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

Introduction

The hardships that the Nazi leaders faced during their remand detention and imprisonment at Nuremberg and Spandau prison are well documented in Albert Speer’s ‘Spandau Secret Diaries’. He wrote that the inmates were forbidden to talk to each other, about the lack of privacy during visits by relatives and about not being permitted to read newspapers, magazines and history books. A further source of controversy has been the way in which Rudolf Hess was treated in Spandau. Although the prison was built to accommodate hundreds of prisoners, from 1966 until his death in 1987 Hess was Spandau’s only inmate. Nowadays, such isolated confinement would probably be considered inhumane. Moreover, no efforts were ever made to further the social rehabilitation of the Spandau prisoners or their reintegration into society. Much appears to have changed since then, as reflected in the accounts now being given on the conditions of detention in the detention facilities of the contemporary international criminal tribunals. Upon Mladić’s transfer to The Hague in May 2011, for example, the media reported that he was to be held in one of the most humane prisons in the world.

However, little has been written by legal scholars about the legal position and conditions of detention of persons detained by international criminal tribunals, particularly as regards their internal legal position (their rights and duties inside the remand facility). A comprehensive study into that law has not yet been undertaken. Accordingly, the primary purpose of this study is to set out the law governing the detention of persons detained under the tribunals’ jurisdiction. Apart from describing the law, it examines whether the positive law corresponds to the relevant international penal standards and human rights law. It also aims to contribute to the (further) development of both the international criminal justice system and the law governing detention at international criminal tribunals by providing recommendations. The need for recommendations is based on the working hypothesis of this study that certain particularities of the international detention context, which have an institutional dimension and relate to the particularities of the detention population, warrant a
different approach to that in the domestic detention context. Underlying that hypothesis is the recognition that the international penal standards and the relevant human rights norms relate specifically to the domestic context. They do not address the specific situation of internationally detained persons.

Part I

Part I of the study provides a general overview of the sources of the detention law of the international criminal tribunals. It consists of three chapters.

Chapter 2 sets out the protection of detainees and prisoners under international law, including a general insight into the relevant human rights law and international penal standards. It follows, *inter alia*, from this Chapter that the soft-law penal standards, which are often considered legally non-binding, may in actual fact contain or reflect norms of customary international law.

Chapter 3 examines whether those norms may be considered legally binding *on international criminal tribunals*. More generally, Chapter 3 outlines the tribunals’ detention regimes, thereby focusing on the legal position of detained persons. Firstly, this requires examining the tribunals’ own legal frameworks. Secondly, the exceptions to the regular detention regimes must be considered. These exceptions concern, on the one hand, the modification of detention conditions by the tribunals’ Presidents in exceptional circumstances, which may entail the transfer of an individual detainee to the detention facility of another tribunal or to a safe-house and, on the other hand, restrictions imposed by the Registrar or the Commanding Officer on an individual detainee’s right to contact with any other person pursuant to a request by the Prosecution. Thirdly, it must be seen whether and, if so, how human rights law is applicable to the tribunals’ detention regimes and what the status is of soft-law penal standards. The former question is answered in the affirmative in so far as human rights norms form part of international customary law or belong to general principles of international law. On the basis of institutional arguments, this also holds true for the *U.N. Standard Minimum Rules for the Treatment of Prisoners*. In view of, i) the fact that the application of human rights norms raises difficulties concerning, *inter
alía, their identification, definition and scope of application and, ii) that the application of human rights law to the specific situation of confinement is far from straightforward, it is argued that a solution may lie in the application of the jurisprudence and decisions of human rights monitoring courts and bodies and, above all, in the application of the (other) international and regional penal standards. It should be noted in this regard, that human rights law and soft-law penal standards only provide for minimum guarantees and contain both lacunae and multi-interpretable norms. Moreover, a general feature of detention law is that broad discretionary powers are vested in the detention authorities. As a consequence, the tribunals’ detention authorities may choose for a more or less contextual approach towards the detention regimes: from a strictly international to a more regional or domestic approach, and from a more conservative to a progressive approach. There is more to say for adopting a liberal than a conservative contextual approach. Further, in the tribunals’ recent case-law, no support can be found for taking a ‘national contextual approach’, particularly where this would prejudice the legal position of internationally detained persons. In the end, however, this remains a matter of policy choice.

In Chapter 4, it is argued that such ‘contextual margins of appreciation’ and the discretionary powers vested in the tribunals’ detention authorities are subject to a number of principles that underlie and constitute the core elements of the law governing detention at the international criminal tribunals. This requires first defining the notion of ‘legal principles’. Following this, a number of legal principles are distilled from the different sources of the tribunals’ detention law and from their case-law. The resulting list of principles is not meant to be an exhaustive one.

Part II

Part II focuses on the procedural internal legal position of international detainees. It consists of three chapters, which examine different intramural procedures (in a broad sense).
Chapter 5 examines the avenues available to persons detained at the tribunals’ detention facilities to complain about the conditions of their detention and about the treatment they receive. Detainees may file a complaint with the Commanding Officer or Chief Custody Officer, who is the person in charge of the day-to-day management of the remand facility. If a detainee is not satisfied with the decision made on his complaint, he may address the Registrar, who functions as chief-custodian. At most of the tribunals, a detainee may appeal the Registrar’s decision to the President (at the ICC this is the Presidency) who, in this context, must be viewed as the tribunal’s highest administrative official (or organ). Detainees may also complain to the inspectorate during visits by its representatives to the remand facility. Inspections of the tribunals’ detention facilities are carried out by the ICRC. Moreover, accused persons in detention may, pending their trial, address the Trial or Appeals Chamber seised of their case on issues relating to their treatment in detention. Chambers only accept competence if the detained person has exhausted the available formal complaints procedure and if the complaint concerns an aspect of detention that may have a negative impact on the fairness of the accused’s trial.

It is argued, inter alia, that, due to the particularities of the international context, the limited competence of Chambers and the ineffectiveness of complaints to the inspectorate’s representatives, the tribunals’ formal complaints procedures fail to provide adequate legal protection to detained persons. The solution suggested in this study is the establishment of an external adjudicator’s office. When dealing with medical complaints, the external adjudicator should consist, at least in part, of medical practitioners. In light of the importance of inspecting places of confinement and of the deficiencies inherent in the ICRC’s current inspecting arrangements, it is argued that the scope of persons/institutions to whom/which the ICRC reports its findings must be widened and that its reports must be made public.

Chapter 6 examines the tribunals’ detention facilities’ procedures for imposing disciplinary punishment. First, the principles underlying such systems and the standards that such systems must comply with are set out. Following this, the disciplinary systems established at the various tribunals are described in detail. In the evaluation paragraph, it is argued that the recommendation made in Chapter 5 to establish an external adjudicator’s office also applies to the tribunals’ disciplinary
procedures. This recommendation is made on the basis of i) the right to a fair trial (and the corresponding ECtHR case-law) and the right to an effective remedy; ii) the advantages of disciplinary decisions being made by someone who is not part of the institution’s management; and iii) the particularities of the international context. In addition, it is recommended that international detainees are given the right to address the president of the external adjudicator’s office pending the decision on the appeal and ask him to suspend the implementation of the disputed disciplinary decision.

The tribunals have their own remand facilities. For the enforcement of their prison sentences, tribunals are dependent on the co-operation of States. Chapter 7 examines under what conditions States may enforce the tribunals’ sentences. Above all, it examines the tribunals’ procedures regarding the designation of States for the enforcement of prison sentences. In the evaluation paragraph, it is argued that detainees must be permitted to appeal the designation decision to an external adjudicator. Further, the co-operation between tribunals and States on the enforcement of sentences is compared to inter-State co-operation on the transfer of sentenced persons. It is, moreover, argued that, when making designation decisions, the tribunals’ authorities must not only take into account the general prison law of candidate States of enforcement, but must also consider the legal position of foreign prisoners in such States.

Part III

Part III consists of one chapter only (Chapter 8), which examines the right of international detainees and prisoners to contact with the outside world. It is the only substantive right of detainees and prisoners that is dealt with extensively in this study. The Chapter describes and analyses the right of detainees to contact with family and friends, with their counsel and with the media. First, the principles and standards underpinning the detainees’ right to contact with these three categories of persons/institutions are examined. Subsequently, the Chapter describes the tribunals’ positive law. The evaluation paragraphs analyse the main (positive law) findings on the basis of the underpinning principles and standards.
In respect of contact of detainees with their relatives and friends, it appears that part of the law is inaccessible and that certain infringements on the rights of detainees are insufficiently foreseeable. It is further argued that the necessity of such infringements is at times inadequately legitimised. Moreover, it is argued that indigent international detainees and their relatives should be offered financial support in order to enable those relatives to visit their confined loved ones. In the next paragraph, it is argued that, in the international context, the right of detained persons to speak freely and confidentially with their counsel must also apply to other (specified) members of the defence team. Finally, in respect of the right of detainees to contact with the media, the ICTY’s case-law is discussed at length, including the decision that some form of interactive communication between detainees and the media must be made possible. A blanket prohibition of such contact has been declared impermissible.

Chapter 9 is a compilation of the most important findings and recommendations. On the basis of those findings and recommendations, this study’s working-hypothesis is answered in the affirmative in relation to a number of aspects of the tribunals’ detention law. In view of the particularities of the international detention context, it is argued that the competent authorities are not only obliged to act in accordance with the tribunals’ own legal frameworks and with the relevant human rights law and penal standards, but must also make additional efforts in order to ensure that international detainees may actually enjoy their rights.