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Releasing International Prisoners

Róisín Mulgrew

This book looks at who should release and how. The majority of chapters look at this issue from the perspective of national criminal justice systems. There is also, however, a functioning international criminal justice system with an international prisoner population to be considered for release. This chapter will focus on the release systems of two international judicial institutions, the United Nations Mechanism for International Criminal Tribunals (MICT) and the International Criminal Court (ICC). The MICT was created by the UN Security Council,¹ and one of its core functions is to supervise the sentences of imprisonment imposed by the temporary International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).² In addition to making release decisions for persons the MICT convicts, the MICT President is also tasked with making release decisions for persons convicted by the ICTY and ICTR.³ The ICC, the worlds' only permanent international criminal court, was established by a multi-lateral treaty signed by one hundred and twenty nations in 1998.⁴

The creation of international criminal courts facilitated the punishment of individuals responsible for the commission of war-time atrocities. All of the aforementioned courts use imprisonment as their primary penalty.⁵ Given the inevitability of international criminal courts imposing lengthy custodial sanctions, it may come as a surprise to many that there is no international prison. While the remand centres of the ICTY and ICTR did house sentenced international prisoners,⁶ the primary system for the enforcement of international sentences of imprisonment involves transferring convicted persons to cooperating states to serve their sentences.⁷

While enforcing states are responsible for the day-to-day implementation of international sentences of imprisonment, the international courts retain responsibility for the supervision of enforcement. A key aspect of this supervision is release. Irrespective of where international sentences of imprisonment are served, the power to make release decisions is exclusively granted to the senior international judges of the sentencing courts. At first glance, therefore, the international release system appears to operate on the basis of international judicial discretion. Further analysis, however, reveals that this description is too simplistic. It omits consideration of the constraints placed on judicial discretion by statutory, regulatory and treaty provisions. Moreover, it fails to take account of the unique context in which the international judiciary must operate and the potential influences that can arise in a penal system totally reliant on voluntary state cooperation.

This chapter begins by setting out the legal framework governing release decisions at the MICT and ICC and proceeds with discussions of key elements of this framework, namely, eligibility for release, the procedure used to make release decisions and the criteria that judges have to consider in reaching their decision. It also analyses the subtle yet strong potential influence that states can have on the exercise of judicial discretion in the international criminal justice system.

1 The Legal Framework Governing International Release Decisions

Although international judges are tasked with determining if an international prisoner should be granted release, the decision-making process is governed by a legal framework established in the statutes, rules, practice directions and bilateral enforcement agreements of the international criminal courts. As the international criminal justice system lacks a legislature, this legal framework has developed differently from those in most national criminal justice systems.

1.1 MICT

The legal framework governing release decisions at the MICT is virtually identical to the framework governing release decisions at the ad hoc tribunals. Like the ICTY and ICTR,⁸ the MICT was created by the UN Security Council and its statute was annexed to the resolution which established it.⁹ The statute contains two key provisions relevant to international release decisions. The first states that the enforcement of punishment by states is subject to supervision by the MICT.¹⁰ The second notes that only the MICT President can make decisions relating to pardon and commutation of sentence.¹¹

Due to the lack of detail in these statutory provisions, it was necessary to elaborate on the release procedure elsewhere. Like the judges of the ad hoc tribunals,¹² MICT judges were empowered to adopt the MICT's rules of procedure and evidence.¹³ Part Nine of the MICT rules contains three provisions relevant to the pardon and commutation of sentence or early release¹⁴ (dealing with notification by states, determination by the President and general standards for granting pardon or commutation of sentence, or early release) which mirror the ad hoc tribunals' rules.¹⁵

Whereas the judges of the ad hoc tribunals granted themselves the power to amend the rules,¹⁶ the MICT judges were granted the power to amend the rules by the UN Security Council.¹⁷ The MICT judges can amend the rules remotely using a written procedure if thirteen judges agree or by the majority of judges approving amendments in a plenary session convened by the President.¹⁸ These amendment powers were regularly used by the judges of the ad hoc tribunals: the ICTY rules were amended three times a year on average.¹⁹ On the one hand, the delegation of broad powers to the ad hoc tribunal judges to write and amend their own rules has been defended as a necessary means of creating the procedure required to ensure the functioning of international tribunals that did not have the benefit of relying on established criminal codes or practice.²⁰ On the other hand, the grant of legislative power to judges that act without oversight or, indeed, any obligation to make the reasons for their amendments public,²¹ has been severely criticised on the grounds that such power threatens the independence of the judiciary and infringes upon the principles of separation of power and legality.²² Against this background, the power of the MICT judges to amend the rules is controlled internally by the need to ensure that amendments are consistent with statutory provisions²³ and that they cannot operate to prejudice the rights of accused, convicted or acquitted persons in a pending case,²⁴ but also externally by executive control in the shape of the potential veto of proposed amendments by the UN Security Council.²⁵

Despite this enhanced external control over the legislative powers of the MICT judges, the rules empower the MICT President to issue Practice Directions addressing detailed aspects of the conduct of internal proceedings.²⁶ President Meron used this power to adopt a 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 Mechanism²⁷ (PDER), which was drafted on the basis of the Practice Directions of the ICTY and ICTR.²⁸ While the rules state that the President must consult with the Registrar and Prosecutor and ensure that the practice direction is consistent with the statute and rules,²⁹ the ability to write internal procedure can have significant results. In the release context, this power enabled the individual responsible for making release decisions to create a procedure whereby his decision is final and not subject to appeal.³⁰

Provisions relating to release can also be found in the agreements entered into by cooperating states and the sentencing tribunals. The UN delegated authority to the Registrars of the ad hoc tribunals to enter into enforcement agreements with states on its behalf. Enforcement agreements outline the core conditions that will govern the bilateral relationship, including release. The ICTY³¹ and ICTR³² enforcement agreements, and their provisions on release, will remain in force for the MICT.³³

1.2 International Criminal Court

The relevant sections of the ICC's statute and rules are more detailed than those of the ad hoc tribunals or MICT. Part Ten of the ICC Statute deals with 'review concerning reduction of sentence' rather than pardon or commutation of sentence (MICT). Pardon was not deemed to be appropriate for

persons convicted by the ICC. The statute clearly states that sentences of imprisonment are binding on enforcing states and the right to decide any reduction of sentence is reserved exclusively to the Court.³⁴ The central provision on release, Article 110, establishes temporal eligibility thresholds,³⁵ sets out the procedure for reviews and some of the factors that should be taken into account.³⁶ The criteria to be considered and the procedure for initial and subsequent reviews are further elaborated on in Rules 223 and 224 of Section V of the rules.

The ICC's legal framework can be differentiated from that of ad hoc tribunals as the adoption and amendment of the rules has been reserved to the court's management, oversight and legislative body. The adoption of and any amendments to the rules require approval from a two-thirds majority of the Assembly of States Parties.³⁷ While a two-thirds majority of ICC judges can draft provisional rules to deal with situations not covered by existing rules in urgent cases, these can also be rejected, adopted or amended by the Assembly of States Parties.³⁸ All rules and any amendments to them must be consistent with the statute and if there is a conflict, the statute will prevail.³⁹

While there was no statutory requirement for the ICC to enter into enforcement agreements, their conclusion was permitted by the rules.⁴⁰ To date, the ICC has secured eight agreements with countries located in Europe, Africa and South America.⁴¹ Like the MICT's agreements, these agreements contain provisions which relate to the release process.

1.3 Conclusion

As D'Ascoli notes, 'the international system does not have legislative or political structures comparable to those of domestic jurisdictions... [therefore] it is actually the executive and the judiciary that create the laws and rules of procedure'.⁴² The ability of the judges at the MICT and ICC to amend the procedure relating to release is constrained by executive or quasi-legislative oversight and the requirement to ensure proposals are consistent with statutory provisions. While these measures will help to ensure the on-going legal certainty of the release process,⁴³ changes may result from practice directions, policy documents or precedent. The legal frameworks of both the MICT and ICC deal with three key elements of the release process; eligibility for release, the release decision-making procedure and the factors to be considered. The following sections will discuss these elements in greater detail.

2 Eligibility for Release

Although there is no right to release in the international criminal justice system, all of the modern international criminal courts have established procedures that enable international judges to consider whether international prisoners should be granted a commutation or reduction of sentence. Although persons convicted by the ICTY, ICTR and MICT are, in theory, eligible for pardon under the domestic law of enforcing states,⁴⁴ this has not occurred to date and, as Klip notes, there are unlikely to be impassioned calls for mercy to be shown to international criminals.⁴⁵ As the drafters of the Rome Statute felt that pardon was inappropriate for persons convicted of international crimes,⁴⁶ ICC prisoners are limited to applying for a revision of their conviction or sentence,⁴⁷ or a reduction of their sentence.⁴⁸ The practice of the ad hoc tribunals has demonstrated that what is applied for, and what is granted, is early release.⁴⁹ In reality, neither the sentence is reviewed⁵⁰ nor is a reduced sentence imposed. Moreover, without a police force, parole or probation system, there are no realistic possibilities of supervising released persons or imposing conditions that could result in revocation and a return to detention. Release in the international criminal justice system is therefore an irreversible and unconditional form of release that results in complete freedom.⁵¹ The following sections analyse how and when prisoners become eligible for release at the MICT and ICC.

2.1 MICT: Eligibility for Pardon, Commutation of Sentence or Early Release

Article 26 of the MICT Statute states that 'if, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for

pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly'. The legal framework of the MICT,⁵² like the ad hoc tribunals,⁵³ would appear to locate the trigger for release eligibility in the domestic law of enforcing states. The jurisprudence of the ad hoc tribunals, however, reveals that Presidents opted to retain international control over the temporal point for eligibility. Moreover, despite having identical legal frameworks, the practice of the ICTY and ICTR differed.

2.1.1 ICTY: Presumption of Release and a Two-Thirds Rule of Thumb

Although eligibility under national law has been cited as an essential precondition for consideration for release,⁵⁴ the real temporal point for eligibility has been determined by ICTY Presidents. In a bid to equalise the treatment of prisoners, ICTY Presidents adopted a rule of thumb whereby prisoners only became eligible for release when they had served two thirds of their sentence.⁵⁵ The two-thirds point was selected as it was considered to reflect the domestic law of the majority of enforcing states.⁵⁶ However, this is not the case for all enforcing states. Prisoners in Belgium can qualify for release after serving one-third of their sentence,⁵⁷ while prisoners in the UK,⁵⁸ Austria⁵⁹ and France⁶⁰ may be eligible at the half-way point of their sentence. In Spain, prisoners must typically serve three-quarters of their sentence before they are eligible for release. The Spanish penal code only permits early release at the two-thirds stage in exceptional circumstances: where the prisoner had progressed through three grades of prisoner status, behaved well and displayed a high likelihood of successful reintegration into society.⁶¹ In practice, Spain has applied these provisions flexibly, facilitating the release of ICTY prisoners at the two-thirds point.

Arguments that the Tribunal is bound by national law on eligibility where it entitles prisoners to release before the two-thirds point, and that the two-thirds rule of thumb is unlawful have been rejected on the basis of the statutory stipulation that enforcement is “subject to the supervision” of the Tribunal (Article 27) and the rule that states that the President must take the treatment of similarly situated prisoners into account (Rule 125).⁶² The “two-thirds practice has [therefore] been applied consistently... notwithstanding the domestic law in enforcement states”.⁶³ In other words, even were prisoners were eligible for release under the domestic law in enforcing states, there were not considered to be eligible for release by ICTY Presidents as they had not served two-thirds of their sentence.⁶⁴

While called a rule of thumb, ICTY prisoners are therefore considered for release “only after”⁶⁵ or when “at least”⁶⁶ two thirds of the sentence had been served. The practice, introduced by the Tribunal’s President to ensure equality of treatment of convicted persons, also serves to ensure ICTY prisoners serve a minimum period of time in prison before they can be considered for release. The discretion to make release decisions has therefore enabled the President to achieve what was considered to be beyond the powers of a trial chamber. The ICTY Appeal Chamber in the Stakić case held that as the legal framework clearly stated that eligibility for pardon, commutation of sentence or early release is to be determined by the national law of enforcing states, the trial chamber’s direction that the prisoner must serve a minimum of twenty years before he could be considered for early release was *ultra vires*.⁶⁷ By interpreting the factor ‘treatment of similarly-situated persons’ set out in the judge-written rules, to refer solely to the length of time that has been served by other persons convicted by the same court, the ICTY Presidents were able to introduce an international rule for release eligibility.

While it was not considered to be a rule by President Pocar in 2008,⁶⁸ it became so ingrained in the release jurisprudence and practice of the ICTY that serving two-thirds of the sentence became an almost absolute requirement for release eligibility.⁶⁹ To date, there has only been one acknowledged exception to the rule: substantial cooperation with the Prosecutor resulted in Mr Obrenović being the sole ICTY prisoner to be released before the two-thirds point.⁷⁰ Though it is not written in the statute, rules or practice direction, ICTY prisoners are considered eligible for release only after they become eligible under the domestic law of an enforcing state and when they have served two-thirds of their sentence. It should be noted that the two thirds point marks eligibility for consideration for release,

however, and not an entitlement to release.⁷¹ While the majority of applicants are granted release at the two-thirds point, some applications at this point have been rejected.

2.1.2 ICTR: Presumption against release and a three-quarters rule of thumb?

In contrast, ICTR Presidents did not establish a pre-determined point for release eligibility. Indeed, it appeared until recently that they operated on the basis of a presumption against granting release at all. Until 2011, prisoners housed in enforcing states and the ICTR's Detention Facility (UNDF) in Arusha served their sentences in full.⁷² Applications for release were rejected on the basis that submitted factors had already been considered in mitigation, the gravity of the crime committed was too high and the term remaining to be served did not militate in favour of release.⁷³ In 2009, Mr Ruggiu was the first person convicted by the ICTR to be released early from an enforcing state, benefiting from remission granted by the Italian authorities.⁷⁴

The first instance of early release being granted by an ICTR President occurred in October 2011. Mr Bagaragaza was released from prison in Sweden after serving three-quarters of his sentence.⁷⁵ While President Khan was keen to note that this decision was "not intended to create a precedent for early release at three quarters" and that "future decisions will continue to be determined on a case-by-case basis,"⁷⁶ Mr Rugambarara was also granted early release by President Khan just over four months later at the three-quarters point.⁷⁷ It is significant to note that in both cases, their guilty pleas and significant cooperation with the Prosecutor were strong positive factors in deliberations.⁷⁸ Release at the three-quarters point seemed unlikely to be granted to persons who had not provided the same degree of assistance. The following month, however, Mr Muvunyi was released from the UNDF at the three-quarters point on the basis of this practice,⁷⁹ despite his lack of cooperation with the Prosecutor.⁸⁰ Indeed, President Joensen noted that he had served an amount of time in prison that was 'equal to or exceeds that of prisoners who were sentenced at the lesser end of the spectrum for similar crimes'.⁸¹ These decisions appear to be put more emphasis on the amount of time served by similarly situated prisoners. It is not clear whether the reference to persons sentenced at the lesser end of the spectrum was intended to infer that there is or should be a bifurcated approach to release eligibility. It may also be debated whether these decisions represented a movement towards the adoption of a three quarters rule-of-thumb at the ICTR. All release decisions for ICTR prisoners, are now, however, in the hands of the MICT President.

2.1.3 MICT

Practice of the ad hoc tribunals demonstrated that ICTY release decisions were made on the basis of a presumption of release at the two-thirds point unless there were significant negative factors militating against release, and while the ICTR initially operated on the basis of a presumption against release, more recent decisions demonstrated a growing trend of release at the three-quarters stage.

When making the first release decision, the fundamental question facing the MICT President was whether to interpret Rule 151 to mean that the 'treatment of similarly-situated persons' referred to other persons convicted by the same tribunal, or persons convicted and sentenced by the ICTY, ICTR and MICT.⁸² The MICT President opted to adopt the latter interpretation, and further, the ICTY practice of considering prisoners eligible for release after they had served two-thirds of their sentence. This was an interesting development, particularly given that the first two applicants for release had been sentenced by the ICTR. President Meron defended his decision on the basis of the need to ensure equality among all persons supervised by the MICT irrespective of which court they had been convicted and sentenced by.⁸³ While he recognised the divergent practice of the Tribunals in relation to release discussed above,⁸⁴ he felt that the *lex mitior* principle, as well as the requirements of fundamental fairness, dictated that the ICTY practice should be applied uniformly to the entire prisoner population supervised by the Mechanism.⁸⁵ Though he acknowledged that 'the adoption of the two-thirds eligibility threshold might constitute a benefit not previously recognised for persons convicted by the ICTR,'⁸⁶ he did not feel that this alone could justify discrimination between the groups of convicted persons under the jurisdiction of the MICT. Like his ICTY predecessors,

however, he emphasised that the two-thirds rule represented a threshold for consideration for early release and not an entitlement to release.⁸⁷

While the ICTY rule of thumb was created to ensure the equal treatment of ICTY prisoners, it did not ensure equal treatment for prisoners serving life sentences.⁸⁸ Without a pre-established international point for eligibility, the potential for discrimination will be significant given the vast range of temporal points and methods for prisoners serving life sentences to become eligible for parole under the domestic law of enforcing states.⁸⁹ The MICT should consider adopting an explicit temporal eligibility threshold for release applications from persons serving life sentences.

In addition, the MICT Practice Direction should be amended to include the intervals at which applications for subsequent reviews will be permitted. Under the present practice direction, decisions denying release should specify the date at which convicted persons next become eligible for consideration for release, unless this is specified by the domestic law of enforcing states.⁹⁰ At the ICTY, decisions denying release to persons who had not served two-thirds of their sentence did not refer to when they would next become eligible under national law but the date at which they would have served two-thirds.⁹¹ Even when enforcing states informed the ICTY of prisoners becoming eligible again according to domestic law, the rule of thumb dictated jurisprudential practice.⁹² Perhaps eligibility under domestic law is more influential for prisoners who have served the requisite minimum amount of time determined appropriate by the President. Given the variations in intervals required by domestic law, greater clarity in relation to subsequent reviews would also be welcome.

2.3 ICC: Statutory Eligibility for Review concerning Reduction of Sentence

To avoid the potential for disparity of treatment that arises from reliance on national triggers for release eligibility, and the lack of certainty for persons serving indeterminate sentences, the ICC has introduced a statutory trigger for release eligibility and mandatory reviews. Pursuant to Article 110(3), the Court must review the sentences of prisoners who have served two thirds of a determinate sentence, or twenty-five years of a life sentence, to determine whether they should be reduced.⁹³ In addition to establishing the point at which ICC prisoners will become eligible for an initial review concerning reduction of sentence, the statute also establishes a mandatory process for subsequent reviews.⁹⁴ According to the rules, such reviews must occur every three years, or at shorter intervals if this is determined by the judges in the previous review.⁹⁵ A three year interval seems disproportionately long given that prisoners sentenced to the maximum possible determinate sentence of thirty years⁹⁶ will become eligible for release after twenty years. If release is denied at the initial review, the prisoner will have to serve a third of the remaining term before he can be considered for release again. As the majority of determinate sentences are likely to be less than the maximum term, a three year interval seems even more excessive. The practice of most European countries is to allow subsequent reviews after a couple of months.⁹⁷ While the drafting history of the Rome Statute would suggest that the three year term was meant to be applied to persons subject to terms of life imprisonment,⁹⁸ this is not clear from the current rule. The rules do however give ICC judges the option to conduct reviews at shorter intervals on the basis of a determination made at the initial review, or before the regulatory or judicially determined review date if there has been a significant change of circumstances.⁹⁹ It would be helpful if the relevant interval for the different types of sentences, as well as what constitutes ‘a significant change of circumstances’ could be clarified in guidelines.

The ICC’s introduction of an express statutory trigger for release eligibility introduces transparency, predictability and consistency. The statutory requirement for mandatory review¹⁰⁰ also provides a “possibility to moderate the lengthy or perpetual character”¹⁰¹ of a life sentence. On the other hand, this provision seems to severely curtail judicial discretion as it expressly states that no review concerning reduction of sentence can be conducted before these fixed time frames.¹⁰² This rigidity reflects the views of some states involved in drafting the statute that persons convicted by the Court should serve a significant part of their sentence before becoming eligible for consideration for release.¹⁰³ It may also be considered necessary to ensure the equality of treatment of ICC prisoners

servicing their sentences in a variety of enforcing states. However, equality of treatment should not be ensured at the expense of fairness. As Liebling notes ‘fairness is related to, but is more than, equality.’¹⁰⁴ Fair treatment, she argues, involves consistent treatment in line with pre-established rules as well as flexible and merciful treatment where appropriate.¹⁰⁵ More specifically, human rights law and principles would suggest that the international judiciary should have the inherent power to consider applications and grant early release to persons diagnosed with terminal or chronic illnesses before these temporal points.¹⁰⁶ While the rules enable the judges to consider the individual circumstances of prisoners, including a worsening state of physical or mental health or advanced age,¹⁰⁷ review before the statutorily determined points for eligibility is not permitted.¹⁰⁸

2.4 Conclusion

Although there is no right to release in the international criminal justice system, and indeed international prisoners may be sentenced to imprisonment for the remainder of their lives,¹⁰⁹ all of the international courts have introduced a system whereby prisoners can be considered for release.

While the MICT President has ensured equality and clarity by adopting the two-thirds rule in relation to release eligibility, explicit rules on the temporal eligibility for release for prisoners serving indeterminate sentences is required. Moreover, greater clarity in relation to intervals for subsequent reviews would also be welcome.

The ICC’s statute and rules deal with these precise issues. What it gains in certainty and equality, however, it lacks in flexibility and possible fairness. While the requirement that prisoners must serve a minimum period of time before they can be considered eligible for release is in line with international sentencing rationales and victims’ expectations,¹¹⁰ it is foreseeable that issues will arise that will necessitate reviews before these stated points. A human rights approach would suggest that ICC judges should have the inherent power to grant release before the stated statutory point if there are valid and serious humanitarian grounds.¹¹¹ The ICC’s rules relating to subsequent reviews would also benefit from more precision in relation to the intervals for subsequent reviews and the meaning of ‘significant change of circumstances’.

3 International Release Procedure

Once an international prisoner is considered to be eligible for release, the international court puts a procedure in place to determine if a commutation or reduction of sentence or early release should be granted. The MICT procedure, which is virtually identical to the procedure used by the ad hoc tribunals, differs from the ICC procedure in several respects.

3.1 MICT

As the MICT’s statutory and regulatory provisions provide little detail on the matter, the procedure was set out in the Practice Direction. This procedure is initiated once an international prisoner becomes eligible for release. Although the statute and rules state that enforcing states should notify the MICT of a prisoner’s eligibility,¹¹² the MICT Practice Direction enables the President to receive direct applications from international prisoners.¹¹³ This reflects the practice and policy of the ad hoc tribunals to accept applications from prisoners serving in enforcing states and international detention facilities to ensure equality of treatment.¹¹⁴ To date, the President has received two direct applications from prisoners serving their sentences in Mali.¹¹⁵

As previously stated, the MICT President is responsible for making the decision on whether or not pardon or commutation of sentences should be granted.¹¹⁶ The Registrar is responsible for preparing a file for the President which should include reports on behaviour during incarceration, conditions of imprisonment, the prisoner’s mental condition, cooperation of the convicted person with the Office of the Prosecution and any other information the President considers relevant.¹¹⁷ The Registrar must also inform the convicted person of their eligibility for release, advise him about the steps that will be

taken and provide him with a copy of the file prepared for the President.¹¹⁸ The prisoner will then have ten days to examine the file and send written submissions or make oral submissions to the President by video-link or telephone.¹¹⁹

In terms of coming to an actual decision, the statutes of the UN Tribunals simply directed the President to consult with the other judges.¹²⁰ The rules were amended in 2001 to specify that consultation should be with the ‘permanent’ judges¹²¹ and again in 2005 to its current form that states that the President should consult with ‘members of the Bureau¹²² and the permanent judges of the sentencing Chamber who remain Judges of the Tribunal’.¹²³ The practice directions were amended to reflect these changes.¹²⁴ Although the MICT Statute does not refer to consultation, its rules and practice direction specify that the President should consult with any judges of the sentencing Chamber who are judges of the MICT about the appropriateness of granting release.¹²⁵

Although the MICT President is directed to consult with these other judges, this may not always be possible.¹²⁶ Even if it is possible, he or she is not bound by their views.¹²⁷ The President’s decision is final and is not subject to appeal.¹²⁸ If the President decides that release is appropriate, the Registry is tasked with sending the decision to the enforcing state, the convicted person and other interested parties.¹²⁹ The President may also direct the Registry to inform persons who testified at the convicted person’s trial about the destination the prisoner will travel to upon release and any other information considered relevant by the President.¹³⁰ The decision is usually made public, although the President can decide to withhold its publication.¹³¹ If, the President determines that release is not appropriate, the decision should specify the date when the prisoner will next become eligible for consideration for release, unless this is specified by the enforcing state’s law.¹³²

3.2 ICC

The procedure governing reviews concerning reduction of sentences is set out more explicitly in the statute and rules of the ICC. The Rome Statute clearly states that ‘the Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter having heard the person’.¹³³ Once a convicted person becomes eligible for a review according to the statute, it is conducted by three judges from the Appeals Chamber appointed by that Chamber.¹³⁴ This review will typically involve a hearing with the sentenced person (assisted by counsel and interpretation services if necessary).¹³⁵ The review panel should invite the Prosecutor, states enforcing penalties or reparations, and victims and their legal representatives who participated in proceedings to attend or submit written observations.¹³⁶ In exceptional circumstances, the hearing can be conducted using video-conference or in an enforcing state with a judge delegated by the Appeals Chamber.¹³⁷ The review panel can reduce the sentence if it determines that one or more of the factors set out in the statute¹³⁸ and the rules¹³⁹ have been established. If release is not granted at the first review, prisoners have a right to be reconsidered for release at regular intervals. Subsequent reviews will typically to be conducted by means of written representations, although the three judge panel may decide to hold a hearing.¹⁴⁰ The three judges must communicate a reasoned decision to those who participated in proceedings as soon as possible after it has been made.¹⁴¹

3.3 Conclusion

This section outlined the procedures for making release decisions at the MICT and ICC. Not only do they differ in several respects, but key aspects of the procedures may create cause for concern.

Firstly, the MICT will (like the ad hoc tribunals) rely primarily on written submissions from the prisoner, although the President may, alternatively,¹⁴² opt to hear the prisoner via telephone or video-conference. Initial reviews at the ICC will typically be held ‘with’ sentenced persons, although hearings via video-conferencing or with a single judge in the enforcing state may be permitted in exceptional circumstances. Subsequent reviews at the ICC, in contrast, revert to the MICT preference for written submissions, although the possibility of an oral hearing is retained. Given the geographical spread of countries that have signed enforcement agreements with the ICC, it is unclear how this

preference for oral hearings will work in practice. The ‘complex logistical problems’¹⁴³ involved in transferring international prisoners or holding three-judge panels in enforcing states make it likely that video-conferences and delegated single judge hearings will occur more frequently than envisaged.

The second issue relates to the independence and impartiality of the decision-maker. At the MICT, the decision may ultimately rest in the hands of one individual who may have been involved in the case at the trial or appeal stages. Although the President is guided by factors that must be considered, and consultations with other judges, it is ultimately his or her decision. While the requirement of consultation can limit or correct any potential biases of an individual judge,¹⁴⁴ the release decisions of the ad hoc tribunals did not state what the other judges said during these consultations in the majority of cases, other than to note whether the decision had been unanimous¹⁴⁵ or not.¹⁴⁶ It is clear, that the President is free to make a decision irrespective of dissenting views.¹⁴⁷ Moreover, the creation of a new judicial institution (MICT) may mean that it is not possible to consult with sentencing judges, leaving the decision solely in the hands of the President.¹⁴⁸ The concentration of decision-making power with one individual, who may have previously been involved in the case, may risk creating perceptions of partiality. Furthermore, the approach to release policy and procedure may vary according to the views of each new president.¹⁴⁹

The ICC procedure attempts to avoid these problems by tasking a three judge panel to conduct reviews. The ICC Statute also allows for the disqualification of judges from a case if they had previously been involved in any capacity.¹⁵⁰ This article may be used to prevent judges involved in trial, appeal or revision proceeding from sitting on the review panel. What remains unclear under the ICC system is whether decisions from the three judge panel require a majority or unanimous decision, or if a delegated single judge can make a decision alone. These issues should be clarified before the first decision on release is made.

Finally, and perhaps most significantly, both systems lack provision for appellate review, either internally or externally. This sits uneasily with due process and regional penological standards.¹⁵¹ While this lacuna may be understandable to a certain degree at the MICT, given that the President is the highest judicial officer and there are no external courts with jurisdiction to review international judicial decisions, the ICC does, at least, have the internal option of permitting the Presidency to hear appeals or to judicially review decisions made by the appeal chamber judges.

Release decision-making procedures ‘should meet the requirements of fairness and due process’¹⁵² and judicial impartiality should be ensured by the creation of a system that can filter out bias or correct mistakes.¹⁵³ The concentration of power at the MICT and the lack of review at both the MICT and ICC fail on this score. The lack of independence of decision-makers at the ad hoc tribunals and the absence of a right to appeal decisions¹⁵⁴ have been criticised for falling short of contemporary human rights standards.¹⁵⁵ Perhaps release is considered to be an administrative or executive task at the MICT but this should not preclude judicial review of decisions. The ICC has an opportunity to correct some of these issues, and particularly the question of appeal, before the first application for release is received.

4 Factors considered in International Release Decisions

While the release procedure is initiated when international prisoners become eligible for release, release decisions are not based solely on the amount of time a prisoner has served. International judges must consider a range of criteria set out in the statutes and rules.

4.1 MICT

The provisions of the MICT’s statute, rules and practice direction that set out the factors that should be considered by the President when making a release decision replicate those of the ad hoc tribunals. The statutory direction that release decisions should be made in the interests of justice and based on general principles of law¹⁵⁶ does not provide much guidance. The criteria to be considered are

therefore expanded in the rules. The relevant rule lists four factors that the President must take into account: the gravity of the crime for which the prisoner was convicted, the treatment of similarly-situated persons, the prisoner's demonstration of rehabilitation and cooperation with the Prosecutor.¹⁵⁷ This list is not exhaustive, and the practice direction confirms that the President may consider any other information deemed relevant.¹⁵⁸ Before looking at how these factors have been applied at the MICT, this section will analyse the jurisprudence of the UN Tribunals.

4.1.1 ICTY

Although gravity was an express factor, release was often granted "notwithstanding" the gravity of the crimes the individual had been convicted for.¹⁵⁹ Later decisions appear to consider gravity in more depth by referring to the crimes committed, quoting from sentencing judgments and noting that the gravity of the crimes was a factor going against release.¹⁶⁰ However, release continued to be granted despite the high gravity of the crimes committed.¹⁶¹ It seems that gravity was only really used as a determinative factor militating against release in cases where the individual had not served the required two thirds of the sentence.¹⁶² Rather than viewing 'the treatment of similarly-situated persons' as a separate criterion, ICTY Presidents therefore appear to have used this factor to justify the introduction of an implicit international rule on release eligibility. The President was, however, obliged to form an opinion on the prisoner's demonstration of rehabilitation. ICTY Presidents considered a range of issues under this heading, including behaviour in detention, participation in work, education and activities, relations with staff and prisoners, expressions of remorse, acknowledgements of responsibility, and the prisoner's psychological condition, risk of recidivism and ability to reintegrate into society upon release.¹⁶³ In relation to cooperation, testimony at other international or national trials, active cooperation and/or a willingness to testify were considered to be positive factors in support of release.¹⁶⁴ Mere availability or willingness to testify was not considered to be cooperation for this purpose. If cooperation had not been requested by the Prosecutor, this was deemed to be a neutral factor.¹⁶⁵

ICTY Presidents were willing to consider other relevant information¹⁶⁶ including media material and information provided by third parties,¹⁶⁷ the suffering of the prisoner's family due to their loved one's conviction and imprisonment,¹⁶⁸ the physical and mental health of the prisoner, and the adequacy of the medical care provided.¹⁶⁹ Age, by itself, and time spent in isolation due to harassment were not, however, considered to be factors pertinent to rehabilitation assessments.¹⁷⁰

4.1.2 ICTR

The ICTR's release criteria exactly mirror those of the ICTY. In contrast to the ICTY's practice of virtually automatic release at the two-thirds point, however, the consideration of these criteria only resulted in two early release decisions at the ICTR from applications from persons serving in enforcing states and one from an individual serving his sentence in the UNDF, Arusha.

While the gravity of crimes committed was cited as a reason not to grant early release,¹⁷¹ more recent decisions held that the high gravity of crimes would not *per se* bar consideration for release if it was otherwise appropriate.¹⁷² In relation to the treatment of similarly situated persons, the ICTR Presidents felt that they were not bound by the ICTY two-thirds rule, and in the cases granting release, found the three-quarters point more suitable for persons convicted of genocide-related crimes.¹⁷³ Despite a clear reluctance to create a rule of thumb,¹⁷⁴ it seemed that this factor was beginning to be applied in this way in practice.¹⁷⁵ In relation to rehabilitation, factors previously considered in mitigation, such as surrender, guilty pleas, confessions, remorse, acknowledgment of responsibility, were considered to be positive factors.¹⁷⁶ Good behaviour (during trial and in detention) and reintegration potential were also considered.¹⁷⁷ The overriding consideration in the first two release decisions, however, appeared to have been the significant value attached to the parties' voluntary, substantial and long-term cooperation with the Prosecutor.¹⁷⁸ This is in stark contrast to the first application for early release, when President Møse declined to consider the applicant's cooperation with the Prosecutor, voluntary surrender and guilty plea as they had already been considered as mitigating factors in sentencing.¹⁷⁹ It

is noteworthy that the third grant of early release at the three quarters point was granted despite the prisoner's lack of cooperation with the Prosecutor.¹⁸⁰

1.3 MICT

In both release decisions to date, the MICT President held that the high gravity of the applicants' crimes militated against the grant of release.¹⁸¹ As stated previously, the MICT adopted a two-thirds rule of thumb for consideration for release. Service of this requisite period has therefore qualified as a factor in favour of release under the heading of 'treatment of similarly-situated persons'.¹⁸² Under consideration of rehabilitation, the MICT President has acknowledged reports and recommendations in support of release from national prison authorities and considered the prisoners' views.¹⁸³ Behaviour in prison, signs of rehabilitation and potential for successful reintegration after release (in terms of work, family support etc.) were also important factors.¹⁸⁴ Though the President referred to the relevance of psychiatric and psychological assessments, their absence was not deemed to negatively affect the overall assessment of rehabilitation.¹⁸⁵ The entry of a guilty plea was considered to be a factor in favour of release on account of the positive impact such pleas have on the efficient administration of justice,¹⁸⁶ despite objections from the ICTR Prosecutor on the basis that cooperation was required by a plea agreement, that it had already been taken into account during sentencing and that not all expected cooperation had been forthcoming.¹⁸⁷ The MICT President also considered humanitarian and health issues when making release decisions. This was possible due to paragraph 9 of the Practice Direction which states that the President may consider 'any other information' that the President considers 'relevant' and previous ICTY jurisprudence which determined that a serious illness may make continued detention inappropriate.¹⁸⁸ In both cases, medical reports indicating treatment for illnesses were considered and appear to have been factors in favour of release.¹⁸⁹

4.2 ICC

Article 110 of the statute lists two specific criteria to be applied by the judicial review panel - the early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions and the voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, in particular, providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims.¹⁹⁰ This latter factor reflects the Court's new penalty options¹⁹¹ and powers to order convicted persons to make reparations to, or in respect of victims.¹⁹² While these factors have an obvious administration of justice focus, the statute also leaves room for further criteria to be created in the rules that establish 'a clear and significant change of circumstances'.¹⁹³ Rule 223 sets out additional factors to be considered, which include conduct in detention which shows a genuine dissociation from the crime convicted of, the prospect of resocialisation and successful resettlement, the likelihood that release would give rise to significant social instability, any action taken by the prisoner for the benefit of victims, the impact of the release on victims and their families and the individual circumstances, age or health of the prisoner.¹⁹⁴

Some factors clearly reflect the human rights and penological approach to release decisions by focusing on the likelihood of recidivism, rehabilitation and prospect of successful reintegration into society. Other factors reveal a more restorative or transitional approach to international criminal justice in that they look beyond the prisoner to determine the impact release will have on victims, their families and the wider community. The criteria therefore not only look at how the prisoner has dealt with the past and behaved in prison, but also how that individual and the affected community will cope post-release. The reference to societal stability should be treated cautiously as it appears to be more political than penological, and may be more relevant to considerations related to the relocation of the individual after release¹⁹⁵ rather than a factor that should determine whether or not to grant release. The rules also permit the judges to consider individualised health, age and humanitarian factors.

It is unclear if these factors are exhaustive or if their consideration is mandatory. The statutory provision states that the Court may reduce the sentence if it finds one or more of the listed factors or those provided in the rules of procedure and evidence.¹⁹⁶ Does this award discretion to grant release only in cases where the specified factors can be established? Rule 223 seems clearer when it states that the judges ‘shall take into account’ the factors listed in the state and those listed in the Rule. While this direction makes consideration of criteria mandatory, it seems to indicate that the list of factors is not exhaustive.

Some of the factors that the ICC judges are obliged to consider may create problems as they will be difficult for international prisoners to demonstrate. In addition to being clear and explicit, release criteria should be realistic and attainable.¹⁹⁷ Continued detention on the basis that prisoners have not fulfilled their sentence plans or demonstrated that they have worked towards release criteria may be considered arbitrary, and therefore unlawful, if such prisoners do not have access to the programmes necessary for them to do so.¹⁹⁸ International prisoners often do not have access to offending behaviour and other rehabilitation programmes.¹⁹⁹ Another problem lies with the lack of clarity surrounding who has to establish the criteria and how. While it will be relatively easy to establish whether a prisoner did something for the benefit of victims, it is likely to be much more difficult to ascertain what impact the prisoner’s release will have on victims, their families and societal stability. What does ‘impact’ mean? Will the determination be based on a subjective judicial judgment call or objective empirical evidence? These issues could benefit from clarification.

4.3 Conclusion

The MICT President has had to consider the same range of factors as the ad hoc tribunal Presidents. The ICTR’s adoption of the ICTY rules should have promoted more harmonious results at the two tribunals.²⁰⁰ The decisions, however, demonstrate that their approach to release was markedly different. The main disparity in practice resulted from the different temporal guides for eligibility generated by the Presidential interpretation of the ‘treatment of similarly-situated persons’ factor. ICTY Presidents adopted a two-thirds point to ensure equality of treatment, while later ICTR Presidents (Khan and Joensen) insisted that prisoners serve a minimum of three-quarters of their sentence to reflect the higher gravity of crimes. Moreover, practice seems to indicate a presumption in favour of early release at the ICTY and a presumption against early release at the ICTR. Cooperation with the Prosecutor was the only factor to create exceptions to the established practice of the respective Tribunals. The ICTY released Mr Obrenović before the two-thirds point due to his exceptionally substantial cooperation²⁰¹ and the only two instances of early release being granted by the ICTR to persons serving their sentences in enforcing states were mainly attributed to the voluntary, substantial and long-term cooperation of the convicted persons. The adoption of an explicit two-thirds rule of thumb by the MICT will ensure a greater degree of consistency in the release process and its outcomes. However, this consistency, and indeed the judicial nature of the decision, may be short-lived. In spite of the fact that international sentences imposed by the UN tribunals will require supervision until 2030 at the earliest,²⁰² the MICT was only granted an initial four year mandate, extendable for two year periods.²⁰³ It is highly likely that the power to make release decisions will be transferred to another body to be established by the UN Security Council at a later stage.²⁰⁴

The ICC judges are obliged to consider factors set out in the statutes and rules that address the administration of justice, enforcement of penalties, rehabilitation, reintegration, victims’ rights and societal stability. It is significant to note that the ICC judges do not have to consider the gravity of crimes committed by the individual. This development is to be welcomed given that the gravity was already one of the most powerful determinants of the sentence imposed.²⁰⁵ It is apparent that while some of the ICC factors may be more relevant in the international criminal justice context, some of them seem difficult to establish, whether from the prisoner’s perspective or more generally. These factors would therefore benefit from some clarification. It may also be helpful to outline the weight that should be attributed to each factor.²⁰⁶

Overall, the MICT factors are backward-looking, whereas the ICC factors are more forward-looking. Though an obligation to consider criteria set out in the statutes and rules may constrain judicial discretion, this duty was considered necessary to ensure the equal treatment of prisoners convicted by the international courts who must serve their sentences in a myriad of different countries, even continents.²⁰⁷

5 Potential Influences on International Judicial Discretion

Although states enforce international sentences of imprisonment in their national prison systems, the power to make release decisions has been reserved for the international judiciary. The international judiciary is comprised of judges, diplomats, academics and legal advisers with experience in criminal, international humanitarian and human rights law from a range of countries that represent the world's principle legal systems.²⁰⁸ While personal backgrounds and professional experiences are recognised potential influences on judicial reasoning, research has indicated that international judges generally adopt a legal-facts model of decision-making, which involves basing decisions on legal criteria and case specific facts.²⁰⁹ Even though the structure of international release decisions to date would seem to verify that this approach has been adopted, it cannot be ignored that international judges have to make decisions in light of the 'special challenges'²¹⁰ involved in operating an international criminal court.

In contrast to national criminal justice systems, the international criminal justice system does not have the necessary apparatus required to function independently.²¹¹ There is no international police force, parole or probation service or prison. Wessel notes that while international judges may be better insulated from influence from their state of origin than national judges, their 'strategic concerns are more nuanced.... Rather than worrying about their personal removal from the bench... [they] must be concerned with the subtle impact of their decisions on the Court as an institution'.²¹² Therefore despite the fact that international judges are granted the sole power and discretion to grant or deny release, they are aware that their decisions have to be implemented in a penal system that is completely dependent on state cooperation.

The statutory and regulatory obligation placed on international judges to consider administration of justice and enforcement of penalties criteria highlights the pressure the international judiciary is under to ensure the continuing functionality of the international criminal justice process. Indeed, some states involved in drafting the ICC's statute went so far as to suggest that cooperation with the Prosecutor should be the principal or only ground upon which early release should be granted.²¹³ Despite the repeated judicial assertion that a lack of or limited cooperation is not viewed negatively,²¹⁴ it is obvious from the ad hoc tribunals' practice that it can exclude a prisoner from consideration for release at the earliest point possible. A less obvious, but perhaps more significant aspect of the system, is that states are not under any obligation to implement international sentences of imprisonment. The entirely voluntary nature of cooperation enables states to directly and indirectly exert pressure on the international judiciary through the inclusion of conditions in their enforcement agreements, the transmission of orders or recommendations in relation to sentenced reductions or release, and ultimately, their ability to withdraw cooperation.

The consensual nature of the enforcement system has resulted in states being permitted to include conditions in their bilateral agreements with international courts which enable states to reserve the right to make national decisions on whether or not particular international prisoners should be granted release. While no enforcing state can release an international prisoner before the expiration of the sentence imposed by the international court, some states have reserved the right to choose whether or not to continue enforcing the sentence or to terminate the enforcement of the sentence in their prison system and to transfer the prisoner elsewhere in the event of a disagreement with the President's decision.²¹⁵ Others left the decision to the tribunal.²¹⁶ In fact, only half of the agreements concluded by the ad hoc tribunals followed the statutory scheme and state that the enforcing state will act according to the President's decision.²¹⁷ Treaty provisions which reduce the President's power to a consideration of the appropriateness of the recommendations or decisions of national authorities were

accepted due to the need to respect state sovereignty, domestic law and secure timely cooperation.²¹⁸ This flexibility has however resulted in release being viewed by some states as an issue of shared competence.

ICTY judges expressed concern that some enforcing states appeared to be assuming more responsibility in relation to release decisions than the statute permitted.²¹⁹ Even though the statute clearly stated that the power to make decisions on release lay solely with the President, some national authorities did more than simply notify the tribunal of a prisoner's eligibility for release. For example, national judges granted early release to international prisoners, subject to an authorising decision from the ICTY President²²⁰ and state authorities notified the ICTY of decisions not to grant release.²²¹ ICTY release jurisprudence also reveals that national officials, prisons, local or central authorities made explicit recommendations on whether or not an individual should be released.²²² National rules on sentence remission and reduction may also result in recommendations for significant reductions to the length of sentences international prisoners must serve. For example, Mr Santić was entitled to 302 days of benefit under the Spanish system,²²³ Mr Martinović qualified for 765 days of a sentence reduction under the Italian system²²⁴ and a French judge recommended that Mr Radić be granted a four years and three months reduction from his twenty year sentence.²²⁵ These entitlements have been taken into account by ICTY Presidents in the determination of whether an international prisoner is eligible for consideration for release.

Despite the concern expressed about this national interference with release procedures at the ad hoc tribunals, it appears that the relevant provisions in enforcement agreements with the ad hoc tribunals will remain in force for the MICT.²²⁶ Indeed, the MICT's Practice Direction explicitly notes that enforcing states may not agree with or be able to accept the President's decision on release, and if this situation should arise, the President, in consultation with the Registrar, may decide to transfer the prisoner to a different state to serve the remainder of their sentence.²²⁷

The ICC's legal framework tried to avoid this situation arising in the first place by prohibiting the inclusion of conditions in enforcement agreements that deviate from the statutory scheme governing release.²²⁸ To date, the provisions of all of the ICC's enforcement agreements, bar one, reflect the statutory position that enforcing states are bound by the duration of the international sentence and that the ICC has the sole authority to make release decisions.²²⁹ It is unfortunate, however, that the agreement with Denmark deviates from this position. For example, Article 12(3) of the agreement states that Denmark will notify the ICC when the international prisoner becomes eligible for early release or pardon under domestic law. This ignores the fact that the ICC statutes determines release eligibility and pardon is not permitted. Perhaps more worryingly, it goes on to state that in the event that Denmark disagrees with the Court's view on the appropriateness of early release or pardon, the Court may transfer the prisoner to another state.²³⁰ It appears that this agreement was erroneously drafted on the basis of the legal framework of the ad hoc Tribunals. It is unclear if this agreement will establish precedent for other states to demand similar conditions in their enforcement agreements.

While flexible conditions may be necessary to ensure cooperation, their acceptance results in a release system that can place considerable influence on those responsible for making release decisions. Irrespective of whether or not deviating provisions are included or permitted in enforcement agreements, enforcing states can still influence international release policy. Prison authorities often exercise significant de facto influence over release decisions, even when they are not the body formally charged with making them.²³¹ While international courts are independent in one sense, they are also interdependent insofar as they cannot operate without the support of states.²³² States can therefore exert pressure on international judges by implicitly or explicitly threatening to partially or completely exit the enforcement regime.²³³ For instance, many believe that it was the Rwandan Government's withdrawal of cooperation, and not the discovery of new facts, that resulted in a reversal of the ICTR decision to release Jean Bosco Barayagwiza.²³⁴ While both the ICC and MICT can terminate enforcement in a particular state and transfer a prisoner elsewhere to serve the remainder of their sentence should an enforcing state disagree with or be unable to accept the international judicial decision in relation to release,²³⁵ this measure will only be used in extreme cases.

With no international prison, a finite number of conditional enforcement agreements and the ICC's duty to ensure the equitable distribution of the burden of enforcement,²³⁶ the MICT President and ICC appeal judges will be acutely aware of the limited options available to facilitate continued enforcement elsewhere. While the ICC has the additional option of access to a residual facility provided by the host state,²³⁷ the Dutch Government has made it clear that this is to be used as a measure of last resort and for short term periods only.

International judicial discretion may be influenced by the unavoidable reality that international courts rely on states to provide the prison cells in which international sentences of imprisonment are enforced.²³⁸ International judges may therefore use unconditional early release as a means to reduce the length of sentences to be served by international prisoners to ensure the continued and future cooperation from states.

6. Conclusion

This chapter has outlined the release schemes at the two international institutions that will be responsible for making the majority of international release decisions, the MICT and the ICC. The MICT relies on one judge, the President, to make a decision following consultation with other judges on the basis of eligibility determined by the national law of enforcing states, factors outlined in the statute and rules and written information provided by the Prosecutor, the enforcing state and the convicted person. The ICC, on the other hand, relies on a panel of three appeal chamber judges to make a decision on the basis of eligibility determined by the court's statute, factors outlined in the statute and rules, the views of the Prosecutor, enforcing state and victims conveyed at a hearing conducted with the sentenced person. Aspects of both schemes require clarification or elaboration, and it is unfortunate that neither procedure grants international prisoners the right to appeal release decisions.

Judicial discretion in international release decision-making is important to ensure that a flexible approach can be taken in individual cases. This discretion is constrained, to a certain extent, by eligibility requirements and the need to consider factors set out in the relevant statute, rules or practice direction. A mandatory obligation to consider a core set of pre-determined factors enhances equality of treatment and legal certainty. Despite the elucidation of these factors, it remains unclear what the objective of international release decisions should be or what goals international punishment should achieve.

The UN Tribunals' focus on retribution (and proportionality)²³⁹ at the sentencing stage may be the cause of the focus on the time international prisoners have served in release decision-making, with institutional effectiveness and efficiency concerns focusing attention on cooperation with the Prosecutor. These elements are relatively easy for international tribunals to determine. What is more difficult to determine is whether or not international prisoners have demonstrated signs of rehabilitation. In this regard, the international judiciary is dependent on reports from national authorities. These reports often focus on good behaviour in prison and participation in work and education, as national prisons often do not provide access to relevant offending behaviour programmes. While national reports do contain sections on the prisoner's psychological condition and risk of recidivism,²⁴⁰ some have been treated cautiously due to difficulties encountered in supplying accurate accounts due to linguistic and cultural barriers.²⁴¹ Moreover, the risk of recidivism is often classified as low due to the fact that the conflict situation no longer exists.²⁴² This may be the reason why there is no international parole or probation system. Only international prisoners granted leave to remain in the enforcing state will be subject to a licence or supervision. All deported international prisoners will be released unconditionally.

The MICT has inherited the release system of the UN Tribunals. ICC appeal chamber judges will have to consider a broader range of factors than the MICT President, many with a more restorative or transitional justice focus. For example, they will have to determine the impact release will have on victims and social stability. Such decisions should not be based on subjective judicial opinion. While

it may constitute a constraint on judicial discretion, clear and objective criteria should be developed to determine such issues and assessments should be strictly related to the risk posed by the individual prisoner.

Both the MICT and the ICC have adopted the enforcement system used by the UN Tribunals – the international sentencing court delegates the practical task of sentence implementation to cooperating states. While states agree to act as the custodians of international prisoners, the international courts remain the custodians of the sentences being enforced. The international nature of the sentence dictates that an enforcing state should not be able to reduce the term of imprisonment to be served or release an international prisoner against the wishes of the sentencing court.²⁴³ To ensure that modern international criminal courts could prevent pressure being put on domestic authorities to prematurely release international prisoners,²⁴⁴ enforcing states agree to respect the length of the sentence imposed by the international court and not to release international prisoners without the international courts' permission. They may not, however, agree to respect an international judicial decision not to grant release to a particular individual at a particular point in time. In such instances, prisoners in some enforcing states may have to be transferred elsewhere to serve the remainder of their sentences. Therefore, in addition to the constraints placed on international judicial discretion by statutory and regulatory rules governing eligibility, procedure and factors to be considered, the system's complete reliance on state cooperation may result in strong pressure to grant early release. Until such time as international criminal courts can directly enforce their own sentences of imprisonment in international facilities,²⁴⁵ it is foreseeable that capacity and cooperation concerns will have the potential to influence international judicial release policy and decisions.

¹ See UN Security Council Resolution (SCRes) 1966 (2010), adopted 22 December 2010.

² See paras. 1, 4 SCRes 1966(2010); Articles 25(2), 26 MICT Statute (St).

³ From 1 July 2012 for ICTR and 1 July 2013 for the ICTY. See para. 1 SCRes 1966(2010); Article 25(2) MICTSt; Rule 128 MICT Rules of Procedure and Evidence (RPE).

⁴ Rome Statute (UN. Doc. A/Conf.183/9) adopted 17 July 1998, entered into force on 1 July 2002.

⁵ Other penalties (fines, forfeiture and compensation) can only be imposed in addition to imprisonment and they have not been used to date.

⁶ See paragraph A.2(13) ICTY *Manual of Developed Practice* (Turin: UNICRCI, 2009) at 153-4 (hereafter *MDP*); paragraphs 35, 70 ICTR Fifteenth Annual Report, A/65/188 – S/2010/408, 30.07.10.

⁷ Article 25(1) MICTSt; Article 103(1)(a) ICCSt. See also Article 27 ICTYSt; Article 26 ICTRSt.

⁸ See SCRes 827 (1993) and SCRes 955 (1994).

⁹ SCRes 1966 (2010).

¹⁰ Article 25 MICTSt. See Article 27 ICTYSt; Article 26 ICTRSt.

¹¹ Article 26 MICTSt. See Article 28 ICTYSt; Article 27 ICTRSt.

¹² Article 15 ICTYSt; Article 14 ICTRSt.

¹³ Paras. 5, 6 SCRes 1966 (2010); Article 13(1) MICTSt.

¹⁴ Rules 149-151 MICT RPE.

¹⁵ Rules 123-125 ICTY RPE; Rules 124-126 ICTR RPE.

¹⁶ Rule 6 ICTY and ICTR RPE. Amendments are subject to approval by ten permanent judges at plenary or unanimous approval by all permanent judges using a written procedure. The rules were amended twice to increase the number of judges that were required to approve amendments from seven (11.02.94) to nine (Rev.14, 04.12.98) to the current requirement of ten (Rev. 20 12.04.01).

¹⁷ Article 13(2) MICTSt.

¹⁸ Rule 6(A)(i)-(ii) MICT RPE.

¹⁹ Göran Sluiter ‘Procedural Law-making at the International Criminal Tribunals’ in Shane Darcy and Joseph Powderly (eds.) *Judicial Creativity at the International Criminal Tribunals* (OUP, 2010) 315-331 at 315.

²⁰ See James Meernik, Kimi Lynn King and Geoffrey Dancy ‘Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors’ (2005) 86(3) *Social Science Quarterly* 683-703 at 684-7; Jared Wessel ‘Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication’ (2006) 44(2) *Columbia Journal of Transnational Law* 377- 452 at 386, 391; Sluiter, note 19 at 315-6, 321.

²¹ See paragraph 8 ICTY *Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal*, Rev. 2, 24.01.02.

²² See Mia Swart ‘Ad hoc Rules for ad hoc Tribunals? The rule-making power of the judges of the ICTY and ICTR’ (2002) 18 *South African Journal on Human Rights* 570-589 at 570-1, 576, 578.

²³ Article 13(4) MICTSt.

²⁴ Rule 6 (C) MICT RPE. See Rule 6(C) ICTR RPE and Rule 6(D) ICTY RPE. The ICTY rule was amended to include convicted and acquitted persons (Rev. 19, 01.12.00 and 13.12.00).

²⁵ Para. 6 SCRes 1966 (2010); Article 13(3) MICTSt; Rule 6(B) MICT RPE.

²⁶ Rule 23(B) MICT RPE.

²⁷ MICT/3, 05.07.12.

²⁸ Only the ICTY Practice Direction was published. It has been amended twice since its adoption in 1999. Amendments reflect changes made to the rules in relation to the number of judges the President must consult with (para. 6 ICTY PDER Rev. 2, 01.09.09 and ICTY PDER Rev. 3, 16.09.10) and to enable the President to receive direct petitions from prisoners (para. 2 ICTY PDER Rev. 2, 01.09.09) and request information from enforcing states should such a petition be received (para. 2 ICTY PDER Rev. 3, 16.09.10).

²⁹ Rule 23(B) MICT RPE; para. 1 MICT PDER.

³⁰ See paragraph 12 MICT PDER. See also para. 9 ICTY PDER Rev. 1, 07.04.99; para. 10 ICTY PDER Rev. 2, 01.09.09 and ICTY PDER Rev. 3, 16.09.10.

³¹ Italy, Finland, Norway, Sweden, Austria, Germany, France, Spain, Denmark, UK, Belgium, Ukraine, Portugal, Estonia, Slovakia, Poland and Albania.

³² Italy, Sweden, France, Swaziland, Benin, Mali, Rwanda and Senegal.

³³ Articles 1, 25 MICTSt; para. 4 SCRes 1966(2010). See also Para. 12 Bisengimana (President’s Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 13 Serushago (President’s Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

³⁴ Articles 105(1), 110(2) ICCSt.

³⁵ Article 110(3) ICCSt.

³⁶ Article 110 (2), (4)-(5) ICCSt.

³⁷ Article 51(1), (2) ICCSt.

³⁸ Article 51(3) ICCSt.

³⁹ Article 51(4)-(5) ICCSt.

⁴⁰ Rule 200(5) ICC RPE.

⁴¹ Austria, UK, Denmark, Serbia, Finland, Belgium, Mali and Colombia.

⁴² Silva D’Ascoli *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Oxford: Hart Publishing, 2011) at 8.

⁴³ Swart, note 22 at 576.

⁴⁴ Article 26 MICTSt.

⁴⁵ André Klip ‘Enforcement of Sanctions imposed by the International Criminal Tribunals for Rwanda and former Yugoslavia’ (1997) 5(2) *European Journal of Crime, Criminal Law and Criminology* 144-164 at 161.

⁴⁶ See paragraph 361 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, GA, 51st Session, Supp. No. 22, A/51/22, 1996 (Volume I).

⁴⁷ Article 84 ICCSt.

⁴⁸ Article 110 ICCSt.

⁴⁹ See William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (OUP, 2010) at 1105.

⁵⁰ See para. 14 Obrenović (President’s Decision) IT-02-60/2-ES, 21.09.11 (Public Redacted, 29.02.12).

⁵¹ See para. 11 Muvunyi (President’s Decision) ICTR-00-055A-T, 06.03.12.

⁵² See also Rule 149 MICT RPE.

⁵³ Article 28 ICTYSt; Article 27 ICTRSt.

⁵⁴ Paras. 6-7 Josipović (President’s Decision) IT-95-16-ES, 30.01.06; para. 6 Santić (President’s Decision) IT-95-16-ES, 16.02.09; para. 9 Martinović (President’s Decision) IT-98-34-ES, 22.01.10.

⁵⁵ See para. 11 Vuković (President’s Decision) IT-96-23 & 23/1-ES, 11.03.08.

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- ⁵⁶ See para. D.4.4 (52) *MDP* at 162.
- ⁵⁷ Para. 2 Zelenović (President's Decision) IT-96-23/2-ES, 10.06.10; paras. 1-2 Zelenović (President's Decision) IT-96-23/2-ES, 21.10.11.
- ⁵⁸ See para. 1 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10.
- ⁵⁹ Para. 2 Kordić (President's Decision) IT-95-14/2-ES, 13.05.10.
- ⁶⁰ Para. 2 Radić (President's Decision) IT-98-30/1-ES, 23.04.10.
- ⁶¹ See para. 4 Josipović (President's Decision) IT-95-16-ES, 30.01.06; para. 7 Šantić (President's Decision) IT-95-16-ES, 16.02.09. See José Cid and Beatriz Tébar 'Spain' in Nicola Padfield, Dirk van Zyl Smit, Frieder Dünkel *Release from Prison: European Policy and Practice* (Cullompton: Willan Publishing, 2010).
- ⁶² Paras. 2, 12-15 Radić (President's Decision) IT-98-30/1-ES, 23.04.10.
- ⁶³ Para. 20 Simić (President's Decision) IT-95-9-ES, 15.02.11.
- ⁶⁴ Para. 14 Krajišnik (President's Decision) IT-00-39-ES, 26.02.10; paras. 2, 5, 12 Radić (President's Decision) IT-98-30/1-ES, 23.04.10; paras. 12-13 Žigić (President's Decision) IT-98-30/1-ES, 08.11.10; para. 21 Krajišnik (President's Decision) IT-00-39-ES, 11.07.11.
- ⁶⁵ Para. 13 Zelenović (President's Decision) IT-96-23/2-ES, 10.06.10.
- ⁶⁶ Para. 14 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10.
- ⁶⁷ See paras. 392-3 Stakić (Appeal Judgment) IT-97-24-A, 22.03.06 and Stakić (Sentencing Judgment) IT-87-24-T, 31.07.03 at page 253-4.
- ⁶⁸ Para. 11 Vuković (President's Decision) IT-96-23&23/1-ES, 11.03.08.
- ⁶⁹ See para. 13 Sikirica (President's Decision) IT-95-8-ES, 21.06.10; para. 8 Gvero (President's Decision) IT-05-88-ES, 28.06.10; para. 14 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10; para. 14 Bala (President's Decision) IT-03-66-ES, 15.10.10; para. 12 Žigić (President's Decision) IT-98-30/1-ES, 08.11.10; para. 14 Rajić (President's Decision) IT-95-12-ES, 31.01.11; para. 15 Mrđa (President's Decision) IT-02-59-ES, 01.02.11; para. 20 Simić (President's Decision) IT-95-9-ES, 15.02.11; para. 13 Tarčulovski (President's Decision) IT-04-82-ES, 23.06.11; para. 24 Krajišnik (President's Decision) IT-00-39-ES, 08.11.12.
- ⁷⁰ See Obrenović (President's Decision) IT-02-60/2-ES, 21.09.11 (Public Redacted, 29.02.12); paras. 27, 43 Krajišnik (President's Decision) IT-00-39-ES, 08.11.12.
- ⁷¹ Para. 20 Simić (President's Decision) IT-95-9-ES, 15.02.11; para. 16 Obrenović (President's Decision) IT-02-60/2-ES, 21.09.11 (Public Redacted, 29.02.12).
- ⁷² See for example ICTR Press Release 'Vincent Rutaganira Released After Completing his Sentence' ICTR/INFO-9-2-556.EN, 03.03.08.
- ⁷³ See Damien Scalia 'Long-term sentences in international criminal law: do they meet the standards set out by the European Court of Human Rights' (2011) 9(3) *Journal of International Criminal Justice* 669-687 at 676.
- ⁷⁴ Ruggiu (President's Decision) ICTR-97-32-S, 12.05.05.
- ⁷⁵ Para. 8 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11.
- ⁷⁶ Para. 17 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11.
- ⁷⁷ Para. 17 Rugambarara (President's Decision) ICTR-00-59, 08.02.12.
- ⁷⁸ Paras. 10, 13 Rugambarara (President's Decision) ICTR-00-59, 08.02.12.
- ⁷⁹ See paras. 11, 12 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.
- ⁸⁰ Para. 7 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.
- ⁸¹ Para. 13 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.
- ⁸² Para. 16 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12.
- ⁸³ Paras. 16-17 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12.
- ⁸⁴ Paras. 18-19 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12.
- ⁸⁵ Para. 20 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 17 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.
- ⁸⁶ Para. 21 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12.
- ⁸⁷ Para. 21 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 18 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.
- ⁸⁸ See Dirk Van Zyl Smit 'International Imprisonment' (2005) 54(2) *International Comparative Law Quarterly* 357-386 at 371.
- ⁸⁹ For example in Europe, international prisoners serving life sentences could become eligible for release after serving 10 years in Belgium, 12 years in Denmark and Finland, 15 years in Austria and Germany, 18 years in France, 26 years in Poland and 30 years in Italy. In contrast, in the Netherlands and Sweden, release is dependent on a grant of a pardon. See Frieder Dünkel, Dirk van Zyl Smit and Nicola Padfield 'Concluding Thoughts' in Nicola Padfield, Dirk van Zyl Smit, Frieder Dünkel *Release from Prison: European Policy and Practice* (Cullompton: Willan Publishing, 2010) 395-444 at 408, 420.
- ⁹⁰ Para. 10 MICT PDER.

⁹¹ See paras. 17 Krajišnik (President's Decision) IT-00-39-ES, 26.02.10; paras. 12-13 Žigić (President's Decision) IT-98-30/1-ES, 08.11.10; para. 14 Tarčulovski (President's Decision) IT-04-82-ES, 23.06.11.

⁹² See paras. 1, 22 Krajišnik (President's Decision) IT-00-39-ES, 11.07.11; paras. 5, 24, 43 Krajišnik (President's Decision) IT-00-39-ES, 08.11.12.

⁹³ Article 110(3) ICCSt.

⁹⁴ Article 110(5) ICCSt.

⁹⁵ Article 110(5) ICCSt; Rule 224(3) ICC RPE.

⁹⁶ Article 77(1)(a) ICCSt.

⁹⁷ See Dirk van Zyl Smit and John R Spencer 'The European dimension to the release of sentenced prisoners' in Nicola Padfield, Dirk van Zyl Smit, Frieder Dünkel *Release from Prison: European Policy and Practice* (Cullompton: Willan Publishing, 2010) 9-48 at 18; Dünkel, Van Zyl Smit and Padfield, note 89 at 427.

⁹⁸ Schabas, note 49 at 1104.

⁹⁹ Rule 224(3) ICC RPE.

¹⁰⁰ Article 110(3), (5) ICCSt; Rule 224(3) ICC RPE.

¹⁰¹ Scalia, note 73 at 687.

¹⁰² Article 110(3) ICCSt.

¹⁰³ Schabas, note 49 at 1103.

¹⁰⁴ Alison Liebling 'Why fairness matters in criminal justice' in Nicola Padfield (ed.) *Who to Release? Parole, fairness and criminal justice* (Cullompton: Willan Publishing, 2007) 63-71 at 64.

¹⁰⁵ *Ibid* at 65.

¹⁰⁶ See paras. 36, 48 *Mousiel v France* (67263/01) 14 November 2002, (2004) 38 EHRR 34 and para. 70 CPT 3rd General Report, CPT/Inf (98)12, both cited in Dirk van Zyl Smit and Sonja Snacken *Principles of European Prison Law and Policy: Penology and Human Rights* (OUP, 2009) at 165, 317, 320-321.

¹⁰⁷ Rule 223(e) ICC RPE.

¹⁰⁸ Article 110(3) ICCSt.

¹⁰⁹ See Article 22(1) MICTSt; Rule 125 MICT RPE; Article 24(1) ICTYSt; Article 23(1) ICTRSt; Rule 101(A) ICTY/ICTR RPE; Article 77(1)(b) ICCSt; para. 16 Lubanga (Sentence) ICC-01/04-01/06, 10.07.12.

¹¹⁰ See para. 1794 Perišić (Judgment) IT-04-81-T, 06.09.11; Schabas, note 49 at 1102; Swart note 22 at 577; Sylvia de Bertodano 'Judicial Independence in the International Criminal Court' (2002) 15(2) *Leiden Journal of International Law* 409-430 at 410, 414, 417-9.

¹¹¹ See Esther Gumboh 'The Penalty of Life Imprisonment under international criminal law' (2011) 11 *African Human Rights Law Journal* 75-92 at 90.

¹¹² Article 26 MICTSt; Rule 149 MICT RPE; Para. 2 MICT PDER.

¹¹³ Para. 3 MICT PDER.

¹¹⁴ See para. 2 ICTY PDER Rev. 2, 01.09.09; para. D.2(41-3) *MDP* at 161; paras. 2-4 Tadić (President's Decision) IT-95-9-T, 03.11.04; para. 4 Kvočka (President's Decision) IT-98-30/1-A, 30.03.05; para. 5 Krnojelac (President's Decision) IT-97-25-ES, 21.06.05; paras. 1, 4, 6 Josipović (President's Decision) IT-95-16-ES, 30.01.06; para. 3 Tadić (President's Decision) IT-94-1-ES, 17.07.08; para. 10 Banović (President's Decision) IT-02-65/1-ES, 03.09.08; paras. 5, 6, 9 Strugar (President's Decision) IT-01-42-ES, 16.01.09; para. 1 Šantić (President's Decision) IT-95-16-ES, 16.02.09; para. 1 Krnojelac (President's Decision) IT-97-25-ES, 09.07.09; para. 1 Martinović (President's Decision) IT-98-34-ES, 22.01.10; paras. 1, 10, 19 Tarčulovski (President's Decision) IT-04-82-ES, 23.06.11; paras. 1, 14 Šljivančanin (President's Decision) IT-95-13/1-ES, 05.07.11; paras. 3, 10 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹¹⁵ Paras. 1, 4, 5 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; paras. 1, 6, 12 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹¹⁶ Article 26 MICTSt; Rule 150 MICT RPE.

¹¹⁷ Para. 4(b)-(d) MICT PDER.

¹¹⁸ Paras. 4(a), 5, 6 MICT PDER.

¹¹⁹ Para. 6 MICT PDER.

¹²⁰ Article 28 ICTYSt; Article 27 ICTRSt.

¹²¹ Rule 124 ICTY RPE, Rev. 20, 12.04.01.

¹²² The Bureau is composed of the President, Vice-President and the Presiding Judge of the Trial Chambers. Rule 23(A) ICTY/ICTR RPE.

¹²³ Rule 124 ICTY RPE, Rev. 34, 11.02.05.

¹²⁴ See para. 6 ICTY PDER, Rev. 2, 01.09.09 and ICTY PDER, Rev. 3, 16.09.10.

¹²⁵ Rule 150 MICT RPE; para. 7 MICT PDER.

¹²⁶ See para. 7 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹²⁷ Para. 9 MICT PDER. See also para. 8 ICTY PDER; para. D.3(45) *MDP* at 161; para. 12 Vuković (President's Decision) IT-96-23 & 23/1-ES, 11.03.08; para. 13 Plavšić (President's Decision) IT-00-39 & 40/1-ES, 14.09.09.

¹²⁸ Para. 12 MICT PDER.

¹²⁹ Para. 13 MICT PDER.

¹³⁰ Para. 13 MICT PDER.

¹³¹ Para. 9 MICT PDER.

¹³² Para. 10 MICT PDER.

¹³³ Article 110(2) ICCSt.

¹³⁴ Rule 224(1) ICC RPE.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Article 110(4) ICCSt.

¹³⁹ Rule 223 ICC RPE.

¹⁴⁰ Rule 224(4) ICC RPE.

¹⁴¹ Rule 224(2), (5) ICC RPE.

¹⁴² See paras. 40-42 Krajišnik (President's Decision) IT-00-39-ES, 08.11.12.

¹⁴³ Schabas, note 49 at 1105.

¹⁴⁴ See Theodor Meron 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99(2) *American Journal of International Law* 359-369 at 361; D'Ascoli, note 42 at 45.

¹⁴⁵ See para. 35 Krajišnik (President's Decision) IT-00-39-ES, 26.02.10; para. 23 Radić (President's Decision) IT-98-30/1-ES, 23.04.10; para. 28 Tarčulovski (President's Decision) IT-04-82-ES, 23.06.11; para. 44 Krajišnik (President's Decision) IT-00-39-ES, 08.11.12.

¹⁴⁶ See para. 14 Santić (President's Decision) IT-95-16-ES, 16.02.09; paras. 4, 14 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹⁴⁷ See paras. 12-13 Vuković (President's Decision) IT-96-23&23/1-ES, 11.03.08.

¹⁴⁸ See para. 7 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁴⁹ See Wessel, note 20 at 395-6.

¹⁵⁰ Article 41(2)(a) ICCSt.

¹⁵¹ For example, Council of Europe member states are directed to ensure that 'convicted persons... [are] able to make a complaint to a higher independent and impartial decision-making authority established by law against the substance of the [release] decision as well as against non-respect of the procedural guarantees.' Recommendation 33 of Recommendation (2003)22 of the Committee of Ministers to Member States on *Conditional Release (Parole)* adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers' Deputies.

¹⁵² Van Zyl Smit and Spencer, note 97 at 38.

¹⁵³ See Meron, note 144 at 361.

¹⁵⁴ See para. 3 Rutaganira (AC Decision) ICTR-95-IC-AR, 24.08.06.

¹⁵⁵ See Denis Abels *Prisoners of the International Community: Legal Position of Persons Detained at International Criminal Tribunals* 2012 at 970-972; Scalia, note 73 at 676-7.

¹⁵⁶ Article 26 MICTSt. See Article 28 ICTY St; Article 27 ICTR St.

¹⁵⁷ Rule 151 MICT RPE. See Rule 125 ICTY RPE; Rule 126 ICTR RPE.

¹⁵⁸ Para. 9 MICT PDER.

¹⁵⁹ See para. 17 Tadić (President's Decision) IT-94-1-ES, 17.07.08; para. 15 Banović (President's Decision) IT-02-65/1-ES, 03.09.08; para. 10 Plavšić (President's Decision) IT-00-39& 40/1-ES, 14.09.09; para. D.4.1(48) *MDP* at 162.

¹⁶⁰ Paras. 13-16 Rajić (President's Decision) IT-95-12-ES, 22.08.11.

¹⁶¹ See Simić (President's Decision) IT-95-9-ES, 15.02.11.

¹⁶² See para. 23 Kordić (President's Decision) IT-95-14/2-ES, 13.05.10; paras. 23-24 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10; paras. 12-13 Žigić (President's Decision) IT-98-30/1-ES, 08.11.10; para. 14 Rajić (President's Decision) IT-95-12-ES, 31.01.11; para. 27 Stakić (President's Decision) IT-97-24-ES, 15.07.11; para. 32 Zelenović (President's Decision) IT-96-23/2-ES, 21.10.11.

¹⁶³ See paras. 11-12 Josipović (President's Decision) IT-95-16-ES, 30.01.06; paras. 6-7 Landžo (President's Order) IT-96-21-ES, 13.04.06; paras. 4, 6, 11 Vuković (President's Decision) IT-96-23 & 23/1-ES, 11.03.08; paras. 7, 20 Delić (President's Decision) IT-96-21-ES, 24.06.08; paras. 8, 16 Tadić (President's Decision) IT-94-1-ES, 17.07.08; paras. 6, 8, 12-13 Banović (President's Decision) IT-02-65/1-ES, 03.09.08; paras. 11-12 Šantić (President's Decision) IT-95-16-ES, 16.02.09; para. 20 Krnojelac (President's Decision) IT-97-25-ES, 09.07.09; paras. 8, 9 Plavšić (President's Decision) IT-00-39&40/1-ES, 14.09.09; para. 21 Vasiljević

(President's Decision) IT-98-32-ES, 12.03.10; para. 18 Radić (President's Decision) IT-98-30/1-ES, 23.04.10; paras. 19-20 Kordić (President's Decision) IT-95-14/2-ES, 13.05.10; paras. 21, 23 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10; paras. 18-19 Rajić (President's Decision) IT-95-12-ES, 22.08.11; para. 21 Rajić (President's Decision) IT-95-12-ES, 31.01.11; para. 21 Mrđa (President's Decision) IT-02-59-ES, 01.02.11; paras. 22, 24-25, 28-29 Simić (President's Decision) IT-95-9-ES, 15.02.11; paras. 26-7 Šljivančanin (President's Decision) IT-95-13/1-ES, 05.07.11; paras. 29, 30, 32, 33 Stakić (President's Decision) IT-97-24-ES, 15.07.11; paras. 22, 27, 29 Zelenović (President's Decision) IT-96-23/2-ES, 21.10.11.

¹⁶⁴ See para. 14 Banović (President's Decision) IT-02-65/1-ES, 03.09.08; para. 13 Šantić (President's Decision) IT-95-16-ES, 16.02.09; para. 12 Plavšić (President's Decision) IT-00-39&40/1-ES, 14.09.09; para. D.4.3(51) *MDP* at 162.

¹⁶⁵ Para. 10 Josipović (President's Decision) IT-95-16-ES, 30.01.06; para. 13 Strugar (President's Decision) IT-01-42-ES, 16.01.09.

¹⁶⁶ Para. 8 ICTY PDER.

¹⁶⁷ Para. 22 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10; paras. 23-24 Bala (President's Decision) IT-03-66-ES, 15.10.10.

¹⁶⁸ Para. 21 Delić (President's Decision) IT-96-21-ES, 24.06.08.

¹⁶⁹ See para. 20 Krnojelac (President's Decision) IT-97-25-ES, 09.07.09; para. 11 Plavšić (President's Decision) IT-00-39 & 40/1-ES, 14.09.09; para. 19 Radić (President's Decision) IT-98-30/1-ES, 23.04.10.

¹⁷⁰ Para. 19 Radić (President's Decision) IT-98-30/1-ES, 23.04.10; para. 22 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10.

¹⁷¹ See Serushago (President's Decision) ICTR-98-39-S, 12.05.05.

¹⁷² Para. 7 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11; para. 7 Rugambarara (President's Decision) ICTR-00-59, 08.02.12; para. 9 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹⁷³ Paras. 8-10 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11; para. 11 Rugambarara (President's Decision) ICTR-00-59, 08.02.12; para. 11 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹⁷⁴ See para. 17 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11.

¹⁷⁵ See para. 12 Rugambarara (President's Decision) ICTR-00-59, 08.02.12; para. 12 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹⁷⁶ Paras. 5-6, 11-12 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11; paras. 13 Rugambarara (President's Decision) ICTR-00-59, 08.02.12.

¹⁷⁷ Paras. 11-12 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11; paras. 13-15 Rugambarara (President's Decision) ICTR-00-59, 08.02.12; para. 6 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹⁷⁸ Para. 13 Bagaragaza (President's Decision) ICTR-05-86-S, 24.10.11; paras. 10, 13 Rugambarara (President's Decision) ICTR-00-59, 08.02.12.

¹⁷⁹ Serushago (President's Decision) ICTR-98-39-S, 12.05.05.

¹⁸⁰ Para. 7 Muvunyi (President's Decision) ICTR-00-055A-T, 06.03.12.

¹⁸¹ Para. 14 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 15 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸² Para. 22 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 19 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸³ Paras. 6, 24 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; paras. 20-1 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸⁴ Para. 25 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12.

¹⁸⁵ Para. 26 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 21 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸⁶ Paras. 30-1 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; paras. 30 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸⁷ Para. 29 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 25 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸⁸ Para. 32 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 31 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁸⁹ Para. 33 Bisengimana (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 33 Serushago (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

¹⁹⁰ Article 110(4)(a)-(b) ICCSt.

¹⁹¹ Article 77(2) ICCSt.

¹⁹² Article 75(2) ICCSt.

¹⁹³ Article 110(4)(c) ICCSt.

¹⁹⁴ Rule 223 ICC RPE.

¹⁹⁵ See Article 107 ICCSt.

¹⁹⁶ Article 110(4), (5) ICCSt.

¹⁹⁷ See recommendation 18 *Recommendation Rec (2003) 22 of the Committee of Ministers to member states on conditional release (parole)* 24.09.03.

¹⁹⁸ See *James, Wells and Lee v UK* (25119/09, 57715/09 and 57877/09) 18.09.12.

¹⁹⁹ See chapters 2, 5 Róisín Mulgrew *Towards the Development of the International Penal System* (Cambridge University Press, 2013).

²⁰⁰ See Swart, note 22 at 576.

²⁰¹ Paras. 15-28 *Obrenović* (President's Decision) IT-02-60/2-ES, 21.09.11 (Public Redacted, 29.02.12).

²⁰² Para. 102 *Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the ICTY and ICTR and the seat of the residual mechanism(s) for the Tribunals S/2009/258*, 21.05.09.

²⁰³ Preamble, para. 17 SCRes 1966(2010).

²⁰⁴ Para. 18 SCRes 1966(2010); Rule 128 MICT RPE.

²⁰⁵ Van Zyl Smit, note 88 at 373.

²⁰⁶ See Mandeep K Dhimi 'From Discretion to Disagreement: Explaining Disparities in Judges' Pretrial Decisions' (2005) 23 *Behavioural Sciences and the Law* 367-386 at 369, 383.

²⁰⁷ See para. 14 *Obrenović* (President's Decision) IT-02-60/2-ES, 21.09.11 (Public Redacted, 29.02.12).

²⁰⁸ See Articles 9, 10(1)(C) MICTSt; Articles 36(3)(a), (b), (7) and 38(8)(a) ICCSt; Meron, note 138 at 360.

²⁰⁹ See Meernik, King and Dancy, note 20 at 684-5, 687, 689, 692-3, 701; D'Ascoli, note 42 at 44.

²¹⁰ Preamble, ICC *Code of Judicial Ethics* (ICC-BD/02-01-05) 09.03.05.

²¹¹ See D'Ascoli, note 42 at 60.

²¹² Wessel, note 20 at 422.

²¹³ Schabas, note 49 at 1103.

²¹⁴ Para. 17 *Jokić* (President's Decision) IT-02-60-ES, 13.01.10; para. 27 *Krajišnik* (President's Decision) IT-00-39-ES, 26.07.10.

²¹⁵ See Articles 3(4), 8(2) ICTY-France, Articles 3(5), 8(2) ICTY-Spain, Article 3(5) ICTY-Portugal/Belgium, Article 9(2) ICTY-Slovakia, Article 8(2) ICTR-Italy/France Bilateral Enforcement Agreements (BEA).

²¹⁶ See Article 8(3) ICTY-Sweden/Denmark/Estonia, Article 3(5) ICTY-Belgium, Article 4(3) ICTY-Slovakia, Article 8(2) ICTR-Sweden BEAs.

²¹⁷ See Articles 3(4), 8(2) ICTY-Finland/Norway/Ukraine/Albania, Article 8(3) ICTY-Austria, Article 8(2) ICTY-UK, Articles 3(6), 8(2) ICTY-Poland, Article 8(2) ICTR-Mali/Benin/Swaziland/Rwanda BEAs.

²¹⁸ See para. A.1(11) *MDP* at 153; Antonio Cassese *International Criminal Law* (OUP, 2008) (2nd ed.) at 433-4.

²¹⁹ Para. 12 *Josipović* (President's Decision) IT-95-16-ES, 30.01.06.

²²⁰ Para. 8 *Josipović* (President's Decision) IT-95-16-ES, 30.01.06; para. 9 *Santić* (President's Decision) IT-95-16-ES, 16.02.09.

²²¹ Para. 2 *Tadić* (President's Decision) IT-94-1-ES, 17.07.08.

²²² See para. 15 *Jokić* (President's Decision) IT-02-60-ES, 13.01.10; para. 9 *Martinović* (President's Decision) IT-98-34-ES, 22.01.10; paras. 19, 23 *Radić* (President's Decision) IT-98-30/1-ES, 23.04.10; para. 21 *Bala* (President's Decision) IT-03-66-ES, 15.10.10.

²²³ Para. 8 *Santić* (President's Decision) IT-95-16-ES, 16.02.09.

²²⁴ Para. 3 *Martinović* (President's Decision) IT-98-34-ES, 16.12.11.

²²⁵ See paras. 7-9 *Radić* (President's Decision) IT-98-30/1-ES, 22.06.07.

²²⁶ Articles 1, 25 MICTSt. See also para. 4 SCRes 1966(2010); Para. 12 *Bisengimana* (President's Decision) (Public Redacted version) MICT-12-07, 11.12.12; para. 13 *Serushago* (President's Decision) (Public Redacted version) MICT-12-28-ES, 13.12.12.

²²⁷ Para. 11 MICT PDER.

²²⁸ See Articles 103(1)(b), 105(1) ICCSt; Rule 200(5) ICC RPE.

²²⁹ See Articles 105(1), 110(1)-(2) ICCSt; Articles 4(1), 10 ICC-UK, Articles 4(1), 11 ICC-Austria, Articles 4(1), 11(2)-(3) ICC-Serbia/Finland, Articles 4(1), 12(2) ICC-Belgium, Articles 1(3), 6(1)-(2) ICC-Mali BEAs.

²³⁰ See Article 12(4)-(5) ICC-Denmark BEA.

²³¹ See Dünkel, Van Zyl Smit and Padfield, note 89 at 425-426.

²³² Wessel, note 20 at 429.

²³³ *Ibid* at 423.

²³⁴ See De Bertodano, note 110 at 415-6.

²³⁵ See para. 11 MICT PDER; Article 104 ICCSt; Rules 209-210 ICC RPE; Article 13(1)-(2) ICC-Austria/Finland/Serbia, Article 14(1)-(2) ICC-Belgium, Article 9 ICC-Mali, Article 12 ICC-UK, Article 14(1)-(2) ICC-Denmark BEAs.

²³⁶ Article 103(3)(a) ICCSt.

²³⁷ Article 103(4) ICCSt.

²³⁸ See Wessel, note 20 at 429.

²³⁹ See para. 2594 Gotovina et al. (Judgment)(Vol.2) IT-06-90-T, 15.04.11; para. 1794 Perišić (Judgment) IT-04-81-T, 06.09.11.

²⁴⁰ Para. 21 Vasiljević (President's Decision) IT-98-32-ES, 12.03.10; para. 20 Kordić (President's Decision) IT-95-14/2-ES, 13.05.10; para. 23 Krajišnik (President's Decision) IT-00-39-ES, 26.07.10; para. 21 Rajić (President's Decision) IT-95-12-ES, 31.01.11; para. 28 Simić (President's Decision) IT-95-9-ES, 15.02.11; para. 33 Stakić (President's Decision) IT-97-24-ES, 15.07.11.

²⁴¹ Para. 20 Radić (President's Decision) IT-98-30/1-ES, 23.04.10; paras. 19, 22, 24 Bala (President's Decision) IT-03-66-ES, 15.10.10; paras. 27, 29 Zelenović (President's Decision) IT-96-23/2-ES, 21.10.11.

²⁴² See para. 28 Zelenović (President's Decision) IT-96-23/2-ES, 21.10.11; paras. 840, 843 Kunarac, Kovač, Vuković (Judgment) IT-96-23-T and IT-96-23/1-T, 22.02.01.

²⁴³ Paras. 71-3 Erdemović (Judgment) IT-96-22, 29.11.96.

²⁴⁴ See C Kreß and G Sluiter 'Imprisonment' in A Cassese, P Gaeta and J Jones *The Rome Statute of the International Criminal Court: A Commentary* (Vol. II) (Oxford University Press, 2002) 1757-1821 at 1763-4; para. 357 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, GA, 51st Session, Supp. No. 22, A/51/22, 1996 (Volume I).

²⁴⁵ See chapters 1, 2 and 10 Mulgrew, note 199.