Prisoners of the international community: the legal position of persons detained at international criminal tribunals
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Citation for published version (APA):

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Download date: 17 Mar 2019
Chapter 9 Concluding remarks and recommendations

9.1 Introduction

This final Chapter contains the major conclusions of this study as well as a number of recommendations. It attempts to answer the questions of (i) whether the tribunals’ detention law reflects the relevant international penal standards and human rights law; and (ii) whether the particularities of the international context require that additional efforts be made on the part of the detention authorities in order for detained persons to be able to enjoy their intramural rights.

The theory underlying the assessment of the tribunals’ detention regimes in the present Chapter is borrowed from Kelk. He identifies three elements, which together may be said to provide adequate legal protection to confined individuals. These (interrelated) elements are (i) a maximum number of legal norms, which are formulated in as much detail as possible, from which detainees can derive implementable substantive rights; (ii) an effective adversarial procedure, which contains sufficient legal safeguards; and (iii) adequate and sufficient information on both the material norms and the available procedures.\(^1\) A characteristic of detention and prison law is the large number of vague or ill-defined norms, which leave much room for discretion to the authorities in the field, and which are therefore appropriately referred to by Kelk as ‘instruction norms’.\(^2\) The vagueness of such norms must be compensated, arguably in the form of adversarial proceedings. As such, it is possible to speak of a three-pronged test for ascertaining the adequacy of the detained persons’ legal position in a particular jurisdiction.

The assessment below might convey the impression that the final evaluation of the tribunals’ detention law is a negative one. However, this would be incorrect. It should be noted in this regard that the tribunals’ detention regimes are probably among the most liberal in the world, providing high-quality care to the detainees and treating them with respect for their inherent dignity. David Kennedy, UNDU’s Commanding Officer, said in this respect:

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\(^2\) *Id.*, p. 34, 35.
‘I’ve got over thirty years experience in the UK system. As far as custody goes, I think we’re leading the field; and I’m just talking about custodial matters, the day-to-day things that I’m in charge of and make sure happen. The links with court, (...) for self-represented, (...) with families, I think we’re a long, long way ahead of a lot of national systems. I came here just over a year and a half ago and I don’t think there was anything we could pick up from the UK; this is my experience of course and I know it’s slightly blinkered. But I personally think the UK has one of the best prison systems going – in lots of areas they were leading the field. But I think we’re a step ahead in this Unit. But we have the opportunity to do that because of the small size – when you’re dealing with 85,000 people it’s a bit different than when you’re dealing with 37 – so you can do different things than in a national system. And we can be more reactive. We’re not so much setting precedents that are going to tie the system down for the next 100 years. We are under a different mandate. When the mandate ceases, we cease’.³

Nevertheless, comparing the tribunals’ detention regimes to those in domestic jurisdictions is an external evaluation, which may contribute little to the tribunals’ regimes’ further development. Adopting an internal perspective may provide such direction. It is to be hoped that the evaluations and recommendations made in this study may contribute thereto.

9.2 Conclusions

9.2.1 The detention law of the international criminal tribunals

Besides their own legal frameworks, the international criminal tribunals are bound to apply both international human rights law and the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR). The applicability of human rights law follows, inter alia, from provisions in the tribunals’ own legal frameworks, from institutional arguments, from the tribunals’ role as human rights protagonists, from the fact that - as international organisations and subjects of international law - they are bound by obligations of international law (including customary law and general

³ ICTY, interview conducted by the author with David Kennedy, Commanding Officer of the ICTY UNDU, The Hague – Netherlands, 17 June 2011.
principles of law), as well as from the residual obligations resting on the States that
established these institutions. The SMR’s applicability is based primarily on
institutional arguments. However, the application of human rights law is beset with
difficulties. Problems arise, *inter alia*, in identifying the norms that form part of
customary law or constitute general principles of law, in establishing the precise
content of the international norms and in determining their scope of application.
Furthermore, human rights norms are of a general character and, therefore, not
adapted to the particularities of the penal context. In addition, the limitations clauses
in human rights treaties leave a broad margin of appreciation to domestic authorities.
In view of such difficulties, in evaluating the tribunals’ detention regimes, reference
should not only be had to the case-law and decisions of human rights monitoring
bodies and courts, but also to soft-law penal standards, *i.e.* the resolutions,
declarations, guidelines, standards and principles containing norms which relate to the
penal field, as formulated by organs such as the United Nations and the Council of
Europe. Indeed, after more than half a century of proclaiming penal standards, the
international community finally has the chance to show that these standards can be
applied, whilst maintaining safe, orderly and secure detention regimes. Besides the
difficulties associated with the application of human rights law, there are good
reasons to respect soft-law standards. They may reflect customary law, directly
precede the forming of new customary law, or further develop certain norms for these
to later become part of customary law. Furthermore, these standards may provide an
authoritative interpretation of treaty obligations. It should be noted in this respect that
human rights monitoring bodies have often made use of soft-law standards in
determining the content of treaty obligations. In addition, moral arguments may be
adduced for applying soft-law penal standards.

Of course, the application of soft-law penal standards to international detention cannot
be expected to solve all difficulties. Firstly, the existing norms relate specifically to
the domestic context. None of the soft-law instruments address the specific situation
of internationally detained individuals. The question then arises as to whether the
particularities of the international context warrant a different approach to that in the
domestic context. Secondly, the soft-law penal standards only provide for minimum
guarantees and contain both lacunae and multi-interpretable norms. As a consequence,
they leave plenty of room to the tribunals’ detention authorities to make “contextual”
policy choices: they may adopt a strictly international, a more regional or a domestic approach, or may follow a more conservative or progressive course. Taking a conservative course, however, may undermine the tribunals’ image of human rights role models and may be considered inconsistent with the presumption of innocence. Geographic contextualisation would be difficult to realise at the ICC, since its detainees may come from all parts of the world. Moreover, geographic contextualisation would lead to the unequal treatment of the different tribunals’ detainees. It appears that there is more to say for adopting a progressive contextual approach, than a conservative one. However, in the end, this is a policy choice. Indeed, a general feature of detention management is the high level of discretionary decision making. Such discretionary powers are, however, subject to the principles which underlie and constitute the core elements of the law. These principles may provide guidance to the detention authorities in interpreting their legal obligations, when confronted with lacunae in the law and when formulating or interpreting policy aims. In light of the principles’ open-endedness and their essentially critical and protective function, they are perfectly suited for giving direction to a contextual interpretation of the tribunals’ obligations under their own legal frameworks, international or regional human rights law and penal standards, taking into account the particularities of the international context.

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

The international and regional soft-law penal instruments cannot simply be dismissed as non-binding, neither in respect of States, nor of international criminal tribunals. These documents, at least in part, contain rules that are based on or reflect customary law. An example, according to the STL President, is the right to communicate freely and privately with counsel. Although the detainees’ right to privileged communications with and visits by defence counsel has been respected by all international criminal tribunals, the STL President’s recognition of the customary status of this rule may be seen as an important contribution to the development of (international) detention and prison law.
9.2.3 Disciplinary punishment: solitary confinement and reduction of diet

Solitary confinement is employed as a form of disciplinary punishment by some of the tribunals. Solitary confinement is, however, a ‘controversial mode of punishment’, one that should be resorted to infrequently and exceptionally. The international criminal tribunals, as human rights role models, may be expected to apply this mode of punishment only exceptionally, if at all, and with the highest caution. It is, therefore, surprising that the SCSL Rules of Detention provide for the possibility of prolonging isolation *ad infinitum* on the basis of mere *necessity*. Such provisions are inconsistent with contemporary penal standards. Equally worrisome is the listing of ‘reduction of diet’ as a mode of punishment in the ICTR Document on Disciplinary Measures. This form of punishment has been broadly recognised to constitute inhuman treatment.

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

At first glance, the tribunals’ enforcement regimes resemble inter-State co-operation on the transfer of convicted persons for the enforcement of sentences. At a closer look, however, these systems are altogether different. It is common for inter-State treaties on transferring prisoners to vest the authority to decide on such extramural issues as early release, commutation of sentences and pardon in the receiving State, which is incompatible with the principle of primacy governing the enforcement of sentences in the international context. In addition, the wide use of the *exequatur* procedure in inter-State practice appears to be incongruous with the primacy concept. Due to concerns for prisoners’ safety and security, as well as for the effective enforcement of sentences, and in order to ensure that prisoners are treated with respect for their dignity, transferring the convicted person back to his own country is often not possible in the international context. This, however, is the main aim of prisoner enforcement transfers in inter-State practice. Indeed, the tribunals’ enforcement regimes (and designation decisions) are not grounded in the notion of social rehabilitation, which has traditionally been one of the prime reasons for inter-State co-operation on the transfer of sentenced persons. As a consequence, the sentenced
person is not asked for his consent, a requirement traditionally found in inter-State practice regarding the continued enforcement of sentences, and his role in the designation process is very limited.

9.2.5 UNDU detainees’ contact with the media

Operations and disturbances in the UNDU have generated a significant amount of media attention, which has put pressure on the detention authorities and staff. This may well explain the authorities’ persistence in trying to prevent detainees from having contact with the media. Although understandable, such diligence should not lead to violations of the detainees’ right to freedom of expression. Under human rights law, measures which wholly preclude detained persons from having access to the media are unacceptable. This view was confirmed by the ICTY Vice-President in the Karadžić case. Although he accepted that face-to-face interviews were totally banned under the ICTY Rules of Detention, the Vice-President considered that such a prohibitory clause may only be justified where detainees have alternative means of communication with the media. He found the Registrar’s practice regarding the detainees’ contact with the media to demonstrate a blanket denial of all forms of interactive contact, and held that this violated the principle of procedural fairness. The Vice-President’s Decision is groundbreaking. The applicability of the principles of procedural fairness, proportionality and ‘least intrusiveness’ was affirmed, while the core substance of the detainees’ right to freedom of expression was upheld. The Vice-President’s line of reasoning has since been affirmed in the ICTY’s case-law. It has been consistently held that at least some means of communicating interactively with the media must be available to detainees. The central question in this regard is, according to Livingstone, ‘why it is more necessary to control the public expression of prisoners than other groups’. In the international context, an argument frequently invoked for prohibiting such contact is the damage that such communications may inflict on the tribunals’ mandate. It follows from ICTY case-law that direct involvement of detainees in the political arena will not easily be permitted. However, the ICTY President has restricted the Registrar’s discretionary powers in prohibiting a

detained person’s contact with the media on the grounds of the risk posed to the tribunal’s mandate. The President has held that communications may only be restricted if it is obvious that an individual detainee tries to influence or comment upon a political situation. Further, the Registrar must indicate how the contended information may damage the Tribunal’s mandate.

Both ICTY and ICTR judicial authorities have held, however, that detained accused are not free to publicly comment on facts sub judice in ongoing court proceedings. Where a detained person merely expresses his personal opinions, even where these concern unsubstantiated allegations in respect of the tribunal’s organs, there is no valid reason for upholding restrictions on communications. In 2004, however, Šešelj’s contact with the outside world was restricted because he had claimed serious misconduct on the part of tribunal’s officials including Judges, Prosecutors and staff members of the Registry. The decision to restrict such contact is difficult to reconcile with ECtHR case-law, according to which individuals are, in principle, entitled to comment on and criticise the administration of justice and the officials involved in it.

9.3 Recommendations

9.3.1 The need for an independent and impartial adjudicator in complaints proceedings

One of the characteristics of the tribunals’ detention administration is the involvement of different officials, each of whom has multiple tasks. The detention facilities operate under the responsibility of the tribunals’ Registrars and, ultimately, their Presidents/Presidency. These officials have been attributed legislative powers, carry the ultimate responsibility for security, safety and order, and have been given adjudicative functions in inmate grievance procedures. Such ‘multi-tasking’ bears upon their (perceived) independence and impartiality in the adjudicating process. The close proximity of the tribunals’ various “branches of government” and the officials’ heavy workload only exacerbate this concern. Furthermore, effective forms of independent control on the administration of detention are absent. The only regularly conducted inspections are those carried out by the ICRC. Although the ICRC is a highly respected, independent and professional organisation, it lacks any binding
powers and its findings remain confidential. Moreover, the tribunals’ and their staff members’ immunity render it improbable that a detained person may successfully seek relief before a domestic court. Furthermore, the tribunals are not parties to international or regional human rights conventions, which implies that complaints by the tribunals’ detainees to the adjudicating bodies established under those conventions will not be admissible, at least not in so far as such complaints are directed against the tribunals. Whilst the tribunals’ Chambers may provide some relief, this solely concerns those modalities of detention that may affect the fairness of the criminal proceedings against an accused person. Another complicating factor is the democratic deficit and the lack of political and ministerial accountability.

It is therefore recommended that a truly independent and impartial complaints adjudicator be established. It would, in this regard, be most practical to see whether such bodies as the HRC, or the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment would be willing and able to perform this task.

The procedure before this external adjudicator may have a simple structure. In light of the importance of resolving intramural conflicts at the lowest possible level, the tribunals’ current complaints procedures should remain unaltered to the extent that issues must first be raised with the person in charge of the daily management of the institution, with a right to administrative review by the Registrar. The final decision would then be taken on appeal by the external adjudicator. The division of labour between the President and the Registrar based on the substance of the complaint (at some of the tribunals), must be abolished. Within the tribunals, the Registrars would be the final arbiters on all complaints. The Registrar would nonetheless be obliged to report all complaints to the President, since the latter supervises the Registrar’s administrative tasks. All complainants would, within a certain time-limit, have the right to file a written appeal to the external adjudicator, unless the complaint concerns a matter of general policy rather than the detention situation of the individual complainant. Complaints concerning general policy issues would be inadmissible before the external adjudicator, unless – in the view of the external adjudicator – it would not be in the interests of justice to deprive the complainant of the opportunity to challenge the impugned policy, for example, if it may affect the fundamental rights of the person concerned. In regular complaints cases, the adjudicating body may
consist of three lawyers, with expertise in the fields of human rights law and at least one lawyer specialised in prison law. In complaints concerning medical issues, two of the adjudicators should be medical practitioners. In light of the immunity of the tribunals and their personnel before domestic courts, the adjudicator should be empowered to award financial compensation, at least in cases of negligence, breaches of fundamental rights, lost property claims, assault, battery and misfeasance in public office. Provision must also be made for dealing with emergency complaints. If not, the cases for which damages may be sought should be extended to that of false imprisonment (to repair cases of wrongful isolation). The adjudicating body should have a President, who would be given the task of deciding on emergency complaints. Pending a final decision on a complaint, the complainant would be entitled to approach the external adjudicating body’s President directly with the request to suspend a particular decision of the Chief Custody Officer/Commanding Officer or the Registrar. The adjudicating body’s President would only be empowered to suspend a decision where it clearly constitutes a breach of a legal provision, or if the decision is of such unreasonableness or unfairness that an urgent interest for suspension can be argued to exist.

Another point of concern is the difficulty or even impossibility for convicted persons to receive legal assistance in complaints proceedings. It is difficult for such persons to formulate solid legal arguments on the basis of vaguely defined and multi-interpretable detention rules, particularly since they do not have access to or knowledge of international human rights law, literature on prison and detention law or soft-law documents. It follows from the many cases in which complaints were declared inadmissible by Chambers that the current complaints procedures are far from clear to the detainees. It is recommended that a legal assistance office is attached to the office of the external adjudicator. Legal assistance should at the very least be made available in the procedure before the external adjudicator.

9.3.2 The need for an independent and impartial appeals adjudicator in disciplinary proceedings

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

It may be difficult to find an appropriate candidate for the role of the impartial disciplinary appeals adjudicator within the penitentiary system. Prison governors conducting disciplinary hearings have close relationships with the officers bringing the charges. This situation is exacerbated at the tribunals by the close proximity between the first-line detention administrators and the tribunals’ Registrars on the one hand, and between the Registrars and the Presidency/Presidents on the other. What is also problematic, is the Registrars’ and Presidency’s/Presidents’ multitasking in the field of detention management. These officials have important functions in monitoring detention conditions, adopting and drafting prison legislation, handling detainees’ complaints, deciding on the inspectorate’s recommendations, as well as in deciding on disciplinary appeals. In addition, the phenomena of ‘institutional knowledge’ and ‘institutional bias’ call for the right of appeal to an external adjudicator. Finally, as argued above, a number of particularities of the international context require that an adjudicator be called in from outside, i.e. the lack of ministerial accountability, the democratic deficit, the lack of an effective inspectorate, and the fact that the tribunals are not parties to international or regional human rights conventions.

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5 ECtHR, Ezeh and Connors v. the United Kingdom, judgment of 9 October 2003, Application Nos. 39665/98 and 40086/98, par. 89.
The arrangements in place at the SCSL are particularly unfortunate, where disciplinary appeals must be lodged with the Registrar as the final arbiter on such complaints. The Registrar is also the administrative official directly in charge of and responsible for detention management. Hence, such appeals remain ‘within the detention administration’, which seriously undermines the perceived fairness of the proceedings. This is exacerbated by the fact that the Registrar’s disciplinary decisions are not made public and that, over the years, not one appellant appears to have been successful in appealing an imposed punishment. It should further be noted that only at the SCSL is loss of remission listed among the possible modes of punishment, applicable to all types of misconduct. This provides a strong indication that disciplinary charges must be viewed as ‘criminal charges’ as meant in Article 6 ECHR. As a consequence, fair trial rights, including the right to be heard by an impartial and independent tribunal, may be deemed applicable to the SCSL’s disciplinary proceedings.

With respect to the other tribunals, it may be argued that the appointment of the Presidents/Presidency as the final arbiters in disciplinary proceedings is not the most ‘efficient or even practicable expenditure of judicial resources’ given the ‘limitations on judicial time’. Moreover, as a result of both of these officials’ close proximity to the other detention authorities and of their function in acting upon the inspectorate’s recommendations, the inmates may perceive the Presidents/Presidency to be institutionally biased.

It was argued above that the particularities of international detention, together with the rationales underlying and the legal framework governing grievance mechanisms, call for the appointment of an external complaints adjudicator. The same may be argued in respect of the tribunals’ disciplinary proceedings. Again, it is recommended that such bodies as the HRC or the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment fulfill such a task. It is further recommended that all of the tribunals employ the same external agency to decide on disciplinary appeals.

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Again, it is noted that the tribunals’ and their officials’ immunities make it unlikely that breaches of international detainees’ rights will ever be remedied by domestic courts. As a consequence, it is necessary to introduce the possibility of awarding damages in disciplinary (appeals) proceedings.

It is also noted with concern that, at some of the tribunals, it is difficult or even impossible, for inmates to receive legal assistance in disciplinary proceedings. This is particularly so for convicted persons. As argued above, it is recommended that a legal assistance office be attached to the office of the external adjudicator. At the very least, legal assistance should be available in the procedure before the external adjudicator.

Since cases of wrongful punishment (e.g. isolation) cannot be repaired after their (partial) execution, the need for emergency proceedings is particularly pressing in prison disciplining. It is recommended that, pending disciplinary procedures, the external adjudicator’s President may make a temporary assessment as to whether the decision is clearly in breach of a legal provision or is of such unreasonableness or unfairness that an urgent ground for suspension can be argued to exist.

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

Leaving the decision on the designation of State for enforcement wholly to the Presidents’/Presidency’s discretion vests too much power in the administration. As has been argued above, in exercising their administrative functions, the institutions’ Presidents/Presidency cannot be considered sufficiently independent and impartial. As a consequence, the personal circumstances and fundamental rights of the sentenced persons may be at risk of being overlooked in the designation process in favour of practical considerations. The difficulties that the tribunals experience in securing enforcement agreements and finding prison cells only complicates matters further. Often persons convicted by the tribunals are transferred to States far away from their country of origin. This may impede these persons’ social rehabilitation and their reintegration into society, and infringe upon the accessibility of counsel and their right to family life. Where such transfers may lead to their isolation, the prohibition of torture, inhuman and degrading treatment or punishment may even come into play. Although some of these aspects are listed in the tribunals’ Practice Directions as
factors to be considered during designation, the possible impact that transfer may have on the inmates’ fundamental rights raises the question of whether an effective remedy is available to them.

At the very least, the tribunals must be considered to be obliged to hear the sentenced persons on the place of their future imprisonment. It is in accordance with natural justice to notify the person who will be affected by a particular decision beforehand and to hear him on the matter.

As stated above, where transfer decisions may be argued to affect the sentenced person’s enjoyment of his fundamental rights, an effective remedy must be available to the person concerned. The official rendering the redress decision must be sufficiently independent of the authority that is responsible for the violation. At the tribunals, neither a redress procedure nor an independent and impartial adjudicator is available in this regard. Sentenced persons lack the right to appeal the designating official’s determination. Some of the tribunals’ Presidents have even denied sentenced persons the right to address them on the matter of designation. The obligation laid down in the ICC’s legal framework to consult the sentenced person in this regard is a welcome improvement on the arrangements at the ad hoc tribunals, where seeking the sentenced person’s view is a matter of discretion for the Presidents. However, merely offering prisoners the chance of being heard is far from adequate to secure their legal protection, particularly when a right to appeal the administrative designation decision to an independent and impartial adjudicator is not provided for.

It is recommended, therefore, that sentenced persons be granted the right to complain to the President/Presidency about the latter’s designation decision, with a right to appeal the decision on the complaint to the external adjudicator, whose establishment was recommended above. In light of the many practical difficulties involved in designating States of enforcement, it would be best for such adjudicator to only scrutinise the legality and reasonableness of the President’s decision on the complaint – both the formal and substantive aspects – rather than to substitute the President’s/Presidency’s designation decision with its own. In other words, the adjudicator should apply a margin of deference in reviewing the designation decision. If the adjudicator considered the President’s/Presidency’s decision on the complaint to be unlawful or unreasonable, he or she should refer the matter back to the President/Presidency in order for the latter to render a new decision.
9.3.4 Inspections

As stated above, the tribunals’ remand facilities are inspected by the ICRC. It is unfortunate that its inspection reports are not made public. This is particularly so in view of the fact that the ICRC can only make (non-imperative) recommendations. Without public scrutiny, the tribunal’s authorities are under no pressure whatsoever to implement the ICRC’s findings and recommendations. Whereas in a domestic context, an inspectorate’s lack of binding powers may perhaps be attenuated by petitioning rights, democratic control and ministerial responsibility, these are lacking in the international context. As a consequence, any issues of concern identified by the ICRC delegates remain unknown to the outside world. Furthermore, it is up to the institutions’ officials whether or not to act upon the ICRC’s recommendations. An inspecting agency should also be autonomous which, according to Harding, means that ‘it does not report to or through the department or agency responsible for prison operations nor depend on it for funding (…) Otherwise, there is an extreme likelihood that its findings and recommendations will only be taken seriously if they happen to coincide substantially with what the operational arm already thinks or wants to hear’.7 Although ICRC inspections comply with the “funding criterion”, the ICRC’s reporting practice does not conform to Harding’s criterion that inspectorates should not report to or through the department or agency responsible for prison operations. Although the ICRC is a well-respected, independent inspecting agency, its current powers are inadequate to repair the deficiencies caused by the particularities of the international context. It should be recalled that the ICRC is the only truly independent inspecting agency to perform regular inspections of the international remand centers. This is a meager arrangement compared to those in the domestic context, where inspections are carried out by domestic, regional and international agencies.

It is recommended that the inspectorate’s reports are sent directly to the tribunals’ Presidents, since they carry the ultimate responsibility for the detention administration. Secondly, the inspectorate should also report directly to the ICC’s Assembly of States Parties or, in respect of the other tribunals, to the U.N. Secretary-

9.3.5 The sentencing judges’ knowledge of prison conditions

In the domestic context, it is common for the judiciary to decide on the length of a prison sentence, whilst the place of imprisonment is determined by the administration. In the international context, such uncertain factors as the availability of a sufficient number of willing and ready States for the enforcement of sentences, political sensitivities, as well as the possibility that some or all of the sentencing chamber’s judges may no longer be serving at the time of designation, render it impossible to allow the sentencing judges to determine the State of enforcement. Designation thus takes place after sentencing, by different, i.e. administrative officials. Nevertheless, in order to ensure respect for the principles of proportionality, individualisation of sentences and the equal treatment of prisoners, the sentencing judges must have basic knowledge of the general conditions of imprisonment in the States of enforcement and the severity of the enforcement regime. Since, in the international context, the place of imprisonment is determined by the tribunals’ Presidents/Presidency after sentencing, whilst the conditions of imprisonment are governed by the domestic laws of the different States of enforcement, the sentencing judges’ knowledge of the post-transfer situation of imprisonment will, by definition, be limited. In this regard, it is recommended that the tribunals’ sentencing judges regularly undertake “excursions” to potential States of enforcement, in order to gain information on the prison situation there.

9.3.6 The treatment of international prisoners as foreign prisoners

The tribunals’ prison sentences are enforced in accordance with the domestic laws of the States of enforcement. The tribunals’ legal frameworks prescribe that the Registrar must report to the designating official about domestic penitentiary legislation in
candidate States of enforcement. In this regard, it is recommended that the Registrar and the designating officials pay specific attention to the manner in which foreign prisoners are treated in those States, since this may vary considerably from how States treat their own nationals. But even in countries where the general penitentiary regime applies equally to both national and foreign prisoners, the lack of provisions catering to the latter group’s specific needs may generate ‘unequal opportunities for foreign prisoners taking into account the distance from relatives, differences in culture, religion and above all communication barriers’.

Neither the tribunals’ designation orders nor their rules on designation pay specific attention to the legal position of foreign prisoners in candidate States of enforcement. The tribunals may, in this regard, be guided by the Council of Europe’s Recommendation concerning foreign prisoners of 1984, or seek guidance from the recommendations for the treatment of foreign prisoners drawn up by Van Kalmthout, Hofstee-van der Meulen and Dünkel in their study on the treatment of foreigners in European prisons.

9.3.7 Accessibility of regulations and detention orders governing detainees’ contact with the outside world

Some of the tribunals’ rules governing the detained persons’ right to contact with the outside world (and on the restrictions thereof) are insufficiently accessible. At the ICTR, the basic legal regime laid down in the Rules of Detention is elaborated on in the ‘Regulations to Govern the Supervision of Visits to and Communications with Detainees’. A major problem with these Regulations is that they are not accessible to detainees or their counsel. The provisions in the SCSL Rules of Detention on detainees’ contact with the outside world are elaborated on in a number of Detention Operational Orders. These Orders are neither publicly available, nor accessible to detainees. Due to such inaccessibility, these Regulations and Detention Operational

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9 CoE, Recommendation (84)12, concerning foreign prisoners, adopted by the Committee of Ministers on 21 June 1984 at the 374th meeting of the Ministers’ Deputies.
10 A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkel, supra, footnote 8, p. 78-88.
11 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 (on file with the author).
Orders cannot be said to be ‘in accordance with the law’ or ‘prescribed by law’, as stipulated in Articles 8 and 10 ECHR, respectively. It is, therefore, recommended that these Regulations and Orders are made publicly available and that all of the tribunals adopt a set of accessible and understandable (and regularly updated) House Rules.

9.3.8 The foreseeability and necessity of infringements on substantial rights of detainees

Another aspect of the ‘in accordance with the law’ requirement under Article 8 ECHR is at stake, in cases concerning 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 (prolongation of a) monitoring order, it is not at all clear from the Rules of Detention and the relevant Regulations whether monitoring is the norm or the exception. The Regulations do indicate the maximum duration of the measure, the general grounds or aims that may warrant its application and the possibility of challenging such measure before the President. The “safeguard” that monitoring orders are restricted in duration to a maximum period of thirty days should, however, be seen as no more than a mere formality: all detainees’ telephone conversations are routinely monitored and all monitoring orders are automatically extended (it is not even required that reasons be given for such a prolongation decision). Also, the general grounds or reasons for which telephone conversations may be monitored need not relate to any concrete circumstance.

Moreover, the ICTY legal framework fails to adequately discriminate between the detained persons’ various correspondents. Communications with counsel and diplomatic or consular representatives are privileged under the rules and regulations. This, however, does not appear to apply to (all of the) detainees’ communications with the ICRC. The privileged nature of detainees’ communications with the inspectorate is inadequately recognised in the ICTY’s legal framework.

As a consequence, it may be argued that, in numerous respects, the ICTY Regulations fail to indicate with reasonable clarity the scope and manner of exercise of the discretion conferred upon the authorities. The regimes in place at the STL and the ICC represent an improvement in this regard, which provide for foreseeable infringements
on the rights of detained persons, whilst only allowing for more far-reaching infringements when specifically and concretely justified.

The ICTY regime on the monitoring of telephone conversations also falls short of the requirement that infringements on the fundamental rights of detainees must be ‘necessary in a democratic society’ (this criticism also applies to the routine censorship of all incoming and outgoing mail at the ICC Detention Centre by the Chief Custody Officer). Whereas the ICTY Regulations require that there are specific grounds for recording, no justification is required to listen to such intercepted communications in a specific case. Moreover, the requirement of ‘reasonable grounds’ or ‘beliefs’ that applied to the recording of telephone conversations was abandoned in 2009. On the basis of human rights law, however, infringements on a person’s private life may only be considered justified when required by the circumstances and particularities of the case. It is, therefore, recommended that the ICTY adopts the practice of either the STL or the ICC, where recordings may only be listened to when justified on the basis of the circumstances of the case. In a similar vein, the routine censorship of all incoming and outgoing mail at the ICC violates the necessity requirement under Article 8 ECHR. It is recommended that the relevant regulations are amended, in order that censorship only be carried out when justified on the basis of the circumstances of the case.

9.3.9 Detainees’ 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’. The right to free and confidential correspondence with the inspectorate has also been laid down in the relevant ICTR
Regulations. Nevertheless, since it is unclear whether the phrase ‘communicate freely’ also means that telephone conversations with ICRC representatives are confidential, it is recommended that a provision is inserted in the ICTR Rules of Detention, such as the provision in Rule 60 of the SCSL Rules of Detention.

It follows from Regulations 174(1) and 175(2) of the ICC RoR that telephone conversations with ICRC representatives are exempted from the regular monitoring regime. Furthermore, items of detainees’ mail sent to or received from the ICRC are not subject to review by the Chief Custody Officer. Nor is the regime governing the application of requests for permission for visits applicable to visits by ICRC representatives. It is stated that 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. Nevertheless, the fact that ICRC representatives have to talk to detained persons ‘within the sight’ of the detention staff may undermine the ICRC’s mandate and, in any case, does not appear to be in conformity with Article 4(c) of the Agreement concluded between the ICC and the ICRC. It is recommended, in this respect, 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 into the RoR.

Rule 82 of the ICTY 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’. Worrisome, however, are the alterations that have been made to the relevant ICTY Regulations, as a result of which correspondence of detainees with ICRC representatives no longer appears to be regarded as privileged. In 2009, Regulation 6 was altered, pursuant to which reference is now made to ‘the Inspecting Authority under Rule 6(A) of the Rules of Detention’. This excludes the inspectorate mentioned in Rule 6(B) (which is the ICRC). Furthermore, Regulation 21 declares that the regime governing the monitoring of telephone conversations is only inapplicable to detainees’ communications with counsel and diplomatic representatives. As such, telephone calls to and from ICRC representatives appear to fall under the automatic monitoring regime. In light of these findings, it is strongly recommended that the said provisions are altered and that a
provision similar to Rule 60 of the SCSL Rules of Detention is inserted in the ICTY Rules of Detention.

9.3.10 Financial assistance for family visits

The financially difficult predicament that many families of detained and imprisoned persons find themselves in has been recognised in the domestic context. Families often experience significant financial loss when a member of their household is imprisoned. Extra costs are incurred in trying to maintain contact with their detained loved ones, either through visits or by phone. For families of internationally detained persons the costs will usually be even higher, due to the long distance between the tribunals’ remand facility and their place of residence. This may have serious repercussions for their and the detainees’ right to family life.

The ICC Presidency was correct in recognising the existence of a positive obligation on the ICC to fund family visits. Without such a positive duty, the right to family visits will become an illusory right for indigent internationally detained persons and their low-income families. It is no more than reasonable to attribute the responsibility of facilitating family contact to the institution that causes the infringement. In accordance with ECtHR jurisprudence, infringements on the ‘core minimum guarantee’ of a fundamental right, which cannot be regarded as the ordinary and reasonable requirements of imprisonment and which are not necessitated by security concerns or maintaining good order within the institution, should be compensated by the responsible authorities. Admittedly, the answers to the questions of what ‘the ordinary and reasonable requirements of imprisonment’ are and ‘what constitutes the minimum guarantee of a certain right in a prison or detention context’ are, in part, subjective and subject to the authorities’ margin of appreciation.12 The existence of an independent right to family visits (instead of the more general right to family life) was recognised, which was not some invention of the Presidency, but found support in the Registrar’s submissions in the Ngudjolo case, in the Report of the Court on funding family visits and in the majority opinion of the delegates to the ICC seminar on family

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visits. It is obvious that if indigent detainees are not offered financial assistance, the core substance of their right to family visits will be affected. This is reflected in the Presidency’s observation that the right to funded family visits is not unlimited, but is necessarily restricted by resource restraints, which are only legitimate to the extent that the right to family visits is still rendered effective. Moreover, the Presidency based its conclusion that a core right to family visits exists not only on human rights law, but mainly 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 recognised, it becomes difficult to legitimise infringements on the core minimum of that right by allowing for contact through other means. In respect of the ‘unavoidable consequences of confinement’, it may be argued that the costs incurred in funding such visits are relatively low — and therefore not unavoidable — when compared to the total yearly budget of these institutions. Moreover, the rationales underlying prison visits, the principle of social rehabilitation, the presumption of innocence, and the interpretation of the right to family life in such a way as to safeguard its effectiveness may all be adduced in support of such a positive obligation. Finally, in the international criminal justice context, requests for temporary or provisional release are often denied, whilst the duration of remand detention can be long when compared to domestic jurisdictions. These two particularities of the international context call for adopting a more liberal approach towards facilitating family visits to detained persons.

The ICC Bureau’s Working Group delegates and the delegates to the Assembly of States Parties who objected to the Presidency’s decision adduced no convincing arguments. Rather, such objection appeared to be based on political unwillingness and fear that a precedent would be set and customary law created.

However, the Assembly of States Parties’ subsequent policy decision to fund family visits should be welcomed for its positive practical effect. The arrangements provided for at the ICC are to be preferred to those in place at the ICTY, which depend wholly on the benevolence of the detainees’ States of origin, whilst at the ICTR no arrangements for funding appear to exist at all. It is recommended that all tribunals start funding family visits, thereby taking into account the family circumstances of the individual indigent detainee and the size of his family. Detainees should further be entitled to see each of their nuclear family members at least once a year.