Memorandum

Rehabilitation as a Sentencing Goal in International Criminal Justice

by Katie Smith

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Introducing Rehabilitation

Defining Rehabilitation

The aim of rehabilitation is to restore someone to a useful place in society. It attempts to remove the desire to offend, and then tries to return the offender to society (Hudson, 1996). Rehabilitation can thus be understood as involving two aspects: the rehabilitative process, i.e. individualised programmes aimed at reducing criminogenic risk factors, and the rehabilitative outcome, the individual's ability to be reintegrated into society (Kelder, Holá and van Wijk, to be published). Rehabilitation is based upon the assumption that individuals are not inherently or permanently criminal, and that it is possible to change offenders so that they make a positive contribution to wider society. Rehabilitation may involve a range of measures including treatment for afflictions such as mental illness, drug dependency, and chronic violent behaviour. It may also include the use of educational programmes which give offenders the knowledge and skills required to get a legitimate job (Cavadino and Dignan, 2002), cognitive behaviour programmes designed to increase offenders' awareness about their offending behaviour and liaising with family to build strong support networks to assist the offender in re-joining society (Campbell, 2005).

The concept of rehabilitation as a justification for punishment stems from utilitarianism philosophies, which aim to maximise happiness and reduce suffering (1789, as cited in Cavadino and Dignan 2002). The utilitarian approach views punishment as defensible only when the suffering caused is outweighed by the resulting gains for the society, i.e. the resulting reduction in crime through deterrence, incapacitation or rehabilitation of criminals. As such, rehabilitation, like all the utilitarian justifications, looks to the future and rationalises punishment though the anticipated outcome: it views punishment as a means to an end.

The concept of rehabilitation has taken on many different meanings and encompassed many different methods throughout the years and between countries, with varying levels of public and political support. In Europe, many penitentiaries in the 19th Century aimed to rehabilitate offenders through silence and isolation which, it was thought, would allow them to cleanse and transform themselves into productive citizens (Irwin, 1980). Hard labour was added to assist with the meditative process, before the trend towards medically based interventions at the start of the 20th Century changed what was viewed as suitable rehabilitative measures for offenders. This phase was characterised by the use of drugs and surgery to change offender's behaviour and rehabilitate them. More recently, the focus has shifted towards educational, vocational and psychologically based programmes, alongside a range of specialised services to address individual problems (Campbell, 2005).

Criticisms of Rehabilitation

The concept of rehabilitation has received much criticism both on a theoretical and a practical level. It has been argued that rehabilitation proposes a deterministic view of human nature, removing individual agency and treating offenders as sub-human (Duff, 1986, as cited by Hudson, 1996). Additionally, rehabilitation presents the problem that two offenders may end up serving different amounts of time in prison for the same offence, according to their response to treatment, their progress on rehabilitative programmes, and the discretion of parole boards and judges who must tailor the sentence to the offender (Hudson, 1996). These factors have led critics to claim that the rehabilitative sentencing principle infringes on the rights of the offender. Furthermore, the concept has been criticised as it assumes that offending is abnormal and irrational, and therefore requires treatment or interventions however there are many examples when this is not the case: the benefits of committing a crime may far outweigh the potential negative consequences to the perpetrator. In those circumstances, which are likely to be particularly prevalent within the context of international crimes, the act is not irrational or abnormal. Rehabilitation has also been criticised for its lack of effectiveness in reducing reoffending. Martinson (1974, as cited in Hudson 1996) argued that rehabilitative efforts were futile, with programmes being both expensive and having little impact on reoffending rates. Additionally, the rehabilitative model has been criticised for supporting intrusive treatments. The large number of risk factors means that interventions would have to intervene in virtually every aspect of the perpetrator's life in order to be effective.

Rehabilitation as a Sentencing Principle

Domestic Sentencing

The rationales and trends in sentencing vary not just over time but also between different states and depend greatly upon the specific penal culture of that time and place (Hola and van Wijk, 2013). Certain states are more focused on rehabilitation than others which instead may view punishment as having a predominantly punitive role. The result is huge variations in prison conditions and opportunity for rehabilitation.

In spite of the differences between states in their scope for rehabilitation, there are some minimum standards provided for under international human rights law. The UN's Standard Minimum Rules for the Treatment of Prisoners (1955) addresses the requirement of rehabilitation, with Rule 61, emphasising the need for rehabilitation of prisoners, their participation in the community, and maintaining relationships between the prisoner and their family and social agencies, and Rule 75 limiting the working hours of prisoners to allow for their participation in rehabilitative programmes. The European Prison

Rules (Council of Europe, 2006) also emphasise the importance of rehabilitation for prisoners (Rule 17.1) by recommending that prisoners are located near to establishments which provide these services. The International Covenant on Civil and Political Rights (1966), goes further, and creates obligations for states regarding the rehabilitation of prisoners. Article 10(3) of the Covenant states that "the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation" thereby asserting that States must provide some level of rehabilitation for prisoners and ought not to have penitentiary systems of a purely retributive nature.

The national criminal codes of the Former Yugoslavia, Rwanda and Sierra Leone differ in the emphasis they place on rehabilitation. Article 33 of the Criminal Code of the Former Yugoslavia on the purpose of punishment includes "preventing the offender from committing criminal acts and his rehabilitation" as one of the aims of sentencing. The Criminal Code of the Federation of Bosnia and Herzegovina also list rehabilitation of the perpetrator as a purpose of the punishment (Article 6), as does the Criminal Code of the Republic of Serbia, particularly in reference to juvenile offenders (Article 4). The Criminal Codes of Croatia (Articles 9 and 85) and also of the Republic of Serbia (Article 97) have a alternative interpretation of rehabilitation. They state that whilst prisoners do have a right to rehabilitation this is in reference to their reintegration, whereby rehabilitation means that their sentence may be removed from their records providing they have met certain conditions, such as desisting from further offending and so forth. In Rwanda, the majority of sentences were given by the Gacaca Courts, which did not generally place much importance on rehabilitation as a principle of sentencing (Carter, 2008). Nonetheless, Community Service was introduced as an option for Gacaca Courts in 2001, which would in theory aid the rehabilitation and reintegration of those perpetrators who had admitted their guilt through truth-telling (Bornkamm, 2012). The Criminal Code of Rwanda refers to evidence of rehabilitation as factor when considering early release (Article 101), and similar to the codes of Croatia and Republic of Serbia, also refers to rehabilitation in relation to the removal of the perpetrators criminal record following the completion of their sentence (Articles 67 and 142). In regards to Sierra Leone, there is limited information available regarding the sentencing principles applied at the national level, hence it is not possible to comment on their interpretation of rehabilitation.

International Sentencing

The ad-hoc Tribunals were set up by the United Nations' Security Council with the key purpose to "contribute to the restoration and maintenance of peace" and "the rule of law" in the Former Yugoslavia and in Rwanda (Security Council Resolutions 827 and 955). Within this backdrop, the Judges of the Tribunals developed sentencing goals; the primary principles of which are retribution and deterrence (van-Zyl-Smith, 2005). Nonetheless, the sentencing goals of the Tribunals do not exclude

other considerations, instead in order to achieve restoration or peace, the traditional principles of retribution, deterrence, rehabilitation and prevention may be applied. The extent to which each one is relevant however, is a largely a subjective matter, and as is pointed out in the Erdemović judgment, "the importance and appropriateness of each of these change with time and from one legal system to another. In addition, punishment often appears to serve several purposes, the relative weight of which depends on the nature of the crime and the individual circumstances of the perpetrator" (para. 60).

Although there is only limited literature available on the principles applied in international sentencing, multiple references have been made to the notion that within this realm, rehabilitation should be seen as one of the goals of the penitentiary, rather than as a sentencing principle per se (Mulgrew, 2009; van-Zyl-Smit, 2005 and Culp, 2011). Thus, Mulgrew (2009) argues that rehabilitation does add to the justification of sentencing the perpetrator to imprisonment in the first place, but above all it influences the operations and sentence planning within the penitentiaries. The goals of the prison systems must reflect their obligations under the international treaties and covenants discussed above. This system of distinguishing between the rationale behind punishment and the subsequent goals of its implementation has been criticised by Culp (2011), who claims that it leads to conflicts between the Court and the penitentiary systems enforcing their sentences. Such an out-sourcing of rehabilitation allows the international Courts and Tribunals to avoid the problematic issue of how best to rehabilitating international perpetrators. It also results in differences in the accessibility of rehabilitative opportunities, dependant on where the international prisoner is serving their sentence.

Regardless of whether or not rehabilitation is predominantly viewed as a principle of sentencing or as a goal of the penitentiary, or indeed, as the goals of both institutions, the rehabilitation of perpetrators of international crimes raises some unique problems. Hola and van Wijk (2013) suggest that even if the perpetrator is imprisoned in a country which does provide for rehabilitation of domestic prisoners, there remain a number of factors which may limit the success of rehabilitating perpetrators of international crimes. These include being kept in high security prisons (often rehabilitative programmes are offered only in prisons of a lower security level); not speaking the language programmes are conducted in; not being suitable for programmes tackling 'ordinary' offenders, and not having access to suitably trained staff.

Rehabilitation in the Sentencing Judgments of the ICTY, ICTR and SCSL

How often is Rehabilitation mentioned?

Across the three international Courts, rehabilitation was mentioned as one of the principles the judges considered in determining the sentence in 56.5% of the perpetrators' sentencing judgments (Figure 1). While the frequency rehabilitation in which was listed as a sentencing principle did not vary much between the ICTR (57.4%) and the ICTY (51.6%), the SCSL stands out, as rehabilitation was mentioned in 100% of the judgments.

	Total number of cases	Rehabilitation mentioned as a principle of sentencing
ICTY	91	47 (51.6 %)
ICTR	61	35 (57.4 %)
SCSL	9	9 (100 %)
Total	161	91 (56.5 %)

Figure 1: Frequency in which rehabilitation mentioned as a sentencing principle.

Definitions and Explanations of Rehabilitation

ICTY

The majority of the judgments from the ICTY do not go into any detail about the sentencing principle of rehabilitation. Instead they just refer to it as one of the principles considered by the Chamber without any elaboration, other than to say it ought not be considered as overly important or significant, or by referring to the Criminal Code of the Former Yugoslavia. Those judgments which do provide a more extensive discussion, suggest that the aim of rehabilitation is to reintegrate the perpetrator into society (, para. 46; Mrđa, para. 18; and Delić, Landžo and Mucić, para. 1233). The sentencing judgment for Delić, Landžo and Mucić (para. 1233) states the additional aims of producing useful members of society and allowing perpetrators to have normal and productive lives following their release from imprisonment.

The aims of rehabilitation are supposed to be achieved through the process of rehabilitation, which is said to "encompass all stages of the criminal proceedings, not simply the post-conviction stage" (Nikolić, para. 93 and Obrenović, para. 53). It is hoped that being exposed to the victims' experiences and stories (Nikolić, para. 93 and Obrenović, para. 53), along with the loss of freedom provides the context for which the perpetrator to reflect on their crimes, and thus better understand the suffering of their victims (Mrđa, para. 18 and Babić, para. 46). This in turn will help them to refrain from acting in the

same way if presented with a similar situation in the future. In addition, this change is supported by the expressive function of the sentence: the perpetrator is further encouraged down the rehabilitative path by the seriousness with which society regards their crimes.

Throughout the sentencing judgments, there is very little discussion of which factors make a perpetrator a suitable candidate for rehabilitation, nor regarding which factors are considered important in deciding whether rehabilitation is a suitable sentencing principle. The only time the ICTY touches on this subject is in the Delić, Landžo and Mucić sentencing judgment (para. 1233), in which it says that the age of the accused; their education; their circumstances and ability to be rehabilitated; and the availability of facilities through which the rehabilitative process can take place are relevant considerations.

ICTR

Whilst the ICTY's explanations regarding rehabilitation in the sentencing judgments are limited, the ICTR's explanations are virtually non-existent. Only one of the judgments does anything other than list rehabilitation as one of a number of sentencing principles considered by the Tribunal. Nonetheless, this judgment also does not provide much detail regarding the aims, methods or factors influencing the success of rehabilitation, instead Vincent Rutaganire's judgment just suggests that the Chamber ought to consider whether or not the perpetrator has the ability to be rehabilitated, and that the rehabilitative process is likely to assist his reintegration into society (para. 113).

SCSL

Like the above discussed Tribunals, the SCSL also does not provide much information about the aims and methods of rehabilitation, nor the factors which make a perpetrator particularly suitable for the process. The only guidance regarding the definition, aims and purpose of rehabilitation comes from the Sesay, Gbao and Kallon Trial Chamber Judgment which states that "Rehabilitation as a goal of punishment means the restoration of the convicted person to a state of physical, mental and moral health through treatment and education, so that he can become a useful and productive member of society" (para. 16). When the case came to the Appeals Chamber, the defence for Kallon suggested that his personal circumstances, namely being married to three wives and having nine young children, increases his likelihood of being successfully rehabilitated.

Relative Importance of Rehabilitation as a Sentencing Principle

Despite rehabilitation being mentioned in over 55% of cases, in 50% of those cases, the Judges argue that rehabilitation was less important than the sentencing principles of retribution and deterrence, or less important than within domestic jurisdictions (Figure 2). This differed between the three courts, both

in the frequency in which it occurred and in the language used. The ICTY judgments stated that rehabilitation was of "limited relevance" (Banović, para. 35) or was a factor which should not be given "undue weight" (Nikolić, para. 133; Deronjić, para. 143; Bralo, para. 22; Delić, para. 559; Martić, para. 131; Milošević, para. 987; and Ojdanić, para. 1146) in 61.7% of perpetrator's judgments. In just over 22% of cases in the ICTR, sentencing was said to reflect the aims of rehabilitation "to a lesser extent" (Bikindi, para. 443; Rukundo, para. 593; and Bizimungu, Ndindiliyimana, and Nzuwonemeye, para. 2174) than the principles of retribution and deterrence. In the SCSL, comparison was made to sentencing in domestic courts, with the judgments stating that rehabilitation was given less consideration in determining the sentence in SCSL as compared to sentencing in national jurisdictions.

	Rehabilitation mentioned as a principle of sentencing	Rehabilitation given less importance than other principles of sentencing
ICTY	47	29 (61.7%)
ICTR	35	8 (22.9%)
SCSL	9	9 (100%)
Total	91	46 (50.5%)

Figure 2: Frequency in which Rehabilitation given less importance than other principles of sentencing.

Some guidance in understanding why, in certain cases, rehabilitation is assigned less importance is provided in a few of the sentencing judgments from the ICTY, who come up with three main explanations. Firstly, the Court is limited in its sentencing options: it may only sentence perpetrators to a period of imprisonment (Kunarac, Kovač and Vuković, para. 844). This is distinct from many domestic Courts who may have the option of sentencing the perpetrator to rehabilitative programmes, community supervision, drug or alcohol rehabilitative programmes and so forth. As the Chamber notes in the judgment, imprisonment is not compatible with the aims of rehabilitation, and thus ought not to be given excessive significance. Another explanation given is that the Tribunal is not in a position to influence the rehabilitative programmes available, and thus the scope of such programmes is dependent upon the state supervising the prisoner, rather than on the Tribunal itself (Kunarac, Kovač and Vuković, para. 844).

As further explanation for why less importance is assigned to the principle of rehabilitation, the ICTY suggests that the gravity of international crimes rules out the possibility of rehabilitation. The nature of the crimes means that priority is given to stigmatising the acts and deterring similar crimes (Erdemović, para. 66). In the Kordić and Čerkez (para. 1079) sentencing judgment, it is suggested that rehabilitative considerations are not compatible with the principle of proportionality and the sentencing

principles of retribution and deterrence. This is due to rehabilitative sentences placing emphasis on the needs of the offender and on their reintegration into the community, whereas the principles of retribution and deterrence demand more punitive punishments. This latter point is also found in judgments from the SCSL. In the majority of these Judgments, the main aims of sentencing as given in Security Council Resolution 1315 (2000), are reiterated. It is then argued that the aim to "end impunity and … contribute to the process of national reconciliation and to the restoration and maintenance of peace" (Kamara, Brima and Kanu, para.. 17; Fofana and Kondewa, para.. 29) are the key principles; hence rehabilitation can be conceived as secondary to this.

Although the ICTY and SCSL provide some general explanations for the lesser significant of rehabilitation, they do not provide any explanations for the differences between cases within the Court. The ICTR also does not discuss in its sentencing judgments why in some cases it views rehabilitation as a less importance principle. Whether the differences between the Courts, and between cases within the ICTY and ICTR reflects anything more than differences in the style of Judges (or of their legal assistants), or reflects more significant differences in the intended aims of sentencing is, at the moment, unclear. Further analysis could start to address this question.

Rehabilitation and the Guilty Plea

Some of the judgments suggest a link between a guilty plea in the courtroom and the perpetrator's potential for rehabilitation. In four of the cases, the Judgments state that by pleading guilty, the accused is taking "an important step" in the process of rehabilitation (Rutaganira, para. 114; Češić, para. 28; Mrđa, para. 19; and Babić, para. 46). In the Rutaganira judgment, it is argued that the "admission of guilt … shows the resolve of an accused to accept responsibility vis-à-vis the injured party and society as a whole" (para. 114). The three ICTY cases also argue that it is the perpetrator's acknowledgment of their responsibility towards both society and the specific victims which aids the rehabilitation process (Češić, para. 28; Mrđa, para. 19; and Babić, para. 46). In each instance, reference is made to paragraph 93 of the Nikolić sentencing judgement, which proposes that rehabilitation should be viewed broadly and that it "can encompass all stages of the criminal proceedings".

The idea that perpetrator's acknowledgment of responsibility for their crimes is linked to successful rehabilitation is also found within domestic sentencing, which may even argue that if the perpetrator does not plead guilty, they have not demonstrated a sincere interest in rehabilitation (Vetri, 1964). This in turn, may encourage guilty pleas as rehabilitative sentences in the domestic sphere have a tendency to be more lenient, often including community punishments. On the other hand, Newman (1956) argues that sentencing following a guilty plea is more often determined by the skills of the offender or his

lawyer in plea bargaining, rather than on factors which may suggest the importance of rehabilitation for the individual perpetrator. Nonetheless, an acceptance of guilt, at least in part is often required for admission onto a rehabilitative programme (Kaden, 1998), supporting the view that a guilty plea can aid the process of rehabilitation.

In the context of the International Courts and Tribunals, it may be that plea bargaining also had an important role, particularly considering that many people felt that once someone was accused by such a Tribunal, it was highly unlikely that they would ever be acquitted (Suboitić, 2012). The perception that pleading guilty leads to a more lenient sentence may have placed additional pressure on the accused to do so and to acknowledge responsibility even if it was not genuinely felt, such as Suboitić asserts is the case for Biljana Plasvšić, whose statement of remorse was met with disbelief. On the other hand, such scepticism may not be warranted, as the guilty pleas may have reflected a genuine sense of responsibility and desire to change, which is likely to aid the process of rehabilitation.

Reflection

The extent to which rehabilitation can be seen as a sentencing principle of the ICTY, ICTR and SCSL, as a goal of the penitentiary system, or as a combination of both is a debate which requires further discussion and analysis. On the one hand, the fact that a large proportion of the sentencing judgments do list rehabilitation as one of their sentencing principles suggests that rehabilitation has got a role to play, albeit a less influential role than retribution or deterrence. If this is so, more consideration needs to be given to how the aims of rehabilitation can best be achieved within such a context: how can a perpetrator of international crimes be rehabilitated; what are their specific needs; how can we assess whether someone has been rehabilitated and so forth. On the other hand, as rehabilitation is not compatible with the other sentencing goals, and there are limited options available to the International Courts in the sentences they may impose, one may conclude that rehabilitation is a problem best left to the national penitentiary systems, who may or may not be in a position to deal with such a perpetrator.

Regardless of precisely where the aims of rehabilitation come into play, it is nonetheless used by the International Tribunals to support the early release of prisoners. Consequently, more attention ought to be paid to the specific context of international crimes; the types of perpetrators involved and the best ways to meet their specific rehabilitative needs, along with how best to measure success in rehabilitating perpetrators of international crimes. Should it be concluded that there are substantive differences in their rehabilitative needs, the possibility of specific staff training and the development of a specialised rehabilitative programme ought to be discussed. Further investigation could also look in more depth at the reasons behind the different levels of importance assigned to rehabilitation as a principle of sentencing in

order to better understand when rehabilitation is deemed to be an appropriate response to an international crime.

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