

**Gert Vermeulen ■ Eveline Dewree**

**Offender**

**Reintegration and Rehabilitation**

**as a Component of**

**International Criminal Justice?**

**Execution of Sentences at the Level of  
International Tribunals and Courts:**

**Moving Beyond the Mere Protection of Procedural  
Rights and Minimal Fundamental Interests?**



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International Criminal Justice?



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Execution of Sentences at the Level of International  
Tribunals and Courts:  
Moving Beyond the Mere Protection of Procedural Rights and  
Minimal Fundamental Interests?

**Gert Vermeulen  
Eveline De Wree**



**Maklu**

Antwerpen | Apeldoorn | Portland

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Antwerpen | Apeldoorn | Portland

Maklu

2014

134 pag. - 24 x 16 cm

ISBN 978-90-466-0651-3

D/2014/1997/15

NUR 824



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Maklu- Publishers

Somersstraat 13/15, 2018 Antwerpen, Belgium, [info@maklu.be](mailto:info@maklu.be)

Koninginnelaan 96, 7315 EB Apeldoorn, The Netherlands, [info@maklu.nl](mailto:info@maklu.nl)

[www.maklu.eu](http://www.maklu.eu)

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## I. INTRODUCTION

Historically, (*infra*, under II) little attention was paid to the execution of sentences passed at the level of international courts and tribunals. Capital punishment was still used, and custodial sanctions were imposed in the relevant states. It was not until the 1990s, with the creation of the *ad hoc* tribunals, that the execution of sentences also became a task for international tribunals (and, recently, for the UN Mechanism for International Criminal Tribunals (MICT)), in cooperation with, and by means of transferring the sentenced person to, a state which had committed itself to executing the sentence. The basic principles of these vertical transfer, or execution of sentence, procedures (*infra*, under III), as is also the case at the level of the ICC, are characterized by a system logic, with a limited role for the sentenced person. Nonetheless, minimal human rights and international standards for the execution of sentences are respected (*infra*, under IV.A). This book investigates whether, and to what extent, the interests of the sentenced person could be better pursued and enhanced during vertical procedures for the execution of sentences; it therefore takes a clear-cut rehabilitation and social integration perspective.

This book essentially draws on doctoral research on the transfer of prisoners, conducted by Eveline De Wree (De Wree, 2011) under the supervision of Gert Vermeulen, and on a research project on the cross-border execution of judgments involving the deprivation of liberty in the EU (JLS/2009/JPEN/PR/0031/E4; principal: European Commission, DG Justice) (Vermeulen et al., 2011). The latter shed light on the compliance by EU member states with international and European standards relating to detention conditions, including standards relating to offenders' reintegration and prospects for rehabilitation. A detailed overview of the standards concerned and the compliance of EU member states with those standards features as an annex to the body of this book. Legally speaking, the practice of the execution of sentences at the level of international tribunals and courts is only required to comply with universal minimum standards (such as the Universal Declaration on Human Rights (hereafter: Universal Declaration)). However, the question arises whether practice should not evolve towards reflecting the obligatory compliance of EU member



states with additional (sometimes broader, more precise and higher) binding and non-binding Council of Europe and EU standards. This would affect the tribunals' and courts' (especially the ICC's) policies relating to the conclusion of sentence execution agreements with states, as well as the actual case-based decisions that stipulate a particular state for the execution of a sentence. This question seems all the more relevant because fourteen out of the seventeen states that have concluded agreements with the ICTY for the execution of sentences are EU member states (and twelve out of the thirteen states to which the ICTY has transferred convicted persons are EU member states), because the only three non-African states that have concluded agreements with the ICTR for the execution of sentences are EU member states, and because five out of the eight states that have so far concluded agreements with the ICC for the execution of sentences are EU member states.

The very limited practice of the UN Mechanism for International Criminal Tribunals (MICT), which in 2010 has been set up by the UN Security Council in the context of the completion strategies for both *ad hoc* tribunals and has taken over responsibility from the ICTR and ICTY *inter alia* as far as the execution of sentences and the supervision thereof are concerned (since 1 July 2012 respectively 2013) is not reflected in the book. Essentially, the MICT has not prompted any fundamental changes (nor will it) when it comes to the principles of vertical execution of sentences pronounced by the ICTY and ICTR. Its task is to *continue* the function of execution of sentences of both institutions. *Mutatis mutandis*, the relevant rules embedded in its Statute<sup>1</sup>, its Rules of Procedure and Evidence,<sup>2</sup> its Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve His or Her Sentence<sup>3</sup> and its Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism<sup>4</sup> have merely substituted those embedded in

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<sup>1</sup> Statute of the International Residual Mechanism for Criminal Tribunals (December 22, 2010), UN Security Council Resolution 1877 (July 7, 2009), *U.N.Doc. S/RES/1966* (2010) and [http://www.unmict.org/files/documents/statute/101222\\_sc\\_res1966\\_statute\\_en.pdf](http://www.unmict.org/files/documents/statute/101222_sc_res1966_statute_en.pdf).

<sup>2</sup> [http://www.unmict.org/files/documents/rules/120608\\_rules\\_en.pdf](http://www.unmict.org/files/documents/rules/120608_rules_en.pdf).

<sup>3</sup> [http://www.unmict.org/files/documents/practice\\_directions/pd\\_mict2\\_en.pdf](http://www.unmict.org/files/documents/practice_directions/pd_mict2_en.pdf).

<sup>4</sup> [http://www.unmict.org/files/documents/practice\\_directions/pd\\_mict3\\_en.pdf](http://www.unmict.org/files/documents/practice_directions/pd_mict3_en.pdf).

the corresponding ICTY and ICTR texts, which consequently are still being referred to throughout the book. Essentially, it suffices to bear in mind that the jurisdiction to designate states for the execution of sentences is currently with the MICT, including for persons convicted by the two tribunals after 1 July 2012 respectively 2013. In addition, from the same dates onwards, the MICT president has inherited from the ICTR and ICTY presidents the jurisdiction to supervise the execution of sentences and to decide on requests for pardon or commutation of sentence, including for convicted persons already serving their sentences.



## II. HISTORY

The tracing, prosecution and punishment of offenders has always been the main objective of international courts and tribunals. The stage of the execution of a sentence was often nothing more than ‘accessory’. For a full understanding of the basic principles of the execution of a sentence after conviction by an international court, it is necessary to examine the origin of international courts and tribunals further. The underlying motives in their development largely explain the general lines of the chosen system for the execution of sentences and the historical evolution of that system up to the present day.

### A. The Nuremberg and Tokyo Tribunals

Both these *ad hoc* tribunals were created after World War II with the support of national governments that realized the importance of an international *accountability* mechanism with a view to preserving world order and restoring peace (Bassiouni, 2000). The tribunals broke the monopoly of states in respect of the prosecution and judgment of international crimes: for the first time, organizations of a non-national or multinational nature were created to prosecute and punish crimes with an international dimension (Cassese, 2003). The nation state was no longer exclusively responsible for crime control. The strict linkage between geography and political power was broken. As the Nuremberg and Tokyo tribunals were created, a formalized international criminal law system was achieved (Findlay, 2008). Prominent individuals, not states, were convicted for crimes of aggression, war crimes and crimes against humanity (Beigbeder, 2005). In this way, the recognition of individual responsibility, as regards punishment for those crimes, became a fact.

Concerning the execution of sentences, these tribunals did not take much action. The sentence was considered nothing more than a logical consequence of a conviction by these courts. Besides, capital punishment was the only sentence actually imposed by the Nuremberg tribunal, even though it was also possible for the tribunal to impose another sentence that it considered to be ‘right’ (Sebba, 2009). In October 1945, twenty-four Nazi leaders were accused; their trial – ‘The Trial of the Major War Criminals’ – started a month later. After one

year, nineteen of the accused were convicted of *crimes against humanity*; twelve were sentenced to capital punishment. But otherwise the tribunals of Tokyo and Nuremberg did not consider it their task to provide for the execution of the sentences they imposed. Sentences had to be enforced in the country where the crimes were committed (i.e. Germany and Japan), and, moreover, where the tribunals themselves were located (Klip, 1997).

## **B. The International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)**

Subsequently, the international community remained silent for a long time.<sup>5</sup> Bassiouni concludes that, although internal conflicts were still happening and regimes still existed that were characterized by violations of human rights, no prosecution or other *accountability* mechanism was in place. Instead, the aim was for a political solution, with impunity often being the price people had to pay for the ending of a conflict (Bassiouni, 1996). In the 1990s, there was goodwill, regarding a few events, for reverting to the creation of *ad hoc* tribunals. The ICTY and the ICTR were the first international tribunals after those of Nuremberg and Tokyo (Balint, 1996).

For the ICTY, unlike the post-war tribunals, it was assumed that the execution of sentences was also the task of the tribunal. Moreover, the tribunal is different from the post-war tribunals because it is not located in the conflict area itself, but in a host country, i.e. the Netherlands. The tribunal's host country does not, however, have to ensure the execution of the sentences. Also, the countries in which the conflict had taken place were not considered for the execution of sentences. A way to execute the sentences imposed by the international courts and tribunals had to be found, with few precedents to rely on. A

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<sup>5</sup> However, the United Nations, or more specifically the International Law Commission, searched for a more permanent and impartial mechanism to mete out international punishment (Cassese, 2003). To do this, it started with the idea of clearly defined norms which would be applied consistently by a permanent international criminal court (Bassiouni, 2000). After the Nuremberg and Tokyo tribunals had accomplished their tasks, the first acts towards the creation of a permanent international criminal court were, however, quickly put aside as the Cold War began. The impulse existing at the end of World War II was thus not used for the creation of a permanent international criminal court (Broomhall, 2003).

specific criminal legal system was therefore required, supported by the entire international community. In the ICTY Statute of the ICTY<sup>6</sup> a first indication can be found of the system the authors had in mind, namely research by the Security Council into the willingness of different countries, and then the passing of this information to the registrar of the tribunal so that a list of states in which the execution of sentences could take place could be created. This was the final design of the system for the execution of a sentence after a conviction by an international court.

Concerning the execution of sentences, the ICTR chose a similar system to that of the ICTY. The execution of sentences in Tanzania (the host country) was in any event out of the question. The execution of sentences in Rwanda was not excluded as such. Moreover, the Statute (and the Rules) of the ICTR stipulate: 'Imprisonment shall be served in Rwanda or any of the States on a list of states which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda' (Article 26 ICTR Statute). The possibility of the execution of sentences in Rwanda was thus preserved, as well as the system of spreading the execution over different countries that was also used for the ICTY. For this reason, the goodwill of other countries to accept convicted persons in their prisons has to be examined here as well.

This difference between the two tribunals can be understood in the light of the context in which they were created. The government of Yugoslavia was against the creation of the ICTY from the beginning, but the Rwandan government supported the creation of the ICTR and participated in the negotiations. Eventually, however, Rwanda voted against Resolution 955, because it did not agree with the time delimitation and the consistency and structure of the tribunal (Magnarella, 2000). Rwanda's rejection also related to the execution of sentences. It could not accept that convicted persons would be detained outside Rwanda, and that these countries would have the responsibility for decisions concerning these people. Rwanda argued that this responsi-

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<sup>6</sup> Statute of the international criminal tribunal for the former Yugoslavia (May 25, 1993, last changed on July 7, 2009), UN Security Council Resolution 1877 (July 7, 2009), *U.N.Doc. S/RES/1877* (2009) and <http://www.icty.org/sid/135> (hereafter: ICTY Statute).

bility belonged to the international tribunal or, at least, to the Rwandan people. There was a fear that the countries taking responsibility for the execution of sentences would release the convicted persons (too soon). Because of this concern, the Statute later included a provision that the Rwandan government had to be informed of modifications to any penalty. There was also a thought that there was a disparity because capital punishment could not be imposed on people sentenced by the tribunal, but it could on people prosecuted before the Rwandan courts. Finally, people were displeased by the fact that the ICTR would be located in Rwanda itself (Akhavan, 1996).

### C. The International Criminal Court (ICC)

The ICC reflects an innovative development in international law. The creation of the ICC was preceded by the *ad hoc* tribunals, which – in retrospect – figured as laboratories in which the feasibility and the workability of this form of international justice could be tested. However, never before had the international community tried to create a court with a similar general range and general application (Schabas, 2004).

Therefore the ICC also faced a new challenge concerning the system for the execution of sentences. The ICC considers the execution of sentences as its own task, in the same way as do the ICTY and the ICTR. In line with the choices made within the ICTY and the ICTR, a distribution of the sentencing load among different states was chosen. A new element is, however, that there is an explicit effort to distribute the load as evenly as possible, illustrated by the reference in the Statute to the principle of ‘equitable distribution’ (Schabas, 2004). This means that the number of convicted persons already received by a state is taken into account, and that it is assumed that every state should be granted the opportunity to receive convicted persons (Rule 201, Rules of Procedure and Evidence). The main aim of this principle is a proper distribution between different states, keeping in mind the number of people and the length of their punishments. ‘Equitable

geographical distribution' was not previously a legal principle, but was used by the ICTY as a 'guiding principle' in its decisions.<sup>7</sup>

#### D. Conclusion

In the past century there was the beginning of an international system of punishment, whereby the international community considers itself responsible for the prosecution and adjudication of – the most serious – crimes. During the past century, the lines were therefore laid down and the structures evolved over time. Eventually, this process culminated in the creation of a permanent international criminal court.

On this basis, it could be reasoned that greater importance is attached to the idea of an international community (Gardocki, 1992). Once the tribunals and the ICC had been created, international reaction against behaviour considered as harmful for the entire international community has grown. The underlying supposition is that there is an international community, a social and moral order common to all countries (a '*civitas maxima*'). With this, the international criminal law functions as a way to confirm and strengthen the feeling of solidarity. The institutionalization of the punishment of these crimes signifies the expression of a universal aversion (Wise, 1999). The international community institutionalized the reaction to these crimes that lay at the heart of her interests and concerns. It is doubtful that a genuine international community is in place. As the existence of a shared and collective consciousness at the level of the nation state (or, to put it better, in a national context) is already doubtful, doubts are even more obvious at the international level.

Concerning the execution of sentences, this means that the idea of a 'community' played a role in how sentences were executed after conviction by an international court. As the execution of sentences did not at first (with the post-war tribunals) belong among the tasks of an international tribunal, giving the task to the tribunal was considered to be necessary with the *ad hoc* tribunals. It was not considered opportune to appoint a precise country for the execution of all sentences: the

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<sup>7</sup> Manual on Developed Practices of the ICTY, 2009, [http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/icty\\_manual\\_on\\_developed\\_practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf).



host country was not generally willing to do this and the country or countries in which the conflict had taken place were (at first) considered to be inappropriate. Therefore a pragmatic model for the execution of sentences was chosen, in which countries had to declare themselves to be willing to ensure the execution of sentences. The ICC went one step further: for this tribunal, an administrative logic is applied to the execution of sentences by including the desire for 'equitable geographical distribution' in the requirements of the system for execution of sentences.

### III. BASIC PRINCIPLES OF VERTICAL EXECUTION OF SENTENCES

In this review of the basic principles, the main focus will be on the ICTY and the ICTR, as these tribunals already have a wide practice for the execution of sentences. A review of the execution of sentences within the ICC, by contrast, remains limited to the official documents.

#### A. The 'system' for the execution of sentences passed by international tribunals and courts

##### 1. *Cooperation with states*

The international courts and tribunals themselves do not possess the capacity to detain people in order to execute their sentences. The detention units to which they have access are meant for the custody of defendants during the prosecution and trial stages. As these detention units are not (officially) used for the execution of sentences, the international courts do not have their own prisons. Moreover, the execution of a sentence within the state where the court is situated is not necessarily an option. It is an option for the ICC if no other country is prepared to execute the sentence (see later), whereas the agreement established with the host country (Tanzania) for the ICTR stipulates that convicted persons will be dismissed from Tanzania.

A way had to be found to execute sentences imposed by international courts and tribunals, but there were few precedents on which to rely. The Statute of the ICTY stipulated that the Security Council would research the willingness of several countries and subsequently would report this information to the registrar of the tribunal so that a list could be drawn up of the countries in which sentences could be executed. This model crucially influenced the execution of sentences within the ICTR and the ICC.

The statutes of all international courts, including that of the ICC, stipulate that the sentence has to be served in a country which has declared itself willing to accept convicted people. All international criminal courts therefore appeal to a decentralized network of states for the execution of their sentences (Mulgrew, 2009). Countries are expected to engage in the execution of sentences because they support

the international court (and, more widely, the ‘rule of law’). This derives from the underlying idea about the international courts: they are a part of a much larger network of actors who are striving for the same purpose, namely international justice. In that respect, states are all members of this community and have to help the criminal court, which itself does not possess any mechanisms for the execution of judgments. The execution of sentences is, in that sense, not very different from the other stages of the criminal procedure, as international courts also appeal to national authorities and legal systems for the execution of decisions.

States must offer their services voluntarily by declaring that they are willing to accept these prisoners in their prisons. They were also encouraged by the Secretary-General to declare themselves willing.<sup>8</sup> After all, there is no general obligation to cooperate (Cassese, 2003). While states have many obligations to cooperate with international courts (by, *inter alia*, handing over suspects and providing evidence), the execution of sentences is a matter in which states cooperate voluntarily (Tolbert & Rydberg, 2000). Goodwill is probably the most pragmatic framework, but it is still clear that many states do not want to contribute voluntarily to the international transfer of convicted persons and, moreover, do not want to be forced to do so. Only a few countries, and not the superpowers (see later), have declared themselves willing to execute punishments. In the case of the ICTR, it appeared that initially no countries of their own accord reported to the Security Council their willingness to accept prisoners.<sup>9</sup>

A prison sentence is executed in the state appointed to that end by the court from a list of states that have stipulated, to the Security Council (for *ad hoc* tribunals) or to the court itself (for the ICC), their willingness to receive convicted persons. A state can inform the registrar that it wishes to withdraw from the list. This, however, will not have any effect on the persons already imprisoned in the country concerned.

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<sup>8</sup> Report of the Secretary-General related to Paragraph 2 of Resolution 808 (1993) of the Security Council (3 May 1993), *U.N. Doc. S/25704* (1993).

<sup>9</sup> Interview with Roland Amoussouga, Senior Legal Adviser, Chief of External Relations and Strategic Planning Section (ERSPS) and ICTR Spokesperson, held September 23, 2009.

## 2. Sentence execution agreements

International courts conclude bilateral agreements with states willing to execute their sentences. In these agreements, a framework is created for the acceptance of persons convicted by the court. As only a few countries were willing to execute sentences, it gradually became the case that the *ad hoc* tribunals initiated the forming of agreements. In practice, the initiative to conclude an agreement can be taken either by the international court itself or by the country concerned.

The *ad hoc* tribunals adopted a policy concerning the creation of agreements, in the sense that a certain group of countries was clearly preferred. The policy of the ICTY<sup>10</sup> is, in accordance with the Manual on Developed Practices, mainly based on the human rights standards in the countries concerned: the circumstances of the detention have to be adequate. For humanitarian reasons, for instance geographical considerations, agreements are mostly concluded with European countries. The aim is to ensure that the distance between the countries and the region of the former Yugoslavia is not too great, so that there is no obstacle preventing family and friends from visiting prisoners. The ICTY has concluded sentence execution agreements with seventeen countries: Italy and Finland (1997), Norway (1998), Austria and Sweden (1999), France, Spain and Germany (*ad hoc*) (2000), Denmark and Germany (*ad hoc*) (2002), the UK (2004), Belgium, Ukraine and Portugal (2007), Estonia, Slovakia, Poland, Albania and Germany (*ad hoc*) (2008) and Germany (*ad hoc*) (2011). It is clear that, initially, agreements were mostly concluded with countries from Northern and Western Europe. In recent years, however, some agreements have been concluded with Eastern European countries. Fourteen out of the seventeen countries concerned are members of the EU – which explains why, later on in this book (and in particular in the annex), not only UN but also EU sentence execution standards are reviewed. There have so far been no agreements with non-European countries.

To date, eight countries have been found willing to oversee the execution of custodial sentences pronounced by the ICTR: Mali and Benin

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<sup>10</sup> The responsibility for identifying states suited to the execution of sentences lies with the registrar.

(1999), Swaziland (2000), France (2003), Italy and Sweden (2004), Rwanda (2008) and Senegal (2010). The first agreements were therefore concluded with African states. The ICTR indicated that, for socio-cultural reasons, the execution of sentences in African states was appropriate (Magnarella, 2000). Secondly, European countries (all three of them EU countries) were added to the list – countries that had also declared their cooperation quite rapidly to the ICTY. Later, however, sentence execution agreements were again concluded with African states, including Rwanda itself.<sup>11</sup>

The agreements concluded by the ICTR and ICTY remain in force for the MICT, which itself has not (yet) concluded any new agreements.

It is the case that persuasive efforts from international courts are necessary to motivate countries to make this commitment (Tolbert & Rydberg, 2000). Some countries remain reluctant, for instance because their governments are not inclined to take measures which could cause a strong public reaction, or because they do not want to have foreign inspections of their own prisons (see later). Likewise, legal amendments are sometimes needed to permit the execution of sentences imposed by an international court, for instance regarding clemency<sup>12</sup> and penalty reduction, or the inspection regime provided by the court (Tolbert & Rydberg, 2000). Some countries also fear that they will be flooded with people convicted by the international courts. So, for example, Finland told the ICTY that it did not want to hold more than five convicted persons in its prisons at one time, and Italy demanded that it be asked to accept no more than ten prisoners during the three years after its declaration of willingness (Klip, 1997). The Special Court for Sierra Leone (hereafter: SCSL) also had to deal with competition from the other international courts. Finally, states remained worried about the possibility of the family of the convicted person asking for asylum in the country agreeing to execute the sentence (Mulgrew, 2009). The ICC is still working on concluding agreements for the execution of sentences. To date, the ICC has con-

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<sup>11</sup> The ICTR initially faced problems in finding countries that were willing to execute sentences. Nevertheless, in the course of 1998, many countries declared themselves willing to do so: Austria, Belgium, Denmark, Norway, Sweden and Switzerland.

<sup>12</sup> Clemency can usually only be granted by, e.g., the president or the queen of the country and, if permitted, is recorded as such in the Constitution.

cluded eight such agreements (and it is again striking that, in five cases, these are with EU member states): with Austria (2005), the UK (2007), Belgium, Denmark and Finland (2010), Serbia and Columbia (2011) and Mali (2012).<sup>13</sup>

In any event, each country has the right to refuse to agree to execute sentences. The negotiation of treaties on the execution of sentences therefore requires a necessary dose of creativity to overcome the caution. Negotiations are, according to the Manual on Developed Practices of the ICTY (Manual on Developed Practices, p. 152), characterized by continuous pressure, by regular deliberations and by an increase in the awareness of the needs of the tribunal in the area of the execution of sentences. Normally it is remarked that there cannot be justice if the sentences that are imposed cannot be executed.

Other elements can also put a brake on the negotiation of treaties: for example, the execution of sentences involves a relatively large expense for the less developed countries. A few African developing countries were apparently willing to cooperate with the ICTR, but were confronted with the problem that they could not comply with the minimum international standards.

The contents of the agreements concluded by the tribunals and courts concerning the execution of sentences are almost the same. For the first agreements of the ICTY, a model agreement<sup>14</sup> was created, partly because the UN further determined the framework for the execution of sentences (Tolbert & Rydberg, 2000). A state can include a few conditions to its commitment to execute sentences. The Statute of the ICC stipulates that states can link conditions to their willingness to execute sentences (without it being possible to derogate from the terms of the Statute). There is therefore not complete freedom over the terms of the agreements (Mulgrew, 2009). If there is no agreement on the conditions stipulated by a country, the country concerned will not be included in the list. Moreover, a state can withdraw the conditions it has stipulated. Changes or amendments concerning

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<sup>13</sup> Further states that have declared their willingness to accept sentenced persons under certain circumstances are: Andorra, Czech Republic, Honduras, Liechtenstein, Lithuania, Slovakia, Spain and Switzerland.

<sup>14</sup> The agreement between the ICTY and Norway is *mutatis mutandis* identical to the model agreement.

those conditions have, however, to be acknowledged by the president of the court.

The fact that an 'agreement' is still required between the court and the state has to do with the fact that there is no obligation for states to cooperate with the execution of sentences. In some cases it turned out that countries were not prepared to conclude a general agreement, but were prepared to consider executing sentences on a 'case-by-case' basis (Manual on Developed Practices, p. 152), notably when a convicted person was one of their citizens or was a resident, and even then under the condition that the sentence imposed did not exceed the corresponding national maximum sentence. Currently this is the case for another eight countries.

3. *Execution of sentences in country of origin not obligatory and may even be excluded*

The execution of a sentence after conviction by an international court or tribunal takes place in one of a few countries which have declared their willingness, and in that way does not necessarily take place in the country of origin of the convicted person. This development is recent, and only arose with the *ad hoc* tribunals. At the time of the post-war tribunals, it was still understood that sentences had to be served in the country where the crimes were committed (*in casu* Germany and Japan), and where the tribunals were located (Klip, 1997).

However, it is interesting that, concerning the ICTY, the execution of sentences was not possible in the countries of the former Yugoslavia. The UN Secretary-General judged that 'given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia'.<sup>15</sup> Bosnia-Herzegovina and Croatia did, however, initially declare their willingness to execute sentences (Klip, 1997). This possibility was excluded due to the continuing conflict in the region. Over time, however, it became possible to transfer cases to the national institutions. The sentences arising from these transferred cases were in any event executed in the countries of the former Yugo-

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<sup>15</sup> Report of the Secretary-General relating to paragraph 2 of Resolution 808 (1993) of the Security Council (3 May 1993), *U.N. Doc. S/25704* (1993).

slavia itself. The existing system of the ICTY itself remained unchanged, and the punishments of the leaders thus had to be executed elsewhere. In the judgment concerning *Erdemovic* this was confirmed by the trial chamber (Schabas, 1997); the jurisprudence of the ICTY therefore follows the report of the Secretary-General (Manual on Developed Practices, p. 157).

The Statute (and the Rules) of the ICTR do not exclude detention in Rwanda. According to the Statute (Article 26), imprisonment shall be served in Rwanda or any of the states on a list of states which have indicated their willingness to accept convicted persons. For a long time, none of the prisons in Rwanda complied with the internationally accepted minimum standards for detention, so the execution of sentences was not possible in Rwanda (Schabas, 1997).

The ambiguity and difficulties regarding the execution of sentences in the country of conflict itself are also noted for the mixed tribunals. Concerning the SCSL, a mixed tribunal, the initial aim was to execute the sentences in Sierra Leone itself. This was also stipulated in the SCSL Statute. At first, the SCSL was reluctant, as it feared that the presence of certain prisoners would have a negative influence on the stability of the country and the region. However, after the deaths of two of the 'high profile' prisoners, this consideration lost its importance (Mulgrew, 2009). Two other concerns did, however, remain: security in the prison system of Sierra Leone, and the fact that the prisons did not meet the international standards (as a consequence of overpopulation and a shortage of nourishment, water, sleeping places and adequate sanitation). Because of this, the execution of sentences in another state was preferred. The solution that was found was that sentences were executed in one of the states that had concluded a sentence execution agreement with the UN tribunals, if the state informed the SCSL registrar that they would also accept persons convicted by the SCSL (Mulgrew, 2009). The government of Sierra Leone desired that all sentences of the court should be executed in Africa. The African states that had already concluded agreements with the ICTR pointed out that they were not interested in cooperating with the SCSL. Therefore the SCSL broadened its field of interest beyond Africa. The SCSL concluded treaties on the execution of sentences with Sweden (2004), the UK (2007) and Finland (2009). Eventually, also



in 2009, a sentence execution agreement with Rwanda was established, and Rwanda eventually became the country where in practice the execution of sentences takes place.

#### 4. *State for the execution of a sentence appointed by the tribunal or court*

The court determines the state where the sentence will be executed, and is able to change this at any time (Cassese, 2003). The procedures for the indication of the state are largely the same in all the different international courts and tribunals. The framework for these procedures can be found in the Statutes and the Rules of the tribunals. Concerning the ICTY and the ICTR, these procedures are further developed in the ‘Practice Directions 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’.<sup>16</sup>

After a sentence has become final<sup>17</sup> or – as often happens in practice – shortly before sentencing,<sup>18</sup> the registrar makes preliminary enquiries with states about their willingness to execute the sentence (Practice Direction Designation ICTY, p. 2). In the Practice Direction of the ICTR the equivalent provision reads: ‘[...] the registrar shall engage in a communication process with any of the States that have declared their willingness to accept convicted persons and have signed an agreement with the Tribunal’ (Practice Direction Designation ICTR, p. 1).

During this consultation stage, the ICTY and ICTR provide the necessary documents (copy of conviction, details of any part of the sentence

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<sup>16</sup> ICTY’s 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 (1 September 2009), *ICTY IT/137/Rev. 1* (1998) and [http://www.icty.org/x/file/Legal%20Library/Practice\\_Directions/it\\_137\\_rev1\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Practice_Directions/it_137_rev1_en.pdf) (hereafter: Practice Direction Designation ICTY) and ICTR’s Practice Direction on the procedure for designation of the state in which a convicted person is to serve his/her sentence of imprisonment (September 23, 2008), <http://www.unict.org/Legal/PracticeDirections/tabid/96/Default.aspx> (hereafter: Practice Direction Designation ICTR).

<sup>17</sup> In an attempt to abbreviate the timescale as much as possible, the normal practice within the ICTY is to make preliminary enquiries with states before the judgment is final.

<sup>18</sup> Interview with staff of the ICTY Registry, held August 25, 2010.

already served and copy of identity card) so the state is able to take an informed decision. Reports and information about behaviour during custody and medical history can also be provided if asked for by the state. Furthermore, three countries (Sweden, Denmark and the UK) request that the tribunal (*in casu* the ICTY) provides documents confirming that the convicted person has connections with that country.<sup>19</sup> The UK also does this in its agreement with the ICC.

The president of the court will eventually indicate a state in which the sentence will be executed. Therefore, the registrar gives the president a confidential memorandum. The memorandum contains information concerning the conviction and the sentence, a list of all countries which will execute sentences or have executed them for the tribunal, and background information concerning the civil status and family relationships of the convicted person (*inter alia* their place of residence and – if appropriate – information concerning the resources available for prison visits). Moreover, the memorandum indicates whether the convicted person still has to act as a witness before the tribunal or if he/she will be relocated as a witness (and, in this case, which states have concluded relocation agreements with the tribunal); medical and psychological reports about the convicted person are delivered (if appropriate); and information about the convicted person's knowledge of languages, and, if possible, the general detention conditions and regulations relating to 'security and liberty' in the state is given (Practice Directions Designation ICTY, p. 3 respectively ICTR, p. 2). Based on this information, the president of the tribunal determines where the sentence will be served. According to the Practice Direction of the ICTY, the president should pay special attention to the 'proximity' of the convicted person's relatives when executing this discretionary power. In the Practice Direction of the ICTR this becomes: '[...] the president will take into account the desirability of serving sentences in states that are within close proximity or accessibility of the relatives of the convicted person'. Nevertheless, in practice other factors, such as whether the convicted person will still figure as a witness in another

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<sup>19</sup> The UK specifies that it wants to be given the name, date and place of birth and possible family or other existing connections with the UK or any other reason why the request should be made to the UK.

case, will often be given weight in the choice of the state in which the sentence will be executed.<sup>20</sup>

The president can consult the sentencing chamber, or the judge-president. He can also ask for the opinion of the convicted person and/or of the prosecutor. Moreover, the president can decide not to reveal the possible state. If the state accepts, the convicted person is informed of the chosen state, the content of the agreement between the tribunal and the state and other relevant questions.

However, the Manual on Developed Practices shows that the registrar of the ICTY does not notify all states, but itself identifies potential states for the execution of the sentence, based on the minimum and maximum duration of the sentence that can be passed,<sup>21</sup> the maximum number of punishments, the compatibility of the socio-cultural environment for the convicted person and the geographical accessibility for relatives. Each time only one state is notified, rather than more than one state at a time, because of concerns that a state that had declared itself to be willing would have to be rejected (Manual on Developed Practices, p. 155). The Practice Direction stipulates that the memorandum includes a list of countries, and that the president of the tribunal chooses (Practice Direction Designation ICTY, p. 2). However, given the fact that only one state is notified at a time, the memorandum is mainly created so that the president can decide whether or not to honour the choice of state.

Regarding the ICC, the Statute stipulates that, when designating a state, the court has to take into account: the application of widely-accepted international treaty standards concerning the treatment of prisoners, the opinion of the convicted person (see later), the nationality of the convicted person and other factors concerning the circumstances of the crime or the convicted person or the effectiveness of the execution of the sentence (Article 103, Rome Statute). Moreover the Statute refers to the principle that states should bear the responsibility for the execution of the sentence, in accordance with the principle of

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<sup>20</sup> Interview with staff of the ICTY Registry, held August 25, 2010.

<sup>21</sup> The length of the sentence is thus an important factor, as it determines whether a sentence will be fully executed in a certain country or will need to be distributed over two different countries.

‘equitable distribution’ (Schabas, 2004). Therefore the court must consider the principle of equitable distribution in its decisions on the indication of a state. This means that the number of convicted persons already received by a state is taken into account, and that it is assumed that every state should have the opportunity to receive convicted persons (Rule 201, Rules of Procedure and Evidence). This principle mainly aims at the equitable distribution of costs, bearing in mind the number of persons and the length of their sentences (Manual on Developed Practices, p. 154). How exactly it should be followed is hard to tell (and thus also hard to evaluate). For instance, it is not clear if there should be a distinction between bigger and smaller countries. ‘Equitable geographical distribution’ was not previously a legal principle, but was used by the ICTY as a ‘guiding principle’ in its decisions. Moreover the application of the principle also arose in practice, as states that already had some convicted persons in their prisons invoked the principle to show that there were problems with a new indication.

The appointed state is notified of the decision, and a few documents are passed to it (documents showing name, nationality, place and date of birth; a copy of the definitive judgment (with details of the length and starting date of the punishment and the rest of the sentence); and, after consultation with the convicted person, any necessary medical information) (Rule 204, Rules of Procedure and Evidence). When a state is appointed, it must immediately respond to say whether it accepts the appointment. If a state declines the indication, the president can appoint another state (Rule 205, Rules of Procedure and Evidence). If no state is appointed, the prison sentence will be served in a prison facility made available in the host country, *in casu* the Netherlands. In this case the costs arising from the execution of the sentence will be borne by the court (Article 103, Rome Statute).

At the date of writing,<sup>22</sup> the ICTY had convicted 69 persons, of which one is awaiting transfer to the state in which he will serve his sentence. The others are serving their sentences in a state appointed for this purpose (16), died during the execution of their sentence (3) or have already served their sentence (49), either after transfer (31) or in the ICTY detention facility itself, the latter because the duration of the

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<sup>22</sup> This was the situation on January 15, 2014.

sentence imposed did not exceed the period during which they had been remanded in custody, or only barely exceeded that period so that the transfer was no longer necessary, useful or meaningful (18). The total number of convicted persons who have been transferred (49) turns out to be quite equitably distributed between the different countries (Austria and Norway: 6; Italy, Finland and Spain: 5; France, Germany and Denmark: 4; the UK and Sweden: 3; Estonia: 2; Belgium and Portugal: 1). Relatively speaking, the countries that promised their cooperation first in an official agreement have also received the most convicted persons. The countries that have more recently made their official commitment, except for Estonia and Portugal, have not yet received any convicted persons.

With a few exceptions, the people convicted by the ICTR appear until now mainly to have been transferred to two countries for sentence execution: 20 to Mali, 16 to Benin, 1 to Italy and 1 to Sweden.<sup>23</sup>

##### 5. *Consultation with the person concerned*

With regard to the tribunals, a (possible) consultation with the person concerned was envisaged before the final appointment of a state for the execution of the sentence. The Practice Directions provide for the possibility that the convicted person may declare his opinion, if requested by the president, within the timeframe set by the president (Practice Direction Designation ICTY, p. 3,<sup>24</sup> respectively ICTR, p. 3<sup>25</sup>). The consultation mainly aims to obtain the views of the convicted person before the making of a decision that will eventually have a great influence on the detention process. The president inquires in particular whether there are previously unknown elements that make it undesirable for the sentence to be served in the country concerned. In its present form, this cannot be considered a legal right to be heard. Instead, it is a possibility offered to the convicted person to raise fun-

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<sup>23</sup> Transfer for the service of a sentence can moreover be postponed. In the case of *Ruggiu*, for instance, the convicted person stayed in the ICTR detention facility for a longer time for the sake of providing help as a witness in current proceedings (see: ICTR, The president's decision on the prosecutor's ex parte application for the continued detention of Georges Ruggiu in the Tribunal's detention facility in Arusha (January 17, 2003).

<sup>24</sup> 'The President may, furthermore, request the opinion of the convicted person [...]'

<sup>25</sup> 'The President may request the submissions of the convicted person concerned [...]'

damental objections. However, this does not mean that the convicted person can ‘choose’ the country in which he/she will serve his/her sentence. Therefore the consultation is seen as important to allow the court to become aware of particularly serious obstacles (for instance death threats).

The jurisprudence of the ICTY has made it clear that, according to the Statute, the Rules and the Practice Direction, there is no question of a right for the defendant to be heard about the state where he/she will serve his/her sentence. There is no formal right of appeal against the decision regarding the appointment of a state. Of course, convicted persons are free to notify the president of their objections, but no formal procedure is set out. Some convicted persons, both from the ICTY and the ICTR, have however asked for a transfer to a certain state or to a state other than the one appointed. As the convicted person does not have the right to demand this directly from the president, these requests were not followed up. The president can, however, choose to consider the convicted person’s opinion, at his discretion. So far, however, there are no cases known at the ICTR level in which consultation with the person concerned has led to the appointment of another state.<sup>26</sup>

While consultation with the person concerned is still optional, it became a requirement for the ICC: ‘The Presidency shall give notice in writing to the sentenced person that it is addressing the designation of a State of enforcement. The sentenced person shall, within such time limit as the Presidency shall prescribe, submit in writing his or her views on the question to the Presidency’ (Rule 203, Rules of Procedure and Evidence). The president may also be allow the convicted person to give ‘oral presentations’. Moreover, the president will allow the convicted person to be assisted by a competent translator in order to express his opinion. In addition, appropriate time and facilities have to be provided for the preparation of the presentation of his opinion.

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<sup>26</sup> Interview with former staff of the ICTR Presidency, held October 4, 2009.

## B. Actual execution of the sentence

### 1. *Execution of the sentence in line with the 'general law and regulations' of the state concerned*

When a state executes a punishment pronounced by an international court or tribunal, the state is bound by the duration of the sentence and cannot modify this in any way.

The fact that the state cannot modify the nature or the duration of the sentence indicates the truly international character of the sentence. Yet accepting the duration of the sentence seems to be an important issue in the sentence execution agreements concluded with the international courts. The ICTY's agreements with some countries stipulate that the countries will not execute sentences that exceed the absolute maximum number of years that can be served in that country (the longest sentence for any kind of crime). This is the case in the agreements with Spain, Estonia, Portugal and Slovakia. The agreements with Poland and Ukraine stipulate that, if the ICTY sentence is longer, then only a part of the sentence is executed, namely the part of the sentence that does not exceed the highest sentence under the internal law, and that the convicted person is then transferred to the tribunal or to another country afterwards. This means that the sentence can only be enforced until the time when release is compulsory under the national legislation (Mulgrew, 2009). None of the ICTR's agreements contain such terms.

The states thus do not have any decision-making power concerning the sentences (Cassese, 2003), but international prisoners are considered as national prisoners during their detention in the state of execution and are subject to the national rules. This applies to all courts. The ICC Statute stipulates explicitly that the detention conditions may never be more favourable or less favourable than the circumstances of prisoners convicted for similar facts in the country of execution (Cassese, 2003).

### 2. *Detention conditions consistent with international standards*

The circumstances of the prison sentence are regulated by the law of the state of execution, but must be compatible with international standards. This requirement was not incorporated explicitly in the

Statutes of the ICTY and the ICTR, but is implicitly present in the whole system. The agreements concluded between the tribunals (both the ICTY and the ICTR) and the states normally stipulate that the ‘conditions of detention shall be compatible with the Standard Minimum Rules for the Treatment of Prisoners [hereafter: Standard Minimum Rules], the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereafter: [Body of Principles] and the Basic Principles for the Treatment of Prisoners [hereafter: Basic Principles]’. However, four countries (Austria, the UK, Germany and Poland) preferred vague provisions in the agreements they concluded with the ICTY. These agreements refer to ‘relevant human rights standards’. With the exception of Germany, these countries also added that the detention conditions have to be equivalent to those of persons serving a sentence in accordance with the national law. This latter requirement was not included in any agreement concluded by the ICTR.

The Statute of the ICC (in Article 106) also requires that ‘the conditions of imprisonment [...] shall be consistent with widely accepted international treaty standards governing treatment of prisoners’ It further that ‘in no case [...] such conditions [shall] be more or less favourable than those available to prisoners convicted of similar offences in the state of enforcement’. In the (preambles of the) agreements drawn up by the ICC, there is also reference to the Standard Minimum Rules, the Body of Principles and the Basic Principles. The agreements with Austria and the UK, though, respectively require that the detention conditions are ‘consistent with widely accepted international treaty standards governing treatment of prisoners’ and ‘in accordance with relevant human rights standards governing the treatment of prisoners, including any obligations of the UK under the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950’. The reference to the three specific instruments (Standard Minimum Rules, Body of Principles, and Basic Principles) has thus been removed from the texts of the agreements themselves. The texts only record that the detention conditions cannot be ‘more or less favourable’ than those of persons convicted of similar crimes in their own country (or equivalent to those applicable to prisoners serving a sentence in accordance with national law). This stipulation is exceptional for this type of agree-



ment, and would be hard to permit in certain circumstances (for instance when sentences of the ICTR are executed in Mali and Benin). Notwithstanding the fact that, legally speaking, the execution of the sentences of international tribunals and courts only needs to comply with universal minimum standards (such as the Universal Declaration), the question arises whether practice should not evolve towards reflecting the obligatory compliance of EU member states with additional (sometimes broader, more precise and higher) binding and non-binding Council of Europe and EU standards. This would affect the policy of the tribunals and courts (especially the ICC) relating to the conclusion of sentence execution agreements with states, following the example of the agreement with the UK.

3. *Inspections of the detention conditions organized by the tribunal or court*

As the execution of the sentence has to be consistent with the widely accepted international treaty standards on the treatment of prisoners, the state of execution must allow inspections of the detention conditions – at any time and on a periodic base.

The detention circumstances can be reviewed by the court, or by an entity appointed by the court. However, the authority responsible for the review depends on the circumstances. The international courts have concluded an agreement with the International Committee of the Red Cross (ICRC), in which they allow the latter to carry out reviews in the country of execution, if the country concerned agrees. Many of the agreements concluded by the ICTY therefore provide for review by the ICRC, and all the agreements concluded by the ICTR stipulate that the reviewing will be done by the ICRC. In addition, the agreement between the SCSL and Sweden also does this.

The purpose of the inspections is to examine whether the detention facility in the country concerned is adequate and whether the convicted person is in good condition and, for instance, is receiving any necessary medical care. The reviews take place regularly: about once a year and additionally if requested. The agreement concluded by the ICC and the ICRC explains that the purpose of the reviews by the ICRC is purely humanitarian: it is to make sure that all prisoners are treated humanely and in accordance with ‘widely accepted interna-

tional standards governing the treatment of persons deprived of liberty' (Article 3).<sup>27</sup> The ICRC examines the material conditions of the detention, such as the psychological and physical condition and treatment of the prisoner. If appropriate, the ICRC can ask the court to take measures necessary to ameliorate the detention conditions. The ICRC can also formulate suggestions if problems concerning judicial guarantees occur, although there is an explicit stipulation that the ICRC cannot question the grounds for the detention. During the inspections, the ICRC asks for unlimited access to all prisoners and all parts of the prisons; moreover it demands the possibility of talking in private with the prisoners. The prisoners have the right to express themselves freely and without any limitation. The ICRC can also contact the family of the prisoner or other persons assumed to hold relevant information.

A few countries objected against the inspections by the ICRC, and, for these, alternatives were sought. There are therefore countries that preferred a review by the CPT,<sup>28</sup> such as the UK, Portugal, Albania, Ukraine and (in the *Galić* case) Germany in their agreements with the ICTY, and the UK in its agreement with the ICC.<sup>29</sup> In the agreement between the ICTY and Spain, a 'Parity Commission' of the ICTY and state officials was chosen for reviews.<sup>30</sup> The agreement between Austria and the ICC only mentions 'the court or an entity designated by it'.

Moreover, the ICC Rules of Procedure stipulate that, as part of the supervision, regulations should be adopted to guarantee the right of the convicted person to communicate with the court. Besides, the court can ask for information, reports or expert opinions from the state of execution and any other reliable source. If appropriate, the president can delegate a judge or another employee of the court to

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<sup>27</sup> Agreement between the International Criminal Court and the International Committee of the Red Cross on visits to persons deprived of liberty pursuant to the jurisdiction of the International Criminal Court, 13 April 2006, *ICC-PRES/02-01-06*.

<sup>28</sup> The European Committee for the prevention of torture and inhuman or degrading treatment or punishment.

<sup>29</sup> The UK also included this in its agreement with the SCSL.

<sup>30</sup> The Manual on Developed Practices of the ICTY, however, clearly stipulates that monitoring by independent authorities is preferred to monitoring by joint committees, to maintain credibility.

meet the convicted person and to hear his opinions – without the national authorities being present (Cassese, 2003). If appropriate, the state of execution will be offered the opportunity to comment on the opinion of the convicted person (Rule 211, Rules of Procedure and Evidence).

A confidential report, based on the findings, will be sent to the country concerned and to the president. The state of execution and the president will consult each other about it. Subsequently, the president can demand that the state of execution reports on any changes that have occurred concerning the detention conditions described in the report.

Some countries call the reports ‘monitoring’ (this is the case, for instance, in the agreements between Austria, Spain and Portugal and the ICTY) and some ‘visits’ (for instance, in the various *ad hoc* agreements between Germany and the ICTY), which – probably – illustrates the sensitivity of this issue. The UK ensured that it is written, both in the agreement with the ICTY and in the agreement with the ICC, that the report cannot be published without the approval of the government of the UK. Reports of the CPT can be published (theoretically), but those of the ICRC cannot (Mulgrew, 2009).

#### 4. *Modification of the sentence decided by the tribunal or court only*

The terms of the international courts allow punishments to be modified during the time the sentence is being executed. Three conditions are discussed in the legal instruments of the international courts. The Practice Direction Early Release of the ICTY<sup>31</sup> and the Rules of Procedure and Evidence of the ICTR<sup>32</sup> contain terms concerning clemency, penalty reduction and early release. Clemency is granted if the court judges the crime should be forgiven, or if a judicial error has occurred, or if the sentence should not have been imposed in the first place.

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<sup>31</sup> 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 of the ICTY (September 1, 2009), *ICTY IT/146/Rev.2* (2009) (hereafter: Practice Direction Early Release).

<sup>32</sup> Rules of Procedure and Evidence of the ICTR (29 June 1995, last changed on October 1, 2009), <http://www.unictcr.org/tabid/95/default.aspx> (hereafter: Rules of Procedure and Evidence of the ICTR).

Penalty reduction means that the punishment is substituted by a lesser punishment, which can also mean that the court acknowledges that the original punishment was too severe. Early release includes all kinds of release, measures and programmes (Tolbert & Rydberg, 2000).

The decisions on this matter are taken by the international court itself. In any case, the state of execution may not release the convicted person before the completion of the sentence as set down by the court. Only the court has the right to decide on any reduction of the sentence.

The procedures of the tribunals and the ICC differ here and there. For the ICTY and the ICTR, the state of execution informs the tribunal when the convicted person, according to the rules of the state of execution, is eligible for a revision or reduction of the sentence, 45 days before the date of ‘eligibility’ at the latest (Rule 124, Rules of Procedure and Evidence of the ICTR). Consequently, no prison term is fixed by the international court itself; the terms of the individual states count as the point of reference. This is not the case with the ICC. The Statute of the ICC stipulates that, in any case, a person convicted by the ICC is only eligible for a revision of the sentence in order to reduce it after two-thirds of the sentence has been served, or after 25 years in the case of life imprisonment. A revision of the sentence will not occur before this date (Article 110, Rome Statute).

Regarding the tribunals, after the tribunal is notified by the state concerned,<sup>33</sup> the convicted person is informed about the fact that he/she is eligible for clemency, penalty reduction or early release.<sup>34</sup> The regis-

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<sup>33</sup>The ICTY Manual on Developed Practices clarifies the fact that the notification is also given by the convicted person himself (who believes he is eligible because his situation is comparable with other persons punished by the ICTY who have been released). Although the convicted person does not actually have a right to demand his release, there is in practice a reaction by the court to the convicted person’s asking for the materials mentioned in Article 2 of the Practice Direction and enquiring about the position of the state of execution.

<sup>34</sup> The agreements between the ICTY and the countries where the sentence is executed, besides *commutation and pardon*, which are integrated into the text by default, also refer to *early release*. A few countries however preferred to describe their sentence execution modalities in more detail: for instance ‘non-custodial measures’, ‘working activities outside the prison’, and ‘conditional release’ in the treaty with Italy; ‘release

trar requests reports from the competent authorities of the state of execution about the behaviour of the convicted person, psychological/psychiatric evaluations of his/her mental condition during the detention, and reports concerning the general detention conditions. From the prosecutor he requests a detailed report of the cooperation of the person concerned with the office of the prosecutor and the importance of this cooperation. Furthermore, the registrar collects all information considered by the president to be important (Practice Direction Early Release, p. 3). A copy of this information is sent to the president and also to the convicted person himself. The person concerned has ten days to consider all the information mentioned,<sup>35</sup> and subsequently is heard by the president (in writing, by telephone or by video link) (Practice Direction Early Release, p. 3). Afterwards there is a round of consultations with the members of the sentencing chamber and of the bureau. They receive all the information mentioned above, accompanied by comments of the president on the demonstration of the convicted person's rehabilitation. The Rules of the ICTR also stipulate that the government of Rwanda should be informed (Rule 125, Rules of Procedure and Evidence of the ICTR), so that it can also give its opinion. The victims are not involved in these procedures at all. This is in line with the fact that the role given to the victims in the tribunals is rather limited. The legal framework of the tribunals mainly considers victims as witnesses.<sup>36</sup>

The final decision is taken by the president, who at this stage also considers the general standards of, respectively, Rule 125 and Rule 126 of the Rules of Procedure and Evidence of the ICTY<sup>37</sup> and the ICTR ('In determining whether pardon or commutation is appropriate, the president shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of simi-

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on parole or any other measure altering the conditions or length of detention' in the treaty with France; and 'half-open or open prison' in the agreement with Poland. However, all the modalities described require a notification to the tribunal, except that in the treaty with Belgium it is additionally stipulated that it 'shall notify the ICTY if the convicted person is granted a sentence enforcement method other than early release, or if this method is revoked or suspended'.

<sup>35</sup> The registrar has to ensure that he/she is assisted by an adviser.

<sup>36</sup> Interview with former staff of the ICTR Presidency, held October 8, 2009.

<sup>37</sup> Rules of Procedure and Evidence of the ICTY (December 10, 2009), *ICTY IT/32/Rev. 44* (2009) and <http://www.icty.org/sid/136>.

larly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor'). Clemency, a reduced sentence or early release are only possible if the president of the tribunal, in consultation with the judges, decides to grant this because of the legal position and the general principles of the law (Article 28, ICTY Statute). If release is not granted, the decision will mention a date on which the convicted person will be eligible for a new consideration of his/her early release (unless this date is fixed in the law of the relevant state) (Practice Direction Early Release, p. 4).

The decision of the president is final, and no appeal is possible (Practice Direction Early Release, p. 5). The decision is notified to the relevant authorities of the state of execution, to the convicted person and eventually to other interested parties. If there is a decision to grant release, the registrar will, if appropriate, and if the president insists, notify the people who gave evidence during the trial of the release, the destination of the person concerned and other information considered to be relevant (Practice Direction Early Release, p. 5).

The procedure of the ICC at some points differs from the procedures mentioned above for the *ad hoc* tribunals – for example, the elements to be considered when a decision on reducing a penalty is made are stipulated in the Statute. Notably, the ICC can decide to revise the sentence in one of the following circumstances: the early and continuous willingness of the person to cooperate with the investigations and prosecutions of the court; the voluntary cooperation of the person to enable the execution of the sentence, in particular concerning the whereabouts of money so that the collection of fines, seizures and compensation becomes possible; or the existence other factors which make it clear that there is an obvious change of circumstances sufficient to motivate a reduction in the penalty (Article 110, Rome Statute). Moreover, the Rules of Procedure and Evidence stipulate that the following criteria will also be considered: (a) behaviour during detention that shows a dissociation from criminal behaviour; (b) the prospects for successful reintegration of the convicted person; (c) whether the early release would induce significant social instability; (d) significant actions undertaken by the convicted person for the benefit of the victims and the possible impact of the early release on victims or their

families; and (e) the individual situation of the convicted person, *inter alia* worsening physical or mental health or advanced age. These provisions are more specific than those of the *ad hoc* tribunals and, moreover, they complement them on a few points.

An ICC decision to revise a sentence is not made by the president (as is the case with the *ad hoc* tribunals), but by three judges of the appeals chamber, who conduct a hearing. The hearing is held in the presence of the convicted person, who can be assisted by an adviser (and a translator). The prosecutor, a representative of the state of execution and the victims are invited to join this hearing, or to file written observations. The three judges will decide and communicate the reasons to all of those who participated in the hearing, as quickly as possible. If reduction is refused, the three judges of the appeals chamber will reconsider the question every three years, unless a shorter interval is set. In the case of a significant change of circumstance, the three judges can allow the convicted person to ask for a revision before the end of the period (of three years) (Rule 224, Rules of Procedure and Evidence).

##### 5. *Consequences of the tribunal's or court's decision on the execution of the sentence*

The way the decisions on clemency, penalty reduction and release are handled was normally set out in a flexible way in the treaties between the court and states, and also differs between the tribunals and the ICC. It also differs between the states with which agreements are concluded.

For the tribunals, different consequences can be attached to the president's decision that the alteration of the sentence is not suitable (*'appropriate'*). If the president of the tribunal decides that no early release should be allowed, but the country concerned nevertheless wants to release the convicted person, the situation is described as 'an impossibility to execute the sentence'. In such a case, the convicted person is transferred to the tribunal or to another state appointed by the tribunal. This regulation is recorded in the agreements of the ICTY with Italy, Spain and Portugal and in the *ad hoc* agreements with Germany, and in the agreement of the ICTR with Italy. A variant in this case is that, after the decision of the tribunal, it is again up to the country

concerned. The tribunal formulates its vision on the question of whether or not early release is appropriate. Sweden, Denmark (, Belgium)<sup>38</sup> and Estonia then consider the tribunal's opinion and give an answer. Based on this answer, the tribunal can demand the transfer of the convicted person to another state or to the tribunal.

Other countries however follow a different path: when the president of the tribunal judges that early release is not appropriate, the state of execution acts upon this decision. This regulation is recorded in the agreements between the ICTY and Finland, Norway, Austria, the UK, Ukraine, Poland and Albania. The agreement between the SCSL and the UK stipulates that the UK will act upon the decision of the court regarding release. This is *inter alia* also the case with the agreements between the ICTR and Mali, Benin, Swaziland and Rwanda (i.e. all the African states that have concluded an agreement with the ICTR).

Lastly, there are also a few countries which preferred not to choose structurally between the two options, but to act on a case-by-case basis. Slovakia and France, for example, do not make the choice in their agreements with the ICTY: if the president of the tribunal stipulates that the person concerned is not eligible for release, these countries announce whether they will continue to execute the sentence under the same circumstances, or will transfer the convicted person to the tribunal. France also does this in its agreement with the ICTR, just like Sweden.

The provisions on the consequences of these decisions are strongly influenced by the (practical) possibility of the state concerned allowing the rules of the international court to take precedence over its internal legislation. The way compromises are achieved between these two thus differs.

The state of execution cannot reduce or modify the sentence, nor release the convicted person before the end of the imposed sentence. Only the international court itself can make changes in the sentence.

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<sup>38</sup> The treaty with Belgium stipulates that if the tribunal protests against the parole decision and this is nevertheless awarded, the tribunal will transfer the convicted person to another state or to its headquarters within 24 hours of receiving the decision. After this deadline, Belgium can implement the decision on the release.



But, even though the countries cannot grant clemency, a penalty reduction or early release against the will of the tribunal, they can make sure that the person concerned will serve his sentence in another country. It is striking that there are a few regional preferences regarding the way of dealing with negative decisions concerning early release: the countries of Southern Europe show less of a tendency to continue to execute the sentence, while the countries of Northern and Eastern Europe and also the African states are more likely to obey the decision of the court and to make the international court take the final decision on release.

In general, the countries make similar regulations on *clemency* and *penalty reduction*: if no clemency/penalty reduction is awarded by the president of the tribunal, the rules provide for the transfer of the convicted person to another place, or the state of execution agrees to obey this decision. Yet in this case there are more ‘followers’ than in the case of early release: in their agreements, ten countries agreed to obey the decision of the tribunal, whereas only seven agreed to obey in the case of early release. Belgium, Portugal and Germany are more flexible regarding negative decisions on clemency and penalty reduction in their treaties with the ICTY. France and Slovakia choose not to obey negative decisions and to opt for transfer (whereas they left the door open regarding release). In the agreements of the ICTR, the African states agree to obey the decision, whereas Italy, France and Sweden prefer in that case to transfer the person concerned to the tribunal.

At the ICC, the consequences of negative decisions on the different measures were worked out in less detail than in the agreements concluded by the tribunals. The general rule is clearly that only the court can decide on the revision and reduction of sentences, and this is also stated in the agreements with the UK and Austria. Besides that, though, it is stipulated that ‘when a sentenced person is eligible for a prison programme or benefit available under the national law [...] which may entail some activity outside the prison facility’, the necessary information has to be passed on to the court. One specific stipulation on the consequences of a negative decision can however be found, concerning ‘any circumstances which could materially affect the terms of extent of the imprisonment’. In this case the state of execution is expected to notify the court. If the court cannot agree to these

circumstances, the state of execution is notified and the convicted person is transferred to another state. (This applies to the agreements between the ICC and Austria and the UK).

#### 6. *Possibility of (requesting) a change to the sentence execution state*

On the initiative of the president or of the prosecutor, the ICC can decide at any time to transfer the convicted person to the prison of another country. Moreover, a convicted person can at any time request the court to allow him to be transferred from the state of enforcement (Article 104, Rome Statute). The requests by the prosecutor and the convicted person have to be written and must mention the reasons why transfer is demanded (Rule 209, ICC Rules of Procedure and Evidence). Before the president makes a decision, he can (a) ask for the opinion of the executing state; (b) consider written and oral presentations by the convicted person and the prosecutor; (c) consider written or oral expert opinions concerning, *inter alia*, the convicted person; and (d) obtain other relevant information from reliable sources. If a request to change the state is rejected, the convicted person, the prosecutor and the registrar will be notified as quickly as possible of the decision and the reasons for it. The state of execution will be notified as well.

### C. Conclusion

Cooperative associations between states are used in respect of the procedures for the international transfer of convicted persons who have been convicted by an international court or tribunal. The cooperation is regulated in (bilateral) agreements. Within the tribunals, there seems to be a relatively ambiguous attitude towards the possibility of the sentence being served in the conflict region. In theory, the tribunals do not like the sentence to be executed in the conflict region. However, it can be seen that this attitude has been modified as the years have passed by. Within the ICTR, an agreement with Rwanda was indeed concluded after several years. In the discussions and practices, a parallel can be found with the transfer of cases to national jurisdictions. The gradual return or transfer of responsibilities to authorities in the conflict region is therefore not specific to the execution of sentences.

The country where the sentence is served is appointed by the court. The international court can exercise great discretion in this. However, in the present situation, the choice is very limited, as the number of countries which have declared themselves prepared to take responsibility for the execution of sentences is not very high. As was shown above, the majority of states that have volunteered to execute sentences are EU member states.

The opinion of the convicted person plays a very small role in all of this, especially in the practice of the *ad hoc* tribunals. At the tribunals, the convicted person does not really have the right to be heard, so the decision that the sentence should be executed in a certain country is made without the person concerned, and, moreover, apart from that, few personal points of reference are applied. At the ICC a very pragmatic framework remains in place for decisions on sentence execution, even though the right to be heard has been introduced.

Concerning the execution of the sentence itself, it appears that two basic principles are applied. First, the execution of the sentence is regulated by the national law of the executing state. Secondly, the sentence must be executed in accordance with international standards. Sometimes (for instance in the agreements with Austria, Germany and Poland), equivalence with prisoners convicted in accordance with national regulations is also required, but this is certainly not the case in all agreements and, moreover, is difficult to achieve in certain situations (for instance in the execution of sentences for the ICTR in Mali and Benin). The modifications that are allowed to be proposed to the sentence also differ. For the tribunals, it was stipulated that the investigations into the desirability of early release and other changes were launched by a national *trigger*, namely the date when the convicted person would be eligible for this according to national law. At the ICC, this system was abandoned, and they reverted to a system of a central *trigger* in order to create more uniformity.

#### IV. THE CONVICTED PERSON AS A SUBJECT IN THE CONTEXT OF THE VERTICAL EXECUTION OF A SENTENCE?

In this part, we evaluate the degree to which the convicted person can be considered as a subject in the context of the international execution of sentences, and we consider in particular the question of whether his/her personal interests should or can be given minimal or maximal weight. After the historical contextualization of the execution of sentences at the level of the international tribunals and courts, and the extensive analysis of the system logic controlling vertical sentence execution (in which the convicted person plays a limited formal role), we analyse in depth the extent to which attention is (or should ideally be) given to the interests of the convicted person by the choices made in the international execution of sentences.

Minimum or maximum attention can be given to the interests of the convicted person by, respectively, watching over his/her (fundamental) interests and pursuing his/her integration (or his/her subjective interest or advantage), as the starting point.

Minimum consideration is given to the interests of the convicted person when his/her (most fundamental) interests are not harmed by the instruments. In the penal chain, and particularly in the phase of the execution of the sentence, this means that certain fundamental standards are respected, and that the way in which the sentence is executed (and all procedures that form a part of this) corresponds to certain rules.

The interests of the convicted person are maximally protected when a certain advantage for him/her is pursued. In the light of the execution of penalties, the pursuit of advantages within the execution of a sentence is obviously always associated with the sentence itself. Regarding the international execution of sentences, it is vital that the different instruments focus on the continued execution of the sentences. Therefore, in any event, the sentence remains in place. The interests of the convicted person, or the advantage he/she has, are affected by the sentence itself and the differences following from execution in one state or another. Within the phase of the execution of the sentence, the potential advantages for the convicted person should therefore also

be tied to the aims of the sentence itself and to the impact it has on the life of the convicted person.

**A. Minimal individual interest: Non-violation of fundamental interests**

Not violating the fundamental interests of the convicted person is a very important aspect of the execution of a sentence and, as mentioned before, this has been recognized in human rights and detention-specific basic instruments.

Vertical instruments for the execution of sentences certainly protect the role of the convicted person very minimally. Furthering his or her interests is in no way the primary objective. International courts and tribunals mainly aim to achieve reciprocal aims in prosecution and judgment. Few explicit aims are associated with the stage of the execution of the sentence. The fact that the interests of the convicted person do not hold a central position in the activities of an international court or tribunal does not mean that no attention is paid to them. There is an obvious effort to create a fair system which does not violate the international human rights and sentence execution norms. In this way, even though the aim is not to further the interests of the convicted person, the aim is not to violate the fundamental rights which the convicted person – according to international standards – has in the sentence execution phase. International courts include respect for the (fundamental) rights of convicted persons in the most important instruments regulating the execution of sentences.

The norms concerning human rights and/or sentence execution will serve as a touchstone for the minimal protection of the convicted person's interests. Those interests that definitely cannot be violated have been recognized by the international community. They reflect a compromise, with a striving for a balance between the claims of the different parties involved in the criminal proceedings (offender, victim and the wider community). These assessment criteria concentrate on individual rights (and the role of the convicted person), but not in such a way that they influence other interests that have a role to play in the punishment phase.

The first group of evaluation norms that need to be considered are human rights norms, as they have been the ideal touchstone for many years. Human rights norms for this evaluation are: the Universal Declaration and the International Covenant on Civil and Political Rights (ICCPR). European, North and South American and African human rights instruments are left out of account here, for they concern regional actions (Rehman, 2002).<sup>39</sup> Given the EU member states' dominant representation among the states in which sentences may be executed, however, it is argued elsewhere in this book that international practice for the execution of sentences at the level of international tribunals and courts (in particular the ICC) should probably take into account the supplementary (and sometimes higher) standards to which EU member states adhere because of their compliance with both binding and non-binding Council of Europe and EU standards.

Human rights norms are, however, insufficient *per se* to assess the question of whether or not fundamental interests are violated. After all, human rights are in general seen as a set of norms applied to an existing legal system in order to judge whether a minimally acceptable level is reached. Yet, the achievement of minimal norms is not necessarily sufficient if a system is created which has to meet 'international standards'. Human rights norms are therefore too basic *per se* to be evaluated by international courts and instruments (Johnson, 1998).

Other imposed standards therefore have to be taken into account in the consideration of this international system for the execution of sentences. The second group of international standards considered in this evaluation is formed of international instruments for the execution of sentences and consists of the Standard Minimum Rules, the Body of

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<sup>39</sup> This certainly does not imply that we are underestimating the relevance or impact of regional human rights systems. After all, an important advantage of the regional systems is that, in Europe and in the Inter-American system, for instance, there is provision for a court to enforce human rights. So, even though the regional systems complement the global ones, the framework of human rights is formed at a global level, by the instruments mentioned in the text. Regional systems often function as an intermediary enforcement mechanism, and are supported in this by the geographical proximity and common traditions within the region (Mugwanya, 2003).

Principles and the Basic Principles. The Standard Minimum Rules were adopted by the UN in the 1950s and reflect the penology applicable at that time, which was built on a rehabilitation philosophy. The two subsequent documents, the Body of Principles and the Basic Principles, focus more on the dignity and autonomy of the prisoner. This is more in line with the other convention adopted in that period, namely the ICCPR (1966).

These instruments, and the Standard Minimum Rules in particular, state that they reflect the general consensus on the execution of sentences at the time at which they were created. Therefore, the aim was to name the essential elements of those systems that were considered to be the most adequate at the time, so that it would be clear what was included in 'good principle and practice' in the treatment of prisoners.

As a whole, these instruments set standards concerning the conditions of the detention and the rights of the person concerned. The basic principles that are proposed for the conditions of detention are as follows: the essence of a sentence is the deprivation of freedom, the conditions of detention should be adequate (including the prohibition of torture and inhumane treatment), and the sentence should be served as close as possible to the prisoner's home (the latter only if the person concerned asks for it). Concerning the rights of prisoners, a great deal of attention is paid to the non-discriminatory protection of these rights, and the right to complaint and inspection and to contact the outside world (for a detailed overview of additional European principles and standards, see the annex). In what follows, we evaluate the extent to which the law and practice applicable to the vertical execution of sentences satisfy these basic principles.

The entire function of tribunals and courts is characterized by the explicit choice of the enforcement of the law in the context of the rule of law. Following a fair process is therefore crucial.<sup>40</sup> Besides, the fact that procedures are followed in a fair way is important, as the individual is set up against the entire community (Meernik, 2003). Individual

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<sup>40</sup> At the ICC, this is not stipulated as such in the objectives, but it is clearly indicated by the fact that the case is only admissible if the country concerned cannot or does not want to judge the dispute itself. This is assessed, *inter alia*, according to standards for due process.

rights and freedoms should therefore be protected appropriately against arbitrary actions taken in the name of the international community (Henham, 2003). Working legitimately is of great importance to the international courts. They want to ensure legitimacy, independence, impartiality and effectiveness, with a view to the long term. The norm of judicial independence is very important for the legitimacy of the courts, which in any event have the difficult task of judging people accused of international crimes in a fair and independent way (Meernik, 2003).<sup>41</sup> Fair proceedings contribute to the development of the international system in itself, but moreover function as an example for the national systems (in development) (Haveman, 2005). A sentencing system carried out and promoted by the entire international community may therefore serve as an example. It is not unthinkable that the legal system of the international courts will serve as an example for developing national penal law systems (Knoops, 2003). Bearing this in mind, it is extremely important, for the legitimacy and the credibility of the entire system, to respect and incorporate the most important international norms (Henham, 2003).

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<sup>41</sup> The actors in the international courts have a relatively large discretion. Since a minimum sentence and a maximum sentence are stipulated for each crime in national penal codes, this became the subject of discussion in the international penal rules. The first debates about this were held under the auspices of the International Law Commission in the 1950s. In the Rome Statute, a maximum is stipulated, but the decision on a specific case is for the greater part left to the judge. Accordingly, this is therefore a relative exception to the general principles of the court which aim to give limited judicial discretion (Schabas, 2004). As an example, the judges of the ICTY adopted their own Rules of Procedure and Evidence (Meernik, 2003). Proceedings before the international courts and tribunals are thus looked at critically. Until now, in respect of the determination of sentences, they have passed the test. Meernik investigated whether judges used a legal model in their determination of the sentence, namely whether variables that were particularly legally relevant were used in the determination before extra-legal factors. For the international courts, this particularly concerns legal criteria based on widely accepted international conventions (for instance the ICCPR) and standards of *due process* (Meernik, 2003). Meernik found that the judgments were affected most by legal factors: the seriousness of the crimes, the number of crimes and the defendant's responsibility for those crimes were the most important factors in deciding on the punishment, and accordingly there was little or no influence from political factors.



Concerning prosecution and justice, general principles, such as the rule of law, the presumption of innocence and equality of arms were gradually converted from the national to the international level, and they are now strongly integrated into this (Cassese, 2003). As an example, the statutes of the tribunals and the courts are clearly influenced by Article 14 of the ICCPR, which covers *fair trial* guarantees (Schabas, 1997). The Secretary-General also confirmed that 'it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights' (Meernik, 2003). The question now arises whether all conditions normally required in the sentence execution phase were integrated into this international system to the same degree. When these international penal systems are evaluated, the initial focus lies on the prosecutions and judgments of these international courts. The focus rarely lies on the system for the execution of sentences passed by these courts, even though this is an important and essential part of the international punishment mechanism, and cannot be neglected. A system for the execution of sentences, supported by the entire international community, must also be a fair system that is in line with the standards imposed by the international community on itself. The way a punishment is executed has a significant influence on the legitimacy of the system. Not only does the execution of the sentence directly influence the convicted person himself and his environment, but the victims and everyone directly or indirectly involved with the facts also has an interest in the sentence execution stage. A sentence execution stage that appears to be too 'gentle' may give rise to certain questions, since the tribunals in the first place were set up for reciprocal purposes. By creating the tribunals, the international community wanted to ensure that offenders were tried and actually sentenced. The stage of the execution of sentences is also important because it may take more time than the procedural stage and requires the support of the entire international community.

The statutes of the *ad hoc* tribunals and the ICC do not stipulate explicitly that the (execution of) sentences should be in accordance with

human rights norms. International courts and tribunals are technically not strictly legally bound by human rights instruments.<sup>42</sup> Still, it seems unthinkable that the provisions of the Universal Declaration and the ICCPR would not be respected. There is reference, in the agreements with the states concerning the execution of sentence and elsewhere, to the Basic Principles, which themselves refer to the Universal Declaration and the ICCPR. The most important international norms regarding the execution of sentences are mentioned as such in the legal instruments of the international courts and tribunals, with the explicit purpose that the rights of the convicted person should not be harmed, thus making the circle complete.

These instruments are also mentioned in the decisions of the tribunals. In the decision concerning the execution of the sentence enforced by the ICTR in the *Ruggiu* case, it is clearly stipulated that ‘other instruments also apply to the enforcement of sentences [...] namely: the Standard Minimum Rules [...], the Body of Principles [...] and the Basic Principles [...]. Although these instruments are not binding acts, and the rules and principles therein stated are not in effect in all states, they nonetheless constitute what the States have agreed on as being the minimum best practices in imprisonment. [...] International Criminal Tribunals ought to adhere to these agreed standard minimum rules.’

For these reasons, the vertical execution of sentences will mainly be assessed against these international standards. The balance between individual fundamental rights and the reciprocal purposes of the in-

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<sup>42</sup> The hierarchy of the legal norms binding on the ICC, especially at the stage of prosecution and the determination of sentences, was clearly stipulated. The Statute assumes that there is a threefold hierarchy. At the top, of course, is the Statute itself, together with the Elements of Crime and the Rules of Procedure and Evidence. Secondly, there are the applicable treaties and the principles and rules of international criminal law. There is no explicit reference to the international human rights treaties. Nonetheless, Article 21 (3) mentions that the application and interpretation of the law has to be in line with internationally recognized human rights. The third stage is made up of general principles of law, deduced from the national legislation of the states that would normally be responsible for judging the crimes. Article 21 invites the Court, if the issues cannot be resolved from the legal sources already mentioned, to turn to general principles of law deduced from national legislation.

ternational criminal law system should create a balanced international system.

1. *Detention conditions*

a. Deprivation of liberty as the essence of punishment

The Standard Minimum Rules stipulate that the prison system cannot aggravate the suffering inherent to the imprisonment (Article 57). The regime to which prisoners are subjected must therefore reduce the difference between life in prison and life in freedom. The main aim is a humane detention, with respect for the inherent dignity of the person (Principle 1, Body of Principles). Article 10 of the ICCPR reads: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

The aim for a humane punishment is shown by the international courts in a few aspects. There is an attempt to produce a humane detention by making sure that the detention conditions are as good as they can be. The ICTY wanted to conclude agreements only with countries that attach great importance to human rights. The ICTY has confirmed, in its Practice Direction, that, in this regard, it mostly sought sentence execution agreements with European countries. Until this time, no agreement has been concluded with a non-European country (Klip, 1997). The ICTR eventually sought to make sentence execution agreements with African countries. Moreover, special attention was paid to the detention conditions, so that they would be in line with international standards (see further).<sup>43</sup>

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<sup>43</sup> Note that that the aim meet out humane punishments may also appear from the fact that life imprisonment functions as an upper limit. When the ICTR was created, there was a dispute about whether the tribunal should be able to impose the death sentence. After all, Rwandan law provides for the death sentence in case of murder. The fact that this was not possible at the ICTR created a certain dissociation, with two speeds of trials in the conflict regions: the ICTR applied life imprisonment as the maximum sentence, whereas the Rwandan national courts eventually did pass the death sentence on *lower level officials*. Therefore it was argued that there was a fundamental injustice, because the masterminds of the genocide were 'only' sentenced to life imprisonment (Roberts & McMillan, 2003). The representative of Rwanda at the Security Council stated that this would not contribute to national reconciliation. This dissociation ended when Rwanda stopped imposing the death sentence, and later

In practice, there are differences in the circumstances of the deprivation of freedom, as the punishments are executed in a decentralized system. The determination of the sentence and the indication of the country where the sentence will be served are two different procedures. The judges do not know in advance where the sentence will be executed. Nevertheless, as the location of the detention indicates the conditions under which the sentence will be executed, this is a crucial element of the decision to impose the sentence. This decision determines the detention regime, the political environment in which the prisoner will live, the early release rules, the distance from the conflict region and the international human rights supervision mechanisms that are applicable (Klip, 1997). Schabas therefore argues that it is important for the tribunal to evaluate the detention conditions, because they influence the severity of the sentence (Schabas, 1997).

In the *Erdemovic* case, the trial chamber of the ICTY took a closer look at this. Even though the trial chamber is aware of the fact that responsibility for the execution of the sentence is given to the registrar and the president, 'the Trial chamber will, however, take account of the

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abolished it. For cases the Rwandan courts tried themselves, death sentences were initially imposed and a few people were also executed. The executions took place in large stadiums and were massive public affairs.

Strictly speaking, the death penalty cannot be considered an inhumane punishment. Article 6 of the ICCPR stipulates that the death penalty can only be imposed for the most serious crimes, and that each person sentenced to death must have the right to ask for clemency or a reduction in the penalty. Nevertheless, there is no consensus on the death sentence. Western countries in particular have appeared to be in favour of the abolition of the death penalty in recent decades. It was not until the second half of the twentieth century that the death penalty was removed from the penal codes of these countries. In the Nuremberg and Tokyo trials, the desire for retribution overtook the purpose of imposing a humane punishment, and this is also evident from the frequent use of the death penalty (Schabas, 1997). The fact that the death penalty was not imposed by the recently created international courts means that one form of punishment, whose humanity is questioned by a few countries, was not accepted. Nevertheless, Rwanda, supported in this by the US, strongly fought for the death penalty. It cannot be forgotten that previous history may have played a role in this, too. The fact is that the prohibition on the use of the death penalty was still uncontroversial when the ICTY was founded. Not integrating the death sentence into the ICTR Statute made these norms take precedence over those of the Rwandan people (Akhanvan, 1996). The fight for humanity in the sentence that is imposed has therefore become an essential part of international justice.

place and conditions of enforcement of the sentence in an effort to ensure due process, the proper administration of justice and equal treatment for convicted persons'. In practice this appears to be impossible as the registrar would not by the sentencing stage have determined where the sentence should be served. The trial chamber accepted as an alleviating circumstance the fact that the punishment would be served in a prison far away from the convicted person's own country (Schabas, 1997).

b. Adequate detention conditions

Article 7 of the ICCPR points out that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 5 of the Universal Declaration also contains an absolute prohibition on torture and inhuman or degrading treatment or punishment, just like Principle 6 of the Body of Principles. This stipulation is relatively vague, and the interpretation given to it has evolved through the years. The Body of Principles says that cruel, inhuman or degrading treatment or punishment 'should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time' (Note to Principle 6). The prohibition of torture is the absolute lower limit in the realization of adequate detention conditions.

The prescription for adequate conditions of detention is, however, not limited to this. The Standard Minimum Rules stipulate that different categories of prisoners have to be put in different institutions. In any event, persons in custody have to be separated from persons already convicted (Article 8). There is no preference for individual cells over dormitories, but if there are individual cells it is required that each prisoner should sleep in his own cell. Otherwise, the rules suggest that prisoners should be carefully selected for their ability to sleep in the same dormitory (Article 9). It is also required that nourishment with a sufficient nutritional value is provided, that unlimited drinking water is available and that prisoners should, at the minimum, have an hour of exercise in the open air (Articles 20 and 21). All prisoners are

supposed to work, if they are found suitable for this by a doctor (Article 71). After all, significant and paid work will facilitate the reintegration that is assumed (Basic Principle No 8). A possibility for all prisoners to be educated has to be provided. Recreation and cultural activities have to be arranged in all institutions (Article 78, Standard Minimum Rules; Basic Principle No 6).

The tribunals examine whether the detention conditions correspond to the standards, in the areas of nourishment, medical care, right of access, possibilities of correspondence, and so on.<sup>44</sup> The detention conditions nonetheless differ greatly between countries that have declared themselves willing to execute sentences. Countries from all over the world have declared themselves willing to execute sentences, and not all of them could or can comply with the requirements mentioned above. The execution of sentences in African states after conviction by the ICTR seemed to be especially problematic. The ICTR preferred sentences to be executed in African states, but the detention conditions did not comply with the international standards. Starting from the argument that they are not responsible for the general detention conditions in a certain country, but only for the specific conditions in which international convicts are held, specific regulations on this were recorded in the agreements with African states. The agreements with Mali, Benin and Swaziland stipulated that ‘the tribunal undertakes to approach donor countries and agencies with a view to securing financial assistance’, so that the detention conditions could be brought into line with international standards for persons convicted by the tribunal.<sup>45</sup> Normally only the costs of the transfer itself are borne by the tribunal, and all other costs relating to the execution

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<sup>44</sup> Interview with Roland Amoussouga, Senior Legal Adviser, Chief of External Relations and Strategic Planning Section (ERSPS) and ICTR Spokesperson, held September 23, 2009.

<sup>45</sup> This possibly also has more substantial consequences for these countries, as it leads to further debate on detention conditions. After all, the rights granted to these international prisoners may possibly influence other prisoners, who may also claim these rights. In Benin this has led to a search for donors to ameliorate the detention conditions in other facilities too.

of the sentence are borne by the state itself.<sup>46</sup> Mali and Benin received considerable sums of money to upgrade their prison facilities. The agreement with Rwanda stipulates that the tribunal will bear the costs related to ‘upgrading of the ICTR quarters in the designated prison facility in Rwanda, upon mutual agreement, to international standards for imprisonment conditions under which convicted persons are to serve their sentences pursuant to this Agreement’ (these costs are mainly for accommodation, but also for nourishment, communication and medical care). Rwanda will bear all other costs related to the execution of sentences, including the costs of safety and surveillance, the remuneration of prison staff and fundamental resources (water, electricity, etc.).

Detention conditions still remain an important area of attention, especially within the ICTR. It was stipulated that sentence execution must also be possible in Rwanda, but in the ‘Rule 11bis’ jurisprudence it appears that there are worries concerning the detention conditions in Rwanda. Rule 11bis stipulates that cases can be referred to a national jurisdiction if the court is convinced that the person concerned will receive a fair trial and that the death sentence will not be imposed. The decisions also examine whether the country which asks for the transfer of jurisdiction possesses an adequate structure for the execution of sentences. Detention conditions are therefore also evaluated: ‘Case law has established that conditions of detention in a national jurisdiction, whether pre- or post-conviction, are a matter that touches upon the fairness of that jurisdiction’s system’.<sup>47</sup> It is confirmed that the conditions for detention ‘must accord with internationally recognized standards’.<sup>48</sup> Rwanda had recorded in its transfer law that ‘Any

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<sup>46</sup> Moreover, the agreements with Mali, Benin, Swaziland and Rwanda stipulate that repatriation after the sentence has been served and repatriation of the body in case of death is funded by the tribunal. If the person concerned returns to a country other than Rwanda, ‘where he/she is lawfully resident’, Rwanda has to provide for all necessary travelling documents and has to authorize the emigration from Rwanda in accordance with Rwandan law; this applies to all Rwandan subjects.

<sup>47</sup> ICTR, *The Prosecutor v. Gaspard Kanyarukiga*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, Case No. ICTR-2002-78-R11bis (June 6, 2008).

<sup>48</sup> ICTR, *The Prosecutor v. Yussuf Munyakazi*, Decision on Prosecutor’s Request for Referral of Case to the Republic of Rwanda, Case No. ICTR-97-36-R11bis (May 28, 2008).

person who is transferred to Rwanda by the ICTR for trial shall be detained in accordance with the minimum standards of detention stipulated in the [...] Body of Principles [...]. Moreover, there is also provision for inspections by the ICRC. All of this ensured that a special regime was created for these persons. The trial chamber does not consider it probable that prisoners under this special regime would be subjected to torture or inhumane treatment. Nevertheless, in the light of these proceedings there are some worries concerning the service of life imprisonment in solitary confinement,<sup>49</sup> which comprises a violation of Article 7 of the ICCPR. The *Munyakazi* decision states that ‘human rights bodies have consistently held that imprisonment in isolation is an undesirable penalty and should be used only in exceptional circumstances and for limited periods’, and that ‘States must ensure that where individuals are imprisoned in isolation, effective safeguards are in place to guarantee that such isolation is consistent with the right to humane treatment and respects the inherent dignity of the person’.<sup>50</sup> The trial chamber also considered that there was a risk that prisoners would have to serve their life imprisonment in solitary confinement in Rwanda, given the vagueness of the legal provisions in this respect and the absence of certain guarantees. The request for the transfer of the prosecution of *Munyakazi* to Rwanda was declined *inter alia* for this reason, just like the request for the transfer of the prosecution of *Kanyarukiga*.<sup>51</sup>

### c. Sentence execution near home

The Body of Principles stipulates that a prisoner, if he so requests, will be imprisoned ‘reasonably near his usual place of residence’, if possible (Principle 20). In practice, it is often not the case that people, after

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<sup>49</sup> According to the Rwandan Organic Law No. 31/2007 of 25 July 2007 on the Abolition of the Death Penalty, ‘life imprisonment with special provisions is imprisonment with the following modalities: 1. A convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment; 2. A convicted person is kept in isolation’.

<sup>50</sup> ICTR, *The Prosecutor v. Yussuf Munyakazi*, Decision on Prosecutor’s Request for Referral of Case to the Republic of Rwanda, Case No. ICTR-97-36-R11bis (May 28, 2008).

<sup>51</sup> ICTR, *The Prosecutor v. Gaspard Kanyarukiga*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, Case No. ICTR-2002-78-R11bis (June 6, 2008).



having being convicted by an international court, can serve their sentence near the place where they resided before custody. After all, it is not possible to serve a sentence imposed by the ICTY in a country that was previously a part of Yugoslavia. At the ICTR this only became possible recently, after the agreement was concluded with Rwanda. The ICC has only concluded two agreements yet, but as the court aspires to 'equitable geographical distribution' regarding the execution of sentences, for a prisoner to serve his sentence in his home country is certainly not a paramount objective.

Clearly, the structure of the international decentralized system is not in accordance with the recommendation in the Body of Principles. Moreover, the difference between this and the established practice of horizontal international transfer of convicted persons to their home country, where the starting point is that the sentence is best executed in the home country of the person concerned, is striking. However, the issue is of course more complicated in vertical procedures than in horizontal ones, for in vertical procedures the home country is usually the country of the conflict itself. At the time that a vertical criminal procedure is initiated, the conflict is possibly still (latently) continuing. But even at a later stage, the execution of a sentence in the home country can have both advantages and disadvantages.

An important advantage is that the court can respond to the criticism that proceedings before an international court are too far from the conflict region, with the result that such trials are insufficiently visible to the local community and are less 'accessible' to the victims. For instance, the ICTY is located in The Hague, and thus is far from the conflict region, which creates a physical and psychological distance from the population of the former Yugoslavia. The fact that the sentence would be served in the country of origin also brings the punishment closer.

The proximity to victims and survivors can also be a disadvantage (Mulgrew, 2009), not least for the convicted persons themselves. It is, for instance, noticeable that within the ICTR, where the execution of sentences in Rwanda was not excluded, this theme is a very sensitive one. Convicted persons declare in letters that they do not want to serve their sentence in Rwanda, because they fear that their lives would be

in danger – because of the threat of reprisals of their enemies from the time of the conflict.<sup>52</sup> This is the case even while Rwanda itself strongly insists on its ability to execute sentences: each time it is informed of an allocation procedure, it lets the ICTR know that it is willing to execute the sentence. Rwanda declares that it attaches great importance to the principle that ‘justice is seen to be done’, which means that the victims can see that the offenders are really punished. Moreover, it thinks that Rwanda should receive priority in this, as it is mentioned first in Article 26 of the Statute; however, the ICTR however does not follow Rwanda in this view.<sup>53</sup> Other courts, such as the ICTY (but also the SCSL), also feared that former supporters would consider the prisoners as ‘heroes’ and that this would influence the execution of their sentences. It is also noticeable that the conflict regions do not necessarily – always – have a good working relationship with the tribunal: the Serbian authorities were reluctant to cooperate with the ICTY or even to prosecute Serbian war criminals under the national penal system. The relationship between the ICTR and Rwanda has been uncertain more than once. After Carla Del Ponte announced in 2000 that the ICTR would start research into crimes committed by the Rwandan Patriotic Front (which was in power in Rwanda), the traffic of witnesses and employees of the ICTR between Rwanda and Tanzania was obstructed (Zaum, 2009).

This system of the international transfer of convicted persons is thus not based on the principle that prisoners should serve their sentences in their home countries. The question remains: what is the paramount objective of this international system for the execution of sentences? In practice it seems that this type of international transfer of convicted persons is strongly influenced by pragmatism.

The execution of sentences is the subject of international relationships, a domain in which discretion and politics play an important role. Klip wondered if the execution of sentences should really be the task of the international courts – since, as he noticed, the tribunals of

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<sup>52</sup> Interview with Roland Amoussouga, Senior Legal Adviser, Chief of External Relations and Strategic Planning Section (ERSPS) and ICTR Spokesperson, held September 23, 2009.

<sup>53</sup> Interview with staff of the ICTR Registry, held September 29, 2009.

Tokyo and Nuremberg did not feel obliged to undertake this task (Klip, 1997) – and it seems that this is also the opinion of numerous countries. A limited number of countries have concluded agreements, but here also the ‘political’ factor still plays a role. By way of example, the existence of good personal ties seems to have influenced the conclusion of the first agreements by the ICTR (for instance with Mali). In contrast, the conclusion of an agreement by the ICTR has been blocked by the UN Office of Legal Affairs because of problems concerning democracy and *good governance* in the country concerned. Some countries also do not want to conclude an agreement so that they do not introduce further tensions with the country concerned, *in casu* Rwanda.<sup>54</sup>

Moreover, it appears that the power and the possibility of making decisions on a case-by-case basis are also of great importance to the states involved in the execution of sentences. Whereas it could be assumed that the conclusion of an agreement with the tribunal on the execution of sentences is an expression of the country’s overall willingness to execute the punishments of the tribunal, in practice the execution happens on a case-by-case basis. Although the decision of the president in the case of *Ruggiu* does stipulate that ‘the president considers that the existence of such an agreement complies with the requirement in Article 26 that the State indicates to the Security Council its willingness for such enforcement’,<sup>55</sup> an additional approval for each individual is still required. The agreements function as ‘framework agreements’, which allow decisions to be made on the execution of sentences on a case-by-case base. Some countries chose to record their restrictions and conditions in the agreements, but other countries chose not to record their intentions (regarding, for instance, the rejection of requests concerning high profile prisoners or punishments longer than the maximum sentence in the national legislation) (Tolbert & Rydberg, 2000).

At the ICTR it is clear that there are many problems in executing the sentences. States are very reluctant. African states, especially, partici-

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<sup>54</sup> Interview with staff of the ICTR Registry, held September 29, 2009.

<sup>55</sup> ICTR, *Prosecutor v. Georges Ruggiu*, Decision on the enforcement of sentence, Case No. ICTR-97-32-A26 (February 13, 2008).

pate in the system because the UN pays for the building of adequate detention facilities, and only a few other countries have declared themselves willing. The latter group of countries mainly seem interested in certain convicts and therefore only accept convicts on a case-by-case base. To be precise, these countries continue to think that the sentence is best executed in a country connected to the convict. For this reason, Italy accepted a person convicted by the ICTR because he was part Italian. The other European countries have not so far accepted anyone convicted by the ICTR. Nevertheless, Sweden has declared its willingness to accept convicted persons who have strong ties with Sweden.<sup>56</sup> *De facto* this means that the choice of place for the execution of sentences at the ICTR is limited to Mali and Benin,<sup>57</sup> where prison facilities have already been built.<sup>58</sup> Although the *Ruggiu* decision ambitiously states that ‘the President shall take into account the individual circumstances of the convicted person in his/her decision-making process’, this is less obvious in practice. The consideration of individual circumstances is therefore more of a theoretical issue if the choice of place for the execution of the sentence is so limited.

## 2. *Rights of the convicted person*

### a. Non-discriminatory application of the law

In all human rights and norms for the execution of sentences, a non-discriminatory application of the law is an important foundation. The Universal Declaration simply says ‘all are equal before the law’. Article 14 of the ICCPR stipulates that ‘all persons shall be equal before the courts and the tribunals’. The specific norms for the execution of sentences stipulate that the norms have to be applied ‘impartially’ and that there can be no question of discrimination. The Body of Princi-

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<sup>56</sup> Note that some countries do not follow this reasoning and explicitly declare this to be the case – see, for instance, the provision in the agreement between the ICTY and Poland: ‘enforcement is possible also when the convicted person is not a Polish national and not permanently residing within the territory or when he/she does not consent’.

<sup>57</sup> A few convicted persons have also served their entire sentence in the detention facility of the tribunal itself.

<sup>58</sup> Interview with former staff of the ICTR Presidency, held October 8, 2009.

ples stipulates that the principles have to be applied to all persons 'within the territory of any given state' (Principle 5) without any distinction. Though all stipulations refer to equality, there are differences in the type of equivalence promoted. Whether it is equivalence within the territory of a certain state that is required, or equivalence regarding the proceedings of a certain court, causes a fundamentally different situation in the context of the international courts. (In)equality can, moreover, be important in respect of detention conditions on the one hand and early release on the other hand.

### *Detention conditions*

The stipulation in the Body of Principles could be interpreted as a recommendation that states should strive for equality in execution of sentences between those convicted by the international court and those convicted in the country where the sentence is executed. In the context of the international courts, this would not, however, be the most logical form of equality. After all, the place where the prisoner has to serve his/her sentence has, in practice, until now been more of a consequence of a 'pragmatic' decision, based on the existing possibilities (see earlier), than the result of a rationally motivated choice. There are rarely specific ties between the convicted person and the country where he will serve his sentence. Tying the requirement of equality to the country where the sentence is executed therefore has no foundation. A required equality between all those convicted by the international court or tribunal itself is common sense to the tribunals and the courts. Nevertheless, this type of equivalence with national prisoners is sometimes required (for instance in the agreements between the ICTY and Austria, Germany and Poland).

Moreover, this creates an inequality between the various people convicted by the court, even though an international court strives for the creation of a certain uniformity in punishment (Findlay & McLean, 2007). The jurisprudence of the ICTY mentions this explicitly in the *Erdemovic* judgment, in which it is stated that the court strives for the realization of an equal treatment of all convicted persons (Klip, 1997). The differences in detention conditions and the modalities for the execution of sentences, inherent to a decentralized system, possibly constitute a weakness of the system that has repercussions for the

tribunal itself. The wish to realize an equal treatment requires that there is no significant disparity between states (Klip, 1997).

Choosing to realize equality between those convicted by the courts therefore seems the most logical choice. For this reason it is also rather strange to see that the Statutes of the ICTY and the ICTR state that ‘imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal’. The fact that sentences are executed in different countries may mean that two people given similar sentences by the tribunal will eventually serve two totally different punishments (Mettraux, 2005). The international courts can only achieve a certain degree of consistency. There is a certain risk of discrimination, of unequal treatment in the way sentences are executed. As an example: in a Scandinavian country, a prisoner has the right of access by his family or undisturbed visits by his partner, whereas this is not the case in Benin. It is very hard to eliminate this kind of inequality in treatment.<sup>59</sup>

Nevertheless, the courts and tribunals operate under the fiction that detention conditions are similar worldwide. The varieties in detention conditions are not taken into account when appointing the country in which the sentence will be executed. It is assumed that the detention conditions are always adequate and that there are no important differences. It is also assumed that all facilities used are suitable for the execution of sentences, although the standard varies, at best, between adequate and good. The tribunals choose a country based on a fair balance, working on the assumption that all countries from which they can choose are sufficiently equal, with no specific reason to choose one country or another.

In her analysis of the execution of sentences passed by the SCSL, Mulgrew called for the preservation of the detention facility of the court, as this meets the international standards and the staff are experienced regarding the implementation of those international standards. The prison regime meets human rights and current principles of penology. According to her, this internationalized model constitutes a good combination of national and international support: it has a

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<sup>59</sup> Interview with former staff of the ICTR Presidency, held October 8, 2009.

national location, but the staff, management and supervision are in accordance with international standards. Moreover, she reasons that nowadays the detention facilities of the international tribunals are also used as ‘prisons’, as sentences are executed there. Some people serve their sentence there, in anticipation of their transfer to another state, and others are even released from these facilities (Mulgrew, 2009). Mulgrew states that the ICC must consider preserving the detention facilities of the temporary tribunals, so that an instant and permanent detention capacity is available. Prisoners can be imprisoned in their region of origin, and a network of internationally controlled prisons is created. According to Mulgrew, this is a further step towards the realization of an international penal system (Mulgrew, 2009). Financially, this does not seem to be an option (Klip, 1997). Moreover, the detention facilities also know their limitations: at the ICTR detention facility, for instance, the possibilities for work are limited (to the prisoner cleaning his/her own cell), and the only possibility for education is taking English classes.<sup>60</sup> Moreover, the question arises of which countries would be willing to accept these facilities on their territory.

#### *Early release*

Another matter in which there is a risk of unequal treatment concerns early release. The fact that, at the ICTY and ICTR, national legislation stipulates whether one is eligible for early release allows there to be a lack of equality between different prisoners of the international court (Schabas, 1997). Even though the national regulations on release are not directly applicable to international prisoners, the agreements with the executing countries stipulate that the international court will be informed when the convicted person is eligible for early release. The ‘trigger’ for the release is thus found in the national legislation. The differences in legislation (in Belgium, for instance, a prisoner is eligible after one third of his sentence, in the UK after half, and in Sweden after two-thirds) do have an influence (Mulgrew, 2009). Differences between the different countries in legislation concerning early release possibly also cause discrepancies.

Nevertheless, the courts attempt to remedy the inequalities arising from the fact that there are no fixed terms for early release. This

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<sup>60</sup> Interview with staff of the ICTR Detention Facility, held October 8, 2009.

mainly happens through the courts themselves. The fact that the president of the court, and not the state itself, eventually makes the decision indicates that a balance is sought in decisions regarding release. Just because this control is kept by the court, the punishment and the prisoner are granted an 'international rank' (Mulgrew, 2009). If the decision on release were to end up in the hands of the state of execution, this would undermine the foundations of the international execution mechanisms. This would signify a kind of internationalization of the sentence.

The Manual on Developed Practices of the ICTY reasons that the concentration in the president of the discretionary competence in the decisions on early release means that the relevant factors can be consistently evaluated. Moreover, the president can take account of decisions concerning other prisoners.<sup>61</sup> It is stipulated that all prisoners receive equal treatment and equal possibilities of obtaining early release. Even though this was not recorded in the Practice Direction, it turns out that, in practice, the limit of two-thirds is applied.

The application of this two-thirds threshold is also seen in the cases in which a convicted person is never transferred to a state for the execution of his sentence, but stays in the detention facility of the tribunal. There is no special procedure provided for this. Normally, the state

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<sup>61</sup> The supervision of the detention by the international tribunal was recorded in the Statutes of the ICTY and the ICTR. The supervision remains with the tribunal, but this means that it is not immediately clear who is responsible for the supervision when the mandate of the tribunal ends. The appeals chambers ceased their hearings at the end of 2010. The ICTR Rules of Procedure and Evidence clearly stipulated that 'all sentences of imprisonment shall be served under the supervision of the Tribunal or a body designated by it'. In the agreements which the ICTR concluded regarding the execution of sentences, this becomes a real concern. The treaties with Benin, Mali, Swaziland and Rwanda indeed stipulate that 'in the event that the tribunal is to be wound up, the registrar will inform the Security Council (and the government of Rwanda) of any sentences whose enforcement remains to be completed pursuant to this Agreement'. For Sierra Leone as well, there is no certainty about the way the remaining sentences will be executed after the discontinuation of the tribunal (Mulgrew, 2009). In the discussions concerning the residual mechanism, the execution of sentences was also discussed with the Security Council. The ICTR is convinced that, if the president stays, he can realize a certain degree of harmonization in the practices of states.



concerned must let the tribunal know when the person concerned is eligible for release. In the case of detention in the UN facility, this, however, is not possible. In this case even a request by the prisoner is declared admissible after a certain time. ‘Considering that the conditions for eligibility regarding early release applications should be applied equally’ the ICTY has decided, *inter alia* regarding *Simić*<sup>62</sup> and *Mucić*<sup>63</sup> to allow a release after two-thirds of the sentence has been served, ‘considering that eligibility for early release in some Signatory States starts at two-thirds of the sentence served and, in some circumstances, even earlier’. This explicitly refers to the principle of ‘equality’, and indicates that the ICTY generally accepts that prisoners can be released after serving two-thirds of their sentence. The president of the ICTY has nevertheless already been prepared to intervene before the two-thirds limit in the past (*inter alia* in the cases of *Kos* and *Kolundzija*) (van Zyl Smit, 2007). The two-thirds limit is therefore not always applied consistently.

Even though an attempt is made at consistency, equality between prisoners remains an important point of interest. In a few cases, the prisoner is only eligible for release after three-quarters of his sentence. Release is only possible if the person involved complies with the conditions of the national legislation, and in this respect the discrepancy with the unofficial two-thirds term remains.

The ICC system, under which the ICC records a term itself, will therefore be more able to exclude inequality. The ICC sentence will be based on a fixed term in which the prisoner is eligible for release after two-thirds of his sentence, or, in the case of life imprisonment, after 25 years (Mulgrew, 2009). This also allows for the implementation of the ‘*rule of law*’ in the execution of sentences and therefore decreases the room for discretion. The creation of a framework for awarding release only encourages the good administration of justice in the long term.<sup>64</sup>

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<sup>62</sup> ICTY, *Prosecutor v. Simić et al.*, Decision of president on early release of Blagoje Simić, Case No. IT-95-5 (15 February 2011).

<sup>63</sup> ICTY, *Prosecutor v. Mucić*, Order of the President in response to Zdravko Mucic’s request for Early Release, Case No. IT-96-21-Abis (July 9, 2003).

<sup>64</sup> Interview with former staff of the ICTR Presidency, held October 8, 2009.

Besides clarity on the terms, there should be a better framework regarding the criteria to be applied in deciding on early release. Without this, it is possible that the degree of discretion in decisions concerning release is (too) high. For instance, large differences between the policies of the ICTY and the ICTR can be noticed nowadays. At the ICTR, awarding early release is a relatively standard practice. The standard practice of the ICTY differs greatly. In twenty or so cases so far, the ICTY has opted for the release of the person concerned before the termination of the sentence. This has happened at the earliest after about two-thirds of the sentence had been served. In most of the cases the length of time was much greater: on average, the prisoners had served more than three-quarters of their sentences before they were released early. Nevertheless, at the ICTR, early release is hardly ever awarded,<sup>65</sup> even though some judges have been common to both tribunals.<sup>66</sup>

The criteria taken into account by the ICTY are, *inter alia*, the prisoner's behaviour during detention (based on a report from the Commanding Officer of the Detention Unit), the prisoner's attitude regarding the facts, psychological reports dealing with whether there is an objection to the release<sup>67</sup> and with whether the prisoner is 'prone to

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<sup>65</sup> Such differences between tribunals have also been noted earlier in history: the people given prison sentences by the Tokyo tribunal were released before the end of their sentences. Eight years after their convictions, they had already all been released. The persons convicted in Nuremberg, on the other hand, normally served their whole sentence, with the exception of two persons sentenced to life imprisonment who were released after 44 years (Klip, 1997).

<sup>66</sup> It is possible that the vagueness concerning the relevant criteria for decisions concerning release also plays a role in this, as these criteria can determine the differences for the two tribunals in the files prepared with a view to obtaining the release. In requests made to the ICTR, there is more often a reference to elements of the case (cooperation with the prosecutor, voluntary surrender and guilty plea) than to the fact that the prisoner has been rehabilitated (although this sometimes happens, for instance concerning Ruggiu). In the ICTY decisions, it is clear that the tribunal was informed about the prisoner's behaviour during detention (and was also told of his employment, relationships with staff etc.), and about whether he showed regret, his psychological condition and the chances of him being successfully reintegrated into society.

<sup>67</sup> ICTY, *Prosecutor v. Furundzija*, Order of the President on the Application for Early Release of Anto Furundzija, Case No. IT-95-17/1 (July 29, 2004).

loss of control' (but not with whether he is emotionally stable, e.g. *Simić* (Abels, 2008), whether the prisoner is suffering from disease, the prisoner's bonds with his family, and the prisoner's prospects of work.<sup>68</sup> The jurisprudence of the ICTY makes it clear that importance is attached to whether the prisoner has complied with the rules and has a good relationship with the staff<sup>69</sup> and other prisoners. Special attention is paid to good relationships with persons of the same nationality, ethnicity or religion as the victims of the person concerned. Also regret, participation in prison activities and good behaviour notwithstanding that the person is imprisoned in a foreign country are considered as positive. The *Miroslav Tadic* decision additionally refers to the prisoner's opinion that he had good relationships with the other ethnic groups before the conflict broke out, and assumed that his return to the community would not cause any commotion.<sup>70</sup> Also a confidential memorandum of the registrar and a written opinion of the prosecutor are taken into account; the latter explains the cooperation with the prosecutor.<sup>71</sup> If a prisoner has acted as a witness in other cases after his conviction, this is seen as a positive factor for the reduction of his penalty (Manual on Developed Practices, p. 162). In addition, consistency between cases is also taken into account. The *Simić* decision contains the words 'considering that Milan Simić's case is no less appropriate for a grant of early release than prisoners previously granted early release'. The president is not affected by the judgment when he makes this decision, although in some judgments some kind of rate is stipulated. As an example: in the *Dusko Tadic* case the judgment states that 'unless exceptional circumstances apply, Dusko Tadic should serve a term of imprisonment ending no earlier than 14 July 2007'. This is equivalent to about two-thirds of the sentence. Never-

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<sup>68</sup> ICTY, *Prosecutor v. Mucić*, Order of the President in response to Zdravko Mucić request for Early Release, Case No. IT-96-21-Abis (July 9, 2003).

<sup>69</sup> ICTY, *Prosecutor v. Furundzija*, Order of the President on the Application for Early Release of Anto Furundzija, Case No. IT-95-17/1 (July 29, 2004).

<sup>70</sup> ICTY, *Prosecutor v. Tadic*, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadic, Case No. IT-95-9 (November 3, 2004).

<sup>71</sup> This opinion should concern cooperation given after the conviction, because cooperation given before the conviction would already have been taken into account in the determination of the sentence; other authors have already pointed to the risk of double counting in this regard.

theless, such recommendations do not have to be considered by the president (Tolbert & Rydberg, 2000).

The jurisprudence of the ICTR indicates that the nature of the facts plays an important role. The decision concerning *Serushago* states: 'Noting that the crimes for which Serushago was sentenced include those of the utmost gravity, including genocide; [...] considering that to date, no person convicted by this Tribunal has yet applied for commutation or early release and that those persons granted early release by the International Criminal Tribunal for the former Yugoslavia have not been convicted for genocide.'<sup>72</sup> Similar considerations can be found in the decision with regard to *Ruggiu*.<sup>73</sup>

But the decisions regarding release are always short and contain little reasoning, frequently using the words 'noting' and 'considering' followed by the decision. Genuine argument is lacking. The importance attached to each of the parameters and the way they relate to each other remains unclear. The criteria for early release are not fixed in a verifiable and workable manner. The decisions are only made by the president himself, without following a framework supported by a larger whole. Considering the consequences of these decisions, this is unacceptable, and the procedure can be called rather 'primitive'. The 'novelty' of the tribunals means that many imperfections can still be found in the system. The search for compromises often creates difficulties when the aim is to ensure instant and obvious answers. Nonetheless, it is extremely important to consider the discretion that is now present in the system, so that abuse and unwanted consequences can be opposed. For as long as there are no adequate criteria, the tribunal is vulnerable to accusations of the arbitrary adjudication of favours (Abels, 2008). Transparency, decisions that can be anticipated, and clarity are important, not only for the convicted person, but also for the judges, the victims and the entire international community (Sluiter, 2008).

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<sup>72</sup> ICTR, *Prosecutor v. Omar Serushago*, Decision of the President on the Application for Early Release of Omar Serushago, ICTR-98-39-S (May 12, 2005).

<sup>73</sup> ICTR, *Prosecutor v. Georges Ruggiu*, Decision of the President on the Application for Early Release of Georges Ruggiu, ICTR-97-32-S (May 12, 2005).

## b. Right of complaint and inspection

The international norms stipulate that regular inspections of prison institutions have to be carried out by qualified and experienced inspectors (Article 55, Standard Minimum Rules; Principle 29, Body of Principles). During the inspections, it must always be possible for the prisoners to talk with the reviewing authority in a free and confidential way, without the prison staff being present (Principle 29, Body of Principles). Each prisoner must, moreover, have the possibility (on a weekday) of making a request or complaint to the director of the institution (or someone who represents him) and of making a request or complaint to the general prison administration. The Body of Principles also stipulates that it has to be possible, if necessary, to contact other competent authorities who are 'vested with reviewing or remedial powers' about violations of the principles (Principle 7). The first Optional Protocol to the ICCPR<sup>74</sup> allows the Human Rights Committee 'to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violations by that state of any of the rights set forth in the Covenant'.

All the agreements provide for inspections to be carried out, but whether these are to be executed by 'qualified and experienced inspectors' could nonetheless be a topic for debate. In many agreements, the ICTY and the ICTR agreed that inspections were to be carried out by the ICRC. The appointment of the ICRC was not completely obvious. The experience of the ICRC in supervising the treatment of prisoners in penitentiary institutions was not very broad. The ICRC, on the other hand, did have experience in the treatment of prisoners of war in armed conflicts, but this treatment is of a totally different order. The situation in prisons cannot be related to the competences of the ICRC under the Geneva Conventions, and signifies a diversion from the core activities of this organization (Klip, 1997). The CPT, which, for instance, carries out the inspections in the UK, does have this experience, but it is a European organization. The agreement between the ICTY and Spain, for instance, provides for a joint commission to execute the inspections. The way in which this commission is ap-

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<sup>74</sup> Optional Protocol to the International Covenant on Civil and Political Rights, December 16, 1966, 999 *U.N.T.S.*, 171.

pointed, however, is not clear. A (more) credible solution (at least for the ICC) would probably have been to entrust inspections to the Subcommittee on Prevention of Torture (SPT), which – quite comparable to the CPT but at UN level then – was set up by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>75</sup> Its establishment had been pleaded for since decades, building on the ICRC experience, but with a generic mandate to conduct independent international inspections of detention conditions (Gautier, 1980).

Moreover, the organization of inspections is far from flawless. The ICTR, for instance, is only willing to execute a first inspection in countries executing a sentence, immediately after the transfer of the prisoner. Requests for recurring inspections are met with resistance.<sup>76</sup> For this reason the ICTR staff sometimes refrain from inspections.<sup>77</sup> Although the inspections are well-organized on paper, certain problems remain in practice. Moreover it is not clear whether experienced inspectors are involved at all times.

Concerning complaints made by prisoners, it should be pointed out that the tribunals do not necessarily communicate directly with the prisoners. The ICTR, for instance, frequently uses the United Nations Development Programme (UNDP) to communicate with prisoners. The UNDP in a sense looks after the institutional bonds between the state that is enforcing the sentence and the ICTR. People working at the UNDP might not be *officers of the court*, but the court delegates this responsibility to them. Besides this communication line, prisoners can also send letters to the president of the tribunal, allowing them to communicate their complaints.<sup>78</sup>

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<sup>75</sup> Which entered into force on 22 June 2006.

<sup>76</sup> In the detention facility itself, inspections are executed by the ICRC every six months.

<sup>77</sup> Interview with Roland Amoussouga, Senior Legal Adviser, Chief of External Relations and Strategic Planning Section (ERSPS) and ICTR Spokesperson, held September 23, 2009.

<sup>78</sup> Ibidem.

c. Right to contacts with the outside world, in particular family and legal counsel

In this respect, the Standard Minimum Rules (Article 37) and the Body of Principles provide that prisoners must be permitted to communicate with their family and friends on a regular basis, under the necessary supervision, both by the exchange of letters and by receiving visits (Principle 19). It is stipulated that special attention should be given to the maintenance and amelioration of these relationships with persons (*inter alia* family) and institutions in the outside world that are desirable and in the interest ('best interest') of both sides. According to the Body of Principles, each prisoner also has the right to communicate with his legal counsel. In this respect, adequate time and facilities have to be provided (Principle 18).

Even though detention, by definition, has an influence on both private and family life, it is stipulated that the suffering caused by the deprivation of physical freedom may not be augmented by the prison regime, unless there is sufficient justification for this. As we have said, the core of the punishment is the deprivation of freedom. By itself this does not have to lead to a violation of other rights, such as the right to a family life, but in an internationalized mechanism for the execution of sentences the distance from family and home can literally be very great. Simply because in this kind of international transfer of convicted persons the bonds of the convicted persons do not necessarily play a crucial role in the appointment of a state to execute the sentence, the realization of a right to contact the outside world is not easy. The prisoners are rarely transferred to the country in which their family lives, and it often requires a huge financial outlay if the family wishes to visit the prisoner. Many people convicted by the ICTR, who are serving their sentences in Mali and Benin, serve their sentences far away from their family, as their families often live in Europe. The right to receive visits can become rather meaningless if the family does not have the means to travel long distances, and certainly not to do so on a regular basis. For this reason, the ICRC has already, regarding one prisoner, intervened financially so that the close relatives could visit the prisoner.<sup>79</sup> Even though the possibility to receive visits

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<sup>79</sup> Interview with staff of the ICTR Registry, held September 29, 2009.

may well exist on paper, i.e. in the legislation of the state of execution, it may often be hard for the right actually to be exercised in practice.

## **B. Maximum individual interest: Reintegration**

Earlier we reviewed how well the individual interests of the convicted person are protected. Next, we review how and to what extent the interests of the convicted person are given maximum attention. In the context of this research, the maximum attention is paid to the interests of the convicted person when his/her reintegration is promoted at the time the choice is made about the execution of his/her sentence.

At international courts and tribunals the execution of the sentence is an 'additional' stage, which *per se* is not of crucial importance to the activities of the court or tribunal. The interests of the convicted person are therefore definitely not the focus in the vertical framework for the execution of sentences, which lacks (theories on) goals for the execution of sentences. The international courts *per se* do refer to penal goals, mainly to retribution (Sebba, 2009), but these goals were not explicitly extended to the execution of the sentences. Moreover, whether and to what extent penal goals are or should be relevant at the stage of sentence execution is still subject to (increasing) jurisprudence in the courts. It is however clear that the reintegration of the offender is not the primary objective in the execution of his sentence. The international agreements made by these courts concerning the execution of sentences are guided by an administrative logic that seeks to spread the costs as much as possible around the international community. Yet these instruments cannot be completely decoupled from reintegration, as they ground the execution of sentences on internationally accepted standard instruments. This orientation demonstrates that the agreements are intended to be 'fair' and to comply with the valid – international – instruments that govern them. Yet these governing instruments also refer to the rehabilitation of the offender as an important aspect of the execution of a sentence. Therefore, these standard instruments refer to the reintegration of the offender as an important aim of the execution of the sentence, and the individualization of the sentence and the offender's gradual return to



society are proposed as important principles (Articles 60 and 67-69, Standard Minimum Rules).

The way in which rehabilitation has to be considered can nevertheless be shaped by the literature. Rehabilitation is not an empty box – theory and practice form a consistent framework in which the meaning and content of this term are well worked out. The primary objective of rehabilitation is the prevention of criminality. The punishment should focus on the remediation of criminal behaviour, by influencing the personal skills and possibilities of the individual delinquent (Duff, 2001). *Willingness to change* has always played a central role in theories concerning rehabilitation, and has developed in stages. Initially, rehabilitation was mainly considered as a psychological transformation that has to be experienced by the offender during his prison sentence. Later on, the growing therapeutic trend was integrated into this concept. People who committed crimes now had to be cured from their criminal tendencies. In a third stage, the therapeutic model was supplemented by a social learning model, which no longer characterizes criminality as an individual pathology, but argues that it is a result of learnt behaviour. Rehabilitation thus has to compensate for the faults in socialization. The most recent evolution in the rehabilitation model is the attention that is paid to the rights of the offender: rehabilitation is now translated into a right to education and aid that will permit or facilitate the offender's reintegration into society and also into an avoidance of custody circumstances that are below standard or create a physical or mental decline that is incompatible with social reintegration (Rotman, 1994).

Another characteristic of the rehabilitation perspective is that in decisions on the nature and duration of the punishment there should be room for *subjectivation*:<sup>80</sup> subjective aspects are of crucial importance in determining the sentence. The type and duration of the sentence must – as far as possible – be adjusted to the individual causes of the crime that has been committed, and must assist the offender in ending his or her criminal behaviour (Rotman, 1994). In the punishment,

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<sup>80</sup> The term 'subjectivation' is preferred to terms like individualization; subjectivation refers to the level of attention given to the person concerned and to his or her subjective needs and motivations, as well as to the role he or she can play in a given procedure (here: transfer procedures).

the life course of the offender is taken into account. The aim is to prevent criminality by influencing the personality and the skills of the person who committed the crime, or his position and abilities in society, so he will no longer commit crimes (de Keijser, 2004). Theories concerning rehabilitation are distinct from retribution theories, which only take subjective criteria into account if these are necessary to determine whether a crime has been committed or the degree of responsibility (Rotman, 1994).

From the point of view of rehabilitation, a prison sentence is the ultimate recourse (subsidiarity of the prison sentence). A prison sentence is seen as a counter-productive measure (except in exceptional circumstances), which tends to strengthen criminal predispositions instead of weakening them. If possible, alternative sentences and measures are preferred (Duff & Garland, 1994).

Rehabilitation assumes that it is possible to examine the causes of a certain offender's criminal behaviour, and to intervene with regard to these causes or to stimulate other positive changes (Raine & Willson, 1997). Future criminal behaviour is, on the one hand, influenced by factors that have to do with the 'ways of thinking' of the offender and, on the other hand, by factors that have to do with the 'circumstances' in the life of the offender (Maguire & Raynor, 2006). The chosen interventions in a framework of rehabilitation are thus treatment and assistance, like the stimulation of social bonds.

Rehabilitation in punishment requires that the criminal law system also opens doors to *help and assistance*, considering declining recidivism (Rotman, 1994). Individual treatment and assistance programmes, possibly also focused on psychological or addiction problems, try to increase the prisoner's motivation and willingness to change. There is an international consensus on the effectiveness of such programmes: Canadian, American, and European authors think that some rehabilitation programmes succeed in lowering the degree of recidivism, when they are focused on the criminal needs of the persons concerned (i.e. those factors that are very likely to contribute to the criminal behaviour of the person concerned) (Bernfeld, Farrington & Leschied, 2001). The most effective individual treatment pro-

grammes are those focused on the factors which are of a very dynamic kind, and which are directly related to the committing of criminal activities, such as social attitudes, problem-solving skills and abuse of means. Moreover, high risk offenders would be especially helped by treatment programmes focused on rehabilitation. Concerning the context, it seems that interventions in the community produce better results than those in prison: generally it is noticed that treatment in the context of an alternative sanction produces better results than treatment in prison (Easton & Piper, 2005). It is nonetheless important to adapt the intensity and length of the treatment to the needs and the risk profile of the offender. Treatment in prison therefore also assumes that different treatment options are offered, to take into account the diversity in the profiles of the offenders when assigning prisoners to particular treatments (Bourgon & Armstrong, 2005).

Lastly, the social bonds of offenders have to be developed, maintained or repaired, to increase their chances of reintegration. The contribution of social factors is an important part of rehabilitation. Defeating social problems is often insufficient *per se* for ending the criminal behaviour, but it is a necessary condition (Maguire & Raynor, 2006). Social problems are in this sense obstacles to a life without criminality. *Hirschi* considered, in his theory concerning the social control of criminality, that the appearance of social bonds is the paramount force preventing criminal behaviour. Later, effect studies confirmed that social bonds are connected with criminal behaviour (MacKenzie, 2002). In particular, having a partner (or, more broadly, good family relationships) and having employment cause a reduction in criminal behaviour (Hepburn & Griffin, 2004). People who have committed crimes find it hard to establish strong social bonds.<sup>81</sup> When they have

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<sup>81</sup> Studies show that former prisoners experience high levels of social need (Maguire & Raynor, 2006). Former prisoners are one of the least privileged groups and are often the subject of social exclusion. This has to do with the prison sentence itself and with the previous history of the prisoners. By now it is well known that criminal behaviour is associated with different kinds of economic and social deprivation, such as low income, lack of employment possibilities and bad housing circumstances (Crow, 2001). A prison sentence often increases this deprivation: a large number of prisoners lose their job and their house, etc., while serving their prison sentence. Others face financial problems or find that contact with their family is broken (Robinson & Raynor, 2006).

created those bonds, the chances are that their life is greatly changed and that positive changes occur in their life (De Li & Layton MacKenzie, 2003). Given the importance of social bonds, especially bonds of employment and social relationships, it is necessary that attention is given to this at the stage of sentence execution. By applying alternative sanctions, social bonds can be maintained, but these matters also have to be incorporated into the prison sentences (or the interventions after release).

Based on the literature describing the theoretical framework for this penal goal, and according to the aspects of this theory for which empirical evidence was found, this penal goal was not only generally investigated, but was also evaluated by four operational criteria for reintegration: a focus on changing, room for subjectivity, attention to social bonds, and admission to help and assistance.

### 1. *Reintegration in general*

Vertical proceedings in a sense also include attention to rehabilitation. After all, the norms on the execution of sentence explicitly refer to this at certain points. Article 10 of the ICCPR reads: ‘The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation [...]’, and thus stresses the importance of rehabilitation (Schabas, 1997). The United Nations Human Rights Committee added that ‘no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner’.<sup>82</sup> The Basic Principles point out that: ‘With the participation and help of the community and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.’ (Principle No 10). The final justification for a prison sentence is, according to the Standard Minimum Rules, the protection of society against criminality (Article 58). For that very reason, the period of imprisonment has to be utilized so that the convicted person wants and is able to live a life without criminality when he returns to society. A prison institution should therefore

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<sup>82</sup> General Comment, Human Rights Committee, *U.N. Doc. CCPR/21/Rev.1/Add.3* (1992).

provide all forms of support and assistance which are suitable and available, and supply these according to the individual treatment needs of the prisoners (Articles 59-61). Rehabilitation thus is the ideal penal goal proposed by the standard instruments that play such a central role in the sentence execution system of the international courts and tribunals (Schabas, 1997). Besides that, it is also explicitly mentioned in the basic norms that a sentence should be based on the individualization of treatment, and that a gradual return to society should be accomplished (Articles 60 and 67-69, Standard Minimum Rules).

In the context of international courts and tribunals, this penal goal is hard work in every way. These courts formulated totally different goals of their own. Retribution and deterrence are the main objectives in the passing of the sentence, and they are therefore often cited by the ICTR and the ICTY. In the *Dusko Tadic* case, the ICTY stated that 'retribution and deterrence serve as a primary purposes of sentence'.<sup>83</sup> The ICTR said that sentences are intended to achieve retribution with regard to the offenders and deterrence with regard to others who could possibly want to commit these crimes in the future, by demonstrating that the international community will not tolerate this.<sup>84</sup> The tribunals are focused both on specific deterrence, so that those who are convicted do not commit any further crimes, and on general deterrence, so that other persons who might commit crimes are discouraged.<sup>85</sup> The ICC also refers to the end of the impunity for perpetrators of such crimes and, in this way, to the contribution to the prevention of these crimes. A judgment of the ICTY<sup>86</sup> referred to the fact that the certainty of the sentence, rather than its severity, has a greater influence on making it an important instrument of retribution, stigmatization and deterrence. It further stated that the international character of the

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<sup>83</sup> ICTY, *Prosecutor v. Tadic*, Sentencing Judgment, Case No. IT-94-I-S (July 14, 1997).

<sup>84</sup> ICTR, *Prosecutor v. Rutaganda*, Judgment and Sentence, Case No. ICTR-96-3 (December 6, 1999).

<sup>85</sup> General deterrence can nevertheless not have the greatest influence in individual sentences, which are only based on the crimes committed by the person concerned and not on paramount objectives. No-one can therefore be punished more heavily than is considered necessary because of a belief that this will discourage others (Meernik, 2003).

<sup>86</sup> ICTY, *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T (December 10, 1998).

court contributes to this, as its moral authority and impact ensure a much stronger punitive effect, which should also be taken into account when deciding on the right punishment. The context in the international tribunals is mostly retributive and deterrent (Henham, 2003).<sup>87</sup> The very point is the punishment (of international crimes), whether or not there is an effect in the future. The main purpose is retribution (Kury & Ferdinand, 2008).

The tribunals (and their founders) also speak of reparation and the maintenance of the peace as their goal (Meernik, 2005). The UN Resolution which created the ICTR<sup>88</sup> stipulates that the prosecutions will contribute to ‘the process of national reconciliation and to the restoration and maintenance of peace’. The ICTY stated in the *Delalic* case that, if retribution were to be taken as the only reason for punishment, this could be counter-productive and difficult as regards the paramount objective of the Security Council, namely the restoration and maintenance of peace on the territory of the former Yugoslavia.<sup>89</sup> The reaction with regard to these crimes would in this sense not be limited to the criminal field (Haveman, 2004). This aim is, neverthe-

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<sup>87</sup> The individual’s responsibility, which is a very important paradigm in the international courts and tribunals, is often based on the belief that penal sentences really do have a deterrent effect. Criminological research has nevertheless questioned the effectiveness of deterrence as a penal strategy: deterrence starts from models of human rationality that are too simplistic (Roberts & McMillan, 2003). Note that the faith in this penal goal remains fully intact at the international level. The footnotes which were added by the investigation about the deterrent effect do not find a willing ear. Henham nevertheless argued that the effect of deterrence as a goal of punishment should be put into perspective, and that the type of crime should also be considered. He gave the example of suicide terrorism to state that deterrence can be completely irrelevant for certain crimes (Henham, 2003). Whether international courts can contribute to prevention is not clear, and is a matter of ‘possibility’ and ‘faith’ rather than of empirical evidence or clear analysis (Tallgren, 2002). Moreover, the relatively small number of convicts is mentioned, and this also should temper the optimism concerning deterrence (Findlay & McLean, 2007).

<sup>88</sup> Resolution S/PV.3453 of the Security Council of the United Nations (November 8, 1994), *U.N. Doc. S/PV.3453* (1994).

<sup>89</sup> ICTY, *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-95-17/1-T (December 10, 1998).

less, (too) ambitious,<sup>90</sup> and causes the creation of different roles for tribunals. After all, the objectives of the courts are, in fact, fundamentally prosecution and judgment, not *peace-keeping* and *peacemaking* (Beigbeder, 2005). Whether these courts can contribute to the restoration of peace in the conflict region also depends on the attitude adopted by the local population with regard to the court. The legitimacy of the courts is questioned anyway, judging from the local population's perception of and trust in these institutions (Arzt, 2006). There is also scepticism about whether tribunals would really contribute to peace in the country concerned. Meernik thought that there was only an effect in Bosnia (and not in the entire territory of the former Yugoslavia), or that sometimes even the opposite occurred: increased hostility after an arrest or a conviction (Meernik, 2005). In the case of the ICTR, it is generally pointed out that most of the Rwandan population considers the ICTR as an expensive irrelevance and that the international community has contributed little to the development of the national judiciary. Ambitions that are too high threaten to delegitimize an international court in the eyes of the population concerned (Zaum, 2009). However, one ought not to forget that the reference to the peace proceedings was a legal necessity in the creation of the tribunals. In the interpretation of the official purposes of the courts and tribunals, a sense of reality is needed.<sup>91</sup> The *ad hoc* tribunal

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<sup>90</sup> Enquiries of the local population or the ICTR, for instance, show that it is assumed that the tribunal can only make a limited contribution to reconciliation in Rwanda.

<sup>91</sup> The abolition of impunity is only possible for a limited group of offenders. Large numbers exceed the capacity of the international courts. The courts may contribute to an awareness that atrocities cannot be accepted and that, by definition, they do not remain unpunished. This in itself, when linked to the concrete possibilities provided by the courts to the victims, possibly has a good influence on the reparation in and of society. However, it seems very difficult to perform this work. A contribution to reconciliation from the offender risking a sentence seems to be an illusion. The threat of being convicted will not promote truth-telling behaviour by the offender at the trial. In a truth and reconciliation commission this may be more likely to happen. These commissions are seen as a non-judicial and non-penal way to 'set an example', and involve giving an example of the way in which people treat each other in a democratic society, even if there is no solution to the underlying disputes. The South African TRC, for example, was part of a package of measures focused on the establishment of a democratic rule of law. Moreover, reconciliation is something coming from the inside, and cannot be imposed by external people like international judges (Haveman, 2005). But truth and reconciliation commissions also have their shortcomings. At the South African TRC, many victims did not have the opportunity to give testimony.

fundamentally remains focused on the prosecution and judgment of criminals, and this judicial process is the purpose of an international tribunal.<sup>92</sup>

Nevertheless, the reasons for *imposing* a sentence and the purposes which have to be achieved during the *execution* of that sentence have to be distinguished (Henham, 2003). In the context of the tribunals, it

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Those who did think that their testimony was often limited to the gathering of empirical data of which the TRC was in need. Here also, the victim is treated as an instrument, even if the goal is not even to achieve a conviction (Findlay, 2008). Criminal law does not stand alone in the national context, but operates in the totality of social intervention mechanisms. Not all of these mechanisms have a counterpart at the international level. This means that the ICC functions in almost total isolation. Nevertheless, this cannot interfere with the fact that the ICC realizes that the criminal approach is only one of many approaches. Besides this, there are also other necessary mechanisms, which can be classified under the heading of *transitional justice*. In particular, one can think of both corrective and educational measures. Besides that, institutional reform is often also a crucial component. Also the aforementioned reconciliation commissions may prove relevant and may help to contribute to the expected transition. Additions are thus necessary to overcome the inherent limitations of the criminal law (Haveman, 2005).

<sup>92</sup> The way in which an answer based on the criminal law can be combined with reparation remains a difficult issue. Studies also give different results. A survey of the war victims in Bosnia-Herzegovina, Croatia and Kosovo, for instance, makes it clear that the victims wish the offenders concerned to be brought to judgment (about 80% of the people surveyed said that they thought that this was needed). This however does not mean that it is assumed that the offenders have to go to prison (only 38% think that imprisonment is necessary, slightly less than the percentage who think that the victims should be compensated (40%). Nonetheless, rarely or never is it said that the offenders should be executed (1.5%). The most startling result of the questionnaire nevertheless lies in the answers to the question of why there should be punishment. Around 88% think that the first place should be given to the purpose of finding the truth about what happened. This corresponds to the results of other studies of victims and witnesses at the ICTY. Obtaining revenge is a purpose of the punishment according to only 10.5% of the persons surveyed. It should be noted that there are large differences in this between Kosovars and the two other populations in the survey. The Kosovars taking part in the survey do not think that finding the truth is as important as do the two other populations (71.6% of Kosovars put finding the truth first), but that taking revenge is more important (21%). Moreover, they also indicate that the creation of the possibility of living together is an important goal (27%), while neither of the other populations think this. These differences possibly have to do with the fact that the conflict in Kosovo arose later than the conflicts in Croatia and Bosnia-Herzegovina, so the victimization is still fresh in the memory (Kiza, 2008).



is clear that a separate aim regarding the execution of sentences has not been explicitly set. Schabas states that in international courts the judgment is normally the most important element; what happens to the offenders after conviction is less important (Schabas, 1997). Nothing is said in the Rome Statute about the purposes of the execution of sentences, as if the matter is clear and does not require further explanation or guidance. Mulgrew has already argued, concerning the mixed SCSL tribunal, that the jurisprudence of the SCSL ‘discusses sentences of imprisonment as though they are an end in themselves’, while in human rights instruments it is admitted that a prison sentence should not only be retributive, but also has to assist in the social rehabilitation of the offender. Other international courts have acknowledged in their judgments that rehabilitation is a valid purpose of the execution of sentences in international systems. The ICTY trial chamber, for instance, admitted in the Dusko *Tadic* case that both punishing the most dangerous offenders and rehabilitation can be desirable objectives, stipulating that ‘the punishment should fit the offender and not merely the crime’. In the *Erdemovic* case it is made clear that rehabilitation has to be subordinated to retribution, deterrence and stigmatization (Henham, 2003). The trial chamber said that the possibility of rehabilitation ‘must be subordinate to that of an attempt to stigmatize the most serious violations of international humanitarian law, and in particular an attempt to preclude their recurrence’. According to the Chamber, the vital function is located elsewhere: ‘One of the purposes of punishment for a crime against humanity lies precisely in stigmatizing criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole. [...] On the basis of the above, the International Tribunal sees public reprobation and stigmatization by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.’ Nevertheless, irrespective of this argument, the trial chamber appeared to be sensitive to the possibility of rehabilitation in passing a ten year prison sentence, when it mentioned ‘a series of traits characterizing a corrigible personality’ (Schabas, 1997). In the context of the most serious crimes, the consideration of rehabilitation nevertheless remains difficult.

This means that there is no paramount official rationale for the execution of sentences, and even that the purpose acknowledged and recommended by the international human rights and sentence execution norms has no priority. The role of punishment seems to suffer under the lack of theorizing or, better, the lack of explanation. Henham states that this partly has to do with the compromises that have to be sought at the international level. Paradoxes and disharmony are often hidden and ignored, so they can be hidden in the rhetoric of retribution. The absence of principles, however, weakens the claim that an international court has a rational basis for the execution of democratic principles of punishment (Henham, 2003).

The fact that there are no explicit purposes linked to the stage of the execution of the sentence does not imply that this stage is without purpose. In what follows, an inventory has been drawn up of aspects of thinking about reintegration that can be found in or derived from sentence execution instruments and proceedings of the international courts.

## 2. *Change-orientation*

It is hard to defend the statement that willingness to change shapes the instruments and proceedings for the execution of sentences at the international courts and tribunals. Sentence execution agreements are concluded with states which declare themselves willing to conclude them. The connection between the countries responsible for the execution of sentences and the convicted persons in this respect is not always clear. At the ICTY, the countries executing sentences may all be European countries, and at the ICTR sentences appear to be executed in both European and African countries. A connection between the convicted person and the country of execution is not assumed or considered to be necessary. This means that the regulation of the execution of sentences is not explicitly controlled by a concern for the convicted person himself. Moreover, it is very difficult to discover the policy behind the practice of the international transfer of convicted persons by the *ad hoc* tribunals. The written decisions under which a state is appointed are often very short, and the reasons why a person will serve his/her sentence in a certain country are barely given. It can

only be assumed that these reasons are mentioned in the confidential memoranda that are delivered to the registrar and to the president. In the decisions made by the president of the ICTY, on the other hand, the substantive argument is very brief. In a few cases (for instance in the *Plavsic* case) there are no references to specific factors.<sup>93</sup> At the ICTR it is also often hard to discover a policy line in the decisions concerning the execution of sentences. Most of the decisions concerning the appointment of a state are even shorter than those of the ICTY.

In addition to the insubstantial and very brief character of the decisions concerning the appointment of the state in which a sentence will be executed, it appears that the system for the appointment of states to execute the sentences does not operate on a continuous and regular basis. The first decisions of the ICTR were made in 2001. Subsequently, nothing happened for seven years in the area of the execution of sentences. It took until 2008 before another decision was made.<sup>94</sup> Only the decision, mentioned earlier, concerning the execution of the sentence passed on *Ruggiu*, in February 2008, has been made public. After this, these decisions became confidential again, and were not published until their implementation.

The huge delays in the appointment of states to execute sentences were to some extent influenced by the wait for the availability of the necessary detention facilities. An important factor, however, is the pressure experienced by the ICTR from Rwanda for the sentences to be executed in Rwanda itself. When a decision is made not to send a convicted person to Rwanda, this is therefore very sensitive, and is followed by an indignant reaction from Rwanda. This also explains the reluctance to make decisions, and the fact that decisions are often

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<sup>93</sup> ICTY, *Prosecutor v. Plavsic*, Order designating the state in which Biljana Plavsic is to serve his prison sentence, IT-00-39&40/1 (April 24, 2003). Specific elements were also not apparent in the decisions concerning *Banovic*, *Cesic*, *Mradjica*, *Krnjelac*, *Delic* and *Nikolic*.

<sup>94</sup> This specifically means that Judge Erik Møse did not make a decision on the execution of a sentence. President Pillay made the first decisions in 2001, but it took until the moment when President Byron took over from Møse before the next decisions were made.

made ‘on a group-by-group basis’.<sup>95</sup> Moreover, it is more than likely to be a decisive element in the decision that the sentences should be executed in African states: ‘In my view the idea was to, what we call in French, *trancher la poire en deux*: they want to go to Europe, the victims want them in Rwanda, so leaving them in Africa will be just halfway between Rwanda and Europe.’<sup>96</sup>

The stage of sentence execution is given an intrinsically administrative character. This stage is the logical consequence of the conviction, but there is neither a specific purpose connected to it, nor a substantial interpretation given to it.

### 3. *Individualization of treatment*

The ‘subjectivation’ of the sentence is not only one of the main aspects of reintegration, but it is also supported by the basic norms for the execution of sentences. The Standard Minimum Rules stipulate that, with a view to the rehabilitation of the offender, the treatment has to be made individual, keeping in mind the social and criminal history of the person concerned, his capabilities and his perspectives after release. In order to do this, a flexible system of classification has to be applied, so that appropriate treatment is facilitated (Articles 67-69).

Subjectivation is only translated to a limited extent into the execution of sentences after conviction by the international courts. The decisions are not based on the preferences of the person concerned, with one exception. In the decision with regard to *Landzo*,<sup>97</sup> the court focused on the preferences of the person concerned, which is totally exceptional. Landzo asked whether he could serve his sentence in an English-speaking country, as he had learned English during his detention in The Hague and had also learned computer skills which he wanted to develop further, with a view to rounding off his higher education. The decision however mentions that, at that time, there was no agreement with an English-speaking country. The offender therefore had to serve his sentence in Finland. Nevertheless, the decision men-

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<sup>95</sup> Interview with former staff of the ICTR Presidency, held October 8, 2009.

<sup>96</sup> Interview with staff of the ICTR Registry, held September 29, 2009.

<sup>97</sup> ICTY, *Prosecutor v. Landzo*, Order designating the state in which Esad Landzo is to serve his prison sentence, IT-96-21-ES (April 29, 2003).

tions, in addition, that English is widely spoken in Finland and that, when the tribunal did conclude an agreement with an English-speaking country, Landzo could submit an application in order to serve his sentence in this state.

Objections of convicted persons themselves also have little or no influence on the decisions. The limited extent to which the individual circumstances of the convicted person play a role is shown, for instance, in the reconsideration of the decision concerning *Martic*.<sup>98</sup> Martić demanded that the decision that he serve his sentence in Estonia be reconsidered. In the decision on the reconsideration, the president stated firmly: ‘The Practice Direction allows me, if I so wish, to request the opinion of the convicted person and of the office of the prosecutor. However, as the Statute, Rules of Procedure and Evidence, and Practice Direction make clear, there is no right conferred on a convicted person to be heard on this issue. Accordingly, Martić has no right to directly petition me with respect to the location in which he will serve his imprisonment, and the Request is incompetent on this basis alone.’ Still, the president briefly considered the request. Martić argued that his family did not have the financial means to visit him in Estonia. Moreover, he said that he did not speak the language and could not practice his religion in Estonia. The president did not answer these objections, but argued: ‘Paragraphs 3(a), (c) and (g) of the Practice Direction require the registrar to take these considerations – and “any other considerations related to the case” – into account. [...] In light of the above, there is no basis for ordering the registrar to conduct an investigation into Martić’s family’s financial resources and to stay the procedure of enforcement of his sentence’. The request was rejected.

It also appears that the convicted person cannot influence the decision at the ICTR, as the tribunal has declared that decisions on the execution of sentences are made independently of the ‘*submissions*’ of the offenders.<sup>99</sup> As an example, there was a case at the ICTR in which the convicted person himself wrote to the country in which he wanted to

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<sup>98</sup> ICTY, *Prosecutor v. Martić*, Decision on Milan Martić’s request for reconsideration of order designating state in which he is to serve his sentence, IT-95-11-ES (July 26, 2002).

<sup>99</sup> *Inter alia* in jurisprudence relating to Rule 11bis.

serve his sentence. That country wrote to the ICTR and declared its willingness to execute the sentence. The ICTR refused this. Notifications to the registrar and the president have also been stopped: to combat the flow of letters, the president released a direction in September 2008 to the Commanding Officer of the detention facility to let him know that communications of prisoners about where they might execute their sentences no longer have to be brought to the president. The prisoners are only heard when the president decides to hear them. Since that date, only one set of decisions has been made, but the opinions of the prisoners were not requested before these. Moreover, the convicted persons are only informed at the end of the proceedings of the fact that they will be transferred to a particular country to execute their sentence, without any specific information being given.<sup>100</sup>

The formal procedure that has to be followed in this matter is not clear. At the ICTR, the convicted person expresses his/her opinion by writing a letter addressed to the president of the court, in which he/she stipulates his/her preference for or rejection of a certain country for the execution of the sentence.<sup>101</sup> Convicted persons often stipulate, on the one hand, that they want to serve their sentence in a European country, or, on the other hand, that they do not want to serve their sentence in the country where the conflict took place. Nevertheless, because of the limited choices available to the ICTR (see earlier), the president does not have much opportunity to take this opinion into account in his decision. In any case, the number of countries involved in the execution of sentences is already rather limited; moreover the eventual decision on whether or not the convicted person is accepted is in the hands of the countries concerned.

For these reasons, there is no foundation on which convicted persons can force their individual circumstances to play a specific role in the appointment of a state. There is no right to be heard at the tribunal and also no way to question the decision.<sup>102</sup> An obligation to hear the person concerned about this before the appointment of the state

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<sup>100</sup> Interview with staff of the ICTR Registry, held September 29, 2009.

<sup>101</sup> Interview with former staff of the ICTR Presidency, held October 4, 2009.

<sup>102</sup> Interview with staff of the ICTR Registry, held September 29, 2009.

would however be appropriate, given the impact of the decision. Johnson has already expressed his concerns about the rights of the offender at the ICTY: ‘While there is much to praise, there is also much with which to be concerned’. He says that the pressure on the ICTY to succeed is so great that it is no wonder that the rights of the defendant are insufficiently protected (Johnson, 1998). The ‘objectivation’ of the convicted person also causes concerns in the area of the rights of the convicted person, and thus at the stage of the execution of the sentence. The rights granted to the convicted person are rather limited. It was stipulated that convicted persons have the right to state their opinion, but the consequences of their doing this remain unclear.

#### 4. *Ties with society*

At the ICTY, it is demonstrated that connections with society play a role in the making of decisions on the execution of sentences. Most of the decisions state that all factors mentioned in the Practice Direction have been taken into account, especially the place of residence of the family of the person concerned (for instance in the decision concerning *Aleksovski*<sup>103</sup>) or, in another instance, the family situation of the person concerned (for instance in the decision concerning *nik*<sup>104</sup>). In the decision with regard to *Kunarac*, the place of residence of his family is the reason why the sentence was executed not in one of the countries that had concluded an agreement with the ICTY,<sup>105</sup> but in Germany.<sup>106</sup> For the same reason, Italy was first appointed as the state where *Jelusic* should serve his sentence. Later, this decision was reversed (as the transfer could not take place within a reasonable time, ‘contrary to the spirit of the Statute and the Rules’), and the sentence still had to be served in Norway. The reference to the family was removed in the order appointing the latter as the new country of en-

<sup>103</sup> ICTY, *Prosecutor v. Aleksovski*, Order designating the state in which Zlatko Aleksovski is to serve his prison sentence, IT-95-14/1 (July 7, 2000).

<sup>104</sup> ICTY, *Prosecutor v. Krajisnik*, Order designating the state in which Momcilo Krajisnik is to serve his prison sentence, IT-00-39-ES (April 24, 2009).

<sup>105</sup> Germany has not concluded an agreement with the ICTY, because this is not possible because of the federal structure of the country. Nevertheless, the German authorities declared that they were willing to conclude agreements concerning specific convicts based on an ‘exchange of notes’.

<sup>106</sup> ICTY, *Prosecutor v. Kunarac*, Order designating the state in which Dragoljub Kunarac is to serve his prison sentence, IT-96-23 & IT-96-23/1-A (July 26, 2002).

forcement.<sup>107</sup> Based on the decisions of the ICTY, it can even be concluded that family reasons are almost the only factors considered in the decisions. Reasons other than family reasons are only exceptionally considered. In the decision concerning *Deronjic*<sup>108</sup> there was concern about the safety and protection of the person concerned and his family. In the *Nikolic* decision, additional reasons were censored ('redacted').<sup>109</sup>

In the decisions of the ICTR there is no reference to the place of residence of the family or to the family situation, let alone the personal preferences of the person concerned. In only one decision are many 'deliberations' explained.<sup>110</sup> After an outline of the legal framework, the decision states that 'in accordance with those guiding principles, the President shall take into account the individual circumstances of the convicted person in his/her decision-making process. It is logical for the President to consider such circumstances, because these circumstances will also influence the determination of the President as to which State will enforce the sentence.' The nationality and birthplace of the person concerned are discussed, as are some individual circumstances (medical condition and religion), and the court decided that the sentence should be executed in one of the states in which the person concerned held nationality.<sup>111</sup>

The social bonds of a person with a certain country do not constitute an element which the president *must* consider in his decisions. None of the elements mentioned is legally binding. This means that the president can consider these elements, but can also decide that they

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<sup>107</sup> ICTY, *Prosecutor v. Jelusic*, Order setting aside the order of 21 August 2001 and designating Norway as the state in which Goran Jelusic is to serve his sentence, IT-95-10-A (November 6, 2001).

<sup>108</sup> ICTY, *Prosecutor v. Deronjic*, Order designating the state in which Miroslav Deronjic is to serve his prison sentence, IT-02-61-ES (August 15, 2005).

<sup>109</sup> ICTY, *Prosecutor v. Nikolic*, Order designating the state in which Momir Nikolic is to serve his prison sentence, IT-02-60/2-ES (December 14, 2007).

<sup>110</sup> ICTR, *Prosecutor v. Ruggiu*, Decision on the enforcement of sentence, ICTR-97-32-A26 (February 13, 2008).

<sup>111</sup> The sentence is being executed in Italy. Ruggiu has both Belgian and Italian nationality.



are not relevant in proportion to other considerations.<sup>112</sup> The convicted persons are considered as ‘objects’ rather than as ‘subjects’ in these proceedings: a convicted person can be moved to any country which declares its willingness to accept him/her, without individual circumstances necessarily playing a role. If these prisoners are isolated from family and other support mechanisms, they are more than likely to be in a situation of relative isolation and in a culturally unknown environment, and they are not able to communicate with other prisoners or staff. Also treatment may not be possible, in any event not in the prisoner’s own language. The question arises whether this is in line with the stipulation of the Basic Principles that ‘the responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State’s other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society’ (Principle No 4).

##### 5. *Help and assistance*

Help and assistance were, in an exceptional case and to a limited extent, discussed at the ICTY. The *Jelisić* case is exceptional because there is explicit reference to the fact that the person concerned has to receive treatment. The trial chamber recommended that the person concerned should be given psychological and psychiatric treatment, and requested ‘the registry to take all the appropriate measures in this respect together with the state in which he will serve his sentence’. In the decision indicating the state of execution, this was translated as follows: ‘Noting the disposition of the above trial judgment which provides that the convicted person must receive psychological or psychiatric follow-up treatment’. However, this cannot be considered as more than a recommendation, as the sentence is executed in accordance with the legislation of the executing state (Tolbert & Rydberg, 2000).

Nevertheless, the norms for the execution of sentences pay great attention to the prisoner’s return to society: they require that circumstances are created that are favourable to the reintegration of the former prisoner into society under the best possible conditions (Basic Principle No 10). The Standard Minimum Rules stipulate that a grad-

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<sup>112</sup> Interview with former staff of the ICTR Presidency, held October 4, 2009.

ual return to society has to be accomplished, because, according to those rules, the duty of society does not end with the release of the prisoner. Therefore it is proposed that a *pre-release* regime is organized in the prison or that a convicted person is released under supervision combined with social assistance. Efficient after-care has to be provided (Articles 60 and 64).

The question of after-care and preparation for the release is also a very relevant matter for the international tribunals and courts. The fact is that, notwithstanding the gravity of the crimes that are tried there, prison sentences of very different lengths are pronounced. The ICTY, for instance, has passed sentences varying between two years and life; the average duration of a sentence is about fifteen years. It is therefore unrealistic to assume that the convicted persons do not return to society. Nevertheless, there is no provision for a gradual return to society. The 'early release' mechanism foreseen in the context of the tribunals concerns early release, and not conditional release or 'parole' as in many national systems, because an early release decision is in any case definite and irreversible (Cassese, 2003). Nevertheless, good reasons would exist to provide for a gradual return to society, with a view to both rehabilitation and security. Given the seriousness of the crimes committed, the fact that it is not guaranteed that the persons concerned will receive treatment during their detention and the fact that a return to the home country may be excluded, the observation, supervision and assistance of released offenders could have many advantages.

The execution of sentences in a decentralized system in any event reduces the possibility of a gradual return. In many systems '*early release*' is at least conditional, in the sense that an offender can be re-imprisoned if he commits new crimes. Until now, however, there has been no authority that could ensure the supervision of the convicted person. Until now, there also are no cases in which parole was granted to convicts, as happens in national systems with a view to preparing the prisoner for release.

Moreover, there are additional problems in these international proceedings. Given the nature of the crimes committed, it is not always

possible for former prisoners to return to their home country. When they request a right of residence in other states, this is often refused. Not only does this apply to people who are convicted, but it even applies to people acquitted by the court. These people often cannot or do not want to return to their home country, but even for them it is hard to obtain residence in other states.<sup>113</sup>

### C. Conclusion

Instruments for the vertical execution of sentences seem to opt explicitly for minimal consideration of the role of the offender; in particular, a ‘fair’ system is pursued which does not harm the interests of the offender. It is not the purpose to pay the maximum attention to the interests of the convicted person through the international execution of sentences. At the stage of sentence execution, the international courts and tribunals have to perform a difficult task. The international courts set themselves the aim of ensuring that sentences were executed (this is only since the creation of the *ad hoc* tribunals in the 1990s). The aim was thus the creation of a good system that respects the interests of all parties involved. After all, punishments after conviction are very sensitive matters, especially bearing in mind the seriousness of the crimes committed.

The system of the international transfer of convicted persons, as it exists today, is not entirely up-to-date and still faces a few problems that fundamentally influence its activities. An evaluation based on a few of the main – universal – instruments in the areas of human rights and the execution of sentences made this clear. Moreover, the question arises whether, for instance, the EU member states that have concluded sentence execution agreements with international courts and tribunals, should be required or expected to comply with supplementary, and often wider and more precise, binding and non-binding norms of the Council of Europe and the EU. An additional assessment by the international courts and tribunals may therefore be desirable when a sentence is being executed in an EU country or when this is

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<sup>113</sup> Interview with Roland Amoussouga, Senior Legal Adviser, Chief of External Relations and Strategic Planning Section (ERSPS) and ICTR Spokesperson, held September 23, 2009.

planned. If there is a choice between an EU and a non-EU country, a fair comparison possibly even requires the court to take account of the reality that EU countries have to comply with additional norms (and thus that the prospects for the execution of sentences may be better there). In order to allow for such a comparison, detailed information on the compliance of EU member states with both international standards and additional Council of Europe and EU standards has been inserted in the annex to this book.

Even though in the present system for the international transfer of convicted persons there are many references to human rights and sentence execution norms, there are clear shortcomings in a number of areas. The reference to these norms mainly seems to focus on the material detention conditions, while some of the substantial considerations are given a less important place. Some problems are in any case inherent to a decentralized system. Solving the potential conflicts between the national legislation and the international court is of permanent interest in such a system. These conflicts are solved by, *inter alia*, ensuring that the authority of the court over the sentence that it has pronounced remains. In this system of the international transfer of convicted persons, the international court is responsible for the supervision of the circumstances of the detention, and therefore maintains international control over the fundamental aspects of the sentence. Even so, the system is characterized by many inequalities, especially concerning detention conditions and release. Consequently, it seems to be crucial for international tribunals and courts to have a proper insight into the variations that exist. At least for the EU member states, this book offers such an insight (see the annex). In the area of the terms for release, there is already some noticeable progress at the ICC, as the term has been set in advance at two-thirds of the sentence, and this is not dependent on the legislation of the country concerned. Such prior stipulations can increase transparency and predictability.

A few of the premises that occupy a central role in the internationally recognized norms for the execution of sentences cannot be recognized in the international system for the execution of sentences. Serving one's sentence as close as possible to one's home environment, for

instance, is not an underlying motive in this system. The combination of a lack of commitment to make arrangements in the system for sentence execution and a limited willingness of states means that only a small number of states is involved. The choices available for the place where a sentence will be executed are therefore necessarily limited. Individual circumstances are not or are only briefly considered when a state is appointed, so that the country in which a convicted person ends up is almost the result of pure arbitrariness. The person concerned is treated here as an object instead of as a subject. There is no judicial explanation of the goals for the execution of sentences, or any criteria at all. The execution of sentences is treated in a pragmatic way. A hyper-individual decision forms the basis, which means that the proceedings relating to the execution of the sentence are not at all transparent or rational. For these reasons it is hard to consider this kind of international transfer of convicted persons as a coherent and credible system or to refer to 'international justice'. There is little certainty for the person concerned and there is no policy (Henham, 2003).

However, alternatives are conceivable. As an example, the courts could consider only concluding agreements with countries in which the detention conditions, based on the regulations in that country and according to evaluation reports (for instance of the CPT), are optimal, in order to create equality between different convicted persons. The study by Vermeulen et al. (2011), the high-level results of which have been reproduced in the annex, may be instrumental from this perspective. The courts could also think of a system in which differences in detention conditions are allowed, but in which these different types of conditions are allocated, based on fixed criteria, to different categories of prisoner. Therefore people who are punished for a long time could be given better facilities in the detention regime than those who are punished for a short time. The courts could also, by analogy with the interstate transfer of prisoners, decide that the sentence should be served in the home country (unless this is not desirable) as a standard mechanism, or could consider the place of residence of the closest relatives as the decisive element. This also has the advantage that the sentence can be executed close to the victims. Moreover, the transfer of cases to national jurisdictions is considered as time goes on, so the

question arises of why the execution of sentences in the conflict region cannot be considered as time goes on. For now, however, there is no 'policy', only a list of possibilities.

As we have seen, it is clear that there are some malfunctions of this system. No specific rights were provided which combat the aggravating consequences of imprisonment in a decentralized system (Mulgrew, 2009). There is barely room for the opinions of the convicted persons. Nevertheless, it would be better, considering the deficiencies of the system, not just to put this to one side. This would eventually not have to be a problem for the international transfer of convicted persons, if the right to be heard is actually used to discover the preferences of the convicted person or if it was explicitly made possible to ask for a transfer for justifiable reasons. The main thing is that the sentence is served. Giving space to the individual in the international transfer of a convicted person does not constrain the enforcement of the sentence in any way, and thus does not endanger the legal order.



## V. GENERAL CONCLUSION

The history of vertical proceedings shows that the execution of sentences at the international courts and tribunals has followed a troubled path. The execution of sentences was not initially part of this international system. The death sentence was still applied, and imprisonment took place in the relevant states themselves. It was not until the 1990s, as the *ad hoc* tribunals were created, that the execution of sentences was also considered to be a task for the international tribunals. Starting from the idea that the activities of the international courts and tribunals are supported by the entire international community, the execution of sentences was also incorporated into this system. Even though states were not obliged to do anything (a commitment to execute sentences is voluntary), it is clear that the courts aspired to make different states carry the costs of executing sentences. Moreover, it is clear, especially in the regulations of the ICC, that the idea was to spread the costs as equally as possible. Consequently, it appears that there was also a system logic in place here, in which the prisons appear as nothing more than a part of a larger international whole. The vertical function of the international transfer of convicted persons is therefore based instead on administrative motives: finding a compromise between countries and developing an acceptable distribution.

In vertical proceedings, the role of the convict is intrinsically limited, even though there is a certain flexibility and sense of compromise. The basic principle in vertical proceedings, in any case, is not that the sentence is best served in the home country of the person concerned. In fact, there is no basic principle about 'where' sentence execution happens best. It all comes down to executing the sentence in one of the countries that are connected to the system for executing sentences. States are not obliged to accept convicted persons; even after an agreement is concluded with the court or the tribunal, the country chooses entirely freely whether or not to accept a (certain) convicted person. The framework in which the vertical proceedings operate is thus a very pragmatic framework (countries have to declare their willingness, and 'where' someone ends up is a secondary consideration). Moreover, it is a system logic (prisons as part of a larger whole), which is still characterized by a broad margin of discretion regarding the



states concerned. Also the court itself enjoys considerable discretion in the appointment of a state to execute the sentence. A few factors should be considered, according to the relevant stipulations that apply to the courts and tribunals, but in what way they have to be considered in the decision has not been stipulated. In these vertical proceedings, the individual is always subsidiary to the system. Consequently, the individual again does not play the main role, but at most a supporting role – although again this depends on the way in which the right to be heard is utilized.

Finally, the proceedings for the international transfer of convicted persons are evaluated in the light of the attitude towards the convicted person. The question here is the determination, by means of conducting an assessment, of the extent to which the international transfer of a convicted person is in that person's interests.

In vertical proceedings the interests of the convict in the area of reintegration is far from the primary purpose. It is hard to make the reintegration of the offender the paramount objective with regard to the execution of the sentence. Indirectly, this kind of international transfer of convicted persons is influenced by reintegration, because of the sentence execution norms that declare these instruments to be applicable, but in the retributive context in which tribunals and courts, after all, evolve, reintegration is only obliquely aimed at or striven for. This becomes clear when the proceedings are compared with the most important substantial criteria from the reintegration perspective. Of the different elements underpinning reintegration, few are seen in the mechanisms for the execution of sentences of the international courts: the vertical instruments do not reflect actual policy, but rather mere pragmatism, so no specific attention is paid to the willingness to change. The bonds of the convicted person with a certain society do play some role in the indication of the state to which the prisoner will be sent, especially at the ICTY, but the proximity of the family for potential visits is considered rather than real bonds with a society itself. The potential need for help and assistance is almost never present in the considerations.

As furthering the interests of the convicted person is also not the aim of the vertical proceedings, a better framework can be found in the

human rights and sentence execution norms. Vertical proceedings are definitely characterized by their inherent striving for fairness vis-à-vis the convicted person and by their attempts to avoid damaging his interests. The interests of the convicted person are definitely not harmed by the material detention conditions, as great efforts are made to make sure that there are no material problems and, in order to do this, inspections are also organized. Nevertheless, there are certain problems of 'fairness' in some respects. One of the main problems is typical of the system that is chosen, because the convicts are spread over the different countries that have indicated their willingness to execute sentences, and it concerns the requirement for equality. Differences are remedied as much as possible, *inter alia* by supervising the conditional release of prisoners, but inherent differences always remain. The most important problem, nevertheless, is the fact that these inequalities have not until now been based on anything and they could thus be considered as arbitrary. The system of the international courts for the execution of sentences still operates in a pragmatic framework in which no paramount objective is provided for the execution of sentences.

Nevertheless, alternatives are conceivable. For example, the courts could consider only concluding agreements with countries in which the detention conditions, based on the legislation in those countries and according to evaluation reports (for instance of the CPT), are optimal for creating equality between different convicts. The courts could also think of a system in which differences in detention conditions are allowed, but in which these different conditions are assigned, based on fixed criteria, to different categories of prisoners. Therefore people who are punished for a long time could be granted better facilities under the detention regime than people who are punished for a short time. The courts could also treat detention in the home country (unless this is not desirable) as the standard mechanism, by analogy with the interstate transfer of prisoners, or apply the place of residence of the closest relatives as the decisive criterion. The vertical system obviously needs a regulating or at least an explicit normative framework with regard to the execution of sentences, based on autonomous criteria such as reintegration and rehabilitation.

In addition, and notwithstanding the fact that, legally speaking, only compliance with universal minimum standards (such as the Universal Declaration) is required in the practice of sentence execution at the level of international tribunals and courts, the question arises of whether practice should not evolve towards reflecting the obligatory compliance of EU member states with additional (sometimes broader, more precise and higher) binding and non-binding Council of Europe and EU standards. This would be reflected in the policies of the tribunals and courts (especially the ICC) relating to the conclusion of sentence execution agreements with states, as well as in the actual case-based decisions in which particular sentence execution states are chosen.

When it comes to the conclusion of sentence execution agreements, a bilateral EU-ICC agreement on the execution of sentences should be seriously considered. Given that currently the laws and practices of the states that have entered into agreements in this area with the ICC sometimes differ widely when it comes to issues relating to the execution of sentences, it would clearly be beneficial to have a single or agreed (approximated) position for the EU member states in this respect. The study by Vermeulen et al. (2011) may bring indispensable knowledge to the ICC-EU negotiation table in this respect (see the annex). Also, an EU-wide commitment to accept requests from the ICC for the execution of sentences would constitute an important contribution to international justice, and one that is likely to make the reintegration and rehabilitation of offenders (a greater) part of it.

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## ANNEX: INTERNATIONAL & EUROPEAN DETENTION-RELATED STANDARDS

The below analysis provides details on the relevant international legal framework as regards material detention conditions and the execution of custodial sentences.

First, information is given on the United Nations (UN) Conventions (and [optional] Protocols), the Council of Europe (CoE) Conventions (and [optional] Protocols), the relevant European Court of Human Rights (ECtHR) jurisprudence, and the Framework Decisions and Conventions of the European Union. Given that people convicted by international tribunals and courts have almost always been adult males, specific standards relating to juveniles and women have been left out, although they were included in the original analysis (Vermeulen et al., 2011). Based partly on this analysis, the national legal framework questionnaire was drafted.

The instruments and documents listed are preceded by the abbreviation (**bold**) that is used in the overview of standards under B.I.

### A. Index of legal instruments and documents

#### 1. *Legally binding international instruments and documents*

##### a. United Nations (UN)

- **CERD** Convention on the Elimination of all Forms of Racial Discrimination (entered into force January 4, 1969)
- **ICCPR** International Covenant on Civil and Political Rights (entered into force March 23, 1976)
- **ICESCR** International Covenant on Economic, Social and Cultural Rights (entered into force January 3, 1976)
- **OPCAT** Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force June 22, 2006)

- **UNCAT** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force June 26, 1987)
  
  - b. Council of Europe (CoE)
    - **ECHR** Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (Rome, 4.XI.1950)
  
    - **ECHR<sup>1</sup>** Additional Protocol No. 1 (Right to Protection of Property and Education) to the ECHR, as amended by Protocol No. 11 (Paris, 20.III.1952)
  
    - **ECHR<sup>12</sup>** Additional Protocol No. 12 (General Prohibition on Discrimination) to the ECHR, as amended by Protocol No. 11 (Strasbourg, 4.X.2000)
  
    - **CPT** European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as amended by Protocol No. 1 (Strasbourg, 26. XI. 1987)
  
  - c. European Union (EU)
    - **CFREU** Charter of Fundamental Rights of the European Union (2007, entered into force 2009)
2. *Non-binding international instruments and documents*
- a. United Nations (UN)
    - **BOP** Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (1988)
  
    - **BPTP** Basic Principles for the Treatment of Prisoners (1990)
  
    - **PME** Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982)

- **PPPMI** Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)
- **RTFP** Recommendation on the Treatment of Foreign Prisoners (1980)
- **SMR** Standard Minimum Rules for the Treatment of Prisoners (1957), amended (1977)
- b. Council of Europe (CoE)
  - **EPR** Recommendation No. R(2006)2 on the European Prison Rules
  - **R(82)16** on Prison Leave
  - **R(82)17** concerning Custody and Treatment of Dangerous Prisoners
  - **R(84)12** concerning Foreign Prisoners
  - **R(89)12** on Education in Prison
  - **R(93)6** concerning Prison and Criminological Aspects of the Control of Transmissible Diseases including Aids and related Health Problems in Prison
  - **R(98)7** concerning the Ethical and Organisational Aspects of Health Care in Prison
  - **R(99)22** concerning Prison Overcrowding and Prison Population Inflation
  - **R(2003)23** on the Management by Prison Administrators of Life Sentence and other Long-term Prisoners
  - **R(2004)10** concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorders
  - **R(2003)22** concerning Conditional Release

- **Resolution (70)1** on the Practical Organisation of Measures for the Supervision and After-care of Conditionally Sentenced or Conditionally Released Offenders
- **Resolution (62)2** on Electoral, Civil and Social Rights of Prisoners

## B. EU & EU member state compliance overview

### 1. *Thematic overview of detention-related standards*<sup>114</sup>

Questions highlighted in light grey relate to commitments arising from binding legal instruments and documents and/or jurisprudence emanating from the European Court of Human Rights.

Overarching principles	
2.1.1	Has your country adopted laws or policies specifically requiring that prisoners must be treated with respect for their human rights? ICCPR 10(1), UDHR 1, BOP 1, BPTP 1, EPR 1 & 72.1
2.1.2	Has your country adopted laws or policies obliging prison management to ensure, as far as is practicable, that the prison is operated having regard to international, regional and domestic human rights standards? EPR 72.1
2.1.3	Has your country adopted laws or policies explicitly prohibiting practices that could constitute torture, inhuman or degrading treatment or punishment of prisoners? ICCPR 7, BOP 6, ECHR 3, <i>Kalashnikov v Russia</i> (ECtHR 2003)
2.1.4	Has your country adopted laws or policies to ensure that prisoners have access to a wide range of constructive activities, including, inter alia, educational, recreational, work/training and welfare programmes? SMR 77 & 78, BOP 28, BPTP 6 & 8, EPR 25

### Conditions of imprisonment

3.1.1	Has your country adopted laws or policies requiring prison
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<sup>114</sup> The numbering of the standards from the original analysis is maintained.

Conditions of imprisonment	
	management and staff to be aware of the special difficulties experienced by prisoners in their first days in custody and the need to respond as appropriate? SMR 7(1), EPR 15.1, 31.1, 31.2 & 31.3
3.1.2	Has your country adopted laws or policies requiring that upon admission, each prisoner is given a booklet outlining his/her rights, duties, obligations and privileges and the rules and regulations governing the prison which apply to the individual prisoner? The booklet shall be written in a language that the prisoner understands. CERD 7, SMR 35, BOP 13, EPR 30
3.1.3	Has your country adopted laws or policies requiring that all prisoner details are recorded at the time of committal including, inter alia, details of any visible injuries, scars, tattoos or distinctive marks on the prisoner and their personal belongings? SMR 24, BOP 24, R(98)7: 1, EPR 42.1
3.1.4	Has your country adopted laws or policies requiring that upon admission, every prisoner shall undergo a medical examination either by a nurse reporting to a doctor or by a doctor? SMR 24, R(98)7: 1, EPR 42.3
3.1.5	Has your country adopted laws or policies requiring the doctor/nurse to pay particular attention to the detection of injuries, mental illnesses, of withdrawal symptoms resulting from the use of drugs, medication or alcohol, of contagious and chronic conditions, and to assess the prisoner's suicide/self-harm risk? EPR 15.1.e & 42.3.c
3.1.6	Has your country adopted laws or policies requiring upon admission that each prisoner be assessed to determine whether he/she poses a safety risk to other prisoners or staff, or whether they pose a threat to themselves? ICCPR 6, UDHR 3, ECHR 2, R(2003)23: 12, EPR 52.1, <i>Keenan v UK</i> (ECtHR 2001)
3.1.7	Has your country adopted laws or policies requiring that

Conditions of imprisonment	
	such risks be managed for the duration of the prisoner's sentence? ICCPR 6, UDHR 3, ECHR 2, EPR 52.2, <i>Osman v UK</i> (ECtHR 2000)
3.2.1	Has your country adopted laws or policies requiring prisoners to be assigned to a prison as near to their home area as possible in order to maintain relationships with families and friends, subject to the maintenance of good order and security? BOP 20, EPR 17.1
3.3.1	Has your country adopted laws or policies requiring that where possible prisoners should have individual cells to sleep in? SMR 9(1), EPR 18.5
3.3.2	Has your country adopted laws or policies stipulating that prisoners who are required to share cells be carefully selected and assessed as suitable for sharing accommodation? ICCPR 6(1), UDHR 3, SMR 9(2), ECHR 2, EPR 18.6 & 18.7, <i>Edwards v The United Kingdom</i> (ECtHR 2002)
3.3.3	Has your country adopted laws or policies requiring that the size of a cell must be suitable for its purpose? The suitability of the cell size should be dependent on the number of hours spent in the cell, the number of prisoners accommodated in the cell and the availability of in-cell sanitation facilities that ensure privacy. SMR 9, 10, 11 & 12, EPR 18 & 19.3
3.3.4	Has your country adopted laws or policies requiring that cells should not be used to accommodate more prisoners than the intended design capacity, unless justified in exceptional circumstances? SMR 9(1) & 10, EPR 18.1, 18.3, 18.4 & 18.6
3.3.5	Has your country adopted laws or policies requiring that cells be suitable for accommodating prisoners in respect of size, lighting, heating, ventilation and fittings? SMR 9, 10, 11, 12 & 13, EPR 18
3.3.6	Has your country adopted laws or policies requiring that all

Conditions of imprisonment	
	<p>prisoners have in-cell access to a working alarm bell that attracts the attention of staff at all times?</p> <p>ICCPR 6(1), UDHR 3, ECHR 2, EPR 18.2.c &amp; 52.4, IPR 18(4), <i>Edwards v The United Kingdom</i> (ECtHR 2002)</p>
3.4.1	<p>Has your country adopted laws or policies to ensure that all prisoners have access to adequate and appropriate sanitary and washing facilities that respect their privacy?</p> <p>SMR 12 &amp; 13, EPR 19.3, 19.4 &amp; 19.7</p>
3.4.2	<p>Has your country adopted laws or policies requiring that all in-cell sanitation facilities must be adequately screened?</p> <p>ICCPR 10(1), SMR 12, BOP 1, BPTP 1, ECHR 3, EPR 19.3, <i>Peers v Greece</i> (ECtHR 2001)</p>
3.5.1	<p>Has your country adopted laws or policies to ensure that prisoners are provided with clothing that is suitable for the climate, is not degrading or humiliating and is age appropriate?</p> <p>SMR 17(1), EPR 20.1 &amp; 20.2</p>
3.5.2	<p>Has your country adopted laws or policies requiring each prisoner to be provided with a bed and appropriate bedding and to ensure that all bedding is in good condition, is changed regularly and laundered?</p> <p>SMR 19, EPR 21</p>
3.6.1	<p>Has your country adopted laws or policies to ensure that prisoners are provided with a sufficient quantity of nutritious food taking into account their health, physical condition, special dietary requirements, religion and culture?</p> <p>SMR 20(1), EPR 22.1 &amp; 22.6</p>
3.6.2	<p>Has your country adopted laws or policies to ensure that prisoners have access to clean drinking water?</p> <p>SMR 20(2), EPR 22.5</p>
3.7.1	<p>Has your country adopted laws or policies requiring that adequate time and facilities be provided to prisoners to receive professional visits from their legal advisers?</p> <p>BOP 18(2), EPR 23.1</p>
3.7.2	<p>Has your country adopted laws or policies establishing the right of prisoners to communicate with their legal advisers</p>



Conditions of imprisonment	
	by telephone and by letter? BOP 18(1), EPR 23.1
3.7.3	Has your country adopted laws or policies requiring that communications between a prisoner and his/her legal adviser remain confidential and can only be restricted by law or a judicial authority? ICCPR 17, BOP 18(3) & (4), ECHR 8, EPR 23.4 & 23.5, <i>Campbell v The United Kingdom</i> (ECtHR 1992)
3.8.1.1	Has your country adopted laws or policies establishing the right of prisoners to communicate with their family and friends by correspondence and by receiving visits, subject to reasonable conditions/restrictions imposed by law or another authority? ICCPR 23(1), UDHR 16(3), SMR 37, BOP 15 & 19, EPR 24.1 & 24.2
3.8.1.2	Has your country adopted laws or policies requiring that visits take place in an environment that enables prisoners to maintain and develop family and other relationships in as normal a manner as is possible subject to the maintenance of good order and security in the prison? SMR 79, EPR 24.4
3.8.2.	Has your country adopted laws or policies requiring that searching procedures for visitors be undertaken in a manner that respects a person's dignity? SMR 27, BOP 19, EPR 54.1.C, 54.3, 54.4 & 54.9
3.8.2.2	Has your country adopted laws or policies requiring that prison officers only be permitted to search visitors of the same gender? EPR 54.5
3.8.3.1	Has your country adopted laws or policies requiring the authorities to explain the circumstances leading to the imposition of closed visits to the appropriate party(ies) and to review these circumstances on a regular basis? SMR 27, 79 & 80, EPR 60.4
3.8.4.1	Has your country adopted laws or policies requiring that prisoners be informed of the death/serious illness of a close

Conditions of imprisonment	
	relative/ friend without delay? SMR 44(2), EPR 24.6
3.8.4.2	Has your country adopted laws or policies allowing a prisoner to leave the prison to visit a sick relative/friend, attend a funeral or for other humanitarian reasons, either under escort or alone where practicable and consistent with the promotion of safe and secure custody? SMR 44(2), EPR 24.7
3.8.4.3	Has your country adopted laws or policies ensuring that prisoners are allowed to inform their families or other nominated persons without delay of their imprisonment, transfer to another institution or of any serious illness that they may suffer from? SMR 44(1) & (3), BOP 16(1), EPR 24.8
3.8.4.4	Has your country adopted laws or policies requiring the prison authorities to immediately inform the spouse or the nearest relative to the prisoner (or any other person previously nominated), if the prisoner dies in custody, is removed to a hospital or suffers a serious injury/illness? SMR 44(1), EPR 24.9
3.8.5.1	Has your country adopted laws or policies preventing the monitoring or censoring of telephone calls unless the prisoner or the recipient of the call is informed of the possibility of such monitoring or such monitoring has been agreed by any lawful authority? ICCPR 17, UDHR 12, SMR 37, BOP 19, ECHR 8, EPR 24.2
3.8.5.2	Has your country adopted laws or policies permitting prisoners to send a minimum of 7 letters a week free of charge and more if he/she can afford it, and to receive as many letters as are sent to him/her? SMR 37, BOP 19, EPR 24.1
3.8.5.3	Has your country adopted laws or policies preventing the prison authorities from opening prisoners' private correspondence subject to the maintenance of good order and safe and secure custody in the prison? ICCPR 17, UDHR 12, ECHR 8, EPR 24.2

Conditions of imprisonment	
3.8.6.1	Has your country adopted laws or policies entitling prisoners to be kept informed of current affairs and other developments outside the prison by reading newspapers and periodicals and by listening to radio or television broadcasts (subject to the maintenance of good order and safe and secure custody)? SMR 39, BOP 28, EPR 24.10
3.9.1	Has your country adopted laws or policies requiring work to be incorporated as a positive aspect of prison regimes and prohibiting its use as a form of punishment? SMR 71(1), EPR 26.1
3.9.2	Has your country adopted laws or policies requiring the work provided to, insofar as is possible, prepare prisoners for worthwhile work on their release and facilitate their reintegration into the workforce? SMR 71(3) & (4), BPTP 8, EPR 26.3 & 26.7
3.9.3	Has your country adopted laws or policies entitling prisoners to be remunerated in respect of prison work carried out? ICESCR 7(a), UDHR 23, SMR 76(1), BPTP 8, EPR 26.1
3.10.1	Has your country adopted laws or policies ensuring that, subject to the constraints of the particular prison and the maintenance of good order and security, prisoners shall be entitled to spend as much time out of their cells as is possible? EPR 25(2)
3.10.2	Has your country adopted laws or policies ensuring that prisoners receive at least one hour's exercise each day in the open air, weather permitting? SMR 21, EPR 27.1
3.10.3	Has your country adopted laws or policies ensuring that prisoners shall have access to a well-stocked library at least once a week (subject to the maintenance of good order and safe and secure custody)? R(89)12: 10, EPR 28.5
3.11.1	Has your country adopted laws or policies requiring, as far

Conditions of imprisonment	
	as practicable, that prisoners have access to educational programmes that can meet their individual needs? ICESCR 13, UDHR 26, SMR 77(1), BPTP 6, R(89)12: 1, EPR 28.1
3.II.2	Has your country adopted laws or policies requiring that education provided in prisons shall be integrated, insofar as is practicable, with national educational systems/programmes enabling prisoners to continue their education following their release? SMR 77(2), R(89)12: 16, EPR 28.7.a
3.II.3	Has your country adopted laws or policies requiring that vocational training be available for those prisoners who are able to benefit from it, particularly young prisoners? SMR 71(5), BPTP 8, R(89)12: 9, EPR 26.5
3.I2.1	Has your country adopted laws or policies ensuring that prisoners have the opportunity to practise their religion and to follow their beliefs whilst in custody? ICCPR 18(1), CERD 5 (d) (vii), UDHR 18, SMR 42, BPTP 3, EPR 29.1 & 29.2

Health	
4.I.1	Has your country adopted laws or policies requiring that primary healthcare services to meet the needs of all prisoners be provided in each prison to a standard equivalent to that available to the community in general? ICESCR 12(1), SMR 22(1), PME 1, R(98)7: 10, 11, 12 & 19, EPR 40
4.I.2	Has your country adopted laws or policies to ensure that where a sick prisoner requires treatment that cannot be provided by the medical staff in the prison he/she shall be transferred to an appropriate hospital without undue delay? SMR 22(2), BPTP 9, R(98)7:3, EPR 46.1
4.I.3	Has your country adopted laws or policies requiring that medical records be created and accurately maintained on all prisoners and that such records are treated as confidential? BOP 26, R(98)7: 13, EPR 42.3.a

Health	
4.3.1	<p>Has your country adopted laws or policies requiring that prisoners with mental health difficulties be entitled to care appropriate to their circumstances, commensurate to the type of care available for people with similar mental health difficulties in the community?</p> <p>SMR 22(1), PPPMI 1 &amp; 20, R(98)7: 10, 11 &amp; 52, R(2004)10: 35(1) &amp; (2), EPR 40</p>
4.3.2	<p>Has your country adopted laws or policies to ensure that prisoners who require psychiatric in-patient care are transferred to a suitable hospital facility of an appropriate security level without undue delay?</p> <p>SMR 22(2), PPPMI 9(1) &amp; 20, R(98)7: 3 &amp; 55, R(2004)10:8, 9(1) &amp; 35(1), EPR 12(1) &amp; 46(1)</p>
4.4.1	<p>Has your country adopted laws or policies requiring that prisoners assessed as vulnerable be accommodated in such area(s) of the prison as is most convenient and appropriate for the monitoring and treatment of such prisoners by the medical personnel and other relevant agencies?</p> <p>SMR 22(2) &amp; 62, EPR 12.2, 39, 43.1, 46.2, 47.1 &amp; 47.2</p>
4.4.2	<p>Has your country adopted laws or policies requiring that prisoners assessed as being at risk of suicide/self-harm be continuously monitored by both medical and prison staff throughout the prisoner's time in custody and that records are kept of such monitoring?</p> <p>R(98)7: 58, EPR 47(2)</p>
4.4.3	<p>Has your country adopted laws or policies requiring that prisoners detained in a special cell be visited daily and as frequently as is necessary by a doctor who shall, inter alia, monitor his/ her physical and mental health?</p> <p>SMR 25(1) &amp; 32(3), R(98)7: 66, EPR 43.2</p>
4.5.1	<p>Has your country adopted laws or policies to ensure that every prisoner has access to appropriately qualified medical personnel in the prison at all times?</p> <p>SMR 24, BOP 24, R(98)7:1, 2 &amp; 4, EPR 41.2 &amp; 41.4</p>
4.6.1	<p>Has your country adopted laws or policies to ensure that prisoners with addiction problems have access to appropriate</p>

Health	
	treatment and support services, including those from external agencies, subject to the maintenance of good order and safe and secure custody? SMR 62, R(98)7: 7, 43, 44, 45, 46 & 47, EPR 42.3.d
4.7.1	Has your country adopted laws or policies forbidding the practice of forced feeding of hunger strikers? DOMHS, R(98)7

Good Order	
5.1.1	Has your country adopted laws or policies requiring that regular reviews be undertaken by prison management regarding the level of security required for each prisoner throughout that prisoner's time in custody? R(82)17: 8, EPR 51.5
5.2.1	Has your country adopted laws or policies requiring that regular reviews of the placement of prisoners on protection take place and ensuring that prisoners are only subject to protection status for as long as they pose a threat to another prisoner or whilst their life or safety is under threat? EPR 51.5, 53.1 & 53.2
5.3.1	Has your country adopted laws or policies requiring that searches conducted on prisoners be carried out with due regard to the prisoner's dignity? ICCPR 10(1), BPTP 1, EPR 54.3 & 54.4
5.3.2	Has your country adopted laws or policies stipulating that prisoners may only be searched by a staff member of the same gender? ICCPR 10(1), BPTP 1, EPR 54.5
5.3.3	Has your country adopted laws or policies stipulating that prisoners may only be subjected to a strip search in exceptional circumstances and for good reason, and then only in the presence of two officers in an appropriate place which ensures privacy? ICCPR 10(1), BPTP 1, EPR 54.3, 54.4 & 54.6, <i>Van der Van v The Netherlands</i> (ECtHR 2004)
5.4.1	Has your country adopted laws or policies stipulating that all

Good Order	
	<p>inquiries into breach of prison discipline or rules shall be conducted in an independent and impartial manner?            ICCPR 14(1), UDHR 10, ECHR 6(1), <i>Ezeh &amp; Connors v. UK</i> (ECtHR 2004)</p>
5.4.2	<p>Has your country adopted laws or policies requiring that all incidents of bullying/violence/threatening behaviour between prisoners and any breach of discipline be reported to an officer of a higher rank, duly recorded and properly investigated?            EPR 52.2 &amp; 58</p>
5.4.3	<p>Has your country adopted laws or policies stipulating that when a prisoner has been charged with a disciplinary offence he/she shall be promptly informed of the allegation made against him/her in a language that he/she understands?            ICCPR 14(3)(a), CERD 5(a), SMR 30(2), ECHR 6(3)(a), EPR 59.a</p>
5.4.4	<p>Has your country adopted laws or policies stipulating that if an inquiry is being conducted into a breach of prison discipline or rules the prisoner shall have adequate time to prepare his/her defence and/or to receive legal assistance?            ICCPR 14(3)(b) &amp; (d), SMR 30(2), ECHR 6(3)(b) &amp; (c), EPR 59.b &amp; 59.c, <i>Ezeh &amp; Connors v. UK</i> (ECtHR 2004)</p>
5.4.5	<p>Has your country adopted laws or policies stipulating that in any disciplinary proceedings prisoners must understand the proceedings and, if necessary, appropriate interpretation facilities must be provided?            ICCPR 14(3)(f), SMR 30(3), ECHR 6(3)(e), EPR 59.e</p>
5.4.6	<p>Has your country adopted laws or policies stipulating that no prison officer shall impose a punishment/penalty/deprivation on a prisoner without due process and in accordance with the law and/or relevant rules or instruments?            EPR 57.2.d</p>
5.4.7	<p>Has your country adopted laws or policies stipulating that if a prisoner is found guilty of a disciplinary offence, he/she shall be entitled to exercise his/her right of appeal to an independ-</p>

Good Order	
	ent and impartial tribunal established by law? ICCPR 14(5), BOP 30(2), EPR 61
5.4.8	Has your country adopted laws or policies requiring that when a prisoner is detained in any type of special cell (special observation/cladded/strip) he/she shall be regularly monitored by a prison officer? ICCPR 6(1), ECHR 2
5.4.9	Has your country adopted laws or policies requiring that a detailed record be maintained of, inter alia, the monitoring of such prisoners, their expressed requirements, actions taken in response to such requests and details of visits by officers or others to such prisoners? ICCPR 6(1), ECHR 2
5.4.10	Has your country adopted laws or policies to ensure that prisoners in a special cell are able to contact a member of staff at all times, including during the night, and that a staff member shall respond without delay? ICCPR 6(1), EPR 18.2.c & 52.4, <i>Edwards v The United Kingdom</i> (ECtHR 2002)
5.5.1	Has your country adopted laws or policies stipulating that members of staff will use force only when absolutely necessary and that any force used shall be proportionate to the situation? SMR 54(1), CCLEO 3, BPUF 4, EPR 64 & 65
5.6.1	Has your country adopted laws or policies to ensure that prisoners have sufficient opportunity to make requests or complaints to the Governor of the prison or to any other competent authority? SMR 36(1) & (3), BOP 33(1), EPR 70.1
5.6.2	Has your country adopted laws or policies establishing the right of a prisoner's legal adviser or to make a request or a complaint regarding that prisoner's treatment to the prison authorities, or other relevant authorities? BOP 33 (1) & (2), EPR 70.5
5.6.3	Has your country adopted laws or policies requiring that all complaints be promptly investigated in accordance with the



Good Order	
	law? SMR 36(4), BOP 33(4)
5.6.4	Has your country adopted laws or policies to ensure that where a request is denied or a complaint is rejected, the prisoner is informed promptly as to the reason(s) for such denial or rejection? SMR 36(4), BOP 33(4), EPR 70.3
5.6.5	Has your country adopted laws or policies to ensure that prisoners are not disadvantaged for exercising their rights to make requests or complaints? BOP 33(4), EPR 70.4
5.6.6	Has your country adopted laws or policies requiring that complaints made by members of staff against other members of staff be properly recorded and investigated in accordance with the law? EPR 88 & 87.1

Management & Staff	
6.1.1	Has your country adopted laws or policies to ensure that all prison staff receive appropriate training at regular intervals throughout their career? SMR 47(3), EPR 8, 76 & 81.2
6.1.2	Has your country adopted laws or policies to ensure that members of staff who work with particular groups of prisoners, such as foreign nationals, women, juveniles or mentally ill prisoners, receive training particular to their individual work? R(82)17:10, R(2004)10: 12(1), EPR 81.3, ERJO 129

Inspection and monitoring	
7.1.1	Has your country adopted laws or policies requiring that prisons be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law? SMR 55, EPR 92, R(2004)10 36.1, ERJO 125, PPPMI 22
7.2.1	Has your country adopted laws or policies requiring that the

Inspection and monitoring	
	<p>conditions of detention and the treatment of prisoners shall be also monitored by an independent body or bodies, comprised of qualified experienced personnel, and whose findings shall be made public?</p> <p>OPCAT 3, 17, 18, 19, BOP 29.1, EPR 93.1, R(2004)10:36.2, ERJO 126.1</p>
7.2.2	<p>Has your country adopted laws or policies granting such an independent body open access to places of detention, to prisoners and others whom it wishes to interview?</p> <p>OPCAT 19, 20, CPT 8,9 BOP 29.2, ERJO 126.1</p>
7.2.3	<p>Has your country adopted laws or policies encouraging such independent bodies to co-operate with those international agencies that are legally entitled to visit prisons?</p> <p>CPT 2,7 EPR 93.2, ERJO 126.2</p>

Sentenced prisoners	
8.1.1	<p>Has your country adopted laws or policies requiring that a prisoner's release and re-integration back into society should constitute a central part of the sentence management plan?</p> <p>ICCPR 10(3), SMR 80, EPR 6, 103.2 &amp; 103.4</p>
8.1.2	<p>Has your country adopted laws or policies requiring that a sentence management plan be prepared for each prisoner serving a sentence of 12 months or over as soon as practicable after their admission? It should provide for, inter alia, the welfare and health needs of the prisoner, training, employment or education needs he/she may have, and include a release plan for the prisoner. This plan shall be reviewed at regular intervals to take into account the changing circumstances of the prisoner.</p> <p>SMR 65, 66 &amp; 69, R(2003)23:3 &amp; 9, EPR 6, 103 &amp; 104</p>

## 2. EU level – compliance overview table (adoption rate)

		YES							NO		
		Yes	%	Yes - in law	%	Yes - in policy	%	Yes - in jurisprudence	%	No	%
<b>Overarching principles</b>											
2.1.1	Respect for prisoners' human rights	22	92	19	79	7	29	1	4	2	8
2.1.2	Human rights standards and prison management	21	88	18	75	4	16	3	13	3	12
2.1.3	Prohibition of torture	22	92	21	88	1	4	3	12	2	8
2.1.4	Wide range of activities	24	100	23	96	7	29	0	0	0	0
<b>Conditions of imprisonment</b>											
3.1.1	Vulnerability and first days in custody	17	71	15	63	7	29	1	4	7	29
3.1.2	Admission booklet	15	63	13	54	6	25	1	4	6	25
3.1.3	Prisoner records (upon arrival)	23	96	20	83	6	25	1	4	1	4
3.1.4	Medical examination (upon arrival)	15	62	10	42	8	33	1	4	9	38
3.1.5	Injury detection	7	29	5	21	4	17	1	4	17	71
3.1.6	Risk assessment	11	46	10	42	5	21	1	4	13	54
3.1.7	Risk management - ongoing	12	50	12	50	3	13	1	4	12	50
3.2.1	Prisoner allocation	19	79	15	63	6	25	1	4	5	21
3.3.1	Individual cells	14	58	13	54	3	13	0	0	10	42
3.3.2	Cell share assessment	10	42	7	29	4	17	0	0	14	58
3.3.3	Cell size	9	37	8	33	2	8	1	4	15	63
3.3.4	Design capacity and occupancy	13	54	12	50	3	13	0	0	11	46
3.3.5	Lighting - heating - ventilation	18	75	16	67	4	17	0	0	6	25
3.3.6	Cell alarm	20	83	13	54	2	8	0	0	4	17
3.4.1	Sanitation and privacy	14	58	14	58	2	8	0	0	10	42
3.4.2	Screened sanitation	15	62	13	54	4	17	1	4	9	38
3.5.1	Appropriate clothing	17	71	17	71	10	42	0	0	7	29
3.5.2	Access to bedding	18	75	17	71	2	8	0	0	6	25
3.6.1	Adequate nutrition	20	83	20	83	5	21	1	4	4	17
3.6.2	Clean drinking water	19	79	16	67	5	21	1	4	5	21
3.7.1	Visits from legal advisers	22	92	22	92	4	17	1	4	2	8

ANNEX: INTERNATIONAL & EUROPEAN DETENTION-RELATED STANDARDS

		YES							NO		
		Yes	%	Yes - in law	%	Yes - in policy	%	Yes - in jurisprudence	%	No	%
3.7.2	Communication with legal advisers	21	87	20	83	3	13	3	13	3	13
3.7.3	Restrictions on legal communication	22	92	22	92	3	13	1	4	2	8
3.8.1.1	Contact family/friends	24	100	23	96	7	29	2	8		0
3.8.1.2	Visiting environment	22	92	21	88	6	25	0	0	2	8
3.8.2.1	Searching of visitors	17	71	15	63	4	17	0	0	7	29
3.8.2.2	Same gender searching	12	50	9	38	1	4	0	0	12	50
3.8.3.1	Restrictions on visits	9	37	9	37	1	0	0	0	15	63
3.8.4.1	Information on death/illness of relatives	11	46	10	42	2	8	0	0	13	54
3.8.4.2	Humanitarian leave	21	87	21	87	3	13	0	0	3	13
3.8.4.3	Communication with outside world	14	58	14	58	1	4	0	0	10	42
3.8.4.4	Information on death/illness of prisoner	18	75	18	75	3	13	0	0	6	25
3.8.5.1	Telephone censoring	19	79	19	79	3	13	1	4	5	21
3.8.5.2	Correspondence (minimum)	12	50	11	46	1	4	0	0	12	50
3.8.5.3	Correspondence (privacy)	15	62	15	63	3	13	1	4	9	38
3.8.6.1	Access to media	23	96	22	92	5	21	1	4	1	4
3.9.1	Constructive prison work	16	67	16	67	4	17	0	0	8	33
3.9.2	Work as rehabilitation	20	83	18	75	7	29	0	0	4	17
3.9.3	Prison work (remuneration)	23	96	22	92	3	13	1	4	1	4
3.10.1	Out-of-cell time	16	67	16	67	4	17	0	0	8	33
3.10.2	Exercise	23	96	22	92	5	21	2	8	1	4
3.10.3	Access to library	13	54	13	54	0	0	0	0	11	46
3.11.1	Individually tailored education	23	96	23	96	5	21	1	4	1	4
3.11.2	Integration - prison/community education	21	87	18	75	5	21	0	0	3	13
3.11.3	Vocational training	22	92	20	83	5	21	0	0	2	8
3.12.1	Religion	24	100	23	96	5	21	0	0	0	0
<b>Health</b>											
4.1.1	Healthcare equivalence	23	96	22	92	6	25	0	0	1	4

ANNEX: INTERNATIONAL & EUROPEAN DETENTION-RELATED STANDARDS

		YES								NO	
		Yes	%	Yes - in law	%	Yes - in policy	%	Yes - in jurisprudence	%	No	%
4.1.2	Hospital transfer	22	92	21	88	3	13	1	4	2	8
4.1.3	Medical records	21	87	20	83	5	21	0	0	3	13
4.3.1	Mental health care	21	87	19	79	4	17	0	0	3	13
4.3.2	Transfer to psychiatry	18	75	17	71	3	13	0	0	6	25
4.4.1	Accommodation of vulnerable prisoners	16	67	15	63	3	13	0	0	8	33
4.4.2	Monitoring of prisoners at risk of suicide	10	42	7	29	5	21	0	0	14	58
4.4.3	Medical monitoring of prisoners in special cells	13	54	12	50	3	13	0	0	11	46
4.5.1	Medical personnel	21	87	21	87	3	13	0	0	3	13
4.6.1	Addiction	21	88	19	79	8	33	0	0	3	13
4.7.1	Forced feeding and hunger strikers	9	37	5	21	5	21	0	0	15	63
<b>Good Order</b>											
5.1.1	Security assessment	15	62	15	62	3	13	0	0	9	38
5.2.1	Protection status	15	63	15	63	4	17	0	0	9	37
5.3.1	Searches and dignity	23	96	22	92	3	13	0	0	1	4
5.3.2	Searches and gender	23	96	22	92	1	4	0	0	1	4
5.3.3	Strip searches	15	66	13	54	3	13	1	4	13	54
5.4.1	Discipline investigations	16	67	15	63	2	8	1	4	8	33
5.4.2	Inter prisoner violence	15	62	15	62	4	17	0	0	9	38
5.4.3	Discipline and language	17	71	17	71	3	13	0	0	7	29
5.4.4	Discipline and defence	15	62	14	58	2	8	0	0	9	38
5.4.5	Discipline and interpretation	13	54	12	50	3	13	0	0	11	46
5.4.6	Discipline and due process	20	83	20	83	2	8	0	0	4	17
5.4.7	Discipline and appeal	19	79	19	79	1	4	0	0	5	21
5.4.8	Special cells/monitoring	17	71	16	67	3	13	0	0	7	29
5.4.9	Special cells/recording	8	33	8	33	2	8	0	0	16	67
5.4.10	Special cells/staff contact	9	37	9	37	1	4	0	0	15	63
5.5.1	Proportionate use of force	21	87	21	87	4	17	1	4	3	13
5.6.1	Access to requests and complaints	23	96	23	96	3	13	0	0	1	4

		YES							NO		
		Yes	%	Yes - in law	%	Yes - in policy	%	Yes - in jurisprudence	%	No	%
	procedure										
5.6.2	Legal adviser's right to make a complaint	18	75	18	75	1	4	0	0	6	25
5.6.3	Legal basis for complaints procedure	17	71	16	67	2	8	0	0	7	29
5.6.4	Explanation for denial or rejection of complaint	17	71	15	63	2	8	1	4	7	29
5.6.5	Protection against discrimination	11	46	10	42	3	13	0	0	13	54
5.6.6	Investigation of complaints between staff	13	54	11	46	3	13	0	0	11	46
<b>Management &amp; Staff</b>											
6.1.1	Training of staff	19	79	14	58	7	29	0	0	5	21
6.1.2	Specific training	9	38	5	21	4	17	0	0	15	62
<b>Inspection and monitoring</b>											
7.1.1	Governmental monitoring	20	83	19	79	4	17	0	0	4	17
7.2.1	Independent monitoring	14	58	14	58	1	4	0	0	10	42
7.2.2	Monitoring and access	15	62	14	58	3	13	1	4	9	38
7.2.3	Monitoring and international cooperation	7	29	6	25	1	4	0	0	17	71
<b>Sentenced prisoners</b>											
8.1.1	Reintegration	20	83	20	83	6	25	2	8	4	17
8.1.2	Long-term prisoners	14	58	13	54	5	21	0	0	10	42

### 3. EU level – high-level compliance analysis

#### a. General overview

Nineteen of the commitments set out in the questions have been adopted by 90% or more of the member states sampled.

Twenty-seven of the commitments set out in the questions have been adopted by 75% or more of the member states sampled.

Thirty-five of the commitments set out in the questions have been adopted by 50% or more of the member states sampled.

Fifteen of the commitments set out in the questions have been adopted by 25% or more of the member states sampled.

The average number of member states who had adopted the measures for a particular question was 17 (71%). The same percentage was obtained when investigating legally binding as well as non-binding standards, which appears to indicate that the legal status of a commitment makes little difference as to whether or not a member state will adopt it.

The highest degree of member state compliance was shown in the section of the questionnaire relating to the ‘Overarching Principles’, where on average 23 member states had adopted measures to comply with the provisions of international legal instruments/documents and/or ECtHR’s jurisprudence. In the sections relating to ‘Conditions of Imprisonment’, ‘Health’ and ‘Sentenced Prisoners’ on average 17 of the member states sampled had adopted measures to comply with international legal instruments/documents and/or ECtHR’s jurisprudence. The average compliance for the section concerning ‘Good Order’ was 16 of the 24 member states sampled. Lower compliance averages were seen in the sections relating to ‘Inspection and Monitoring’ (14/24) and ‘Management and Staff’ (13/24).

## b. Overarching Principles

### *General*

Three out of the four commitments set out in the questions have been adopted by 90% or more of the member states sampled: 2.1.1 - Respect for prisoners’ human rights, 2.1.3 - Prohibition of torture and 2.1.4 - Wide range of activities.

One of the four commitments set out in the questions has been adopted by 88% of the member states sampled: 2.1.2 - Human rights standards and prison management.

Member states most commonly adopted these measures in law.

*Legally binding commitments*

Two of the commitments in the ‘Overarching Principles’ section of the questionnaire derive from binding legal instruments/documents and/or ECtHR’s jurisprudence: 2.1.1 - Respect for prisoners’ human rights and 2.1.3 - Prohibition of torture. In both instances, more than 90% of surveyed states have adopted commitments to comply with these instruments.

## c. Conditions of Imprisonment

*General*

Eleven of the commitments set out in the questions have been adopted by 90% or more of the member states sampled: 3.1.3 - Prisoner records upon arrival, 3.7.1 - Visits from legal advisers, 3.7.3 - Restrictions on legal communication, 3.8.1.1 - Contact family/friends, 3.8.1.2 - Visiting environment, 3.8.6.1 - Access to media, 3.9.3 - Prison work (remuneration), 3.10.2 - Exercise, 3.11.1 - Individually tailored education, 3.11.3 - Vocational training and 3.12.1 - Religion.

Twelve of the commitments set out in the questions have been adopted by 75% to 89% of the member states sampled: 3.2.1 - Prisoner allocation, 3.3.5 - Lighting/heating/ventilation, 3.3.6 - Cell alarm, 3.5.2 - Access to bedding, 3.6.1 - Adequate nutrition, 3.6.2 - Clean drinking water, 3.7.2 - Communication with legal advisers, 3.8.4.2 - Humanitarian leave, 3.8.4.4 - Information on death/illness of prisoner, 3.8.5.1 - Telephone censoring, 3.9.2 - Work as rehabilitation and 3.11.2 - Integration-prison/community education.

Sixteen of the commitments set out in the questions have been adopted by 50% to 74% of the member states sampled: 3.1.1 - Vulnerability and first days in custody, 3.1.2 - Admission booklet, 3.1.4 - Medical examination (upon arrival), 3.1.7 - Risk management - ongoing, 3.3.1 - Individual cells, 3.3.4 - Design capacity and occupancy, 3.4.1 - Sanitation and privacy, 3.4.2 - Screened sanitation, 3.5.1 - Appropriate clothing, 3.8.2.1 - Searching of visitors, 3.8.4.3 - Contact with outside world, 3.8.5.2 - Correspondence (minimum), 3.8.5.3 - Correspondence



(privacy), 3.9.1 - Constructive prison work, 3.10.1 - Out-of-cell time and 3.10.3 - Access to library.

Six of the commitments set out in the questions have been adopted by 25% to 49% of the member states sampled: 3.1.5 - Injury detection, 3.1.6 - Risk assessment, 3.3.2 - Cell share assessment, 3.3.3 - Cell size, 3.8.3.1 - Restrictions on visits and 3.8.4.1 - Information on death/illness of relatives.

#### *Legally binding commitments*

Eleven of the commitments in the ‘Conditions of Imprisonment’ section of the questionnaire derive from binding legal instruments/documents and/or ECtHR’s jurisprudence.

Five of these commitments have been adopted by 90% or more of the member states sampled: 3.7.3 - Restrictions on legal communication, 3.8.1.1 - Contact family/friends, 3.9.3 - Prison work (remuneration), 3.11.1 - Individually tailored education and 3.12.1 - Religion.

Four commitments have been adopted by 50% to 74% of the sampled member states: 3.1.2 - Admission booklet, 3.1.7 - Risk management - ongoing, 3.4.2 - Screened sanitation and 3.8.5.3 - Correspondence (privacy).

Two commitments have been adopted by 25% to 49% of the sampled member states: 3.1.6 - Risk assessment and 3.3.2 - Cell-share assessment.

#### d. Health

##### *General*

Two of the commitments set out in the questions relating to healthcare have been adopted by more than 90% of the member states sampled: 4.1.1 - Healthcare equivalence and 4.1.2 - Hospital transfer.

Five of the commitments set out in the questions have been adopted by 75% to 89% of the member states sampled: 4.1.3 - Medical records,

4.3.1 - Mental health care, 4.3.2 - Transfer to psychiatry, 4.5.1 - Medical personnel and 4.6.1 - Addiction.

Two of the commitments set out in the questions have been adopted by 50% to 74% of the member states sampled: 4.4.1 - Accommodation of vulnerable prisoners and 4.4.3 - Medical monitoring of prisoners in special cells.

Two of the commitments set out in the questions have been adopted by 25% to 49% of the member states sampled: 4.4.2 - Monitoring of prisoners at risk of suicide and 4.7.1 - Forced feeding and hunger strikers.

#### *Legally binding commitments*

One commitment in the 'Health' section of the questionnaire (4.1.1 - Healthcare equivalence) derives from binding legal instruments/documents and/or ECtHR's jurisprudence, and has been adopted by 96% of the sampled member states.

#### e. Good Order

##### *General*

Three of the commitments set out in the questions relating to Good Order have been adopted by 90% or more of the member states sampled: 5.3.1 - Searches and dignity, 5.3.2 - Searches and gender and 5.6.1 - Access to requests and complaints procedure.

Four of the commitments set out in the questions have been adopted by 75% to 89% of the member states sampled: 5.4.6 - Discipline and due process, 5.4.7 - Discipline and appeal, 5.5.1 - Proportionate use of force and 5.6.2 - Legal adviser's right to make a complaint.

Twelve of the commitments set out in the questions have been adopted by 50% to 74% of the member states sampled: 5.1.1 - Security assessment, 5.2.1 - Protection status, 5.3.3 - Strip searches, 5.4.1 - Discipline investigations, 5.4.2 - Inter prisoner violence, 5.4.3 - Discipline and language, 5.4.4 - Discipline and defence, 5.4.5 - Discipline and

interpretation, 5.4.8 - Special cells/monitoring, 5.6.3 - Legal basis for complaints procedure, 5.6.4 - Explanation for denial or rejection of complaint and 5.6.6 - Investigation of complaints between staff.

Three of the commitments set out in the questions have been adopted by 25% to 49% of the member states sampled: 5.4.9 - Special cells/recording, 5.4.10 - Special cells/staff contact and 5.6.5 - Protection against discrimination.

*Legally binding commitments*

Eleven of the commitments in the ‘Good Order’ section of the questionnaire derive from binding legal instruments/documents and/or ECtHR’s jurisprudence. Two of these commitments have been adopted by more than 90% of the sampled member states: 5.3.1 - Searches and dignity and 5.3.2 - Searches and gender. One commitment has been adopted by 79% of the sampled member states: 5.4.7 - Discipline and appeal. Five commitments have been adopted by 50% to 74% of the sampled member states: 5.3.3 - Strip searches, 5.4.1 - Discipline investigations, 5.4.3 - Discipline and language, 5.4.5 - Discipline and interpretation and 5.4.8 - Special cells/monitoring. Two commitments have been adopted by 25% to 49% of the sampled member states: 5.4.9 - Special cells/recording and 5.4.10 - Special cells/staff contact.

f. Management and Staff

*General*

Commitment 6.1.1 (Training of staff) has been adopted by 79% of the member states sampled. Commitment 6.1.2 (Specific training) has been adopted by 38% of the member states sampled.

*Legally binding commitments*

No commitments in the ‘Management and Staff’ section of the questionnaire derive from binding legal instruments/documents and/or ECtHR’s jurisprudence.

## g. Inspection and Monitoring

### *General*

Commitment 7.1.1 (Governmental monitoring) has been adopted by 83% of the member states sampled.

Two of the commitments set out in the questions have been adopted by 50% to 74% of the member states sampled: 7.2.1 - Independent monitoring and 7.2.2 - Monitoring and access.

Commitment 7.2.3 - Monitoring and international cooperation has been adopted by 29% of the member states sampled.

### *Legally binding commitments*

Two commitments in the 'Inspection and Monitoring' section of the questionnaire derive from binding legal instruments/documents and/or ECtHR's jurisprudence. Both of these commitments (7.2.1 - Independent monitoring and 7.2.2 - Monitoring and access) have been adopted by 50% to 74% of the sampled member states.

## h. Sentenced Prisoners

### *General*

Commitment 8.1.1 (Reintegration) has been adopted by 83% of the member states sampled. Commitment 8.1.2 (Long-term prisoners) has been adopted by 58% of the member states sampled.

### *Legally binding commitments*

One commitment in the 'Sentenced Prisoners' section of the questionnaire derives from binding legal instruments/documents and/or ECtHR's jurisprudence (8.1.1 - Reintegration). This standard has been adopted by 83% of sampled member states.

4. EU member states<sup>115</sup> – compliance overview table (adoption rate)<sup>116</sup>

member state	YES								NO	
	Yes	%	Yes – in law	%	Yes – in policy	%	Yes – in jurisprudence	%	No	%
Finland	95	100	86	91	10	11	0	0	0	0
Slovakia	93	98	86	91	15	16	0	0	3	3
Estonia	92	97	88	93	10	11	0	0	4	4
Hungary	88	93	86	91	87	92	0	0	8	8
Germany	80	84	77	81	1	1	26	27	16	17
Belgium	78	82	72	76	55	58	7	7	18	19
Malta	74	78	74	78	0	0	0	0	22	23
Denmark	70	74	59	62	25	26	0	0	26	27
Slovenia	70	74	68	72	13	14	1	1	26	27
Spain	70	74	65	68	3	3	2	2	26	27
Italy	68	72	67	71	2	2	2	2	28	29
Cyprus	66	69	64	67	3	3	0	0	30	32
Latvia	64	67	60	63	5	5	0	0	32	34
Czech Republic	63	66	61	64	0	0	0	0	33	35
Austria	62	65	62	65	0	0	0	0	34	36
France	62	65	60	63	26	27	0	0	34	36
Romania	62	65	62	65	0	0	0	0	34	36
Greece	59	62	58	61	18	19	0	0	37	39
Netherlands	57	60	55	58	8	8	6	6	39	41
Lithuania	52	55	52	55	0	0	1	1	44	46
UK	52	55	35	37	34	36	0	0	44	46

<sup>115</sup> In the context of the study conducted by Vermeulen et al. (2011) 24 out of the 27 member states have provided information.

<sup>116</sup> Please note that for most member states the "yes - in law", "yes - in policy" and "yes - in jurisprudence" numbers surpass the total "yes" number, since they may e.g. comply with certain standards both in the law and in policy (and/or jurisprudence).

member state	YES								NO	
	Yes	%	Yes – in law	%	Yes – in policy	%	Yes – in jurisprudence	%	No	%
Bulgaria	50	53	49	52	2	2	0	0	46	48
Poland	48	51	48	51	0	0	0	0	47	49
Ireland	30	32	2	2	27	28	1	1	66	69

##### 5. EU member states – high-level compliance analysis

Four of the sampled member states have adopted 90% or more of the measures set out in the questions relating to both binding international legal instruments and documents and/or ECtHR's jurisprudence and non-binding international legal instruments: Finland, Slovakia, Estonia and Hungary.

Three of the sampled member states have adopted 75% to 89% of these measures: Germany, Belgium and Malta.

Sixteen of the sampled member states have adopted 50% to 74% of the measures: Denmark, Slovenia, Italy, Cyprus, Latvia, Spain, Austria, France, Romania, Czech Republic, Greece, the Netherlands, Lithuania, the UK, Bulgaria and Poland.

One member state has adopted 32% or more of the measures: Ireland.

The member states who had the highest rate of adoption in law were Finland, Slovakia, Estonia and Hungary.

The member states who had the highest rate of adoption in policy were Hungary and Belgium.

The member state with the highest rate of adoption in jurisprudence was Germany.

The member state with the highest adoption rate is Finland, which has adopted all 95 commitments (100%), whilst Ireland has adopted the fewest commitments (30, 32%).

**H**istorically, little attention was paid to the execution of sentences passed at the level of international courts and tribunals. Capital punishment was still used, and custodial sanctions were imposed in the relevant states. It was not until the 1990s, with the creation of the ad hoc tribunals, that the execution of sentences also became a task for international tribunals, in cooperation with, and by means of transferring the sentenced person to, a state which had committed itself to executing the sentence. The basic principles of these vertical transfer, or execution of sentence, procedures, as is also the case at the level of the ICC, are characterized by a system logic, with a limited role for the sentenced person. Nonetheless, minimal human rights and international standards for the execution of sentences (as agreed upon at the level of the UN) are respected.

The authors investigate if and to what extent the interests of the sentenced person could be better pursued and enhanced during vertical procedures for the execution of sentences; they therefore take a clear-cut rehabilitation and social integration perspective.

Given the dominant representation of EU member states among states willing to execute sentences passed by international tribunals and courts, the authors moreover wonder whether practice should not evolve towards reflecting the obligatory compliance of these states with, besides the UN standards, additional (sometimes wider, more precise and higher) Council of Europe and EU standards. This would be reflected in the policies of the tribunals and courts (especially the ICC) relating to the conclusion of sentence execution agreements with states, as well as in the actual case-based decisions in which particular sentence execution states are chosen.

The authors further plead for the conclusion of a bilateral EU-ICC agreement on the execution of sentences, since this would constitute an important contribution to international justice, and one that is likely to make the reintegration and rehabilitation of offenders (a greater) part of it.

**Prof. dr. Gert Vermeulen** is full professor of international and European criminal law and department chair criminal law and criminology at Ghent University, director of the Institute for International Research on Criminal Policy (IRCP) and extraordinary professor of evidence at Maastricht University.

**Dr. Eveline Dewree** holds a PhD in Criminology (Ghent University, 2010) and is a former researcher at the Institute for International Research on Criminal Policy (IRCP).

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