1. The legal position of international detainees: applicable law and standards

Jan Christoph Nemitz

1. INTRODUCTION

This chapter will present a comprehensive overview of the law governing the detention of individuals who are accused by the ICC, the ICTR and the ICTY and who are detained in the respective detention facilities of these institutions. The reasons for choosing these three international judicial bodies is that over the past years they have gained extensive experience in relation to the legal and practical aspects of detaining persons who are awaiting trial or appeal proceedings or are otherwise detained on the authority of an international tribunal or court.¹

The chapter will analyse the respective Statutes, RPE, Rules of Detention (ROD), Practice Directions, international instruments and the relevant jurisprudence of these judicial bodies. When analysing this body of law, the chapter will pay due attention to the inherent tension in the relationship between the need to govern, on the one hand, the administration of a detention unit for accused persons who are detained during their proceedings and, on the other hand, the need to ensure the continued application and protection of their individual rights during their time in detention.

The chapter will first define the term ‘International Detainee’ as being distinct from, for instance, a convicted person or a person on provisional release. It will then set out the various legal sources that form the applicable law of the respective courts and tribunals (Section 2). Thereafter it will address the legal standards that provide the framework in which International Detainees spend their days in the respective detention units. This will include, inter alia, communications and visits, accommodation, personal hygiene, clothing, food, access to medical services, spiritual welfare, recreational activities, and personal possessions of detainees (Section 3). The subsequent part of the chapter will deal with the law governing the maintenance of security in the detention units. In this context the chapter will analyse the respective rules on discipline, segregation and isolation, disturbances and the use of instruments of restraint (Section 4). Further, the applicable procedure to file complaints will be considered, including complaints to the Registry and to the Chambers (Section 5). In addition, the chapter

¹ Due to the necessary limitations in the scope of this chapter, the laws on detention of the ECCC and of the STL will not be analysed. Furthermore, the laws on detention of these two institutions can be substantially distinguished from the detention laws of the three judicial organisations that will be analysed. As to the ECCC, their detainees are held in accordance with national Cambodian law. With respect to the STL, this Tribunal has currently (last update: 17 November 2014) no detainees which means that any analysis of its detention law appears to be a rather theoretical exercise.
4. **Research handbook on the international penal system**

will discuss to what extent other specific rights of the detainees of international courts and tribunals are protected, such as the right to receive (or extend) a passport and the right to vote (Section 6). Finally, the chapter will address the possibilities for international detainees to cooperate with their counsel and legal assistants as well as the situation of a self-represented accused who is working on his defence from within the detention unit (Section 7).

Where appropriate the chapter will consider relevant jurisprudence of the various international institutions, including decisions, orders and reports. Reference will also be made to applicable legal standards with respect to detainees.

2. **INTERNATIONAL DETAINEES AND THE APPLICABLE SOURCES OF LAW GOVERNING THEIR DETENTION**

For the purposes of this chapter an International Detainee is a person detained awaiting trial or appeal proceedings, or held pending transfer to another institution, or any other person detained on the authority of the ICC, ICTR or ICTY. This definition of an International Detainee therefore includes persons who have been finally convicted by an international tribunal but who are still held in the respective detention unit pending the determination of a State in which the sentence can be enforced. While these judicial bodies aim to transfer convicted persons as soon as possible to enforcement States, practice has shown that many months (even years) can pass until such transfers can be achieved. During that time the detention regime remains applicable to them.

2 At the ICC, the sentenced person shall be delivered to the State of enforcement as soon as possible after the designated State of enforcement accepts (Rule 206 ICC RPE). See also D. Abels, *Prisoners of the International Community* (TMC Asser Press 2012) 461. At the ICTY Johan Tarčulovski, a national of the Former Yugoslav Republic of Macedonia, had his conviction for violations of international criminal law affirmed by the Appeals Chamber of the ICTY on 19 May 2010. It took, however, until 7 July 2011 until he could be transferred to Germany to have his 12-year sentence enforced. The ICTY President had designated Germany on 23 August 2010 as the enforcement State, but it took more than ten months to finally send him to Germany. Until 2006 convicted detainees were not even separated from non-convicted detainees. After the suicide of Milan Babić, a convicted person who had returned to the ICTY as a witness in the proceedings against Milan Martić, Swedish independent investigators recommended a separation of convicted and non-convicted individuals in the detention unit (Independent Audit of the UNDU, 4 May 2006). In response the then President of the ICTY stated such practice ‘is consistent with principles of human rights’ (‘Order to the Registrar to Separate Convicted and Non-Convicted Detainees held in the Detention Unit’, IT-06-89-Misc. 1 (President) 2).

3 On the other hand, this definition of an International Detainee means that suspects or accused persons who have not yet been transferred to any of the international courts and tribunals fall outside the scope of this chapter. Similarly, it will not address the legal position of persons who have been (finally) convicted by these courts and tribunals and subsequently transferred to the national authorities of the enforcement State. In both situations, the governing law is not that of the international courts but national law. Neither will this chapter address in any detail the legal position of individuals who have been finally acquitted by the ICTR but who are staying in so-called safe houses as they do not wish to return to Rwanda and no other country is willing to accept them. At the time of writing (24 April 2014), there were still seven
In this context it is important to note that the applicable law governing the detention of International Detainees in the so-called UNDU and ICCDC in The Hague (ICTY and ICC, respectively) and in Arusha (ICTR) is truly international in character, being devised in accordance with the applicable international legal standards. The detention regime for International Detainees inside the detention units is thus, in general, not influenced by national detention laws. Instead the ICTY and the ICTR have adopted detention laws that are in line with UN standards, even where such standards cannot necessarily be seen as customary international law and might be considered as non-binding on States. Those standards are included in the UNSMR, the UNBOP and the UNBP. Similarly, these standards are in line with international legal instruments on detention on the regional level.

The standards set out in these international instruments have been incorporated in the respective detention laws of the ICC, ICTR and ICTY. From a purely legal standpoint it is difficult to see how it could be any other way, given that these tribunals are bound by international legal standards, and that their acceptance by the global public depends, in part, on the perception that their respective detention regimes are operated in a lawful and fair manner. It is in line with a modern understanding of human rights law to accept that minimum detention standards apply to every detainee at an international tribunal, irrespective of the fact that he (or she) is charged with the most serious violations of international humanitarian law. This applies even in cases in which the detention conditions of a high-ranking alleged war criminal surpass those of an alleged criminal of a minor rank who has been detained by national authorities and under national detention laws. Similarly, the fact that many victims of wartime atrocities may receive less medical care than alleged war criminals cannot alter an international court’s obligation to provide its International Detainees with appropriate food and with medical services to the extent practically possible, including consultation with a doctor or dentist of their choice and specialist or in-patient treatment in the respective host country. While this may contribute to an unwanted perception of the international tribunals’ detention facilities being the ‘Scheveningen Hilton’ and the acquitted persons and three ex-convicts who are de facto homeless as they have nowhere to go. Previously, there were 14 individuals in safe houses in Arusha, but the ICTR managed in bilateral negotiations to find countries willing to receive some of them.

4 However, when drafting the ICTY ROD the ICTY Judges ensured that the detention regime was consistent with the Dutch prison system. See Abels (n 2) 178.

5 See Abels (n 2) 148.

6 Approved by ECOSOC Resolutions 663 (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977.


9 See Council of Europe Recommendation no R (87) 3 of 12 February 1987, referred to in Plavšić IT-00-39 and 40/1 (Order of the President on the Defence Request to Modify the Conditions of Detention of the Accused, 18 January 2001).

10 For a detailed analysis of the applicability of human rights law in the legal detention regimes of the ICC, the ICTR and the ICTY see Abels (n 2) 134 et seq.

11 Rule 27 ICTR ROD, See also Rule 30 ICTY ROD and Reg 103 ICC ROC.

12 Rule 28 ICTR ROD; Rule 31 ICTY ROD; Reg 103(3), (5) ICC ROC.

13 Rule 29 ICTR ROD; Rule 32 ICTY ROD; Reg 103(5) ICC ROC.
‘Arusha Hilton’, respectively, this is the price to be paid lest the international community falls behind its own widely accepted international standards.

The above-mentioned international detention standards were translated into the respective detention regulations of the ICC, ICTR and ICTY. These are not so much to be found in the respective Statutes or RPE, but rather in their own ROD in which the ICTR, ICTY and ICC have provided detailed provisions on all aspects of the legal duties and rights of International Detainees. As stated above, these provisions reflect legal standards that are truly international in character, which means that an International Detainee in a detention unit of an international court or tribunal has the rights and duties under those international rules, and not under the respective national regulations. These ROD are complemented by Practice Directions, issued by the respective President of the court, which provide further detailed provisions with respect to the position of the International Detainee in a detention unit as well as on the determination of the enforcement State. Finally, the jurisprudence of the international tribunals and courts is an important source for the regulation of the detention of an International Detainee. On the pre-trial, trial and appeal level, many Chambers have already had the opportunity to rule on detention-related issues. Apart from the motions for provisional release that have been filed by detainees on a regular basis, Chambers have had to deal with subject-matters as diverse as requests for interviews, motions to grant political engagement in the country of origin, and a request to be placed under house arrest. Of particular importance is the report that was written by Judge Kevin Parker after the death of Milan Babić who, after having returned to the ICTY as a witness, committed suicide in the UNDU in 2006. In this report Judge Parker made a large number of recommendations in relation to the factual and legal regime of

14 Abels (n 2) 2.
15 Considerable criticism was also raised by the detention conditions for Biljana Plavšić who had her sentence enforced in a women’s prison in Örebro, Sweden. This prison has a sauna, a massage room, sporting facilities and a horse-riding paddock, ‘facilities that would be the envy of any holiday camp’. ‘Luxury Prison for Bosnia’s Iron Lady’ (The Telegraph, 7 June 2003) <http://www.telegraphindia.com/1030607/asp/foreign/story_2044806.asp> accessed 24 April 2014.
16 However, during the transfer of an International Detainee from the UNDU to the respective court and tribunal or to any other location outside the detention facilities, the law of the Host State applies.
17 For instance the UNDU House Rules for Detainees (IT/99) and the UNDU Regulations to Govern the Supervision of Visits to and Communications With Detainees (IT/98/Rev.4). For further legal texts see website of the ICTY at <www.icty.org>. For the ICC see the ICC ROR (ICC-BD/03-03-13), which further regulate, inter alia, the management of the Detention Centre and the Complaints Procedure.
18 See Part 3.
19 See Haradinaj et al IT-04-84-T (Judgment, 3 April 2008); Vojislav Šešelj IT-03-67-PT (Decision on Defence Motion for Provisional Release, 23 July 2004).
20 In 2005 the then President of the ICTY denied a request for house arrest instead of detention as ‘the presence on Dutch territory is likely to pose a danger to public order and peace, if only because of the presence in the Netherlands of thousands of refugees from the former Yugoslavia’, Halilović IT-01-48-PT (Order of the President on the Renewed Defence Motion Concerning Conditions of Detention During Trial, 24 January 2005) para 21.
21 Judge K. Parker, Report to the President – Death of Milan Babić (ICTY, 8 June 2006).
International Detainees which were aimed at preventing a similar situation in the future. Fortunately, no International Detainee has died in the UNDU since then.

3. LEGAL STANDARDS GOVERNING THE MANAGEMENT OF INTERNATIONAL DETENTION UNITS

The following section will deal with legal provisions governing the day-to-day routine in the detention units, including, inter alia, communications of the International Detainees with their family and friends, the legal regime applicable to visits and the available medical services.

3.1 Communications With the Outside World

An important feature of the life of an International Detainee concerns his or her communications with the outside world. In general detainees are entitled to communicate with their families and other persons with whom it is in their legitimate interest to correspond by letter and by telephone. For security reasons, however, the staff of the detention unit will generally inspect all correspondence and mail for explosives or other restricted materials. Further restrictions have been established, for instance, in the ‘Regulations to Govern the Supervision of Visits to and Communications with Detainees’ of the ICTY. But communications with their fellow detainees is also of major importance to International Detainees. In this context it is important to bear in mind that the special circumstances of international courts and tribunals often lead to the situation that several detainees are accused of crimes that have been committed at the same crime sites, but by members of the different parties to the armed conflict. In so-called ‘flip-side’ cases accused from those warring parties may find themselves as being part of the same, or substantially related, proceedings before the court or tribunal. Unless this situation causes potential conflict in the detention unit, those detainees can spend their leisure time with each other in the detention unit. This also means that they can, if they so wish, discuss their case with each other.

22 While Judge Parker’s report concluded that Milan Babić hung himself with his own belt, he stated that there had not been any threat that had required the belt to be removed and he recommended that ‘[t]he events of this case are isolated and provide no justification for a change to the policy in this respect of the present Rules of Detention’ (Parker (n 21) para 60(m)). Further Judge Parker recommended ‘that a record be maintained in the medical records of a detainee at [the UNDU] of any assessment, whether formal or informal, or treatment of a detainee by the [UNDU] psychiatrist’, which was not the practice at the time (Ibid., para 60(o)).

23 Rule 58 ICTR ROD; Rule 58(A) ICTY ROD. This right can be restricted by the Registrar or, in cases of emergency, the Commanding Officer, if the Prosecutor has reasonable grounds for believing that such contact is for the purposes of attempting to arrange the escape of the International Detainee, or if such contact could prejudice the outcome of proceedings (Rule 64 ICTR ROD). See also in general Rules 58–64bis ICTY ROD; Reg 99(1)(h)–(i) ICC ROC.

24 Rule 59 ICTR ROD; Rule 59(A) ICTY ROD.

25 UNDU, Regulations to Govern the Supervision of Visits to and Communications with Detainees (IT/98/Rev. 4).
In particular, International Detainees enjoy the right to communicate with, and receive visits from, the consular or diplomatic representative of the State to which they belong. Apart from those communications some International Detainees have requested more specific benefits from the international tribunals and courts. It is important to point out that in line with the specific nature of the statutory crimes of which they are accused, which usually require an element of implication of State organs, many International Detainees before the ICC, ICTR and ICTY have exercised important political functions before they came to The Hague or Arusha, respectively. In some instances they had requested to pursue, at least to some extent, their political work from inside the detention unit.

Perhaps the most well-known case before the ICTY in which the political activities of an accused were discussed was the Haradinaj case. At the time when he was indicted by the ICTY, Haradinaj was the Prime Minister of Kosovo within the provisional democratic self-governing institutions under SCRes 1244 (1990). From this post he stepped down and surrendered to the ICTY. Like other accused persons, Haradinaj was not allowed to engage in political activities while he was an International Detainee at the UNDU. Then, on 6 June 2005, he was allowed provisional release, but under the condition that he was not permitted ‘to make any political appearances or in any way get involved in any public political activity’ during the first 90 days of his provisional release. However, he was allowed to ‘take up administrative or organizational activities in his capacity of the President of the Alliance for the Future of Kosovo’, provided that such activities would not violate the conditions of provisional release. These conditions were changed about five months later when Trial Chamber II allowed Haradinaj to appear in public and engage in political activities, provided that UNMIK found them important ‘for a positive development of the political and security situation in Kosovo’. On 1 February 2007, due to the upcoming trial the Trial Chamber recalled Haradinaj from provisional release. During the trial, when he was again an International Detainee, he was not allowed to participate in political activities.

---

26 Rule 63 ICTR ROD; Rule 63 ICTY ROD; Reg 98 ICC ROC.
28 Ibid., para 10.
29 Ibid., para 10, referring to Haradinaj et al IT-04-84-PT (Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005) para 53(5).
31 Ibid.
32 Another important case in this respect is the case against Uhuru Muigai Kenyatta, the President of Kenya, who is facing proceedings before the ICC. On 18 October 2013, Trial Chamber V(b) of the ICC granted Kenyatta conditionally to be excused from continuous presence at his trial, with the exception of the opening and closing statements, hearing when victims present their views and concerns in person, the delivery of the Judgment, and any other attendance ordered by the Chamber. This was motivated by the wish of the Chamber to accommodate the functions of his office as President of Kenya. See Kenyatta, ICC-01/09-02/11 (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, 18 October 2003). See also Ruto and Sang ICC-01/09-01/11 (Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater, 18 February 2014).
An important case in this context is the Šešelj case. In 2004 the Deputy Registrar of the ICTY decided on the communication privileges of Šešelj at the UNDU and:

[prohibit[ed], unless otherwise authorised by the Commanding Officer of the Detention Unit, all communication between the Accused with person(s) except for his legal counsel (if applicable) and diplomatic and consular representatives and his immediate family, provided that his contact with his family shall be subject to live monitoring under conditions prescribed by the Commanding Officer of the Detention Unit.]

However, the accused showed a ‘defiant disposition’ with respect to this decision when he sent a letter to the Deputy President of his political party, which was published in the press on 21 April 2004, and in which he alleged serious misconduct by officials of the ICTY, including Judges, Prosecutors and staff members. The Deputy Registrar found these allegations to be unfounded and of such a grave nature that they amounted to a serious abuse of his communication privileges, in particular as Šešelj had encouraged that the letter be distributed to the media and to supporters of his political party prior to the Serbian presidential elections campaign that was ongoing at the time. As a result, the Deputy Registrar struck a reasonable balance between Šešelj’s rights to communicate or receive visits with that of the ICTY to effectively perform its mandate and functions, and he found that the circumstances of the case continued to require the imposition of measures aimed at avoiding ‘potentially deleterious media coverage resulting from unrestricted communication entitlements and visits’.  

International Detainees have at times requested permission to be interviewed by media outlets that had contacted them with such requests. The ICTY has established a ‘Procedure for Contacts with the Media’ pursuant to Rule 64bis (A) ICTY ROD which is distributed to International Detainees. Any contact between an International Detainee and a media outlet needs to be requested by the detainee and approved by the Registrar. However, face-to-face contacts are not allowed and other forms of contacts with the media can be prevented if the Registrar has reason to believe that the particular

---

33 Šešelj IT-03-67-PT (Restrictions on Vojislav Šešelj’s Communication Privileges Extended from 10 May to 13 June 2004, 7 May 2004).
34 Ibid.
35 Ibid. In June 2004, the Deputy Registrar rendered a subsequent decision in which he considered ‘that there is a strong likelihood that the political party and the supporters of the Accused will seek his further involvement in political activities associated with the forthcoming Serbian presidential elections until the anticipated second round of elections, for example, by issuing a letter of support to his political party and its supporters’. Šešelj IT-03-67-PT (Restrictions on Vojislav Šešelj’s Communication Privileges Extended from 13 June to 1 July 2004, 9 June 2004). Consequently the above-mentioned restrictions were extended. On 7 November 2014 Trial Chamber III ordered proprio motu the provisional release of Šešelj on the basis of compelling humanitarian reasons, Šešelj IT-03-67-T (Order on the Provisional Release of the Accused Proprio Motu, 7 November 2014).
36 Karadžić IT-95-05/18-T (President, Deputy Registrar’s Submission Regarding the Accused’s Request for Reversal of Limitations of Contact with Journalist: Süddeutsche Zeitung Magazin, 21 August 2013).
contact could disturb the good order of the detention unit or could interfere with the administration of justice. For instance, in 2013, the German Süddeutsche Zeitung Magazin requested a face-to-face interview with Radovan Karadžić. The application of the latter to be granted the right to participate in the interview was rejected by the ICTY Tribunal, and the President, to whom Karadžić had appealed, approved the Decision of the Registrar. The reason given was, inter alia, that ‘the risk of potential disclosure of confidential information to a journalist in a direct conversation between a detainee and a journalist – even if inadvertent – is unacceptable’. The President upheld the decision of the Registrar, finding that it was reasonable and in compliance with the relevant legal requirements. In light of the risk at stake for the disclosure of confidential information this decision did not disproportionally curtail any right of the accused as an International Detainee.

3.2 Visits

The right to receive visits from family and friends at regular intervals is an important right of an International Detainee, as it is vital to his well being in the detention unit. This is all the more so as International Detainees are usually detained in a country which is neither their country of origin nor the country in which their family and friends are living. In order to allow the International Detainee to keep in contact with his family the ICCDC and the UNDU and UNDF even allow for conjugal visits in a room specifically designed for this purpose. During visits in this room no supervision will be conducted. In general, other visits by family members and friends are conducted within the sight of the security officers at the Detention Units. However, all visitors must comply with the requirements of the visiting regime of the Host State, as they will have to pass through the national prison in order to reach the detention unit. Such procedure may include personal searches of clothing and X-ray examination prior to entering the detention unit.

3.3 Accommodation, Personal Hygiene, Clothing and Food

Unlike many national detention facilities, the international detention units, in general, do not foresee more than one International Detainee in one cell. It is only in exceptional circumstances or in cases where the Commanding Officer, with the

---

38 Ibid.

39 Karadžić IT-95-05/18-T (Decision on Request for Reversal of Limitations of Contact with Journalist: Süddeutsche Zeitung Magazin, 7 October 2013) para 10.

40 Ibid., para 17.

41 Abels (n 2) 573. Abels quotes from an interview with the Commanding Officer of the UNDU who states that ‘[o]ne of the issues for having people a long way from their home is maintaining family and relationships which makes somebody psychologically stronger’.

42 Ibid. See also Reg 100 ICC ROC.

43 Rule 61(1) ICTR ROD; Rule 61(C) ICTY ROD. See also Reg 100(3) ICC ROC. On the issue of financial assistance to family members of the International Detainee, see Abels (n 2) 577–8 (for ICTY), 590–93 (for ICTR), 632–51 (for ICC).
The legal position of international detainees

approval of the Registrar, considers that there are advantages to the sharing of accommodation that such a measure can be applied.\(^{44}\) Further, the detention unit must meet, at all times, all requirements of health and hygiene with regard to climatic conditions, lighting, heating and ventilation.\(^{45}\) This is closely related to the issue of personal hygiene of the International Detainees. While it is the primary responsibility of the staff of the respective detention unit to ensure that all requirements of health and hygiene are fulfilled, it is for the detainee himself to ensure that his cell is kept clean and tidy at all times.\(^{46}\) In addition, each International Detainee must keep himself clean and will be provided with the necessary toilet articles.\(^{47}\) In contrast to many national prisons, International Detainees may wear their own civilian clothing.\(^{48}\)

A very important aspect of the daily life of the International Detainees is their food. Taking into account their religious beliefs, their age and their health status, the respective ROD provide that their food shall satisfy the standards of dietetics and modern hygiene, and they shall take into consideration the above-mentioned issues as well as any cultural requirements.\(^{49}\) In addition, International Detainees can use the kitchen facilities in the respective detention units, which also serve as an important place to meet with the other detainees, regardless of their nationality and ethnicity. Furthermore, they can enjoy card games together in the meeting room.

3.4 Medical Services

The provision of health care to International Detainees is of utmost importance both to the detainee and to the conduct of his criminal proceedings. Many decisions and orders have been rendered with respect to the fitness of the detainee to stand trial, his inability to attend proceedings for medical reasons, and surgery and dental treatment. In general, International Detainees have the right to consult with a doctor or dentist of their own choice and at their own expense.\(^{50}\) If a Detainee requires specialist or in-patient treatment, he will be treated within the host prison or transferred to a civil hospital of the Host State.\(^{51}\) Of particular importance were cases in which the International Detainee requested to be provisionally released to another country in order to receive medical treatment. Such requests have at times been granted. For instance, Pavle Strugar requested provisional release in order to undergo surgery for a total hip prosthesis implantation in the Republic of Montenegro.\(^{52}\) At first the Appeals Chamber denied this request and found that Strugar had not shown that the medical aid he

\(^{44}\) Rule 14 ICTR ROD; Rule 17 ICTY ROD; Reg 105(3) ICC ROC.

\(^{45}\) Rule 16 ICTR ROD; Rule 19 ICTY ROD. See also Reg 103(1) ICC ROC.

\(^{46}\) Rule 18 ICTR ROD; Rule 21 ICTY ROD.

\(^{47}\) Rule 20 ICTR ROD; Rule 22 ICTY ROD; Reg 197 ICC ROR.

\(^{48}\) Rule 21 ICTR ROD; Rule 24 ICTY ROD; Reg 198 ICC ROR.

\(^{49}\) Rule 23 ICTR ROD; Rule 26 ICTY ROD; Reg 199 ICC ROR.

\(^{50}\) Rule 27 ICTR ROD; Rule 30 ICTY ROD; Reg 157 ICC ROR.

\(^{51}\) Rule 29 ICTR ROD; Rule 32 ICTY ROD; Reg 154(2) ICC ROR.

\(^{52}\) Strugar IT-01-42-A (Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions, 14 November 2005).
needed could not be adequately provided in health institutions in the Netherlands.\textsuperscript{53} Shortly thereafter, however, Strugar filed another request for provisional release based on medical reasons, and this time it was granted, as he no longer asked that the time spent on provisional release be credited as time spent in custody.\textsuperscript{54} The most well-known example in which such a request had been rejected by a Chamber of the ICTY was in the \textit{Milošević} case in which the accused had sought to be transferred to Russia for proper medical treatment.\textsuperscript{55} Here the request was rejected by the competent Trial Chamber for essentially two reasons. First, the Chamber held that Milošević’s assigned counsel had not made a real attempt to demonstrate that his medical needs could not be met in the Netherlands, stating that a request for provisional release could not be granted unless such a showing was made.\textsuperscript{56} The Trial Chamber further held that in case the accused wanted to be treated by non-Dutch specialists, they could come to the Netherlands to treat him.\textsuperscript{57} Second, the Trial Chamber found that Milošević, at the time of the decision, was facing the possibility of life imprisonment if he was convicted. In light of this consideration, it held that notwithstanding the guarantees of the Russian Federation to send him back to The Hague after the medical treatment, it was not satisfied that, if provisionally released, he would indeed return for the continuation of his trial.\textsuperscript{58} Only a few weeks later, on 11 March 2006, Milošević was found dead in his cell in the UNDU.

3.5 Spiritual Welfare

As part of the psychological well being of an International Detainee, a qualified representative of each religion or system of beliefs held by any detainee is to be appointed (at the ICTR and ICTY: subject to approval by the Bureau).\textsuperscript{59} Access to such an approved representative cannot be refused to any International Detainee.\textsuperscript{60} Similarly, detainees are allowed, so far as is practicable, to satisfy the needs of their spiritual and

\textsuperscript{53} Strugar IT-01-42-A (Decision on ‘Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions’, 8 December 2005).

\textsuperscript{54} Strugar IT-01-42-A (Decision on ‘Defence Motion: Defence Request for Provisonal Release for Providing Medical Aid in the Republic of Montenegro’, 16 December 2005). On 12 January 2006, the Appeals Chamber filed the Corrigendum to ‘Decision on “Defence Motion: Defence Request for Provisonal Release for Providing Medical Aid in the Republic of Montenegro”’.

\textsuperscript{55} Milošević IT-02-54-T (Decision on Assigned Counsel Request for Provisional Release, 23 February 2006).

\textsuperscript{56} Ibid., para 17.

\textsuperscript{57} Ibid.

\textsuperscript{58} Ibid., para 18.

\textsuperscript{59} Rule 67 ICTR ROD. The Bureau is a body that comprises the President, Vice-President and the Presiding Judges of the Trial Chambers established pursuant to Rule 23 ICTR RPE. At the ICTY, any minister or spiritual adviser has to be accredited by the Registrar, Rule 66(A) ICTY ROD. See also Reg 102 ICC ROC.

\textsuperscript{60} Rule 68 ICTR ROD. This right is subject only to any restrictions or supervision as the Commanding Officer, in consultation with the Registrar, may deem necessary. Those restrictions may include personal searches of clothing and X-ray examination of possessions on entry to the detention facility. Rule 61 ICTR ROD. See also Rule 67 ICTY ROD and Reg 100(3) ICC ROC.
moral life by attending services or meetings held in the detention unit and by possessing the necessary books or literature.61

3.6 Recreational Activities

In general, each International Detainee is allowed to procure at his own expense books, newspapers and other means of occupation as long as they are compatible with the good order of the respective detention unit.62 In addition, International Detainees are entitled to follow the news by radio and television broadcasts.63 This right, however, is not unrestricted. If the Prosecutor believes that the interests of justice would not be served if a particular International Detainee had unrestricted access to the news, or that such unrestricted access could prejudice the outcome of proceedings, he can request that the Registrar, or in cases of urgency, the Commanding Officer, to restrict such access.64 International Detainees are also entitled to physical exercise and sports activities, including remedial or therapeutic treatment.65

3.7 Personal Possessions of Detainees

Unless the clothing or any other personal item in the International Detainee’s possession constitutes a threat to the security or the good order of the detention unit or the host prison, or to the health or safety of any person therein, it can remain in the possession of the detainee for his own use.66 Any item that is taken away from the International Detainee is to be put in an inventory which is to be signed by the detainee.67 If an item comes from the outside, for instance because it was introduced by a visitor, separate security controls can be implemented by the respective detention unit. Upon release of the International Detainee from the detention unit, after having been acquitted or finally convicted, all articles and money which belong to him shall be returned.68

4. MAINTENANCE OF SECURITY IN THE DETENTION UNITS

One of the most important sections of the respective provisions regulating the management of the detention units deals with the maintenance of the security. The status of the International Detainees, the character of the serious violations of international humanitarian law with which they are charged as well as the severe sentences that can be meted out by the international judges may contribute to a possible situation in which the security of the detention unit is endangered. It is therefore of

61 Rule 69 ICTR ROD; Rule 68(B) ICTY ROD; Reg 102 ICC ROC and Reg 153 ICC ROR.
62 Rule 72 ICTR ROD; Rule 71 ICTY ROD; Reg 99(1)(c) ICC ROC.
63 Rule 73 ICTR ROD; Rule 72(A) ICTY ROD; Reg 99(1)(d) ICC ROC.
64 Rule 74 ICTR ROD. See also Rule 73 ICTY ROD; Reg 99(1)(d) ICC ROC.
65 Rule 24 ICTR ROD; Rules 27–29 ICTY ROD; Reg 99(1)(f)–(g) ICC ROC.
66 Rule 76 ICTR ROD; Rule 74(A) ICTY ROD; Reg 99(1)(b) ICC ROC.
67 Rules 11–12, 76 ICTR ROD; Rules 13–14, 74(B) ICTY ROD.
68 Rule 81 ICTR ROD; Rule 79 ICTY ROD.
utmost importance to give the respective Registrars and Commanding Officers the legal tools to reinstate law and order once these have been breached.

4.1 Discipline: Segregation, Isolation and Other Means to Maintain Security

Of particular importance for the legal position of International Detainees are the applicable rules on discipline. These provisions are characterised by their balancing between the rights of International Detainees and their duties vis-à-vis the detention unit and the Tribunal. For instance, the detainee has the right to be heard on the subject of any (disciplinary) offence which he is alleged to have committed. On the other hand an International Detainee has the duty to comply with the applicable ROD, and any violation of these rules can be punished. An important non-punitive measure to ensure discipline is the right of the Registrar, either upon request by the Prosecutor or on his own initiative, to order that an International Detainee be segregated from all or some of the other detainees. Such measures, however, can only be imposed in order to avoid any potential conflict in the detention unit or danger to the detainee in question. For example, in the Čelebići case, segregation had been imposed on two co-accused in the UNDU. This was not done in order to prevent them from generally communicating with each other in relation to their case. However, the staff of the Detention Unit had become aware that they had exchanged notes and that they hid them in an area in order to circumvent any monitoring by the staff of the UNDU. Similarly, in the Katanga and Chui case before the ICC, the Prosecution requested the segregation of both accused;

because it had reasonable grounds to believe that such contact could prejudice or otherwise affect the outcome of the proceedings against each of the Detainees, adversely impact ongoing or further investigations, harm victims or witnesses or any other person, or be used by the Detainees to breach an order for non-disclosure made by a Judge.

The Single Judge who had to decide on the Prosecution’s request considered that this would amount to a de facto segregation of Mathieu Ngudjolo Chui from all other detainees, and that the accused had the right pursuant to Article 67(1) ICCSt to discuss

---

69 Rule 37 ICTR ROD; Rule 41(iv) ICTY ROD; Reg 95(2) ICC ROC.
70 Rule 36 ICTR ROD. Such punishment should, in general, be limited to disciplinary measures or, in more severe cases, fines. It is hardly conceivable that violations of the Detention Rules can lead to a sentence of imprisonment. See also Rule 41 ICTY ROD. See also Regulations for the Establishment of a Disciplinary Procedure for Detainees, (IT/97), April 1995. For the ICC see Regs 207–208 ICC ROR.
71 Rule 38 ICTR ROD. This can only be done after having sought medical advice. See also Rule 42(A) ICTY ROD; Reg 209 ICC ROR.
72 Rule 38 ICTR ROD; Rule 42(B) ICTY ROD; Reg 201 ICC ROR. For temporary segregation see Reg 209 ICC ROR.
73 Delalić et al IT-96-21-T (Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić, 11 November 1996) para 25.
74 Katanga et al ICC-01/04-01/07 (Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008) 7.
the evidence on which the Prosecution intended to rely in order to properly prepare his defence.\(^{75}\) As the Judge found the allegations of the Prosecution merely speculative, she did not see a need to address the proportionality requirement which would have been necessary for a restriction of the rights of the International Detainees under the detention regime.\(^{76}\)

It is important to stress that in cases where an International Detainee has requested to be segregated from all or some of the other detainees,\(^{77}\) the Commanding Officer has to consult with the medical officer to determine whether such segregation would be injurious to the mental or physical health of the detainee, in which case it shall not be ordered.\(^{78}\) Once segregation has been ordered, the Commanding Officer has to review it at least once a week and report to the Registrar thereon.\(^{79}\)

A specific situation arose when Jelena Rasić, a former case manager in the Lučić and Lučić case, was detained in the UNDU after having pleaded guilty to several charges of contempt.\(^{80}\) As she was the only female International Detainee at the time in the UNDU, she felt that she had insufficient interactions with the other inmates, and she complained about what she considered to be de facto solitary confinement.\(^{81}\) As a consequence, she requested provisional release, arguing that her limited communications with some of the male International Detainees for two hours or less per day were insufficient for her well being.\(^{82}\) The Trial Chamber granted her request to be provisionally released, and her detention situation was later taken into consideration when meting out her sentence.\(^{83}\)

Another non-punitive measure in particularly severe cases, such as in order to prevent an International Detainee from inflicting injury on any other detainee, is the Commanding Officer’s order that a detainee be confined to the isolation unit.\(^{84}\) It must be noted that, due to the severity of the measure, no International Detainee shall be kept in the isolation unit for more than seven consecutive days. In practice, however, detention in the isolation unit can be significantly longer than seven days. If the...

\(^{75}\) Ibid., 10.

\(^{76}\) Ibid., 9, 13.

\(^{77}\) While an International Detainee can request to be segregated from other detainees (see, for instance, Rule 40 ICTR ROD), there is no right of an International Detainee to request the segregation of other detainees. Šešelj IT-03-67-PT (Decision on Šešelj’s Request that the ICTY President Order that Honourable Serbs in Detention and those who have Arranged a Plea Bargain with the Prosecution and Agreed to Give False Testimony be Segregated in the Detention Unit and Prevented from Being Able to Contact Each Other, 15 June 2006). Also, in general, International Detainees who are accused of the same or similar crimes are not per se segregated from each other.

\(^{78}\) Rule 40 ICTR ROD; see also Rule 43(A) ICTY ROD; Reg 201(1) ICC ROR.

\(^{79}\) Rule 41 ICTR ROD. See also Rule 43(D) ICTY ROD; Regulation 201(4) ICC ROR.

\(^{80}\) Rasić IT-98-32/1-R77.2 (Written Reasons for Oral Sentencing Judgment, delivered orally 7 February 2012, filed 6 March 2012).

\(^{81}\) Rasić IT-98-32/1-R77.2-A (Judgment, 16 November 2012) para 39.

\(^{82}\) Ibid.

\(^{83}\) Ibid., paras 30, 39.

\(^{84}\) Rule 43(b) ICTR ROD. Such a measure can also be imposed by order of the Registrar, acting in consultation with the President, and as a punishment pursuant to Rule 36 ICTR ROD. See also Rule 45(A)(ii) ICTY ROD; Reg 212 ICC ROR.
Commanding Officer decides that further isolation is necessary, the isolation can be ordered to continue for a further period not to exceed seven days, provided that the medical officer has confirmed the physical and mental fitness of the detainee.\textsuperscript{85} The relevant rule does not provide for any limit of isolation. To the contrary, it states that ‘[e]ach and every extension of use of the isolation unit shall be subject to the same procedure’.\textsuperscript{86} In light of the serious character of an order to go to the isolation unit it is necessary that any such assignment must be subject to the general principles limiting any administrative decision of the Registrar and the Commanding Officer.\textsuperscript{87} In particular it is important to note that no isolation should be ordered if the relevant situation could be solved by a less severe measure or punishment. Further, it must be stressed that the International Detainee’s right to make a complaint at any time to the Commanding Officer and, if necessary, ultimately to the President applies of course as well to complaints against being placed in isolation.\textsuperscript{88}

4.2 Disturbances and Suspension of the Rules of Detention

While the outer security of the detention units is guaranteed by the law enforcement authorities of the respective Host State, the proper functioning of the good order within the detention units of the ICTR and the ICTY is the duty of the Commanding Officer, the Registrar and the relevant staff members working in the units. If the Commanding Officer opines that a situation carries a risk that would threaten the security and good order of the detention unit, he can contact the head of the host prison and request the immediate assistance of the authorities of the Host State in order to maintain control within the detention unit.\textsuperscript{89} While the authorities of the Host State, in general, should not interfere within the detention unit, this provision takes due account of the fact that any disturbance within a detention unit may get out of hand and thus threaten the security and good order of the Host State. If there is such danger of disturbances occurring within a detention unit, the Commanding Officer or the head of the host prison, as appropriate, can suspend the ROD for a maximum of two days.\textsuperscript{90} Again, in accordance with the general principle that the discretion to order administrative measures is not unfettered, such suspension of the Rules can only be imposed if no

\begin{flushright}
\textsuperscript{85} Rule 47 ICTR ROD; Rule 49 ICTY ROD; Reg 212(5) ICC ROR.

\textsuperscript{86} Rule 47 ICTR ROD; Rule 49 ICTY ROD; Reg 212(6) ICC ROR.

\textsuperscript{87} Pursuant to ICTY jurisprudence, a decision of the Registrar can be quashed if he has: (1) failed to comply with the relevant legal requirements; (2) failed to observe basic rules of natural justice or to act with procedural fairness toward the accused; (3) taken into account irrelevant material or failed to take into account relevant material; or (4) has reached a conclusion that no reasonable person could have reached on the material before him (Šešelj IT-03-67-PT (Decision on Vojislav Šešelj’s Request for Review of Registrar’s Decision of 10 September 2009, 21 October 2009) para 19. As to the relevant procedure before the ICC see Abels (n 2) 322.

\textsuperscript{88} See Rules 82–83 ICTR ROD; Rules 80–81 ICTY ROD; Reg 216bis–222 ICC ROR.

\textsuperscript{89} Rule 54 ICTR ROD; Rule 56 ICTY ROD; Reg 96 ICC ROC.

\textsuperscript{90} Rule 55 ICTR ROD. Such suspension has to be reported immediately to the Registrar. Subsequently the President, acting in consultation with the Bureau, must consult with the relevant authorities of the Host State and take such action ‘as may be seen fit at the time’. See also Rule 57 ICTY ROD and Reg 96(2) ICC ROC.

Jan Christoph Nemitz - 9781783472161
Downloaded from Elgar Online at 08/17/2019 10:06:58AM
via free access
other, less severe measures would be effective. Furthermore, during the period in which the ROD are suspended the International Detainees are not without rights, and every discretionary decision has to fulfill the applicable standard of proportionality. Thus, even if the ROD are not directly applicable during that time, any measure imposed on International Detainees must be compatible with applicable human rights law. If necessary, International Detainees must also be able to retroactively file a complaint on the basis of measures taken against them during this time once the suspension of the ROD is terminated. In addition, the severity of the suspension of the ROD requires that as soon as the underlying reason for its imposition has fallen away, the suspension shall be terminated and the ROD shall be applicable as previously.

Similarly, before the ICC, the Chief Custody Officer may take such actions in order to ensure the safety of the detainees and staff, and the security of the detention facility.91

4.3 Instruments of Restraint and the Use of Force; Transport of Detainee

As a general rule, International Detainees should not be handcuffed, either in the respective detention unit or in the tribunals and courts. Therefore, handcuffs or other instruments of restraint can only be used in specific, exceptional circumstances such as a precautionary measure against escape during transfer from the detention unit to any other place; on medical grounds by direction and under the supervision of the medical officer and to prevent an International Detainee from self-injury, injury to others or to prevent serious damage to property.92 If used, such instruments of restraint must be removed as soon as possible.93 While these provisions on the use of instruments of restraint regulate the use of passive force vis-à-vis an International Detainee, the applicable law of detention also grants the staff of a detention unit the right to use active force. This, however, is only possible in very specific circumstances, namely in self-defence against an International Detainee or in cases of an attempted escape or active or passive resistance to an order.94 Also, staff must not use more force than is strictly necessary to achieve the desired result, and the incident must be immediately reported to the Commanding Officer who shall provide a report to the Registrar.95 While the use of force appears to be easily understandable when it comes to the prevention of escape, it is less obvious as a measure against ‘active or passive resistance of an order’.96 In such situations, it is important that force shall only be used if it is not disproportionate to both the order and the nature of the resistance to it. As against any other administrative decision which impacts on the rights of an International Detainee, the latter has the right to file a complaint against the use of force by a staff member of the detention unit. In addition, each International Detainee shall have

91 Reg 96(1) ICC ROC.
92 Rule 48 ICTR ROD. The restrained detainee shall be kept under constant and adequate supervision (Rule 50 ICTR ROD). See also Rule 50 ICTY ROD; Reg 203(2) ICC ROR.
93 Rule 49 ICTR ROD; Rule 51 ICTY ROD; Reg 203 ICC ROR.
94 Rule 51 ICTR ROD; Rule 53 ICTY ROD; Reg 204 ICC ROR.
95 Rule 51 ICTR ROD; Rule 53 ICTY ROD; Reg 204(1) ICC ROR.
96 Rule 51 ICTR ROD; Rule 53(A)(ii)(b) ICTY ROD; Reg 204(2)(b)(ii) ICC ROR.
the right to be examined by the medical officer, in the absence of any non-medical staff.\(^\text{97}\) The result of this examination as well as any relevant statement of the International Detainee shall be made available to the detainee, the Commanding Officer, the Registrar, the Prosecutor and the President.\(^\text{98}\)

5. COMPLAINTS

One of the most important rights of International Detainees of the ICC, ICTR and ICTY is their right to make, at any time, a complaint to the Commanding Officer or his representative.\(^\text{99}\) The respective ROD do not explicitly provide for any time period within which the Commanding Officer has to respond to the complaint. However, they do provide for a deadline within which every complaint to the Registrar shall be dealt with, namely ‘promptly and (…) within a reasonable period of time’.\(^\text{100}\) The same principle should apply with respect to the response by the Commanding Officer. In particular, the more the decision against which the complaint is made affects the rights of the International Detainee, the sooner, it is suggested, the Commanding Officer should respond to it. For instance, if an International Detainee has been confined to the Isolation Unit and has filed a complaint against this assignment, the Commanding Officer or his representative should deal with it without undue delay, bearing in mind the seriousness of the decision. If the detainee is not satisfied with the response of the Commanding Officer, he has the right to file a written complaint to the Registrar, who shall forward it to the President.\(^\text{101}\) This ensures that the right to complain against

\(^{97}\) Rule 52 ICTR ROD; Rule 54(A) ICTY ROD; Reg 204(4) ICC ROR.

\(^{98}\) Rule 52 ICTR ROD; Rule 54(B) ICTY ROD; Reg 204(5) ICC ROR.

\(^{99}\) Rule 82 ICTR ROD; Rule 80 ICTY ROD. This provision further states that each International Detainee on admission should be provided in a language which he understands the Regulations for the Establishment of a Complaints Procedure for Detainees. See also Reg 106 ICC ROC.

\(^{100}\) Rule 86 ICTR ROD; Rule 84 ICTY ROD; ‘without undue delay’. Reg 219(1) ICC ROR: ‘where possible (…) within seven calendar days (…) and in any event, no more than 14 calendar days of the date of receipt’. See also Abels (n 2) 290–92.

\(^{101}\) Rule 83 ICTR ROD. The complaint to the Registrar, and ultimately to the President, shall be without any censorship (ibid); Rule 81 ICTY ROD. This procedure is further developed in the Regulations for the Establishment of a Complaints Procedure for Detainees (IT/96) (ICTY) which sets out, for instance, the division of responsibilities between the Registrar and the President. An International Detainee may make a formal complaint concerning the conditions of his detention to the Registrar at any time, whether or not such complaint has already been raised with the Commanding Officer, provided that not more than two weeks have elapsed since the incident. The Registrar shall examine the substance of the complaint and determine whether it should be dealt with by the Registrar, being a complaint about an administrative matter or a matter of general concern, or whether it relates to an alleged breach of the rights of the individual detainee, in which case it shall be referred to the President for consideration. In any event the Registrar shall forward a copy of each and every complaint to the President. The Registrar or the President shall investigate the complaint promptly and efficiently and shall seek the views of all relevant persons or bodies, including the Commanding Officer. The detainee shall be permitted to communicate freely and without censorship on the matter with the
matters of detention are not limited to a non-judicative, exclusively administrative procedure. In light of the seriousness of the consequences that decisions against detainees may have, it is imperative that, if necessary, a judicial organ of the international court or tribunal takes the final decision on the issue. This is all the more so as administrative decisions against International Detainees may have a direct impact on the ability of the detainee to conduct his own defence or to assist his counsel and follow the proceedings. Whenever the fair trial rights of the International Detainee are influenced and possibly thwarted, it is of crucial importance that, if necessary, Judges decide on the issue in question.102 This follows, for instance, from Article 20 ICTYS which provides that a Trial Chamber ‘shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused’. Pursuant to the jurisprudence of the ICTY, a Trial Chamber cannot appropriate the power to review a decision of the Registrar if this is specifically conferred on the President of the ICTY. However, in light of a Trial Chamber’s statutory obligation to ensure that the trial of the accused is fair, it is the Trial Chamber that has the authority to review a Registrar’s decision. In this respect, the President of the ICTY has held that ‘review of a decision by the Registrar on allocation of funds in terms of its impact upon the right of an accused to “equality of arms” with the Prosecution lies with the relevant Chamber’.103 While this decision did not explicitly deal with a detention-related issue, the same principle applies in such a scenario in case the principle of ‘equality of arms’ is on the line. However, the International Detainee has first to exhaust all available remedies.104

Registrar during this period and the Registrar shall, where appropriate, pass all such communications to the President without delay. If the complaint is justified, action to rectify it shall be taken within that two-week period if possible and the detainee advised accordingly. If the Registrar or the President finds the complaint to be unfounded, the Registrar shall notify the detainee in writing, giving reasons for rejection of the complaint. Rejection of a complaint by the Registrar or the President does not bar the detainee from raising such complaint again. In such cases, the Registrar, in consultation with the President, may reject the complaint without further enquiry if it reveals no additional matters not already considered. These Regulations only apply to the ICTY.


103 Stanišić and Simatović IT-03-69-T (Decision on Stanišić Defence Motion for Equality of Arms and Immediate Suspension of the Trial and on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 10 March 2011) para 14.

104 Ibid., para 14. Pursuant to Reg 106 ICC ROR, ‘[a] detained person shall have the right to file a complaint against any administrative decision or order or with regard to any other matter concerning his or her detention’. More specifically, a detained person can make an oral or written complaint on any matter concerning his or her detention to the Chief Custody Officer at any time and he or she may be represented by their counsel. Reg 217(1)&(6) ICC ROR. During the investigation of a complaint, the International Detainee has the right to freely communicate with the Chief Custody Officer (Reg 218(2) ICC ROR). Where possible, the complaint shall be dealt with within seven calendar days of its receipt and, in any event, no more than 14 calendar days of the date of receipt (Reg 219(1) ICC ROR). Similarly, if a complaint is deemed to be justified, action to rectify the matter shall be taken, if possible, within 14 days (Reg 219(3) ICC ROR). If the complaint is found to be unjustified, the International Detainee and counsel shall be notified in writing, with reasons for the decision (Reg 219(5) ICC ROR). The International
In this context, it is important to note that each International Detainee has the right to freely communicate with the competent inspecting authority. The ICRC has the right to inspect the respective Detention Units. During such inspections an International Detainee shall have the right to talk to the inspector.

6. PROTECTION OF OTHER SPECIFIC RIGHTS OF INTERNATIONAL DETAINEES

Over the past years, the jurisprudence of the international tribunals has had the opportunity to adjudicate on further rights of International Detainees which are not explicitly mentioned in the respective ROD. For instance, an International Detainee before the ICTY had requested the Appeals Chamber to allow him to extend his identity card. In order to pursue this request he had to ask the Appeals Chamber to grant him leave to physically go to the embassy of his home country in The Hague and to apply for it there. However, the Netherlands, who, like Serbia, had been invited to make submissions on this request, stated that granting such a custodial visit to the embassy would present ‘very serious challenges to public order and national security’, not the least because the Host State feared an ‘unwanted precedent’ in relation to other detainees of other international courts and tribunals in The Hague. The Appeals Detainee has the possibility to address the Registrar with respect to a decision of the Chief Custody Officer, and the Presidency in relation to a decision of the Registrar (Regs 220–221 ICC ROR).

Rule 84 ICTR ROD; Rule 82 ICTY ROD. At the ICC, the Presidency can at any time appoint a Judge to inspect the detention centre and to report on its conditions. Further, there shall be regular and unannounced visits by an independent inspecting authority (Reg 94(1), (2) ICC ROC).

Since 1995, the ICRC has been doing annual inspections of the UNDU. During these inspections it holds, inter alia, individual meetings with ICTY International Detainees. See ICTY, ‘ICRC completes annual inspection of Detention Unit’ (ICTY, 17 December 2012) <www.icty.org/sid/11177> accessed 7 May 2014.

Rule 84 ICTR ROD. See also Rule 82 ICTY ROD. Such meetings between International Detainees and the inspector shall be out of the sight and hearing of the staff of the respective detention unit (ibid). None of its content should be disclosed to the Commanding Officer or any other representative of the international court or tribunal, unless this is the wish of the International Detainee. Also, an International Detainee may at any time during an inspection of the detention unit by inspectors appointed by the Tribunal raise a complaint concerning the conditions of his detention, see Regulations for the Establishment of a Complaints Procedure for Detainees (IT/96) (ICTY). With respect to inspections by the ICRC, however, it shall be noted that ICRC staff members enjoy the right not to testify: ‘the right to non-disclosure of information relating to the ICRC’s activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate’. Simić et al IT-95-9 (Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999) para 73. See also Reg 94 ICC ROC.

Popović et al IT-05-88-A (Public Redacted Version of 22 July 2011 Decision on Vinko Pandurević’s Motion for Temporary Alteration of the Conditions of his Detention, 10 November 2011).

Ibid., 2.
Chamber dismissed the request and recalled that matters relating to the rights of International Detainees and conditions of their detention are regulated by the ROD and fall primarily under the authority of the ICTY Registrar and the ICTY President.\footnote{Ibid., 4.}

Another important right that an International Detainee shall be generally allowed to exercise is the right to vote, that is to participate as a voter in elections in his home country. An International Detainee who has not been finally convicted will in general retain his right to vote in his national elections, in accordance with the respective national election provisions. Thus, as long as the exercise of this right does not conflict with the interests of the administration of justice and the security and good order of the respective detention unit, the international courts and tribunals should enable the detainee to exercise his right to vote.\footnote{For jurisprudence of the European Court on Human Rights on the right to vote of detainees see, for instance \textit{Soyler v Turkey} App no 29411/07 (ECtHR, 17 September 2013).} The fact that many International Detainees have been charged with offences which are related to their political position within the State system does not change this. An International Detainee who has not been finally convicted must be presumed to be innocent. And an innocent person must be guaranteed the right to vote.

A more complex issue is the question whether an International Detainee should be allowed to actively take part in political activities in his home country. This issue was given particular attention in the case against Ramush Haradinaj, who, at the time of his arrest, was Prime Minister in Kosovo.\footnote{\textit{Haradinaj et al} IT-04-84-T (Judgment, 4 April 2008).}

7. COOPERATION OF INTERNATIONAL DETAINEES WITH THEIR COUNSEL

Part of an International Detainee’s right to have the opportunity to entertain contacts with the outside world is his or her entitlement to communicate freely with his legal representative.\footnote{See Rule 65(A) ICTY ROD; Article 67(1)(b) ICCSt; Rule 73(1) ICC RPE; Reg 151 ICC ROR and Reg 97(1) ICC ROC.} At the ICTY, as a concession to the detention regime, however, visits of the legal representative must be pre-arranged with the Commanding Officer.\footnote{Rules 61, 65(D) ICTY ROD.} Furthermore, in general, the International Detainee at the ICTY can address his or her correspondence to counsel without interference. However, where the Commanding Officer or the Registrar has reasonable grounds for believing that this privilege is being used in order to, inter alia, arrange escape or obstruct justice, they can interfere in the correspondence and, for instance, give it to the Registrar who can request counsel to open the correspondence in his presence.\footnote{See Abels (n 2) 678. For the situation at the ICTR see ibid., 691–706.} Similarly, the lawyer-client privilege is not guaranteed without exceptions when it comes to telephone contacts between an International Detainee and his counsel. Pursuant to Rule 65 ICTY ROD, they can be recorded and monitored. Again, such monitoring can only be ordered if the Registrar...
has reasonable grounds to believe that the privilege is being abused in an attempt to, for instance, interfere with or intimidate witnesses or interfere with the administration of justice.\footnote{Rule 65(B) ICTY ROD.} Pursuant to the same Rule, the International Detainee can request the President to reverse any such decision by the Registrar. While such a requirement is not included in the ROD, it is important to note that any such request should be dealt with expeditiously so that the negative effect on the preparation of the International Detainee’s defence is reduced to a minimum. Furthermore, the security requirements regarding the entry to the Detention Unit apply to legal counsel, too.\footnote{Rule 61 ICTY ROD. For instance, when suspicions arose that some of Slobodan Milošević’s legal associates were misusing the lawyer-client privilege by smuggling material in and out of the UNDU, additional security measures included the searching of these legal associates. See Abels (n 2) 683–4.}

The legal regime applicable to the cooperation between International Detainees and their counsel before the ICC is of an essentially similar nature.\footnote{See Abels (n 2) 713–15.}

8. CONCLUSION

In light of the foregoing, it can be summarised that the current detention regimes in these three international courts and tribunals largely protect the legal position of International Detainees and respect and guarantee their rights while being detained during their legal proceedings. The fact that all three detention units are far away from the country of origin of the International Detainees constitutes a systemic hardship for them. However, as the above-mentioned analysis has shown, the applicable rules and regulations, in general, manage to alleviate this hardship to the extent possible. In fact, the proper treatment of the International Detainees in the Detention Rules may cause perceptions of preferential treatment and double standards as detainees of the ICTR, the ICTY and the ICC are detained in accordance with legal standards which may be higher than those standards governing national detention regimes in which lower-ranking accused are detained. However, this almost inevitable mismatch can never be a reason for curtailing the rights of an International Detainee to be detained in accordance with the applicable international standards.