

Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR

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Abstract

While cited as one of the goals of international sentencing and used as a factor for deciding on early release, rehabilitation of perpetrators of international crimes has thus far been neglected by academia and practitioners. This article presents an analysis of all ICTY and ICTR early release decisions handed down until July 2013, indicating how the tribunals have conceptualised rehabilitation of these ‘enemies of mankind’. After observing that the success rate of rehabilitating international prisoners is very high, we suggest that this may be attributable to (i) a lack of the Presidents’ critical evaluation of the materials upon which he bases his conclusions regarding prisoners’ rehabilitation and (ii) the fact that perpetrators of international crimes are a ‘different kind of perpetrator’. We offer suggestions to re-conceptualise rehabilitation in the context of international crimes and to adjust the enforcement system of international sentences in order to better promote rehabilitation.

Keywords

rehabilitation – ICTY – ICTR – early release – sentence enforcement

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1 Introduction

Rehabilitation is often cited as one of the goals of international sentencing.¹ The extent to which international prisoners are rehabilitated is moreover considered as a factor for granting early release by the international criminal tribunals (ICTs).² As of July 2013, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) granted early release to 47 individuals, i.e. 85 per cent of those released at the time. For each of these individuals, the President assessed their level of rehabilitation, considered it sufficient and set them free before serving their full sentences. A lack of rehabilitation has in these cases almost never hindered early release. This high ‘success rate’ suggests that rehabilitating perpetrators of international crimes is a relatively easy exercise. There are, however, issues on a fundamental and practical level that need to be addressed before coming to this conclusion. First, rehabilitation of perpetrators of international crimes is complicated by the fact that international prisoners are incarcerated in different national prisons scattered over Europe and Africa. One may wonder to what extent prison authorities in these various prisons are capable to

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- 1 Cf. *Judgment Erdemović*, 29 November 1996, International Criminal Tribunal for the former Yugoslavia [Trial Chamber], IT-96-22-T, paras. 61/66; *Judgment Furundžija*, 10 December 1998, ICTY [Trial Chamber], IT-95-17/1-T, para. 291; *Judgment Kupreškić et al*, 14 January 2000, ICTY [Trial Chamber], IT-95-16-T, para. 849; *Judgment Obrenović*, 10 December 2003, ICTY [Trial Chamber], IT-02-60/2-S, para. 48-49; *Judgment Krajišnik*, 27 September 2006, ICTY [Trial Chamber], IT-00-39-T, paras. 1134/1138; *Judgment Popović et al.*, 10 June 2010, ICTY [Trial Chamber] T-05-88-T, para. 2130; *Judgment Haradinaj et al.*, 3 April 2008, ICTY [Trial Chamber], IT-04-84-T, para. 488. For more detailed information on international sentencing goals, Cf. Mirko Bagaric and John Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’, 6 *International Criminal Law Review* (2006) 191–225; Stuart 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* (2001) 33–90; Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, Cambridge, 2007).
- 2 ICTY *Rules of Procedure and Evidence (RPE)*, Rule 125; ICTR *RPE*, Rule 126 and Mechanism for International Criminal Tribunals (MICT) *RPE*, Rule 150; ICTY *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; ICTR *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; MICT *Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism* (Doc No MICT/3) 5 July 2012.

develop and administer specific rehabilitation programmes for these foreign prisoners. Additionally, language and cultural differences may pose serious obstacles to this endeavour. Second, on a fundamental level, criminologists have argued that, as opposed to offenders of conventional serious crimes, perpetrators of international crimes are relatively well-adapted 'ordinary people', who commit their crimes in 'extraordinary circumstances' of collective, systematic and state-sanctioned violence. It might be questioned, therefore, to what extent the conventional concept of rehabilitation and traditional rehabilitation programmes currently administered by prison authorities around the world are applicable to this 'different type of perpetrator'.

Rehabilitation can be understood to encompass two interrelated aspects: (i) rehabilitation *process*, i.e. programmes offered during incarceration and on remand aimed at addressing criminogenic risk factors of individual offenders; and (ii) rehabilitation *outcome*, i.e. reintegration into society.³ Rehabilitation of perpetrators of conventional crimes is regularly discussed by academics and significant resources are dedicated by states to develop rehabilitation programmes to facilitate reintegration of 'ordinary' criminals. The same, however, cannot be said about rehabilitation of perpetrators of international crimes. Rehabilitation of these 'enemies of humankind' has been entirely neglected by academia and practitioners alike.

This article seeks to fill the current gap in scholarship by empirically analysing how the international criminal tribunals operationalise and measure rehabilitation of perpetrators of international crimes. The ICTY and ICTR (sentencing) judgments provide little guidance in this regard as they often only cursorily mention rehabilitation as a sentencing goal without providing any definition. A more elaborate discussion on rehabilitation is found in the early release decisions. This article is therefore based on an analysis of 71 ICTY and ICTR early release decisions handed down by the tribunals' President between August 1999 (when the first early release decision was made) and July 2013. In order to get more insight into the process of rehabilitation of perpetrators of international crimes during their incarceration, we furthermore conducted 11 interviews with prison authorities and officials from ministries and correctional services in some of the countries where convicts serve(d) their sentence (Norway, France, Sweden, Finland and Denmark).

3 Although not explicitly making this distinction, see e.g.: Anton M. van Kalmhout and Ioan Dumescu, 'European Probation Service System. A Comparative Overview', in Anton M. van Kalmhout and Ioan Dumescu (eds.), *Probation in Europe* (Wolf Legal Publishers, Nijmegen, 2008), pp. 1–49; Peter Raynor and Gwen Robinson, 'Why help offenders? Arguments for rehabilitation as a penal strategy', 1 *European Journal of Probation* (2009) 3–20.

The article starts with a brief overview of the system of enforcement of international sentences and early release practice at the ICTY and ICTR. The subsequent section discusses how rehabilitation is traditionally conceptualised and analyses how the ICTY and ICTR operationalised rehabilitation in their early release decision-making practice. After observing that the vast majority of ICTY and ICTR convicts are deemed sufficiently rehabilitated by the time they have served two-thirds of their sentence, we will in section four offer possible explanations for this high success rate. We conclude with suggestions to re-conceptualise the notion of rehabilitation of perpetrators of international crimes and adjust the system of enforcement of international sentences in order to better promote rehabilitation.

2 Enforcement of International Sentences and Early Release at ICTs

The enforcement of ICTY and ICTR sentences is quite distinct from the way in which prison sentences are enforced in domestic jurisdictions. Both the ICTY and ICTR do not have a permanent prison at their disposal as their detention facilities were set up to hold only those awaiting trial or those on trial.⁴ The tribunals are dependent on states to enforce their sentences. According to Article 27/26/25 of the ICTY/ICTR/MICT Statute, imprisonment is served in a state designated from a list of states that entered into a sentence enforcement agreement with the tribunal. Upon conviction, it is the task of the tribunals to find one of these states willing to actually enforce the sentence. Holá and Van Wijk have extensively described this process elsewhere.⁵ In short, after the final verdict, the Registrar starts consulting with enforcement states to discuss their willingness to enforce a particular sentence. In deciding which enforcement states to approach, the ICTY Practice Direction lists the following criteria: (i) the national laws regarding pardon and commutation of sentences, maximum sentence available and other considerations relating to the ability

4 Jan C. Nemitz, 'Execution of Sanctions Imposed by Supranational Criminal Tribunals', in Roelof Haveman and Olaoluw Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, Antwerp, 2006), pp. 133–134; Denis Abels, *Prisoners of the International Community. The Legal Position of Persons Detained at International Criminal Tribunals* (TMC Asser Press/Springer, The Hague, 2012). In practice some of the convicted do spend their entire sentence in the UNDU or UNDF due to credit given for time served during (pre-) trial and the lengthy procedures at the tribunals, for instance Amir Kubura, Rasim Delic, Milojevic Kos, Zdravko Mucic or Veselin Sljivancanin.

5 Barbora Holá and Joris van Wijk, 'Life after Conviction at International Criminal Tribunals – Empirical Overview', 12 *Journal of International Criminal Justice* (2014) 113–118.

of the state to enforce a particular sentence; (ii) equitable distribution of convicted persons among all the states; and (iii) other relevant considerations.⁶ If the approached state agrees to enforce the sentence, the Registrar provides a memorandum to the President containing relevant information, 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.⁷ Particular attention should be paid to the proximity of the convicted person's relatives.⁸ Convicted persons can inform the President about their preferences, but the President may disregard their choice without giving a motivation.⁹ Once the President has designated an enforcement state, the prisoner is transferred to that state. The imprisonment itself is consequently governed by the law of the enforcement state and subjected to the supervision of the tribunal.¹⁰ In practice, international prisoners are scattered around different prisons across and within various countries (11 European and two African countries are enforcing international sentences) and are subjected to largely differing prison conditions with varying emphasis on rehabilitation.¹¹

6 ICTY *Practice Direction on 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, para. 3. The ICTR and MICT have not included such provisions in their practice directions.

7 ICTY *Practice Direction*, *ibid.*, para 4; 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, para. 3 and MICT *Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve his or her Sentence of Imprisonment* (MICT/2) 5 July 2012, para. 4.

8 ICTY and United Nations Interregional Crime and Justice Research Institute (UNICRI) *Manual on Developed Practices*, 16 November 2008, p. 152; ICTY *Practice Direction*, *ibid.*, para 5. Such reference is also made in the ICTR and MICT practice directions (*see* ICTR *Practice direction*, *ibid.*, para 4; MICT *Practice Direction*, *ibid.*, para 5).

9 ICTY *Manual on Developed Practices*, *ibid.*, p. 155–156. For a more extensive overview of the actual practice of assigning an enforcement state, *see* Holá and Van Wijk, *supra* note 5.

10 ICTY and ICTR *RPE*, Rule 104; MICT *RPE*, Rule 128. The Tribunals 'outsourced' the supervision of imprisonment conditions to external organizations that regularly check prisons where international prisoners are incarcerated. This is either the International Committee of the Red Cross (ICRC) (*see for instance* the enforcement agreements with Belgium (2 May 2007) or France (25 February 2000)) or the European Committee for the Prevention of Torture (CPT) (*see for instance* the enforcement agreement with the United Kingdom (11 March 2004) or Portugal (19 December 2007)).

11 Beresford, *supra* note 1, pp. 44–45.

Similar to conditions of imprisonment, the commutation of sentences and pardons are governed by the law of the enforcement state. Articles 28/27/26 of the ICTY Statute/ ICTR Statute/MICT Statute state 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.¹² In addition, the ICTY and MICT—not the ICTR—have included a paragraph in their practice directions on the designation of an enforcement state that allows a convicted person him- or herself to petition for early release.¹³ When the tribunal is notified by either the enforcement state or a convict, it is to request documents from the enforcement state: Reports and observations regarding the convict's behaviour in custody, general conditions of imprisonment and psychological or psychiatric reports.¹⁴ On the basis of these reports, the convict's response to such reports, and in consultation with other judges, the President then decides on whether or not early release should be granted.¹⁵

In doing so, he or she takes into account “the interests of justice” and “general principles of law”.¹⁶ Although the eligibility for early release depends on the law of the enforcement state, the tribunals retain a supervisory power in this respect and an international prisoner cannot be released without the approval of the President. ICTY Rule 125, ICTR Rule 126 and MICT Rule 151 mention four factors that the President shall, *inter alia*, take into account in reaching this decision: (i) the gravity of the crime or crimes for which the prisoner was convicted, (ii) the treatment of similarly-situated prisoners, (iii) any substantial cooperation of the prisoner with the Prosecutor, and (iv) the prisoner's demonstration of rehabilitation.¹⁷ What is meant by rehabilitation of perpetrators of international crimes and how this should be demonstrated is, however, not specified.

12 This process is further governed by ICTY Rules 123–125, ICTR Rule 124–126 and MICT Rule 149–151. In addition, the ICTY, ICTR and MICT have developed practice directions further regulating the early release procedure, *supra* note 2.

13 ICTY *Practice Direction*, *supra* note 2, para. 2; MICT *Practice Direction*, *supra* note 2, para. 3. According to the ICTY *Manual on Developed Practices*, several convicts have in fact done so (ICTY *Manual on Developed Practices*, *supra* note 8, p. 161).

14 ICTY *Practice Direction*, *supra* note 2, para. 3(d); ICTR *Practice Direction*, *supra* note 2, para. 2(b); MICT *Practice Direction*, *supra* note 2, para. 4(b).

15 ICTY, *Practice Direction*, *ibid.*, paras. 5, 6 and 8; ICTR *Practice Direction*, *ibid.*, paras 4, 5, and 7; MICT *Practice Direction*, *ibid.*, paras. 6, 7 and 9.

16 ICTY *Statute*, Art 28; ICTR *Statute*, Art 27, MICT *Statute* Art. 26. Also see ICTY *RPE*, Rules 123, 124; ICTR *RPE*, Rules 124,125 and MICT *RPE*, Rules 150, 151.

17 See also ICTY, ICTR and MICT *Practice Directions*, *supra* note 2.

As of 16 July 2013, 54 individuals applied for early release (46 prisoners did so at the ICTY and eight at the ICTR, 14 of them repeatedly).¹⁸ The early release was granted by the tribunals in the cases of 47 individuals (one of which was a remission of sentence). In total, the Presidents rejected an early release application 29 times; at the ICTY 16 and at the ICTR four individuals faced rejection of their early release application (six of them repeatedly). Although the reasons for the rejection varied across cases, it seems that the decisive factor for denying early release was whether the prisoner had already served two-thirds of his/her sentence.¹⁹ The international prisoners are incarcerated in countries with varying parole laws regulating eligibility for early release. In order to prevent 'different treatment', it has become standard practice of the President to consider international prisoners eligible for early release after they have served two-thirds of their sentence.²⁰ Table 1 presents the basic figures on early release decisions at the ICTY and ICTR used in our analysis.

3 Rehabilitation

Rehabilitation is one of those concepts that, despite numerous attempts to capture it in one definition, remains remarkably vague, and "perhaps, defies an

18 In the following, the term 'early release' is used as a generic term for all the types of commutation of sentences of international prisoners, such as early release or remission of sentence. Early release *stricto sensu* refers to the fact that a prisoner is released before the entire sentence is served. Remission of sentences entails that the sentence to which a prisoner has been convicted is lowered. The difference thus lies in the fact that for early release the length of the original sentence remains intact, whereas for remission of sentence this length is shortened.

19 See for example *Decision of President on Early Release of Zoran Žigić*, 8 November 2010, ICTY, IT-98-30/1-ES, paras. 13/22; *Decision of President on Early Release of Momčilo Krajišnik*, 26 July 2010, ICTY, IT-00-39-ES, paras.14-17/33.

20 The two-third threshold started to be applied by the ICTY President due to the fact that in the majority of enforcement countries prisoners are eligible for early release after serving two-third of their sentence. The ICTR President initially granted early release to ICTR convicts only after serving three-fourth of their sentence. Since 1 July 2012 the MICT has formally taken over the supervision of the sentence enforcement at the ICTR and decides on the early release. In its first early release decision the MICT President decided that all the ICTY and ICTR convicts are to be considered eligible for early release upon the completion of two-third of their sentence to guarantee equal treatment for all those that fall under the responsibility of the MICT. See: *Decision of President on Early Release of Paul Bisengimana*, 11 December 2012, MICT, MICT-12-07 (ICTR-00-60), para. 20.

TABLE 1 *Number of early release decisions analysed*

<i>Type of Decision</i>	<i>N (ICTY)</i>	<i>N (ICTR)</i>	<i>N (Total)</i>
Decisions granting early release	40	5	45*
Early release rejections	16	4	20**
Decisions granting sentence remission	1	0	1***
Sentence remission rejections	5	0	5
Total	62	9	71

*46 people have been granted early release by the ICTY or ICTR up until 16 July 2013. The early release decision of Dragan Jokić is not available, however, and can therefore not be used in this study.

**24 people were denied early release by the ICTY or ICTR up until 16 July 2013. Four of these decisions could not be found/were confidential.

*** In total two people were granted sentence remission by the ICTY until 16 July 2013 (the ICTR has none). The remission of Vladimir Šantić is, however, discussed in the 'regular' early release decisions, because there is no separate decision on the remission of sentences.

exact definition".²¹ To make matters more complicated, rehabilitation has known many forms and justifications throughout the centuries and still knows many different shapes nowadays.²² Even so, rehabilitative efforts are based on similar principles, or what Allen has called the "rehabilitative ideal".²³ The idea is that criminal behaviour has certain identifiable causes and that by treating offenders and addressing these causes (through interventions), the risk of becoming a re-offender may be reduced.²⁴ This element of 'treatment' is an important characteristic of rehabilitation as it separates rehabilitation from other forms of preventing re-offending, for example through (specific) deterrence.²⁵

An associated, and nowadays perhaps the most important, pillar of rehabilitation,²⁶ is the promotion of offenders' reintegration back into society. As such, rehabilitation comprises two elements: the rehabilitation *process*

21 Francis A. Allen, 'Legal Values and the Rehabilitative Ideal', in Michael H. Tonry (ed.), *Why Punish? How much? A Reader on Punishment* (Oxford University Press, Oxford, 2011), p. 97.

22 Van Kalmthout and Durnescu, *supra* note 3; or: Raynor and Robinson, *supra* note 3.

23 Allen, *supra* note 21, p. 98.

24 Allen, *ibid.*; Tim Newburn, *Criminology* (Routledge, London, 2013), pp. 532–533.

25 Bagaric and Morss, *supra* note 1, p. 222.

26 Van Kalmthout and Durnescu, *supra* note 3.

(with different interventions offered to prisoners during their incarceration and occasionally after their release) and the rehabilitation *outcome* (reintegration). Rehabilitation then ultimately aims at “enabling the client to socially function in a way that is acceptable to both himself/herself and society.”²⁷ The interventions aimed at achieving such integration focus on material (housing, re-educative programmes, income assurance, etc.) as well as immaterial (social and psychiatric evaluations) elements.²⁸

Although rehabilitation programmes differ per country, and thus also differ per enforcement state, generally, they focus on education, work activities, vocational training, substance abuse treatment or psychological counselling.²⁹ The actual participation in such programmes is often a requirement to qualify for promotion to a less restrictive prison regime, early release or parole.³⁰

3.1 *The Tribunals’ Operationalization of Rehabilitation*

As mentioned above, ‘rehabilitation’ is not defined in any of the rules governing the functioning of the tribunals or in the ICTY or ICTR judgments. The President is thus free to interpret the concept and consider whatever factors he or she finds relevant for demonstration of a prisoner’s rehabilitation. In order to see how rehabilitation is operationalised by the ICTs we analysed all 71 decisions granting or denying early release to international prisoners issued by the President in the period between August 1999 till July 2013.³¹

We identified no less than 16 different factors the tribunals consider relevant for the determination of a prisoner’s demonstration of rehabilitation. These are, however, certainly not all equally important, nor considered systematically in each decision. Some factors were taken into account in many decisions while others were only taken into account in a few decisions. For

27 *Ibid.*, p. 28. Social integration that is acceptable to society is unlikely to include the continuation of offense. It is perhaps therefore that Raynor and Robinson note that “[u]sually, the implied goal seems to be less reoffending by sentenced offenders”, *in*: Raynor and Robinson, *supra* note 3, pp. 4–5.

28 Van Kalmthout and Durnescu, *ibid.*, p. 28; Allen, *supra* note 21 p. 98; David Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (Oxford University Press, Oxford, 2001), pp. 34–35.

29 Van Kalmthout and Durnescu, *ibid.*, p. 15. Kathryn M. Campbell, ‘Rehabilitation Theory’ in Mary Bosworth (ed.), *Encyclopedia of Prisons and Correctional Facilities* (Sage Publications, Thousand Oaks, 2005), pp. 832.

30 Campbell, *ibid.*, p. 833.

31 In this analysis we included all the decisions on early release, commutation of sentences or remission of sentences (hereinafter referred to as ‘early release decisions’).

TABLE 2 *Factors Indicating Level of Rehabilitation*

<i>Category</i>	<i>Factor</i>	<i>N</i>	<i>Per Cent</i>
Period in prison	Conduct in prison	62	87,3
	Prison integration	24	33,8
	Participation in programmes	12	16,9
	Changed in prison	5	7,0
	Prison regime	5	7,0
	Attitude towards other nationalities	4	5,6
Future perspectives	Family ties	31	43,7
	Relation home country	16	22,5
	Career prospects	15	21,1
	Explicit intention not to reoffend	5	7,0
Reflection on crimes	Showing regret/remorse	27	38,0
	Acceptance of responsibility	24	33,8
Personal characteristics	Mental health	14	19,7
	Personality traits	9	12,7
	Conduct prior to crimes	6	8,5
	Age	2	2,8

example, ‘conduct in prison’ was taken into account in 62 decisions (87,3 per cent), whereas ‘personality traits’ was only taken into account in nine decisions (12,7 per cent). The tribunals’ interpretation of rehabilitation in its early release decisions is in other words by no means straightforward. Instead of using a clear definition and set of assessment criteria, the President relies on a seemingly coincidental *ad hoc* list of factors.

Further scrutiny of the data, however, unravels a somewhat coherent framework. The factors identified by the tribunals can roughly be divided in four categories: i) the convict’s period in prison, ii) his/her future perspectives, iii) his/her reflection on crimes and iv) his/her personal characteristics. The 16 identified factors are accordingly categorised in Table 2, followed by the number and percentage of decisions that mention these factors.

The majority of early release decisions discusses various factors related to the *period in prison* as demonstrating a prisoner’s rehabilitation. Conduct in prison was considered a relevant factor for rehabilitation in the vast majority of early release decisions. In these instances terms such as “exemplary

behaviour”,³² “good conduct”,³³ or a “model prisoner”³⁴ were used. In some decisions, conduct in prison was even the only indicator of rehabilitation.³⁵ Other factors that relate to the period in prison are the extent to which the prisoner interacted with fellow inmates,³⁶ participated in training or rehabilitation programmes,³⁷ tried to learn the local language,³⁸ was deemed to have ‘changed for the better’,³⁹ got promoted to or behaved well in a (more)

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- 32 See for instance Bisengimana, *supra* note 20, para. 26; *Public Redacted Version of the 9 July 2009 Decision of the President on Pardon or Commutation of Sentence of Milorad Krnojelac*, 9 July 2009, ICTY, IT-97-25-ES, para. 20; or *Decision of President on Application for Pardon or Commutation of Sentence of MladoRadić*, 23 April 2010, ICTY, IT-98-30/1-ES, para. 18.
- 33 See for instance *Decision on Application for Haradin Bala for Sentence Remission*, 15 October 2010, ICTY, IT-03-66-ES, para. 20), *Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić*, 3 November 2004, ICTY, IT-95-9, para. 4; or *Decision of President on Early Release of Johan Tarčulovski*, 8 April 2013, ICTY, IT-04-82-ES, para. 21.
- 34 *Decision of President on Early Release of Momčilo Krajišnik* 2 July 2013, ICTY, IT-00-39-ES, para. 24.
- 35 See *Decision of the President on Early Release of Vidoje Blagojević*, 3 February 2012, ICTY, IT-02-60-ES, para. 22; *Public Redacted Version of Decision of President of Early Release of Dragan Obrenović*, 21 September 2011, ICTY, IT-02-60/2-ES, para. 21; and *Decision on Tharcisse Muvunyi’s Application for Early Release*, 6 March 2012, ICTR, ICTR-00-055A-T, para. 6.
- 36 See for instance *Decision on the Early Release of Michel Bagaragaza*, 24 October 2011, ICTR, ICTR-05-86-S, para. 12; *Decision of President on Early Release of Momčilo, Krajišnik*, 11 July 2011, ICTY, IT-00-39-ES, para. 26; Miroslav Tadić, *supra* note 33, para. 6; or: *Decision of President on Early Release of Johan Tarčulovski*, 23 June 2011, ICTY, IT-04-82-ES, para. 21.
- 37 See for instance *Decision of President on Application for Pardon or Commutation of Sentence of MladoRadić*, 9 January 2013, ICTY, IT-98-30/1-ES, para. 23; *Decision of President on Early Release of Veselin Šljivančanin*, 5 July 2011, ICTY, IT-95-13/1-ES, para. 23; or: *Public Redacted Version of Decision of the President on the Early Release of Omar Serushago*, 13 December 2012, MICT, MICT-12-28-ES, para. 21.
- 38 See for instance Haradin Bala, *supra* note 33, para. 24; or *Decision of President on Early Release of Milomir Stakić*, 15 July 2011, ICTY, IT-97-24-ES, para. 34.
- 39 This assessment is sometimes based on the prisoner’s own claims, see *Public and Redacted Version of the 27 March 2013 Decision of President on Early Release of Radomir Kovač*, 3 July 2013, ICTY, IT-96-23&23/1-ES, para. 22 and *Public Redacted Order of the President on Commutation of Sentence [Prosecutor v. Esad Landžo]* 13 April 2006, ICTY, IT-96-21-ES, para. 7. In other cases the criteria for this statement are unclear, see: *Order Issuing a Public Redacted Version of Decision of the President on Early Release [Prosecutor v. Dražen Erdemović]*, 13 August 1999, ICTY, IT-96-22-ES and *Decision on the Application of Pardon or Commutation of Sentence of Drago Josipović*, 30 January 2006, ICTY, IT-95-16-ES, para. 10). In *Decision of President on Early Release of Blagoje Simić* it is noted that discussion over the years has caused him to feel regret for his crimes (25 February 2011, ICTY, IT-95-9-ES, para. 23).

lenient prison regime,⁴⁰ and demonstrated a positive attitude towards other nationalities.⁴¹

The second group of factors relates to the *future perspectives* of the prisoner. In this respect the most important factor is whether prisoners have good family relations. In that case they are regarded more likely to return to a stable family and lead a normal (crime free) life.⁴² The prisoner's relationship with his or her home country⁴³ or career perspectives⁴⁴ are also deemed relevant. The explicitly expressed intention not to reoffend in the future was taken into account five times.⁴⁵

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- 40 In these decisions it is for instance argued that a prisoner was transferred to a more lenient prison regime as a result of good behavior and 'rehabilitation', or it was suggested that good behaviour in a more lenient prison regime indicates that the international prisoner will behave well upon release as well. *See for example*: Drago Josipović, *ibid.*, para. 11; *Decision of the President on Early Release of Momčilo Krajišnik*, 8 November 2012, ICTY, IT-00-39-ES, para. 32; Momčilo Krajišnik, *supra* note 34, para. 25 or Johan Tarčulovski, *supra* note 33, para. 22.
- 41 *See*: Miroslav Tadić, *supra* note 33, para. 5), Johan Tarčulovski, *supra* note 36, Johan Tarčulovski, *ibid.*, para. 20) and *Decision of the President on the Application for Pardon or Commutation of Sentence of Stevan Todorović*, 22 June 2005, ICTY, IT-95-9/1-ES, para. 9.
- 42 *See for instance*: Paul Bisengimana, *supra* note 20, para. 25), Rutaganira (2 June 2006, p. 2), Veselin Šljivančanin, *supra* note 37, para. 25; *Decision on the Early Release Request of Juvénal Rugambarara*, 8 February 2012, ICTR, ICTR-00-59, para. 14; or: Johan Tarčulovski, *ibid.*, para. 22.
- 43 For positive perspective of rehabilitation in this regard, *see for instance* Momčilo Krajišnik, *supra* note 40, para. 31; Blagoje Simić, *supra* note 39, para. 25 or Miroslav Tadić, *supra* note 33, para. 5. For negative perspective, *see for example*: Esad Landžo, *supra* note 39 or *Decision of President on Early Release Dragan Zelenović*, 30 November 2012, ICTY, IT-96-23/2-ES, para. 19. For the ICTR, the relation between the prisoner and his or her home country was considered once. This was discussed superficially in Bisengimana, *ibid.*, para. 26. It is remarkable that this relationship is not mentioned more often, as returning to the home country is in practice most problematic for those convicted by the ICTR. They generally cannot go back to Rwanda out of security reasons and other countries are generally unwilling to accept them either (*see* Joris van Wijk, 'When International Justice Collides with Principles of International Protection; assessing the consequences of ICC Witnesses seeking asylum, defendants being acquitted and convicted being released', 26 *Leiden Journal of International Law* (2013), 173–191).
- 44 Examples of decisions in which such prospects are mentioned are: *Decision of the President on Commutation of Sentence [Prosecutor v. Predrag Banović]*, 3 September 2008, ICTY, IT-02-65/1-ES, para.13; Dražen Erdemović, *supra* note 39; Radomir Kovač, *supra* note 39, para. 24; or Momčilo Krajišnik, *supra* note 19, para. 21.
- 45 *See for example*: Dražen Erdemović, *ibid.*; *Order of the President on the Early Release of Dragan Kolunžija*, 5 December 2001, ICTY, IT-95-8-S; Radomir Kovač, *ibid.*, para. 22.

Additionally, the tribunals pay considerable attention to the question how the prisoner *reflects upon his or her crimes*. In this regard, the President seems to distinguish between acceptance of responsibility and showing remorse. In the majority of the cases, the prisoner was considered to have reflected upon his or her deeds and had either accepted responsibility, showed remorse or both.⁴⁶ In some decisions, however, the President concluded that the prisoner had not taken in the meaning of his/her sentence, had not (sufficiently) reflected upon their crimes, had failed to accept responsibility, had shown no remorse or had denied committing any crime.⁴⁷

Finally, the tribunals, to a lesser extent, consider *personal characteristics of a prisoner*, such as mental health (psychiatric illness or absence thereof),⁴⁸ personality traits,⁴⁹ conduct prior to the perpetration of crimes⁵⁰ and age.⁵¹

Although the President does not use a clear definition of rehabilitation, the above suggests that to a certain extent rehabilitation in the early release decisions is operationalised in a rather systematic way. Note that the factors taken into account by the Presidents strongly resemble the subject of domestic rehabilitation efforts, such as vocational training and programmes, behaviour in prison or reflection on crimes. As such, it seems that the tribunals rely on a rather 'traditional' conceptualization of rehabilitation.

3.2 *Success Rate of Rehabilitating International Prisoners*

Given that rehabilitating perpetrators of ordinary crimes incarcerated in their home countries is already challenging,⁵² one would expect that rehabilitating

46 See for instance *Order for the President for the Early Release of Zlatko Aleksovski*, 14 November 2001, ICTY, IT-95-14/1; Miroslav Tadić, *supra* note 33, para. 5, or Dražen Erdemović, *supra* note 39.

47 See for instance Haradin Bala, *supra* note 33, para. 21, Milomir Stakić, *supra* note 38, paras. 30–31 or Mlado Radić, *supra* note 32.

48 See for instance Johan Tarčulovski, *supra* note 33, para. 20); *Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Mitar Vasiljević*, 12 March 2010, ICTY, IT-98-32-ES, para. 21); or Zoran Žigić, *supra* note 19, para. 18.

49 See for instance: *Decision of President on Early Release of Milan Gvero*, 28 June 2010, ICTY, IT-05-88-ES, para. 14; *Decision of the President on Early Release of Vinko Martinović*, 16 December 2011, ICTY, IT-98-34-ES, para. 20; or : Stevan Todorović, *supra* note 41.

50 For example, see: Juvénal Rugambarara, *supra* note 42, para. 15; Omar Serushago, *supra* note 37; Miroslav Tadić, *supra* note 33, para. 5 and Dragan Zelenović, *supra* note 43, para. 16.

51 Two decisions explicitly mention age as an important factor for rehabilitation (Dražen Erdemović, *supra* note 39 and *Decision on Samuel Imanishimwe's Application for Early Release*, 30 August 2007, ICTR, ICTR-99-46-S), while it is explicitly considered irrelevant elsewhere (Momčilo Krajišnik, *supra* note 19, para. 21; and Mlado Radić, *supra* note 32, para. 19).

52 *CF. Allen*, *supra* note 21; *Garland*, *supra* note 28; or: *Newburn*, *supra* note 24.

'enemies of mankind' in foreign prisons would be even more difficult. In relation to 'regular' foreigners in European prisons Van Kalmthout *et al.* conclude that language barriers cause problems such as difficulties in understanding prison regulations, inability to participate in work or education programmes or problems in communicating with other prisoners, prison staff or the outside world.⁵³ Serving a sentence in a foreign country typically has a negative impact on the ability of prisoners to reintegrate into society as they become socially isolated in prison.⁵⁴

The ICTY Trial Chamber in its first ever judgment against *Erdemović* recognised that cultural and linguistic difficulties of being imprisoned in far off third countries may also impact ICTY prisoners,⁵⁵ but the tribunals have since not undertaken any action to mitigate possible problems. It may therefore not come as a surprise that 14 decisions refer to linguistic or cultural difficulties faced by ICTY prisoners.⁵⁶ As it is more difficult for families to visit, convicts complain that it is difficult to maintain close contact with relatives or partners.⁵⁷ In addition, our explorative interviews with prison staff and staff from the correctional services of several enforcement countries indicated that their '*status aparte*' of being a foreign war criminal or *genocidaire* also at times negatively impacted the prisoners' abilities to integrate in prison or rehabilitate.⁵⁸

A further complicating consequence of serving a sentence in a far-away country is that gradual reintegration into society is next to impossible. They cannot be guided back into society in their country of origin by means of half-way houses or short term trips to family members. Moreover, they have limited access to rehabilitative programmes in general, let alone to treatment that is specifically tailored towards the specific crimes they committed.⁵⁹ As the ICTY

53 Anton M. van Kalmthout, Femke B.A.M. Hofstee-van der Meulen and Frieder Dünkel, *Foreigners in European Prisons* (Wolf Legal Publishers, Nijmegen, 2013), pp. 21–37.

54 *Ibid.*, p. 35.

55 *Judgment Dražen Erdemović*, *supra* note 1, para. 75.

56 Linguistic or cultural difficulties are mentioned in none of the ICTR decisions

57 For example Dragan Zelenović has only remained in contact with his family through occasional phone calls (*supra* note 43, para. 15) and Radomir Kovač had not seen his wife in four years when he was granted early release (*supra* note 39, para. 24).

58 Interviews with representatives of Norwegian prisons (2 July 2013) (14 June 2013), an interview held with a legal adviser on one of the international prisoners (27 May 2013). Confirmed in email conversations with a representative of the Danish Prison and Probation Service (16 and 17 May 2013) and a lawyer at the Judicial Unit of the Finnish Criminal Sanctions Agency (5 August 2013).

59 Klaus Hofmann, 'Some Remarks on the Enforcement of International Sentences in Light of the Galic case at the ICTY', *Zeitschrift für Internationale Strafrechtsdogmatik: ZIS online* (2011), <http://www.zis-online.com/dat/artikel/2011_10_622.pdf>, 26 June 2013, p. 842.

convicts form only a small part of the prison population, no specific programmes are developed.⁶⁰ Even in Norway, a country known for its progressive prison system focused on rehabilitation,⁶¹ the representative of a small Norwegian prison where two international prisoners served their sentence stated that the prison staff never really talked with the inmates about the crimes they committed:

It felt...unpleasant.....it was so terrible...I felt I couldn't ask him...in a way to protect myself (...) it was so strange to us, such terrible things had been done (...) For normal crimes we had programs. Programs like *breaking drug abuse* or *breaking violence* (...) But what competence do we have to deal with them? We are only simple prison officers, knowing about life in [the place where the prison is located]. We are not educated in these matters.⁶²

Also in Mali and Benin, where ICTR convicts are concentrated in separate wings, there are no indications that special rehabilitation programmes exist.

Despite all complexities, and much to our surprise, the President has so far only once *postponed* the early release of an international prisoner because of a lack of rehabilitation. In response to Mlado Radić's early release request,⁶³ the President reviewed a letter from the French authorities which states that Radić has not demonstrated an effort to rehabilitate. It notes that he does not participate in professional or educational activities offered in detention, including French lessons, which renders it more difficult to interact with him. On the basis of this letter and Radić's response to it, the President holds:

Based on the information provided, I think it is obvious that Radić has not been able to adjust to his conditions of detention in France. I am

60 Interviews held with a representative of the French Prison and Probation Service (20 May 2013), representatives of Norwegian prisons, *supra* note 58; supported in interviews with a representative of the Correctional Services Department of the Norwegian Ministry of Justice (11 June 2013), a representative of the national security unit of the Swedish prison and probation Unit (18 June 2013); and confirmed again in email conversations with a representative of the Danish Prison and Probation Service, *supra* note 58; and by a lawyer at the Judicial Unit of the Finnish Criminal Sanctions Agency, *supra* note 58.

61 Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and the Future Perspectives for the ICC* (Hart Publishing, Oxford, 2011), p. 63; or, Van Kalmthout and Durnescu, *supra* note 3.

62 Interview with Representative Norwegian prison (24 July 2013).

63 MladoRadić, *supra* note 37.

concerned that his rehabilitation has been impeded by his inability to come to terms with his environment. That said, I am equally concerned that there is little to no evidence of actual rehabilitation other than his response to the material provided by him in which he expresses his regret for the suffering of the victims. Based upon the foregoing, I consider Radić's demonstration of rehabilitation to be a neutral factor in my assessment of his suitability for early release.⁶⁴

Reiterating that the Tribunal's practice of granting early release after having served two-thirds of a sentence is not an entitlement, the President decided that Radić's request should be denied for now and that he should be granted early release on 31 December 2012, almost one and a half year later than he was supposed to on the basis of the two-thirds criterion.⁶⁵

In all other cases (six in total) in which the President considered evidence of rehabilitation to be insufficient, it was also considered to be a 'neutral factor'.⁶⁶ In these cases, however, this did not hinder early release. This means that apart from Radić, all other most responsible perpetrators of the most atrocious crimes committed in the former Yugoslavia and Rwanda have been found sufficiently rehabilitated to be granted early release by the time they had served two-thirds of their sentence.

4 Rehabilitating Perpetrators of International Crimes; Piece of Cake or Hard Nut to Crack?

Are offenders of international crimes really so easy to rehabilitate as the above data suggest? In this paragraph we will explore some possible explanations for this rather remarkable observation. We will first point to the fact that the President generally does not critically evaluate the underlying sources

64 Mlađo Radić, *ibid.*, para. 26.

65 Why the President believes Radić to be better rehabilitated on 31 December 2012 is not explained. No conditions were set.

66 See *Public Redacted Version of the 28 June 2012 Decision of the President on Early Release of Haradin Bala*, 9 January 2013, ICTY, IT-03-66-ES; *Public Redacted Version of the Decision of the President on Commutation Sentence [Prosecutor v. Predrag Banović]*, 10 March 2006, IT-02-65/1-ES; *Public Redacted Version of the Decision of the President on Commutation Sentence [Prosecutor v. Predrag Banović]*, 4 September 2007, IT-02-65/1-ES; *Decision of President on Application for Pardon or Commutation of Sentence of Mlađo Radić*, 22 June 2007, ICTY, IT-98-30/1-ES; Mlađo Radić, *supra* note 23) and Dragan Zelenović, *supra* note 43.

demonstrating the level of rehabilitation. Next, it is discussed that perpetrators of international crimes can be considered ‘a different kind of perpetrator’ and that this may provide a reason why they are relatively easy to rehabilitate.

4.1 *Limited Review of Sources which Demonstrate Rehabilitation*

A first possible explanation for the high success rate in rehabilitating international prisoners is that the President seems to do little to critically assess the underlying sources submitted to demonstrate prisoners’ rehabilitation. The fact that the tribunals are not actively involved in the enforcement of sentences means that the President relies heavily on information provided by third parties. According to Article 3(b) of the Practice Direction the Registry shall in reaction to an early release request ask for:

reports and observations from the relevant authorities in the enforcement State as to the behaviour of the convicted person during his or her period of incarceration and (...) any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration.

Although enforcement states have not been given any guidance on how to rehabilitate international prisoners,⁶⁷ the President typically trusts their reports about a convict’s behaviour in prison and follows their advice in relation to the prisoner’s level of rehabilitation. The Norwegian authorities, for example, addressed Mr. Obrenović’s custodial behaviour by stating that he had not breached any rules or regulations during his detention. The President was informed by letter that Mr. Obrenović reliably served as a kitchen assistant for several years, “taking full responsibility for his duties and fulfilling his obligations very accurately”. Based on the information provided, the President was of the view that “Mr. Obrenović’s good behaviour while serving his sentence demonstrates some rehabilitation and weighs in favour of his early release”.⁶⁸ How Obrenović’s accurate fulfilling of obligations in the kitchen actually assists in rehabilitating this former military officer convicted of persecuting hundreds of civilians remains unclear. Typically, the President does not question such issues.

67 Interviews held with representatives of Norwegian prisons, *supra* note 58/62, and confirmed in interviews with representatives of Norwegian prisons enforcing ICTY sentences (27 June 2013) and an interview with a former counselor at the National directorate of the Correctional Services/Department of the Correctional Services at the Norwegian Ministry of Justice (4 June 2013).

68 Dragan Obrenović, *supra* note 35, para. 23.

With respect to psychiatric or psychological reports, the President's assessment is similarly uncritical. The ICTY and ICTR do not as a matter of standard practice make psychological assessments prior to delivering a sentence. Additionally, enforcement states are arguably not experienced in administering the psychiatric or psychological evaluation of perpetrators of international crimes. It may in this regard not come as a surprise that the President regularly concludes that information about the psychological conditions of convicts is insufficiently available or completely absent. While typically merely noting the absence or insufficiency of a psychological assessment, the President has occasionally criticised the enforcement states for not providing more detailed information. For example in the early release request of Haradin Bala the President states:

I take note of the fact that the record is contested in relation to whether the psychological assessment indicates that Mr. Bala has demonstrated signs of rehabilitation (...) I have great difficulty in relying upon its conclusions, which appear to be general observations that are not based upon specific information and reactions obtained from Mr. Bala during his interview with the psychologist. In any subsequent application for confirmation of sentence remission or early release, it would assist me in my determination of the matter if the French authorities would ensure that future psychological reports provide additional detail regarding the bases upon which the conclusions are reached.⁶⁹

In the vast majority of instances when the President noted the absence of psychological reports or other relevant information, he, however, did not enquire further.⁷⁰

Finally, the President at times also puts much trust in the information provided by the convicts themselves. This is in particular the case when it concerns the convicts' future perspectives of reintegration. Paul Bisengimana in his early release request, for example, informed the President that he had

69 Haradin Bala, *supra* note 33, para. 24. See also *Decision of President on Application for Pardon or Commutation of Sentence of Dario Kordić*, ICTY, IT-95-14/2-ES, para. 19.

70 For example, the President decided that the fact that the German authorities indicated that Tadić had not shown any remorse should not be given much weight in the absence of a psychological report (*Decision of the President on the Application of Pardon or Commutation of Sentence of Duško Tadić*, 17 July 2008, ICTY, IT-94-1-ES, para. 16). See also Bisengimana, *supra* note 20, para. 26), Dario Kordić, *ibid.*; or Dragan Obrenović, *supra* note 35, para. 23.

plans to set up a family business in Mali after release. He claimed (and supported this by presenting a refugee card) that Mali had in 1997 granted him a refugee status, which allowed him to permanently reside there after release.⁷¹ Next to this, Bisengimana argued that he had maintained a close relationship with his family, in support of which he added signed statements by three of his children that they visit him regularly in prison as annexes. The President noted the following:

The facts that Bisengimana has retained close links with his family and has plans for his future suggest that he will be able to reintegrate into his family and society should he be released. While this does not constitute concrete evidence of rehabilitation, I do consider this evidence relevant in establishing his ability to return to a productive life, supported by his family members.⁷²

From the early release decision it is unclear if the President actually checked if Bisengimana's children indeed visited him regularly or to what extent his business plans were feasible or not. More importantly, the President does not seem to have verified Bisengimana's claim that he upon release indeed will be allowed to permanently stay in Mali. His refugee status was granted in 1997,⁷³ which is three years before he was indicted by the ICTR in 2000.⁷⁴ Instead of letting Bisengimana stay as a permanent resident it would be far from surprising if Mali considered excluding him from refugee protection on the basis of article 1F of the Refugee Convention on the basis that there are serious reasons for considering that he committed serious crimes such as genocide. Exclusion on the basis of article 1F is also possible for people who have already served a sentence.⁷⁵

The above paints a picture of a rather lenient President who generally does not critically reflect on the information provided. Instead, he puts quite a lot of

71 *Redacted Public Version of Confidential Application of Paul Bisengimana's Counsel for Defence for Early Release*, 12 July 2012, MICT, MICT-12-07 (ICTR-00-60), <unmict.org/files/cases/bisengimana/defence/en/120712.pdf>, 30 December 2013.

72 Bisengimana, *supra* note 20, para. 26.

73 Bisengimana, *supra* note 71.

74 *Indictment Paul Bisengimana*, 1 July 2000, International Criminal Tribunal for Rwanda, ICTR-2000-60-I (154-99), <<http://www.unict.org/Portals/o/Case/English/Bisengimana/indictment/index.pdf>>, 30 December 2013.

75 For an elaborate discussion on the application of article 1F Refugee Convention for already sentenced perpetrators of international crimes, see Van Wijk, *supra* note 43, pp. 188-189.

trust in often unsubstantiated information provided by enforcement states and the convicts themselves. It begs the question to what extent this trust is justified. For obvious reasons, the convicts have ‘vested’ interests in demonstrating rehabilitation. But the same can to some extent be said about the enforcement states. They often bear the costs of incarcerating convicts who are generally not to be reintegrated in their societies and are to be relocated or repatriated. How relaxed would they be in the assessment of international prisoners’ behaviour and levels of rehabilitation if they were to reintegrate in their own societies?

4.2 *A Different Kind of Perpetrator*

An additional, but very different, possible explanation of the high success rate in rehabilitating ICTY and ICTR prisoners is that they are fundamentally different from perpetrators of ‘ordinary crimes’. International crimes (i.e. genocide, crimes against humanity and war crimes) can be distinguished from ordinary crimes on the basis of their large scale⁷⁶ and collective nature.⁷⁷ Social science research has pointed to the fact that international crimes take place in a context of extreme violence where the regular moral order, in which people are socialised into refraining from doing harm to others, is reversed in such a way that violence becomes the norm.⁷⁸ Destructive ideologies, often promoted by authorities, encourage people to commit violent acts.⁷⁹ Within this specific

76 For figures *see for example*: Helge Brunborg, Torkild H. Lyngstad and Henrik Urdal, ‘Accounting for Genocide: How Many Were Killed in Srebrenica?’ 19 *European Journal of Population* (2003), 236–237; or: Gérard Prunier, *The Rwandan Crisis. History of a Genocide* (Hurst & Company, London, 1995).

77 Drumbl, *supra* note 1, p. 24; Alette Smeulers and Fred Grünfeld, (2011). *International Crimes and other Gross Human Rights Violations. A multi- and Interdisciplinary Textbook* (Martinus Nijhoff Publishers, Leiden, 2011), 20; Alette Smeulers and Barbora Holá, ‘ICTY and the Culpability of Different Types of Perpetrators of International Crimes’, in Alette Smeulers (ed.), *Collective Violence and International Criminal Justice. An Interdisciplinary Approach* (Intersentia, Antwerp, 2010), p. 175.

78 Drumbl, *supra* note 1, p. 26; Smeulers and Grünfeld, *ibid.*, p. 205; Smeulers and Holá, *ibid.*, p. 203; Stathis N. Kalyvas, *The Logic of Violence in Civil War* (Cambridge University Press, New York, 2006), p. 56. There is extensive literature on (social-) psychological factors that influence the ability of ordinary people to become perpetrators of international crimes. *See for example* Albert Bandura, ‘Moral Disengagement in the Perpetration of Inhumanities’, 3 *Personality and Social Psychology Review* 1999, 193–209; Frank Neubacher, ‘How Can it Happen that Horrendous State Crimes are Perpetrated? An Overview of Criminological Theories’, 4 *Journal of International Criminal Justice* (2006), 787–799.

79 Alex Alvarez. ‘Destructive Beliefs: Genocide and the Role of Ideology’, in: Alette Smeulers and Roelof Haveman (eds.), *Supranational Criminology: Towards a Criminology of*

social context many individuals who otherwise do not display any deviant behaviour get involved in collective violence and commit international crimes. Whether they are leaders (the ones who create and nurture the social context) or followers (the ones who conform and accept the new social context and commit crimes within it), they have generally always conformed to societies' norms and are typically not characterised by a 'criminal identity'.⁸⁰

International crimes, in other words, are not committed by abnormal (deviant) and extraordinary people, but are instead first and foremost characterised by the fact that perpetrators commit crimes in abnormal and extraordinary circumstances. Once the violent context in which they organised, planned or executed criminal acts changes into a peaceful society, theory goes that the perpetrators of international crimes would adjust their behaviour accordingly. From this perspective, it is very understandable that the majority of them function well in prison, have a normal personality and good perspectives to reintegrate in society. Following this line of reasoning, conventional rehabilitation programmes developed for deviant individuals aimed to reintegrate them back into society and to facilitate a crime-free life are not appropriate for international prisoners. If they already functioned as normal, non-deviant people before they committed the crimes, they are likely to be able to function as such after being released as well. This is in particular the case if the specific context in the region in which they committed their crimes, most often the same region in which they are to reintegrate, has changed for the good.⁸¹ From this perspective it is not surprising that the tribunals conclude that the majority of international prisoners are rehabilitated.

International Crimes, (Intersentia, Antwerp, 2008), pp. 217–218; Alette Smeulers, 'Perpetrators of international crimes; towards a typology', in Smeulers and Haveman (eds.), *Supranational Criminology*, *ibid.*, p. 235.

80 Smeulers, *ibid.*, pp. 177–178. Although in practice there are many factors distinguishing one follower from the other and one leader from another leader, it suffices for the purposes of this article to roughly distinguish between leaders and followers. For a more detailed account of theories explaining group behaviour and how this may lead to participation in violence, see Henri Tajfel, *Human groups and Social Categories. Studies in Social Psychology* (Cambridge University Press, Cambridge, 1981); Robert S. Baron and Norbert L. Kerr, *Group Process, Group Decision, Group Action* (Open University Press, Buckingham/Philadelphia, 2003); Stanley Milgram, *Obedience to Authority* (Harper and Row, New York, 1974); or: Herper C. Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility*. (Yale University Press, New Haven, 1989).

81 Those convicted by the ICTY and ICTR are unlikely to face a similar context defined by large scale violence and mass involvement as the conflicts in the respective areas have

5 The Need to Adjust the Enforcement System of International Sentences and to Reconceptualise Rehabilitation of Perpetrators of International Crimes

The above gives reasons to assume that the currently used system of enforcement of international sentences and concept of rehabilitation generally suffice in dealing with perpetrators of international crimes. Although on a practical level improvements are still possible –the President could more critically assess rehabilitation related information he is provided with, the enforcement states could, for example, more systematically report rehabilitation proceedings—, on a fundamental level there does not appear to be a problem.

In actual practice, however, we simply do not know if international prisoners have been adequately rehabilitated. The ICTY and ICTR have no monitoring mechanisms in place to keep track of released prisoners. As noted by the President in the early release decision for Tharcisse Muvunyi the Tribunal “has no means to supervise convicted persons on parole or to react if conditions for early release are being violated”, adding that “early release by the Tribunal is in fact an unconditional reduction or commutation of the sentence”.⁸² In contrast to the domestic jurisdictions, the practice of setting conditions upon early release – e.g. no repetition of offences – does not exist for ICTY and ICTR convicts. After their release, the prisoners disappear from the tribunals’ radar and are ‘not of their concern’.

The fact that no monitoring system is in place is significant. There is a clear reason why states often heavily invest in rehabilitation in the post-release phase, including the monitoring of early release conditions and assistance in reintegration. Although perpetrators of international crimes may in theory not face many problems in reintegrating in society, it is certainly not a given that they will upon release, live a productive life without committing crimes or facing any practical difficulties. Anecdotal evidence suggests that a number of released persons face considerable practical problems. Miroslav Kvočka, a former *de facto* deputy commander of the Omarska camp, for example claims he cannot find a job, feels rejected by society, has lost his pension entitlements

ended. Several scholars have pointed to the unlikelihood that those convicted by the ICTY or ICTR will in a similar way become involved in international crimes. See: Bagaric and Morss, *supra* note 1, p. 248; Gavin Dingwall and Tim Hillier, ‘The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes’, 6 *International Journal of Punishment and Sentencing* (2010), p. 8; or: Hofmann, *supra* note 59, p. 841.

82 Tharcisse Muvunyi, *supra* note 35.

and fights to make ends meet.⁸³ Hazim Delić, a former deputy commander of the Čelebići camp, tried to be relocated in another country than his homeland, expressing fears for his safety upon return.⁸⁴ Others 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.⁸⁵ In this respect, the ICTY and ICTR sentence enforcement system could improve significantly by introducing a body which monitors the released whereabouts, signals problems and provides assistance if needed.

A (related and) perhaps even more complicating element which has so far not been discussed is that ICTY released prisoners often return to deeply divided societies which are—even years after the atrocities have taken place—still dealing with the legacy of a destructive war and genocide. The President's assessment of prisoners' rehabilitation efforts and future reintegration opportunities are, however, only focused on the convicts' individual position.⁸⁶ Can the individual rehabilitation process of international perpetrators in a Swedish or Spanish vacuum be successful without reflecting on the society (s)he is to return to? Does it accurately address the collective nature of the crimes (s)he committed, the destruction of social fabric (s)he was part of and the still profound ethnic or religious divisions in the society (s)he may (or may not) return to? And how does it relate to the tribunals other (sentencing) goals of retribution and reconciliation?

One only has to review the early release process of Biljana Plavšić or Veselin Šljivančanin to understand the possibly detrimental consequences of the tribunals' limited take on rehabilitation for the reconciliation processes in the former Yugoslavia.⁸⁷ Based on former President of Republika Srpska Plavšić's

83 <www.balkaninsight.com/en/video-clip-template/episode-26-life-of-the-convicted-war-criminals-what-after-a-long-term-prison-sentence>, 1 July 2013; A. Sorguc: Life After Prison for Bosnia's War Criminals. On file with the authors.

84 *Public redacted Version of Decision of Hazim Delić's Motion for Commutation of Sentence*, 24 June 2008, ICTY, IT-96-21-ES, para. 15.

85 Van Wijk, *supra* note 43, pp. 188–189.

86 In the few instances the President did refer to the wider societal context in which a prisoner is to reintegrate, he generally did not link it to reconciliatory concerns. See Haradin Bala, *supra* note 33, para. 22; Blagoje Simić, *supra* note 39; Milomir Stakić, *supra* note 38, para. 30; *Decision of the President on Sentence Remission of Goran Jelisić*, 28 May 2013, ICTY, IT-95-10-ES, para. 30; *Decision of President on Early Release of Dragan Zelenović*, 21 October 2011, ICTY, IT-96-23/2-ES, para. 28 and Dragan Zelenović, *supra* note 43.

87 Jelena Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague', 36 *Southeastern Europe* (2012), p. 40; or: Claus Kress and Göran Sluiter, 'Enforcement: Preliminary Remarks' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of*

own accounts in her early release request, the President of the ICTY considered that “[b]y accepting responsibility and expressing her remorse fully and unconditionally, Mrs. Plavšić hopes to offer some consolation to the innocent victims (...) of the war in Bosnia and Herzegovina”.⁸⁸ Directly after her release, Plavšić was picked up by a governmental plane, flown to Belgrade, welcomed by the prime minister, and offered an office in the country’s senate.⁸⁹ When granting her early release, the President was probably unaware that during her imprisonment Plavšić had also given two interviews retracting her expression of remorse, and written two volumes in which she, according to Subotić, expressed

a remarkably clear worldview of an unrepentant nationalist, whose collectivist understanding of ethnicity, race, and politics demonstrates a profound lack of rehabilitation and a strong rebuttal to the ICTY’s handling of her guilty plea, sentencing, and early release.⁹⁰

In a similar vein, Veselin Šljivančanin, a former major in the Yugoslavian army, became a celebrated war time hero, wrote a bestselling book about his ‘unfair’ treatment at the tribunal and became a public figure frequenting TV shows and providing interviews in one of which he claimed that he would “do everything the same he did, and he would go to Vukovar to fight again”.⁹¹

For released individuals it is obviously not forbidden to deny having committed any crimes, nor is it to become public figures and to state that they would act in the very same manner all over again. At the same time such statements for obvious reasons outrage victim groups,⁹² tear open old wounds and possibly create instability in an already fragile region. In the absence of specialised rehabilitation programmes which seriously address the nature of international crimes, profoundly confront perpetrators with the shortcomings and effects of destructive nationalist or ethnic ideologies, and make them

International Criminal Court: A Commentary (Oxford University Press, New York, 2002), p. 1753.

88 *Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić*, 14 September 2009, ICTY, IT-00-39&40/1-ES, para. 8.

89 <dalje.com/en-world/dodik-will-give-plavsic-office-in-the-senate/281001>, 30 December 2013; <www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=10&dd=28&nav_id=62644>, 30 December 2013.

90 Subotić, *supra* note 87, p. 50.

91 <www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1216416/%C5%A0ljivan%C4%8Danin%3A+I%C5%A1ao+bih+u+Vukovar.html >, 30 December 2013.

92 Subotić, *supra* note 87, p. 40.

reflect on the consequences of their crimes, it comes as no surprise that some of the perpetrators continue to justify their crimes and adhere to the same (destructive) world-view as during the conflict.

If the tribunals are serious about successfully rehabilitating its convicts and reintegrating them in post-conflict regions, they may consider re-conceptualizing the traditional notion of rehabilitation and tailor it to the specifics of international crimes, their perpetrators and the societies they come from. Using the conventional concept of rehabilitation, as the tribunals currently do, may in this regard not suffice. Instead, we suggest putting more emphasis on the promotion of 'healing damaged relationships,' an element which has historically been at the heart of modern penal systems, but in more recent years became largely overshadowed by the 'what works approach' and the focus on less re-offending.⁹³ The development of such a new concept and related rehabilitation activities is complex and needs much more research and analysis. But as a start, one could think of making more serious efforts to actively 'de-ideologise' perpetrators, confront them with the impact of their crimes by for example organizing mediation sessions with victims or by setting certain specific conditions upon release.

Changing the perspective of these perpetrators may, as Subotić writes, be incredibly difficult and unlikely.⁹⁴ But that in itself is no argument not to try. It is similarly difficult to hold the most responsible perpetrators of international crimes accountable, to deter future perpetrators from committing such crimes, and to provide justice to victims. The goals of international criminal justice are by definition set high.

6 Conclusion

On the basis of an empirical analysis, this article discussed how the ICTY and ICTR define and measure the level of rehabilitation of international prisoners. To do so, we analysed 71 early release decisions issued by the Presidents up till July 2013. We concluded that the Presidents use many factors in assessing the level of rehabilitation that generally fall within the conventional conceptualization of rehabilitation. Although these factors are mentioned inconsistently, they can be roughly divided into four categories: Conduct in prison, future perspectives, reflection on crimes and personal characteristics.

93 Raynor and Robinson, *supra* note 3, p. 4.

94 Subotić, *supra* note 87, pp. 40–41.

Surprisingly, the President has nearly always concluded that international prisoners were sufficiently rehabilitated to qualify for early release after having served two-thirds of their sentence. Possible explanations for this high success rate are the fact that the President only to a very limited extent critically evaluates underlying sources demonstrating the level of rehabilitation and the fact that perpetrators of international crimes are generally 'non-deviant' persons who committed crimes in extraordinary circumstances.

We argued that various practical steps can be taken to improve the tribunals' rehabilitation practice and policy. The President could for example more critically assess rehabilitation related information he is provided with and provide more concrete guidelines with respect to what is expected of enforcement states with regard to such reports. The enforcement states could on the other hand more systematically report rehabilitation proceedings. But we also indicated shortcomings of the current system on a more fundamental level. Because currently no steps are taken to monitor whether international prisoners in actual practice prove to be adequately rehabilitated, we suggested introducing a body which monitors (early) released prisoners' whereabouts, signals problems and provides for assistance if needed. Since released prisoners are to reintegrate in an often deeply divided and sensitive post-conflict society, we suggested to reconceptualise the notion of rehabilitation in the context of international crimes, and to develop rehabilitation programmes which could be beneficial in promoting healing of damaged relationships.

Since many more ICTY and ICTR prisoners will in the near future become eligible for early release, a critical analysis of rehabilitation practices is required. Moreover, the International Criminal Court (ICC) has adopted an enforcement system which is similar to that of the ICTY and ICTR (Article 103–107 of the Rome Statute) and the ICC will thus be faced with the same theoretical and practical issues raised in this article. The ICC's Rules of Procedures and Evidence suggest that it will more clearly link early release to issues of reconciliation.⁹⁵ Finally, national states are increasingly confronted with the matter of rehabilitation in the process of convicting perpetrators of international

95 Criteria for reviewing a reduction of sentence are (a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) The prospect of the resocialization and successful resettlement of the sentenced person; (c) Whether the early release of the sentenced person would give rise to significant social instability; (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; and (e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age (Article 110 and Rule 223).

crimes.⁹⁶ A proper understanding on how to rehabilitate perpetrators of international crimes is also in this regard needed. With rehabilitation being a well-consolidated sentencing purpose in many countries across the world,⁹⁷ the question is not whether or not rehabilitation should remain included as a goal of international criminal justice, but rather what form it can or should have in this particular context.

96 Joseph Rikhof, 'Fewer places to hide? The impact of domestic war crimes prosecutions on international impunity', 20 *Criminal Law Forum* (2009) 1–51.

97 Van Kalmthout and Durnescu, *supra* note 3, p. 47. Elaine Genders and Elaine Player, 'Rehabilitation, risk management and prisoners' rights', 14(4) *Criminology and Criminal Justice* (2014) 434–457, 435–436. or: Tony Ward, 'Human Rights and Dignity in Offender Rehabilitation', 11 *Journal of Forensic Psychology Practice* (2011) 112–113.