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Wijk, Joris van; Holá, Barbora

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When Justice is Done

The ICTY and the Post-trial Phase

Joris van Wijk and Barbora Holá***

Until 30 September 2017, the International Criminal Tribunal for the former Yugoslavia (ICTY) has convicted eighty-two individuals with a final judgment and acquitted eighteen individuals of all charges. Of these sentenced individuals five (6.1 per cent) serve a life sentence, the majority of these have been sentenced to determinate sentences which range from two to forty years. The average determinate sentence is 15.6 years. Based on our previous work[1] this chapter focuses on the 'post-trial phase' at the ICTY and discusses what happens to ICTY defendants after being convicted or acquitted.

The first part will provide an overview of 'post-conviction challenges', and discuss the many dilemmas that the ICTY, States which enforce ICTY sentences, and the sentenced individuals themselves have faced. Special attention is given to the designation of an enforcement state and the conditions under which international prisoners serve their sentences. This part will also discuss early release practices at the ICTY, focusing on factors that are considered in granting early release and problematizing whether and to what extent individuals can, upon release, be considered rehabilitated.

In turn, the second part discusses 'post acquittal challenges', focusing in particular on the possibility and occurrence of subsequent prosecutions in domestic courts, following an acquittal at the ICTY. The conclusion assesses the ICTY's legacy when it comes to post-conviction issues. The data presented are based on an analysis of case law, academic literature, interviews with relevant stakeholders and, if academic sources were not available, newspapers and online sources.

* Associate Professor at the Department of Criminal Law and Criminology at VU University of Amsterdam and co-director of the Center for International Criminal Justice (CICJ).

** Senior Researcher at the NSCR and Associate Professor at the Department of Criminal Law and Criminology at VU University of Amsterdam and co-director of CICJ.

[1] This chapter is a compilation of content which has previously been published in the following contributions: B Holá and J van Wijk, 'Life After Conviction; an Empirical Analysis' (2014) 12 Journal of International Criminal Justice 109; J Kelder, B Holá and J van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of ICTY and ICTR' (2014) 14 International Criminal Law Review 1177; B Holá, J Kelder, and J van Wijk, 'Effectiveness of International Criminal Tribunals: Empirical Assessment of Rehabilitation as Sentencing Goal' in C Bailliet and N Hayashi (eds), *Legitimacy and Effectiveness of International Criminal Tribunals* (Hart Publishing 2017); B Holá and J van Wijk, 'Acquittals in International Criminal Justice: Pyrrhic Victories?' (2017) 30 Leiden Journal of International Law 24. The results presented in this chapter are part of the larger research project 'When Justice is Done'. For more details see <http://www.whenjusticeisdone.org> accessed 1 March 2020.

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22.1 Post-conviction Challenges

The drafters of the ICTY Statute almost entirely neglected issues regarding the enforcement of sentences. As one commentator noted 'the contrast between the meticulous regulation of the prosecution and trial, and the nearly total neglect of regulation for the execution of sentences could hardly have been more glaring'.[2] The following section examines the most pertinent post-conviction challenges encountered at the ICTY relating to (i) designation of an enforcement state where a prisoner will serve his/her sentence; (ii) conditions of incarceration; (iii) early release; and (iv) post-release.

22.1.1 Designation of Enforcement States

According to Article 27 of the ICTY Statute a convicted individual is to serve his/her sentence in a State designated from a list of States willing to enforce the Tribunal's sentences. The imprisonment is governed by the laws of the State enforcing the sentence and subjected to the supervision of the Tribunal.[3] The very limited regulation of the enforcement of sentences in the Statute is complemented by the Rules of Procedure in Evidence (RPE). Rules 103 and 104 of the RPE, however, do not add much more clarity and simply reiterate the regulation contained in the Statute. The President of the Tribunal is responsible for designation of the enforcement State. The transfer to the designated State shall be effected as soon as possible after the final verdict and, pending the transfer, the convicted person remains in the detention unit of the respective tribunal.[4]

Consequently, the ICTY has relied on a decentralized network of States to implement the custodial sanctions. The system is based on the double-consent of individual States: first, a state must enter into a general sentence enforcement agreement with the ICTY whereby it expresses its willingness to enforce sentences in the future and second, the States that concluded such agreements are to give consent to accept individual convicts on an ad hoc basis. The designation of an enforcement State is further elaborated upon in the Practice Directions, policy papers issued by the Presidents of the Tribunals.[5] On an ad hoc basis, after a final verdict, the Registrar approaches selected States that entered into enforcement agreements to indicate their preparedness to do so in the particular case.

The ICTY Practice Directions contains general criteria which should be considered when deciding which State(s) to approach: (i) the national laws regarding pardon and

[2] S Karstedt, 'Life After Punishment for Nazi War Criminals: Reputation, Careers and Normative Climate in Post-war Germany' in S Farrall et al (eds), *Contemporary Perspectives on Life After Punishment* (Routledge 2011) 240–76, 243.

[3] Due to the time-consuming nature of international criminal proceedings, many of the released in practice served a considerable part or the whole of their sentence prior to their conviction in the UN detention centre. Consequently, the UN detention centre can 'de facto' also be regarded an integral part of the sentencing enforcement system.

[4] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (RPE) IT/32 (1994) Rule 103.

[5] ICTY Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment IT/137/Rev1 (1 September 2009); ICTR Practice Direction On The Procedure For Designation Of The State In Which A Convicted Person Is To Serve His/Her Sentence Of Imprisonment [As revised and amended on 23 September 2008] (September 2008); Special Court of Sierra Leone Practice Direction for Designation of State for Enforcement of Sentence (10 July 2009).

commutation of sentences, maximum sentence available and other consideration relating to the ability of the state to enforce a particular sentence; (ii) equitable distribution of convicted persons among all the States; and (iii) other relevant considerations.[6] If the approached State expresses its willingness to accept the convict, the proposal is made to the President to designate it as the enforcement State in that particular case.

Convicted persons have no right to be heard in this respect. They may inform the President of their preferences but these can be disregarded, without motivation.[7] In the decision-making process, the President generally has a wide discretion but is asked to consider several factors, such as; whether the convicted person is expected to serve as a witness in further proceedings, whether the person will be relocated as a witness following the sentence, and any medical or psychological reports, linguistic skills, general conditions of imprisonment and rules governing security and liberty in the State concerned.[8] Particular attention should be paid to the proximity of the convicted person's relatives.

Also, in the Manual on Developed Practices, the ICTY emphasizes that the Tribunal should pay special attention to geographical distance between the enforcement State and the former Yugoslavia, in order to enable family and friends to visit the prisoners.[9] In practice, however, many convicts have been sent to countries far away from their homes and relatives. For example, when the ICTY's first convict, Erdemović, was about to serve his sentence, the ICTY entered into enforcement agreements with Norway, Finland, and Italy. Since Italy is geographically closest to the former Yugoslavia, one would have expected Erdemović to be imprisoned there. He, however, was sent to Norway.[10]

In practice, it is not entirely clear what considerations have been taken into account when approaching and designating an enforcement State since the majority of decisions and communications between the Tribunal and individual states are confidential. According to one of our interviewees, who worked at the ICTY Office for Legal Aid and Defence Matters (OLAD), the most important consideration is how many ICTY prisoners the country already has.[11] This criterion is also emphasized in the ICTY Manual on Developed Practices—the ICTY strives to ensure an even burden-sharing among enforcement States in terms of the number of convicted persons transferred and the length of the sentences imposed.[12] Since many of the ICTY convicts do not speak any language, other than their own, the linguistic skills of a person are not the decisive criterion.[13]

Finding an enforcement State is often a very burdensome process involving 'a lot of diplomacy'.[14] This is also demonstrated by the fact that it has taken on average ten months at the ICTY, after the final verdict is issued, to transfer a convict to an enforcement country.[15]

[6] ICTY Practice Direction (n 5) para 3 (a)–(c).

[7] *Order withdrawing confidential Status of 31 May 2006 Decision on Request of Zoran Žigić* IT-98-30/1-ES (1 October 2008); interview with a legal adviser of Haradin Bala, (27 and 30 May 2013) where he indicated that Bala wanted to go to Italy but ended up in France. Transcripts of all interviews are on file with authors.

[8] ICTY Practice Direction (n 5) para 4.

[9] *ICTY Manual on Developed Practices*, prepared in conjunction with UNICRI as part of a project to preserve the legacy of the ICTY (Turin: UNICRI Publisher 2009) 152.

[10] M M Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law' (1999–2000) 15 American University International Law Review 322, 367.

[11] Interview with a former Intern at Office for Legal Aid and Defence Matters (OLAD) ICTY (The Hague, The Netherlands, 10 April 2013).

[12] M M Penrose, 'Spandau Revisited: The Question of Detention for International War Crimes' (1999–2000) 16 New York Law School Journal of Human Rights 553, 554.

[13] Interview with a former OLAD Intern (n 11).

[14] ibid.

[15] Data as of September 2017.

Another employee of the OLAD unit at the ICTY, however, claimed that out of human rights considerations factors such as proximity of family members, presence of people able to speak to a prisoner in a language he understands, and security level of a potential prison are all relevant factors when approaching States with the request to enforce a particular sentence.[16] All in all, the ICTY has concluded general enforcement agreements with sixteen different European countries and a number of ad hoc enforcement agreements with Germany. The ICTY's prisoners have been scattered across thirteen countries and no country has held more than seven convicts.[17]

22.1.2 Imprisonment Regimes

As demonstrated above, the ICTY convicts have been serving their sentences in different European countries and consequently, have experienced widely different prison regimes, as prison systems differ considerably within Europe.[18] On the one hand, prison conditions of the Scandinavian countries are known to be very favourable and prisoner-friendly. Norway, for example, exemplifies what is referred to as Scandinavian 'exceptionalism' in penal policies.[19] It has a low level of imprisonment, small prisons, a low occupancy rate, with a single cell for each prisoner and a progressive system focused on rehabilitation. On the other hand, countries such as Italy or France are characterized by the overcrowded prisons, shared prison cells and a lesser focus on rehabilitation and progressive reintegration of prisoners.[20]

Not only are there differences between individual European countries regarding the general prison systems, but prison conditions also vary within the countries themselves and even within prison units, within the same prison, depending on the security level. Whether an international prisoner is placed in a high security prison, protective custody, regular prison, or an open prison has great consequences for their daily life and influences the execution of his/her sentence to a considerable extent. The Statute and RPE are virtually silent regarding the type of prisons international convicts shall be sent to. This determination lies with domestic authorities and arguably differs per State and per convict.

According to a former employee of the ICTY OLAD the majority of international prisoners are placed in high security prisons, but 'that is where things go wrong'.[21] Due to the character of international crimes, international convicts are often classified as 'the worst criminals' by domestic authorities. In practice, however, many of them are former politicians or military/State officials, who according to our respondent, pose no danger to society. Therefore, 'there is practically no need to place them in high security facilities'.[22]

Our interviews with national prison authorities, however, suggest that at least some countries take a slightly more nuanced approach. This seems particularly to be the case

[16] Interview with a former Legal Officer at the OLAD ICTY (The Hague, The Netherlands, 7 June 2013).
[17] Twenty-three ICTY convicts served their entire sentence in the UNDU in The Hague.
[18] A M van Kalmthout, F B A M Hofstee-van der Meulen, and F Dunkel (eds) *Foreigners in European Prisons* (Wolf Legal Publishers, 2007) 9.
[19] J Pratt, 'Scandinavian Exceptionalism in an Era of Penal Excess' (2007) 48 British Journal of Criminology 119.
[20] cf B Moody 'Italy's overcrowded prisons close to collapse' (*Reuters*, 12 June 2013) <http://www.reuters.com/article/2013/06/12/us-italy-prisons-idUSBRE95B0IF20130612> accessed January 2018; T John, 'Inside the Heart of French Prisons' (*Time*, 28 February 2017) <http://time.com/4681612/french-prisons/> accessed January 2018.
[21] Interview OLAD ICTY (n 16).
[22] ibid.

after they have had some experience in detaining international prisoners. In Norway, for example, international convicts are indeed placed in high security prisons, but not necessarily in maximum security units with the strictest regime.[23] Each transferred person is subjected to an individual security and health assessment and depending on a number of criteria a decision is made. Such criteria includes: his/her risk of fleeing, safety concerns in regards to the potential risk from other inmates (religion and ethnicity of other inmates is taken into account), and health considerations (such as the need for specialized health care).[24]

Erdemović, as the first international convict, was placed in a high security prison with a strict security regime because '[a]t the time Norway didn't know what to expect'.[25] Over time, however, it turned out that international prisoners are usually 'exemplary prisoners' with a very low risk of escape compared to other categories of inmates, such as organized criminals.[26] As noted by a representative of the Norwegian Ministry of Justice '[from] [o]ur past experiences with the ICTY convicts [we] learned that they don't cause many problems in detention and that they don't pose a real risk to escape'.[27] Over time, therefore, international convicts were placed in high security prisons but with more lenient security regimes.[28] This decision, according to our respondents, caused no problems: 'They behaved very [well] … obviously there are individual differences, but some of them actually behaved quite like they would do in the military. If a prison officer would come in uniform, they would straighten up and stand up right.'[29]

In contrast in Sweden, as a matter of standard operating procedure all international convicts are initially placed in 'protective custody units'(small units of six to twelve inmates with a strict security regime). Typically, persons staying in these units have requested a stay there because they are being or feel threatened, for example because they talked to the police, or have debts with other prisoners. The international convicts are, in a way, an exception in these units, because they are automatically placed in protective custody for security reasons.[30] Conversely, in Finland, Hazim Delić was transferred to an open prison—a facility without any walls.[31]

ICTY prisoners are typically integrated into domestic prison populations and national prison authorities do not distinguish between international convicts and other inmates.[32] International prisoners are treated as any other foreign prisoners, in the domestic context, which leads to differences in their treatment compared to the 'ordinary' domestic prisoners. Prison authorities have to account for cultural and linguistic differences, while

[23] Interview with a representative of the Correctional Services Department, Ministry of Justice, Norway (5 June 2013).

[24] Interview with former counsellor at National Directorate of the Correctional Services Department, Ministry of Justice, Norway (4 June 2013).

[25] ibid.

[26] ibid.

[27] Interview with Correctional Services Department, Norway (n 23).

[28] ibid.

[29] Interview with Correctional Services Department, Norway (n 23).

[30] Interview with a representative of National Security Unit, Prison and Probation Service, Sweden (18 June 2013).

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

[32] Interview, National Security Unit (n 30); interview with a representative of Directrice Penitentiaire D'Insertion et de Probation, Ministry of Justice, France (20 May 2013); interview with a defence lawyer of Goran Jelisić, Italy (June 2013); interview with a representative of the Danish Prison and Probation Service, Denmark (13 May 2013).

distance from their countries of origin substantially limits the possibility of family visits.[33] For example, Bala was never visited by his family while imprisoned in France for four and a half years and his defence lawyer states that the main reason for this lies in practical obstacles such as the costs of travelling and housing and the visa requirements for Kosovars in France.[34] The interviewed prison officials from Norway also underlined the extra costs of family visits for the international prisoners.[35] For this reason 'the national treatment of international prisoners', is at times modified. When international prisoners are visited by their families in Norway or France, for example, special arrangements are made regarding visiting hours. Visiting hours are adjusted so that the prisoners can spend as much time as possible with their family within the limited timeframe the family spends in the country of imprisonment.[36]

Furthermore, in many countries, such as Sweden or Norway, a progressive system of incarceration is adopted whereby national prisoners will move, throughout their imprisonment, to lower security level prison facilities with more lenient regimes and less significant limitations on an inmates' freedom. The more 'progressed' in the system, an inmate is, the higher the possibility of leave is in order to gradually reintegrate the offender into society. This system is, however, not implemented in case of foreign prisoners in general, and international prisoners in particular.[37] The prison authorities try to minimize the potentially negative impact of these policies on international prisoners by adopting specifically tailored measures in order to alleviate their possible frustrations: 'We asked ourselves how we could give [one of the international prisoners] something as a compensation for the lack of family contact and the limitations he faced in leaving prison. So he could take a coffee outside, get some physical activity.'[38]

One of the ways to cater for this was to provide the prisoner with relatively more escorted leaves from prison. This started with a closely monitored visit to the local town, gradually leading to several trips a month which included cycling, Nordic skiing, watching football matches, or making a two-day hike in the mountains. Not all international prisoners are, however, provided with such options. With respect to leaves, our data suggests that the approach across countries and prisons differs considerably. Countries typically deny requests to leave the country of imprisonment and go home—even when faced with tragic personal circumstances.[39] Besides this, quite varying leave policies have been applied. In Sweden, international prisoners do not have the possibility to go on unaccompanied leaves. 'They can, together with prison staff, three to four times a year go on leave for a maximum period of four to six hours.'[40] In contrast, in Norway:

> The Hague people can go on leave. This is not directly after their arrival. But if they behave well, they too are allowed to go on leave. In principle, detainees have the right to a

[33] Interview Directrice Penitentiaire D'Insertion et de Probation (n 32).
[34] Interview with a legal adviser for Haradin Bala (n 7).
[35] Interview with a representative of Norwegian prison II, Norway (14 June 2013).
[36] Interviews (n 32).
[37] Interview with a representative of Norwegian prison III, Norway (27 June 2013); Interview National Security Unit (n 30).
[38] Interview with a representative of Norwegian prison IV, Norway (24 July 2013).
[39] The French district court, for example, denied a prisoner's request to attend the funeral of his mother: interview with legal adviser of Haradin Bala (n 7).
[40] Interview National Security Unit (n 30).

> maximum of 18 days per year. If they have children or special needs, this can be upgraded to 30 days. Inmates can for example request to visit a friend, or stay a weekend over with family members. The prison officers can set conditions that they for example are not allowed to leave a certain area.[41]

One of the prisoners in Norway who got acquainted with a Serbian family living in the vicinity of his prison was, for example, allowed to spend some weekends at their place.[42]

One of the most interesting questions regarding imprisonment of international criminals is their rehabilitation. Rehabilitation is often cited as one of the goals of international sentencing and it is particularly emphasized when considering early release. As discussed already, international prisoners are (with slight modifications) simply incorporated into domestic prison populations and subjected to the same rehabilitation programmes as ordinary domestic criminals.[43] As one of the respondents noted: 'For us, it is important to treat them like anybody else who committed a serious crime.'[44] There are, however, several problems with this approach: (i) as discussed, international prisoners are usually kept in high security establishments and do not progress through the system to lower security regimes. Rehabilitation programmes in many countries are adjusted to the progressive nature of incarceration and a larger variety of rehabilitative activities are available in lower security prisons; (ii) rehabilitative programmes are usually offered in a language of the country where a prison is located. This can be a major problem for many international prisoners who simply do not speak the language and consequently, do not have access to the offered rehabilitation activities; and above all (iii) it might be questionable to what extent rehabilitation programmes developed for ordinary criminals are suitable for international prisoners who committed their crimes under very specific circumstances and are by many criminologists regarded as a different type of criminal, compared to ordinary rapists or murderers.[45] They are nonetheless all placed in normal domestic correctional facilities amongst perpetrators of conventional crimes. The question here is to what extent domestic prison officers and therapists are instructed to, and are capable of, safeguarding the Tribunals' ambitious goal of rehabilitating these offenders. The director of a small prison in northern Norway mentioned that the ICTY never directly, or via the Ministry, instructed prison authorities to work on rehabilitation. She also questioned if her prison actually had the expertise to deal with these matters, arguing that it was unusual to have inmates who committed such levels of violence.

> For normal crimes we had programmes. Programmes like 'breaking drug abuse' or 'breaking violence'. Many prisoners go to these programmes, they talk in group sessions or individually about the crime. (…) But what competence do we have to deal with them [the ICTY convicts] (…) To think about a programme for war criminals is out of reach (…) We are not educated in these matters.[46]

[41] Interview Norwegian Prison II (n 35).

[42] Interview with a representative of Norwegian prison III (n 37).

[43] Interview with a former representative of Norwegian prison I, Norway (2 July 2013); Interview with a lawyer at the Judicial Unit of the Criminal Sanctions Agency, Ministry of Justice, Finland (5 August 2013); interviews (n 32); interview Norwegian Prison II (n 35).

[44] Interview Correctional Services Department (n 23).

[45] A L Smeulers, *In opdracht van de staat: Gezagsgetrouwe criminelen en internationale misdrijven* (Prisma Print 2012); M A Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007).

[46] Interview Norwegian prison IV (n 38).

22.1.3 Early Release

Similar to conditions of imprisonment, the commutation of sentences and pardons are, according to the ICTY Statute, governed by the law of the enforcement State. Article 28 of the ICTY Statute states that if an imprisoned individual is eligible for commutation of sentence, according to the domestic law of the State of enforcement, the State shall notify the Tribunal. The President of the Tribunal then decides if an early release of the individual is warranted, taking into account 'the interests of justice' and 'general principles of law'.[47] Consequently, on the face of it, the eligibility for early release differs depending on the laws of the enforcement State. The Tribunal, however, retains a supervisory power in this respect and an international prisoner should not be released without the approval of the President. The four factors the President considers when making such decisions are provided for in Rule 125 of the ICTY RPE: (i) the gravity of crimes; (ii) the treatment of similarly situated prisoners; (iii) prisoner's demonstration of rehabilitation; and (iv) any substantial cooperation with the Prosecutor.

In actual early release practice, the 'gravity of the crimes' criterion has rarely played much of a role. In none of the decisions has the President mentioned a crime to be of a relatively low gravity suggesting that this would positively impact the early release decision making. Neither has gravity of the crimes been the only decisive factor *not* to release someone. The 'treatment of similarly situated prisoners' criterion, on the other hand, seems to be a very decisive criterion for granting early release. Although domestic laws, regarding the early release are very divergent,[48] over the years 'an unwritten rule' developed that international prisoners qualify for release only after having served two-thirds of their sentences. This two-thirds threshold was applied due to the fact that in the majority of enforcement countries prisoners are eligible for early release after serving two-thirds of their sentence. With regard to the fourth criterion, 'substantial cooperation with the Prosecutor' the President in some instances refused to take into account cooperation prior to conviction since it was already taken into account in mitigation of sentence.[49] In some cases cooperation of the accused during trial is considered when granting early release,[50] while a guilty plea in the trial phase can also be qualified as such.[51] After conviction, it seems that there must be some active engagement by a prisoner with the Prosecution, such as testimony in other trials, in order to be taken into account in favour of the early release. The mere availability of the convict to testify is not to be considered as a form of cooperation. When the Prosecution does not ask for cooperation, the willingness to cooperate is treated as a neutral factor.[52]

[47] Art 28 ICTY Statute (1993). A similar regulation is contained in the ICTR (art 27) and SCSL (art 23) Statutes. Also see Rules 123, 124 ICTY RPE; Rules 124,125 ICTR RPE; and Rules 123, 124 SCSL RPE.

[48] For example, in France and Finland, under specified circumstances, convicts are eligible for early release after serving 1/2 of their sentence. In contrast in Belgium, Denmark, Sweden, or Norway the necessary period to be served is 2/3 and in Spain generally 3/4 of an imposed sentence.

[49] *Decision of the President on Commutation of Sentence of Mlado Radić*, IT-98-30/1-ES (22 June 2007) para 15.

[50] cf *Public Redacted Decision of President on Early Release of Dragan Obrenović*, IT-02-60/2-ES (21 September 2011) para 28; *Public Redacted Version of Decision of the President on the Early Release of Omar Serushago*, MICT-12-28-ES (13 December 2012) para 30; *Decision on the Early Release Request of Juvenal Rugambarara*, ICTR-00-59 (8 February 2012) para 10.

[51] *Public Redacted Version on Decision of the President on Sentence Remission of Goran Jelisić*, IT-95-10-ES (28 May 2013) paras 31, 32.

[52] *Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović*, IT-95-16-ES (30 January 2006) para 10; *Public and Redacted Version of the 27 March 2013 Decision of the President on Early Release of Radomir Kovač* IT-96-23&23/1-ES (3 July 2013) para 30; *Decision of the President on Commutation of Sentence of Predrag Banović*, IT-02-65/1-ES (10 March 2006) paras 5, 14; however, in the decision of 3 September

22.1.4 Measuring Rehabilitation

The way in which the President has in actual practice been assessing the third factor in the context of early release— 'the prisoner's demonstration of rehabilitation'—could best be described as flawed. The President is vested with large discretionary powers regarding how to interpret the concept of rehabilitation and what factors to consider relevant 'to demonstrate rehabilitation'. Given that rehabilitating perpetrators of ordinary crimes incarcerated in their home countries is already challenging, one would expect that rehabilitating 'enemies of mankind' in foreign prisons would be even more difficult.[53] In this regard it is problematic that our analysis of early release decisions demonstrates that Presidents' interpretation of rehabilitation is by no means straightforward. Instead of using a clear definition and clear assessment criteria, the President relies on a seemingly coincidental, ad hoc list of numerous factors which relate to (i) the convict's period in prison; (ii) his/her future prospects; (iii) his/her reflection on crimes; and (iv) his/her personal characteristics.

The vast majority of early release decisions, but not all, discuss various factors related to the *period in prison* as demonstrating a prisoner's rehabilitation. In these instances, terms such as 'exemplary behaviour', 'good conduct', and a 'model prisoner', were used.[54] In some decisions, conduct in prison was the only indicator of rehabilitation. Other factors that relate to the period in prison are the extent to which the prisoner: interacted with fellow inmates; participated in training or rehabilitation programmes; tried to learn the local language; was deemed to have 'changed for the better'; got promoted to, or behaved well in, a more lenient prison regime; and demonstrated a positive attitude towards other nationalities in prison. The second group of factors relates to the *future perspectives* of the prisoner. The most important factor in this respect is whether prisoners have good family relations. If they do, they are regarded as being more likely to return to a stable family and lead a normal, crime-free life. The prisoner's relationship with his/her home country, as well as his/her career prospects, is also deemed relevant. The explicitly expressed intention not to reoffend in the future was also regularly taken into account. Additionally, the Tribunal pays attention to the question of how the prisoner *reflects upon his/her crimes*. In this regard, the President seems to distinguish between acceptance of responsibility and showing remorse, but without making a clear conceptual differentiation and without attaching any consequences to the difference between both types of reflection.[55] In the majority of cases, where this factor was mentioned, the prisoner was considered to have reflected upon his/her deeds, and either accepted responsibility, or shown remorse, or both. In some decisions,

2008 actually granting early release to Banović, the President weighed his willingness to cooperate in favour of his request for early release (para 14).

[53] The ICTY Trial Chamber in its first ever judgment in the Erdemović case recognized that cultural and linguistic difficulties of being imprisoned in far-off third countries may also impact ICTY prisoners (*Prosecutor v Erdemović* (Trial Chamber Judgment) IT-96-22-T (29 November 1996) para 75), but the Tribunal has not since undertaken any actions to mitigate possible problems. Consequently, as already referred to, international prisoners have limited access to rehabilitative programmes in general, let alone treatment, which is specifically tailored towards the specific crimes they committed.

[54] Specific references to decisions in relation to the factors mentioned in this paragraph can be found in Kelder, Holá, and Wijk (n 1).

[55] For a much more elaborate discussion on acceptance of responsibility and remorse at ICTY, see B Holá, J van Wijk, F Constantini and A Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' (2018) 28 International Criminal Justice Review 349.

however, the President concluded that the prisoner had not taken in the meaning of his/her sentence; had not sufficiently reflected upon his/her crimes; had failed to accept responsibility; or had shown no remorse, or denied committing any crime. This finding, however, seems not to have any repercussions on the evaluation of the level of prisoner's rehabilitation by the President. Finally, though to a lesser extent, the tribunals consider the *personal characteristics of a prisoner*, such as mental health (psychiatric illness or absence thereof), personality traits, conduct prior to the perpetration of crimes, and age.

Although the President does not use a clear definition of rehabilitation, the discussion above suggests that, to a certain extent, early release decisions do operationalize rehabilitation in a rather systematic way. The factors taken into account by the Presidents to a large extent reflect rehabilitation as operationalized in many domestic jurisdictions with respect to ordinary crimes, focusing on (i) rehabilitation processes in prison, such as vocational training and programmes, behaviour in prison, and reflection on crimes; and (ii) reintegration prospects of the prisoner, such as his/her family ties and prospects of employment. As such, it seems that the tribunals rely on a rather 'traditional' concept of rehabilitation. This might be caused by the fact that the President is largely dependent on the information provided to him/her by the national prison authorities enforcing the Tribunals' sentences and that, consequently, any discussion of rehabilitation is based largely on this information. Arguably, domestic prison authorities, while evaluating the eligibility of international prisoners for early release and preparing their submissions to the Tribunal, rely on their 'standard operating procedures' and apply the same format and tools to international prisoners as their domestic/ordinary counterparts.

The ICTY President had, until 2017, only in three instances (Dragoljub Kunarac in 2017, Haradin Bala in 2013, and Mlađo Radić in 2013) *postponed* the early release of an international prisoner after having served two-thirds of his sentence based on a negative assessment of his level of rehabilitation. Radić's release, for example, was blocked arguing that the prisoner's rehabilitation 'has been impeded by his inability to come to terms with his environment' and:

> there is little to no evidence of actual rehabilitation other than his response to the material provided by him in which he expresses his regret for the suffering of the victims. Based upon the foregoing, I consider […] demonstration of rehabilitation to be a neutral factor in my assessment of his suitability for early release.[56]

Reiterating that the Tribunal's practice of granting early release after having served two-thirds of a sentence is not an entitlement, the President decided that the request for early release should be denied for the time being, and that the prisoner should be granted early release almost one and a half years later than he was supposed to, on the basis of the two-thirds criterion.[57] This means that, apart from these three individuals, *all other convicts* granted early released at the ICTY by 2017 had been found sufficiently rehabilitated after having served two-thirds of their sentences.

[56] *Decision of President on Application for Pardon or Commutation of Sentence of Mlađo Radić,* IT-98-30/1-ES ICTY (9 January 2013) para 26.

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

When assessing the level of rehabilitation, the President seems to do little to critically evaluate the sources, which are submitted to demonstrate prisoners' rehabilitation. The fact that the Tribunal is not actively involved in the enforcement of sentences means that the President relies heavily on information provided by third parties. According to Article 3(b) of the ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release, the Registry shall, in reaction to an early release request, ask for:

> reports and observations from the relevant authorities in the enforcement State as to the behaviour of the convicted person during his or her period of incarceration and […] any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration.[58]

Although enforcement States have not been given any guidance on how to rehabilitate international prisoners, the President typically trusts their reports and follows their advice in relation to the prisoners' level of rehabilitation. The Norwegian authorities, for example, addressed Obrenović's custodial behaviour by stating that he had not breached any rules or regulations during his detention. The President was informed by a letter that Obrenović reliably served as a kitchen assistant for several years 'taking full responsibility for his duties and fulfilling his obligations very accurately'. Based on the information provided, the President was of the view that 'Mr. Obrenović's good behavior while serving his sentence demonstrates some rehabilitation and weighs in favour of his early release'.[59] How Obrenović's accurate fulfilment of obligations in the kitchen actually assists in rehabilitating this former military officer convicted of persecuting hundreds of civilians remains unclear. Typically, the President does not question such issues.

ICTY's early release decisions paint a picture of a rather lenient President who generally trusts the information provided by either the authorities of the enforcement State or the convict him or herself. It raises questions as to the extent to which this trust is justified. For obvious reasons, convicts have 'vested' interests in demonstrating rehabilitation. But the same can, to some extent, be said about the enforcement States. They bear the costs of incarcerating convicts who are generally not to be reintegrated in their societies and are to be relocated or repatriated. How positive would they be in the assessment of international prisoners' behaviour and levels of rehabilitation if they were to reintegrate in their own societies?

22.1.5 Post Release

In domestic criminal proceedings, after being released early, individuals are usually subjected to reintegration programmes, stipulated conditions, and supervision of a parole

[58] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, ICTY, IT/146/Rev3 (16 September 2010). Similar provisions are contained in the SCSL Practice Direction for Designation of Sate for Enforcement of Sentence (10 July 2006) art 5 (C), (D).

[59] *Public Redacted Version of Decision of President of Early Release of Dragan Obrenović* ICTY, IT-02-60/2-ES, ICTY (21 September 2011) para 23.

officer. In contrast, at the ICTY there is no institutional oversight, and a general lack of information regarding the lives of the former prisoners. Early release at the ICTY is equivalent to unconditional pardon in domestic penal systems. Released individuals are not subjected to any conditions, there is no possibility for them to be called upon to serve the remainder of their sentence,[60] and no assistance is provided regarding their reintegration into society. However, there are indications that the return of international prisoners to society and their post-release life is not entirely problem-free.

In general, the fate of released international prisoners is to a large extent determined by the way in which the conflict ended in their respective countries, their political or societal status, and the living circumstances of their family members. The former Yugoslavia disintegrated into various successor countries, largely reflecting the ethnic lines of former fighting groups. The ICTY's Serb prisoners are thus free to return to Serbia, Croats to Croatia, and Bosniacs to Bosnia. The most prominent ones are at times welcomed as war heroes in their respective countries and may continue to publicly justify their crimes, often to the dismay of victim groups. Some return to their communities, live with their families, and again become active in municipal politics, while others cannot find jobs, feel rejected by society, have lost their pension entitlements and fight to make a living.[61]

A related and perhaps even more complicating element is that ICTY-released prisoners often return to deeply divided societies which are—even years after the atrocities have taken place—still dealing with the legacy of a destructive war and genocide. The President's assessment of prisoners' rehabilitation efforts and future reintegration opportunities are, however, only focused on the convicts' individual position. This leads to various, quite fundamental, questions: can the individual rehabilitation process of international perpetrators in a Swedish or Spanish vacuum be successful without reflecting on the society (s)he is to return to? Does it accurately address the collective nature of the crimes (s)he committed, the destruction of social fabric (s)he was part of, and the still profound ethnic or religious divisions in the society (s)he may (or may not) return to? And how does it relate to the Tribunal's other sentencing goals of retribution and reconciliation? One only has to review the post release statements of Biljana Plavšić or Veselin Šljivančanin to understand the possibly detrimental consequences of the Tribunal's limited take on rehabilitation for the reconciliation processes in the former Yugoslavia. After being released both denied having committed any crimes and argued they would act in the same manner again.[62] For released individuals making such statements is of course not forbidden. At the same time such statements for obvious reasons outrage victim groups, tear open old wounds and possibly create instability in an already fragile region. In the absence of specialized rehabilitation programmes, which seriously address the nature of international crimes, profoundly confront perpetrators with the shortcomings and effects of destructive nationalist or ethnic ideologies, and make them reflect on the consequences of their crimes, it comes as no surprise that some of the perpetrators continue to justify their crimes and adhere to the same world view as during the conflict.

[60] J H Chui, 'Early Release in International Criminal Law' (2014) 123 The Yale Law Journal 1785.

[61] Holá and van Wijk (2014) (n 1) 129–30.

[62] J Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' (2012) 36 Southeastern Europe 39–59, 50; Č 'Šljivančanin: Išao bih u Vukovar' (*PTC*, 22 November 2012) <http://www.rts.rs/page/stories/sr/story/125/Dru%C5%A1tvo/1216416/%C5%A0ljivan%C4%8D anin%3A+I%C5%A1ao+bih+u+Vukovar.html> accessed January 2018; O Simic, '"I Would Do the Same Again": In Conversation with Biljana Plavšić' (2018) International Criminal Justice Review 317–32.

The experiences at the ICTY remind us that if international criminal justice initiatives are serious about successfully rehabilitating its convicts and reintegrating them in post-conflict regions, they may consider re-conceptualizing the traditional notion of rehabilitation and tailor it to the specifics of international crimes, their perpetrators, and the societies they come from. Using the conventional concept of rehabilitation, as the ICTY has done, may in this regard not suffice. Instead, we suggest putting more emphasis on the promotion of 'healing damaged relationships', an element which has historically been at the heart of modern penal systems, but in more recent years became largely overshadowed by the 'what works approach' and the focus on less re-offending. The development of such a new concept and related rehabilitation activities is complex and needs much more research and analysis. But as a start, one could think of making more serious efforts to actively 'de-ideologise' perpetrators, confront them with the impact of their crimes by, for example, organizing mediation sessions with victims or by setting certain specific conditions upon release. As Subotić writes it may be incredibly difficult and unlikely to change the perspectives of these individuals.[63] But that in itself is no argument not to try. It is similarly difficult to hold the most responsible perpetrators of international crimes accountable, to deter future perpetrators from committing such crimes, and to provide justice to victims. The goals of international criminal justice are by definition set high.

22.2 Post-acquittal Challenges

Persons acquitted by international criminal tribunals typically spent a long time in detention, often during a period in which their country of origin has massively changed. This is no exception for ICTY convicts. This means that they, upon release, may encounter difficulties after returning back to society and face challenges in finding a house or a job and reuniting with family members, with no avenue to acquire compensation for their economic and personal losses. Zejnil Delalić, for instance, claims that the almost two years he spent in pre-trial detention at the ICTY resulted in the collapse of his business.[64] Another recurring issue is the negative stigma, which might stem from having been tried. Former Bosnian Croat Army (HVO) member Mirjan Kupreškić, for example, returned to his Bosnian hometown Vitez and claims that some townspeople still view him as a war criminal.[65] Former captain in the Serbian-dominated Yugoslav People's Army (JNA) Miroslav Radić voices similar complaints. Acquitted in 2007, he complained in a 2008 article that the world still sees him as a member of the notorious 'Vukovar Three' and that his two children continue to carry this burden.[66] Sefer Halilović filed a lawsuit against a political opponent for being called a 'war criminal' in 2013.[67]

[63] J Subotić, ibid 40–41.

[64] J D Michels, 'Compensating Acquitted Defendants for Detention before International Criminal Courts' (2010) 8 Journal of International Criminal Justice 407.

[65] According to the Sarajevo-based Center for Investigative Reporting 'Bosniak neighbors in Vitez remember those years he spent in a cell (. . .) and see the 41-year-old Bosnian Croat still as a war criminal; one who had a good lawyer'. See The Center for Investigative Reporting in Sarajevo (CIN) 'Defence and prosecution: a tale of two side' (11 July 2005) <http://www.cin.ba/en/na-razlicitim-stranama-istog-zlocina/> accessed January 2018.

[66] G Otašević, 'Miroslav Radić tuzi Srbiju' (*Politika*, 2 November 2008) <http://www.politika.rs/rubrike/Drustvo/Miroslav-Radic-tuzi-Srbiju.lt.html> accessed January 2018.

[67] Fena, 'Sefer Halilović podnio tužbu protiv Radmanovića' (*Bošnjaci.net*,14 February 2013) <http://bosnjaci.net/prilog.php?pid=48222> accessed 6 February 2018.

At the same time it should be noted that in particular, in the former Yugoslavia, a smooth transition to post-trial life certainly is possible, not in the least because the Tribunal's findings on the lack of individual criminal responsibility of a defendant is often perceived as evidence of 'collective vindication', which challenges general feelings of 'collective stigma'.[68] Because of these perceptions some more prominent acquitted persons have arguably even benefitted from their trials and the subsequent acquittals. Most illustrative in this regard is perhaps the acquittal of the former Croatian army general Ante Gotovina. After his acquittal in 2012 an estimated 100,000 enchanted Croats waited to see the government plane, which transported him home, touch down on Croatian soil. As already noted by others,[69] the Croatian government and many citizens had regarded his trial as nothing less but an attack to discredit the young republic of Croatia. Between 2006 and 2012, the Croatian State spent millions of euros on his legal support.[70] In the eyes of many Croats, Gotovina's acquittal heralded the dismissal of the '*Stigma Hrvatska*' (Croatian stigma).[71] In fact, virtually all other republics of the former Yugoslavia have their own acquitted heroes who after a warm welcome—at least initially—reintegrated without many challenges.[72]

A serious challenge that all ICTY-acquitted individuals however have in common is the fact that they have been, or in the future may be, confronted with subsequent prosecutions by other international or domestic prosecutors. Indeed, various ICTY acquitted have been sought for additional prosecutions in the countries of their former adversaries. For example, Croatia issued a request to extradite Miroslav Radić from Serbia,[73] while Serbia requested Bosnia to extradite Naser Orić,[74] which also led to his arrest by Switzerland in 2014.[75] Although the criminal investigation of Fatmir Limaj, which Serbia's War Crimes Prosecutor publicly announced,[76] never made it into an extradition request he was arrested in 2011 pursuant to an order by the District Court of Pristina, operating under the European Union Rule of Law (EULEX) Mission.[77] Despite Kosovar Ramush Haradinaj

[68] R Williams, 'The Fog of War Crimes Prosecution; the ICTY Appeals Chamber Acquits Perišić' (*TerraNullius*, 1 March 2013) <http://terra0nullius.wordpress.com/2013/03/01/the-fog-of-war-crimes-prosecution-the-icty-appeals-chamber-acquits-perisic/> accessed January 2018.

[69] See J Clark, 'Courting Controversy; The ICTY's Acquittal of Croatian Generals Gotovina and Markač' (2013) 11 Journal of International Criminal Justice 399, 418.

[70] 'Croatia's Hague Spending on Ante Gotovina Revealed' (*Croatiaweek*, 23 December 2013) <http://www.croatiaweek.com/croatias-hague-spending-on-ante-gotovina-revealed/> accessed January 2018.

[71] J Hopkin, 'Croatia Starts to Hope Again, as a "War Crime" Stigma is Lifted' (*The Guardian*, 20 November 2012) <http://www.theguardian.com/commentisfree/2012/nov/20/croatia-war-crime-stigma-lifted> accessed January 2018.

[72] For more details, see Holá and van Wijk (2014) (n 1).

[73] Agence France Presse, 'Croatia Charges Serb Whom UN Court Freed' (27 November 2007) <https://listserv.buffalo.edu/cgi-bin/wa?A2=JUSTWATCH-L;53aa9fb9.0711> accessed January 2018.

[74] M Ristic and D Dzidic, 'Serbia Probes Bosnian Army Commander Naser Orić' (*Balkan Investigative Reporting Network*, 29 January 2014) <http://www.balkaninsight.com/en/article/serbia-investigates-bosniak-commander-naser-oric> accessed January 2018.

[75] Balkan Investigative Reporting Network, 'Bosnian Army Wartime Commander Naser Orić Arrested' (10 June 2015) <http://www.balkaninsight.com/en/article/bosnian-army-wartime-commander-naser-oric-arrested?utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed%3A+LatestHeadlinesFromBosniaAndHerzegovina+%28Bosnia+and+Herzegovina%3A+Latest+Headlines%29> accessed January 2018.

[76] Information online available at <https://trialinternational.org/latest-post/fatmir-limaj/ > accessed 30 January 2020.

[77] In May 2012, the EULEX Court acquitted him on all charges. This verdict was annulled by Kosovo's Supreme Court in November 2012, while the ordered retrial, again, resulted in an acquittal in September 2013. EULEX, 'Defendants in Klecka case acquitted' (17 September 2013) <http://www.eulex-kosovo.eu/en/pressreleases/0485.php> accessed 15 April 2015.

having been tried, acquitted, retried and acquitted at the ICTY,[78] he too is probably well aware that investigators of the recently established Kosovo Specialist Prosecutor's Office are digging into his past in order to link him to an organ smuggling ring, which was allegedly active during the 1998 Kosovo conflict. Already in 2014, a European Union Special Investigative Task Force (STIF) report mentioned that individuals at the most senior levels of the Kosovar Liberation Army could face prosecution for conducting 'a campaign of persecution'.[79]

From a strictly legal perspective, follow-up prosecutions often do not violate the 'double jeopardy' or *ne bis in idem* principle which holds that no one shall be tried or punished again for an offence for which he has already been convicted or acquitted.[80] *Ne bis in idem* is a concept based on fairness to the accused and a desire for finality in criminal cases.[81] In the context of this discussion, where international and domestic criminal courts are working side by side prosecuting international crimes, the so-called 'downward vertical effects' of the principle, that is, whether or not domestic prosecution can take place *after* a final decision by an international criminal tribunal, is of particular interest.[82] Carter extensively studied this issue and concludes that it is accepted that subsequent State prosecution for the same crime and the same underlying conduct is possible only on the basis of new evidence.[83]

In reality, however, it is not inconceivable that new evidence related to the same conduct is identified by domestic prosecutors. They are, compared to their international counterparts, usually better equipped in terms of their institutional capacity and proximity to crime scenes and domestic archives, to ask for cooperation of their own State authorities. Their general embedding in the domestic criminal justice systems provides them with easier access to potential evidence. In addition, subsequent prosecutions may also relate to additional international crimes, which were committed during the same violent conflict or persecutory campaign, and were left outside of the scope of the international prosecution. Limited jurisdiction, limited resources, and the sheer scale of the atrocities often do not allow international prosecutors to consider all possible criminal behaviour of defendants. For that reason and in order to secure convictions, they often purposefully limit their investigations in terms of temporal and spatial scope. Illustrative in this regard is that when the Prosecutor of the Serbian War Crimes Chamber said that he was looking into crimes committed by Fatmir Limaj, he also added that the crimes he was investigating had not been included in the ICTY indictment.[84]

Moreover, given the often politically-charged context of the transitional period after atrocities and a potential desire of former warring parties to 'settle accounts' by other means, persons acquitted by international criminal tribunals can face subsequent prosecutions in

[78] *Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* (Public Judgment) IT-04-84bis-T (29 November 2012).

[79] D Bilefsky and S Sengupta, 'Senior Guerrilla Leaders Tied to Acts of Persecution After Civil War' *The New York Times* (30 July 2014) A8.

[80] See art 14 (7) of the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 99 UNTS 171.

[81] L E Carter, 'Complementarity and the International Criminal Court: The Role of Ne Bis in Idem' (2010) 8 Santa Clara Journal of International Law 165.

[82] ibid 165, 172.

[83] ibid 180–84.

[84] Trial Watch Fatimir Limaj (2017) <https://trialinternational.org/latest-post/fatmir-limaj/> accessed January 2018.

domestic courts of their former adversaries, which are often subject to highly politicized confrontations. When Bosnian war hero Naser Orić was acquitted, thousands of Bosniak fans received him at Sarajevo Airport.[85] Serbia's National Council for Cooperation with the ICTY in response issued a statement that the verdict 'cannot contribute to either achieving justice and truth nor to regional reconciliation'.[86] Serbia's War Prosecutor's arrest warrant, which followed suit in 2014, caused significant tensions in the already uneasy relationship between Serbia and Bosnia. While Orić argued that the Serbs 'hope to find a way to balance the crimes committed in 1992–1995', Bosnian President Izetbegović added that Serbia 'should reconsider its actions towards Bosnian civilians' if it 'hopes to become an EU member'.[87] The fact that Serbia and Bosnia do not have an extradition agreement for war crimes[88] only strengthens the belief that the arrest warrant could be seen as a politically motivated move by the Serbian prosecutor to 'make things even' among the former warring parties, especially given the fact that Serbs typically perceive the ICTY as Serb-biased.[89]

Following a strictly legal line of reasoning, one could argue that as long as fundamental legal principles relating to fairness, presumption of innocence, and *ne bis in idem* principle are taken into account, successive prosecutions of suspected war criminals or génocidaires are not problematic. Given the heinous nature of the crimes committed and the fight against impunity, the international community tries to take every necessary step to hold alleged perpetrators accountable. At the same time, the situation leads to some thorny political and normative questions. The experiences of ICTY-acquitted individuals suggest that it is perfectly possible that an acquittal by an international criminal tribunal may be shortly after followed by an extradition request from a domestic prosecutor. This leads to fundamental questions, which current practitioners in international criminal justice need to reflect upon: is it problematic if domestic prosecutors fervently 'complement' the job of international prosecutors? Should we accept internationally-funded domestic war crimes prosecutors using their position and resources in prosecuting individuals, who have already been acquitted by international criminal tribunals? Also, might such prosecutions be politically motivated?

22.3 Conclusion

This chapter discussed the 'post-trial phase' at the ICTY, focusing on the question what happens to ICTY defendants after being convicted or acquitted. It illustrates that the setup of the sentence enforcement system at the ICTY is not transparent, is conceptually underdeveloped, and leads to inequalities in the treatment of international prisoners. The prisoners are sent to various countries around Europe and it is not clear what considerations,

[85] S Olivera, 'Bringing "Justice" Home? Bosnians, War Criminals and the Interaction between the Cosmopolitan and the local' (2011) 12 German Law Journal 1388, 1392.

[86] Ristic (n 74).

[87] 'Serbia to Prosecute Bosnian War Hero Naser Orić' (*World Bulletin*, 31 January 2014) <http://www.worldbulletin.net/news/127979/serbia-to-prosecute-bosnian-war-hero-naser-oric> accessed January 2018.

[88] Ristic (n 74).

[89] Orić was eventually arrested in Switzerland and extradited to Bosnia. In October 2017 the Bosnian state court acquitted him of killing three Serb prisoners of war in the Bratunac and Srebrenica area. A Muslimovic, 'Srebrenica Commander Naser Orić Acquitted of War Crimes' (*Balkan Transitional Justice*, 9 October 2017) <http://www.balkaninsight.com/en/article/naser-oric-srebrenica-commander-war-crimes-trial-verdict-10-06-2017> accessed February 2018.

except for political factors, are taken into account when deciding on the enforcement country. They are scattered in different prisons across and within various countries and subjected to largely differing prison conditions. In general, ICTY convicts are integrated into domestic inmates' populations and typically serve their time in units with serious offenders of ordinary crimes like murderers, child molesters, or drug traffickers. They follow similar daily routines and are offered existing rehabilitation programmes. One might question whether rehabilitating *génocidaires* and war criminals in the same way as ordinary delinquents makes much sense given the specific character of international crimes and their perpetrators. Despite being usually convicted of very serious crimes, the international criminals committed their crimes under very specific (ideological, social, individual) circumstances and arguably differ from ordinary criminals. We would argue this should be duly reflected in designing their rehabilitation programmes. The vast majority of international prisoners are deemed to be rehabilitated from international crimes when they attended work activities or language courses and behaved well in the respective prisons. Therefore, they are released after having served two-thirds of their sentences. ICTY practice demonstrates that the concept of rehabilitation from international crimes and its assessment and implementation in practice is far from clearly developed and would benefit from further conceptualization and reassessment. After their release, the prisoners simply disappear from the radar of the international community (unless they enter witness protection programmes and cooperate with the tribunals) and there is no supervision of their conduct or any attention paid to their activities. Some go back to their countries of origin and return to the political posts they held prior to or during the periods when crimes were committed.

As to the acquittals, the chapter illustrates what an ambivalent message such a decision actually conveys. Whereas a conviction confirms that atrocities have been committed and a responsible person has been held accountable, an acquittal means that the court has *not* established that the accused is responsible for the crimes he has been charged with, but this does *not* mean that no crimes have been committed, *nor* that the acquitted person is innocent. While former ICTY President Meron once argued that acquittals show the health of the international criminal justice system,[90] this chapter brings into question to what extent the negative repercussions some acquitted individuals experience after their release, does not also show the chronic ailment of that very system. Some ICTY acquitted may have 'benefitted' from their status as a former defendant, but a considerable number are confronted with serious problems. They arguably continue to carry the stigma of being tried by an international criminal tribunal. Given the large-scale character of international crimes and the typically very limited focus of international prosecutions, they—similar to the ones who are convicted—can in principle be confronted with new prosecutions any time and anywhere, either by regular or specialized domestic war crimes prosecutors. Due to the complexity of the cases and the gravity of the crimes, defendants have often spent very lengthy periods in detention with no avenue to acquire compensation for their economic and personal losses. Given all of the above, for many an acquittal by an international criminal tribunal can mean winning a pyrrhic victory.

[90] See BBC HARDtalk (16 March 2013) <http://www.bbc.co.uk/programmes/p015gwb1> accessed 6 February 2018.

To conclude, the ICTY has been confronted with a number of practical and fundamental challenges with regards to the post-trial phase. The inequalities and the lack of a principled approach towards the regulation and practical implementation of enforcement of international sentences and the way in which acquitted individuals continue to bear the consequences of once having been prosecuted by the Tribunal have clear repercussions for the Tribunal's legacy and should be taken into account when drafting new policies in the field of international criminal justice.