Life after Conviction at International Criminal Tribunals

An Empirical Overview

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Abstract

As of July 2013, the ICTY, ICTR and SCSL have together convicted and sentenced over 120 perpetrators of international crimes committed during the conflicts in the former Yugoslavia, Rwanda and Sierra Leone, respectively. Only 13% of these convicts serve life imprisonment. The vast majority has been sentenced to determinate sentences. According to the tribunals' Statutes convicted persons serve their sentences in a country designated by a tribunal. The enforcement of sentences, including any commutation of sentences, is governed by the laws of the countries of imprisonment. 'International prisoners' have been scattered around Europe and Africa and almost half of the convicts have already been (early) released. So far not much has been written about conditions under which international prisoners serve their sentences; factors that justify their (early) release; and what they do after their release. In this article we provide an initial overview of this empirical reality of the post-conviction stage at the international criminal tribunals. Since the ICC has adopted a largely similar approach to sentence enforcement, the findings might serve as a starting point for discussion and possible re-assessment of future enforcement of international sentences.

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Journal of International Criminal Justice **12** (2014), 109–132 doi:10.1093/jicj/mqu003

1. Introduction

On 26 August 1998, Dražen Erdemović, a 27 year old Bosnian Croat arrived at the Norwegian maximum security 'Ringerike' prison to serve the remainder of a five year sentence. This day marked a novelty for international criminal justice. For the first time in history, an international criminal tribunal transferred a convict of international crimes to serve his sentence in a foreign prison. Meanwhile, after serving a little over three years, Erdemović has been released. He and his family entered a witness protection programme: they were given new identities, relocated, and are now living in a northern European country.[1] Erdemović's story serves as an illustration of the post-conviction stage at the international criminal tribunals. International prisoners serve their sentences in prisons outside their country of origin; are often released before having served their full sentence; and are repatriated or — either within a witness protection programme or not — relocated to a different country.

The post-conviction life of international prisoners and released individuals has been almost entirely neglected in scholarship and never systematically and empirically studied. It seems international criminal justice scholars (with few notable exceptions)[2] decided to disregard this important stage of the international criminal justice project. Given that international criminal tribunals are entering the final years of their existence this neglect is surprising. The enforcement of international sentences constitutes an important aspect of the evaluation of the tribunals' performance. As Kress and Sluiter argue, it forms 'the backbone of the system of the international criminal justice … and [its] nature … and application in practice must form part of a complete judgment about the legitimacy of this system'.[3] The way how the convicted persons are treated has substantial impact on the public's and victims' opinion about the

1 See Sense Agency: Erdemović to Face Karadžić, available online at http://www.sense-agency.com/icty/Erdemović-to-face-karadzic.29.html?news.id=13684 (visited 1 July 2013).

2 Cf. M.M. Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law', 15 *American University International Law Review* (1999-2000) 322-394; R. Mulgrew, 'On the Enforcement of Sentences Imposed by International Courts, Challenges Faced by the Special Court for Sierra Leone', 7 *Journal of International Criminal Justice* (*JICJ*) (2009) 373-396; D. van Zyl Smit, 'International Imprisonment', 54 *International and Comparative Law Quarterly* (2005) 357-386; I. Weinberg de Roca, and C. Rassi, 'Sentencing and Incarceration in the Ad Hoc Tribunals', 44 *Stanford Journal of International Law* (2008) 1-62; J.C. Nemitz, 'Execution of Sanctions Imposed by Supranational Criminal Tribunals', in R. Haveman, O. Olusanya (eds), *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, 2006) 125-144; R. Culp, 'Enforcement and Monitoring of Sentences in the Modern War Crimes Process: Equal Treatment before the Law?' available online at http://www.jjay.cuny.edu/Culp_MonitoringTribunalPunishment_rev.9Apr11.1..pdf (visited 30 July 2013); A. Klip, 'Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the former Yugoslavia', 5 *European Journal of Crime, Criminal Law and Criminal Justice* (1997) 144-164.

3 C. Kress and G. Sluiter, 'Enforcement: Preliminary Remarks', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of International Criminal Court: A Commentary* (Oxford University Press, 2002), at 1753.

tribunals, clear repercussions for the assessment of the tribunals' legitimacy,[4] and 'will be among [their] most important legacies'.[5]

In this article we aim 'to open the gates' of the post-conviction phase and provide an initial empirical overview of the enforcement of international sentences and life after release of the convicts at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).[6] This contribution is explorative and descriptive in nature, aiming to open a discussion on this crucial, yet understudied aspect of international criminal justice. Data for our analysis were gathered from open sources such as tribunals' judgments, decisions on designation of the state of enforcement, early release decisions, other official documents and newspaper articles. Data were collected up to 16 July 2013 and analysed by SPSS 21 (an advanced statistical analysis software package). In addition, we conducted 17 exploratory interviews with (former) staff members of the ICTY, defence lawyers, journalists and prison authorities in some of the enforcement countries (Norway, Sweden, Denmark, Finland, Italy, France and Rwanda).

The article describes each phase of the post-conviction stage chronologically. The second section provides a brief overview of the sentencing practice at the international tribunals and presents general figures regarding the status of convicted persons. The third section outlines the legal framework for the enforcement of sentences at the tribunals. In the fourth section, the attention turns to the first stage of the enforcement process — the designation of the state of imprisonment. The fifth section presents some preliminary findings regarding the actual prison conditions of international prisoners. Section six focuses on the (early) release practice at the ICTY and ICTR[7], while section seven provides illustrations of the (many) possible scenarios regarding the life of already released individuals.

2. General Sentencing Facts and Figures

As of July 2013 the ICTY, ICTR and the SCSL have together convicted and sentenced 121 persons (ICTY: 69; ICTR: 44 and SCSL: 8). Many commentators have discussed the differences in sentence severity among the tribunals.[8] The ICTR and SCSL have handed out much more severe sentences compared to

4 Nemitz, *supra* note 2, at 144. See also online http://www.vg.no/nyheter/innenriks/artikkel.php?artid=101489 (visited 20 February 2013).

5 Weinberg de Roca, *supra* note 2, at 60.

6 The article focuses on the eforcement of sentences rendered by the Tribunals for substantive crimes and excludes sentences rendered in contempt cases.

7 As of July 2013 the SCSL had not granted any (early) release.

8 Cf. M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007); S. Beresford, 'Unshackling the paper tiger: The sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda', 1 *International Criminal Law Review* (*ICLR*) (2001) 33-90; B. Holá, A. Smeulers and C. Bijleveld, 'International Sentencing Facts and Figures: The Sentencing Practice at the ICTY and ICTR', 9 *JICJ* (2011) 411-439.

the ICTY. This is demonstrated not only by the more frequent imposition of life sentences at the ICTR (14 life sentences (31.8%) compared to two life sentences at the ICTY (2.9%)), but also by comparatively lengthier determinate sentences at the ICTR and SCSL. The determinate sentences range from three years to 40 years at the ICTY; from six to 45 years at the ICTR and from 15 to 52 years at the SCSL. The average determinate sentence at the ICTY is 14.84 years, while at the ICTR and SCSL it is 21.9 years and 37 years respectively.[9] This variation in sentence severity between the tribunals has been explained by available sentencing options, case compositions and prosecutorial strategy.[10] The high average sentence at the SCSL might be related to the fact that the tribunal is not allowed to render life sentences[11] and dealt only with a very limited number of top-ranking perpetrators. Similarly, the majority of the ICTR defendants were members of government and high ranking organizers of violence convicted to life in prison or lengthy determinate sentences for genocidal killing and/or genocidal violence against victims. The prevalence of genocide convictions at the ICTR could be seen as one of the primary reasons for the more severe ICTR sentences.[12] In contrast, the vast majority of the ICTY defendants were convicted of crimes against humanity and war crimes and the convictions include not only violent crimes such as killing, but also less serious offences such as crimes against property. Initially many more lower ranking hands-on perpetrators who are generally considered less culpable were prosecuted at the ICTY.[13]

In the academic literature, sentencing at the tribunals (in particular at the ICTY) is criticized for its leniency especially in light of the gravity of crimes.[14] In practice, the vast majority of convicts do not even serve their full sentences. Fifty-five persons (45% of the persons convicted by the tribunals) have already been released. Of these, 46 individuals (84% of the released) have been granted early release, generally after having served 2/3 of their imprisonment term. The nine individuals who have served the totality of their sentences were sentenced to relatively low prison terms. Given the protracted character of international trials, they actually served the totality of their sentence during the course of the proceedings and were released immediately after a final verdict

9 This statistic is based on completed cases where the final decision by the tribunals was reached excluding cases pending on appeal.

10 A. Smeulers, B. Holá and T. van den Berg, 'Sixty-Five Years of International Criminal Justice: The Facts and Figures', 12 *ICLR* (2013) 7-41, at 21.

11 Art. 19 SCSLSt.

12 Despite the ICTY and ICTR judges' statements in the case law that there is no hierarchy between different categories of international crimes for the purposes of sentencing, many authors have demonstrated that empirically there are differences in the actual sentence length rendered. Genocide is subjected to the most severe sentences followed by crimes against humanity; war crimes are sentenced the most leniently. Cf. Holá et al. *supra* note 8.

13 Holá et al., *supra* note 8, at 433.

14 Cf. M. Bagaric and J. Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework', 6 *ICLR* (2001) 191-225, at 253 who noted that 'penalties imposed by the Tribunals are breathtakingly light compared to imilar offences when committed in any other domestic jurisdiction'; Drumbl, *supra* note 8, at 15.

Table 1. Status of Convicted Individuals

Tribunal	Early released	Released after serving full sentence	Serving	Died in prison	Awaiting transfer	Total
ICTY	40	4	19	3	3	69
ICTR	6	5	30	3	0	44
SCSL	0	0	8	0	0	8
Total	46	9	57	6	3	121

was pronounced.[15] 57 persons (47% of all convicts) are currently serving their terms of imprisonment in various European and African countries, six died in a detention unit or in a prison after their transfer and three ICTY convicts are awaiting their transfer. Table 1 presents data on the status of convicted persons per tribunal.

3. Enforcement of International Sentences in Law

The drafters of the tribunals' Statutes almost entirely neglected issues regarding the enforcement of sentences. As one commentator noted, 'the contrast between the meticulous regulation of the prosecution and trial, and the nearly total neglect of regulation of the execution of sentences could hardly have been more glaring'.[16] According to Article 27 of the ICTY Statute the imprisonment is to be served in a state designated from a list of states willing to enforce the tribunal's sentences. The imprisonment is governed by the law of the enforcement state and subjected to the supervision of the tribunal. Since the conflict in the former Yugoslavia was still ongoing when the ICTY was established, countries of the former Yugoslavia were excluded from the possibility to enforce ICTY sentences.[17] In contrast, Article 26 ICTR Statute explicitly includes Rwanda as one of the possible enforcement countries[18] and in Article 22 of the SCSL Statute, Sierra Leone is given preference to enforce the

15 ICTY: Hadžihasanović, Prcać, Čerkez, Brahimaj; ICTR: Nsengiyumva. Four ICTR convicts convicted for rather low sentences and transferred to national prisons also served the totality of their sentence: Rutaganira, Nzabirinda, E. Ntakirutimana, Imanishimwe.

16 S. Karstedt, 'Life after punishment for Nazi War Criminals: reputation, careers and normative climate in post-war Germany', in S. Farrall et al. (eds), *Contemporary Perspectives on Life After Punishment* (Routledge, 2011) 243.

17 Art. 27 ICTYSt.; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, § 121. It has been argued, however, that since the circumstances have changed fundamentally, it should be possible to enforce ICTY sentence in the countries of the former Yugoslavia especially taking into account the possibility of the ICTY to transfer cases to these countries according to the Rule 11*bis* RPE. Cf. ICTY Manual on Developed Practices (UNICRI Publisher, 2009), at 156.

18 Art. 26 ICTYSt.

Court's sentences. Only 'if circumstances so require', shall the individuals convicted by the SCSL serve their imprisonment in another willing state.[19] In practice, none of the ICTR or SCSL convicts is serving his/her sentence in the country where (s)he committed crimes. The reasons for this range from security fears and the perceived inability of domestic prison authorities to prevent the escape of international prisoners, to humanitarian considerations relating to conditions and the treatment of prisoners, such as overcrowding of prisons or insufficient sanitary conditions.[20] Despite the fact that Rwanda has built a new prison facility — Mpanga prison — to ensure that the ICTR convicts would serve their sentences in accordance with international standards, concerns have been raised that ICTR prisoners could spend their whole sentence in isolation in violation of their right not to be subjected to inhuman punishment.[21] Currently, the prison is exclusively used to host SCSL convicts and persons transferred from ICTR and third countries to face domestic prosecution in Rwanda.[22]

The very limited regulation of enforcement of sentences in the tribunals' Statutes is complemented by the Rules of Procedure and Evidence (RPE). Rules 103 and 104 of the ICTY, ICTR and SCSL RPE do not add much more clarity and simply reiterate the regulation contained in the Statutes. The Presidents of each of the tribunals are the competent organs to designate the enforcement state and in the case of Rwanda the ICTR is required to notify the government of Rwanda of this decision. The transfer to the designated state shall be effected as soon as possible after the final verdict. Pending transfer the convicted persons remain in the detention unit of the respective tribunals.[23]

Similar to conditions of imprisonment, the commutation of sentences and pardons are governed by the law of the enforcement state. Article 28 of the ICTY Statute states that if an imprisoned individual is eligible for commutation of sentence according to the domestic law of the state of enforcement, the state shall notify the tribunal and the President then decides if an early release is warranted, taking into account 'the interests of justice' and 'general principles of law'.[24] Consequently, the eligibility for early release differs depending

19 Art. 22 SCSLSt.

20 Mulgrew, *supra* note 2, at 378.

21 Mulgrew, *supra* note 2, at 376.

22 See online http://www.newtimes.co.rw/news/views/article.print.php?i=14983&a=53286&icon=Print (visited 10 January 2014). In October 2013, Charles Taylor, the last individual sentenced by the SCSL, was transferred to the UK to serve his 52-year sentence. He is the only individual convicted by the SCSL not serving his sentence in Rwanda.

23 Rule 103 ICTY, ICTR, SCSL RPE. See also ICTY Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment (IT/137/Rev.1), 1 September 2009; ICTR Practice Direction On The Procedure For Designation Of The State In Which A Convicted Person Is To Serve His/Her Sentence Of Imprisonment [As revised and amended on 23 September 2008]; SCSL Practice Direction of 10 July 2009.

24 Art. 28 ICTYSt. A similar regulation is contained in the ICTR (Art. 27) and SCSL (Art. 23) Statutes. Also see Rules 123, 124 ICTY RPE; Rules 124,125 ICTR RPE and Rules 123, 124 SCSL

on the laws of the enforcement state. The tribunals, however, retain a supervisory power in this respect and an international prisoner cannot be released without the approval by the President. The four factors the President is meant to consider are stipulated in Rule 125 of the ICTY RPE (Rule 126 ICTR RPE): the gravity of crimes, the treatment of similarly situated prisoners, prisoner's demonstration of rehabilitation and any substantial cooperation with the Prosecutor. Consequently, many factors decisive in granting early release are in essence similar to factors taken into account by judges when determining sentences upon conviction.[25] For this reason, some scholars have expressed concerns that such practices might lead to double-counting of some of the factors to the detriment or to the advantage of sentenced persons.[26]

4. Enforcement of International Sentences in Practice

As discussed above, the enforcement of international sentences, including conditions of imprisonment and eligibility for early release, is largely governed by the domestic laws of individual enforcement states. This fact has raised concerns among scholars regarding the transparency of the international enforcement system and the danger of inherent disparities.[27] It clearly matters in what country a convict is serving his/her sentence and there are significant differences in the treatment of international prisoners across different countries. To what extent these worries are justified is discussed in the next sections.

A. Designation of Enforcement State

The sentence enforcement system is based on double-consent of individual states: first, a state must enter into an enforcement agreement with a tribunal and express its willingness to enforce sentences in future and second, these states agree to accept individual convicts on an ad hoc basis. The designation of an enforcement state is further elaborated upon in the so-called Practice Directions, policy papers issued by the Presidents of the tribunals.[28] After a final verdict, and on a ad hoc basis, the Registrar will approach selected states that entered into enforcement agreements to indicate their preparedness to do

RPE and Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal (IT/146/Rev.1), 16 September 2010; Practice Direction for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000. During the review process of this article the President of the SCSL also issued Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone, 1 October 2013.

25 Holá et al., *supra* note 8.

26 Van Zyl Smit, *supra* note 2, at 373.

27 Weinberg de Roca, *supra* note 2, at 42.

28 ICTY, ICTR and SCSL Practice Directions, *supra* note 23.

so in a particular case. The ICTY Practice Directions contains rather general criteria to be considered in deciding which state(s) to approach: (i) the national laws regarding pardon and commutation of sentences, maximum sentences available and other considerations relating to the ability of the state to enforce a particular sentence; (ii) equitable distribution of convicted persons among all the states; and (iii) other relevant considerations.[29] If the approached state agrees, the proposal is made to the President of a tribunal to designate it as the enforcement state in the particular case. Convicted persons have no right to be heard in this respect, but can inform the President about their preferences. These can, however, without motivation be disregarded.[30] In this decision-making process, the Presidents are generally given large discretion but should consider several factors such as whether the convicted person is expected to serve as a witness in further proceedings; whether the person will be relocated as a witness following the sentence; any medical or psychological reports; linguistic skills; general conditions of imprisonment; and rules governing security and liberty in the state concerned. Particular attention should be paid to the proximity of the convicted person's relatives. Also in the Manual on Developed Practices, the ICTY emphasizes that the tribunal pays special attention to geographical distance between the enforcement state and the former Yugoslavia in order to enable family and friends to visit the prisoners.[31] In practice, however, many convicts are sent to countries far away from their relatives. For example, at the time when Erdemović was about to serve his sentence, the ICTY entered into enforcement agreements with Norway, Finland and Italy. Since Italy is geographically closest to the former Yugoslavia, one would have expected Erdemović to have ended up there. However, he was sent to Norway.[32]

In practice, it is not entirely clear what considerations are taken into account when designating an enforcement state. The majority of decisions and communications within each tribunal and with individual states are confidential. According to one of our interviewees who worked at the ICTY Office for Legal Aid and Detention Matters (OLAD), the most important consideration is the number of ICTY prisoners the country already has.[33] This criterion is also emphasized in the ICTY Manual on Developed Practices — the ICTY allegedly strives to ensure an even burden-sharing among enforcement states in terms of the number of convicted persons transferred and the length of the sentences imposed. The selection of enforcement states may involve considerable time and diplomacy.[34] This is also demonstrated by the fact that it takes on average

29 Similar regulation is missing at the ICTR and SCSL.

30 Decision on Request of Zoran Žigić (IT-98-30/1-ES), 31 May 2006; Interview with a legal advisor of an ICTY convict, 27 and 30 May 2013 where he indicated that his client wanted to go to Italy but ended up in France. Transcripts of all interviews are on file with authors.

31 ICTY Manual, *supra* note 17, at 152.

32 Penrose, *supra* note 2, at 390.

33 Interview with a former Legal Officer at the OLAD ICTY, 7 June 2013.

34 Interview with a representative of the ICTY OLAD, 7 October 2013; Mulgrew also details the difficulties encountered by the SCSL in finding enforcement states. Mulgrew, *supra* note 2.

Table 2. Designation of Enforcement State

ICTY					
State	Number of prisoners	Sentence Range	State	Number of prisoners	Sentence Range
Albania	0	NA	Norway	5	5–20
Austria	6	5–25	Poland	0	NA
Belgium	1	15	Portugal	1	20
Denmark	4	7–30	Spain	5	10–18
Estonia	2	29–35	Sweden	3	8–20
Finland	5	7–20	Slovakia	0	NA
France	4	8–40	UK	3	15–35
Germany	4	12-life	Ukraine	0	NA
Italy	4	12–40			

ICTR			SCSL		
State	Number of prisoners	Sentence Range	State	Number of prisoners	Sentence Range
Benin	16	11-life	Finland	0	NA
France	0	NA	Rwanda	8	15–52
Italy	1	12	Sweden	0	NA
Mali	20	12-life	UK	0	NA
Rwanda	0	NA			
Sweden	1	8			
Swaziland	0	NA			

10 months at the ICTY; 21.5 months at the ICTR; and 13.5 months at the SCSL after the final verdict is issued to transfer a convict to an enforcement country. Another employee of the OLAD Unit at the ICTY claimed that human rights considerations such as the proximity of family members, the presence of people who are able to speak to a prisoner in a language he understands and the security level of a potential prison are all relevant factors when approaching states with the request to enforce a particular sentence.[35]

Table 2 shows a list of states which have concluded the enforcement agreements with each of the tribunals (column 1). In light of the emphasis on equitable burden-sharing, column 2 indicates how many persons were actually accepted by each country. The last column shows the range of sentences these persons were subjected to.

The table demonstrates clear differences in the designation practice among the tribunals. On the one hand, the ICTY has concluded enforcement agreements with 17 different European countries, with prisoners scattered across

35 Interview, *supra* note 33.

13 of them. No country has been enforcing sentences for more than six ICTY convicts.[36] This practice has been labelled as a dispersion model.[37] Advantages of this system are, amongst others, its cost-efficiency (countries typically provide these 'services' for free) and the fact that former comrades-in-arms are prevented from forming alliances since they serve their imprisonment far away from each other. However, there are also disadvantages: for instance, the danger of disparities in the treatment of prisoners across individual countries and lack of language and culturally appropriate services in receiving prisons since only a few individuals are detained there. On the other hand, the ICTR and SCSL have pursued a different designation strategy. The ICTR concluded 7 enforcement agreements with three African and four European countries. The vast majority of the ICTR prisoners are sent to two countries: Mali and Benin.[38] The SCSL entered into an enforcement agreement with four countries. All its convicts (except recently-convicted Charles Taylor who was transferred to the UK) are, however, serving their sentences in Rwanda. The strategy of the ICTR and SCSL has been labelled a concentrated model.[39] The ICTR and SCSL prisoners are not only concentrated in a very limited number of countries but also serve their sentences in a special prisons or special wings interacting only with each other in contrast to the ICTY prisoners who are dispersed into domestic prison populations.

B. Prison Conditions

The majority of the enforcement agreements with the tribunals refer to international standards relating to treatment of prisoners.[40] Despite this "common ground", however, there are differences between the prison conditions in different countries. The differences between incarceration practices in the African enforcement states and their European counterparts have already been noted in the literature.[41] However, prison systems differ considerably even within Europe.[42] On the one hand, prison conditions in the Scandinavian countries

36 Seventeen ICTY convicts served their sentence solely in the UNDU in The Hague.

37 Culp, *supra* note 2, at 10.

38 Six ICTR convicts served their sentence solely in the UNDF in Arusha.

39 Culp, *supra* note 2, at 10.

40 Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 663 C(XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977; Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, GA Res. 43/173 of 9 December 1988; Basic Principles for the Treatment of Prisoners, GA Res. 45/111 of 14 December 1990.

41 Various commentators have raised concerns relating to prison conditions in the African countries and their adherence to international human rights standards. Culp, *supra* note 2; Weinberg de Roca, *supra* note 2, at 45-48. It should be noted, however, that international prisoners are serving their times in special prisons/units built or adjusted specifically for international prisoners in order to conform to international prison standards. This practice, however, is also problematic since double-standards are created within prisons or national prison systems.

42 A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dunkel (eds.), *Foreigners in European Prisons* (Wolf Legal Publishers, 2007), at 9.

are known to be very prisoner-friendly. Norway, for example, exemplifies what is referred to as Scandinavian 'exceptionalism' in penal policies.[43] It has a low level of imprisonment, small prisons, a low occupancy rate with a single cell for each prisoner and a progressive system focused on rehabilitation. On the other hand, countries such as Italy or France are characterized by overcrowded prisons, shared prison cells and less focus on rehabilitation.[44] Not only are there differences between individual European countries regarding the general prison systems, but conditions may also vary between different prisons in the same country or even between units within the same prison depending on security levels. Whether an international prisoner is placed in a high security prison, protective custody, regular prison, or for example, an open prison, has a great consequences for his daily life and influences the execution of his/her sentence to a considerable extent. The law of the tribunals is virtually silent regarding the type of prisons international convicts shall be sent to. This determination lies with domestic authorities and arguably differs by state, but also by convict.

According to a representative of the ICTY OLAD the majority of international prisoners (at least initially) were placed in high security prisons.[45] Due to the character of international crimes, international convicts are often classified as 'the worst criminals' by domestic authorities. In practice, however, many of them are former politicians or military/state officials who according to our interviewee pose no immediate danger to society. Therefore, 'there is practically no need to place them in high security facilities'.[46] Our interviews with national prison authorities suggest that some of them have over time for this reason adopted a more nuanced approach. This seems to be in particular the case after they have had some experience with international prisoners. In Norway, for example, it turned out that international prisoners are usually 'exemplary prisoners' with a very low risk of escape compared to other categories of inmates such as for example organized criminals.[47] International convicts are now usually placed in high security prisons, but not necessarily in maximum security units with the strictest regime.[48] In contrast, in Sweden as a matter of standard operating procedure all international convicts are initially placed in 'protective custody units' (small units of six to 12 inmates with a strict security regime). Typically, other inmates staying in these units have themselves requested a stay there because they are or feel threatened, because

43 J. Pratt, 'Scandinavian Exceptionalism in an Era of Penal Excess', 48 *British Journal of Criminology* (2007) 119-137.

44 Cf. online http://en.avaaz.org/1235/inside-frances-hellish-prisons; http://www.reuters.com/article/2013/06/12/us-italy-prisons-idUSBRE95B0IF20130612 (visited 1 June 2013).

45 Interview, *supra* note 34.

46 *Ibid.*

47 Interview with former counselor at the Correctional Services Department, Ministry of Justice, Norway, 4 June 2013.

48 Interview with a representative of the Correctional Services Department, Ministry of Justice, Norway, 5 June 2013.

they might have talked to the police, or have debts with other prisoners.[49] Conversely, in Finland, for example, it is known that an ICTY convict has been transferred to an open prison, i.e. a facility without any walls.[50]

Generally, ICTY prisoners are typically integrated into domestic prison populations in the respective prisons.[51] They are treated as any other foreign prisoners in the domestic context. In Africa, international prisoners are separated from domestic prisoners and concentrated in a special 'international' wing. In the following, preliminary findings regarding possibilities for family visits, leaves and rehabilitation available to international prisoners are discussed.

1. Visits

Prison authorities have to deal with the fact that international prisoners are usually incarcerated in countries far away from their countries of origin and that this may substantially limit possibilities of family visits. For example, in France a prisoner was never visited by his family for four and a half years, according to his counsel due to practical obstacles such as costs of travelling and housing or visa requirements.[52] Prison officials from Norway and Rwanda underlined the extra costs of family visits to the international prisoners and the limited possibilities of international prisoners to maintain contact with their families.[53] For this reason the national authorities may provide special treatment for international prisoners. When international prisoners are visited by their family members in Norway or France, for example, special arrangements are made regarding visiting hours. These are adjusted to allow the prisoners to spend as much time as possible with their family within the limited timeframe available.[54] In other instances, prison authorities have adopted specifically tailored measures to alleviate the unique problems facing international prisoners: 'We asked ourselves how we could give [one of the international prisoners] something as a compensation for the lack of family contact and the limitations he faced in leaving prison. So he could take a coffee outside, get some physical activity.'[55] Prison officials offered the international prisoner the possibility of additional escorted leaves from prison. This

49 Interview with a representative of National Security Unit, Prison and Probation Service, Sweden, 18 June 2013.

50 Order Issuing a Public Redacted Version of Decision on Hazim Delić's Motion for Commutation of Sentence (IT-96-21-ES), 15 July 2008, § 7 where the President notes that Delić was transferred to Satakunta prison, which is according to the official website of the Finnish Criminal Sanctions Agency an open institution.

51 E.g. Interview, *supra* note 48; Interview with a representative of the French Prison and Probation Service, France, 20 May 2013; Interview with a representative of the Danish Prison and Probation Service, Denmark, 13 May 2013.

52 Interview, *supra* note 30.

53 In Rwanda for example under normal circumstances families are allowed to visit the SCSL prisoners once per year. Interview with a prison warden, Mpanga prison, Rwanda, 12 March 2013. Interview with a representative of a Norwegian prison, 14 June 2013.

54 Interviews, *supra* notes 30, 53.

55 Interview with a representative of a Norwegian prison, 24 July 2013.

started with a closely monitored visit to the local town, gradually leading to several trips a month which included cycling, Nordic skiing, watching football matches or making a two-day hike in the mountains. Not all international prisoners are, however, provided with such options.

2. Leaves

With respect to leaves, our data suggest that the approach across countries and prisons, once again, differs considerably. National officials generally denied requests to leave the country of imprisonment and go home, even when faced with tragic personal circumstances.[56] In Sweden international prisoners are not permitted to go on unaccompanied leaves: 'They can, together with prison staff, three to four times a year, go on leave for a maximum period of four to six hours.'[57] In contrast, a representative from a Norwegian prison stated that:

> [a]lso the Hague people can go on leave. This is not directly after their arrival. But if they behave well, they too are allowed to go on (unaccompanied) leave. In principle, detainees have the right to a maximum of 18 days per year. If they have children or special needs, this can be upgraded to 30 days. Inmates can for example request to visit a friend, or stay a weekend over with family members. The prison officers can set conditions, that they for example are not allowed to leave a certain area.[58]

One of the prisoners in Norway who became acquainted with a Serbian family living in the vicinity of his prison was for example allowed to spend some weekends at their place.[59] In contrast, prisoners in Rwanda are not allowed to leave the prison unless they need to see a doctor. In such cases, they are escorted by prison wardens to a medical facility.[60]

3. Rehabilitation

One of the most interesting questions regarding imprisonment of international criminals is their rehabilitation. Rehabilitation is often cited as one of the goals of international sentencing and it is particularly emphasized at the enforcement stage. As discussed above, in Europe international prisoners are (with slight modifications) incorporated into domestic prison populations and are generally offered the same rehabilitation programmes as ordinary domestic criminals.[61] As one of the respondents noted: 'For us, it is important to treat

56 The French district court, for example, denied a prisoner's request to attend his mother's funeral. Interview, *supra* note 30.
57 Interview, *supra* note 49.
58 Interview, *supra* note 53.
59 Interview with a representative of a Norwegian prison, 27 June 2013.
60 Interview, *supra* note 53.
61 Interview with a former representative of a Norwegian prison, 2 July 2013; Interview with a lawyer at the Judicial Unit of the Criminal Sanctions Agency, Ministry of Justice, Finland, 5

them like anybody else who committed a serious crime.'[62] There are, however, several problems with this approach. First, international prisoners are usually kept in high security establishments and do not progress through the system to lower security regimes. Rehabilitation programmes in many countries are adjusted to the progressive nature of incarceration and a larger variety of rehabilitative activities is available in lower security prisons. Second, rehabilitative programmes are usually offered in the local language of the prison, which may prevent international prisoners from participating. Finally, and most importantly, it is questionable to what extent rehabilitation programmes developed for ordinary criminals are suitable for international prisoners who committed their crimes under very specific circumstances. Many criminologists consider that those who violated international criminal law are a different type of criminals than ordinary rapists or murderers.[63]

The pertinent question is to what extent domestic prison officers and therapists are able to implement the tribunals' ambitious goal of rehabilitating international offenders. The director of a small prison in northern Norway mentioned that the ICTY never directly or via the Ministry instructed prison authorities to work on rehabilitation. She also questioned if her prison actually had the expertise to deal with these matters, arguing that it was unusual to have inmates who committed such (levels of) violence:

> For normal crimes we had programmes. Programmes like 'breaking drug abuse' or 'breaking violence'. Many prisoners go to these programmes, they talk in group sessions or individually about the crime … . But what competence do we have to deal with them [the ICTY convicts]? … To think about a programme for war criminals is out of our reach … . We are not educated in these matters.[64]

C. Commutation of Sentences and Early Release

By now 45% of all international convicts have been released, while a majority of these (84%) has been granted early release by the ICTY and ICTR. As of July 2013, the SCSL had not granted any early release. Similar to the regulation of conditions of imprisonment, domestic laws of individual enforcement countries govern the eligibility of international convicts for early release. In practice domestic laws regarding early release are divergent. For example in France, Finland or Italy convicts are eligible for early release after serving 1/2 of their sentence. In Belgium, Denmark, Sweden, Italy or Norway the necessary period is 2/3 of the sentence. Spain generally requires convicts to serve 3/4 of an imposed sentence. In Mali or Benin the domestic laws do

August 2013; Interview, *supra* note 53; In Rwanda, on the other hand, according to our interviewee, no specific rehabilitation programmes are available to international prisoners, except courses in computer skills. Interview, *supra* note 53.

62 Interview, *supra* note 48.

63 A.L. Smeulers, *In opdracht van de staat: Gezagsgetrouwe criminelen en internationale misdrijven* (Prisma Print, 2012); Drumbl, *supra* note 8.

64 Interview with Norwegian prison representative, 24 July 2013.

not regulate any specific conditions in this respect.[65] The final decision whether a person is to be released, however, lies with the Presidents of the tribunals.[66]

To establish an internal procedure for the determination of early release the tribunals have issued Practice Directions on the early release procedure.[67] Early release can be initiated by the enforcing state or by a prisoner.[68] After consultation with members of the Bureau and judges[69] and with Prosecution regarding the extent of cooperation of a prisoner with the OTP, and after giving an opportunity to the prisoner to be heard, the President decides on early release. As noted above, according to Rule 125 of the ICTY RPE the President is supposed to take into account (i) the gravity of crimes; (ii) the treatment of similarly situated prisoners; (iii) demonstration of rehabilitation; (iv) cooperation with Prosecutor and any other relevant information.[70] On the basis of an analysis of all early release decisions and their rejections at the ICTY and ICTR, we will discuss below how these factors have been evaluated in practice.

1. Gravity of Crimes

An early release decision has never been based on 'low gravity of crimes'. Conversely, gravity of crimes is often emphasized as the countervailing factor against early release. In the early practice at the ICTR, the fact that prisoners were convicted of extremely serious crimes and genocide was one of the motivating factors for denying their applications for early release.[71] In some of the most recent decisions, the ICTR President adopted a slightly different approach and argued that 'since gravity of crimes was already assessed when determining sentence, it does not per se bar a person from early release, if otherwise

65 Weinberg De Roca, *supra* note 2, at 59.

66 Art. 28 ICTYSt., Rules 123-125 ICTY RPE; Art. 27 ICTRSt., Rules 124-126 ICTR RPE; Art. 23 SCSLSt.

67 ICTY, ICTR and SCSL Practice Directions on Early Release, *supra* note 24. The SCSL Practice Direction was issued in October 2013 and is therefore not included in the following analysis. *Prima facie*, however, there are significant differences between regulation of early release at the ICTY (ICTR) and SCSL. Not only is the SCSL Practice Direction more detailed but also the criteria that Presidents are supposed to take into account differ between the ad hoc tribunals and the Special Court. More fundamentally, the SCSL Practice Direction envisages *conditional* early release.

68 ICTY Practice Direction, *ibid.*, §§ 1, 2.

69 In making commutation decisions, the President normally states briefly whether his or her decision is unanimously supported by the Judges or whether some or all of them expressed contrary opinions.

70 See also Rule 126 ICTR Rules. Rule 124 SCSL Rules states that the President decides on early release on the basis of the interests of justice and the general principles of law.

71 Decision of the President on the Application for Early Release of Omar Serushago, *Serushago* (ICTR-98-39-S), 12 May 2005; Decision of the President on the Application for Early Release of Georges Ruggiu, *Ruggiu* (ICTR-97-32-S), 12 May 2005; Decision on Samuel Imanishimwe's Application for Early Release, *Imanishimwe* (ICTR-99-46-S), 30 August 2007. This practice has led to some criticism regarding the double-counting of gravity of crimes, Van Zyl Smit, *supra note 2*.

appropriate'.[72] Because of this practice, it could be argued that factoring in the gravity of crimes is actually a redundant exercise.

2. Consistency with Other Decisions

This factor, on the other hand, seems to be a very decisive criterion in considering early release. At the ICTY, 'an unwritten rule' developed that international prisoners are released after serving 2/3 of their sentences. The 2/3 threshold was applied due to the fact that in the majority of enforcement countries prisoners are eligible for early release after serving 2/3 of their sentence.

The ICTR was initially reluctant to grant early release to prisoners after serving 2/3 of their sentence,[73] emphasizing gravity of their crimes.[74] The first three ICTR prisoners who were granted early release were set free after serving 3/4 of their sentences.[75] However, after the power to commute sentences handed out by both tribunals was transferred to the Residual Mechanism for International Criminal Tribunals (MICT) the most decisive criterion for granting early release seems to be the consistency with previous early release decisions and the 2/3 criterion. The MICT President in one of his first decisions determined that 'all the ICTY and ICTR convicts supervised by the Mechanism are to be considered eligible for early release upon the completion of two-thirds of their sentences, irrespective of the Tribunal that convicted them'.[76]

As of 16 July 2013, 53 individuals applied for early release (at the ICTY 44 and at the ICTR nine prisoners applied for the early release, some of them repeatedly). Early release was granted by the tribunals to 46 individuals. In total, the Presidents rejected early release applications 25 times; 12 individuals at the ICTY and five at the ICTR faced rejection of their application for early release (some of them repeatedly). Many of them (eight at the ICTY and two at the ICTR) were ultimately released early. The reasons for rejection vary across the cases. The major consideration at the ICTY was whether a defendant had served 2/3 of his/her sentence.[77] The President, however, at times also

72 Decision on the Early Release Request of Juvénal Rugambarara, *Rugambarara* (ICTR.-00-59), 8 February 2012, § 7.

73 Both Ruggiu and Imanishimwe had served (almost) 2/3 of their sentences at the time when their application for early release was rejected.

74 *Supra* note 71.

75 Rugambarara, *supra* note 72; Decision on the Early Release of Michel Bagaragaza, *Bagaragaza* (ICTR-05-86-S), 24 October 2011; Decision on Tharcisse Muvunyi's Application for Early Release, *Muvunyi* (ICTR-00-055A-T), 6 March 2012.

76 Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, *Bisengimana* (MICT-12-07, ICTR-00-60), 11 December 2012, § 20. Also note that the SCSL President explicitly accepted the 2/3 criterion in the SCSL Practice Direction on early release and all the SCSL convicts are eligible for early release after serving 2/3 of their sentences, provided they meet other requirements set out in the Directive. See SCSL Practice Direction, *supra* note 24, paragraph 2(A).

77 See for example Decision of President on Early Release of Zoran Žigić, *Žigić* (IT-98-30/1-ES), 8 November 2010; Decision of President on Early Release of Momčilo Krajišnik, *Krajišnik* (IT-00-39-ES), 26 July 2010, §§14-17, 33.

emphasized the gravity of crimes to underpin his rejection. Only in exceptional cases has the ICTY President rejected early release of a defendant who had served 2/3 of his sentence.[78] In contrast, very few individuals were released before serving 2/3 of their sentences. For example, Dragan Obrenović was granted early release eight months before serving 2/3 due to his 'exceptional cooperation' with the Prosecutor.[79] Similarly, Vladimir Šantić was released three months before the 2/3 threshold because of his 'exceptionally good behaviour' in prison and 'extensive' support to the Office of the Prosecutor.[80]

3. Rehabilitation

The demonstration of rehabilitation as a criterion for early release is a very peculiar one. It is not entirely clear what rehabilitation from international crimes entails[81] and there is a considerable confusion and lack of clear assessment criteria in the early release decisions. The Presidents usually consider various factors (and different combinations thereof) as a proof of rehabilitation such as: good conduct in prison,[82] good relationship with fellow inmates (especially of different ethnicities and nationalities),[83] remorse for crimes, guilty plea and attitude towards his deeds,[84] intention not to reoffend,[85]

78 In these cases, the reason for rejection seems to be ineligibility for early release under the domestic law of the enforcement country. Cf. Decision of the President on Early Release of Vidoje Blagojević, *Blagojević* (IT-02-60-ES), 3 February 2012, §15, 25; Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnolejać, *Krnolejać* (IT-97-25-ES), 12 November 2008, § 7. In only one case the president denied early release when a prisoner served 2/3 of his sentence and was eligible under domestic law of the enforcement state. The reason seems to be limited evidence of rehabilitation and that the sole factor that weighed in favour of a release was the period of 2/3 of a sentence served. Public Redacted Version of 13 February 2012 Decision of the President on Early Release of Mlađo Radić, *Radić* (IT-98-30/1-ES), 9 January 2013.

79 Decision of President on Early Release of Dragan Obrenović, *Obrenović* (IT-02-60/2-ES), 21 September 2011, § 28.

80 Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Šantić, *Šantić* (IT-95-16-ES), 16 February 2009, §§ 12,13.

81 For conventional crimes an authoritative definition of rehabilitation is already lacking. It is, however, at least understood to encompass two aspects: (i) treatment, such as psychological counseling in order to prevent recidivism and (ii) reintegration into society, so that offenders will not commit crimes in future. Cf. P. Raynor, G. Robinson, 'Why help offenders? Arguments for rehabilitation as a penal strategy', 1 *European Journal of Probation* (2009) 3-20.

82 Cf. Muvunyi, *supra* note 75, § 6; Order of the President for the Early Release of Zlatko Aleksovski, *Aleksovski* (IT-95-14/1), 14 November 2001, at 4.

83 Cf. Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, *Strugar* (IT-01-42-ES), 16 January 2009, § 10; Decision of President on Early Release of Ivica Rajić, *Rajić* (IT-95-12-ES), 22 August 2011, § 18.

84 Cf. Decision of President on Early Release of Duško Sikirica, *Sikirica* (IT-95-8-ES), 21 June 2010, § 17. Bisengimana, *supra* note 77, § 26.

85 Cf. Order Issuing a Public Redacted Version of Decision of the President on Early Release, *Erdemović* (IT-96-22-ES), 15 July 2008, at 2; Order of the President on Commutation of Sentence, *Landžo* (IT-96-21-ES), 13 April 2006, § 7.

family circumstances and attachment to family,[86] career prospects and prospects of taking active role in his community,[87] involvement in rehabilitation programmes offered by a prison, participation in working activities or language courses[88] and prisoner's good character with no previous criminal record, stable mental health and personality.[89] It is difficult to see how some of these factors, such as the fact that a convict used to be of a good character before committing crimes or the fact that he participated in language courses, would 'demonstrate' a prisoner's rehabilitation. Not to mention that many of these factors, such as remorse, guilty plea, family circumstances, cooperation with OTP during trial or good character are usually already taken into account in mitigation during sentencing by trial chambers.[90] The President sometimes notes that due to language barriers, communication between a prisoner and prison authorities was severely hindered and that assessing the extent of rehabilitation is therefore difficult.[91] Another particularly striking element of the early release decisions is that a lack of documents reporting on prisoner's rehabilitation is often disregarded. In order to prepare the President in making a well informed decision, Paragraph 3(b) of the Practice Direction states that the Registrar shall request the relevant authorities in the enforcing state to submit 'any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration'. If these evaluations are not available, which is often the case, the President regularly merely 'takes note' and accepts this as a matter of fact without further inquiries.[92]

4. Cooperation

The final factor the Presidents are asked to take into account when deciding on early release concerns 'substantial cooperation' with the Prosecutor. In some cases the President refuses to take into account cooperation prior to conviction since it was already taken into account in the mitigation of sentence.[93] However in other cases, cooperation of the accused also during trial is considered when granting early release[94] and a guilty plea in the trial phase can

86 Cf. Order of the President on the Application for the Early Release of Simo Zarić, *Zarić* (IT-95-9), 21 January 2004, at 3; Order of the President on the Application for the Early Release of Anto Furundžija, *Furundžija* (IT-95-17/1), 29 July 2004, at 3.

87 Cf. Order of the President in Response to Zdravko Mucić's Request for Early Release, *Mucić* (IT-96-21-A bis), 9 July 2003, at 2.

88 Cf. Decision of the President on Commutation of Sentence, *Banović* (IT-02-65/1-ES), 3 September 2008, § 13; Public Redacted Version of Decision of the President on the Early Release of Omar Serushago, *Serushago* (MICT-12-28-ES), 13 December 2012, § 21.

89 Cf. Rugambarara, *supra* note 72, § 15; Žigić, *supra* note 77, § 18.

90 Holá et al., *supra* note 8.

91 Cf. Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of Mladen Naletilić, *Naletilić* (IT-98-34-ES), 26 March 2013, § 26.

92 Cf. Obrenović, *supra* note 79, § 23.

93 Decision of the President on Commutation of Sentence, *Radić* (IT-98-30/1-ES), 22 June 2007, § 15.

94 Cf. Rugambarara, *supra* note 72, § 10; Obrenović, *supra* note 79, § 28.

Table 3. Average Imposed and Effective Sentences at the ICTY and ICTR

Tribunal	Sentence			
	Average Imposed (in years)	Average Effective (in years)	Range Imposed (in years)	Range Effective (in years)
ICTY (N = 44)	10.7	7.7	3–20	2–14
ICTR (N = 11)	11.5	9.3	6–15	5–14

also be qualified as such.[95] After conviction, it seems that there must be some active engagement by a prisoner with the Prosecution, such as testimony in other trials, in order to be taken into account in favour of early release. The mere availability of the convict to testify is not to be considered as a form of co-operation. When the Prosecution does not ask for cooperation, the willingness to cooperate is treated as a neutral factor.[96]

In majority of early release decisions, the President discusses each of these factors and concludes that early release is possible. He typically argues that the gravity of crimes militates against granting early release, but that prisoners have demonstrated rehabilitation by behaving well in prison, participating in language courses, working in for example a kitchen brigade, and that there are no indications (or reports) showing any signs of mental problems. If the convict served 2/3 of his sentence, and has not frustrated court proceedings he will be released. This, obviously, means that the effective sentence international prisoners serve is considerably lower than the sentence that was initially imposed.[97] In order to ascertain how much time is actually deducted, we have compared the length of imposed sentences with the length of effective sentences. For methodological reasons (since it is impossible to calculate effective sentence of individuals who remain imprisoned) the following statistics is based on the population of all the individuals who have been released after serving their whole sentence or granted early release as of 16 July 2013 (Total = 55; ICTY = 44; ICTR = 11).

Table 3 presents the average imposed and average effective sentences at the ICTY and ICTR.

95 Decision of the President on Sentence Remission of Goran Jelisić, *Jelisić* (IT-95-10-ES), 28 May 2013, §§ 31 and 32.

96 Cf. Public and Redacted Version of the 27 March 2013 Decision of the President on Early Release of Radomir Kovać, *Kovać* (IT-96-23&23/1-ES), 3 July 2013, § 30; But see Banović, *supra* note 88, § 14 where the President weighed his willingness to cooperate in favour of his request for early release.

97 In few cases, a Trial Chamber tried to take the practice of releasing convicts after serving 2/3 of their sentence into account when handing out the sentence and based the final sentence determination, among others, on considerations of a minimal sentence to be actually served in practice. The Appeals Chamber, however, overturned this, stating that the Trial Chamber 'mechanically … gave effect to the possibility of an early release.' Judgment, *Nikolić* (IT-94-2), Appeals Chamber, 4 February 2005, § 97. See also Judgment, *Stakić* (IT-97-24), Appeals Chamber, 22 March 2006, § 392.

Table 4. Imposed and Effective Sentence at the ICTY and ICTR

Tribunal	Total Imposed Sentence Years	Total Served Sentence Years	Total pardoned years
ICTY (N = 44)	514 (100%)	330 (64.2%)	184 (35.8%)
ICTR (N = 11)	126 (100%)	102 (80.9%)	24 (19.1%)
Total (N = 55)	640 (100%)	432 (67.5%)	208 (32.5%)

The table shows that the average effective sentence is three years lower compared to the average sentence imposed by the ICTY and two years lower at the ICTR. In general, at the ICTY the number clearly corresponds to the 2/3 rule policy which seems to be decisive for the commutation of sentences (2/3 of the average imposed sentence of 10.7 years is 7.1 years). At the ICTR the average effective sentence is almost two years more than 2/3 of the average imposed sentences (2/3 of 11.5 is 7.6). This difference is caused by the early ICTR practice, initially refusing early release and then only granting it after the applicants had served ¾ of their sentences. As noted above, since the President of the MICT has decided to "synchronize" the early release practice across the tribunals, the identified "discrepancies" are likely to diminish in the future.[98]

Table 4 complements this statistic by comparing sums of all sentence years imposed by the tribunals (across all 44 ICTY cases and 11 ICTR cases) to sums of all sentence years actually served by prisoners and sums of years pardoned by the tribunals' Presidents. The ICTY President has in total pardoned 184 years, i.e. 35.8% of the sentence years imposed by the ICTY judges. In contrast, the ICTR President has in total pardoned only 24 years (19.1% of sentence years imposed by the ICTR). The ICTY prisoners seem to have benefitted from the early release practice to a much larger extent compared to the ICTR. This however is connected to the fact that not so many individuals at the ICTR have been sentenced to imprisonment terms below 20 years (which is the maximum imposed sentence in this population of already released international prisoners).

All early release decisions combined add up to a total of 208 years of pardoned sentence years (32.5% of imposed prison sentence). These numbers might not be surprising; granting early release is in line with the tribunals' regulations and one could even consider the high percentage of early releases to be a demonstration of successful correctional policy. In how many national jurisdictions does it happen that almost all offenders of serious (conventional) crimes qualify for early release? At the same time, exactly this high 'success rate' begs a number of questions. Are offenders of international crimes really so well behaved and really so easy to rehabilitate as these data suggest? If so, how could that be explained? Perhaps by the nature of the crimes they

98 Bisengimana, *supra* note 76.

committed or the nature of their personalities? Or could it be explained by completely other factors? The President is highly dependent on information provided by the authorities of the enforcing states. Could it be that these enforcement states are somehow more lenient in their assessment of these international prisoners' behaviour and levels of rehabilitation compared to serious offenders who are to reintegrate in their own societies? Another pertinent question relates to future possible problems regarding those sentenced to life imprisonment — since parole regulations regarding individuals convicted to life imprisonment differ across countries or is arguably non-existent in some countries such as Mali or Benin where most convicts incarcerated for life are actually held — how will the MICT deal with these individuals? Will they be incarcerated for the rest of their lives and not benefit from early release possibility available to those sentenced to determinate sentences? Again, our cursory analysis identifies a number of questions that demand further scrutiny.

D. Life after Release

In domestic criminal proceedings after being early released, individuals are usually subjected to reintegration programmes and supervision of a parole officer. Nothing of this sort exists at the international level.[99] After release, international prisoners are literally 'off the radar'. There is no institutional oversight and in general, there is a lack of information regarding their lives. We tried to collect some information regarding their whereabouts from popular press and newspaper articles — basically the only public sources that proved to be helpful in this respect. Our analysis so far suggests that a variety of outcomes exist. Those who end up in the tribunals witness protection programme, such as Dražen Erdemović, are relocated, given a new identity, might cooperate with a tribunal on a continuous basis and possibly be assisted with integration into their new countries. Some more prominent released individuals go happily back to former allies in their country of origin, are picked up by a governmental jet at the date of their release, welcomed by a state president, offered an office in a country's senate and enjoy moderate media attention, such as Biljana Plavšić, a former President of Republika Srpska, in Serbia.[100] Others return as celebrated war time heroes, write a bestselling book about their 'unfair' treatment at the tribunal and become public figures frequenting TV shows and providing interviews, such as Veselin Šljivančanin, a former Major in the Yugoslavian army, who recently stated he would 'do

99 But see the SCSL Practice Direction, *supra* note 24, paragraph 11, which unprecedently envisages conditional early release of the SCSL prisoners and monitoring of their conduct after their release.

100 See online at http://dalje.com/en-world/dodik-will-give-plavsic-office-in-the-senate/281001 (visited 1 July 2013). http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=10&dd=28&nav.id=62644 (visited 1 July 2013).

everything the same he did, and he would go to Vukovar to fight again'.[101] Some less prominent ones return back to their communities, live with their families and become (again) active in municipal politics, such as Blagoje Simić, a municipal political figure during the war in Bosnia[102] or Simo Zarić, a former lower ranking assistant commander in the Bosnian Serb army.[103] On the other hand, there are persons like Miroslav Kvočka, a former de facto deputy commander of the Omarska camp, who go back to their old homes, live with their families, cannot find a job, feel rejected by a society, lose their pension entitlements and fight to make a living.[104] Some try to be relocated in another country than their homeland expressing fears for their safety upon return, such as Hazim Delić, a former deputy commander of the Čelebići camp.[105] Then there are persons like the former Tea Plantation chief Michel Bagaraza who upon release file a request to stay in the country where he served his sentence.[106] Finally, we identified some persons who cannot go anywhere and get stuck in the country where their trial took place, since they too do not feel safe returning to their home country and no other country is willing to accept them. This happened to a number of ICTR convicts who currently — and quite paradoxically — share a safe house in Tanzania with ICTR acquitted in a similar situation.[107]

These stories provide anecdotal evidence of life after release of international prisoners. In order to fully evaluate the impact of 'doing international criminal justice' on convicted persons and their communities this topic warrants more systematic attention and should form an integral part of the research on the tribunals' effectiveness and legacy. In general, the faith of released international prisoners is to a large extent determined by the way the conflict ended in their respective countries. The former Yugoslavia disintegrated into various successor countries to a large extent reflecting ethnic lines of the former fighting groups. The ICTY Serb prisoners are thus free to return to Serbia, Croats to Croatia, or Bosniacs to Bosnia, and are often welcome as war heroes in their respective countries. In contrast, Rwanda is now governed by a

101 See online at http://www.blic.rs/Vesti/Hronika/264586/Sljivancaninu-zao-zbog-zrtava-rata-ali-se-nije-pokajao http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1216416/%C5%A0ljivan%C4%8Danin%3A+I%C5%A1ao+bih+u+Vukovar.html (visited 1 July 2013).

102 See online at http://www.accessmylibrary.com/article-1G1-306584080/convicted-serb-war-criminal.html (visited 1 July 2013)

103 See online at http://iwpr.net/report-news/bosnia-ban-convicts-holding-public-office-urged (visited 1 July 2013).

104 See online at http://www.balkaninsight.com/en/video-clip-template/episode-26-life-of-the-convicted-war-criminals-what-after-a-long-term-prison-sentence (visited 1 July 2013); A. Sorguc, 'Life After Prison for Bosnia's War Criminals' (on file with the authors).

105 Order issuing a Public Redacted Version of Decision on Hazim Delić's Motion for Commutation of Sentence, *Delić* (IT-96-21-ES), 15 July 2008, § 15.

106 In this case Sweden. See J. van Wijk, 'When International Criminal Justice Collides with Principles of International Protection; Assessing the Consequences of ICC Witnesses Seeking Asylum, Defendants Being Acquitted and Sentenced Being Released', 26 *Leiden Journal of International Law* (2013) 173-191.

107 *Ibid.*

Tutsi-based government and the ICTR Hutu defendants do not want to return to Rwanda fearing discrimination or additional prosecutions.

5. Conclusion

Academic commentators have dedicated considerable attention to many aspects of international criminal trials and international criminal law. One issue, however, has consistently been neglected: what happens to an individual convicted by an international criminal tribunal after the final guilty verdict is pronounced. This article aimed to take an initial step in filling in this gap by presenting an empirical overview of the stage following conviction at the ICTY, ICTR and SCSL. The reality uncovered in this article largely confirms critical views expressed by the limited number of authors who have reflected on the current setup of the enforcement system of international sentences: it is not transparent, conceptually underdeveloped and leads to inequalities in the treatment of international prisoners. International prisoners are sent to various countries around Europe and Africa and it is not clear what considerations, apart from political factors, are taken into account when deciding on the enforcement country. International prisoners are scattered in different prisons across various countries and subjected to largely differing prison conditions. Within Europe they are integrated into domestic inmate populations and typically serve their time in units with domestic murderers, child molesters, or drug traffickers. They follow similar daily routines and are offered existing rehabilitation programmes. One might question whether rehabilitating *génocidaires* and war criminals in the same way as ordinary delinquents makes much sense, given the specific character of international crimes and their perpetrators. Despite being usually convicted of very serious crimes, the international criminals committed their crimes under very specific (ideological, social, individual) circumstances. One might argue this should be duly reflected in designing their rehabilitation programmes. Such reflection, however, seems to be entirely missing; scholars or policy makers at the international or domestic level have not yet dedicated any attention to this pressing issue. A vast majority of international prisoners is soon deemed rehabilitated if they behave well, attend work activities or language courses in the respective prisons and show (any) remorse. They are often released after serving 2/3 of their sentences. A mere cursory look at these factors allegedly demonstrating prisoners' rehabilitation show that the concept of rehabilitation of perpetrators of international crimes and its assessment and implementation in practice is far from clearly developed and would benefit from further conceptualization and reassessment. After their release, the international prisoners simply disappear from the radar of the international community (unless they enter a witness protection programme and cooperate with the tribunals) and there is no supervision of their conduct or any attention paid to their activities. Some go back to their countries of origin and return to political posts they held prior

to or during the periods when crimes were committed. Some simply cannot go anywhere since no country is willing to accept them.

It might be questioned, whether this picture indeed represents what we as the international community envisage by 'doing justice'. In any case, the inequalities and a lack of principled approach towards the regulation and enforcement of international sentences have clear repercussions for the tribunals' legacy. To what extent the current system of enforcement of international sentences promotes or hinders the achievement of the multiplicity of goals the international tribunals claim to achieve, such as retribution, deterrence, rehabilitation or reconciliation, is a matter of considerable importance for any future evaluations of their effectiveness and legitimacy. In addition, the ICC has adopted a largely similar approach to the enforcement of its sentences and despite being a permanent international criminal court the post-conviction phase as regulated in the ICC Statute largely resembles the system before the international criminal tribunals. It is therefore absolutely essential to further study the current system of enforcement of international sentences in order to evaluate the functioning of the regime of the ad hoc tribunals and their effectiveness and draw lessons for the future. The overview presented in this article raises many important and interesting questions for this endeavour, and might serve as a starting point for future systematic empirical and theoretical research of the post-conviction stage of the international criminal justice system.

In case readers have relevant information on, or illustrations of, any of the post conviction issues discussed above, the authors would very much appreciate being contacted: b.hola@vu.nl or j.van.wijk@vu.nl.