the STL Rules of Detention further states that detainees are entitled to receive privileged visits from their lead and co-counsel, who may be accompanied by legal assistants. The Rules’ drafters created a solution for the problem of privileged access of legal assistants to detained persons outside the presence of counsel in Paragraph (B), which provides that ‘Lead Counsel may request the Head of the Defence Office to permit one additional member of his Defence team to conduct such visits in (A) without the presence of Lead Counsel or Co-counsel. This person shall be the Legal Officer of the Case Core Team, as defined in the Legal Aid Policy of the tribunal and who is assigned in accordance with Article 22 of the Directive on the Assignment of Defence Counsel. In such cases, the Lead Counsel accepts full responsibility for all aspects of the visit by a defence team member’.1358

Upon their appointment, lead and co-counsel and legal assistants will be issued with a ‘permit for regular visits’. Before their appointment, ‘upon written request by a Detainee, the Registrar may issue a permit for a specific period of time prior to the

1356 *Id.*, par. 29-31.
1357 Rule 65(A) of the STL Rules of Detention.
1358 Article 22(B) of the Directive on the Assignment of Defence Counsel stipulates that ‘[a]t the request of the lead counsel and in accordance with the Legal Aid Policy envisaged in Article 37, the Head of the Defence Office may assign persons assisting counsel, such as legal assistants, consultants, investigators, case managers, interpreters and legal interns, to provide support to the lead counsel. Only persons assigned or approved by the Head of the Defence Office may assist counsel with the defence of the suspect or accused. The Head of the Defence Office may impose qualification requirements for persons assisting counsel. The lead counsel, co-counsel and the persons assisting him shall be referred to as the defence team. The lead counsel is responsible for supervising all defence team members, including co-counsel’. Further, Article 22(D) prescribes that ‘[a]ll members of the Defence Team shall be bound by the Statute, the Rules, the Rules of Detention, the Code of Professional Conduct, this Directive and any other applicable rules or regulations’.

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hearing for confirmation of charges’. Nonetheless, privileged visits are subject to ‘prior arrangement’ with the Chief of Detention as to their time and duration. It is provided that ‘[t]he Chief of Detention shall not refuse a request for such a visit without reasonable grounds’. Paragraph (F) stipulates that ‘[v]isits from Lead Counsel or Co-Counsel and persons assisting counsel shall be conducted within the sight but not within the hearing of the staff of the Detention Facility’. The costs incurred in a detainees’ communications with and visits received from counsel are borne by the detained person, unless the detainee has been declared indigent, in which case the tribunal pays for such expenses.

From 10 April 2009 until the Order for their release was issued on 29 April of that year, a number of persons were detained in the Lebanon under the legal authority of the STL. The Head of the Defence Office, after visiting the detainees on 20 April, requested the President to order, inter alia, that ‘any meetings between the lawyers and their clients be privileged and confidential, without any prison staff or other persons being able to listen to, or record, the communication’. In his Order, the President noted that Article 16(4)(b) of the STL Statute, Rule 163 of the STL RPE and Rule 65(F) of the Rules of Detention all provide, in one way or another, that communications between counsel and client are privileged. He considered that ‘[t]he rights attaching to suspects or accused in detention under these provisions are necessarily to be considered applicable, mutatis mutandis, to all detained persons even if they have not formally been held to be suspects or accused’. He further recognised that the counsel-client privilege is stipulated or implied in international

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1359 Rule 65(D) of the STL Rules of Detention.
1360 Rule 65(E) of the STL Rules of Detention.
1361 Ibid.
1362 Rule 65(F) of the STL Rules of Detention. See, in a similar vein, Rule 67(A) of the STL Rules of Detention. Emphasis added.
1363 Rule 65(C) of the STL Rules of Detention.
1364 STL, Order Regarding the Detention of Persons Detained in Lebanon in connection with the Case of the Attack against Prime Minister Rafiq Hariri and Others, Case No. CH/PTJ/2009/06, Pre-Trial Judge, 29 April 2009.
1366 Id., par. 7, sub (i).
1367 Id., par. 13.
and regional instruments on human rights\textsuperscript{1368} and subsequently held that ‘[t]he very broad recognition of the right to communicate freely and privately with counsel by the international community, and the general attitude taken by States and international judicial bodies as to its importance, show that the right is now accepted in customary international law as one of the fundamental human rights relating to due process. Indeed, the right of an accused person to freely and confidentially communicate with his or her counsel is an indispensable condition for the effective exercise of most his or her other rights. As the European Court has aptly noted, “if a lawyer were unable to confer with his client and receive confidential instructions from him without (...) surveillance, his assistance would lose much of its usefulness”. The rights of the defence, of which this right is an indispensable component, are one of the foundations of the concept of a fair trial’.\textsuperscript{1369}

The President further held that the right also ‘accrues to a person suspected of having committed a crime. Such persons may also find themselves in need of confidential legal assistance, particularly when held in detention’.\textsuperscript{1370} Although he recognised that the right is not ‘unlimited’ and may, if necessary, be temporarily restricted,\textsuperscript{1371} he also found – on the basis of Principle 18 of the U.N. Body of Principles – that ‘restrictions of the right may only be admissible if they fulfill certain conditions, namely, that: (i) they are envisaged by law; (ii) they are necessary (that is, they are rendered indispensable by the need to countervail possible negative effects); (iii) they are proportionate to the exigency that warrants them (that is, they are commensurate to and do not exceed the fulfillment of such exigency – this may imply that the restriction be of limited duration); and (iv) they are submitted to regular and judicial scrutiny’.\textsuperscript{1372} The President found that, in the circumstances of the case,\textsuperscript{1373} there appeared to be no justification for restricting the right to ‘freely and privately communicate with counsel’.\textsuperscript{1374}

\textsuperscript{1368} Id., par. 15.
\textsuperscript{1369} Id., par. 16. Footnote omitted.
\textsuperscript{1370} Id., par. 17.
\textsuperscript{1371} Id., par. 18.
\textsuperscript{1372} Id., par. 19.
\textsuperscript{1373} No details were mentioned of such circumstances or of the original reasons, if at all existent, for restricting this right. Ibid.
\textsuperscript{1374} Id., par. 30.
Communications with counsel

Article 67(1)(b) of the ICC Statute stipulates, in connection to the right to a fair trial, that accused persons are entitled to ‘communicate freely with counsel of the accused's choosing in confidence’. Further, Rule 73(1) of the ICC RPE provides in relevant part that ‘[w]ithout prejudice to article 67, paragraph 1 (b), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged’. Further, according to Regulation 151 of the RoR, ‘[a] detained person shall receive assistance to enable him or her to exercise his or her rights in connection with his or her trial at the Court’. Pursuant to Regulation 97(1) of the RoC, a detained person must be informed of his ‘right to communicate fully, where necessary with the assistance of an interpreter, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68’. The privileged nature of these communications is emphasised in Sub-Regulation 97(2). Since this provision speaks of such communications being conducted ‘within the sight but not the hearing’ of detention staff, it must be assumed that ‘communications’ does not refer to telephone conversations or correspondence.

All items of mail entering the Detention Centre are subject to security controls. This includes mail from counsel to their detained clients. It was seen in the former paragraph that all items of mail are routinely censored by the Chief Custody Officer. Items of mail received from or sent to counsel are, however, exempted from such review. Moreover, the regime of Regulation 174(1), which provides for the routine passive monitoring of telephone conversations, is not applicable to those with counsel. Neither the RoC nor the RoR appear to provide for the possibility of monitoring a detained person’s communications with his counsel, even in exceptional circumstances.

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1375 Regulation 68 of the RoC provides, as far as relevant, that ‘[p]ersons assisting counsel (…) may include persons who can assist counsel in the presentation of the case before a Chamber’.
1376 Regulation 168 of the RoR.
1377 Regulation 169(1)(a) of the RoR.
Visits by counsel

Upon counsel’s appointment, the Registrar issues him with a permit for regular visits. Prior to his or her appointment, and upon the written request of a detainee, ‘the Registrar may issue a permit for a specific period of time prior to the hearing for confirmation of the charges’. Counsel must make arrangements for visits with the Chief Custody Officer. The latter must thereby take into account the ‘demands of the daily schedule of the detention centre and the facilities and staff available’. The grounds for refusing non-privileged visits are not applicable to visits by counsel. In certain situations, provision may be made for visits by counsel outside the regular visiting hours. In Lubanga, for example, the Pre-Trial Chamber issued an order for this purpose. During a trial session, Defence Counsel for Lubanga had complained to the Chamber that ‘my team visited the Detention Centre yesterday, and despite the order which you issued last week at our request to be able to see our client until 7.45 in the evening – my team was asked to leave the Detention Centre at 7 o’clock – 7 p.m. – making it impossible for the team to prepare for today’s hearing’ and argued that this constituted an ‘important violation of the rights of the Defence’. The Presiding Judge recalled that, during the confirmation hearing, the Chamber had ordered for the ‘times allowing communication between the defender and the detained person [to be] changed’ and instructed the Registrar ‘to be particularly attentive in applying this decision’.

Counsel are subject to the regular security controls, which ‘shall not extend to reading or copying documents brought to the detention centre by him or her’. Unlike other visitors, counsel are permitted to ‘pass documents to and receive documents from the detained person during a visit’. As to quantities of documents

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1378 Regulation 178(1) of the RoR.
1379 Regulation 178(2) of the RoR.
1380 They are neither applicable to visits by diplomatic or consular representatives, representatives of the inspectorate and officers of the Court; see Regulation 180(1) of the RoR.
1382 Id., p. 18, lines 16-21.
1383 Id., p. 19, lines 4-5.
1384 Regulation 181(1) of the RoR.
1385 Regulation 181(2) of the RoR.
1386 Regulation 182(1) of the RoR.
that are too large to be physically passed over, these must be handed to the Chief Custody officer ‘who shall pass them unopened and unread to the detained person concerned’. \(^{1387}\)

It is reiterated in Regulation 183(1) of the RoR, in conjunction with Regulation 97(2) of the RoC, that communications between a detained person and his counsel or legal assistants must be conducted ‘within the sight but not the hearing, either direct or indirect, of the staff of the detention centre’. The regime governing the monitoring of non-privileged visits is not applicable to visits by counsel. \(^{1388}\) Neither the RoC nor the RoR appear to provide for the possibility of monitoring visits by counsel, even in exceptional circumstances.

### 8.3.3 Evaluation

Free and confidential communications with counsel: a rule of customary international law

In Chapters 2 and 3, it was argued that the international and regional soft-law penal instruments should not simply be dismissed by States or international criminal tribunals as non-binding, since such instruments contain rules that may be based on or reflect rules of international or regional customary law. According to the STL President, an example of such a rule is the right to communicate freely and privately with counsel. In the former sub-paragraph, it was seen that President Cassese held that ‘[t]he very broad recognition of the right to communicate freely and privately with counsel by the international community, and the general attitude taken by States and international judicial bodies as to its importance, show that the right is now accepted in customary international law as one of the fundamental human rights relating to due process’. \(^{1389}\)

The detainees’ rights to privileged communications with and to visits by defence counsel have been duly recognised by all of the international criminal tribunals.

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\(^{1387}\) *Ibid.* Such documents are in all other aspects treated as regular mail and dealt with in accordance with the relevant provisions. See Regulation 182(2) of the RoR.

\(^{1388}\) Regulation 184(2) of the RoR.

Nevertheless, the former STL President’s recognition of the customary status of this rule may be regarded as an important contribution to the development of the detention law of international criminal tribunals.

Restrictions on the lawyer-client privilege

When outlining the content of the right to communicate freely and privately with counsel, former President Cassese pointed to Principle 18 of the U.N. Body of Principles, which provides that ‘[t]he right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order’.

The ECtHR has interpreted the ‘in accordance with the law’-requirement under Article 8 ECHR as requiring not only that domestic law adequately differentiate between the detained persons’ various correspondents, but also that domestic law define the length and scope of possible restrictions, stipulate the reasons for their application, stipulate their manner of exercise and make provision for independent review.

In principle, all communications between a counsel and his or her client are confidential at the SCSL. Rule 44(A) does state, however, that a Chamber or a Judge may decide otherwise. Neither the grounds and justifications for such restrictions, nor the duration for which they may be imposed are indicated. If Rule 44(A) is to be applied in practice, the Court will first need to adopt a set of regulations which elaborate on that Rule, thereby providing for rule of law safeguards as prescribed by the ECtHR.

At the ICC, the RoR stipulate that items of mail received from or sent to counsel are exempted from routine censorship. Further, the regime of Regulation 174(1) of the

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1390 Principle 18(3) of the U.N. Body of Principles.
1391 ECtHR, Moiseyev v. Russia, judgment of 9 October 2008, Application No. 62936/00, par 266.
1392 Ibid.
1393 Regulation 169(1)(a) of the RoR.
RoR, which provides for the routine passive monitoring of telephone conversations, is not applicable to conversations with counsel. The same applies to monitoring visits by counsel. No provision is made for the exceptional situation in which lawyer-client contact needs to be monitored. It is, therefore, recommended that such a provision is inserted in the RoR.

Facilities for counsel-client contact

It may be said that, generally speaking, the various tribunals have been fairly generous in providing facilities to accused persons in detention for the preparation of their criminal defence. At the ICTY, however, the facilities provided to self-representing accused have at times generated security risks. Further, at the ICTR the possibilities for (indigent) detained persons to contact their lawyer by telephone are rather limited, both in respect of incoming and outgoing calls. In this Chapter's introductory paragraph, it was argued that, in the international context, telephone contact is an essential means for detainees to stay in contact with their defence team. Accordingly, it is recommended that a more flexible regime is established, which allows detained persons more time to speak to their lawyers over the phone.

Access of and privileged communications with legal assistants

Temminck Tuinstra draws attention to the circumstance that defence counsel working before the tribunals are remunerated for their stay at the seat of the court only from two weeks before the trial starts. She recognises that during the pre-trial phase, counsel and client will need to communicate regularly in order to prepare the defence. This may incur high travel costs for international counsel whose practices are often located thousands of miles from the seat of the court. But even after the trial has started, the long distance between the seats of the tribunals and international defence counsel’s practices poses problems. Temminck Tuinstra points to the defence’s limited resources and the frequent trial breaks at the ICTR – ‘during which counsel is

1394 Jarinde P.W. Temminck Tuinstra, supra, footnote 1011, p. 67.
not paid to stay at the seat of the Tribunal; and, on this basis, argues that ‘it is unreasonable not to allow defence team members other than counsel to visit an accused in private with counsel’s approval’. She warns that, if having privileged communications is merely the lead and co-counsel’s prerogative, this may prejudice the defence both in a budgetary and logistic sense and points to the fact that in the major common law jurisdictions the lawyer-client privilege extends to any official representative of a defence team. As noted by Zappalà, ‘the right to receive adequate time and facilities depends upon the circumstances of each case and its implementation has to be evaluated on a case by case basis’. The particularities of the international criminal justice context referred to by Temminck Tuinstra arguably weigh in favour of adopting a more flexible approach by allowing other defence team members to communicate with the detained client and permitting (at least some of) those persons to communicate confidentially with the detained client.

The questions as to the scope of detainees’ right to privileged communications with counsel and whether the various defence team members must be permitted access to accused persons in detention have been raised before the tribunals. At the ICTY, the Registry has authorised self-representing counsel to have unlimited communications with designated legal associates, whilst contact with defence investigators takes place in accordance with UNDU’s standard procedures. According to the ICTY Registry, it has in those cases only ‘de facto extended the application of attorney-client privilege, which normally exists only between a client and his or her counsel, to cover defence-related communications between the Accused and persons who were not technically his defence attorneys’. Privileged contact is argued not to apply to those not bound by the code of conduct for defence counsel. In , however, the Appeals Chamber noted that in case no legal associate has been designated to a self-representing accused, as a result of which no lawyer is

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1395 Id., p. 71.
1396 Ibid.
1397 Id., p. 69.
1398 Id., p. 71.
1400 ICTY, Decision on Krajšnik Request and on Prosecution Motion, Prosecutor v. Krajšnik, Case No. IT-00-39-A, A. Ch., 11 September 2007, par. 35.
1401 ICTY, Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Submission No. 425, Prosecutor v. Šešelj, Case No. IT-03-67-T, President, 23 September 2009, par. 6.
permitted privileged access to the accused person, ‘a self-represented accused is limited only to the standard UNDU procedures for communication with the outside. If these procedures do not provide a self-represented accused with sufficient opportunity to exchange appropriate information with team members outside the UNDU during the preparation of his case, then this may amount to a lack of “adequate time and facilities for the preparation of his defence” in violation of Article 21(4)(b) of the Statute’.\(^{1402}\) Such a situation may call for special arrangements to be made in order to ensure that the accused has ‘adequate means of communicating’ with his defence team.

It is unclear whether, at the ICTY, the lawyer-client privilege (access and confidential communications) may, in exceptional circumstances, also apply to a non self-representing detainee’s communications with legal assistants and defence investigators. It may be concluded, however, that at the ICTY, the term ‘legal representatives’ includes ‘designated legal associates’, to whom the lawyer-client privilege does apply. Noteworthy in this respect is the difference between the concepts of ‘defence counsel’, which is used in the ICTR Rules of Detention, and ‘legal representative’ used in the ICTY’s legal framework.\(^{1403}\)

At the ICTR, neither investigators nor legal assistants are considered to be counsel and are, therefore, denied the same privileged and confidential rights of communication with accused persons. Defence investigators may meet with detained persons only upon producing official documentation issued by the Registrar confirming the proper engagement as an investigator by the defence, and subject to the usual restrictions and measures of supervision applicable to non-privileged visits. It has further been conceded that ‘in exceptional circumstances, it is possible that confidential visits may be permitted between the Accused and an unaccompanied investigator or legal assistant’.\(^{1404}\) In \textit{Bizimungu} the ICTR Trial Chamber took note of

\(^{1402}\) ICTY, Decision on Krajišnik Request and on Prosecution Motion, \textit{Prosecutor v. Krajišnik}, Case No. IT-00-39-A, A. Ch., 11 September 2007, par. 36.

\(^{1403}\) Before 2005, Rule 67(A) of the ICTY Rules of Detention recognised that detained persons have the right to privileged communications with ‘defence counsel’. Since 2005, the right to privileged communications is laid down in Article 65(A) of the ICTY Rules of Detention and applies to communications with a detainee’s ‘legal representative’. See Jarinde P.W. Temminck Tuinstra, \textit{supra}, footnote 1011, p. 70.

the Registrar’s submissions that “in certain very exceptional circumstances [when] counsel and co-Counsel are unavoidably absent from Arusha, yet need to be able to communicate with the Accused on a confidential basis for the continued preparation of the Defence”, the Registrar will allow for visits by non-Counsel members of the Defence team’.1405 The Chamber held that it is ‘in the interests of justice (…) to authorise meetings between an accused and members of the Defence team where _inter alia_, Defence Counsel can demonstrate that he cannot access his client for an essential purpose without an unreasonable delay or expenditure of funds’.1406 The Trial Chamber’s formulation – in particular the term ‘_inter alia_’ leaves more room for making exceptions than the Registrar’s submission did. Although the ICTR provides for the possibility that defence team members other than counsel may in exceptional circumstances be permitted to meet their detained client outside of the presence of lead or co-counsel, Temminck Tuinstra criticises the discretion attributed to the Registrar in determining the ‘exceptionality’ of a certain situation. She argues, in this respect, that the requirement that counsel must inform the Registrar of the details of such a situation may conflict with the principle of confidentiality1407 and that the accused’s right to privileged communications with counsel should be extended to other members of the defence team.1408

It is noted, in this regard, that other tribunals have come up with possible solutions. Pursuant to Regulation 97(1) of the ICC RoC, a detained person must be informed of his ‘right to communicate fully, where necessary with the assistance of an interpreter, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68’.1409 The privileged nature of these communications is emphasised in Sub-Regulation 97(2). It is reiterated in Regulation 183(1) of the RoR, in conjunction with Regulation 97(2) of the RoC, that communications between a detained person and his counsel or legal assistants must be conducted ‘within the sight but not the hearing, either direct or indirect, of the staff of the detention centre’.

1406 _Id._, par. 29.
1408 _Ibid._
1409 Regulation 68 of the RoC provides, as far as relevant, that ‘[p]ersons assisting counsel (…) may include persons who can assist counsel in the presentation of the case before a Chamber’. Emphasis added.
Rule 44(A) of the SCSL Rules of Detention provides that ‘[e]ach Detainee shall be entitled to receive visits from his Counsel and Legal Assistant and to communicate fully and without restraint by letter or telephone with his Counsel and Legal Assistant, with the assistance of an interpreter where necessary’ (emphasis added). It further stipulates that ‘[a]ll such communications shall be privileged, unless otherwise ordered by a Judge or a Chamber’. Moreover, Rule 44(D) provides that ‘[v]isits from Counsel and Legal Assistants shall be conducted in the sight of but not within the hearing of the staff of the Detention Facility’.1411

Finally, a possible compromise can be found in the STL Rules of Detention. Rule 65(A) stipulates that detainees are entitled to receive privileged visits from their lead and co-counsel, who may be accompanied by legal assistants. Rule 65 (B) adds that ‘Lead Counsel may request the Head of the Defence Office to permit one additional member of his Defence team to conduct such visits in [Rule] (A) without the presence of Lead Counsel or Co-counsel. This person shall be the Legal Officer of the Case Core Team, as defined in the Legal aid Policy of the tribunal and who is assigned in accordance with Article 22 of the Directive on the Assignment of Defence Counsel. In such cases, the Lead Counsel accepts full responsibility for all aspects of the visit by a defence team member’. Paragraph (F) provides that ‘[v]isits from Lead Counsel or Co-Counsel and persons assisting counsel shall be conducted within the sight but not

1410 Also, Rule 97 of the SCSL RPE prescribes that ‘[a]ll communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless: (i) The client consents to such disclosure; or (ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. (iii) The client has alleged ineffective assistance of counsel, in which case the privilege is waived as to all communications relevant to the claim of ineffective assistance’.


1412 Article 22(B) of the Directive on the Assignment of Defence Counsel stipulates that ‘[a]t the request of the lead counsel and in accordance with the Legal Aid Policy envisaged in Article 37, the Head of the Defence Office may assign persons assisting counsel, such as legal assistants, consultants, investigators, case managers, interpreters and legal interns, to provide support to the lead counsel. Only persons assigned or approved by the Head of the Defence Office may assist counsel with the defence of the suspect or accused. The Head of the Defence Office may impose qualification requirements for persons assisting counsel. The lead counsel, co-counsel and the persons assisting him shall be referred to as the defence team. The lead counsel is responsible for supervising all defence team members, including co-counsel’. Further, Article 22(D) prescribes that ‘[a]ll members of the Defence Team shall be bound by the Statute, the Rules, the Rules of Detention, the Code of Professional Conduct, this Directive and any other applicable rules or regulations’.

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within the hearing of the staff of the Detention Facility’. Some may fear that adopting a Rule such as those in the ICC Regulations or SCSL Rules of Detention will lead to unwelcome consequences in the ICTR context, due to the aforementioned alleged abuse by ICTR defence investigators. The STL Rules provide for an elegant middle course solution, at least in respect of legal assistants, which may be adopted by the ICTR. Although the situation at the ICTR appears to have posed greater challenges to the adequate functioning of defence teams working before the tribunal than at the ICTY, the latter conclusion and recommendation may also be relevant to the ICTY.

1413 Rule 65(F) of the STL Rules of Detention. See, in a similar vein, Rule 67(A) of the STL Rules of Detention.
8.4. Contact with the media

8.4.1 Contact with the media: rationales and legal framework

Rationales

With bars they blur the gracious moon,
And blind the goodly sun:
And they do well to hide their Hell
For in it things are done
That Son of God nor son of Man
Ever should look upon!

_Oscar Wilde,_
_The Ballad of Reading Goal^{1414}_

The media may play an important role in making detention and imprisonment visible to the general public.\(^{1415}\) Visibility may bring some measure of “democratic” legitimacy\(^{1416}\) to what goes on in (international) closed institutions. Allowing media access to prisons and remand institutions may further help to prevent wrongs and forestall abusive conduct in such environments.\(^{1417}\) Detained persons may thus have a legitimate interest in airing their ‘grievances beyond the prison walls’.\(^{1418}\) In this

regard, Straight argues that seeking publicity must be protected where it may be the sole means of exercising one’s right to petition the government and parliament.1419 Apart from questions of legitimacy and control, the public also has the right to know what is going on inside the prison walls, and has an interest in receiving such information,1420 i.e. getting ‘a clearer, more open picture of how [the] penal system operates’.1421 In the 1970s, Hass further spoke of a ‘desire on the part of the press to pursue a right to investigate in an atmosphere where concealment cloaked in the guise of security has been common’.1422 Communications between inmates and representatives of the media further contribute to the ‘exchange of ideas’, which, as Cooper notes, is essential to a democratic society.1423 He is of the opinion that ‘[t]he inmate’s viewpoint is a necessary element to maintain a meaningful balance if the media is to serve as the marketplace for ideas’.1424 Access to the media finds support in the principles of social rehabilitation, normalisation1425 and the presumption of innocence. As to the former, Cooper argues that ‘[s]ilencing an inmate’s expression does not further a prison’s rehabilitative goals; in fact, it may hinder them’.1426 Bernstein observes that ‘interviews with prison inmates serve as a vivid reminder that, despite their often deplorable acts, inmates remain human beings. Most of them will be released, and how they are treated in prison will affect their behavior outside prison gates’.1427 Access to the media may, according to Cooper ‘be a prisoner’s only hope to maintaining self-respect by enabling communication with the outside world’ and help ‘preserve the media’s successful function as a vehicle of self-expression’.1428 Another reason why detained persons should be allowed to speak to the press lies in the fact that the other party, the prosecution, regularly turns to the media to inform the public about the case it is working on and the alleged involvement of the accused

1420 Joan N. Feeney, supra, footnote 1417, at 1355, 1365. See, in a similar vein, Seth L. Cooper, supra, footnote 1418, at 272; Michael Straight, supra, footnote 1417, at 277, 279; Daniel Bernstein, supra, footnote 1416, at 162.
1421 Sharon Hass, supra, footnote 1418, at 402.
1422 Id., at 401.
1423 Seth L. Cooper, supra, footnote 1418, at 272.
1424 Id., at 292.
1425 Penal Reform International, supra, footnote 1, p. 112.
1426 Seth L. Cooper, supra, footnote 1418, at 292.
1427 Daniel Bernstein, supra, footnote 1416, at 165.
1428 Seth L. Cooper, supra, footnote 1418, at 272.
therein. Not permitting the detained accused to present his side of the story might create an unbalanced or distorted picture of what happened. Moreover, De Jonge is of the opinion that the media’s watchful eye may prevent miscarriages of justice; the authorities would be constantly reminded of the need to carry out their work meticulously.

It is, of course, impossible for the media to contribute to the aforementioned values if they are not permitted to establish contact with detained persons and conduct personal interviews. Information then effectively ‘stays within prison walls’. It has been held that ‘no alternative method of communication can compensate for the ban on personal interviews’, since ‘many newsmen are reluctant to publish a story in the absence of a personal interview with the source’. Of course, security safeguards must be built-in, and it must be made possible to impose legitimate restrictions on this specialis of the detained persons’ right to contact.

An argument frequently cited against allowing press interviews with detained persons is the impact such reporting may have on the victims. In the international context, this is certainly a factor which must be taken into account in light of the atrocities that are prosecuted before international criminal tribunals. Nonetheless, Bernstein does have a point where he argues that ‘[i]f the portrayal of an inmate on television offends crime victims, they have an option available to all other viewers – turning the channel. Just because they do not want to hear what an inmate has to say, the rest of the viewing public should not be denied the opportunity’.

There has been quite some media attention for some of the high-profile accused detainees at the various tribunals. Generally speaking, these persons have themselves

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1430 Id., at 305. See, in a similar vein, Gerard de Jonge, Commentary, in: André Klip and Göran Sluiter (eds.), Annotated Leading Cases of International Criminal Tribunals, Volume 19, Intersentia, Antwerp-Oxford-Portland 2010, p. 937-940, at 940, where he states that ‘[n]ational and international prison authorities should realise that secrecy and fear of publicity are the worst enemies of developing good prison practice’.
1432 Michael Straight, supra, footnote 1417, at 274.
1434 Daniel Bernstein, supra, footnote 1416, at 143.
been quite eager to tell the public their version of reality and have, for that purpose, sought contact with representatives of the media. In this sense, the international detainees have been rather “fortunate” compared to the domestic situation, where prisoners and their circumstances oftentimes lack media coverage. Jewkes explains such lack of interest by arguing that “[t]here is a perception that the public do not care what happens to prisoners; they are the dregs of society, an underclass who are not deserving of our attention”. Nonetheless, Jewkes’ analysis of the lively interest in the domestic context in the detention situation of celebrity inmates strikes a note with the international detention situation. She holds that such coverage often merges with a widespread perception of ‘pampered prisoners’, arguing that ‘[s]tories which characterise prisons as ‘holiday camps’ in which notorious inmates enjoy advantages they do not ‘deserve’ – whether it is good food, personal television sets or extended visits from their spouses or partners – fuel the tabloid media’s view of a criminal justice system which is soft on crime’. According to Jewkes, the media have a distinct responsibility in this regard. The lack of media attention or the media’s presentation of groups of inmates as ‘the others’, may fuel or even cause society’s indifference to their suffering. She further opines that such a depiction of ‘otherness’ is oftentimes exacerbated by populism, both public-driven and ‘top-down’ or ‘authoritarian’, i.e. a process whereby ‘ambitious and manipulative politicians capitalize on public fears and prejudices in order to maximize their electoral appeal and display their ‘tough on crime’ credentials’.

Another manner in which the media is relevant to the prison and detention environment is that detained persons receive information via newspapers, periodicals, television, radio or even the internet. Access to the outside world through the receiving of information may help normalise the prison or the detention situation, and may further provide opportunities for ‘distance learning’ programmes. As with imparting information, the right to access to information finds support in the

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1435 Yvonne Jewkes, supra, footnote 1415, at 449.
1436 Id., at 450.
1437 Id., at 451.
1438 Id., at 455.
1439 Id., at 457; Dirk van Zyl Smit and Sonja Snacken, supra, footnote 14, p. 228.
principles of social rehabilitation, normalisation\textsuperscript{1441} and in the presumption of innocence. More specifically, Johnson states that ‘[i]nformation about the free world that is readily accessible to prisoners is conveyed primarily by television. Television (…) is a lifeline for many inmates at once allowing them to escape (mentally) from the prison world to establish familiar routines, and to feel some connection to the general culture that is shared by family and friends on the outside’.\textsuperscript{1442} From a practical viewpoint, introducing access to such media to the prison setting may, as Jewkes argues, reduce the amount of contact between prison staff and detained persons by, for example, making earlier lock-up times more acceptable to inmates, and may thus help to bring down costs.\textsuperscript{1443} From a humane perspective, access to information may mitigate the detained persons’ isolation from the outside world and thereby ease their suffering, which will most likely also have an impact on order within the prison or remand institution. Nonetheless, it has been argued that being confronted with the outside world may also fuel feelings of frustration, particularly where detained persons are barred from reacting to news items.\textsuperscript{1444} Moreover, the lack of access to the internet – the prime means of communicating and receiving information in a modern “information-society” – may exacerbate feelings of exclusion.\textsuperscript{1445} In this regard, Johnson observes that ‘[p]risoners, essentially limited to television as the most modern technology readily at their disposal, are increasingly out of touch with the world as experienced by citizens of the larger free society’.\textsuperscript{1446} Apart from stating that prisoners should have access to radio and television and that newspapers should be available, the U.N. Manual on Human Rights Training for Prison Officials also stipulates that ‘[a]ccess to the World Wide Web for the purpose of gathering information and keeping up to date with the news should be available to prisoners’.\textsuperscript{1447}

\textsuperscript{1441} Penal Reform International, \textit{supra}, footnote 1, p. 112-113.
\textsuperscript{1442} Robert Johnson, \textit{supra}, footnote 1440, at 255, 270. Negative effects of watching television – \textit{e.g.} addiction, losing interest in other activities such as reading – have also been recognised; \textit{id.}, p. 269.
\textsuperscript{1443} Yvonne Jewkes, \textit{supra}, footnote 1415, at 457.
\textsuperscript{1444} \textit{Id.}, at 458.
\textsuperscript{1445} Dirk van Zyl Smit and Sonja Snacken, \textit{supra}, footnote 14, p. 257.
\textsuperscript{1446} Robert Johnson, \textit{supra}, footnote 1440, at 257.
Legal framework

Restricting detained persons’ access to the media affects the rights of the public, the press and those of the detained persons. Throughout this research, however, the focus has been on the legal position of international detained persons, a line which will be followed in the present Chapter. The detained persons’ right to contact with the media finds protection in the right to freedom of expression, which includes both the receiving and imparting of information. This right is set forth in Article 19 of the UDHR and in Article 19(2) of the ICCPR. The latter provision provides under Paragraph (3) that restrictions may be permitted. The HRC has held, in this regard, that ‘Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes’.\textsuperscript{1448} According to Nowak, in the prison context restrictions are only permitted when ‘absolutely necessary to prevent crime and disorder in the prison’.\textsuperscript{1449}

In its Report on its visit to Paraguay, the SPT called for access of representatives of the media to prisons ‘as a means of ensuring external monitoring’.\textsuperscript{1450} Further, pursuant to Rule 39 of the SMR, ‘[p]risoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorised or controlled by the administration’. As

\textsuperscript{1450} SPT, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, U.N. Doc. CAT/OP/PRY/1, 7 June 2010, par. 165(c).
to remand detainees, Rule 90 of the SMR adds that such persons are allowed to ‘procure at [their] own expense or at the expense of a third party such books, newspapers, writing materials and other means of occupation as are compatible with the interests of the administration of justice and the security and good order of the institution’.

The various regional human rights treaties also stipulate the right to freedom of expression. The ECtHR has explicitly held that prisoners retain their right to freedom of expression. In Hirst v. the United Kingdom it held that ‘[a]ny restrictions on [this right] must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment’. It subsequently held that ‘there is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion’. In Yankov v. Bulgaria, the Court reiterated the ‘fundamental principles underlying its judgments relating to Article 10’. It stated that

‘(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

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1451 See Article 13 ACHR; Article 9 ACHPR; Article 10 ECHR.
1452 ECtHR, Hirst v. the United Kingdom, judgment of 6 October 2005, Application No. 74025/01, par. 69.
1453 Ibid.
1454 Id., par. 70.
(ii) The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists (…).

(iii) (…) the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. (…)

(iv) In a democratic society individuals are entitled to comment on and criticise the administration of justice and the officials involved in it. Limits of acceptable criticism in respect of civil servants exercising their powers may admittedly in some circumstances be wider than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. Moreover, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive, abusive or defamatory attacks when on duty’.¹⁴⁵⁵

In the admissibility decision in Bamber v. the United Kingdom, the Commission assessed whether the prohibition on Bamber to contact the media from prison by telephone was in accordance with Article 10 ECHR.¹⁴⁵⁶ In examining whether the infringement had been ‘necessary’, the Commission noted that Bamber had not been wholly barred from access to the media, since he had been allowed to contact the press by letter and because his lawyers did have ‘effective access to and use of the

¹⁴⁵⁵ ECtHR, Yankov v. Bulgaria, judgment of 11 December 2003, Application No. 39084/97, par. 129. Since the case did not concern (denied) contact between a detained person and the media or the outside world more in general – the applicant had been disciplined by the prison authorities for having written down his thoughts about the detention conditions and staff members in a private manuscript, thoughts which the authorities considered to be offensive - the case will not be discussed here in further detail. The Court did find a violation of Article 10 ECHR.
¹⁴⁵⁶ ECommHR, Bamber v. the United Kingdom, admissibility decision of 11 September 1997, Application No. 33742/96.
media’.\textsuperscript{1457} It further took into account that the reason for restricting the right to contact the media lay in the consideration that ‘it was considered impracticable effectively to control telephone calls to the media’.\textsuperscript{1458} The Commission recalled that it must have regard to ‘the ordinary and reasonable requirements of imprisonment, and that some measure of control over the content of prisoners’ communications (...) is not in itself incompatible with the Convention’ and concluded that it did not have reasons to dispute the authorities’ assessment.\textsuperscript{1459} Finally, the national authorities had been concerned about the distress media coverage might cause to the victims or to their families. In this regard, the Commission noted that it did ‘not consider that the distress which victims or their families might experience necessarily justifies the scope of the restriction which goes so far as to prevent the applicant from making even serious representations to the media by telephone’.\textsuperscript{1460} However, in light of the foregoing, it did not find a violation of Article 10 ECHR.\textsuperscript{1461}

The case of \textit{Nilsen v. the United Kingdom} concerned the question of whether the authorities’ confiscation of the applicant’s manuscript, in which he wrote about his experiences with the criminal justice system, had been in breach of Article 10.\textsuperscript{1462} The national authorities had refused to return the manuscript to Nilsen or his lawyer, \textit{inter alia}, because of ‘the anguish its publication would cause to surviving victims and to all victims’ families and given the sense of outrage which its publication would cause among the general public’.\textsuperscript{1463} In its admissibility decision, the Court recalled that restrictions on the freedom of expression may not ‘be based solely on what would offend public opinion’.\textsuperscript{1464} Nevertheless, the Court accepted the domestic authorities’ assessment, particularly in light of the High Court’s description of the applicant’s crimes as ‘“as grave and depraved as it is possible to imagine”’.\textsuperscript{1465} According to the Court, ‘[t]hat the perpetrator of such crimes would seek to publish for personal
reasons his own account of the killing and mutilation of his victims is an affront to human dignity, one the fundamental values underlying the Convention’.\textsuperscript{1466} In light of these human dignity-considerations, the Court distinguished the authorities’ argument of ‘public outrage’ from the ‘broader notion of “offence to public opinion”’ in its earlier case-law, arguing that the former justified the restrictions imposed.\textsuperscript{1467} The Court further took into account that the restriction had not amounted to a blanket prohibition on Article 10 rights. It noted that the relevant national legislation allowed for ‘constructive communication by prisoners about their crimes’.\textsuperscript{1468}

In this regard, it is relevant to mention Easton’s analysis of U.K. law, where she states that ‘the prisoner’s right to freedom of expression may be limited in the case of criminal biographies, but not if the prisoner is making serious representations relating to his conviction or sentence, or on the processes of justice’.\textsuperscript{1469}

The Council of Europe is of the view that, in principle, detainees must be allowed to communicate with the media.\textsuperscript{1470} Restrictions on such communication are allowed where ‘there are compelling reasons to forbid this for the maintenance of safety and security, in the public interest or in order to protect the integrity of victims, other prisoners or staff’.\textsuperscript{1471} The Commentary to the EPR explains that the drafters sought to attain a balance in what was recognised as a ‘highly controversial area of communication by prisoners’.\textsuperscript{1472} It provides that ‘freedom of expression is the norm, but public authorities are allowed to restrict freedom of expression in terms of Article 10.2 of the ECHR’. In respect of Article 10 ECHR, the Council recognises that the term ‘public interest’ allows for restrictions on communications ‘on grounds other than those relating to internal concerns with safety and security’, for example, in order to protect victims, other inmates or detention staff.\textsuperscript{1473} However, this term must be interpreted ‘relatively narrowly so as not to undermine what prisoners are being allowed by this rule’.\textsuperscript{1474}

\textsuperscript{1466}Ibid.
\textsuperscript{1467}Ibid.
\textsuperscript{1468}Id., par. 51. Emphasis added.
\textsuperscript{1469}Susan Easton, supra, footnote 17, p.156.
\textsuperscript{1470}Rule 24(12) of the EPR.
\textsuperscript{1471}Ibid.
\textsuperscript{1472}CoE, Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, sub Rule 24(12).
\textsuperscript{1473}Ibid.
\textsuperscript{1474}Ibid.
As to the receiving of information, the ECtHR – while referring to CPT recommendations – has recognised in relation to Article 3 ECHR that access to the outside world through such medium as television may attenuate the long-term negative effects of imprisonment, particularly where persons are held in segregation or relative isolation.\footnote{ECtHR, \textit{Öcalan v. Turkey}, judgment of 12 May 2005, Application No. 46221/99, par. 195-196.} Indeed, the CPT has stressed the importance of detained and imprisoned persons having access to the media in order to receive information.\footnote{CPT, Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002, CPT/Inf(2004)36, Strasbourg, 7 December 2004, par. 69; CPT, Report to the Albanian Government on the visit to Albania carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) from 23 May to 3 June 2005, CPT/Inf(2006)24, Strasbourg, 12 July 2006, par. 94.} Further, Rule 24(10) of the EPR stipulates that ‘[p]risoners shall be allowed to keep themselves informed regularly of public affairs by subscribing to and reading newspapers, periodicals and other publications and by listening to radio or television transmissions unless there is a specific prohibition for a specified period by a judicial authority in an individual case’.\footnote{See, specifically in respect of remand detainees, Rule 99 sub (c) of the EPR.}

\textit{8.4.2 Contact with the media at the various tribunals}

\textbf{ICTY}

Contact between a person detained at UNDU and a representative of the media is governed by Rule 64bis of the ICTY Rules of Detention.\footnote{See, in a similar vein, Rule 63 of the STL Rules of Detention.} Contrary to the general regime governing detainees’ communications, the outlook of Rule 64bis is a negative one, \textit{i.e.} such contact is not allowed \textit{unless} specifically permitted. In the language of Rule 64bis(A), a detained person’s communications that have ‘the sole purpose of contacting the media directly or indirectly, shall be subject to the approval of the Registrar’. In deciding on such a request, the Registrar must have regard to ‘whether such contact with the media: i. could disturb the good order of the Detention Unit; or ii. could interfere with the administration of justice or otherwise undermine the
Tribunal’s mandate’.\textsuperscript{1479} The Registrar may consult the Commanding Officer on the issue. Also,\textsuperscript{1480} the Registrar need not have ‘reasonable grounds’ to determine that one of the policy aims listed under i. and ii. is at risk of being undermined. Hence, under Rule 64\textit{bis}, the presence of mere ‘grounds’ appears to suffice to restrict the detainees’ right to contact with the media. If the detained person in question is dissatisfied with the Registrar’s decision, he is entitled to bring the matter to the President’s attention. If the President disagrees with the Registrar’s finding, he may ‘decide to review the decision, or if the President determines that the denial of contact constitutes an infringement on the right of the accused to be tried fairly, refer the request to the Trial Chamber to determine’.\textsuperscript{1481}

Regarding visits by representatives of the media, the Registrar has little discretion. Rule 61(B) provides that ‘[t]he Registrar shall refuse to allow a person to visit a detainee if he has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media’.\textsuperscript{1482} This provision subsequently states that Rule 64\textit{bis}(C) applies to the Registrar’s decision made under Rule 61(B), which implies that the detained person concerned is entitled to address the President.\textsuperscript{1483} Regulation 33, which sets forth the situations in which visits to detained persons may be denied, mentions under (B) that ‘[p]ermission may be denied if the Registrar has reason to believe that the purpose of the visit is to obtain information which may be subsequently reported in the media’.\textsuperscript{1484} This formulation appears to leave the matter to the Registrar’s discretion. Nevertheless, since the Regulations must be read subject to the Rules, the aforementioned interpretation of Rule 64\textit{bis} is decisive. It is likely that Regulation 33(B) echoes an earlier version of Rule 61(B), which read that in such a situation ‘[t]he Registrar may refuse to allow a person to visit a detainee’.\textsuperscript{1485}

\textsuperscript{1479} Rule 64\textit{bis}(B) of the ICTY Rules of Detention. See, also, ICTY, Decision on Radovan Karadžič’s Request for Reversal of Denial of Contact with Journalist, \textit{Prosecutor v. Karadžič}, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, par. 3.

\textsuperscript{1480} See, in contrast, \textit{e.g.}, Rule 64(A) and Rule 65(A) of the ICTY Rules of Detention.

\textsuperscript{1481} Rule 64\textit{bis}(C) of the ICTY Rules of Detention.

\textsuperscript{1482} Emphasis added.

\textsuperscript{1483} See, also, Regulation 35, which entitles a detained person to address the President on decisions made by the Registrar under Regulation 33(B).

\textsuperscript{1484} Emphasis added.

In relation to Blaškić, whose detention conditions had been modified pursuant to Rule 64 of the RPE and who was consequently located in a residence in the Netherlands outside UNDU, it is noted that the Decision of the President explicitly held that Blaškić was not to have any ‘contact of any sort with the press and the media. He shall refuse any interview or contact with reporters, journalists, photographers or TV cameramen’.\textsuperscript{1486} Blaškić was, however, permitted to ‘have a television and a radio available to him at his own cost, in accordance with the Rules of Detention’.\textsuperscript{1487}

As to the latter arrangement, it is worth mentioning that the UNDU detainees have at times complained about the lack of ‘possibility to receive TV and radio programs from [their] own countries’.\textsuperscript{1488}

At the ICTY, information has at times reached the media through the detainees’ legal representatives.\textsuperscript{1489} This has occasionally led to a prohibition of contact between the lawyers and their detained client. In Milošević, for example, one of the detainee’s legal associates, Christopher Black, was temporarily barred from visiting Milošević at UNDU, after an interview with Milošević was published in a German magazine. According to a spokesperson for the Registry and Chambers ‘[i]t was established that the information had been transmitted to that magazine by [the legal associate in question] in full violation of the rules of detention, which he was fully aware of’.\textsuperscript{1490} When asked about the incident during an interview, Christopher Black stated that

‘It was some time after 9/11, I was in Amsterdam and I asked permission to see Milošević – I had to ask permission each time – and I didn’t get an answer so I phoned the prison to ask “will you let me in or not”? They said “No, we decided not this time. You can speak to him by telephone”. So I spoke to him by telephone and in that conversation we started discussing that attack. [Milošević said] “Well you know

\begin{itemize}
  \item \textsuperscript{1486} ICTY, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, President, 3 April 1996, par. 24 sub (F).
  \item \textsuperscript{1487} ICTY, Decision on the Motion of the Defence Seeking Modification to the Conditions of Detention of General Blaškić, \textit{Prosecutor v. Blaškić}, Case No. IT-95-14-T, President, 17 April 1996.
  \item \textsuperscript{1488} ICTY, Press Release, CC/PIU/339-E, The Hague, 12 August 1998.
  \item \textsuperscript{1489} See, \textit{e.g.}, ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 80.
  \item \textsuperscript{1490} ICTY, Weekly Press Briefing, 31 October 2001.
\end{itemize}
it’s very ironic that Bush is going to be declared a hero to be going after Osama Bin Laden as he supposedly did this attack, while in 1998 Bin Laden was in Kosovo in our province with the Americans and the KLA killing our people, killing police men, cutting their eyes out, doing horrible things and we knew it. Our intelligence told us that Osama Bin Laden and the mujahedeen were there with the Americans. So I phoned Bill Clinton direct and said you have to get Bin Laden and his men out of here because otherwise I’ll have to send my forces into these villages, into these areas and all hell will break loose and people are going to be killed. And then you’re going to blame me. But Clinton just refused”. So [Milošević] said “Bin Laden did this?” The press, knowing that I was in Amsterdam, contacted me as usual asking me about Milošević. I told them the conversation. That was published in a Paris and a Berlin newspaper. I went back to Canada five days later and almost a day after I arrived back in Canada I got a fax from Holthuis, the Registrar, saying “We tracked what you said in the press and what you did and we saw that conversation about Bin Laden; you’re now prohibited from seeing Milošević and Milošević is going to be put in solitary for punishment”. So that’s the right for free press’. 1491

In Šešelj, the privileged status of Šešelj’s legal associates was suspended, because it was alleged that they had ‘revealed confidential information to the public, which is contrary to the proper administration of justice’. In addition, it was held that they had ‘repeatedly made public statements which [were] abusive towards the International Tribunal and [had] acted in a manner that could bring the International Tribunal into disrepute’. 1492

The tribunal has prohibited detainees to contact the media in decisions granting them provisional release, 1493 or transferring them to another State in order to

1491 ICTR, interview conducted by the author with Christopher Black, defence counsel working before the ICTR, Arusha - Tanzania, May 2008.
1492 ICTY, Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Submission No. 425, Prosecutor v. Šešelj, Case No. IT-03-67-T, President, 23 September 2009, par. 17. Šešelj responded to the allegation by saying that ‘[t]hese accusations are preposterous as it is a well-known fact that the Hague Tribunal has never enjoyed any professional or moral reputation’; ICTY, Decision on Vojislav Šešelj’s Request for Review of Registrar’s Decision of 10 September 2009, Prosecutor v. Šešelj, Case No. IT-03-67-T, Acting President, 21 October 2009, par. 14.
conduct an evidentiary hearing.\textsuperscript{1494} In respect of convicted persons’ contact with the media, the tribunal has recommended that enforcing States ‘carefully consider’ requests thereto in light of ‘the gravity of the crimes considered by the Tribunal’ as well as in light of ‘the rights of the convicted individual, the rights of the victims and witnesses affected by the convicted individual’s actions, and the adverse impact the media communication may have on ongoing trials and judicial process as a whole’.\textsuperscript{1495}

In 2011, sensitive ‘inside information’ reached the media through Wikileaks. In a motion to the President in which he complained of the renewal by the Registrar of an order to monitor his non-privileged telephone communications, Karadžić expressed great concern at ‘recent revelations that former United Nations Commander Timothy McFadden has disclosed information he obtained from monitoring and recording the telephone conversations of the late President Slobodan Milošević’.\textsuperscript{1496} A cable from a legal counselor of the U.S. Embassy in The Hague was attached to his motion in which the legal counselor described a meeting with the former Commanding Officer of UNDU in the presence of a physician.\textsuperscript{1497} It was reported by the counselor that the Commanding Officer had disclosed intimate details of the relationship between Milošević and his wife, and talked about the ‘nature of the relationship among the so-called legal associates (Serb lawyers who have no courtroom privileges but enjoy privileged communications with the defendant), the amici and Milošević’, including Milošević’s personal opinions of the people surrounding him.\textsuperscript{1498} In his Decision on the Motion, the President considered that the diplomatic cable did not mention Karadžić’s name and that both the diplomatic cable and the alleged disclosure were ‘as yet unverified’.\textsuperscript{1499} For these reasons, he denied Karadžić’s request for the President ‘to order the Registrar to file a submission (…) containing sworn statements from the current Commanding Officer of the UNDU and all UNDU Commanding

\textsuperscript{1495} ICTY, ICTY Manual on Developed Practices, UNICRI Publisher, Turin 2009, p. 160, par. 38.
\textsuperscript{1497} Id., par. 11.
\textsuperscript{1498} Id., par. 11(A)-(G) and Annex B.
Officers since July 2008, indicating the instances in which they discussed the content of Karadžić’s telephone conversations at the UNDU with third parties, “and the information revealed in those discussions”.

Restrictions on detainees’ communications with the media, imposed because such contact was thought to undermine the tribunal’s mandate, can be found in Milošević and Šešelj. These cases illustrate the Registrar’s apparent efforts to prevent detained persons from having contact with the media, and will therefore be discussed in more detail below.

Milošević was a candidate in the Serbian parliamentary elections of December 2003. The Deputy Registrar observed that the Commanding Officer had received reports that Milošević had ‘recently made statements to his political party and supporters, using communication facilities provided by the Detention Unit and with the intention of having these statements subsequently being reported in the media’. He also noted ‘that Mr. Slobodan Milošević (the "Accused") is presently being tried at the Tribunal for acts allegedly committed while he held high political office in the former Yugoslavia’. It was further considered that Milošević had, on earlier occasions, ‘either directly contacted the media or ha[d] used his privilege to communicate with others who ha[d] in turn provided messages through the media in contradiction of the Rules of Detention, which ha[d] resulted in a widespread media attention and coverage of the fact that an indictee for genocide, crimes against humanity and war-crimes such as the Accused is facilitating, with ease, the ongoing Serbian parliamentary elections campaign’. The Deputy Registrar held that ‘the facilities provided by the Detention Unit are intended for the well-being of the Accused and not for purposes that frustrate the Tribunal’s function to assist in establishing peace and security in the former Yugoslavia and that the fact that a detainee at the Detention Unit has communicated with the aid of facilities provided by the Detention Unit to participate in an ongoing Serbian parliamentary elections campaign is such an occasion that is likely to frustrate the Tribunal’s mandate’, and that ‘in balancing

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1500 Id., par. 4.
1501 ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 11 December 2003.
1503 ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 11 December 2003.
1504 Ibid.
between the rights and entitlements to communication and visits of the Accused with
that of the Tribunal to effectively perform its mandate and functions, the particular
circumstances of the detainee necessitates the imposition of measures which are
imperative for the avoidance of potentially deleterious media coverage resulting from
unrestricted communication entitlements and visits for the time being. On these
grounds, the Deputy Registrar prohibited all of Milošević’s telephone
communications, except for ‘telephone communication with his immediate family,
legal counsel (where applicable), diplomatic or consular representatives on condition
that this facility shall not be used in any manner to contact the media.’ The
exempted telephone conversations were to be monitored, except for those with
counsel and diplomatic or consular representatives. The Deputy Registrar further
forbade all visits, except those from immediate family, counsel (where applicable) or
diplomatic or consular representatives. The only mode of communication that was not
made subject to additional restrictions was written communications. In those
elections, Milošević’s political party won almost 10% of the seats in the Serbian
Parliament. For the same reasons as those mentioned above and because ‘post-
elections associated activities will likely see the political party and the supporters of
the Accused seeking his further involvement in post-elections political activities
associated with the 28 December 2003 Serbian parliamentary elections’, after the
elections the Deputy Registrar renewed the monitoring order for another thirty
days.

In Šešelj, the Deputy Registrar went a step further. In December 2003, he had
issued an order similar to the one referred to above in the Milošević case. It was

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1505 Ibid. It is noted in this regard that Rule 24(11) of the EPR prescribes that ‘[p]rison
authorities shall ensure that prisoners are able to participate in elections, referenda and other
aspects of public life in so far as their right to do so is not restricted by national law’. In view
of the specific mandate of the international criminal tribunals and the context in which they
operate, it may be argued that the detainees’ right to participate actively in national elections
cannot in all situations be fully respected and may at times need to be curtailed. Consistent
with the second part of Rule 24(11), it is recommended that the tribunals lay down the
possibility to impose such restrictions in their legal frameworks.

1506 ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 11
December 2003.

1507 Ibid.

1508 ICTY, Decision, Prosecutor v. Milošević, Case No. IT-02-54, Deputy Registrar, 8 January
2004.
discovered later that Šešelj had violated that order, which led the Deputy Registrar to impose a total contact ban, except for communications with counsel and diplomatic or consular representatives. It was reported that Šešelj had ‘addressed the Serbian Radical Party press conference held on 25 December over the telephone from the Detention Unit, in direct violation of [the earlier decision]’. This second order was renewed in January 2004. In February, the Deputy Registrar ordered a second renewal, while again permitting Šešelj to communicate with his immediate family subject to live monitoring. This order was renewed in March and in April of that year. In the April 2004 Decision, the Registrar stated that ‘the balance between the rights and entitlements to communication or visits of the Accused with that of the Tribunal to effectively perform its mandate and functions, must be assessed in view of the 13 June 2004 presidential elections and the disposition of the Accused as noted above’ and, in that light, considered ‘that the particular circumstances in this case continue to necessitate the imposition of measures to avoid potentially deleterious media coverage resulting from unrestricted communication entitlements and visits’. These orders have been criticised by De Jonge, who wrote ‘one can wonder why the Registrar saw it as his duty to prevent Šešelj playing an active role in ongoing elections in Serbia. First of all: Serbian law apparently allowed him to lead his party, while detained in Scheveningen. As far as is known, Šešelj, when using his contacts with the media did not violate any Serbian laws at the time. Interference in the Serbian political process by trying to keep Šešelj silent – whether you like the person, his party or ideology or not – does not seem a task for the Registrar, as long as

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1510 ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 6 February 2004.
1512 ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 6 February 2004.
1513 ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 9 March 2004.
1514 ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Registrar, 8 April 2004. The Registrar took note of the fact that ‘on 6 April 2004, when the Commanding Officer of the Detention Unit inquired as to the Accused’s position with regard to the measures concerning his communication privileges at the Detention Unit, the response of the Accused indicated an uncooperative disposition with regard to the said measures and the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal ("Rules of Detention"').
1515 Ibid.
this does not disturb the order in the UNDU or does not threaten the administration of justice. As long as his political rights are not expressly taken away from him by law or judicial decision he must be considered as entitled to vent his ideas.\footnote{Gerard de Jonge, \textit{supra}, footnote 1430, at 939.}

In February 2004, the Deputy Registrar also renewed the order that he had issued in the Milošević case. However, he noted that Milošević had complied with the previous order. He further considered that ‘the Accused, who is representing himself, needs to take steps to prepare his defence case and thus will need to contact potential witnesses and attend to the collection of evidence’.\footnote{ICTY, \textit{Decision}, \textit{Prosecutor v. Milošević}, Case No. IT-02-54, Deputy Registrar, 6 February 2004.} He therefore determined that the imposed restrictions would not apply to ‘(a) communication and visits which are reasonably necessary for the preparation of the Accused’s defence, including interviewing by telephone or in person potential witnesses or otherwise collecting evidence in his defence, provided that this facility shall not be used in any manner for any contacts with the media; and (b) written communications wherein the current practices shall be maintained and the Detention Unit’s regulations concerning the import and export of mail shall be adhered to’.\footnote{\textit{Id.}, disposition, sub (v).}

In Šešelj, the drama continued in May of the same year. In April, he had reportedly succeeded in sending a letter to a certain Tomislav Nikolić, the Deputy President of Šešelj’s political party, which had been published in the press. In that letter Šešelj had made allegations of serious misconduct on the part of tribunal’s officials including Judges, Prosecutors and staff members of the Registry, some of whom were mentioned by name.\footnote{ICTY, \textit{Decision}, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, 7 May 2004.} The Registrar noted that ‘the Accused has, in the said letter, strongly encouraged that the letter be distributed to the media and supporters of his political party, in contradiction of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal ("Rules of Detention") and that the publication of the letter has resulted in a widespread media attention and coverage of the fact that an indictee for crimes against humanity and war-crimes such as the Accused is in a position to facilitate, with ease, the ongoing Serbian presidential elections campaign’.\footnote{\textit{Ibid.}} The Registrar recalled that in November 2003 the Trial Chamber had, ‘as a result of
similar allegations made by the Accused on the part of Tribunal officials (...) cautioned the Accused and took a "very poor view of his conduct in this matter and that any future attempts to hijack public proceedings for the purpose of directing unsubstantiated accusations against staff members or other persons associated with this Tribunal is more than likely to meet with sanctions". The Registrar concluded that ‘the Accused’s unsubstantiated allegations, particularly where the allegations are of such a grave nature, amount to a serious abuse of the opportunity afforded in the Decision and previous decisions concerning his communication privileges to exercise his right to communicate in writing in accordance with the existing regulations and practice at the Detention Unit concerning import and export of mail’, and, therefore, renewed the order restricting Šešelj’s communications with the outside world. On 9 June 2004, the Registrar, while noting that the Serbian Presidential elections were to be held on the 13th day of that month, ‘with a possible second round of voting on 27 June 2004’, renewed the order until 1 July 2004.

In January 2004, the tribunal set out the reasons for imposing the aforementioned restrictions in Šešelj and Milošević in ‘Magazine Balkan’. It stated that ‘one of [these reasons] is to protect the accused from incriminating him/herself by making a statement to the media that could later be used against them in court. In addition to that, the Tribunal must ensure that the accused do not have means to threaten the safety of witnesses, in particular protected witnesses, and that the integrity of court proceedings is protected. After all, the place for the accused to defend themselves is in the courtroom, not in the media’. The tribunal further stressed that ‘[t]he restrictions on Šešelj and Milošević’s communications will not in any way affect their ability to conduct their defence before the Tribunal. They continue to have unimpeded access to fully confidential communication with their legal representatives’.

In 2006, Šešelj objected to a decision by the Registrar in which he was denied a visit by (the earlier mentioned) Tomislav Nikolić on the ground that Nikolić had

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1521 Ibid.
1522 Ibid.
1523 ICTY, Decision, Prosecutor v. Šešelj, Case No. IT-03-67-PT, Deputy Registrar, 9 June 2004.
1525 Ibid.
‘violated the terms of the Undertaking for Visitors to the United Nations Detention Unit ("Undertaking") he had signed on 30 July 2004 by revealing the name of a potential defence witness to the media’.\textsuperscript{1526} Šešelj complained that in August 2004 the Registry had permitted him to nominate two members of his political party that would be allowed to visit him in UNDU, and that the Registrar’s refusal to allow Nikolić entrance to UNDU was in breach of that earlier decision.\textsuperscript{1527} The Registry responded that it had recognised ‘the legitimate interest of Šešelj in communicating with members of the SRS [Serbian Radical Party] and in this regard it ha[d] allowed him to nominate two members of the SRS to visit him at the Detention Unit’.\textsuperscript{1528} However, it considered that ‘"the Tribunal’s interest in ensuring the safety of witnesses, the security and good order of the UNDU (Detention Unit), and the administration of justice, justify refusing" to allow Nikolić to visit the Detention Unit’.\textsuperscript{1529} The President confirmed that, since the language of Rule 61(B) is mandatory, ‘the Registrar "shall" refuse to allow visits to detainees if he considers that the purpose of the visit is to acquire information to be reported in the media. Accordingly, provided the Registrar has a reasonable basis for considering that the purpose of a visit is to obtain information to report in the media he must prohibit the visit’.\textsuperscript{1530} The President further noted that Nikolić had violated the ‘Undertaking’ in several respects, i.e. ‘by reporting to the media on his visit to Šešelj and not only did he reveal the name of a protected witness in that interview, albeit allegedly erroneously, but he also made reference to the health of Šešelj and another detainee knowing that in doing so he was in violation of other provisions of the Undertaking’.\textsuperscript{1531} In light of the foregoing, the President was ‘satisfied that the basis of the Registrar’s conclusion was a reasonable one’,\textsuperscript{1532} and dismissed Šešelj’s appeal.\textsuperscript{1533}

The Swedish independent investigators of UNDU recognised that UNDU has a ‘quite unique position’, which ‘leads to the operations and any disturbances in them receiving great international attention, which the management and staff feel imposes a

\textsuperscript{1526} ICTY, Decision on Appeal against Decisions of the Registry of 20 August 2004 and 30 January 2006, 	extit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, President, 11 April 2006, par. 1.
\textsuperscript{1527} Id., par. 4.
\textsuperscript{1528} Id., par. 5.
\textsuperscript{1529} Ibid.
\textsuperscript{1530} Id., par. 6.
\textsuperscript{1531} Ibid.
\textsuperscript{1532} Ibid.
\textsuperscript{1533} Id., par. 7.
great strain’\textsuperscript{1534} An example may be found in the extensive media coverage following Milošević’s death. According to the Report by Judge Parker, who conducted an inquiry into the circumstances surrounding Milošević’s death, ‘there were widespread media reports that Mr. Milošević had been murdered, especially by poisoning’.\textsuperscript{1535} Further, the tribunal has not always been successful in controlling sensitive information leaving UNDU. In 2001, for example, one detained person managed to give an interview to a Belgrade newspaper ‘that denounced a co-accused as a traitor because she is co-operating with the Prosecution’.\textsuperscript{1536} When asked how such an interview could have occurred and whether the tribunal was worried about the co-accused’s safety, the tribunal’s spokesperson explained during a press briefing that ‘the journalist entered the Detention Unit pretending to be a friend of the detainee and not a journalist’.\textsuperscript{1537}

Occasionally, the tribunal has also had to refute untrue stories in the media. In a 2006 press release, for example, the story in the Croatian daily “Večernji list” that a Večernji list journalist had visited UNDU was rebutted. The tribunal’s Media Office stated that ‘[n]o Večernji list journalist has visited the Tribunal's Detention Unit. In order to protect the privacy of the detainees, journalists are not permitted to visit the unit and no exception has been made with regard to Večernji list’.\textsuperscript{1538} The foregoing may very well explain the great diligence with which the detention authorities have tried to restrict and control\textsuperscript{1539} detainees’ contact with the media. It may also explain why face-to-face interviews with detainees have been banned.

\textsuperscript{1534} ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.3.

\textsuperscript{1535} See ICTY, Report to the President Death of Slobodan Milošević, Judge Kevin Parker Vice-President, 30 May 2006, par. 3, 39, 80 and ICTY, Press Release “Update from the President on the Death of Slobodan Milošević”, FP/MOW/1056, The Hague, 17 March 2006.


\textsuperscript{1537} Ibid.

\textsuperscript{1538} ICTY, Press Release, MH/MO/PA284e, The Hague, 25 September 2006. The Media Office further stated that ‘[p]hoto[graphs accompanying the article are said by the newspaper to show the cell of Ante Gotovina. This claim is entirely bogus. The newspaper boldly asserts “Exclusive” at the head of the article. This implies that the photographs in question were exclusively obtained by Večernji list. Again, this is a fiction. The photographs carried by the newspaper are, in fact, images made available by the Tribunal to all media agencies and are carried on the Tribunal's website at http://www.un.org/icty/glance-e/index-du.htm’.

outright. Although understandable, such diligence should not lead to violations of the detainees’ right to freedom of expression.

Karadžić, in 2008, submitted a request to the Registrar under Rule 64bis for a face-to-face interview with a journalist of Revu magazine. The Registrar denied the request, holding that ‘that both prongs of Rule 64bis(B) were satisfied, citing the threat posed to the safety and security of the UNDU and the risk that sensational reporting could interfere with the administration of justice or otherwise undermine the Tribunal’s mandate’. Karadžić had based his request on his right to freedom of expression, and argued that ‘having observed others discuss his situation in the media, he wished to respond in the same fora’. He further argued that the Registrar’s decision had violated the principle of proportionality and that the Registrar had been ‘obliged to consider alternative arrangements – for example, allowing remote communication with Ms. Vukojevic [the journalist of Revu magazine] – which he did not’.

The Registrar stressed, *inter alia*, that, if allowed, the request would lead to disclosure of confidential information ‘such as the equipment of UNDU and its guards, security devices, details of the changing of the guards, details of the security checks of the detainees as well as the general interaction between the guards and detainees’. He also held that admitting other persons than consular representatives, defence team

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1541 *Id.*, par. 4. With respect to the allegation of possible ‘sensational reporting’, Karadžić argued that such ‘content-based objection is clearly prohibited in the United States and European jurisprudence and constitutes an unjustified and unlimited ban on contacts by an accused with the news media that flunks any proportionality test’; ICTY, Request for Reversal of Denial of Contact with Journalist, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, President, 18 November 2008, par. 36.
1542 ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, par. 2, 5. Karadžić spoke about ‘the “hyperbole that accompanied his arrest”’ and said ‘that he was widely demonized by the media, including in statements by the Prosecutor of the Tribunal and former ambassador Holbrooke’. He argued that ‘“it is only fair” that he also be entitled to express his views’; *id.*, par. 8. See, also, ICTY, Request for Reversal of Denial of Contact with Journalist, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, President, 18 November 2008, par. 3.
1544 *Id.*, par. 11.
members, relatives and close friends to the detainees could endanger the detainees’ safety and security. Moreover, according to the Registrar, ‘the Tribunal’s facilities should not be used as a political platform, being mindful of the Tribunal’s efforts to maintain peace and promote reconciliation in the former Yugoslavia’.  

In his Decision, the Vice-President noted that Article 61 ‘imposes a total ban on face to face visits between detainees and journalists’. He was of the view that this did not in itself constitute an unreasonable restriction, ‘provided that detainees have alternative means of communication with the media (as envisaged by Rule 64bis)’.  

He further considered that, although the Registrar had held that requests for media contact were decided upon ‘on a case by case basis’, in practice, media contact had only been authorised once, which was ‘to allow a detainee to request that information be withdrawn from a magazine’. In the Vice-President’s opinion, this ‘evince[d] a blanket denial of all interactive contact with the media, which would run contrary to the doctrine of procedural fairness’. Moreover, the Vice-President considered the Registrar’s submission that ‘he would deny the Applicant any form of contact with the media [instead of face to face interviews only] because the purpose of the Applicant’s contact would disturb the good order of the UNDU’ to be unreasonable, and held that it did not appear impossible for Karadžić to have contact with the media while not compromising safety and security of UNDU. As to the content of the requested communication, the Vice-President took note of the fact that Karadžić did not seek ‘to influence or comment upon the political situation in the former Yugoslavia’ and said that he ‘fail[ed] to see how discussion of [the immunity agreement] in the media would compromise achievement of the Tribunal’s mandate’. He concluded that the topic of the requested communication constituted no valid reason for the refusal.

The Registrar had further adduced the argument that granting the request entailed the risk that eligible witnesses in Karadžić’s case may be intimidated or influenced. The Vice-President confirmed that this would be ‘obviously unacceptable’, and added that this also applied to the risk that confidential information might be disclosed in the interview. Nevertheless, he was of the opinion that two precautions, i.e. monitoring

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1545 Id., par. 13.  
1546 Id., par. 16.  
1547 Id., par. 18.  
1548 Id., par. 19.  
1549 Id., par. 20.  
1550 Id., par. 14, 20.
the communications and warning the journalist in question of ‘her obligations as a member of the press and her exposure to contempt proceedings before the Tribunal’, constituted adequate safeguards in this respect.\textsuperscript{1551}

The Vice-President also mentioned other criteria that might be relevant in determining requests under Rule 64\textsuperscript{bis}. In this regard, he noted that Karadžić had not made an ‘excessive or unreasonable number of requests of this nature’, and had not shown any behaviour which would indicate that ‘he intends to undermine the Tribunal’s mandate’.\textsuperscript{1552}

In the light of the foregoing, the Vice-President partly granted Karadžić’s application, ordering that ‘(a) The Applicant is permitted to contact Ms. Vukojevic remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate. (b) All communication between the Applicant and Ms. Vukojevic will be monitored by registry personnel. (c) Ms. Vukojevic shall be put on notice that any failure to comply with her obligations as a member of the media pursuant to the rules and requirements of the Tribunal will expose her to investigation and possible prosecution for contempt’.\textsuperscript{1553}

The Vice-President’s Decision may be regarded as groundbreaking for the development of the tribunal’s detention law. He affirmed the applicability of the principles of procedural fairness, proportionality and ‘least intrusiveness’, and upheld the detainees’ right to freedom of expression. The Decision further imposes clear limitations on the detention authorities’ discretionary powers in forbidding blanket prohibitions of contact with the media.

The Registrar subsequently decided to allow the communications between the journalist of Revu magazine and Karadžić \textit{in writing}. Karadžić objected to this new decision, and appealed to the Vice-President complaining, \textit{inter alia}, that ‘[i]nterviews by journalists are not conducted by written questionnaire because such contact lacks the spontaneity of oral communication, and the ability to follow-up or clarify the answers’.\textsuperscript{1554} Karadžić requested the President to be allowed ‘to be interviewed by the

\textsuperscript{1551} Id., par. 21.
\textsuperscript{1552} Id., par. 22.
\textsuperscript{1553} Id., par. 24.
\textsuperscript{1554} ICTY, Request for Reversal of Limitations of Contact with Journalist, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18-PT, Vice-President, 20 March 2009, par. 5.
journalist in a monitored telephone call'. The Registrar responded by saying that in arriving at his decision, he ‘took into account the following two factors: 1) the monitoring facilities available at the UNDU; and 2) the type of media for which the interview is intended (that is, print or broadcast media)’. Regarding the first factor, he explained that the monitoring facilities available at UNDU ‘would not allow for the effective protection of confidential information as required. There is a risk that confidential information could be divulged, not only to the journalist, but also to the public at large. This is due to the nature of telephone conversations as being “spontaneous” (….). Although the UNDU facilities enable calls to be monitored and recorded, there is not a possibility to delay the transmission and the receipt of the spoken word. Furthermore, it cannot be guaranteed that the detainee’s interlocutor will not live-broadcast or tape-record the conversation’. The Vice-President recalled that, in his Decision of 12 February 2009, he had authorised Karadžić to contact the journalist “remotely via written correspondence, telephone calls, or whatever other means the Registrar deems appropriate”, and held that ‘[i]t was therefore within the Registrar’s discretion to determine the appropriate modalities of the contact in accordance with this guidance’. He found that the Registrar’s Decision complied with the relevant legal requirements, that it was reasonable (and in so doing, stressed that the ‘potential disclosure of confidential information pertaining to witnesses is an unacceptable risk’), and that the Registrar had observed the principles of procedural fairness and natural justice. As a consequence, he dismissed Karadžić’s request.

It may be argued that it follows from the Vice-President’s Decision of 21 April 2009 that the principle of ‘least intrusiveness’ does not apply to discretionary decision making by the Registrar. At first glance, it seems as though the Registrar had total freedom in determining the appropriate means of Karadžić communicating with the

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1555 Id., par. 18.
1556 ICTY, Registry Submission Regarding the Request for Reversal of Limitations of Contact with Journalist, Prosecutor v. Karadžić, Case No. IT-95-05/18-PT, Vice-President, 3 April 2009, par. 17.
1557 Id., par. 18.
1558 ICTY, Decision on Request for Reversal of Limitations of Contact with Journalist, Prosecutor v. Karadžić, Case no. IT-95-5/18-PT, Vice-President, 21 April 2009, par. 19.
1559 Ibid.
1560 Id., par. 20-21, 24.
1561 Id., par. 25.
media. However, in his submissions the Registrar did respond to Karadžić’s complaint that he (the Registrar) had failed to apply the least intrusive measure in not allowing telephone contact. In this regard, the Registrar stipulated that ‘allowing contact via written correspondence is the only measure which guarantees the Accused’s right to freedom of expression whilst adequately protecting the good order of the UNDU and the administration of justice’.\footnote{ICTY, Registry Submission Regarding the Request for Reversal of limitations of Contact with Journalist, \textit{Prosecutor v. Karadžić}, Case no. IT-95-5/18-PT, Vice-President, 3 April 2009, par. 22. Emphasis added.} Hence, where the Vice-President ruled that the Registrar’s Decision was reasonable and that it complied with the principle of procedural fairness, he also appears to have given his approval to the Registrar’s line of reasoning in respect of how the principle of ‘least intrusiveness’ had to be applied to this specific situation.

On a later occasion, Karadžić sought to have the President reverse a decision by the Registrar, in which the latter had restricted contact between himself and a journalist of the broadcast media Russia Today to written communication.\footnote{ICTY, Request for Reversal of Limitations of Contact with Journalist: Russia Today, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18-PT, President, 9 September 2009, par. 1.} He had specifically requested permission for the interview to be conducted by telephone communication, but this had been denied by the Registrar. Karadžić then proposed to record his answers to the journalist’s questions on a video file to be reviewed by the Registrar before posting it to Russia Today. The Registrar’s arguments for refusing this proposal were that recording devices were not permitted in UNDU, and that reviewing video-taped material would be too time-consuming. Karadžić responded, \textit{inter alia}, that breaches of fundamental rights can never be justified by a lack of resources, and that the ‘various types of media – for example, written and audio-visual - have their own specific qualities in respect to outreach and power of persuasion. Therefore, a blanket prohibition on all audio-visual broadcast material – as is the direct result from the Registrar’s reasoning – would entail a violation of the principles of proportionality and least intrusiveness’.\footnote{\textit{Id.}, par. 23.}

The Registrar stressed that, according to the tribunal’s case-law, ‘it is within the Registrar’s discretion to decide which form of contact is most appropriate when
deciding on a request to grant contact with the media.\footnote{ICTY, Registry Submission Re Media Contact – Russia Today, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18-PT, President, 9 October 2009, par. 10.} He further argued that in arriving at the decision, he had taken ‘into account whether contact by means of an interview recorded on a video file or a cassette could disturb the good order of the United Nations Detention Unit (“UNDU”), interfere with the administration of justice or otherwise undermine the Tribunal’s mandate.\footnote{Id., par. 12.} In relation to the ‘resources argument’, he also argued that, ever since the President’s Revu media Decision, ‘the Registry has made considerable efforts to accommodate the Accused’s requests for contact with the media. It has elaborated a protocol guiding staff and detainees. The Accused has submitted 17 requests for contact with the media. After a thorough review of the questions and answers, the Registry has granted every request, at times demanding that answers be rephrased. This procedure has been time-consuming and has involved a considerable number of staff members who have been taken away from their primary responsibilities, notably facilitating the court proceedings and ensuring the smooth running of the UNDU’.\footnote{Id., par. 14.}

The Acting President found that the Registry’s limited resources may indeed be ‘one of the determining factors’ in limiting a detainee’s right. In this respect, he noted the Registrar’s concern that ‘the review of audio-video material as such is more time-consuming than an assessment of written submissions, and that a review of such recordings may lead to a significant delay of Karadžić’s current and future requests for contact with the media’.\footnote{ICTY, Decision on Radovan Karadžić’s Request for Reversal of Limitations of Contact with Journalist: Russia Today, \textit{Prosecutor v. Karadžić}, Case No. IT-95-05/18-PT, Acting President, 6 November 2009, par. 27.} Moreover, he noted that ‘[w]hile a complete denial of a detained accused’s right to freedom of expression shall not be justified by the authority’s lack of (human) resources, it may well serve as one reason among others for a partial restriction of that person’s right to access the media’.\footnote{Id., par. 30.}

Further, regarding Karadžić’s argument that the different kinds of media all have their own specific qualities, the Vice-President stated that ‘the preference of a particular broadcast media regarding the format of the information received cannot define or qualify a detainee’s right to freedom of expression’, and held that ‘[w]hile a detainee
is generally allowed to communicate with the media, this right does not as such comprise the form in which the communication takes place’.\textsuperscript{1570}

In September 2009, Karadžić again sought the Registrar’s permission to contact the media. This time it concerned a request for an interview by a journalist of Le Monde newspaper to be conducted by way of (written) correspondence. The Registrar granted the request with the exception of one of Karadžić’s responses to the questions asked.\textsuperscript{1571} According to the Registrar, Karadžić’s response defamed UNPROFOR and the U.N. more generally, and argued that it could thus undermine the tribunal’s mandate.\textsuperscript{1572} He invited Karadžić to reformulate or leave out the purported part of the correspondence.\textsuperscript{1573} Moreover, he indicated that both the journalist and Karadžić would need to sign an undertaking stipulating the conditions under which the contact was permitted. Karadžić appealed to the President arguing that ‘nothing in his Proposed Answer is denigrating or disrespectful’, and that the Registrar’s decision infringed upon his right to freedom of expression.\textsuperscript{1574} With respect to the latter argument, he argued, inter alia, that according to human rights jurisprudence, ‘freedom of expression as an essential foundation of the democratic society also applies to shocking, offending or disturbing information and not only to information or ideas that are considered to be inoffensive’.\textsuperscript{1575} Karadžić further stated that the same type of allegations as the one made in his proposed answer had already been or could still be made public in his Court filings.\textsuperscript{1576} The Acting President considered that ‘Karadžić’s contention, while blunt and unspecific in his Proposed Answer, will most probably form part of the contentious facts to be discussed at trial’. He noted that ‘as a general rule, the courtroom is the only appropriate place where to discuss any contentious case-related matters amongst the parties, and to give all parties to the proceedings the proper means to rebut the other party’s contentions. The right of an accused to access to the media shall not be abused as a parallel forum to publicly discuss contentious issues central to the charges

\textsuperscript{1570} Id., par. 29.
\textsuperscript{1571} ICTY, Decision on Radovan Karadžić’s Request for Reversal of Limitations of Contact with Journalist: Le Monde, Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Acting President, 28 October 2009, par. 3.
\textsuperscript{1572} Id., par. 15.
\textsuperscript{1573} Id., par. 4.
\textsuperscript{1574} Id., par. 6, 8.
\textsuperscript{1575} Id., par. 9.
\textsuperscript{1576} Id., par. 16.
against him. Such conduct strips the adverse party in the proceedings of the possibility
to immediately react to these contentions’.\textsuperscript{1577} As to the argument that the Registrar’s
decision had violated Karadžić’s right to freedom of expression, the Acting President
noted that the Registrar had not imposed a total ban on Karadžić’s contact with the
journalist, but had only rejected a minor part of the correspondence. The reasons for
this rejection were, according to the Acting President, ‘appropriately established’.\textsuperscript{1578}
Further, he approvingly took note of the fact that the Registrar had invited Karadžić to
reformulate or omit the contended part of the correspondence.\textsuperscript{1579} Finally, regarding
the argument that freedom of expression includes the right to “comment on and
criticize the administration of justice and the officials in it”’, the Acting President
found that ‘[w]hile such finding may be true for many issues of a general nature, it
cannot be strictly applied on contentions of facts \textit{sub iudice} in ongoing court
proceedings (…)’\textsuperscript{1580} and, subsequently, denied Karadžić’s Motion.

On another occasion, one of Karadžić’s proposed answers to questions posed
by a journalist of the Austrian news magazine Profil would, according to the
Registrar, have ““unfairly and incorrectly misrepresent[ed] (...) the work of the Office
of the Prosecutor of the ICTY””.\textsuperscript{1581} Karadžić argued that it was irrelevant whether the
Registrar thought his opinions were true or not, since ‘he has no business censoring
the answers of a detainee simply because he does not agree with them. This is
censorship of the worst form and is a violation of my right to free speech’.\textsuperscript{1582} He
added that ‘[t]he Office of the Prosecutor has accused me of the most serious crimes
contained in the Statute of the Tribunal. It has held press conferences since 1995
making accusations and allegations which I do not agree with. No one has suggested
that these communications with the news media by the prosecution should be halted.
Similarly, I have the right to present my point of view without censorship because the
Registrar does not agree with them’.\textsuperscript{1583} The Registrar responded that since, in his
opinion, the ‘response in question misrepresented the work of an organ of the

\textsuperscript{1577} \textit{Id.}, par. 17.
\textsuperscript{1578} \textit{Id.}, par. 18.
\textsuperscript{1579} \textit{Id.}, par. 19.
\textsuperscript{1580} \textit{Id.}, par. 20.
\textsuperscript{1581} ICTY, Request for Reversal of Limitations of Contact with Journalist: Profil Magazine,
\textsuperscript{1582} \textit{Id.}, par. 20.
\textsuperscript{1583} \textit{Id.}, par. 21.
Tribunal’, it ‘could potentially undermine the mandate of the Tribunal and/or interfere with the administration of justice’. The President, however, noted that the contended part of the proposed correspondence ‘in essence comprises Karadžić’s personal opinion alleging bias on the part of the OTP’, and stated that he was ‘unable to appreciate how this opinion as stated, falls within the scope of Rule 64bis(B)(ii) of the Rules of Detention’. The President said that the reasons adduced by the Registrar only gave expression to the latter’s ‘personal disagreement with the opinion expressed by Karadžić’, and held that mere disagreement ‘does not provide an adequate basis for curtailing Karadžić’s right to freedom of expression in the absence of some indication as to how the response could, if published, result in the kind of prejudice to the Tribunal’s operations envisioned under Rule 64bis(B)(ii) of the Rules of Detention’.

As stated above, one of the factors that must be taken into account when deciding on a request for contact with the media is whether such contact may undermine the tribunal’s mandate. However, the vagueness of this ground for restrictions on the right to freedom of expression may raise issues under the legality or, more specifically, the lex certa principle. As noted by De Jonge, ‘[t]he terms in which this mandate is formulated certainly have a high symbolic and even solemn value, but are too general to function as a basis for infringements on basic prisoners’ rights like sending and receiving mail, receiving visits and making telephone calls.’ Karadžić had indeed complained that the Registrar had ‘fail[ed] to specifically demonstrate how the Third Response undermines the mandate of the Tribunal or interferes with the administration of justice’. The President was therefore correct in limiting the Registrar’s discretionary powers in prohibiting a detained person’s contact with the media on the basis of this ground.

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1586 Id., par. 23.
1587 Gerard de Jonge, supra, footnote 1430, at 939.
interests. He also gave an example of a situation in which the Registrar may legitimately invoke those grounds: ‘[c]ontact with the media which, for example, threatens to result in the public disclosure of confidential information could clearly result in the prejudicial consequences stated under Rule 64bis(B)(ii) of the Rules of Detention’.\(^\text{1589}\) With regard to the specifics of the case before him, he held that ‘no reasonable person who has properly applied his mind to the current issue, could arrive at the conclusion that the publication of Karadžić’s subjective view, as stated in the Third Response, alleging bias on the part of the OTP and a general lack of impartiality in its conduct of investigations, could interfere with the administration of justice or otherwise undermine the Tribunal’s mandate’.\(^\text{1590}\) Consequently, he found that the Registrar’s decision was unreasonable and amounted to ‘an unjustified restriction of Karadžić’s right to freedom of expression’ and, therefore, directed the Registrar to allow the communication.\(^\text{1591}\)

Notwithstanding the Registrar’s apparent efforts to prevent detainees from having contact with the media, the tribunal has gone to some length to provide the public with an inside view of UNDU, consistent with the idea of transparent governance. In 2006, it launched a video of UNDU on its website showing ‘scenes from the detention facility, including a detainee's room, the detainees' common area, the lawyers' meeting room, medical facilities, weight room and gym, the library, spiritual room and the educational and occupational therapy facilities’.\(^\text{1592}\) The video constituted ‘an addition to the Detention Unit page on the ICTY website’, which also contained a photo gallery of UNDU.\(^\text{1593}\)

When interviewed for the purpose of this research, ICTY detainees made the following remarks about (the regime governing) contact with the media:\(^\text{1594}\)

> ‘If the topic of discussion is not linked to the trial, I don’t see why detainees should not be allowed to write in the media’.

\(^{1589}\) Id., par. 23.  
\(^{1590}\) Ibid.  
\(^{1591}\) Id., par. 24, Disposition.  
\(^{1593}\) Ibid.  
\(^{1594}\) ICTY, interviews conducted by the author with ICTY detainees, The Hague – Netherlands, 22 February 2011.
‘Contacts are allowed with the media, but there is censorship. Contacts without censorship by the Registry are necessary’.

‘Newspapers and television are provided to us in our own language. I don’t read the newspapers because the outside world interests me less and less, but I occasionally watch films or television series from my own country’.

‘The UNDU does not provide newspapers. We get some from Serbia, and we get the newspaper Vesti. The problem is that newspapers are not delivered on time, but only when ten or so issues have been collected, and these are out of date. We get newspapers when lawyers or members of the family come to visit us’.

‘I don’t have the multinational or state programmes from BH. I asked for FTV BH to be made available to us, but nothing came of that. We have a programme which is irritating (Hajat) and hostile to everyone who is not a Bosniac. As far as I know no one here is interested in that programme’.

‘We get newspapers late, not from the UNDU, but from the publishers in our own country’.

Several detainees complained about not being permitted to access the internet. According to David Kennedy, UNDU’s Commanding Officer,

‘People do ask why [access is not permitted], but that’s a huge issue. In the UK, crimes have been committed because people had access to the internet. There have been all sorts of illicit (...) in contact, you know, by smuggling in third generation phones and upwards. I don’t think we’ll see the time when people have unrestricted access. I’m not sure that the security systems are good enough at the moment to allow access’. 1595

1595 ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, 17 June 2011.
The ICTR Rules of Detention do not contain any provisions on the detainees’ contact with the media. Therefore, such contact is governed by the regular visiting and communications regime. In the apparent absence of any relevant case-law, the issue needs no further discussion. As to the detained persons’ right to receive information, it may be worthwhile considering some of their own remarks on the matter. These are listed below.

‘The right to keep myself informed of the news exists in reality at the UNDF. A free French channel TV5 is broadcasting regularly at daytime. A modest library with some international, local newspapers and magazines is daily opened. Furthermore, some detainees may watch the local channels through their own TV screens in their respective cells. Each detainee may listen to local and international bulletins through their radio receivers’.  

‘To be informed of the news is like feeding the mind. We need to be informed of the news in order to know what is going on in the world. Prisoners need to have a picture of how the world is evolving compared to how they left it. People in jail need to cultivate themselves and learn from books, newspapers and internet. By doing so, they prevent themselves from turning into morons and many other mental diseases are thus avoided’.  

‘Je trouve que c’est relativement acceptable. J’ai mon propre poste de radio, je peux suivre le canal international TV5 pendant la journée. Nous réclamons depuis longtemps d’être connectés sur TV5 pendant la nuit mais sans résultats’.

Rule 42 of the SCSL Rules of Detention governs a detainee’s communications with and visits from representatives of the media. Both the detainee seeking contact with

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1596 ICTR, interviews conducted by the author with UNDF detainees, Arusha - Tanzania, May 2008.
1597 Ibid.
1598 Ibid.
the media – either by letter or phone, or through a visit – and the representative of the media may make a request for permission for such contact to the Registrar. The grounds for refusing such a request are stipulated in Paragraph (B), i.e. ‘if there are reasonable grounds for believing that such communications or visit: (i) is for the purposes of attempting to arrange the escape of the Detainee from the Detention Facility; (ii) could prejudice or otherwise undermine the outcome of the proceedings against the Detainee or any other proceedings; (iii) could constitute a danger to the health and safety of any person; (iv) could be used by the Detainee to breach an order made by a Judge or a Chamber, or otherwise interfere with the administration of justice or frustrate the mandate of the Special Court; or (v) could disturb the maintenance of the security and good order in the Detention Facility’. As was stated in connection to Rule 64bis of the ICTY Rules of Detention, the phrase ‘frustrate the mandate of the tribunal’ is rather vague and may lead to arbitrary decision making. It follows from Detention Operational Order 3:11, which is entitled ‘Visits by Journalists, Broadcasters and Writers’, that in any decision made pursuant to Rule 42(A), the Registrar must clearly state whether the representative of the media is indeed permitted to speak to a particular detainee. Permission may also be granted to such persons merely to enter the Detention Facility ‘for the purposes of filming or collecting material for publication or broadcasting’. 

On several occasions, representatives of the media have been contacted by detainees’ counsel or relatives. For example, in 2003, the Registrar felt compelled to publicly react to allegations made in the media by Norman’s counsel and relatives about the level of care and the facilities provided to detained persons. On another occasion, counsel for Norman were reported to have stated in the press in relation to the detention conditions at Bonthe Island that Norman was being ‘held in “mosquito infested caves which formerly held West African slaves”’. Again, the Registrar tried to refute the allegations by issuing a press release stating that ‘[t]he detention

1599 Rule 42(A) of the SCSL Rules of Detention.
centre in Bonthe is not a cave and was never used to hold slaves. The centre is also
not mosquito infested and no detainee has fallen sick from malaria’.  

In Norman et al., a Judge designated pursuant to Rule 28 of the RPE\textsuperscript{1604} stated that ‘[b]y way of a strong caution embodied as a footnote to this Decision addressed to Counsel who practise before the Special Court, I take this opportunity as Designated Judge in this matter to remind all Counsel that matters pending before courts of justice are subject to the doctrine of sub judice until final disposition. Accordingly, public comments and press interviews given while litigation is pending may well border on contempt of court, having regard to how such comments are framed. Specifically, my attention was directed to some immoderate comments on the Interim Order in this matter by Defence Counsel during a radio interview. I say, with all judicial forthrightness, that it is expected that learned Counsel of seniority and standing at the Bar should appreciate the difference between their obligations, as Officers of the Court, and the alluring attractions of populism and ideological posturing so as to ensure the harmonious co-operation and mutual respect that have always characterized the relationship between the Bench and the Bar in the administration of justice’.  

In 2005, a defence counsel in the Brima et al. case was reproached by the Trial Chamber’s Presiding Judge for making certain statements to the press. The counsel concerned responded that: ‘Well, the rule of the Bar of England and Wales does not preclude me from writing or speaking to the press. And the rules here -- the rules, the present rules, of this Special Court does not preclude me from speaking to the press. It specifically does not preclude me from speaking to the press. So I am not sure what we are getting at or where we are going. I have not committed any breach of any rule that I know’.  

Another counsel added that ‘there have been remarks off-the-cuff of a cutting and biased nature coming from the very mouths of the top of the Prosecution

\textsuperscript{1603} \textit{Ibid.}.

\textsuperscript{1604} Rule 28 of the SCSL RPE provides, as far as relevant, that ‘[a]fter consultation with the Judges concerned, the President shall designate for a given period such Judge as necessary to whom indictments, warrants and all other pre-trial matters not pertaining to a case already assigned to a Chamber, shall be transmitted for review’.

\textsuperscript{1605} SCSL, Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone, \textit{Prosecutor v. Norman, Fofana and Kondewa}, Case No. SCSL-04-14-PT, Designated Judge Pursuant to Rule 28 of the Rules, 19 April 2004, par. 17.

in this case in the local and international press. They have never been sanctioned'. 1607 He further stated that ‘nothing that was contained within that article ascribed to [the other defence counsel] that he has not said in open court in this building, at which point in time the Bench has not said to him that anything he said was offensive or contumacious in any event’. 1608 Responding to the other defence counsel’s first argument, the Presiding Judge asked that the Court be provided with the articles referred to for consideration.1609 As to the second argument, the Presiding Judge found that ‘what is said within the precincts of the Court where the Court is subject to submission, reply et cetera, is one matter. It is a different matter to publish in the press matters such as, "The real question is whether justice is or could be seen to be done. The answer unhappily must be in the negative," and then say that detainees have been met -- families of detainees have been unable to gain access et cetera, et cetera, I will not go into the detail when factually when it was made known that that was inaccurate’. 1610

In response to the argument raised by the first counsel, the Chamber pointed to the Code of Conduct of the Bar of England and Wales, which was said to provide that ‘[a] barrister must not in relation to any anticipated or current proceedings or mediation in which he is briefed or expects to appear or has appeared as an advocate, express a personal opinion to the press or other media in any other public statement upon the facts or issues arising in the proceedings’. 1611 The Judge concerned then added that ‘[n]ow, firstly, it would defy all logic to say that barristers appearing in the Special Court are not bound by any code of conduct because there is no specific Special Court code of conduct. Further, to demonstrate that the code of conduct in your own Bar at home, to which you are bound, to demonstrate that that is binding on you here can be seen from Rule 46. If you look at 46(D) if we decide to sanction you in any way - and I might say that we have not decided that, we have just decided to give you a warning’. 1612

1607 Id., p. 17, line 27 to p. 18, line 1.
1608 Id., p. 18, lines 11-14.
1609 Id., p. 18, lines 16-22.
1610 Id., p. 18, line 22, to p. 19, line 2.
1611 Id., p. 21, line 25, to p. 22, line 1.
1612 Id., p. 22, lines 1-9. Rule 46(D) of the SCSL RPE provides that ‘[a] Judge or Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission’. 945
In this respect, Article 13 of the Code of Conduct for Counsel, which was adopted in May 2005, provides that ‘(A) Counsel shall not publish or assist in the publication of any material concerning any current proceedings which: (i) is false; or (ii) discloses any confidential information. (B) Counsel shall not comment on any matter which is sub judice in any case in which he is involved.’\(^{1613}\)

Occasionally, detained persons have themselves tried to contact the media, or managed to have statements appear in the press, without having submitted a prior request thereto to the Registrar. In January 2004, the Registrar received information that Norman had ‘recently made statements inciting his supporters to public unrest, using communication facilities provided by the Detention facility and with the intention of having these statements subsequently being reported to the media.’\(^{1614}\) Responding to such information, the Registrar found that ‘the facilities provided by the Detention Facility are intended for the well-being of the Detainee and not for purposes that frustrate the mandate of the Special Court.’\(^{1615}\) As a consequence, the Registrar prohibited Norman’s telephone communications except for those with counsel (on the condition that this facility would not be used to contact the media), and all visits except for those by counsel (again, on the condition that the facility would not be used to contact the media).\(^{1616}\)

In September of the same year, one of the accused in the Norman et al. case ‘addressed a letter (…) to the Principal Defender regarding the proceedings against [him], which [he] “cc-ed [carbon-copied]” to a number of individuals, including the Registrar and “family, Press and File”’.\(^{1617}\) A week later, two Sierra Leonean newspapers published the letter in question.\(^{1618}\) The detainee concerned was warned that he was required to request the Registrar’s permission in order to contact the media. However, a week later the detained person again addressed a letter to the Principal Defender regarding the criminal proceedings against him, which he carbon-copied to a number of individuals, including the Registrar and “Family / Press /

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\(^{1613}\) Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, adopted on 14 May 2005, as amended on 13 May 2006.


\(^{1615}\) Ibid.

\(^{1616}\) Ibid.


\(^{1618}\) Ibid.
Again, the letter in question was published a couple of days later in two local newspapers.\textsuperscript{1619} When, two days later, the detainee sent a third letter to a person whom he referred to as a “Prosecution agent”, which was cc-ed to the Registrar, the media and others, the Registrar officially warned the detainee that disciplinary sanctions might be imposed against him, including restrictions on contact with the outside world in case he violated the rules again.\textsuperscript{1620} Notwithstanding such warnings, two weeks later the detained person’s letter was published in four local newspapers, whereupon the Registrar prohibited the detainee’s visits for a period of four weeks, except for visits by counsel.\textsuperscript{1621}

Although in \textit{Norman} the Registrar appears to have dealt with the situation in a rather relaxed way, the same cannot be said of the Trial Chamber’s approach in the \textit{Sesay et al.} case. In that case, counsel had complained in open court that one of the accused detainees’ wives had paid a visit to the Detention Facility and had thereby been subjected to a vaginal search.\textsuperscript{1622} After having heard and accepted the Chief of Detention rebuttal of those allegations, the Trial Chamber strongly reproached counsel for making such allegations during a public trial session. Addressing the counsel concerned, the Presiding Judge stated that ‘[y]ou are supposed to (…), [the complainants] are supposed to have spoken to you before you make such an allegation, you know, in front of this Bench and to the world, to the world. I mean, the gallery is there and you know what has been published in the papers about that allegation’.\textsuperscript{1623} He subsequently said that ‘we are sitting in an open session and (…) whatever we say or do here is directly transmitted, you know, to the public, to both the national and the international audience, and that I think we need to be very, very, very, very careful’.\textsuperscript{1624}

When interviewed for the purpose of this research and asked about his possibilities to contact the press, one SCSL detainee said that

\textsuperscript{1619} \textit{Ibid.}
\textsuperscript{1620} \textit{Ibid.}
\textsuperscript{1621} \textit{Ibid.}
\textsuperscript{1623} \textit{Id.}, p. 14, lines 2-4.
\textsuperscript{1624} \textit{Id.}, p. 20, lines 8-10.
'They don’t allow us. If we would talk to the media, we would be punished. (…) In 2004 I spoke to a friend who is a journalist and complained to him about what was happening at the Court. But then I was warned by the Registrar that every time I would talk to a journalist action would be undertaken against me. Mr. Norman talked to the press and he was sanctioned; for one month he was not allowed communication with the outside world’.  

He continued by saying that

‘The public is not allowed to hear my voice. The public does not know what really happens in the Court; it would be in the interest of the Sierra Leonean people to hear our side of the story also. It would also be in the interest of fairness. Some things that come out of the trial are just not true’.  

Another detained person, when asked about his desire to contact the media, stated that

‘That is precisely the reason why I did not turn down your request to interview me. The only one who talks to the press is the Prosecutor; only one side of the story is being presented in the media. We have asked for it so many times. From all over the world, people have been trying to come and see us in here, but they have not gotten permission to talk to us. No one has ever received permission to see us. You are the first one that has come to speak to us in here. (…) The court would also not allow my counsel to speak to the press. Actually, my colleague’s lawyer contacted the press; for that reason he received threats over the telephone, persons who threatened to kill him. It is a big problem; the world can only listen to the story that is being told by the Prosecution. Often when I read the paper, I see stories about the Court which are distortions of the truth; I wish I could tell my own story. The media in Sierra Leone apparently do not need to check whether it’s correct what they are writing; the Court just tells them what to write and they do so. It’s frustrating to hear, for example, that the Prosecutor says about me that I have been in Bonthe at a certain time whereas, in reality, I have never set a foot in that place; the place may be green, yellow, red or pink, I do not know. Yet he says that I have been there’.  

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1625 SCSL, interviews conducted by the author with SCSL detainees, Freetown - Sierra Leone, October 2009.
1626 Ibid.
1627 Ibid.
Regarding the possibilities to receive information, one detainee said that

‘they do bring us newspapers, but only those of last month. That is not effective; but we can watch television and listen to the radio’.\(^{1628}\)

**ICC**

With regard to receiving information, the ICC RoC state that detained persons are entitled to keep themselves ‘regularly informed of the news by way of newspapers, periodicals and other publications, radio and television broadcasts’.\(^{1629}\)

As to contact with representatives of the media or other persons, Regulation 180(1)(c) of the RoR stipulates that if the Chief Custody Officer or the Registrar has reasonable grounds to believe that ‘[t]he purpose of the visit is to obtain information which may be subsequently reported in the media’, he may deny a request for permission for a visit. Otherwise, it appears that the regular regime governing detained persons’ contact with the outside world is equally applicable to contact with the media.

**8.4.3 Evaluation**

‘Saw an article in the Revue but was so hurried that I could read only part of it. It was two and a half months old, for even the guards kept this article a secret from us – which also saved us from bothersome questions. An account of our life in Spandau is given, with many distortions (…) From small signs I conclude that the material for the article was supplied by Funk. Probably he too has a channel to the outside at his disposal; in general it may be assumed that each of the prisoners by now has an illegal means of communication available’.

*Albert Speer*\(^{1630}\)

\(^{1628}\) *Ibid.*

\(^{1629}\) Regulation 99(1)(d) of the ICC RoC. See, also, *id.*, sub (e).

According to the Swedish independent investigators of UNDU, operations and disturbances in UNDU have generated great media attention, which has put pressure on the detention authorities and staff.\textsuperscript{1631} This may well explain the authorities’ persistence in trying to prevent detainees from having contact with the media. Although perhaps understandable, this attitude should not result in the violation of the detainees’ right to freedom of expression. Human rights law does not accept restrictive measures that wholly preclude detained persons from having access to the media.\textsuperscript{1632} This principled viewpoint was confirmed by the Vice-President in his Decision of 12 February 2009 in the \textit{Karadžić} case. Although the Vice-President did not object to the fact that face-to-face interviews are totally banned under the ICTY Rules of Detention, he considered that such a prohibitory clause may only be justified where detainees have alternative means of communication with the media.\textsuperscript{1633} The Registrar’s blanket denial of all forms of interactive contact of detainees with the media, was considered to violate the principle of procedural fairness.\textsuperscript{1634} The Vice-President’s Decision was groundbreaking. The applicability of the principles of procedural fairness, proportionality and ‘least intrusiveness’ was affirmed, whilst the core substance of the detainees’ right to freedom of expression was upheld. Further, the Decision limited the detention authorities’ discretionary powers in proscribing blanket prohibitions of contact with the media. The Vice-President’s line of reasoning has been confirmed in later Presidential case-law involving restrictions on the right of detainees to media contact. An important criterion to determine the legitimacy of such restrictive measures has been the question of whether the measures concerned amounted to a total ban on such contact. Detainees must be provided with some (alternative) means of having interactive communication with the media. Notwithstanding these positive developments, it may be argued that the different kinds of media, \textit{e.g.} writing and broadcasting, should all be able to obtain access to detainees and prisoners. According to Feeney, this is particularly so in respect of

\begin{footnotesize}
\textsuperscript{1631} ICTY, Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia, 4 May 2006, par. 2.3.
\textsuperscript{1632} ECommHR, \textit{Bamber v. the United Kingdom}, admissibility decision of 11 September 1997, Application No. 33742/96.
\textsuperscript{1633} ICTY, Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, \textit{Prosecutor v. Karadžić}, Case No. IT-95-5/18-PT, Vice-President, 12 February 2009, par. 16.
\textsuperscript{1634} \textit{Id.}, par. 18.
\end{footnotesize}
illiterate persons, who form part of some of the other tribunals’ detention populations. Moreover, it cannot be stated in absolute terms that allowing reporters with cameras and recorders access to prisons will in all circumstances constitute too big a threat to security. One U.S. Circuit Court Judge has suggested allowing access to a single reporter who is known to prison officials and who, therefore, ‘should cause minimal, if any, interference to jail routine’. Another argument for allowing broadcasting media access to prisons, one which was not recognised in Karadžić, is that ‘not being able to videotape inmate interviews will discourage much television reporting of prisons because television coverage usually depends on the availability of subjects to be interviewed on-camera’. Bernstein further states that reporters, if they are not permitted to conduct face-to-face interviews, will not be able to observe the respondent’s body language and may therefore not be able to properly assess his or her credibility (or convey this to the public). Hence, allowing face-to-face interviews is likely to improve the accuracy of news reporting.

According to Livingstone, the central question in connection to whether detained persons should be granted access to the media is ‘why it is more necessary to control the public expression of prisoners than other groups’. In the international context, a frequently cited argument for prohibiting such contact is the damage that such communications may inflict on the tribunals’ mandate. In this respect, it follows from ICTY case-law that direct involvement of detainees in the political arena will not easily be allowed. According to the Registrar, ‘the Tribunal’s facilities should not be used as a political platform, being mindful of the Tribunal’s efforts to maintain peace and promote reconciliation in the former Yugoslavia’. However, the Vice-President has held that where it is not obvious that a detained person is indeed trying to ‘influence or comment upon the political situation in the former Yugoslavia’, it may not automatically be assumed that such discussions in the media compromise the
achievement of the Tribunal’s mandate.\textsuperscript{1641} Also, where communications merely entail a detained person’s personal opinions, even where these concern unsubstantiated allegations in respect of the tribunal’s organs, there is no valid reason for upholding restrictions on detainees’ communications with the media.\textsuperscript{1642} According to the Vice-President, the authorities’ mere disagreement with a detainee’s viewpoint does not justify infringements on his right to communicate with the press.\textsuperscript{1643} It is recalled, however, that in 2004 Šešelj’s contact with the outside world was restricted on account of allegations of serious misconduct on the part of tribunal’s officials including Judges, Prosecutors and staff members of the Registry.\textsuperscript{1644} That decision appears to be irreconcilable with ECtHR case-law, pursuant to which individuals are, in principle, entitled to comment on and criticise the administration of justice and the officials involved in it.\textsuperscript{1645} In a number of decisions, the (Vice-)President has restricted the Registrar’s discretionary powers in prohibiting a detained person’s contact with the media on the basis of vague and ill-defined interests. In such cases, the Registrar must at least indicate how the contended information may affect such interests. Both the ICTY and the ICTR have held, however, that accused persons are not free to publicly comment on facts \textit{sub iudice} in ongoing court proceedings.\textsuperscript{1646} It has been stipulated that the ‘right of an accused to access to the media shall not be abused as a parallel forum to publicly discuss contentious issues central to the charges against him. Such conduct strips the adverse party in the proceedings of the possibility to immediately react to these contentions’.\textsuperscript{1647}

\textsuperscript{1641} Id., par. 20.


\textsuperscript{1643} Id., par. 23.

\textsuperscript{1644} ICTY, Decision, \textit{Prosecutor v. Šešelj}, Case No. IT-03-67-PT, 7 May 2004.

\textsuperscript{1645} See, supra, footnote 679.


\textsuperscript{1647} Id., par. 17. See, further, SCSL, Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any other Bank in Sierra Leone, \textit{Prosecutor v. Norman, Fofana and Kondewa}, Case No. SCSL-04-14-PT, Designated Judge Pursuant to Rule 28 of the Rules, 19 April 2004, par. 17 and Article 13 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, adopted on 14 May 2005, as amended on 13 May 2006.
In conclusion, it appears apt to cite Hass, who in the 1970s made an eloquent argument for media access: ‘[p]ress abuses are possible along with prisoner abuses, the desire for a sensational story being a factor of the profession, but there are sufficient numbers in the news media who regard their job as one of a trustee for the public’s right to know what is occurring within its institutions. Access would hold greater advantages than disadvantages for a penal system which needs public understanding as an impetus to implementing change’.1648

1648 Sharon Hass, supra, footnote 1418, at 402-403.
8.5 Conclusion

This Chapter discussed the right of internationally detained persons to contact with the outside world. Only discussing this substantive right of international detainees was said to be justified by this research’s central hypothesis, i.e. the mere fact that the international criminal tribunals have in their legal frameworks, in accordance with existing international standards, recognised that detained persons retain certain rights, does not yet guarantee these rights’ effectiveness in an international context. In this regard, it was argued that the domestic pedigree of the international standards, which formed the blueprint for the tribunals’ own detention rules and regulations, might lead to unsatisfactory results when strictly applied to the international detention situation. The international detention context differs from most domestic ones in that it often entails extraordinarily long distances between the seats of the tribunals and the detainees’ family members’ place of residence. As a consequence, in the international sphere, staying in touch with detained loved ones is often a costly and time-consuming activity.

A primary problem encountered at various tribunals is that the regulations that make infringements on detained persons’ right to contact with the outside world possible often lack in ‘accessibility’. It appears that where the ICTR Regulations place restrictions on detainees’ fundamental rights, they fail the tests of being ‘in accordance with the law’ or ‘prescribed by law’ as stipulated in Articles 8 and 10 ECHR, respectively. A similar conclusion was reached in respect of the SCSL Detention Operational Orders. For all tribunals, it is recommended that sets of accessible and understandable House Rules are developed, which must be regularly updated.

Another facet of the ‘in accordance with the law’ requirement of Article 8 ECHR is at stake as regards the routine monitoring and recording of non-privileged telephone conversations at the ICTY UNDU. It is not at all clear from the relevant legal provisions that monitoring is the norm rather than the exception. In this regard, the regimes at the STL and ICC are preferable, which provide for foreseeable infringements on the rights of detained persons, while limiting the possibility for making more far-reaching infringements to situations in which this can be specifically and concretely justified. It was held that the removal of the ‘reasonable grounds’-
requirement from the ICTY Regulations regarding the monitoring of telephone conversations in 2009, leaves too much discretion to the detention authorities and therefore does not comply with the ‘in accordance with the law’-requirements. This latter point also poses a problem as regards the ‘necessity’-requirement under Article 8. When examining measures that infringe on detainees’ rights under Article 8, the ECtHR has held that domestic authorities cannot merely point to some perceived general need to apply such measures. Infringements may only be justified where authorities can indicate particular reasons therefore, reasons which are linked to the circumstances and particularities of a situation. It is recommended, in this respect, that the ICTY adopts the practice and legal safeguards of either the STL or the ICC.

Further, although it was noted that the STL’s and ICC’s legal framework provide that recordings of telephone conversations must be erased after the completion of proceedings, such a provision appears to be lacking in the Rules of Detention of the ICTY, the ICTR and the SCSL. In light of the ECtHR’s rulings on the matter, it is advised that all tribunals adopt such a provision as the ones found in the STL and ICC legal frameworks.

Directly related to the central working hypothesis is the issue of financial assistance for family visits to internationally detained persons. It was recognised that fears for both precedent setting and customary law creation have done much to undermine a supportive, rights-based approach to the issue. The ICC Presidency was correct in recognising the existence of a positive obligation on the Court to fund family visits. Without recognising such a positive obligation, the right to family visits becomes illusory for indigent detained persons and their low-income families. It was argued that it is no more than reasonable to attribute the responsibility of facilitating family contact to the institution that causes the infringement on the detained person’s fundamental right in the first place. The infringement in question is the direct result of confinement which, in the international context, is carried out under the tribunals’ responsibility. More generally, it is recommended that all tribunals adopt a system of funding family visits, which takes into account the family circumstances of the individual indigent detainee, including the size of the family and the minimum entitlement of being able to see all members of the nuclear family in the course of one year.
The detainees’ right to communicate freely and confidentially with the inspectorate has been recognised by the ICTR, the SCSL, the ICC and the STL. The clear provision in the SCSL Rules of Detention is most preferable in this regard, which provides that ‘[e]ach Detainee shall have the right to communicate freely and in full confidentiality with the ICRC or any other competent inspecting authority designated under Rule 4 of the Rules’. It was noted, however, that is unclear whether the arrangements laid down in the ICTR Regulations imply that telephone conversations with ICRC representatives are regarded as confidential. It is, therefore, recommended that a provision as clear as Rule 60 of the SCSL Rules of Detention is inserted in the ICTR Rules of Detention. More worrisome, however, is the situation at the ICTY, where it appears that, as a result of alterations made to the relevant ICTY Regulations, correspondence of detainees with ICRC representatives is no longer regarded as privileged. Further, it was seen that telephone calls to and from ICRC representatives fall under the automatic monitoring regime. It is, therefore, recommended, with respect to the ICTY, that a provision similar to Rule 60 of the SCSL Rules of Detention is inserted in its Rules of Detention.

A positive development within the detention law of the international criminal tribunals, from the viewpoint of the legal position of detained persons, has been the fact that all tribunals now have conjugal visiting programmes.

Apart from relationships with relatives and friends, contact with the outside world also includes detainees’ access to the media – both in order to impart and to receive information – and to their lawyers.

As to detained persons’ contact with their lawyers, it was seen that the STL President has recognised that the detainees’ right to communicate freely and privately with their counsel finds its basis in customary international law.

It was considered whether legal assistants should be permitted privileged access to detained accused. This is another area in which the location of the seats of the tribunals poses problems usually not encountered in a domestic context. On this basis, it was argued that it is unreasonable not to allow legal assistants to have privileged communications with detained accused. The issue has mainly led to discussions at the ICTR, which currently allows legal assistants to meet the detained client outside the presence of lead or co-counsel in exceptional circumstances only. More practical
solutions were found in the ICC’s and STL’s legal frameworks. It is recommended that similar provisions are adopted by the ad hoc tribunals.

In respect of internationally detained persons’ contact with the media, it was recognised that wide media coverage of occurrences in the tribunals’ remand facilities and the pressure this has generated on detention staff and authorities may explain the authorities’ initial persistence in trying to prevent detainees from having such contact. However, it was held that such diligence should not lead to violations of the detainees’ right to freedom of expression. Important in this regard is the decision rendered by the ICTY’s Vice-President in 2009 in the Karadžić case. Although the Vice-President accepted that face-to-face interviews were totally banned under the ICTY Rules of Detention, he considered that such prohibitory clause may be justified where detainees have alternative means of communication with the media. Blanket prohibitions on such contact were not permitted. As a consequence, the core right of detainees to freedom of expression was affirmed. Moreover, the Vice-President affirmed the applicability of the principles of procedural fairness, proportionality and ‘least intrusiveness’ to administrative decision making in the field of detention.

It was argued, though, that the tribunals should strive to enable the different kinds of media, i.e. writing and broadcasting, to have access to detained persons. Further, it was seen that a frequently cited argument for restricting detainees’ access to the media lies in the damage that such communications could inflict on the tribunals’ mandates. In recent years, however, case-law has restricted the Registrar’s discretionary powers in prohibiting a detained person’s contact with the media on the basis of such grounds, and has required that, in such cases, the Registrar must indicate precisely how the contended information may affect such interests.