

Filip Vojta

Imprisonment for International Crimes

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Filip Vojta

Imprisonment for International Crimes

An Interdisciplinary Analysis of the
ICTY Sentence Enforcement Practice



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Želite li dobro svojoj djeci,
zaslužni?

Želite li možda najbolje?

Ne!

Ja treniram da gađam.

Ne!

Ja treniram da mrzim.

Ne!

Ja treniram da slušam.¹

(*Azra*, 3N [1984])

They're trying to build a prison

For you and me to live in

Another prison system

(*System of a Down*, Prison Song [2001])

1 “Do you wish well for your children, you meritorious? Do you perhaps wish the best for them? No! I train to shoot. No! I train to hate. No! I train to obey” (lyrics translated into English by the author).

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“All books have a destiny of their own and a life of their own”, said a character in *Roman Polanski’s* 1999 mystery thriller film “The Ninth Gate” (adapted from the equally intriguing 1993 novel “The Club Dumas” by *Arturo Pérez-Reverte*). The same can be said of the book you hold in your hands, which is a slightly updated version of the doctoral dissertation I submitted under the title “Punishment and Sentence Enforcement for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia” at the Faculty of Law, University of Freiburg (Albert-Ludwigs-Universität Freiburg), in the summer term of the academic year 2018. It is a culmination of a doctoral research project which had started in October 2012 within the framework of the International Max Planck Research School on Retaliation, Mediation and Punishment (IMPRS REMEP) at the Max Planck Institute for Foreign and International Criminal Law (MPICC) in Freiburg; it was shortly afterwards also accepted as the leading project on international sentencing within the research curriculum of the Max Planck Partner Group for Balkan Criminology (MPPG). Looking back, little could I have anticipated the magnitude of the learning experience which the research for this book and all the adjoining scientific and non-scientific activities would provide and which I am deeply grateful for.

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It is my hope that the analysis this book provides will serve to further the knowledge and awareness about the still predominantly “arcane” practice of enforcing international sentences. Following a credo inspired by two giants of modern literature – “The good of a book lies in its being read” (*Eco* 2004 [1980], p. 388), naturally succeeded by a “[writer’s] wish for you to be the reader this book has awaited” (*Borges* 2001 [1980], p. 11) –, this hope lends itself to a desire that the analysis offered here would also encourage the improvement of the aforementioned practice within the broader framework of international criminal justice.

Freiburg, January 2020

Filip Vojta

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Abstract

How criminal sentences are enforced is of fundamental concern for the legitimacy of any justice system. However, fairly little is known about the practice of enforcing the prison sentences imposed by the international criminal tribunals.

Following the atrocities of totalitarian regimes during World War II, the ever-growing body of international human rights law has strongly been advocating for the limits on the excessive use of penal power, resulting, among other, in the recognition of offender's rehabilitation as a legitimate penal purpose guiding the enforcement of prison sentences. This purpose – being derived from the right to human dignity and arguing for an imprisonment conscientious of the prisoner's rights as well as his/her criminogenic needs which ought to be addressed to prevent further offending – has simultaneously been promoted by the widely accepted hybrid theory of punishment, which combines retributivism with deterrence and rehabilitation and argues for the legitimacy of penal reaction by assigning these goals varying emphases at the different levels of the criminal justice system.

Adhering *prima facie* to the postulates of the hybrid penal theory, the sentencing practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) has over the years been scrutinized almost exclusively with regard to its retributive and deterrent effects. Contrastingly, rehabilitation of convicted war criminals and the enforcement of their sentences have sparked only marginal attention from the scholars. This scientific lacuna owes as much to the idiosyncratic nature of criminality featured in the perpetrators of international crimes – often superficially seen as conflicting with the rehabilitative principle – as to the vertical structure of the enforcement system introduced by the ICTY in 1993 (and subsequently adopted by other international criminal tribunals), which relies on the assistance of different states in the enforcement of its sentences. Over the years, the ICTY convicts have been serving their sentences in prison systems of 14 different European states (albeit not in their home states), under a concealed treatment and in conditions largely inaccessible to the outside enquiry.

Drawing upon a wide range of disciplines and fields – including international criminal and human rights law, penology, (supranational) criminology, transitional justice and terrorism studies –, this volume offers a novel and innovative discourse that argues for the significance of penal rehabilitation for the perpetrators of international crimes and comprehensively explores its implementation in the ICTY sentence enforcement practice – in the designation of a state of enforcement, in the prison conditions and treatment of the ICTY convicts in different European enforcement states, in the procedure for their release and in their post-penal treatment. The uniquely interdisciplinary analysis is informed by rich and systematically collected empirical data stemming from the ICTY/MICT case files, a wide-ranging selection of media reports and in-depth interviews the author conducted with the ICTY/MICT officials,

national prison officials, imprisoned ICTY convicts, released ex-prisoners and their defence attorneys.

The research convincingly shows that contrary to the international human rights standards and the postulates of modern penal theory, rehabilitation is not the governing goal of the enforcement of the ICTY sentences, but at best a desirable side effect of a system that is to a large extent governed by a pragmatic concern of solely enforcing the international sentences. The author provides provocative insights into the complexities of the procedure for the designation of the enforcement state, where the pragmatic concerns for securing a state are often pitted detrimentally against the humanitarian and risk-related concerns pertaining to the prisoner's rehabilitation. Inside the national prisons, the ability and willingness of states to meet the rehabilitative needs of the prisoners are as much dependant on the general quality and sensibility of their penal systems as they are on the status of the ICTY convicts, being both foreigners and convicted perpetrators of international crimes. The study reveals in meticulous detail the inequality in enforcement practices between different states – the most evident in the rift between the Scandinavian states and the Central/Western European states – as well as between the national and the ICTY prisoners. Without the prospect of being integrated into enforcement states upon their release, the ICTY prisoners are not only denied rehabilitative programmes more suitable to their crime aetiology but often those basic services usually available to national prisoners, which detrimentally impacts an already aggravated isolation they suffer due to being imprisoned in a foreign cultural, social and lingual environment. Especially controversial is the risk of violence the ICTY prisoners suffer from in certain enforcement states, due to the stigma of being convicted perpetrators of international crimes. As a consequence, such deficits in treatment tend to consolidate many of the ICTY prisoners in their previous unrepentant and negative attitudes towards committed crimes and received punishments, which in turn can negatively impact the transitional momentum and reconciliatory efforts in their home countries, once they return.

The analysis of the ICTY sentence enforcement practice this study provides and the accompanying recommendations for improvement of the vertical system for enforcement of international sentences serve as a powerful means through which to reconsider fundamental assumptions about the criminality of perpetrators of international crimes, their imprisonment and penal rehabilitation, purposes and legitimacy of international sentencing in general, and its impact on the broader goals of international criminal justice.

Introduction

This study presents the first comprehensive empirical analysis of the vertical system for enforcement of international sentences imposed by the International Criminal Tribunal for the Former Yugoslavia (ICTY). Marking the “rejuvenation” of international criminal justice in the midst of gross human rights violations occurring between the states of the former Yugoslavia in 1993, the ICTY at the time not only provided a much-needed momentum for prosecution and adjudication of international crimes, it also established a system for enforcement of sentences quite different from the one established by its historical precedent, the International Military Tribunal in Nuremberg. In the absence of official international prison facilities, persons convicted by the ICTY are being transferred to national prisons in those states that entered for that purpose into special agreements with the Tribunal, to serve their sentences there, according to domestic prison regimes but under the supervision of the Tribunal. None of the states of the former Yugoslavia has been allowed to enforce the ICTY sentences. Of the 17 European states with whom the ICTY and its successor body, the Mechanism for International Criminal Tribunals (MICT),² has made the enforcement agreements, 14 are actively enforcing or have previously enforced the ICTY sentences.

The nature of such an enforcement system fundamentally challenges its legitimacy – and ultimately also the legitimacy of international punishment as an accepted instrument of social control that should consequently contribute to the overarching aims or principles under which international criminal justice institutions nowadays operate. The challenge primarily stems from a questionable abidance of the introduced enforcement system to the penal aim of offenders’ rehabilitation, which is nowadays firmly embedded in the evergrowing body of international human rights law as the legitimate purpose guiding the enforcement of prison sentences. The latter is recognized not only in the support for fundamental rights of prisoners as minimum (humane) standards of conditions and services in prison that cannot be violated, but also in the offer of specific rehabilitative means that are tailored according to the risks and needs of each prisoner and that should consequently enhance their ability to become functioning, law-abiding members of the civil society. Notwithstanding this recognition, the approach national prison regimes take to the offender’s rehabil-

2 In order to indicate structural and legislative continuity between the ICTY and the MICT, two bodies shall be referred to under the same banner throughout the study, the “ICTY/MICT” or the “Tribunal/Mechanism”, and will be referred to separately only when there is a noteworthy discrepancy in their normative provisions or enforcement practice. Persons convicted by the ICTY/MICT are, however, predominantly referred to as “ICTY convicts” or “ICTY prisoners” and their sentences as “ICTY sentences”.

itation can differ quite strongly – even within a region such as Europe where standards and rules developed by regional human rights bodies generally indicate strong support for rehabilitation. This subsequently raises concerns about the absence of a standardized approach to the treatment of ICTY prisoners in different European prisons and the violation of the principle of equal treatment before the law. Inequality can potentially stem not only from differences between different domestic prison systems (external inequality) but also from the status the ICTY prisoners are attributed in these systems. In foreign prison systems developed to fit the needs of a domestic prison population, the status of both a foreigner and a person convicted for grave international crimes (war crimes, crimes against humanity, genocide) can impose an additional stigma on ICTY prisoners, which can subsequently degrade their position and entitlement to services that would normally be available to domestic prisoners (internal inequality). If occurring in practice, such discrepancies in treatment can gravely affect perceptions of the legitimacy of punishment.

More fundamentally, rehabilitative services and programmes that are offered to ordinary prison population in different national prison systems might not be appropriate to tackle the complex etiology of the so-called “macro-criminality” – acts of collective violence, often committed by “ordinary people within extraordinary circumstances” of a widespread violent conflict where perpetrators do not deviate from national policy and laws but act in conformity with them. Their moral conditioning, which deemed “good bad and bad good”³, as well as the subsequent risk from further engagement in hostilities in a transitional society within which the conflict might still be ongoing or is latent would arguably dictate a more refined rehabilitative assistance to the offenders than the one focusing on risk factors such as behaviour, drug abuse or vocational incompetency can provide.

In order to address these challenges, the study undertakes a qualitative exploration of the enforcement practice developed with regard to the ICTY prisoners. It examines purposes that govern the enforcement of ICTY sentences, how these purposes are implemented within the vertical system for enforcement of international sentences – starting with the procedure for designating the state where an ICTY prisoner is supposed to serve the sentence and continuing through prison treatment in a national prison, up to the release from prison and return to the home state – and, finally, to what extent such enforcement and its outcome purposefully contribute to the overarching aims of international criminal justice. In doing so, the study resorts to the analysis of case law decisions, media reports and exploratory interviews. The latter were personally conducted by the author with a number of interviewees involved in different capacities of the enforcement of ICTY sentences, including ICTY/MICT legal officers in The Hague, the Netherlands, members of the national prison staff

3 To paraphrase the well-known chant of the three witches in *Shakespeare's Macbeth*: “Fair is foul, and foul is fair” (*Shakespeare* 2016 [1606], p. 3).

and ICTY prisoners in different European states.⁴ The evaluation based on this exclusively obtained primary data aims at filling the evident gap in the existing literature on the enforcement of international sentences, where the authors have mainly focused on the narrow analysis of the ICTY normative framework, thus largely dismissing the need to empirically assess the correlation between the underlying penal issues of such an enforcement and its modalities as well as outcomes in practice.⁵

In its broader scope, this is a study about the rehabilitation of perpetrators of international crimes, or macro-criminals as they are predominantly called throughout the study. It explores the suitability of orthodox (e.g. cognitive-behavioural programmes based on the R-N-R risk assessment model) and unorthodox (e.g. restorative-based) rehabilitative methods to be purposefully implemented as part of the penal treatment of macro-criminals, which should not only contribute to their personal, moral and social rehabilitation, but also promote them as benign moral agents who in the long term can also positively influence a moral transition of the societies on behalf of which they committed crimes. It argues for communication as the basic staple of their rehabilitative trajectory and for more transparency and cooperation between international and national justice institutions in the enforcement of international sentences.

Chapter 1 introduces the governing research questions and elaborates on the methodology that was applied for data collection. While the empirical analysis of the enforcement of ICTY sentences is more prominent in the second part of the study, some findings from the fieldwork were already integrated into its first part in order to reinforce the theoretical underpinning upon which the research questions and the subsequent empirical enquiry are based.

Accordingly, *Chapter 2* opens the first part of the study by providing a general analytical framework within which the efficacy and legitimacy of the ICTY sentencing practice should be evaluated, encompassing both the imposition and the enforcement of criminal sentences. The framework consists of a clear delineation between the overarching aims or principles of international criminal justice (macro-aims) and the aims which individual penal proceedings against perpetrators of international crimes should fulfil (micro-aims). It is argued that only if individual penal proceedings can achieve the micro-aims through legitimate normative frameworks and practice, they can also positively contribute to the broader macro-aims, such as reconciliation and the maintenance of peace. The chapter further argues that both the under-developed sentencing framework and the extraordinary nature of international crimes contributed to the perception of the ICTY sentencing practice as lacking legitimacy and fairness. While trials mostly served the purposes of retribution and deterrence, the rehabilitation of perpetrators has been largely dismissed as belonging to the phase of

4 See in detail *Chapter 1.2*.

5 See under *Chapter 1.2*.

enforcement of sentences, with only a handful of judges devoting it a more concrete consideration.

Before examining how the penal reaction can then efficiently contribute to the rehabilitation of macro-criminals through the enforcement of sentences, *Chapter 3* proceeds to exploring the etiological characteristics of perpetrators of international crimes. It stipulates that in order to rehabilitate macro-criminals, it is necessary to a priori understand the etiological factors that had contributed to the commission of their crimes in the first place. After delineating different situational and personal factors that play a prominent role in the etiology of macro-criminals, the chapter introduces a typology of perpetrators based on different combinations of etiological factors within distinctive perpetrator categories. It is argued that such a typology can help modify or tailor rehabilitative programmes in accordance with criminogenic needs of different categories of perpetrators.

Chapter 4 opens by tracing the historical development of the penal concept of offenders' rehabilitation within the context of enforcing prison sentences before proceeding to examine four distinctive facets the rehabilitation of offenders should pertain to. These facets are in part analyzed with regard to the etiological features of macro-criminals. Subsequently, a framework is introduced on the basis of which the contemporary concept of offenders' rehabilitation is in operation. The framework will guide the empirical analysis of enforcing ICTY sentences in the empirical part of the study. Further, preliminary considerations are considered regarding the adaptation of rehabilitative measures towards macro-criminality, before exploring their potential application in the historical example of the Spandau prisoners. The Spandau prison in Berlin, where the convicts of the first Nuremberg trial were incarcerated, represents the first instance in the developmental trajectory of the international penal/prison system as existing nowadays, therefore representing a valid reference point for any discussion on prison treatment and the rehabilitation of perpetrators of international crimes.

Subsequently, *Chapter 5* introduces a new system for the enforcement of international sentences as established by the ICTY. Here, the analysis of normative provision guiding the enforcement serves to introduce research problems upon which the research questions governing data gathering and the empirical analysis are based.

Chapter 6 opens the second, empirical section of the study. Here, the practice of designating the states of enforcement, enforcement in different national prisons as well as post-release lives of ex-prisoners are explored. The chapter delineates the governing principles of such an enforcement, the division of prerogatives between the ICTY/MICT and national prison authorities within the system, the extent of inequality in treatment between the prisoners and major challenges for the overall abidance of the system to the penal concept of offenders' rehabilitation.

Chapter 7 concludes by demonstrating that both Spandau and the ICTY-introduced system represent different forms of a "penal exile" for perpetrators of international

crimes which have little or nothing to do with the rehabilitation of prisoners and which have negative implications for the perception of the legitimacy of international punishment among various stakeholders in the conflict. In the long run, unwillingness and an inability to more meaningfully pertain to the rehabilitation of macro-criminals can also have serious security implications for transitional societies which “unchanged” perpetrators tend to return to. Accordingly, the chapter concludes by discussing certain postulates that from the author’s perspective are seen as potentially benefiting the evolving practice of enforcing international sentences towards more efficiently achieving the rehabilitative penal aim. The benefit is particularly recognized with regard to the International Criminal Court (the ICC), which has tailored its enforcement system in accordance with the ICTY’s dispersion policy of enforcement between many different states, and which can consequently be faced with the same challenges the ICTY has been throughout its enforcement practice.

Chapter 1

Research Questions and Methodology

Prior to the commencement of this study, existing research has mostly adopted a normative approach to the topic.⁶ Notwithstanding its significance – especially in terms of raising the awareness for this particular aspect of international criminal justice and the conundrums it might entail –, the authors have mainly focused on the narrow analysis of the ICTY’s normative framework, thus largely dismissing the need to assess the correlation between the underlying penological issues of such an enforcement and its modalities as well as outcomes in practice. This lacuna⁷ has prompted the following study to provide a comprehensive empirical exploration of the practice of enforcing ICTY sentences. In particular, the exploration has been governed by the research questions and methods delineated below.

-
- 6 See, for example, *Hoffmann* 2011, *van Zyl Smit* 2005, *Tolbert & Rydberg* 2001, *Penrose* 2000, *Tolbert* 1998 and *Klip* 1997.
 - 7 During the work on this project, which commenced in October 2012 and was officially finished in July 2018, a number of scientific contributions emerged that made a tentative empirical enquiry into the enforcement of sentences imposed by international criminal tribunals (see, e.g., *Holá & van Wijk* 2014, *Kelder et al.* 2014, *Vojta* 2014, *Mulgrew* 2013). Notwithstanding their importance for furthering the discussion and knowledge on the enforcement of international sentences, these efforts predominantly resorted to a preliminary empirical enquiry into the enforcement practice, rather than providing any sort of holistic analysis. This is partly due to the broad scope of their enquiries – mostly attempting to encompass the enforcement practices of the ICTY, the ICTR and the SCSL at the same time –, which (from the methodological standpoint) prevented any in-depth empirical assessment. Partly, it is also conditioned by a complicated access to the empirical data and subjects (in this regard, also see *Chapter 1.2.3*), which in many instances prompted the authors to consult data mainly obtained from the justice officials or available from open-access sources. Subsequently, this mostly resulted in a one-sided enquiry that is substantially missing the perspective of the prisoners for a rounded and objective analysis. With regard to the ICTY/MICT specifically, these contributions, given the time of their publication, also omitted the analysis of significant developments to the enforcement practice post-2014 (e.g. regarding the enforcement of life sentences and the designation of the state of enforcement). Accordingly, the study at hand aims at surpassing the limitations of previous analyses and providing a more rounded, holistic analysis of the ICTY/MICT sentence enforcement practice.

1.1 Questions

The main research questions governing the investigation into the enforcement of ICTY sentences are as follows:

a. Which purposes govern the enforcement practice?

This question tackles the fundamental aspects of the introduced vertical system for the enforcement of ICTY sentences. Namely, it explores the rationale that prompted the United Nations Security Council to resort, through the ICTY/MICT, to sending the convicted persons to prisons in foreign states instead of their states of origin. Furthermore, notwithstanding the actual ability of foreign states to uphold internationally advocated prison standards, different distances of foreign prisons from the familiar milieu which prisoners originally belong to can by themselves already have various impacts on rehabilitation in individual cases, either by aggravating the deprivation of liberty or by making the sentence more endurable. Which criteria govern the decision which state a prisoner ought to be sent to in a concrete case? Why is one state chosen over the other when determining where a prisoner should serve his or her sentence?⁸ Subsequently, the question also paves the way for an empirical enquiry into the adequacy of conditions, services and programmes offered in national prison systems to purposefully address a distinctive nature of macro-criminality which differentiates most international prisoners from the ordinary prison population.⁹

b. How are ICTY sentences enforced in practice?

Next to determining which purposes actually guide the enforcement of ICTY sentences in practice, the other question tackles the implementation of these purposes in the everyday treatment of prisoners, from their arrival to prisons in foreign states up to their release. Of particular significance here is the assessment of standardization of such enforcement in accordance with the principle of equal treatment before the law. Offering similar, if not the same, conditions, services and programmes that purposefully tend to the rehabilitation of the ICTY prisoners highly impacts the perceptions of equality in prison treatment, which subsequently has implications for the acceptance of such a system as being legitimate. On the other hand, the occurrence of great discrepancies in enforcement might seriously undermine the legitimacy of the system, which in turn can negatively reflect not only on the prospect of rehabilitation in individual cases, but consequently also on the acceptance of punishments as just, both among the prisoners and the international community. What is more is that it might further the polarization between the communities in the post-conflict

8 For example, why Austria might be the designated state for one prisoner and Estonia, Denmark or Portugal for another one.

9 See in detail *Chapter 3*.

societies as, for example, one ethnic side might perceive the treatment of “their” prisoners to be unjustly aggravated when compared to the others.

c. What is the outcome of the enforcement?

The question concerning the outcome of the enforcement is twofold. First, it assesses the extent to which all facets encompassed within an individual’s rehabilitation (i.e. personal, moral, social and legal¹⁰) are achieved. Second, it generally questions the impact the established enforcement system has on the overarching aims of international criminal justice.¹¹ In particular, can the way in which sentences are enforced be considered to positively impact the reconciliation between the former warring communities, or can it be perceived as yet an additional “unjustified attack on our people” and therefore possibly be utilized as another tool for furthering polarization and the creation of victim myths within the post-conflict society.

1.2 Methods

Given the prevailing scarcity of empirical data on the enforcement of ICTY sentences, qualitative research methods were applied in order to obtain the information and to answer the research questions.

In particular, the following sources were used to gain the required information: case law decisions (including, among others, the ICTY judgements as well as the ICTY/MICT decisions on the designation of the state of enforcement and on the early release of prisoners), media reports (both international and regional, the latter encompassing the former Yugoslavian states) and semi-structured interviews. The latter were of particular significance for the study as they offered access to exclusive primary data, most of which would not have been obtainable otherwise. Furthermore, the possibility to conduct interviews with subjects on all levels of the enforcement system – including legal officers at the ICTY/MICT, national prison staff as well as persons convicted by the ICTY and imprisoned in different countries – not only allowed to cross-validate data gathered from different subjects but offered an in-depth perspective on various dimensions of the enforcement of international sentences and on challenges faced by the system.

1.2.1 Case Law Decisions

Information on the case law decisions was obtained through a search of three publicly available databases. First, the ICTY’s online database on selected documents

10 See in detail *Chapter 4*.

11 For the relationship between micro- and macro-aims of international criminal justice, see *Chapter 2*.

with regard to adjudicated cases¹² was primarily consulted. Second, the search was broadened to the ICTY Court Records database.¹³ Third, after the MICT officially took over the prerogatives on enforcement from the ICTY, the MICT online Case Law Database¹⁴ was also consulted with regard to certain cases. Given that in many publicly available case law decisions, detailed information on the treatment of international prisoners in foreign prisons as well as the reasoning underlying such decisions are either missing or redacted, an attempt was made to contact the ICTY/MICT in The Hague during the course of research in order to obtain non-restricted access to such information. It was presumed that because of its formal supervisory role, such information would be available to the Tribunal/Mechanism and stored in a dedicated database at The Hague, therefore making data collection easier. Despite several attempts, access was denied on the grounds of the information being highly sensitive and therefore confidential.

1.2.2 Media Reports

Media reports from a variety of online news agencies proved to be particularly useful for supplementing data on prison conditions, prison treatment and post-release lives of ICTY convicts. The information was gathered with regard to each transferred prisoner and then sorted by relevance. While both international and regional (i.e. post-Yugoslavian states) news agencies were consulted, more relevant data could be obtained from regional news reports, as due to lingual familiarity and actual geographical proximity, the reporters could get easier access to released prisoners, their attorneys and their relatives, or report on the lives of ex-prisoners after they had been released. In particular, reports from the following news agencies were integrated into the study: Al Jazeera Balkans¹⁵, Balkan Insight¹⁶, DEPO Portal¹⁷, Deutsche Welle¹⁸, Dnevnik.hr¹⁹, E-novine.com²⁰, HRsvijet.net²¹, Index.hr²², Katolički tjednik²³, N1²⁴,

12 icty.org/en/action/cases/4 [21/09/2017].

13 icr.icty.org/ [21/09/2017].

14 cld.unmict.org/?q=en/cases/ictr-icty-case-law-database [21/09/2017].

15 balkans.aljazeera.net/ [18/02/2018].

16 balkaninsight.com/en/page/all-balkans-home [18/02/2018].

17 depo.ba/ [18/02/2018].

18 dw.com/bs/teme/s-10037 [18/02/2018].

19 dnevnik.hr/ [18/02/2018].

20 e-novine.com/ [18/02/2018].

21 hrsvijet.net/ [18/02/2018].

22 index.hr/ [18/02/2018].

23 nedjelja.ba/ [18/02/2018].

24 hr.n1info.com/Vijesti [18/02/2018].

Nacional.hr²⁵, NaszeMiasto.pl²⁶, Novosti²⁷, Novosti Online²⁸, Radio Slobodna Evropa (Radio Free Europe/Radio Liberty)²⁹, Slobodna Dalmacija³⁰, Sputnik Srbija³¹, The Local³² and Tportal.hr³³.

1.2.3 Interviews

The primary data obtained through the interviews was of paramount importance for the study. It provided both a deeper and a broader insight into the practice of sentence enforcement, revealing information that was to a great extent inaccessible via secondary or tertiary sources. From the onset of the study, it was decided that if possible, interviews would be made with subjects on all levels of the enforcement system.

No specific number of interviews or interviewees was planned. As indicated above, given the sensitivity of the required information, it was not possible to predict how many potential interviewees might be willing to participate. It was certainly hoped that interviews with ICTY/MICT staff who were personally engaged in the enforcement of the Tribunal's sentences and competent to decide on the matter would be possible to procure. This allowed to get a clearer picture on the rationale governing top-down decisions and on how the prerogatives between the Tribunal/Mechanism and national authorities are allocated in practice. Furthermore, it was hoped that challenges for enforcement as well as solutions conceived to bypass them in practice could be clearly indicated.

Second, it was decided that, where willing, national authorities such as staff in prisons holding ICTY prisoners would also be interviewed, as it was presumed that they could provide more specific information on the cooperation between national and international authorities with regard to the enforcement of international sentences. What is more, the prison staff was perceived to be able to shed light on the particularities of prison treatment in cases of individual prisoners, such as under which conditions they serve sentences, which programmes are offered to them and which kind of status they have in the respective national prison systems.

Finally, the highest hopes were placed on the possibility to actually talk to ICTY prisoners, or released ex-prisoners. There were several reasons for this. For once, the

25 nacional.hr/ [18/02/2018].

26 piotrkowtrybunalski.naszemiasto.pl/ [18/02/2018].

27 portalnovosti.com/ [18/02/2018].

28 novosti.rs/ [18/02/2018].

29 slobodnaevropa.org/ [18/02/2018].

30 slobodnadalmacija.hr/ [18/02/2018].

31 rs-lat.sputniknews.com/ [18/02/2018].

32 thelocal.se/ [18/02/2018].

33 tportal.hr/ [18/02/2018].

experience the prisoners go through during the enforcement of their sentences in foreign prisons is an embodiment of both their punishment and the enforcement policy. As such, it should be an essential component of any valid assessment of the system. In line with the argument offered by *King* in his particularly inspiring contribution on doing research in prisons,³⁴ it is simply not possible to conduct research that will tell much about the enforcement of international sentences without actually going to prisons and listening to the experiences of the prisoners themselves. Official reports and policy – or even experiences of prison staff who are in direct contact with prisoners – are one-sided, potentially biased and, as further argued by *King*, “cannot be taken at face value”.³⁵ They can only be understood in the context of personal imprisonment experiences. Furthermore, it was hoped that even a small number of interviews with prisoners could more clearly indicate the extent of external and internal (in)equality in their treatment, thus allowing for a critical comparative analysis of enforcement between different states. Consequently, a possibility to talk to released ex-prisoners was also welcomed as it was predicted that they could offer information on their status after release as well as on the process of post-release adaptation and reintegration.

Given the limited time frame of the project, it was decided not to follow specifically a top-down or a bottom-up approach to procuring interviews (e.g. starting from the macro-level, the ICTY officials, and then gradually working one’s way down to the micro-level, the prisoners), but to approach potentially suitable interviewees simultaneously. Motivational letters explaining the purpose of the study, the ways data would be collected and used, the author’s background and the institutional affiliation were carefully drafted and distributed to potential interviewees, together with copies of questionnaires and interview consent forms. Questionnaires were designed to revolve around open-end questions which covered areas of interest for the study and served as a guideline for the interviews, but were not exclusive. Precisely due to the open-end nature of the questions, new and interesting topics came up during the interviews, which also allowed for refining and fine-tuning the questionnaires as the empirical work progressed.³⁶

34 The argument is offered as the first of ten nostrums offered for research in prison: “*You have to be there* [...] This may sound obvious. But it does have to be said. It simply is not possible to do research that will tell you much about prisons without getting into the field. No amount of theorizing or reading in an office can substitute for the hands-on experience of spending your time in prison” (*King* 2000, pp. 297–298).

35 *King* 2000, p. 298.

36 Especially during the interviews with the ICTY prisoners, some interviewees were particularly willing to discuss how and why international crimes are committed, basing their reasoning on personal experiences and those of acquaintances or other more or less public persons. This has been tremendously valuable for a deeper understanding of the etiology of international crimes and, in particular, for what kind of treatment might better suit the rehabilitation of prisoners and their etiology. The information has been incorporated into the study accordingly. An additional significance of this kind of primary data is that it fills the considerable lacuna of first-

All interviews were conducted personally by the author between January 2013 and October 2016. Altogether, 15 interview sessions took place with 12 persons. The interviews were almost exclusively conducted in person, with one interview via e-mail correspondence and one via Skype. Interviewees included a legal officer at the ICTY/MICT's Registry, three legal officers at the Office of the ICTY/MICT's President, a director of a penitentiary in Germany, a member of the prison staff in a penitentiary in Estonia, a defence attorney for an ICTY prisoner and five ICTY prisoners, three of whom were incarcerated in German penitentiaries, one in a penitentiary in Estonia, and one had formerly been incarcerated in Finland. Interviews took place at the ICTY/MICT headquarters in The Hague, the Netherlands, in three penitentiaries in Germany, in a penitentiary in Estonia and in a restaurant in Croatia. In order to appropriately discuss questions of interest for the study, some interviews with prisoners were split into two sessions conducted over two consecutive days, while one prisoner was interviewed twice over a broader period of time. Interview times varied, with the shortest session lasting approximately half an hour and the longest session lasting approximately eight hours in a row. Interviews were conducted in English, German and Serbo-Croatian.

Procuring interviews with the ICTY/MICT officials was relatively straightforward. After initially approaching the Tribunal/Mechanism, the author was appointed to persons in charge of sentence enforcement matters with whom the interviews were then arranged and conducted. The situation, however, differed for the national prison

hand research in contemporary criminological and penological studies of perpetrators of international crimes. The reasons for this lacuna are manifold. *Mylonaki* in particular stresses the difficulties of accessing people in order to conduct interviews as well as the emotive nature of international crimes that can repel from conducting primary research and relying on qualitative data (2014, p. 63). However, perhaps the biggest hindrance might be preconceptions directly tied to the condemnation of international crimes, whereby, as *Mylonaki* states, "those committing mass atrocities may be viewed as not being worthy to be heard, under the assumption that they will be disposed to lie, and so the argument goes that it is preferable to hear what the government and its representatives, such as the police, have to say" (2014, p. 63). Besides the morally underlined argument claiming that "by demonizing and dehumanizing perpetrators, we thereby engage in the very same processes that helped make their crimes possible in the first place" (*Clark* 2009, p. 424), the other argument against this sort of viewpoint concerns the nature of interviewed perpetrators having been involved in crimes that are being researched. Similarly to *Horgan's* advocacy for first-hand research in terrorism (*Horgan* 2004, pp. 30–56), it could be argued that despite international crimes resulting from a social and political process, "it is essentially psychological factors that drive individual motivation, action, and decisional processes: consequently, it remains inevitable that if one is to effectively study [international crimes and its perpetrators] from criminological and psychological perspectives, one *must* meet with and speak to individuals who are, or who have been, directly involved [in international crimes]" (*Horgan* 2004, pp. 30–31). Conceptions and experiences of perpetrators are therefore invaluable for better understanding international crimes and how to effectively tackle them. Subsequently, the perceived challenge of the "truthfulness" of data obtained from the perpetrators is not exclusively tied to this field of criminological research, as it could then be argued that qualitative research might to a certain extent be inherently posed with this very challenge, which can, however, be effectively overcome by data triangulation and additional research enquiries.

staff members and the ICTY prisoners. Initially, the challenge was to locate where exactly the prisoners were being held, in order to approach them. While the information about the states in which prisoners are serving their sentences is public, the exact prison locations are kept relatively secret. One chosen way to overcome this challenge was to contact defence attorneys and to propose through them to the prisoners to conduct interviews. This was done with regard to both the convicts who were still serving their sentences and those who had already been released. It was also anticipated that by contacting the attorneys first, the prisoners would be more trustful and willing to participate in the study. There was a positive response to some proposals; however, many were left unanswered, even after repeated efforts to get in touch with attorneys by means of both telephone and e-mail. On several occasions, the attorneys agreed to receiving the interview materials for their clients to examine them before deciding whether to participate in interviews or not. However, after that, there was no possibility of further contacting them as some attorneys neither called back nor answered repeated calls. On one occasion, a pre-agreed visit was paid directly to a law firm office of an attorney in Croatia in order to discuss the possibility of an interview with his client, a released ICTY ex-prisoner; however, the attorney did not show up, nor did he reply to the motivational letter or other interview materials that were left for him in the office.

The second way of establishing a contact was to write directly to those prisoners whose prison addresses had been made public, either in publicly accessible case files or through media reports. While this method also proved to be successful, there were also many instances without any reply. Interestingly, during the initial enquiries with The Hague about the possibility to get access to sensitive case files for data analysis, the corresponding legal officer at the ICTY/MICT offered to send the motivational letters to the prisoners of choice. The offer was accepted for those prisoners for whom previously there had been no other option to get in touch with. Ultimately, this path proved to be beneficial for establishing the first contact with some prisoners.

Arrangements for the interviews required more time. It was possible to arrange some interviews within a couple of weeks from the initial contact with the interviewees, while for others, making the arrangements took more than a year. The latter was particularly the case for interviewed prisoners. Almost all of them had the possibility to only communicate via written letters, and depending on the location of their imprisonment, it might have taken a while before the letters reached them or until their replies arrived. In addition, as admitted by themselves, some interviewees were initially suspicious about the purpose of the study and the intentions of the researcher; therefore, they needed some time to consider the proposal. In some instances, the prisoners asked in writing for additional clarifications and information. On one occasion, the author was contacted by phone by a family member of a prisoner who asked for more information on the nature of the study and the author's opinions about the ICTY/MICT's sentencing practice. After giving assurance that the research was

conducted with scientific objectivity and strictly aimed at answering the posed research questions, the family member's favourable impressions of the study were conveyed to the prisoner who consequently agreed to participate in the study. The impression of working under auspices of the ICTY/MICT was initially also shared by some other interviewees; however, any suspicion or confusion regarding the scientific nature of the study was quickly cleared upon the first meeting. Subsequently, most interviewed prisoners afterwards expressed their satisfaction with and, in some instances, also their gratitude for the interviews. One interviewed prisoner openly said that nobody had ever asked him before what had been discussed during the interview and that he was grateful for the opportunity to share these thoughts.³⁷ Consequently, these positive impressions prompted this prisoner to recommend participation in interviews to several other prisoners, one of whom eventually accepted the proposal and agreed to be interviewed, too.

Obtaining the prisoners' consent to participate in the study was not the only challenge in arranging interviews with them. In order to conduct interviews with inmates of a prison institution, a permission is usually required from national prison authorities, too. In many instances over the course of the study, this proved to be particularly challenging. First and foremost, the procedure to obtain such approval varies between states, e.g. in terms of who grants the approval, whom the researcher should contact first, which forms need to be filled in and what kind of documents have to be submitted. Unless already familiar with such a procedure in a particular state, the logical first step for a researcher would be to contact either the director of a prison institution or the person in charge of public relations who could then direct him or her to personnel authorized to grant such requests. Given the high number of different states in which ICTY prisoners are being held, letters of motivation had to be translated into native languages in certain instances, as not all national authorities could speak English properly. While it was eventually possible to obtain approval for visiting a number of prisoners, in some other cases, after successful initial contact with the prison authorities, the communication would unexplainably stop and (similar to some defence attorneys) could not be continued despite repeated attempts by the author. In other instances, national authorities would blatantly deny access to a prisoner without any further explanation, despite the prisoner's consent to participate in the study. However, there were also instances where national authorities did not condition the visit with any particular procedure, and if the prisoner agreed, it was possible to arrange the interview within regular visiting hours. Eventually, information obtained from prisoners incarcerated in different countries proved to be of tremendous value for the study, not only with respect to their own personal experiences, but also with regard to those of other prisoners with whom they kept contact during imprisonment. This also deepened and broadened the comparative aspect of the study.

37 Interview with ICTY prisoner B in Germany, 02.03.2016.

In general, prison staff was more reluctant to be interviewed and only on two occasions agreed to answering questions about the enforcement of the ICTY sentences. This data has been incorporated into the study accordingly.

Almost all interviews were recorded with a voice recorder, for which approval was granted from both prisoners and prison authorities. All interviews were personally transcribed by the author, some verbatim and some summarily according to discussed themes, given their long duration. Regarding the latter, after a preliminary content analysis, sections of interviews pertaining to a particular topic of interest were additionally transcribed verbatim and incorporated into the study. All transcripts were produced in the language in which the interview was conducted. Those parts quoted in the study verbatim were additionally translated into English.

All interviewees voluntarily agreed to participate in the study. They also asked not to be identified by name. Therefore, whenever referring to a particular interview, general terms such as legal officer, defence attorney, ICTY prisoner A, B, C etc. have been adopted.

Chapter 2

Sentencing Practice of the ICTY in the Context of International Criminal Justice: A Preliminary Overview

Following a series of detailed reports of gross and widespread human rights violations occurring since 1991 as a result of the armed conflicts between different ethnic groups in the territory of the former Yugoslavia,³⁸ the Security Council of the United Nations (UN), acting under Chapter VII of the UN Charter,³⁹ adopted Resolution 827 on 25 May 1993. It established the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁴⁰ in The Hague, the Netherlands, so as to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”⁴¹ The decision to establish another international criminal tribunal – almost 50 years after the trials of the major Nazi war criminals by the International Military Tribunal (IMT) in Nuremberg had taken place – was of paramount importance for the globalization of criminal justice. The magnitude of atrocities (normatively conceptualized as international crimes)⁴² that were committed at the time

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- 38 *Sundhaussen* (2014, pp. 17–18) argues against the mainstream labelling of the three conflicts that occurred between 1991 and 1999 in the territory of the former Yugoslavia (the Serbo-Croatian, the Bosnian and the Kosovo Wars) as “the third Balkan War”, stating that, opposed to the Balkan Wars of 1912/13, only a small portion of the Balkan region was involved and one of the main participants (Croatia) is located outside of the Balkans. Instead, he refers to the armed conflicts as the post-Yugoslavian wars of 1991–1999. This term will also be applied as such in this study.
- 39 Full name: Charter of the United Nations and the Statute of the International Court of Justice, San Francisco 1945 (hereinafter: The UN Charter); Chapter VII pertains to “Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression”.
- 40 Also known by its full name as “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” (Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009; hereinafter: ICTY Statute).
- 41 S/Res/827 (25 May 1993).
- 42 The list of substantive crimes for which the ICTY has jurisdiction includes grave breaches of the Geneva Conventions of 1949 (Article 2, ICTY Statute), violations of the laws or customs of war (Article 3, ICTY Statute), genocide (Article 4, ICTY Statute) and crimes against humanity (Article 5, ICTY Statute).

in the territory of the former Yugoslavia was recognized to be “a threat to international peace and security”,⁴³ impacting deeply not only the societies involved in the conflict but the whole international community and its commonly shared values.

The driving force behind the reinvigoration of international criminal justice that came with the establishment of the ICTY was the realization that in the 20th century, some 250 conflicts in almost every region of the world resulted – through genocide, crimes against humanity and war crimes – in the death of between 70 and 170 million people and that almost all of the perpetrators benefited from impunity.⁴⁴ It is paradoxical that in spite of the values which had been promoted after the World War II under the banner “never again” and subsequently gave rise to the human rights movement, governments – who frequently retreated to the conveniences of “realpolitik” and in a way of a “peace or justice” dilemma – often bargained away accountability and justice in favour of political compromise and (unstable) peace.⁴⁵ This, however, should not come as much surprising, considering the negative impact international crimes have on the social, economic and political stability in many countries.⁴⁶ Societies engulfed in armed conflict and collective violence are in a dire need of cease-fires, which often comes at the exclusive price of abstaining from criminal prosecution of those responsible. Additionally, weak or failed states that emerge after a conflict often lack resources as well as the willingness to enforce a legitimate form of condemnation upon those accountable for atrocities.⁴⁷ In the short run, impunity for the sake of peace might seem to be the more pragmatic option. However, the question is whether the peace can be maintained without justice.

The challenge for peace and reconciliation after a conflict depends on the type of violence experienced through the conflict.⁴⁸ International crimes are forms of collective violence⁴⁹ that are, by their very nature, widespread and affecting large sections of the conflicting groups (as perpetrators or as victims), therefore making the task of reconciliation very difficult.⁵⁰ Mass victimization that results from such crimes inevitably contributes to the creation of narratives that recount who the innocent victims and who the evil perpetrators are.⁵¹ It also feeds the collective memory of affected social and ethnic groups with feelings of hatred and revenge.⁵² As long

43 S/Res/808 (22 February 1993).

44 Bassiouni 1999, p. 312.

45 Bassiouni 1999, p. 312.

46 Bassiouni 1999, p. 311.

47 Albrecht 2006, p. 38.

48 Albrecht 2006, p. 41.

49 See in detail *Chapter 2*.

50 Albrecht 2006, p. 41.

51 Albrecht 2006, p. 42.

52 Albrecht 2006, p. 42.

as these narratives and feelings remain intact, they are a strong sign of ongoing conflict and can be used as a powerful instrument for triggering new violence.⁵³ The importance of countering this dynamic has been recognized by the UN Security Council when establishing the ICTY. The correlation between the legitimate penal condemnation of those responsible for crimes and reconciliation of warring societies has been explicitly addressed in both founding resolutions of the ICTY which underline the conviction that bringing those responsible to justice “would contribute to the restoration and maintenance of peace”.⁵⁴ Therefore, this should be understood as the overarching mandate, or the “strategic purpose”,⁵⁵ under which the ICTY operates.

In more than 20 years of its existence, the ICTY has established itself at the crest of the international criminal justice momentum. None from its list of 161 indicted persons remains at large and, at the time of writing, the Tribunal has completed proceedings for 154 accused.⁵⁶ This list includes heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties in the post-Yugoslavian wars.⁵⁷ Opposed to its predecessors (the Nuremberg and Tokyo tribunals), which were empowered to impose the death penalty on a convicted war criminal,⁵⁸ the penalties imposed by the ICTY are limited to imprisonment.⁵⁹ The exclusion of capital punishment in the Statute is deemed to reflect the progress of the international human rights law norm promoting the abolition of the death penalty.⁶⁰ As *Rotman* argues, the paradigm shift which led to a system that respects the rights of persons convicted of international crimes (including the right to life), was brought about by the very accountability for major international crimes, that is, to place human life and dignity above ideological policies that justify their destruction.⁶¹ If international criminal justice failed to respect these values, even with regard to the perpetrators, it would contradict its very foundations.⁶²

From the list of accused, more than 80 persons have so far been sentenced to various terms of imprisonment.⁶³ For some of them, the time they had spent on remand in the UN Detention Unit (UNDU) in Scheveningen, The Hague, amounted to the full term of their sentence. However, given that the UNDU is intended only to house

53 *Albrecht* 2006, p. 42.

54 S/Res/808 (22 February 1993), S/Res/827 (25 May 1993).

55 *Futamura & Gow* 2014, p. 15.

56 icty.org/en/cases/key-figures-cases [30/07/2016].

57 icty.org/en/about [30/07/2016].

58 *Schabas* 2006, p. 546.

59 Article 24 (1), ICTY Statute.

60 *Schabas* 2006, p. 546.

61 *Rotman* 2008b, p. 132.

62 *Rotman* 2008b, p. 132.

63 icty.org/en/cases/key-figures-cases [26/08/2016].

accused on remand before and during their trials and appeals, persons convicted to lengthy sentences are not supposed to serve their sentences there but have to be transferred to national prison systems outside the territory of the former Yugoslavia.⁶⁴ The ICTY has no police force or coercive powers embodied in an international or supranational prison institution through which it can enforce its sentences; therefore, it has to rely on the cooperation of states in this significant legal area.⁶⁵

Similar to many other aspects of the ICTY's work, the establishment of the system for the enforcement of its sentences had very little precedent before.⁶⁶ Nowadays, it constitutes an important part of its legacy;⁶⁷ not least as the subsequently established international criminal tribunals – the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) – adopted the system to a large extent for the enforcement of their own sentences. On 01 July 2013, the ICTY branch of the Mechanism for International Criminal Tribunals (MICT) commenced functioning, taking over the prerogatives of the ICTY over the enforcement of its sentences.⁶⁸ The MICT was initially founded on 22 December 2010 by Security Council Resolution 1966⁶⁹ as a “small, temporary and efficient structure” intended to carry out a number of essential functions of both ICTY and ICTR after the end of their mandates. It consists of two branches, the ICTY branch located in The Hague, the Netherlands, and the ICTR branch, located in Arusha, Tanzania. Currently, the ICTY branch supplements the jurisdiction of the ICTY in certain aspects (e.g. in taking over the appellate proceeding or retrials for some of the ICTY accused⁷⁰) while in the others, such as the enforcement of sentences,⁷¹ it holds the exclusive prerogatives.

The enforcement of international sentences is considered to be an indispensable part of the international criminal justice system, to the extent that certain commentators label it as the “backbone” of the system.⁷² Indeed, considering that the situation of detainees after conviction represents the embodiment of imposed sentences, it is understandable that the way in which convicted persons are treated has a huge impact not only on the general opinion about the legitimacy of the international criminal justice system, but in particular on those of the parties (or the stakeholders) involved

64 ICTY/UNICRI 2009, p. 151.

65 ICTY/UNICRI 2009, p. 151.

66 ICTY/UNICRI 2009, p. 151.

67 ICTY/UNICRI 2009, p. 151.

68 unmict.org/en/about [02/08/2016].

69 S/Res/1966 (22 December 2010).

70 unmict.org/en/about [02/08/2016].

71 Next to the enforcement of sentences, other continuing functions the MICT has taken over from the ICTY on 01 July 2013 include the protection of victims and witnesses, assistance to national jurisdictions as well as the preservation and management of the archives (unmict.org/en/about [02/08/2016]).

72 *Kress & Sluiter* 2002a, p. 1752.

in the conflict.⁷³ For the sake of argument, it should not be forgotten that apart from the discussions about the conformity of the trials of Nuremberg and Tokyo with such principles as the “*nullum crimen sine lege*”, some observers have based their overall assessment about Nuremberg and Tokyo precisely on the enforcement of sentences.⁷⁴ Therefore, the nature of the enforcement regime and its application in practice must form, complementary to the imposition of the sentences, part of a complete judgement about the legitimacy of the international criminal justice system.⁷⁵

Accordingly, this study will provide an in-depth analysis of the ICTY’s system for the enforcement of sentences and its application in practice. Before proceeding further, however, it is necessary to set the framework within which the sentencing practice of the ICTY in general – and the enforcement of its sentences in particular – should be analyzed. Essentially, this pertains to the relationship between the overarching (macro-)aims of international criminal justice and the (micro-)aims an individual penal process is supposed to achieve.

Setting the framework has a pragmatic value insofar as – by delineation of various stakeholders and interests on the macro-level – it accentuates the extraordinary nature and impact of international crimes the penal reaction should be wary of. Consequently, this mandates a penal reaction that would reaffirm trust in the rule of law among these stakeholders to the widest extent possible, thus reducing the possibility of a continuation or re-escalation of violence. Here, it is of particular relevance to understand that perpetrators and victims tend to be seen not solely as individuals but also as a symbolic link to the collective on behalf of which they either committed crimes or were targeted. How the penal proceedings are conducted, which facts and consequently the truth have been ascertained and, finally, what sort of punishment is fit to befall those guilty as well as how it is enforced will inevitably influence perceptions of received justice or injustice among all the collectives involved in the conflict. Based on the outcome, these perceptions can then either open the way for a reconciliatory dialogue – to serve maintenance of peace in the long term – or might be used as a justification for another cycle of violence.

Acknowledging wider implications of the international penal reaction does not, however, justify “scapegoating” the perpetrators. As *D’Ascoli* puts it, identifying the purposes of punishment exclusively with reference to the overarching objectives of the international criminal justice system poses a risk to extending the scope of punishment beyond the personal responsibility of the accused for the crimes committed⁷⁶ in order to meliorate distrust and to appease collective sentiments. Here, the concept of *Günther Jakobs*’ “Feindstrafrecht”, or the “enemy criminal law”, comes to mind

73 *Nemitz* 2006, p. 144.

74 *Kress & Sluiter* 2002a, p. 1753.

75 *Kress & Sluiter* 2002a, p. 1753.

76 *D’Ascoli* 2011, p. 297.

in particular. The enemy criminal law, as opposed to the citizen's criminal law ("Bürgerstrafrecht"), sees offenders as the actors whose behaviour suggests that they have durably deviated from the path of the law and that they can no longer provide a minimal (cognitive) guarantee of trust they will conduct themselves as law-abiding citizens.⁷⁷ This, then, can result in a penal reaction that sees the offender only as an abstract mean to fulfil overriding social goals⁷⁸ and as someone who is devoid of any rights that should have otherwise been guaranteed to him; not merely as a citizen, but as a human being. Examples of such measures may vary – from departures from stringent procedural safeguards which usually apply in criminal proceedings to the imposition of disproportionately harsh sentences⁷⁹ and their enforcement in grave and inhumane conditions. As such, the penal reaction becomes not a legitimate instrument of social control (tasked to protect rights of all its subjects, including the offenders), but is resorted to a mere retaliatory violence. Accordingly, *D'Ascoli* reasons that if it is opportune to take into account the overarching aims as the system of reference, it is then equally necessary to consider personal circumstances of the accused and of the case at hand as well as to formulate the actual penalty also in terms of the accused and of the micro-aims of individual penal proceedings – rather than solely with regard to the objectives of the whole system of international criminal justice.⁸⁰ Consequently, this mandates the international criminal justice with a delicate task of fine-tuning its normative framework, as well as its practice, in order to accordingly and legitimately achieve both micro- and macro-aims.

2.1 International Criminal Justice and its Overarching Aims

When discussing the success, or efficacy, of the ICTY, the answer depends on what the expectations were.⁸¹ These, in turn, are directly related to the aims or goals the international criminal justice, and the ICTY in particular, has been designed to achieve.⁸² As *Haveman* argues, goals steer the criminal justice system; they influence the magnitude of sentences as well as their execution.⁸³ Without them, the efficacy of a criminal approach cannot be assessed.⁸⁴ What the goals are or should be, however, depends on the nature of the system in question. Therefore, *Henham*

77 See *Ohana* 2011, p. 355; *Albrecht* 2006, p. 46; *Jakobs* 2000.

78 *Rotman* 1990, p. 2.

79 *Ohana* 2011, p. 356.

80 *D'Ascoli* 2011, p. 297.

81 *Eser* 2011, p. 108.

82 *Eser* 2011, p. 108.

83 *Haveman* 2006, p. 10.

84 *Haveman* 2006, p. 10.

stresses that it is vitally important to pin down exactly what we mean when using expressions such as “international criminal justice” (ICJ).⁸⁵

Some commentators identify the ICJ system with a body of international and national institutions (e.g. the UN *ad hoc* tribunals – ICTY and ICTR, the ICC, the various systems of national criminal justice) which are “expected to work jointly and often complementarily in order to achieve effectiveness and to maximize the opportunities of enforcing international criminal law”.⁸⁶ The others tentatively propose to talk about “international penalty” rather than ICJ.⁸⁷ In this way, the term “penalty” should be understood as referring not only to “international trial justice” *stricto sensu* but to a broader universe of ideas, norms, structures and processes through which the dominant ideology of punishment is promulgated.⁸⁸ Consequently, it is argued, referring to “penalty” should be helpful in advancing our understanding of the international context.

Despite the non-existence of a single international legislator⁸⁹ who would comprehensively determine contents, goals and the enforcement mechanism of ICJ (or international penalty), it is still possible to distinguish its operational framework, e.g. by studying which aims the international criminal tribunals were supposed to pursue according to their creators.⁹⁰ As delineated in its founding resolutions, the ICTY has been mandated with bringing to justice people responsible for atrocities committed during the post-Yugoslavian wars which, in turn, should contribute to the restoration and maintenance of peace between the conflicting parties. Being valid from both moral and humanitarian standpoints, these aims are nevertheless deemed to be too abstract, particularly in terms of how they ought to be achieved.⁹¹ While the general aim of “bringing to justice” logically refers to the sentencing practice of the ICTY, the Statute makes scant reference as to which principles should guide the practice when “bringing to justice” those responsible.⁹² Furthermore, it also gives no elaboration on how exactly the sentencing practice should contribute to the restoration and maintenance of peace.

85 *Henham* 2011, p. 235.

86 *D’Ascoli* 2011, p. 1.

87 *Henham* 2011, p. 235.

88 *Henham* 2011, p. 235.

89 *Swart* (2008, pp. 98–99) points to a basic difference between the UN *ad hoc* tribunals for Yugoslavia and Rwanda, which were founded on the basis of the UN Security Council resolutions that are binding for all UN member states, and the ICC, which has been created by a treaty to which a majority of states have become parties, but by no means all states.

90 *Swart* 2008, p. 99.

91 *Haveman* 2006, p. 149.

92 Next to Article 24 (1) on imprisonment as the only possible sentence, the only substantive guidance the Statute provides on sentencing is (1) a reference to the general practice regarding prison sentences in the courts of the former Yugoslavia to which the Trial Chamber shall have recourse, and (2) a notion that in imposing the sentences, the Trial Chamber should take into

Recourse to the wealth of judicial decisions imposed by the ICTY sheds more light on the underlying penal justifications of its sentencing practice; however, it also makes “confusion and obfuscation” on the part of ICTY judges more evident with regard to the possible scope and meaning of these justifications.⁹³ The aims pursued by the ICTY judges in their sentencing judgements are multifaceted, to say the least.⁹⁴ On the one hand, they encompass purposes attributed to punishment in any national justice system, namely, retribution, deterrence and rehabilitation. On the other hand, they are presented as more general principles, such as the fight against impunity, reaffirmation of the rule of law and collective reconciliation, or even as procedural maxims, namely, the establishment of truth. Despite a general recognition of retribution and deterrence by the judges of the ICTY as the two most prominent punishing rationales,⁹⁵ various other aims have been attributed seemingly equal importance in guiding the sentencing practice. For example, when discussing the “purposes and functions of penalty”, the ICTY judges have in the *Erdemović* Sentencing Judgement referred to the declarations of Member States of the Security Council, who at the time the ICTY was founded saw the Tribunal as “a powerful means for the *rule of law* to prevail, as well as to *deter* the parties to the conflict [...] from perpetuating further crimes [...]. Furthermore, the declarations [...] were marked by the idea of a penalty as proportionate *retribution* and *reprobation* by the international community [...]. The International Tribunal [...] restated those aims and added that the impunity of the guilty would only fuel the desire for vengeance [...], jeopardizing the return of the ‘*rule of law*’, ‘*reconciliation*’, and the *restoration of ‘true peace*’.”⁹⁶ Furthermore, even if resorting exclusively to the most prominent aims of retribution and deterrence, the relationship has often been unclear. For instance, through the years, the ICTY has issued judgements that cite retribution and deterrence as “equally important”, judgements that cite retribution as the “primary objective” and deterrence as a “further hope”, warning deterrence “should not be given undue prominence” and judgements that openly state “deterrence is probably the most important factor in the assessment of appropriate sentences.”⁹⁷ *D’Ascoli* effectively summarizes the issue when stating that despite the fact that some Trial Chambers recognized

account such factors as the gravity of the offence and the individual circumstances of the convicted person. Regarding the recourse to the sentencing practice in the former Yugoslavia, this provision has been repeatedly addressed by the judges of the Tribunal as being more of a guidance to the Trial Chambers, and thus not binding (*D’Ascoli* 2011, pp. 141–143).

93 *Henham* 2003, p. 69.

94 For the list of analyzed ICTY judgements, together with a detailed discussion on deduced purposes, see *D’Ascoli* 2011, pp. 135–140. Also see *Drumbl* 2007, pp. 60–63, and *Henham* 2003, pp. 68–70.

95 *D’Ascoli* 2011, p. 135; *Drumbl* 2007, p. 60; *Schabas* 2006, p. 555; *Henham* 2003, p. 69.

96 *The Prosecutor v. Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 58.

97 *Drumbl* 2007, pp. 60–61.

the duty to discern the underlying principles and rationales for punishment that respond to both the needs of the society of the former Yugoslavia and the international community, the adopted justifications of punishment remain abstract and vague.⁹⁸ They are usually only listed but not explained or discussed, and there seems to be no final systematization or coherent examination of the rationale of punishment in international adjudication which would bring forward an organic theory of the purposes of punishment for ICJ.⁹⁹

Notwithstanding this practical ambiguousness, the commentators have in recent years made a substantial effort to offer a more structured framework for the aims of ICJ, mostly systematizing them as proclaimed in the sentencing practice of international criminal tribunals.¹⁰⁰ The basic rationale on which the framework rests stems from the notion made by *Garland*, that is, that the phenomenon of punishment, whether at the national or international level, needs to be considered in the context of the social, political, historical and cultural background of a given legal system.¹⁰¹ This, in turn, demands a broader reflection on the role of the international community with regard to atrocities, the basis for collective action against international crimes as well as the relation between the penal reaction and the promotion and maintenance of peace.¹⁰²

International crimes violate fundamental values shared within the international community and expressed in various human rights instruments. While the notion of state sovereignty, as indicated in Article 2 (1) of the UN Charter, signifies the capacity of the state to make authoritative decisions with regard to the people and resources within its territory, it also entails the responsibility of the state to protect its citizens and their rights. This benchmark for state conduct, initially set in the Universal Declaration of Human Rights of 1948, was more firmly established by the two Covenants of 1966.¹⁰³ The instruments have inspired the enactment of human rights provisions in many national laws and international conventions and have led to the creation of long-term national infrastructures for the protection and promotion of human rights.¹⁰⁴ Subsequently, this has warranted the re-characterization of the concept of

98 *D'Ascoli* 2011, p. 140.

99 *D'Ascoli* 2011, p. 140.

100 See in detail *D'Ascoli* 2011, *Eser* 2011 and *Swart* 2008.

101 *Garland* 1990, as quoted in *D'Ascoli* 2011, p. 294.

102 *D'Ascoli* 2011, p. 294.

103 See in detail International Covenant on Civil and Political Rights (ICCPR), adopted and open for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 May 1976, in accordance with article 49. Also, International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and open for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

104 ICISS 2001, p. 14.

sovereignty, from the one of sovereignty solely as *control* to the one of sovereignty as *responsibility*, too.¹⁰⁵

Furthermore, while one state's sovereignty entails a corresponding obligation to respect every other state's sovereignty (the rule of non-intervention¹⁰⁶), the atrocities of World War II warranted the establishment of a "safeguard", embodied in Chapter VII of the UN Charter, which allows the UN Security Council to authorize acting against the explicit will of a state whenever its actions constitute a threat or breach of international peace and security or an act of aggression.¹⁰⁷ At the crux of this mechanism lies a humanitarian notion, an understanding that intervention from the international community (including military measures in extreme cases) is justified when major harm to civilians is occurring and the state in question is unable or unwilling to end the harm, or if it is the perpetrator itself.¹⁰⁸ The fact that in recent years, the UN Security Council has been increasingly prepared to act on this basis – as well as that there is a growing body of law supporting the notion of responsibility to protect human rights despite the explicit will of the state in question¹⁰⁹ – provides a strong validation for what is seen as an emerging guiding principle for international relations – the responsibility of the broad community of states to protect both their own citizens and those of other states.¹¹⁰

According to the International Commission on Intervention and State Sovereignty (ICISS), the "responsibility to protect" as assigned to the international community encompasses three facets, namely, "responsibility to prevent", "responsibility to react" and "responsibility to rebuild". These facets should be seen as neither independent nor conflicting but rather as mutually supportive. In particular, the ICISS argues that the "responsibility to react" represents a fair and legitimate basis for collective action by the international community – e.g. through sanctions, international prosecution, tribunals and courts etc. – against the commission of international crimes.¹¹¹

Rightfully, this line of reasoning also corresponds with the one given in the ICTY's founding resolutions where the Tribunal's sentencing practice – the "responsibility to react" – should contribute to the restoration and maintenance of peace, which in turn correlates with both the "responsibility to rebuild" and the "responsibility to prevent". Yet the sentencing practice, revolving around the punishment, is also multifaceted and its goals may have varied weight within different stages of sentencing

105 ICISS 2001, p. 13.

106 The UN Charter 1945, Article 2 (7).

107 The UN Charter 1945, Article 39.

108 ICISS 2001, p. 16.

109 See e.g. the Genocide Convention of 1948, the Geneva Conventions of 1949 and Additional Protocols on international humanitarian law, statutes of the UN ad hoc tribunals and the ICC.

110 ICISS 2001, pp. 15–16.

111 ICISS 2001, p. 29; see also *D'Ascoli* 2011, p. 296.

proceedings.¹¹² *Wilson* in particular argues that “no criminal sentence can be fully understood if we stop at the moment of sentencing”, consequently distinguishing the stages and purposes of imposing the sentence and enforcing (i.e. implementing) the sentence.¹¹³ The obfuscation appears when this set of varied micro-aims (which the punishment is supposed to fulfil through different stages of individual criminal proceedings) is “equalized” with or brought to the level of overarching macro-aims that correspond with the responsibility to prevent and rebuild (as has occasionally been done by the judges of the ICTY; see, for example, the *Erdemović* Sentencing Judgment above) – in other words, when the penal reaction becomes a purpose in itself.

Instead, punishment should carry an inherent consequentialist notion: it should serve another goal rather than being a goal in itself.¹¹⁴ As much as this notion relates to the individual being punished, in the context of ICJ, it also carries a wider consequentialist implication for the international community as well as for the societies affected by collective violence. In general, the legitimate penal reaction should contribute to the maintenance of international peace by deterring any potential perpetrator with, on the one hand, the very real threat of punishment and, on the other hand, with the reinforcement of norms. The latter claim is based on the concept of positive general prevention where the reinforcement of norms through punishment is seen as raising legal conscientiousness (subsequently diminishing chances that someone might resort to atrocities as a means to an end) and reaffirming the trust of the international community in the rule of law.¹¹⁵ This is also of relevance for the conflicting parties; in particular, the punishment should influence their moral attitudes towards positive transformation and reconciliation. This can only come with the satisfaction and trust that the rule of law is being upheld appropriately. As explained above, the gravity of violence experienced in international crimes lingers through generational cycles and has a tendency to feed collective memories of suffering and victimhood on the part of the societies involved in the conflict. If not addressed – or at least not appropriately addressed¹¹⁶ –, the violence and its legacy pose the risk of retriggering the conflict, which often means nothing more than that a new generation takes up the

112 *Eser* 2011, p. 115.

113 *Wilson* 2015, p. 745.

114 *Haveman* 2006, p. 147.

115 See here especially *Novoselec* 2009, p. 386.

116 Analyzing the challenges put forward for reconciliation after the conflict, *Albrecht* (2006, pp. 41–42) stresses the importance of understanding what kind of violence has taken place previously as this dictates the type of appropriate reaction and its long-term effects. For example, the approach of the South African Truth and Reconciliation Commission could be deemed successful in the long run in situations where most of the opponents were not actively involved in acts of violence. However, the task of reconciliation will be more difficult – perhaps spanning for several generations – if violence has been widespread and has affected large sections of the conflicting groups. In these situations, a legitimate penal condemnation of atrocities, next to other mechanisms of accountability, presents itself as an essential form of reaction to countering seeds of future conflicts and retaliatory violence (*Albrecht* 2006, p. 44).

arms and continues with the warfare (together with its imminent atrocities).¹¹⁷ In the long run, it is an endless cycle of collective violence and revenge which the legitimate penal reaction aims at breaking.¹¹⁸ Therefore, when discussing the punishment and the micro-aims it is supposed to fulfil at the level of individual proceedings, in the context of ICJ, they are considered to also pave the way for reconciliation and lasting peace.¹¹⁹ While it is acknowledged that each single case might not have the capacity to make a positive contribution to this ultimate ICJ objective, the individual proceedings should at least avoid detracting from that objective.¹²⁰

Distilling the discussion, the following points present the overarching aims of ICJ (macro-level) on which the commentators agree the most¹²¹ and to which individual penal proceedings (micro-level) ought to contribute (see *Figure 1*):

1. Maintenance of peace
 - a. General deterrence
 - b. Reconciliation
2. Fight against impunity

In particular, the fight against impunity (2.) amounts to a penal reaction to atrocities by imposing the punishment, on those accountable and enforcing it against them. This message of condemnation and disapproval, which simultaneously reinforces values protected by law, is aimed at contributing to (1.) the maintenance of international peace in two ways. First, as with regard to (1a.), the broader international community, it effectively shows the threat of punishment is real, therefore deterring, in general, any potential attempt to commit atrocities. The fact that the penal reaction at the same time reinstates the value of human rights within the international community and (re)creates a sense of trust in the rule of law also positively contributes to general deterrence. Second, and more specifically, the outreach of this reaction is focused on societies and groups among whom the atrocities have been committed. The legitimate punishment, coming as the result of a rule-of-law-based process that has ascertained the truth about the crime(s), perpetrator(s) and victim(s) (which also

117 *Von Trotha* 2003, p. 82.

118 *Futamura & Gow* 2014, p. 19.

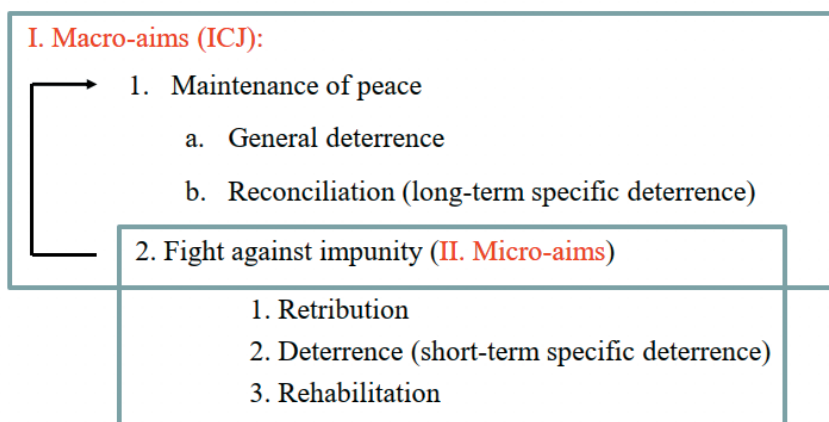
119 *Eser* 2011, p. 115.

120 *Eser* 2011, p. 115.

121 Both *D'Ascoli* (2011) and *Eser* (2011) refer to the listed goals as essentially the ultimate aims of international criminal justice. However, when delineating the macro-aims of the ICJ, *Eser* offers a more detailed list which comes as a structured form of the aims originally collected by *Schrag* (2004). Given that many of them can substantively be equated with each other (e.g., the enforcement of international law is also recognized in the fight against impunity) or that some of them serve as intermediary aims (e.g., satisfaction found by the victims should come as an outcome of the fight against impunity which, in turn, ought to positively affect reconciliatory efforts), the following list only refers to those aims that can be understood as having paramount significance.

holds a historical relevance, subsequently disabling the manipulation of the facts¹²²), is aimed at bringing a sense of justice to crime-torn communities – thus reinstating their trust and enhancing their satisfaction, consequently swaying away potential unrest and retaliatory tendencies that come along with the perpetration of crime (“canalizing revenge”¹²³). This then opens the way for (1b.) reconciliation, which is defined as “the act of causing two people or groups becoming friendly again after an argument or disagreement”.¹²⁴ It refers to the restoration of relationships between people, which in turn necessitates that (for at least a period of time) there had been meaningful relationships before. Reconciliation is therefore a precondition for the (long-term) maintenance of peace between former warring parties and a deterrence of atrocities.

Figure 1 Correlation between macro- and micro-aims in international criminal justice



Summarily, ICJ is nowadays considered to operate under the “no peace without justice” paradigm. It is of question then how justice contributes to peace and which qualities individual penal proceedings (and international punishment in particular) need to possess in order to be accepted as being legitimate. The following section will address these questions on the example of the ICTY’s sentencing practice. More

122 While the acknowledgment and reconstruction of facts serve as an essential part of penal proceedings – especially trial proceedings, for the purpose of discerning the accountability of perpetrators –, in the long run, this record should also serve as a legitimate historical reference point so as to disable manipulations of the facts and their utilization for a (re-)furtherance of dangerous purposes and ideologies (e.g. by propagating victim myths).

123 Haveman 2006, p. 147.

124 merriam-webster.com/dictionary/reconciliation [22/08/2016].

specifically, the analysis will concentrate on the issues that have been considered to negatively influence the perceptions of its legitimacy, especially among the communities affected by the post-Yugoslavian wars as well as among wider international audiences. Consequently, the analysis shows that the debate regarding the legitimacy of the ICTY's sentencing practice has so far mostly revolved around the imposition phase of sentences, whereas their enforcement has only been marginally addressed.

2.2 Achieving the Overarching Aims: The Issue of Legitimacy in the ICTY's Sentencing Practice

In its essence, punishment represents force, which can be understood as the most elementary form of power.¹²⁵ Any exertion of power through force carries the specific stigma of violence, which follows from the possible claim that it is based on despotism/tyranny and therefore presents itself as a wrong, which then may trigger violent retaliation from the subject upon whom it is imposed.¹²⁶ For punishment to compensate for this risk, to strip the stigma of violence off itself and to become a legitimate instrument of social control, it must be grounded in accepted, codified rules which are guided by valid purposes and principles.

This rationale is especially relevant for ICJ and individual penal proceedings of international criminal tribunals. In particular, the legitimacy of the ICTY has been contested on both pragmatic and theoretical bases even before the Tribunal actually became operational.¹²⁷ While the pragmatic concerns mostly came from the international community which challenged the feasibility of the Tribunal's mandate – especially with regard to obtaining cooperation and maintaining monetary costs¹²⁸ – theoretical contestations referred to the impact the Tribunal would have on the relations between the countries of the former Yugoslavia.

Political elites and accused persons coming from these countries challenged the foundational legitimacy of the ICTY, deeming it as a biased¹²⁹ political¹³⁰ organ,

125 *Popitz* 1992.

126 *Fromm* 1973.

127 *Kerr* 2014, p. 2.

128 *Kerr* 2014, p. 2.

129 This line of criticism is coming mainly from Serbia, due to most of those accused in front of the ICTY having been Serbs.

130 Initial doubts regarding the “politicization” of the ICTY were linked to the precedent decision of the Security Council to use its Chapter VII prerogatives in order to establish an international criminal tribunal with extensive judicial authority, as well as to a “surrounding suspicion that such a judicial body might be influenced or even interfered with by the parent political organ” (*Cassese* 2012, p. 495). According to *Cassese* (2012, pp. 459–496), these doubts were dispelled by focusing on two circumstances. First, the foundational legitimacy of the ICTY could be inferred from the fact that the UN General Assembly had implicitly approved the decision

tasked to carry on with roles and preferences its creators upheld before and during the conflict.¹³¹ In time, however, the Tribunal's foundational legitimacy became affirmed (at least to an extent) – also due to the almost immediately subsequent establishment of the ICTR,¹³² but mostly due to the rapid growth of its sentencing practice and the number of accused persons facing trial. This resonates with the argument that an institution can achieve or confirm legitimacy through its “performance legitimacy”, even if initially lacking some forms of it.¹³³ In the case of the ICTY (or any other international criminal tribunal), this would mean functioning as an impartial, independent and absolutely fair body that adheres to the fundamental principles of international justice¹³⁴ – namely, legitimate penal aims and legitimate ways to achieve them.

Notwithstanding the overarching aims of ICJ, the justifications for punishment which the judges of the ICTY have delineated through individual penal proceedings resonate with the traditional goals of criminal justice – namely, retribution, deterrence and rehabilitation. With regard to these micro-aims, the commentators note that their mere enumeration is not sufficient: if multiple purposes are available, there should also be adequate guidance on which ones sentencing decision-makers should choose amongst those goals, which in any case are not mutually exclusive.¹³⁵ This resonates with a modern concept of penalty based on human rights that denounces adherence to exclusively a single purpose of punishment, rather opting for what in German criminal justice system is known as the *Vereinigungstheorie*¹³⁶ – that is, a hybrid theory of punishment which combines retributivism with deterrence and rehabilitation. Subsequently, the concept also recognizes that, given the fact that the purposes may often conflict with each other, they will receive varying emphases at

of the UN Security Council to create the Tribunal by electing eleven of its judges. Second, the UN Security Council had laid down the ICTY's independence from any state or UN organ in its Statute. Furthermore, in its 1995 Interlocutory Decision in the *Tadić* case, the ICTY Appeals Chamber stated that the Tribunal had the judicial authority to review the legality of its own establishment, with the consequence that were it to decide that its creation was illegal (contrary to the UN Charter or to general principles of international law), it would have to conclude that the Tribunal should stop operating *ultra vires*.

- 131 This resonates with some of the imminent challenges the international tribunals are bound to face with regard to the acceptance of their mandate and practice. Namely, a significant and serious deficit in legitimacy stems from the circumstance that “they come from the outside”, are perceived “to take sides” (in particular when sorting out perpetrators; also due to the fact that they can process only a limited number of perpetrators) and that “they are part of the history of the conflict” (given that international organizations did either nothing or not enough to prevent large-scale violence and mass victimization in the first place) (*Albrecht* 2006, pp. 33–34).
- 132 An important legitimizing factor for the ICTR was that opposed to the countries of the former Yugoslavia, the establishment of the tribunal for Rwanda had been requested by the Rwandan government itself (*Cassese* 2012, p. 496).
- 133 *Cassese* 2012, p. 498.
- 134 *Cassese* 2012, p. 498.
- 135 *D'Ascoli* 2011, p. 297.
- 136 See in detail *Roxin* 1966, pp. 381–387.

the different levels of the criminal justice system: deterrence (general prevention) at the level of legislation; retribution at the level of imposition of sentence; and rehabilitation/resocialization/special prevention at the level of sentence enforcement.¹³⁷ As shown above, judges of the ICTY have also followed this line of reasoning to the extent that they have recognized retribution and deterrence as the two most prominent purposes the punishment is supposed to fulfil by its imposition in a criminal trial,¹³⁸ with a somewhat ambiguous reference to rehabilitation.¹³⁹

The determination of goals is important. However, how to materialize them becomes the subject of controversy¹⁴⁰ and is indeed the area where the “performance legitimacy” is evaluated the most. Accordingly, below is the list of purposes of punishment as indicated by the judges of the ICTY, followed by the estimation of the extent to which they can be considered to be legitimately achieved by the ICTY’s sentencing practice.

2.2.1 Retribution

In modern penal theory, the retributive purpose of punishment is exemplified by the “just deserts” concept where punishment expresses moral and social censure towards offenders, but where a careful calibration of retribution must guarantee that this censure is proportionate and therefore also limited by the seriousness of the offence.¹⁴¹ Punishment should by no means be conveyed as “revenge”, which is understood as disproportionate to the offence and therefore illegitimate.¹⁴²

In international sentencing, the retributive approach is justified by the consideration that the atrocious nature of international crimes requires the criminalized behaviour to be perceived as wrong, serious, blameworthy and necessarily implying punishment.¹⁴³ Public trials and imposed punishment assume a relevant social meaning that there can be no justification and no tolerance for grave violations of human rights.¹⁴⁴ In this sense, it is also an attempt to restore, albeit crudely, some equality between

137 *Van Zyl Smit & Snacken* 2009, pp. 75, 78. For a comprehensive summary of theories supporting this concept, i.e. “dialektische Vereinigungstheorie” (dialectical unification theory), “Stufentheorie” (step theory) or “Drei-Säulen-Theorie” (three pillars theory), see *Kaiser & Schöch* 2002, pp. 246–247.

138 See under *Chapter 2.1* above.

139 See in detail *Chapter 2.2.3*.

140 *Haveman* 2006, p. 149.

141 *Van Zyl Smit & Snacken* 2009, p. 73.

142 *Novoselec* 2009, p. 382.

143 *D’Ascoli* 2011, p. 298.

144 *D’Ascoli* 2011, p. 298.

offender and victim.¹⁴⁵ However, the legitimacy of the condemnation and its message depend on the proportionality of punishment to the seriousness of the offence and the responsibility of the offender.¹⁴⁶

The proportionality of the ICTY's punishments has long suffered criticism, coming from both the war-affected communities and the general public, but also being generated by a wide academic debate. Not only has the sentencing practice of the ICTY been considered fairly lenient as opposed to the magnitude of crimes and individual circumstances of offenders (also in comparison to punishments often pronounced by national courts for ordinary crimes) – the commentators have also maintained that it has been inconsistent and disproportionate.¹⁴⁷ More recent empirical enquires have aimed at evaluating these claims by resorting to quantitative empirical analyses of factors used by judges in sentencing, and while they note a certain degree of consistency,¹⁴⁸ the sentencing practice is generally considered to be flawed by discretionary decisions of judges and instances of inconsistencies, especially with regard to the application of aggravating and mitigating factors throughout the case law.¹⁴⁹

Part of the problem owns to a distinctive nature of international crimes, which are also forms of collective violence. While they are undoubtedly committed by individuals, they are also generally committed on behalf of a collective/community or “in the name of the state” (that is, the existing state or state-to-be), utilizing state or state-like institutions, as well as committed as part of a state or emerging state policy¹⁵⁰ based on polarizing rationales and narratives. This requires participation of some, if not all institutions of the state and necessitates their potential transformation and often also the development of institutions for this purpose.¹⁵¹ What emerges are complex and complicated relationships between perpetrators, victims and third parties, including a particular historical relationship.¹⁵² Consequently, discerning a degree

145 *Van Zyl Smit & Snacken* 2009, p. 81.

146 *Van Zyl Smit & Snacken* 2009, p. 81.

147 For summaries of debates, see, e.g., *D'Ascoli* 2011 and *Ohlin* 2008; see also *De Roca & Rassi* 2008, *Drumbl* 2007, *Drumbl* 2005 and *Olusanya* 2005.

148 The empirical analyses of the case law of both the ICTY and the ICTR, conducted by *Holá et al.* (2012) and *D'Ascoli* (2011), indicate that patterns of consistency have developed with regard to, e.g., convictions for genocide and more severe sentences, a higher rank of defendants and more severe sentences, the multiplicity of crimes and more severe sentences, as well as the type of perpetration and the length of sentences (for example, more severe sentences are associated with high-ranking perpetrators who were also “direct perpetrators”). In general, the sentences pronounced by the ICTR are considered more severe (lengthier) in comparison to those of the ICTY. This is deemed partly to depend on the fact that the majority of convictions imposed by the ICTR were for genocide and related acts, while the ICTY has prevalently imposed convictions for crimes against humanity and war crimes.

149 *D'Ascoli* 2011, p. 260.

150 *Balint* 2008, p. 313.

151 *Balint* 2008, p. 313.

152 *Balint* 2008, p. 313.

to which an individual perpetrator is criminally responsible for crime(s) that might involve a multiplicity of co-perpetrators (often reaching thousands) and are supported by the state becomes a very complex task that depends on a great variety of elements.¹⁵³

The other part of the problem is that the normative framework (in accordance with which the judges of the ICTY should impose punishments) does little to provide substantiated sentencing guidelines that would adequately address the complexity of international crimes.¹⁵⁴ While the Statute established a catalogue of offences over

153 In Article 6 of its Statute, establishing that “the International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute”, the ICTY has furthered the principle of *individual* criminal responsibility for international crimes, previously also set by the IMT (referring to the statement by *Telford Taylor*, public prosecutor at Nuremberg, that crimes are committed by individuals and not abstract identities, *Egbert* 1947).

Notwithstanding this postulate, *Drumbl* (2005, pp. 573–576) notes that the nature of crimes prompted some independent criminological developments in the jurisprudence of the international ad hoc tribunals for the penal reaction to acknowledge the collective dimension of these crimes. This is reflected in the extent to which they have appropriated theories of criminal responsibility that contemplate group dynamics, such as command responsibility. Similarly, the ICTY has favoured joint criminal enterprise and secondary liability theories such as aiding and abetting genocide. However, it has been observed that while this development points at the potential of international criminal law to become a full-grown discipline, the broad application of vicarious liability within the traditional framework of individual culpability has also proven to be increasingly controversial and often unsustainable, as also acknowledged by the ICTY (*Drumbl* 2005, p. 575). In practice, a number of reasons has tempted the Tribunal to a broad application of vicarious liability, including political pressures to obtain convictions, difficulties in establishing precise facts and evidentiary linkages, as well as the complex sequencing of administrative directives that order massacres (*Drumbl* 2005, pp. 574–575). The complexity of its application to real-life circumstances in which international crimes occur has also been addressed in an interview the author of this study conducted with a released ICTY prisoner who, while referring to the imposed sentence, stated: “*I accept it. But I don’t accept the way they [the ICTY] imposed it. According to the command responsibility principle – on the basis of which I was convicted –, anybody can be proclaimed responsible; up there [the ICTY], the principle is ‘either you knew, or you should have known’, but out in the war zone, it was something completely different, it was like in the Wild West... This is what I mean when I say there are no facts – and I am talking about my case now –, because there are things you simply cannot control! The things they [the ICTY judges] think they know, for example that we had an organized army – they are in denial! Whoever is familiar with the circumstances knows it was like in the Wild West down there... Do you think commands were obeyed? Do you think you could’ve locked somebody up after a month, two months, or a year that you found something had happened? It was impossible...*” (Interview with a released ICTY prisoner, 20/05/2014).

154 This has also been observed in the post-Yugoslavian national jurisdictions with regard to the adjudication of international crimes committed during the post-Yugoslavian wars. In particular, *Drumbl* (2007, pp. 99–110) observes that in terms of sentencing, many of the domestic reforms as well as judicial cases mirror the ICTY’s grant of considerable discretion to judges. This, for example, includes wide sentencing ranges for international crimes prescribed in national penal codes (although they have established sentencing minima and maxima, which is considered an improvement in terms of legal certainty over the ICTY’s legal framework; see in particular *D’Ascoli* 2011, pp. 96–109, for an affirmation of this improvement even in other national jurisdictions with regard to international crimes), the apparent lack of cogent rationales for sentencing extraordinary international criminals, the frequent imposition of sentences that go well

which the Tribunal has jurisdiction, there is no normatively established hierarchy between them, also in terms of minimal and maximal sentencing ranges, which would not only help distinguish international from ordinary crimes, but also the actual commensuration of punishment.¹⁵⁵ Instead, judges are left with a wide sentencing range which, in terms of years of imprisonment, can amount “up to and including the remainder of the convicted person’s life.”¹⁵⁶ This broad discretion the judges share is also affirmed by allowing them to take into account any aggravating or mitigating circumstances when determining the sentence¹⁵⁷ – however, without previously offering guidance on which circumstances are to be considered relevant, especially when it comes to the potential aggravation of a sentence. While a possibility for any circumstance to bring a reduction of the penalty is not considered problematic as far as the rights of the accused are concerned, any element which can potentially aggravate the sentence should in theory be explicitly indicated and specified so as not to violate those rights and the principle of legality.¹⁵⁸ In practice, the vagueness of Rule 101 has led to divergence in the way the ICTY’s Chambers interpreted certain factors or assigned their weight in the mitigation or aggravation of the final punishment.¹⁵⁹

below the statutory minima, as well as the absence of any or obfuscating reasons for an aggravation or mitigation of the sentence. With regard to the latter, it has been noted that ethnic bias on the side of judges often determines whether a circumstance should be attributed mitigating or aggravating value in individual cases (for example in Croatia, whereas service in the Croatian armed forces is a mitigating factor for a Croatian defendant, while service in the Yugoslav armed forces could be considered an aggravating factor for a Serbian defendant; *Drumbi* 2007, p. 109).

155 *D’Ascoli* 2011, p. 306.

156 Rule 101, ICTY Rules of Procedure and Evidence (IT/32/Rev.50, 8 July 2015), hereinafter: ICTY RPE. As of July 2016, among 77 persons convicted to determined sentences of imprisonment, more than half have been convicted to a term of less than 20 years. The lowest sentence imposed was two years (see *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, IT-01-47–A, Appeals Judgement, 22 April 2008). The mean term of imprisonment imposed by the ICTY is 15.5 years. This calculation does not include five convictions to life imprisonment (*Ljubiša Beara*, *Stanislav Galić*, *Milan Lukić*, *Vujadin Popović* and *Zdravko Tolimir*) nor the first-instance judgement of *Radovan Karadžić* (40 years) whose appellate proceedings are still to be completed at the time of writing.

157 ICTY RPE 101 (B).

158 *D’Ascoli* 2011, p. 189.

159 For example, divergence has been observed in the attribution of mitigating or aggravating value to individual circumstances such as “age”, “health of the accused” or “good character”. In particular, criticism has been voiced to a scant argumentation coming from the judges of the Tribunal on the criteria they apply when considering these circumstances to be either mitigating or aggravating (*D’Ascoli* 2011, p. 190). Similarly, their tendency to consider certain facts, e.g. the behaviour of the accused throughout the proceedings, as relevant without expressly identifying them as neutral, mitigating or aggravating has been reproved by commentators in terms of clarity and fairness (*D’Ascoli* 2011, p. 191). Furthermore, the commentators have expressed concern with regard to divided judicial opinions on what should actually constitute an aggravating or mitigating circumstance. For instance, in the *Delalić et al.* case, the Appeals Chamber also recognized the mitigating and aggravating value of factors such as conduct *during trial*

Another problem of the ICTY's sentencing practice concerns the use of guilty pleas. Generally, when a guilty plea was entered, it was considered a factor in the mitigation of a sentence.¹⁶⁰ However, in the Tribunal's practice, pleading guilty has also meant bargaining upon the charges pressed against the accused, in the sense that admitting to the commission of certain crimes often caused the Prosecutor to drop the charges for other crimes. As much as this can accelerate the proceedings and bring about the sentence faster, the risk at stake is that dropping the charges might be viewed as a recognition that those crimes did not take place.¹⁶¹ Not only does this affect the overall representation of the facts of the case, but the impression that many crimes of a particularly heinous nature are thus being ignored or forgotten resonates gravely with the victim community, especially since the final penalty fails to reflect the degree of harm they have actually suffered.¹⁶² In this sense, the *Plavšić* case is considered to be a notorious example of negotiated justice in international sentencing. *Biljana Plavšić*, a former Bosnian Serb leader, pleaded guilty to crimes against humanity (one count of persecution), after which the ICTY Prosecutor agreed to drop all the other charges (two counts of genocide and complicity in genocide, five other counts of crimes against humanity). No evidence was ever presented in relation to the dropped charges, nor was *Biljana Plavšić* ever asked to account for those facts in her guilty plea.¹⁶³

The pursuit of a retributivist purpose to which trial proceedings of the ICTY seem to strive is, as it seems, plagued by a variety of conundrums that ultimately undermine the legitimacy of punishments the ICTY judges impose. As much as this can ab initio be attributed to the complex nature of international crimes, the problem also seems to lie in the underdeveloped sentencing framework. What comes out as a consequence is a sentencing practice plagued by inconsistencies where imposed punishments give the impression to be "a little more than an afterthought"¹⁶⁴ of the sentencing judges, with a questionable adherence to fundamental principles of criminal

proceedings, while in the *Kunarac et al.* case, the Trial Chamber was adamant that only circumstances directly related to the commission of the offence charged and to the offender himself *when he committed the offence* may be considered in aggravation (*D'Ascoli* 2001, p. 192.). Additional criticism pertains to the Tribunal's practice of not distinguishing between circumstances that mitigate the personal responsibility of the accused (such as duress) and circumstances that do not affect the criminal responsibility but have an impact on the imposition of the final penalty (e.g. guilty plea, remorse and cooperation with the Prosecution) (*D'Ascoli* 2011, p. 193).

160 An exception can be found, for instance, in the *Jelisić* case (*The Prosecutor v. Goran Jelisić*, IT-95-10-T, Trial Judgment, 14 December 1999) where the Trial Chamber, although considering the guilty plea of the accused out of principle, pointed out that the accused had demonstrated no remorse in front of the judges for the crimes he had committed; therefore, it accorded only relative weight to his plea (para 127).

161 *D'Ascoli* 2011, p. 195.

162 *D'Ascoli* 2011, p. 195.

163 *D'Ascoli* 2011, p. 195.

164 *Sloane* 2006, p. 716.

law, i.e. the legality, individuality and proportionality of punishment. This, in turn, hampers the expressivist effect of the legitimate condemnation the imposed punishments should make, to the extent that their contribution to the overarching aims of ICJ can be considered quite dubious.

2.2.2 Deterrence

In modern penal theory, deterrence can be seen in terms of either general prevention (the prospect of punishment should deter a potential offender from committing a crime) or special prevention (already imposed punishment should positively contribute to the offender's desistance from re-offending).¹⁶⁵

When it comes to general prevention, the deterrent effect of punishment is mostly perceived on the basis of the Benthamite Model which sees the offender as a rationally thinking "homo economicus" who evaluates the advantages and disadvantages of a certain form of behaviour before committing an offence.¹⁶⁶ According to this reasoning, the harsher the punishment prescribed, the greater the likelihood that people will refrain from committing an offence.¹⁶⁷ In practice, however, research has indicated that it is the reiteration of the legal norm itself and the certainty and speed of the reaction which reduces offending rather than the prospect of a harsh punishment.¹⁶⁸

The analysis of the ICTY and its sentencing practice in the context of deterrence presented here is faced with difficulties, as deterrence is marked by the absence of an event (i.e. the atrocity), therefore making the success of the Tribunal's preventive function hard to measure.¹⁶⁹

Generally speaking, the problem of empirically measuring the deterrent effect of punishment is well-known in criminology. Most deterrence research originates from the United States, and it revolves around enquiries into the deterrent effect of the death penalty on murder rates. Econometric analyses that correlate executions and the murder rate in order to ascertain the ratio of lives saved per execution have been prevalent in this area ever since the 1950s. However, due to their largely inconsistent results – as well as fundamental methodological and theoretical problems they have been facing –, they are considered to provide no plausible evidence that the deterrent effect actually exists.¹⁷⁰ As stressed in the 2012 report of the National Academy of

165 *Van Zyl Smit & Snacken* 2009, p. 81.

166 *Van Zyl Smit & Snacken* 2009, pp. 81–82.

167 *Van Zyl Smit & Snacken* 2009, p. 82.

168 *Van Zyl Smit & Snacken* 2009, p. 82.

169 *D'Ascoli* 2011, p. 300.

170 For a comprehensive overview of econometric analyses on the deterrent effect of the death penalty in the United States, Canada and Japan, see in detail *Albrecht* 2014, pp. 29–44.

Sciences, “research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. [...] The committee was disappointed to reach the conclusion that research conducted in the 30 years since the earlier NRC report has not sufficiently advanced knowledge to allow a conclusion, however qualified, about the effect of the death penalty on homicide rates.”¹⁷¹ From this, then, it can be asserted that the perception of the deterrent effect of punishment rests mostly on belief,¹⁷² or at least on a general estimation.

Taking this into account, the following sub-sections provide an estimation of the effect the ICTY might have produced with regard to three different types of deterrence (see *Figure 1*), namely: *general deterrence*, *short-term specific deterrence* and *long-term specific deterrence*.

2.2.2.1 General deterrence

When discussing “general deterrence” as the overarching principle of ICJ, it can be estimated that the ICTY has made a positive contribution to it by sending a strong message to the international community that these types of crimes will no longer be tolerated and that the threat of punishment is real. The significance of this contribution is even more affirmed by the subsequent formation of the ICTR and the ICC, which have extended the threat of punishment for great violations of human rights beyond the post-Yugoslavian wars.

At the same time, it can be estimated that the sentencing practice of international criminal tribunals (and the ICTY in particular) also positively contributes to general deterrence by reaffirming the norms that have been violated. In effect, the reaffirmation of norms and values reinstates the trust of the international community into the rule of law and its preeminence over impunity. Simultaneously, trust will to a large extent also depend on the perceived legitimacy of the penal reaction.

2.2.2.2 Short-term specific deterrence

On the other hand, the continuation of various atrocious conflicts around the world well after the ICTY re-activated ICJ stands as a critique of the positive assessment above, perhaps even as a critique of the overall concept of deterrence. In particular, commentators have questioned to what extent it is plausible to consider a rational-based model of deterrence in situations of war, large-scale violence and collective pathologies where it is to be expected that the viability of the familiar cost-benefit calculus on which the Benthamite Model depends is gravely distorted.¹⁷³ The sustainability of this reasoning seems to be even more obvious if the general preventive

171 Nagin & Pepper 2012, p. 2.

172 Albrecht 2013, p. 39.

173 Sloane 2006, pp. 40–41.

effect of the ICTY is analyzed on the level of “specific deterrence”,¹⁷⁴ that is, exclusively within the territory of the former Yugoslavia. As observed by *D’Ascoli*, the first evaluation of the *short-term* specific deterrent effects the ICTY has had on the conflicting parties seems to be a negative one, especially if considering that the post-Yugoslavian conflicts lasted until 1999, a period during which the atrocities in Srebrenica happened in 1995 and ethnic cleansing against Kosovo Albanians occurred in 1998/1999, a good six years into the Tribunal’s operational mandate.¹⁷⁵

Not to overstate this criticism, the perceived absence of a deterrent effect which the Tribunal might have had in the short-term is probably also linked to its lack of initial credibility, international cooperation and political support.¹⁷⁶ As the cooperation and support grew, so did the Tribunal’s influence, and in this sense, it might be worthwhile to consider that, even hypothetically, the Tribunal might have actually had some kind of deterrent effect, especially with regard to the latter stages of the conflict. For example, *Sloane* stresses that even if generally swaying away the sustainability of the Benthanian Model of deterrence in instances of war and mass violence, it would be misguided to assimilate all war criminals and génocidaires to a single psychosocial profile.¹⁷⁷ Subsequently, he implies that based on the etiology of their criminality, different categories of perpetrators might be differently susceptible to a deterrent effect of the penal reaction.¹⁷⁸

With regard to rank-and-file perpetrators (e.g. members of armed groups who are often influenced by the authority to commit atrocities), findings from the research on obedience – especially from *Stanley Milgram’s* series of experiments¹⁷⁹ – are helpful for understanding the possible lack of deterrent effects the ICTY might have exerted on them. In the context of *Milgram’s* research, this can be analyzed in terms of the following dilemma: to commands of which authority – in the situation where at least two legitimate authorities simultaneously exert their influence by issuing contradictory commands – will a person yield? The setup can obviously be translated to a real-life situation where, on the one hand, an international criminal tribunal such as the ICTY issues a message/command to any potential perpetrator not to commit atrocities (otherwise they will be punished), while on the other hand, the state or an armed group commands the atrocities to be committed. Here, all referenced authorities can theoretically be considered as *legitimate*, which is a prerequisite for their commands to be accepted and obeyed without force (therefore being stripped of the stigma of

174 *Specific* deterrence is understood as a territory-/region-oriented form of general prevention (*D’Ascoli* 2011, p. 299) and as such differs from the *special* prevention which is aimed at a particular individual offender and associated with the penal concept of rehabilitation/resocialization (see the following sub-section; also see *Chapter 3*).

175 *D’Ascoli* 2011, p. 299.

176 *D’Ascoli* 2011, p. 300.

177 *Sloane* 2006, p. 42.

178 *Sloane* 2006, p. 42.

179 *Milgram* 1974.

despotism). With reference to *Weber*,¹⁸⁰ the legitimacy of authority can either be seen here as originating from an individual charisma (e.g. the head of an armed group) or from a rational-bureaucratic procedure for the delegation of authority (e.g. the ICTY or the head of the state). In more general terms, *Kelman* and *Hamilton* see the authority as being derived from the position of social actors within a social structure.¹⁸¹ This also coincides with *Milgram's* findings, where in the situation in which two legitimate authorities are issuing contradicting orders, the subject will try to discern who the *higher* authority is in order to decide upon the consequent course of action.¹⁸² However, further experiments have indicated that it is not so much the designation or rank of the authority that plays a role for the obedience but their “actual position within the structure of action in the situation.”¹⁸³ In other words, while the hierarchy is important, “how much over” is far less important than the visible presence of ranked ordering in a concrete situation.¹⁸⁴ Theoretically, the ICTY should have had an upper hand based on its position within the social structure, yet its deterrent effect has certainly been undermined by the invisibility of its authority (the trials are conducted far away from the scene of the crime¹⁸⁵) as well as its inability to exercise its authority in adequate ways (e.g. the lack of its own police force to quickly apprehend the suspects¹⁸⁶). As *Kelman* and *Hamilton* argue, for disobedience (i.e. to commit atrocities), the claim of conscience is probably the most effective weapon short of revolt as it offers a justification and not merely an excuse to disobey.¹⁸⁷ It renders disobedience acceptable, even praiseworthy, in the eyes of *at least some countervailing authority*.¹⁸⁸ However, without the actual or implied presence of such an authority, it is to be assumed that obedience is almost always the simplest and most prudent course of action.¹⁸⁹ More fundamentally, in the case of the ICTY,

180 *Weber* 1947, as referenced in *Kelman & Hamilton* 1989, p. 54. See also *Weber* 1968, *Chapter 3* in detail.

181 *Kelman & Hamilton* 1989, p. 55.

182 *Milgram* 1974, p. 107.

183 *Milgram* 1974, pp. 108, 112.

184 *Milgram* 1974, pp. 108, 112.

185 *Smeulers & Grünfeld* 2011, p. 472.

186 *Smeulers & Grünfeld* 2011, p. 472.

187 *Kelman & Hamilton* 1989, pp. 75–76.

188 *Kelman & Hamilton* 1989, p. 76.

189 *Kelman & Hamilton* 1989, p. 76. *Browning* (1992) analyzed a modification of this setup on the example of members of Reserve Police Battalion 101, a unit of the German Order Police who during the last years of World War II significantly contributed to the genocide over Jews in Poland. Before the massacre at the village of Józefów, the commander of the battalion, Major *Wilhelm Trapp* (whom the members had affectionately known as “Papa Trapp”) absolved from responsibility anybody who did not feel up to the task (p. 2). Furthermore, he reinforced the claim of conscience himself by evidently showing distress over the endeavour and challenging the orders of the higher authority (“Major Trapp [...] asked if I agreed with this. I looked him straight in the eye and said, ‘No, Herr Major!’”, p. 58). Unsettlingly, only a small number of people accepted the offer and disobeyed the orders. Rationalizing this behaviour, *Browning*

the legitimacy as a precondition for obedience has been largely diminished during the most intense years of the post-Yugoslavian wars, as already described above. On the other hand, it can be reasonably estimated that the legitimacy of more immediate authorities, such as military commanders and political elites, during that time had been growing in the eyes of their followers.¹⁹⁰

tentatively puts the pressures of conformity at the forefront (p. 175). According to their own narratives, many policemen responded to the pressures of conformity; as *Browning* notes, those who did not shoot risked isolation, rejection and ostracism – a very uncomfortable prospect for a tightly knit unit stationed among a hostile population so that the individual had virtually nowhere else to turn for support and social contact (p. 185). Second, there was concern that a refusal to shoot could be interpreted as a form of moral reproach of those who did shoot, risking again the hostility of one’s own members (p. 185). *Browning’s* analysis, while pointing at the complexities involved in each instance of obedience, evidently makes case for the adoption of a more nuanced, multifactorial approach to the explanation of atrocities. This approach is further explored in *Chapter 3* below.

- 190 *Fiske et al.* (2004) note that virtually anyone can be aggressive if sufficiently provoked, stressed, disgruntled or hot (p. 1482). The context of war and wide-spread violence certainly fits all these conditions. People tend to lose their frame of orientation due to uncertainty, fear and often a personal loss. By offering an alternative goal, purpose or direction that soothes these personal sentiments (or simply by being considered a person “who knows what to do”), individuals can acquire the status of a legitimate authority among followers – the latter then willing to instrumentalize the commands of authority to destructive purposes. In an interview conducted for the purpose of this study, an ICTY prisoner who formerly commanded an armed unit described these mechanisms through the narrative of his own experiences on the battlefield: “*Look, at the time, I didn’t have this, so to say, military experience you acquire at the academy; I learned things in the field, you understand? I was simply thrown into that war where you have to learn your way around... So you survive once, twice; when you make a mistake once, you won’t do it again; I had been wounded and everything, but I was coming out alive. People came to appreciate the one-year experience on the battlefield that I had at that point more than 30 years of life and education in military that somebody else might have had. The guys in my unit had a tremendous trust in me... Those are special friendships... If you are aware that a person is saving your life, that he is willing to put his head on the line for you, then that is something much stronger; that stays eternally... So then, here comes this young guy, 23–24 years old, whose whole family had been wiped out in a previous attack. He comes to me and says: ‘Bro’, I cannot go like this, they left us, they sold us, my whole family was killed, and nobody moved a finger, please, let me come with you.’ ... And I took him. I got to talk to him the following days, and you know what he told me on one occasion? He told me: ‘Man, I live just to see a single *balija*...’ [a derogatory term for Bosnian Muslims; see also *Elias-Bursać* 2015, p. 145] And I told him: ‘Son, leave it be, as with regard to that, you will see 300 of them if needed, but never go in with these feelings, they will get you killed and I care that you come back alive’” (Interview with ICTY prisoner B in Germany, 02/03/2016). The narrative illustrates how in a chaotic situation, the authority becomes both affirmed and perceived as legitimate; even more so if it provides an orienting framework for personal sentiments. Continuing his story, the ICTY prisoner then also suggested how this can be destructively utilized through obedience: “... give me, let’s say, 20 young fellows, 17–18 years old, and give me enough resources, or whatever I might need, and I guarantee you that I will make them – no, not make them, they will go willingly [emphasis added] – after a year they will take the explosive, put it on themselves, go somewhere and they will blow up... I will be able to brainwash them and they will believe it... The essence of every war, at least that’s my opinion, is the fear of ‘the other’” (Interview with ICTY prisoner B in Germany, 02/03/2016).*

With regard to the elites responsible for large-scale and systematic international crimes, *Sloane* states that they can often be described as “conflict entrepreneurs”, manipulating values and tools of state power in order to amass their own social, economic or political power.¹⁹¹ As such, he continues, they also calculate and weight the costs and benefits of their actions, and in that sense, while they may be intuitively seen as more blameworthy than the rank-and-file perpetrators, they are also seen to be more susceptible to external incentives – consequently, perhaps, more deterrable.¹⁹²

Indeed, to predict under which conditions states (or their political elites) are more or less likely to cooperate with international regimes (especially those concerned with so-called “high politics” issues, i.e. security and human rights) has for a long time been a subject of debate among policy-makers, international relations scholars as well as international legal scholars.¹⁹³ While noting here the merits of the “traditional” adherence theories,¹⁹⁴ *Kreps & Arend* are nevertheless critical of their incompleteness, especially in terms of not being able to “explain variances in state adherence behaviour within the same treaty, or why the same state will adhere differently across different treaties”.¹⁹⁵ In return, they argue, a more textured explanation of state behaviour can be reached through what they call a “positional theory of adherence”.¹⁹⁶

A positional theory hypothesizes that adherence behaviour can be understood by examining the position of a state (vis-à-vis other states) within the global or regional system as it relates to certain factors: the nature of the regime (“high” or “low” politics), the degree to which it infringes on sovereignty, its verification/enforcement arrangements and its normativity.¹⁹⁷ With regard to deterrence from international crimes, the problem can be set in terms of how the international criminal justice regime can ensure the highest possible adherence from those states (or different groups within the same state) that are in an adversarial relationship¹⁹⁸ and among which a high risk of wide-spread violence exists. According to the positional theory, developing an adherence pull with regard to adversarial states is the most difficult challenge as these states are often bound by the security dilemma to be convinced of any

191 *Sloane* 2006, p. 42.

192 *Sloane* 2006, p. 42.

193 For a detailed overview of traditional theories that explain the adherence of a state to a treaty regime, see *Kreps & Arend* 2006, pp. 333–345.

194 The analyzed theories include *structural realism, modified structuralism, hegemonic stability theory, neoliberal institutionalism* and *constructivism*.

195 *Kreps & Arend* 2006, p. 404.

196 *Kreps & Arend* 2006, p. 413.

197 *Kreps & Arend* 2006, p. 413.

198 The theory predicts four roles a state can occupy within the international or regional system: *a hegemon, a partner, a competitor* and *an adversary*.

benefits of cooperation.¹⁹⁹ Perceived fairness of the regime, in conjunction with distrust towards the adversary, plays a huge role for adherence.²⁰⁰ Despite a possible acceptance of the cause for which the treaty stands, the adversarial states are often far too sceptical towards the transparency of other states' behaviour and towards the enforcement regime in general so as to be willing to infringe their sovereignty and ability to defend themselves by closely adhering to the regime.²⁰¹ For example, next to the high normativity²⁰² the Geneva Conventions and the Genocide Convention share, it can be assumed that because of their very lenient enforcement regime, a large number of states actually have become members to the treaties. The universality principle established by the Geneva Conventions²⁰³ obliges the state parties to actively seek, apprehend and prosecute perpetrators of international crimes, regardless of their nationality and the territory in which they committed the crimes; yet in practice, only a few states have done so as the process is both cumbersome and time-consuming.²⁰⁴ Given that states (especially those where a "criminal" regime is still in power) are not very eager to prosecute crimes committed by their own nationals on behalf of the government,²⁰⁵ the regime's enforcement system has little impact on state sovereignty, subsequently resulting in a strong "formal" but also in a very weak "practical" adherence. Similarly, while the Genocide Convention requires state parties to enact necessary legislation to provide effective penalties for genocide as well as to prevent genocide and punish those guilty of the crime,²⁰⁶ practice has shown quite a reluctance – especially on the side of third-party states – to qualify a situation as genocide. Terrible stigma that comes with the crime, disrupted internal and foreign relations as well as moral and legal obligations to prosecute perpetrators have prompted the international community to approach each potential genocide with caution, by avoiding the "notorious" label whenever possible.²⁰⁷ In order to

199 *Kreps & Arend* 2006, pp. 411–412.

200 *Kreps & Arend* 2006, p. 412.

201 *Kreps & Arend* 2006, pp. 412, 408.

202 The "normativity" of the regime can be explained as "consensus among states and other relevant actors about the value of the regime" (*Kreps & Arend* 2006, p. 348).

203 See in detail Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) of 12 August 1949, Article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) of 12 August 1949, Article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) of 12 August 1949 and Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) of 12 August 1949.

204 *Smeulers & Grünfeld* 2011, pp. 44, 476–477.

205 *Smeulers & Grünfeld* 2011, p. 44.

206 See Articles 5 and 1 of the Convention on the Prevention and Punishment of the Crime of Genocide of 09 December 1948 (Genocide Convention).

207 *Smeulers & Grünfeld* 2011, p. 164.

partly appease sentiments, states have often resorted to qualifying the crimes as “genocidal acts” rather than genocide, which, however, does not trigger any international legal obligation to try to stop the violence.²⁰⁸

Similar adherence dynamics could be observed in the wake of the post-Yugoslavian wars. Here, it is also worthwhile to observe how the change of a state’s position affects the adherence to the regime. Decentralization that came with the Yugoslav constitution of 1974 reduced Serbia’s role of the political-administrative *hegemon* in Tito’s Yugoslavia to being a *competitor* with the other member states. However, the attempts by *Slobodan Milošević*²⁰⁹ to restore Serbia’s control over Kosovo and Vojvodina as well as leadership over recentralized Yugoslavia in the period 1987–1990 were still occurring under the mutually accepted umbrella of Yugoslavia’s unity, internal and external borders, and the shared statehood of Serbs and other Yugoslavs altogether.²¹⁰ Regarding the adherence to the Geneva Conventions as well as the Genocide Convention in this context, the situation resonates with postulates of the positional theory, where competitor states are seen as being able to overcome their fear of anarchy, but only under the condition that other states – primarily their competitor, but basically all the states – are subject to the same constraints of the treaty.²¹¹ When the states break these constraints (or give an indication of an intent to break them), then the relationship shifts to the *adversarial*, where the states are less inclined to adhere to the provisions of regimes that touch on issues relating to rivalry.²¹² As *Hoare* notes, it was only in January 1990 with the defeat at the 14th Extraordinary Congress of the SKJ (League of Communists of Yugoslavia), followed by the electoral victories of that year’s spring of the non-Communist opposition in Slovenia and Croatia (boasting an exclusionary nationalistic rhetoric²¹³) that

208 *Smeulers & Grünfeld* 2011, p. 164. A quite ambiguous adherence to the aforementioned treaties is also illustrated in a study by *Harff* (2003, pp. 57–73). *Harff* strived to provide a risk-assessment model for the emergence of genocide and politicide. In doing so, she analyzed instances of genocide and politicide that had occurred since 1955. While the Genocide Convention does not encompass the destruction of *political* groups, mass killings of politically defined victims were also analyzed as they show similarities in their causes, organization and motives with genocide (*Harff* 2003, p. 58). The sheer number of analyzed cases, including nine instances of genocide and 31 instances of politicide that had occurred until 1990, indeed speak little of the enforcement power of the treaties.

209 The President of Serbia through its many state iterations from the 1980s to 2000, when he was overthrown and in 2001 extradited to The Hague to stand trial at the ICTY.

210 *Hoare* 2014, pp. 523–524.

211 *Kreps & Arend* 2006, p. 408.

212 *Kreps & Arend* 2006, p. 408.

213 *Glenny* (1996) describes the highly exclusionary nature of the nationalistic policy propagated by the HDZ (Croatian Democratic Union), the winning party in Croatia at the time. For example, the replacement of Serb nationals with Croats in the state administration, the replacement of bilingual signs in Latin and Cyrillic only with the Latin ones as well as President *Tudman*’s obsession with control over the Serb-dominated Krajina had led to deep feelings of insecurity and fear among Serb people in Croatia, revoking the memories of Serb persecutions by the

Milošević's regime shifted its goals from support for a centralized Yugoslavia to support for a de facto enlarged ('Greater') Serbia as being exclusively a Serb state.²¹⁴

According to *Kreps & Arend*, a way to build confidence in adversarial states is then to create a more robust transparency, verification and enforcement regime.²¹⁵ This should serve the fairness principle and mitigate the security dilemma of adversarial states,²¹⁶ consequently resulting in a higher degree of adherence.

The reinvigorated ICJ regime that came with the activation of the ICTY in 1993 improved in terms of enforcement, where the prosecution of international criminals became a much more focused effort of the international community, rather than being left to political dispositions of individual states. Around the time the wars ended, many key political figures from the region became indicted by the ICTY's Office of the Prosecutor (OTP).²¹⁷ Admittedly, these efforts were developing alongside other forms of international intervention in the region, including the NATO bombings of Serbia and Kosovo in 1999,²¹⁸ which arguably had a more concrete impact on the ceasefire and the deterrence of further atrocities. Therefore, the question of a sole deterrent impact the ICTY might have had on the political elites is open for discussion; however, if tested against the postulates of the positional theory, a tentative positive estimation might be warranted. Similar to the rank-and-file perpetrators above, it is the speed of reaction and the ability to effectively enforce authority what

Ustashas, the Croat fascists, merely 50 years before (pp. 13–14). These feelings were then conveniently mobilized in support of *Milošević's* nationalistic policy.

214 *Hoare* 2014, pp. 523–524.

215 *Kreps & Arend* 2006, p. 412.

216 *Kreps & Arend* 2006, p. 412.

217 For example, initial indictments for *Ratko Mladić* and *Radovan Karadžić* date 25 July 1995 (ICTY Case Information Sheet: *Ratko Mladić*, IT-09–92, p. 1, icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf [03/09/2019]; *Radovan Karadžić*, IT-95–5/18, p. 1, icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf [03/09/2019]), for *Slobodan Milošević* 24 May 1999 (ICTY Case Information Sheet: *Slobodan Milošević*, IT-02–54, p. 3, icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf [03/09/2019]), for *Momčilo Krajišnik* 25 February 2000 (ICTY Case Information Sheet: *Momčilo Krajišnik*, IT-00–39, p. 1, icty.org/x/cases/krajisnik/cis/en/cis_krajisnik_en.pdf [03/09/2019]) and for *Biljana Plavšić* 7 April 2000 (ICTY Case Information Sheet: *Biljana Plavšić*, IT-00–39 & 40/1, p. 1, icty.org/x/cases/plavsic/cis/en/cis_plavsic_en.pdf [03/09/2019]). Due to the ICTY RPE that only allow for those indictments that are confirmed by judges to be publicly available, details on those indictments that might have been prepared but never submitted to judges remain clandestine (*Bachmann & Fatić* 2015, p. 130). As far as public records reveal, the ICTY never considered indicting Bosnian President *Alija Izetbegović* or Croatian President *Franjo Tuđman* (*Bachmann & Fatić* 2015, p. 131). This, however, was partly refuted by the ICTY, claiming that *Izetbegović* was indeed under war crimes investigation, which ended with his death in 2003 (news.bbc.co.uk/2/hi/europe/3203323.stm [25/01/2017]). Similarly, in 2002, the ICTY Prosecutor at the time, *Carla Del Ponte*, told Bosnian newspaper *Dani* in an interview that she would have indicted *Tuđman* for a JCE had he not died in 1999 (*Bachmann & Fatić* 2015, p. 131). *Tuđman's* involvement in a JCE was later confirmed in the first-instance judgement in *Prlić et al.* on 29 May 2013 (icty.org/sid/11324 [25/01/2017]).

218 *Smeulers & Grünfeld* 2011, p. 443.

carries the leverage. Also, the higher the transparency, verification and fairness of the regime, the closer (and faster) the adherence that is to be expected. As noted above, the ICTY has so far faced considerable challenges with regard to these factors; furthermore, their fulfilment – or lack thereof – holds great relevance for the acceptance of its sentencing practice as legitimate. Consequently, the impact of its legacy on any reconciliatory efforts in the region can also be expected to be valued according to these factors.

Summarizing the above arguments, it is most likely that the practical difficulty of “demonstrating something through the absence of something” deems to leave the question of the ICTY’s deterrent effect unanswered.²¹⁹ According to the commentators, if the value of an international court is to be seen only in its deterrent power, then expectations are likely to be unfulfilled.²²⁰ Instead, if deterrence is seen as only one of the purposes of international trials – to be pursued in conjunction with retribution –, then the chances of a positive evaluation are higher.²²¹ In turn, a retributive penal reaction – only if legitimately conducted and perceived as such – can be expected to have a significant deterrent effect.

2.2.2.3 Long-term specific deterrence

Where a general preventive effect, however, might be monitored, is the level of *long-term* specific deterrence in the territory of the former Yugoslavia. This pertains to the above-mentioned necessity of the ICTY’s (or, for that matter, any other international tribunal’s) individual penal proceedings, together with their legacy, to contribute in the long run to the overarching aims of reconciliation and maintenance of peace between the societies formerly engulfed in violent conflict. Recent reports from the region, however, indicate that so far, trials for international crimes have not indicated a visible process of reconciliation among ethnic groups who still bear grudges about the wars of the 1990s.²²² It has been argued that the current situation can at best be described as one of peaceful coexistence, but this has been seen as resulting less from the ICTY’s work than from the practical demands of everyday life and simple pragmatism where people generally accept – even begrudgingly – that they have to live together.²²³ Granted, reconciliatory efforts have also been undermined by the irresponsible behaviour of political establishments and media outlets who often downplay the importance of judgements, either by ignoring them or by playing a populist card and going along with the sentiments of the crowd, which

219 *D’Ascoli* 2011, p. 300.

220 *D’Ascoli* 2011, p. 300.

221 *D’Ascoli* 2011, p. 300.

222 *Pajić* 2014, p. 231.

223 *Clark* 2014, p. 205.

usually means response with cynicism, hate speech and calls for reprisals.²²⁴ A regret has been expressed towards the ICTY's outreach programme²²⁵ which is perceived to come – at least initially – too late and in too small a scope to overcome the negative views of the Tribunal as perpetuated by the local media and politicians.²²⁶

Despite this, part of the burden in achieving a desired impact certainly befalls the sentencing practice itself. In particular, victim communities have expressed their frustration with the way trials are being conducted and have claimed that their expectations of getting satisfaction for their sufferings are not met or even considered in (what are for them) incomprehensible court procedures.²²⁷ Furthermore, in evaluating the trials and their outcome, they inevitably (and understandably) resort to comparisons with their own situations and positions in society. In contrast to the accused – for whom all the governments from the region of the former Yugoslavia at a certain point have established special funds to monetarily assist them through their proceedings –, victims and their families do not enjoy any form of institutionalized government support.²²⁸ Instead, they have to rely on self-help and humanitarian programmes occasionally put together by a few NGOs that often struggle with a lack of funds themselves.²²⁹ This is then evaluated against the position of the ICTY's detainees in the UNDU who, according to the victims, enjoy comfortable living conditions, often combined with temporary release and home stay until the commencement of the trial or during a Tribunal recess.²³⁰ Furthermore, a distrust towards the ICTY is propelled by trials and tribulations of penal proceedings, such as the controversial use of plea bargaining²³¹ (see *Chapter 1.2.1* above), as well as the length of imposed sentences which are generally perceived as being too lenient.²³²

Eventually, time will show to what extent the ICTY has had an impact on reconciliation in the region of the former Yugoslavia and whether its legacy can deter a re-triggering of grievances and violence. Given the number of issues the sentencing practice of the ICTY has so far encountered, it seems reasonable to consider the proposition by *Ewald* that

224 *Pajić* 2014, p. 231.

225 The first phase of the ICTY's outreach programme revolved around organizing a series of conferences, round tables and seminars in countries of the former Yugoslavia (the largest having been held in Bosnia and Herzegovina in 2004 and 2005) in order to bridge a gap between the ICTY and its work and local communities (*Kerr* 2014, p. 5). More recently, the programme has been aiming at engaging young people through seminars at universities and high schools in the region (*Kerr* 2014, p. 5).

226 *Kerr* 2014, p. 6.

227 *Pajić* 2014, pp. 231–232.

228 *Pajić* 2014, p. 231.

229 *Pajić* 2014, p. 232.

230 *Pajić* 2014, p. 232.

231 *Clark* 2014, p. 65.

232 *Clark* 2014, p. 63.

when, after [...] years following the creation of the ICTY, peaceful life is not possible in the former Yugoslavia without a forceful engagement of the international community, in particular the European Community, and hatred among the different ethnic communities and former conflict parties, as insiders and experts say, is an everyday phenomenon, there is enough reason to challenge existing approaches and to ask for innovative new answers on where to move with global security and international criminal justice as a substantial part of it.²³³

To that extent, it should be noted that research into the perceptions of delivered justice among the people in the region of the former Yugoslavia indicates that there is scarcely any reference as to how the imposed punishments are actually enforced.²³⁴ As previously highlighted, the way convicted persons are treated during the time of their imprisonment holds a tremendous importance for the legitimacy of any criminal justice system; therefore, seemingly lack of concern for this stage of proceedings comes as surprising. This might be due to at least two reasons. First, as opposed to the trials (which are public), information on the enforcement of the sentences is mostly confidential. When it becomes publicly available, it is usually well after trial proceedings ended, so it can be expected that the interest by the general public has subdued. Content-wise, information is mostly basic, e.g. a statement declaring to which country the convict had been sent. The reasons for this will be further explored in the subsequent chapters; nevertheless, one of the outcomes is that – similar to the failed effect of the outreach programme with regard to the trial proceedings – the general public is either misinformed or not informed at all. This leads to the second reason. In particular, *Clark* has shown in her study that when complaining that the ICTY sentences are low, people from the region often speak in general terms, and if they do cite particular cases, they tend to be focused on the lowest sentences.²³⁵ Consequently, given that proceedings often take years to complete, for those sentenced to lower sentences, it is likely that their time spent in detention on remand amounts to the full term of the sentence, after which they are released from the UNDU.

It is therefore understandable that the common public often identifies conditions and treatment which the accused have had during their remand detention in UNDU with the conditions and treatment of imprisonment as punishment.²³⁶ Accordingly, many

233 *Ewald* 2010, p. 402.

234 In the interviews *Clark* conducted, the enforcement of sentences was mentioned only in the context of frustration, expressed by the interviewees either by the fact that in general, convicted war criminals should at some point be released from prison, or that they are being released prior to serving the full term of their sentence (see e.g. *Clark* 2014, pp. 63, 134).

235 *Clark* 2014, p. 63.

236 Terminological obfuscation also tends to appear in academic literature. For example, while providing a comprehensive study on the legal position of persons detained at remand facilities of international criminal tribunals, *Abels* (2012) initially refers to them as “prisoners” of the international community, instead of detainees.

come to assume that those sentenced to longer terms of imprisonment will serve their sentences in UNDU, too.²³⁷

An initial step towards clearing this confusion is to preliminarily assess the extent to which the ICTY has attached importance to rehabilitation in its sentencing practice. According to the postulates of the modern penal theory, rehabilitation is the purpose usually attached to the phase of sentence enforcement, yet the judges of the ICTY have also referred to it in the context of trial proceedings.

2.2.3 Rehabilitation

According to penal theory, rehabilitation refers to the objective of enhancing the ability of offenders to function normally in civil society.²³⁸ Given that the majority of prisoners are eventually released into society, the prison system should help them reduce recidivism (special prevention) after release from prison.²³⁹ This stands as the basic distinction between the imposition and the enforcement of prison sentences. Even though courts may take the future of the offender into consideration when choosing between different penalties, the imposition of the sentence is mainly directed towards addressing the past and the offence that has taken place, while the enforcement of the prison sentence is oriented towards the future.²⁴⁰

Despite different historical approaches to the enforcement of prison sentences,²⁴¹ rehabilitation is nowadays recognized as the essential aim of any penitentiary system; subsequently, it also stands for a positive obligation of the state towards prisoners.²⁴² If they are to function normally in society upon release, the prison system should provide opportunities for them not only to better themselves in various ways, but also to partake in activities that limit the detrimental effects of the prison itself.²⁴³ First of all, this should encompass a normalization of the prison regime and the implementation of the fundamental rights of prisoners.²⁴⁴

237 The author's own experience testifies to this. In a discussion on the enforcement of the ICTY's sentences during the "Crime Prevention through Criminal Law & Security Studies: 2014 – A Year of Critical Issues and Challenges for International Criminal Justice" conference in Dubrovnik, Croatia, 24–28 March 2014, many participants coming from the region of the former Yugoslavia expressed their surprise upon learning that persons convicted by the ICTY are not supposed to serve their sentences in the UNDU but should be transferred to prisons in other countries.

238 *Van Zyl Smit & Snacken* 2009, p. 83.

239 *Van Zyl Smit & Snacken* 2009, p. 83.

240 *Van Zyl Smit & Snacken* 2009, p. 79.

241 See *Chapter 3.1.1*.

242 See in particular ICCPR, Article 10(3): "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

243 *Van Zyl Smit & Snacken* 2009, p. 84.

244 *Van Zyl Smit & Snacken* 2009, p. 84.

With regard to the sentencing practice of the ICTY, the approach the judges took towards rehabilitation is ambiguous, to say the least. Certain judgements acknowledge rehabilitation as an important purpose of punishment,²⁴⁵ while the other ones recognize it as a purpose to which an undue weight or significance should not be given.²⁴⁶

It is of importance here to understand how the judges interpret rehabilitation as the purpose of punishment.

Contrary to the penal theory, many judgements seem to detach rehabilitation from special prevention or, rather, see the latter solely as an outcome of the expressive feature of punishment. According to the judicial discourse, a sentence imposed by the Tribunal should “influence the legal awareness of the accused”²⁴⁷ in order to dissuade him/her from repeating the offences in the future.²⁴⁸ In other words, the

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- 245 *Prosecutor v. Ivica Rajić a.k.a. Ivo Andrić* (IT-95-12-S), Sentencing J., 8 May 2006, para. 71; *Prosecutor v. Vidoje Blagojević & Dragan Jokić* (IT-02-60-T), Judgement, 17 January 2005, para. 824; *Prosecutor v. Radoslav Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 1192; *Prosecutor v. Milan Babić* (IT-03-72-S), Sentencing J., 29 June 2004, paras 43, 46; *Prosecutor v. Darko Mrđa* (IT-02-59-S), Sentencing J., 31 March 2004, para. 18; *Prosecutor v. Miodrag Jokić* (IT-01-42/1-S), Sentencing J., 18 March 2004, para. 35; *Prosecutor v. Ranko Češić* (IT-95-10/1-S), Sentencing J., 11 March 2004, para. 27; *Prosecutor v. Dragan Obrenović* (IT-02-60/2-S), Sentencing J., 10 December 2003, para. 53; *Prosecutor v. Stanislav Galić* (IT-98-29-T), Judgement and Opinion, 5 December 2003, para. 757; *Prosecutor v. Momir Nikolić* (IT-02-60/1-S), Sentencing J., 2 December 2003, para. 85; *Prosecutor v. Kupreškić et al.* (IT-95-16-T), Judgement, 14 January 2000, para. 849; *Prosecutor v. Mucić et al.* (IT-96-21-T), Judgement, 16 November 1998, para. 1230; *Prosecutor v. Anto Furundžija* (IT-95-17/1-T), Judgement, 10 December 1998, para. 291.
- 246 *Prosecutor v. Popović et al.* (IT-05-88-A), Appellate J., 30 January 2015, para. 1966; *Prosecutor v. Zdravko Tolimir* (IT-05-88/2-T), Judgement, 12 December 2012, para. 1211; *Prosecutor v. Šainović et al.* (IT-05-87-T), Judgement, 26 February 2009, para. 1146; *Prosecutor v. Rasim Delić* (IT-04-83-T), Judgement, 15 September 2008, para. 559; *Prosecutor v. Haradinaj et al.* (IT-04-84-T), Judgement, 3 April 2008, para. 488; *Prosecutor v. Milan Martić* (IT-95-11-T), Judgement, 12 June 2007, para. 484; *Prosecutor v. Dragomir Milošević* (IT-98-29/1-T), Judgement, 12 December 2007, para. 987; *Prosecutor v. Dragan Zelenović* (IT-96-23/2-S), Sentencing J., 4 April 2007, para. 35; *Prosecutor v. Momčilo Krajišnik* (IT-00-39-T), Judgement, 27 September 2006, para. 1138; *Prosecutor v. Miroslav Bralo* (UT-95-17-S), Sentencing J., 7 December 2005, para. 22; *Prosecutor v. Miroslav Deronjić* (IT-02-61-S), Sentencing J., 30 March 2004, para. 143; *Prosecutor v. Dragan Nikolić* (IT-94-2-S), Sentencing J., 18 December 2003, para. 133; *Prosecutor v. Predrag Banović* (IT-02-65/1-S), Sentencing J., 28 October 2003, para. 35; *Prosecutor v. Milorad Krnojelac* (IT-97-25-T), Judgment, 15 March 2002, para. 508; *Prosecutor v. Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Judgement, 22 February 2001, para. 844; *The Prosecutor v. Tihomir Blaškić* (IT-95-14-T), Judgement, 3 March 2000, para. 765 (in interpretation of para. 761); *The Prosecutor v. Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 66.
- 247 *Brđanin* (IT-99-36-T), Judgement, 1 September 2004, para. 1091.
- 248 See e.g. *Šainović et al.* (IT-05-87-T), Judgement, 26 February 2009, para. 1146; *Delić* (IT-04-83-T), Judgement, 15 September 2008, para. 559; *Mucić et al.* (IT-96-21-T), Judgement, 16 November 1998, para. 1234.

desistance from further offending should come as a natural result of censure which the punishment communicates to the offender.

Such a view of special prevention resonates more closely with the postulates of certain “just desert” theorists²⁴⁹ who see the perpetrator as a moral agent to whose sense of right and wrong the punishment should appeal.²⁵⁰ According to *von Hirsch*, a response to a criminal offence that conveys blame gives the individual the opportunity to respond in ways that are typical for an agent capable of moral deliberation, that is, to recognize the wrongfulness of action, to feel remorse and to make efforts to desist in the future.²⁵¹ However, the conundrum here is that perpetrators of international crimes usually act in accordance with broader state policies which support or at least approve of atrocities, therefore lacking criminal identity due to the conditioned inversion of their moral framework.²⁵² If they do not perceive themselves as wrongdoers in the first place, it is questionable whether the mere imposition of punishment can actually change their attitudes towards themselves, their crimes and their victims instead of fuelling their aggravation and resentment.

The lack of a coherent argumentation on the consequentialist purpose of punishment also seems to be induced by the perception the judges have of these crimes. As argued in *Kunarac et al.*,

the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render [...] consideration [of special deterrence] in this way unreasonable and unfair.²⁵³

As true as that may be, the previous section has shown that grievances induced by atrocities tend to linger among the population, and what is more, they can be consciously cultivated. Even if improbable, a chance for a convicted perpetrator – especially if previously belonging to higher echelons of political power – to return unchanged by punishment and rally again masses into dangerous campaigns should not be dismissed as impossible.²⁵⁴

249 See *von Hirsch* 2009; also *Duff* 2009.

250 *Von Hirsch* 2009, p. 116.

251 *Von Hirsch* 2009, p. 116.

252 See *Chapter 3*.

253 *Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Judgement, 22 February 2001, para. 840. See also *Zelenović* (IT-96-23/2-S), Sentencing J., 4 April 2007, para. 33; *Krajišnik* (IT-00-39-T), Judgement, 27 September 2006, para. 1136; and *Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 66.

254 Illustrative of these dynamics are public statements and behaviour displayed by one of the ICTY’s accused, *Vojislav Šešelj*, during his provisional release from the UNDU in 2015. Mr. *Šešelj*, who had been accused of crimes against humanity and violations of the laws or customs of war, engaged in “a line of incidents and threatened the Hague witnesses, therefore the decision on his provisional release has been withdrawn” (*Blaško* 2015). The culmination of this

In cases where explicitly recognized, rehabilitation has been variously interpreted by the judges. In the *Nikolić* case, for example, the Trial Chamber observed that the concept of rehabilitation “can be thought of broadly and encompass[es] all stages of the criminal proceedings and not simply the post-conviction stage.”²⁵⁵ In particular, the judges described the “process of coming face-to-face with the statements of victims, if not the victims themselves” as having a rehabilitative effect in terms of “inspiring – if not reawakening – tolerance and understanding of ‘the other’, thereby making it less likely that if given an opportunity to act in a discriminatory manner again, an accused would do so.”²⁵⁶ The elaboration is important insofar as it recognizes not only the importance of attitudinal change in perpetrators – which then should reduce the risk of re-offending and contribute to reconciliation²⁵⁷ –, but indicates that this should be done via means that are more nuanced than mere condemnation. In particular, phrasing can be understood as underlining the value of communication, either personal or by other means, which should then bring about the reflection on committed crimes, resulting in remorse and empathy. The context of the phrasing, however, indicates that any rehabilitative effect is thought of merely as a desired side-effect of trial proceedings rather than a conceptualized principle towards the fulfillment of which conscious efforts should be made. Interestingly, in the *Obrenović* case, the Trial Chamber went further in its conceptualization, stating that “the [rehabilitative] process continues upon the return of a convicted person to society and makes an active contribution towards reconciliation.”²⁵⁸ However, it remains unclear in which way this contribution should occur.

In trial proceedings, guilty pleas have often been acknowledged as indicators of rehabilitation on the side of perpetrators. Similarly to the examples above, the reasoning provided in judgements revolved around the convicted persons’ reflections on

behaviour came when he burned the Croatian flag in front of “several hundred cheering supporters” in Belgrade as “a message to the Croatian state of Ustashes” (*Blaško* 2015). Subsequently, Mr. *Šešelj* has been acquitted of charges by the Trial Chamber of the ICTY; however, the Prosecution has initiated appellate proceedings in front of the MICT which at the time of writing are still pending (*The Prosecutor v. Vojislav Šešelj* [MICT-16-99-A], Prosecution’s Notice of Appeal, 2 May 2016). Upon his acquittal, Mr. *Šešelj* has further engaged in radical rhetoric and politics (*Delauney* 2016). After the 2016 parliamentary elections in Serbia, his Serbian Radical Party (SRS) managed to enter parliament as the third-most successful party (*Delauney* 2016).

255 *Nikolić* (IT-02-60/1-S), Sentencing J., 2 December 2003, para. 93.

256 *Nikolić* (IT-02-60/1-S), Sentencing J., 2 December 2003, para. 93. See also *Blagojević & Jokić* (IT-02-60-T), Judgement, 17 January 2005, para. 824; *Obrenović* (IT-02-60/2-S), Sentencing J., 10 December 2003, para. 53.

257 *Nikolić* (IT-02-60/1-S), Sentencing J., 2 December 2003, para. 93; *Obrenović* (IT-02-60/2-S), Sentencing J., 10 December 2003, para. 53.

258 *Obrenović* (IT-02-60/2-S), Sentencing J., 10 December 2003, para. 53.

the wrongfulness of acts, harm and suffering caused to others as well as their determination to face responsibility towards the aggrieved party and society at large.²⁵⁹ It is questionable, however, to what extent these repentant statements should be taken for granted, especially given the practice of plea-bargaining as has developed within the sentencing practice of the ICTY.

Certain judgements have expressed support for rehabilitative programmes in which the convicted persons might participate while serving their sentence.²⁶⁰ However, as stated by the Trial Chamber in *Kunarac et al.*,

[...] that is an entirely different matter to saying that rehabilitation remains a significant sentencing objective. The scope of such national rehabilitative programs, if any, depends on the states in which convicted persons will serve their sentences, not on the International Tribunal.”²⁶¹

Normatively, the President of the ICTY (nowadays President of the MICT) has the mandate to decide on the release of ICTY prisoners.²⁶² According to the RPE,²⁶³ the decision is partially conditioned by the Tribunal’s evaluation of the prisoners’ rehabilitation. Subsequently, it indicates that the ICTY has developed a policy, or at least criteria, against which it evaluates the rehabilitation of its prisoners. Consequently, it can be presumed that rehabilitative policies on the national level should also operate in accordance with these criteria. Contrary to the judicial statement above, this line of reasoning would then consider that the International Tribunal indeed has a say, even if indirect, in framing the rehabilitative programmes of its prisoners.

Summarizing the discourse, it can be seen that the attitudes of the judges towards rehabilitation vary in the context of international trial proceedings. Far from being completely neglected, it is nevertheless subsided to the other purposes, mainly due to the crime-oriented (backward-looking) nature of the criminal trials. Still, when ruminating on the nature of rehabilitation, the judges have stressed the importance of attitudinal changes in the perpetrators, both within the prospect of their eventual return to society and with regard to reconciliation and the “healing effect”²⁶⁴ this might have on the community. In certain cases, while not regarding rehabilitation as a valid purpose for the trial proceedings, the judges have explicitly supported it as a

259 *Babić* (IT-03–72–S), Sentencing J., 29 June 2004, para. 46; *Mrđa* (IT-02–59–S), Sentencing J., 31 March 2004, para. 18; *Jokić* (IT-01–42/1–S), Sentencing J., 18 March 2004, para. 35.

260 *Kunarac et al.* (IT-96–23–T & IT-96–23/1–T), Judgement, 22 February 2001, para. 844; *Furundžija* (IT-95–17/1–T), Judgement, 10 December 1998, para. 291.

261 *Kunarac et al.* (IT-96–23–T & IT-96–23/1–T), Judgement, 22 February 2001, para. 844.

262 See in detail *Chapter 6.3.5*.

263 See ICTY RPE 125: “General Standards for Granting Pardon or Commutation”; see also Mechanism for International Criminal Tribunals: Rules of Procedure and Evidence (MICT/1/Rev.1, 18 April 2016), hereinafter: MICT RPE, Rule 151: “General Standards for Granting Pardon, Commutation of Sentence, or Early Release.”

264 *Rajić* (IT-95–12–S), Sentencing J., 8 May 2006, para. 71.

valid purpose for the enforcement of the sentences. However, at this stage, scant argumentation hinders any meaningful insight into how this purpose should be implemented in practice.

2.3 Summary

This chapter has provided a preliminary analysis of the ICTY's sentencing practice in the context of broader aims international criminal justice strives to achieve. These broader aims serve as an analytical framework within which the impact of individual penal proceedings should be evaluated, encompassing both trials of the ICTY accused and the enforcement of their sentences. Notwithstanding the generation of the framework mostly through an academic discourse, the practice of the ICTY's trial proceedings has shown that, at least on a general level, the judges of the ICTY are also abiding to its structure, namely, by pursuing purposes conventionally attributed to punishment – retribution, deterrence and rehabilitation –, but which in the context of the ICJ should have an influence on its broader aims.

To that extent, the ICTY's pursuit of purposes which the penal theory usually associates with a prescription and imposition of punishments – deterrence and retribution – has throughout the years been plagued with conundrums. In particular, the underdeveloped sentencing framework has in terms of a hierarchy of crimes, punishments and comprehensive sentencing guidelines allowed for a sentencing practice riddled with inconsistencies and discrepancies, which is ultimately perceived to lack legitimacy and fairness and subsequently has a dubious (negative, many might say) reconciliatory impact on perpetrators, victims and the general public in the countries of the former Yugoslavia.

The penal discourse at the level of the ICTY trials has seldom paid attention to the rehabilitative purpose of punishment, mostly due to the backward-looking nature of the trials and their predominant focus on committed crimes. Nevertheless, there has been a certain degree of recognition with regard to rehabilitation as well as its significance for both the perpetrators and the societies involved in the conflict. Argumentation has revolved around stressing the need for a transformation of perpetrators' attitudes and the significance this transformation carries for their reintegration into society and reconciliation; however, it has scarcely ventured beyond general or "quasi-religious"²⁶⁵ remarks in order to explain how exactly rehabilitation should be achieved.

Despite this, certain judgements have recognized rehabilitation as the purpose for the enforcement of the sentences. The discourse also goes along the reasoning of the contemporary penal theory as well as the main body of international human rights

265 *Sloane* 2006, p. 57.

law that assigns rehabilitation not only as a valid purpose to any penitentiary system but as a right of every prisoner.²⁶⁶ This means that the prison system should not only offer opportunities for prisoners to better themselves in various ways – essentially tackling their crime etiology – in order to be reintegrated as functional members back into the society, but, in more general terms, should counteract the detrimental effects of imprisonment by recognizing and implementing fundamental rights of prisoners. The fact that persons convicted by the ICTY are being sent to national prison systems to serve their sentences and that the ICTY/MICT evaluates achieved rehabilitation prior to their release presumes the application of rehabilitation as a valid purpose in their cases, too. However, national rehabilitative policies might differ from state to state; also, it is of question how their application fares towards the criminality of “international prisoners”. As indicated in this chapter, one of the initial conundrums that perceivably hindered the adequate penal response of the ICTY trial proceedings was precisely the complex nature of international crimes, which in the phenomenology as well as etiology of their perpetrators substantially differ from ordinary criminality. Whether this poses a challenge for contemporary prison policies and whether there is a special rehabilitative policy envisaged for ICTY prisoners will be further explored in the following chapters. However, in order to foresee challenges, one first needs to understand the nature of the phenomenon that is being addressed. The next chapter will, therefore, analyze the criminality of international crimes, or the so-called “macro-criminality”, in more detail.

266 See in detail *Chapter 4*.

Chapter 3

Understanding Macro-Criminality

Penal reaction needs to properly understand the phenomena it aims at addressing and counteracting; otherwise, it runs the risk of being unjust (from both moral and pragmatic points of view) and inefficient (in terms of prevention).²⁶⁷ As much as this stands true for the choice and measure of a sentence during the trial proceedings, it gains particular significance in the stage of enforcing a sentence.

The enforcement of prison sentences and rehabilitative ideology are seen as being complementary. Generally speaking, the moral censure conveyed by imprisonment is seen to be of limited duration after which the convict ought to return to the society as a functioning member who would not re-offend. However, the impact of moral censure alone, notwithstanding its importance, on the prospect of bettering the offender and reducing the chances for re-offending is dubious, especially if considering that it is actually social and personal circumstances that constrain, if not compel, people to commit crimes, and not solely their “freedom of choice”.²⁶⁸ In this sense, social reprimand through pains of punishment might have a limited effect – or even a detrimental one – on offenders, as for most of them, it might very well be a social or other disadvantage that brought them to commit a crime in the first place.²⁶⁹ What is more, further deprivations that come with imprisonment – i.e. the loss of meaningful relationships, skills and roles – add additional pains to those already inflicted by a deprivation of liberty and might in fact enhance those criminogenic factors that contributed to offending in the first place.

Rehabilitation through the enforcement of imprisonment is therefore seen to encompass means that would, on the one hand, effectively reduce prisoners’ tendency to further commit crimes²⁷⁰ and, on the other hand, enhance their ability to function normally in a civil society. The approach to this is two-fold. On a more general level, it encompasses the recognition of prisoners’ fundamental rights, which is aimed at humanizing their stay in prison in order to counter additional detrimental effects that come with liberty deprivation. Notwithstanding the support this rights perspective

267 *Derenčinović & Getoš* 2008, p. 22.

268 *Cullen & Gilbert* 2009, p. 30.

269 *Ashworth* 2009, p. 3.

270 *Ashworth* 2009, p. 2.

attains, it has also been considered as a “two-edged sword” if taken as a sole approach to rehabilitation.²⁷¹ What, for example, *Cullen and Gilbert* caution for is that sole reliance on the rights perspective ideally binds the justice system to abide by certain humane standards. However, it also establishes the limits of the good the system can be expected or obliged to provide, therefore failing to beneficially address the adversarial attitude and resentment many inmates have against the justice system and which they might find difficult to suppress upon their release back into society.²⁷² This would then imply that effective rehabilitation policy depends as much on adequate humane standards provided during imprisonment as it does on structured programmes that tackle and counter criminogenic (etiological) factors with more focus and understanding. What reviews of meta-analyses on re-offending show is that there is a positive effect in terms of a reduction in reconviction rates when informed programmes – structured sequences of opportunities for learning and change²⁷³ – are applied, and they can have considerable policy implications if achieved consistently.²⁷⁴ Furthermore, empirical research indicates that the affinity towards small-scale programmes that are run by skilled and motivated staff and are applied towards either well-motivated groups of offenders or (more preferably) individuals has a better chance of success than across-the-board programmes applied generally to all offenders in prison or on probation.²⁷⁵

The application of rehabilitative measures as means of a special prevention to perpetrators of international crimes has been contested from a dogmatic normative viewpoint. This criticism particularly pertains to those measures dealing more concretely with crime etiology. For example, *Roxin* points to the Nazi criminals as perpetrators who are not in need of rehabilitation as they have committed crimes in a conflict situation that is not likely to repeat itself, therefore there is no risk that they might perpetrate atrocities again.²⁷⁶ While to an extent, this viewpoint correctly indicates the relevance of extraordinary situational circumstances for the commission of international crimes, it also rather simplifies the complex dynamics of their etiology, making it completely dependent on external factors. As will be elaborated below, external circumstances do not encompass only societal, economic and political preconditions to violence, but can also be consciously devised by individuals, e.g. an ideology devised by political authorities. Furthermore, in the case of each perpetrator, the external (situational) factors are also engaged in an intrinsic interplay with individual (dispositional) personality traits and motives, subsequently initiating internal transformative processes that lead to the commission of atrocities. Failure to

271 *Cullen & Gilbert* 2009, p. 29.

272 *Cullen & Gilbert* 2009, pp. 29, 31.

273 *McGuire* 2002, p. 27.

274 *Raynor* 2009, p. 20.

275 See *Bottoms* 2009 and *Raynor* 2009.

276 *Roxin* 2006, p. 77.

understand how all these factors interact and exert their influence prevents an adequate counter-response to their dynamics, subsequently raising the risk of their replication in similar conditions.

While *Roxin's* argument that the circumstances of conflict could not be repeated again in the case of Germany might resonate as true, it is also fixated on a sui generis example of a generally stable post-conflict society,²⁷⁷ whereas in a large number of current post-conflict societies – including countries of the former Yugoslavia –, conflict is latent or even still ongoing, albeit perhaps with a lower intensity.²⁷⁸ What basic characteristics of such societies – i.e. weak and illegitimate state structures, a prevalent state of anomie, distrust and serious societal divisions due to the impact of collective violence²⁷⁹ – imply is that conflict might not be resolved in a way that prevents it from occurring again and that collective violence may break out again any time.²⁸⁰ In such conditions (which can last for decades or even be the fruit of a seed of conflict planted centuries ago), a possibility for released former perpetrators whose etiological factors are not positively tackled by punishment to become again engaged in destructive processes and large-scale violence does not present itself as alien. A variety of scenarios comes to mind – for example, a political demagogue who is trying again to amass power and popular support by creating or re-inventing victim myths,²⁸¹ thus stirring up feelings of resentment and causing again turmoil among a still polarized society that is engulfed in all-prevailing anomia.²⁸² On the other side of the spectrum, in such a situation, a person whose strong tendency towards obedience, coupled with e.g. a motive to also obtain prosperity, led to the

277 Indeed, the Allied occupation of Germany which continued after the official end of WWII certainly contributed to (and supervised) the “basic story of separation” (German *Basiserzählung der Abgrenzung*), that is, a disassociation from the Nazi past and its actors in the effort to build a new political and social system (von Trotha 2004, p. 2). Even so, *Karstedt* notes that before public opinion changed towards an increasing acknowledgement of guilt and responsibility, there was a period of collective amnesia among the general public with regard to Nazi atrocities that lasted well into the mid-1960s (2015, p. 726). Furthermore, *von Trotha* stresses how – despite its steady evolution towards Western European pattern – German political culture in the post-war period has always been characterized by attempts to somehow neutralize the atrocious Nazi past (1995, pp. 41, 43). Not seldom has this political discourse given raise to violent unrests by old and neo-Nazis. A notable example of these dynamics is the wave of xenophobic activities and anti-Semitic crimes that increased sharply between the early and mid-1980s in Germany, which is seen as having its roots in the political climate at the time, generated mostly by the rhetoric and policy of the then Chancellor, Helmut Kohl, towards the troubling Nazi past (von Trotha 1995, pp. 37, 43–46).

278 See *Albrecht* 2006, p. 33.

279 *Albrecht* 2006, pp. 36–40.

280 *Albrecht* 2006, p. 33.

281 The term “victim myths” (German *Opfermythos*) can be defined as an unfounded perception of victimization that, even though incorrect, in time becomes an essential component of the group’s identity (*Getoš* 2007, p. 110). It stands in juxtaposition to “victim narratives” which refer to actually suffered injustice and victimization of one’s own group members during past armed conflicts (*Getoš* 2007, p. 110).

282 See *Chapter 2.2.3* and the example of *Šešelj*.

perpetration of atrocities in the first place might become again involved in destructive mechanisms if personal attitudes and susceptibility to such an authority have not been adequately tuned. Furthermore, the conditions of a post-conflict society might provide a fertile ground for the former perpetrators of atrocities to continue the war in other forms of private or asymmetric violence, such as terrorism.²⁸³ An infamous example is the assassination of the former Serbian Prime Minister *Zoran Đinđić*. Mr. *Đinđić*, who came into power after the government of *Slobodan Milošević* was toppled, made continuous efforts to fight organized crime and to extradite alleged Serbian war criminals to the ICTY. On 12 March 2003, he was murdered by a former member of several Serbian paramilitary groups that were noted for having committed atrocities during the post-Yugoslavian wars.²⁸⁴ The statement by the defendant that the murder was not committed because of monetary gain but in order to “prevent extradition of our people to The Hague” points to the political character of the crime²⁸⁵ – the etiology of extreme nationalism that very likely also fostered the commission of crimes during the post-Yugoslavian wars.

Potential risk as the ground for a rehabilitative argument might not only stem from the possibility of being involved in a similar type of violence again. Negative effects coming out of involvement in warfare and atrocities can manifest themselves in other ways and be of potential risk even in ordinary surroundings. For example, one ICTY prisoner openly discussed being diagnosed with posttraumatic stress disorder (PTSD) as the result of having participated in warfare.²⁸⁶ In particular, he harbours a fear that due to its manifestations (especially increased arousal which can also lead to aggressive behaviour), “somebody innocent might get hurt.”²⁸⁷ Research findings on PTSD and violence indicate that an increased risk of violent behaviour in individuals diagnosed with PTSD stems not so much from the PTSD itself but from its combination with another array of factors.²⁸⁸ For example, research on war veterans and PTSD has indicated a substantively higher rate of subsequent severe violence

283 *Albrecht* 2006, p. 41.

284 See news.bbc.co.uk/2/hi/europe/6683463.stm [15/01/2017].

285 See news.bbc.co.uk/2/hi/europe/6683463.stm [15/01/2017].

286 Interview with ICTY prisoner B in Germany, 02/03/2016.

287 With regard to this, the prisoner was particularly concerned because of his inability to anticipate when PTSD might actually manifest itself and how it might be provoked by some ordinary or random occurrence. He describes this in very vivid terms: “*I have hearing problems due to damaged eardrums. So it can be a serious issue when there is noise or more people talking at the same time as I can get confused, and at that moment, I can sort of lose consciousness and react very abruptly. [...] It is like a flash, there are these pictures that you cannot change. At that moment, we can be talking about something, never mind, something completely different, but then an image flashes, for example, when I had to amputate my friend's leg. [...] I could not save his leg, it was me who had to cut it; otherwise he would have died! [...] I see myself cutting his leg off, and at that moment I could set the whole world ablaze!*” (Interview with ICTY prisoner B in Germany, 02/03/2016).

288 See *Norman et al.*; ptsd.va.gov/professional/treat/cooccurring/research_violence.asp [20/01/2018].

among veterans who resorted to drug or alcohol misuse as a form of self-medication for the symptoms of PTSD than among those who have been diagnosed with PTSD but without misuse of opiates.²⁸⁹ Given the high availability of opiates – also among the prison population –, it is of importance to counter these risk factors effectively – more specifically, by understanding the reasons behind stress disorder and ameliorating their influence and, in more general terms, by providing prison conditions that would reduce the risk of enhancing their effects (e.g. through the availability of illicit drugs).

Humane prison conditions and an acknowledgement of fundamental prisoners' rights hold a direct significance for a treatment more oriented towards risk factors. It provides not only a good motivational basis for the offenders to become willingly engaged in such treatment, but, as a ground condition, it prevents the negative enhancement of the factors that led to the commission of crimes in the first place. For instance, for some perpetrators, a susceptibility to polarizing viewpoints that might have ultimately influenced them to violence comes from having experienced direct or indirect victimization.²⁹⁰ This antagonism and exclusive perception of the self as a victim might very well be enhanced if the prison conditions are perceived only as an additional (disproportionate) punishment on the already burdensome loss of freedom;²⁹¹ thus, they also carry a higher risk of being destructively expressed upon release. Subsequently, an unwillingness to perceive committed acts as wrong also stands as a hindrance to any reconciliatory effort – not only between perpetrators and

289 *Elbogen et al.* 2014, pp. 1, 5.

290 This is also present among people convicted by the ICTY. In an interview conducted by the author, one ICTY prisoner brought up the stories of *Goran Jelisić* and *Milorad Krnojelac*, both convicted by the Tribunal, as examples of people who have also suffered personal victimization prior to the commission of crimes: "*Goran Jelisić was imprisoned by Croatian Army, and he suffered a lot while being imprisoned, so when he came out, that also left a mark on him; he also has huge problems with PTSD, so what he did was also his personal revenge for what he has been through. This I am aware of because I had a chance to talk to him privately... [...] Milorad Krnojelac [...], his house was the first one Muslims set on fire during the war, so he was left without anything. He didn't have a place to stay, but given that he had been a teacher prior to war and also had a rank of a reserve Captain, they gave him an apartment and a position of a commander of a detention camp in Foča [...]*" (Interview with ICTY prisoner B in Germany, 02/03/2016).

291 One released ICTY prisoner stressed this when referring how, in general, the punishment imposed by the ICTY resonates with individual perceptions of victimization and imposed justice: "*Without going further into my judgement, I support the ICTY [...] even now, after everything. However, what I don't support is that they do not provide justice. All the time, they keep referring to the truth and only the truth and justice. However, there's none of it there. This is my personal opinion – because they do not take all the facts into account. I also lost my father in war... whose corpse I was able to identify only by his underwear. That means, what they did to him – out of him! –, I wasn't able to recognize his face, but identify him by underwear. My house was – and I am talking personally now as this relates to me –, my house was burned to the ground. For these acts committed against me, nobody was held responsible in front of the ICTY. It is hard, then, you know; I also told them up there [the ICTY]: 'Until I see who did that, I cannot take you seriously'*" (Interview with a released ICTY prisoner, 20/05/2014).

victims, but also between different groups who are symbolically represented by these actors. While it is understood that “reconciliation and peace are primarily due to the efforts of those who have suffered”,²⁹² the offenders’ understanding of the wrongness of the act and hence sincere remorse is the first step in the direction of repairing the breach of relationships that happened due to the committed atrocities. It is also an important step towards satisfaction of moral demands and moral communication²⁹³ as required by ICJ. As such, the initiation of moral rehabilitation is also clearly dependent on sufficiently understanding psychological mechanisms and etiological factors that led to the perpetration of atrocities.

From the above, it is clearer to what extent the legitimate response of international criminal justice to atrocities does depend on a proper understanding of the causes and phenomenology of international crimes. Being aware not only of how different etiological factors contribute to the perpetration of crimes but also of how they interplay with the punishment helps rid the ICJ response of the very flaws that led to atrocious acts in the first place.²⁹⁴ Examples of such flaws, or mechanisms, are the demonization and exclusion of others through the construction of an image of the enemy in which flesh-and-blood human beings are turned into abstractions.²⁹⁵ In other words, this knowledge should contribute to a criminal justice response that is not perceived as being driven by revenge but by a just condemnation of crimes that simultaneously and constructively strives to prevent reiteration of such crimes, thus also contributing to the maintenance of peace. It is therefore important to delineate the body of criminological knowledge on why and how international crimes are perpetrated. To an extent, this will also guide the empirical analysis of the enforcement of ICTY sentences in later chapters, particularly to the extent of determining whether and how the crime etiology of ICTY prisoners has been tackled through the enforcement of their sentences.

Given the frequency of conflicts and occurrences of mass violence during the 20th century, it comes as surprising that until 10–15 years ago (symbolically coinciding with the activation of the ICC), coherent criminological enquiries into international crimes, or “macro-criminality” (*Makrokriminalität*, to use a German compound criminological term coined by *Herbert Jäger*)²⁹⁶ have been seldom at best.²⁹⁷ This

292 Von Trotha 2004, p. 1.

293 McNeill 2014, p. 4205.

294 Rotman 2008a, p. 137.

295 Rotman 2008a, p. 137.

296 Jäger 1989.

297 For example, an illustrative analysis of academic work presented at the annual conferences of the American Society of Criminology in the period 1990–1998 shows that among 7,029 presentations, only six dealt with the topic of genocide (*Yacoubian* 2000, p. 11). Similarly, the analysis of 13 major international periodicals devoted to the discipline of criminology indicates that among 3,138 articles published in the period 1990–1998, only one dealt with the topic of genocide (*Yacoubian* 2000, p. 12.). Such a trend also seems to be prevalent among wider strata of

scientific inertia has been attributed to the prevalent focus of criminology on the behaviour of individuals which is criminalized by a state and therefore considered deviant.²⁹⁸ In contrast, war crimes, crimes against humanity and genocide are often committed with the involvement of states, as official state structures either instigate or condone the commission of these crimes.²⁹⁹ In the case of international crimes, individual deed cannot be perceived as isolated; it is a part of the collective effort and policy that constitute the framework for its commission.³⁰⁰ Given its collective nature, the crimes of so-called “collective violence”³⁰¹ are to be understood not as deviant, but as conforming behaviour.³⁰² The fact that official state structures do not condemn but support or participate in the commission of these crimes inverts the theoretical framework of conventional criminology and gives it a profoundly new dimension.³⁰³ The main analytical concern is not anymore the etiology of deviant behaviour – the perpetrators of international crimes are often not considered criminal by those in their own society, and to call their behaviour deviant only makes sense with reference to some standard at the superior level, such as international law³⁰⁴ –, but how violence and genocide become a norm within a state and, accordingly, why and how masses of people obey or conform themselves to this norm.³⁰⁵ For criminology, this means that an entirely different starting point needs to be taken when studying international crimes, as compared to cases in which ordinary crimes are studied.³⁰⁶

3.1 Macro-Criminality: Etiological Delineations of International Crimes

Ever since the atrocities of the Nazi regime came to light, many other disciplines, if not exclusively criminology, have made the effort to explain why international crimes are committed. In particular, early psychiatric analyses of the major Nazi leaders during the trial at the IMT in Nuremberg in 1946 focused on proving that it

European criminologists: among 215 articles published in the *European Journal of Criminology* in the period 2004–2014, atrocities and genocide are represented in 1.9 percent (*Smith* 2014, p. 12).

298 *Haveman & Smeulers* 2008, p. 6; *Jäger* 1989, p. 13.

299 *Haveman & Smeulers* 2008, p. 7.

300 *Jäger* 1989, p. 12.

301 *Jäger* 1989, p. 7.

302 *Jäger* 1989, p. 12.

303 *Haveman & Smeulers* 2008, p. 7.

304 *Neubacher* 2006, p. 789.

305 *Haveman & Smeulers* 2008, pp. 8–9.

306 *Haveman & Smeulers* 2009, p. 9.

had to be exclusively internal (dispositional) factors of the perpetrators, such as idiosyncratic psychopathology, which distinguished them from ordinary people and led them to commit such horrendous crimes.³⁰⁷ Even though some analyses contested this hypothesis from the beginning,³⁰⁸ it took startling observations by *Hannah Arendt* on the “banality of evil” of *Adolf Eichmann*³⁰⁹ – one of the main organizers of the Holocaust who had been in charge of devising deportations of Jews from all the countries occupied by Germany to the extermination camps, based on reporting from his trial in Jerusalem – to initiate the eventual decline of support for the “Mad Nazi” hypothesis. *Arendt* remarked that

the trouble with Eichmann was precisely that so many were like him and that they were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. [...] this normality was much more terrifying than all the atrocities put together.³¹⁰

Indeed, *Eichmann’s* claims that he merely followed orders and that almost everyone would have reacted the same way in his place prompted a Yale University psychologist, *Stanley Milgram*, to test the assumption that most people facing immoral orders would disobey.³¹¹ In what turned out to be one of the most (in)famous experiments in social psychology, *Milgram* proved exactly the opposite – to which he admitted that “after witnessing hundreds of ordinary persons submit to the authority in our own experiments, I must conclude that *Arendt’s* conception of the *banality of evil* comes closer to the truth than one might dare imagine.”³¹²

The shocking outcome of these experiments led to further analyses of pressures and effects exerted on individuals by external factors, such as authority or a group, consequently leading them to commit atrocities. The growing body of case studies on perpetrators of international crimes which appeared in subsequent years³¹³ further dismissed the claims of their mental derangement or psychopathological disturbances. On the contrary, the studies almost universally revealed that the etiology of

307 *Harrower* 1976, p. 342.

308 Dr. *Douglas Kelley*, the prison psychiatrist for the first few months at the IMT in Nuremberg, obtained together with his assistant, Dr. *Gustav Gilbert*, the Rorschach records of 17 Nazi war criminals, to be submitted for analysis by Rorschach experts in order to give a clear psychological profile of this group of perpetrators. Based on these records, and prior to the intended analysis, his own findings concluded that “not only [...] such personalities are not unique or insane but also [...] they could be duplicated in any country of the world today” (*Kelley* 1946, p. 47, as quoted in *Blass* 1993, p. 38; see also *Harrower* 1976, pp. 341–342.)

309 *Arendt* 1963.

310 *Arendt* 1963, p. 253.

311 *Smeulers & Grünfeld* 2011, p. 212.

312 *Milgram* 1967, p. 5, as quoted in *Blass* 1993, pp. 32–33. See also *Smeulers & Grünfeld* 2011, p. 212.

313 For an overview of scientific work, see *Smeulers* 2008, p. 234; see also *Smeulers & Grünfeld* 2011, p. 302.

their criminality is not exclusively conditioned by personal dispositions, but is dependent on, and induced by, extraordinary circumstances in which they find themselves engulfed during the period of political turmoil and war. As *Waller* states: “[...] not only does the claim of widespread psychopathology among perpetrators contradict the available evidence, [...] it also contradicts all diagnostic and statistical logic.”³¹⁴

Of course, this does not say that people with innate sadistic traits, or otherwise tendency towards criminal behaviour, cannot be involved in the commission of these crimes. During the post-Yugoslavian wars, more than 80 paramilitary groups were operating alongside formal armies,³¹⁵ some of which included people who were convicted criminals or had previously been involved in criminal activities. An infamous example is the paramilitary unit “Arkanovi tigrovi” (Arkan’s Tigers) led by warlord *Željko Ražnatović Arkan* who had prior to war – and subsequent assembling of his paramilitary group that became notorious for its plundering, murders and rapes of civilians – been heavily involved in criminal activities, including murders, bank robberies and political assassinations.³¹⁶ This example, however, does not undermine the argument that among the sheer number of war criminals or génocidaires – which during a conflict often goes as high as thousands – they simply cannot all be born sadists or insane.³¹⁷ Indeed, under other, more ordinary circumstances, most of these people would never have perpetrated any crimes, but it is the exceptionality of external or situational factors that can drive people to commit them, or such a situation induces personality traits that would otherwise remain dormant.³¹⁸ This is not to say that certain individual aspects do not play a role in the commission of international crimes.³¹⁹ During the time of collective violence, there are also people who oppose genocidal movements or even actively rescue victims.³²⁰ Hence, it cannot be doubted that there are indeed individual aspects and internal mechanisms within a person which foster their involvement in international crimes, while others prevent a person from such involvement.³²¹ In order to understand how and why international crimes are committed, it is necessary to resort to an integrative approach, the

314 *Waller* 2007, p. 73.

315 *Alvarez* 2006, p. 12.

316 *Alvarez* 2006, pp. 8–12.

317 *Smeulers* 2008, p. 234.

318 *John M. Steiner* introduced the concept of the “sleeper”, a person who in specific situations and circumstances can become either a perpetrator or, at the other end of the moral spectrum, an altruistic rescuer. For example, extreme deprivation, coupled with powerlessness at one end of the spectrum, and the assumption of considerable power, causing elation and joy on the other, tend to produce the necessary conditions, and thereby passions, which can activate the sleeper (*Steiner* 2000, p. 69).

319 *Harrendorf* 2014, p. 246.

320 *Harrendorf* 2014, p. 246.

321 *Harrendorf* 2014, p. 246.

one which takes into account both external factors and influences as well as personal aspects of the perpetrators.³²²

3.1.1 External and situational factors

This section will delineate the most prominent external and situational factors that exert pressures or otherwise influence perpetrators of international crimes, namely: *ideology*, *authority* and *group dynamics*. For the sake of clarity, each factor is explained individually. However, it is common that during the period of collective violence, all of them exert their influences simultaneously.

3.1.1.1 Ideology

Given that international crimes are usually an expression of conform behaviour, it is inevitable that they are embedded in particular developments and events on the macro-level of a society.³²³ Here, the leading state structures are essential in creating an atmosphere of approval and support for atrocities. The main factors for the inception of this atmosphere are official state policies grounded in some form of dangerous ideology.

Ideology can be understood as a system of shared beliefs, ideas and symbols which help make sense of the world around us.³²⁴ They provide people with the necessary intellectual framework not only to define the world around them, but to determine their identity and to give themselves meaning and purpose.³²⁵ In this sense, they are essential for people to preserve their psychic equilibrium, otherwise they would lose their capacity to function.³²⁶ For people, everything necessary for the maintenance of their psychic equilibrium is of the same vital interest as that which serves their physical equilibrium.³²⁷ It has been shown that periods of collective violence are often preceded by extreme circumstances, such as political turmoil, rapid changes and difficult living conditions,³²⁸ which can in turn gravely disturb these equilibriums in masses of people. Existential fear, which develops due to extreme conditions, is based on uncertainty and makes people susceptible to new ideologies that can reinstall the sense of belonging, security and certainty in their lives. In these situations, populations can be easily manipulated into ideologies that strongly legitimize belonging and security at the expense of a violent exclusion of other groups of people.

322 Harrendorf 2014, p. 246.

323 Jäger 1989, p. 12.

324 Alvarez 2008, p. 216.

325 Alvarez 2008, p. 216.

326 Fromm 1973, p. 197.

327 Fromm 1973, p. 197.

328 Smeulders 2008, p. 235; see also Harff 2003, pp. 62–64.

Several components have been found in ideologies that are prone to political and genocidal violence: nationalism, past victimization, scapegoating, dehumanization, absolutist worldview and utopianism.³²⁹ They are often closely interlinked and very much interrelated, to the extent that, for example, in any given case of genocide, any number of them may be present and reinforce each other.³³⁰

Nationalism by itself is not necessarily dangerous; however, strong nationalism can be instrumentalized for the purpose of genocide and mass atrocity as it is an ideology that clearly differentiates between an in-group of persons who are deemed of the nationality due to a shared cultural heritage, language and religion, and an out-group of all others not sharing this nationality.³³¹ In this sense, nationalism is as much about who is not a member of the national community as it is about who is a member,³³² and these differences can be used to justify violent persecution of others. In cases of many atrocities, including those committed during the post-Yugoslavian wars, nationalistic sentiments have been used not only to differentiate between groups, but also to indicate the superiority of one group over the other. Combined with the derogatory portrayal of the target group, feelings of nationalistic superiority can strongly contribute to its dehumanization³³³ and eventually instigate destructive action.

Nationalistic xenophobia is often compounded by myths and a glorification of *past victimization*. Ideologies that create and promote the self-image of a group as being wronged and persecuted can easily provide a ready justification for violence directed against those defined as the former victimizer.³³⁴ Placing the focus on past victimization, ideology induces the transformation of aggressive to defensive violence,³³⁵ thus legitimizing it in the mind of the perpetrator. An example from the post-Yugoslavian wars can be the propaganda of *Slobodan Milošević* and other Serbian extremist politicians who continuously played upon the theme of Serb victimization at the hands of the Ottoman Turks during the Battle of Kosovo in 1389 as well as of the Croats during World War II, which helped legitimate the violence against the Bosnian Moslems and Croats.³³⁶

Closely tied to blaming the target group for actual or perceived past victimization is *scapegoating*, that is, also blaming it for all other past and present misfortunes.³³⁷ Historically, scapegoating has been understood to provide a symbolic exculpation of

329 Alvarez 2008, pp. 220–229.

330 Alvarez 2008, p. 220.

331 Harrendorf 2014, p. 235.

332 Alvarez 2008, p. 221.

333 Alvarez 2008, p. 221.

334 Alvarez 2008, p. 222.

335 Alvarez 2008, p. 222.

336 Alvarez 2008, p. 223.

337 Alvarez 2008, p. 225.

sins and misdeed which befell the community by placing them on a person who would then be ritually cast out or outright killed.³³⁸ It was perceived that the process would cleanse the community and might enable it to start anew.³³⁹ As a part of genocidal ideology, scapegoating can be instrumentalized not only so as to offer an easy consolation and explanation for extreme, seemingly unexplainable circumstances in which people find themselves prior to or during the period of collective violence, but also to solidify their collective identity by turning them against a common enemy.

Dehumanization is the consequence of psychological processes that condition the commission of atrocities by an individual and to which ideological components elaborated upon here can contribute.³⁴⁰ However, dehumanization can itself also be an evident component of genocidal ideologies – in particular when the social worth of the target group is blatantly diminished, not only to depict it as an out-group, but also to openly define their members as subhuman or nonhuman.³⁴¹ During the Nazi regime, the propaganda labelled Jews as a bacillus that needs to be exterminated,³⁴² while in Rwanda, the radical Hutu elite at the center of the government mobilized their genocidal movement by publicly labelling Tutsi and the Hutu opposition as “inyenzi” (cockroaches).³⁴³ Another example of a dehumanizing element in ideologies can pertain to the systemic persecution of Bosnian Muslims during the post-Yugoslavian wars, which also involved their labelling as “balije” (backward or simpleton Muslim peasants³⁴⁴), a highly derogatory term for Muslims of Bosnia and Herzegovina. Ideologies that serve to define certain groups as having less worth or value than others are dangerous in the sense that they create a greater social distance between the perpetrators and the target group, making the latter more vulnerable to victimization.³⁴⁵

A further component of dangerous ideologies can be the *absolutist worldview*. Ideologies that define the world in absolutist terms often see no possibility of compromise and can, similar to scapegoating, be particularly appealing since the viewpoint they proclaim is to be held as the one and only truth, thus providing an easy explanation for complex circumstances. This kind of mindset is most often manifested in religious and quasi-religious systems, particularly among those who believe in a fundamentalist version of their faith.³⁴⁶ For a fundamentalist, the belief in the literal and

338 Alvarez 2008, p. 225.

339 Alvarez 2008, p. 225.

340 See the section on *internal (personal) factors* (Chapter 3.1.2) below for more detail.

341 Alvarez 2008, p. 224.

342 Neubacher 2006, p. 797.

343 Melson 2003, p. 333.

344 Elias-Bursać 2015, p. 145.

345 Alvarez 2008, p. 224.

346 Alvarez 2008, p. 226.

absolute truth does not allow for moral complexity or ambiguity.³⁴⁷ The world is easily divided into good and evil, and all other points of view deterring from the absolute truth are perceived as wrong and displeasing to God.³⁴⁸ People who do not share the same fundamentalist vision are by definition spiritually and morally inferior and are therefore perceived as legitimate victims of righteous violence.³⁴⁹

The final component, *utopianism*, can be described as a vision of a perfect, and therefore unattainable, society.³⁵⁰ Creating a more perfect society often involves getting rid of those who by some criteria do not fit in.³⁵¹ Because massive upheaval and transformation of a society creates tremendous difficulties, resistance and obstacles from many sources, genocidal violence has often been a preferred tool for overcoming those obstacles and difficulties.³⁵² The politics of ethnic cleansing, in which all sides of the post-Yugoslavian wars participated,³⁵³ can be taken as an example of a utopian-nationalistic ideology where – under the pretext of ensuring a territory on which ethnically homogenous people could peacefully live – masses of civilians belonging to different ethnicities were forcefully deported or killed.

Genocidal ideologies can be considered a meta-external factor influencing or condoning the commission of atrocities, given that they are usually created on the macro-level of a society, from which they are disseminated to other levels of social strata. However, while international crimes can be embedded in ideological postulates, they do not necessarily have to be committed with direct ideological influences. Some perpetrators commit atrocities without being indoctrinated, but under the influence of other, more immediate external factors, such as authority or group dynamics.

3.1.1.2 Authority

A common trait shared among Adolf Eichmann and the defendants of the Nuremberg Trials in 1946 was a persistent claim of following orders of a higher authority, as an attempt to justify their deeds. This prompted *Stanley Milgram*, a psychologist at the Yale University, to make an enquiry into the effects the authority might have on human behaviour – together with their implications for the study of international crimes – through a series of experiments at the beginning of the 1960s. Subsequently, the *Milgram experiments*, also known informally as the “Eichmann experiments”³⁵⁴, provided an essential insight into the dynamics of obedience to authority, from which

347 *Alvarez* 2008, p. 227.

348 *Alvarez* 2008, p. 227.

349 *Alvarez* 2008, p. 227.

350 *Alvarez* 2008, p. 228.

351 *Alvarez* 2008, p. 228.

352 *Alvarez* 2008, p. 229.

353 See in detail *Glenny* 2000, pp. 644–647.

354 *Neubacher* 2006, p. 789.

they also derive a troubling lesson about human nature – that is, just how easily normal people possessing no malevolence whatsoever can be made to carry out inhumane commands.³⁵⁵ Following *Milgram*, other researchers have also made an effort to deepen the knowledge on obedience to authority, providing insightful and often challenging arguments to the original findings and thus reaffirming, time and again, the contemporary social relevance of this phenomenon.

In his experiments, *Milgram* tested the ability of an individual to resist authority that is not backed by any external coercive threat. The basic setup³⁵⁶ included naïve subjects who were instructed by authority (an experimenter) in an alleged learning experiment to inflict an escalating series of fake electric shocks upon a victim (an actor) who responded with pre-programmed voice feedback – an escalating series of complaints, cries of pain and ultimately silence. Contrary to preconceived belief, in the baseline version of the experiment, the majority of *Milgram's* subjects (65 %) were obedient to the point of inflicting extreme pain.

Findings from the experiment lent themselves to the identification of a number of important processes in obedience, some of which have already been touched upon in *Chapter 2*.³⁵⁷

In particular, *the nature of authority* (or how the authority is perceived by subjects) is seen to be of fundamental importance for its subsequent exertion of influence.³⁵⁸ Contrary to the *coercive* authority, who bases its power solely upon force, *Milgram* saw his experimenter to be a *legitimate* authority, that is the one who is seen as having a right to issue commands and to whom one feels an obligation to obey³⁵⁹ without the exertion of power through force. In the first case, the assumption of the right to issue commands and one's duty to obey rests only on the side of authority, making the disobedience (due to the stigma of violence) by the subjects that more likely. However, in the second case, that assumption is shared by both sides,³⁶⁰ which strengthens the bond between them – and, subsequently, also the obedience.

The bases of legitimacy are seen to be multifaceted. For example, *Weber* saw them to rest on the traditional/historical origins of the authority (e.g. hereditary kinship or

355 *Blass* 1993, p. 32.

356 *Milgram* 1963. For a comprehensive summary of the experiment, also see *Browning* 1992, p. 172.

357 See under *Chapter 2.2.2.2*.

358 *Blass* 1999, p. 958.

359 *Milgram* 1974, pp. 138, 142–143, as referenced in *Blass* 1999, p. 958. Some theorists (e.g. *Stinchcombe* 1968) find the monopoly of power in some authority to be the defining characteristic of its legitimacy. On the contrary, *Kelman & Hamilton* (1989, p. 55) argue against this view, seeing the coercive means for enforcing orders as an indicator of legitimacy, rather than as a source of that legitimacy.

360 *Kelman & Hamilton* 1989, p. 55.

tribal succession), on the individual charisma of a new leader or on the rational-bureaucratic procedure for the change of government, the promulgation of law and the delegation of authority.³⁶¹ With regard to the latter in particular, *Weber* argued that in the bureaucracies of modern civil societies and organizations, hierarchical position and expertise/knowledge go hand in hand,³⁶² which then would imply that legitimacy can actually be drawn solely from a position within a social structure.³⁶³ In his later career, *Milgram* also abided to this point of view, claiming that the legitimacy of authority in his experiments stemmed both from their position (as persons in charge) and perceptions by subjects that they possess expert knowledge.³⁶⁴ Other authors, however, have pointed out that position and knowledge are not necessarily interlinked and may represent different types of an authority-subordinate relationship.³⁶⁵ In particular, *Patten* highlighted the significance of distinguishing between authority based on expertise (which he saw as represented in *Milgram's* experimenters) and more worrisome authority whose acceptance by subjects is based on legal or quasi-legal considerations (i.e. social position) and not because of any special expertise regarding the task at hand (e.g. “Hitler-type” authority).³⁶⁶ Indeed, certain replications of *Milgram's* experiment,³⁶⁷ as well as a more contemporary attributional analysis by *Blass*,³⁶⁸ have shown that as much as being a desirable (and more understandable) explanation, expertise is often not the reason – or at least not the sole reason – why subjects accept and legitimize the will of authority. This, then, necessitates an explanation of why subjects attribute such great legitimacy to the position of authority within a social structure.

361 *Weber* 1947, as referenced in *Kelman & Hamilton* 1989, p. 54. See also *Weber* 1968, *Chapter 3* in detail.

362 *Weber* 1947, as referenced in *Kelman & Hamilton* 1989, p. 54. See also *Weber* 1968, *Chapter 3* in detail.

363 *Kelman & Hamilton* affirm that this is especially valid in modern Western context (1989, p. 55).

364 *Milgram* 1983, as quoted in *Blass* 1999, p. 960.

365 See for example *Morelli* 1983, *Patten* 1977 and *Blau* 1968.

366 *Patten* 1977, as referenced in *Blass* 1999, p. 959.

367 *Blass* (1991, p. 400) makes account of two experiments in which the experimenter's authority was “delegitimized” by disclosing his lack of expertise, and yet his ability to command obedience still remained substantial. Namely, in the experiments by *Rosenhan* (1969) in the United States and *Maniell* (1971) in West Germany the experimenter was discovered to be an undergraduate working without professional supervision. While this had a drop effect on the overall obedience rates (from 85% in the baseline condition to 53% for *Rosenhan* and 52% for *Maniell*), it is significant that despite this discovery more than half of the subjects still obeyed to the point of inflicting maximum shocks.

368 *Blass* (1992, as referenced in *Blass* 1999, pp. 960–963) screened a documentary depicting *Milgram's* experiment, after which he asked subjects to attribute a particular base of social power (out of multiple-choice matrix) to depicted authority, based mostly on how they think subjects perceived the experimenter in the film. Prevalent choice of *Blass's* subjects closely resembled those of actual subjects in the film: both groups found social position of the experimenter, together with his perceived expertise, to be of utmost importance for the acceptance of instructions.

From a very early age, people are being raised and socialized into obedience:³⁶⁹ in the family, through school and by their immediate environment.³⁷⁰ Obedience provides belonging and advancement; therefore, people are being thought to value obedience and do as told when a person who is in the *position* of authority gives an order.³⁷¹ This is a longitudinal process with constant reinforcements which solidifies internal dispositions towards obedience. Failing to obey would cause unwanted cognitive and emotional strain, so people might resort to it only when they don't run the risk of exposure or when they feel supported by defying peers or dissenting authority on which they could rely.³⁷² *Socialization into obedience* – which draws the legitimacy of authority from a *position within a social structure* – is, therefore, perceived to be among the essential factors for the explanation of how ordinary people, doing their job and without any particular hostility on their part, can become agents in a terrible, destructive process.³⁷³ Furthermore, uncertain circumstances of war and violent strife can significantly contribute to the attainment or reaffirmation of one's authority. In such a time of all-prevailing fear and anxiety, people at the top of the social structure are someone supposed to be looked upon, someone who should have the explanation or the right answers; therefore, they can successfully define reality for the person who accepts their authority.³⁷⁴

It can be rightfully argued, however, that despite long-term socialization into obedience as a prerequisite for destructive action, it would still be problematic for a person to straightforwardly obey and thus simply overcome internalized inhibitions towards harming other human beings – that is, of course, if these have not already been somehow neutralized. What *Milgram* recognized in his experiments to be a significant mechanism contributing to the neutralization of moral reflection is *gradual progression* through performed tasks which, in turn, escalated in the sense of commitment with the subjects.³⁷⁵ In the experiments, the effect was induced by starting from a relatively low shock level which then slowly but steadily increased, causing among the subjects a failure to recognize the qualitative difference within the shock levels. At the point of being already deeply involved in administering the shocks, if they suddenly wanted to break off, they would have had to admit that everything done up to that point had been wrong, which would, in turn, create a significant cognitive

369 *Smeulers & Grünfeld* 2011, p. 218.

370 For example, during the Nazi regime, the first of twelve commandments listed in a primer used to indoctrinate the Nazi youth was: "The leader is always right" (*Blass* 1993, p. 33). Also, many generations of German children grew up on cautionary tales, such as *Struwwelpeter* (Shock-headed Peter) whose moral was that disobedience could lead to rather drastic, violent circumstances (*Blass* 1993, p. 34).

371 *Smeulers & Grünfeld* 2011, p. 218.

372 *Smeulers & Grünfeld* 2011, p. 218.

373 *Smeulers & Grünfeld* 2011, pp. 218, 221.

374 *Blass* 1999, p. 958.

375 *Smeulers & Grünfeld* 2011, pp. 219–220; see also *Harrendorf* 2014, p. 241.

strain. The only way to overcome this and be reassured about the past performance would have been to continue the tasks. As *Milgram* notes: “Earlier actions give rise to discomforts, which are neutralized by later ones. And the subject is implicated into destructive behaviour in piecemeal fashion.”³⁷⁶ In that case, even if the destructive effects of the work done would have become apparent, relatively few persons would have had resources needed to resist authority.³⁷⁷

Another process which bears explanatory significance for the issue of tackling moral responsibility in obedient subjects who are faced with immoral commands is the so-called *agentic shift*. Namely, the process pertains to the shift of subjects into a different experiential state – the agentic state – which enables them to relinquish responsibility to the authority and, subsequently, to follow his/her orders without regard to their morality.³⁷⁸ Based on this agentic shift, “a man feels responsible *to* the authority directing him but feels no responsibility *for* the content of the actions that the authority prescribes. Morality does not disappear but acquires a radically different focus.”³⁷⁹

The concept of the “agentic shift” represents a point of contestation among researchers, especially those who attribute greater responsibility to perpetrators’ personal dispositions. The reason for this is that – as it seems – *Milgram* not only intended for his experimental account to be read as an appropriate explanatory model for the motivation and involvement of *all* perpetrators of international crimes (apart from the head authority)³⁸⁰ but considered the agentic state as the master attitude from which the obedient behaviour follows³⁸¹ instead of being considered the most extreme, “far-reaching consequence of submission to authority”³⁸² – as previously even asserted in his own work. Additionally, the criticism focuses on the “either-or” nature *Milgram* ascribed to this shift – that is, that coming under the influence of authority (or “entering the authority system”) would necessarily cause subjects socialized in adequate extent to obedience to abandon their own agenda and see themselves as agents for executing wishes/commands of others.³⁸³ As *Mandel* states, *Milgram’s* conception of rapidly-shifting discrete states fails to describe not only the significance of a range of motives that might prompt the individual to enter such a system first hand³⁸⁴ but also how the very perpetration (especially if happening recurrently) affects the manner in which the individual thinks and behaves even when not acting

376 *Milgram* 1974, p. 149, as quoted in *Smeulers & Grünfeld* 2011, p. 220.

377 *Smeulers & Grünfeld* 2011, p. 218.

378 *Blass* 1999, p. 959.

379 *Milgram* 1974, pp. 143, 145, as quoted in *Smeulers & Grünfeld* 2011, p. 219.

380 *Mandel* 1998, pp. 79, 81.

381 *Mandel* 1998, p. 81.

382 *Milgram* 1974, p. 8.

383 See *Mandel* 1998 and *Darley* 1992.

384 *Mandel* 1998, p. 79.

under authority.³⁸⁵ For example, recurrent destructive action on the basis of commands can warrant an adaptation in subjects where they are not so much responding to situational influences anymore but to their own internalized dispositions. As *Fiske et al.* suggest, subordinates not only do what they are ordered to do but what they think their superiors would order them to do, given their understanding of the authority's overall goals.³⁸⁶

Recent findings from the replication of *Milgram's* experiment by *Burger*³⁸⁷ further challenge the notion of the agentic shift as originally conceived. Namely, *Burger et al.* have analyzed the extent to which participants took personal responsibility for the learner's suffering, based on spontaneous comments the participants made during the experimental as well as the debriefing session of *Burger's* study.³⁸⁸ While those who continued shocking to the end were significantly less likely to express a sense of personal responsibility than those who resisted the experimenter's instructions (40.5 % as opposed to 81.3 %), the study found no statistically relevant difference between the groups when it came to the attribution of responsibility to someone other than themselves (around 50 % in both groups).³⁸⁹ *Miller* eagerly accepts this as an evidence of no agentic shift;³⁹⁰ however, the nature of data collection – the analysis of self-made comments – provides certain limitations on any definitive conclusion: as *Burger et al.* assert, “we do not know about thoughts left unexpressed.”³⁹¹ Nevertheless, even if the percentage was higher for those who continued, the nature of findings does not indicate *to whom exactly* the responsibility is being attributed when transferred by the subjects. For the sake of comparison, while *Milgram's* participants also did not differ in the amount of responsibility attributed to the experimenter, those who obeyed ascribed twice as much responsibility to the learner than those who were defiant.³⁹² In particular, those who justified their action by attributing the responsibility to the learner/victim did so based on the claim that the victim's (perceived) stubbornness and stupidity had made the punishment inevitable.³⁹³

At this point, it might be worthwhile to juxtapose the above debate on the nature and role of the agentic shift against research on the process of internal transformation in perpetrators. What the arguments challenging *Milgram's* original concept might be indicative of is perhaps not to observe the agentic shift as an inevitable ever-present condition to which one succumbs upon entering the authority system, but to rather

385 *Mandel* 1998, p. 81.

386 *Fiske et al.* 2004, p. 1483.

387 *Burger* 2009.

388 *Burger et al.* 2011.

389 *Burger et al.* 2011, p. 4.

390 *Miller* 2014, p. 562.

391 *Burger et al.* 2011, p. 6.

392 *Blass* 2009, p. 41.

393 *Milgram* 1974, p. 8.

see it in terms of neutralization techniques as developed by *Sykes and Matza*,³⁹⁴ that is, as just one of several proposed cognitive methods through which perpetrators justify their acts to themselves – similar to, for example, *denial of responsibility* and *appeal to higher loyalties*.³⁹⁵ As shown above, perpetrators may very well pass the responsibility on to victims and not relinquish it to the authority, despite entering the authority system.

What further research on obedience has shown is that choice and the successful application of neutralization techniques significantly depend on a change in situational variables. For example, *Milgram* observed that the greater the distance from the authority, the higher the likelihood for subjects to disobey.³⁹⁶ Similarly, the proximity to the victims has also demonstrated to have a significant effect on obedience rates. In particular, *Milgram's* own modifications as well as a replication by *Kilham and Mann*³⁹⁷ have shown that it is less likely for subjects to obey in a situation where their internal inhibitions are severely challenged by the explicit presence of the victim. What is interesting here, as well as concerning, is the quota of people who, even when physically required to enforce punishment over a learner (touch-proximity situation) – the highest challenge for their inhibitions – were willing to act in accordance with the instructions of the authority.³⁹⁸ One might ponder over what made them see their action as acceptable: a prospect of earning money by completing the required task? Perceived incompetence of the learner? A high degree of socialization into obedience which made the demands of authority seem to be acceptable? A probable answer might as well include all the aforementioned factors, albeit to a different

394 *Sykes & Matza* 1957.

395 See under *Chapter 3.1.2.2*.

396 In one modification of the experiment's baseline condition, the authority was not physically present but gave instructions by telephone. With the experimenter unable to directly project or show his authority, obedience dropped sharply: only nine out of twenty subjects fully obeyed (*Smeulers & Grünfeld* 2011, p. 217). This can also be paralleled with observations provided in *Chapter 1* – namely, on the underwhelmingly deterrent effect of the distant authority of the ICTY perceivably achieved when compared to the closer authority of, e.g., militia commanders or political leaders (see *Chapter 1.2.2.2* above).

397 *Milgram's* four-part proximity modifications in experiments showed a severe drop in obedience rates when victims were physically present and visible to the subjects (*proximity/touch-proximity* situations) as opposed to the situation where subjects could only hear their knocking or their voice (*remote/voice-feedback* situation) – between these situations, the obedience rates dropped from 65 % to 40 % (*Blass* 2009, p. 41). Similarly, *Kilham & Mann* (1974) attempted to reconstruct a bureaucratic chain-of-command situation where, next to the teacher, they inserted a person who acted as a transmitter of orders between the experimenter and the teacher. Given their hierarchical position as well as a distance from the victims, the transmitters showed significantly higher rates of obedience when compared to the teachers (68 % against 40 % for males, 40 % against 16 % for females) (*Smeulers & Grünfeld* 2011, p. 223).

398 *Milgram* (1974, p. 46) recounts a scene where one of his participants had to physically force a learner to place a hand on the shock plate in order to receive a shock: "The scene is brutal and depressing: his hard, impassive face showing total indifference as he subdues the screaming learner and gives him shocks. He seems to derive no pleasure from the act itself, only quiet satisfaction at doing his job properly."

extent and depending on the phase of involvement. Once again, *Mandel* makes a case here for a multi-causal perspective when juxtaposing a controlled obedience experiment situation against a real-life genocide, such as committed by members of the Reserve Police Battalion 101 during World War II, where many conditions – when compared to *Milgram's* experiments – warranted disobedience (e.g. distant or delegitimized authority, close proximity to victims, vague or non-existent nationalistic indoctrination³⁹⁹), and yet, a prevalent number of participants perpetually participated in atrocities by killing and plundering.⁴⁰⁰

With regard to the enforcement of sentences, it becomes clearer how compelling a task is then for the rehabilitative treatment of such offenders, not only to take into account any possible factor that might have influenced the commission of crimes, but also to understand the intrinsic interplay of these factors in the genesis of crime – including their effect on the offenders' perceptions of the crimes, their moral responsibility and the risk of recidivism – in order to effectively counter re-offending. However – and despite the contrasting views –, the prevalent strength of authority as an etiological factor alone should not be dismissed as impossible. In her typology of perpetrators of international crimes, *Smeulers* depicts “a follower”, i.e. an individual whose personality is bleak, colorless, and who in the time of uncertainty relatively easily lends himself to demands of authority as they bring comfort, a sense of belonging and identity.⁴⁰¹ These perpetrators challenge the conventional notion of “re-integration” – for which, among else, penal reaction strives –, as they might find themselves well-fitting and obedient in any type of setting. They might even comprehend the moral wrongness of their acts and feel apologetic, yet this does not preclude that given another entry into a destructive authority system, they would not participate in atrocities. As one of the participants in *Milgram's* experiments conveyed to *Milgram* in their correspondence: “[...] it is easier for me (although hardly simple) to recognize and avoid situations in which authority and obedience play significant roles (e.g. the military, many government and business organizations) than it is to defy authority in such situations.”⁴⁰² It is, therefore, fundamentally important to understand both the potential effect of such factors, as well as individual susceptibility to their influence, in order to reduce their impact.

Differences in susceptibility to an authority's influence have also been explored with regard to gender. Consistent with *Milgram's* own findings, nine out of eleven replications testing levels of obedience among men and women did not find differences

399 See *Browning* 1992.

400 *Mandel* 1998, p. 89.

401 See under *Chapter 3.2.5* below.

402 *Blass* 1999, p. 971.

in obedience based on gender.⁴⁰³ As the results indicate in general, neither gender seems to be more susceptible to obedience than the other.⁴⁰⁴ *Milgram*, however, found early on that women experienced greater tension during the experiments than men did.⁴⁰⁵ Despite this, the potential for higher empathical concerns to serve as an offset for defiance when juxtaposed to a strong situational variable such as authority still remains speculative. *Burger* found in his recent replication that while the participants who were more empathically aware expressed a reluctance to continue the procedure earlier, this early reluctance did not translate into a greater likelihood of refusing to continue.⁴⁰⁶ What these findings then support is not the notion that a lack of empathy explains high obedience rates, but that situational variables indeed have the power to overcome internal feelings of reluctance and dictate an individual's course of action.⁴⁰⁷

Burger's contemporary replication of the obedience experiment⁴⁰⁸ displayed practically the same overall rates of obedience as *Milgram* did 50 years ago. Similar results – albeit with regard to a different variation of *Milgram's* experiment – were observed by *Doliński et al.*⁴⁰⁹ As of yet, these contemporary replications stand as perhaps the strongest argument in favour of the overwhelming power situational factors such as authority might carry. Furthermore, a previous comparative study of 14 replications

403 See *Burger* 2009; also *Schurz* 1985, *Miranda et al.* 1981, *Shanab & Yahya* 1978, *Shanab & Yahya* 1977, *Costanzo* 1976, *Bock* 1972, *Bock & Warren* 1972, *Edwards et al.* 1969 (as analyzed in *Blass* 1999, pp. 966–969).

404 Two studies challenging these findings are by *Kilham & Mann* (1974) where the obedience rate in men was found to be significantly higher than among women (40 % against 16 %), and by *Sheridan & King* (1972) where, on the contrary, women were fully obedient (100 %) and only half of male participants obeyed (54 %). The latter study is particularly controversial as it featured a real victim, a puppy, who was visible to subjects and to whom actual shocks were administered, which was indicated by running, yelps of pain, barking and howling (*Sheridan & King* 1972, pp. 165–166).

405 *Blass* 1999, p. 969.

406 *Burger* 2009, p. 10.

407 *Burger* 2009, p. 10.

408 *Burger* 2009.

409 See *Doliński et al.* 2017. Most common replications of *Milgram's* experiments (including the one by *Burger*, 2009) resemble Experiment No. 5 in which the alleged learner reports heart problems at the beginning of the experiment, making the results thus more shocking. Because of ethical reasons, *Doliński et al.* opted to replicate Experiment No. 2 which lacks the learner with a heart ailment (2017, p. 2). Nevertheless, in terms of obedience rates, *Milgram* noted almost identical reactions by the participants in Experiments No. 2 and No. 5 (*Doliński et al.* 2017, p. 2). An additional value from the replication by *Doliński et al.* stems from their attempt to analyze the impact the gender of the “learner” had on the obedience levels. Even though the number of those disobeying the commands was three times higher when the learner was female (six as opposed to two in the case of male learners), the authors argue that the small sample size ($N = 80$) does not allow to draw excessively far-reaching conclusions, in particular on the impact which different socio-cultural norms about women (e.g. either as being inferior to men or as a gender towards which men should behave nobly) might have on the obedience rates (*Doliński et al.* 2017, pp. 3, 5).

of obedience experiments (baseline situation) that had been carried out throughout 22 years (from 1963 to 1985) found no systematic relationship between when a replication was conducted and the amount of obedience obtained, even though levels of obedience across studies ranged from around 30 % to as high as 90 %.⁴¹⁰ According to *Blass*,⁴¹¹ these findings speak, even if indirectly, against the operation of so-called “enlightenment effects”, as proposed by *Gergen*.⁴¹² *Gergen* argued that “sophistication as to psychological principles liberates one from their behavioural implication. [...] Psychological principles also sensitize one to influences acting on him and draw attention to certain aspects of the environment and himself.”⁴¹³ In other words, if the enlightenment effects had taken place, the latter studies – including the one by *Burger* – should have shown lesser rates of obedience than the previous ones, given that the longer passage of time allowed the participants to hear about the obedience experiments and therefore through this enlightenment become liberated from unwanted demands of authority.⁴¹⁴ One can also argue that even if participants have not heard about the experiments, a vast information of resources documenting atrocities – including mass and news media – provide an ample opportunity for an individual to become acquainted, at least to an extent, with how the “crimes of obedience” escalate, what their consequences are and which role the authority plays in their development.

Consequently, it can be presumed that since World War II and the subsequent initiation of the human rights movement that is gradually expanding on the international level, people have been developing stronger integrity with regard to common moral principles, as well as becoming more aware of each other’s rights. As much as that might be true in general, findings from the obedience experiments – not to mention the number of actual atrocities ongoing – clearly undermine the absolute certainty of this notion. Also, with reference to the above comments made by one of *Milgram*’s participants, it is evident that “knowledge does not or cannot always lead to action”⁴¹⁵ in terms of defiance. Being enlightened about the potentially destructive power of authority may help a person stay away from an authority-dominated situation, but once in such a situation, this knowledge does not necessarily help free the individual from the grip of forces operating in that concrete situation, which would mean defying the authority in charge.⁴¹⁶

While the explanatory approach to the individual perpetration of international crimes obviously warrants an integrative or mixed perspective, findings from the research

410 For the list of analyzed experiments, see the Appendix in *Blass* 1999, p. 978.

411 *Blass* 1999, p. 970.

412 *Gergen* 1973.

413 *Gergen* 1973, p. 313.

414 See also *Blass* 1999, p. 970.

415 *Blass* 1999, p. 971.

416 *Blass* 1999, p. 971.

on obedience to authority evidently hold a great value as they indicate just how strong situational variables can be and to what extent they can shape individual destructive actions. The knowledge about factors and mechanisms through which the malignant authority acquires legitimacy and subsequently exerts influence – e.g. through gradual pressure into action, through its close proximity, through its ability to appease internal motives – can certainly be of use not only in developing approaches that can “untangle” individuals from its grip or lessen their susceptibility to its influence, but can also be utilized in an expanded proactive way – that is, to improve the adherence to the counteracting authority that represents legitimate moral principles and rules of conduct, such as ICJ. As already pointed out above, it was the inability of the ICTY to exert its influence to the extent the malignant authorities did which, at least partly, omitted to prevent atrocities in the early years of the post-Yugoslavian wars. In this sense, the necessity for ICJ to make its presence more visible in the conflict region, to improve the impact of its penal proceedings and outreach programme as well as to improve its cooperation with the local authorities and population holds a great relevance for the deterrence of atrocities and the maintenance of peace. That being said, however, does not eliminate further challenges to counteracting the etiology of international crimes. As *Browning's*⁴¹⁷ study of Reserve Police Battalion 101 particularly illustrates, individuals who are unsusceptible to influences of ideology or authority are still prone to committing atrocities when subjected to other situational factors, such as the influence of the group on the individual. These influences – e.g. peer pressure – can ultimately result in conformity with the group's norms and values, subsequently also with the destructive action its members commit.⁴¹⁸ The following section will therefore further analyze how and why intergroup dynamics and conformity contribute to the perpetration of international crimes.

417 *Browning* 1992.

418 The effect peers might have on the individual (the influence of group norms) has also been explored to an extent in the context of obedience experiments. For example, in the modelled refusal condition of his experiment, *Milgram* succeeded in lowering compliance when using only two resisting peers (*Milgram* 1974, as quoted in *Burger* 2009, p. 10). On the other hand, if the peers continued, and especially if the real subject only had a minor role, the great majority of subjects obeyed until the end (37 out of 49) (*Smeulers & Grünfeld* 2011, p. 218). A similarly modelled refusal variation was conducted by *Mantell* (1971) who used defiance of a single peer prior to the involvement of the subject. This resulted in a significant raise in the defiance of subjects, from 15 % as expressed in the baseline condition of the experiment to almost half of the subjects (50 %) in the modelled refusal condition (*Smeulers & Grünfeld* 2011, p. 222). On the contrary, *Burger's* replication of *Milgram's* modelled refusal condition with two peers disobeying had no apparent effect on obedience levels (*Burger* 2009, p. 10). While these findings also point to the relevance of group norms on the behaviour of the individual, they do not lend themselves to any definitive conclusion with regard to a possible prevalent effect one situational variable might have over the other. As *Miller* points out, in each individual case, it will clearly be the situation, the person and, quite often, their interaction that dictates obedience or disobedience (2014, p. 570).

3.1.1.3 Group dynamics and conformism

It has been explained how ideologies promulgate group inclusion at the expense of a target group. They are a powerful factor for the justification of atrocities, both *ex post* and *ex ante*. With regard to the latter, however, it is important to note that crimes embedded in the policies of a collective are usually perpetrated by smaller groups of individuals (e.g. paramilitary units, death squads, concentration camp personnel) who carry out the actual acts of killing, murdering or raping⁴¹⁹ and who might be induced to action by more immediate factors, such as the internal dynamics of these smaller groups, rather than ideologically motivated vendettas. Embracing the ideology as a justification for atrocious acts might occur only after a person became repeatedly involved in their commission. Additionally, while smaller groups tend to have their own set of norms and values which do not have to resonate with atrocious ideologies essentially, a group member might still commit to their perpetration.

People are social beings by nature and therefore influenced by the groups around them.⁴²⁰ Usually, people are attracted to groups for self-enhancement (e.g. self-esteem or status improvement) and uncertainty reduction (e.g. protection).⁴²¹ In particular, the development of an individual identity and a sense of self is strongly linked to social groups and categories which a person is considered to be a member of.⁴²² If a group is perceived to have a positive effect on the self-enhancement of an individual, he/she will also see himself/herself as representing the group, that is, he/she will acquire a social identity.⁴²³ Once inside the group, both implicit and explicit group pressure will have a profound effect on maintaining that identity and group cohesion.⁴²⁴ Members will want to fulfil the expectations of the group and be good group members because they want to belong to the group, not because they might fear group sanctions.⁴²⁵ Particularly, group norms – as socially accepted beliefs and values concerning what is to be considered normal, acceptable and good – are a strong influence on the ideas, thoughts, moral judgement and behaviour of the individual group members.⁴²⁶ They inevitably imply a level of social categorization and comparison to other groups: in order to enhance their own and the group's self-esteem, individuals will favour their own group and members, subsequently conforming themselves to its behaviour and norms and distancing themselves from other groups.⁴²⁷ Strong and cohesive groups can make people feel proud of their cherished

419 Harrendorf 2014, p. 242.

420 Smeulers & Grünfeld 2011, p. 256.

421 Smeulers & Grünfeld 2011, p. 249.

422 Smeulers & Grünfeld 2011, p. 248.

423 Smeulers & Grünfeld 2011, p. 248.

424 Smeulers & Grünfeld 2011, p. 245.

425 Smeulers & Grünfeld 2011, p. 254.

426 Smeulers & Grünfeld 2011, p. 245.

427 Smeulers & Grünfeld 2011, p. 254.

collective identity, but this can also lead to a severe polarization from others by reinforcing feelings of elitism, stereotyping and prejudice.⁴²⁸

Different dynamics influence the conformism and unity of a group. Certain groups with elitist values and status, such as special army forces, demand from their members to go through a tough *initiation* period in order to prove that they are worthy of becoming a member of the group. Initiation rites are often characterized by phases of separation, transition and reintegration.⁴²⁹ By separating individuals from their former environment and identity, they are subjected to isolation in order to create a feeling of loneliness and the desire to identify with the new norms and values as well as to bond with fellow recruits.⁴³⁰ The transition phase, where they are often subjected to maltreatment, inhumane living conditions and demanding tasks, is designed to reinforce their desire towards a new identity, but also for them to prove that they deserve that identity.⁴³¹ Ultimately, for those who pass the transition, a special ceremony marks integration into a new identity which, in essence, is marked by membership in the group.⁴³² Those initiated feel immense bonding with their peers and extreme loyalty towards the group, given that they have all gone through the same ordeal and have all proven themselves to be worthy of their status.⁴³³ Faced with the prospect of violence, developed bonds between the members should ensure not only that everybody commits to action but also that members who do not agree with certain norms or behaviour will not implicate others as they themselves are involved and guilty.⁴³⁴

A further reinforcement of group cohesion and a deindividuation of responsibility can be achieved through *gradual progression* in the collective perpetration of acts – from less severe ones to those of extreme brutality – and, subsequently, their continuous repetition or *routinization*. A micro-sociological study⁴³⁵ of the Srebrenica massacre, committed in 1995 by members of the Bosnian Serb Army against several thousand Bosnian Muslims after capturing the Srebrenica UN safe area, is illustrative of these mechanisms. In the days preceding the massacre, forces of the Bosnian Serb Army embarked on a gradual campaign of small-scale violence, from shouting insults and threats and firing intimidating shots towards enemy positions to setting haystacks and buildings on fire and killing animals or selective “easy” human targets.⁴³⁶ These acts of a “lesser” severity helped mobilize internal solidarity between

428 Smeulers & Grünfeld 2011, pp. 248–249.

429 Smeulers & Grünfeld 2011, p. 271.

430 Smeulers & Grünfeld 2011, p. 270.

431 Smeulers & Grünfeld 2011, p. 272.

432 Smeulers & Grünfeld 2011, p. 272.

433 Smeulers & Grünfeld 2011, p. 272.

434 Smeulers & Grünfeld 2011, p. 255.

435 Klusemann 2012.

436 Klusemann 2012, pp. 469, 472, 474.

groups of perpetrators and their polarization from victims,⁴³⁷ as well as contributing to emotional dominance over the target group in order to engage in subsequent acts of mass violence. When atrocities started, individual commitment was ensured by the collective mood of the acts.⁴³⁸ Killings and rapes were done in groups, and group cohesion was maintained through the division of labour as well as through ritualistic behaviour such as killing games.⁴³⁹ As with the *Milgram* experiments, the gradual severity of continuous violence, reinforced by participation of the peers, escalated in individuals with a commitment to further violence. Defiance becomes increasingly difficult after having made the first step (“passing the gate region”), and breaking off would be seen as admitting having repeatedly made the wrong decision.⁴⁴⁰ Psychologically, it is easier to continue and defend the given situation against doubts.⁴⁴¹ Additionally, it helps if others are also involved, as nobody then seems to be fully responsible and participants even mutually reinforce each other in their actions.⁴⁴²

The other two elements playing a significant role in group dynamics and ensuring conformism are *ridicule* and *status*. The very nature of *ridicule* is to express contempt for the actions of one another and, by doing so, to call into question his/her fitness for membership in a group.⁴⁴³ To risk ridicule means to risk expulsion from the group, and to lose the group might mean to lose identity and sometimes the prestige it creates, as well as the sense of belonging it affords.⁴⁴⁴ Therefore, the mere risk of ridicule might be sufficient to provoke participation in behaviour that is undeniably dangerous, illegal or morally reprehensible.⁴⁴⁵ Similarly, groups might attach value not only to group membership but also to a *status within the group*. A higher status might bring larger benefices, and criminal groups, for example, might attach a higher status to those who commit most crimes without getting caught.⁴⁴⁶ A higher status can also be deemed as more representative of social identity, so, as a consequence, individuals can, in their urge to belong, display far more extreme behaviour than when on their own.⁴⁴⁷

437 Klusemann 2012, p. 471.

438 Klusemann 2012, p. 478.

439 Klusemann 2012, p. 477.

440 Neubacher 2006, p. 791.

441 Neubacher 2006, p. 792.

442 Neubacher 2006, p. 791.

443 Smeulers & Grünfeld 2011, p. 255.

444 Smeulers & Grünfeld 2011, p. 255.

445 Smeulers & Grünfeld 2011, p. 255.

446 Smeulers & Grünfeld 2011, p. 255.

447 Smeulers & Grünfeld 2011, pp. 256–257.

3.1.2 Internal (personal) factors

Notwithstanding the external factors, in order to understand the etiology of international crimes, equal importance must be acknowledged to internal or personal factors of the perpetrators. People cannot be simply considered to be puppets of external pressures and influences;⁴⁴⁸ personal motives as well as internal transformative mechanisms of perpetrators also need to be taken into analysis when explaining the engagement in international crimes.

3.1.2.1 Motives

International crimes are committed in periods that are often preceded by political upheavals, social restructuring and austere economic conditions.⁴⁴⁹ In such extreme circumstances, different things might be at stake for different parts of the engulfed population. *Smeulers* distinguishes three categories of social strata based on the factor of perceived loss or gain the period of collective violence might bring to them.⁴⁵⁰ This factor can be seen as a strong motivator for initial engagement in the destructive process.

The first category consists of *law-abiding citizens*, a part of the population that is well-adapted, relatively successful and generally not involved in any criminal activity in the period preceding the one of collective violence.⁴⁵¹ Upcoming changes and social restructuring challenge this, and not going along with new policies might result in huge losses for this part of the population.⁴⁵² Similar to law-abiding citizens, *borderliners* are not involved in any crime but are less well adapted: to some extent, they might feel as misfits, unhappy and resentful, although this might not be visible nor will it materialize in the absence of extraordinary circumstances.⁴⁵³ In contrast to the first group, borderliners do not have much to lose but a lot to win; a restructuring of the society as a result of a period of collective violence will give them new opportunities and might be seen as a chance to achieve wealth, status or a career.⁴⁵⁴ The final group includes people who are often considered to be outcasts within a society as they are already, under normal circumstances, involved in crime.⁴⁵⁵ Given that natural inhibitions of *criminals/sadists* towards violence are already lowered, new ideologies might legitimize their behaviour; what is more, they might offer them

448 *Harrendorf* 2014, p. 246.

449 *Harff* 2003, pp. 62–64.

450 *Smeulers* 2008, pp. 237, 242.

451 *Smeulers* 2008, p. 237.

452 *Smeulers* 2008, p. 237.

453 *Smeulers* 2008, p. 237.

454 *Smeulers* 2008, p. 237.

455 *Smeulers* 2008, p. 237.

the prospect of a better status if their natural tendencies towards violence can be focused on a particular target group.⁴⁵⁶

The above-implied motives, e.g. fear of loss or opportunism, have also been acknowledged by other authors when analyzing the process of individual engagement in international crimes. *Gupta* asserts that an individual's choice to participate in atrocities is determined by three basic motivations: *fear*, *greed* and *ideology*.⁴⁵⁷ These factors are multifaceted, and each factor might acquire a different meaning for each individual perpetrator. Fear, for instance, can be engaged in due to an experienced direct threat (e.g. harassment, personal victimization or victimization of a family member) or a perceived threat (e.g. due to political propaganda). It can also manifest itself as fear of becoming an outsider from the group, in which case it coincides with ideology, to which *Gupta* attributes the meaning of "group preference".⁴⁵⁸ Similarly, greed, if understood as selfish interest,⁴⁵⁹ can mean, for example, a desire to exact a revenge upon the other, to use the situational opportunity to pillage, to indulge in sexual and sadistic behaviour over civilians or to pursue a career within the bureaucratic apparatus.

People in different positions or roles within a social structure are likely to have different motives for their participation in atrocities.⁴⁶⁰ Also, it occurs often that more than one motive drives a person.⁴⁶¹ With a prolonged involvement, people frequently change their roles in a destructive process, and with these also their motives.⁴⁶²

3.1.2.2 The process of transformation

Social psychology nowadays distinguishes three responses to social influence: compliance, identification and internalization.⁴⁶³ *Compliance* refers to the adaptation of behaviour in order to get social acceptance and other rewards or to avoid rejection or other punishments. *Identification* exists if a person identifies with another person in order to establish a satisfying relationship. *Internalization*, on the other hand, is the most permanent and most extreme form of adaptation. Through internalization, people accept a certain opinion as their own and integrate it into their system. The belief or opinion then becomes independent of its source and the person will express it even if the source of influence is not present. Here, the person has actually changed a belief.

456 *Smeulers* 2008, pp. 242, 237.

457 *Gupta* 2001, p. 85.

458 *Gupta* 2001, p. xi.

459 *Gupta* 2001, p. xi.

460 See the section on the *typology of perpetrators* (Chapter 3.2) below.

461 *Smeulers* 2008, p. 264.

462 *Smeulers* 2008, p. 264.

463 *Smeulers & Grünfeld* 2011, p. 247.

Among the perpetrators of international crimes, the internalization of values and attitudes that justify atrocities might come at different degrees and paces. For many, it might not come at all, yet these persons would still commit themselves to perpetrating atrocities. It is of question how those perpetrators internally reconcile their primary values with deeds that go against them (e.g. killing a member of one's own kind despite internal inhibitions that work against it).

People rationalize their behaviour in accordance with their deeply internalized values and attitudes. When they start behaving against these attitudes, they experience intense internal mental and emotional strain, which prompts them to reconcile again the two divergent aspects by providing a justification for their new behaviour,⁴⁶⁴ because otherwise they would go insane.⁴⁶⁵ Subjects in *Milgram's* experiments profoundly experienced this feeling of *cognitive dissonance*⁴⁶⁶ when they were conflicted by their internal inhibition to hurt another person and their feeling of duty towards the experimenter.⁴⁶⁷ The only way for them to continue performing the task was to neutralize or reduce cognitive dissonance by providing a justification to what they were doing.

Many people who become engaged in international crimes are likely to experience cognitive dissonance. *Smeulers* asserts that those who belong to the stratum of *law-abiding citizens* in the period preceding collective violence would, with subsequent participation in atrocities, most profoundly experience cognitive dissonance, as their behaviour would go against most of their previously internalized values and attitudes.⁴⁶⁸ The same would apply to *borderliners*, even though to a lesser extent, as they have not completely internalized conventional norms and values.⁴⁶⁹ Those belonging to the category of *criminals/sadists* are deemed not to experience cognitive dissonance, or only to a very little extent, as their inhibitions to commit violence are already low or nonexistent.⁴⁷⁰

Cognitive dissonance can be reduced by a variety of so-called "neutralization techniques". Originally introduced as a theory of delinquency,⁴⁷¹ the theory of neutralization presents a range of cognitive techniques, learned and applied by perpetrators, to justify the breach of a norm in exceptional situations without questioning the validity of the norm as such.⁴⁷² Neutralization makes it possible for the violation of

464 *Gupta* 2001, p. 78.

465 *Smeulers* 2008, p. 238.

466 *Festinger* 1957.

467 See the section on *authority* (Chapter 3.1.1.2) above.

468 *Smeulers* 2008, p. 242.

469 *Smeulers* 2008, p. 242.

470 *Smeulers* 2008, p. 242.

471 *Sykes & Matza* 1957.

472 *Neubacher* 2006, p. 792.

appear acceptable, if not legitimate; moreover, by applying neutralization, the perpetrator protects his image and himself from self-blame and feelings of shame and guilt.⁴⁷³ Proposed techniques of neutralization can be used to rationalize one's behaviour before the actual commission of a crime, but also to provide a justificatory reason for the perpetration of a crime after it is committed.⁴⁷⁴

The original theory of neutralization distinguished between five different techniques: the denial of responsibility, the denial of injury, the denial of the victim, the condemnation of the condemners and the appeal to higher loyalties.⁴⁷⁵ These techniques have subsequently also been appropriated and used to explain the perpetration of international crimes.⁴⁷⁶ Some of them are also used to eventually internalize destructive norms and values. It has been observed how many perpetrators do not initially display the feelings of hate towards their victims, but only start to do so later (as well as believing in an ideology that promotes such feelings) as this helps them justify the killing and torture which they have become involved in.⁴⁷⁷

The first of the techniques, the *denial of responsibility*, is achieved by transferring one's own responsibility to external circumstances.⁴⁷⁸ In the context of international crimes, a perpetrator can justify committed atrocities by appealing to group conformity, authority and obedience, or to one's replaceability, therefore distancing the personal self or moral judgement from one's professional role.⁴⁷⁹ The *denial of injury* means denying the wrongfulness of the deed.⁴⁸⁰ For the perpetrator, wrongfulness can turn on the question of whether or not anyone has clearly been hurt by the act.⁴⁸¹ In the context of atrocities, however, it has been argued that the nature and magnitude of crimes do not easily allow for these types of denials, given that pain and suffering of victims are what the perpetrators actually want.⁴⁸² Mechanisms such as using a euphemistic language (e.g. "final solution" instead of "genocide"; "showering" instead of "murder by poisonous gas") could be understood as means to deny injury,⁴⁸³ but they could effectively be applied only by perpetrators who are not in the close proximity to victims. For immediate perpetrators, the denial of injury could perhaps be achieved through a justification of the act by downgrading its severity in comparison to other atrocities. For example, *Zoran Vuković*, a member of a Bosnian Serb

473 Neubacher 2006, p. 792.

474 Harrendorf 2014, p. 249.

475 Sykes & Matza 1957, pp. 667–669.

476 Harrendorf 2014, p. 249.

477 Smeulers 2008, p. 239.

478 Neubacher 2006, p. 792.

479 Harrendorf 2014, p. 250.

480 Neubacher 2006, p. 793.

481 Sykes & Matza 1957, p. 667.

482 Cohen 2001, p. 95.

483 Harrendorf 2014, p. 250.

paramilitary unit and convicted in front of the ICTY for, among other, mass rapes of Bosnian Muslim women as crimes against humanity, reportedly told a 15-year-old girl after raping her that he could have been more brutal with her but refrained from doing so because he had a daughter of the same age.⁴⁸⁴ The *denial of the victim*, or “the victim status”, can in the case of international crimes be achieved by, for example, internalizing destructive components of ideological propaganda. By means of scapegoating the target group,⁴⁸⁵ victims can be turned into perpetrators, hence violence could be justified on the grounds of defence or retaliation for perceived past misfortunes. In extreme instances, the perpetrator can – under the influence of a dehumanizing ideology – deny that there is a victim by denying that the victim is truly “a person”.⁴⁸⁶ The technique of *condemning the condemners* would refer to the perpetrator’s attempts to deprive the accusers of the moral right to accuse.⁴⁸⁷ This could be done by pointing to other atrocities committed on behalf of other states, therefore forbidding any criticism from outside and blaming it to be hypocritical.⁴⁸⁸ Attention is deflected from the behaviour of a perpetrator to questioning the critics’ right to criticize: the wrongfulness of others then becomes the issue.⁴⁸⁹ Reportedly, while proposing the idea of genocide to his General Staff, *Hitler* easily dismissed world criticism and conscience by referring to the lack of opposition which Turkish pogroms of the Armenians had received in 1915: “Who, after all, speaks today of the annihilation of the Armenians?”⁴⁹⁰ Finally, *the appeal to higher loyalties* allows for a crime to be justified by appealing to a higher authority or upon higher values⁴⁹¹ – such, for example, integrated into the prevailing ideology that allows for destructive behaviour or even demands it.⁴⁹² This neutralization technique is characterized by presenting the perpetrator as an unselfish person driven by ethical motives.⁴⁹³

In addition to the originally introduced neutralization techniques, some authors have proposed to further adapt the theory to international crimes by expanding the model with other categories.

Denial of knowledge,⁴⁹⁴ similar to denial of injury, has been discussed in terms of using the euphemistic language or special language rules in order to create a social reality that distorts facts and events, making either a self-deception or a blatant denial

484 *Drakulić* 2004, pp. 54–55.

485 See the section on ideology (*Chapter 3.1.1.1*) above.

486 *Neubacher* 2006, p. 793; see also the section on ideology (*Chapter 3.1.1.1*) above.

487 *Neubacher* 2006, p. 793.

488 *Harrendorf* 2014, p. 250.

489 *Cohen* 2001, p. 98.

490 *Des Pres* 1976, p. 48.

491 *Neubacher* 2006, p. 793.

492 *Harrendorf* 2014, p. 250.

493 *Neubacher* 2006, p. 793.

494 *Cohen* 2001, pp. 78–88.

in the face of criticism easier. However, while denial of injury is concerned with the disputation of the deed's wrongfulness, denial of knowledge can be considered as a disputation of the deed itself, thus also applying to bystanders and a broader population who might claim they were unaware of any persecutions, tortures or killings going on.

*Moral indifference*⁴⁹⁵ is seen as a consequence of truly radical and consistent repudiations of conventional moral codes: "radical" in terms of not denying the existence of conventional moral codes but their legitimacy, and "consistent" meaning that the justification is not picked up in an opportunistic way, but is inherent in (before and after) the act. Pure ideological crimes, for example, would not require any neutralization because there is no morally legitimate universe outside the ideology.⁴⁹⁶

Finally, *denial of humanity*⁴⁹⁷ has been proposed as a new and separate technique by which internal prohibitions to killing are neutralized. It can be understood as an extreme form of the "denial of victim" technique discussed above. In order to overcome a lifetime of socialization resulting in the deep-seated revulsion to killing human beings, perpetrators need to be able to cast the victims as beings of a lower order than the rest of humanity.⁴⁹⁸ It has already been explained how, for example, ideology can contribute to dehumanizing the target group by means of imagery, symbols, selective readings of history and distorted truths.

Next to the techniques of neutralization, another mechanism of psychological adaptation to atrocities has been proposed: the development of a new, distinct psychological self, or so-called *doubling*.⁴⁹⁹ Doubling is understood as a defence mechanism which allows perpetrators to adapt to extreme situations by psychologically separating one world, e.g. the death camp in which they work, from the ordinary world, i.e. their home.⁵⁰⁰ This separation manifests itself as the development of two psychological selves which operate autonomously,⁵⁰¹ thus allowing the perpetrator to switch between different social identities and roles, or between a social and a personal identity.⁵⁰² This is understood as both a conscious and a subconscious choice which allows participants to avoid confronting the moral and ethical polarity between their

495 Cohen 2001, pp. 98–101.

496 Cohen 2001, p. 98.

497 Alvarez 1997, pp. 166–169.

498 Alvarez 1997, p. 167.

499 Lifton 1986.

500 Smeulers 2008, p. 239.

501 Alvarez 1997, p. 147.

502 Harrendorf 2014, p. 245.

work and their normative self-image.⁵⁰³ Thus, for example, a person can be a ruthless torturer or executioner during working time and a caring family man while at home.

3.2 Towards a Typology of Perpetrators

The development of a plausible typology of perpetrators of international crimes is a somewhat precarious endeavour as, due to the multiplicity of factors which govern or influence individual behaviour, one can only strive towards a set of ideal types. In reality – that is, when examining the criminality of a concrete perpetrator –, overlapping and shifting between the (ideal) types of perpetrators⁵⁰⁴ as well as a differentiation from variables attributable to each ideal type are very likely to be found. Nevertheless, it is perceived that such a typology can provide a useful tool to enhance the understanding of interpersonal relationships, group dynamics and other underlying socio-psychological mechanisms which can help comprehend the causes of international crimes.⁵⁰⁵

The typology presented in this sub-chapter has been generated by *Smeulers*.⁵⁰⁶ While it takes into account research previously conducted by other authors,⁵⁰⁷ it provides a more comprehensive categorization in terms of not being solely focused on a specific situation, period or group of perpetrators, but by encompassing “all people involved in committing international crimes, no matter whether as leaders, policy-makers, bureaucrats or physical perpetrators.”⁵⁰⁸ Such an overarching typology provides a useful frame of reference which can then be applied to the analysis of virtually any perpetrator of international crimes. Accordingly, it can be helpful to devise new or adapt the existing rehabilitative programmes offered in and outside of prison to better suit the etiology of macro-criminals. The analysis takes into account previously delineated external and situational factors as well as personal motives and transformation mechanisms of perpetrators. Furthermore, the typology also addresses roles or positions perpetrators might occupy. Notwithstanding the comprehensiveness, the following categories should only be taken as ideal types. Features of each type can merge or interchange.

503 *Alvarez* 1997, p. 147.

504 *Harrendorf* 2014, p. 247.

505 *Smeulers* 2008, p. 233.

506 *Smeulers* 2008, pp. 243–265.

507 See in detail *Mann* 2005, *Post* 2004, *Gupta* 2001, *Crelinsten* 1993, *Hilberg* 1992 and *Fromm* 1973.

508 *Smeulers* 2008, p. 240.

Table 1 The perpetrator scheme according to Smeulers

Types before the period of violence	Perpetrator Type	Drives
Law-Abiding Citizens	Careerist	Career (Opportunism/Fear of Loss)
	Conformists	Fear of Rejection
	Followers	Authoritarian (Obedience Internalized)
	Devoted Warrior	Devotion (Internalized Values)
	Compromised	Direct Threat (Fear)
	Professional	Internalized Threat
Borderline	Profiteer	Opportunism/Profit
	Fanatics	Dogmatic Ideology (Internalized Values)
Criminals/Sadists	Criminal Mastermind	Opportunism/Cruelty, Aggression, Destructiveness (“Evil”)
	Criminal	Personal Gain (Opportunism)
	Sadist	Pleasure (e.g. sexual satisfaction, deliberate infliction of pain, humiliation of others)
	Fanatics	Hatred, Resentment

3.2.1 Criminal masterminds

Perpetrators belonging to the *criminal mastermind*⁵⁰⁹ category distinguish themselves from the others by the very fact that they are the ones who design dangerous policies; therefore, they do not commit crimes of obedience but conspire and initiate them. The position they occupy is usually the utmost in the chain of command: head of state, but he/she can also be the head of a specific organization or department (e.g. army, police or secret service). Compared to other perpetrators, criminal masterminds will not submit themselves to any authority, as they perceive themselves to be the only and ultimate authority. They feature strong leadership capabilities, a very manipulative character and, often but not always, a hypnotic or charismatic appeal. Criminal masterminds can be described as being very authoritarian, anti-democratic, extremely vain and arrogant, accepting no criticism and believing themselves to be infallible. It is common for them to feature megalomaniac, paranoid and narcissistic

⁵⁰⁹ Smeulers 2008, pp. 244–245; also Smeulers & Grünfeld 2011, pp. 320–321.

traits. Many are power-hungry and driven by opportunism: they might feverously promote a certain ideology but will opportunistically pick and choose the ideology which will bring them to power (e.g. *Slobodan Milošević* who switched from communism to nationalism). For them, the violence is purely instrumental. On the other hand, some criminal masterminds might feature so-called “evil”⁵¹⁰ and destructive traits; for them, the focus might not be solely on the consolidation of power but on the complete destruction or extermination of the target group (e.g., *Adolf Hitler* has been described as a charismatic, almost divine, but utterly destructive leader).

3.2.2 Profiteers and careerists

A period of war or collective violence usually leads to a social re-stratification of society, which means new opportunities for people. Perpetrators who are driven by taking the advantage of the situation can be labelled as either profiteers or careerists. *Profiteers*,⁵¹¹ who under ordinary circumstances would usually not cross certain boundaries, will during the period of collective violence use various means to gain power, prestige, money, material advantage, or simply to settle a score. Opposed to careerists, they are usually less well-adapted and more individualistic; if analyzed within the framework of a pre-conflict society, they would fit the category of “borderliners”. Their goals are rather shaped by situational opportunities than envisaging a long-term perspective. Often described as self-centred with little interest in others, they would usually not have a problem with accepting new values and attitudes, even though some might undergo the process of transformation. They might not necessarily strongly believe in the propagated ideology, but they embrace it as an efficient tool for gaining power, status or material gain. For them, the persecution of a particular group within society creates different opportunities, and while they need not necessarily be involved in the crimes as such, they support them by keeping quiet and taking advantage. Examples of their modus operandi can stem from detention centre guards taking advantage of their position to rape female inmates to private entrepreneurs doing business with evil regimes or civilians denouncing neighbours for personal gain or to settle a score. This type of perpetrator can take up any role.

*Careerists*⁵¹² are also profiteers, but they mainly profit by making themselves a career within the new emerging organizations or at the expense of the target group. Opposed to the plain profiteers, careerists are usually extremely well-adapted to the system and can consequently rise to a specific position within the regime. The re-

510 *Harrendorf* (2014, p. 248) questions whether the concept of *evil* can be empirically operationalized. It is ambiguous how *Smeulers* exactly defines it. Given the presented personal characteristics, it is probable that a criminal mastermind would display a highly psychopathic character (possibly also displaying the traits of a *sadist*) which, understandably, could be labelled as “evil” (similarly, *Harrendorf* 2014, p. 248).

511 *Smeulers* 2008, pp. 249–250; also *Smeulers & Grünfeld* 2011, p. 321.

512 *Smeulers* 2008, pp. 250–251; also *Smeulers & Grünfeld* 2011, p. 321.

stratification of society and extreme circumstances during the period of collective violence can create opportunities for some people to create or advance their careers. The others, unless they close their eyes and go along with crimes, risk losing their careers. It has been observed that careerists rarely show animosity or hostility but are merely focused on their own jobs and careers – if this means serving a destructive political leader, they will do so. Careerists are seldom in close proximity to victims: they plan, organize and delegate. They are often described as vain, arrogant and selfish in their pursuit of advancement. It is common for them to become close associates of the criminal mastermind.

3.2.3 Devoted warriors and professionals

Opposed to profiteers and careerists, who are strongly driven by selfish motives, the so-called *devoted warriors*⁵¹³ have come to internalize new attitudes and values. They do not usually commit crimes for personal profit but because they truly and sincerely have come to believe in a certain ideology and/or a specific leader. Devoted warriors usually do not feature a sadistic or destructive nature per se; under ordinary circumstances, this type would never commit a crime. However, they have a strong sense of duty and responsibility, which makes them prone to the influences of authority. Precisely because they consider obedience, discipline, loyalty and conformity as the most important virtues of a man, they will gradually internalize new norms and subsequently devote themselves to the attitudes which promote destruction under the pretext of some nobler cause. Their crimes are crimes of obedience. For a devoted warrior, violence must be functional. In this sense, they feature a particular mindset because they would accept, condone and promote destruction of a target group; yet they would be appalled by e.g. corruption or excessive and unnecessary cruelty. They will generally dislike sadists and fanatics whom they will consider barbaric, and they will probably also despise profiteers whom they will consider unethical. Given their good adaptation to the system, they are considered to be extremely useful functionaries in all organizations. They are the ideal bureaucrats and soldiers: dutiful, law-abiding and reliable. Within an oppressive system, they can be involved as planners and organizers of crimes, supervise these crimes or be otherwise involved in their perpetration. *Adolf Eichmann* and *Rudolf Höss* are considered to represent typical devotees.

Similar to the devoted warriors, *professionals*⁵¹⁴ also commit crimes of obedience – however, not because they have come to believe in a particular cause by themselves but because they have been trained (or conditioned) to do so. This type encompasses the members of military, police, secret service or any other specialized and militarized unit who have gone through a specifically designed and sometimes extremely

513 *Smeulers* 2008, pp. 252–254; also *Smeulers & Grünfeld* 2011, p. 322.

514 *Smeulers* 2008, pp. 258–260.; also *Smeulers & Grünfeld* 2011, p. 322.

coercive training programme in which they are disciplined, learn to accept a very strict hierarchy and are taught to obey all orders unquestioningly. The training serves to crush their personality and previous identity, to de-individualize and depersonalize them in order to make them focus on their jobs, to act instinctively and without emotional obstructions. Group coherence and focusing on a job become the primary importance. Initially, the recruits within such a training programme will react to clearly visible threats (deliberately imposed on them) and obey out of fear, but after certain period, they internalize this fear and continue to do their jobs even in the absence of such a clear threat. This is the point when they have become successfully transformed into instruments of violence and destruction so as to be professional torturers and killers. They are usually not characterized by sadistic traits, nor do they particularly enjoy the killing – for them, it is a profession, and as with every profession, those who are good at it take a certain degree of pride in it. Opposed to devoted warriors, it has been observed that professionals would probably not have a problem with changing sides after the war: for them, violence constitutes simply a job; for devotees, it is a job with a cause.

3.2.4 Criminals, sadists and fanatics

Unlike the devoted warriors, criminals, sadists and fanatics are usually driven by their own emotions and feelings of hatred, anger or desire and are often already involved in some kind of criminal activity or socially unacceptable behaviour before the period of collective violence. For some people, violent or sadistic traits might be dormant and become activated only in the period of collective violence due to extraordinary circumstances (the so-called “latent type”), yet those who feature them openly and are strongly motivated by their own drivers are likely to be convicted *criminals or sadists* even before the period of collective violence.⁵¹⁵ These perpetrators take deliberate advantage of the context of mass violence or are intentionally used by others because they feel fewer inhibitions to use violence and come in handy for political purposes.⁵¹⁶ However, because they are strongly driven by their selfish motives rather than obedience or conformity, they are hard to control; therefore, they are of limited use to organizations in which obedience, loyalty and discipline are considered important virtues. They are never fully committed to the cause, group or a leader and will merely go along with the system as long as it is to their advantage. Despite popular opinion, there are rather few sadists or otherwise mentally disturbed individuals among the perpetrators of international crimes. Notwithstanding the fact that there are always some perpetrators who go further than others and are clearly driven by violent, sadistic or other sexual impulses, this group is always a minority.

515 Smeulers 2008, pp. 247–248.; also Smeulers & Grünfeld 2011, pp. 322–323.

516 See the example of Arkan above (Chapter 3.1).

*Fanatics*⁵¹⁷ are driven by very strong emotions like hatred, contempt and resentment and usually project these feelings onto a particular group which they blame for their misfortune. Under ordinary circumstances, they often feel resentful to the ruling society and its norms, and it is likely that they often feel themselves to be misfits, not because of their shortcomings but because they believe society to be unfair or imperfect. Such people can come to commit hate crimes by their own initiative or subsequently devote themselves absolutely and unconditionally to a fundamentalist ideology or a specific leader whom they deem capable of successfully channeling their feelings. The strong emotional drive of a fanatic can also coincide with the one of the criminal mastermind. They are the perpetrators who absolutely and fully believe in what they are doing. Their fanatical belief resembles a religious zeal, and they sometimes feel they have a mission larger than life – they would rather die than admit they might be wrong. Fanatics can be instigators who incite others to commit crimes, who co-conspire with criminal masterminds and fill extremely high positions within the hierarchy – in which case they need to contain their internal drives to an extent – , or they can be involved in the physical perpetration of the crimes. Opposed to devoted warriors, violence is not just functional to them, it is more ritualistic, and they will often make excessive use of it. Given their emotional involvement in the cause they believe in, they are more extreme about it than devoted warriors – and therefore potentially more difficult to control.

3.2.5 Followers and conformists

Many perpetrators have no specific reason to commit crimes, no hatred, resentment or insatiable urge to gain profit, but they do get involved in mass atrocities merely because they follow others. *Followers* and *conformists*⁵¹⁸ are deemed very “colourless” people without strong personalities, who are reluctant to take a lead or responsibility. Some of these perpetrators follow a leader or just a hierarchical chain of command: given their strongly internalized dispositions towards obedience, they are considered to be very authoritarian. Others are less influenced by authority but strongly influenced by a group and submit to peer pressure. Their drive is fear of rejection; they will strive for not being considered misfits. Often their own identity depends a lot on their membership in a group. Both types seldom act on their own initiative, and the groups they are members of often determine the path of life they take.

There are several distinguishable subtypes of followers: the naïve, the admirer and the obedient. Both *naïve* and *admiring* followers are not aware of the consequences of their idolatry. They feel attracted to a specific person (e.g. a member of their

517 Smeulers 2008, pp. 246–247; also Smeulers & Grünfeld 2011, pp. 322–323.

518 Smeulers 2008, pp. 254–256; also Smeulers & Grünfeld 2011, pp. 323–324.

group, their platoon leader or a criminal mastermind) and, because of their admiration, they lose their ability (or simply refuse) to judge the person in an objective manner. The *obedient* followers are not characterized so much as admirers but as authoritarians. They have strong internal dispositions towards obedience; they feel comfortable when just following orders, without a question and without any responsibility. Opposed to devoted warriors who are rather driven by the cause, obedient followers are more passive; they will take an action or initiative only if they are specifically asked to do so. While they might feel some empathy for their victims, they will take the righteousness of their superior's decision for granted. In times of crisis, psychologically healthy personalities can become simply overwhelmed by uncertainty and subsequently fall prey to a charismatic leader to whom they submit. The security of a group or mass movement with a directive leader makes them feel comfortable again, which is therefore considered psychologically attractive.

Similar to the followers, the conformists are reluctant to take any initiative; they will submit themselves to normative social influence and simply accept the given social definition of reality by the group. They relinquish any responsibility for their own acts; according to them, they rest with the leader or the group. The conformists will always seek to express the opinions that are prevalent within the group, and if their own opinions initially differ, they will change them or not reveal them at all. The conformists easily adapt to different situations and can thus be easily dragged into violence and violations. While a variety of explicit or implicit group pressures can influence a person towards conformism, the fear of rejection has been found to be a discerning drive among conformists. Given that sometimes, their entire identity depends on the group identity, they are afraid to be excluded or deemed unfit for the group. Also, they sometimes feel a strong comradeship and can be very loyal towards their fellow group members.

Many minor but indispensable roles in oppressive regimes (e.g. bureaucrats, functionaries) can be filled with followers and conformists. It is known that destructive regimes are built on the silent cooperation of thousands, maybe millions. They can, however, also fill the role of a physical perpetrator. One such example comes from a study of Reserve Police Battalion 101⁵¹⁹ whose members during the World War II accepted the order to kill and execute Jews because they were afraid of disappointing the others and being considered outcasts, weaklings and cowards.

3.2.6 Compromised

The *compromised perpetrators*⁵²⁰ do not commit crimes out of their own initiative or accord but because they are pressured, forced, coerced or tricked into doing so.

519 Browning 1992.

520 Smeulers 2008, pp. 257–258; also Smeulers & Grünfeld 2011, p. 324.

They do not agree with the policy nor the crimes but are forced to cooperate because they are, for example, (related to) members of the target group or because they have a socially underprivileged or vulnerable position, like the unemployed or children. These people will cooperate because of fear: they feel they do not have a choice if they want to save their lives or the lives of their loved ones. Some might cooperate because they believe that if they cooperate, they can undermine the perpetrators, limit the damage and keep the situation in control (e.g. Jewish Councils during the Nazi regime). Admittedly, being exposed to the vortex of violence long enough, even compromised perpetrators can become far less reluctant participants.

3.3 Summary

Interdisciplinary research into perpetrators of international crimes, which has been developing since World War II, paints a rather complex picture of various etiological factors that might prompt an individual into the involvement and perpetration of atrocities.

Crucial importance has been attributed to extraordinary circumstances which either precondition or directly influence the commission of international crimes. In particular, great political changes, economic instability and social restructuring have a profound effect on different social strata in terms of provoking different sentiments and feelings, which can range from fear and insecurity to plain opportunism. These sentiments are a fertile ground for political elites to manipulate and/or mobilize masses into destructive, often genocidal campaigns against members of a selected target group under the pretext of a defensive action – however, often with the ulterior motive of consolidating their own political power and wealth. One of the distinguishing features of these crimes is the moral conditioning destructive policies produce by inverting the moral framework within the society and different social groups: atrocities (e.g. killings, rapes, lootings, destruction of properties) towards other human beings who become labelled as members of the target group are not anymore something prohibited but something that is, if not openly incited or commanded, at least condoned. In that sense, a crime – which becomes a crime only with reference to some standard at the superior level, such as international law – is not an act of deviance but of obedience and conformism. Such external legitimization also removes the criminal stigma from the perpetrators; they are not condemned but hailed for contributing to the collective cause.

The ordinariness of a vast number of perpetrators is another distinguishing feature attributed to international crimes – ordinariness in the sense that perpetrators of atrocities have, prior to their commission, rarely exhibited tendencies towards violence or any form of behaviour which in normal circumstances would be considered as deviant. Many of them have been law-abiding citizens, even distinguished members of the society. Moreover, many perpetrators belonging to the official state structures, such as police or military, are under normal circumstances mandated to protect

citizens from exactly the kind of acts in which they find themselves taking part later. This sets them apart from the category of the “normal”, deviant perpetrator who is usually not well-integrated socially and belongs to lower-social strata. Furthermore, research has indicated that despite the role of personal dispositions, influences and pressures exerted by external factors (such as ideology, authority, group dynamics and conformity) to a large extent condition the change in the moral framework of the perpetrators of international crimes, as well as their subsequent participation in atrocities. These factors also play a significant role in cognitive justificatory processes (the processes of transformation) which the perpetrators, to a greater or lesser extent, undergo prior to or after the commission of crimes. It has been noted that justification comes easier only for those whose internal inhibitions towards violence are already low or non-existent (e.g. criminals, sadists, psychopaths); for a great many others, this can take more time and might often involve additional mechanisms such as routinization (continuous involvement) and escalating commitment (gradual progression, e.g. from violence of little intensity to high-intensity violence), which not only increases the cognitive capacity for violence, but also impedes any attempt to reason on the moral rightness of the acts.

The variety of etiological factors presented in this chapter has been comprehensively summarized through the typology of perpetrators as proposed by *Smeulers*. The typology is ideal; in real life situations, it is highly probable that a more complex combination of factors would play a role for an individual to commit international crimes.⁵²¹ Nevertheless, it provides a useful frame of reference which can be applied to the analysis of a perpetrator’s etiology. In the context of enforcement of international sentences, the typology indicates not only the challenge for rehabilitation to tackle – in the sense that, given their etiological factors, for some of these types, rehabilitative programmes might either not be available or those available might not fulfil any rehabilitative purpose –, but can also serve as an initial starting point for

521 A good example of how etiological characteristics attributed to different types of perpetrators merge in real-life circumstances is given in the book “Beara” by *Ivica Đikić* (2016). The book presents a “thick” micro-sociological reconstruction of the Srebrenica massacres in order to discern motivations and personality traits of its main orchestrators – in particular those of *Ljubiša Beara*, a colonel and former Chief of Security of the Army of Republika Srpska’s Main Staff, who was found guilty of genocide over Bosnian Muslims in front of the ICTY on 30 January 2015 (see the *Popović et al.* case, IT-05–88). For *Đikić*, the main question is how a formerly distinguished, high-ranking naval officer of the Yugoslav Navy, educated and trained to protect members of all constituent nations of the SFRY, could suddenly devise and implement mass killings of members of one of these very nations. The study, supplemented by a broader historical and political analysis of the context in which the post-Yugoslavian wars occurred, as well as by *Ljubiša Beara’s* biographical details, rejects the notion of fanaticism or nationalistic hatred but rather argues that factors such as professional opportunism, obedience, devotion to superiors and conformism played a significant role for *Beara* to perpetrate the crimes. If applied to *Đikić’s* study, the above-delineated typology could distinguish traits of at least four different types of perpetrators in *Beara*, namely a careerist, a devoted warrior, a professional and an admiring follower.

the development of constructive programmes which would not only assist perpetrators to properly implement their right to rehabilitation and subsequent reintegration into society, but would also have a profound impact on the overarching aims of international criminal justice.

Chapter 4

Rehabilitation and Macro-Criminality

The previous chapters have, among others, analyzed the relevance attributed to rehabilitation as a penal goal in the context of the ICTY's trial proceedings. While not given due prominence for the imposition of sentences, it has nevertheless been considered as a valid goal for the phase of sentence enforcement – partially by judges, but also indicated in some normative provisions for the enforcement of the Tribunal's sentences. This reasoning also stands in line with international human rights and prison standards instruments. Furthermore, the previous chapter has argued how, in order to constructively achieve rehabilitation of perpetrators of international crimes, it is necessary to understand which etiological factors and mechanisms lead to their involvement in atrocities. Their rehabilitation is of relevance not only for their potentially peaceful reintegration into the society where the conflict might still be latent (e.g. their disengagement from involvement in further possible atrocities), but also for the process of reconciliation between former warring groups. In particular, a change of attitudes towards the committed crimes, remorse as well as a willingness to contribute to reparative action as positive outcomes of rehabilitation can all be seen as having a significant effect on the amelioration of relationships not only between perpetrators and their direct victims, but also between groups whom these actors symbolically represent. Furthermore, the individualization of punishment which rehabilitative concern contributes to helps elevate unwanted detrimental effects of imprisonment. Subsequently, it expresses a humanitarian concern that underlies criminal justice reaction; that is, an individual is not only an abstract means to fulfil overriding social goals, but his/her fundamental rights should also be respected.⁵²² In this sense, ICJ also sends a message that penal condemnation is not intended as a vengeful reaction but as a just censure that constructively strives to prevent further crimes and to contribute to reconciliation between polarized parties. It is one of the crucial preconditions for punishment to attain its legitimacy and be accepted as a valid instrument of social control instead of despotic violence.

In order to evaluate the implementation of rehabilitation towards perpetrators of international crimes in general and the ICTY prisoners in particular, it is necessary beforehand to delineate the facets of a rehabilitative approach as usually understood in the context of enforcing prison sentences. Furthermore, the discussion will be

522 *Rotman* 1990, p. 2.

broadened with a detailed analysis of the contemporary rehabilitative operational framework. The meaning and significance of rehabilitation is well-known within discourses of disciplines such as philosophy of law and punishment; yet how is rehabilitation supposed to be achieved in practice represents a point of ambiguousness and contestation. As will also be shown in more detail, throughout history, rehabilitative models have changed (or better to say morphed) based on the means as well as the roles and powers of the members of the rehabilitative relationship,⁵²³ and while there has never been a clear cut between different historical models – past models were generally retained in a modified way, coexisting or blending with new ones⁵²⁴ –, certain methods of the old models (e.g. solitary confinement with forced labour for the purpose of moral reflection and penance, or overly coercive methods of the so-called therapeutic model) have clearly lost their endorsement within the new human-rights-based rehabilitative discourse – not least due to empirically proven detrimental effects such means have for prisoners where, instead of fostering their successful return to society, they actually obstruct it.

The delineation of rehabilitative facets as well as the operational framework rehabilitation retains in the context of enforcing prison sentences will then serve as the backdrop for a preliminary consideration of challenges contemporary rehabilitative programmes might face when applied to macro-criminals. For example, some authors have voiced concern with regard to the conformist/obedient aspect of macro-criminality, claiming that within a social/state system “infested” by policies and actors that propagate or support atrocities, social rehabilitation of individual perpetrators is futile. Given that their acts do not deviate from the state policy but are in conformity with it, they lack criminal identity. Therefore, within the prevalent concept of rehabilitation, it could be argued that they are already integrated and do not need to be reintegrated or re-socialized. What they see then as a valid purpose for the penal reaction is to strive to change the infested system by what is labelled by *Rotman* as a “symmetrical response”⁵²⁵ to atrocities, with certain propositions going so far as to claim a radical de-solidarization towards perpetrators as the only legitimate answer. Of course, to an extent, this can be recognized in the major Nazi war criminals trial held at the IMT in Nuremberg in 1946 where, despite setting the precedent in terms of uplifting values of human life and dignity above ideologies propagating their destruction, the same postulate was not applied in the case of a majority of

523 *Rotman* 1990, p. 4.

524 *Rotman* 1990, p. 4.

525 *Rotman* adapts this terminology first and foremost with reference to counter-terrorism methods as currently developed, claiming that “counter-terrorism has been largely conditioned by terrorists’ methodology becoming, to a certain extent, its mirror image” (2008a, p. 526). According to *Rotman*, what this results in is a symmetrical response, e.g. through torture or unbridled punitive reactions, that produces the psychological mechanisms that originated the terrorist acts, subsequently leading to an endless cycle of retaliatory violence between the actors (2008a, pp. 526–527).

defendants, who were charged with death by hanging. Only a handful of perpetrators were sentenced to punishment of imprisonment in the Spandau prison in Berlin.

In the context of the present study, the case of the “Spandau Seven” reveals itself as an interesting opportunity for a preliminary analytical enquiry into the enforcement of prison sentences of macro-criminals. Opposed to the ICTY enforcement system – that is, in general, based on a policy of dispersion between different national prison systems (see *Chapter 5*) –, the Spandau prison was a dedicated, stand-alone prison facility that housed exclusively inmates convicted for international crimes and was under joint administration of the four occupation powers (France, Britain, the United States and the Soviet Union). In that sense, it can be considered, if not the first international prison facility, then at least an archetype of one. It is particularly interesting – and of relevance for the comparison with the ICTY enforcement system – to determine to what extent the prison conditions, treatment and subsequent release of the Spandau inmates did represent a *sui generis* penal policy, in particular regarding the implementation of rehabilitative penal principles towards imprisoned Nazi macro-criminals. Notwithstanding the death penalties meted out by the IMT, the Nuremberg Trials also represent an inception point for the human rights movement that subsequently began opting for more humane punishment and prison sentences. Given that during the time the “Spandau Seven” were incarcerated, the prisoners’ rights movement also started gaining a more prominent momentum, it is relevant to see whether and to what extent it influenced (or better to say “mellowed down”) the symmetric response to macro-criminality the IMT initially opted for. This, of course, is then directly related not only to the impact punishment has on offenders but also to the perception of punishment and its legitimacy within the post-conflict society as well as among the wider international community. Consequently, Spandau represents a first instance in the developmental trajectory of the international penal/prison system as existing nowadays and, as such, a valid reference point for any discussion on prison treatment and the rehabilitation of perpetrators of international crimes.

4.1 Imprisonment and Human Rights: Unveiling the Concept of Rehabilitation

In the penal context, the aim of rehabilitation⁵²⁶ is concerned with enhancing the ability of offenders to function normally in civil society⁵²⁷ in order to be reinstated

526 *Ward and Maruna* (2007) as well as *Rotman* (1990, p. 3) indicate the historical appropriation of various terms for rehabilitation, ranging from *reform*, *regeneration* and *correction* to modern expressions such as *reentry*, *reintegration*, *reeducation* and *resocialization*. Despite their differences, these terms have all been used to essentially refer to the rehabilitative idea of “improving the offender’s chance of being a useful citizen and staying out of prison” (*Rotman* 1990, p. 3).

527 *Van Zyl Smit & Snacken* 2009, p. 83.

and accepted as fully reintegrated members. While this can also be attributed to the forms of non-custodial sanctions, e.g. fines or probation,⁵²⁸ it is most commonly linked with sentences of imprisonment⁵²⁹ where it appropriates true significance.⁵³⁰

528 Any positive rehabilitative effect attributed to non-custodial sanctions, such as fines or probation, is, hypothetically speaking, left to chance as they do not engage constructively with reasons for offending, nor can they guarantee that the moral reprimand the punishment expresses will prevent the perpetrator from re-offending. Nevertheless, *Rotman* (1990, p. 4) sees them as having an indirect effect that resonates with a negative concept of rehabilitation, that is the avoidance of harm and deterioration.

529 *Robinson* 2014, p. 4363.

530 While advocated for in the context of imprisonment, rehabilitation has not been the exclusive penal purpose associated with it. Certain deviations from the exclusively rehabilitative discourse can be seen, for example, in *Franz von Liszt's* penal theory where the *indeterminate incapacitation* of dangerous “incorrigible” offenders is seen to be a valid means of achieving special prevention, which is, according to *von Liszt*, a fundamental purpose of punishment (*Novoselec* 2009, p. 43; *von Liszt* 1883, p. 3). *Von Liszt* has envisaged three means through which punishment ought to achieve special prevention – namely, through the deterrence of so-called “first-time offenders”, through the rehabilitation of “corrigible chronic offenders” and through the incapacitation of “incorrigible chronic offenders” (*Novoselec* 2009, pp. 43, 384; see also *Roxin* 2006, p. 74; in particular, see *von Liszt* 1905, chapter 7: *Der Zweckgedanke im Strafrecht*, pp. 126–179). The concept of imprisonment as serving the purpose of incapacitation, that is, of protecting the society by depriving a serious offender of his liberty indeterminate (*van Zyl Smit & Snacken* 2009, p. 82) is seen as problematic within the contemporary human rights discourse. On the one hand, it can be perceived as to relieve the state of its positive obligation to uphold fundamental rights of prisoners and offer them an opportunity to better themselves in order to be reintegrated. On the other hand, an indeterminate period of detention enhances negative forms of coping, such as increased prisonization and institutionalization, which, by default, diminish prisoners’ skills and abilities required for successful reintegration, thus making it that much less likely (*van Zyl Smit & Snacken* 2009, pp. 82–83). The jurisprudence of the European Court of Human Rights (ECtHR) indicates that in those instances where the incapacitation of “dangerous” offenders is accepted – that is, it is subject to periodic access to a court to review the necessity to continue the detention –, the detention could become illegitimate if release were made impossible as a consequence of the effects of the way in which it is implemented (e.g. *Weeks v United Kingdom*, 02 March 1987; see *van Zyl Smit & Snacken* 2009, p. 83). This then points to rehabilitation of an offender as a goal that, in the context of the enforcement of imprisonment, indeed should have a priority and be implemented. Nevertheless, many states (e.g. Germany, Switzerland, Belgium, Brazil, Portugal, Spain, the Netherlands, the Nordic/Scandinavian countries) have still found a way to circumvent rehabilitative underpinnings of the punishment of imprisonment (*van Zyl Smit et al.* 2016, p. 15). Namely, by adapting a “dual track system” of sanctions, *imprisonment as punishment* – based on the heinousness of the offence and the degree of guilt of the individual – is distinguished from *imprisonment as preventive detention* which can be imposed on convicts – also after the completion of their punishments – because of their perceived dangerousness and can lead to an indeterminate loss of liberty (*van Zyl Smit et al.* 2016, p. 15). From the standpoint of the offender’s rights, this can be particularly detrimental as the state can abuse it in order to appease populist demands while simultaneously relieving itself of any obligation to foster the rehabilitation of the offender. The case of Switzerland speaks to this. Due to a popular initiative in the 1990s, the Swiss Federal Constitution was amended so as to provide also for detention until the end of their lives of sex or violent offenders who were deemed to be “untreatable” (*van Zyl Smit et al.* 2016, p. 16; see also *Coninx* 2016). A release can be considered only if new scientific findings can demonstrate that these persons can be cured and no longer present a danger to the public; in that case, the authorities granting the release must accept liability if the person does re-offend (*van Zyl Smit et al.* 2016, p. 16). The risk of being held liable can indeed make the

The underlying impetus of rehabilitation in this context is to induce a positive change in offenders. However, the approach to this change has differed throughout history. Before delineating its different facets (or strands) – interdependent within contemporary understanding of rehabilitation –, it is useful to lay out the developmental trajectory of rehabilitative models. As mentioned earlier, the adoption of each new model did not mandate the immediate cancelation of means and approaches that could be found in the previous one. On the contrary, past models were retained in a modified way, coexisting or blending with the new ones,⁵³¹ therefore certain principles and approaches that can be found within the contemporary operational framework of rehabilitation also have their origins within the past models. Furthermore, this developmental trajectory has been heavily influenced by the progress of criminological theory as well as the human rights movement which gained momentum after World War II.

4.1.1 Historical development of rehabilitation

As indicated by *McNeill*, the earliest use of the term “rehabilitation” in the criminal justice context was in late 17th century France where it referred to the destruction or undoing of a criminal conviction and to the deletion or expunging of the criminal record.⁵³² While not concerned per se with the change of offenders in a psychological or sociological sense, the legal restoration of citizenship after the offence, or so-called “judicial rehabilitation”,⁵³³ is of direct relevance for any constructive rehabilitative effort as it removes the formal stigma that comes with a criminal record, and with that legal and practical barriers that might stand in the way of the offender’s complete rehabilitation.⁵³⁴ This meaning was also reflected a century or so later by *Cesare Beccaria* who argued for the use of punishment as a way of requalifying individuals as juridical subjects.⁵³⁵ In this sense, rehabilitation is understood to be a proper objective of punishment as well as its final conclusion: by completing the punishment, a putative debt created by offending was settled.⁵³⁶

authorities reluctant to any constructive effort to assist these persons towards rehabilitation. Subsequently, holding individuals indefinitely (that is, until the end of their lives) on the basis of a perceived risk can lead to the unnecessary restriction (or even abuse) of their rights under the pretext of protecting society.

531 *Rotman* 1990, p. 4.

532 *McNeill* 2014, p. 4197.

533 *McNeill* 2014, p. 4204.

534 *McNeill* 2014, p. 4204.

535 *Beccaria* 1964 [1764], as quoted in *McNeill* 2014, p. 4197.

536 *McNeill* 2014, p. 4197.

The socio-psychological aspects of offenders' change are more prominently expressed within four historical models of rehabilitation, as delineated by *Rotman*.⁵³⁷

4.1.1.1 The “penitentiary” model

The *penitentiary* model of the 19th century recognized the rehabilitation of offenders mostly as their psychological transformation.⁵³⁸ This led to the development of two versions of the model: one approximating the monastic ideal of penance and the other associated with the individualist 19th century ideal of progress through industriousness and personal effort.⁵³⁹ Both versions relied heavily on imprisonment to mold the character of the offender – through a high degree of supervision (in which the prison architecture played a significant role⁵⁴⁰), isolation, work (carried out either in solitude or in the silent presence of other inmates), discipline and moral education based on religious discipline and indoctrination.⁵⁴¹ Gradually, the trend towards an individualization of prison sentences mitigated an exaggerated disciplinary model where each individual was treated exactly alike and introduced a unique system of incentives and deterrents where inmates were encouraged to work towards their eventual release – however, by appropriating already fixed patterns of labour and discipline.⁵⁴² Those who failed to do so were faced with the loss of privileges or demotion to a lower stage of progression where deprivation and isolation were stricter.⁵⁴³ Alongside this new disciplinary approach, the indeterminate sentence was adopted.⁵⁴⁴

4.1.1.2 The “medical/therapeutic” model

At the turn of the 20th century, with biological and psychiatric interpretations of social deviance assuming a central role in criminology and policy-making, a *medical*, or *therapeutic*, model of rehabilitation emerged, resting on the assumption that criminal offenders were sick (suffering from some physical, mental or social pathology) and needed to be “cured” of criminality.⁵⁴⁵ Due to the medical analogy, the term “treatment”, formerly applied to the administrative handling of prisoners, began to

537 *Rotman* 1990.

538 *Rotman* 1990, p. 5.

539 *Rotman* 1990, p. 5.

540 This reflects the ideas put forward by *Jeremy Bentham* for his infamous “Panopticon” design for a prison modelled on a factory (*Robinson* 2014, p. 4362). The regime proposed by *Bentham* centered upon the supposedly reformatory effects of permanent surveillance and the productive labour of prisoners working in their cells for up to 16 hours per day (*Robinson* 2014, p. 4362).

541 *Rotman* 1990, pp. 5, 59.

542 *Rotman* 1990, pp. 59–60.

543 *Rotman* 1990, p. 60.

544 *Rotman* 1990, p. 5.

545 *Rotman* 1990, pp. 5, 60.

be used in a medical sense, which as a consequence had the expansion of incapacitating custodial policies against dangerous offenders at the expense of their individual rights.⁵⁴⁶ In principle, the medical/therapeutic model can alleviate the pains of the penitentiary model with the element of care; however, it has also allowed for abuses and violations of individual rights (e.g. the application of drugs and psychosurgery) under the pretext of therapeutic intervention.⁵⁴⁷ As *Rotman* observes, most of the modern critique of rehabilitation revolves around the medical/therapeutic model.⁵⁴⁸ Eventually, the socio-psychological theory helped correct the theoretical flaws of a unilateral therapeutic model and, by raising awareness of both social and psychological aspects of criminality, subsequently paved the way for the social-learning model of rehabilitation.⁵⁴⁹

4.1.1.3 The “social-learning” model

The *social-learning* model evolved together with the development of the socialization theory around the mid-twentieth century.⁵⁵⁰ Socialization is seen as the process through which an individual becomes a participant in the social system.⁵⁵¹ From the perspective of the individual, it is a process of communication and learning through which he/she appropriates and develops norms, values, skills, knowledge, motivations and feelings corresponding with those of the society.⁵⁵² From the society’s perspective, socialization means the achievement of a degree of consensus with an individual needed to maintain the viability of the social system.⁵⁵³ The consensus does not imply that the interests of society and those of the individual should be exactly the same; however, great relevance is placed on the individual’s appropriation of norms and values that underlie the provisions of criminal law.⁵⁵⁴ Subsequently, the social-learning model views criminality as the result of learned behaviour and rehabilitation as a compensation for flaws in the socialization process (occurring, e.g., through improper schooling, family dissolution or neglect of children, but also

546 *Rotman* 1990, pp. 5, 60.

547 *Rotman* 1990, pp. 5, 8.

548 *Rotman* 1990, p. 5. In their “Preface” to *Rotman’s* “Beyond Punishment” chapter (1994, p. 281), *Duff* and *Garland* affirm this point; however, they argue that the abuses were rare in practice and that it was mainly popular novels such as “*A Clockwork Orange*” (*Burgess* 1962) and “*One Flew over the Cuckoo’s Nest*” (*Kesey* 1962) that imprinted the image of “an authoritarian state, in white-coated therapeutic disguise”, performing “drastic and dehumanizing brainwashing” in people’s minds. Consequently, they stress, the image resonated widely in a cultural milieu which was libertarian in ethos and increasingly concerned about the threats to individual liberty and rights posed by the government (*Duff & Garland* 1994, p. 281).

549 *Rotman* 1990, p. 5.

550 *Rotman* 1990, p. 64.

551 *Rotman* 1990, p. 64.

552 *Rotman* 1990, p. 64.

553 *Rotman* 1990, p. 64.

554 *Rotman* 1990, p. 64.

through the dissolution of values or their confusion brought about by wars and social conflicts).⁵⁵⁵ The socialization itself is seen to stretch over an individual's entire life; therefore, the rehabilitative concept within this framework favours the conception of corrections as a social learning and educational undertaking.⁵⁵⁶ In this sense, it also sees the transformation of the traditional prison environment into a problem-solving community as a necessary step towards the achievement of the rehabilitative goal.⁵⁵⁷ Namely, the model assumes that the capacity for law-abidance can be learned through a process of human interactions, including participation, sharing information and feelings as well as preparation for the post-confinement world.⁵⁵⁸ Communication is seen as the essential component of this process and gains particular significance in the most advanced form of this model, the so-called "social therapy". Modern social-therapeutic efforts strive to open the institutions to the community as much as possible as it became clearer that inmates are in need of communal support during a gradual release period, too.⁵⁵⁹ In particular, it has been found that among inmates of social-therapeutic institutions, those who undergo a pre-release period of preparation through leaves of absence and furloughs are less prone to recidivism than those who are directly released from a closed regime.⁵⁶⁰ Additionally, opening the door to the community stimulates a reparation of relationships between the offender, victims and wider circle of community members that has been breached by the commission of crimes. It can consequently have a wider positive impact than a solely offender-oriented treatment⁵⁶¹ and finds its particular expression in the community-based programmes.⁵⁶² On the level of prisons, social therapy strives to replace the strictly authoritarian hierarchical structure of the institution with a horizontal association of mutually responsible human beings who aim at resolving their problems through a process of intensive human interaction: frequent meetings and group discussions are seen as the vehicle of this process where decisions are reached through the participation of both inmates and staff.⁵⁶³ The broad scheme of social learning is also complemented with various specific forms of psychological therapy.⁵⁶⁴ Even though social therapy allows for a greater role flexibility between prison staff and inmates – which is seen too allow for a relationship that is based on therapeutic inclinations, trust and genuine cooperation rather than on authority and subordination –, the model

555 *Rotman* 1990, p. 65.

556 *Rotman* 1990, p. 65.

557 *Rotman* 1990, p. 5.

558 *Rotman* 1990, p. 5.

559 *Rotman* 1990, p. 66.

560 *Rotman* 1990, p. 66.

561 *McNeill* 2014, p. 4204.

562 *Rotman* 1990, p. 6.

563 *Rotman* 1990, p. 66.

564 *Rotman* 1990, p. 65.

is still part of the criminal justice system, and therefore still seen as required to comply in some measure with its incapacitative⁵⁶⁵ and deterrent demands – subsequently also in terms of a certain distance established between inmates and staff.⁵⁶⁶

According to *Rotman*, perhaps the main point of contention within the social therapy is the offenders’ motivation for treatment.⁵⁶⁷ Growing awareness and respect for the dignity of offenders and their rights that started developing within the simultaneously emerging “rights” model of rehabilitation⁵⁶⁸ also led to a “consideration of rehabilitation from offenders’ perspective”.⁵⁶⁹ The overly coercive aspect of the past therapeutic model and indeterminate sentencing became increasingly replaced by the concern for offenders’ consent and his/her voluntary participation in the treatment. However, as *Rotman* argues, the continuing trend towards voluntary treatment within the legal framework of determinate sentencing makes it difficult to arouse motivation for participation in the offenders, and therapists often require considerable skills and imagination to make offenders aware of their need for socio-psychological transformation.⁵⁷⁰

Indeed, the coercive potential of rehabilitation is an “anathema”, especially within the “rights-based” discourse, as it involves ethical questions about individuals’ rights, the extent of the change the system strives to achieve in the individual as well as means through which this change is supposed to be achieved. Notwithstanding this concern, certain authors argue that within the rehabilitative framework, coercion is not inherently unethical, nor is it entirely avoidable – not least because rehabilitative programmes are often a compulsory part of sentences, particularly for those inmates assessed as posing a high risk of harm to the public, such as violent offenders, offenders who are also prone to substance abuse and sex offenders.⁵⁷¹ In particular, *Day et al.* have argued that a certain level of coercion can be effective in terms of getting reluctant offenders into treatment programmes as well as keeping them there.⁵⁷² *Robinson* further stipulates that the legitimacy of coercion in the context of rehabilitation largely depends on what the offenders would potentially be required to

565 Here, incapacitation is not meant in terms of above-discussed indeterminate confinement of offenders who are perceived to pose too high a risk for public security to be released, but in terms of incapacitation being, essentially, a characteristic of any implementation of a prison sentence. As *Van Zyl Smit & Snacken* (2009, p. 82) note, “[...] even the least possible curtailment of [...] prisoners’ rights will still have the desired incapacitating effects, as long the necessary conditions for preventing escapes and ensuring internal security are present.”

566 *Rotman* 1990, pp. 66–67.

567 *Rotman* 1990, p. 68.

568 See below under 4.1.1.4.

569 *Rotman* 1990, p. 6.

570 Arguably, dialogue and personal involvement of therapists are recognized as only possible means of influencing inmates; especially as the stress of prolonged incarceration and the reward of anticipated release are no longer deemed as valid means of motivation (*Rotman* 1990, p. 68).

571 *Day et al.* 2004; *Carlen* 1989, as referenced in *Robinson* 2014, p. 4364.

572 *Day et al.* 2004, as referenced in *Robinson* 2014, p. 4363.

do – while many probably would not mind a reluctant pedophile to undergo a treatment that would reduce the likelihood of further sexual offending, there would certainly be objections to the idea of a person undergoing a compulsory surgical or chemical castration for such purpose.⁵⁷³ Addressing the question about the extent of a state’s intrusion into the offender’s inner world within the rehabilitative framework, *Bottoms* suggests that it should never be greater than is merited by their offending behaviour, therefore placing it within the constraints of proportionality.⁵⁷⁴ However, he cautions that rehabilitation – in order to attain legitimacy – has to attend more carefully to the question of consent, as well as conducting rehabilitative activities in ways which are more respectful of liberty.⁵⁷⁵ Despite his indication of the problem of motivation in inmates, *Rotman* concurs to this by implying that coercive authoritarian efforts to mold the offender and to ensure conformity to a predesigned pattern of thought and behaviour would only aggravate the already disrupted relationship between the justice system and the offender.⁵⁷⁶ Instead, he argues that significant change can only come from the individual’s own insight and that the humanistic model of rehabilitation should contribute to this not by issuing authoritative statements but by encouraging the process of self-discovery through a dialogue and understanding of psychological determinants leading to antisocial acts, so as to provide the key that will unlock the offender’s own conscience.⁵⁷⁷ This is a fair point, however, as already indicated with regard to the practical issue of offenders’ motivation, also being somewhat “self-obstructing” in the sense recognized by *Cullen* and *Gilbert*, that is that too much tipping around individual rights establishes the limit on the good the state can be expected or obliged to provide.⁵⁷⁸ Instead of adhering to a reform of offenders through care, as suggested by *Rotman*, the justice system can (under the pretext of not meddling with individual rights for fear of not violating them) simply tend to maintain their fundamental minimum while leaving the offenders to their own capacities. Subsequently, this can have a very limiting rehabilitative effect on offenders that can be recognized in various aspects of their re-integrative process and, ultimately, also re-offending.

4.1.1.4 The “rights” model

The debate revolving around individual rights recognized their endangerment not only in the application of overly coercive methods of the past models but also when there was no rehabilitation at all.⁵⁷⁹ Additionally, the criticism of authoritarian state

573 *Robinson* 2014, p. 4364.

574 *Bottoms* 1980, as referenced in *McNeill* 2014, p. 4199.

575 *Bottoms* 1980, as referenced in *McNeill* 2014, p. 4199.

576 *Rotman* 1990, p. 8.

577 *Rotman* 1990, p. 8.

578 *Cullen & Gilbert* 2009, p. 29.

579 *Rotman* 1990, p. 69.

policies with regard to rehabilitation coincided with an incrimination of other forms of human rights abuses committed within the scope of state policies or with their support. What emerged as the *rights* model of rehabilitation can be seen as also having its origins in the criminalization of international crimes that started with the 1946 Nuremberg Trials and, with that, the affirmation and protection of human life and dignity which elevated them beyond the repressive reach of destructive state policies. Subsequently, the affirmation of human rights on an international level that started with the 1948 Universal Declaration of Human Rights soon led to international legal instruments that have been mandating not only the serious protection of these rights but have also paved the way for their protection within the context of criminal justice reaction, in the form of a more humane punishment which also recognizes rehabilitation/reintegration as the right of every prisoner. In particular, the fundamental 1966 International Covenant on Civil and Political Rights (ICCPR) prohibits torture as well as cruel, inhuman and degrading treatment or punishment⁵⁸⁰ while simultaneously establishing a positive obligation towards penitentiary systems to “comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”.⁵⁸¹ Within this discourse, a strong impetus for the protection of offender’s life, dignity and, subsequently, also freedom was given by the 1989 Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, which reflected the further evolvement of the moral and societal values of many of the world’s communities with regard to the imposition of capital punishment.⁵⁸²

Recognition of the prisoner as a possessor of rights eventually led to a change of perspective on rehabilitation. As *Rotman* highlights, it reconciled the apparent conflict between the idea of rehabilitation and the rights of the individual, in the sense that rehabilitation is no longer considered exclusively as a state policy but became a right of the offenders to certain minimum services from correctional authorities.⁵⁸³

580 ICCPR (1966), Article 7.

581 ICCPR (1966), Article 10(3).

582 See *Freeland* 2010, p. 16. With regard to this, it should be noted, however, that Article 2(1) of the Second Optional Protocol to the ICCPR allows for a reservation of the right to apply “the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.” This, essentially, would allow member states to withhold the right to impose the death penalty on perpetrators of international crimes under national legislations. Starting with the ICTY, international criminal tribunals are firmly opposing the application of the death penalty – as indicated in their statutes, the most severe penalty for perpetrators of international crimes can be life imprisonment. While noting that many countries still retain and apply the death penalty, *Freeland* (2010, p. 20) sees its exclusion from the statutes of the leading ICJ mechanisms as giving further impetus to the abolitionist momentum and illegality of the death penalty worldwide. This especially resonates with European countries. Following the 1983 Protocol 6 to the European Convention on Human Rights (ECHR) – that regards the abolition of the death penalty and that basically reinstated provisions of the ICCPR’s Second Optional Protocol, including those regarding the death penalty in the time of war –, the Council of Europe issued in the 2002 Protocol 13, opting for the abolition of the death penalty *in all circumstances*.

583 *Rotman* 1990, pp. 69, 6.

In particular, international prison standards, such as the 1955 Standard Minimum Rules for the Treatment of Prisoners (SMR)⁵⁸⁴, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BoP)⁵⁸⁵ and the 1990 Basic Principles for the Treatment of Prisoners (BP)⁵⁸⁶, not only appropriate the notion of rehabilitation and reintegration of offenders as guiding principles for the enforcement of prison sentences,⁵⁸⁷ but they also affirm fundamental rights of prisoners as minimum standards that cannot be trespassed if the aim of rehabilitation is to be achieved. Considered as a broader framework or basis for rehabilitation, these standards encompass both “positive” and “negative” rights. Positive rights pertain to an affirmative care, recognized e.g. in the provision of education, vocational/skills training and contacts with the outside world,⁵⁸⁸ while the negative ones relate to the freedom from substandard conditions of incarceration and detrimental effects they can entail, such as physical and mental deterioration.⁵⁸⁹

At this point, it is opportune to address the basic criticism directed against the notion of the offenders’ right to rehabilitation. Namely, the criticism points to the onset of a discrepancy between prisoners and those in society who may be experiencing some of the same personal or socio-economic problems, for whom, however, such “rehabilitative assistance” remains unavailable.⁵⁹⁰ Historically speaking, the criticism resonates with *Bentham’s* postulate of “less eligibility” that advocated for prisoners not to enjoy conditions of punishment more favourable than those enjoyed (or endured) by the poorest independent labourer.⁵⁹¹ As much as such criticism may be shunned from the humanitarian standpoint as “intellectually and morally bankrupt”,⁵⁹² it closely entails the popular notion of justice as well as the debate on the fairness of punishment that can often be found to be ongoing between the wider community, victims and policy-makers. For the “right to rehabilitation” to maintain its legitimacy within the criminal justice paradigm, it is necessary to point to research on the extended negative effects (or deprivations) the “sole” deprivation of liberty poses on

584 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. In 2015, the UN General Assembly adopted a revised version of the 1955 Standard Minimum Rules for the Treatment of Prisoners, under the “Nelson Mandela Rules” moniker (A/RES/70/175).

585 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly Resolution 43/173 (9 December 1988).

586 Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 of 14 December 1990.

587 See e.g. SMR, Articles 58–61; BP, Article 10.

588 *Rotman* 1990, pp. 6, 70.

589 *Rotman* 1990, p. 6.

590 *Robinson & Crow* 2009, p. 13.

591 *Robinson & Crow* 2009, p. 13.

592 *Rotman* 1990, p. 111.

prison inmates. If not countered by the guarantee of minimum rights to prisoners, these extended deprivations can seriously breach the retributive principle of the proportionality of punishment.

Sykes' micro-sociological study of a maximum security prison in the 1950s was particularly influential in that it pointed to additional "pains of imprisonment" that those condemned by the society have to endure, next to the physical deprivation of liberty.⁵⁹³ In particular, the gradual loss of meaningful relationships that occurs due to imprisonment, the loss of autonomy and previously held social roles (as well as the attribution of the one of the outcast) – that also entails deprivation of goods and services – as well as all-prevailing feelings of insecurity, anxiety and boredom are only some of the detrimental effects the prison society poses on offenders and which not only aggravate their situation within the prison but have a rather negative impact on their prospect of re-entering the society.⁵⁹⁴ Subsequent research has shown that in order to physically and psychologically survive within prison, prisoners have to develop a set of skills different from those necessary for their reintegration and which (especially for long-term prisoners) often come at the expense of the latter.⁵⁹⁵ In order to counter these detrimental effects and to provide an adequate basis for more meaningful rehabilitative efforts, elementary human rights need to be honoured. As *Rotman* argues, from there, then, a continuum of rights begins that extends to the offer of specific rehabilitative means⁵⁹⁶ which (according to the principle of individualization) are tailored on the basis of the risks and needs of each prisoner. In fact, understanding the risks prisonization and institutionalization pose for the success of prisoners' rehabilitation, the argument within the human rights discourse has been extended in support of the principle of "normalization", meaning that prison life should approximate life in the community as closely as possible.⁵⁹⁷

With recourse to the introduced international prison standards, notwithstanding their lack of legal obligation as "soft law" legal instruments, they have nevertheless served

593 *Sykes* 1958.

594 *Sykes* 1958, pp. 63–84.

595 For example, *Cobden and Stewart* (1984) illustrate the impact long prison terms have on inmates by describing different stages of imprisonment and according coping mechanisms they have to appropriate in order to progress through each stage. The first stage of imprisonment ("doing your time") demands a change in focus and values in order to survive in prison. It means forgetting your past and making prison your whole life. The second stage ("hitting the street") means starting life in a new world, which is now entirely foreign. The final stage ("making the change") means giving up the psychological and behavioural mechanisms that served as a protection during incarceration. While shedding these mechanisms can be difficult without a proper guidance, their appropriation can take a rapid pace. *Wheeler* (1961) stresses how the adoption of the codes, norms, dogma and myth of an inmate society is deemed to be distinctly harmful to the process of rehabilitation and is considered to develop after six months of incarceration.

596 *Rotman* 1990, p. 70.

597 *Van Zyl Smit & Snacken* 2009, p. 53.

as influential guidelines in shaping regional and domestic prison policies. Europe, in particular, has been very prone to their influence, and standards and rules subsequently developed by the Council of Europe as well as the jurisprudence of the European Court of Human Rights underline the strong position of rehabilitation in the region.⁵⁹⁸ Furthermore, in some European countries such as Italy and Spain, rehabilitation has been explicitly recognized in constitutional provisions as a valid penal goal and, therefore, a right belonging to prisoners.⁵⁹⁹ In others, e.g. Germany and Belgium, the offenders' right to rehabilitation is considered to emanate from constitutionally recognized rights of the individual, such as the right to human dignity.⁶⁰⁰

Despite established international human rights principles, the dichotomy between national prison policies is being prudently recorded. The most notable rift is the well-known one between the USA and Europe. As *Karstedt* notes, over the past decades, Europeans have cast themselves as a contrasting model of criminal justice and penal systems to the penal policies dominating in the USA, as they have distanced themselves from the death penalty and have eschewed the massive increase of imprisonment or "mass incarceration" that took hold of US states and the federal penal system from the 1970s, which has levelled off only recently.⁶⁰¹ However, even if more strongly sustaining human right principles on the global level, Europe as a region has not been immune to diverging penal policies between its countries.

4.1.1.5 Rehabilitation in the context of contemporary European prison policies

Based on the analysis of four indicators – i.e. imprisonment rates, prison conditions, state violence (represented as illegal violence within criminal justice agencies) and prisoners' voting rights –, *Karstedt* distinguished the prison policies of Western European countries from those of Eastern Europe⁶⁰² in terms of upholding human rights standards.⁶⁰³ General findings indicate that Eastern European countries fare worse off in terms of analyzed factors, with higher imprisonment rates, worse prison conditions and a higher rate of violence by the state and criminal justice system as well as less attention to prisoners' rights than in Western European countries. A more fine-tuned distinction demonstrates spatial divergences between four penal cultures. For example, penal cultures with (1) *low imprisonment but poor prison conditions*

598 *Albrecht* 2015, p. 19.

599 *Van Zyl Smit & Snacken* 2009, p. 79.

600 *Van Zyl Smit & Snacken* 2009, pp. 79–80.

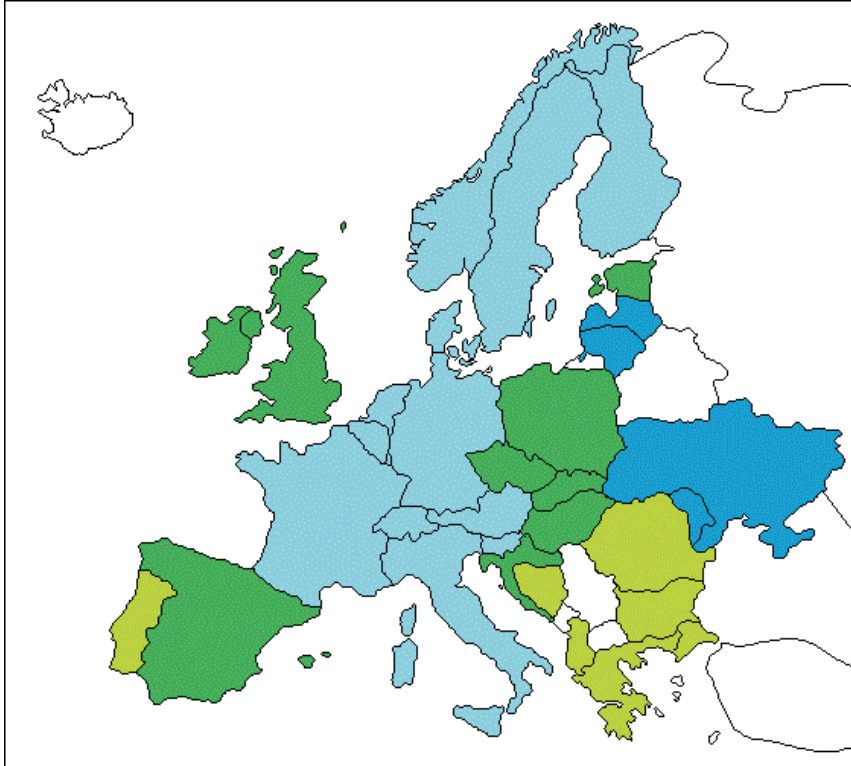
601 *Karstedt* 2014, p. 89.

602 Based on UN Classification, *Karstedt* included the following countries among those of Eastern Europe: Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, Georgia, Hungary, Moldova, Poland, Romania, Russia, Slovakia and Ukraine (see Appendix in *Karstedt* 2014, p. 109).

603 *Karstedt* 2014, pp. 94–101.

range from Southeast to Southwest Europe, from Romania to Portugal, including some countries of the former Yugoslavia and Greece.⁶⁰⁴

Figure 2 *European penal cultures*



Light green: (1) low imprisonment/poor prison condition; light blue: (2) high entry/standard prison conditions; dark green: (3) medium imprisonment/standard prison conditions; dark blue: (4) high imprisonment/poor prison conditions; white: no data available

Source: *Karstedt* 2014

Contrary to this, a cluster of twelve countries⁶⁰⁵ spanning from Italy through Central Europe to Scandinavia demonstrates mostly (2) *good prison conditions with low imprisonment rates* (but comparatively high admission rates – pointing towards an extended use of shorter prison sentences), indicating higher adherence to rehabilitative principle and prisoners' rights.⁶⁰⁶ (3) *Standard to slightly worse prison conditions*

604 *Karstedt* 2014. p. 100.

605 Including Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Slovenia, Sweden, Switzerland (see *Karstedt* 2014, Figure 9).

606 *Karstedt* 2014. pp. 100–101.

with medium to high imprisonment rates have been further noted in the countries of Western Europe, such as the United Kingdom and Spain, while the (4) *highest prison rates and deteriorating prison conditions* are found among Eastern European States, namely successor states of the Soviet Union, Ukraine, Moldova and the Baltic states.⁶⁰⁷

These penal cultures also positively correlate with penal tendencies attributed to certain clusters of European countries, as indicated by *Cavadino* and *Dignan* in their influential comparative study on political economies and penal systems.⁶⁰⁸ What their study indicates are major differences in national penal systems which are directly related to the form of economic organization and social structure of the respective state. In Europe, for example, three prevailing types of political economy – neo-liberal, conservative corporatist and social democratic⁶⁰⁹ – encompass certain clusters of states and heavily influence their punishment practices. Corresponding to *Karstedt's* third group of penal cultures is the *neo-liberal* cluster of states, encompassing England and Wales, where the states feature conservative politics and free-market capitalism and tend to have a minimalist or residual welfare system, which promotes limited social rights and displays extreme income differentials among citizens. This can result in a high level of social exclusion in terms of poverty, but also in a denial of full and effective rights of citizenship in civil, political and social life, which, in turn, can lead to increased crime rates. Consequently, the increase in criminality can result in higher “fear of crime” rates among the general population and an overall demand towards the ruling party to tackle the problem effectively. It is noted that a policy which has a pronounced tendency towards social exclusion also features more restrictive penal indices.⁶¹⁰ The mode of punishment is exclusionary, with prison policies arguably being more oriented towards risk management and dealing with offenders in a quantitative manner. Imprisonment rates and a receptiveness to prison privatization are recognized as high in states of this type. Spatially corresponding with *Karstedt's* second group of penal cultures are countries encompassed within both the conservative corporatist and social-democratic clusters. Opposed to her more general taxonomy, *Cavadino* and *Dignan* distinguish between these two clusters of countries in terms of development level of the welfare state, income differentials, citizen-state relations and social inclusivity/exclusivity (which, consequently, reflects on the level of “liberalness” with regard to penal policies).⁶¹¹ For instance, states with a *socio-democratic* political economy (represented by Sweden and Finland which have rather highly developed welfare systems, where the income and status differentials as well as the tendency towards social exclusion are

607 *Karstedt* 2014, p. 101.

608 See in particular *Cavadino & Dignan* 2006, also *Cavadino & Dignan* 2014.

609 See *Cavadino & Dignan* 2006, p. 15.

610 *Cavadino & Dignan* 2006, p. 15.

611 *Cavadino & Dignan* 2006, p. 15.

relatively limited) feature a rights-based, inclusionary penal ideology which is pronouncedly oriented towards rehabilitation, offering better conditions to offenders and alternative programmes, as well as towards a reduction of imprisonment rates. Comparatively, states in the *conservative corporatist* cluster (such as Germany, France, Italy and the Netherlands) are seen to have a slightly less generous welfare state, expressed by still pronounced (but not extreme) income differentials, conditional and moderate social rights as well as some social exclusion in the form of limited participation in civil society for some. This is then correspondingly represented in the penal policy, which is ostensibly also “moderate”, and is driven by a penal ideology oscillating between inclusionary and exclusionary poles, with medium-high imprisonment rates and a moderate receptiveness to prison privatization. According to *Cavadino* and *Dignan*, this penal broadband also allows for the inclusion of penal policies in Southern European states,⁶¹² the group corresponding to *Karstedt’s* first penal culture. For example, while having comparable political economies, these states differ quite significantly in imprisonment rates – however, even so, they still all fall within the rates measured for conservative corporatist Western European countries insofar as all of them have imprisonment rates higher than any social-democratic country and lower ones than Scotland, England and Wales.⁶¹³ Countries among *Karstedt’s* fourth penal culture were not included in the analysis.

What these analyses are indicative of is that despite the human rights movement and support for a rehabilitative principle on the international level (or even on the regional level, as demonstrated by the body of law stemming from European supranational institutions), their implementation through national prison policies can differ quite strongly, or can also be missing ostensibly. The delineated discrepancies between European countries can also be seen as a potential challenge for the standardization of a rehabilitative treatment towards ICTY prisoners, as they have all been sent to different European prison systems to serve their sentences. The question of the standardization or equality of treatment pertaining to the enforcement of the ICTY sentences will be formulated in more detail in the next chapter and will be further explored through a subsequent empirical analysis.

4.1.2 Facets of rehabilitation

The delineation of the historical development in the previous section has brought to the front different concepts, approaches and methods pertaining to the rehabilitation of criminal offenders. In the words of *McNeill*, they altogether represent a tangle of different facets or forms of rehabilitation that needs to be untangled in order to analyze their interrelationships and mutual dependencies.⁶¹⁴ Consequently, any measure

612 *Cavadino & Dignan* 2014, p. 283.

613 *Cavadino & Dignan* 2014, p. 283.

614 *McNeill* 2014, p. 4204.

of success in achieving the goal of an offender's rehabilitation through the enforcement of prison sentences will to a large extent depend on the appropriate amount of attention given to all the encompassed facets.

4.1.2.1 Personal rehabilitation

The first facet is concerned with the *personal* rehabilitation of the offender. Essentially, this means assistance to the offender through different disciplinary perspectives and techniques,⁶¹⁵ for developing new skills and abilities, as well as addressing and resolving deficits or problems, in order to lead a crime-free life and to be successfully reintegrated into society.⁶¹⁶ Starting in the late 1980s and early 1990s, a proliferation of rehabilitative programmes based on a cognitive-behavioural (psychological) paradigm brought at the forefront the so-called “risk-need-responsivity” (RNR) model which has widely been regarded as the dominant approach to offender rehabilitation in the early 21st century.⁶¹⁷ The crux of this model revolves around overcoming those deficits in individual perpetrators (e.g. risks, problems and personal deficiencies) that are assessed to have an impact on offending.⁶¹⁸ Juxtaposed to the RNR model is the “Good Lives Model” (GLM) which focuses on promoting potential strengths, instead on deficits, in the individual for him/her to effectively secure primary human goods without harming others.⁶¹⁹ Despite their focus on individual rehabilitation, the effects the models intend to produce ought to have positive impacts on other facets of rehabilitation. For instance, moral rehabilitation of the offender can to a large extent depend on unlocking inner psychological barriers that hinder his/her relationship with the others and which are tackled within the RNR model. Similarly, an improvement of skills and strengths of the individual through GLM ought to have positive effects on different aspects of the offender's social rehabilitation – for example the acquisition of social means, such as steady employment and housing, that contribute to leading a crime-free life. In the broader perspective, personal rehabilitation also refers to minimizing the detrimental effects of imprisonment on offenders by upholding (or, preferably, improving on) the fundamental standards of incarceration as well as the fundamental rights of prisoners.

615 *McNeill* indicates that terms such as “correctional” or “psychological” rehabilitation can also be utilized to refer to this facet; however, he argues that the term “personal” is preferable as it abstains from tying any particular disciplinary perspective to this project of personal change (2014, p. 4204).

616 *McNeill* 2014, p. 4204.

617 *Robinson* 2014, pp. 4365–4366.

618 *Robinson* 2014, p. 4368.

619 *Robinson* 2014, p. 4368.

Means and measures applied through both perspectives of personal rehabilitation will be delineated in more detail within the section on the rehabilitative operational framework below.⁶²⁰

4.1.2.2 Moral rehabilitation

Closely tied to personal rehabilitation is the *moral* rehabilitation of offenders which, first and foremost, mandates an attitudinal change towards the perpetrated crime, but also towards the “adoption of moral values that are embodied in the most basic prohibitions and commands of a particular legal system.”⁶²¹ Moral rehabilitation answers to moral demands that were created by the offence; it communicates the readiness and willingness of the perpetrator to “pay off” a moral debt before he/she can “trade up” to a social position as a citizen of good character.⁶²² It is expressed in the acceptance of responsibility for the crime in remorse, as well as the willingness to “make good” and atone for the committed wrong, e.g. through a reparative action. As such, it is an important link to the broader social rehabilitation of the offender, recognized in an amelioration of his/her relationship with victims and the wider community.

The moral “conditioning” of the offender is not tied exclusively to the rehabilitative aim; as seen above, the conveyance of censure and scrutiny that punishment imposes on the offender within its retributive scope is also supposed to induce a remorse in him/her, a desire to atone for committed crime(s) as well as to instigate efforts to desist in the future.⁶²³ However, this reasoning is based on a rather deterministic perspective that sees the perpetrator as a free moral agent whose sense of right and wrong the imposed punishment should appeal to while at the same time disregarding the extent to which various socio-psychological factors might have actually influenced the perpetration of the crime and the moral transgression. As such, it dismisses the underlying reasons that caused the aggravation of the relationship between the perpetrator, his/her victim(s) and the society in the first place. Furthermore, the restrictions that are inherently imposed by punishment, such as the long-term deprivation of liberty, might be seen as a coercive, paternalistic approach to the instilment of moral values which, in turn, might actually aggravate offenders’ attitudes and broaden the breach of the aforementioned relationship.

In this sense, the topic of offenders’ moral reconditioning stands close to the issue of coercion within the rehabilitative context as it inevitably draws the ethical questions about the extent of moral reconditioning and the means of doing so. In particular, *Rotman* argues how within the contemporary rights-based rehabilitative perspective,

620 See under *Chapter 4.1.3*.

621 *Rotman* 1990, p. 6.

622 *McNeill* 2014, p. 4205.

623 See *Chapter 1.2.3* above.

the violation of individual rights through the application of overly coercive means (e.g. during the imprisonment) simply cannot be justified as an attempt to induce a conformity of the offender to the values of a given socio-cultural system.⁶²⁴ Furthermore, the imposition of moral values that govern the socio-cultural system appropriates a different meaning in modern pluralistic societies where several cultural systems coexist within the same social system and different sets of norms and values interact simultaneously.⁶²⁵ Especially in the societies with a large immigrant population, the imposition of moral systems based on particular religious or political ideologies under the rehabilitative pretext can hardly be considered to be legitimate, as this narrows human freedom beyond a necessary extent.⁶²⁶ To what extent can the rehabilitative moral conditioning of the perpetrator then be considered as appropriate and legitimate?

According to *Rotman*, the function of a penal reaction consists exclusively of protecting vital individual and social interests embodied within basic commands and prohibitions of a legal system.⁶²⁷ Therefore, any attempt to moralize the offender beyond those fundamental values and rights would inevitably transform crime control into a paternalistic undertaking.⁶²⁸ What rehabilitation is seen as being mandated to accomplish within this framework then is to generate a new morality within offenders that is based on a deep sense of responsibility and compassion.⁶²⁹ The invocation of this moral awareness is not based so much on a coercion as it is on providing the opportunities for a learning process and dialogue that can help understand and dissolve those psychological mechanisms of conflict and isolation that are the substance of immorality.⁶³⁰ At a minimum, an opportunity for such an endeavour should exist between moral agents (e.g. prison staff) and offenders; desirably, it would provide an opportunity for other stakeholders whom the crime concerns to be involved. A moral rehabilitation conceived in such a way and aimed at awakening the personal experience of social responsibility is seen to have the utility also in cases where offenders unequivocally embrace socially accepted values; however, they lack institutionalized means of achieving them, which results in an adoption of crime as a method of innovation.⁶³¹

Moral rehabilitation is of particular relevance for the perpetrators of international crimes. Given their symbolic link with a certain group or a community on behalf of

624 *Rotman* 1990, p. 7.

625 *Rotman* 1990, p. 6.

626 *Rotman* 1990, pp. 6–7.

627 *Rotman* 1990, p. 6.

628 *Rotman* 1990, p. 6.

629 *Rotman* 1990, p. 8.

630 *Rotman* 1990, pp. 7–8.

631 See *Merton* 1964, as referenced in *Rotman* 1990, p. 7.

which the crimes were committed, their sincere remorse and desire to repair or compensate for the harm done should positively contribute to an amelioration not only of their relationship with the victim groups and the wider society but also of the group on whose behalf the crimes were committed. In other words, while reconciliation with victim communities also depends on their own efforts and strength to forgive, an attitudinal change in perpetrators towards their committed crimes is certainly an important prerequisite for such an effort to successfully take place. Presumably, the moral rehabilitation of macro-criminals is less likely to happen unless there has been a significant change in the regime and socio-political climate in the society. It is hard to imagine their positive moral conditioning within the system of moral agents whose adopted values are inherently immoral and go against fundamental human rights. While some perpetrators might *ex post* atrophy experience “pangs of conscience”,⁶³² these will be quickly neutralized within a society where destructive policies are still condoned or even utilized, especially if there was a direct gain from the crimes for perpetrators, e.g., in terms of career advancement, amassed political power or monetary gain. What this then mandates is a change in the socio-political system and an appropriation of values based on the international and human rights ethos (that emphasize the tolerance and commonality of human beings rather than their differences⁶³³) before a substantive moral rehabilitation can take place. However, such a process can take place over a long period of time, and it is usually intended for the criminal justice system and its reaction to contribute to this change instead of vice versa.

An example of how individual rehabilitation can influence a wider rehabilitation of in-group members and supporters of dangerous ideologies can be taken from the contemporary research on terrorism. Given that the etiology of terrorists can to an extent resemble those of macro-criminals, the research on prison de-radicalization of terrorists offers a valuable insight into possibilities of the collective de-radicalization on a group level that is being fostered by de-radicalized individual authorities of such groups.⁶³⁴ Namely, what the examples from Egypt and Algeria show is that given the right conditions (e.g. faltering of an armed campaign) and the quality of the existing relationship between terrorist leaders and followers (functioning leadership, hierarchically structured), the leaders can be coaxed into influencing de-radicalization through a dialogue and learning process – which would also encompass moral rehabilitation – of a wider stratum of members and supporters of their groups.⁶³⁵ Admittedly, the success of such a campaign is to be valued on a case-by-case basis, particularly given the mentioned preconditions. Nevertheless, it shows how the re-

632 *Smeulers* 2008, p. 263.

633 *Alvarez* 2008, p. 230.

634 *Neumann* 2010, pp. 39–46.

635 *Neumann* 2010, pp. 39, 46.

habilitation of certain offenders can, through a dialogue and learning process, be utilized to induce a change of the value system and beliefs within a wider social stratum. Comparatively speaking, with reference to *Smeulers'* typology of perpetrators,⁶³⁶ it is then possible to imagine that, for example, a rehabilitated criminal mastermind – a former inceptor of state policies based on dangerous ideologies – could through a positive altruistic rhetoric also give impetus to the change of a value system within his/her in-group. Such an influence can also be seen as positively contributing to the reconciliation between (former) warring communities, as it creates preconditions for any form of a broader reconciliatory dialogue. In such a case, the process of preliminary individual (moral) rehabilitation would still be conditioned to take place outside the systems where moral values and ethos remain inverted.

An additional challenge to the process of individual moral rehabilitation of macro-criminals is presented by their etiology. For example, *Smeulers* indicates that the horrendous nature of committed atrocities will likely cause the perpetrators to keep and maintain the justificatory psychological reality they created as a coping mechanism well after the commission of crimes.⁶³⁷ Otherwise, she argues, when faced with the responsibility for the horrors they brought about, the psychological burden would be too grave to cope with.⁶³⁸ Case studies of perpetrators who eventually have come to accept responsibility for their crimes show how they often suffer nervous breakdowns, nightmares and PTSD as the consequences of a re-activated cognitive dissonance when facing the reality of their crimes.⁶³⁹ In order to psychologically cope, it is likely that they will consciously or unconsciously deceive themselves by denying or justifying crimes.⁶⁴⁰

From *Smeulers'* overview of how certain types of perpetrators look back on committed crimes⁶⁴¹, it could be inferred that those considered law-abiding citizens before the period of violence might be more easily morally rehabilitated than those belonging to the other two groups.⁶⁴² Given that their inhibitions towards violence have been artificially lowered, and that without immediate pressures or influences of external factors they are more often prone to experiencing psychological and emotional turmoil over the acts they committed, they might be more open to moral transformation. In particular, it seems valid to expect that with a proper approach, such as, for example, the aforementioned means of dialogue and learning process as introduced in the social-learning model of rehabilitation, they can be guided in deconstructing invented excuses and justifications in order to perceive the wrongness of

636 See *Chapter 3.2*.

637 *Smeulers* 2008, pp. 260–263.

638 *Smeulers* 2008, p. 263.

639 *Smeulers* 2008, pp. 262–263.

640 *Smeulers* 2008, p. 263.

641 *Smeulers* 2008, pp. 260–263.

642 See *Table 1* in *Chapter 3.2*.

their acts and develop healthy, therapeutic attitude towards them. This would, essentially, comprise genuine remorse and willingness to somehow repair or compensate for the harm done.

Perpetrators belonging to the other two groups of borderliners and criminals/sadists might be more challenging, as it is likely that their inhibitions towards crime and violence have, prior to the period of collective violence, already been lowered and external circumstances only allowed their internal dispositions to become more easily manifested. An additional aggravation is posed by the fact that perpetrators who occupy leading places within the state/organizational hierarchy (e.g. a criminal mastermind, a fanatic, a profiteer) – and whose liability is therefore often the highest – can come from within these three groups. Arguably, the magnitude of their liability places the biggest moral burden on them to strive towards the rehabilitation and reparation of relationships they conceived to disrupt when they instigated, conceived or conspired to implement destructive policies. However, the intricacies of their etiology are also those that might largely impede this effort. *Smeulers* argues how both criminal masterminds and fanatics will feverishly challenge the legitimacy of the penal process against them in an effort to show their infallibility, righteousness and often self-perceived divinity.⁶⁴³ In particular, any effort to coercively impose censure, scrutiny or moral blame on them will be perceived as hostile and inherently unjust, and they will go lengths to prove its incompetence and fallacy.⁶⁴⁴ An endeavour to discredit the justice system is seen as yet another waged battle against the “oppressors” that ultimately has the purpose of broadening victim myths around themselves and therefore maintaining the legitimacy of their past and future actions.

Given this, it does not seem unreasonable to suppose they might strive to re-amass power and support after serving their period of sentence, which then creates the further risk of resorting to destructive policies and prolonging or re-igniting the conflict. It is therefore important that as part of their overall rehabilitative treatment, their moral reconditioning is approached with nuanced measures, paying heed to the intricacies of their etiology. This would very likely not be a one-fold approach but encompass different means, also spanning through different stages of enforcement of sentence. With reference to *Neumann*'s report on the de-radicalization of terrorist leaders and followers, some lessons can be drawn and possibly also applied in the case of elite macro-criminals. For example, while the value of ideological re-educational programmes is certainly underlined, more important is the role of interlocutors who can actually psychologically and personally reach these persons.⁶⁴⁵ Members of political elites often share a high social intelligence and quite expansive oratory skill sets; it is therefore important that those with whom they engage in dialogue are perceived as “equals”, not in terms of their social status but of offering plausible and

643 *Smeulers* 2008, pp. 245, 261.

644 See also *Smeulers* 2008, pp. 245, 261.

645 *Neumann* 2010, p. 56.

convincing contra-arguments to dangerous narratives.⁶⁴⁶ Furthermore, it is regarded as important that, due to the detrimental effects of imprisonment, interlocutors can also empathically relate to their psychological needs.⁶⁴⁷ Especially here, substantial contacts with their family can also serve to appease these needs; what is more, they underline the notion that rehabilitation does not happen in a social vacuum.⁶⁴⁸ With regard to the latter, experiences listed in *Neumann's* report show that both the moral and the social facets of rehabilitation can mutually reinforce one another, e.g. by providing opportunities for dialogue with other social actors, but also by committing perpetrators to an active disengagement by various “checks-and-balances” systems – especially during their conditional release. For example, the report lists regular meetings with interlocutors or an engagement with mainstream social networks and staying away from extremist social circles, as only some of the means that are implemented in this regard.⁶⁴⁹

Certainly, the successful inducement of moral rehabilitation in perpetrators of international crimes will be dictated by characteristics of their individual crime etiology, but also by creative new approaches developed to address it. Interlocutors should also be aware of the negative effects a treatment can induce when internal psychological mechanisms and artificial inhibitions are deconstructed, such as the above-mentioned psychological traumas instigated by a re-activation of cognitive dissonance. Approaches should mitigate these negative effects so that they do not obstruct an efficient rehabilitation of perpetrators, but also in a way that they are not used as a new negative argument for further undermining the legitimacy of ICJ.

4.1.2.3 Social rehabilitation

Social rehabilitation of the offender can be defined in two ways. In the narrower sense, it is a continuation of the personal and moral rehabilitation that “entails both the restoration of the citizen’s formal social status and the availability of the personal and social means to do so”.⁶⁵⁰ Essentially, it is a process through which the offender takes his/her place in the society⁶⁵¹ by developing skills and acquiring material and social means that allow for a law-abiding life. As indicated by *Robinson and Crow*, for the prevailing number of offenders/prisoners, it is the lack of one or more of these skills or means that initially led to offending;⁶⁵² therefore, prisoners should be allowed and encouraged to appropriate them to the widest extent possible. The process

646 *Neumann* 2010, p. 52.

647 *Neumann* 2010, p. 56.

648 *Neumann* 2010, pp. 55, 49.

649 *Neumann* 2010, p. 55.

650 *McNeill* 2014, p. 4205.

651 *Robinson & Crow* 2009, p. 124.

652 See in detail *Robinson & Crow* 2009, Chapter 8.

should ideally start while they serve the sentence; however, it is essential that it continues immediately after the release, as this is the time within which the challenges for re-offending can be most excruciating.

One of the most common challenges for a successful social rehabilitation in this context is the appropriation of skills and training that not only make a former offender competitive on the job market but also allow him/her to find a job that is stable and satisfactory.⁶⁵³ This is directly tied to the prospect of finding a satisfactory long-term accommodation as an important staple of an individual's well-being – also in terms of being the basis for developing nurturing (“bonding”) social networks, such as families and friends, as opposed to exclusive (“bridging”) social capital which is more likely to be criminogenic.⁶⁵⁴ However, research indicates the extent to which the appropriation of these means and capital can be problematic for prisoners,⁶⁵⁵ as it is not only the individual preparedness that plays an important role in the process but also the informal social recognition and acceptance of the reformed ex-offender on the side of the society (e.g. the latter's willingness to provide employment or housing to ex-offenders).⁶⁵⁶ Once again, this underlines the importance of addressing the relational aspect of rehabilitation and reintegration.

In order to make the resettlement smoother and more efficient, a variety of institutes revolving around some sort of supervision for ex-offenders have been introduced.

4.1.2.3.1 Mentor-mentee relationship

For example, a more informal type of supervision is recognized in the *mentor-mentee relationship* where a more experienced person is helping and acting as a role model for somebody who is less experienced.⁶⁵⁷ This form of supervision has typically been utilized with respect to young people who have a history or are considered to be at risk of problematic behaviour or social exclusion, including young offenders.⁶⁵⁸

4.1.2.3.2 Probation/parole

On the other hand, within the scope of the criminal justice system, a more formal rehabilitative supervision can be recognized in institutes such as *probation* or *parole*. Both revolve around a supervision of the offender by a probation or parole officer; however, while probation usually means supervision during the time of the suspension of sentence (if it is imposed but not implemented), parole is a supervision occurring after the offender has served a certain term of time in prison but has been

653 Robinson & Crow 2009, pp. 130–131; see also Webster et al. 2001 and Motiuk & Brown 1993.

654 See Robinson & Crow 2009, Chapter 8.

655 Robinson & Crow 2009, pp. 125–134.

656 McNeill 2014, p. 4205.

657 Robinson & Crow 2009, p. 145.

658 Robinson & Crow 2009, pp. 145, 141.

conditionally released for the remainder of his/her sentence. Because the release is conditioned by the prohibition to commit further offences as well as other individual conditions that can be added if necessary, it is understood to be a way of implementing the sentence and not modifying it – as opposed to amnesty or pardon.⁶⁵⁹ Given that the parole involves a drastic change of the environment for the prisoner, assigning him/her a supervisor who ought not only to “supervise” but advise and be of support is considered to be “one of the most effective and constructive means of preventing re-offending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community”.⁶⁶⁰ A body of research underlies the importance of supervisors for an effective social rehabilitation of the ex-offenders.⁶⁶¹ From the perspective of offenders, the quality and the consistency of their relationships with supervisors are seen as being central to effective practice – both in terms of promoting motivation and compliance with the conditions of parole and of encouraging desistance from offending in the longer term.⁶⁶² With regard to the quality of the relationship between the supervisor and the offender, the extent to which the supervisor demonstrates as well as rewards a desired behaviour has a direct relevance on the offender’s behaviour.⁶⁶³ Furthermore, in terms of consistency, it has been found that this sort of positive relationship is more likely to develop within a one-on-one programme than within a fragmented one where different officers are involved in different aspects of the programme – however, none of them to the extent of developing a necessarily meaningful insight into the progress, needs and achievements of the offender.⁶⁶⁴

4.1.2.3.3 Therapeutic jurisprudence

The work of parole officers can have a profoundly therapeutic effect on ex-offenders that consequently fosters their social rehabilitation. The notion of the “therapeutic effect” has been further expanded with the concept of *therapeutic jurisprudence*. It argues that the overall criminal justice system has the potential to have an either “therapeutic” or “anti-therapeutic” impact; therefore, practical efforts have been undertaken to “awake” the therapeutic potential in other legal actors, such as judges, who traditionally have had little or no involvement in the enforcement of sentences⁶⁶⁵ – and yet play the main role, from the offender’s perspective, in producing anti-therapeutic effects by imposing a criminal stigma on the offenders. The rationale

659 See Article 1.1, Council of Europe Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole).

660 Council of Europe Recommendation Rec(2003)22 of the Committee of Ministers to member states on conditional release (parole), Preamble.

661 See in detail *Robinson & Crow* 2009, pp. 141–145.

662 *Robinson & Crow* 2009, p. 142.

663 *Robinson & Crow* 2009, p. 144.

664 *Robinson & Crow* 2009, pp. 141–142.

665 *Robinson & Crow* 2009, p. 148.

here is to proactively involve these actors in the rehabilitative process of individuals in order to speed it up, as well as to counter the antagonistic relationship that is likely to emerge with the criminal conviction. The example here can be taken from the so-called “drug courts” in the USA and the UK where the judges appropriate the role of “treatment managers”, developing a one-to-one “working alliance” with defendants which then allows the judge to become a key figure and powerful motivator in the rehabilitation process.⁶⁶⁶ Through regular review hearings, the judges have a chance to engage in a direct dialogue with the offenders, to follow their progress through the programme as well as to offer incentives and a motivation to stay in it.⁶⁶⁷ Furthermore, the “drug courts” model has been used as a basis for the development of other therapeutic approaches to social rehabilitation of former prisoners. In particular, the “reentry courts”, as developed in the USA, tend to expand the relational notion of rehabilitation by involving members of the community in the process of reintegrating released prisoners.⁶⁶⁸ As opposed to the drug courts – where the judge appropriates the role of a treatment manager by making sure the offender commits to the programme –, here, he/she is cast as a “reentry manager” who oversees the offender’s transition from custody to the community.⁶⁶⁹ In both cases, the judge is a supervisor (which makes his/her role similar to those of probation and parole officers); however, while in the case of the “drug courts”, the focus is solely on the offender, in the case of the “reentry courts”, the community – as a stakeholder in crime – also plays a significant role. Namely, the offender is held accountable to the community (e.g. represented by citizen advisory boards or other community groups) and has to negotiate his/her reintegration into it by completing certain milestones of the reentry process (e.g. voluntary work), which will automatically trigger recognition and awards.⁶⁷⁰ The notion of rewards for achieved tasks, instead of reprimand for failure, is a staple of the process⁶⁷¹ and is seen as a positive incentive that can motivate the offender to commit to the milestones while on the other hand making his/her acceptance by the community faster and easier.

The concept of the “reentry courts” pertains to the second, broader definition of social rehabilitation that moves away from the offender’s access to social resources, such as accommodation and employment, and addresses the relational dimension of rehabilitation. As reiterated by *Robinson* and *Crow*, rehabilitation is best understood as something that does not happen to or is “done to” offenders in a social vacuum but is a process which takes place in the context of – and seeks to build – relationships

666 *Robinson & Crow* 2009, p. 149.

667 *Robinson & Crow* 2009, pp. 149–150.

668 *Robinson & Crow* 2009, p. 151.

669 *Robinson & Crow* 2009, p. 150.

670 *Robinson & Crow* 2009, p. 151.

671 *Robinson & Crow* 2009, p. 151.

of various kinds.⁶⁷² In that sense, it also concerns other actors with a stake in crime and its consequences, such as family and other supporters, but also victims and members of the wider community with whom the offender's rehabilitation must arguably be negotiated.⁶⁷³ In this context, a group of approaches, gathered under the umbrella term "restorative justice", has emerged, seeking to resolve conflicts (broadly conceived) by bringing together those with a stake in resolving that conflict and deciding how to move on from it.⁶⁷⁴

4.1.2.3.4 Restorative justice

By understanding that crimes cause breaches in interpersonal relationships, restorative justice seeks to ameliorate these relationships by bringing together those affected by crime and addressing their needs and obligations,⁶⁷⁵ for example by encouraging offenders to assume responsibility for their actions,⁶⁷⁶ by providing victims with a platform to share their feelings and to reclaim empowerment⁶⁷⁷ as well as by offering a chance for the offenders to actively redeem for the wrongs they did and, by doing so, to earn back their place in the community.⁶⁷⁸ An encounter between the stakeholders in crime, direct or indirect, is at the crux of all restorative justice models.⁶⁷⁹ The novelty of the restorative justice approaches lies in the value and importance it places on the involvement of other stakeholders, specifically "non-professionals", including victims, supporters of offenders and victims (e.g. family members) and sometimes members of the wider community in which offenders and victims reside.⁶⁸⁰ Based on the extent of involvement of these other stakeholders, but also on how they tackle needs and responsibilities that emerge from committed crimes, the modalities of restorative justice can range from a victim-offender mediation (VOM) – principally revolving around the encounter between only the offender and the victim – to different types of restorative conferences that also include other stakeholders, such as community members and families.⁶⁸¹

The appeal and utility of restorative justice approaches has been recognized insofar through its versatile application, e.g. either as a supplement to conventional criminal

672 In particular, with reference to *Bazemore & O'Brien* 2002, *Maruna* 2001 and *Bazemore* 1999.

673 *Robinson & Crow* 2009, p. 151.

674 *Robinson & Crow* 2009, p. 151.

675 *Zehr* 2002, p. 19.

676 *Robinson & Crow* 2009, p. 151.

677 *Zehr* 2002, p. 15.

678 *Robinson & Crow* 2009, pp. 151–152.

679 *Zehr* 2002, pp. 44–45.

680 *Robinson & Crow* 2009, p. 152.

681 *Robinson & Crow* 2009, p. 152. Each of the most commonly recognized restorative justice processes is explained in more detail in *Chapter 4.1.3.2*.

justice institutes such as probation and imprisonment⁶⁸² or as their alternatives, for example in cases of juvenile or property crimes.⁶⁸³ In particular, the focus on the amelioration of disrupted or broken relationships between individuals or groups has also made restorative justice an appealing approach to dealing with the aftermath of gross human rights violations, such as international crimes. Examples of mechanisms dealing with the admission of accountability for atrocities as well as needs and obligations stemming from these crimes – therefore also incorporating restorative justice elements – can be recognized in truth and reconciliation commissions as well as in grass-roots forums for resolutions of conflicts such as the *gacaca* system developed in the post-genocide Rwanda.⁶⁸⁴ Despite their differences, both these mechanisms, which stand as alternatives to traditional penal processes, place the principle of “personalism”, or emotional involvement, at the forefront.⁶⁸⁵ This means that for those directly involved in the conflict (crime), it is not only determination of forensic or factual truth about what happened and who is guilty that matters but also how each of them experiences this truth. The importance of individual experiences for the process of reconciliation is accentuated by *Haveman* when he mentions that every story has several truths and that the consequences of choosing one truth above another are fundamental.⁶⁸⁶ What restorative justice offers is a possibility to reconcile these personal truths and to find a solution how to move forward from there. For example, truth and reconciliation commissions provide forums for both victims and perpetrators to voice and share their experiences, with a further possibility to meet with a view to dialogue, personal healing or restoration in the long term.⁶⁸⁷ Similarly, in the vein of *Christie’s* appeal to return conflicts to those directly involved,⁶⁸⁸ the *gacaca* system⁶⁸⁹ demands active participation in the conflict resolution not only from the offender and the victim but also from a wider community within which the

682 *Van Garsse* 2014.

683 *Van Garsse* 2014; *Parmentier et al.* 2008, p. 344.

684 The *gacaca* forums had already traditionally existed before the Rwandan genocide; however, according to *Molenaar* (2005), it is not entirely clear how often and with regard to which conflicts they were still in use before having been ‘reinvented’ to try genocide suspects (see also *Haveman* 2008, p. 367).

685 *Parmentier et al.* 2008, p. 353; also *Haveman* 2008.

686 *Haveman* 2008, p. 398.

687 *Parmentier et al.* 2008, p. 345.

688 *Christie* 1977.

689 While also being referred to as “courts”, the *gacaca* system being developed as an answer to the multiplicity of génocidaires in post-1994 Rwanda has a broader, more reconciliation-oriented agenda of goals as well as a much wider constituency of parties than those typically found within the traditional court system (for details on the *gacaca* system, see *Knust* 2013 and *Havemann* 2008). Given the cultural, psychological and political implications the *gacaca* system has had in the aftermath of genocide, *Haveman* finds it more suitable to refer to it as a “social process” rather than solely as a legal practice (2008, p. 395). This also seems to correspond with its historical incarnations where the *gacacas* referred to community gatherings in order to discuss conflicts within or between families or inhabitants on a village hill (*Haveman* 2008, p. 367).

crime happened, as it is within this very community that the offender continues to live.

While the aforementioned mechanisms incorporating restorative justice principles present alternatives to traditional penal process, it is not difficult to imagine positive outcomes the integration of (or a supplement with) such principles could have for international criminal justice – if not before or during the trial proceedings, then certainly in their aftermath, i.e. during the enforcement of sentences. Opposed to the adversarial nature of the trial proceedings, the nature of rehabilitation as the guiding principle for the enforcement of sentences seems to be particularly suitable for an introduction of methods that revolve around restoration (e.g. dignity, a sense of security, empowerment and equality) and, by doing so, “offer to the offender a concept of learning and communication promising positively valued experiences”.⁶⁹⁰ Through this experience, then, the offender is given the “opportunity to provide assistance to the victim with the consequences of the crime”,⁶⁹¹ which is a way of meaningfully contributing to the reparation of relationships not only between the offender and the victim(s) but also indirectly between the communities symbolically represented by these actors. In trial proceedings, the efforts are exclusively directed towards a factual determination of what happened and who bears responsibility for it, thus largely leaving personal experiences out of it. For victims, this often means a denial of any form of catharsis for what they suffered,⁶⁹² as their testimonies are utilized exclusively for the purpose of evidence – in order to determine whether or not something happened – thus leaving largely out of the frame the part on how that personally impacted them.⁶⁹³ In the terms of *Christie*, their “conflict” with the perpetrator is appropriated by others, that is by prosecutors and defence attorneys⁶⁹⁴ who interact through intricate – and for the parties often incomprehensible – legal concepts that leave the main stakeholders largely either out of the dialogue or dumbfounded by it. Consequently, it also sidetracks the perpetrators from meaningfully assessing their part in the conflict, not to mention communicating their part of the story to those whom they have grieved, as they (or, better to say, their defence counsellors) are then solely focused on refuting the accusations from foreign conflict entrepreneurs,⁶⁹⁵ who are perceived as another enemy. Given the intricacies of their

690 *Albrecht* 2001, p. 300.

691 *Albrecht* 2001, p. 300.

692 *Pajić* 2014, p. 232.

693 For a constructive criticism of this aspect of trial proceedings at the ICTY, see *Eser* 2011, p. 146.

694 *Christie* 1977, p. 4.

695 To this, *Christie* stresses the extent to which the conflict, embodied in the committed crime, has nowadays been depersonalized and taken away from its main stakeholders (victim and offender) by putting it in the bureaucratized legal arena and leaving it to the lawyers to handle (1977, pp. 4–5). As a retort, *Albrecht* critically argues that within the contemporary penal sys-

criminality which, as addressed before, is the one of conformity and not of a (perceived) deviance, the perpetrators often do not comprehend their acts as morally wrong and are often grievous about being stigmatized as criminals without, as they see it, being given a proper opportunity to adequately express their point of view of what happened, as well as their experience thereof.⁶⁹⁶

Considering that the judgement (usually) brings a finality to the contestation over guilt or innocence, this finality can be utilized through enforcement of the sentence as a new starting point which allows for dialogue, rehabilitation and an amelioration of relationships with sincerity, without attempts for control, manipulation and deception that so often plague the trial proceedings. In particular, restorative justice approaches that focus on addressing needs and obligations through encounter and dialogue can mutually reinforce different facets of the offender's rehabilitation with the overarching aims of ICJ. For example, a mediated encounter between the imprisoned perpetrator and the victims (or their representative) – where both parties convene their experiences of what happened and how it affected them – could change the offender's view of him-/herself as well as of the committed acts in a profoundly remorseful way. This closely resembles the concept of offender rehabilitation certain judges of the ICTY attempted to project within the context of the trial proceedings, where the encounter with the testimonies of the victims or with the victims themselves in a courtroom would, hopefully, have a remorseful effect on perpetrators.⁶⁹⁷ Not denying the plausibility of such an outcome within the trial proceedings, this is, however, not the main concern of the trial. Furthermore, given the adversarial nature

tem (that has the monopoly of criminal punishment), victims were never robbed of their conflicts: it is not the conflicts that were taken away from them but only certain ways of dealing with such conflicts (see in detail 2001, pp. 304–305).

696 One of the interviewed ICTY prisoners vividly expressed these grievances, in particular over his inability to properly communicate his personal experiences about what happened, whether something could have been done differently and especially how it is being *ex-post* addressed by the international community (i.e. the ICTY) through legal institutes that, as it is perceived, attempt to humanize something inherently inhumane, such as waging a war. With reference to this, he stressed: *"I mean, I am doing my time here because of the state. Not because of myself, it wasn't my will to go to [...], you understand? I didn't want to go to war. Everybody says how they did not want war, but I was a professional, for me, it was not a matter of choice, whether I wanted something or not – either you go to prison or in command; good riddance, and that was that. [Secondly,] even when two guys get into a fight, you have to see what the other guy did, whether he hit him, whether it was a defence or not – in the Hague, there is no word about the 'other side' [parties to the conflict], and they expect me to be objective, well, how am I supposed to be objective?! What should I, as a commander, expect, that they will ask me to admit to every, I don't know what, incident? Because not every incident is a crime, we have to be clear on that: [...] that was a war. Many people tend to forget, that was a war what was going on. [...] And it reads in my judgment: 'he is found guilty for giving orders in accordance with article seven-point-one [...] because he knew that those orders will cause death among people... I mean, I am in a war, right?! I am not expecting anything else. When I give the order to attack, I expect for it to cause death. And this is how they justify my guilt?'"* (Interview with ICTY prisoner A in Germany, 15/08/2014).

697 See Chapter 2.2.3 above.

of trials that is inherently based on contestations between the parties, it is possible that they might actually aggravate relationships instead of ameliorating them.⁶⁹⁸ A more positive outcome can be imagined within the phase of the enforcement of sentences, oriented towards a rehabilitative outcome. Furthermore, such an outcome is also supported by the postulates of the learning theory, as it is claimed that through restorative practices – and especially the encounter with the victim –, the offender may learn about the victim’s interests, attitudes and fears.⁶⁹⁹ Changes in the perception and attitudes of the offender may lead to building up obstacles against re-offending as he/she becomes aware of the victim as a subject, as an individual and as a human being.⁷⁰⁰ In this perspective, the re-humanization process of victims can also be understood as a cognitive re-calibration of offenders that reverses the previous neutralization of cognitive dissonance – in fact activating it again –, which was an important staple of the atrocious psychological transformation of the offenders.⁷⁰¹ In other words, it also further nurtures the personal/individual rehabilitation of offenders. A re-humanization of victims and an awareness of the impact of crimes can then open ways for possibilities of reparation or other ways of active atonement. On the other hand, giving the opportunity to perpetrators to share their personal experiences and answers with those whom they grieved could relieve the victims from falling into the same destructive pitfall of dehumanization that characterized the commission of crimes in the first place. Indeed, reconciliatory efforts largely depend on those who suffered;⁷⁰² however, reconciliation itself does not merely revolve around granting forgiveness to somebody or not but is preconditioned by those affected being personally able to transcend the status of the victim and to put (as much as possible) a closure on grievances.⁷⁰³ In this sense, communication and dialogue provide for understanding, which in turn can also lead to a re-humanization of the perpetrators in the eyes of other stakeholders.⁷⁰⁴ For victims especially, this understanding

698 See also Eser 2011, pp. 145–146.

699 Albrecht 2001, p. 302.

700 Albrecht 2001, p. 302.

701 See Chapter 3.

702 Von Trotha 2004, p. 1.

703 This, in particular, was addressed by an interviewed legal officer at the ICTY as an important precondition for reconciliation; no matter which effort is given on the side of the perpetrator, there has to be a willingness by the victims to overcome their status in order to forgive and to move on: “I went to Srebrenica to explain to them [the victim associations] sentencing, and I was heckled the entire time of my presentation by the “Mothers of Srebrenica” [...], it went nowhere. [...] But you can [also] understand it, you know. [...] it takes a big character to reach forgiveness [...] in the circumstances those people are in [...], but this reconciliation requires forgiveness [...] and I think this is what victims don’t understand – they need to forgive because otherwise, they will always going to be frozen in this really awful place of victimhood” (Interview with Legal Officer B at the ICTY, 15/06/2015).

704 Clark 2009, p. 424.

offers a chance for at least a degree of closure, which can then serve as a platform for further reconciliatory efforts.⁷⁰⁵

The appeal of restorative justice methods in this context does not exclude an awareness of practical conundrums that might hinder their desired effect. In particular, *van Garsse* stresses how even with regard to ordinary criminality, in most countries, for a long time, prison administrations did not consider restorative justice approaches to be relevant for the work within prison, as they could not imagine prison staff to have any responsibility beyond what is required for holding prisoners inside the institution or for preparing them for release within the framework of offender-oriented/personal rehabilitation.⁷⁰⁶ Especially with regard to the context of international crimes, it is evident that next to the basic training in restorative justice methods, the interlocutors – be that a mediator between the offender and the victim or a facilitator of a larger restorative conference that would involve a broader number of stakeholders – would also require specialized knowledge on different aspects of the collective violence phenomenon. For the restorative effort to produce a desired result, overheated emotions and insecurity that are present in both offenders and victims in the aftermath of crime need to be calmed by creating a safe spot where people can exchange personal feelings and private matters without the risk of being used or abused.⁷⁰⁷ Such a safe spot would evidently depend on the ability of interlocutors to guide the exchange between the stakeholders in an objective and fair way, which (in instances of international crimes) would also require that they are familiar with the societal, political, historical, but also criminological aspects of mass violence. For instance, *Weitekamp* and *Parmentier* argue that in order to repair the harm that was suffered during the conflict, it is crucial to consider a number of questions that are criminologically par excellence, namely, what are the causes of mass violence, what were the conditions that made it happen and what kind of sociological and psychological reasons could explain people's involvement in committing these atrocities?⁷⁰⁸ These are also closely tied to the questions of significance for the empowerment of victims, as victims typically place particular value on the ability to explain why the crime happened, why they were victimized, and to put a face to the offender.⁷⁰⁹

Apart from the requirement of interlocutors possessing a broader skills-set, it is usually the concern of secondary victimization that might prevent the encounter between the offenders and the victims⁷¹⁰ in the aftermath of atrocities. This necessitates not only the already mentioned skill of interlocutors to guide the session in a fair and objective way that disables any attempt of emotional and psychological abuse, but

705 *Clark* 2009, p. 428.

706 *Van Garsse* 2014, p. 14.

707 *Van Garsse* 2014, p. 23.

708 *Weitekamp & Parmentier* 2014, p. 4436.

709 *Doak & O'Mahony* 2014, p. 4428.

710 *Van Garsse* 2014, p. 18.

that there is acknowledgement (to some extent, at least) of responsibility on the side of the offender, as restorative approaches are not applied if he/she denies guilt or responsibility for committed crime(s).⁷¹¹ For any meaningful restorative approach to take place then, it is primarily required that substantial progress is achieved within the personal/individual-oriented rehabilitation programme.

A final remark regarding the practical application of restorative justice methods in the context of offenders' rehabilitation revolves around the contestation the offender-oriented approach can have with the victim's perspective.⁷¹² Initially, restorative justice has developed as a victim-centred approach,⁷¹³ allowing victims a more direct participation in the "conflict" than the one provided by the justice system, in order to more meaningfully address their needs with regard to the crime. As such, the encounter primarily depends on the voluntariness and desire of the victims to participate, but subsequently also on that of the offenders.⁷¹⁴ Given the possible benefits such participation can have for both sides, it is of question on what kind of criteria the actual encounter should depend and how it would affect the perceptions of the legitimacy of the system on both sides. Similar to previously addressed issue of guilty pleas in the ICTY trials, is the willingness to encounter other stakeholders in crime something that can also be considered a shrewd "calculation" on the side of the perpetrator, aimed at, for example, qualifying for early release from prison (as this can be considered to be an indication of rehabilitation) – or is it, in fact, a genuine indicator of personal/moral rehabilitation? How does the encounter affect the perception of the equality of treatment among the offenders if encounters with other stakeholders are allowed to some and denied to others, despite a shared genuine remorsefulness and a willingness to somehow make the wrong right? Theoretically, this can depend on a fact as simple as the external stakeholders expressing a desire to meet with some offenders but not with the others. Furthermore, should the encounter with, e.g., direct victims be considered to be a stronger rehabilitative indicator as opposed to the one with members of their family or the community? Similar questions can pertain to other stakeholders in the offence. As indicated by *Weitekamp* and *Parmentier*, the number of possible stakeholders in international crimes, outside of the "offender-victim" circle, is vast, and they differ in their needs (see *Figure 3* below); however, their perceptions of whose needs have (or should have) a predominance can be (and probably are) very subjective. On one side, this is then also tied to the infrastructural challenge of having the institutional capacity in prison to allow those interested to encounter perpetrators and express their experiences and needs, while on the other side, at which point within the offender's rehabilitative path would – if at all – an encounter with different types of stakeholders be beneficial?

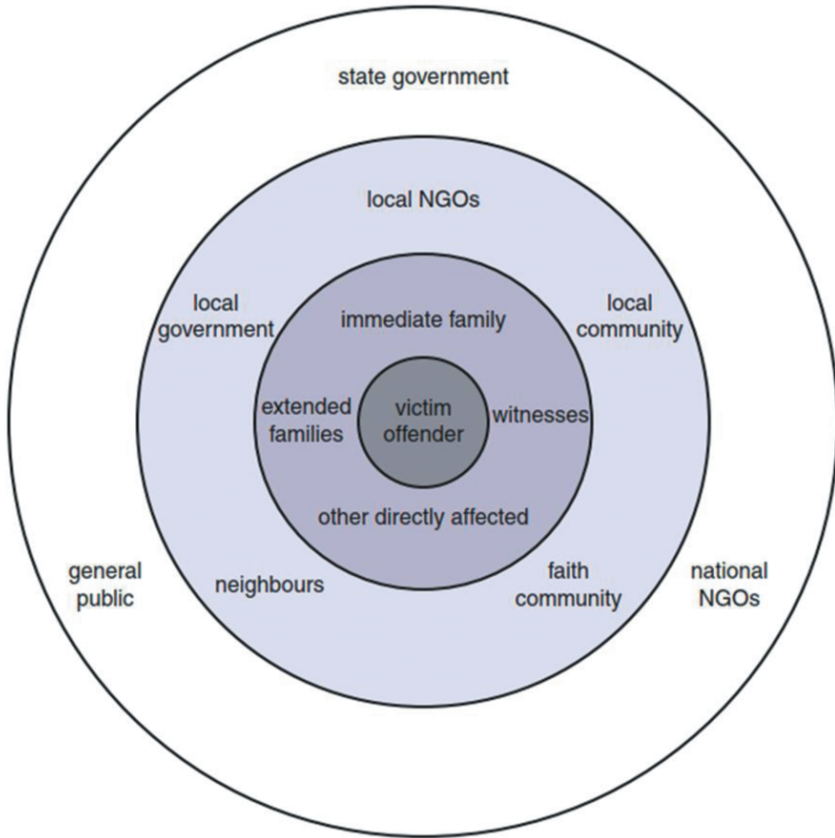
711 *Zehr* 2002, p. 46.

712 See also *Albrecht* 2001, p. 309.

713 *Doak & O'Mahony* 2014, p. 4422.

714 *Zehr* 2001, p. 46.

Figure 3 The scope of stakeholders in the case of state (international) crimes



Source: Weitekamp & Parmentier 2014

Furthermore, if regarding other stakeholders than the perpetrators, how can, in physical terms, all those affected by genocidal policies that were devised by a handful of criminal masterminds be allowed to have an encounter with them? Furthermore, can access to the perpetrators (as has been granted to some victims for the purpose of restorative encounters – and denial of such access to other victims involved) substantially impact the perception of (in)equality among victims and, subsequently, their perception of the legitimacy of the restorative mechanism? In terms of actual practice, this raises the interesting question as to what kind of restorative justice approach would actually most benefit the achievement of offender rehabilitation within the context of punishment for international crimes – and subsequently also have a positive effect on the overarching aims of ICJ. Furthermore, have any such approaches been applied within the system for the enforcement of sentences, as devised by the ICTY – and if so, how?

Before attempting to answer these questions,⁷¹⁵ it is opportune to become acquainted with the most commonly devised restorative justice approaches. These will be introduced in more detail in the section on the rehabilitative operational framework below.

As already mentioned in the introduction to this chapter, certain authors have argued that the application of the concept of social rehabilitation to macro-criminals is manifestly inappropriate, if not absurd, given that they do not deviate from but rather act in conformity with the policy of their state.⁷¹⁶ This implies that within their state (or their community whose members are also in charge of the formal state structures), their status is differentiated from that of ordinary criminals. Given that what they did constitutes a meaningful part of the official state policy, it is deemed as something done for the good of their community; therefore, they would not only lack the criminal stigma but – quite the opposite – might be regarded as heroes or martyrs. The problem can be further analyzed in the terms following below.

In the course of a conflict, it is quite unlikely that the perpetrators of atrocities are prosecuted at all – even if some of them are punished, the sentences they receive are usually short and imposed so as to mitigate the growing outrage of the international community rather than to provide any commensurate condemnation of crimes that would appease the interests of justice (particularly considering the members of the victim communities). Usually, the penal processes are initiated after the conflict when the society, or at least its formal structures, are partly transformed. While the conflict is halted, grievances still linger on and the overall society is likely to be polarized, as perpetrators and victims are often found among all conflicting groups. Depending on the social strata in the post-conflict society as well as on inclinations of the ruling state structures, the overall criminal censure of the perpetrators can range between disproportionately low (e.g. in instances where policy-makers and predominant social strata still authorize, even indirectly, committed crimes) or disproportionately high (e.g. when the monopoly of power falls under the regime of those victimized). In the first instance, transformation by the punishment is theoretically non-existent, as the censure from the society itself is non-existent. In such a case, victim communities might experience a further aggravation of their status within a post-conflict society, and an amelioration of their relationships with the perpetrators' communities will be significantly hindered. In the second example, the censure is disproportionately high to the point of aggravation and can be regarded as revenge; therefore, reconciliation is further hindered. What this speaks to is that “rehabilitation of the post-conflict society” is also an important factor, as an appropriation of the international human rights ethos and commonality instead of differences for the purpose of reconciliation should be reflected not only in attitudes of the population but also in the approaches by all groups to handling past crimes. Societal

715 See *Chapter 4.1.3.3*.

716 Jäger 1995, pp. 340–341, 345, as referenced in *Kress & Sluiter 2002a*, p. 1755.

attitudes are also sought to be changed through educational, structural and informational transformation, which usually occurs with international help and monetary assistance. However, this can also lead to the “sovereignty paradox” where international attempts to instill common values backlash since the local population might consider this reform to be something forcefully pushed, instead of allowing them to handle.⁷¹⁷ The feeling of local ownership of reforms is a precondition for a widespread norm change, or for it to take a root at the local level.⁷¹⁸ This works similarly for the status and reputation of the former perpetrators. Presuming that they are adjudicated according to rule of law principles, it is of question how they further relate to the wider social demography or social strata who suffered the direct or indirect consequences of their crimes. The fact is that in a divided society – post-conflict societies can be considered to be ‘divided’ as there are usually either explicit or latent feelings of animosity between social groups previously engulfed in a conflict and now co-existing in these societies –, the role and status of the perpetrators appropriates meaning within a wider context of conflict and conflict transformation. It will not fall into obscurity but will always be scrutinized from the historical, social and ideological aspect. As *Feron* stressed with regard to the role of the former ethno-national terrorist in the process of reconciliation in Northern Ireland, “their qualification, their status, and their future relate to the political and ideological struggles over the more general meaning and purpose of the [...] conflict.”⁷¹⁹ If the perpetrators have instigated, shaped or aggravated conflict, their social rehabilitation is partly dependent on them actively transforming that conflict through a meaningful contribution to reconciliation between the conflicting groups. This can be achieved through dialogue and restorative action; by not only reaching out to victim communities but also changing the attitudes of those condoning the crimes – as these are the communities on whose behalf the perpetrators fought for –, the perpetrators command credibility and respect from them. The example of such a dynamic, even though on a smaller scale, is presented in *Neumann’s* report on prison de-radicalization of followers by terrorist leaders, as discussed in the section on moral rehabilitation above. A further example of social rehabilitation successfully contributing to wider national reconciliation will be discussed with regard to the rehabilitation of ex-combatants in the North Ireland conflict, especially in the context of a successful application of various restorative justice approaches as part of a rehabilitative operational framework introduced in *Chapter 4.1.3*. Consequently, the idea of former perpetrators *actively* earning their social rehabilitation is something that shall also be discussed in the context of the final rehabilitative facet, the judicial rehabilitation.

717 *Jones* 2012, pp. 128, 130.

718 *Jones* 2012, p. 130.

719 *Feron* 2006, p. 448, as quoted in *Dwyer* 2012, p. 292.

4.1.2.4 Judicial rehabilitation

The last rehabilitative facet concerns the formal acknowledgment of ex-offender's rights and freedoms to be equal with those of other citizens, by expunging, deleting or otherwise setting aside his or her criminal record.⁷²⁰ As argued by *McNeill*, no amount of personal rehabilitation and support to offenders to change themselves can be sufficient to the tasks and challenges of reintegration, resettlement and reentry if legal and practical barriers are left in place.⁷²¹ This is designed to formally remove the criminal stigma from the offender and to acknowledge his/her status as a full and equal member of the society.

Contemporary practices of judicial rehabilitation mostly revolve around the so-called "passive redemption" or the automatic expunging of criminal records,⁷²² which means that through passive avoidance of crime and with a pre-determined passage of time (e.g. either in terms of numbers of years after the completion of sentence or by reaching a certain age), the individual's criminal record will be deleted and the person will be considered to never having been convicted.⁷²³ The expunging policies in most European countries and Australia have been supportive of the end-effect this removal of criminal stigma ought to achieve, that is, to make the reintegration as efficient as possible by promoting the privacy of the offenders and by protecting them from having to reveal their criminal histories, also before the onset of judicial rehabilitation.⁷²⁴ On the contrary, the USA have a long history of freedom of information (including "naming and shaming" that dates back to the Salem witch trials) which, according to *Robinson*, at least partly explains the disadvantage of ex-offenders when it comes to the protection of their privacy and therefore their ability to eventually shed off the criminal stigma and its collateral effects.⁷²⁵ For example, mere access to a computer with an internet connection will enable anyone in the USA to download an extensive amount of information on anybody who might have been arrested or convicted of a crime in most US states.⁷²⁶ Furthermore, individuals with criminal records in the USA can be restricted from gaining licences for a remarkable range of jobs as well as from a whole range of welfare benefits at the federal level.⁷²⁷ Although the situation is better in Europe and Australia, there is concern that these countries are also in a progressing state of "Americanization" in this domain.⁷²⁸ This

720 *Robinson* 2014, p. 4369.

721 *McNeill* 2014, p. 4204.

722 *Maruna* 2011, p. 106.

723 *Maruna* 2011, p. 101.

724 *Maruna* 2011, pp. 109–110.

725 *Robinson* 2014, p. 4369.

726 *Maruna* 2011, p. 99.

727 *Maruna* 2011, p. 99.

728 *Maruna* 2011, p. 100.

is becoming evident in the practice of making criminal records more widely available, and especially in community notification schemes with respect to sexual offenders, which (under the pretext of public protection) not seldom compromise the ex-offenders' right to put the past behind them.⁷²⁹

Drawing upon an important survey of European and Australian policies, *Maruna* raises two noteworthy points with regard to the prevailing concept of passive or automatic judicial rehabilitation.⁷³⁰ First of all, he stresses how the passive concept that requires years of crime-free behaviour before recognizing the respective person's reform may indeed be seen as normatively just but is almost worthless for rehabilitative purposes.⁷³¹ While the approach ensures that the status of being an "equal citizen" will ultimately be restored – and thus avoids bureaucratic complexities which can potentially stem from a "merit-based approach" –, it usually takes long periods of time (based on the survey, 7–10 years on average) within which often very little is done in terms of constructively facilitating reintegration and the reparation of breached ties between the offender and the community.⁷³² In particular, *Maruna* argues, desisting from crime for a substantial period of time before being forgiven comes as being extremely difficult if the community or society at large uses the criminal record (or the stigma) of the ex-offender as an excuse to hinder his/her social rehabilitation (e.g. by withholding a chance for the offender to get permanent employment, to qualify for loans or housing assistance or even to rent accommodation because of his/her criminal conviction).⁷³³ Second, the deletion of the criminal record often goes "under the radar", to the extent that even the offenders themselves are not aware that their criminal records have been (or could have been) cancelled.⁷³⁴ In this sense, *Maruna* argues, the deletion of the criminal stigma lacks the symbolic and expressive value that is present during its imposition by conviction; therefore, it does little to reduce the social and psychological effects of the criminal stigmatization.⁷³⁵ In other words, this implies that if the condemnation of the perpetrator for the committed crime is rightfully public and on behalf of the whole community, the perpetrator's redemption and restoration to the status of a full member of the society should have equal symbolic value if it is to have a positive effect for reintegration. Instead of expunging convictions from one's criminal record as if the past had not happened, *Maruna* rather opts for the formal certification of the concerned person's

729 *Robinson* 2014, p. 4369.

730 *Maruna* 2011; for individual country reports, see *Herzog-Evans* 2011, *Morgenstern* 2011, *Padfield* 2011, *Larrauri* 2011, *Boone* 2011 and *Naylor* 2011.

731 *Maruna* 2011, pp. 99, 106.

732 *Maruna* 2011, pp. 98, 99, 106.

733 *Maruna* 2011, p. 107.

734 *Maruna* 2011, p. 107.

735 *Maruna* 2011, p. 107.

rehabilitation (in the vein of “better to forgive than to forget”), which would publicly acknowledge that people can change and should be forgiven for the past.⁷³⁶

Public certification of the rehabilitation is seen as having a positive effect on the amelioration of the breached relationship between the offender and the community, in the sense that it provides an incentive for the offender to actively commit to reparative action, which would, as a reward, speed up the process of deleting the conviction.⁷³⁷ On the other hand, by certifying that the ex-offender has indeed perpetrated a crime but has rightfully deserved the full status of a citizen again, the community is proactively involved in reintegration as a therapeutic agent and not as a vengeful enemy aimed at making the post-release phase as miserable as possible. The example of France speaks of such forms of “reintegration rituals”, where released prisoners have the ability to apply with the courts for an earlier deletion of their convictions from the register.⁷³⁸ If they can demonstrate that they have complied with their sentence, paid the necessary damages, acknowledged and apologized for the offence and made efforts to stop offending, there is a high chance for them to be rewarded rehabilitation by expunging their records sooner.⁷³⁹ Crucial here is the role of the court which decides over the imposition of the criminal stigma as well as over its removal by granting the rehabilitation. Referring to *Herzog-Evans*,⁷⁴⁰ *Maruna* positively emphasizes the symbolic value such decisions carry, stressing the imprimatur of official respectability a judicial role has and which, for example, cannot be found in administrative procedures of automatic restoration.⁷⁴¹ The courts are seen as having an advantage over almost any other institution in the society, as “they can state what the truth is” and this statement of judicial truth carries the real weight:⁷⁴² only courts can deliver the life-long stigma of conviction and turn a person into a criminal, and only courts have the ability to remove or replace that label with a new one.⁷⁴³

Expressed concerns are of particular relevance for the rehabilitation of international criminals. As mentioned in *Chapter 1*, the ascertainment of truth about crimes by international courts holds a relevance for the overarching ICJ aims of maintaining peace, general deterrence and reconciliation, not least as in the long term, this should disable any potential attempt to misuse or misinterpret historical facts and to utilize them in favour of another circle of violence. With concrete reference to the ICTY, one of the tasks of its MICT branch is to manage and preserve the archives of case

736 *Maruna* 2011, p. 99.

737 *Maruna* 2011, pp. 106–107.

738 *Maruna* 2011, p. 107; also see in detail *Herzog-Evans* 2011.

739 *Maruna* 2011, p. 107.

740 *Herzog-Evans* 2011.

741 *Maruna* 2011, p. 108.

742 *Maruna* 2011, p. 108; also see *Herzog-Evans* 2011.

743 *Maruna* 2011, p. 108.

files and documents on crimes, perpetrators and victims, providing them as a reference to interested parties, such as “communities in the affected regions, local judiciaries, civil society and individuals worldwide committed to international justice”.⁷⁴⁴ As such, this stands in contrast to the prevailing concept of passive or automatic judicial rehabilitation because, theoretically, the overarching ICJ aims render the deletion of the criminal records of convicted war criminals inappropriate and contrary to their very achievement. On the other hand, an indefinitely maintained stigma of a convicted international criminal through such criminal records poses a serious obstacle to the fulfilment of the individual rights of ex-offenders, not least the right to be re-accepted as an equal member of the society. For example, not only could this prevent ex-prisoners from obtaining social capital necessary for their livelihood,⁷⁴⁵ there might also be security risks of retaliatory attacks, particularly from those identifying with victim communities. The currently run online database of the ICTY provides detailed information on the cases and perpetrators to the general public, and while its maintenance serves a legitimate cause, it also implies the myriad of issues individual ex-perpetrators might face with their social rehabilitation, as already addressed in the context of an ongoing “Americanization” of criminal databases above. As a preliminary observation, the concept of a merit-based certification of rehabilitation that acknowledges the past but also that people can change, that good people can do bad things and that all individuals should be able to move from their past convictions – as supported by *Maruna*⁷⁴⁶ as well as different therapeutic and restorative justice approaches discussed above – seems to be of practical utility for ICJ and the rehabilitation of international criminals. Interestingly – as will also be seen in *Chapter 4* below –, neither the ICTY Statute nor the RPE provide information on the judicial rehabilitation of the convicted perpetrators, thus leaving the question of their legal status after the end of their sentences open to enquiry.

Referring again to *McNeill’s* notion of rehabilitation as a “tangle” of different approaches, the delineation of the personal, moral, social and judicial facet above has

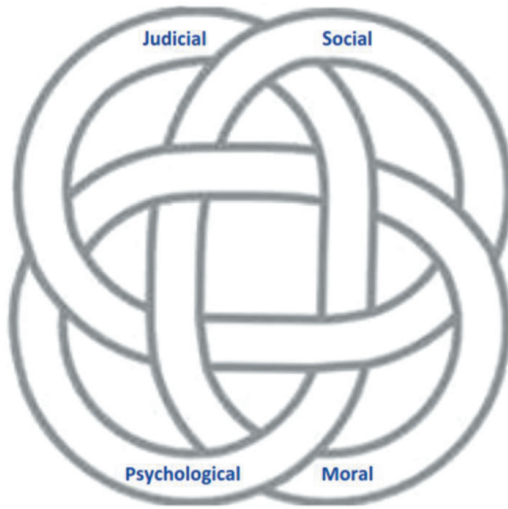
744 unmict.org/en/about/functions/archives [29/04/2017].

745 This adds to the discussion on the social rehabilitation of macro-criminals in a narrower sense. It is not difficult to imagine that despite the high vocational and educational qualifications many of them might have (i.e. those belonging to higher political and military echelons), honing these respective skills in prison might prove to be difficult, given not only the institutional restriction imposed but also the effects of the prison culture that demands the adaptation of a different kind of skills set (see *Cobden & Stewart* 1984). Imprisonment under the “rights” paradigm ought to counter these effects of prisonization and offer, if not a substitute for this inevitable deterioration, then at least a compensatory vocational-educational programme that would provide for one’s individual ability to appropriate the necessary social capital upon release. Similarly, such programmes would also improve rehabilitative chances of those perpetrators of international crimes who already came from a less privileged social stratum, such as “borderliners” or “criminals”.

746 *Maruna* 2011, p. 97.

demonstrated to what extent they are interdependent and to what extent each of them needs to be addressed if a successful rehabilitation of the offender is to be achieved.

Figure 4 “Punishment as Rehabilitation” – the four interdependent facets of rehabilitation



Source: McNeill 2014

In particular, the section has also tackled the challenges some of these facets might face in the context of the rehabilitation of international criminals. Before addressing the practice of the ICTY in this regard, a more complete picture ought to be given by delineating the operational framework against which the achievement of rehabilitative facets is generally measured. The introduced framework will accordingly serve as an analytical matrix for an empirical analysis of the enforcement of the ICTY sentences below.

4.1.3 Operational framework

The delineation of the rehabilitative operational framework is intended to deepen the analytical matrix for evaluating the enforcement of the ICTY sentences. As it is conceived, the framework consists of two parts.

The general (rights-based) part concerns fundamental standards of detention and rights guaranteed to every prisoner. It draws upon international human rights instruments⁷⁴⁷ as well as those international instruments pertaining to the enforcement of

747 Here encompassing the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR).

the prison sentences.⁷⁴⁸ The provisions and principles encompassed by it are seen as representing a “minimum consideration for the interests of the convicted person”.⁷⁴⁹ Within the stage of sentence enforcement, this means that the implementation of the sentence has to correspond to certain standards and rules, the breach of which could seriously undermine the basis for any constructive rehabilitative effort, as well as undermining the very legitimacy of punishment. Given that these standards ought to apply to every prisoner, they are also valid for prisoners convicted by international tribunals. In fact, as will be shown below, the agreements of the enforcement of sentences made between the ICTY and the states of enforcement explicitly recall provisions of these instruments when it comes to the offenders being convicted by the Tribunal. The fundamental standards of imprisonment and of prisoners’ rights presented here to an extent correspond to those stemming from the analysis of the aforementioned international instruments as provided by *Vermeulen and De Wree*.⁷⁵⁰

The special (desistance-oriented) part of the framework is partly concerned with the currently most widely applied methods of offender-assessment and according rehabilitative programmes developed to address particular factors that are determined as the offender’s criminogenic needs or risks. The discourse is also supplemented by an insight into parallel stream developing – the one arguing that instead of an exclusive focus on deficiencies and risks in the offender, a stronger accent should be placed on developing his/her potential strengths as a character. Furthermore, the overview expands the notion of a rehabilitative “programme” as a “planned sequence of learning opportunities”⁷⁵¹ focusing exclusively on the individual offender also to include the initiatives that involve other stakeholders in crime. Here once again, the notion that crime does not happen in a social vacuum is invoked; therefore, the quality of relationships between the offender and other immediate stakeholders as well as the broader community to which the offender returns is also of paramount importance for his/her rehabilitation. Some well-established interventions into the social facet of rehabilitation have already been touched upon;⁷⁵² therefore, more light will here be shed on particular restorative justice approaches, given the extent of the benefits they potentially hold for the rehabilitation of criminal offenders in general, and of perpetrators of international crimes in particular.

In this context, the challenge for the rehabilitation of macro-criminals exists insofar as no particular rehabilitative programmes seem to have been developed with the

748 Namely, the 1955 Standard Minimum Rules for the Treatment of Prisoners (SMR), the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BoP) and the 1990 Basic Principles for the Treatment of Prisoners (BP).

749 *Vermeulen & De Wree* 2014, p. 43.

750 *Vermeulen & De Wree* 2014, pp. 43–71.

751 *Robinson & Crow* 2009, pp. 105–106.

752 See *Chapter 4.1.2.3* above.

etiology of perpetrators of international crimes in mind.⁷⁵³ Therefore, certain aspects of rehabilitative programmes for “ordinary” offenders will be discussed in the context of their potential usefulness for the rehabilitation of macro-criminals. Furthermore, given the etiological similarities between the perpetrators of terrorism and those of international crimes,⁷⁵⁴ the literature on the rehabilitation of the former has been drawn upon to present cases of “good practice” with regard to their rehabilitative programmes and positive outcomes. What the examples of Northern Ireland and Italy show in particular is that reaching out to imprisoned terrorists in terms of upholding the prison standards as well as of offering a therapeutic dialogue and restorative encounter greatly improves the chances of their personal and moral rehabilitation, which in turn positively reflects on their willingness to undertake reparative action and “earn” their place back in the community by contributing to the wider reconciliatory process. The reintegrative relationship between the former combatants and the society is reciprocal and depends on mutual efforts; however, a significant accent has been placed on encouraging former terrorists to accept responsibility and to decide what they can do for the society (instead of the opposite) – not only so as to ameliorate past wrongs, but to prevent younger generations from getting involved in the conflict again.⁷⁵⁵ These findings also support the ones stemming from the wider international survey in *Neumann’s* report, indicating “the crucial role played by prisons in reversing the process of radicalization and undermining terrorist campaigns on the outside.”⁷⁵⁶ As *Neumann* further indicates, “if there is an overall thread – or an underlying message –, [...] it is the idea that prisons can present opportunities

753 Taking into account the literature overview on rehabilitation as presented in *Chapters 3.1.1* and *3.1.2*.

754 In particular, the combination of external factors, such as ideology, authoritarianism and group dynamics (with personal motives resulting in the psychological transformation of individuals as well as recognized, for example, in the neutralization of cognitive dissonance and dehumanization) has also been recognized in the individual crime etiology of perpetrators of terrorist acts (see, for example, *Rotman* 2008a and *Getoš* 2007). Despite this, because of the large-scale potential for violence in the hands of the state and the actual magnitude of victimization that can result from such violence, *state terrorism* (under the umbrella of which legally conceptualized crimes such as genocide and crimes against humanity can certainly be put) is by many scholars distinguished from e.g. insurgent terrorism and considered to be a *sui generis* phenomenon, which they therefore usually omit from the analyses of the etiology of terrorist violence (*McAllister & Schmid* 2011, pp. 203–204). Contrary to that, other scholars argue that it is mostly the far greater material capability at the disposal of the state that differentiates a regime from insurgent terrorism and that with regard to etiological similarities, the perpetrators of both state and insurgent terrorism are quite alike (*McAllister & Schmid* 2011, p. 204). Substantiating this point on their convergence is, for example, the magnitude of crimes committed against the Yazidi population by the so-called “Islamic State”/ISIS terrorist group that is determined to constitute, among others, genocide and crimes against humanity (see the 2016 “They Came to Destroy: ISIS Crimes Against the Yazidis” Report by the Independent International Commission of Inquiry on the Syrian Arab Republic, established by the UN Human Rights Council in 2011; ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP_2_en.pdf [09/03/2018]).

755 *Dwyer* 2012, p. 292.

756 *Cento Bull & Cooke* 2016, p. 210; see also *Neumann* 2010.

for combating radicalization and terrorism, and that their potential for doing so needs to be fully understood and acted upon”.⁷⁵⁷ Similarly, given the impact atrocities have left on many post-conflict societies – not least to the extent that in many of these societies, conflicts are actually still latent, waiting to outburst again –, this rationale can as well be applied to the prison treatment and rehabilitation of perpetrators of international crimes. The general, preliminary proposition of aspects from which rehabilitative programmes of macro-criminals can benefit will then be partly based on the aforementioned rehabilitative practice as applied to the perpetrators of terrorism.

4.1.3.1 General (rights-based)

With reference to international human rights instruments, next to the explicit mention of rehabilitation as the guiding goal for the enforcement of prison sentences,⁷⁵⁸ the ICCPR provides for “fair trial” guarantees in Article 14. The here presented notion of general equality before courts and tribunals is also seen to exceed towards a penitentiary system, where the system should not only abide to certain standards and principles established by the international community,⁷⁵⁹ but those fundamental standards and principles should be applicable towards all prisoners. In particular, Principle 5 of the BoP explicitly mandates the non-discriminatory application of these principles towards all persons within the territory of any given state and without distinction of any kind.⁷⁶⁰

When discussing fundamental prison standards, these, first of all, pertain to the conditions of detention, or so-called “negative rights”.⁷⁶¹ Article 57 of the SMR annuls the theory of inherent limitations⁷⁶² to imprisonment by stressing that the prison system shall not aggravate the suffering that comes with freedom deprivation. Quite to the contrary, the prison regime ought to treat all persons under any form of detention or imprisonment in a humane manner and with respect for the inherent dignity of the human person.⁷⁶³ While the term “humane manner” arguably leaves a broad range of discretion in determining what the treatment should actually look like, it nevertheless has to abide to the mandatory minimum, forbidding any form of torture or

⁷⁵⁷ Neumann 2010, p. 8.

⁷⁵⁸ ICCPR, Article 10 (3).

⁷⁵⁹ Vermeulen & De Wree 2014, p. 48.

⁷⁶⁰ BoP, Principle 5 (1).

⁷⁶¹ Rotman 1990, p. 6; see also *Chapter 4.1.1.4*.

⁷⁶² The theory corresponds to the “less eligibility” postulate as proclaimed by *Bentham* (see *Chapter 3.1.1.4*) and is refuted by the contemporary rights-based model of rehabilitation. Regarding this, the famous adage of *Alexander Paterson*, stipulating that people are sent to prison *as* punishment and not *for* punishment, became an internationally recognized principle, reflecting the idea that no additional pains may be imposed on the prisoner (apart from liberty deprivation) and that only minimal interference with the fundamental rights and freedoms of the prisoner is legitimate (*van Zyl Smit & Snacken* 2009, p. 81).

⁷⁶³ BoP, Principle 1; BP, Principle 1.

cruel, inhuman or degrading treatment or punishment.⁷⁶⁴ The latter prohibition is 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.⁷⁶⁵

Further provisions regarding the conditions of detention argue for a separation of categories of prisoners, i.e. men from women, untried ones from those convicted as well as young offenders from adults.⁷⁶⁶ In terms of accommodation, the SMR do not categorically opt for either individual cells or dormitories; however, when dormitories are used, prisoners occupying them should be carefully selected on the basis of being able to associate with one another under these conditions.⁷⁶⁷ Basic provisions meeting requirements of health (such as minimum floor space, the entrance of fresh air, adequate natural and artificial light, heating, adequate sanitary installations as well as appropriate clothing and bedding) should all be at the prisoners' disposal.⁷⁶⁸ Food containing adequate nutritional value for health and strength should be prepared and provided, as well as unlimited drinking water.⁷⁶⁹ Prisons ought to have adequate facilities and equipment for sport and recreational activities, and every prisoner not employed in outdoor work is entitled to at least one hour of suitable daily outdoor exercise, if the weather permits.⁷⁷⁰ Educational development of all categories of prisoners ought to be encouraged by providing an adequate stock of both recreational and instructional books.⁷⁷¹

Furthermore, conditions should be created that would enable prisoners to take up meaningful remunerated employment, which would facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support as well as to that of their families.⁷⁷² This is then directly tied to the provided possibility for prisoners to serve the sentence of imprisonment reasonably near their usual place of residence – if they so request.⁷⁷³

The latter holds particular significance for prisoners sentenced in foreign countries, as it is argued that serving the sentence in a known surrounding highly improves the

764 BoP, Principle 6; ICCPR, Article 7; UDHR, Article 5.

765 BoP, Note to Principle 6.

766 SMR, Article 8.

767 SMR, Article 9.

768 SMR, Articles 9–19.

769 SMR, Article 20.

770 SMR, Article 21.

771 SMR, Article 40.

772 BP, Principle 8.

773 BoP, Principle 20.

chances of successful rehabilitation – in particular, its social facet – and lowers the possibility of sentence aggravation due to lingual and cultural barriers as well as the large distance from the family.⁷⁷⁴ Usually, persons convicted in a foreign state shall – on the basis of bilateral or multilateral agreement – be transferred to the state of their nationality or to one with which they have familiar, social, lingual, economic and cultural ties.⁷⁷⁵ This is also believed to improve diplomatic relations between the states and has an indirect positive effect on crime prevention and law enforcement.⁷⁷⁶ However, the opposite might also be true, in that if sent to their home country (or the country with which they have the aforementioned ties), their fundamental rights might be seriously endangered, e.g. due to socio-political circumstances, lack of infrastructural capacities to uphold minimum prison standards or extra-judicial persecutions. For these reasons, the consent of the sentenced persons has usually been listed in international legal instruments as one of the mandatory prerequisites for a potential transfer.⁷⁷⁷ An involuntary transfer, so it is argued, risks violating international human rights norms, in particular the right to respect for family life as well as the right to freedom from torture, inhuman or degrading treatment or punishment.⁷⁷⁸

Besides providing for freedom from substandard conditions of incarceration, the international instruments pertaining to the enforcement of prison sentences also stipulate “positive rights”⁷⁷⁹ for prisoners; these refer to basic affirmative care or a range of services provided to inmates.

For example, every prisoner should be informed of the prison regime regulations upon arrival to the institution and “all such matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution”.⁷⁸⁰ Foreign prisoners in particular should have these information disseminated in a language they understand, or have the assistance, free of charge, of an

774 UNODC 2012, p. 11.

775 UNODC 2012, p. 11.

776 UNODC 2012, pp. 13–14.

777 For example, the 1983 Council of Europe Convention on the Transfer of Sentenced Persons lists among the conditions for potential transfer the necessary consent of the sentenced person or his/her legal representative (Article 3 [1d]). Subsequent legislation pertaining mostly to the European countries (such as the 1997 Additional Protocol to the Council of Europe Convention on the Transfer of Sentenced Persons and European Union Framework Decision 2008/909/JHA) has, however, moved away from the exclusively “principled” approach, adapting a more pragmatic view on the transfers that also allows for a transfer of sentenced persons without their consent (see *Mulgrew* 2011). For both instruments, however, the decision on involuntary transfer of prisoners cannot be made without taking the prisoner’s view into account beforehand (*Mulgrew* 2011, pp. 112–114). In this way, so it is argued, at least a degree of balance is provided between principled and pragmatic approaches to transfers (*Mulgrew* 2011, p. 142).

778 *Murdoch* 2006, p. 324, as referenced in *Mulgrew* 2011, p. 116.

779 *Rotman* 1990, pp. 6, 70.

780 SMR, Article 35.

interpreter.⁷⁸¹ Next to that, prisoners ought to have the opportunity to issue a complaint or make a request to the director of the institution or a person authorized to represent him/her on each weekday.⁷⁸² Given that prison institutions are subject to supervision on adherence to relevant laws and regulations by an impartial and competent authority, prisoners are also entitled to communicate freely and in full confidentiality with this inspection; accordingly, may also make requests and file complaints.⁷⁸³ In addition, every prisoner is allowed to make an uncensored request or complaint to the central prison administration, the judicial authority or other proper authorities through approved channels.⁷⁸⁴ If this (or any other available domestic remedy) fails, the first Optional Protocol to the ICCPR entitles the Human Rights Committee (created by the ICCPR) to receive and consider communications from individuals subject to its jurisdiction regarding violations of any of the rights set forth in the ICCPR.⁷⁸⁵

Inmates are entitled to proper medical care while being incarcerated in a prison institution; this includes physical, mental and psychiatric services.⁷⁸⁶ The care is ought to be provided free of charge⁷⁸⁷ and without discrimination on the grounds of a prisoner's legal situation.⁷⁸⁸ Ill prisoners who require specialist treatment should have access to specialized institutions or to civic hospitals.⁷⁸⁹ In female institutions, special accommodation for pre-natal and post-natal care and treatment should be provided.⁷⁹⁰ Furthermore, prisoners shall have the right to partake in education, recreational, religious and cultural activities aimed at the full development of human personality.⁷⁹¹ In this context, special attention ought to be given to the education of illiterates and young prisoners, going so far as to making it compulsory.⁷⁹² Closely tied to educational possibilities is the obligation on the side of the prison institution to provide for vocational training in useful trades for those prisoners able to profit

781 BoP, Principle 14.

782 SMR, Article 36.

783 SMR, Article 36 (2); BoP, Principle 29.

784 SMR, Article 36 (3).

785 See Articles 1 and 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, adopted and open for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 May 1976, in accordance with Article 9.

786 SMR, Articles 22–26; BoP, Principle 24.

787 BoP, Principle 24.

788 BP, Principle 9.

789 SMR, Article 22 (2).

790 SMR, Article 23.

791 BP, Principle 6; see also SMR, Articles 41–42, 77–78.

792 SMR, Article 77 (1).

thereby, and especially young prisoners.⁷⁹³ Being able to legally acquire social capital after release is seen as important, also to the extent that the work provided in prison ought to “maintain or increase the prisoners’ ability to earn an honest living after release.”⁷⁹⁴ That being said, sentenced prisoners are allowed to work, based on the assessment of their physical and mental fitness by the medical officer, and are entitled to appropriate remuneration.⁷⁹⁵

Fundamental prisoners’ rights allowing for rehabilitative outcomes are further upheld by allowing them to maintain contacts with the outside world. In particular, prisoners have the right to be visited by as well as to correspond with members of their families and reputable friends at regular intervals.⁷⁹⁶ Prisoners who are foreign nationals are to be enabled to communicate with the diplomatic and consular representatives of the state they belong to.⁷⁹⁷ An important component of this right is also their ability to maintain contacts with their legal counsel, for which they shall be allowed adequate time, facilities and confidentiality.⁷⁹⁸ Furthermore, the Body of Principles stipulates that communication between the prisoner and the outside world, and especially with family and legal counsel, shall not be denied for more than a matter of days.⁷⁹⁹ This holds particular relevance in cases of transfers of prisoners to and between institutions as well as for foreign prisoners, who are entitled to notify promptly and without delay their family members or other persons of choice (for foreign prisoners, also a consular post or the diplomatic mission of the belonging state) on the place of their transfer and imprisonment.⁸⁰⁰ In case an imprisoned person is incapable of understanding these entitlements, the competent authority shall on its own initiative undertake these notifications, promptly and without delay.⁸⁰¹

As much as being fundamental, it is questionable to what extent these rights can by themselves contribute to the rehabilitation of prisoners, particularly with regard to the more intricate layers of their crime etiology. Conceived as being fundamental, they are, after all, supposed to stand as the last line of defence against the treatment that would otherwise be seen as cruel, inhuman or degrading punishment. Within this argument, then, and in line with *Rotman’s* stipulation,⁸⁰² the right to rehabilitation should not only encompass these fundamental standards but also include the

793 SMR, Article 77 (5).

794 SMR, Article 71 (4).

795 Nelson Mandela Rules, Rules 96 and 103; cf. SMR, Articles 71 (2) and 76.

796 SMR, Article 37, BoP, Principle 19.

797 SMR, Article 38.

798 BoP, Principle 18.

799 BoP, Principle 15.

800 BoP, Principle 16.

801 BoP, Principle 16.

802 *Rotman* 1990, p. 70.

offer of specific rehabilitative means, tailored to address and supplement all rehabilitative facets to the widest extent possible. These will be addressed in more detail in the next section.

4.1.3.2 Special (desistance-oriented)

With reference to the aim of rehabilitation, international prison standards argue that the period of imprisonment ought to be used to ensure, as far as possible, that upon their return to society, the offenders are not only willing but also able to lead a law-abiding and self-supporting life.⁸⁰³ For this purpose, all appropriate and available means should be used according to their individual needs, bearing in mind the encouragement of their self-respect and the development of their sense of responsibility.⁸⁰⁴ In particular, the principle of individualization of treatment is further supported by requiring that as soon as possible after admission to the prison institution and after a study of the personality of each prisoner, a programme of treatment shall be prepared in light of the knowledge obtained about the prisoner's individual needs, capacities and dispositions.⁸⁰⁵ Full reports on the latter aspects should be at the disposal of the director of the institution and kept up to date so as to enable them to be consulted whenever the need arises.⁸⁰⁶

What the above provisions accentuate with regard to the application of rehabilitative programmes is, first and foremost, the importance of an assessment of offenders. As *Robinson and Crow* explain, this assessment

can be understood as a process which serves to classify the offender in relation to particular variables, setting out what the relevant issues or problems are in the case, and this serves as a starting point for making decisions about how to respond to or tackle the identified problems.⁸⁰⁷

However, as they further stipulate, assessment is not necessarily oriented towards identifying problems or deficits (the so-called "Risk-Need-Responsivity" or "RNR" model of assessment); it can also serve to identify more positive aspects of the individual or his/her circumstances (the so-called "Good Lives" model or "GLM"), and this can then also be used to assist the process of rehabilitation.⁸⁰⁸

803 SMR, Article 58.

804 SMR, Articles 59, 65.

805 SMR, Article 69.

806 SMR, Article 66.

807 *Robinson & Crow* 2009, p. 89.

808 *Robinson & Crow* 2009, p. 89.

4.1.3.2.1 The assessment of offenders

The methodology of offender assessment differs in terms of what and how it is being assessed. The former essentially revolves around making judgements about the likely future behaviour of an individual which, in the case of the RNR model, means taking into account several interconnected areas of risk: the *risk of harm* (both gravity and seriousness of any future offending behaviour), the *risk of re-offending* (the probability or likelihood of such behaviour reoccurring) and the *risk for a particular victim* (e.g. him-/herself, the public at large, particular communities and specific individuals).⁸⁰⁹ Risk assessment of all these areas has assumed an increasing importance since the mid-1990s; however, it is the assessment of the *risk of re-offending* that nowadays holds the prevalent importance for penal practitioners oriented towards offender rehabilitation.⁸¹⁰ In an attempt to assess this risk, sets of variables are analyzed. “Static factors” (which cannot be modified) – such as age, sex, type of offence or a number of custodial sentences or previous convictions – are suitable for a general statistical prediction of reconviction on the basis of attributing the offender, according to these characteristics, to a group or population of offenders that has a certain reconviction rate; however, they cannot provide an accurate prediction of risk with respect to an individual.⁸¹¹ For this purpose, the “dynamic risk factors” (or “criminogenic needs”) need to be analyzed, as they point to those individual-specific factors which are linked to risks (of harm and/or re-offending).⁸¹² However, these factors are also prone to faster change; therefore, if subject to intervention and help, they are understood to reduce the risk of further offending.⁸¹³

Instruments designed for the assessment of criminogenic needs in offenders, such as the “Level of Service Inventory – Revised” (LSI-R) or the “Offender Assessment System” (OASy), encompass a variety of dynamic risk factors/criminogenic needs areas pertaining to individual offenders, such as accommodation, education, vocational training, income, relationships, lifestyle and associates, drug and alcohol misuse, emotional well-being, thinking, behaviour and attitudes.⁸¹⁴ What is seen as a benefit is that they also lend themselves to the inclusion of other areas, allowing for a more specialist treatment, such as in the cases of violent or sexual offenders.⁸¹⁵ Furthermore, due to their inclusion of dynamic risk factors, these risk/needs assessment instruments are deemed valid not only for measuring the rehabilitative progress of individual offenders but also of the effectiveness of programmes at the levels of

809 *Robinson & Crow* 2009, p. 90.

810 *Robinson & Crow* 2009, p. 90.

811 *Robinson & Crow* 2009, pp. 91–92.

812 *Robinson & Crow* 2009, pp. 93–94.

813 *Robinson & Crow* 2009, pp. 93–94.

814 *Robinson & Crow* 2009, p. 95.

815 *Robinson & Crow* 2009, p. 95.

aggregates, that is groups of offenders.⁸¹⁶ The data they obtain can also be used to inform managers of rehabilitative services about the spread of criminogenic needs in different types of the offender population.⁸¹⁷ Generally speaking, these types of risk/needs assessment instruments have found good reception among penal practitioners, insofar as they provide for a much greater consistency in assessment practices. With reference to the required principle of individuality as demanded by international prison standards, they also allow for deeper insights into the circumstances and personality of offenders, as data is gathered on a case-by-case basis, through interviews and the consultation of other relevant sources.⁸¹⁸

Table 2 Examples of dynamic risk factors/criminogenic needs areas as covered by OASy (source: Robinson & Crow 2009)

Dynamic Risk Factors/Criminogenic Needs	
1.	Accommodation
2.	Education, Training, Employability
3.	Financial Management and Income
4.	Relationships
5.	Lifestyle and Associates
6.	Drug Misuse
7.	Alcohol Misuse
8.	Emotional Well-Being
9.	Thinking and Behaviour
10.	Attitudes

In correctional practice, the level of perceived risks carries great weight in terms of attracting rehabilitative resources, yet the *responsivity of offenders* is also a factor taken into account when deciding on programmes. What responsivity pertains to are “individual differences between offenders in respect of a variety of issues which have the potential to impact on their ability to benefit from rehabilitative interventions.”⁸¹⁹ These “issues”, or factors, can be differentiated into those that are internal to the individual (so-called “idiographic factors”, such as intellectual functioning, self-esteem and motivation) and those that are external (so-called “nomothetic factors”, like characteristics of the prison staff, therapeutic relationships, environmental support

⁸¹⁶ Robinson & Crow 2009, p. 96.

⁸¹⁷ Robinson & Crow 2009, p. 96.

⁸¹⁸ Robinson & Crow 2009, p. 97.

⁸¹⁹ Robinson & Crow 2009, p. 100.

and the content and delivery programmes).⁸²⁰ Also being present in risk/needs assessment instruments, offenders' motivation to change is a factor that merits particular attention for the decision on whether and what kind of rehabilitative programme to apply: levels of motivation to engage in rehabilitative programmes can greatly differ across the inmate population, and those whose criminogenic needs indicate a high risk of re-offending or harm can quite likely be very reluctant to meaningfully engage in rehabilitative programmes.⁸²¹ Unfortunately, there is no clear indication of how much weight is given in practice to the motivation of offenders when deciding on rehabilitative interventions: some experts are proposing the allocation of rehabilitative resources to those displaying higher levels of willingness and a desire to desist,⁸²² while others prioritize risks and needs assessment over individual motivation, arguing that some interventions can be effective even when they are coerced.⁸²³ There is a limit to coercion, however, and what is usually seen as ethically justifiable pressure to programmes in different jurisdictions usually concerns some sort of negative consequences for prisoners if they do not participate, such as a denial of parole or the refusal of security declassification.⁸²⁴ Even if pressured, prisoners may still lack the motivation and willingness to participate and actually benefit from the programme. The relationship between coercion and motivation is of a subjective nature, in the sense that prisoners might feel coerced even when such coercion does not objectively exist, while when, on the other hand, it actually *does* exist – e.g. in the above-mentioned examples –, they might be sufficiently motivated themselves to participate and benefit from the programme.⁸²⁵ Furthermore, even if there is an initial reluctance on the side of the prisoners, this can change over time, especially if the treatment is delivered in a way that responds to the prisoners' individual needs, thus increasing the likelihood of effectiveness. What this shows is that there is a close relationship between idiographic and nomothetic factors in influencing responsivity, and that it is actually the *perception* of coercion that weights on motivation, rather than coercion itself.⁸²⁶ The likelihood of prisoners' motivation for personal rehabilitation will probably be higher if ethically allowed (legal or administrative) means of coercion are accompanied by a therapeutic approach of interlocutors towards inmates, based on communication and dialogue, the development of mutual trust, respect and honesty.⁸²⁷

820 *Robinson & Crow* 2009, p. 100.

821 *Robinson & Crow* 2009, pp. 100–101.

822 *Farrall* 2002, *Maruna* 2001, as referenced in *Robinson & Crow* 2009, p. 101.

823 *Day et al.* 2004.

824 *Day et al.* 2004, p. 260.

825 *Day et al.* 2004, p. 260.

826 *Day et al.* 2004, p. 266.

827 See in this regard also the arguments by *Day et al.* 2004, p. 267; *Rotman* 1990, p. 8, and *Botoms* 1980, as referenced in *McNeill* 2014, p. 4199.

As an alternative to the risk/needs approach to offender assessment, certain proponents of the so-called “positive psychology” approach argue for the development of a “strength-based” (or “Good Lives”) model for offender rehabilitation which, instead of focusing on deficits and negative aspects of offenders’ lives and circumstances, aims at focusing on offenders’ preferences, strengths, primary goods and relevant environments in order to foster their rehabilitation.⁸²⁸ While the approach carries a theoretical merit, the penal practice still favours the RNR model – despite the concern coming even from the proponents of the RNR model about seeing the offender as characterized primarily by deficiencies.⁸²⁹ However, *Robinson* and *Crow* indicate that even within a risk/needs model, it is still possible to generate an assessment that is not entirely based on deficiencies, by taking into account the so-called “protective/positive risk” factors, that is those attributes of the offender which are seen to reduce rather than increase risk.⁸³⁰ Admittedly, current knowledge on protective factors is limited; however, some known factors stem from research on juveniles and include individual factors such as female gender, resilient temperament, sense of self-efficacy, positive outgoing disposition and high intelligence, as well as those considered to be social bonding factors, such as nurturing family relationships and links with adults and peers who hold positive attitudes.⁸³¹

4.1.3.2.2 Rehabilitative programmes

Following the assessment of offenders based on their risks/needs, delivered rehabilitative programmes usually target those offender problems or features that contribute to or are supportive of their offending.⁸³² General rehabilitative programmes are usually provided in groups to those who have been convicted a number of times, and frequently for a variety of offences (typically including property and violent offences).⁸³³ Common features of these programmes are the exercises based on the postulates of the cognitive-behavioural theory, delivered to the participants in a highly-structured sequencing manner.⁸³⁴ For instance, the first part of general offending-behaviour programmes⁸³⁵ teaches participants basic practical means of problem-solving (identify the problem, find solutions to the problem that are an alternative to crime, identify the steps and anticipate the outcome), self-management (e.g. the control of impulsiveness) and social skills training (e.g. proactive social

828 *Robinson & Crow* 2009, p. 102; see also *Ward & Maruna* 2007 and *Ward & Brown* 2004.

829 *Robinson & Crow* 2009, p. 102.

830 *Robinson & Crow* 2009, p. 102.

831 *Robinson & Crow* 2009, pp. 102–103.

832 *Robinson & Crow* 2009, p. 116.

833 *Robinson & Crow* 2009, p. 111.

834 *Robinson & Crow* 2009, p. 111.

835 The most commonly applied such programmes are “Reasoning and Rehabilitation” (R and R), “Enhanced Thinking Skills” (ETS) and “Think First” (*Robinson & Crow* 2009, p. 111).

interaction).⁸³⁶ The second part is more focused on encouraging offenders to analyze specific offences in detail (e.g. through exercises such as 5-WH, involving the “what”, “who”, “when”, “where” and “why” of the offence) – with a view to helping offenders develop and practice strategies to change their behaviour so as to avoid offending in the future.⁸³⁷

What the general criticism of these programmes indicates is their overt focus on cognitive deficits and antisocial attitudes,⁸³⁸ thus largely disregarding other areas of criminogenic needs which, in the case of offenders with multiple risk factors, spread across different criminogenic needs areas are unlikely to achieve a considerable success.⁸³⁹ Here, specialized programmes (such as those focusing on aggression issues, substance and alcohol misuse and providing treatment for sex offenders) can potentially supplement general offending-behaviour programmes, thus also adhering to specific personal needs of offenders in accordance with the principle of individuality.

International prison standards also accentuate the social aspect of crime and the offender’s rehabilitation, arguing for the treatment not to emphasize their exclusion from the community but their continuing part in it, by involving the community agencies to assist the task of the prisoners’ social rehabilitation.⁸⁴⁰ This should happen during the imprisonment, not only by nurturing healthy social contacts but also by enabling a gradual return to society through appropriate substantive and infrastructural means,⁸⁴¹ as well as after release through provided after-care⁸⁴² that would lessen the prejudice against the ex-prisoner and assist him/her in obtaining the necessary social capital.⁸⁴³ Notwithstanding the merit of these institutes with regard to improving the prospect of offenders’ social rehabilitation, it is, however, opportune here to address the restorative justice approaches in more detail. Opposed to the “passive redemption” institutes that essentially only demand for an abstinence from crime, the restorative justice opts for motivating the offender to commit to active redemption through restorative action. It is a proactive therapeutic indication of a moral change in the offender, which can likely result in swaying away the lingering aggravation among victims and the community with more rapidity, making them more inclined to openly accept the offender back again.

836 *Robinson & Crow* 2009, p. 112.

837 *Robinson & Crow* 2009, p. 112.

838 See the last three areas of criminogenic needs in *Table 2* above.

839 *Robinson & Crow* 2009, p. 116.

840 SMR, Article 61.

841 SMR, Article 60.

842 See, e.g., for the institutes of parole, probation and mentorship *Chapter 4.1.2.3* above.

843 SMR, Articles 60 and 64.

4.1.3.2.3 Restorative justice processes in detail

To an extent, this chapter has already discussed the advantages and conundrums of restorative justice approaches, both in general and with reference to the perpetrators of international crimes; therefore, the following paragraphs will supplement that discussion by delineating converging and diverging aspects of predominantly applied restorative approaches. The next section will discuss which type of restorative approach would positively contribute to the rehabilitation of the perpetrators of international crimes, as well as at which point of their rehabilitative continuum it would be beneficial to apply such approaches (e.g. during imprisonment or after release). The following distinction between the restorative justice approaches is most commonly applied and is based on who participates in the approaches and in what style or form the stakeholders in crime are brought together.⁸⁴⁴

The first form of this approach, the so-called *victim-offender mediation* (VOM), is recognized as the most common form of restorative justice practice in both the USA and Europe.⁸⁴⁵ It involves contact between the offender and the victim and is facilitated by a specially trained neutral mediator.⁸⁴⁶ The contact itself between the parties can be either direct (that is involving a face-to-face meeting) or indirect, where a party (usually a victim) is represented by a surrogate,⁸⁴⁷ or questions/information are relayed by the mediator.⁸⁴⁸ Generally speaking, mediation is intended to give offenders and victims a safe environment where they are able to discuss the crime, its impact and the harm it may have caused.⁸⁴⁹ While the process may be oriented towards allowing the offender to make the harm caused right (e.g. material restitution), it is flexible in terms of goals and can be used, e.g., as a conduit for understanding what happened and why, exclusively.

The other form, gathering several approaches of *restorative conferencing*, differs from the VOM most notably by its inclusion of a wider number of stakeholders in the process. In particular, “family group conferences” (FGC) enlarge the circle of primary participants to include family members as well as community members in the process.⁸⁵⁰ Family group conferences have been applied most notably in cases of juvenile delinquency as they – opposed to the other type of restorative conferencing – place particular significance on the potential of the family to positively influence the offender towards accepting the responsibility for the crime as well as taking the initiative for repairing the harm done. The participants gather for a dialogue that allows all the parties to express their views and feelings on what happened. However,

844 Zehr 2002, p. 47.

845 Robinson & Crow 2009, p. 152.

846 Robinson & Crow 2009, p. 152.

847 Zehr 2002, p. 42.

848 Robinson & Crow 2009, p. 152.

849 Doak & O'Mahony 2014, p. 4423.

850 Zehr 2002, pp. 47–48.

it is a distinctive component of FGCs to require a family caucus at some point during the conference, where the offender and his/her family discuss what has happened and develop a proposal/plan of how to restitute the victim.⁸⁵¹ The plan is intended to be the consensus of everyone involved in the conference⁸⁵² and should ideally include elements that address the needs of the victim, the offender and the wider community so as to achieve a restorative outcome.⁸⁵³ Similar to the mediator in a VOM, the coordinator of an FGC should be impartial, balancing the concerns and interests of both sides while making sure that the plan addresses the accountability, the causes as well as reparation, and that it is realistic.⁸⁵⁴

Similar to the FGC, the “police-led restorative cautioning” (or “community conferencing”⁸⁵⁵) nevertheless differs insofar as instead of the family, the role of the community is more accentuated in the overall restorative process. As the title indicates, the role of the facilitator in a conference is appropriated by a trained police officer, and the conferencing process is heavily based on a preconceived script or agenda.⁸⁵⁶ The process of bringing together the offender, the victim, their families and community members is aimed at making the offender aware of the wrongfulness of the act, to encourage him/her to undertake a reparative action and, through such process, to “earn back” their place in the community.⁸⁵⁷ Opposed to the FGC, which places more accent on the needs of victims, the police-led conferencing is more oriented towards offenders and their relationship with the community as the conduit for rehabilitative and reintegrative outcomes.⁸⁵⁸ In this sense, it heavily relies on *Braithwaite’s* theory of reintegrative shaming which sees the community’s disapproval of the offence (“moral censure”) as having a more profound effect on the offender than that of a magistrate or judge, in whose esteem the offender has little or no personal involvement.⁸⁵⁹ By condemning the act (and not the offender), the community’s judgement is intended to perform an educative and reintegrative function where the concern is to persuade the offender (although not by pain or retributive punishment) to share the community’s judgement of their behaviour and to act in the future with that judgement in mind.⁸⁶⁰ In the shaming process, the victim has also been acknowledged a significant role as he/she draws the offender’s attention to-

851 Zehr 2002, p. 49.

852 Zehr 2002, p. 50.

853 Doak & O’Mahony 2014, p. 4427.

854 Zehr 2002, p. 49.

855 Robinson & Crow 2009, p. 152.

856 Doak & O’Mahony 2014, p. 4426.

857 Doak & O’Mahony 2014, p. 4426.

858 Robinson & Crow 2009, p. 152.

859 Braithwaite 1989, p. 87, as referenced in Robinson & Crow 2009, p. 152.

860 Braithwaite 1989, p. 1; also Robinson & Crow 2009, pp. 152–153.

wards the collateral damage caused by the offence – which may include fear, personal injury or material loss.⁸⁶¹ It is understood that this is an effective way of inducing guilt within the offender, as well as of eliciting remorse and a willingness to repent; furthermore, it makes it less likely for the offender to apply neutralization techniques once he/she is faced with the victims and their testimonies in person.⁸⁶² In this way, through “reaffirmation of the morality” and conscience, the offender can earn “symbolic” reintegration, rehabilitation and re-acceptance as a law-abiding member of the community.⁸⁶³ While not preconditioned by it, such re-acceptance can nevertheless be underlined by concrete restorative action, such as apology, offers of forgiveness or reparative work.⁸⁶⁴ Additionally, an agreement may be signed as symbolizing re-acceptance, in which case it may indeed depend on the actual performance of some reparative work by the offender.⁸⁶⁵

Adopting the elements from both VOMs and restorative conferences, *circles* present the final common group of restorative approaches. In particular, “peacemaking circles” have found their utility in a variety of surroundings and contexts, stemming from sentencing, workplace conflicts, healing-intended practice as well as those within which common community issues are discussed.⁸⁶⁶ Similar to restorative conferences, peacemaking circles consciously enlarge the circle of participants to encompass offenders, victims, family and community members as well as sometimes justice officials.⁸⁶⁷ The procedure entails the arrangement of participants in a circle within which they pass a “talking peace” in order to assure that each person speaks, one at a time, in the order in which each one is seated in the circle.⁸⁶⁸ This underlies a common set of restorative values which participants ought to abide to, namely respect, the value of the individual, integrity and honesty.⁸⁶⁹ Usually, one or two “circle keepers” serve as facilitators of the circle, in which they govern the discussion or offer advice and insight.⁸⁷⁰

The other circle-based approach, the so-called “circles of support and accountability” (COSA or CSA), has been developed in order to more meaningfully facilitate social rehabilitation of violent and sexual offenders while at the same time appeasing safety concerns of both victims and the immediate community the offender returns to. Re-

861 *Robinson & Crow* 2009, p. 152.

862 *Robinson & Crow* 2009, p. 153.

863 *Robinson & Crow* 2009, p. 153.

864 *Robinson & Crow* 2009, p. 153.

865 *Robinson & Crow* 2009, p. 153.

866 *Zehr* 2002, pp. 50–51.

867 *Zehr* 2002, p. 51.

868 *Zehr* 2002, p. 51.

869 *Zehr* 2002, p. 51.

870 *Zehr* 2002, p. 51.

flecting the postulates developed by *Braithwaite's* reintegrative shaming theory, COSAs place the emphasis on the role of the community and of how their scrutiny of the offence, but also the assistance provided to the ex-offender, can facilitate his/her accountability, remorse and willingness to desist from further offending.⁸⁷¹ In a way being “informal” parole boards, COSAs generally bring ex-offenders and community members (usually volunteers who have passed the necessary training) together for daily check-ins (stemming from telephone calls and informal get-togethers as well as more formal gatherings), which enables participants to be updated on current developments in the offender’s life and to support him/her in facing whatever challenges may arise for his/her social rehabilitation.⁸⁷² In return, the offender’s rights as a citizen are contingent on his/her willingness to cooperate with the terms of an explicit agreement to cooperate with the COSA – if he/she chooses to leave the circle, the police will usually be notified.⁸⁷³ Interaction between the members is intense, and next to the daily meetings, the terms of agreement can also involve strict guidelines in terms of what the person can do and where he/she can go; however, as *Zehr* notes, such an applied process for offenders to take responsibility while putting the necessary support in place has, especially in the USA and Canada, been successful in reintegrating ex-offenders while allaying community fears.⁸⁷⁴

4.1.3.3 Application of the rehabilitative operational framework to macro-criminality: preliminary considerations

In this section, preliminary considerations regarding the application of the above-described operational framework to the perpetrators of international crimes will predominantly focus on the special part of the framework which extends the notion of rehabilitation beyond upholding fundamental prison standards and rights of the prisoners to address their crime etiology more meaningfully. It is understood that not only would denial of the aforementioned fundamental rights and standards undermine any legitimacy of the penal reaction, it would also make its contribution to the rehabilitation of macro-criminals – and subsequently the overarching aims of ICJ – virtually non-existent.

Closely tied to the point of upholding fundamental prison standards is the question of where the prison sentence – and accordingly also the rehabilitative treatment – is actually being enforced or implemented. Reiterating the point from the above section on moral rehabilitation⁸⁷⁵ – that it is unlikely for a perpetrator to develop a positive moral change within the system of moral agents whose adopted values are inherently

871 *Robinson & Crow* 2009, p. 156.

872 *Robinson & Crow* 2009, p. 156; see also *Zehr* 2002, p. 54.

873 *Robinson & Crow* 2009, p. 156.

874 *Zehr* 2002, p. 54.

875 See under *Chapter 4.1.2.2* above.

immoral and go against internationally accepted human rights ethos –, it is then suggested that the initial, individually oriented rehabilitative treatment ought to be offered either outside the criminogenic state system (and then most likely outside the conflict zone or the state) or within the state system that has undergone meaningful socio-political change and the state structures which have abandoned destructive atrocity-oriented policies. Arguably, it is the question of risk assessment, as the ongoing conflict might necessitate the enforcement of sentences outside the conflict zone, while the enforcement within the zone of the conflict might (from the security perspective) be more suitable after the conflict has ended. However, both perspectives carry implications for other rehabilitative facets: for example, a security concern that underlines the “outing” of the perpetrator outside the conflict zone can detrimentally affect the fundamental right to serve the sentence close to one’s place of residence, which then also has implications on other rights, such as the right to respect for the convicted person’s family life (which, in fact, might be of great importance for the process of personal rehabilitation, in terms of support and motivation). Similarly, serving the sentence within the state system that has undergone a change in the regime has to be devoid of any attempts of unequal treatment in terms of fundamental rights and standards. As previously stipulated in the section on social rehabilitation,⁸⁷⁶ the conflicting groups are quite likely to still co-exist in the post-conflict society. As the change of regime can mean that members from formerly targeted group obtain state leadership, it is crucial that the prison treatment of adjudicated perpetrators from all sides maintains the standard of equality and adherence to fundamental rights. Any attempt of submitting the perpetrators from the opposite group to substandard treatment can be interpreted as an act of revenge, not only undermining the legitimacy of punishment but also giving a further impetus to socio-political polarization, which might still be latent within the society.

The question of an ongoing conflict within which the atrocities happen – as well as in fact of a latent conflict that still might linger within the post-conflict society for years to come – can be taken as a preliminary indicator of areas of criminogenic needs which risk assessment ought to pay attention to in cases of individual perpetrators. While not being developed in terms of distinctive categories of criminogenic needs, we can nevertheless see that usually examined areas of dynamic risk factors, such as relationships, lifestyle and associates,⁸⁷⁷ might to an extent also encompass those external factors that are taken to prominently feature in the commission of atrocities, such as authority demands or peer pressures exerted within group dynamics. To what extent these factors might have actually influenced the commission of crimes and to what extent a person can still be suspected to fall under their influence

876 See under *Chapter 4.1.2.3* above.

877 See *Table 2* in *Chapter 4.1.3.2* above.

is to be determined by a comprehensive assessment of the prisoner's personal background, criminal history, personality traits, ideological influences and behaviour.⁸⁷⁸ For instance, the circumstances of a committed crime can already provide a starting point in terms of which areas of criminogenic needs the attention ought to be paid to. The fact that a person is convicted on the basis of devising a policy of ethnic cleansing and of issuing commands for the perpetration thereof can already shift the focus towards the criminogenic areas of personal attitudes, thinking and behaviour as well as emotional well-being. On the other hand, the assessment might be less straightforward in the case of those engulfed by such policies, e.g. mid- or low-ranking perpetrators, where external circumstances to an increasingly complex extent interact with personal dispositions of individuals, often to produce a starkly contradicting behavioural outcome. Here, a fine-tuned effort of expert interlocutors, such as psychologists, would likely be mandated to give a clear assessment. For instance, personal attitudes and morality can be greatly shaped by external influences, such as ideology and group norms that develop in the state of continuous warring, to the extent that hatred and animosity towards the target group represent a significant part of that person's internal framework of orientation, which still remains even after external influences are removed; therefore, this might pose a risk even when there is no more official policy condoning such attitudes. On the other hand, sadistic personal dispositions might also be pre-existent, and external circumstances might only allow them to come at the forefront. For example, are the multiple rapes and the enslavement of female Bosnian Muslims, as committed by *Radomir Kovač*⁸⁷⁹ during his time as a paramilitary commander an indication of innate sadistic traits that pose the further risk of reoccurrence – therefore mandating treatment provided for sex offenders? Or are they strictly a “product” of particular circumstances of impunity without which they would not come afore? Taking into account *Smeulers*' typology⁸⁸⁰ and likeliness of different categories to overlap in real life, the determination of criminogenic needs and risk factors of perpetrators becomes an increasingly challenging task. Arguably, it might involve the cross-disciplinary effort of a variety of experts who are able to assess not only the personal and micro-situational circumstances of the offender but also how the wider socio-political developments in the society relate to the individual's etiology and a possibility of a further (or recurrent) engagement in atrocities. For example, the estimates provided by the application of instruments such as the United Nations Framework of Analysis of Atrocity Crimes⁸⁸¹ – designed

878 *Stone* 2015, p. 236.

879 See the ICTY case *Kunarac et al.* (IT-96-23 and 23/1), Case Information Sheet, p. 1.

880 See *Chapter 3.2* above.

881 UN 2014. The instrument delineates a variety of risk indicators that can be useful for estimating the potential of international crimes occurring within a particular state or a region. In particular, common risk factors include the situation of an armed conflict in the country or other forms of instability (e.g. economic, political, social), a previous record of serious violations of international human rights and humanitarian law as well as different forms of a weakness of state

to monitor the risk of an occurrence of international crimes – as well as developing research on socio-political risk factors of genocide and political violence⁸⁸² can be helpful for supplementing the risk assessment of individual macro-criminals.

Undoubtedly, types and levels of risk are not the same across different categories of perpetrators. For example, the etiological factors featured among criminals/sadists, such as innately lower inhibitions towards violence, might in any case pose a risk of harming others, regardless of the overarching policy that would support or condone such acts. Such a type of risk differs from the one of being repeatedly involved in the commission of international crimes. It could be argued that for many imprisoned macro-criminals, there would be no further risk of committing atrocities, as the circumstances in which they committed these crimes would not repeat. This argument, however, should not be taken at face value; as stressed previously, many areas struck by mass victimization feature latent conflict boiling among the population and formal state structures, even well after peace has formally been established. The re-escalation could occur due to the same macro-etiological factors that plague such conflicts in the first place: the state of anomia, economic depravity and still lingering social divisions on the basis of ethnic, national, cultural or religious attribution. Also, it should not be forgotten that individual motives also play a huge role in initial involvement; e.g., becoming an agent of a state's destructive policy could give a prospect of transcending personal economic deprivation and existential threat within the above-mentioned circumstances. Being released from prison into circumstances of anomia, a convicted soldier of fortune might not think twice before taking up arms again in order to obtain his/her livelihood by the same measures, even if for different actors. For example, the story of *Dražen Erdemović*, convicted by the ICTY for mass killings during the Srebrenica massacre,⁸⁸³ tells of a Bosnian Croat who, due to personal economic deprivation during the post-Yugoslavian wars, switched allegiances between virtually all sides in the conflict. Starting from the Yugoslav National Army, at that time under the governance of Serbia, he became a member of the Croatian Council of Defence units in Herzegovina, only to end up in the Army of the Republika Srpska,⁸⁸⁴ as part of which he participated in the Srebrenica massacre. It could hardly be argued that Mr. *Erdemović* had strong personal views or beliefs on ethnicity and nationalism; it rather seems that due to the lack of any, he actually ended up

structures or actions considered to be preparatory for the onset of violence, such as the enactment of emergency laws or the creation of or support for militia and paramilitary groups. More specific risk factors pertain to public expressions of animosities between different social or political groups in the country, the use of the media to provoke or incite violence, the creation of new special armed forces or signs of patterns of violence directed against an enlarged number of certain group members or directed towards a specific geographic area (un.org/en/genocide-prevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf [09/03/2018]).

882 See, e.g., *Nyseth Brehm* 2017, *Harff* 2003 and *Fein* 2003.

883 See the ICTY case *Erdemović* (IT-96–22), Case Information Sheet.

884 *Drakulić* 2004, p. 108.

under circumstances that pressured him to commit these crimes. In cases of weak personalities, such as may exist within the categories of followers and conformists,⁸⁸⁵ it would then seem to be more opportune to focus on the development of protective/positive risk factors⁸⁸⁶ (such as a sense of self-efficacy, self-reliance and a positive outgoing disposition) that would decrease the chance for individuals to again fall under the influence of destructive external circumstances. Drawing upon principles adopted in the “Rome Memorandum of good practices for the rehabilitation and reintegration of violent extremist offenders”, it can be inferred that educational opportunities that are offered as part of the fundamental prisoners’ rights curriculum can increase self-esteem and self-confidence among those with a lower educational background (many of whom might be found among followers and conformists), thus ending “their reliance upon other persons who tell them what to think”.⁸⁸⁷ The same could be of value for those categories of perpetrators who do not feature a strong internalization of destructive values and ideologies, yet who participate in atrocities due to careerism and opportunism – or have been conditioned or trained to do so.⁸⁸⁸ The focus on protective risk factors, such as the development of empathy, altruism and emotional intelligence,⁸⁸⁹ is something that would potentially open their perspective on how others are affected by their acts – and therefore raise the inhibitions against doing something at the great expense of another person’s well-being. Not only would such an approach diminish the potential risk of repeatedly getting involved in destructive mechanisms and acts, it could also contribute to seeing perpetrated crimes in a different light, re-igniting the cognitive dissonance and thus making the prospect of moral rehabilitation all the more likely.

Ostensibly, those perpetrators who have (or might have) strongly internalized destructive values, such as criminal masterminds, devoted warriors and fanatics,⁸⁹⁰ might present the biggest challenge in terms of a posed risk and achievement of moral rehabilitation – also on the grounds of usually being the instigators of atrocious policies, therefore belonging to higher echelons of political power. It is opportune to assess to what extent their personal viewpoints, principles and inclinations represent a further risk of engagement in such policies when correlated with the socio-political situation in the country they came from and where conflict might be ongoing or is latent. In fact, recent examples from the Balkans show that an anticipation of a certain amount of such risk is not displaced and that those once involved in the radical ideology might attempt to re-amass the power through the same, or similar,

885 See *Chapter 3.2.5* above.

886 See *Chapter 4.1.3.2* above.

887 *Stone* 2015, p. 242.

888 See *Chapters 3.2.2* and *3.2.3* above.

889 It has been found that among adults, a higher emotional intelligence can be associated with greater empathy and less use of destructive interpersonal strategies (see *Mayer et al.* 2008).

890 See *Chapters 3.2.1*, *3.2.3* and *3.2.4* above.

means.⁸⁹¹ While being valid from a theoretical standpoint, current cognitive-behavioural programmes might, however, face challenges in attempts to dissolve the radical thinking and values of these offenders. The methodology they provide is rather basic, oriented towards teaching rudimentary means of problem-solving and improving social skills, whereas these macro-criminals often have an expansive knowledge and education, a high social intelligence and broad oratory skills. The successful implementation of any such programme might, in fact, depend on the involvement of a broader array of experts, including scholars who are able to engage with them in extensive dialogue and raise, through plausible and convincing arguments, doubts about their views on the acceptability of radical viewpoints and the use of violence.⁸⁹²

Furthermore, criminal masterminds represent a special case insofar as by being the inceptors of atrocious policies, they might not necessarily have internalized such views themselves. The research on the etiology of macro-criminality shows that the utilization of policies based on dangerous ideologies can serve extremely selfish purposes, such as appeasing personal megalomania through ruthless means. Insofar, they can very likely exhibit traits of a psychopathological personality. However, a summary of empirical research on the treatment of psychopathy has not encountered plausible evidence that current cognitive-behavioural programmes focusing on deficits in offenders can with certainty reduce violent tendencies when applied to psychopaths.⁸⁹³ The reason for this, so it is argued, is that there is nothing wrong with them in terms of a deficit or impairment that therapy can “fix”.⁸⁹⁴ What is opted for instead is the reinforcement of behaviour incompatible with psychopathic conduct (i.e. delaying gratification, telling the truth, being responsible, helpful and cooperative),⁸⁹⁵ which, in other words, would mean reinforcing protective/positive risk factors that are similar to the categories of careerists and profiteers.

891 Apart from the already discussed *Šešelj* case (see *Chapter 2.2.3* above), the case of the alliance between the radical political parties of *Ramush Haradinaj* and *Fatmir Limaj*, both formerly accused in front of the ICTY and (at the time of writing) running for the Kosovo parliament – rather successfully, according to public polls –, is also illustrative of this risk (see *Hecking 2017*). In particular, Mr. *Haradinaj* has been under suspicion of having ties with the criminal underworld, as well as of committing crimes against humanity through the persecution of Serbian and Roma people during the ex-Yugoslavian wars and by having participated in acts of murder and torture against civilians (*Hecking 2017*). His pre-election rhetoric is based, among others, on promise to implement “hard measures” against the Serbian minority in Kosovo (*Hecking 2017*). Kosovo itself is still reeling from the consequences of war, and the lack of perspective many share due to overwhelming unemployment rates, corruption and nepotism is attempted to be filled by placing hopes on radicals such as *Haradinaj* (*Hecking 2017*).

892 For this, see also *Neumann 2010*, p. 52, and *Stone 2015*, p. 242.

893 *Harris & Rice 2006*.

894 *Harris & Rice 2006*, p. 568.

895 *Harris & Rice 2006*, p. 568.

Another question concerns the deliverance of and responsivity to programmes. Ideally, their availability according to individual needs and potentials should be ensured, yet the likeliness of this occurring in practice with regard to every single prisoner is doubtful. Furthermore, should those presenting a higher risk have a priority, or should higher motivation be the ground condition to candidate for these programmes? Reiterating the previously stated point, the success of any rehabilitative attempt with offenders might depend on carefully balancing ethically allowed pressures, such as conditioning the eligibility for parole with the attendance of programmes, with the therapeutically based work of interlocutors and oriented towards inducing personal motivation and the desire for rehabilitation. Arguably, it is the work of interlocutors and their ability to communicate and relate to offenders that carries the highest relevance for the success of programmes.

Closely tied to the challenge of risk prevention is the change of perpetrators' moral attitudes towards their crimes. As one of the fundamental facets of offenders' rehabilitation, the awareness of wrongfulness of one's acts answers to moral demands that were created by the offence. While this might not be the product of the punishment itself (i.e. the deprivation of liberty as such), it nevertheless communicates to the wider community that *the way the punishment is enforced or implemented* has succeeded in conveying the censure to the offender. Many perpetrators of international crimes might not be in an objective risk of re-offending, yet they might persistently deny responsibility or the wrongfulness of their previous crimes. On the other hand, among those whose risk factors indeed indicate a higher chance of re-offending, moral rehabilitation can be a fundamental precondition for lowering or annulling that risk. Therefore, positively influencing moral change in macro-criminals contributes not only to lowering the risk of being engaged in atrocious acts again, but also communicates the success of moral censure in offenders to others, thus swaying away unrest in the society due to the occurred crimes. For perpetrators of international crimes, it then also opens possibilities for more proactive attempts at social rehabilitation, such as restorative actions, that would improve not only their acceptance (especially among the victim population), but could contribute to broader reconciliation in the longer term.

The appeal of previously discussed restorative justice approaches for the personal, moral and especially social rehabilitation of the perpetrators of international crimes has so far been recognized; however, their application is found to be predominantly present in mechanisms alternative to the traditional penal process, rather than supplementing it.⁸⁹⁶ Reasons for this have already been partially addressed.⁸⁹⁷ Namely, the adversarial nature of contemporary trial proceedings – with its sole focus on the

896 See, e.g., the above discussion on truth and reconciliation commissions and the *gacaca*; also see in more detail Weitekamp & Parmentier 2014, Parmentier et al. 2008 and Weitekamp et al. 2006.

897 See Chapter 4.1.2.3 above.

determination of accountability and the measure of punishment – allows little room for the exploration of personal experiences of injury and how to consequentially transcend them. Furthermore, the antagonistic feelings that drive the parties in a trial can also be seen as being in stark opposition to the principles restorative justice holds in high esteem and are often a pre-requisite for a successful restorative outcome, such as understanding, empathy, repentance and neutrality. In many ways, the successful achievement of the above-discussed facets of offenders’ rehabilitation also depends on upholding these very principles, in both the offender and the rehabilitative approach towards him/her. In this sense, by being removed from the hostility of the court-room arena, the enforcement of prison sentences that abides to the rehabilitative principle in therapeutic, empathically and communicative ways can actually offer a fertile ground for the adaptation of restorative approaches, as well as benefiting from them.

Despite this, certain authors see the looming realities of prison experiences working against the restorative principles. Next to practical challenges, such as gaining access to prisoners and introducing victims to the prison environment, the dangers of “prisonization” and “institutionalization” are seen as the main hindrance for the instilment of restorative values among prisoners that would allow for peaceful conflict resolution and an amelioration of relationships.⁸⁹⁸ In particular, the prison culture – taking the prisoner “through a degradation process which weakens him and makes him docile to the prison’s administrative and disciplinary machine”⁸⁹⁹ – as well as prison subcultures are seen as especially obstructive for the prisoner’s personal changes to take place – including the reconstruction of self-identity and the adoption of restorative values.⁹⁰⁰

However, experiences from prison programmes that were applied to terrorists and perpetrators of political violence in Italy and Northern Ireland argue against this claim.⁹⁰¹ Indeed, they show that an imprisonment which upholds prisoners’ rights and offers the possibility for dialogue and understanding can well enough serve as a platform for the implementation of restorative approaches which (even when extended after their release) can further contribute not only to the process of their reintegration but also to a wider process of national reconciliation and the maintenance of peace. As *Marshall* argues, *the flexibility of practice* to accommodate restorative approaches is of particular importance if such outcomes are to be promoted.⁹⁰² Next to finding a safe place and a safe process, the parties also ought to be willing to meet many times over an extended period⁹⁰³ for meaningful outcomes to come about. For

898 *Van Ness* 2007, p. 318.

899 *Guidoni* 2003, p. 62, as quoted in *Van Ness* 2007, p. 318.

900 *Van Ness* 2007, p. 318.

901 See in particular *Cento Bull & Cooke* 2016, *Dwyer* 2012, *McEvoy & Shirlow* 2009.

902 *Marshall* 2007, pp. 385–386.

903 *Marshall* 2007, p. 386.

perpetrators of terrorist violence (similar to those of international crimes), one of the grounds for a polarizing viewpoint which justifies the dehumanization of their targets (perceived enemies) can also be the perception of one's self as a victim. Notwithstanding the effect the programmes offered in the context of individual/personal rehabilitation have on enabling the prisoners to transcend this status and to abandon it as the justification for violent action, the minimal requirement for their contribution to the restorative process might nevertheless be a willingness to listen to them and to allow them to speak truly about their own motivations and actions.⁹⁰⁴ The acknowledgment of their pain removes their last refuge from responsibility for their crimes; however, if this is flatly denied, they will continue to feel justified in their actions.⁹⁰⁵ Comparatively, the perceived success of disarmament, demobilization and reintegration (DDR) of imprisoned left- and right-wing terrorists in Italy is to a large extent seen as owing exactly to therapeutic and restorative measures adapted towards them in the course of their prison treatment. In particular, more humane prison conditions reduced the potential for the prison to be used as a fertile ground for radicalization and harbouring grievances; what it offered instead was a chance for self-reflection and repentance.⁹⁰⁶ In Italy, the Catholic Church played a particularly significant role as a therapeutic interlocutor in the introspection and repentance of imprisoned terrorists.⁹⁰⁷ Offering them a chance for dialogue and self-analysis, it subsequently encouraged many of them to also engage in a dialogue and new relationships with family members, with the judiciary as well as the political and intellectual classes.⁹⁰⁸ Consequently, their social reintegration and attempts at ameliorating broken relationships with victim groups were fostered by their involvement in social work projects run by voluntary, mainly Catholic, associations.⁹⁰⁹

Opposed to the case of Italy where mainly the Catholic Church took over the role of a mediator-facilitator in restorative processes, the case of DDR of terrorists in Northern Ireland features a more eclectic approach to social rehabilitation in terms of actors and stakeholders – even though the overall pattern is similar. The initial phase of imprisonment for combatants from both republican and loyalist sides also featured strong opposition to authorities reinforced by mutual support between the prisoners, episodes of brutal violence between the prisoners as well as between them and prison staff, and the constant testing of rules and authorities as a way of undermining their authority.⁹¹⁰ Eventually, the prospect of long prison sentences together with a growing awareness of a military victory being impossible for the belonging collective had

904 *Marshall* 2007, p. 385.

905 *Marshall* 2007, p. 386.

906 *Cento Bull & Cooke* 2016.

907 *Cento Bull & Cooke* 2016, pp. 208–210.

908 *Cento Bull & Cooke* 2016, p. 208.

909 *Cento Bull & Cooke* 2016, p. 208.

910 *Cento Bull & Cooke* 2016, p. 209.

an impact on the transformation of personal values and the morality among prisoners.⁹¹¹ However, instead of the Church as a mediator, the significant factor for moral transformation was a chance for prisoners from both republican and loyalist sides to meet within the prison and to engage in a formative dialogue themselves.⁹¹² As indicated by one former combatant, restorative benefits of such meetings were recognized insofar as former enemies “began to identify what were the common issues and common interests, and [...] began to see that those who have been demonized were human beings like [themselves].”⁹¹³ This encouraged future cross-community relations and contributed to a further engagement in restorative practices upon release from prison.⁹¹⁴ Again, opposed to Italy where the role of the Church was crucial in this respect, the state has provided funding for community reintegration projects in Northern Ireland.⁹¹⁵ The particularity of these projects has been their reliance on a self-help model where the advisory board of the project was constituted by the main prison groupings as well as professional agencies; however, actual management and staffing were left largely to the ex-prisoners themselves.⁹¹⁶ Based on the rationale that the needs of ex-prisoners are best recognized by the ex-prisoners themselves,⁹¹⁷ the reintegration programmes not only allowed those immediately released to acquire the necessary social capital but also enabled them to take up social and community work as well as activism upon their release,⁹¹⁸ which contributed to the process of conflict transformation and reconciliation.⁹¹⁹ Similar to Italy, the role of imprisonment has been highlighted as being crucial for the transformation of the ethno-nationalist conflict in Northern Ireland and for ending terrorist activities.⁹²⁰

What the reintegration programmes for the perpetrators of political violence in Italy and especially Northern Ireland bring to the forefront is a way of therapeutically and restoratively handling the challenge of their rehabilitation – also in order to beneficially impact a wider process of national reconciliation and transformation of the conflict. As such, these practical examples positively resonate with the ideas introduced especially with regard to the social rehabilitation of macro-criminals above.⁹²¹ Similar to the latter group of perpetrators, it is argued that imprisoned ex-terrorists were an organic element of their communities and indeed very well-respected. Given

911 *Cento Bull & Cooke* 2016, p. 210.

912 *Dwyer* 2012, p. 285.

913 *Dwyer* 2012, p. 285.

914 *Dwyer* 2012, p. 285.

915 *McEvoy & Shirlow* 2009, p. 32.

916 *McEvoy & Shirlow* 2009, p. 34.

917 *Dwyer* 2012, pp. 290–291.

918 *Dwyer* 2012; *McEvoy & Shirlow* 2009.

919 *Dwyer* 2012, p. 295.

920 *Cento Bull & Cooke* 2016, p. 209.

921 See *Chapter 4.1.2.3* above.

that their crimes were politically motivated and justified as being committed for the good of their community, it is the community that sees them as someone having the authority and credibility to guide further conflict discourse – eventually also to its transformation and reconciliation. What is seen as being particularly remarkable is the public and visible involvement of prominent ex-combatants (from both the political and the military leadership) in the process of conflict transformation through a myriad of restorative approaches, such as leading community-based peacemaking efforts, developing relations with previous enemies, participating in truth recovery and outreach work to victims as well as dealing with the past within the communities that did most of the fighting and dying.⁹²² The latter is particularly accentuated in the adopted self-help and mutual-aid approach aimed at the prevention of sectarianism and working with young people at risk where it has been explicitly acknowledged by former combatants that their effort is guided by the desire for younger generations not to go through what they have experienced.⁹²³ This certainly speaks for the benefits of restorative approaches in the contexts of both social acceptance and wider societal reconciliation in the aftermath of atrocities. It is also an indicator of benefits individually oriented rehabilitative programmes can have when combined with restorative justice elements.

Several useful elements can be deduced from these experiences. First of all, therapeutic dialogue and the willingness to listen to the imprisoned perpetrators are at the core of their moral transformative process. As much as the success of that process depends on themselves, it is up to the interlocutors, such as psychologists and social workers, to provide guidance and, if possible and mandated, to involve other experts in the process, such as historians, religious scholars, sociologists, political scientists and criminologists. Enabling the imprisoned offenders to see the immorality of their acts is an intricate and, arguably, long-term process where the competence of interlocutors in arguing for the universal flawlessness of the human rights ethos has to be balanced with their willingness to understand the reasons that prompted the perpetrators to commit the crimes. Here, understanding or empathy is not to be mistaken with condoning or sympathy. Ultimately, it is the understanding that mandates which concrete rehabilitative programmes should be offered and could actually benefit the perpetrators.

Second, a moral transformation that has been induced by individual/personal rehabilitative programmes can expand through restorative encounters. Experiences from Northern Ireland where former combatants from both sides were able to meet and engage in restorative dialogue inside the prison speak also in favour of a consolidative allocation of prisoners⁹²⁴ enabling such encounters. This, however, might not

922 Dwyer 2012, p. 295; McEvoy & Shirlow 209, pp. 39–46.

923 Dwyer 2012, pp. 295, 292.

924 For a more detailed explanation of the difference between the consolidative and the dispersive allocation of prisoners, see *Chapter 6.3.1* below.

always be the case, and the usefulness of such encounters might well depend on at which point a prisoner already is in terms of his/her personal/moral rehabilitative trajectory, therefore making it preconditionally dependent on at least a partial success of the offered programmes. The same might prove true for meetings with other stakeholders, such as victims or their representatives. Given the infrastructural limitations of a prison facility, it is likely that only the VOM type of restorative encounters could actually be arranged. Whether this should be done in person or by representatives of the stakeholders (e.g. an individual representative of a victim group or a designated organization) is left to be considered in each individual case – also due to previously expressed concerns that might exist, such as the sheer number of potential (direct and indirect) victims⁹²⁵ as well as the prospect of secondary victimization by meeting the offender. The small scale of the VOM format could actually be utilized to involve other stakeholders apart from victims, such as renowned community representatives or politicians, the dialogue between which could be useful for the amelioration of relationships. The beneficial side of restorative justice approaches is that they allow for flexibility, so restorative elements can already be found in such actions as the exchange of letters between the perpetrator and other stakeholders in crime,⁹²⁶ or in relaying information/questions between stakeholders by a mediator. Furthermore, this flexibility neither excludes a possibility of actually bringing the stakeholders together in a form of restorative conferencing during the time of the offender's imprisonment, if infrastructural means and security issues are sufficiently tended to. Once again, personal circumstances on the side of all parties to such a conference would have to be assessed before proceeding with it.

From the two case studies above, it can be seen to what extent successful moral rehabilitation has also served as the basis for proactive efforts at social rehabilitation and reconciliation after the former combatants have been released from prison. From the example of Northern Ireland in particular, it can be seen that such efforts have extensively appropriated restorative principles and approaches not only to ensure a better reintegration of former combatants, but also to have a long-term impact on preventing the cycles of violence and to contribute to the reconciliation between the communities. Moreover, while there existed a form of formal supervision over the process of reintegration, it is important to pinpoint that the initiative was mostly taken by the ex-combatants themselves whose prison experiences have sufficiently motivated them to commit to such a process and to give their personal contribution to the amelioration of broken relationships. Considering the benefit of such approaches – also for the social rehabilitation of perpetrators of international crimes and for the overarching goals of ICJ –, the question might be whether the macro-

925 See *Figure 2* at *Chapter 4.1.2.3* above.

926 For a real-life example of such practice between imprisoned terrorists and victims, see *Marshall 2007*.

criminals should be pressured into such actions, e.g. by conditioning their earlier release from prison with demands of restorative actions.

The question at its crux revolves around the proportionality of punishment and whether coercing perpetrators into such actions would breach this proportionality beyond freedom deprivation (together with all other forms of deprivation that inevitably come with it) and the potential necessary attendance of rehabilitative programmes that are already required as a means of “paying off the moral debt” conceived by committing the crime(s). Ostensibly, the success of rehabilitative programmes – in terms of the offender being sufficiently morally transformed and motivated for active repentance – can never be guaranteed with certainty. As with restorative justice approaches within prison, the possibility and eventual success of their implementation in the after-release phase through some sort of formalized way (e.g. as part of a parole or after-care treatment) would probably differ on a case-by-case basis. To that extent, a coercion to restorative actions without the offenders being sufficiently motivated themselves for such actions might actually do more harm than good. However, this is not to say that the interlocutors in the rehabilitative process should not encourage tendencies towards active redemption. What could be a particularly effective initial motivator (next to dialogue and learning) is the concept of a judicial “certification of rehabilitation”, as proposed by *Maruna*.⁹²⁷ The concept itself reflects postulates of *Braithwaite’s* reintegrative shaming theory, which can already be recognized in proceedings of institutions such as reentry courts as well as in the application of restorative justice approaches such as family conferencing and police-led restorative cautioning.⁹²⁸ The key idea is to acknowledge the ex-offender’s completion of reparative milestones and the rehabilitative progress with an official judicial recognition of his/her rehabilitation, which would, however, not deny the commission of crimes by erasing the criminal record, but would indeed affirm that the offender provided enough effort to redeem him-/herself and that this should be acknowledged by all stakeholders in crime. By abiding to the principle of active social rehabilitation, such an approach can be seen to promote the cooperation between former offenders, victims as well as the wider community in order to overcome grievances made by crime in order to repair the caused harm to the widest possible extent and, by doing so, to contribute to the amelioration of relationships as well as the subsequent re-acceptance of ex-offenders into the society by “de-certifying” their criminal stigma.

As for the form of such a process, the restorative approaches delineated above provide a plethora of elements that could be incorporated so as to effectively reach the developed aims. With regard to the latter, family-based conferences as well as reentry courts give an example of how to develop an effective plan which ought to set milestones the offender would be required to achieve, e.g. within his/her parole.

927 See in detail *Maruna* 2011; also, see *Chapter 4.1.2.4* above.

928 See *Chapter 4.1.2.3* above.

An involvement of community members and victim representatives in the supervisory committee, as, for example, stems from the models of police-led conferencing, would make sure that other stakeholders are up to date with the offender's progress as well as his/her adherence to the developed plan. The milestones themselves could represent forms of restorative action, stemming from acknowledging committed crimes and issuing a public apology to being engaged in a longer process of active community work or monetary reparations, or acting as moral agents by promoting peace, human rights values, reconciliation and equality. For example, by providing a variety of national experiences with de-radicalization in prisons (together with particular experiences of imprisoned terrorists in Italy and Northern Ireland), *Neumann's* report shows the potential the rhetoric of rehabilitated perpetrators can have on individual, moral and social rehabilitation, not only of those imprisoned terrorists belonging to the same in-group, but also of those whom they previously regarded as enemies.

As the final point in this section, the appeal which the concept of "certified rehabilitation" has for the perpetrators of international crimes ought to be considered not only with regard to those adjudicated at international tribunals – for whom there is a very clear prospect that they will be permanently brought in connection with these crimes –, but also for those adjudicated for such crimes at national courts. Here, it is also questionable to what extent the comparison between the penal practice for international crimes at international and national levels reflects the principle of equality in front of courts and tribunals, as guaranteed by Article 14 of the ICCPR, as it is quite likely that those perpetrators adjudicated at the national level do not face such a grave prospect of a criminal stigma as those adjudicated at an international level in terms of publicity, and whose judicial rehabilitation will eventually occur by the passage of time, according to national laws.

4.2 Archetype of the International Prison Institution: the Spandau Prison

The Spandau prison in West Berlin that hosted seven Nazi war criminals adjudicated to prison sentences in front of the IMT in Nuremberg in 1946 was a first step in the developmental trajectory of the international penal/prison system as existing nowadays. As such, it provides an opportunity for an evaluation of the archetypal penal policy developed towards imprisoned perpetrators of international crimes – in particular in terms of penal goals, conditions and treatment. Here, it is of interest to see to what extent such a policy represented a continuation of the "symmetrical" approach of desolidarization towards Nazi war criminals as enforced by the Nuremberg trials, and to what extent it resembled principles of the contemporary rehabilitative framework as introduced above. The enforcement of prison sentences in Spandau was of direct relevance for the perceived legitimacy of the Nuremberg (international)

penal reaction and also had implications for the transitional process within which post-war Germany found itself in the decades after the World War II. It is necessary to stress that these were the initial steps the international criminal justice had taken, and a large part of the international human rights and prison law was at the time inexistent and only developed in the subsequent decades. Therefore, Spandau is also a relevant historical reference for comparison with the system the ICTY has subsequently introduced – especially in order to assess to what extent the challenges that were present at Spandau might still exist within the newly introduced sentence enforcement system.

The scarcity of information makes it difficult to fully assess the conditions and treatment of those imprisoned in Spandau; however, some insight can be obtained from a diary one of the convicts, *Albert Speer*, kept during his imprisonment.⁹²⁹ With the help of a member of the prison staff, *Speer* managed during 20 years of his imprisonment to smuggle his thoughts and personal observations on Spandau to the outside world via notes (often on pieces of toilet paper). These form the core of his diary and have been recognized even by *Telford Taylor*, the Prosecutor at the Nuremberg Trials, as an objective and important contribution on the prisoners of Spandau.⁹³⁰

4.2.1 Organization of the Spandau prison

On 1 October 1946, the IMT at Nuremberg passed judgements for 22 major German war criminals.⁹³¹ Among those accused, three were acquitted,⁹³² twelve were sentenced to death⁹³³ and seven to various terms of imprisonment.⁹³⁴ Given that there was no right to appeal the judgements,⁹³⁵ the enforcement of sentences followed immediately, and those sentenced to imprisonment were flown from the IMT detention unit in Nuremberg to Spandau prison complex in Berlin on 18 July 1947 to serve their sentences.⁹³⁶

Originally built to house hundreds of prisoners, the Spandau prison served the sole purpose of enforcing the prison sentences of seven Nuremberg convicts. As such, it

929 *Speer* 2010 [1975].

930 *Kress & Sluiter* 2002b, p. 1761.

931 *Kress & Sluiter* 2002b, p. 1758.

932 *Hans Fritzsche, Franz von Papen and Hjalmar Schacht* (*Kress & Sluiter* 2002b, p. 1758).

933 *Hermann Göring, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur Seyß-Inquart and – in absentia – Martin Bormann* (*Kress & Sluiter* 2002b, p. 1758).

934 *Rudolf Heß, Walther Funk and Erich Raeder – life imprisonment; Baldur von Schirach and Albert Speer – 20 years; Konstantin von Neurath – 15 years; Karl Dönitz – 10 years* (*Kress & Sluiter* 2002b, p. 1758).

935 *Kress & Sluiter* 2002b, p. 1759.

936 *Speer* 2010 [1975], pp. 62–63.

was placed under the joint administration of the four occupation powers (France, Britain, United States and the Soviet Union). In addition to the general directorate body in which every occupying power had a representative, each power had a chief guard and six other guards in the prison.⁹³⁷ The internal administration of the prison demanded that guards from three powers were present at all times, which made it impossible for any occupying power to unilaterally influence the prison conditions, and any change of the allied prison rules needed the consent of all four directors.⁹³⁸ To the contrary, the external control of Spandau alternated on a monthly basis between the troops of the four powers.⁹³⁹ The guards were entitled to use their firearms against trespassers from the outside – the use of firearms against the prisoners was allowed only in case of their attempted escape or if the prisoner and his accomplices posed a threat to the guards' lives and limbs.⁹⁴⁰ In no instance, however, were they allowed to use firearms to kill prisoners, but only to incapacitate them.⁹⁴¹

At the time the seven convicted were transferred to the Spandau prison, the international legal instruments establishing fundamental prison standards, minimum prisoners' rights and the rehabilitative purpose the enforcement of prison sentences is supposed to achieve had still not been passed. Furthermore, from *Speer's* notes, it is unclear whether any penal purpose governing the treatment of prisoners in Spandau had been explicitly established by the prison regulations (or any other, for that matter). Therefore, a determination of any overarching penal purpose will clearly have to be inferred from the analysis of practice, even though preliminary indications of the governing penal principles had already been given before the prisoners were transferred to Spandau. According to the American military newspaper at the time, "Stars and Stripes", Americans, British and French were opting for a humane treatment, while the Russians were demanding isolation and more stringent prison conditions in general.⁹⁴²

4.2.2 Prison Conditions

The austerity of the Spandau prison conditions was evident from the very beginning. Upon entering the prison, the inmates were given the clothing of convicts from concentration camps.⁹⁴³ They were referred to solely by the number by which they had

937 *Kress & Sluiter* 2002b, p. 1761.

938 *Kress & Sluiter* 2002b, p. 1761.

939 *Kress & Sluiter* 2002b, p. 1761.

940 *Speer* 2010 [1975], p. 419.

941 *Speer* 2010 [1975], p. 419.

942 See *Speer* 2010 [1975], pp. 53, 20.

943 According to *Speer*, this was explicitly pointed out to them by the prison officials (2010 [1975], p. 63).

entered the prison,⁹⁴⁴ and they were forbidden to talk to each other⁹⁴⁵ – and with guards only with regard to essential official matters.⁹⁴⁶ While the official language was to be German, many guards, being foreigners, were lacking its proficiency; however, this did not seem to considerably impede understanding. Initially, there were no work opportunities and prisoners were led outside to a narrow prison yard for only half an hour each day, to march in circles ten paces from one another.⁹⁴⁷ This, however, changed soon, and those who were willing and capable were given the opportunity to work in the prison garden during the day.⁹⁴⁸ Tending to the prison garden was more than a welcome improvement as it gave an additional goal in the prisoners' lives: *Speer* himself was particularly engaged as, on the one hand, organizing and maintaining the prison garden allowed him to partially use his skills as an architect, and, on the other hand, getting out in the fresh air for several hours a day was recognized by the prisoners as having noticeable health benefits and recreational value.⁹⁴⁹ Additional work details pertained to prison maintenance, including tending to the heating system, renovating prison corridors, washing prisoners' clothes, running the prison library and tending to their own cells.⁹⁵⁰ The cells were ascetic, with basic furniture such as an iron bed, a worn-out wooden table and a small cupboard.⁹⁵¹ There was no artificial light in the cells,⁹⁵² and for reading or writing, the prisoners had to rely on natural light coming in through a "cloudy, brownish celluloid" replacing the window glass.⁹⁵³ During the night, prison cells would be poorly illuminated by outside light.⁹⁵⁴ Prison regulations also prescribed lights to be turned towards the

944 "From now on, therefore, I am 'Number Five'", *Speer* writes gloomily (2010 [1975], p. 63).

945 *Speer* 2010 [1975], p. 64.

946 *Speer* 2010 [1975], p. 78.

947 *Speer* 2010 [1975], p. 64.

948 *Speer* 2010 [1975], p. 64.

949 *Speer* 2010 [1975], p. 96. Even after being officially approved, there was always a looming insecurity about whether the garden detail might be banned on the orders of the Russian director who opposed it as being bad for discipline and making it hard to supervise the prisoners (see, e.g., p. 147).

950 See *Speer* 2010 [1975], pp. 64, 69, 84, 103, 114, 172. Part of the work plan was devised by the prisoners (p. 114); for instance, *Speer* himself was engaged in quite a lot of renovating work and gardening. In other instances, work was imposed by the prison administration, e.g. folding and pasting envelopes (p. 84) or basket-making (p. 187). Interestingly, attitudes of prisoners towards this practice differed: in the case of the former, there was no opposition from the prisoners, while in the case of the latter, they vehemently protested against the attempt to make them learn basket-making, claiming they had not been sent to penitentiary or to forced labour. On the other occasion, they were given the task to paint the hall, to which there was no protest (p. 218).

951 *Speer* 2010 [1975], p. 68.

952 More than ten years into the enforcement of his sentence, *Speer* was, thanks to the assistance of a US ambassador at the time, granted an artificial light lamp in his cell, given that previous insufficient lighting conditions had been damaging his eyes (*Speer* 2010 [1975], pp. 329–330).

953 *Speer* 2010 [1975], p. 67.

954 *Speer* 2010 [1975], p. 68.

cells every ten minutes during the night so as to prevent any attempts of suicide, but admittedly, this rule was kept by the guards only partially.⁹⁵⁵ Nutrition was recognized as a major issue – contrary to detention in Nuremberg, food provisions were supplied by the nation on duty for the month, from military ration. This usually meant rather economic rations, which caused a progressive loss of weight among prisoners.⁹⁵⁶ Under Russian administration, the food regime was arguably the worst, causing borderline malnutrition in prisoners, irritability and weakness.⁹⁵⁷ Due to such a regime, as *Speer* admits, they often had to resort to picking left-over bread crumbs or breaking the prison rules by stealing and eating raw vegetables from the garden.⁹⁵⁸ Contrary to food provisions, health service was generally regarded to be adequate, even though also subject to restrictions – an example being *Funk's* operation for which a medical leave to an American hospital was denied by the Russian director; therefore, an army-type mobile operating unit was deployed to Spandau in order to perform the operation.⁹⁵⁹ Another major issue were contacts with the outside world: during the first couple of years, there was a general ban on newspapers and magazines.⁹⁶⁰ Books were generally allowed, however, historical books only if dealing with the period before World War I.⁹⁶¹ Communication with the family was also hindered. A letter was allowed to be written only every fourth week and a quarter-hour visit every eighth week, according to prison rules.⁹⁶² In addition, relatives often lived far away, making a visit problematic.⁹⁶³ Whenever such visits did occur, however, they took place in the presence of several guards, with one of them taking notes

955 *Speer* 2010 [1975], p. 78.

956 *Speer* 2010 [1975], p. 69.

957 *Speer* 2010 [1975], pp. 67, 93, 128.

958 See *Speer* 2010 [1975], pp. 64, 102. Some guards eschewed obedience to these prohibitions, letting the prisoners help themselves to additional food from the garden and sometimes going so far as to offer them already prepared food (p. 102). This can be taken as one indication of a positive change in the attitudes of many guards towards the prisoners. The others, however, did not shy away from reporting such breaches, which usually meant punishment by spending a certain amount of time in a solitary confinement (p. 102).

959 *Speer* 2010 [1975], p. 131.

960 *Speer* 2010 [1975], p. 109. However, the guards secretly kept prisoners informed, at least with regard to major news from the outside (see, e.g., p. 128).

961 *Speer* 2010 [1975], p. 109.

962 *Speer* 2010 [1975], p. 65.

963 *Speer* 2010 [1975], p. 65. An additional aggravation for visits was posed by political circumstances such as the Berlin Blockade of 1948/49, effectively disabling any approach routes to the sectors of Berlin that were under Western control (p. 117). Due to this, for instance, *Speer's* wife was able to visit him for the first time three years after he had been imprisoned in Spandau (p. 127).

of the conversation and with two wire gratings separating the prisoner from the visitor.⁹⁶⁴ A mitigating circumstance was that unused time could be accumulated, allowing for more time when visits actually occurred.⁹⁶⁵

Within the first few years, there was no possibility to maintain contacts with legal representatives, even for civil cases.⁹⁶⁶ This, however, changed in 1954 when a number of amendments to the prison rules were introduced. While these amendments relaxed the rules to some extent, many of them had in fact been already informally “tolerated” by the guards for some time; therefore, they did not significantly improve the situation of the prisoners. Nevertheless, this step can be taken as an indication of the developing human rights movement on an international level, opting for the maintenance of fundamental prison standards and rights of prisoners.

The most noticeable improvements affected contacts with the outside world.⁹⁶⁷ The prisoners were now able to maintain contacts with their lawyers, although not on questions concerning the Nuremberg Trial. They were also able to meet their lawyers and have wills or other documents prepared by them, although with the same restriction. In their letters, the prisoners were now entitled to refer to topics of health and life in the prison. An additional half-hour visit⁹⁶⁸ was approved for Christmas, and the wire grating between the speakers was removed, even though physical contact was not allowed. Each of the four occupying powers took on itself to provide for a different newspaper to the prisoners while, however, maintaining the right to discretionary censorship of the news. Furthermore, lights were allowed to be turned off sooner in the evenings, and the ban on talking was abolished.

Despite improving contacts with the outside world, there was still a lack of independently monitoring the enforcement of sentences. Inspections were usually conducted by one of the Berlin city commanders belonging to one of the occupying powers, or by an ambassador belonging to each power.⁹⁶⁹ While there was an official possibility to issue complaints and requests, these were often disregarded in practice.⁹⁷⁰

964 *Speer* 2010 [1975], p. 118.

965 *Speer* 2010 [1975], p. 100. There was also a possibility to veto decisions on granting accumulated time, which was occasionally made use of by the Russian director (see, e.g., p. 157).

966 *Speer* 2010 [1975], p. 160.

967 *Speer* 2010 [1975], p. 244.

968 As with regard to visits, the security element also became more eased. For instance, *Speer* mentions how on the occasion of one of his wife’s visits, only a single guard was present (who did not speak any German), without the usual party of directors and an interpreter keeping a record (*Speer* 2010 [1975], p. 318).

969 See, e.g., *Speer* 2010 [1975], p. 219.

970 *Speer* recalls a guard informing him that the American ambassador was shown how their official notes were being dealt with (*Speer* 2010 [1975], p. 327): “Letham took one of Hess’s note-books, which had just been brought in, and inserted it into the machine. He pressed a button, and it began to chatter. Triumphantly, he displayed the shredded bits of paper to the astonished

4.2.3 Treatment of prisoners

According to *Speer*, it did not take long for the guards to change their attitudes towards the prisoners. The initial treatment was deemed “irreproachable, but extremely cold and aloof”,⁹⁷¹ attributed to “distinct feelings of hatred”⁹⁷² the guards seemed to have towards the prisoners. Over time, however, it became obvious that they were finding it hard to repress “their spontaneous humanity”, as they started showing “the first signs of sympathy” and were trying not to make the prisoners’ lives any harder.⁹⁷³ Over time, the examples of a humane and friendly behaviour by the guards stemmed from disregarding the ban on talking, secretly conveying news and letters to prisoners, up to exchanging gifts⁹⁷⁴ or even doing one another favours.⁹⁷⁵ However, such an approach was not universal; it differed not only with regard to the nationality of the guards,⁹⁷⁶ but also depended on individual attitudes.⁹⁷⁷ Furthermore, prison regulations strictly forbade guards to discuss the sentences the prisoners received, as well as their past.⁹⁷⁸ Apart from their psychological assessment done for

ambassador. This, I now hear for the first time, is the road that all our official notes have taken for the past ten years.”

971 *Speer* 2010 [1975], p. 64.

972 *Speer* 2010 [1975], p. 78.

973 *Speer* 2010 [1975], p. 79.

974 As *Speer* writes (2010 [1975], p. 198): “Donaho has just nonchalantly distributed to each of us a bar of chocolate and a bottle of beer.”

975 An example of this – and at the same time a rather unorthodox example of how relationships in prison can appropriate their own dynamic contrary to regulations – is a scene from the Spandau prison garden (*Speer* 2010 [1975], p. 355). *Speer* recalls a visit by the Russian director, who found two prisoners who were supposed to mow the grass seated, idly chatting in the shadow of a tree, while the guard who was supposed to watch them was mowing himself the lawn jacketless himself. *Speer* refers to the absurdity of the situation: “[T]he Russian called on the two others to go to work. Although the rules say that we are not permitted to remove our heavy corduroy jackets, I stood in shirt and trousers before the director. But he tactfully turned away until I had put on my jacket; only then did he give a friendly response to my salute. As soon as he left, Pease went back to his mowing, I took off my jacket, Schirach and Hess resumed their conversation under the tree. I recalled the remark the American commandant of the city made recently after an inspection, although he intended it rather differently: ‘Spandau, what a great farce!’”

976 For example, *Speer* (2010 [1975], p. 78) notes how the French were the first to change, followed by the Americans. The British were more reserved, but not unfriendly. While the Russian guards showed the biggest restraint, many of them also often disregarded the rules, engaging, e.g., in conversations with prisoners if they knew they were unobserved.

977 For example, on the occasion of the tenth anniversary of *Hitler’s* last birthday, an English-speaking guard was deliberately provoking *Speer* into recognizing the day as such (*Speer* 2010 [1975], p. 268). When *Speer* sincerely could not recall that it was *Hitler’s* anniversary, the guard lost his temper, snapping at *Speer* not to act so dumb while knowing perfectly well which day it was (p. 268). On other occasions, seemingly reasonless cell inspections took place by a Russian prison guard, sowing chaos by piling bedding, clothing and all other *Speer’s* possessions in a heap, without explanation (p. 199).

978 As with the general ban on talking, this was also occasionally disregarded.

the purpose of the Nuremberg trials⁹⁷⁹, it is unclear whether any such mandated assessment, done for the purpose of rehabilitation, was conducted during imprisonment.⁹⁸⁰ Where there is a mention about any of the interlocutors in the prison tackling issues such as guilt and remorse, it is about the prison priest making such references in the context of religious masses offered to the prisoners – and even then, indirectly, through Biblical parables.⁹⁸¹ *Speer* notes how the other prisoners, but not himself, resented such preaching.⁹⁸² He, on the contrary, was extensively ruminating over his own role in the Nazi machinery, his infatuation with *Hitler*, the justness of his sentence and his own guilt. *Speer* recognized responsibility for the crimes he had been convicted of already during the Nuremberg trials, and – as can be asserted from his contemplations during imprisonment – this constituted a basis to further renounce his Nazi past and to accept the guilt⁹⁸³ – which he was resented for by his fellow prisoners.⁹⁸⁴ This moral rehabilitation, however, does not seem to be induced by any particular interlocutor in Spandau other than *Speer* himself. On the contrary, towards the end of his sentence, he bitterly asserts how, due to the longevity of his imprisonment, the years spent in Spandau actually dulled the feelings of personal guilt and grew resentment within him.⁹⁸⁵ What is more, by the time he was released, he felt how the prison had detrimentally transformed him, both physically and psychologically.⁹⁸⁶

979 See *Chapter 3.1* above for the “Mad Nazi” hypothesis.

980 The prisoners had undergone a medical examination upon their arrival, and there is a mention of a psychiatrist paying them a visit during imprisonment (*Speer* 2010 [1975], p. 146). From the context, it would seem that the aim was to assess how the prisoners were mentally coping with imprisonment. *Speer* himself admits that the prisoners avoided any obtrusive questions; however, the nature of these questions is not further elaborated upon (p. 146).

981 See, e.g., *Speer* 2010 [1975], p. 70.

982 See *Speer* 2010 [1975], pp. 70 and 72, where he proclaims: “I am not a neurasthenic. I would rather not be treated delicately. Your sermons *should* upset me.”

983 For example, *Karstedt* (2011, p. 250) maintains that *Speer* accepted his responsibility but denied guilt. In his diary, however, he refers to the acceptance of his guilt as such from the very beginning. For example, in the immediate aftermath of the trial, he speaks of knowing that “in my own heart I was guilty” (*Speer* 2010 [1975], p. 3). Further into imprisonment, he admits how his “feeling of guilt at Nuremberg was certainly completely sincere, but I wish I could have felt it in 1942” (p. 129). For another critical discourse on *Speer*’s acceptance of guilt, see *Goda* 2007, pp. 176–220.

984 See, e.g., *Speer* 2010 [1975], p. 115: “Schirach, Raeder and Dönitz are distinctly cool toward me, although they occasionally find a few words to say to me. They disapprove of my consistent and basic rejection of the Third Reich.”

985 See, e.g., *Speer* 2010 [1975], p. 422: “In the meantime, twenty years have passed. [...] How much more difficult it has become to accept within oneself the guilty verdict pronounced by those judges. Moreover, the many years of brooding, of dialogue with myself, have dissipated my former guilt feelings. For at bottom every confrontation with one’s own guilt is probably an unconfessed search for justification, and even if that were not the case, no human being could go on asserting his own guilt for so many years and remain sincere.”

986 See *Speer* 2010 [1975], p. 431.

4.2.4 Release

The question of an earlier release of the prisoners in Spandau was a point of contestation between the four occupying powers from the very beginning. The Russian administration insisted on the prisoners remaining in prison until they had served their sentences to the very end, or until they died.⁹⁸⁷ Eventually, three of the prisoners were released earlier because of health reasons,⁹⁸⁸ while the other three served their sentences to the very end.⁹⁸⁹ The last remaining prisoner, *Rudolf Heß*, remained the sole detainee of the Spandau prison for twenty more years until he committed suicide in 1987.⁹⁹⁰ After that, the Spandau prison was demolished.⁹⁹¹

As it seems, there has never been a consistent policy with regard to the prisoners' release. In case of those released due to their health condition, decisions were made by political elites of the four occupying powers on an *ad hoc* basis, usually without prior knowledge of the prisoners that they had even been considered for release.⁹⁹² Even for those who were supposed to be released because they had served their sentences to a day, there was always a looming insecurity that their release might be denied or postponed because of an unfavourable political climate or for some other reason.⁹⁹³ Once released, however, no restrictions were imposed on ex-prisoners, and they were under no sort of official supervision.⁹⁹⁴

4.2.5 Evaluation

Already from the onset of the enforcement of the sentences in the Spandau prison, it can be seen that the conditions and treatment of the Nuremberg convicts had little in common with the nowadays advocated rights-based model of prisoners' rehabilitation. In fact, the overall organization of the Spandau prison and the treatment of inmates emphasized their exclusion from society, rather than their belonging to it.⁹⁹⁵ The censure of punishment and moral reprimand was meant to be instilled in them from the very first day. Dressing them in clothes of convicts from concentration

987 *Speer* 2010 [1975], p. 181.

988 *Neurath* on 6 November 1954, *Raeder* on 26 September 1955 and *Funk* on 17 May 1957 (*Kress & Sluiter* 2002b, p. 1762).

989 *Dönitz* was released on 1 October 1956, *Speer* and *Schirach* on 1 October 1966 (*Kress & Sluiter* 2002b, p. 1762).

990 *Kress & Sluiter* 2002b, p. 1762.

991 *Kress & Sluiter* 2002b, p. 1762.

992 For example, the prisoners accidentally found out by reading in a newspaper – only two days before his actual release – that the Soviet High Commissioner had proposed to representatives of the other three occupying powers that *Neurath* should be released because of his age and his ill health (*Speer* 2010 [1975], p. 256).

993 For example, prior to *Dönitz* being released, see *Speer* 2010 [1975], p. 294.

994 See, for example, before *Neurath's* and *Raeder's* releases, *Speer* 2010 [1975], pp. 257, 276.

995 For this point, also see *Kress & Sluiter* 2002b, p. 1759.

camps, imposing the ban on talking, depriving them of any substantial contacts with the outside world and mandating work and discipline all resembled the monastic ideal of penance through isolation and silent contemplation as seen in the first historical model of “penitentiary rehabilitation”.⁹⁹⁶ While this obviously had a symbolic significance by expressing dissolution and intolerance towards the Nazi crimes and regime, it also substantially undermined the legitimacy of punishments imposed at the Nuremberg trials. The voiced criticism by the prisoners’ families, the general public and even the occupying powers apart from the Soviet Union pointed to gross discrepancies their treatment had with basic human rights and fundamental prison standards that were evolving on the international level. Many aspects of the conditions and treatment in Spandau, especially in the early years, would arguably amount to a cruel, inhuman and degrading treatment and punishment according to contemporary human rights standards. Notwithstanding the formal ease of prison conditions later (as well as attempts from guards not to further aggravate them for prisoners), the harsh conditions and the stupefying dullness of life in Spandau had various detrimental effects on the prisoners. As *Speer* notes, “it became desperately clear to me that the walls of Spandau are robbing me not only of my freedom, but of everything.”⁹⁹⁷ Prisoners had to cope with their declining health,⁹⁹⁸ depression⁹⁹⁹ and the lack of perspective. The latter was an issue which also had implications for their moral rehabilitation (or better to say, lack thereof), as well as their social rehabilitation afterwards. Despite the fact that most of them were released in the end, during imprisonment, it was rather uncertain when and whether for many of them release would actually happen, as there was no established threshold of eligibility for an early release. Those with determined sentences were therefore facing the certainty of one or two decades of prison solitude, and those with life sentences perhaps a lifetime in prison. Hopes were circularly replaced with disappointments, given that the question of release was highly politicized and dependent on the current political climate,

996 See *Chapter 4.1.1.1*.

997 *Speer* 2010 [1975], p. 281.

998 For example due to the previously mentioned nutrition issues as well as progressing age.

999 *Speer* noted throughout his whole diary how he psychologically coped with fits of depression that came about due to the pains of imprisonment. Particularly noticeable is the disparity between the earlier and later stages of imprisonment where mental and intellectual enthusiasm became increasingly replaced by apathy and efforts to simply survive in prison psychologically. In an earlier stage, *Speer* found enthusiasm in contemplating the possibility to turn his cell into a “scholarly den”, devoting himself to reading, learning and writing his reflections on the time under the *Hitler* regime, with the prospect of eventually publishing his writings. These were especially invigorated after one of the prison staff offered to smuggle his notes to the outside world. Furthermore, he was resolute to return to his work as an architect, for the purpose of which he then decided to further keep learning the craft from books and journals that were available to him. Gradually, as his social contacts dissipated and he felt himself being stripped of his previously held social and family roles due to the years of imprisonment, his vigour also waned. In order to fight lethargy and despair, he mostly focused his mental efforts to surviving psychologically, e.g. by imagining travelling around the world on foot while walking circles in the prison garden in reality.

not only with regard to the Nazi crimes,¹⁰⁰⁰ but also in terms of the ongoing “Cold War” and tensed international relations between the East and the West. In such an environment and climate, many inmates resorted – as a way of psychological coping strategy – to upholding their previously held roles, retaining their former titles among themselves and reliving their past experiences while at the same time refusing any attempt to refer to their conscience with regard to the crimes they had been convicted of. This state of moral “sameness” and self-justification was also possible to be retained as grave prison conditions contributed to their feelings of being personally grieved. Even *Speer*, who had accepted his guilt already during the Nuremberg trials, admitted to remorseful feelings being dulled by the resentment developing within him due to the years of harsh imprisonment. Opposed to the more contemporary experiences of imprisoned terrorists in Italy and Northern Ireland – where the positive change in prison conditions and treatment motivated prisoners to engage in a dialogue both among themselves as well as with interlocutors in order to re-evaluate their previous convictions and radical beliefs –, the generally austere conditions of Spandau made the consolidation policy (holding the same type/profile of prisoners in the same institution) a fertile ground to actually re-enforce previous convictions and beliefs among the inmates. In addition, there was no rehabilitative programme that could have offered them a chance to tackle the questions of guilt and remorse constructively. It could even be said that the prospect of their personal and moral rehabilitation was a “taboo”, given that the prison rules prohibited the staff to refer to their sentences and past.

In sum, if there is a guiding penal aim to be discerned from the conditions and treatment of the macro-criminals at Spandau, it was arguably the one of exclusion and stigmatization, rather than constructive rehabilitation and reintegration. Given the policy of consolidation, the lack of any meaningful rehabilitative programmes offered, the austere prison conditions that formally offered very scant possibilities of contacts with the outside world as well as the lack of an independent monitoring of imprisonment, the overall enforcement of sentences in Spandau can hardly be considered as having been an “asymmetrical” penal approach to macro-criminality, in line with the contemporary rehabilitative framework as delineated above. It is dubious whether at that time, their exclusion was guided by the rationale of a perceived risk they might have posed if they had returned to post-war Germany, or if it was purely vengeful “justice” and censure expressed towards major Nazi macro-criminals as, for example, could be deduced from the policy adapted by the Soviet administration of Spandau. Perhaps it was both. While the former ground could be justified, the way their sentences were actually enforced undermined the legitimacy and credibility of such rationale. In fact, despite the IMT trials at Nuremberg having been

1000 For example, in 1960, *Speer* was informed that the efforts pushing for his release on the outside had to be stalled as the *Eichmann* case “has at the moment called the world’s attention too much to the crimes of the Third Reich” (*Speer* 2010 [1975], p. 353).

recognized as “a step in direction of recivilization”,¹⁰⁰¹ because of Spandau, many observers were also prone to label it as “victor’s justice”.¹⁰⁰²

In addition, the way in which certain Spandau ex-prisoners handled their reputations and status after release speaks of the lack of impact the enforcement of their sentences had on their rehabilitation. First and foremost, this refers to their personal and moral rehabilitation and, consequently, also to their social rehabilitation. The latter was much affected by the dynamics of the normative climate in post-war Germany; however, their behaviour and efforts in managing personal reputations also had a significant influence – to the extent, as *Karstedt* argues, that it cannot be excluded that it slowed down and impeded positive changes of the normative climate.¹⁰⁰³ Arguably, one of the reasons for this is that post-war Germany represents a *sui generis* case in transitional societies where the people of the perpetrators were mainly among themselves and thus experienced a strong sense of collective fate¹⁰⁰⁴ which ranged from collective amnesia with regard to the atrocities to the pathos of (military, political, economic) defeat.

For those Spandau prisoners who were released within the first twenty years after the war,¹⁰⁰⁵ this provided an increased opportunity to share their former reputations with a variety of more or less confined social groups, which exempted them from confronting their crimes and guilt.¹⁰⁰⁶ They were morally unchanged by their criminal punishments, and in a society where victim groups did not vehemently challenge the denial of crimes,¹⁰⁰⁷ they could claim innocence, or at least ignorance, and shared these feelings with numerous others.¹⁰⁰⁸ Being the former Nazi elite members, the efforts of the Spandau ex-prisoners at a restoration of their former reputations also influenced other Nazi perpetrators, adjudicated in subsequent Nuremberg trials, to similar attempts and occasionally with highly controversial implications.¹⁰⁰⁹ These included not only attempts by other former prisoners to infiltrate higher echelons of military, industrial or political power in the post-war state, but often doing it with a

1001 Admitted to be as such even by *Speer* himself (2010 [1975], p. 47).

1002 *Goda* points to how “for better or worse, a piece of Nuremberg’s legitimacy would depend on Spandau” (2007, p. 4), further arguing how a punishment (i.e. different aspects of imprisonment) must receive the same careful thought from the advocates of international justice as the trial does; otherwise, the former can erode some of the foundations on which the latter is built (p. 18). Indeed, as he notes, the perceptions of imprisonment in Spandau, whether in West Germany, Italy, the Netherlands, Poland, Yugoslavia, the U.S.S.R. or elsewhere, were overwhelmingly negative (p. 5).

1003 *Karstedt* 2011, p. 261.

1004 *Karstedt* 2011, p. 246.

1005 *Dönitz, Funk, Raeder and Neurath*.

1006 *Karstedt* 2011, p. 261.

1007 In the first twenty years after the war, there was a near-total absence of victims and their families in Germany (*Karstedt* 2011, p. 249).

1008 *Karstedt* 2011, p. 261.

1009 See *Karstedt* 2011, pp. 250–260.

refutation of their personal guilt or even open support for the Nazi regime and *Hitler*.¹⁰¹⁰ The risk of such attempts for the stability of post-war Germany is open to discussion. Given that the country remained for a long time under the strong and continuous surveillance of other international powers, lines were drawn for the reputational claims of former Nazi criminals. However, before German society was ready to face the atrocious legacy of the Nazi regime by itself (for example through the Auschwitz and the Majdanek trials), these were often blurred and thus prone to “probing” by the ex-perpetrators. Therefore, even if excluding any real stability threat from such reputational claims, their negative impact on the momentum of the transitional process cannot be excluded.¹⁰¹¹ This then once again reiterates a close connection between the rehabilitation of macro-criminals and the transitional change/rehabilitation of a post-conflict society – not least the impact the former has on the latter as well as on the subsequent maintenance of peace in the post-war region.

4.3 Summary

Following a comprehensive delineation of various etiological factors that play a role in the perpetration of international crimes, this chapter proceeded by introducing the most important aspects of the concept of offenders’ rehabilitation. Despite its tumultuous historical development, often characterized by coercion and a desire to induce a positive, law-abiding change in offenders’ behaviour by negative/harsh measures, rehabilitation has managed to establish itself as an internationally validated penal aim which, within the phase of enforcement of prison sentences, has attained the status of a prisoner’s right. First and foremost, this means a positive obligation on the side of the penal system to uphold fundamental standards of incarceration as well as to offer a range of services to prisoners without which, arguably, detrimental effects that are inherent to the deprivation of liberty would aggravate the proportionality of punishment and, subsequently, its legitimacy. Consequently, any substantial rehabilitation of offenders is undermined if the fundamental standards cannot be maintained. Second, this then provides a platform for the penal system to offer programmes that tend to the rehabilitation of offenders in a more constructive, more focused manner and with an acknowledgement of all of its facets.

The facet of “personal” rehabilitation generally encompasses the assessment of those criminogenic needs with the offender that pose the highest risk of offending and, consequently, offers corresponding programmes that can assist him/her in overcoming such personal deficits. Here, the “Risk-Need-Responsivity” (RNR) assessment

1010 See, for example, the case studies of *Albert Kesselring*, *Hermann-Bernhard Ramcke* or *Hans Kehr* (Karstedt 2011, pp. 254–256).

1011 Karstedt 2011, p. 261.

model with corresponding cognitive-behavioural programmes has been considered to offer the most positive results with regard to personal rehabilitation. Additionally, an alternative approach to personal rehabilitation – labelled the “Good Lives” model (GLM) – has been developing and argues for more attention to be placed on improving the strengths and positive skills in offenders, instead of their deficits. Its appeal is recognized in practice insofar as the RNR model also tends to those factors that are seen to reduce rather than to increase the risk of offending (positive/protective risk factors).

Motivating offenders towards personal rehabilitation through a therapeutic dialogue and learning process is also seen to positively impact their “moral” rehabilitation, that is the acceptance of responsibility for the crime, remorse as well as the desire to atone for committed wrongs. It is an important component of the overall rehabilitative process as it shows to the broader community that the values embedded in the censure of punishment are successfully communicated to the offender. Simultaneously, moral rehabilitation raises cognitive inhibitions against crime and violence within the offender, which, in effect, lessens the risk of potentially re-offending.

Remorse that comes with moral rehabilitation is also the first step towards an amelioration of relationships that have been broken by crime, and it paves the way for a successful societal re-acceptance of the offender, recognized as “social” rehabilitation. In this context, it has been shown how the offender’s moral and social rehabilitation can both mutually benefit from the incorporation of restorative justice approaches in the rehabilitative process, given that they offer a possibility of an active, more meaningful atonement and involve the encounter/interaction between the stakeholders in crime. Such a concept of “active atonement” has also been propagated with regard to “judicial” rehabilitation where the offender’s remorse and reparative action(s) should not only fasten his re-acceptance by swaying away negative sentiments and by obliging the community to actually recognize the rehabilitation (a “certification” of rehabilitation). It should also remove legal obstacles that are in the way of his/her position as an equal member of the society.

A recognition of rehabilitation as the right of every prisoner also extends this notion to adjudicated and imprisoned perpetrators of international crimes. Careful consideration of the etiology of macro-criminals rejects the notion of their inappropriateness for rehabilitation – not least as, on the fundamental level, rehabilitation as a penal concept is necessary to counter the detrimental effects of imprisonment that threaten to unnecessarily aggravate their punishments. The objection that due to the nature of their crimes, they are already rehabilitated and reintegrated should be dismissed as superficial; ultimately, it is the international human rights ethos and values that are being violated by their acts. Such an ethos, recognized in a continuously developing international body of human rights law, supersedes any criminal state

policy;¹⁰¹² therefore, it is the adoption of those values which their rehabilitation is oriented towards. Furthermore, the ability to perceive their acts as crimes, therefore being wrong and against such humanitarian principles, undermines the foundations upon which the criminal collective is based on (embodied either within formal state structures or smaller social groups). Their crimes carry a strong mark of group membership: they are committed on behalf of a group and against members of certain other groups, therefore their acceptance of moral censure has implications not only for their reintegration into the post-conflict society (and, as can be symbolically argued, the international community) but also for the amelioration of broken relationships between different groups that still, quite possibly, live together within such a society.

Inducing the moral rehabilitation in macro-criminals will arguably depend on how their personal rehabilitation is tackled. This poses a challenge for general rehabilitative programmes as these are based on the assessment of risk, and the question of risk macro-criminals might present is multifaceted due to the intricacies of their crime etiology. Discerning whether their risk exists with regard to atrocity crimes, the crime in general or not at all will arguably depend on the efforts of interdisciplinary experts who are then able to direct rehabilitative action more meaningfully. Here, it might be plausible to combine the analysis of individual criminogenic need areas with the analysis of broader socio-political preconditions for mass violence in the (post-)conflict region, as these might be important for individual re-offending and can also indicate the level of risk for individual perpetrators. The type or the combined typology of the perpetrator(s) in individuals will dictate the rehabilitative means. Ostensibly – as opposed to general rehabilitative programmes that are focused on deficits in offenders –, it has been argued that the rehabilitation of macro-criminals might warrant more focus on improving protective, or positive, risk factors in order to counter the negative influence of external factors such as authority and peer pressure in the future. Improving the protective risk factors, e.g. in terms of empathy, can also have a positive moral influence on those perpetrators whose personal dispositions might have played a key role in the perpetration of atrocities. However, the involvement of interdisciplinary experts might be warranted in order to dissolve criminogenic needs, such as a radical belief system or patterns of thinking, before any concrete attendance to positive risk factors can be conducted.

The question is whether the type and the level of risk should be a sole precondition to reach out to imprisoned macro-criminals beyond what is mandated by fundamental prison standards. Some of them might not pose an objective risk of re-offending, yet they might vehemently refuse to acknowledge the moral wrongness of their crimes, also as means of self-preservation as facing the reality of crimes could have an extremely detrimental effect on personal well-being. Given the fundamental importance of the moral reconditioning of perpetrators – which then positively affects

1012 See *Chapter 2.1* above.

their social rehabilitation and has implications for broader societal reconciliation –, it might be warranted to opt for ethically allowed judicial pressures in order to steer perpetrators towards moral self-reflection. For example, parole can be conditioned by a change in personal attitudes towards crimes, which can come out of a direct personal commitment of perpetrators to rehabilitative programmes. Incentives and guidance by credible interlocutors through dialogue might be of a crucial importance for their commitment to programmes and the process of self-evaluation.

Similar to “ordinary” criminality, benefits or restorative justice approaches have also been recognized for the social and moral rehabilitation of the perpetrators of international crimes. Given that they provide an opportunity to somehow make wrong right, they can also more positively impact a wider reconciliatory process in the post-war society, as the examples of Northern Ireland and Italy vividly show. While demanding from ex-perpetrators to commit to reparative action might exceed the boundaries of proportionality, their personal motivation in this regard should be certainly welcomed and encouraged. Additionally, it has been argued that the concept of certified judicial rehabilitation would beneficially impact not only the social rehabilitation of perpetrators but also their motivation towards reparative action.

This chapter has indicated that contrary to the dogmatic viewpoint mostly retained within the boundaries of the normative discourse to rehabilitation, it is not so much that the contemporary rehabilitative framework is unsuitable to address the challenge of rehabilitation of macro-criminals, as much as it should be carefully tuned, or modified, in order to appropriately tend to all the facets of perpetrators’ rehabilitation. Only then can the achievement of rehabilitation also positively impact the overarching aims of international criminal justice.

Preliminary considerations of a rehabilitative treatment of macro-criminals have been analyzed with regard to the enforcement of the prison sentences of seven adjudicated Nazi war criminals in the Spandau prison, West Berlin, in the aftermath of the IMT trials in Nuremberg. Given that Spandau allocated prisoners on the basis of a consolidation policy and that the prison itself was under the joint administration of the four occupying international powers, it is regarded as the archetype of the international prison institution and, as such, the first instance in the development of an international penal/prison system. The analysis shows that not only there were no developments in terms of a *sui generis* special rehabilitative framework for imprisoned macro-criminals; the enforcement of their sentences did arguably neither abide to fundamental prison standards that were eventually developed on an international level. Despite the positive impact the Nuremberg trials had on the development of international criminal justice and the affirmation of human rights on an international level, the policy of a desolidarization and exclusion of imprisoned Nazi war criminals in Spandau was at the time perceived (and still can be considered as such) as undermining its legitimacy, also attributing the label of “victor’s justice” to the overall penal endeavour. Additionally, a failure to achieve rehabilitation for imprisoned macro-criminals (especially in terms of their moral rehabilitation) arguably had a

hindering impact on the transitional process in post-war Germany upon their release from prison.

The example of Spandau is of relevance for the assessment of the ICTY sentence enforcement policy insofar as it shows to what extent the gravity of international crimes can define and maintain the criminal stigma for convicted macro-criminals. What is more, such a stigma can be used to justify the illegitimate aggravation of punishment that goes beyond a mere deprivation of liberty. Not only does it undermine the credibility of the penal reaction, its negative consequentialist effects are also recognized as hindering the reconciliatory process and a transformation of the affected society. It is then of question whether and to what extent these challenges are present within the sentence enforcement framework introduced by the ICTY. More importantly, it is of question to what extent the ICTY enforcement system abides to the contemporary rehabilitative operational framework as introduced in this chapter, and to what extent it is being modified to legitimately contribute to the overarching aims of international criminal justice.

Chapter 5

The ICTY and a New System for the Enforcement of International Sentences

This chapter provides a preliminary overview of essential normative provisions guiding the enforcement of ICTY sentences. Here, it is of interest to discern to what extent the normative backbone governing the practice of enforcement features previously discussed rehabilitative postulates that ought to guide prison treatment of macro-criminals. Consequently, a normative indication of potential issues and challenges to the attainment of valid penological purposes and principles in enforcement will be explored in detail in the following empirical part in order to provide a clearer assessment of the legitimacy of such a developed system.

5.1 Basic Characteristics of the System

Opposed to the centralized model of the Spandau prison – where prisoners served their sentences in a single dedicated prison facility with a distinctive security regime and prison staff –, the system for the enforcement of ICTY sentences is based on the policy of dispersion. Namely, Article 27 of the ICTY Statute envisages that “imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons”.¹⁰¹³ Throughout the years, the ICTY (as well as now the MICT) has developed a policy to enforce the sentences only in states “with which the United Nations has agreements for this purpose or with States which have indicated their willingness to accept convicted persons under any other arrangement.”¹⁰¹⁴

1013 ICTY Statute, Article 27.

1014 Security Council Resolution 1966 (2010) [S/Res/1966 (2010)], Annex 1 (hereinafter: the MICT Statute), Article 25; also, the MICT RPE, Rule 127. Given that the MICT has succeeded the prerogatives of the ICTY with regard to the enforcement of sentences, all enforcement agreements the Tribunal has made with different states apply *mutatis mutandis* also to the MICT (see S/Res/1966 [2010]), Preamble, para. 4) In addition, all normative provisions the ICTY has issued have been appropriated in more or less the same form by the MICT in its own legislation.

Table 3 Allocation of transferred ICTY/MICT prisoners (data as of July 2016)

State	Year of first transfer	Number of prisoners
Austria	2002	6
Belgium	2008	1
Denmark	2005	4
Estonia	2009	3
Finland	2000	7
France	2004	4
Germany	2000	7
Italy	2003	5
Norway	1998	6
Poland	2014	2
Portugal	2012	1
Spain	2001	5
Sweden	2003	4
United Kingdom	2004	3

In practice, this means that ICTY sentences can be enforced only in prison systems of those states that have either made a general agreement for the enforcement of ICTY sentences – the provisions of which thus apply to all ICTY convicts sent to that particular state –, or they have made ad hoc agreements for each individual convict who has been transferred to their respective prison system. To date,¹⁰¹⁵ enforcement agreements have been made with 17 European states and 58 prisoners have been effectively incarcerated in 14 of them. Thus far, Germany is the only state with which the ICTY/MICT has made ad hoc enforcement agreements.¹⁰¹⁶

1015 July 2016.

1016 See the “Exchange of Notes” of 17 October 2000 between the United Nations and the Government of the Federal Republic of Germany regarding the enforcement of Mr. *Duško Tadić*’s prison sentence (hereinafter: the Tadić Agreement); the “Exchange of Notes” of 14 November 2002 between the United Nations and the Government of the Federal Republic of Germany regarding the enforcement of Mr. *Dragoljub Kunarac*’s prison sentence (hereinafter: the Kunarac Agreement); the “Agreement between the International Criminal Tribunal for the former Yugoslavia and the Government of the Federal Republic of Germany concerning the conditions under which Mr. *Stanislav Galić*’s prison sentence shall be enforced” (hereinafter: the Galić Agreement); the “Agreement between the International Criminal Tribunal for the former Yugoslavia and the Government of the Federal Republic of Germany concerning the conditions under which Mr. *Johan Tarčulovski*’s prison sentence shall be enforced” (hereinafter: the Tarčulovski Agreement); the “Agreement between the Mechanism for International Criminal Tribunals and the Government of the Federal Republic of Germany concerning the conditions

The preliminary overview of the enforcement system points to a couple of noteworthy features. The delineation of these features that follows below – mostly based on the analysis of the existing normative framework – will allow for a basic understanding of how the enforcement system operates and which potential issues of penological relevance might exist in practice. These issues are further explored in the subsequent empirical analysis of the enforcement practice.

5.1.1 Enforcement outside the state of origin of the prisoner

First, there is a noticeable exception of the former Yugoslavian states from the list of states with which the ICTY/MICT has made enforcement agreements (see *Table 3*). As elaborated in the previous chapter,¹⁰¹⁷ under the contemporary rehabilitative framework, it would be generally opportune to consider the enforcement of imprisonment in the country of the prisoner's origin, due to benefits the proximity of the family as well as the familiarity with the cultural, social and lingual milieu carries for the prisoner's rehabilitation. However, the 1993 Report of the UN Secretary General to one of the ICTY's founding resolutions dismissed such a possibility on the grounds 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."¹⁰¹⁸ Arguably, the rationale governing this decision was developed due to the unstable socio-political situation in the former Yugoslavian states at the time the Report was drafted. As argued by the Tribunal itself, it has its footing in humanitarian concerns for the well-being of prisoners – but also, however, because of the need to actually ensure the impartial enforcement of prison sentences.¹⁰¹⁹ Due to the raging conflicts at the time, there was a concern that national criminal justice systems (including the prison apparatus) were non-functional; therefore, serving the sentences in the countries of the former Yugoslavia would have "impermissibly risked the lives of convicted persons".¹⁰²⁰ Additionally, there was a concern that national authorities would neither be able or willing to provide adequate

under which Mr. *Vlastimir Đorđević's* prison sentence shall be enforced (hereinafter: the Đorđević Agreement); the "Agreement between the Mechanism and the Government of the Federal Republic of Germany in which the conditions for the Federal Republic of Germany assuming the enforcement of Mr. *Ljubiša Beara's* prison sentence are determined" (hereinafter: the Beara Agreement); and the "Agreement between the Mechanism and the Government of the Federal Republic of Germany in which the conditions for the Federal Republic of Germany assuming the enforcement of Mr. *Vujadin Popović's* prison sentence are determined" (hereinafter: the Popović Agreement).

1017 See *Chapter 4.1.3.1*.

1018 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (UN Security Council Distr. General, S/25704, 3 May 1993), p. 30.

1019 ICTY/UNICRI 2009, p. 156.

1020 ICTY/UNICRI 2009, p. 156.

supervision over imprisonment,¹⁰²¹ nor would it be possible for the ICTY to provide for judicial supervision,¹⁰²² which would, consequently, increase the risk of interference with the enforcement of sentences.¹⁰²³

Such an approach does not come without a merit or validity if juxtaposed to a contemporary rehabilitative framework. As argued before, within an inter-state system, international instruments for the transfer of sentenced persons allow individuals convicted in one country to be exempted from serving the sentence in their country of origin – first and foremost on the grounds that if sent to their home country, their fundamental rights might be seriously endangered, which would also fundamentally undermine any further attempt at rehabilitating the prisoner. Such a postulate does not contradict the rehabilitative principle; it actually reinforces it. However, by introducing Rule 11*bis* to its RPE in 2002, the ICTY challenged the further sustainability of the humanitarian rationale as implied in the Secretary General’s report. In essence, Rule 11*bis* has allowed the ICTY to refer certain cases to national jurisdictions among the former Yugoslavian states, thus also subsequently consenting to an enforcement of sentences on their territories.¹⁰²⁴ In particular, *Bekou* argues that while being significant in itself, the quality of prisons among the former Yugoslavian states is not a relevant criterion for the referral of a case to national jurisdictions.¹⁰²⁵ Considering that through years, steps have been taken to ameliorate national prison conditions, *Bekou* does not see this as a significant factor that would (negatively) affect the decision to refer.¹⁰²⁶ This would then imply that humanitarian concern for the well-being of prisoners might have lost its leverage as one of the overarching principles for the allocation of prisoners. Furthermore, the fact that a referral to national jurisdictions is possible only for the intermediate- and lower-rank accused¹⁰²⁷ indicates risk-assessment as more prominent overarching factor governing the enforcement of sentences. By maintaining that enforcing the sentences of the highest-

1021 *Safferling* 2001, p. 352.

1022 ICTY/UNICRI 2009, p. 156.

1023 As *Safferling* bluntly describes the dilemma: “[...] more theoretically, [...] the national population and authorities were feared to be not impartial enough [...] to supervise the convicted person serving a sentence inflicted upon him by a foreign (international) court. This is especially true in cases of civil strife and unrest. The former Yugoslavia is a perfect example of this: the difficulties are far too great for the convicted person to be sent back to his home state. Either he ends up in an area which might almost treat him as a war hero, which would destroy any effect of the punishment, or his life expectancy might be severely reduced if he found himself in an environment mainly governed by his former enemies” (2001, p. 352).

1024 ICTY/UNICRI 2009, p. 156.

1025 *Bekou* 2010, p. 785.

1026 *Bekou* 2010, p. 785.

1027 ICTY/UNICRI 2009, p. 156.

ranking perpetrators¹⁰²⁸ is to be conducted outside the states of the former Yugoslavia,¹⁰²⁹ the Security Council implies that the socio-political climate in the former Yugoslavian states is still far from favourable for conducting an impartial enforcement of convicted macro-criminals. Dismissing the humanitarian grounds, this impartiality might then refer to a perceived inability of national prison systems to ensure that punishment still maintains its expressive quality, e.g. by allowing too liberal incarceration conditions and services.¹⁰³⁰ Furthermore (and related to the first point), there might be a concern that the status of perpetrators is still being held in high regard in their countries of origin. As stressed previously, any attempt at rehabilitation among agents whose value system resembles that of perpetrators can be expected not only to be futile but virtually non-existent. Additionally, there might be a concern that perpetrators might influence or stir up underlying animosities that still linger among the population as a consequence of recent conflict.

While the validity of the risk-based rationale demanding the sentences to be enforced outside the zone of conflict could be acknowledged *prima facie* (i.e. if based on a sound evidence), its security-oriented aspects ought to be carefully balanced under the consideration of prisoners' rights, needs and future prospects if the enforcement is to maintain its legitimacy. The fact is that the ICTY/MICT prisoners are dispersed among a wide array of foreign countries with which they most likely have little, if anything, in common in terms of social, cultural or lingual ties. Additionally, while

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- 1028 Admittedly, throughout the years, many adjudicated persons of a mid- or low rank have also been incarcerated in prison systems of different states as part of the ICTY sentence enforcement system. Also, the introduction of Rule 11 *bis* did not create a "custom" with regard to the referral of mid- and low-ranking accused, as can be seen from a rather small sample of transferred cases (see case information sheets for *Ademi & Norac* [IT-04-78], *Kovačević* [IT-01-42/2], *Ljubičić* [IT-00-41], *Mejakić et al.* [IT-02-65], *Stanković & Janković* [IT-96-23/2], *Rašević & Todović* [IT-97-25/1] and *Trbić* [IT-05-88/1]). As *Bekou* indicates, it is more likely that the rationale behind the introduction of Rule 11 *bis* was mainly to "free up precious Tribunal time" in order to achieve its completion strategy more efficiently (2010, p. 726).
- 1029 See Security Council Resolution 1534 (S/RES/1534 [2004]), commending the states which have concluded agreements for the enforcement of sentences and encouraging other states in a position to do so to do likewise. In particular, the Security Council "invites the ICTY [...] to continue and intensify [...] efforts to conclude further agreements for the enforcement of sentences or to obtain the cooperation of other States in this regard" (para. 8).
- 1030 Hypothetically speaking, such a concern might have been conceived due to the experience other countries engulfed in a state of civil unrest had with their high-profile criminals prior to the establishment of the ICTY. For example, in 1992, a year before the ICTY became operational, a Colombian drug lord, *Pablo Escobar*, escaped his plush prison facility in Medellín, Colombia (to which he had been transferred on the basis of an agreement with the government) after having been threatened with a transfer to a more secure military prison unit (*Treaster* 1992). Prior to his escape, Mr. *Escobar*, who was also involved in terrorist activities against the state, yet nevertheless enjoyed support among many people in Medellín, had been kept in a resort-like prison where he had had a personal suite (with living room, kitchen and a jacuzzi-sporting bath) and had enjoyed other commodities such as a discotheque and a bar (see *Cran* 1997, March 25) In addition, Mr. *Escobar* continued running his drug empire from the prison, which included ordering assassinations and having armed criminals walk in and out of prison with the complicity of guards (*Treaster* 1992).

still being in Europe, many of these states are pretty far from the prisoners' states of origin. By default, this can be expected to challenge not only any advanced rehabilitative effort – such as a restorative engagement with crime-affected communities – but also, more fundamentally, the attainment of their basic rights, e.g. adequate contacts with family members due to the large geographical distance.¹⁰³¹ A simple fact of one state being farther away from the prisoner's country of origin than the other can already have serious undermining implications for the achievement of staples pertinent to the legitimacy of punishment, such as equality and standardization of enforcement.

5.1.2 Enforcement in accordance with the law of the enforcing state and under supervision of the ICTY/MICT

The matter of equal treatment is closely tied to the second basic characteristic of the system: the enforcement of sentences in accordance with applicable law of the state concerned, though subject to the supervision of the Tribunal/Mechanism.¹⁰³² Before the ICTY adapted the policy of making enforcement agreements,¹⁰³³ various attempts had been made by different states to modify aspects of enforcement in accordance with their national laws and/or penal policies. *Tolbert* notes that for states to provide assistance or to cooperate with the Tribunal, it is usually necessary to make appropriate amendments to their respective laws.¹⁰³⁴ Given that in the ICTY's first years of operation, there was a considerable lacuna of normative provisions on enforcement and, accordingly, with regard to enforcement prerogatives assigned to both the Tribunal and national authorities, many states have taken the freedom to address various matters pertaining to enforcement – such as escape of the prisoner, additional crimes committed during imprisonment and release – in their implementing legislation and according to their penal policies.¹⁰³⁵ Apparently, the ICTY judges became increasingly aware of the risk this might pose for the uniform treatment of the Tribunal's convicts. In the first judgement passed by the Tribunal, the judges of the Trial Chamber expressed their concern about “reducing the disparities which may result from the execution of the sentence”.¹⁰³⁶ Consequently, they felt obliged to provide guidance with regard to the enforcement of sentences and, in particular, the rights of the convicted persons.¹⁰³⁷ While lacking the normative power of the Statute

1031 For example, *Speer's* account of his years spent in the Spandau prison vividly depicts the hardships his family went through in order to maintain contact, even though living in a neighbouring state (given the legal division of Germany at the time) (see *Chapter 4.2*).

1032 ICTY Statute, Article 27; MICT Statute, Article 25.

1033 Italy was the first state to sign such an agreement, on 6 February 1997.

1034 *Tolbert* 1998, p. 663.

1035 *Tolbert* 1998, p. 663.

1036 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 70.

1037 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 70.

or the RPE,¹⁰³⁸ the provided guidelines are still relevant, as they bring attention to the principles which are of fundamental significance for the enforcement of sentences. In addition, they attempted to delineate the division of prerogatives between the Tribunal and the enforcing states in more detail, while simultaneously highlighting particular challenges of penal relevance for the enforcement practice. As can be seen below, the enforcement agreements do not unanimously follow the guidelines. Next to the issue of uniformity among them (particularly with regard to the division of prerogatives as well as standards guiding the enforcement), the other problem seems to be the prevailing ambiguity of the developed enforcement framework, especially concerning the penal purpose(s) of enforcement and the means of their achievement.

In particular, the judges stressed the importance of the principle of legality for the legitimacy of enforcement, declaring how every accused person should be aware not only of the possible consequences of conviction and the penalty, but also of the conditions under which the penalty is to be enforced.¹⁰³⁹ Furthermore, the judges were particularly conscientious of the need for such conditions to abide to the fundamental rehabilitative minimum as proclaimed in international prison standards.¹⁰⁴⁰ Among other things, this presumed that prisoners retain all their rights apart from those the limitation of which is “necessitated by the fact of incarceration”.¹⁰⁴¹ This explicit dismissal of any other limitations that might be inherent to the deprivation of liberty was further underlined by the consideration that “the penalty imposed on persons declared guilty of serious violations of international humanitarian law must not be aggravated by the conditions of its enforcement”.¹⁰⁴² As it seems, the judges were well aware that there is a potential for such an aggravation within the established decentralized enforcement system. In particular, they raised an awareness of an “inevitable isolation” into which prisoners will have been placed, due to the distance the enforcement states will have from their places of origin.¹⁰⁴³ What is more is that this isolation might result not only from “cultural and linguistic differences [that] will distinguish them from other detainees”, but, as predicted by the judges, that it might well occur within the very group to which the prisoners would normally be-

1038 For example, *Erdemović's Sentencing Judgement* assigns the prerogative of the ultimate decision on the state of enforcement to the Presiding Judge of the Trial Chamber which delivered the sentence (para. 69). Subsequently adopted normative provisions, supplementing those of the Statute – such as ICTY RPE, Rule 103(A) and in particular the ICTY “Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment” (IT/137, 9 July 1998) – clearly dismiss this notion and assign such prerogative exclusively to the President of the Tribunal.

1039 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 70.

1040 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 74.

1041 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 74.

1042 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 74.

1043 *Dražen Erdemović* (IT-96–22–T), Sentencing J., 29 November 1996, para. 75.

long, given that some of them might previously have cooperated with the Prosecution.¹⁰⁴⁴ Consequently, a presumed awareness of differences that exist between different prison systems prompted the judges to advocate for “some degree of uniformity and cohesion in the enforcement of international criminal sentences”.¹⁰⁴⁵ According to their opinion, due to “the principle of equal treatment before the law [...], there can be no significant disparities from one State to another as regards the enforcement of penalties pronounced by an international tribunal”.¹⁰⁴⁶

Opting for uniformity in enforcement, the judges dismissed previous attempts by the states to autonomously regulate its various aspects and asserted that “a State which has indicated its willingness and has been designated will execute the sentences *on behalf of the International Tribunal* in the application of international criminal law and not domestic law.”¹⁰⁴⁷ Further opting for the authority of the Tribunal, they forbade the state to “alter the nature of the penalty [...] in any way, including by legislative amendment, [...] so as to affect its truly international character”.¹⁰⁴⁸

Attempting to define the “international character” of ICTY sentences, the judges have also crudely established the prerogatives of the Tribunal and the states regarding the enforcement of sentences.

First, according to the *Erdemović* judgement, the sentence is international by virtue of being imposed by the Tribunal, and the Tribunal has an exclusive say over the terms of punishment.¹⁰⁴⁹ This also reflects statutory provisions as well as those of the RPE, which invest the President of the ICTY/MICT with power to ultimately decide whether the prisoner should be released from the prison earlier,¹⁰⁵⁰ pardoned or have his/her sentence commuted, despite his/her initial eligibility for such an action being determined by the law of the enforcing state.¹⁰⁵¹ Consequently, the sole authority of the ICTY/MICT President over the duration of the punishment should also provide for more uniformity, as national provisions on the release of prisoners might vary drastically between laws of the enforcing states. By introducing the practice of making the enforcement agreements, the ICTY affirmed this prerogative by obliging the competent national authorities of enforcing states to respect the duration

1044 *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 75.

1045 *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 72.

1046 *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 72.

1047 *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 71.

1048 *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 71.

1049 See *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 73: “[...] no measure which a state might take could have the effect of terminating a penalty or subverting it by reducing its length.”

1050 See MICT RPE (MICT/1/Rev.2), Rules 149, 150.

1051 See the ICTY Statute, Article 28; the ICTY RPE, Rules 123, 124; the MICT Statute, Article 26; the MICT RPE, Rules 149, 150.

of the sentence.¹⁰⁵² However, throughout the upcoming years, a number of enforcement agreements assigned prerogatives to the states, which has enabled them to have an impact – if not directly on the duration of the term of the sentence, then at least on the possibility of enforcing that term in full extent or on the continuity of its enforcement.

For example, in their agreements, Spain and Portugal agreed to enforce only those sentences of the Tribunal that in their duration do not exceed the highest maximum sentence for *any crime* under the national laws of the respective states.¹⁰⁵³ The agreement with Slovakia reiterates this meaning by excluding from enforcing those sentences which are “by their nature or duration incompatible with the law of the Slovak Republic.”¹⁰⁵⁴ Similar provisions, yet imposing more specific conditioning, are contained in the agreement with Estonia, where the state clearly refuses to consider the enforcement of those Tribunal sentences that exceed the highest maximum sentence impossible for *such a crime* under national law.¹⁰⁵⁵ Similar to Spain and Portugal, Ukraine has in its agreement with the Tribunal refused to enforce the part of an ICTY sentence that would exceed the maximum sentence duration stipulated by the state’s national law.¹⁰⁵⁶ However, it does not seem to have a problem with enforcing the part of that very sentence that would amount to the general penalty maximum prescribed by national law.¹⁰⁵⁷ Practically the same arrangement is also envisaged in the agreement with Poland; however, here, the provisions state that the enforceable part of an ICTY sentence must not breach the upper penalty limit for such an offence envisaged under national law.¹⁰⁵⁸ In any case, the same provisions state that after

1052 Usually included in Article 3, para. 1 of enforcement agreements, or Article 2, para. 1 of ad hoc agreements with Germany.

1053 See the “Agreement between the United Nations and the Kingdom of Spain on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Spain Agreement), Article 3, para. 2, as well as the “Agreement between the United Nations and the Portuguese Republic on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Portugal Agreement), Article 3, para. 2.

1054 See the “Agreement between the Slovak Republic and the United Nations on the enforcement of sentences imposed by the International Criminal Tribunal for the former Yugoslavia” (hereinafter: the Slovak Republic Agreement), Article 2, para. 1.

1055 The agreement states that the sentence should not exceed the highest maximum prescribed for a *relevant crime* under the law of the requested state (see the “Agreement between the Government of the Republic of Estonia and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia”, Article 3, para. 2; hereinafter: the Estonia Agreement).

1056 See the “Agreement between the United Nations and Ukraine on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Ukraine Agreement), Article 3, para. 1.

1057 The Ukraine Agreement, Article 3, para. 1.

1058 See the “Agreement between the Government of the Republic of Poland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Poland Agreement), Article 3, para. 3.

serving the eligible part of the sentence, the prisoner would have to be transferred to complete the sentence elsewhere.

As such, these provisions condition the enforceability of international sentences with national penalty frameworks and exclude *ab initio* from the enforcement those states whose prison systems might otherwise be more suitable for a prisoner than those of other states.¹⁰⁵⁹ In cases where states do allow for a part of the sentence to be enforced, the upcoming transfer after that part of the sentence is completed would have a considerable impact on the continuity of enforcement. This would mean a disruption of ongoing rehabilitative programmes, as well as forcing the prisoners to undergo acclimatization not only to a different prison system in itself but to a different socio-cultural environment all over again. While not directly impacting terms of imposed sentences, conditioning their enforcement upon the duration of these very terms would indeed have significant implications for prisoners as well as the consistency and uniformity of their imprisonment.

The potential of a similar impact on the enforcement stems from the provisions some agreements contain with regard to pardon, commutation and early release of prisoners. As previously mentioned, the ICTY/MICT Statute and RPE stipulate that an eligibility for pardon, commutation and an early release of prisoners is determined according to the law of the state of imprisonment.¹⁰⁶⁰ Upon a prisoner becoming eligible for any of these measures, national authorities ought to report this information to the ICTY/MICT, the President of which then decides on the matter.¹⁰⁶¹ While the ultimate decision lies with this official, certain states have diverged in their agreements from the policy of exclusively acting in accordance with such a decision. In those instances where the opinion of national authorities and the President might diverge, the only option to restore the authority of the President's opinion is to transfer the prisoner to another state or to the ICTY/MICT. For instance, some agreements envisage for the prisoner to be transferred back to the ICTY/MICT (that is, presumably, the UNDU there) or to another state if, according to the applicable law of the enforcing state, he/she is eligible to be pardoned, released or have the sentence commuted and the President opposes this.¹⁰⁶² Similarly, some agreements do not mandate an immediate transfer if the President opposes the release, but allow the national

1059 For example, knowing one foreign language over the other or having family members in one state and not in the other one might already be of great significance (and preference) for the prisoner and his/her rehabilitation when it comes to the choice of a state.

1060 ICTY Statute, Article 28; ICTY RPE, Rule 123; MICT Statute, Article 26; MICT RPE, Rule 149.

1061 ICTY Statute, Article 28; ICTY RPE, Rules 123, 124; MICT Statute, Article 26; MICT RPE, Rules 149, 150.

1062 See the "Agreement between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia" (hereinafter: the Italy Agreement), Article 3, para. 4, and Article 8, para. 2; the "Agreement between the United Nations and the Government of the French Republic on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia"

authorities to decide whether to continue the enforcement or, ultimately, to transfer the prisoner.¹⁰⁶³ On the other hand, some agreements allow the national authorities to take into consideration the opinion given by the President of the ICTY/MICT prior to transmitting their own decision to the ICTY/MICT on whether the prisoner should or should not be pardoned, released or have the sentence commuted.¹⁰⁶⁴ Based on such a decision, the ICTY/MICT “may request” for a transfer of that prisoner to another state or to the Tribunal/Mechanism. Finally, two agreements stipulate that if the President has opposed the release of prisoners, national authorities shall be informed accordingly.¹⁰⁶⁵ The agreements remain silent as to which course of action should follow the decision of the President.

Theoretically, all agreements allow for the Registry of the ICTY/MICT to organize for the transfer of prisoners if at any time the ICTY/MICT decides to request the termination of the enforcement in the requested state¹⁰⁶⁶ or if any legal and practical reasons deem further enforcement impossible.¹⁰⁶⁷ These provisions can be understood as sort of a safety plug, ensuring the authority of the ICTY/MICT over the terms of their sentences and conditions of enforcement in case a discrepancy in opinions occurs with authorities of the enforcing state. However, it is open for discussion to what extent the President of the ICTY/MICT would remain autonomous in practice in his/her exertion of that authority. Given that (according to the agreements) the states bear the costs of enforcement,¹⁰⁶⁸ it is easy to foresee the monetary burden a continuation of the enforcement past the date of eligibility for release would carry

(hereinafter: the France Agreement), Article 8, para. 2 (only for pardon and a commutation of the sentence); the Spain Agreement, Article 3, para. 5, and Article 8, para. 2; the Portugal agreement, Article 3, para. 5 (only for early release); the Slovak Republic Agreement, Article 9, para. 2; the Tadić Agreement, Article 2, para. 4 (only for early release); the Kunarac Agreement, Article 2, para. 4 (only for early release); the Galić Agreement, Article 2, para. 4 (only for early release).

- 1063 See the France Agreement, Article 3, para. 4 (with regard to “release on parole or any other measure altering the conditions or length of detention”); the Slovak Republic Agreement, Article 4, para. 3 (with regard to “any early release”).
- 1064 See the “Agreement between the United Nations and the Government of Sweden on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Sweden Agreement), Article 8, paras. 2 and 3; the “Agreement between the United Nations and the Kingdom of Denmark on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Denmark Agreement), Article 8, paras. 2 and 3; the Estonia Agreement, Article 8, paras. 2 and 3.
- 1065 See the Tarčulovski Agreement, Article 2, para. 4; also the Đorđević Agreement, Article 2, para. 4.
- 1066 Apart from the Slovak Republic Agreement, which contains this provision in Article 10, para. 2, and the agreements made with Germany (Article 8, para. 2), all other agreements contain it within Article 9, para. 2.
- 1067 See the agreements made with Germany (Article 9) and the Slovak Republic Agreement (Article 11). All other agreements contain this provision in Article 10.
- 1068 See the Slovak Republic Agreement (Article 12) and the agreements made with Germany (Article 10). See Article 11 in all other agreements.

for them. Taking this concern into account, national authorities might be (hypothetically speaking) more inclined towards releasing prisoners as soon as domestic eligibility thresholds allow in order to avoid further costs. While the President of the ICTY/MICT might personally oppose such a decision – based on the criteria which he/she ought to take into account according to the Statute and the RPE –, the above-listed normative solutions of certain agreements would then necessitate a search for another state of enforcement or, alternatively, a transfer of the prisoner back to the UNDC (presumably again at the expense of the ICTY/MICT) if a dissenting opinion was granted. In order to avoid costs and possible procedural conundrums stemming from a search for another willing state of enforcement, the Tribunal/Mechanism might find it more practical to simply follow the decision of national authorities. In such an instance, then, the decision of national authorities would indeed have an impact on the term of the sentence, bypassing the exclusive prerogative of the Tribunal as provided in the *Erdemović* guidelines. It is also worth noting that when referring to the early release of prisoners, the enforcement agreements do not state any conditions that might be imposed on the ex-prisoner, nor do they state which legal status ex-prisoners should appropriate upon being released.¹⁰⁶⁹ Consequently, the above-depicted reasoning would in practice condition the release of the ICTY/MICT prisoners simply with different national release-eligibility thresholds, as according to enforcement provisions, it is upon them for national authorities to first react. Unless the President of the ICTY/MICT has devised a criterion to bypass this challenge in practice, such an outcome would have a profoundly negative effect on the equality of treatment and, consequently, the legitimacy of enforcement, given that the prospect of an earlier release for one prisoner over the other would simply depend on the state he/she has been sent to.

The described provisions in some agreements, hypothetically allowing for a divergence from statutory norms and the guidelines as provided in the *Erdemović* judgement, prompt a further analysis of the division of enforcement prerogatives as attributed by enforcement agreements.

The judicial guidelines in the *Erdemović* judgement argue that the second characteristic representative of the “internationality” of a sentence in the context of its enforcement is the right of the “International Tribunal [...] to supervise how persons it has convicted are treated”.¹⁰⁷⁰ According to the judges, this mandates on a broader level that the enforcement of sentences abides to the minimum principles of humanity and dignity, as advocated for in international human rights instruments such as the ICCPR.¹⁰⁷¹ More specifically, they also invoke the provisions of international

1069 Nor are such provisions contained in the ICTY/MICT Statute or the RPE.

1070 See *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 74.

1071 See *Dražen Erdemović* (IT-96-22-T), Sentencing J., 29 November 1996, para. 74. The judges particularly referenced Article 10, para. 1 of the ICCPR, stating that “all persons deprived of their liberty will be treated with humanity and with respect for the inherent dignity of the human person”.

fundamental prison instruments (namely the SMR, the BoP and the BP) as the standard that ought to guide the enforcement of international sentences. Interestingly, not all the agreements are in consensus with regard to which standard should guide the enforcement. The majority of general agreements with states are concurrent with the *Erdemović* guidelines and not only recall the provisions of SMR, BoP and BP in their preambles, but explicitly state that the conditions of imprisonment shall be compatible with these standards.¹⁰⁷² On the contrary, the agreements with Austria, the United Kingdom and Poland explicitly state that the conditions applicable to the ICTY/MICT prisoners shall be equivalent to those applicable to prisoners serving sentences under national law before ambiguously invoking their compatibility with “relevant human rights standards”.¹⁰⁷³ If looking at the previously analyzed differences between national prison systems in Europe,¹⁰⁷⁴ it can be seen that each of these three states is representative of a different cluster of states, with prison conditions noticeably varying between the clusters. Arguably, Poland fares the worst in terms of prison conditions, followed by the UK. Austria fits the broad range of Central European countries the conditions of which generally fare good but might quite differ among each other. Explicitly equating the standards of enforcement for ICTY/MICT sentences with those applicable to national prisoners not only raises the risk of inequality in conditions and treatment between international convicts sent to those three states, but also between them and those sent to states which, according to their agreements, have to explicitly abide to international prison standards. Arguably, the provision on a compatibility with “relevant human rights standards” is quite broad and does not per se have to include more specific international prison instruments which,

1072 See the “Agreement between the United Nations and the Republic of Albania on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Albania Agreement), Article 3, para. 5; the “Agreement between the United Nations and the Kingdom of Belgium on the Enforcement of Sentences Handed Down by the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Belgium Agreement), Article 3, para. 6; the “Agreement between the Government of Norway and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Norway Agreement), Article 3, para. 5; the “Agreement between the International Criminal Tribunal for the Former Yugoslavia and the Government of Finland on the Enforcement of Sentences of the International Tribunal” (hereinafter: the Finland Agreement), Article 3, para. 5; the Denmark Agreement, Article 3, para. 3; the Estonia Agreement, Article 3, para. 5; the France Agreement, Article 3, para. 5; the Italy Agreement, Article 3, para. 5; the Portugal Agreement, Article 3, para. 6; the Slovak Republic Agreement, Article 4, para. 4; the Spain Agreement, Article 3, para. 6; the Sweden Agreement, Article 3, para. 3; and the Ukraine Agreement, Article 3, para. 5.

1073 See the “Agreement between the United Nations and the Federal Government of Austria on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the Austria Agreement), Article 3, para. 3; the “Agreement between the United Nations and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia” (hereinafter: the UK Agreement), Article 3, para. 3; and the Poland Agreement, Article 3, para. 8.

1074 See *Chapter 4.1.1.5*.

despite their influence, lack the normative power to provide a mandatory application. A similar solution is found in some agreements with Germany. Both the Kunarac Agreement and the Tadić Agreement call for a compatibility of the imprisonment conditions with “relevant human rights standards”, therefore displaying the same level of ambiguity as to which standard exactly should guide the enforcement of international sentences. More concerning, however, is the solution featured in other German agreements where the compatibility of prison conditions with relevant human rights standards extends only to those standards which Germany is “obliged under international law to respect”.¹⁰⁷⁵ Interpreting this provision on the basis of the strength of international legal instruments might technically exclude the international prison standards – that is, SMR, BoP and BP –, as they lack a legally binding force.

Regarding those general agreements which make explicit reference to international prison standards, it is interesting to ponder how such standards might actually be achieved in practice. Given that many states which have made such an agreement with the ICTY/MICT are continuously struggling to maintain internationally advocated standards even for their own prisoners, one might wonder how they are upholding it for international prisoners in practice, especially since the quota of such prisoners per country is generally very small. Certain enforcing states, such as Portugal, Poland or Belgium, are hosting, or have hosted, only one prisoner so far. Reiterating the fact that the states bear a monetary burden of enforcement themselves, it is dubious whether internationally advocated prison standards are upheld for only one, two or five international prisoners exclusively if the state is already having problems with upholding these standards for their own nationals. However, if that is the case, then those international prisoners would arguably be somewhat physically isolated from the broader prison population. Considering that they quite likely are already isolated by language, culture or simply distance from their home states, such an additional isolation (even if from ordinary prisoners) might have a considerably negative impact on the enforcement of their sentence as well as on their ability to endure it.

International prison instruments have set the standard not only for minimum allowed conditions and services in prison; they are also strongly opting for the application of all appropriate and available means – according to the individual needs of a prisoner – that would allow and encourage them to lead a law-abiding and self-supporting life upon their return to society.¹⁰⁷⁶ This extends the scope of rehabilitative action from solely offering conditions and services that make the deprivation of liberty just bearable (general rehabilitative framework) to constructively tackling a variety of per-

1075 See the Galić Agreement, Article 2, para. 5; the Tarčulovski Agreement, Article 2, para. 5; the Dorđević Agreement, Article 2, para. 5; the Beara Agreement, Article 2, para. 6; and the Popović Agreement, Article 2, para. 6.

1076 See *Chapter 4.1.3.2.*

sonal and social factors revolving around the prisoner in order to reduce his/her potential of re-offending and to enhance his/her ability to live a law-abiding life (special rehabilitative framework). It has been recognized how such a focused effort – provided during time in prison but also after the release of prisoners – has a very positive effect on all the facets necessary for a prisoner’s rehabilitation. Usually, prisoners – predominantly based on their risk assessment – have a treatment devised with the assistance of experts (psychologists, sociologists, social workers etc.) focally striving to reduce their criminogenic needs and/or to enhance positive personal and social attributes. Particular significance in this regard is placed on communication and dialogue with prisoners. Not only are these of benefit for their individual and moral rehabilitation – understanding what caused the offending, which impact the crime had, which alternatives to offending are available and how the harm can be ameliorated –, but they are the foundation upon which a new and improved relationship with victims and the wider community can be built. Especially with regard to this social (and, intertwiningly, legal) aspect of rehabilitation, there is growing support for the application of restorative justice methods.

Benefits of rehabilitative programmes focused on reducing the predominant crime etiology and repairing broken relationships appropriate a particular significance in the context of imprisoned perpetrators of international crimes. Not only does rehabilitation prevent their re-engagement and their instigation or re-instigation of a violent conflict that might still be looming within a society that is polarized on societal, ethnical, political or religious grounds – it also re-invents their symbolic relevance. Instead of being moral agents bearing havoc, rehabilitated macro-criminals should be advocates of peace, actively atoning for their crimes. This might make their reentry more generally positively accepted in the society; on the other hand, it can also have positive effects on their societal reconciliation. As previously stipulated,¹⁰⁷⁷ such an outcome would demand modifications in predominantly applied rehabilitative programmes, to the extent of refining the risk assessment of individuals by placing more focus on the improvement of protective risk-factors and, given the complexities of their crime etiology, involving a wider range of competent experts in the treatment. Where possible, the introduction of restorative approaches as part of rehabilitative programmes has also been encouraged.

Within the ICTY/MICT normative framework on enforcement, the only place where rehabilitation is explicitly mentioned is among the criteria the President ought to take into account when deciding on pardon, the commutation of a sentence and the early release of a prisoner.¹⁰⁷⁸ Next to the fact that a majority of general agreements with

1077 See *Chapter 4.1.3.3*.

1078 See the ICTY RPE, Rule 125, and the MICT RPE, Rule 151. The provisions of both RPEs are almost identical verbatim, listing as relevant factors *inter alia* the gravity of the crime or crimes the prisoner was convicted for, the treatment of similarly situated prisoners, the prisoner’s demonstration of rehabilitation as well as any substantial cooperation of the prisoner with the Prosecutor.

states explicitly refers to international prison standards as the guiding standards for enforcement (the standards themselves also explicitly mention rehabilitation as the purpose the imprisonment ought to serve¹⁰⁷⁹), this is an indicator – at least a formal one – that the ICTY/MICT indeed considers rehabilitation to be a valid purpose the enforcement of their sentences is supposed to achieve. By itself, however, this does not explain how that purpose should be achieved in practice. If, again, considering that the enforcing states cover the costs of imprisonment themselves, it is ambiguous to what extent the national authorities might be inclined to develop special rehabilitative programmes for international prisoners – especially given the miniscule quota of such prisoners a single state usually hosts. Then again, the ICTY/MICT formally has a final say over whether such a purpose has been achieved in case of each imprisoned macro-criminal, and it cannot be excluded that the President, when weighing his decision, also values criminological criteria developed specifically with a backdrop to the extraordinary nature of international crimes. Indeed, the independent criminological development is not a new phenomenon in the practice of the ad hoc tribunals. As stressed before, this can be particularly observed in a way the judges have been expanding the limits or re-conceptualizing modes of criminal liability that contemplate group dynamics, such as superior responsibility and joint criminal enterprise.¹⁰⁸⁰ Notwithstanding the extent to which previously discussed provisions on pardon, commutation and the release of prisoners can hypothetically cause a dichotomy in opinions between the national authorities and the Tribunal/Mechanism, there are provisions which imply that the ICTY/MICT might be more directly involved in day-to-day realities of enforcement. Some of these provisions might then provide for more uniformity in the opinion of authorities and consequently the treatment of prisoners, given their allocation among different states. Others can be interpreted as being more in favour of the principle of individuality, which subsequently can be of benefit for particular crime etiologies of different prisoners, allowing for the introduction of appropriate rehabilitative programmes. For instance, upon asking a state to enforce the sentence, the majority of agreements entitle the ICTY/MICT to provide the national authorities with any recommendations for the further treatment of prisoners during their imprisonment in the respective state.¹⁰⁸¹ Furthermore, all agreements explicitly state that the ICTY/MICT and the national authorities “shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.”¹⁰⁸² In this context, “all matters” can obviously also be interpreted so as to expand the focus of supervision of the Tribunal/Mechanism from the

1079 See *Chapter 4.1.1.4*.

1080 See *Drumbl* 2005, pp. 573–576; *van Sliedregt* 2009.

1081 Apart from the UK Agreement (Article 2, para. d) and the Belgium Agreement (Article 3, para. c), all general agreements contain this provision in Article 2, para. c. Interestingly, none of the ad hoc agreements made with Germany contains such a provision.

1082 Apart from the Slovakia Agreement (Article 8, para. 2) and the ad hoc agreements made with Germany (Article 6, para. 2), all agreements contain this provision in Article 7, para. 2.

maintenance of minimum prison standards to the application of more specialized rehabilitative programmes to international prisoners. While these provisions are more general, some agreements have gone further in explicitly assigning prerogatives to the ICTY/MICT that have a direct impact on the day-to-day realities of enforcement for some international prisoners. For instance, according to the Italy Agreement, the President of the Tribunal/Mechanism has the exclusive prerogative to decide whether a prisoner can be granted non-custodial measures during imprisonment as well as whether he/she should be allowed a working detail outside the prison, if eligible by national law.¹⁰⁸³ Despite not being precisely defined what is meant by “non-custodial measures” in this case, it seems to be probable that it refers to different types of prison furlough – perhaps even a transfer to a more lenient prison unit, as it often happens to prisoners progressing through the prisoner-gradation system during the time of their imprisonment. Interestingly, according to the Poland Agreement, exactly such a prerogative is granted to the President: if, according to national law, the prisoner is eligible for a half-open or an open prison, the national authorities shall inform the Tribunal/Mechanism, the President of which shall then either grant or deny the transfer.¹⁰⁸⁴ Similarly, the France Agreement also entitles the President to decide on “any other measure altering the conditions [...] of detention”.¹⁰⁸⁵ However, as with release, it is upon national authorities to decide whether to act upon such a decision or to transfer the prisoner back to the Tribunal/Mechanism. Finally, the Belgium Agreement demands that the national authorities notify the Tribunal/Mechanism “if the convicted person is granted a sentence enforcement method other than early release, or if this method is revoked or suspended.”¹⁰⁸⁶ Similar to the Italy Agreement, the reference to “a sentence enforcement method other than early release” might, once again, be a reference to non-custodial measures such as furlough.

Next to these provisions allowing for either a more direct supervision of the Tribunal/Mechanism over the enforcement or giving it prerogatives to directly shape aspects of everyday treatment and conditions of international prisoners in certain cases, each agreement usually commissions a third party to conduct the inspection of the conditions of detention and treatment of the international prisoner(s). According to the agreements, such inspections are to be conducted on a periodic basis after which reports are to be issued to the ICTY/MICT and the national authorities who are to consult each other on the findings of these reports.¹⁰⁸⁷ The ICTY/MICT President has the explicit prerogative to request thereafter the state to report of any change in

1083 The Italy Agreement, Article 3, para. 3.

1084 The Poland Agreement, Article 3, para. 7.

1085 See the France Agreement, Article 3, para. 4.

1086 The Belgium Agreement, Article 3, para. 4.

1087 The provisions on inspection are usually contained in Article 6 of the agreements (apart from the Spain Agreement, Article 4; the Slovakia Agreement, Article 7; and the ad hoc agreements with Germany, Article 5).

the conditions as per suggestion of the inspecting body.¹⁰⁸⁸ While such an arrangement suggests an effort to ensure the impartial monitoring of enforcement – so as to ensure that the conditions and treatment of international prisoners abide to international prison standards –, the aforementioned disparities between the states as to which standards actually apply make it difficult *prima facie* to assess the extent of such supervision as well as its criteria. Furthermore, in some cases, the impartiality of monitoring should also be questioned. Usually, the monitoring prerogative is given either to the International Committee of the Red Cross (ICRC) or to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).¹⁰⁸⁹ However, certain agreements have deviated from this arrangement, assigning the monitoring prerogative exclusively to the ICTY/MICT, therefore limiting the possibility of impartial intervention to enforcement if needed.¹⁰⁹⁰ A similar arrangement also exists according to the Spanish Agreement where inspections are to be conducted by the so-called “Parity Commission”, a monitoring commission composed of two representatives of the ICTY/MICT and two representatives of Spain. In addition, even some of those agreements that have commissioned the CPT as the monitoring body have envisaged a reporting procedure that can hypothetically reduce the transparency and impartiality of reporting. According to these agreements, the inspection reports are not simultaneously issued to the ICTY/MICT and the national authorities by the CPT, but only to the state, the authorities of which are then responsible for forwarding it to the President of the

1088 See the provisions in Article 6, para. 2 of all agreements apart from the Spain Agreement (Article 4, para. 3), the Slovak Republic Agreement (Article 7, para. 2) and the ad hoc agreements made with Germany (the Tadić Agreement, Article 5, para. 2; the Kunarac Agreement, Article 5, para. 2; the Galić Agreement, Article 5, para. 3; the Tarčulovski Agreement, Article 5, para. 3; the Đorđević Agreement, Article 5, para. 3; the Beara Agreement, Article 5, para. 3; and the Popović Agreement, Article 5, para. 3).

1089 For those agreements opting for the CPT instead of the ICRC, see the Albania Agreement (Article 6), the Galić Agreement (Article 5), the Portugal Agreement (Article 6), the UK Agreement (Article 6) and the Ukraine Agreement (Article 6). According to *Tolbert and Rydberg*, the initial choice to commission the ICRC as the monitoring body was due to its reputation as “a respected independent body, specializing in prison conditions, [which] ensures that the applicable human rights standards are being enforced” (2001, p. 539). However, as the authors further indicate, some states had difficulties with such an inspection regime, thus opting for other choices (2001, p. 539). This might very well be due to the specific scope of enquiry the ICRC usually has. It is similarly argued by *Klip* (1997, pp. 150–151) who admits that the ICRC has gathered enormous expertise over the treatment of prisoners of war in armed conflicts, yet this by itself does not qualify it as a competent board of visitors to international prisoners, given that prisoners in penitentiary institutions are incarcerated under “totally different circumstances” from those of war prisoners. Consequently, *Klip* suggests the CPT as a more appropriate alternative, due to its experience in supervising prison conditions (1997, p. 151). It is quite likely that the states have followed this rationale in practice when opting for the CPT as the monitoring body in their agreements.

1090 See the Kunarac Agreement (Article 5) and the Tadić Agreement (Article 5). The Austria Agreement has similar provisions, entitling “the international Tribunal, or an entity designated by it [...], to conduct inspections” (Article 6, para. 1).

ICTY/MICT.¹⁰⁹¹ It could be argued that such a procedure gives the state unnecessary leeway to manipulate inspection findings according to its preferences before submitting it to the ICTY/MICT. With regard to this, it is interesting to note that in 2008, the Albania Agreement was the last one to commission the CPT as the monitoring body as well as according to such provisions. All subsequent agreements, the last having been concluded in 2015,¹⁰⁹² have again been featuring the ICRC as the monitoring body – although with representatives of the ICTY/MICT in addition. At this point, it can only be speculated whether the concern over strengthening transparency in monitoring prompted the ICTY/MICT to insist on such arrangements in subsequent agreements.

5.1.3 Voluntary nature of enforcement

The above-indicated differences in enforcement arrangements with states and the general ambiguity that describes the normative framework on enforcement are at least to an extent the result of the voluntary nature of enforcement. Contrary to other provisions on state cooperation with the Tribunal, the enforcement of sentences is conditioned by the *willingness* of states to accept persons convicted by the Tribunal and to host them within their national prison systems. The fact that these states are not hosting their own nationals, that international prisoners have notorious reputations and that the states are obliged to bear the costs of their incarceration themselves makes the effort of trying to shape the conditions according to national prison policies and preferences all the more understandable. It is also understandable that upon activating the ICTY and passing the Statute, the UN paid less heed as to which impact such an enforcement system might have on the administration and perception of justice. At the time, more pressing concerns, such as putting the perpetrators into the dock and actually adjudicating them, mandated the allocation of human and monetary resources elsewhere. However, given the extent of enforcement practice the Tribunal developed in the meantime, the time is ripe to provide a critical assessment, to pinpoint the challenges for legitimacy of the system and to suggest means of improving it. Consequently, it is worthwhile to rethink the penological value of the ICTY-developed system – based on the policy of dispersion and the voluntary acceptance of international convicts – over a dedicated international prison unit (or units) or even over sending the international convicts to serve their sentences in their states of origin.

1091 See the Albania Agreement (Article 6, para. 1), the Galić Agreement (Article 5, para. 2), the Portugal Agreement (Article 6, para. 1) and the Ukraine Agreement (Article 6, para. 1).

1092 The Beara Agreement and the Popović Agreement.

5.2 Consideration of Challenges for the Legitimacy of Enforcement

Summarizing the discussion on basic characteristics of the ICTY sentence enforcement system, potential challenges for the legitimacy of enforcement pertain to two intertwined areas: the equality of treatment of international prisoners and the achievement of the rehabilitative purpose of punishment.

The very nature of the enforcement system makes it likely that a degree of “external” inequality exists between the conditions and the treatment of international prisoners. For example, the geographic distance of an enforcement state from the prisoner’s state of origin can already put him/her in a less favourable position over the others, particularly in terms of maintaining those contacts with the outside world which are essential for prisoners’ rehabilitation, such as family and friends.¹⁰⁹³ At least with regard to fundamental prison standards, such an outcome can also be induced by arrangements in some enforcement agreements, where the states have conditioned their acceptance of prisoners with the duration of their sentences. For those prisoners whose sentences do not match nationally imposed criteria, this means a more limited choice of states from the start that might be willing to accept them, therefore putting them in an unequal position as compared to other prisoners. When it comes to the prison standards the states ought to abide to, the situation also displays an inequality. Agreements with some states explicitly address international prison instruments as setting the minimum standard for the prison conditions of international prisoners, whereas others advocate strictly for conditions applicable to national prisoners or invoke general human rights standards. Given the discrepancies in national prison policies, particularly regarding the minimum quality of conditions and services, this might be a serious problem where the quality of prison conditions for some international prisoners could be considerably diminished in comparison to others.

A notable example of such a discrepancy in prison conditions and treatment can be observed in the cases of two ICTY convicts: *Radislav Krstić* and *Biljana Plavšić*. Both cases became publicly renowned as they depict extremely contrasting examples of prison experiences for international convicts – to the extent that for one of them, Mr. *Krstić*, the experience in prison drastically diminished treatment standards, arguably amounting to cruel, inhuman and degrading treatment and punishment. Quite on the contrary, the conditions of Ms. *Plavšić*’s imprisonment have been widely considered to challenge the punitive/expressive character of international punishment.

1093 Contacts with a legal counsellor – particularly his/her possibility to visit the prisoner when the occasion mandates – can also be added here, as they are essential to issues revolving around the legal status of a prisoner. For example, it is quite likely that those imprisoned in Austria would receive more visits simply due to the fact that it is very close to their region. On the other hand, families and friends of those imprisoned in farther states, such as Scandinavia, Estonia or Portugal, might find it harder to visit due to the distance as well as the monetary expenses such a visit would entail. Consequently, their visits would be inevitably rarer.

In particular, Mr. *Krstić*, a high-ranking military official in the Bosnian Serb Army, was initially incarcerated in the maximum-security Wakefield prison in England¹⁰⁹⁴ (famously dubbed the “Monster Mansion” due to its population of high-profile prisoners) where he suffered a violent attempt on his life in 2010.¹⁰⁹⁵ The incident occurred within the confines of his cell where three other Muslim inmates slashed Mr. *Krstić*’s throat as a retaliation for his involvement in the Srebrenica massacre.¹⁰⁹⁶ Mr. *Krstić* was consequently transferred to a different prison institution in England where other, albeit less serious, incidents occurred, only to be finally transferred to Poland to serve the rest of his sentence there.¹⁰⁹⁷ Eventually, Mr. *Krstić* received a monetary compensation for the suffered harm from the British Ministry of Justice.¹⁰⁹⁸ On the other hand, Ms. *Plavšić*, a former Bosnian Serb leader convicted of crimes against humanity, served her sentence in the plush Swedish Hinseberg prison which boasts a sauna, solarium as well as horse-riding paddock and offers its inmates classes in salsa dancing, photography and cookery.¹⁰⁹⁹ While these examples are indicative of the serious possibility of discrepancies in treatment, they are also somewhat extreme in their contrast. For many other prisoners, differences in conditions and treatment might be more nuanced and therefore disregarded in a wider picture of what the respective enforcement looks like. Nevertheless, they still might have a serious impact on prisoners, especially if they are occurring on an everyday basis during their imprisonment.

The possibility of having “external” inequality in conditions and treatment between the prisoners sent to different states also demands a clarification in terms of how the process of designating and transferring a prisoner to an enforcing state works – namely, what the most relevant criteria are for a concrete decision on the state a convicted person will be sent to and how these criteria are applied in the concrete case. It has also been indicated that different states are very likely to have different eligibility thresholds for early release. Despite achieving a comparable rehabilitative success, some prisoners might have to wait longer for their release simply because the release thresholds in their states are higher than those in the states other prisoners have been sent to, as the eligibility is determined according to national laws. Consequently, this would have a considerably negative impact on the equality of treatment and the perception of fairness in the administration of justice.

1094 England, in particular, is one of the states which in their enforcement agreement opted for imprisonment conditions to be equivalent to those applicable to national prisoners (see the UK Agreement, Article 3, para. 3).

1095 *Ahmetasevic* 2010.

1096 *Rawlinson* 2015.

1097 *Rawlinson* 2015.

1098 *Rawlinson* 2015.

1099 *McLoughlin* 2003.

Next to the issue of the so-called “external” (in)equality of treatment (based on differences in prison regimes among different states), another topic of concern is the one of “internal” (in)equality or of how the international prisoners are treated in national prison systems as opposed to the ordinary prison population. It has been previously indicated that some of the states obliged by their agreements to abide to international prison standards in the treatment of international prisoners might already find it hard to provide such conditions for their national prison population; therefore, it is questionable to what extent they might actually be willing to provide such conditions exclusively for the prisoners of the ICTY/MICT. Providing better conditions and services for international prisoners would make them stand out from other national prisoners, which might result in increased pressure for the government of the respective state to provide equal conditions to the rest of the prison population, too. Avoiding this issue might mean the physical separation from other prisoners, which in turn might actually aggravate the sentence of international prisoners as it would inevitably impose a higher level of isolation upon them. Equally concerning is the possibility that due to their status as international prisoners, the convicts of the ICTY/MICT might suffer a degradation of their treatment in comparison to national prisoners. Certain agreements have opted for the ICTY/MICT to have a direct say in allowing international prisoners to benefit from non-custodial measures during the enforcement of their sentences. Ultimately, this might not only result in a discrepancy from the treatment of prisoners in other states – who might benefit from the very same measure without the ICTY/MICT deciding upon it; it also puts the prisoner in an unfavourable position towards other national prisoners, especially if the national authorities might favour granting such a measure to him/her and the ICTY/MICT opposes it. In addition, non-custodial measures are often a touchstone in the rehabilitative path of a prisoner, granted in order to ease the subsequent release and to reduce the differences between life in custody and life in freedom to the utmost possible extent. Given that international prisoners are foreign nationals whose integration into the society of the enforcing state after the release might not be expected (or perhaps even be vehemently opposed by the state, due to their reputation), they might be deprived by national authorities of such commodities that are usually available to national prisoners.

Certain provisions in enforcement agreements also argue for a level of uniformity in the conditions and treatment of international prisoners. The ICTY/MICT and the national authorities are to consult each other on any matter regarding the enforcement, and the ICTY/MICT is usually entitled to make any suggestions on the treatment. Ultimately, the President of the ICTY/MICT also has a say in whether or not a prisoner is rehabilitated and whether, subsequently, he/she should be pardoned, have the sentence commuted or be released earlier. This gives room to the ICTY/MICT to have more influence on the imprisonment policy and its practical implementation. Theoretically, it would seem logical that the Tribunal/Mechanism pushes the enforc-

ing states to provide similar conditions and services to international prisoners. However, the question of rehabilitating international criminals goes beyond the issue of solely securing adequate imprisonment conditions and services that are essential to a humane treatment of prisoners. In order to appropriately address all dimensions or facets of perpetrators' rehabilitation (namely, personal, moral, social and judicial facets), a constructive effort has to be made so as to address the factors essential to the crime etiology of each individual perpetrator. This is understood to be a fundamental challenge to the legitimacy of the treatment of international prisoners, since serving the sentence according to national laws also implies the application of programmes suitable mainly for "ordinary" offenders. *Chapter 4* has addressed to what extent the special rehabilitative framework of imprisonment should be modified to meaningfully contribute not only to the rehabilitation of macro-criminals, but also to the overarching aims of ICJ. Given its experience in adjudicating perpetrators of international crimes, it might also seem reasonable to suppose that the ICTY/MICT would make a case for tuning or modifying rehabilitative programmes that are offered on the national level to more constructively tackle the crime etiology of international prisoners. Yet, the broad and often ambiguous nature of the norms leaves any assumption to speculation as to what extent the ICTY/MICT is actually involved in envisaging the enforcement policy. Finally, the rehabilitation of any offender does not end with the termination of the sentence but continues well after the person has left the prison. However, in the case of ICTY/MICT prisoners, the normative framework does not provide any information on their legal status after being released from prison.

5.3 Summary

A preliminary analysis of the normative framework governing the enforcement of ICTY sentences raises serious concerns with regard to the legitimacy of enforcement practices. Similar to the framework guiding the imposition of sentences, the provisions featured in the enforcement agreements suffer from ambiguity and inconsistency. This has been particularly noted with regard to the penal purpose(s) guiding the enforcement, concrete means and programmes to achieve these purpose(s), standards of enforcement and the non-transparent division of prerogatives in enforcement between the national and the international level. Arguably, in practice, this is very likely to result in an unequal approach and treatment of international prisoners (as, for instance, noted in the cases of *Krstić* and *Plavšić*), discretionary decisions as well as an imprisonment policy that is based on pragmatism rather than on sound penological theory and principles. Not only does that diminish the potential of actually contributing to personal, moral, social and legal facets of prisoners' rehabilitation; it weighs heavily on how the enforcement of sentences is perceived among the prisoners, the international community as well as societies affected by the conflict, consequently having negative implications for attaining the overarching aims of ICJ.

The issue of purposeful enforcement of international sentences as well as the level of standardization in the developed approaches to the treatment of international criminals demand further exploration which will be provided through the following empirical investigation and the analysis of practice pertaining to the enforcement of ICTY sentences. As such, it will provide a valid ground for discussion on the improvement of the system for the enforcement of international sentences.

Chapter 6

Enforcement of ICTY Sentences in Practice

6.1 General Policy on the Enforcement of ICTY Sentences

6.1.1 Rationale behind the decision to enforce sentences outside the state of origin of the prisoner

Previously, it has been argued that the basic rationale for enforcing ICTY sentences outside the former Yugoslavian states was based on humanitarian reasons and served to ensure effective enforcement.¹¹⁰⁰ However, the introduction of the Rule 11 *bis* – allowing the cases of mid- and low-ranking accused to be transferred to and adjudicated at national courts – suggests that the humanitarian rationale became redundant and that it is predominantly the concern for sentences to be effectively enforced that prevents them from being enforced in national prison systems of the former Yugoslavian countries. Despite such a rationale only being implied in the 1993 Secretary General’s report, the ICTY/MICT personnel in charge of enforcement matters admitted to its on-going practical relevance. As indicated by an ICTY/MICT legal officer, “[W]ell, that was the decision by the Security Council, so when they adopted the Statute, [...] coming with that was Secretary General’s report which said, basically, [that] the time is not right for enforcing the sentences in the former Yugoslavia, the conflict is still ongoing, it’s an inter-ethnic conflict, it’s not a good idea to send the people if they cannot hold the trials, it’s not a good idea to send the people back there to enforce their sentences.”¹¹⁰¹ Notwithstanding almost 20 years that have passed after the conflicts, the rationale is still being upheld by the Security Council despite continuous bids from the former Yugoslavian states to allow them to enforce international sentences, apparently regardless of prisoners’ nationalities.¹¹⁰² Partly, this is based on the perception that the former Yugoslavian states have not done enough to condemn the atrocities committed on their behalf and therefore cannot be

1100 See *Chapter 5*.

1101 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1102 “*So it’s come up over the years with different countries from the region asking to be able to enforce sentences of their nationals convicted by the Tribunal, or any nationality either. They said they would take any: Serbia would take Bosnian Muslims etc.*” (interview with Legal Officer B at the ICTY/MICT, 15/06/2015).

trusted to ensure an effective enforcement of international sentences according to the rule of law. Taking the example of Mr. *Ratko Mladić*, the Main Staff Commander of the Army of Republika Srpska, currently accused in front of the ICTY for, among others, genocide committed against Bosnian Muslims in Srebrenica, the same ICTY/MICT legal officer affirmed this, claiming that “[T]here is an idea, you know, which is not my idea, that he would be treated like a king, right? In prison, because he is still perceived as a hero in Serbia and not as a person, you know, who – possibly – committed violations against international criminal law during the conflict.”¹¹⁰³ Closely tied to this notion is the perception that the current level of achieved reconciliation between formerly warring states still does not permit sentences to be enforced in the states of origin: “[T]he feeling in the broader international community is that there hasn’t been done enough towards reconciliation [among former Yugoslavian states] and that to send back, let’s say, Mr. Mladić, if he is convicted, to Serbia to serve his sentence, would not bode well, you know, with Bosnia or with Croatia.”¹¹⁰⁴ Apparently, feelings of mistrust towards the capability of governments in each former Yugoslavian state to impartially and effectively enforce international sentences are particularly strong among victims who are vehemently opposing enforcement in the states of origin. The ICTY/MICT officer further said: “Yes, it is a political decision, but this is the downside of that decision: the downside is that victims don’t want it, you know? The victims do not want to see these people come back and serve their sentences in their communities, they don’t trust that. The women of Srebrenica do not trust that the Serbian authorities will properly enforce the sentence of Mr. Mladić [...], it would hurt them a lot, there would be a powerful force lobbying against that.”¹¹⁰⁵

Clearly, the prevailing rationale for exempting the enforcement of international sentences outside the former Yugoslavian states continues to be the one of risk assessment. There is a strong concern that enforcing the sentences in the states of perpetrators’ origin might destabilize the ongoing process of reconciliation between different ethnic groups and peace in the region. However, the concern does not seem to be placed on actions of individual prisoners but rather on their general status and its presumed significance for societies in transition. The perception is that none of the societies in transition have separated themselves sufficiently from dangerous policies that allowed for the commission of crimes in the first place, in order to condemn atrocities and to assure the impartial enforcement of sentences that would maintain the expressive punitive component. Subsequently, the concern is that this might cause an aggravation among other strata of the population, particularly the victims, which could potentially re-instigate unrest in the region.

1103 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1104 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1105 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

As admitted by the ICTY/MICT official, it is a decision based on perceived political implications, yet whether the status of each and every ICTY prisoner holds such implications in reality remains uncertain. Another ICTY/MICT official commented on what the position of the Tribunal/Mechanism is: “[U]nless the Security Council authorizes it, we are not in a position to enforce sentences in the region”,¹¹⁰⁶ despite the opinions on the validity of such an approach differing among the personnel of the Tribunal/Mechanism. For instance, one interviewed ICTY/MICT legal officer indirectly affirmed the validity of the risk-based rationale adopted by the Security Council: “In my personal opinion, leaving all political consideration and sensitivities aside, I do think that serving a sentence in a country the language of which you speak, where your relatives are, there are advantages to that, I’m sure. Whether I would support it for other reasons – reasons that are more of a judicial nature –, that I’m not so sure.”¹¹⁰⁷ Another interviewed ICTY/MICT official had a contrasting opinion, opting for the enforcement of sentences in the perpetrators’ states of origin: “[A]s for the Secretary General, that report was in 1992 [in fact 1993, remark by the author], that was a long time ago, [...] and countries have made a lot of progress. I think we should recognize the progress they have made, you know, and we should show some trust. [...] I mean, there will always be a small circle of the population that will do that [glorify convicted war criminals]. And they will do that in the beginning, but they won’t sustain it, I don’t think. That’s my view, and I think the governments will be very careful to try and send the correct messages to the population. [...] I think a lot of progress has been made in the former Yugoslavia, you know, and it was a peaceful country before.”¹¹⁰⁸

As for the prisoners, it seems that on an international level, no substantial assessment of the risk convicted persons might present to regional stability – which could argue for their exclusion from enforcement in their states of origin – is undertaken prior to the enforcement of their sentences. When asked whether the convicted persons are being evaluated in terms of their criminality or personality prior to being sent to prison, an ICTY/MICT legal officer said: “I don’t think so, I mean, that’s normally part of the sentence they get, right? So I think they evaluate the individual circumstances of a person when they impose the sentence, but when it comes to enforcement, we don’t, you know, we don’t then, you know, re-evaluate that. When it comes to applications for early release, then we do go back and evaluate that.”¹¹⁰⁹

In this context, the politically over-generalized conception of “being treated like a king” in prisons of their home states as the main concern for the adoption of the current enforcement policy should also be put in the perspective of contemporary

1106 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1107 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1108 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1109 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

research on imprisonment and the impact it has on inmates. With regard to the general population, it would be fair to assume that perceptions differ from a person to a person on how harsh imprisonment ought to be. For example, to an inmate in an American maximum-security prison, prison conditions in many European prisons might already have a “royal” quality, despite being considered as being average in regional human rights reports and despite national prisoners maybe still experiencing excruciating pains. As recognized in the contemporary rehabilitative movement and international prison standards, a limitation of liberty also inherently entails many other limitations, pertaining to the loss of one’s previous identity, of social roles and relationships, which are of essential meaning to human beings; yet this can hardly be compensated solely by more “luxurious” prison conditions. The deprivation of liberty by itself is already considered to fulfil an adequate retributive/expressive purpose and there is a strong push on the international level for a normalization of prison regimes in terms of approximating as closely as possible life in the community in order to reduce all other negative impacts it entails and due to which it could amount to cruel and inhumane – and therefore illegitimate – punishment. Therefore, when putting forward a concern for prisoners experiencing a “royal treatment” as the fundamental ground for adopting the enforcement policy as it is now, it would be useful – in order to justify the validity of such reasoning – to indicate in which aspects exactly this prison treatment would risk losing its punitive component, therefore potentially resembling the “one of a king”.

6.1.2 Governing purpose and expectations about the enforcement of sentences

As shown above, multiple reasons seem to govern the decision to exclude the enforcement of sentences from the perpetrators’ states of origin – from the concern that current regional regimes are not impartial enough to ensure an effective enforcement – as well as the impact such enforcement might subsequently have on various victim groups – to the blatant hostility of victims towards the possibility of perpetrators serving their sentences in an environment where the crimes were committed. Correspondingly, there are differing opinions on the part of ICTY/MICT personnel on the validity of these reasons.

When it comes to the purpose the imprisonment of ICTY convicts is expected to achieve, there seems to be similar reluctance by ICTY/MICT personnel to firmly state such a purpose or the means through which it ought to be achieved. An interviewed legal officer said about this issue: “I mean, my background is criminal law, so I do know the principles of sentences and punishment, it’s rehabilitation, and these are elements that are taken into account, but what would be the Mechanism’s or the

UN's mission statement when it comes to enforcing sentences, I don't know; bringing to justice, you know, those most responsible, I think that is in its Statute."¹¹¹⁰ The other ICTY/MICT officer was similarly ambiguous, saying: "You know, the purpose is really to enforce the sentence, right? The judicial order, to enforce the sentence. What we expect is that prisoners will be housed in prisons that meet international standards and to serve their sentence, basically. [...] I mean, we don't have... I don't think we have broader expectations, we have hopes... I mean, you know, we have hopes that people will accept the sentences being imposed, be remorseful about crimes they've been convicted for and, you know, seek rehabilitation in a sense that wanting to make positive contributions, you know..."¹¹¹¹

Despite rehabilitation being indicated as one of the concerning principles, similar to the context of trial proceedings, it conveys the impression of being a desired by-product of the enforcement process rather than a concrete aim towards which substantial efforts should be undertaken. As admitted by an ICTY/MICT legal officer, this is due to the limitation of the enforcement system where the ICTY/MICT has to rely on the assistance of national prison systems and, accordingly, their services and programmes to enforce the sentence: "If we had our own prison, we could have specialized staff that deals with highly educated senior official-level people. We rely on national states whenever it comes to any sort of assessment on rehabilitation etc., we rely on the opinions of the national states and their prison administration."¹¹¹² The outcome of such a delegation of prerogatives within the system, as well as how it corresponds to expectations of prisoners, will be further explored in the following sections.

6.2 Designation of the State of Enforcement

6.2.1 Negotiation of enforcement agreements

As indicated in the ICTY Manual on Developed Practices, the Registry of the ICTY/MICT is tasked with identifying states that would be willing to enforce sentences and, consequently, with negotiating and concluding general or ad hoc enforcement agreements with them.¹¹¹³ The reason why Germany is the only enforcing state that has made ad hoc agreements is that due to its federal structure, the regulation on the enforcement of prison sentences falls under the competency of each individual federal state; therefore, it is upon the respective state to decide whether or not it will

1110 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1111 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1112 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1113 ICTY/UNICRI 2009, p. 152.

accept ICTY prisoners.¹¹¹⁴ There does not seem to be a uniform way to acquire support from the states, and throughout the years, representatives of the Tribunal/Mechanism have resorted to various venues of approach when mobilizing states to sign the enforcement agreements. For instance, directly approaching the embassies in the Netherlands has been one way; additionally, discussions with the Permanent Mission to the UN Headquarters in New York, seminars on the enforcement of sentences organized by the European Union's Presidency in The Hague as well as mentioning enforcement needs during the Tribunal's bi-annual Diplomatic Seminars have all been useful in encouraging states to sign the agreements.¹¹¹⁵

When discussing the criteria of importance the state would have to fulfil to be considered for concluding an enforcement agreement, an interviewed ICTY/MICT legal officer mentioned several ones.¹¹¹⁶ First, the ICTY/MICT Registry is bound by geographical limitations, excluding the former Yugoslavian states as potential enforcement states for the reasons discussed above. Second, the conditions of imprisonment play an important role. While initially maintaining that they need to meet international standards in any of the target countries the Tribunal/Mechanism calls, the officer admitted that they (at the ICTY/MICT) "try to keep an open mind [...] with regard to the choice of states", arguing that "even if the conditions of imprisonment overall are questionable, many states do have the facilities that are funded with the UNDP [United Nations Development Programme] money, and those facilities meet the international standards".¹¹¹⁷ Arguably, more of an informal factor – even though seemingly carrying great significance – might be the reason why the ICTY/MICT would also agree to agreements with states that have questionable prison conditions. While legally not limited to that, all enforcement agreements have so far been made with European states, apparently due to the humanitarian notions shared at the ICTY/MICT: "We want as much as possible to facilitate family links, family ties, so we're not aiming to enforce sentences on a different continent, for it would make it impossible for family members to travel to see the convicted persons", the interviewed officer said.¹¹¹⁸ Keeping these criteria in mind, the Registry bases its decisions regarding which state to approach on internal research by its officials, including consulting publicly available information, CPT and Council of Europe reports.¹¹¹⁹ Additionally, decisions can be based on the discussions ICTY/MICT officials personally have with the states as well as on the assurances given by them: "In identifying whether we want to negotiate the agreement with the state, we would also go

1114 Interview with the director of a German penitentiary, 22/02/2013. So far, all ICTY prisoners incarcerated in Germany have been sent to different federal states, as indicated by the ICTY prisoners in German prisons whom the author had the opportunity to interview.

1115 ICTY/UNICRI 2009, p. 153.

1116 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1117 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1118 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1119 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

on a mission to meet with the representatives of the state”, said the ICTY/MICT official.¹¹²⁰

While not directly addressed as a criterion of importance for deciding which state to approach to make an enforcement agreement, there is a factor the ICTY/MICT considers when deciding on where to transfer convicted persons to and which might also be relevant in this context indeed. As admitted by the interviewed official, the ICTY/MICT officers are permanently approaching and consulting states, even if not sending out particular requests for actual sentences, in order to obtain the preliminary acceptance of sentences from the states.¹¹²¹ As explained by the officer: “[S]o we would have states that would say, ‘Okay, between now and the closure of the ICTY or the Mechanism, we’ll enforce two more sentences’, so we have that ‘in the bank’, you know, we can use that, so those states that would have this open commitment to enforce sentences, those would come first when we would have an actual sentence to enforce.”¹¹²² It seems possible that when initially approached for the purpose of making an enforcement agreement, a state could also indicate a fixed quota of prisoners it would be willing to accommodate, which might then influence the decision on whether or not to make the agreement with the respective state. Arguably, even with poor prison conditions, a state which would be willing from the onset to accept five or seven or ten prisoners might be much more interesting for the ICTY/MICT than one with reasonably good prison conditions which, however, only agrees to accept one prisoner, for example.

While arguing that with 17 enforcement agreements, the Tribunal/Mechanism is in a more favourable position than other international criminal tribunals, the officers admitted that they are always looking for additional agreements and that from the beginning, finding the enforcement states has been one of the biggest challenges for the ICTY.¹¹²³ “[W]e are not that fortunate to have states knocking on our door and asking to enforce sentences”, said one interviewed legal officer, further explaining: “It’s a financial commitment that the states take.”¹¹²⁴ As stated in the enforcement agreements, the states are responsible for covering the costs of enforcement themselves. “[I]f you look at the UK, I think it’s like a 100,000 £ for one prisoner per year to enforce the sentence”, said the ICTY/MICT legal officer, while the other one added: “And this is not taking into account specific things, like translation services when they’re not in place but have to be brought in. Also, it’s not just translation for documents, but also when a prisoner has medical issues and goes to a doctor, you

1120 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1121 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1122 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1123 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015; interviews with Legal Officers B and C at the ICTY/MICT, 15/06/2015.

1124 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

know, in order to be able to understand or sign documents; or if they have interactions with the staff and things like that, a priest, or television channels from their region".¹¹²⁵ In addition, by concluding the enforcement agreements, the states would be "signing up for some legal issues, in a sense that you have two jurisdictions which are working simultaneously", as explained by the ICTY/MICT personnel.¹¹²⁶ It is no secret that the ICTY/MICT has been undergoing trials and tribulations in the attempt to negotiate enforcement agreements as there is a number of additional reasons that might detract states from entering into them. For instance, next to the already addressed monetary burden, the ICTY Manual on Developed Practices also lists prevailing popular/political hostility towards foreigners in the state, the corresponding reluctance of governments to take actions that might risk popular/political opposition, the reluctance of governments to accept inspections of their prisons by external monitoring bodies as well as a state's lack to provide an appropriate socio-cultural environment in its prisons for persons from former Yugoslavia as reasons why a state might not accept to enter the enforcement agreement, or would heavily negotiate it.¹¹²⁷ For example, the fact that enforcement agreements with Spain or certain German federal states assign monitoring prerogatives exclusively to the ICTY/MICT (in the case of Spain, also to national supervisors) might very likely be due to the mentioned unwillingness of these states to have their prisons inspected by foreign inspectors. Inspecting the conditions of an ICTY prisoner could also indirectly entail an inspection of the rest of the prison population, which might further entail unwanted problems for the state if these conditions do not meet international standards.

Due to the variety of the presented constraints that might exist on the side of the states to enter into enforcement agreements, one may wonder why states do agree to enter the enforcement agreements at all, given that they are formally not obliged to do so. The ICTY/MICT personnel cite a sense of obligation to do a service to the international community they try to appeal to when negotiating consent from the states: "You know, it's sort of like, these international tribunals that have been set up are doing a service to the international community, right? We've created an ear for accountability, putting an end to the impunity and the consequences of what we do is that we need assistance in fulfilling our mandate, you know, and they should have an obligation, as members of the international community, to take a part of that burden by enforcing sentences. It's like, you know, international public service to do so, those sort of things. [So] most of the countries do it because, I feel, you know, it is part of their obligation."¹¹²⁸

However, there is a feeling that some states consent to agreements due to more pragmatic reasons, such as projecting a certain image in the international community,

1125 Interviews with Legal Officers B and D at the ICTY/MICT, 15/06/2015.

1126 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1127 ICTY/UNICRI 2009, p. 152.

1128 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

which can have potential benefits for the state, particularly in international relations: “Some countries want to look like, the rule of law is fine and everything, you know, they might sign up for that purpose [...]. [...] you know, like, Serbia signed an [enforcement] agreement with the ICC to take their prisoners, now why did they do that? Because they wanted to show everybody, actually, that they are ready to take their own nationals from the Tribunal.” Similarly, given that in the majority of general enforcement agreements, the Tribunal/Mechanism conditions the quality of imprisonment in enforcing states with meeting international prison standards, the impression is that some states also do it to display the quality of their prison conditions: “You know, it’s like, if we give them convicts, it must mean [their] prisons are pretty good, so for some of them, that might hold relevance”, said one interviewed ICTY/MICT legal officer.¹¹²⁹ With reference to the findings of *Cavadino’s* and *Dignan’s* comparative study on penal systems, good prison conditions are a strong indicator of a rather developed welfare policy in the respective state, a generally good economic status of its citizens and limited status differentials.¹¹³⁰ Presumably, then, a state’s desire to promote good prison conditions via signing an agreement on the enforcement of international sentences is directly linked to its desire to promote its economic well-being in the international community, thus increasing its chances of potentially becoming a partner to lucrative international economic agreements.

Despite the indicated willingness to uphold the rehabilitative principle – prison conditions in potential enforcement states ought to match minimum prison standards, therefore corresponding to a general part of the rehabilitative framework as promoted in international instruments –, it seems that negotiating enforcement agreements is an exercise in diplomacy, which can in practice quite likely be governed by pragmatism on the side of both the ICTY/MICT and the states, rather than an insistence on the best possible rehabilitative opportunity for international prisoners. Inherent limitations of the system (such as the fact that the Tribunal/Mechanism has to rely on national prison systems to enforce its sentences and that the enforcement states have to bear expenses of such an enforcement alone) have over the years quite likely put the ICTY/MICT in the situation of having to approach a state which, from the standpoint of the rehabilitative purpose (e.g. geographic proximity to the states in the region, prison conditions), might not be the best choice, yet it had to suffice simply in order to have sentences enforced. Contrary to the option the Statute of the ICC envisioned – to have the host state (the Netherlands) as the last resort for the enforcement of sentences¹¹³¹ –, there is no such option for the ICTY prisoners who have to be transferred to other states as fast as possible; otherwise, they are left “stranded” in the UNDU in The Hague: “[W]e had one or two particular convicts who stayed with

1129 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1130 See in detail *Chapter 4.1.1.5*.

1131 See the Rome Statute of the International Criminal Court, Article 103, para. 4. In such a case, it is predicted that the costs of enforcement in the host state shall be borne by the ICC.

us for more than three years, because we could not find a state willing to take them”, said one ICTY/MICT official.¹¹³² Other officials pointed that the agreement the ICTY/MICT has with the host state (the Netherlands) does not allow the prisoners to serve their sentences in the UNDU.¹¹³³ “Yeah, they definitely want them out, too”, confirmed one official.¹¹³⁴ Apparently, the pressure to find enforcement states as fast as possible was firmly placed on the Registry during the presidential mandate of judge *Fausto Pocar* between 2005 and 2009 and has been maintained as an informal policy by other ICTY Presidents ever since. “He was furious about the fact”, continued the official, “saying ‘It’s a detention unit and not a prison’, and we had people who had been convicted and been there for a year or longer, because we couldn’t get enforcement states to take them. [...] So he ordered the Registrar to basically get them out as quick as possible, you know, [...] and that’s when we really started the first round of lobbying, trying to get enforcement states. [...] So, you know, as a practical matter, we’re always looking for enforcement states, to get agreements – ‘I’ll take three, I’ll take two’ –, even though we might not have that many convicted persons [...], just to get the process going.”¹¹³⁵

Even if the ICTY/MICT eventually amassed a sufficient number of enforcement agreements with states willing to enforce the sentences, getting a state to actually accept a prisoner in a particular case proved to be an equally complex, if not even more daunting task.

6.2.2 Designation of the state of enforcement in a particular case

Even though negotiations for enforcement agreements develop independently from individual penal proceedings, for a concrete prisoner, the process of finding a state of imprisonment may already start after the first-instance judgement has been passed. According to the “Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve His or Her Sentence of Imprisonment”,¹¹³⁶

1132 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1133 Interviews with Legal Officers B and C at the ICTY/MICT, 15/06/2015.

1134 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1135 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1136 See Mechanism for International Criminal Tribunals “Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve His or Her Sentence of Imprisonment” (MICT/2 Rev. 1, 24 April 2014; hereinafter 2014 MICT PD on State Designation); Mechanism for International Criminal Tribunals “Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to serve His or Her Sentence of Imprisonment” (MICT/2, 5 July 2012; hereinafter: 2012 MICT PD on State Designation); ICTY “Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment” (IT/137/Rev. 1, 1 September 2009; hereinafter: 2009 ICTY PD on State Designation); and ICTY “Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a

the procedure consists of two phases: first, the Registry of the Tribunal/Mechanism makes, by means of diplomacy, a preliminary approach to a potential state of enforcement with which an enforcement agreement has been signed in order to obtain its indication of readiness to receive a convicted person. Looking at the provisions, the “Practice Direction” is vague with regard to the criteria the preliminary decision of the Registry is supposed to be based on. Only the 2009 version provides more concrete information about this by listing the relevant factors, such as the national law of the relevant state in relation to pardon and commutation of a sentence, the maximum sentence enforceable by the state, the equitable distribution of convicted persons among all the states, but also any other relevant considerations related both to the ability of states to enforce a particular sentence as well as to the case at hand.¹¹³⁷ However, to what extent the Registry adheres to these criteria in practice is unclear, given that neither the previous 1998 version of the “Practice Direction” nor the subsequent 2012 nor 2014 versions mention them.

Subsequently, if the state preliminarily agrees to accept the convict, the Registry will approach the President of the Tribunal/Mechanism who should consequently approve or decline his/her transfer to the particular state on the basis of certain criteria such as the convicted person’s marital status, the location of his/her family and their monetary resources for visiting, any medical and psychological report pertaining to the convicted person, his/her linguistic skills, the general rules of imprisonment in the state, rules governing security and liberty as well as those pertaining to early release, pardon and a commutation of the sentence. It is also listed that the President shall take into account the desirability of serving sentences in states that are within close proximity or accessibility of the convicted person’s relatives. Additionally, the President ought to take into consideration any relevant views on the choice of the state previously expressed by the convicted person to the Registry. This latter criterion, introduced in 2012,¹¹³⁸ underlines the rehabilitative nature of the criteria the President is supposed to take into account prior to rendering the decisions and, comparatively speaking, makes a stronger case for the choice of state based on the rehabilitative principle over previous versions of “Practice Direction” where the decision to consult the opinion of the convicted person was based on the discretion of the President. Notwithstanding this formal improvement, the fact remains that the President still has the discretion to decide which opinion of the convicted person should be considered to be relevant and which should not. Furthermore, the practical relevance of these rehabilitation-oriented criteria can be brought into question if considering that the factors they take into account are opposite to those the Registry might take into account when making a preliminary choice of the state they then suggest to the President. For example, knowing that in their agreements, the Slovak Republic

Convicted Person is to Serve His/Her Sentence of Imprisonment” (IT/137, 9 July 1998; hereinafter: 1998 ICTY PD on State Designation).

1137 2009 ICTY PD on State Designation, Article 3.

1138 2012 MICT PD on State Designation, Article 4, para. i.

and Ukraine have limited the enforcement for those sentences that exceed upper maxima prescribed by their national laws, this alone removes them from the list of potential enforcing states, even though geographically, they might be closer to the convicted person's family and relatives than other states, therefore allowing them, presumably, to maintain contact more easily. Adhering to other preliminary criteria – such as an equitable distribution of prisoners among the states, the limited quota of prisoners some states might be willing to accept due to monetary and political/popular concerns¹¹³⁹ as well as a concern whether the prisoner might serve as a witness in further proceedings of the Tribunal/Mechanism¹¹⁴⁰ – can further drastically diminish the impact of the rehabilitation-oriented criteria that are left for the President's consideration.

In order to better understand which relevance is attributed to all aforementioned criteria in practice, revealing insights have been obtained from a variety of interviewees who in different capacities have been involved in the procedure of the designation of an enforcement state for ICTY prisoners.

6.2.2.1 Relevant criteria for the designation of a state

As implied by the “Practice Direction”, there can be a great discrepancy in practice between the states that would best suit the needs or concerns of the prisoner from the state that is actually designated. According to the ICTY/MICT officials, while they consider all factors listed in the “Practice Direction” to be worthwhile, in practice, the decision heavily depends on which state would actually be willing to take the convicted person. “International cooperation was good [...], however, we are not in a very beneficial situation in that we could look at 17 Agreements and think, oh, this would be a good fit, or this would be better, you know, we don't have that liberty because state cooperation is voluntary, but not that voluntary. [...] So, unfortunately, we didn't have this ‘pick-and-choose’ ability, no, we really depended on which state was willing to take the convict”, said one ICTY/MICT legal officer.¹¹⁴¹

Translated into practice, such a dependence on the states means that before reaching out to a particular state in order to obtain its consent to enforcement, the Registry would take several factors into account: the maximum duration of the sentence that can be enforced in the state, the number of sentences the state is willing to enforce

1139 See *Chapter 6.2.1*.

1140 See, e.g., 2014 MICT PD on State Designation, Article 4, para. b. The circumstance that this is also taken into account when deciding upon the designation of a state further implies the relevance of pragmatic concerns over those for the treatment of an individual prisoner. For example, if it is foreseen that due to the plea bargain made with the prisoner, it might be necessary for him/her to recurrently return to the Tribunal's headquarters in The Hague so as to testify in other trials, then it might be (from a practical point of view) more pragmatic to imprison him/her in one of the countries neighbouring the Netherlands, as the transport might then be easier and cheaper to arrange, not to mention faster.

1141 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

and the number of sentences it is willing to enforce within a particular time frame. While the first factor is mandated by legal concerns some states had when negotiating their agreements, the second and the third one are conditioned by more pragmatic concerns the states might share at any given time: “It costs money, and if you look, most countries have problems with populations in prisons, you know, they are overpopulated”, argued one interviewed ICTY/MICT official, continuing that it is also the status of prisoners that might deter some states from accepting them: “They are not the average detainees, they don’t speak the language, they are not going to be after put in rehabilitation programmes probably, they don’t know what prison population they can fit them in, whether they will slot in nicely, they don’t want any disruptions, and they want prisons to be calm.”¹¹⁴² Given these concerns, the states might be reluctant to agree to the enforcement of an indefinite number of international prisoners. “People aren’t bashing down on our doors, you know”, the officer continued, “so we might know in advance that Germany has agreed to enforce three more sentences, Italy has agreed to enforce two, you know, so we have this sort of idea [which states to approach].”¹¹⁴³ Among the states preliminarily indicating their willingness to accept prisoners, if there were any imposing the condition that within a certain time frame, they would enforce only a certain number of sentences, those states would then be the first ones to be contacted when it comes to an actual sentence to be enforced, as further clarified by another ICTY/MICT officer.¹¹⁴⁴ “Having said that”, the officer continued, “if there are crucial factors that would weight towards one state over another – for medical reasons, because the family was living in that state –, those would be considerations worthwhile.”

The officers therefore admitted that personal considerations with regard to the prisoner are also taken into account, especially if they are of a humanitarian concern.¹¹⁴⁵ However, the factors that carry humanitarian relevance are to be determined on a case-by-case basis, according to the principle of individuality, as different factors might appropriate a different meaning for different prisoners. “The key element is, we all have to be reminded that we’re dealing with human beings for whom the relevance of concerns varies from one to the other. For some of them, something might be of less relevance than for the others, so there’s always an element of personal assessment when dealing with a person, so it’s difficult”, explained the interviewed ICTY/MICT officer.¹¹⁴⁶

1142 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1143 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1144 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015

1145 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015; interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1146 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

The factors that might be considered to carry a humanitarian concern for prisoners in practice resemble the rehabilitation-oriented criteria to which the President – according to the “Practice Direction” – also subsequently ought to pay attention to when approving or disapproving the choice of the state. For example, the officers listed health of the prisoner as a significant factor, explaining the possibility that a prisoner would require a special treatment which might not always be available in every prison hospital.¹¹⁴⁷ Consequently, this would imply that among the states that indicated their willingness to accept prisoners, the one which has medical facilities that can provide adequate treatment would fare better as a potential candidate for the enforcement than the other states. Similarly, residence of family members in the state of enforcement or knowledge of the language spoken in the prison would be factors of a similar significance that might influence the decision on the state. However, there is no standard procedure where one factor might be attributed a higher relevance over others in all cases.¹¹⁴⁸ The officials also stressed the tremendous sense of isolation when serving a sentence in a foreign country as an important personal consideration of prisoners and as the one which poses a continuous challenge for the Tribunal/Mechanism when it comes to the choice of a state: “I will personally look for who else is in that prison, what’s the population, are there people that speak the [prisoner’s] language there, or are there other prisoners with whom this prisoner might have some sense of community, you know, any connection in that prison, how far is it from where he lives”, said one interviewed official.¹¹⁴⁹ However, the impact of personal consideration on the choice of the state is to a large extent constrained by the selection of states that are actually willing to enforce sentences as well as the quota of prisoners they might be willing to accept. “I don’t think we can underestimate the factor of state-willingness, you know, which states are actually willing [to enforce the sentence], and some states might say: ‘We’ll take four’, so you know, some states might [also] reach their capacity”, stressed the official, explaining the reality of state designation, which in the worst-case scenario – not having a willing state – can result in diplomatic pleading and the acceptance of whichever state eventually indicates its willingness.¹¹⁵⁰ “A few years ago”, the official continued, “we had all these [convicted] people, and we had no enforcement states. So we were going around – basically, one embassy helped us, they set up this whole round-table conference, and we gathered all [other] embassies and basically begged them to take our prisoners. We had someone coming from Norway to give a presentation about what a fantastic experience it was to take an ICTY convict, so, you know, we had to lobby states.”¹¹⁵¹ Dependence on the willingness of the states is also the reason why the Tribunal/Mechanism usually approaches one state at the time, even though the

1147 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1148 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1149 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1150 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1151 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

“Practice Direction” allows it to send an enquiry to multiple states simultaneously.¹¹⁵² Admittedly, this is done so in order to avoid the potential embarrassment from having more than one state agreeing to enforce a sentence and the Tribunal/Mechanism having to decline more than one offer,¹¹⁵³ as the concerned state might be inclined to take the Tribunal/Mechanism’s decline of its help into account next time it is approached. Similarly, while not explicitly stated, the potential embarrassment of having to decline a state’s offer might be the reason why the “Practice Direction” does not any longer oblige the Tribunal/Mechanism to commence with the enquiry towards the states immediately after the first- or the second-instance judgement is passed, but only allows it to start making enquiries after the first-instance judgement has been issued.¹¹⁵⁴ Part of the criticism aimed at the sentencing practice of the Tribunal has also concerned great discrepancies in the outcomes of certain trials where after the first-instance conviction, the defendant was acquitted in the second instance. In such a scenario, the embarrassment stems from the circumstance that the Tribunal/Mechanism might already have had procured the state of enforcement prior to the final judgement, only to be forced to decline it after the defendant was acquitted.

Notwithstanding the indicated dependence on the dispositions of national states, the ICTY/MICT officials insisted that if prisoners expressed concerns with regard to their health and safety in prisons, they would share these concerns and make their best effort to send them to the state that has the capacity to deal with their medical condition and where they would feel safe.¹¹⁵⁵ The latter factor received increased prominence after the failed assassination attempt on *Radislav Krstić* in the UK, after which he was transferred to serve the remainder of his sentence in Poland.¹¹⁵⁶ Allegedly, the reason for this was his insistence on a particular socio-cultural environment in prison where he could feel safe. As one interviewed ICTY/MICT prisoner admitted, for Mr. *Krstić*, this meant a prison without a particular prison population and where a familiar language was spoken: “He wanted some eastern state where he could speak Russian and where there are no Muslim fundamentalists [in prison] at all. [...] And he says it’s great in Poland, all in order, [...] they are treating him properly.”¹¹⁵⁷

Furthermore, the ICTY/MICT officials concluded that in case there are no particular personal considerations to take into account, they would base their decision upon the

1152 ICTY/UNICRI 2009, p. 155; see also 2014 MICT PD on State Designation, Article 2; 2012 MICT PD on State Designation, Article 2; 1998 ICTY PD on State Designation, Article 2.

1153 ICTY/UNICRI 2009, p. 155.

1154 See 2014 MICT PD on State Designation, Article 2, and 2012 MICT PD on State Designation, Article 2: “This engagement [of a communication process with enforcement states] *may commence* upon the issuance of the trial judgement and conviction of an accused at first instance.”

1155 Interviews with Legal Officers B and C at the ICTY/MICT, 15/06/2015.

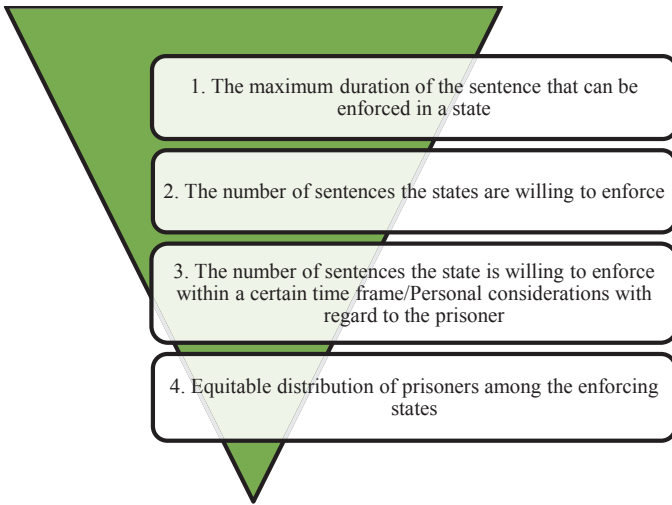
1156 See also *Chapter 5.2*.

1157 Interview with an ICTY prisoner in Estonia, 21/10/2015.

principle of an equitable distribution among the states that have indicated their willingness to accept prisoners: “You know, if Sweden has just accepted three, then we would not approach Sweden, we would approach Denmark which would have last accepted someone two years ago, you know, so it’s equitable distribution that would be the main criterion then.”¹¹⁵⁸

After the Registry makes a preliminary choice of state and the respective state accepts it, it will forward this recommendation to the President, together with the reasoning upon which the preliminary choice is made, and it then is upon the President to either confirm the choice or deny it. Given the precarious nature of the designation process, it is likely that the President would simply support the preliminary choice of the state already made by the Registry. However, even with the approval of the President and an official enforcement request issued to the chosen state, the state still has an option to decline the enforcement of the sentence.¹¹⁵⁹

Figure 5 *Filtering the criteria which govern the designation of the state of enforcement by the ICTY/MICT – the “funnel model” of the state-designation criteria*



The insight provided by the ICTY/MICT officials reveals that – notwithstanding their concern for the personal considerations of prisoners – the designation of the state of enforcement might in practice very well resemble a lottery system, where the

1158 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1159 See 2014 MICT PD on State Designation, Article 7; 2012 MICT PD on State Designation, Article 7; 2009 ICTY PD on State Designation, Article 8; 1998 ICTY PD on State Designation, Article 8.

“choice” of the state is pretty much conditioned by its willingness (or unwillingness) to take a prisoner at any given time. Arguably, considerations with regard to the individual prisoner will be seriously taken into account only if there is a sufficient quota of willing states among which the choice can be made, and if the number of sentences these states are willing to enforce is large enough to allow for such a choice. Having said that, the legal officers at the ICTY/MICT admitted that by merging the ICTY and the ICTR into the MICT, a progress has been made in terms of how the opinion of convicted persons with regard to the choice of the state is treated, explaining that (as opposed to the time before the MICT) the convicted persons now have the opportunity to comment on the state the Registry has in mind to be recommended to the President, as well as to be heard by the President with regard to the state of choice through means of written communication.¹¹⁶⁰

The opinion of convicted persons regarding the choice of the state requires special attention insofar as different reasons might hold a different relevance for them in terms of which state would best suit them. Furthermore, the criteria they consider to be important might be likely to differ from the criteria the ICTY/MICT holds important when considering the characteristics of an individual prisoner. As previously indicated, when it comes to the transfer of convicted persons between the states on the basis of bilateral or multilateral agreements, an involuntary transfer would risk violating the rehabilitative principle, as serving the sentence in a state the prisoner opposes could easily amount to a violation of his/her right to family life as well as his/her freedom from torture, inhuman or degrading treatment or punishment.¹¹⁶¹ It is therefore necessary to discern which criteria in this regard is important for the prisoners and how they are taken into account in practice by the ICTY/MICT.

6.2.2.2 Opinion of the convicted person and other potential factors of relevance for the designation of the state

According to interviewed prisoners, their concern about where they might serve their sentences came at the forefront after their final judgements, given that in the period prior to these, they still nurtured hope to be acquitted. Most detainees in the UNDU in The Hague are usually aware of the general prison conditions in different states as they keep written contact with those imprisoned there who are able to share their experiences of enforcement. Based on this informal information and gathered from their former inmates at the UNDU, they are able to form opinions and reasons why they would like to be sent to some states and not to others.¹¹⁶²

1160 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015. The officer explicitly stated that before the activation of the MICT, ICTY personnel never sought the views of convicted persons with regard to the choice of the state.

1161 See *Chapter 4.1.3.1*.

1162 Additionally, one interviewed prisoner said that especially in the earlier years, information on what the prisons in different states are like were obtained from the UNDU guards who, based

Arguably, for most prisoners, the main criterion of relevance for the choice of the state is the *possibility to be visited by family members* – namely, wife and children – *more easily* in order to preserve families during their years of imprisonment. As one interviewed prisoner explained: “It’s their main concern, when they receive their sentences, to be able to see their children. You forget the punishment that hit you, you’re only concerned whether you’ll be able to see your family. [...] Because when you cannot see... I don’t know whether they [the ICTY/MICT] understand, we are tied to our families, and when you cannot see them, it’s a disaster, it is hell for us. I’m not being physically mistreated here, but psychologically, because my thoughts are with my family.”¹¹⁶³ As explained by the prisoners, the possibility to be visited by family members is dependent not only on the geographic distance from the family’s place of residence – and their family members usually reside in the former Yugoslavian countries –, but also on how the visits are regulated in the prison law of the enforcing state. This pertains to conditions under which visits ought to occur, as well as the number of visits to which the prisoners are entitled. The prisoners indicated great discrepancies between the Scandinavian states – namely, Norway, Finland, Denmark and Sweden – and other European states with regard to visitation regimes. The system in Scandinavian states is regarded as being the most liberal; in Finland, for example, the prisoners are entitled to private visits from their close family members (wife and children) in delegated apartments (under the administration of the prison) with multiple rooms and all necessary domestic appliances as well as minimum supervision.¹¹⁶⁴ During that time, the prisoners are allowed to spend all day and all night with their families up to a week.

Contrastingly, in Germany, the prisoners are complaining about the small number of hours they are granted for family visits. A prisoner imprisoned in one German federal state indicated how his wife and children are entitled to visit up to four days per visit; however, the frequency of visits per year is dependent on their monetary capabilities.¹¹⁶⁵ In addition, the prisoner is only entitled to spend four hours per day in a visitation room with them where other prisoners also receive visits. After each hour, the visitors are conditioned to abandon the room and to make a break before the next hour commences. “It’s the rule for everyone here, even though they promised me that they will mandate these breaks every second hour when my wife visits. But you just cannot... You have barely started to talk and they are already sending them out... And when my daughter visits with her child, and they send them out, too... And it’s

on the state they would come from, were able to give an assessment of the state prison conditions (interview with ICTY prisoner B in Germany, 02/03/2016). The prisoner further explained how, for example, Norway and Denmark rated favourably among the guards, while they were generally critical of the prison conditions in Germany and Austria.

1163 Interview with ICTY prisoner in Estonia, 20/10/2015.

1164 Interview with a released ICTY prisoner, 20/05/2014; interview with an ICTY prisoner in Estonia, 20/10/2015.

1165 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

cold outside... I told her then, better stay at home and save yourself these troubles until we see what we can do, make some written pleas, I don't know", complained the prisoner. The situation is worsened with regard to other family members, he says, who are granted four hours per month for a visit. While this might suffice for nationals whose families and friends live nearby, he continued, it is quite challenging for ICTY prisoners and their families, as travelling to see them might take several days and entail high monetary costs. "My brother once came to visit me, he flew into Germany, had to spend the night in a hotel to catch the train to come here because there were no immediate connections; was here for four hours, came back with the train and had again to spend the night in the hotel to catch the flight... It took several days, only for these four hours... And the expenses were immense", the prisoner elaborated. Due to the high costs and complicated travel arrangements, some prisoners manage to see their families only once per year (e.g. in Estonia),¹¹⁶⁶ while some others did not receive any visits during the whole time of their incarceration (e.g. in Spain and Norway).¹¹⁶⁷

When it comes to the choice of the state, another factor of importance for future prisoners is the *work detail in prison*. Interestingly, this is closely tied to visitation possibilities. Prisoners explained that in the countries where prisoners get a decent remuneration for their work in prison – for example, in Norway, Finland and Denmark –, it allows them to contribute to their families' monetary requirements to visit them, whereas those in other states do not have such possibilities, so their families have to rely on their own monetary resources.¹¹⁶⁸ One interviewed prisoner said that based on state recommendations they received from those already imprisoned in other states, the only state that fared worse than Germany among the ICTY prisoners was Estonia, due to bad travel connections for the families and poorly remunerated work in prison.¹¹⁶⁹ There, the ICTY prisoners not only do not have a possibility to work in order to provide for a living standard more tailored towards their personal preferences, but their families, if capable, also monetarily support them in order to provide for their basic necessities.¹¹⁷⁰ One prisoner incarcerated in Estonia explained that "cleaning the corridor with a broom" is the only work detail available to them, which they can be remunerated for with 10 euros per month, whereas their costs, pertaining to telephone expenses – exclusively with family members – and the

1166 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1167 See, e.g., Prosecutor v. *Darko Mrđa*, Decision of President on Early Release of *Darko Mrđa* (IT-02–59–ES, 18 December 2013), para. 25 (hereinafter: Decision on Early Release of *Darko Mrđa*, 18 December 2013); The Prosecutor v. *Zoran Vuković*, Decision of the President on Commutation of Sentence (IT-96–23&23/1–ES, 11 March 2008), para. 4 (hereinafter: Decision on Early Release of *Zoran Vuković*, 11 March 2008).

1168 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1169 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1170 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

purchase of basic groceries in the prison canteen can amount to 600 euros per month. Without the additional monetary support from their family, he said, they would not be able to maintain contact anymore, as telephone calls abroad are very expensive. Indeed, what the prisoners fear the most is the breach of family ties that might occur due to their far-away imprisonment. “Visits are the problem, and it is a huge problem indeed”, said one prisoner, continuing: “We are aware there are certain boundaries, that we need to be isolated, but with our families visiting us [more easily and frequently], we can feel human at least a little bit, you know? So when there’s a problem, you would like to know about it, to advise them [the families] how to solve it, like this [with the current visitation regime], you cannot do anything, they [the families] are reluctant to tell you anything because they don’t want to upset you, and they are afraid to hurt you, they don’t know how you might react... So they tell you only half of the problem, so you bust your head even more, and you end up getting into a fight with them, like ‘come on, tell me what’s the problem, and not like this’. In this way, we will lose our families, so then you start thinking about the future, and I, personally, don’t have anything to live for but for my family.”¹¹⁷¹ The breach of family ties, particularly marital relationships, is not uncommon, and two interviewed prisoners underlined how their marriages fell apart due to their inability to participate in their families’ lives because of the large distances and irregular contacts they were forced to endure.¹¹⁷²

The issue of contacts with the family is not limited to visits only; the prisoners mentioned discrepancies between the states when it comes to other means of communication as well: “Who gets Norway, Finland and Denmark celebrates, because of visits, work and overall, the whole concept of serving a sentence there is differently conceived”, said one interviewed prisoner.¹¹⁷³ For example, prison authorities in Scandinavian countries enable the ICTY prisoners to maintain regular contacts with their families via Skype sessions (Norway)¹¹⁷⁴ or even allow them a mobile phone (Finland) which a prisoner has at his daily disposal; however, the conversations are conducted in the presence of guards.¹¹⁷⁵ Contrary to that, in Germany, for example, the possibility to maintain contacts via means other than face-to-face visits differs between its federal states. Prisoners usually have access to telephones; however, the frequency of calls is determined by their monetary capabilities as well as prison regulations with regard to how many persons and how frequently the prisoner is allowed to call. One prisoner compared his situation with other ICTY prisoners in different German states, claiming that while others have the possibility to make calls every

1171 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1172 Interview with ICTY prisoner B in Germany, 02/03/2016; interview with a released ICTY prisoner, 20/05/2014.

1173 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1174 Interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1175 Interview with a released ICTY prisoner, 20/05/2014.

day if they wish to, he, in particular, is entitled to only one phone call per week, suggesting, however, that the number can also increase to two or three calls per week if prison staff are willing to accommodate his request.¹¹⁷⁶ Otherwise, he as well as other prisoners are left to maintain contacts with the outside world only through written letters.

After the visitation regime, other means of communication with the outside world as well as the work detail, *safety in prison* and *availability of medical services* are particularly important for ICTY prisoners. One interviewed prisoner compared how the states are rated among the prisoners with regard to safety: “We were all recommended [by other ICTY prisoners] not to go to Germany, France or England, especially after what happened to Krstić in England, and Momčilo Krajišnik [formerly also imprisoned in the UK] had similar experience, he said it was horrible!”¹¹⁷⁷ The prisoner stressed that the ICTY prisoners sent to those states usually find themselves among a prison population that features a high quota of offenders with Muslim backgrounds, and thus with a permanent risk that some prisoners, finding out who the ICTY prisoners are and for what they have been convicted, might plan a revenge attack.

The availability of medical services or a required therapy in enforcement states also rates high as a criterion among those prisoners who have been suffering from personal ailments already during their detention in the UNDU. One interviewed prisoner explicitly stated that he had needed to undergo a change of prosthesis as early as his detention in the UNDU and that he had explicitly stressed his concern to the ICTY authorities about receiving proper medical treatment in the potential state of enforcement.¹¹⁷⁸ Despite the assurances by ICTY authorities – and later national prison authorities – that due care would be provided to him, the prisoner never received the change of prosthesis, the consequence of which being, according to him, an almost complete loss of function in the injured limb. Another prisoner additionally stressed the relevance of medical issues they might have to be considered for their acceptance by the enforcement states. While access to proper medical care is guaranteed to every prisoner by international prison standards,¹¹⁷⁹ the prisoner explained that the states would often actually decline the enforcement if sophisticated medical care should be provided to a prisoner.¹¹⁸⁰ Furthermore, this prisoner was particularly critical of UNDU medical staff who – because of this, he adamantly claimed – tend to change or omit diagnoses in the prisoners’ files that are sent to potential enforcement states in order to make these prisoners more appealing for enforcement. Providing his own example, the prisoner explained that in the UNDU, he was diagnosed with diabetes

1176 Interview with ICTY prisoner B in Germany, 02/03/2016.

1177 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1178 Interview with ICTY prisoner B in Germany, 02/03/2016.

1179 See *Chapter 4.1.3.1*.

1180 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

and given medication; however, in his transfer documents, this diagnosis had been omitted and re-established by the prison doctor only after the transfer.

Additionally, the prisoners listed factors such as *language spoken in prison* as well as *parole eligibility terms in national laws* to have been of relevance for them with regard to the choice of the state.

When it comes to whether and how their opinions on the choice of the enforcement state were taken into consideration by the ICTY/MICT, the experiences of the interviewed prisoners differ. Contrary to the claim that prior to the activation of the MICT, the ICTY never sought opinions of convicted persons on the choice of the state,¹¹⁸¹ one interviewed ex-prisoner stated that prior to his transfer (which happened before the activation of the MICT), he had been approached by the Head of the UNDU who had been mandated by the Registry to inquire about the state the ex-prisoner would like to be sent to, and the ex-prisoner's personal reasons for his choice.¹¹⁸² While the prisoner's wishes with regard to the states – Sweden because of relatives there and Austria because of proximity to his family – were eventually not accommodated, he was nevertheless sent to Finland, which, according to his attorney,¹¹⁸³ was also considered to be a good choice as the conditions there fared better than in the rest of the Europe and other ICTY prisoners were also incarcerated there; therefore, they knew he would not be isolated among an entirely foreign prison population. According to the attorney, while the decision was ultimately granted by the President of the ICTY, it was made with the strong input by the Head of the UNDU to whom the attorney had pleaded for any of the Nordic states.

The influence of the Head of the UNDU on the choice of the state of enforcement was also mentioned as being important by several other interviewed prisoners,¹¹⁸⁴ even though the “Practice Direction on State Designation” does not list it anywhere. The Head of the UNDU usually maintains long-term contacts with future prisoners as he/she supervises their pre-trial and trial detention; therefore, his/her assessment of their behaviour in the UNDU can (according to some prisoners¹¹⁸⁵) have a positive influence on the Registry and the President with regard to the choice of the state. However, as one prisoner stressed, this is not a rule, and the willingness to support the wish of a prisoner depends on the discretion of the person who obtains the function of the Head of the UNDU at the time.¹¹⁸⁶ For instance, two other interviewed prisoners transferred prior to the activation of the MICT had never been openly asked to give their opinions on the choice of the state, even though one submitted a written

1181 See *Chapter 6.2.2.1*.

1182 Interview with a released ICTY prisoner, 20/05/2014.

1183 Correspondence with the defence attorney, 30/06/2014.

1184 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016.

1185 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1186 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

plea asking for Denmark prior to his transfer.¹¹⁸⁷ His wish was not granted, and he was transferred to Germany. The other prisoner was indirectly asked by the Head of the UNDU at the time to confirm whether he had relatives in Germany.¹¹⁸⁸ Even though he stressed that his relationship with these particular relatives had deteriorated and that, in case the question had pertained to the possibility of transfer, he would explicitly object to be transferred to Germany – as he feared harsh conditions in prison and possibly inadequate medical treatment –, he was eventually transferred to one of the German federal states.

After the activation of the MICT, there was a general offer by the Registry to both those sentenced and waiting for transfer and those whose trial was still undergoing to list up to five states of preference for the enforcement of their (potential, for those in trial) sentences and the reasons why they would like to be transferred to these particular states.¹¹⁸⁹ According to one prisoner, the Registry made the explicit promise to consider sending prisoners to the states that are closer to their families.¹¹⁹⁰ To the disappointment of those interviewed who had been transferred after this offer was made, none of their states of preference was chosen as the state of enforcement.¹¹⁹¹

Notwithstanding possible differences when it comes to the criteria that are of relevance for the choice of an enforcement state, the testimonies obtained from interviewed ICTY prisoners testify that for their majority, it is the possibility to maintain as much as possible continuous contact with their families that plays the biggest role with regard to the choice of an enforcement state. More possibilities to maintain contact are not exclusively dependent on the geographical proximity to former Yugoslavian states. The means of communication with the outside world offered in prison, the way the visitation regime is regulated (number of hours and days for visits) as well as the question whether the work in prison provides enough remuneration for prisoners to partly cover their families' travel expenses – all these aspects play a role but can greatly differ between the states as they are regulated by national prison laws. As explained by the ICTY/MICT officials, there is a continuous push from the side of the ICTY/MICT towards the enforcement states to provide harmonization in practice with regard to possibilities of maintaining contact, although this depends on each state's receptiveness.¹¹⁹² For example, it is easier for the state to implement a more suitable visitation regime as well as other services to ICTY prisoners (e.g. translation services) – therefore maintaining their minimal rights guaranteed by international

1187 Interview with ICTY prisoner A in Germany, 15/08/2014.

1188 Interview with ICTY prisoner B in Germany, 02/03/2016.

1189 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1190 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1191 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1192 Interviews with Legal Officers B, C and D at the ICTY/MICT, 15/06/2015.

standards – if its prisons already feature a higher number of foreigners, so there would not be that much concern about the discrepancy between the treatment of “ordinary” and “international” prisoners, which would affect the tranquility of prison life. On the other hand, if the ICTY prisoners are sent to smaller prisons with predominantly national offenders, it might take more time for prison staff to be tuned to their needs. The ICTY/MICT officials further indicated that for the enforcement states, the ICTY prisoners’ right to maintain a family life might not have the same importance as, for example, their right to physical health, and with regard to the required medical services (as opposed to, e.g., contacts with the outside world), the states have been predominantly open to suggestions from the ICTY/MICT and have taken the necessary efforts. However, indications from interviewed prisoners about a possible concealing of medical diagnoses in order to obtain consent from states to accept prisoners, as well as about the general unwillingness of states to accept those with complicated medical ailments, raises serious concern about the sustainability of this claim in practice. Similar to the issue of safety in prisons, the matter of proper medical services for ICTY prisoners, adequate contacts with the outside world as well as any other services they possibly need might gain more attention only after continuous complaints from ICTY prisoners are made, or after an incident, such as the *Krstić* case, makes the problem more evident to the public and therefore harder to ignore.

The criteria of relevance for the future of ICTY prisoners with regard to the state of enforcement of their sentences are, of course, the ones already encompassed in the general rehabilitative framework as introduced in international prison standards. Given that they concern their status as prisoners, their essential needs and services required to accommodate those needs, they pretty much differ from the criteria by which the ICTY/MICT is governed in its search for potential states of enforcement. The fact that the personal considerations expressed by the interviewed prisoners were (partly) taken into account only in a single case is already very indicative of how little practical significance their own interests have. This is not to say that the ICTY/MICT officials completely dismiss personal considerations of the prisoners in practice or that they are not aware of it; nevertheless, given the nature of the enforcement system that allows for a dependence on the political and economic dispositions of the enforcement states, they often need to bargain for any willing state in order to make an enforcement possible at all, instead of making the best possible choice for the prisoner. Consequently, pure coincidence might dictate that some prisoners are being sent to states that are more attuned to their needs – both as foreigners and as international prisoners –, while others end up in a less welcoming prison environment.

One way of achieving a more balanced approach to upholding the basic rights of ICTY prisoners might concern the higher involvement of the ICTY/MICT in the initial designation of a particular prison institution a prisoner should be sent to. According to the interviewed ICTY/MICT officials, this is currently being left entirely

to the competence of the enforcement state, partly because of the statutory provisions mandating an enforcement to be done in accordance with the national law, but partly also due to pragmatic concerns.¹¹⁹³ The officials stressed that not only would researching conditions and treatment possibilities in every prison in the state constitute a “mammoth job” for the ICTY/MICT, but the states might also be inclined to oppose such an interference from the Tribunal/Mechanism, given that they bear the costs of imprisonment themselves. Subsequently, while the ICTY/MICT is aware of general prison conditions in the respective state, the classification of prisoners and their allocation within a particular prison there is left to national authorities. Until a few years ago, the consequence of such a division of prerogatives between the ICTY and the enforcement states was that the ICTY prisoners had virtually no idea into what kind of prison and exactly where they would be sent to, up until they actually entered the prison facility. From the standpoint of international prison standards,¹¹⁹⁴ this might be seen as violating the prisoners’ right to be dutifully and in time informed about the prison environment they are being sent to in order to appropriately adapt to life in the institution. Furthermore, it goes against their right to notify promptly and without delay their family members or other persons of choice about the exact place of their transfer and imprisonment, therefore potentially hindering their right to adequate communication with the outside world. Correspondingly, as admitted by an interviewed ICTY/MICT official, the unawareness of prisoners to which environment exactly they are being sent to tended to create problems for both prisoners and national authorities, which is why around 2010, the ICTY/MICT officials created a so-called “pre-transfer” meeting between the national prison authorities of the respective enforcement state and the ICTY prisoners in order to facilitate their easier transition from the UNDU to national prisons.¹¹⁹⁵

6.2.3 Transfer procedure

Before the “pre-transfer” meetings with national prison authorities at the ICTY/MICT were introduced, the ICTY prisoners did not undergo any particular preparations for the transfer, nor for the upcoming enforcement of their sentences. In fact, despite international prison standards calling for the separation of different categories of detainees,¹¹⁹⁶ this has rarely been applied in cases of perpetrators who had their judgements passed and were waiting for their enforcement transfer. Interviewed prisoners and ICTY/MICT officials alike indicated that those convicted would usually remain in their cells in the UNDU under the same detention regime

1193 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015; interviews with Legal Officers B, C and D at the ICTY/MICT, 15/06/2015.

1194 See *Chapter 4.1.3.1*.

1195 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1196 See *Chapter 4.1.3.1*.

and would still have the possibility – to the extent allowed – to socialize with those who were officially only under remand or trial detention. As implied by one interviewed prisoner, if a separation occurred, this would be due to security reasons, as, for instance, certain detainees were needed as witnesses in trials of others; therefore, depending on the outcome of the respective trial, it would be necessary to avoid contact between these parties.¹¹⁹⁷ Furthermore, given that the number of convicted persons waiting for transfer is usually very low, it has been recognized by the ICTY/MICT that if a total separation regime was applied to them, this could likely lead to situations of forced isolation and consequently have negative effects on their psychological situation.¹¹⁹⁸

A factor that instilled significant psychological pressure on the ICTY prisoners, however, was their unawareness of which state they would be sent to up until several days prior to transfer, with even a possibility that the state of enforcement – but not the exact prison within that state – would be revealed to them only on the very day of their transfer.¹¹⁹⁹ The interviewed prisoners were presented with a written “consent to transfer” form for their signature; however, as claimed by one of them, the transfer would occur nevertheless, i.e. with or without their signature or complaints.¹²⁰⁰

The resulting unpreparedness for the prison environment instigated a lot of complaints from the prisoners to the ICTY/MICT. “The reason why we established this practice [the “pre-transfer” meetings] is we kept getting the same complaints from prisoners – that they didn’t understand, you know, when they’re eligible for release, that they didn’t understand who was enforcing their sentences, they didn’t understand the role of the President [...], that they didn’t understand the rules of detention of the prison they’re in, they didn’t know what their rights were, they didn’t understand the complaints procedure”, explained one ICTY/MICT official.¹²⁰¹ In order to manage the expectations of the prisoners and to make their transfer into the new environment less stressful, the ICTY/MICT officials decided in 2010 to establish the “pre-transfer” meetings between a prisoner, his/her attorney, a representative of the national prison authorities of the state the prisoner would be sent to as well as

1197 Interview with ICTY prisoner A in Germany, 11/05/2014.

1198 ICTY/UNICRI 2009, p. 154.

1199 According to the interviewed prisoners, those convicted are usually informed about the state of enforcement in writing between three and seven days prior to their transfer. In one instance, a prisoner mentioned that around a month prior to his transfer, he had started receiving information “*through both official and unofficial sources*” that he might be transferred to Germany, which eventually happened (interview with ICTY prisoner A in Germany, 15/08/2014). Another ICTY prisoner in Germany stressed that he had been informed about the state of enforcement only on the very day of his transfer (Interview with ICTY prisoner B in Germany, 02/03/2016).

1200 Interview with ICTY prisoner B in Germany, 02/03/2016.

1201 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

ICTY/MICT officials – usually from the Registry and the Office of the President.¹²⁰² The meeting, which is nowadays in practice, is supposed to inform prisoners in advance about the regime of the prison they are being sent to, locally available services, prisoners' rights and the release regime applicable. It is also designed to provide a platform for prisoners to ask any questions with regard to the enforcement of their sentences directly to national authorities or to ICTY/MICT officials. “We realized that many of our convicts spend many years in detention [...], and, you know, the transition to an actual prison was really big for them [as] they spent years and years in the environment where they spoke the same language, with people from the same region, cultural connection etc., and then moving to the actual prison, we thought that to be big, and then with the ‘pre-transfer meeting’, you know, we thought that we could bridge that gap just a little bit and, you know, manage expectations. Prison life is very different from pre-trial detention which we have here in Scheveningen, so you know, there is also that need to manage expectations a little bit”, said one interviewed ICTY/MICT official.¹²⁰³

While the ICTY/MICT officials maintain that the prisoners welcomed the meetings and that they allowed the ICTY/MICT to “cut down on complaints and a lot of nervousness”,¹²⁰⁴ some interviewed prisoners were indifferent towards their practical significance. In particular, one prisoner indicated that, apart from the basic information, a lot of input was lost during his meeting because of the multiple translations that have to be done so as to convey the information to the prisoner – usually from the language of the state to English and further on from English to the native language of the prisoner.¹²⁰⁵ The prisoner additionally implied that regardless of the received information, there is hardly anything that can prepare an individual for the realities of imprisonment in a foreign country. Specifically, he mentioned that despite his family knowing the exact location of the prison, this held little practical relevance in terms of establishing faster contact. Based on the prison regulations, he first had to obtain written consent from his family in which he was allowed to call them – a process which might take only a couple of days for national prisoners, but took three months for him to complete due to the exchange of letters and the control regulations they were subjugated to. Furthermore, while the “pre-transfer” meetings allow the information about the enforcement to be disseminated more openly, none of the interviewed prisoners (both those transferred prior and after these meetings were established) was ever told why they were sent to those particular states or prisons.

1202 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015; Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1203 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1204 Interview with Legal Officer C at the ICTY/MICT, 15/06/2015.

1205 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

After a “pre-transfer” meeting, the next step of the transfer procedure is the actual physical transfer to the enforcement state. In the meantime, prisoners are allowed to pack certain personal belongings – e.g. clothing, a personal hygiene set – to take with them, while other personal material, including their case documentation, is being sent after them within two months.¹²⁰⁶ Depending on the distance of the enforcement state, the transfer is completed either by a plane or by wheeled transport. Usually, if a prisoner is to be transferred to a state bordering the Netherlands, such as Belgium or Germany, only a van with an armed escort will be used to transfer prisoners.

In other instances, prisoners will be flown from Schiphol airport in Amsterdam to their state of enforcement and then transferred in a van with an armed escort to the prison. Experiences of interviewed prisoners with this procedure differ. Some were handcuffed during the transfer, while others were escorted without their hands tied, but with the threat of force in case of an escape attempt.¹²⁰⁷ Depending on the distance from the actual prison, an overnight stay for those travelling with a van might need to be taken into consideration.¹²⁰⁸ In certain cases, prisoners were escorted by Dutch personnel from the Netherlands, and upon arrival in the enforcement state, they were taken over by national security forces, while in other cases, national security forces escorted prisoners directly from The Hague to the enforcement state and their prison.

1206 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016. One interviewed prisoner was aggravated with the treatment by the UNDU personnel during the transfer, claiming that he was the only prisoner whose personal belongings were not sent after him to the state of enforcement and that, under the threat of things being thrown to waste, his wife had to come to The Hague to collect them (interview with an ICTY prisoner in Estonia, 20–21/10/2015).

1207 Apparently, a proper level of security during the transfer is something the ICTY/MICT insists on. The director of a German penitentiary housing one ICTY prisoner said that “*the only thing they [the ICTY] were interested in was that the proper level of security should be provided during the actual transfer to the prison here, so that the prisoner could not escape*” (interview with the director of a German penitentiary, 22/02/2013).

1208 One prisoner had to spend a night in a temporary cell in an unidentified complex along the way to his prison. He was told to unpack and, being under the impression that this was his final destination (no translator was present during the whole trip), he did it completely while simultaneously cleaning his cell. While the conditions alone aggravated him – being quite austere from what he had been promised during the “pre-transfer” meeting in The Hague –, he was even more aggravated when he was told the day after by the guards to pack again for the continuation of the trip to the actual prison (interview with ICTY prisoner C in Germany, 23–23/10/2016.). While expressing an understanding for regulations the national guards need to follow, the majority of interviewed prisoners were nevertheless frustrated by the level of their unresponsiveness during the transfer as well as the lack of translation services for a better communication of information.

6.3 Enforcement of ICTY Sentences in National Prisons

It has previously been indicated that the ICTY/MICT does not have a prerogative to decide on a particular prison institution where the prisoners should be accommodated, but that this is left to the disposition of national authorities. According to an ICTY/MICT official,¹²⁰⁹ some enforcing states might be inclined to propose a prison facility intended to house the ICTY convicts already during the negotiation of enforcement agreements, after which an ICTY/MICT representative might inspect the facility as part of the negotiation. Other states might be more willing to do so upon the actual acceptance of an individual prisoner after national justice authorities become more acquainted with the particularities of an individual case. The ICTY/MICT Practice Direction on State Designation¹²¹⁰ mandates the Tribunal/Mechanism to send to a potential state of enforcement a set of documents pertaining to the individual convict, such as a certified copy of the judgement, a statement indicating the length of the sentence that has already been served as well as information on pre-trial detention, together with any other document of relevance, such as any medical or psychological report on convicted persons or recommendation for his/her further treatment. Based on these pieces of information, national authorities are then able to make a general assessment of prisoners and allocate them in according prison institutions.

6.3.1 Allocation of prisoners and types of prison institutions

The ICTY prisoners are being allocated in national prisons on the principle of either dispersion or consolidation. From the viewpoint of correctional practice,¹²¹¹ both principles represent different ways of managing risk among different groups of prisoners. According to the principle of dispersion, prisoners belonging to a particular group, such as high-risk or violent prisoners, would be dispersed among many different prisons within a particular system in order to reduce the safety/security risk of having all of them in the same institution and to enhance their participation in regular institutional programmes. On the other hand, according to the consolidation principle, risk might be more easily handled if they are all allocated within the same institution, with an appropriately tailored security regime and specially trained prison staff.

Arguably, reasons for an adherence to the allocation of ICTY prisoners on the basis of either consolidation or dispersion can differ between states. Certain states, such as Austria, Finland, Estonia, Spain and Poland, have incarcerated all transferred

1209 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1210 See, e.g., 2014 MICT PD on State Designation, Article 3.

1211 See *Ward & Carlson* 1995.

ICTY prisoners in the same prison institution.¹²¹² Other states, such as the UK, Italy, Germany and Sweden, have opted for the dispersion model where the ICTY prisoners serve their sentences in different prison institutions.¹²¹³ Certainly, factors such as the length of the imposed sentence, the type of crime for which the prisoner has been convicted as well as the fact of being a convicted international criminal all play a role for national prison authorities to decide upon how to allocate ICTY prisoners. For example, all interviewed prisoners have been incarcerated in a closed-type institution with high security – arguably based on being convicted for international crimes as well as on the length of their sentences. One prisoner explained that the availability of services ordinary prisoners are entitled to, such as furlough, has been reduced for him due to being classified as “prone to escape”.¹²¹⁴ When he enquired about the reasons for this, prison authorities explained that such classification is based upon the length of his sentence. Arguably then, the decision for such a classification and incarceration in a closed-type institution with a high security detail can be interpreted as being based on national practice, where high sentences are usually imposed for particularly aggravating offences committed by high-risk, violent offenders. The violent nature of crimes (and the accordingly long sentence) very likely implies a risk of re-offending; however, it is dubious whether in the case of the interviewed prisoner, such an assessment is also based on his personal characteristics, since he was assessed as a model prisoner by the prison authorities in a subsequent report. A similar high-risk classification and, subsequently, incarceration in a maximum-security prison was imposed on the ICTY prisoners in Estonia. The interviewed prison officer explained that the allocation of prisoners within the prison is governed by their risk assessment.¹²¹⁵ However, attorneys of two of the ICTY prisoners incarcerated there stressed that their assessment as high-risk inmates was based simply on the fact that they are ICTY convicts, and not their personal characteristics.¹²¹⁶ This was confirmed by the Estonian prison administration, where all ICTY prisoners were explained that given their long sentences, they are automatically classified as high-risk prisoners prone to escape, disregarding the fact that one of them was a 74-year old man who had lost an eye and the other one was under the permanent risk of collapsing due to his diabetes issues.¹²¹⁷ Due to such a classification, the prisoners are denied possibilities which other, regular prisoners do have, such as an appropriately remunerated work detail or a possibility to leave the prison for

1212 Interview with a released ICTY prisoner, 20/05/2014; interview with an ICTY prisoner in Estonia, 20–21/10/2015; also see *Wojna* 2015 and *Gaura* 2011.

1213 See depo.ba of 10 November 2012: “Igraju šah, prave gusle, žene se, igraju stolni tenis, pišu knjige, slikaju...” [*They are playing chess, making violins, getting married, playing table tennis, writing books, painting...*]; depo.ba/clanak/82248/igraju-sah-prave-gusle-zene-se-igraju-stoni-tenis-pisu-knjige-slikaju [24/11/2017]; also see *Gaura* 2011.

1214 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1215 Interview with a prison staff member in Estonia, 21/10/2015.

1216 See *Janjić Matić* 2016.

1217 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

work.¹²¹⁸ As an additional form of increased surveillance, the prisoners are under constant illumination from an artificial light source in their cells which they cannot turn off during the night (something which was also implemented as an increased surveillance measure in the case of the Spandau prisoners, see *Chapter 3.2.2*).¹²¹⁹

Similarly, in the instance of two ICTY prisoners transferred to a prison in Finland, national authorities also paid too little attention to individual risk assessment prior to their allocation. The outcome, however, contrasted the experiences of the Estonian ICTY prisoners. Generally, the perception among ICTY prisoners is that they are being placed in an institution with too severe security measures, yet without sound reasoning by national authorities for doing so, which hence unnecessarily aggravates their punishments. In Finland, all ICTY prisoners were initially incarcerated in the maximum security Kylmäkoski prison.¹²²⁰ Arguably, the decision to consolidate all of them in the same prison was governed by pragmatic concerns of more easily managing the security detail by having them all in the same institution, but also by humanitarian concerns, such as reducing the level of isolation they might feel as foreigners. The latter concerns have indeed been pinpointed by the ICTY/MICT officials as also potentially having a relevance for enforcement states when deciding on a specific allocation of ICTY prisoners within their prison systems.¹²²¹ Nevertheless, the fact that one ICTY prisoner served as a witness and testified in trial against another one, after which the other prisoner threatened him already during detention in the UNDU, seemed to be dismissed as irrelevant by the Finnish correctional authorities, who placed the two in the same prison nevertheless. This led to physical abuse of the former ICTY prisoner whom the authorities then had to relocate to another prison institution.¹²²² Eventually, the abusive ICTY prisoner had to personally ask for more isolated confinement as a personal safety measure, given that because of his violent nature, he also often entered into disputes with other inmates who consequently became adamant on killing him as a retaliation for these disputes.¹²²³

The aforementioned example is not a sole incident of national prison authorities being poorly informed regarding the personal characteristics and circumstances of the

1218 Interview with an ICTY prisoner in Estonia, 20–21/10/2015; see also *Janjić Matić* 2016.

1219 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1220 Interview with a released ICTY prisoner, 20/05/2014; see also *Gaura* 2011.

1221 One ICTY official elaborated on the reasoning which might guide national authorities when deciding on a concrete prison facility: “[U]ltimately, it depends on their capacity as well – which prison actually has the capacity to take on these prisoners, which prison is best suited for the type of prisoner, and here, it may be the question of, you know, this particular prison might have, sort of, better interpretation, or they are already housing certain prisoners, so they have the facilities there already and it makes more sense” (interview with Legal Officer D at the ICTY/MICT, 15/06/2015).

1222 Interview with a released ICTY prisoner, 20/05/2014.

1223 Interview with a released ICTY prisoner, 20/05/2014.

crimes of ICTY prisoners they are hosting. Consequently, with regard to their allocation, this might have negative implications for the availability of prison services and rehabilitative treatment as well as the level of their personal safety in prisons. For instance, the label of international criminals sentenced for the gravest atrocities might suffice for them to be initially placed in institutions intended for high-risk offenders; however, how their status might correlate with other factors, such as the particular strata of the prison population in a concrete maximum security prison, is seemingly perceived differently by the national correctional authorities in enforcement states.¹²²⁴ As previously mentioned, certain states, such as the UK, France or Germany, do not shy away from placing ICTY prisoners in a prison environment already featuring a high quota of violent offenders of the same ethnic background as the victim population against whom the crimes of the former had been perpetrated.¹²²⁵ Consequently, this can have serious negative implications for the safety of the ICTY prisoners, which goes against the prison standards as advocated by international instruments.

On the other hand, there is evidence that some national correctional authorities are more aware of humanitarian concerns regarding the allocation of ICTY prisoners. The interviewed director of a penitentiary in Germany housing an ICTY prisoner explained that next to an appropriate security detail in prison, factors such as the size of a prison as well as the availability of adequate psychological and medical services played an important role for the choice of the institution where the ICTY prisoner would be incarcerated.¹²²⁶

The above-delineated examples indicate a variety of factors national correctional authorities might take into account when allocating ICTY prisoners. Even though enforcement states can be rather sensitive when it comes to revealing those factors,¹²²⁷ the insights provided by ICTY prisoners as well as national prison staff show that factors such as the nature of crimes, the length of the sentence and security concerns, but also humanitarian concerns such as the availability of appropriate medical/psychological services as well as a less isolating social environment in prison all play a

1224 As it seems, this is also differently perceived by the ICTY/MICT officials who argued that – even though not admitting to it – national enforcement authorities *are generally* considering the impact of having an ICTY prisoner might insert on the other, particularly Muslim, prison population. About this, an ICTY/MICT official said: “*I would say so, I would say they look at their prison population, you know. No one would say this, I would say, and none of the enforcement states are saying: ‘We don’t take this Muslim prisoner, let’s have a look at our prison population’ or ‘That one’s, oh, 30% Serbs, we’re not going to send him there, let’s send him to this other prison that has a good Muslim population’; you know, people don’t want to say that they take that into account, even, you know, that would be a security factor, because nobody wants to be seen to be continuing an ethnic divide*” (interview with Legal Officer B at the ICTY/MICT, 15/06/2015).

1225 See *Chapter 6.2.2.2*.

1226 Interview with the director of a German penitentiary, 22/02/2013.

1227 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

role for allocation in a concrete case. National legal provisions might initially condition the type of institution with the length of the sentence.¹²²⁸ However, the concrete placement of prisoners – here also considering the decision to adopt the consolidation or dispersion policy – will arguably also depend on other concerns by national authorities, such as the level of risk an ICTY prisoner is perceived to pose (e.g. security-related risks, such as escape attempts, or safety-related risks, such as the ability to adjust to the prison environment¹²²⁹), as well as taking care of humanitarian-related needs of the prisoners. Unfortunately, as experience shows, the allocation choice can often be based on a poorly informed assessment of the ICTY prisoners, which can consequently undermine the rehabilitative potential of their imprisonment.

Despite their initial allocation decision, some national prison systems are also allowing ICTY prisoners to progress through the “prisoner-gradation categories”, which then opens up a possibility for them to be placed in a more lenient prison regime with less restrictive conditions. In Finland, for instance, national law provides a possibility for prisoners – also offered to ICTY prisoners – to apply (after a certain time and by fulfilling the required conditions)¹²³⁰ to be transferred to serve the remainder of their sentence in an open-type prison.¹²³¹ In addition to less severe restrictions and supervision, such a prison regime offers the benefits of furloughs and more frequent short-term conditional releases from prison. Similar possibilities of transfer from a closed to an open prison regime have been offered and granted to ICTY prisoners in Norway¹²³² and Germany.¹²³³

Additionally, it could be argued that notwithstanding the common official moniker prison institutions share (e.g. closed type, maximum security), the regimes and conditions they feature might significantly differ between different national prison systems. The blatant example of a common “closed-type institution” moniker, yet with completely different conditions and regimes, is featured in the already-mentioned instances of Wakefield prison in England, where *Radislav Krstić* was incarcerated, and Hinseberg prison in Sweden, which hosted *Biljana Plavšić*.¹²³⁴ There does not

1228 This was also mentioned by an interviewed ICTY/MICT legal officer, explaining that because the ICTY prisoners “*are persons convicted for the most serious crimes. [...] it might be that for that reason, by law, the national state puts them in a maximum-security prison*” (interview with Legal Officer A at the ICTY/MICT, 07/04/2015).

1229 Prison security can refer to either external “security”, that is, the prevention of escapes, or internal security (then referred to as “safety”), understood as a safe and orderly life inside the prison (*van Zyl Smit & Snacken 2009*, p. 267).

1230 For example, good behavioural, disciplinary work and a drug-abuse-related assessment by the prison authorities during the previous enforcement period.

1231 Interview with a released ICTY prisoner, 20/05/2014.

1232 Decision on Early Release of *Zoran Vuković*, 11 March 2008, para. 4.

1233 See *Prosecutor v. Ljube Bošković, Johan Tarčulovski*, Decision of President on Early Release of *Johan Tarčulovski* (IT-04-82-ES, 08 April 2013), para. 22 (hereinafter: Decision on Early Release of *Johan Tarčulovski*, 08 April 2013).

1234 See in detail *Chapter 5.2*.

seem to be any harmonization between the enforcement states in this regard, and the security regime, the level of restrictions as well as the quality of other prison conditions will depend on the policy of the state which decides to accept a prisoner.

6.3.2 Prison conditions

6.3.2.1 Accommodation

The challenge of an appropriate assessment of ICTY prisoners does not end with their arrival at a concrete prison institution. Usually, prisoners entering high-security institutions are required to undergo a short assessment period before being placed in a particular prison section. During that time, which normally does not last longer than a week or two, they are evaluated with regard to the length of their sentence, the type of crime committed as well as their personal circumstances in order to determine the social environment they might fit best in the prison. Their predisposition for any rehabilitation programmes is also analysed. Until the decision is passed, they usually remain in a strict confinement, are allowed to exit their cells only for an hour or two per day and have limited access to prison services as well as to other prisoners.

Most interviewed ICTY prisoners complained about having been detained in such confinement for periods of time extending far beyond those applied to ordinary prisoners. Experiences differ in this regard. For example, two prisoners in Finland were forced to endure such isolated confinement for two months.¹²³⁵ One prisoner in Estonia was detained for a month and another one for three months in such a confinement.¹²³⁶ Furthermore, one interviewed prisoner in Germany confessed to having been held in isolated confinement for 18 months, under a 23-hour lockdown, before he was transferred to a prison wing which featured a more flexible regime.¹²³⁷ During that time, the prisoner was subjected to intensified daily security checks, both of his person and of his cell premises, as well as to restricted contact with other prisoners.

Similar experiences of prolonged isolated detention can be found with other ICTY prisoners incarcerated around Europe. In Spain, for example, two ICTY prisoners, *Drago Josipović* and *Vladimir Šantić*, were incarcerated in León prison for several years before being transferred to Segovia prison. It has been reported that in León prison, they were isolated from other prisoners from the start and were forced to spend 18 hours a day in their cells, having the possibility to socialize only with one another during their daily prison walks, which also took place separately from other

1235 Interview with a released ICTY prisoner, 20/05/2014.

1236 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1237 Interview with ICTY prisoner B in Germany, 02/03/2016.

prisoners.¹²³⁸ The initial decision to be placed under a more isolated confinement came from the prison authorities; however, according to other reports and prisoners' testimonies, it might have been scrapped, as *Josipović* and *Šantić* were eventually allowed contact with other inmates.¹²³⁹ It was only during that time that the two ICTY prisoners started receiving threats from other inmates, which resulted in their plea to be voluntarily placed under the isolated regime again, which lasted until their transfer to another prison institution.¹²⁴⁰

The examples of prolonged assessment periods of ICTY prisoners above illustrate the dilemma national prison staff quite obviously have when it comes to choosing an appropriate penological approach to macro-criminals. However, despite being sentenced for the most horrendous crimes, they do not necessarily feature behavioural traits of violent, volatile offenders, which would usually warrant placing them under a more isolated regime. Many states indeed lack the experience of having international criminals in their prisons; therefore, it is somewhat understandable that they initially approach them with caution. The director of a German penitentiary where an ICTY prisoner is incarcerated openly admitted having had initial doubts and confusion with regard to an adequate way of approaching the prisoner. "The prison staff were uncertain how to approach this person who, while being a mass murderer, on the other hand shows immense social intelligence, has extremely well-adapted to the prison life where he is accepted in a good manner by all the prisoners and has never caused any trouble or disobedience", he explained.¹²⁴¹ He further admitted that since they, as national prison authorities, have not received any instructions from the ICTY on how to approach the inmate, they decided to treat him just like any other prisoner.

The concerns national prison staff might have do not pertain solely to how the ICTY prisoners would adapt to life in prison, but also to how a different strata of the prison population might react to them. In case of two ICTY prisoners sent to Finland, following their prolonged solitary confinement – for which they had initially received no explanation even though they had repeatedly asked for a meeting with the prison director –, the director finally appeared, expressing his apologies for the delay. Apparently, according to him, the issue at hand was the uncertainty as to "what to do with them", given that the prison staff shared concerns with regard to how other prisoners might react to their presence, especially given their background and the crimes for which they had been convicted.¹²⁴²

The concerns are valid indeed, yet keeping international prisoners in prolonged isolated confinement in order to counteract any potential disruption of good order in

1238 Čilić 2002.

1239 Interview with a released ICTY prisoner, 20/05/2014. See also Gaura 2011.

1240 Interview with a released ICTY prisoner, 20/05/2014. See also Gaura 2011.

1241 Interview with the director of a German penitentiary, 22/02/2013.

1242 Interview with a released ICTY prisoner, 20/05/2014.

prison is, arguably, not the right way to approach them. Not resorting to generalizations, it is nevertheless necessary to pinpoint that only in rare instances have the ICTY prisoners personally caused conflicts with other prisoners,¹²⁴³ and the majority of reported incidents is related to them suffering attacks from other prisoners.¹²⁴⁴ For some states, the extended isolated-confinement periods – despite breaching limits set by national laws – tend to end within a reasonable time frame. They can be taken as the result of both inexperience with the treatment of international prisoners and, consequently, increased efforts by national prison staff to provide as suitable conditions and treatment to the ICTY prisoners as possible. For others, however, they might come as the consequence of an unwillingness or inability of national prison staff to provide a proper and efficient assessment which, arguably, might be the result of prejudices held towards the ICTY prisoners. For example, the director of a German prison where one ICTY prisoner spent 18 months in a confinement of increased isolation elaborated his decision to keep the ICTY prisoner separated from other prisoners on the grounds of “not wanting the continuation of [his] war here in this prison”.¹²⁴⁵ Furthermore, when the prisoner complained about scarce possibilities of maintaining family contacts, he was told that he “should’ve thought of that when [he] was killing other people’s children”.¹²⁴⁶ Notwithstanding the inappropriateness of such a remark, it was also ultimately incorrect, as the prisoner’s judgement does not feature any such conviction. Furthermore, such an attitude also shows an insufficient familiarity with the prisoner’s case. The discretionary assessment of ICTY prisoners based on such poor awareness, which consequently results in extremely prolonged isolation periods, can have multiple negative effects. The latter can be reflected in the reinforcement of real as well as perceived isolation, highly impacting feelings of anxiety and boredom, but also resentment in prisoners, as the punishment is not anymore comprised solely in the deprivation of liberty but in that of conditions and services to which prisoners would normally be entitled to under international standards. Consequently, the rehabilitative potential for the individual prisoner might be seriously hindered by increased isolation. It could be argued that if there indeed is a reasonable concern by prison staff for safety and security – for example because of a high percentage of a certain prison population whom it might be risky to bring in contact with an individual ICTY prisoner –, perhaps another prison should be considered as the host institution. Of course, reasonable concern should be based on a valid assessment of the ICTY prisoners, prior as well as during the enforcement. As can be seen from the above examples, this can be quite problematic and is dependent on the underdeveloped practice of national prison authorities. Also, it can be expected that the assessment methodology differs between states.

1243 See *Chapter 6.3.1*.

1244 See in detail *Chapter 6.3.3.1*.

1245 Interview with ICTY prisoner B in Germany, 02/03/2016.

1246 Interview with ICTY prisoner B in Germany, 02/03/2016.

The states hosting ICTY prisoners differ not only with regard to the assessment timeframes, but also with regard to the conditions under which prisoners spend those assessment periods. Generally, increased isolation and security mandate more austere cells and facilities than those which are afterwards available to prisoners. However, there are exceptions. For instance, there is a quite noticeable difference in the accommodation offered to an ICTY prisoner incarcerated in one German federal state, where from the beginning of enforcement he was placed in a cell with private bathroom, including a shower with hot water, a sink, a toilet and a window (later, also a refrigerator was installed in the cell)¹²⁴⁷ – as opposed to another ICTY prisoner in a different German federal state, where not only there was no shower in the cell, but there was also no hot water and no division between the toilet utilities and the rest of the cell.¹²⁴⁸ The prisoner was allowed two showers per week in a common bathroom and was being strip-searched each time upon exiting and re-entering the cell, despite the fact that the bathroom was approximately only three metres away from his cell and that he was allowed to use it only in the absence of other prisoners.

Eventually, following the assessment period, the prisoners are being relocated to a more permanent accommodation within a particular prison wing. There, the cells they are given are usually the same ones the other, non-Tribunal prisoners who are settled in that particular wing are also given. In terms of the inventory ICTY prisoners are allowed to keep in their cells, no noticeable difference has been observed between them and non-Tribunal prisoners. Differences, however, might exist between national jurisdictions with regard to the inventory the prisoners are allowed to keep in their cells in general (in one state, for example, prisoners might be entitled to a smaller number of private wardrobe items than in the other). Also, most of the private inventory the ICTY prisoners had during their detention in the UNDU is not allowed once they commence with the enforcement of their sentences in national prisons (however, private documents in printed format, such as those pertaining to their court cases, are allowed); therefore, any private possession is to be purchased, or re-purchased, within the prison. The purchasable inventory varies and ranges from clothes, shoes, food and personal hygiene appliances to televisions, coffee machines, electric word processors and DVD players up to even video game consoles in some states. Prices are, however, higher in prison, and even though many items might seem to be a lush offer for prison circumstances, they might ultimately be unavailable to prisoners, especially if the remuneration they receive for work in prison suffices just enough to cover their most basic necessities.

1247 Interview with ICTY prisoner C in Germany, 23–24/10/2016. Similarly, the cells in which the ICTY prisoners sent to Estonia spend their assessment periods also feature private bathrooms with warm water, even though described as being located “in a basement” (interview with ICTY prisoner in Estonia, 20–21/10/2015).

1248 Interview with ICTY prisoner B in Germany, 02/03/2016.

In some states, prisoners have individual cells, while in others, they share them with other prisoners. This can be based on decisions by prison authorities as much as on personal preferences of prisoners. For example, *Dario Kordić*, a former Bosnian Croat politician who was sentenced to 25 years of imprisonment for war crimes and sent to Graz-Karlau prison in Austria, served a part of his sentence in a cell with four other prisoners, which was apparently his personal wish so he could better socialize with other people.¹²⁴⁹ Similarly, *Ivica Rajić*, a former commander of units of Bosnian Croat soldiers sentenced for war crimes and sent to serve his sentence in Spain, also shared his cell with another inmate during the enforcement of his sentence.¹²⁵⁰ The ICTY prisoners serving their sentences in Estonia were assigned to share their cells with other Estonian prisoners; however, this decision was scrapped for two of them after they had complained about other prisoners to the ICRC. According to one interviewed ICTY prisoner in Tartu prison, given the prevalence of drug addiction among incarcerated non-Tribunal prisoners – who are also often of a poor material status, therefore inmates sharing the cell can be resorted to sharing personal belongings –, the ICTY prisoners were concerned they might contract an infectious disease in case their cell mates decided to secretly use their personal belongings such as the personal hygiene set.¹²⁵¹ Despite this, one other ICTY prisoner still remains with an Estonian cell mate, and it is argued that the decision came from prison staff for the prisoner to have somebody watching over him in case he lapses into a diabetic coma due to his poor health condition.¹²⁵² On the contrary, all the interviewed prisoners in Germany were given individual cells, a practice which is also applied, for example, for the ICTY prisoners in the UK, Finland, Norway, Sweden, Denmark, Belgium and Poland.¹²⁵³

Not being forced to share a cell maintains a certain level of prisoners' privacy. However, it might also prove challenging for the prison authorities when it comes to preserving the health and well-being of prisoners. The extent to which prison facilities are modernized and technologically equipped differs between states, which becomes particularly evident in the way the prisoners are able to contact staff from their cells in case of emergency. Even in the states with federal structures such as Germany, obvious differences can exist on the level of federal entities. For example, one ICTY prisoner in Germany pointed to the issue of cells in his prison wing not having an intercom connection with the prison staff booth, but only through visual means, i.e. the prison staff need to notice the emergency light above an individual cell door in order to respond.¹²⁵⁴ This has been deemed problematic, as no control panel in the

1249 *Gaura* 2011.

1250 *Gaura* 2011.

1251 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1252 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1253 Interview with a released ICTY prisoner, 20/05/2014; interview with an ICTY prisoner in Estonia, 20–21/10/2015; see also *Wojna* 2015.

1254 Interview with ICTY prisoner B in Germany, 02/03/2016.

booth is clearly indicating the emergency light, but the staff needs to explicitly look above cell doors in the corridor in order to notice the light. In case the guards are not present at their post (which can often happen during night shifts), or may be present but distracted, the chances of them reacting promptly to an emergency, such as a prisoner suffering from a heart attack, can be greatly reduced. Many ICTY prisoners are of advanced age, therefore, the risk of suffering health complications in prison fares higher among them than in the ordinary prison population. Being accommodated in prison facilities that do not allow for immediate effective contact with prison staff (e.g. through voice intercom from every cell) increases potentially fatal consequences of such a risk significantly. On the other hand, other ICTY prisoners incarcerated in different German federal states have indicated that their cells indeed have such means of immediate vocal communication with prison staff.¹²⁵⁵

Unless being subjugated to an intensified security regime or attending work, recreation or some other detail during the day, the ICTY prisoners might be allowed to move within the confinements of the prison wing they are situated in. This usually means getting access to common rooms that are at the disposal of all prisoners within certain prison wing, such as a kitchenette or a common living room. Within a restricted number of daily hours – which usually span from sometime between seven and nine o'clock in the morning up until midday break and after that until some time between six and nine o'clock in the evening –, the prisoners are allowed to walk around in the wing they are situated in or socialize with other prisoners. For example, one ICTY prisoner in Estonia described a dull daily routine where, without a chance to work or being assigned to any structured rehabilitation programmes, his days are reduced to an occasional game of chess or a short conversation with an inmate or two over a cup of coffee, if they manage to understand each other across the language barrier.¹²⁵⁶

Eventually, if allowed to progress through the national “prisoner-gradation” system and if fulfilling the conditions prescribed by national law, some ICTY prisoners might be accommodated in a so-called “semi-open/closed” or “open” prison facility. This usually occurs towards the end of the enforcement period and entails a more lenient safety/security prison regime. For instance, one interviewed ICTY prisoner whose sentence was enforced in Finland spent the last nine months of his imprisonment in an open-type institution.¹²⁵⁷ He was employed in a boat factory that served as part of the open prison complex. The most notable differences from the prison where he had previously been accommodated included a less severe supervision system and more freedom of movement. Nine prisoners, including himself, were accommodated in a single building where they each had their own rooms and a shared kitchen, living room and bathroom facilities. According to the prisoner, two guards

1255 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1256 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1257 Interview with a released ICTY prisoner, 20/05/2014.

were assigned to maintain supervision over the prisoners, yet they were barely visible. There was an envisaged line the prisoners were not allowed to cross, yet it was not made visible by any physical barrier, such as a wall or fence. Prisoners were entitled to use the outer spaces of the complex, such as the terrace or the porch, at any time of day or night, although only under the condition that they did not cross the envisaged line.

The rehabilitative aspect of being transferred to a more lenient prison regime can be recognized in a desire to offer the prisoners the possibility of more “normalized” prison conditions in order to make their transition to a life in freedom more efficient. Prisoners have a chance to gradually develop a new personal orientation framework and habits that are more suitable to life in freedom, something which is arguably more difficult if they are abruptly released from closely monitored confinement to an environment without easily noticeable rules. While some states have offered this option to ICTY prisoners,¹²⁵⁸ there is still scant information available on this issue for all enforcement states. It could be argued that during their enforcement, some ICTY prisoners might not fulfil the required conditions for such a transfer due to their behaviour in prison; yet given the experiences some states have with regard to their initial classification – based on a poorly informed assessment and, in certain instances, on prejudicial grounds –, it is fair to presume that in some national jurisdictions, the ICTY prisoners are by default excluded from such a gradation system due to the gravity of their crimes and their perceived dangerousness. As shown below, in certain instances, such an attached stigma (which can be recognized in the attitudes of the prison authorities towards the ICTY prisoners) might negatively influence their own behaviour, which further reduces their chances of effectively progressing along the rehabilitative path and of attaining benefits available to other prisoners, such as transfer to a more lenient prison regime.

6.3.2.2 Work, education, recreation

Since they are imprisoned in different states, the ICTY prisoners are usually offered the type of employment ordinary inmates are also entitled to. This mainly varies between different types of manual labour, such as working in the prison laundry,¹²⁵⁹

1258 See *Chapter 6.3.1*.

1259 See, e.g., *Prosecutor v. Esad Landžo*, Order Issuing a Public Redacted Version of Order of the President on Commutation of Sentence (IT-96-23&23/1-ES, 15 July 2008), para. 6 (hereinafter: Decision on Early Release of *Esad Landžo*, 15 July 2008); *Prosecutor v. Duško Sikirica*, Decision of President on Early Release of *Duško Sikirica* (IT-95-8-ES, 21 June 2010), para. 18 (hereinafter: Decision on Early Release of *Duško Sikirica*, 21 June 2010); *Prosecutor v. Dario Kordić*, Public Redacted Version of the 21 May 2014 Decision of the President on the Early Release of *Dario Kordić* (MICT-14-68-ES, 06 June 2014), para. 19 (hereinafter: Decision on Early Release of *Dario Kordić*, 06 June 2014).

maintenance jobs of various kinds,¹²⁶⁰ assistance in the prison kitchen¹²⁶¹ and wood-work¹²⁶² up to assembling components for small machines external companies might have contracted from the prison.¹²⁶³ Arguably, the type of manual employment offered in prison does not have a special rehabilitative effect on ICTY prisoners as for most of them, unemployment or lack of a job qualification were not featured as a relevant etiological factor in the commission of crimes. On the contrary, many of the convicted belonged to higher military or political echelons, they developed professional careers beforehand, and therefore, it could be argued they did not suffer from undeveloped working habits. Insofar, many ICTY prisoners could be considered overqualified for the kind of jobs offered in most prisons. Nevertheless, from the standpoint of basic prisoner rights and the rehabilitative effect in general, employment of any kind is important as it reduces the detrimental effects of prison and provides them a daily perspective and goals. When comparing daily routine in the UNDU with the one he developed while employed in a Finnish prison, one interviewed ICTY prisoner stressed work as being an important component which, to an extent, “normalized” the prison experience: “[W]hen I went to Finland, it was much better, starting from food to the overall experience, you know, just the thought that in the morning, you are obliged to get up, go to work, come back... I’d say it was much better [than the UNDC]...”¹²⁶⁴ Similarly, one other ICTY prisoner in Germany referred positively to work possibilities in prison, arguing the work helps him “cure the nerves” and pass the time more quickly.¹²⁶⁵ As mentioned before, there is also a pragmatic side to employment in prison, which carries great significance for the ICTY prisoners. By working, not only are they able to afford a living standard beyond the minimum prison provisions (for instance, one ICTY prisoner mentioned that were it not for a work possibility in prison, he would be resorted to survive on

1260 See, e.g., Prosecutor v. *Hazim Delić*, Order Issuing a Public Redacted Version of Decision on *Hazim Delić’s* Motion for Commutation of Sentence (IT-96-21-ES, 15 July 2008), para. 7 (hereinafter: Decision on Early Release of *Hazim Delić*, 15 July 2008); Prosecutor v. *Momir Nikolić*, Public Redacted Version of the 14 March 2014 Decision on Early Release of *Momir Nikolić* (MICT-14-65-ES, 12 October 2015), para. 21 (hereinafter: Decision on Early Release of *Momir Nikolić*, 12 October 2015).

1261 See, e.g., Prosecutor v. *Dragan Obrenović*, Decision of President on Early Release of *Dragan Obrenović* (IT-02-60/2-ES, 21 September 2011), para. 21 (hereinafter: Decision on Early Release of *Dragan Obrenović*, 21 September 2011); Decision of the President on the Application for Pardon or Commutation of Sentence of *Duško Tadić* (IT-94-1-ES, 17 July 2008), para. 8 (hereinafter: Decision on Early Release of *Duško Tadić*, 17 July 2008); Prosecutor v. *Mitar Vasiljević*, Public Redacted Version of Decision of President on Application for Pardon and Commutation of Sentence of *Mitar Vasiljević* (IT-98-32-ES, 12 March 2010), para. 15 (hereinafter: Decision on Early Release of *Mitar Vasiljević*, 12 March 2010).

1262 See, e.g., Prosecutor v. *Radomir Kovač*, Public and Redacted Version of the 27 March 2013 Decision of President on Early Release of *Radomir Kovač* (IT-96-23&23/1, 03 July 2013), para. 22 (hereinafter: Decision on Early Release of *Radomir Kovač*).

1263 Interview with ICTY prisoner C in Germany, 23-24/10/2016.

1264 Interview with a released ICTY prisoner, 20/05/2014.

1265 Interview with ICTY prisoner C in Germany, 23-24/10/2016.

30 euros per month¹²⁶⁶), but they can also afford more frequent family contacts, particularly by telephone. The remuneration they receive depends on national laws, and those states with higher economic standards, such as Norway, Finland, Denmark or Sweden, can provide a remuneration which even allows their ICTY prisoners to contribute to their families' monetary requirements to visit them.¹²⁶⁷

Despite a work detail being formally provided in prisons, the ICTY prisoners might face challenges in order to access it. For one, the work usually provided is manual, and given the advanced age of many ICTY prisoners as well as health issues they might have, many of them might not be personally fit enough to work, or a doctor might even prohibit them to do so. For those ICTY prisoners whose nationality allows them to apply for a retirement fund in their home states, the pension they receive, as well as whatever monetary support they receive from their families, helps them get by in prisons.¹²⁶⁸ In 2013, a decision was passed in Serbia which assigned additional monetary assistance to Serbian nationals convicted by the ICTY.¹²⁶⁹ In the words of some ICTY prisoners whose nationality allowed them to be entitled to such support, it consisted of several plane tickets per year for visits of family members.¹²⁷⁰ Interestingly, many ICTY prisoners fought in the post-Yugoslavian wars on behalf of a newly-constituted state entity in Bosnia and Herzegovina, the Republika Srpska (RS) or "Serb Republic" which, according to one interviewed prisoner, does not provide any monetary support for ICTY prisoners. Aggravated, the prisoner complained that his "state, the state for which [he] serve[s] the sentence here, does not give a single fenig, a single cent, and that is Republika Srpska".¹²⁷¹ It could be argued that the pressure by the international community as well as the neighbouring states prevents any such effort in order to force the RS entity and, in particular, its political elites to come to terms with past atrocities done on its behalf – due to which the decision of Serbia on monetary support for ICTY prisoners was heavily criticized as well.

Those ICTY prisoners whose nationality does not entitle them to any state support are therefore resorted to any working option the state of imprisonment allows them to take on. The aforementioned health issues prisoners might have (together with lingual barriers and prison classification to which they might be subjugated in enforcement states) can jeopardize their efforts to attain their fundamental right of employment in prison. For ICTY prisoners in Estonia, the prison classification which

1266 Interview with ICTY prisoner B in Germany, 02/03/2016.

1267 Interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with ICTY prisoner C in Germany, 23–24/10/2016.

1268 Interview with ICTY prisoner A in Germany, 15/08/2014.

1269 See e-novine.com of 23 April 2013: "Ratni zločinci na budžetu Srbije" [War Criminals on the Budget of Serbia]. Elektronske Novine; e-novine.com/drustvo/83031–Ratni-zločinci-budetu-Srbije.html [24/01/2018].

1270 Interview with ICTY prisoner A in Germany, 15/08/2014.

1271 Interview with ICTY prisoner A in Germany, 15/08/2014.

they are subjugated to by national authorities poses a serious problem in terms of access to a work detail in prison. According to a defence attorney of one imprisoned ICTY convict there, *Milan Martić*, authorities of Tartu prison in Estonia have envisaged that Mr. *Martić* might be eligible for work in prison only in 2035, something which, according to his attorney, hinders any rehabilitative effect and inevitably leads to his client's further isolation.¹²⁷² Similar problems were encountered by another ICTY prisoner in a German federal state. However, this might not be so much due to his formal classification in prison but to incompetence and personal prejudices some members of the prison staff might have had towards this prisoner. He explained that prior to having been employed in the prison library, he had not been allowed to work in prison for almost five years, apparently due to the doctor's assessment that his medical ailment, a defunct prosthesis in a body limb, deems him unfit to work in prison.¹²⁷³ Besides no constructive effort having been taken by prison authorities to improve the prisoner's medical status,¹²⁷⁴ he also stressed that for five years, he had continuously not been allowed to work, which ultimately led him to resort to criminal activities in prison (selling drugs and mobile phones in the prison yard) in order to somehow amass funds for his expenses (e.g. phone calls to family, legal expenses and food requirements). According to the prisoner, the issue at hand was the wrong translation provided by the prison social worker who, for whatever reason, continuously had missed to properly explain to the prison director that any committed transgression is due to the prisoner starving and being unable to survive without proper work. Once this issue had been cleared out, the prisoner was given a job in the prison library, after which no more transgressions occurred.

Ultimately, this incident shows to what extent inadequate translation services in prison – which, arguably, can be motivated by personal prejudices of prison staff – can hinder the attainment of basic prisoner's rights, which subsequently further aggravates the rehabilitative path of ICTY prisoners, thus forcing them to resort to criminal activities. In some sort of Kafkaesque scenario, the transgressions were ultimately held against the prisoner as a negative assessment of his behaviour in prison, despite having been induced by personal necessity.¹²⁷⁵

Similar to work possibilities in prison, any educational or recreational possibilities the ICTY prisoners might have during the enforcement of their sentences are usually those that are also offered to national prisoners.

1272 *Jungvirth* 2014.

1273 Interview with ICTY prisoner B in Germany, 02/03/2016.

1274 Besides the international prison standards that demand proper medical services for any prisoner (see *Chapter 3.1.3.1*), even the ICTY/MICT officials admitted that the possibility of the enforcing state to adequately tend to any health issues the ICTY convicts might have is a significant factor for the choice of an enforcement state (see *Chapter 6.2.2.1*).

1275 Interview with ICTY prisoner B in Germany, 02/03/2016.

In terms of education, the ICTY prisoners mostly attended language classes,¹²⁷⁶ but there were also examples of prisoners attending primary school classes¹²⁷⁷ or even more specialized educational courses, such as studying art and literacy,¹²⁷⁸ if the latter were provided in national prisons. As in the case of the work detail, educational opportunities in different national prisons are tailored towards ordinary disadvantaged offenders, that is people whose lack of basic educational or vocational skills features as a prominent dynamic risk factor in their crime etiology. Quite on the contrary, many ICTY prisoners are people with a middle or high educational background, with a developed affinity or interests towards different professional fields; therefore, rudimentary educational opportunities in prisons may hardly have any special rehabilitative effect on them. One interviewed ICTY prisoner, formerly occupying a higher military position during the war, jokingly described his experience with a school class in prison where, according to him, he was sometimes forced to correct teachers in class himself, arguing that due to his knowledge of mathematics and physics obtained at a military academy, he knew the taught subject better than the teachers.¹²⁷⁹ Indeed, for many ICTY prisoners, signing up for general education classes in prison might simply be a means of passing time or of adding a purpose to their day, which might eventually be looked at positively when they become eligible for release. Language classes, on the other hand, have a more pragmatic meaning, as learning the language of the country they are imprisoned in might help them better convey their needs to prison staff or more easily communicate with their fellow inmates. Some ICTY prisoners, however, complained that the provided language classes are disadvantageous towards foreigners as they are tailored to offer a grammatical proficiency to those inmates who already have a decent vocabulary, whereas many ICTY prisoners, when they arrive in enforcement states, do not have any knowledge of the language(s) spoken there.¹²⁸⁰ As such, they might struggle with acquiring the lingual basis which (accompanied by the fact that many are sent to states where they might not have wanted to go) creates a resentment to further learning a foreign language.¹²⁸¹ This proved explicitly problematic in the case of some ICTY prisoners in Spain, Italy, Austria and France, as their lack of foreign language skills subsequently

1276 Interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with ICTY prisoner A in Germany, 11/05/2014; interview with a released ICTY prisoner, 20/05/2014; see also, e.g., Decision on Early Release of *Esad Landžo*, 15 July 2008, para. 6; Prosecutor v. *Ivica Rajić*, Decision of President on Early Release of *Ivica Rajić* (IT-95–12–ES, 22 August 2011), para. 18 (hereinafter: Decision on Early Release of *Ivica Rajić*, 22 August 2011).

1277 Interview with ICTY prisoner A in Germany, 15/08/2014.

1278 See, e.g., Prosecutor v. *Blagoje Simić*, Decision of President on Early Release of *Blagoje Simić* (IT-95–9–ES, 15 February 2011), para. 22 (hereinafter: Decision on Early Release of *Blagoje Simić*, 15 February 2011).

1279 Interview with ICTY prisoner A in Germany, 15/08/2014.

1280 Interview with ICTY prisoner B in Germany, 02/03/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1281 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

impeded communication with prison staff and allowed either only for a superficial psychological or psychiatric assessment by prison authorities or none at all.¹²⁸² Furthermore, such a lingual barrier can have serious consequences for prisoners, their prison treatment and subsequent release. The case of *Vinko Martinović*, formerly incarcerated in Italy, shows that due to his poor knowledge of the Italian language, the Italian prison authorities misinterpreted his views on his acceptance of punishment and personal responsibility as negative when conducting the report on this prisoner to be sent to the ICTY for a release evaluation. Were it not for the possibility of the prisoner to personally refute these claims and correct them by appealing to the Tribunal, they might have negatively influenced his chances for release.¹²⁸³

Additionally, some interviewed prisoners criticized the lack of knowledge of widespread foreign languages, such as English, among national prison staff.

Similar to vocational or educational opportunities, recreational possibilities might vary between the states and depend on the concrete prison ICTY prisoners have been sent to. Next to daily walks in the prison yard, the length of which differs between the states but reportedly is never less than an hour per day (as in accordance with international prison standards), a variety of group memberships can be offered in national prisons, such as chess groups, backgammon groups, a prison choir, up to fitness and organized sports such as football or tennis. Some prisoners progressing through national prison gradation systems might also be allowed to participate in organized activities outside of prison, as was the case for *Zoran Vuković* in Norway who, after having been transferred to a progressive ward, attended excursions such as mountain, cycling and fishing trips.¹²⁸⁴ Arguably, the classification of ICTY prisoners carries significance as to which recreational activities might be available to them. Between different states, however, a similar classification of prisoners can nevertheless entail a discrepancy in the offered activities, as well as their frequency. For example, despite falling under a similar classification as high-risk offenders, an

1282 See Prosecutor v. *Drago Josipović*, Decision of the President on the Application for Pardon or Commutation of Sentence of *Drago Josipović* (IT-95-16-ES, 30 January 2006), para. 4 (hereinafter: Decision on Early Release of *Drago Josipović*, 30 January 2006); Order Issuing a Public Redacted Version of the 9 July 2009 Decision of the President on the Application for Pardon or Commutation of Sentence of *Milorad Krnojelac* (IT-97-25-ES, 23 July 2009), para. 16 (hereinafter: Decision on Early Release of *Milorad Krnojelac*, 23 July 2009); Prosecutor v. *Mladen Naletilić*, Public Redacted Version of the 29 November 2012 Decision of the President on Early Release of *Mladen Naletilić* (IT-98-43-ES, 26 March 2013), para. 26 (hereinafter: Decision on Early Release of *Mladen Naletilić*, 26 March 2013); Decision on Early Release of *Duško Sikirica*, 28 June 2010, para. 19; Prosecutor v. *Mlado Radić*, Public Redacted Version of 13 February 2012 Decision of the President on Early Release of *Mlado Radić* (IT-98-30/1-ES, 09 January 2013), para. 17 (hereinafter: Decision on Early Release of *Mlado Radić*, 09 January 2013); Decision on Early Release of *Zoran Vuković*, 11 March 2008, para. 4.

1283 Prosecutor v. *Vinko Martinović*, Decision of the President on Early Release of *Vinko Martinović* (IT-98-34-ES, 16 December 2011), paras. 21–22 (hereinafter: Decision on Early Release of *Vinko Martinović*, 16 December 2011).

1284 Decision on Early Release of *Zoran Vuković*, 11 March 2008, para. 4.

ICTY prisoner in Estonia is entitled only to one hour of sport activities per week, as opposed to a certain ICTY prisoner in Germany who is allowed to go jogging three times per week, attends two fitness sessions as well as a music group within one week.¹²⁸⁵ Furthermore, many ICTY prisoners who – due to their prison classification, health impediments or simply age – do not have access to many recreational opportunities in prison resort to reading as a pastime activity. If they can afford it, they are inclined to order books in their native language from their home countries. While there is scant information on any censorship prison authorities might be placing on books the ICTY prisoners are allowed to read, one interviewed ICTY prisoner in Germany admitted that he had been prohibited to order two political books, one on the pretext of negatively depicting the role of Germany in the dissolution of the former Yugoslavia and the other one for being a biographical book on *Radovan Karadžić*.¹²⁸⁶ It can be assumed that such policies depend on each enforcing state, as, for example, the interviewed prisoner who was serving his sentence in Finland did not mention any censorship enforced on the books the ICTY prisoners were ordering there.¹²⁸⁷

6.3.2.3 Health care

According to international prison standards, proper health care for prisoners does not only entail basic provisions, such as accommodation and nutrition, but extends to them being explicitly entitled to proper physical, mental and psychiatric services while imprisoned. The latter can likely be of great significance for international prisoners, as their progress along the path of personal and moral rehabilitation would entail breaking with old patterns of thought and coping mechanisms that kept their cognitive dissonance silenced. As explained before, for some, facing the reality and consequences of their crimes can be so impactful that they might suffer nervous breakdowns, nightmares, PTSD or become suicidal.¹²⁸⁸

Among the interviewed ICTY prisoners, there was a discrepancy in opinions when it comes to nutrition in prisons. For example, while the prisoner who served his sentence in Finland complimented the food in Kylmäkoski prison as being of a much better quality than what the detainees received in the UNDU at the time, those imprisoned in Estonia and Germany had quite a few complaints about the food they received in prison. One of the major points of criticism was the little or non-existent nutritional value of the food served in prison, due to which ICTY prisoners in some German federal states as well as those in Estonia were forced to supplement their

1285 Interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with ICTY prisoner C in Germany, 23–24/10/2016.

1286 Interview with ICTY prisoner B in Germany, 02/03/2016.

1287 Interview with a released ICTY prisoner, 20/05/2014.

1288 See *Chapter 4.1.2.2*.

diet with additional provisions bought from the prison canteen.¹²⁸⁹ The challenge, however, is that additional groceries, such as fruits and vegetables, cost much more in prison than on the outside, and without properly remunerated work – which some ICTY prisoners, due to their prison classification or health issues, do not have access to –, the inmates can hardly afford it. An interviewed ICTY prisoner in one German federal state explained that before he was finally allowed to work in the prison library, he had lost 30 kilos in prison and was on the verge of malnutrition.¹²⁹⁰ Similarly, another ICTY prisoner in Estonia explained that the ICTY prisoners there depend on monetary support from their families in order to afford themselves groceries in prison, further detailing that the food assigned for prisoners is mostly soup-based. “Meat, you don’t ever see meat here, no”, he complained, comparing the food he received with the allegedly better diet the ICTY prisoners have in Norway, Sweden, Denmark and Belgium.¹²⁹¹ A further problem is the invariability of prison food. This can have negative health impacts on the prisoners if they already suffer from health ailments that require a special dietary regime, as many ICTY prisoners might need due to their old age. For example, one other ICTY prisoner in Germany stressed that due to his diabetic problems, he should be cautious with his sugar intake, yet given that the prison diet is largely based on carbohydrates and sugar, such as in pasta, he does not have much of a choice.¹²⁹²

When it comes to basic health services in prison, the interviewed prisoners did not have particular complaints. However, they indicated the prevalent problem of not speaking adequately the foreign language and the lack of competent translation services in prison: “[Doctors] are polite and want to help, but communication is the problem, you know”, said an interviewed ICTY prisoner in Estonia.¹²⁹³ To that extent, prisoners might have problems to adequately express their needs, or their urgency might be misunderstood. Furthermore, the quality of medical services in enforcement states depends both on the economic standard of these states and their national policies. Even though the ICTY/MICT officials name the concern about the medical well-being of their prisoners as one of the high-priority criteria when it comes to the choice of state, in practice, not all states the prisoners have been transferred to have lived up to their obligation to provide appropriate health care. Much criticism from the side of the interviewed prisoners pointed towards the states not being overly inclined to provide complicated or expensive medical care when required. The prisoner in Estonia said that if a more demanding medical service is needed, a prisoner might have to wait for a year or longer before an appointment can

1289 Interview with ICTY prisoner B in Germany, 02/03/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1290 Interview with ICTY prisoner B in Germany, 02/03/2016.

1291 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1292 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1293 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

be made.¹²⁹⁴ The attorney of another ICTY prisoner in Estonia indicated that when his client requested from the prison authorities to visit a dentist after his dental bridge broke, the first appointment offered was after three years.¹²⁹⁵ Reportedly, only after Serbian diplomats made pressure on the prison authorities was the prisoner scheduled to have his appointment within half a year. According to the attorney, similar issues occurred when the prisoner asked to see an ophthalmologist with whom no appointment has been scheduled even after a year and a half of waiting.¹²⁹⁶ In Germany, the situation is discrepant between the federal states. For example, two ICTY prisoners in different federal states indicated their general satisfaction with medical services, even though one of them had undergone an unsuccessful backbone operation while being imprisoned. While commenting that medical care in prison does not match the one he had received as an UNDU detainee, the general tone expressed by the operated prisoner commended the authorities for at least showing concern for his medical situation.¹²⁹⁷ This prisoner is regularly taking pills as part of his therapy and attends physiotherapy two times per week. In contrast to that, an ICTY prisoner in a third German federal state expressed his utter disappointment and resignation towards national authorities as, according to him, nothing had been done in order to help him replace his now-defunct limb prosthesis, even after he had made repeated appeals to the representatives of the ICTY/MICT who are assigned to supervise the enforcement of his sentence.¹²⁹⁸ This prisoner is particularly aggravated by claims the national prison authorities made to the supervisory committee from The Hague per letters in 2005 and 2007 (claiming to hold these letters as evidence), in which they assured them the prosthesis had been acquired and should soon be installed in the prisoner, even though no such thing has been done in the approximately ten years since. Furthermore, the prisoner has been diagnosed as suffering from PTSD as early as during his detention in the UNDU. He reports to have been making repeated requests to prison authorities during all the time of his enforcement in Germany to be allowed to talk to somebody and to have a therapy for his PTSD disorder. According to his testimony, this request was declined on the grounds that he does not speak the language sufficiently well for such a therapy to take place, upon which he insisted to be given a competent translator. Allegedly, only after 15 years of his imprisonment in Germany, he has finally been allowed to a therapy with a neuropsychiatrist and a competent translator.

The language issues ICTY prisoners have are indeed a big problem when it comes to acquiring much-needed services in prisons, including medical ones, as these services are mostly available in languages foreign to the ICTY prisoners. To that extent,

1294 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1295 *Jungvirth* 2014.

1296 *Jungvirth* 2014.

1297 Interview with ICTY prisoner A in Germany, 11/05/2015.

1298 Interview with ICTY prisoner B in Germany, 02/03/2016.

prison officials might be reluctant to provide more support to them (e.g. in terms of special translation services) as this would give grounds to other prisoners to pose similar demands, therefore posing an additional (including monetary) burden on the prison administration. It has already been indicated that due to the language problems some ICTY prisoners had in Spain, Italy, Austria and France, the quality of their psychological and psychiatric assessment was only superficial, or none was conducted at all.¹²⁹⁹ To that end, in some cases, states have indeed provided appropriate psychological service if the prisoner had sufficient lingual proficiency. For example, people in Scandinavian states feature a high command of the English language, both among the general population and within formal state structures.¹³⁰⁰ In Finnish prisons, English is also taught through educational courses, which in turn has given leverage to those ICTY prisoners incarcerated there who spoke some English to access services in prison more efficiently, given that the prison staff in Finland also speaks fairly good English.¹³⁰¹ Arguably, *Esad Landžo* – who, during his imprisonment in Finland, had continuous and frequent psychological assistance to help him efficiently cope with the knowledge and consequences of his crimes – was able to acquire this treatment also due to his knowledge of English, as it is reported that he kept studying the language in the prison.¹³⁰² It would then seem that states more sensitized to the needs of foreign prisoners (and where the knowledge of English being widespread among foreigners) can more easily offer the needed services.

In recent years, there have also been reports on deaths of some ICTY prisoners in German and Portuguese prisons.¹³⁰³ While media outlets stated long and progressive illnesses as their causes of death, some criticism has been issued by the prisoners' home states with regard to the inappropriateness of medical services offered to the prisoners, which might have contributed to their deaths.¹³⁰⁴

6.3.2.4 Translation services

Translation service in prison is a factor of relevance not exclusively for ICTY prisoners, but for all foreign inmates who are serving their sentences in enforcement states. Having said that and given the number of enforcement states, there can be quite a disparity between the quality of offered translation services which, according to ICTY/MICT officials, partly depend on the prison population of a particular

1299 See *Chapter 6.3.2.2*.

1300 *Johansson 2002*.

1301 Interview with a released ICTY prisoner, 20/05/2014.

1302 Decision on Early Release of *Esad Landžo*, 15 July 2008, para. 7.

1303 See Al Jazeera Balkans of 17 August 2015: “Mile Mrkšić preminuo u zatvoru u Portugalu” [*Mile Mrkšić* died in a Portuguese prison]; balkans.aljazeera.net/vijesti/mile-mrksic-preminuo-u-zatvoru-u-portugalu [11/01/2018]; also see Al Jazeera Balkans of 10 February 2017: “Ljubiša Beara preminuo u njemačkom zatvoru” [*Ljubiša Beara* died in a German prison]; balkans.aljazeera.net/vijesti/ljubisa-beara-preminuo-u-njemackom-zatvoru [11/01/2018].

1304 *Mišljenović 2017*.

state.¹³⁰⁵ If a lot of foreign prisoners are incarcerated in the facility, there are good chances that the prison staff might already be tuned to the fact that they need more skilled translators, as opposed to prisons where a more local stratum of prisoners prevails.¹³⁰⁶ The other factor is the general quality of prison standards in certain enforcement states. As further explained by the ICTY/MICT officials, those states with already quite liberal standards, such as Norway or other Scandinavian states, might already, or more easily, implement services tailored to a particular stratum of prisoners.¹³⁰⁷ It has been argued before that the quality of prison conditions is directly tied to the economic situation in the respective country; therefore, it is quite likely that enforcement states with a higher GDP per capita, such as Scandinavian states, would implement such services more efficiently than those with a smaller GDP per capita, such as Estonia, Poland or Portugal. Those prisons with scarce resources might be more reluctant to provide extraordinary services exclusively to ICTY prisoners, as they might fear this could upset the balance and perceived equality of prisoners within the prison.¹³⁰⁸ For example, if the ICTY prisoners are continuously provided with translations services, other groups of foreign prisoners might start demanding equally appropriate translation services. That being said, the ICTY/MICT officials stress that they have never experienced an open pushback or refusal from enforcing states when it came to urging them to implement required services such as translation for ICTY prisoners. If anything, they said, if the states had never made experiences with international prisoners before, this would simply mean that more time is required for these services to be implemented.¹³⁰⁹

At least to a certain extent, practice seems to resonate with these claims. In particular, it seems that those enforcement states with higher economic and therefore higher prison standards will more efficiently provide the required services even if the quota of foreign prisoners might be smaller than in other states. For example, among the interviewed prisoners, those imprisoned in Germany and Estonia were more vocal in expressing complaints about inadequate translation services than, for example, was the prisoner who served his sentence in Finland, even though Germany and Estonia might seem more accustomed to the needs of foreign prisoners, given their quota in national prisons.¹³¹⁰ As previously described, for an ICTY prisoner in one German federal state, inadequate translation services had a direct impact on being declined to

1305 Interview with Legal Officer D at the ICTY/MICT, 15/06/2015.

1306 Interview with Legal Officer D at the ICTY/MICT, 15/06/2015.

1307 Interview with Legal Officer D at the ICTY/MICT, 15/06/2015.

1308 Interview with Legal Officer D at the ICTY/MICT, 15/06/2015.

1309 Interview with Legal Officer D at the ICTY/MICT, 15/06/2015.

1310 Based on World Prison Brief data, the percentage of foreigners in Estonian and German prisons (Estonia – 38,8 %, Germany – 31,3 %) exceeds that in many other states that enforce ICTY sentences, including Scandinavian states (e.g. Sweden – 30,9 %, Norway – 30,5 %, Denmark – 28,3 %, Finland – 18,6 %); see prisonstudies.org/highest-to-lowest/foreign-prisoners?field_region_taxonomy_tid=14 [11/01/2018].

work in prison for many years.¹³¹¹ Similarly, partly because of his poor knowledge of the local language and partly because prison authorities remained unwilling to provide a competent translator, he was declined a required PTSD therapy for a long time.¹³¹² The unwillingness of national prison authorities to bother with translation services for ICTY prisoners has also been observed in cases of other states, such as Italy, where the assessment of a prisoner by prison authorities might have had negative implications on his release due to poorly understood interaction.¹³¹³ Furthermore, interviewed prisoners complained that they often have to resort to asking their fellow inmates who might have some knowledge of both languages to help them with their requests or explanations.¹³¹⁴ However, these inmates themselves often do not know one or the other language competently enough to provide a correct translation,¹³¹⁵ and when the prison authorities finally resort to acquiring somebody from the outside, this takes a long time, and it is usually somebody without sufficient qualifications to translate.¹³¹⁶ Some prisoners expressed their understanding for the reluctance national authorities might have due to being worried this might disrupt the feeling of equality among prisoners. However, as opposed to other foreigners in prisons – who are already tied to their state of imprisonment either due to personal connections such as residence or due to having committed crimes on the territory of the state –, they stress that they do not have any such ties with enforcement states whatsoever, due to which they would have to endure such an aggravated treatment.¹³¹⁷ One prisoner furiously stressed that the unavailability of appropriate translation services disabled him to implement his rights the way any other non-Tribunal prisoner in his prison could. “When I need something, I have to look for some Russian – that is, if we’re on good terms – to explain him first, so that he can tell the guards,” explained the prisoner, further stating: “and he doesn’t have to do it if he doesn’t want to. I told the prison staff once, during a conversation: ‘Gentlemen, I didn’t ask to come here; if anything, I explicitly asked not to come here! There you have, in my file, my complaint, stating that I do not provide a consent to be transferred to Germany. And you insisted for me to come! So now what are you offering to me? You cannot provide a translator! And you knew that in my file, it says I don’t speak German!’ And I told them I don’t have to learn German; where does it say that I have to learn German? Nowhere! So I asked why they accepted the obligation to enforce my

1311 See *Chapter 6.3.2.2*.

1312 See *Chapter 6.3.2.3*.

1313 See *Chapter 6.3.2.2*.

1314 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1315 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1316 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1317 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

sentence if they cannot provide for me to feel normal here and implement my rights as any other prisoner.”¹³¹⁸

Indeed, for ICTY prisoners, the lack of lingual knowledge is one of the biggest default obstacles to internal equality between them and non-Tribunal prisoners in national prisons. As this section has shown, the different levels of commitment the enforcing states display to ameliorate such a disadvantageous situation for the ICTY prisoners is also indicative of the external inequality of the treatment provided to them between different enforcing states.

6.3.2.5 Contacts with the outside world

When it comes to factors of importance for where they will serve their sentences, the possibilities of maintaining contact with the outside world, especially with their immediate family, are one of the most important factors for ICTY prisoners. This pertains to the geographic distance of enforcement states from the prisoners’ states of origin, the visiting possibilities each enforcement state offers (e.g. the number of visits days per month or visiting hours per day, supervised or unsupervised visits) as well as other means of communication available in prison. While the ICTY prisoners generally fall under the same visitation regime as ordinary prisoners, practice shows great discrepancies not only between ICTY and ordinary prisoners but also between enforcement states.

First and foremost, this might be due to the geographic distance an enforcement state has from the prisoner family’s place of residence. For instance, those ICTY prisoners imprisoned in states that surround former Yugoslavian states, such as Austria and Italy, are – from the standpoint of geographical distance – in a much better position with regard to visits than the prisoners in Portugal, Spain or Scandinavian states. The length of the trip is shorter, both in terms of distance and required time, not to mention its costs. In order to visit the ICTY prisoners in Graz-Karlau prison in Austria, it only takes a two-hour trip by car from the Croatian capital Zagreb, a convenience to which a number of visitors testify whom a former Bosnian Croat politician, *Dario Kordić*, received during his imprisonment there. It has been reported that Mr. *Kordić* broke the prison “record” with regard to the number of visits, as at certain point, there were around 300 persons – extending far beyond only family and friends – on the list waiting to visit him.¹³¹⁹ On the other hand, due to monetary constraints as well as less convenient travel routes, prisoners serving their sentences in distant states receive only irregular visits from their families. An ICTY prisoner in Estonia said that due to a lack of direct flight routes, it takes approximately three days for his wife and daughter to get there to visit him in prison.¹³²⁰ “I don’t have any income,

1318 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1319 *Gaura* 2011.

1320 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

and for my family to come to visit me from Serbia, it takes them two thousand euros for two persons per trip,” complained the prisoner.¹³²¹ Monetary constraints have also been noted as a reason why families of some other prisoners, like *Duško Tadić* in Germany, have only irregularly visited throughout the years.¹³²² As previously described, some ICTY prisoners serving their sentences in particularly distant states, such as Spain (*Darko Mrđa*) or Norway (*Zoran Vuković*), received no visits during the whole time of their imprisonment, as their families, due to economic constraints, could not afford the trip.

However, while the geographic distance plays an important role in terms of visiting possibilities, this does not necessarily need to be the crucial hindering factor. While describing discrepancies in prison conditions between ICTY prisoners, an interviewed prisoner in Estonia complained that ICTY prisoners in Norway, Finland and Denmark earn enough money in prison to partly finance visits by their families¹³²³ – a benefit which some ICTY prisoners in other enforcing states might have no access to, due to their prison classification or other hindrances such as health issues or language problems.¹³²⁴

Furthermore, Scandinavian states have also been rated as being the most liberal towards the ICTY prisoners when it comes to visiting conditions. In Finland, prisoners are entitled to spend around a week per visit with their families, in especially designated apartments outside the prison where they are under minimum supervision by prison staff.¹³²⁵ Similar possibilities have been acknowledged to exist for ICTY prisoners in Estonia. There, however, they are entitled to spend a lesser number of days with their families (three altogether, in a designated apartment within the prison, separated from other prisoners).¹³²⁶ Also, given complicated travel connections as well as economic constraints of their families which they cannot ease due to the work restrictions imposed on them, the ICTY prisoners in Estonia can utilize these visiting possibilities to a far lesser extent than those in Finland.

The ICTY prisoners in other enforcing states such as Germany and Spain do not have the possibility to spend a couple of days continuously with their family members the

1321 For a similar experience with regard to family visits of interviewed ICTY prisoner C in Germany, see *Chapter 6.2.2.2*.

1322 Decision of the President on the Application for Pardon or Commutation of Sentence of *Duško Tadić* (IT-94-1-ES, 17 July 2008), para. 11 (hereinafter: Decision on Early release of *Duško Tadić*, 17 July 2008).

1323 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1324 See in detail *Chapter 6.3.2.2*.

1325 Prosecutor v. *Momir Nikolić*, Public Redacted Version of the 14 March 2014 Decision on Early Release of *Momir Nikolić* (MICT-14-65-ES, 12 October 2015), para. 21 (hereinafter: Decision on Early Release of *Momir Nikolić*, 12 October 2015); interview with a released ICTY prisoner, 20/05/2014.

1326 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

way the prisoners in Finland or Estonia do. According to national legislation, prisoners are usually allowed only a couple of hours for visits per month, something which poses a disadvantage for the ICTY prisoners, as their family members would have to travel great distances to visit them for only a few hours. In addition, given the monetary burden such trips entail as well as lengthy bureaucratic procedures that might precede them (e.g. obtaining visas), this can end up as rare as once per year or even less. However, being aware of this situation, national prison authorities are to an extent willing to accommodate requests by ICTY prisoners to be granted accumulated visiting days with their families, usually with a duration of several hours per day, but not for the whole day.

Nevertheless, interviews with ICTY prisoners in Germany point towards discrepancies in this regard. As previously stated, the enforcement of criminal sentences in Germany falls under the prerogative of the individual federal state. To that extent, the decision regarding a number of visiting days and hours an ICTY prisoner is allowed to receive depends on the discretion of the prison authorities of the federal state that hosts the respective ICTY prisoners. Depending on their “negotiation skills” as much as on the sensibility of prison directors towards their position, the number of visiting days and hours an ICTY prisoner might receive could be larger or smaller than ICTY prisoners in other German states are allowed to. Situations differ, and depending on the federal state the interviewed ICTY prisoners are incarcerated in, reported visiting days have ranged from four up to 14 per single visit.¹³²⁷ The number of expected visits per year as well as whether the prisoners are allowed to transfer unused monthly visiting days all have an influence on how many days they are actually allowed to per visit. One interviewed ICTY prisoner said differences can also occur longitudinally for individual prisoners depending on the changes in prison administration. He explained: “The [prison] director told me that if I needed something, I should just refer to him. And that worked fine, for five years I had my routine, which changed half a year ago, as the new prison director arrived. Before, they allowed my wife to visit four, five days in a row, because of the trip. Now it’s the same as for ordinary prisoners. Before, conjugal hours weren’t included in ordinary visiting hours, now they are.”¹³²⁸

Additional visit privileges outside the prison confines have been reported in case of some ICTY prisoners in Denmark, Austria and Germany. In Denmark, *Ljubomir Borovčanin* – the former Deputy Commander of Republika Srpska’s Ministry of Internal Affairs Special Police Brigade and sentenced to 17 years imprisonment for his role in the Srebrenica massacres – was granted a supervised 12-hour release from

1327 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016.

1328 Interview with ICTY prisoner A in Germany, 15/08/2014.

prison four times to spend time with his son during the enforcement of his sentence.¹³²⁹ Similarly, after being transferred to a so-called “pre-release relaxed detention” of Graz-Karlau prison in Austria, *Dario Kordić* was granted two accompanied excursions outside the prison to spend time with friends and family.¹³³⁰ After his transfer to an open prison facility in the German federal state of Rhineland-Palatinate, *Johan Tarčulovski*, a Macedonian police officer sentenced to twelve years for war crimes, benefited from weekly furloughs, some of which he spent with his family in the town of Diez where the prison is located.¹³³¹ For these prisoners, furlough benefits were granted as a consequence of progressing through the prisoner gradation system, subject to state laws. However, even though being subjected to the national prison-gradation system, some ICTY prisoners serving their sentences in other European states could not benefit from furloughs in the same form as other prisoners – arguably due to their security classification. For instance, an interviewed ICTY prisoner formerly incarcerated in Finland explained that national prisoners were entitled to several furlough days per month, which he was denied. However, prison authorities allowed him a monthly visit to a Bosnian family who was living in a neighbouring town, for a duration of eight hours, which had to happen under the supervision of prison guards.¹³³² Another ICTY prisoner in Finland, *Momir Nikolić*, benefited from a similar type of occasional releases out of Kylvmäkoski prison. Because of good behaviour, he was escorted several times to a shopping mall and a nearby village during the enforcement of his sentence.¹³³³ Similar to the previously described family visiting arrangements some prison directors are willing to resort to, modified furlough possibilities also represent an example of “negotiating” standards and treatment in order to balance the position of ICTY prisoners with the one of national, non-Tribunal prisoners. For example, one interviewed ICTY prisoner in Germany explained that because of being under the jurisdiction of the ICTY, he does not fall under the same release eligibility thresholds as ordinary prisoners do. Due to the length of his sentence, it is therefore likely he might not benefit from the possibility of release for a long time, which is why he appealed to a German district court to be granted a furlough possibility in order to make his prison years more bearable.¹³³⁴ His request was eventually approved, even though it was declined by the prison administration at first instance. This prisoner has been granted a daily furlough, several

1329 Prosecutor v. *Ljubomir Borovčanin*, Public Redacted Version of the 14 July 2016 Decision of the President on the Early Release of *Ljubomir Borovčanin* (MICT-15-85-ES.6, 2 August 2016), para. 24 (hereinafter: Decision on Early Release of *Ljubomir Borovčanin*, 2 August 2016).

1330 Decision on Early Release of *Dario Kordić*, 06 June 2014, para. 19; see also HRsvijet.net of 24 November 2013: “Dario Kordić na slobodi” [*Dario Kordić* furloughed from prison], hrsvijet.net/index.php/vijesti/30-ostalo/30261-dario-kordi-na-slobodi [15/01/2018].

1331 Decision on Early Release of *Johan Tarčulovski*, 08 April 2013, para. 22.

1332 Interview with a released ICTY prisoner, 20/05/2014.

1333 Decision on Early Release of *Momir Nikolić*, 12 October 2015, para. 21.

1334 Interview with ICTY prisoner A in Germany, 15/08/2014.

times per year, to spend with his wife in the city where the prison is located, but under the supervision of two plainclothes officers.¹³³⁵

Contrary to the furloughs some ICTY prisoners in Finland, Norway,¹³³⁶ Denmark, Austria and Germany received, in some cases, furloughs were explicitly denied to ICTY prisoners. For instance, despite being imprisoned under the quite liberal conditions of high-standard Hinseberg prison for females in Sweden, *Biljana Plavšić* – convicted to 11 years for crimes against humanity against the Muslim population in Bosnia and Herzegovina during the war – was not granted a right to furlough by the Swedish authorities on the grounds that her temporary release to a nearby Swedish town might violate the feelings of the Muslim minority that lives there.¹³³⁷ Again, Germany represents an interesting example of discrepant policies towards ICTY prisoners: opposed to two previous cases of granted furloughs to ICTY prisoners there, two other interviewed prisoners complained that furloughs had been denied to them on the grounds of their prison classification. According to one of them, the length of his sentence entails his classification as a high-risk offender prone to escape, due to which the prison authorities denied him furloughs, despite an excellent assessment of his behaviour.¹³³⁸ Similarly, the prison authorities classified the other one as a dangerous high-risk offender despite suffering from bodily ailments due to which one of his limbs is not functional.¹³³⁹ According to this prisoner, in order to be escorted outside the prison, security regulation demands that he is to be strained by chains, which his medical assessment prohibits due to his damaged body limb. Given that inadequate medical care during imprisonment hindered any appropriate recovery of his body limb – which in turn would enable him temporary escorts out of prison –, he is bureaucratically prevented from furloughs. He confessed that he appealed to the district court on this decision by the prison administration; however, his appeal was rejected as no right had been violated according to national authorities.

Next to the frequency and conditions of visits as well as furloughs for ICTY prisoners, a discrepant treatment between the enforcing states can also be observed with regard to other means of communication with the outside world. Because of their already quite liberal prison conditions and higher standards, Scandinavian states (e.g.

1335 Interview with ICTY prisoner A in Germany, 11/05/2015.

1336 It has been reported that *Radomir Kovač*, a former Bosnian Serb paramilitary leader sentenced to 20 years for committed enslavement and rape as crimes against humanity during the post-Yugoslavian wars, was granted a successful leave of absence from prison six times during his imprisonment in Norway (Decision on Early Release of *Radomir Kovač*, 03 July 2013, para. 27).

1337 *Ristić* 2017.

1338 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1339 Interview with ICTY prisoner B in Germany, 02/03/2016.

Norway and Finland) offer more possibilities to prisoners for contacting desired persons, such as via Skype.¹³⁴⁰ Otherwise, ICTY prisoners have telephone calls and written mail at their disposal, just like ordinary prisoners. Interviews with ICTY prisoners point to discrepancies here as well. In Finland and Estonia, no restrictions have been imposed in terms of the frequency of calls or the number of persons the prisoner is allowed to call.¹³⁴¹ The only limit imposed on them is the monetary one. Prisoners buy call credits from the prison administration, and based on the number of credits, they can make a certain number (or length) of calls. The situation in Germany is different insofar as the prisoners there are allowed to contact only a limited number of persons by telephone.¹³⁴² One interviewed prisoner reported that he cannot make a call every day but only on designated days in the week, as opposed to other ICTY prisoners in Germany.¹³⁴³ Similar to the visiting possibilities the prisoners have, the situation with regard to telephone calls can change longitudinally, and while one interviewed prisoner reported a reduction in the visiting days, he also said that a new prison management made communication by telephone easier.¹³⁴⁴ Telephone calls became cheaper, and the list of contacts the prisoner can have was expanded to also include mobile phone numbers. Hand-written letters, on the other hand, are allowed to the extent a prisoner might want to, given that he/she acquires envelopes, paper and postmarks him-/herself. Some prisoners, however, reported their letters to be subject to control by prison authorities. One ICTY prisoner in particular complained that his letters often did not reach their destination or that they were returned to him without explanation.¹³⁴⁵ The problem, he complained, is not control by the prison authorities but its lack of transparency, saying that if there is anything he is not allowed to mention in his letters, he would like it to be clearly pointed out to him.

Other means of information the ICTY prisoners utilize include ordering newspapers from their home states (due to lingual problems, many admitted difficulties in following foreign news) and watching television in prison. While the latter is allowed, many interviewed prisoners admitted that they struggle with the foreign language and would benefit from more channels in their native Serbo-Croatian language. Similar to visiting arrangements and phone calls, the possibility to follow television channels in a native language depends on the decision of each prison administration.

1340 See e.g. Decision on Early Release of *Momir Nikolić*, 12 October 2015, para. 21; Interview with Legal Officer A at the ICTY/MICT, 15/06/2015

1341 Interview with ICTY prisoner B in Germany, 02/03/2016; Interview with a released ICTY prisoner, 20/05/2014.

1342 Interview with ICTY prisoner C in Germany, 23–24/10/2016; Interview with ICTY prisoner B in Germany, 02/03/2016; Interview with ICTY prisoner A in Germany, 15/08/2014.

1343 Interview with ICTY prisoner B in Germany, 02/03/2016.

1344 Interview with ICTY prisoner A in Germany, 15/08/2014.

1345 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

Two interviewed prisoners reported that while they had previously had the possibility to watch such channels, this was eventually cancelled.¹³⁴⁶ “They [the prison administration] say it is due to technical difficulties, but the thing is, they want to maintain the established scheme, so if I ask for a TV channel in Serbian, then that Polish guy over there will, too, they argue”, explained one interviewed prisoner.¹³⁴⁷ The point is, the ICTY prisoner explained further, that while the prison authorities argue for his resocialization, by denying him furloughs as well as limiting visits, translation services and the possibility to be adequately informed (i.e. in his language about the society he comes from), he feels that he is thrown further down into isolation and stigmatized in comparison to national prisoners. With such measures and conditions being applied, he feels neither a possibility to integrate into the society of the enforcing state nor a willingness to do so, arguing that the ICTY prisoners do not in any way belong to the states that decided to accept them and enforce their sentences. The fairest option, he says, would be to return them to serve their sentences in prisons of the former-Yugoslavian states, regardless of the state.

As with translation services, the extent to which different national prison administrations can equate the position of ICTY prisoners with the one of national prisoners when it comes to different means of contact with the outside world depends on several factors, such as sensibility towards the needs of the foreign prisoners as well as the overall standard of prison conditions in the enforcing state. In this sense, as with pretty much all other basic services prisoners ought to have an access to by international prison standards, a general inequality can be observed between Scandinavian states and other continental European, where even default disadvantageous factors, such as a larger geographic distance from their home states, could be mitigated or overcome by better conditions and services the Scandinavian enforcing states do provide to their ICTY prisoners. The issue at hand is the particular status of ICTY prisoners who – even among the strata of foreigners in a particular prison – might represent a minority; therefore, given their socio-cultural background, their isolation is that much likely to be increased. Additionally, their prison classification (which can often be contested) can entail additional restrictions (i.e. a denial of furloughs), thus aggravating an already increased isolation.¹³⁴⁸ In order to uphold a general equality among all prisoners in a particular prison facility, prison authorities can be reluctant to provide special measures tailored to balance the standard of the ICTY prisoners with that of national ones (e.g. Skype calls, additional television programmes in the native language, more concurrent visiting days, more time per visit), since other foreigners (or even domestic nationals) might demand similar measures applied to them. In addition, implementing such services would entail additional costs, something

1346 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner A in Germany, 15/08/2014.

1347 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1348 For more details, see *Chapter 6.3.3*.

with which many enforcing states might already struggle with regard to their own prisoners. As revealed before, neither the ICTY nor the international community monetarily supports enforcing states in maintaining equal standards towards ICTY prisoners.

6.3.3 Treatment of ICTY prisoners

6.3.3.1 Relationship with prison staff and other prisoners

Despite the above-indicated challenges to upholding equal standards of imprisonment (among ICTY prisoners as well as between them and ordinary prisoners), decisions on the early release of the ICTY prisoners¹³⁴⁹ indicate that the majority of

1349 34 available decisions on the early release of ICTY prisoners have been analyzed, namely: Order of the President on the Application for the Early Release of *Anto Furundžija* (IT-95-71/1, 29 July 2004), hereinafter: Decision on Early Release of *Anto Furundžija*, 29 July 2004; Decision on Early Release of *Esad Landžo*, 15 July 2008; Decision on Early Release of *Hazim Delić*, 15 July 2008; Decision on Early Release of *Momir Nikolić*, 12 October 2015; Decision of the President on the Application for Pardon or Commutation of Sentences of Mrs. *Biljana Plavšić* (IT-00-39 & 40/1-ES, 14 September 2009), hereinafter: Decision on Early Release of *Biljana Plavšić*, 14 September 2009; Prosecutor v. *Nikola Šainović*, Public Redacted Version of the 10 July 2015 Decision of the President on the Early Release of *Nikola Šainović* (MICT-14-67-ES.1, 27 August 2015), hereinafter: Decision on Early Release of *Nikola Šainović*, 27 August 2015; Prosecutor v. *Vidoje Blagojević*, Decision of the President on Early Release of *Vidoje Blagojević* (IT-02-60-ES, 03 February 2012), hereinafter: Decision on Early Release of *Vidoje Blagojević*, 03 February 2012; Prosecutor v. *Dražen Erdemović*, Order Issuing a Public Redacted Version of Decision of the President on Early Release (IT-96-22-ES, 15 July 2008), hereinafter: Decision on Early Release of *Dražen Erdemović*, 15 July 2008; Decision on Early Release of *Radomir Kovač*, 03 July 2013; Decision on Early Release of *Dragan Obrenović*, 21 September 2011; Decision on Early Release of *Zoran Vuković*, 11 March 2008; Prosecutor v. *Ranko Češić*, Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of *Ranko Češić* (MICT-14-66-ES, 28 May 2014), hereinafter: Decision on Early Release of *Ranko Češić*, 28 May 2014; Decision on Early Release of *Ljubomir Borovčanin*, 2 August 2016; Decision on Early Release of *Drago Josipović*, 30 January 2006; Decision on Early Release of *Darko Mrđa*, 18 December 2013; Decision on Early Release of *Ivica Rajić*, 22 August 2011; Decision of the President on the Application for Pardon or Commutation of Sentence of *Vladimir Šantić* (IT-95-16-ES, 16 February 2009), hereinafter: Decision on Early Release of *Vladimir Šantić*, 16 February 2009; Prosecutor v. *Haradin Bala*, Public Redacted Version of the 28 June 2012 Decision of the President on Early Release of *Haradin Bala* (IT-03-66-ES, 09 January 2013), hereinafter: Decision on Early Release of *Haradin Bala*, 09 January 2013; Prosecutor v. *Predrag Banović*, Decision of the President on Commutation of Sentence (IT-02-65/1-ES, 03 September 2008), hereinafter: Decision on Early Release of *Predrag Banović*, 03 September 2008; Decision on Early Release of *Mlado Radić*, 09 January 2013; Prosecutor v. *Dragan Zelenović*, Public Redacted Version of the 28 August 2015 Decision of the President on the Early Release of *Dragan Zelenović* (MICT-15-89-ES, 15 September 2015), hereinafter: Decision on Early Release of *Dragan Zelenović*, 15 September 2015; Decision on Early release of *Duško Tadić*, 17 July 2008; Decision on Early Release of *Johan Tarčulovski*, 08 April 2013; Decision on Early Release of *Milorad Krnojelac*, 23 July 2009; Decision on Early Release of *Vinko Martinović*, 16 December 2011; Decision on Early Release of *Mladen Naletilić*, 26 March 2013; Prosecutor v. *Dragan Nikolić*, Decision of President on Early Release of *Dragan Nikolić* (IT-94-2-ES, 16 January 2014), hereinafter: Decision on

them have managed to integrate fairly well in their respective prisons. Their behaviour has been reported to be overly good by national authorities, notwithstanding minor transgressions some of them might have had committed in prison. For some, the behavioural assessment has been exceptional, granting them labels such as “a model prisoner”¹³⁵⁰ or “the most reliable prisoner in the prison”¹³⁵¹. This can be regarded as being supportive of etiological claims that unstable and violent behaviour is not generally innate to macro-criminals, as this depends on a complex interplay of personal characteristics and extraordinary circumstances featured e.g. in the situation of a wide-spread conflict. On the contrary, it is quite likely that many prisoners are prone to conformism and obedience, which made them more easily exploitable during the war by political and military elites towards destructive purposes, while in prison, these characteristics make their adaptation to a structured prison life just that much easier. This hypothesis, however, should not be overgeneralized, as there is also some evidence about violent tendencies from the side of some ICTY convicts in prison, speaking in favour of claims that criminal and sadistic profiles can also be found among the ranks of perpetrators.¹³⁵² Similarly, the good behaviour and social intelligence of a prisoner is by itself not necessarily a sign of rehabilitation (particularly in terms of moral rehabilitation). Socially intelligent people can easily

Early Release of *Dragan Nikolić*, 16 January 2014; Order of the President on the Early Release of *Damir Došen* (IT-95–8–S, 28 February 2003), hereinafter: Decision on Early Release of *Damir Došen*, 28 February 2003; Decision on Early Release of *Duško Sikirica*, 28 June 2010; Decision on Early Release of *Dario Kordić*, 06 June 2014; Decision on Early Release of *Mitar Vasiljević*, 12 March 2010; Prosecutor v. *Zoran Žigić*, Public Redacted Version of the 10 November 2014 Decision of the President on the Early Release of *Zoran Žigić* (MICT-14–81–ES/1, 23 December 2014), hereinafter: Decision on Early Release of *Zoran Žigić*, 23 December 2014; Prosecutor v. *Momčilo Krajišnik*, Decision of the President on Early Release of *Momčilo Krajišnik* (IT-00–39–ES, 02 July 2013), hereinafter: Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013; Decision on Early Release of *Blagoje Simić*, 15 February 2011.

1350 See e.g. Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 24.

1351 See e.g. Decision on Early Release of *Momir Nikolić*, 12 October 2015, para. 21.

1352 For example, Decision on Early Release of *Hazim Delić* (15 July 2008) reports that Mr. *Delić* had “disagreements with some prisoners which resulted in a request by him to be moved to a closed unit” (para. 7). This did not seem to affect the general assessment of his behaviour throughout the imprisonment as being good by both national prison authorities and the ICTY President (paras. 7, 20). The latter particularly commended Mr. *Delić*’s decision to be moved to a closed unit as a sign of his proactive willingness to avoid the conflict and his personal rehabilitation (para. 20) – something Mr. *Delić* himself stressed to be the underlying reason for his decision to be moved to a closed unit within the prison – despite “his physical size and strength” due to which, he implies, he might have easily settled the conflict in his favour (para. 14). However, the testimony obtained from a released ICTY prisoner refutes this claim, stating that Mr. *Delić* had actually been actively provoking other prisoners by his aggressive attitude, which turned other inmates against him. “He wanted to be a ‘big boss’, you know how it goes, but he was alone, didn’t have somebody to hold his back. So that’s when it came to a conflict. [...] In the end, he ended up in a solitary confinement, or whatnot, up there [in the prison] because other inmates wanted to kill him. [...] He asked for it, willingly, because he saw his life was in danger” (Interview with a released ICTY prisoner, 20/05/2014).

obey rules and maintain a smooth interaction with prison staff as well as other inmates, yet it is this skill that also enabled some of them to manipulate masses in favour of destructive goals and personal gain. A person might be an obedient prisoner, yet still retain radicalized viewpoints and intolerance towards members of a particular group.

While decisions on early release provide scant information on the attitudes of prison staff towards ICTY prisoners, some interviewed prisoners have been particularly vocal of their experiences. This differs from the treatment they receive as they progress through the prison classification system – e.g. during the evaluation period and then upon being assigned to a specific prison block – and concerns the general attitude prison staff has towards ICTY prisoners. It is interesting here to correlate the experiences the prisoners already made with guards in the UNDU with those they later had with regard to national prison staff in some enforcement states, as they show a similar pattern in their approach to ICTY prisoners. What is more, these experiences further substantiate the claims of an etiological complexity of macro-criminality. Contrary to expectations of the UNDU staff as well as prison staff in some cases, ICTY convicts have generally displayed an “ordinariness” of behaviour and character, which stands in stark contrast with the nature of crimes for which they have been convicted and, accordingly, the impressions some national prison staff might have had of them.

For instance, one interviewed prisoner explained that according to personal admission of the UNDU guards, before the first group of ICTY detainees came to The Hague, the guards underwent a course in which they were prepared for and instructed on how to handle the detainees. “A guard told me how they indoctrinated them, that we’re savages, that we don’t know how to behave, that we’re this and that. [...] He said they were afraid to approach us, how scared they were; said we could not imagine how the propaganda went”, confessed the prisoner.¹³⁵³ Later, he continued, they had developed a more humane approach towards them, more polite and with mutual respect. Comparing this to the approach the national prison staff developed, he said he can notice the same change of attitude with some guards in the prison: “You know, some feel sorry, they see that I stand off from common criminals here – it’s like in the Netherlands back then, they notice my good behaviour and cannot believe such a person could be sentenced to such long punishment.”¹³⁵⁴ While admitting that a majority of the prison staff in the German prison where he serves his sentence behaves accordingly and with professional dignity, he said that some guards hold prejudices towards foreigners in prison. “Sometimes, some of them insult me, say a rude

1353 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1354 Interview with ICTY prisoner C in Germany, 23–24/10/2016. For similar impressions of attitudinal developments of prison staff towards different ICTY prisoners, also see the account of the interviewed director of a German penitentiary where the ICTY prisoner is incarcerated, *Chapter 6.3.2.1*.

thing, but I take it, you know, turn my head”, confessed the prisoner, saying, however, that this makes him feel stigmatized among other prisoners.

Similar feelings of being stigmatized were expressed by some other interviewed prisoners. Another ICTY prisoner in Germany said he had got the impression that the prison staff would sometimes resort to certain measures towards him specifically because of his status as a convicted war criminal, admitting that while these measures might not seem to be a problem, it makes a difference when they occur frequently.¹³⁵⁵ “For example, a prison guard has a mandate to inspect cells, and there she goes, inspects all of them, leaving only mine for just before the lunch”, said the prisoner, implying that he had been made to wait for his lunch on purpose. “Or other things, like when you ask for something, I have the feeling that they do not want to do it on purpose, because of my status”, said the same prisoner, explaining that – even though being an aged man with health issues – he had repeatedly been taken to medical appointments in chains, until his attorneys complained to the prison administration on such a treatment, after which this stopped.

According to the testimony of *Biljana Plavšić* after her return from Sweden, the guard who had been responsible for her supervision in Hinseberg prison, a Bosnian woman, never referred to her by name during her imprisonment.¹³⁵⁶ Similarly, *Drago Josipović*, formerly incarcerated in Spain, complained on the dismissive attitude of the prison staff towards him, saying: “They treated me like I was not there. They neither approached me nor disturbed me.”¹³⁵⁷ This resonates with claims some other interviewed prisoners made with regard to dismissive attitudes of national prison staff towards them. An ICTY prisoner in Germany complained on their lack of interest and how poorly informed the prison staff was with regard to his sentence as well as to his status as a prisoner.¹³⁵⁸ Consequently, this had had practical implications in terms of being withheld from any constructive rehabilitation programme as well as being denied services that might have been offered to ordinary prisoners. “They [national prison authorities] say we’re here only to ‘serve the sentence’ and that they cannot decide anything with regard to our status”, said the prisoner, explaining that national authorities are not willing to apply services or programmes to him that are available to ordinary prisoners on the grounds of him not having been adjudicated by a national court; therefore, he does not fall under the category of an ordinary domestic prisoner. He further argues that on the other hand, ICTY/MICT personnel are reluctant to take any measures themselves to improve his status as, according to the enforcement agreement, he should serve the sentence in accordance with national law. In practice, this creates a bureaucratic limbo where the position of an ICTY prisoner is unequal to the one of an ordinary prisoner – at least in his case,

1355 Interview with ICTY prisoner A in Germany, 11/05/2015.

1356 *Ristić* 2017.

1357 *Jurišić* 2006.

1358 Interview with ICTY prisoner B in Germany, 02/03/2016.

he frustratingly adds. Similar complaints came from other interviewed prisoners who said that while the behaviour of prison staff was in order, they were – or still are, as might be the case for one interviewed prisoner in Estonia – excluded from any purposeful rehabilitation programme as well as from a number of commodities ordinary prisoners do have access to (i.e. an equal right to furlough, work or study opportunities).¹³⁵⁹ Consequently, the prevalent opinion among the interviewed ICTY prisoners was to either send them to their home states to serve their sentences there, or to come up with a set of rules on an international level (i.e. by the ICTY/MICT) that would balance the normative gap and the inequality in day-to-day enforcement practice, both between them and national prisoners and between the enforcement states. Among other things, they argue, such rules should regulate minimum standards of enforcement, entitling each of them to an equal set of rights as well as equal treatment from prison staff.

Similar to the information gap on attitudes of prison staff towards ICTY prisoners, decisions on early release are vague with regard to what kind of relationships developed between ICTY and ordinary prisoners in national prisons. Regarding the former, the first-hand data obtained through the interviews was to an extent indicative of stigmatizing tendencies that can develop among national prison authorities due to the status of ICTY prisoners, both as foreigners and as persons convicted for international crimes. Stigmatizing tendencies can manifest as open (e.g. verbal assault), concealed animosities (e.g. application of unnecessarily high security measures such as chains or frequent cell inspections at inconvenient times) or a dismissive attitude where the prisoners' status is simply being ignored. To an extent, this also resembles the official policy that was adopted for the Spandau prisoners, as well as personal attitudes some guards there had towards them.¹³⁶⁰ This in turn can have highly negative consequences, increasing their feelings of isolation, anxiety and resentment as well as disabling their progress along the rehabilitative path – e.g. by denying them access to services and structured rehabilitation programmes, but also by hindering their opportunities to personally come to terms with the reality and consequences of their crimes. Similarly, relationships ICTY prisoners have with other prisoners can differently reflect on their experiences of enforcement. For instance, continuous fear for personal safety due to perceived or real threat from other inmates can increase their withdrawal into isolation and a resentment within the prisoner towards authorities and one's personal situation. Consequently, any chances of accepting the punishment as justified and legitimate – not to say the individual guilt and responsibility for the committed crimes – then are that much smaller as they might intensify feelings of personal victimization. The latter feelings might have played a significant role in the etiology of crimes for which the person was convicted; therefore, further

1359 Interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with a released ICTY prisoner, 20/05/2014.

1360 Compare with *Chapter 4.2.3*, also for positive attitudes some guards developed towards the prisoners over time.

feelings of being threatened might only solidify prisoners in their conviction that the crimes they committed were justified. As will be shown below, the quality of relationships with other inmates depends both on the characteristics of each ICTY prisoner – what kind of personal image they tend to give and maintain – and on the prison dogma as well as the myth that are developed among inmates within a particular prison institution and with regard to ICTY prisoners, specifically.

Contrary to the shared belief among ICTY/MICT officials,¹³⁶¹ the interviewed ICTY prisoners confessed that the personal background, the type of crime committed as well as the length of the sentence are among the first things other inmates try to find out about a new prisoner upon entering a prison. “As soon as somebody new comes, stories start to circle”, explained an ICTY prisoner.¹³⁶² To that extent, those interviewed prisoners said they always tried to give a reasonable, normal impression about themselves, without going into details about their convictions. Nevertheless, they are aware that stories about them are very likely to circle among other inmates; therefore, some confessed that they are being cautious, even if up until that point, they have not had any unpleasant experiences.¹³⁶³

Any chances of threat are directly linked with the type of criminal milieu that exists within a prison. Descriptions of the inmate society by the interviewed prisoners reflect the high level of institutional security in the prisons they are being incarcerated in. Predatory offenders and career criminals, such as murderers, rapists, pedophiles and drug dealers predominate the inmate strata of their host prisons. Furthermore, the informal code of the prison society (the “prison dogma”) as well as the way the ICTY prisoners are perceived among different strata of other prisoners dictate the way they are approached. Both in Germany and Finland, the ICTY prisoners confessed that they had been threatened by other inmates as a sort of initiation rite, so the other prisoners would see how they behave in such situations.¹³⁶⁴ According to the former ICTY prisoner in Finland, this did not have anything to do with his status as an ICTY prisoner but is a method of testing to what extent any new prisoner might be weak or exploitable by other inmates.¹³⁶⁵ He admitted having personally experienced two such incidents, which he had managed to resolve in his favour. “I expected

1361 Discussing how the ICTY prisoners are perceived by other inmates in national prisons, the ICTY/MICT officials expressed a general satisfaction, saying that despite incidents such as the one *Radislav Krstić* had in the UK, they tend to integrate peacefully and get along finely with other prisoners. During the conversations, the interviewed officials implied that this was partly due to an informal rule in prison according to which the inmates do not share among each other what they have been convicted for. “*There’s a rule in prison: you don’t say it, you don’t ask it*”, said an interviewed ICTY/MICT official (interview with Legal Officer B at the ICTY/MICT, 15/06/2015).

1362 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1363 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1364 Interview with ICTY prisoner B in Germany, 02/03/2016; interview with a released ICTY prisoner, 20/05/2014.

1365 Interview with a released ICTY prisoner, 20/05/2014.

for something like that to happen, because I knew where I was coming to, I saw what was going on. There were predominantly drug consumers who don't have any money, so they try to use you to get the drugs. So they came and started, you'll be my 'this and that', and I kept my mouth shut until I saw they were alone and then took matters into my own hand. I was disciplined for that with a solitary confinement, but after that, everything was all right... because if I did not hold my ground... and that happened in Spain, the group [of ICTY prisoners] that was transferred to Spain, they threatened them, so they spent a large part of their sentence in a solitary confinement", said the prisoner.¹³⁶⁶

The other type of threat is directly related to their status as ICTY prisoners, convicted for international crimes against a certain ethnic population. Interviewed prisoners have testified about the UK, Germany and France as enforcement states where prisons feature a large number of inmates with a Muslim background; therefore, chances to be targeted because of the sentence received at the ICTY for crimes against Bosnian Muslims are perceived to be higher there. Indeed, an ICTY prisoner in one German federal state confessed to having suffered two life-threatening attacks during the enforcement of his sentences due to the fact that he had been convicted at the ICTY.¹³⁶⁷ The perpetrators had all been Muslim inmates, and the attacks were planned as retaliation for crimes he had been convicted of, he said. Allegedly, other ICTY prisoners in Germany – such as *Duško Tadić* who served his sentence in Straubing prison in Bavaria – had made similar experiences. According to the interviewed prisoner, due to the attacks Mr. *Tadić* had suffered, he had to ask for a confinement isolated from other prisoners. Similarly, *Mlado Radić*, formerly a policeman and shift leader in Omarska concentration camp and sentenced to 20 years at the ICTY, was threatened by Muslim inmates during his imprisonment in France. The prison guards admitted to not being able to guarantee his safety, due to which he agreed to be placed in a more isolated confinement.¹³⁶⁸ Next to the well-reported attack on *Radislav Krstić* in the UK, there are accounts of other ICTY prisoners receiving threats or suffering attacks from their fellow Muslim inmates. For example, *Goran Jelisić*, sentenced to 40 years for crimes against humanity against the Bosnian Muslim population by the ICTY, suffered verbal threats by fellow Muslim inmates while serving his sentence in Italy.¹³⁶⁹ The same occurred to *Radomir Kovač* during his imprisonment in Norway.¹³⁷⁰ *Biljana Plavšić*, formerly imprisoned in Sweden, reported to having been verbally harassed by her fellow Muslim inmates. "Two Muslim inmates who were with me harassed me for a long time, threatening that bin Laden will be my judge and chanting 'Allahu akbar' whenever they saw me", said

1366 For this case, see in detail *Chapter 6.3.2.1*.

1367 Interview with ICTY prisoner B in Germany, 02/03/2016.

1368 Interview with ICTY prisoner B in Germany, 02/03/2016.

1369 Interview with ICTY prisoner B in Germany, 02/03/2016.

1370 Interview with ICTY prisoner B in Germany, 02/03/2016.

Plavšić.¹³⁷¹ According to newspaper reports, while fleeing from her harassers during one such incident, Mrs. *Plavšić* fell and broke her hand.¹³⁷² Her family complained that she had been provided treatment only after couple of days, while the Hinseberg prison administration denied any incident having occurred. Apparently, Mrs. *Plavšić* reported the incident to the prison administration, asking for additional security measures; however, none were provided.

It could be argued that there are several reasons for such attacks. First, inmates might be guided by personal vendettas, as might have been the case for attackers on one of the ICTY prisoners in Germany. The prisoner claimed to have received information that one of the attackers who made an attempt on his life had served in one of the Bosnian Army's units during the post-Yugoslavian wars¹³⁷³ – and might therefore have been compelled to retribution by personal loss (e.g. of fellow fighters). Second, attacks might be due to more radicalized attitudes of individual inmates, and taking a perceived vengeance over a convicted war criminal might be understood as honouring the plight of victims attackers identify with, i.e. Muslim people. Finally, within the codes of an inmate society, violence against an inmate with an extraordinary reputation in prison (which the ICTY prisoners might be considered as – in particular due to the gravity and extraordinary nature of their crimes) could elevate the personal status of the perpetrator, granting him allegiance, tribute and favours from other inmates. Regardless of the reason, interviewed prisoners complained that prison officers can do little to prevent such attacks¹³⁷⁴ – which has also been admitted by prison staff themselves for the above-described instances. What is more, by reporting such incidents to the prison administration, prisoners risk being labelled as “snitches”, which might even increase the hostility by other prisoners.

It is indeed baffling that, despite a demand for the adherence to international human rights and prison standards in the treatment of ICTY prisoners, not more diligence is taken when deciding on their allocation within a particular enforcing state. If the choice of a state suffers from pragmatic reasons such as lack of available states, more attention could be placed on factors such as the social environment in national prisons where the ICTY prisoners would eventually be allocated. Truly, national authorities can hardly anticipate attacks guided by personal vendettas, yet more diligent acquaintance with the prison demography of national prisons could perhaps guide the allocation of ICTY prisoners more suitably, especially as some states have already developed a reputation as being “critical” for the ICTY prisoners due to their prison population. Additionally, first-hand data has shown that the prison directors

1371 *Ristić* 2017.

1372 See index.hr of 5 January 2005: “Biljana Plavšić u švedskom zatvoru slomila ruku” [Biljana Plavšić Broke Her Hand in a Swedish Prison]; index.hr/mobile/clanak.aspx?category=Vijesti&id=242636 [20/01/2018].

1373 Interview with ICTY prisoner B in Germany, 02/03/2016.

1374 Interview with ICTY prisoner B in Germany, 02/03/2016.

themselves often hold security concerns regarding potential interactions of ICTY prisoners with critical strata of their prison population. The fact that the only possible precaution is to place them under isolated confinement reveals an inexperience in providing adequate penal treatment and security for those convicted of international crimes. A lack of personal safety for prisoners goes against minimum standards of prison conditions and treatment and can, arguably, amount to cruel, inhuman and degrading treatment and punishment. Some prisoners who lived through such experiences testified that not only do they feel the burden of being imprisoned in a foreign state; the alertness and anxiety they develop after having survived such attacks feels like an additional punishment on top of the deprivation of liberty they have already been punished with.¹³⁷⁵

Next to the negative experiences some ICTY prisoners had with other inmates in enforcing states, it is also necessary to highlight occurrences where prisoners are integrated extremely well within the prison population. Interestingly, the potential to be accepted and respected by other prisoners seems to be (at least to an extent) linked with those characteristics of perpetrators that feature significantly in the etiology of their crimes. For instance, perpetrators featuring strong leadership capabilities, a hypnotic or charismatic appeal that previously helped them manipulate the masses – as can be found among the political or military elites – can arguably more easily find a way to be liked and respected by their fellow inmates. For instance, *Miodrag Jokić*, a naval commander sentenced to seven years of imprisonment for war crimes by the ICTY, served his sentence in a prison in Denmark where he managed to integrate within the prison structure to the extent that he was considered a “father figure” to other prisoners.¹³⁷⁶ Similarly, *Dario Kordić*, a formerly prominent political figure who was convicted, among others, for organizing, instigating and ordering ethnic cleansing over Bosnian Muslims during the post-Yugoslavian wars, had a reputation in Graz-Karlau prison as “a man who was loved and respected by everyone”.¹³⁷⁷ While imprisoned, Mr. *Kordić* seemingly exchanged an extreme nationalistic rhetoric with the one of extreme piety and religious devotion – although without denouncing his crimes or admitting guilt.¹³⁷⁸ Upon his release from prison in 2014, he started featuring prominently at public gatherings of extreme nationalistic political and clerical circles in Croatia, preaching personal innocence for the crimes he committed.¹³⁷⁹

1375 Interview with ICTY prisoner B in Germany, 02/03/2016.

1376 See index.hr of 2 September 2008: “Haški sud oslobodio Miodraga Jokića: ‘Bio je očinska figura drugim zatvorenicima’” [The Hague Tribunal Sets Miodrag Jokić Free: He was a Father Figure to Other Prisoners]; index.hr/vijesti/clanak/haski-sud-oslobodio-miodraga-jokica-bio-je-ocinska-figura-drugim-zatvorenicima-/400572.aspx [20/01/2018].

1377 *Gaura* 2011.

1378 *Gaura* 2011.

1379 See, e.g., *Srzić* 2017; *Dikić* 2017.

As indicated above, good behaviour and social intelligence that might ensure a good integration within the prison structure are by themselves not a sign of a successful personal or moral rehabilitation of macro-criminals. Extreme prison conditions are likely to hinder any such effort on the side of the perpetrator from the start, yet conditions and treatment that are in line with international prison standards can by themselves not be enough to instigate a change of attitudes, particularly towards committed crimes. Among the perpetrators of international crimes, retaining such attitudes can be a significant risk factor for their re-engagement in destructive policies, especially if upon their release, they return to a still polarized society with clear indications of a latent conflict where they are able to gather new social, monetary or political support due to these very attitudes (e.g. the *Kordić* case, above), which in turn might further negatively influence the ongoing societal polarization. In such instances, a more focused rehabilitative assistance concerned with the perpetrator's crime etiology should be warranted. It is equally significant to motivate perpetrators towards their self-analysis and personal willingness for rehabilitation. As suggested before, soft-pressure mechanisms, such as conditioning an early release from prison with the participation in such programmes and, accordingly, positive rehabilitative results due to such participation, could be a valid way to provide an initial motivation for prisoners.

6.3.3.2 Rehabilitation programmes

Following the investigation into the general conditions and treatment of ICTY prisoners during the enforcement of their sentences, the question of whether and how the rehabilitative purpose of punishment is implemented through their imprisonment also demands an enquiry into the potential development and schemes of rehabilitative programmes suited to the specific crime etiology of perpetrators, much in line with measures suggested in *Chapter 4.1.3.3*.

To that extent, as with general services in prison (such as translation or possibilities of contact with the outside world that would equate the position of ICTY prisoners with national prisoners), the provision of rehabilitation programmes and measures better suited to the crime etiology of macro-criminals depends entirely on the discretion of each enforcement state. Interviewed ICTY/MICT officials admitted that some enforcement states "have indicated that perhaps their rehabilitation system is not tailored to the exact needs of the former president of the country".¹³⁸⁰ However, any possibility of the ICTY/MICT to influence states in this regard is hindered, as in practice – so the ICTY/MICT officials claim –, the Tribunal/Mechanism is no longer involved in the day-to-day management of the prisoners.¹³⁸¹ Despite the majority of enforcement agreements allowing the ICTY/MICT to issue any recommendation on

1380 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1381 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

the “further treatment of prisoners during their imprisonment in the state”,¹³⁸² in practice, their willingness to interfere in enforcement beyond an insistence on ensuring minimum prison standards is rather hindered due to political as well as pragmatic reasons. As shown before with regard to the designation of the enforcement state, the ICTY/MICT is dependent on national prison systems to host its prisoners, and given that enforcement states cover enforcement costs alone, burdening them with additional treatment demands that might entail even higher costs might place the ICTY/MICT out of states’ favour with regard to any future prisoners. Consequently, whenever it comes to any sort of assessment on rehabilitation, the ICTY/MICT relies on the opinions of enforcement states and their prison administrations.¹³⁸³ Based on information from these opinions, the ICTY/MICT President then decides whether the level of achieved rehabilitation warrants prisoners’ releases.

Of course, this raises the question of how national prison administrations handle and evaluate rehabilitation in the case of macro-criminality. The analyzed decisions on the early release of ICTY prisoners¹³⁸⁴ predominantly show that no special rehabilitation measures have been implemented for the prison treatment of ICTY prisoners. Furthermore, obtained data indicate that factors such as behaviour, discipline, a willingness to work and to integrate within prison, a positive relationship with the family as well as the prospect of post-release reintegration based on e.g. pending job opportunities have all been taken as parameters for the assessment of rehabilitation in individual cases. What they show, however, is that generally, no distinction has been made by national prison authorities between ordinary offenders and macro-criminals in terms of risk-assessment and the criminogenic needs that need to be addressed. Previous sections have shown that unless hindered by other factors (such as health, lingual issues or prison classification system), the ICTY prisoners mostly do not find the aforementioned criteria as challenging or in any case affiliated with the risk of potential re-offending. In fact, given that categories such as work or education opportunities also feature among prisoners’ minimum rights, the ICTY prisoners have been particularly vocal to gain access to them, although not because of a desire to supplement their lack of vocational or learning habits, but, as in many cases, to hone those already developed. However, this is not to dismiss the rehabilitative importance such services might have for the crime etiology of certain categories of macro-criminals. Besides providing a daily focus to prisoners, for those less privileged perpetrators who usually feature in the direct perpetration of crimes (e.g. followers and conformists, such as paramilitary members or foot soldiers), work and education opportunities might increase self-awareness, which would make their falling under authoritarian or peer influences less likely in the future. However, these opportunities might have to go beyond rudimentary problem-solving teachings and

1382 See *Chapter 5.1.2*.

1383 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1384 For the list of analyzed decisions, see *Chapter 6.3.3.1*.

manual work details that are mostly offered in prisons, in order to have any desired rehabilitative effect. So as to understand the wrongness and gravity of committed crimes, the reasons why they happened and how to make amends for them, the perpetrators might need to undertake a substantive personal introspective, which in many cases can demand assistance from qualified experts, such as psychologists, and has to be conducted through some form of therapy, e.g. a dialogue or humanitarian work. Other mentioned activities, such as remunerated work in prison, can merely provide a basis or supplement to the rehabilitative effect of the main programmes, e.g. by reducing the detrimental effects of imprisonment.

With regard to the acceptance of guilt for committed crimes and remorse by ICTY prisoners – the moral facet of rehabilitation –, the data is obfuscating to the extent that national prison authorities have paid heed to it. For instance, in the cases of certain prisoners, national reports on their rehabilitation sent to the ICTY/MICT included no psychiatric or psychological evaluation which could indicate their attitude towards the committed offences.¹³⁸⁵ For others, while a psychological or psychiatric evaluation was provided, it featured no mention on whether the prisoners accepted the punishment or how they felt towards the committed crimes afterwards.¹³⁸⁶ As previously indicated, this lack of information might have occurred due to lingual issues the prisoners may have had,¹³⁸⁷ but also possibly due to the lack of adequate translation services that were offered to them. For example, one interviewed prisoner in Germany stressed that even though he had been granted a translator to assist him in his PTSD therapy with an assigned psychiatrist, he was declined the same translation service for a potential rehabilitation programme with the prison psychologist, where his crimes would have been discussed.¹³⁸⁸ Interviewed ICTY/MICT officials explained how the decline of certain services or programmes for ICTY prisoners might be partly due to scant resources of prisons in some states, and partly also due to a fear of highlighting the ICTY prisoners within the prison.¹³⁸⁹ The potential consequences of highlighting a prisoner by offering additional services are seen by the national prison authorities as putting a strain on the formal equality of all prisoners

1385 See, e.g., Decision on Early Release of *Hazim Delić*, 15 July 2008; Decision on Early Release of *Vidoje Blagojević*, 03 February 2012, para. 22; Decision on Early Release of *Dragan Obrenović*, 21 September 2011, para. 23; Decision on Early Release of *Zoran Vuković*, 11 March 2008, para. 4; Decision on Early Release of *Milorad Krnojelac*, 23 July 2009; Decision on Early Release of *Damir Došen*, 28 February 2003; Decision on Early Release of *Zoran Žigić*, 23 December 2014.

1386 See, e.g., Decision on Early Release of *Vladimir Šantić*, 16 February 2009, para. 11; Decision on Early Release of *Dario Kordić*, 06 June 2014, para. 20.

1387 For example, with regard to some prisoners, national authorities have explicitly stressed that a detailed psychiatric/psychological evaluation is not possible due to the prisoner's language barrier (see, e.g., Decision on Early Release of *Duško Šikirica*, 28 June 2010, para. 19). For some, this was merely implied from the decisions on early release (see, e.g., Decision on Early Release of *Mladen Naletilić*, 26 March 2013, para. 26).

1388 Interview with ICTY prisoner B in Germany, 02/03/2016.

1389 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

within a prison institution, which consequently can cause unrest and a demand for equal or similar services by other prisoners, therefore also having security implications. On the other hand, a lack of such services can undermine the equality in the administration of justice between ICTY prisoners. As previously shown in the *Martinović* case, the assessment of the moral rehabilitation of an ICTY prisoner provided without proper translation services could have had serious negative implications for his final rehabilitative assessment, potentially unjustifiably denying the prisoner release.¹³⁹⁰

The lack of required or substantive information on prisoners' moral rehabilitation considerably limits the decision of the ICTY/MICT President when it comes to prisoners' eligibility for release, resorting it to the assessment of other ordinary risk factors, such as behaviour in prison and maintenance of family contacts. Also, it indicates that no constructive effort or assistance has been provided from national prison authorities to adequately tackle the personal and moral rehabilitation of macro-criminals. In some instances, national authorities might find any longitudinal psychological or other assistance unnecessary, especially if the prisoners pleaded guilty during their trial. As the *Plavšić* case shows, guilty pleas can be easily premeditated so as to bargain for a lesser sentence, without reflecting the real attitudes of perpetrators. After having pleaded guilty for crimes against humanity at the ICTY, Mrs. *Plavšić* admitted in an interview to a Swedish magazine during her incarceration in Hinseberg prison that her plea to have the remaining charges against her dropped had been a farce and that in fact, with regard to her crimes, she still felt she had done nothing wrong.¹³⁹¹

In other instances, the assessment of prisoners' moral attitudes might come only prior to the decision on release, without any longitudinal treatment provided during the whole time the sentence is enforced. Consequently, the decision might be provided by a member of the prison staff who might not hold any specialist qualifications (e.g. a general prison physician).¹³⁹² In such instances, any meaningful consideration of one's committed crimes as well as their critical assessment undertaken through dialogue and the acknowledgment of other perspectives is doubtful. Some interviewed prisoners were aggravated by the superficial knowledge of psychologists with whom they occasionally talked about the events which concern the crimes they were convicted of.¹³⁹³ In particular, besides the aggravating circumstance of not being able to express themselves adequately due to lingual issues, they reported rigid moral stances maintained by the authorities, who did not allow the prisoners to express

1390 See *Chapter 6.3.2.2.*

1391 *Goldberg 2009.*

1392 See, e.g., Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013; Decision on Early release of *Duško Tadić*, 17 July 2008.

1393 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016.

“their part of the story” appropriately or were premeditatedly biased towards their accounts.¹³⁹⁴

In addition, most interviewed prisoners were uncertain about whether any rehabilitation plan had been devised for them at all, criticizing a lack of information from national authorities as to which purpose their punishment should fulfil and what is expected from them.¹³⁹⁵ Only in one instance, the prisoner confirmed that after more than ten years into his sentence, he had been given notice of dates of annual conferences where his rehabilitative progress should be evaluated.¹³⁹⁶ He complained, however, that the national prison authorities had declined each of his previous requests for participation in rehabilitative programmes on the grounds of him “being a special case” and therefore not having a suitable programme devised which he could fit in.¹³⁹⁷

Generally, the prisoners positively referred to the possibility of having a goal towards which they would have to work during the enforcement of their sentences,¹³⁹⁸ with some of them also acknowledging a possibility to discuss their crimes in-depth with a qualified person (e.g., a psychologist or a pedagogue) who would be willing to listen without prejudice.¹³⁹⁹ In the view of one interviewed prisoner, “sending people away to foreign states to simply work or ‘sit their sentences off’ doesn’t make much sense.”¹⁴⁰⁰

There are, however, examples where rehabilitative measures more suited to the crime etiology of macro-criminals have been offered to ICTY prisoners. Being presumably components of programmes that are also offered to other prisoners, they nevertheless indicate that there is (or has been) a more focused awareness among certain national prison staff of specific criminogenic needs – such as attitudinal changes or the development of protective risk factors (e.g. an empathical disposition in an individual)

1394 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1395 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1396 Interview with ICTY prisoner B in Germany, 02/03/2016.

1397 There are also found instances where ICTY prisoners have been included in rehabilitative programmes; however, the question how long for, which services these programmes offered and how the rehabilitative outcome was exactly evaluated remains ambiguous. For example, for an ICTY prisoner in Spain, the Internal Ministry Report only recommends release, given that “‘progress with regard to the rehabilitation programme and the activities in which he participates has been positive’, and in the view of the ‘specialists who deal with’ him, ‘he is ready to lead a normal social life in his environment so that continuing to keep him under the current penitentiary regime would only amount to fulfil solely the retributive aspect of the sentence’” (Decision on Early Release of *Darko Mrda*, 18 December 2013, para. 23).

1398 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1399 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016

1400 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

– that need to be addressed in cases of perpetrators of international crimes. For example, *Ivica Rajić*, a former commander of Bosnian Croat soldier units sentenced to 12 years of imprisonment for war crimes, was a member of the Committee on Peaceful Coexistence and Conflict Resolution during the enforcement of his sentence in Spain, which was a part of the prison programme called Workshops for Respect.¹⁴⁰¹ Similarly, in the UK, *Blagoje Simić*, a Serbian physician-turned-politician who was convicted to 15 years of imprisonment for crimes against humanity against Bosnian Muslim and Bosnian Croat civilians, through his incarceration has been engaged in humanitarian work by helping ill children in a nearby hospital.¹⁴⁰² Even though the indication of their moral rehabilitation is somewhat ambiguous, the ICTY President took these factors in favour of their rehabilitation and subsequent release.

A single case of an explicitly positive rehabilitative outcome, partly due to dedicated psychological treatment during the enforcement of his sentence, can be found in the case of *Esad Landžo*, a former Bosnian guard at Čelebići concentration camp who was convicted to 15 years of imprisonment by the ICTY for the mistreatment of prisoners. Mr. *Landžo* served a part of his sentence in Håmeelinna prison in Finland where, according to the decision on early release, he had continuous psychological assistance during his incarceration, which contributed to his acceptance of judgement, feelings of deep remorse for his crimes and the acceptance of responsibility for his actions.¹⁴⁰³ According to his personal statement, Mr. *Landžo* felt that the prison had changed him for the better.¹⁴⁰⁴ Despite remaining in Finland after his release, he is a rare example of a former ICTY convict who, due to his feelings of personal guilt and remorse, felt the need to somehow redeem for his crimes. On personal initiative, after his release, he returned to a Bosnian community where his crimes had been committed in order to apologize to his victims.¹⁴⁰⁵ The *Landžo* case is important insofar as it shows that with the appropriate assistance, the experience of imprisonment and special rehabilitative measures can positively contribute to the personal and moral rehabilitation of international offenders, from which then their social rehabilitation and – in a wider context – the reconciliation between former warring parties can benefit.

6.3.4 Supervision of enforcement in practice

Depending on the enforcement agreement, a different monitoring body can be assigned to supervise the conditions and treatment of ICTY prisoners. For example,

1401 Decision on Early Release of *Ivica Rajić*, 22 August 2011, para. 18.

1402 Decision on Early Release of *Blagoje Simić*, 15 February 2011, para. 25.

1403 Decision on Early Release of *Esad Landžo*, 15 July 2008, para. 7.

1404 Decision on Early Release of *Esad Landžo*, 15 July 2008, para. 7.

1405 This has been documented in a film by a Danish film director, *Lars Feldballe-Petersen*, “The Unforgiven” (see *Grebo* 2017).

for prisoners in Finland and Estonia, the ICRC has been assigned as a third-party independent body to monitor their sentences. For those in Germany, a range of monitoring bodies has been assigned, including the ICRC, the CPT as well as representatives of the ICTY/MICT itself.

Interviewed ICTY/MICT officials confirmed that the ICRC conducts the biggest part of monitoring; accordingly, they have been the most diligent in inspections, resorting them to at least once per year.¹⁴⁰⁶ This has also been confirmed by the prisoners in Estonia and Germany.¹⁴⁰⁷ However, the prisoner who served his sentence in Finland reported that no inspection by any monitoring body was conducted during the whole time of his imprisonment there.¹⁴⁰⁸ Those prisoners who have other monitoring bodies assigned, such as the CPT and the ICTY/MICT representatives, reported less frequent visits, usually in two-year intervals. It is somewhat concerning that while the third-party bodies – the ICRC and the CPT – initiate inspections of their own accord, for a prisoner whom the ICTY/MICT representatives were assigned to monitor the sentence, the visits were conducted only after many pleas by the prisoner to the Tribunal/Mechanism in order to help him with certain issues.¹⁴⁰⁹ According to this prisoner, he also attempted to contact the ICRC and the CPT for help. However, they declined the possibility to visit on the ground that due to the ad hoc agreement the ICTY/MICT made with Germany in his case, the other monitoring body was assigned (i.e. the ICTY/MICT representatives), and therefore, they do not have the prerogative to conduct any monitoring themselves. It can only be speculated whether the visits by ICTY/MICT personnel finally occurred due to the increased pressure the prisoner was also putting on other monitoring committees. Of course, this raises concerns about impartial monitoring in case of some enforcement states where representatives of the ICTY/MICT have also been assigned to monitoring bodies (e.g. also Austria and Spain). Namely, without an external independent mechanism being able to exert pressure for conformity with fundamental prison standards, there is always a risk that the incarceration of those prisoners who are “at the mercy” of the prison system they are in dissolves into cruel, inhuman or degrading punishment due to a negligence of authorities.

The scope of factors the monitoring bodies are inspecting includes the conditions of accommodation, the working environments in prison, the physical and mental health of ICTY prisoners and specific problems the prisoners might have.¹⁴¹⁰ Generally, it might encompass all elements the enforcement of sentence consists of. What makes

1406 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1407 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1408 Interview with a released ICTY prisoner, 20/05/2014.

1409 Interview with ICTY prisoner B in Germany, 02/03/2016.

1410 Interview with ICTY prisoner B in Germany, 02/03/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with ICTY prisoner A in Germany, 15/08/2014; interview with the director of a German penitentiary, 22/02/2013.

the difference for the prisoners, however, is the significance the ICTY/MICT attaches to each of these inspected elements, as it is upon them whether they will eventually follow up and start negotiations with enforcement states. Interviewed ICTY/MICT officials said that they receive a wide range of complaints from the prisoners through presented reports, from not having access to work details, furloughs, appropriate medical care and translation services to demands for having their prison classification lowered, access to more books, magazines or television channels in their native languages as well as more opportunities to contact their families.¹⁴¹¹ Consequently, they stressed that because the enforcement is conducted in accordance with national laws, they are not able to follow up on each request but only with regard to those that concern the violation of minimum prison standards, such as translation or medical services. This becomes problematic when compared with the above analysis of enforcement practices, i.e. the conditions and treatment of ICTY prisoners, as the results show that the status of ICTY prisoners – being foreigners and convicted macro-criminals – often puts them in a disadvantaged position towards national prisoners “by default” when it comes to implementing fundamental prisoner rights. National prisoners might not be bothered with a few visiting hours per month as their families, living nearby, will surely visit them. For ICTY prisoners whose families have to travel great distances to visit them, e.g., once a year, an equal number of visiting hours per visit (as assigned to other prisoners) does not fulfil the criteria of equal administration of justice or maintenance of fundamental rights. Similarly, the significance of access to a work detail is not the same for a national prisoner – whose monthly allowance does not play a role in terms of whether he will receive visits during that month – and an ICTY prisoner, whose chance to see his/her family might depend on whether he/she can contribute to the family’s travel costs with the obtained remuneration. One interviewed prisoner said that during the first ICRC inspection visit, he did not complain to them about the small number of visiting hours granted, nor about the fact that due to the high costs for international calls, he could not afford contacting family members.¹⁴¹² He hoped the prison administration would appreciate that he did not create any problems for them with the ICRC and would in turn positively consider his disadvantaged position – only to be left disappointed when this did not come to fruition.¹⁴¹³ “Visits, visiting hours, money; it’s the small stuff that makes your life miserable, because it’s there, constantly present, only then it’s not so small anymore”, the prisoner said.

Accordingly, it can then be argued that criteria on which the achievement of minimum prison standards is based in cases of ICTY prisoners should be re-evaluated. As with the evaluation of prisoners’ personal considerations with regard to the choice of the state of enforcement, the ICTY/MICT officials seemingly have a huge range

1411 Interviews with Legal Officers B, C and D at the ICTY/MICT, 15/06/2015.

1412 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1413 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

of discretion when deciding with which urgency to treat certain aspects of prisoners' conditions and treatment in foreign prisons. Similar to many other aspects of enforcement, it comes down to which resources should be invested in order to improve the situation. Given that states are doing a favour to the ICTY/MICT even just by accepting the prisoners, ICTY/MICT officials might be reluctant to pressure too hard for improvements that might cause additional costs. For instance, some ICTY prisoners in Estonia were granted single cells upon their complaints to the ICRC that they might potentially contract infectious diseases from their cell mates given the prevalence of drug-related diseases among offenders in the prison there.¹⁴¹⁴ On the other hand, a prisoner in Germany has been pleading for years to both national authorities and the ICTY representatives to help him replace his now-defunct prosthesis, as due to this problem, he was not only prevented to work in prison, but the defunct body limb had lost its function almost completely, rendering the prisoner handicapped.¹⁴¹⁵ While both cases can be considered to pose serious health hazard for ICTY prisoners, it can be reasonably assumed that the prosthesis situation has not been resolved as it involves a more complicated replacement procedure – not to mention expenses – than giving new cells to prisoners.

Similarly, the way monitoring is conducted can arguably also play a role for the efficacy of improvements in enforcement conditions and/or treatment. For example, a prisoner in Estonia reported having had private talks with ICRC representatives together with an independent translator, whereas a prisoner in Germany said that only after he had complained that the allocated translator belonged to prison staff, the ICTY representatives brought their own translator. In addition, whereas visits had been private in the first case, in the case of Germany, the prisoner reported visits being conducted in the presence of prison staff – who, according to him, during some visits also obstructed monitoring representatives from inspecting the premises of his cell. “The prison administration went through a lot to obstruct them from seeing that I’m incarcerated in a cell built in ‘medieval times’, that I don’t have a light switch, not enough daylight, that the toilet seat is there in plain sight and the walls have not been painted in the last seven, eight years – but as soon as I was transferred to a better cell, there were no more problems to granting them permission to visit the cell; they even escorted them personally, both to my cell and my workplace, to personally hear that I don’t have any complaints on my accommodation and my work detail”, the prisoner said.

1414 Interview with an ICTY prisoner in Estonia, 20–21/10/2015.

1415 Interview with ICTY prisoner B in Germany, 02/03/2016.

In sum, the interviewed prisoners admitted that they felt no significant improvement in their position after visits through monitoring mechanisms,¹⁴¹⁶ with some going so far as to claim they were only being conducted as a formality.¹⁴¹⁷

6.3.5 Factors of relevance for early release

The matter of releasing ICTY prisoners has raised concern with regard to possible violations of the equality principle. According to the enforcement agreements, ICTY sentences ought to be enforced in accordance with the national law of enforcement state, and different states might have different rules on the prisoners' eligibility for release. However, through its practice, the ICTY/MICT has found a way to bypass this issue.

Essentially, the rules regarding the release procedure of ICTY prisoners – as already established in the ICTY Statute, the ICTY RPE and the ICTY Practice Direction on Pardon, Commutation of Sentence and Early Release (hereinafter: ICTY PD on Early Release)¹⁴¹⁸ – were incorporated into the legal framework of the MICT in almost the same form.¹⁴¹⁹ They state that if, pursuant to the applicable law of the state in which the person convicted by the ICTY/MICT is imprisoned, the prisoner is eligible for pardon, a commutation of sentence or early release, the authorities of the state concerned (or the prisoner personally) shall notify the ICTY/MICT of this eligibility. Accordingly, the relevant authorities of the enforcement state will deliver reports and observations on the behaviour of the convicted person during the period of incarceration, the general conditions under which he/she was imprisoned and any psychiatric or psychological evaluations prepared on his/her mental condition during the period of incarceration.¹⁴²⁰ Upon deliverance of the required reports to the Registry, the President of the ICTY/MICT shall – in consultation with any judges of the sentencing chamber who remain judges of the Tribunal/Mechanism (previously also with

1416 Interview with ICTY prisoner C in Germany, 23–24/10/2016; interview with ICTY prisoner B in Germany, 02/03/2016; interview with an ICTY prisoner in Estonia, 20–21/10/2015; interview with ICTY prisoner A in Germany, 15/08/2014.

1417 Interview with ICTY prisoner B in Germany, 02/03/2016.

1418 See ICTY Statute, Article 28; ICTY RPE, Rules 123–125; ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal (IT/146/Rev.3, 16 September 2010); ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal (IT/146/Rev.2, 01 September 2009); ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal (IT/146, 07 April 1999).

1419 See MICT Statute, Article 26; MICT RPE, Rules 149–151; MICT Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (MICT/3, 05 July 2012), hereinafter: 2012 MICT PD on Early Release.

1420 2012 MICT PD on Early Release, Article 4(b).

members of the Bureau¹⁴²¹) and upon any additional information he/she considers relevant (previously obtained by the Registry)¹⁴²² – decide whether pardon, commutation of sentence or early release are appropriate. In case the release is found to be inappropriate by the President, the rendered decision shall specify the date on which the prisoner will next become eligible for early release, unless specified by domestic law of the enforcing state.¹⁴²³ Should the enforcement state disagree with or be unable to accept the President’s decision not to allow early release, the President may, in consultation with the Registry, decide to withdraw the prisoner and transfer him/her to a different state to serve the remainder of the sentence.¹⁴²⁴ In any case, the decision of the President is final and cannot be appealed.¹⁴²⁵

Statutory provisions stipulate that the President’s decision ought to be guided by the interests of justice as well as the general principles of law.¹⁴²⁶ These rather vague criteria are supplemented by the RPE, which indicates *inter alia* the gravity of the crime or crimes the prisoner was convicted for, the treatment of similarly situated prisoners, the prisoner’s demonstration of rehabilitation and any substantial cooperation of the prisoner with the Prosecutor as relevant factors for the decision on his/her pardon, commutation of sentence or early release.¹⁴²⁷

Table 4 *Factors referred to in early release decisions*

Rank	Established hierarchy of factors
1 st	Other relevant factors (e.g. health and age)
2 nd	Treatment of similarly situated prisoners/rehabilitation
3 rd	Substantial cooperation with the Prosecutor
4 th	Gravity of crimes

Out of 58 ICTY convicts transferred to serve their sentences in different European prisons, more than half have already been released prior to serving the full term of their imposed punishment. In order to determine the hierarchy of factors which have or might have a prevalent influence on the ICTY/MICT President’s decision in this

1421 See ICTY RPE, Rule 124.

1422 2012 MICT PD on Early Release, Article 4(d).

1423 2012 MICT PD on Early Release, Article 10.

1424 2012 MICT PD on Early Release, Article 11.

1425 2012 MICT PD on Early Release, Article 12.

1426 MICT Statute, Article 26.

1427 MICT RPE, Rule 151.

matter, 34 decisions on early release were analyzed with the method of positive or negative attribution.¹⁴²⁸

The established hierarchy points to a departure from a stigmatizing release policy as implemented in the historical example of the Spandau prisoners. Notwithstanding those released exclusively on the grounds of health reasons, all other Nazi prisoners had to serve their sentences to the very end, due to the high gravity of committed crimes and a high personal culpability. In the practice of the ICTY/MICT, however, the importance of these criteria seemingly fades over time, giving more significance to individually oriented factors, such as rehabilitation of a prisoner, instead of sentence-oriented ones, such as gravity of crimes. As such, it generally reflects postulates of the hybrid theory of punishment – that is, the understanding that penological purposes may shift through the course of imprisonment, and (given enough evidence of rehabilitation in offenders that would indicate a good prospect of their reintegration) any further detention would fulfil solely the purpose of incapacitation, consequently working against their right to be reintegrated as well-functioning members of society.

6.3.5.1 Gravity of crimes

In all analyzed decisions on early release, *the gravity of committed crimes* was taken as a factor which weighs against granting an early release. It might be argued that taking into account the gravity of crimes for a decision on early release is unnecessarily stigmatizing since it has already been acknowledged as an important factor in determining the length of the imposed sentence.¹⁴²⁹ In practice, however, this factor almost never had a significant impact on any of the decisions on early release. In fact, even when the President of the Tribunal/Mechanism explicitly acknowledged the opinion of national authorities rejecting the release of a prisoner on the grounds of gravity of the crimes, he merely postponed the final release for several months instead of setting a new date for a re-evaluation of the prisoner's release eligibility, as indicated in the PD on Early Release.¹⁴³⁰ Arguably, the gravity of committed crimes might have been considered as a counterbalancing factor, to significantly weigh in those cases where, due to lower national eligibility thresholds, some prisoners would obviously have benefited from release sooner than their counterparts in other enforcement states, provided they showed a sufficient amount of rehabilitation. As shown below with regard to the "treatment of similarly situated prisoners", the issue of unequal release eligibility thresholds was eventually bypassed by the ICTY

1428 For the list of analyzed decisions, see *Chapter 6.3.3.1*. Preliminary results obtained through the analysis of a smaller sample of these decisions have previously been published in *Vojta* 2014.

1429 See the ICTY Statute, Article 24, para. 2: "In imposing the sentence, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."

1430 See, e.g., Decision on Early Release of *Vidoje Blagojević*, 03 February 2012, para. 25.

President with a “rule of thumb”, arguing that despite different national provisions, the ICTY prisoners can in practice seriously be considered for release only upon serving 2/3 of their sentences. Notwithstanding some exceptions, this has developed into consistent practice with regard to the release of ICTY prisoners.

6.3.5.2 Substantial cooperation with the Prosecutor

As a factor, *substantial cooperation with the Prosecutor* (see *Figure 6*) has also never been attributed much significance. The majority of released prisoners (19 prisoners – 56 %) never actively cooperated with the Office of the Prosecutor (OTP), nor was their cooperation asked for; therefore, this was considered to be of neutral relevance for their release. In cases where they did cooperate, this was regarded as weighting in favour of the prisoner’s release. Generally, a willingness to provide cooperation to the OTP during the enforcement of the sentence (e.g. by providing additional evidence or serving as a witness for the Prosecution in other proceedings) and, subsequently, to support the mandate of the Tribunal/Mechanism can be considered as a positive indicator of the prisoner’s repentance, the acceptance of guilt as well as a desire for repairing the harm done (moral and social rehabilitation). However, it is necessary to discern what the President considers to be “substantial cooperation”. For instance, among 15 cases (44 %) where cooperation was found to be provided and which, consequently, was weighted in favour of a prisoner’s release, the initial plea bargain of six prisoners was considered as substantial cooperation,¹⁴³¹ despite the fact that no cooperation was given or asked for during enforcement.¹⁴³² Similarly, in three other cases, additional forms of cooperation with the OTP during the trial (e.g. participation in an interview with the Prosecutor with regard to indictment) have been considered as substantial cooperation, even though none was provided during enforcement.¹⁴³³ As with regard to the “gravity of committed crimes”, it could be argued whether it is appropriate to consider the substantial cooperation with

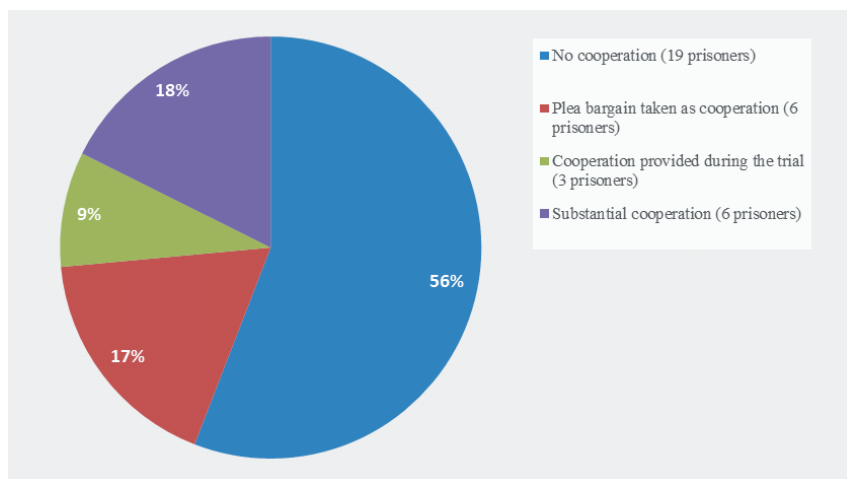
1431 Decision on Early Release of *Momir Nikolić*, 12 October 2015; Decision on Early Release of *Ranko Češić*, 28 May 2014; Decision on Early Release of *Darko Mrđa*, 18 December 2013; Decision on Early Release of *Ivica Rajić*, 22 August 2011; Decision on Early Release of *Dragan Zelenović*, 15 September 2015; Decision on Early Release of *Dragan Nikolić*, 16 January 2014.

1432 In two cases, prisoners have only provided cooperation pursuant to their obligation under the plea agreement. Given that this obligation stemmed from an agreement which already had an impact on the terms of their sentences, it is not considered in the analysis to amount to substantial cooperation during enforcement, even though the President attributed positive weight to it (see Decision on Early Release of *Ranko Češić*, 28 May 2014, para. 22; Decision on Early Release of *Ivica Rajić*, 22 August 2011, para. 23). Similarly, given that in the decision on early release of *Momir Nikolić*, any information as to his cooperation with the OTP during enforcement (notwithstanding his guilty plea) is redacted, it has been treated as being non-existent (see Decision on Early Release of *Momir Nikolić*, 12 October 2015, paras. 25–29).

1433 See Decision on Early Release of *Ljubomir Borovčanin*, 02 August 2016, para. 29; Decision on Early Release of *Nikola Šainović*, 27 August 2015, para. 25; Decision on Early Release of *Vladimir Šantić*, 16 February 2009, para. 13.

the Prosecutor prior to conviction as a factor of relevance for earlier release, since it has already been taken into account when deciding on the term of the sentence.¹⁴³⁴ The practice clearly illustrates the discretionary nature of this provision, as, for example, some Presidents of the ICTY/MICT affirmed the cooperation prior to conviction as a relevant factor for early release,¹⁴³⁵ while others opposed it.¹⁴³⁶

Figure 6 Substantial cooperation with the Prosecutor



The lack of uniformity in standards according to which a substantial cooperation with the Prosecutor should be determined is also reflected in those cases where some cooperation has been provided during the enforcement of the sentence and weighted in favour of release (six prisoners – less than half of all the cases where cooperation

1434 See ICTY RPE, Rule 101 (Bii): “In determining the sentences, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as [...] any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction.”

1435 See, e.g., Decision on Early Release of *Darko Mrda*, 18 December 2013, para. 30: “I [*Theodor Meron*] first note that the entry of a guilty plea by an accused person pursuant to a plea agreement with the Prosecution constitutes cooperation with the Prosecution, due to the impact of such a plea on the efficient administration of justice”; Decision on Early Release of *Vladimir Šantić*, 16 February 2009, para. 13 (*Patrick Robinson*): “Šantić has offered ‘extensive’ support to the Office of the Prosecutor. [This] was also recognized by the Appeals Chamber, forming part of its decision to reduce his sentence to eighteen years. This extent of cooperation offered by Šantić is relevant to the consideration of his [release] request.”

1436 See Prosecutor v. *Mlado Radić*, Decision of the President [*Fausto Pocar*] on the Commutation of the Sentence (IT-98-30/1, 22 June 2007), para. 15: “As for Radić’s response, I do not take his cooperation prior to conviction into account under Rule 125 and Article 2 of the Practice Direction, and given that it was already weighted by the Trial Chamber when determining Radić’s sentence.”

has been positively affirmed).¹⁴³⁷ According to the individuality principle, the particularities of each case clearly have an influence on the decision of the President. However, it could be argued that a clearer standard for the determination of “substantive cooperation” ought to be developed, especially if the factor of cooperation is assessed in connection with other release criteria, such as rehabilitation. For instance, should the same weight of “substantive cooperation” be equally attributed to a mere indication of the willingness to cooperate, as has been affirmed in the cases of two prisoners,¹⁴³⁸ as opposed to “exceptionally substantial cooperation” with the OTP, as was noted in the *Obrenović* case?¹⁴³⁹ Additionally, the provision of cooperation is not necessarily an indicator of rehabilitation, as the *Plavšić* case clearly shows. During the enforcement of her sentence, Mrs. *Plavšić* had appeared as a court witness to testify in the *Krajišnik* case, yet she refused to appear as a witness for the Prosecution to testify in the *Milošević* case.¹⁴⁴⁰ In vein of her subsequent refutation of any personal guilt, the Prosecutor noted that “Mrs. *Plavšić* has not been overtly helpful or anxious to cooperate with the Office of the Prosecutor” during the enforcement of her sentence, even though her testimony in the *Krajišnik* case was eventually affirmed as substantial cooperation, weighting in favour of her request for release.¹⁴⁴¹

6.3.5.3 Treatment of similarly situated prisoners

In practice, the *treatment of similarly situated prisoners* – next to achieved rehabilitation (see below) – usually has the biggest impact on the decision whether to release a prisoner. Treatment of similarly situated prisoners usually means that regardless of the national criteria for release eligibility, prisoners will be considered for evaluation by the President only upon serving 2/3 of their sentence. While it is quite unlikely that the ICTY prisoners might fall under consideration of national authorities of the enforcement states for pardon or a commutation of their sentence in practice (these prerogatives usually being bestowed on the head of the state, e.g. the President), they might, however, fall under national provisions regulating early release from prison (e.g. conditional release – parole) – given that, according to the enforcement agreements, the ICTY sentences are enforced in accordance with the national laws of the enforcing state. In fact, enforcement agreements bestow on national authorities the

1437 Decision on Early Release of *Dragan Obrenović*, 21 September 2011, para. 28; Decision on Early Release of *Mitar Vasiljević*, 12 March 2010, para. 20; Decision on Early Release of *Biljana Plavšić*, 14 September 2009, para. 12; Decision on Early Release of *Predrag Banović*, 03 September 2008, para. 14; Decision on Early Release of *Dražen Erdemović*, 15 July 2008, para. 11; Decision on Early Release of *Damir Došen*, 28 February 2003, para. 17.

1438 See Decision on Early Release of *Predrag Banović*, 03 September 2008, para. 14; Decision on Early Release of *Damir Došen*, 28 February 2003, para. 17.

1439 Decision on Early Release of *Dragan Obrenović*, 21 September 2011, para. 28.

1440 Decision on Early Release of *Biljana Plavšić*, 14 September 2009, para. 12.

1441 Decision on Early Release of *Biljana Plavšić*, 14 September 2009, para. 12.

obligation to inform the ICTY/MICT when the prisoner becomes eligible for such a release. In practical terms, such a “trigger mechanism” for release threatens to violate the principle of equal treatment, as different European states allow prisoners to be considered eligible for early release either after 1/2, 2/3 or 3/4 of their sentences, or they might have adopted a system in which a prisoner is awarded periods of remission at the commencement of his/her enforcement of sentence. In order to provide some uniformity to the enforcement practice (and to uphold the prerogative of having the final say when it comes to the ICTY sentences), the ICTY President has introduced a rule to “consider convicted persons to be eligible for early release when they have served at least two-thirds of their sentences”.¹⁴⁴² Despite lacking the basis in the Tribunal’s/Mechanism’s normative provisions, the rule has developed into a consistent practice when it comes to the release of ICTY prisoners. Almost all of them were released after having served 2/3 of their sentences. The rare cases where release was granted before 2/3 of the sentence were served were mostly due to humanitarian reasons, such as ill health of the prisoner.¹⁴⁴³

There are several important implications of the “2/3 rule”. First, it accentuated the distinction between international and national prisoners, as it more clearly defined the authority and responsibility of the ICTY/MICT regarding the terms of the sentence. With respect to the decision on an early release of prisoners, the President of the ICTY/MICT remains the only authority. Therefore, even though national authorities retain the obligation to inform the Tribunal/Mechanism of the prisoner’s eligibility based on thresholds established in national laws, unless the prisoner has served 2/3 of the sentence, it is unlikely he/she will be released. Arguably, the consistent implementation of the “2/3 rule” might also have been one of the reasons why the 2009 ICTY PD on Early Release for the first time featured a direct petition of a prisoner to the ICTY President as one of two options to trigger the release procedure.¹⁴⁴⁴ As in some states, release can only be allowed after, e.g., 3/4 of the sentence served, national authorities might in certain cases have been reluctant to notify the Tribunal/Mechanism of the prisoner’s eligibility sooner – especially given that enforcement agreements mandate the enforcement to be in accordance with national law. Introducing a direct petition for early release consolidated the new practice and

1442 See, e.g., Decision on Early Release of *Dragan Obrenović*, 21 September 2011, para. 16. Also see the same para. 16 for the list of early release decisions where such a practice has been implemented. In fact, the practice of being eligible for release upon 2/3 of one’s sentence served has been established by ICTY President *Claude Jorda* during his mandate 1999–2003, since, according to interviewed ICTY/MICT officials, the question of release of ICTY prisoners became more prominent at the time (interview with Legal Officer B at the ICTY/MICT, 15/06/2015).

1443 Decision on Early Release of *Momir Nikolić*, 12 October 2015, para. 30; Decision on Early Release of *Mladen Naletilić*, 26 March 2013, para. 31.

1444 2009 ICTY PD on Early Release, para. 2.

gave a safeguard to prisoners against the negligence of national prison authorities to start the release proceedings.

Second, while the rule provided some uniformity to the release procedure over time and defined the prerogatives between international and national levels more clearly, at the beginning, it evidently went against the principle of legality and legal certainty as seen by the judges in the *Erdemović* judgment,¹⁴⁴⁵ given that the provisions of enforcement agreements – indeed the authoritative normative standards governing the enforcement of ICTY sentences – equated the position of ICTY prisoners with that of national prisoners regarding the release thresholds. Technically, if national law allowed for early release after 1/2 of the sentence served, according to the provisions of enforcement agreements, an ICTY prisoner could also be considered to be eligible after having 1/2 of the sentence served. The fact that the ICTY/MICT does no longer pay heed to national release thresholds as demanded by enforcement agreements was recently proved in a particularly controversial manner with regard to the question of release of Mr. *Stanislav Galić*, who had been the first ICTY convict sentenced to life imprisonment.

The “2/3 rule” proved effective for determined sentences; however, in case of life imprisonment, its application is obviously futile as there is no determined standard of a sentence against which 2/3 can be deduced. As both the ICTY sentencing framework and the practice failed to consider this issue in advance, the only recourse provided – albeit also ambiguous – was featured in the agreement the ICTY/MICT made with the Federal Republic of Germany to enforce the sentence of Mr. *Galić*. If, according to the *Galić* Agreement, Mr. *Galić* is eligible for release, pursuant to the national law of Germany and especially section 57a of the German Criminal Code – stipulating that those sentenced to life imprisonment are eligible to be considered for release after having served 15 years of their sentence –, Germany will notify the ICTY/MICT accordingly.¹⁴⁴⁶ If the President of the ICTY/MICT does not consider the application for release to be appropriate, the Registry shall provide for the immediate transfer of Mr. *Galić* to the ICTY/MICT.¹⁴⁴⁷

After notification from German national authorities in 2015 that Mr. *Galić* had served 15 years of his sentence, and according to the available rehabilitative assessment, “there are no indications [he] will commit any sort of crime once he has been

1445 In the proclamation by the judges that “every accused person should be aware not only of the possible consequences of conviction and of penalty, but also of the conditions under which the penalty is to be enforced” (*Dražen Erdemović* [IT-96–22–T], Sentencing J., 29 November 1996, para. 70), the reference to the “conditions of enforcement” can obviously be broadly interpreted as to consider not only the modalities of enforcement (e.g. day-to-day life in prison), but also the matters affecting the term of the sentence during imprisonment, such as the early release procedure.

1446 The *Galić* Agreement, Article 2, para. 3.

1447 The *Galić* Agreement, Article 2, para. 4.

released”,¹⁴⁴⁸ the President of the ICTY/MICT – despite noting *Galić’s* capability of reintegrating into society if released – denied his release on the ground that it would not “accord with the practice relating to similarly situated prisoners”.¹⁴⁴⁹ In the same decision on denial of release, through a judicial precedent, the President set the release eligibility threshold for those sentenced to life imprisonment at more than 30 years of sentence served.

There are several controversial elements to the President’s decision. First, the discretionary nature by which the threshold is established significantly diminishes the legitimacy of the decision. In general, this can be seen as a negative consequence of the underdeveloped sentencing framework at the ICTY and the lack of abidance to the principle of legality – especially seen in the absence of a formal categorization of crimes and the determination of sentencing minima and maxima that would allow for release eligibility tariffs to be set comparatively.¹⁴⁵⁰ Obviously, normative provisions in the *Galić* Agreement provided a less-than-ideal substitute, which was dismissed as soon as the “2/3 rule” became firmly established in practice. In fact, by referring to “the practice relating to similarly situated prisoners”, the President explicitly invoked the application of the “2/3” rule also to those sentenced to life imprisonment. However, with reference to the “general principle of gradation in sentencing”,¹⁴⁵¹ he concluded “that it would be unjust for an individual sentenced to life imprisonment to be considered as having served two-thirds of his or her sentence at a point earlier than the equivalent for a convicted person sentenced to a term of years”.¹⁴⁵² Notwithstanding the fairness of this point, it still does not explain according to which sentencing standard 2/3 of life imprisonment should be deduced as there is no maximum for fixed-term sentences in the normative framework of the ICTY with which it could be compared. The President decided to look into the sentencing practice and to base his decision upon the highest imposed fixed-term sentence. What this means in practice is that a person sentenced to life imprisonment shall only be considered eligible for early release upon having served more than 2/3 of the highest

1448 See *Prosecutor v. Stanislav Galić*, Reasons for the President’s Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion (MICT-14–83–ES, 23 June 2015), hereinafter: Decision on Denial of Release to *Stanislav Galić*, 23 June 2015.

1449 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 51. Interestingly, contrary to the provisions of the enforcement agreement demanding his return to the ICTY/MICT if the release should be denied, Mr. *Galić* remained in Germany to serve the remainder of his sentence. It is likely that this was decided in order not to unnecessarily aggravate the enforcement of his sentence, as the new transfer would again necessitate the adjustment to completely different prison surroundings, conditions, culture and language.

1450 This was somewhat improved in the Rome Statute of the ICC where the maximum for fixed-term sentences is set at 30 years (Article 77 [1a]) and the release eligibility threshold at 2/3 of a sentence served, that is 20 years for a maximum fixed-term sentence (Article 110 [3]). This then allowed the release threshold for life imprisonment to be set higher, at 25 years (Article 110 [3]).

1451 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 29.

1452 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 34.

imposed fixed-term sentence. Obviously, this goes against the principle of legal certainty as it suddenly conditions the release tariff for lifers with the sentence that was, by chance, the highest at the time of the decision in the *Galić* case.

Second, when deciding which fixed-term sentence to consider, the President disregarded the primacy of the ICTY sentencing practice and decided to also consider that of the ICTR and the MICT. By doing so, he determined the highest fixed-term sentence to be set at 45 years, which was handed down by the ICTR in the case of Mr. *Juvénal Kajelijeli*.¹⁴⁵³ According to the President, this decision was based on the fact that the MICT holds jurisdiction over both the ICTY and the ICTR prisoners; therefore, the tariff should apply equally to both of the Mechanism's branches, in accordance with the principle of equal treatment of all convicted persons supervised by the Mechanism.¹⁴⁵⁴ Given that in the case of 45 years' imprisonment, 2/3 amounts to 30 years, the President decided that Mr. *Galić* (and subsequently all the other ICTY and ICTR convicts sentenced to life imprisonment) can be considered to be eligible for release only after they have served more than 30 years of their sentences.¹⁴⁵⁵ The decision is problematic insofar as it disregards the consistency of the ICTY practice and reference to exclusively its own case law when it comes to the release and treatment of similarly situated prisoners.¹⁴⁵⁶ Arguably, from the standpoint of fairness and consistency, more legitimacy would have been attached to the decision if it had solely consulted the ICTY case law where the highest fixed-term sentence is 40 years.¹⁴⁵⁷ Consequently, this would also lower the release threshold for lifers to 26.6 years, thus setting it more in line with current jurisprudential human rights developments on an international level. The recent paramount decision of the European Court of Human Rights (ECtHR) in *Vinter and Others v United Kingdom* (2013)¹⁴⁵⁸ affirmed that even those sentenced to whole life sentences have a right to be considered for release, thus implicitly also affirming their right to rehabilitation. In addition, while the Court acknowledged the "margin of appreciation" of the states when it comes to setting the release thresholds, it also observed that "the comparative and international law materials [...] show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter."¹⁴⁵⁹ The viewpoint that

1453 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 35.

1454 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 27.

1455 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 38.

1456 See, e.g., Decision on Early Release of *Dragan Obrenović*, 21 September 2011, with reference solely to the ICTY case law with regard to the "treatment of similarly situated prisoners" criterion and the implementation of the "2/3 rule" (para. 16). Only after the MICT took over the enforcement prerogatives from the ICTY, it has started to regard the practice of the ICTR in this regard as well.

1457 See the *Stakić* (IT-97-24) and *Jelisić* (IT-95-10) cases.

1458 *Vinter and Others v United Kingdom*, App nos 66069/09, 130/10, 3896/10 (09 July 2013), hereinafter: *Vinter* 2013.

1459 *Vinter* 2013, para. 120.

any retributive purpose of imprisonment is ultimately exhausted after 25 years of imprisonment – arguably even sooner – is also expressed through parole eligibility thresholds of those 32 European states that support life imprisonment.¹⁴⁶⁰ In the main, thresholds vary between 12 and 25 years among European states, which would make the mean parole eligibility term for life imprisonment in Europe even lower than 25 years, i.e. set at about 19 years.¹⁴⁶¹

Furthermore, in an attempt to abide to the principle of gradation in sentencing, the President did not consider exactly 30 years to be the release threshold but “more than 30 years”, arguing that “[t]he extent to which the life sentence will be considered to exceed the fixed-term sentence of 45 years for the purpose of consideration of early release must be considered on a case-by-case basis.”¹⁴⁶² It is astonishing that in an attempt to create some uniformity to the practice of release of lifers, the President complicated the situation even more by refusing to set the eligibility threshold firmly – which the legality principle would demand and which, in fact, has so far been followed by the “2/3 rule” – and resolved to deciding upon it discretionarily on a case-by-case basis after “more than 30 years” have passed. What does “more than 30 years” mean: 30 years and a month? 35 years? 50 years? Such a decision clearly removes the rehabilitative principle from consideration and bases it simply on a discretionary retributive gradation of sentences, as in order to determine whether a prisoner is eligible for consideration of release – and not even whether he/she *should* be released –, it will be necessary to determine beforehand whether an appropriate amount of the punishment has been served. It remains unknown according to which criteria the President will do that. Additionally, if the release eligibility threshold should surpass the one for the highest fixed-term sentence, it is obfuscating why it then was not set to “more than 25 years” for ICTY prisoners, as this would allow for exceeding the one for the highest fixed-term sentence in the ICTY sentencing practice and would also lower the possibility to unnecessarily aggravate the sentence (estimating that ICTY lifers might then be released at some point after 26 to 30 years of imprisonment), which the undetermined term of “more than 30 years” certainly does.

Finally, the imposed threshold of more than 30 years should also be considered from the standpoint of lifers’ rehabilitation. Supposing that people sentenced to life imprisonment survive their sentence to see freedom, it is quite dubious that over such a long period of years, any substantial assistance can be provided to offenders that would counter the negative effects of prisonization and institutionalization – even less that could motivate them towards personal, moral or social improvement. The case of the Spandau prisoners perhaps serves as the best example of how long-term imprisonment detrimentally affects the rehabilitation of offenders. Even *Speer*,

1460 For the list of states, see *Vinter* 2013, para. 68.

1461 See *Vojta* 2016, p. 360.

1462 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 35.

whose moral transformation already started during the Nuremberg trial, reported that 20 years of incarceration (a significantly lower sentence than the 30 or more years as in the case of ICTY lifers) dulled any feelings of personal guilt and instead increased resentment within him towards the imposed punishment.¹⁴⁶³ In the case of the ICTY prisoners sentenced to life imprisonment, even though the President underlined that such an established threshold does not dismiss the possibility for release review also to happen prior to 30 years,¹⁴⁶⁴ given the consistency in the application of the “2/3 rule” for fixed-term sentences, it is unlikely that the ICTY lifers would get a serious chance to be released before they have served 30 or more years of their sentence. In fact, from the President’s elaboration, it is evident that the established threshold is solely based on the retributive gradation of sentences, without consideration of offenders’ rehabilitation. Arguably, unless some grave personal circumstances might deem the prisoners unfit for further incarceration – therefore warranting the release on humanitarian grounds –, it is highly probable that those sentenced to life will have to spend more than 30 years in prison before they are released.

6.3.5.4 Rehabilitation

Next to the “2/3 rule” as a formal “precondition” for eligibility, the level of achieved rehabilitation will be of crucial significance for prisoners’ release. Similar to the dilemma the national prison authorities are faced with, it is of question how the President of the ICTY/MICT subsequently evaluates the rehabilitation of macro-criminals who are eligible for release. Interviewed ICTY/MICT officials admitted they are “very limited in how [they] can evaluate rehabilitation”, given that the President’s decision is essentially based on whatever information the national authorities are able to provide, as well as the comments the prisoners are subsequently entitled to add to this information.¹⁴⁶⁵ Given the apparent lack of consideration the national authorities showed for the particularities of crime etiology and risk assessment in ICTY prisoners,¹⁴⁶⁶ this would consequently mean that for a great number of them, the decision will be based on an evaluation of those risk-factor areas that are commonly evaluated in ordinary offenders. In particular, factors such as behaviour during imprisonment, participation in various activities while imprisoned (e.g. work detail, educational classes, recreational activities) and the prospect of reintegration – usually understood in terms of having a family and a job the prisoner can return to – are all being considered when deciding on whether or not to release prisoners. Taking prisoners’ profiles as well as previously analyzed data into consideration, it can be concluded that unless hindered by extraordinary personal or external circumstances (e.g. health issues, lingual issues or security classification), many ICTY prisoners manage without

1463 See *Chapter 4.2.3*.

1464 Decision on Denial of Release to *Stanislav Galić*, 23 June 2015, para. 39.

1465 Interviews with Legal Officers B and C at the ICTY/MICT, 15/06/2015.

1466 See *Chapter 6.3.3.2*.

too much trouble to fare positively (some extraordinarily well, in fact) with regard to these factors. Then, this can resort the decision of the President regarding their release to sort of an automatism, as the understanding the prisoners have of the gravity of their committed crimes and their wrongness – not to mention possibly latent etiological risk factors such as extreme and dangerous attitudes, delusions of grandeur, conformist tendencies and a lack of empathical reflection – is only superficially addressed, or not at all. As indicated before, due to factors such as the lingual barrier or a lack of appropriate (e.g. psychological, psychiatric) services in prison – in addition to the lack of a continuous and constructive treatment so as to address their criminogenic needs –, the assessment of prisoners' moral rehabilitation remains a continuous challenge for national authorities as well as the ICTY/MICT.

For instance, eight analyzed decisions on early release feature no information whatsoever pertaining to the prisoners' view on the crimes they were convicted for, not to mention their expression of remorse. In the cases of two prisoners, the decisions explicitly state that no psychiatric or psychological report (addressing their moral rehabilitation) was submitted by national authorities. Therefore, this was treated as a neutral factor for their release by the President, due to the lack of information.¹⁴⁶⁷ In six other decisions,¹⁴⁶⁸ even though some state that a psychiatric and psychological evaluation of the prisoners was undertaken, the information with regard to their perception of crimes and punishment is unexplainably missing. For one prisoner, this was even pointed out by the judges who participated in the assessment together with the President, expressing “concern over the fact that more information on the psychological assessment [and accordingly, moral rehabilitation] of [the prisoner] was not available.”¹⁴⁶⁹ It can only be assumed that (as in the cases of the first two prisoners) national authorities failed to submit the information, e.g. due to the lingual barrier that hindered any meaningful insight into the psychology of the prisoners and no visible symptoms hinting at the prisoner being in need of psychiatric or psychological service, but also due to the fact that the prisoners never asked for any such service.¹⁴⁷⁰ As pointed out before, even though the ICTY/MICT asks for the submission of such reports from national authorities, they are in a precarious position when it comes to demands for additional assessment services, due to the nature of

1467 Decision on Early Release of *Vidoje Blagojević*, 03 February 2012, para. 23; Decision on Early Release of *Dragan Obrenović*, 21 September 2011, para. 23.

1468 Decision on Early Release of *Hazim Delić*, 15 July 2008; Decision on Early Release of *Zoran Vuković*, 11 March 2008; Decision on Early Release of *Milorad Krnojelac*, 23 July 2009; Decision on Early Release of *Dario Kordić*, 06 June 2014; Decision on Early Release of *Mitar Vasiljević*, 12 March 2010; Decision on Early Release of *Zoran Žigić*, 23 December 2014.

1469 Decision on Early Release of *Mitar Vasiljević*, 12 March 2010, para. 22.

1470 In fact, for two of these prisoners, *Zoran Vuković* (Norway) and *Milorad Krnojelac* (Italy), the decisions on early release indicate lingual issues they suffered and which consequently might have prevented a substantial psychological/psychiatric evaluation. For *Mitar Vasiljević*, the prison authorities claimed that the prisoner's condition indicated no need for such services, nor did he ask for them.

the enforcement system. When it comes to anything beyond the fundamental minimum standards of imprisonment, it is likely they will be left to dispositions of the enforcement state – which would often mean an implementation of the same services that are offered or demanded in the cases of ordinary prisoners. Therefore, when it comes to the final assessment of a prisoners’s rehabilitative progress, the crucial information (such as the one on the real perception of committed crimes, the real expression of remorse or the acceptance of punishment) might be missing and the President is resorted to make his decision on the basis of whatever other information national authorities have submitted. If this other information indicates a positive rehabilitative evaluation – which is more than probable, based on the analyzed risk factors –, the prisoners are likely to be released.

Interestingly, among the majority of released prisoners, there seems to be some indication of moral rehabilitation (see *Figure 7*). However, as in the case of a “substantial cooperation with the Prosecutor”, it is important to discern what the President considers to be the moral rehabilitation of macro-criminals, as clear expressions of remorse (for committed crimes and suffering of victims) among the prisoners could be found only in four cases (15 %), which could be attributed to the time spent in prison. Interestingly enough, all these prisoners were incarcerated in Scandinavian states (two in Denmark¹⁴⁷¹, two in Finland¹⁴⁷²).

On the other hand, the guilty pleas of eight other prisoners (31 %) have been acknowledged as being indicative of their (moral) rehabilitation. Similar to the treatment of guilty pleas as a “substantial cooperation” factor, it is dubious whether they constitute a legitimate sign of moral rehabilitation if none was shown also during incarceration. For six prisoners, the decision of the President to weight their guilty pleas in favour of their rehabilitation would seem justified, given that their moral rehabilitation was underlined by their continuous expression of remorse and their acceptance of guilt even during incarceration.¹⁴⁷³ Of course, unless substantiated by a positive evaluation by a designated expert, such as a psychologist or psychiatrist, these expressions – similar to initially made guilty pleas – can also be challenged as having been intentionally fabricated in order to rate favourably in the President’s release assessment.¹⁴⁷⁴ The case of *Biljana Plavšić* – whose guilty plea was also

1471 Decision on Early Release of *Ljubomir Borovčanin*, 02 August 2016; Decision on Early Release of *Ranko Češić*, 28 May 2014.

1472 Decision on Early Release of *Esad Landžo*, 15 July 2008; Decision on Early Release of *Anto Furundžija*, 29 July 2004.

1473 Decision on Early Release of *Darko Mrđa*, 18 December 2013, para. 31; Decision on Early Release of *Dražen Erdemović*, 15 July 2008, para. 11; Decision on Early Release of *Predrag Banović*, 03 September 2008, para. 13; Decision on Early Release of *Dragan Nikolić*, 16 January 2014, para. 28; Decision on Early Release of *Damir Došen*, 28 February 2003, para. 16; Decision on Early Release of *Duško Sikirica*, 28 June 2010, para. 17.

1474 For example, more validity can be attributed to claims of those prisoners for whom also psychiatric or other expert assessment reports were made that could – at least to an extent – substantiate those claims (see, e.g., release decisions for *Darko Mrđa* [para. 26], or *Dragan Nikolić*

acknowledged as a sign of her rehabilitation,¹⁴⁷⁵ yet who explicitly denounced her guilt and remorse during imprisonment – speaks for this claim. It is interesting that despite some judges who were consulted in the decision of her release evaluation and who expressed concern with regard to her lack of demonstration of rehabilitation,¹⁴⁷⁶ Mrs. *Plavšić* was nevertheless released by the President before having served the full term of her sentence.¹⁴⁷⁷ Similarly, in the case of *Momir Nikolić*, who had been convicted to 20 years' imprisonment for participation in the Srebrenica massacres, the prisoner's guilty plea was recognized as a sign of rehabilitation in his decision on release,¹⁴⁷⁸ even though his mental health report, submitted by a designated physician in prison, made an arguably less positive assessment of his subsequent attitude towards the committed crimes.¹⁴⁷⁹ The case of *Vladimir Šantić* might also seem concerning, whose partial admission of guilt during trial (albeit not the guilty plea) was taken for granted by the President in his decision on release and was accepted as “an initial degree of rehabilitation relevant under Rule 125 to considering the [release] request”,¹⁴⁸⁰ even though no additional information on Mr. *Šantić*'s attitude towards the committed crimes was provided by national authorities. Consequently, the evaluation of Mr. *Šantić*'s good behaviour was also accepted by the President as evidence of his moral rehabilitation, i.e. with regard to his partial admission of guilt given during the trial, which then fared favourably for his release.¹⁴⁸¹

In the cases of four other prisoners (15 %), their somewhat ambivalent attitudes towards the crimes they were convicted for have also been acknowledged by the President to demonstrate some level of rehabilitation, subsequently weighting in favour of their release. For instance, the admission made by *Nikola Šainović* – former Deputy Prime Minister of the Federal Republic of Yugoslavia (FRY) and sentenced to 18 years' imprisonment for crimes against humanity and war crimes – that he “will carry the burden of the sentence in its psychological, sociological and historical senses” is obfuscating as to his actual personal attitude towards the crimes, in particular how this burden is felt in a psychological sense. Indeed, the sentence established

[paras. 26–28]), as opposed to the claims made solely by the prisoners to the President, e.g. via letter or through a telephone interview (see, e.g., Decision on Early Release of *Damir Došen* [para. 16]).

1475 Decision on Early Release of *Biljana Plavšić*, 14 September 2009, para. 8.

1476 Decision on Early Release of *Biljana Plavšić*, 14 September 2009, para. 13.

1477 As demonstrated in *Chapter 6.3.5.5*, for some prisoners, including Mrs. *Plavšić*, other reasons of a humanitarian nature were considered to be of more importance for release than rehabilitation.

1478 Decision on Early Release of *Momir Nikolić*, 12 October 2015, para. 23.

1479 “More pertinently, the Mental Health Report states that, while *Nikolić* feels that ‘he himself did not participate in’ the crimes to which he was privy because of his position, he ‘wants to face his own guilt, and he has not evaded it’” (Decision on Early Release of *Momir Nikolić*, 12 October 2015, para. 22).

1480 Decision on Early Release of *Vladimir Šantić*, 16 February 2009, para. 11.

1481 Decision on Early Release of *Vladimir Šantić*, 16 February 2009, para. 11.

the truth about the crimes (historical sense), expressed the effective administration of justice for the committed wrong to other stakeholders (sociological sense); yet did it also convey the message of the wrongness of the perpetrated acts to Mr. *Šainović*, or is the burden perceived solely as, e.g., an unjust stigmatization? Similarly, only partial acceptance of guilt or “some expression of remorse”, as expressed in the cases of three other prisoners, have been assessed by the President to weight favourably for their release.¹⁴⁸²

It is interesting to observe the position the President took in those cases in which there was a discrepancy between the opinions of national authorities and the prisoner himself with regard to his/her moral rehabilitation. For the most part, if there was any (even partially) positive reference from a prisoner to the President with regard to his/her acceptance of guilt and expression of remorse – which could additionally be supported by the evidence of his/her good behaviour during enforcement, good prison integration and participation in prison activities –, the contrasting opinion of national authorities on his/her moral rehabilitation would be disregarded as being of neutral significance for the decision on release (5 prisoners – 19 %).¹⁴⁸³ What is more, it seems that solely the fact that the prisoner displayed a good and orderly conduct while imprisoned carries the most significance for the President to ascertain that in general, rehabilitation has been achieved. A comparison between the *Krajišnik* and the *Radić* cases supports this claim. For both prisoners, national authorities expressed concern with regard to the level of achieved (moral) rehabilitation. In the case of Mr. *Momčilo Krajišnik*, the UK authorities pointed out “*inter alia* [to] *Krajišnik*’s ‘continued denial of the offences’”,¹⁴⁸⁴ with Mr. *Krajišnik* personally going so far as to admit that he only accepts part of the conviction, i.e. with regard to the forcible transfer of the non-Serbian population, and that “for [him,] this is the only one that exists at the moment.”¹⁴⁸⁵ In addition, Mr. *Krajišnik* admitted that he was

1482 See Decision on Early Release of *Dragan Zelenović*, 15 September 2015, para. 20. To this, see also para. 19: “According to the Psycho-Social Report, *Zelenović* claims to have assumed partial responsibility for acts committed by his subordinates, whose actions he regrets. In regards to facts and evidence that directly implicate him, *Zelenović* generally admits that ‘he had various sexual relations’, but regrets his inability ‘to recall the specific facts’.” Furthermore, see Decision on Early Release of *Mladen Naletilić*, 26 March 2013, paras. 26 and 27: “These submissions suggest that *Naletilić* feels some remorse towards the victims of his deeds and has shown some signs of rehabilitation. However, it is also clear that [...] due to these communication problems, it is difficult to assess the extent of *Naletilić*’s rehabilitation. [...] I am of the view that this evidence of even some remorse, combined with the positive assessment of *Naletilić*’s conduct while in prison, weighs in his favour.” Also see Decision on Early Release of *Drago Josipović*, 30 January 2006, para. 11.

1483 See Decision on Early Release of *Radomir Kovač*, 03 July 2013; Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013; Decision on Early Release of *Vinko Martinović*, 16 December 2011; Decision on Early Release of *Ivica Rajić*, 22 August 2011; Decision on Early Release of *Blagoje Simić*, 15 February 2011.

1484 Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 24.

1485 Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 26.

actively working on a request for review of his conviction,¹⁴⁸⁶ therefore also substantiating claims by national authorities of having difficulties to come to terms with his crimes and sentence. For Mr. *Mlado Radić*, on the other hand, the indication by the French national authorities of his non-existent rehabilitative progress was mostly based on their inability to properly communicate with him due to the lingual barrier, as well as due to his alleged non-participation in prison activities.¹⁴⁸⁷ What the decision on early release did not stipulate, however, was the fact that Mr. *Radić* had to spend part of his sentence isolated due to threats he had received from other prisoners, and that this considerably hindered prison integration on his part.¹⁴⁸⁸ Furthermore, contrary to Mr. *Krajišnik*, Mr. *Radić* expressed his remorse to the President more clearly, going so far as to claim that he was “prepared to apologize to each and every [victim] and to express [his] sincerest remorse for everything.”¹⁴⁸⁹ Despite this indication, his demonstration of rehabilitation was assessed to be of neutral value for the decision on release, for the most part, as he was found by the President to have failed to adjust to his conditions of detention in France and to “come to terms with his environment”.¹⁴⁹⁰ Due to this, the President decided to postpone his release for a year, as according to him, the “only factor that weights in favour of granting the [release] Request is the fact that *Radić* served two-thirds of his sentence [...]”.¹⁴⁹¹ On the other hand, despite arguably showing a lesser degree of moral rehabilitation than Mr. *Radić*, Mr. *Krajišnik* was awarded release upon completing 2/3 of his sentence, based on the fact that he had managed to integrate in his prison to more than a decent extent, displaying “exemplary” conduct and participating in a variety of activities.¹⁴⁹² This was even mentioned by the President, stressing that he was “of the view that *Krajišnik*, through his good behaviour during his detention, has demonstrated some rehabilitation, which militates in favour of his early release.”¹⁴⁹³

Perhaps the most concerning aspect of disregarding the lack of moral rehabilitation in favour of good conduct in prison is presented in the example of three (12 %) prisoners who evidently showed a lack or remorse for the crimes they had been convicted for, yet they were still released upon completing 2/3 of their sentences. In particular, in the cases of *Haradin Bala* (enforcement in France), *Duško Tadić* (enforcement in Germany) and *Johan Tarčulovski* (enforcement in Germany), the President did not

1486 Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 26.

1487 Decision on Early Release of *Mlado Radić*, 09 January 2013, para. 23.

1488 See also *Chapter 6.3.3.1*. In addition, this was also implied by Mr. *Radić*'s legal counsel, stating that “security risks [among other listed factors] have had an alienating effect on *Radić*, and that according to *Radić*, the French authorities have failed to take them into account” (Decision on Early Release of *Mlado Radić*, 09 January 2013, para. 23.).

1489 Decision on Early Release of *Mlado Radić*, 09 January 2013, para. 25.

1490 Decision on Early Release of *Mlado Radić*, 09 January 2013, para. 26.

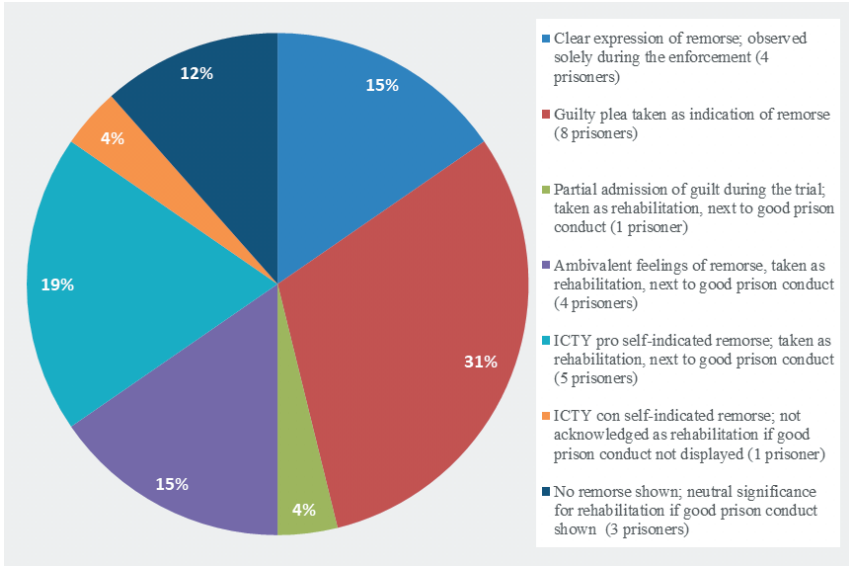
1491 Decision on Early Release of *Mlado Radić*, 09 January 2013, para. 30.

1492 Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 24.

1493 Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 30.

attribute particular significance to the observation of national authorities that these prisoners obviously lacked remorse for their crimes and had difficulties in acknowledging the gravity thereof, but released them mainly on the basis of having served 2/3 of their sentences and featuring good behaviour in prison.¹⁴⁹⁴ Apparently, none of these prisoners attempted to refute claims by national authorities or to prove differently with regard to the lack of their moral rehabilitation.

Figure 7 Evaluation of moral rehabilitation among released ICTY prisoners



From the above analysis, a rather pragmatic rationale can be discerned that governs the evaluation of achieved rehabilitation in ICTY prisoners. Similar to many other aspects of enforcement, it is conditioned by a dependency on national prison systems which essentially provide the infrastructure and the services to the penal treatment of international prisoners. As these are tailored mostly towards the criminogenic needs of the ordinary offender population, they can in many cases only superficially address more complicated etiological traits that are found in macro-criminals, particularly those formerly belonging to a high political, military or other governing structure. Given that national prison authorities implement the first-hand assessment and deliver the potential rehabilitation treatment, it is only their data the ICTY/MICT

1494 See Decision on Early Release of *Johan Tarčulovski*, 08 April 2013; Decision on Early Release of *Haradin Bala*, 09 January 2013; Decision on Early release of *Duško Tadić*, 17 July 2008. Also, for other exceptional factors featuring positively for release in the case of *Haradin Bala*, see Chapter 6.3.5.5.

can rely upon when determining an ICTY prisoner's eligibility for release. Therefore, if prisoners show a positive response to the domestic rehabilitative evaluation – predominantly concerning behavioural traits, positive attitudes towards employment, education, abstinence from drug misuse etc. –, it could be considered unjust by the ICTY/MICT to decline an earlier release solely on the indication that some risk factors are still latent – e.g. displayed in ambivalent attitudes towards the committed crimes –, which, however, domestic rehabilitative treatment or services cannot coherently address, nor discern from them a real risk in terms of re-offending. Interviewed ICTY/MICT officials pointed to the institution of early release as a staple in national penal systems, mentioning that it would be wrong by an international court not to grant early release out of a mere anxiety that a convicted macro-criminal might again be in a position to re-offend or to indicate a threat of re-offending.¹⁴⁹⁵ Others added that the purpose of keeping a person in prison can change over time, pointing out that all those released have served some time, so there has been a punitive element to their enforcement.¹⁴⁹⁶ Quite probably, there is also an understanding among the ICTY/MICT personnel that even if there are latent criminogenic needs in ICTY prisoners, keeping them in national prisons up to the full term of punishment will not have a significantly different impact on their rehabilitation as they would be subject to the same treatment as they were before. On the other hand, further keeping them in prison might only increase the detrimental effects of institutionalization, therefore going against the human rights notion which provided the basis for the institute of early release in the first place.

True enough, the institution of early release is a staple of rehabilitative trajectory, intended to proactively nurture the positive personal and moral development in an individual by releasing him/her back into society earlier – that is, if a pre-determined punitive part of the sentence has already been served, and if there are strong rehabilitative indicators in the prisoner, pointing to more benefits the release (rather than further incarceration) would have for him/her as well as for the community. However, as only the rehabilitative “potential” and not the full rehabilitation can be determined for a prisoner, in order to ensure that the offender does not relapse into crime and that, simultaneously, the moral debt created by crime is entirely paid off, a supervision or monitoring will usually be provided during the time of such a release. Quite possibly, different conditions – such as the avoidance of a certain type of activities, people or places or, oppositely, engagement in socially beneficial activities, such as community or humanitarian work – might also be mandated from the ex-prisoner during the remainder of the sentence in freedom. With regard to the ICTY prisoners, their early release on previously analyzed grounds – good conduct in prison and predominantly ambivalent attitudes towards the committed crimes – could therefore be justified only if a monitoring mechanism is established which

1495 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1496 Interview with Legal Officer C at the ICTY/MICT, 15/06/2015.

would ensure that during the remainder of their sentence, they keep a distance from any factor potentially enabling their relapse into destructive patterns of behaviour or thinking, and that they uphold a law-abiding, socially beneficial behaviour.

6.3.5.5 Other factors of relevance

In several cases, *other relevant factors*, such as high age or health issues of the prisoner, weighted significantly in favour of release, despite an ambiguous indication of rehabilitation or without even serving 2/3 of the sentence.¹⁴⁹⁷ This might be attributed to the willingness of the ICTY/MICT to adhere to the humanitarian principle of releasing those prisoners whose condition deems them unfit for further incarceration and where due to their age or severe health issues, further enforcement might amount to cruel, inhuman or degrading treatment or punishment. On the other hand, it is curious that in the case of *Haradin Bala*, the negative impact the prisoner's incarceration and absence had on his immediate family was especially highlighted by the President as a particular factor weighing in favour of his release, even though the lack of his moral rehabilitation as well as cooperation with the Prosecutor deemed these latter two factors as neutral for the decision.¹⁴⁹⁸ Subsequently, due to this, the President's positive consideration of Mr. *Bala's* application was based solely on 2/3 of the sentence having been served and the negative impact the incarceration had on his family. As such, the decision stands in contrast to the practice of the ICTY, according to which the issue of reasonably maintaining family relations during incarceration is not substantively considered at the time of the designation of the state. In fact, it could be argued that for a majority of prisoners, family relations suffer from their incarceration in a foreign state, yet this is usually not explicitly recognized as weighing favourably for their release. Also, as previously stated, some interviewed prisoners explicitly reported a break of marital relations or family estrangement due to being imprisoned far away from them. Even though release should be decided upon on a case-by-case basis, there is a level of standardization that should be maintained when taking into account factors determined as relevant for the President's decision, in order to maintain the legitimacy of practice and decisions. A sudden consideration of factors that were obviously dismissed as irrelevant for other prisoners through practice – such as aggravated family relations due to imprisonment – obviously undermines this legitimacy and creates an inequality in treatment.

1497 See, e.g., Decision on Early Release of *Momir Nikolić*, 12 October 2015; Decision on Early Release of *Biljana Plavšić*, 14 September 2009; Decision on Early Release of *Mladen Naletilić*, 26 March 2013; Decision on Early Release of *Milorad Krnojelac*, 23 July 2009.

1498 See Decision on Early Release of *Haradin Bala*, 09 January 2013, paras. 25, 31, 34–36.

6.3.6 Post-release

Information on the after-prison life of ICTY convicts can be mostly obtained through various news sources. The general opinion is that international prisoners return to their home states where they are celebrated as heroes or martyrs who sacrificed themselves for their homeland. In certain instances, this might be regarded as true. For example, high-profile convicts such as the former Bosnian Serb politician and state executive *Momčilo Krajišnik* are mostly greeted upon return to their home countries by a mass of followers (sometimes numbering in the hundreds or even thousands), often including current political representatives,¹⁴⁹⁹ which tends to raise concerns (especially among victims and survivors of the conflict) about diminishing reconciliatory efforts and a still existing support for controversial and dangerous ideologies. On the other hand, the return of low- or mid-ranking convicts such as *Radimir Kovac*¹⁵⁰⁰ tends to receive only mild media attention. In some cases, prisoners have requested asylum in foreign countries due to fear of retaliation if they return to their countries of origin.¹⁵⁰¹

Most information regarding post-release life pertains to first impressions upon arrival, when not much is known about how former prisoners further adapt to their surroundings, how they interact with their communities, what they do and experience.

The main issue seems to be the uncertainty regarding their legal status. As stressed before, in accordance with the rehabilitative purpose, those ordinary prisoners who are released earlier are usually subject to reintegration programmes and monitored by parole officers. Their release is conditioned by the prohibition to commit further offences and might include other, individual conditions which can be added if necessary. In the case of ICTY prisoners, however, the normative framework of the Tribunal/Mechanism did not establish any sort of supervision upon release. “They’ve served their sentence, in full. There’s no probation, no monitoring, no reporting requirements whatsoever; release is release”, said an interviewed ICTY/MICT legal

1499 The same was the case for some other ICTY ex-prisoners, such as *Biljana Plavšić* and *Dario Kordić*, but also for some those who were not transferred to other European states but whose time in the UNDU amounted to 2/3 of their sentence or more (see *Grozđanić* 2017; *Dikić* 2016; also *dnevnik.hr* of 06 June 2014: “Dario Kordić stigao u Zagreb: Policija privela osobu koja mu je vikala da je ubojica i sotona” [Dario Kordić Arrived in Zagreb: the Police arrested the Person Who Shouted He is a Killer and the Satan]; *dnevnik.hr/vijesti/svijet/dario-kordic-danas-izlazi-na-slobodu-nakon-vise-od-16-godina-zatvora---339187.html* [09/02/2018]).

1500 *Dzidić* 2013.

1501 See, e.g., Decision on Early Release of *Hazim Delić*, 15 July 2008, para. 15. Similarly, some ex-prisoners who offered substantive cooperation to the Prosecutor against other defendants at the ICTY requested asylum in other European countries for fear of retaliation that might potentially come from the supporting social circles of the latter – including, e.g., governing political elites – in their home states. It is now publicly known that, e.g., *Dražen Erdemović* lives in some European state under a secret identity, as he served as a witness in proceedings against other ICTY defendants (see *Dikić* 2016).

officer.¹⁵⁰² This would actually mean that ICTY prisoners, not having served their terms entirely but being released after having served two-thirds of their sentences, had their punishments reduced – a practice that amounts to an *ex-post* commutation of the sentence. Interviewed ICTY/MICT officials explained that mostly logistical challenges deter the implementation of an “international parole system”, arguing that there is not enough support from both the post-Yugoslavian states and the international community to implement it. “How are we going to supervise them?”, pondered one interviewed official, suggesting: “Are we going to look at media reports? I mean that’s probably not sufficient; we’d have to have appropriate investigative procedures at place [in the home states], then we’d have to have an agreement with the Netherlands to bring convicted persons back on their territory, which they wouldn’t like, and then we’d have to find another prison or get the agreement with the first prison to take them back.”¹⁵⁰³

Arguably, the issue might not be mainly to formally obtain cooperation from the Netherlands or other enforcement states. Even though the Netherlands has been reluctant to offer the ICTY its services beyond hosting defendants as UNDU detainees, it extended this support in the case of ICC convicts. In the Rome statute, the Netherlands is recognized as the “host State” to enforce the sentences of the Court in case no other enforcement state is found.¹⁵⁰⁴ Similarly, despite a reluctance by the enforcement states to accept ICTY convicts, they eventually get to be transferred and have their sentences enforced. Germany, for example, even agreed to further enforce the life sentence of Mr. *Galić* after denial of his release, despite this evidently going against the provisions of his enforcement agreement.¹⁵⁰⁵ It could be argued that as far as support from the international community is concerned, it would solely be a matter of a right diplomatic “carrots and sticks” approach to acquire it.

What could be seen as more problematic is support from the ICTY prisoners’ home states – the former Yugoslavian states – to provide infrastructure, personnel and resources for post-release supervision, as this would evidently have to rely (at least partly) on national resources to be implemented. In this sense, the perceived lack of political will, which could enable impartial enforcement and did prevent it from taking place in the home states in the first place, could also be the reason why the parole system for those released was never seriously considered on an international level.

Additionally, some ICTY/MICT officials implied that the early release mechanism as established (without the parole) is nevertheless warranted because it compensates for the gravity of imprisonment in the foreign country. “[I] think the imprisonment

1502 Interview with Legal Officer A at the ICTY/MICT, 07/04/2015.

1503 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1504 The Rome Statute, Article 103, para. 4.

1505 See the *Galić* Agreement, Article 2, para. 4: “If the President of the ICTY [...] does not consider that the application of the early release is appropriate, [...] the competent national authorities [...] shall provide for the immediate transfer of Mr. *Galić* to the ICTY.”

that they have, you know – in a third state –, it’s much more difficult than the national prisoners have in their national home country or another country they’re familiar with. [...] This imprisonment has been a real punishment; you know, away from their families, in a foreign country, I think they deserve, you know, the opportunity to go back to their communities and make some – hopefully positive – contributions.”¹⁵⁰⁶ Of course, any willingness to make a positive contribution to a post-conflict society is preconditioned by the personal and moral rehabilitation of the perpetrator, that is, the acknowledgement of committed wrongs, remorse and the willingness to somehow repair it. Apart from the already discussed case of *Esad Landžo* – who returned to Bosnia to seek forgiveness from his victims (which was heavily prompted by personal and moral rehabilitation) –, there is scant information on whether any other released ex-prisoner of the ICTY has attempted to somehow proactively redeem for committed crimes. Depending on social and political support in their home states, released perpetrators either attempt to somehow restore their past reputations – a phenomenon already observed among the Spandau prisoners –, or they keep a low profile on their whereabouts and activities. Given the right political climate, it is often the case that any suspicions the victim groups or the general public might have about the dishonesty of ambiguous remorse claims given or demonstrated by ICTY prisoners for the purpose of their release turn out to have been justified.¹⁵⁰⁷ Obviously, the evident lack of a formal supervisory mechanism that could hinder potential attempts to return to the old polarizing rhetoric or to associate with radicalized social circles only solidifies the ex-prisoners in their determination to restore past reputations and to re-establish their influence.

Several elements ought to be considered when discussing the reasons for these attempts at the restoration of previous reputations. First, the motives for as well as the type of risk associated with these attempts can differ among different groups of perpetrators. For instance, those formerly belonging to higher echelons of political or military power might resort to the former ideology and an affirmation of previous

1506 Interview with Legal Officer B at the ICTY/MICT, 15/06/2015.

1507 For instance, next to *Biljana Plavšić*, whose unrepentant behaviour during and ex-post imprisonment has been discussed in detail, media reports on other ex-prisoners of the ICTY tell similar stories. In particular, *Momčilo Krajišnik*, who in his petition to the ICTY President to be released claimed he will subsequently work at the petrol station owned by his children (Decision on Early Release of *Momčilo Krajišnik*, 02 July 2013, para. 24), has mostly been politically active in the years following his release, becoming the president of the “Founders of Republika Srpska” Association, giving numerous interviews and public speeches as well as actively promoting his book “Kako se rađala Republika Srpska” [How Republika Srpska Was Born] (*Đikić* 2016). According to *Đikić* (2016), all these activities are a reaffirmation of the policy and acts that had been the basis for Mr. *Krajišnik*’s conviction in the first place. Similarly, numerous public interviews given by *Nikola Šainović* after he was released from prison in Sweden seem to prove that the conviction imposed by the ICTY as well as the time spent in prison did not change his radical views, nor did they induce feelings of guilt or remorse (see *Đikić* 2016; also compare with *Šainović*’s ambiguous remorse statement in *Chapter 6.3.5.4*).

dangerous politics simply as a pragmatic means of re-gaining publicity and sponsorship from radicalized social circles, especially since imprisonment has stripped them off their former social roles and material wealth. In practical terms, they might resort to the publication of memoirs or other books reaffirming their radicalized views. In terms of public influence, they might be limited to speeches at the rallies of those social circles that relate to the proclaimed ideology or attitudes. While ex-prisoners might resort to such behavioural patterns exclusively because of monetary gain and perhaps some public attention, their reaffirmation of past atrocities or at least the policy which condones such crimes can effectively hinder reconciliatory efforts. In particular, still being accepted as relevant moral agents by certain social circles, their proclamations can undermine the confrontation with the truth about their crimes as well as further reinforce the perception among certain groups as being self-victimised, which provided the legitimization for such radicalized attitudes and the crimes in the first place.

Other perpetrators who formerly held high ranks within state structures and who (besides pragmatic concerns such as money and status) also feature personal grievances and radicalized attitudes might pose a higher level of risk of a destabilization of peace in their country insofar as, given the right political and social climate, they can decide to more concretely utilize dangerous policies. Public campaigns and protests, together with active participation in government bodies, can represent their *modus operandi*. Of course, it is of question whether they could get access to government agencies at all – given their criminal records; however, as the cases of released ICTY prisoners below show, a lack of normative harmonization and disrupt cooperation in criminal matters between national criminal justice authorities and international tribunals render this scenario possible. Additionally, the state of anomie, as is often encountered in a post-conflict society, can quickly enough provide room for political and social support to the former perpetrators, subsequently disregarding concern for the rule of law equally fast.

Media reports suggest that it is usually those who previously held high-ranking positions within destructive regimes who are most persistent in their attempts to reclaim a past reputation. Mid- or low-ranking perpetrators who are usually found among followers, conformists or opportunists are more likely to fall into oblivion without supporting normative or social structures created by masterminds, careerists and devoted warriors within which they could blend in or seek their formerly held reputations. Alternatively, former mid- or low-ranking perpetrators who still feature radicalized attitudes might seek a re-affirmation of past identities in the radical social underground milieu, be accepted as mentor figures to younger members or actively participate in activities of extremist groups. The case of *Damir Došen*, former shift leader at the Keraterm concentration camp and convicted to five years' imprisonment for crimes against humanity by the ICTY, speaks for this. Mr. *Došen*, whose personal statement of remorse to the President weighted positively for his

early release from the Austrian prison,¹⁵⁰⁸ appalled survivors of the Keraterm camp when he was prominently featured on social networks as a member of the extreme nationalistic group (which some also label as being “paramilitary”) “Srbska čast” (Serbian Honour), apparently in the same masked uniform and insignia that had been worn years ago by the personnel of the concentration camp.¹⁵⁰⁹ Consequently, such groups can be an outlet for random violence based on bias or hate; however, they also have the potential of being rallied by more prominent political actors into a broader movement of destabilization in the respective country or region. For instance, members of the “Srbska čast” group were allegedly also engaged as the security force for the parade during the unconstitutional holiday “Day of Republika Srpska” in January 2018.¹⁵¹⁰ Based on available security reports, members of the group had previously been consulted with regard to possible violent interventions in case the political opposition tried to obstruct the celebration.¹⁵¹¹ Recently, some authors in the Balkans have also been warning about the potential of such groups to be recruited as paramilitaries or even ethno-national terrorist cells so as to be utilized for purposes such as securing political power and intimidating the political opposition.¹⁵¹²

Second, next to personal motives, the perception of being monitored after release from prison might guide individual attempts at the restoration of previous reputations. In the cases of released ICTY prisoners, exactly the fact that an early release usually entails some sort of supervision and that any such is not envisaged in the normative framework of the ICTY/MICT can contribute to confusion on the side of released ex-prisoners regarding whether or not they have to report to somebody. Despite the general conviction among ICTY/MICT personnel that the ICTY prisoners are aware of not being under parole after their release,¹⁵¹³ one interviewed prisoner admitted to having been under the impression upon his release that he actually might be under parole. “No, nobody ever [asked him to report after his release], it’s just that I understood it to be a conditional release... So, until the end of the term of the sentence, you are not allowed to commit any offence; otherwise, you would automatically have to go and serve the rest of the term in prison. That’s how I understood it, and I think they would’ve enforced it like that”, said the prisoner.¹⁵¹⁴ Even though

1508 See *Chapter 6.3.5.4* (those prisoners whose guilty pleas were taken as positive indicators of their moral rehabilitation).

1509 *Latif* 2018.

1510 *Latif* 2018.

1511 *Latif* 2018.

1512 *Šušnica* 2018.

1513 Even though interviewed ICTY/MICT officials admitted to never having encountered an enquiry from the prisoners about their post-release status, it is generally held that the prisoners are aware of not being supervised post-release as the ICTY/MICT never attached any condition upon anyone’s release (interviews with Legal Officers B and D at the ICTY/MICT, 15/06/2015).

1514 Interview with a released ICTY prisoner, 20/05/2014.

the released prisoner admitted to never having heard of any such experience from other ex-prisoners, it is likely that some other former prisoners share a similar impression due to the lack of any formal notice on their post-release status. According to the prisoner, it is not uncommon that upon release, the ICTY (ex-)prisoners are simply “left on the doorstep” of the prison to just walk away. In fact, this uncertainty of whether or not ex-prisoners are monitored might be a deterrent factor preventing some from reclaiming past reputations, especially if domestic normative provisions also deny access to any public platform from which they could relaunch a radicalized campaign.

Regarding the latter, it is important to discern the impact criminal records of ICTY prisoners have on their social and judicial rehabilitation post-release. In particular, this would pertain to restrictions or an abrogation of certain political and civil rights which can be imposed in addition to criminal punishment, ad hoc or automatically by the letter of the law, and the effect of which usually lasts well until after the full term of the sentence has been served. Regarding the attempts of convicted war criminals to re-claim their past reputations, the deterrent impact can be predicted insofar as the variety of legal prohibitions to which ex-prisoners are usually subjugated – including the possibility to work in the public sector or to obtain the position of a public functionaire – might practically hinder any such attempt or at least limit the scope of its potentially negative influence. The issue at hand, however, is whether domestic jurisdictions in the home states of the perpetrators legally recognize judgments imposed by the ICTY/MICT and whether these are listed accordingly in domestic criminal records. For instance, in Bosnia and Hercegovina (BiH), the convictions imposed by the ICTY are not listed in domestic criminal records, which subsequently has paradoxical implications for the status of released ICTY convicts.¹⁵¹⁵ So it came to pass that Mr. *Blagoje Simić*, convicted for crimes against humanity against Bosnian Muslims and Croats in the BiH municipality of Bosanski Šamac, returned to the very same municipality in BiH upon his release from the UK prison, where he was appointed as director of a local hospital, apparently due to his practical experience but also because there was no evidence of his ICTY conviction in domestic criminal records.¹⁵¹⁶ The committee who appointed him as well as the local police who issued the certificate of no criminal record claim there were no irregularities in the selection and that the omission of the criminal record is simply the consequence of a loophole in the domestic law – despite the fact that a previous attempt at an appointment had failed as the decision was nullified by the district court on the grounds that Mr. *Simić* actually was convicted.¹⁵¹⁷ Notwithstanding Mr. *Simić*'s medical expertise, the possibility for former war criminals to easily re-enter the public sector not only gives a leeway for its practical misuse – especially if these positions

1515 *Marković* 2017.

1516 *Marković* 2017.

1517 *Marković* 2017.

concern governmental services such as police and military –, it might also send a wrong moral message to the affected population. For instance, the Serbian government also disregarded the ICTY convictions when it approved the appointment of several Serbian generals – one of whom had been convicted by the ICTY to 14 years' imprisonment for aiding and abetting crimes against humanity – as lecturers at the Military Academy in Belgrade.¹⁵¹⁸ The appointment serves not only as a *de facto* acknowledgment of an immediate judicial rehabilitation of the convicted but actively promotes him as a valid and respectable moral agent whose past atrocities should be condoned. In Croatia, Article 2 of the Regulations on Criminal Records allow for judgements imposed by foreign courts to be included in criminal records. However, there is scant information available as to whether this is practically utilized also with regard to the judgements imposed on Croatian citizens by the ICTY. Notwithstanding the media reports on grand receptions and memorials of convicted war criminals that often include members of the current political elite, one interviewed ICTY prisoner, formerly of a lower rank, admitted that upon his release and subsequent return to Croatia, he had been denied work in the public sector.¹⁵¹⁹ As this had occurred during the governmental mandate of the Social Democratic Party, it gives the impression that policies on keeping domestic criminal records of persons convicted at the ICTY in the post-Yugoslavian states might be a matter of discretionary decision and inclinations within the current ruling party. For instance, it is no secret that political elites in Serbia and Republika Srpska that allowed a *de facto* judicial rehabilitation of returned ICTY convicts abide to extreme nationalistic policies.¹⁵²⁰ Similar phenomena can be observed in other post-Yugoslavian states where support for the restitution of previous reputations and (seemingly) also judicial rehabilitation of convicted war criminals usually come during the reign of nationalistic parties. On the other hand, liberal and more left-oriented parties are more vocal in expressing a condemnation for past atrocities, which can subsequently also be implemented through the maintenance of criminal records for convicted war criminals as well as the imposition of other restrictions post-release.

Besides the problematic recognition of the ICTY judgements in domestic jurisdictions, the other issue at stake is when and whether at all persons convicted at the ICTY can actually be judicially rehabilitated. As previously mentioned, the average time frame of automatic judicial rehabilitation in European domestic jurisdictions ranges from seven to ten years,¹⁵²¹ yet this says nothing about how international

1518 See dw.com of 20 October 2017: “Haški osuđenici kao predavači na Vojnoj akademiji u Beogradu?” [The Hague Convicts as Lecturers at the Military Academy in Belgrade?]; dw.com/bs/ha%C5%A1ki-osu%C4%91enici-kaopredava%C4%8Di-na-vojnoj-akademiji-u-beogradu/a-41046046 [14/02/2018].

1519 Interview with a released ICTY prisoner, 20/05/2014.

1520 Compare also with the mention of monetary support provided by the Serbian government to the ICTY prisoners in *Chapter 6.3.2.2*.

1521 See *Chapter 4.1.2.4*.

convictions are to be treated. Given the mandate of the ICTY/MICT to contribute to historical records and truth preservations through the archives of its legal documents – judgements included –, the factual existence of “international criminal records” that can easily be accessed by anyone renders the practical inability of ICTY convicts to ever be truly judicially rehabilitated, notwithstanding policies on dealing with their judgements in their home countries. For instance, one interviewed former ICTY prisoner commented on being suddenly banned from travelling abroad to European Union states, even though he had been on several business trips to neighbouring states since his return from prison.¹⁵²² He described a situation in which he had been halted on the Slovenian border and had his passport nullified by the border control officials on the basis of “disruption of peace and destabilization of peace in Europe”, as was stated in the document he received. Only after his attorney appealed to the ICTY/MICT, the ban was retracted and he was further allowed to travel. Additionally, this ex-prisoner complained about the negative impact the ICTY conviction holds for his rehabilitation, more than ten years since his judgement has been passed. In particular, he is still not being allowed to open a bank account in the majority of banks within his state of residence, as due to his status as a convicted war criminal, any bank opting to cooperate with the US banking system is pressured to exclude him from its clients list, because he is being blacklisted by US banks.

The issue of a legal consequence of international convictions is indeed a complex one. In the cases of perpetrators who are not personally nor morally rehabilitated, they can be an effective preventive measure to keep them from resorting to dangerous narratives, an affirmation of past atrocities or any similar risk-associated behavioural patterns. Nevertheless, as shown before, even that does not guarantee desistance if the governing elites in the home countries are not willing to acknowledge the practical effect of these restrictions, e.g. through legal omissions or simply by disregarding them. On the other hand, in cases of perpetrators who are personally and morally rehabilitated – or at least do not pose any risk from resorting to criminal behaviour again –, the discretionary unlimited imposition of such legal restrictions can be seen as unnecessary oppression, stigmatization and actual obstruction from ever achieving the status of an equal citizen.

A final important factor regarding the possibility to reclaim past reputations pertains to the popular support released ex-prisoners receive from various social circles in their home countries. Similar to circumstances that allowed the momentum of an atrocity-condoning policy in the first place, popular support to returned war criminals and their depiction as ‘returned heroes’ depend on the state of insecurity and anomia in the post-conflict society. An inability of the “common folk” to solve existential issues, to overcome war-related trauma and to build a new collective identity with the available resources and laws further solidifies their self-perception as victims in desperate need to claim justice. Subsequently, returned macro-criminals are attached

1522 Interview with a released ICTY prisoner, 20/05/2014.

their messianic status as they are perceived to be those who previously dealt justice, who took care of “their people” and who – by being sent to some foreign, international tribunal for acts that were (or still are) perceived as legitimate or even necessary – have been equally grieved. Consequently, they are seen as mythical figures who would render possible deliverance from further insecurity and fear – perhaps with the same brutal means as before, if necessary.

To that extent, it is equally the “rehabilitation of post-conflict societies” that should occur in order to maintain peace and to prevent new cycles of violence from happening. Similar to offenders – of whom no rehabilitative progress can be expected if they are continuously stigmatized and oppressed through their imprisonment –, the population in a post-conflict society can detach itself from the image of being victims only if the citizens feel economically and socially secure again. In the transitional period, the challenge for liberal pro-human rights elites is to provide such security in a short term, as negative consequences of conflict (pertaining to infrastructural damage, loss of market, radical changes in the political economy, up to all-prevailing mistrust between social groups due to recent conflict-related victimization) tend to linger long after a truce has been established. Consequently, an inability to guarantee security is perceived as failure, which radical elites then tend to exploit. Actively involving returning war criminals in political, military or other elites, or blatantly showing exculpating support for their previous reputations, is a way of utilizing fragile collective sentiments to consolidate power. In such a climate, it is unlikely that the collective can change an individual. As shown above, the lack of personal or moral rehabilitation in returning macro-criminals is unlikely to change if the collective supports such a status quo. However, if personal and moral change in perpetrators occurs first – which their treatment in prison can either hinder or positively induce –, it has the potential to positively impact wider changes in the society by sending a different moral message by moral agents that are still considered to be valid by many. As claimed by some social psychologists, this should simultaneously happen by perpetrators on all sides of the conflict – and desirably with the support of leading state structures – as an admission of guilt on only one side does not automatically entail an equal admission by the other side.¹⁵²³ Nevertheless, it could be argued that at least, it opens the floor for it, which reconciliation can then be further built upon.

6.4 Evaluation

The human rights movement has been featuring increasing momentum throughout both the 20th as well as the 21st century. This has been particularly recognized in a growing adoption of principles of the sanctity of human life and dignity, the abolition

1523 Grozdanić 2017.

of the death penalty as well as the prohibition of cruel, inhuman and degrading treatment or punishment in both the national and international penal reaction to various forms of criminality, including international crimes. Accordingly, the recognition of the principle of criminal offenders' rehabilitation as a valid penal goal towards which the enforcement of prison sentences should strive affirms these postulates. In fact, international support for the inviolability of minimum humane prison standards as well as for extended means of humane rehabilitative treatment that should enable perpetrators to become well-functioning law-abiding members of the society expresses the following understanding: if punishment is to produce a positive outcome in an offender, to enable his/her successful reintegration and to reduce the risk of re-offending, it has to be rid of those psychological flaws that shaped the crime in the first place – such as the dehumanization of flesh-and-blood human beings and their turning into abstractions through unbridled penal reaction.¹⁵²⁴

Normatively speaking, the vertical system for the enforcement of international sentences that has been established by the ICTY seems to move away from the unbridled penal reaction as recognized in the conditions and treatment of the Spandau prisoners. The enforcement agreements concluded between the ICTY and potential enforcement states indicate support for international prison and human rights standards, which would consequently imply that rehabilitation – in the sense of its general and special operational frameworks – is adopted as the governing principle and purpose for the enforcement of the ICTY sentences. In fact, the extent of achieved rehabilitation among prisoners has been explicitly accepted as one of the criteria the President of the ICTY/MICT ought to consider when reviewing each sentence upon 2/3 of the term served. As the practice shows, it is indeed one of the criteria that fares as being most important for the President's decisions.

Despite formal adherence to the rehabilitative principle, the above analysis of the practice in fact shows that rehabilitation is not a governing penal goal when it comes to the enforcement of the ICTY sentences. At best, it is a desirable side-effect of a system that is to a large extent governed by the pragmatic concern of solely and effectively enforcing international sentences. Much of it has to do with the basic setup of the system, which argues against the enforcement of sentences in perpetrators' home countries and adopts the policy of a wide dispersion of prisoners between different national prison systems.

The prohibition to enforce sentences in perpetrators' home countries is rationalized on the grounds of the risk that exists for the impartial administration of justice if the perpetrators are returned. Notwithstanding the general legitimacy of this rationale – in fact, it might be argued that it is indeed necessary to remove certain perpetrators from the criminogenic state system if any positive development in terms of their

1524 See also *Rotman* 2008a.

personal and moral rehabilitation is to be conceived –, it can poorly justify the prohibition of the UN Security Council in the case of ICTY prisoners. The reason for this is that the Tribunal already decided to put faith in domestic criminal justice institutions of the post-Yugoslavian states when it delegated certain cases from its own jurisdiction according to the Rule 11*bis* to be adjudicated and subsequently enforced in national penal systems of the perpetrators' home states. What is more, the UN Security Council has failed to establish the connection between the aforementioned risk and the individual perpetrator in a concrete case, rather opting for attributing it to the whole group of perpetrators on the basis of their projected reputations in their home countries. Given that the ICTY featured a wide plethora of perpetrators in the dock – stemming from all ranks of (para-)state and (para-)military structures (i.e. high-, mid- and low-ranking) –, it might be considered dubious that each and every perpetrator presented a risk for the effective and impartial administration of justice.

Even if acknowledging the legitimacy of the risk-based rationale as implemented above, it might seem curious that the ICTY/MICT did not opt for entering into an agreement with just a single – instead of various – enforcement state (outside the circle of home states), as this would arguably ensure a higher consistency and standardization in prison treatment than the system now provides as such. Apparently, the same reasons that nowadays prevent the states from entering enforcement agreements or from accepting prisoners on the basis of such agreements (e.g. monetary burden, political sensitivity of hosting convicted war criminals, popular/political opposition towards foreigners, an increased international surveillance of domestic prisons) would also prevent a single state from imprisoning all convicts of an international tribunal. In fact, the concern in the case of a single enforcement state might be even much higher as the state could not excuse itself any longer from providing appropriate and standardized conditions and treatment to ICTY prisoners on the basis of their small number. As opposed to the current situation where some states, such as Belgium, Poland or Portugal, have hosted one or two ICTY prisoners, the number of international prisoners a single enforcement state would host could easily amount to several dozens, who would then present a very distinctive group within the national prison system. Additionally, given the fact that within the vertical enforcement system, the enforcement states alone carry the monetary burden, multiplying the number of international prisoners in national prison(s) of a single state would multiply monetary costs the state would have to shoulder. From a pragmatic standpoint, it must have seemed to be more rational to divide the costs of enforcement between multiple states, instead of ending up having none at all to send convicts to.

The dependency on national prisons – due to the lack of an international prison institution as well as the fact that the states themselves carry the costs of enforcement – resulted in the ICTY/MICT never actually being able to demand enforcement from other states, even after they signed an enforcement agreement. What is more, the ICTY/MICT has been forced to manoeuvre through various criteria discretionally imposed by the states – such as being willing to enforce only sentences of a certain

duration or only a limited number of sentences (altogether or within a certain time frame) – when negotiating a state of enforcement. Consequently, this means that a prisoner is not being transferred to a domestic prison system on the basis of the latter's suitability to effectively contribute to his/her rehabilitation, but rather on the basis of any state's willingness to actually accept the prisoner. Within such a designation system, a prisoner's personal considerations regarding the state of enforcement would be taken into account only if there were enough willing states to choose from at that time, as well as a sufficient number of sentences a single state would be willing to enforce. In practice, this can very much amount to something like a "lottery system" where the prisoner can end up in better or worse conditions depending on the state that at that time was willing to offer the acceptance. Perhaps the only rehabilitative aspect the ICTY has continuously been able to fulfil concerns the enforcement in Europe and not on any other continent, given that this would have rendered meaningless the possibility to maintain contacts with families. Even so, experiences with enforcement in different European states are very discrepant, as prison conditions and the treatment provided to ICTY prisoners are governed by the national laws and prison policies of the different enforcement states.

Generally observed, the ability of states to attend to the needs of ICTY prisoners is based on the overall quality and sensibility of their penal systems. The economic standard of a state or a cluster of states is also represented in their penal policies, with wealthier European states featuring more humane prison conditions and a more proactive approach to rehabilitation. To that extent, it has been found that ICTY prisoners transferred to Scandinavian states are usually more satisfied with the conditions, treatment and services in prison, as the whole concept of enforcing criminal sentences in states such as Denmark, Finland, Norway or Sweden is rather oriented towards a normalization of prison conditions and enabling the prisoners to more efficiently reintegrate into society upon release. In terms of the general rehabilitative framework, ICTY prisoners in Scandinavian states have mostly expressed satisfaction with regard to prison conditions and work opportunities. The latter were particularly commended as providing a decent remuneration to prisoners, to the extent that some prisoners were able to monetarily help their families overcome the great geographic distance and to visit them more frequently. A proactive approach has also been reported with regard to the visitation regime in Scandinavian states, allowing prisoners to spend time with their families in private and more meaningfully – e.g. under minimum supervision, in especially designated accommodation and for longer periods of time. Additionally, the aggravating impact of serving the sentence in a foreign socio-cultural environment that is also geographically extremely distant from the home state has been mitigated by other progressive means of communication and contact the Scandinavian prison system offers, such as Skype calls. To that extent, the positive evaluation of enforcement in Scandinavian states seems to be the outcome of a domestic policy that had already been implemented for ordinary national

prisoners – and does not represent a “special” or “better” treatment provided exclusively for ICTY prisoners.

On the other hand, much more criticism of provided prison conditions and treatment has been expressed by ICTY prisoners in the states of Central or Western Europe. Next to the prison conditions that are generally of a lesser quality than those in Scandinavian states, this criticism was also based on how ICTY prisoners are perceived and integrated in Central/Western European prison systems due to their status as foreigners as well as internationally convicted criminals. In particular, it was observed that the latter factors can have a significant impact on the quality of prison treatment, dictating, e.g., the level of prison security, imposed restrictions (e.g. access to furloughs or work details), the visitation regime as well as the availability of other services, including coherent rehabilitation programmes. If the respective state is not already sensitive to the needs the foreign prisoners have, the standard of provided services can sink well below the one that is offered to nationals, providing for drastic internal inequalities.

One of the biggest issues ICTY prisoners encounter concerns language. Their frequent inability to adequately communicate with prison staff in a foreign language has proven to be detrimental to prison treatment insofar as it can prevent the ICTY prisoners from obtaining equal access to services such as work, special health treatment or rehabilitation programmes. Subsequently, it can have a severely negative impact on the prospect of prisoners’ release, as the reports the national authorities send to the ICTY/MICT for release review can feature substantive misinterpretations with regard to their behaviour or achieved (moral) rehabilitation. Additionally, the prisoners have reported that not only the language courses in foreign prisons are unsuitable for foreigners without previously having acquired some basic knowledge of the local language; the enforcement states are also reluctant to provide adequate translation services that would enable the ICTY prisoners to implement their rights as much as national prisoners. Together with restricted possibilities of maintaining family contacts, this aspect was reported to particularly aggravate the isolation of ICTY prisoners in foreign prisons, making them feel stigmatized.

Apparent, the inability of some enforcement states to ensure the safety of ICTY prisoners in their prisons was reported to be an additional aggravating factor, enhancing feelings of anxiety, fear and isolation in prisoners. Namely, it seems that in enforcement states which feature a high quota of prisoners with Muslim backgrounds, such as the UK, France or some German federal states, too little attention has been given to allocating the ICTY prisoners in a facility where they might not suffer potential attacks from other prisoners. Due to violent attempts on their lives, some prisoners were forced to spend parts of their sentences in isolated confinement, which substantively hindered any potential progress along the paths of personal or moral rehabilitation. What is more, such experiences might have consolidated prisoners in their previous unrepentant and negative attitudes towards the committed crimes as well as the punishments they received.

According to the analyzed practice, the offer of services within the special rehabilitative framework as well as the inclusion of ICTY prisoners in any prison programme with a focus on addressing their crime etiology, the risk of re-offending and/or attitudes towards the committed crimes are left entirely to the discretion of each enforcement state. To that end, several factors are of significance for the potential application of a more focused approach to rehabilitation of macro-criminals.

First and foremost, risk assessment provided for the purpose of an application of more structured rehabilitation programmes in national prisons might be ill-fitting for the etiological complexities of macro-criminality, which are also context-related and might require intimate knowledge about various aspects of the conflict the ICTY prisoners emerged from. As this surpasses the competency usually required when addressing the criminogenic needs of the ordinary prison population, prison staff in foreign prisons might be unable or reluctant to provide assistance to ICTY prisoners in this regard.

Second, as with prison conditions and services offered within the context of a general rehabilitative framework, those states whose penal systems are more attuned to a proactive approach to offenders' rehabilitation might be more willing to adapt or modify the existing services to addressing the criminogenic needs of the macro-criminals, too. For instance, all the prisoners who featured a genuine expression of remorse and could be positively assessed with regard to their moral rehabilitation were incarcerated in Scandinavian states (Finland and Denmark).¹⁵²⁵ Subsequently, as the *Landžo* case shows (Finland), positive developments in terms of offenders' personal and moral rehabilitation through psychological therapy in prison can have equally positive consequences for the social rehabilitation of macro-criminals after release. The latter is understood as a contribution to reconciliation through some form of reparative action and atonement for the harm done – represented through, e.g., an apology to victims, as in the case of Mr. *Landžo*. The example of the ICTY prisoners in Scandinavian states also supports the claim that penal policies oriented towards a normalization of prison conditions are a mandatory basis for any efficient effort aimed at the rehabilitation of offenders, as they reduce potential detrimental effects of imprisonment that can amount to an aggravation of the already burdening deprivation of liberty. This then opens a way for constructive communication and dialogue. On the other hand, those enforcement states whose penal policies feature moderate approach to rehabilitation or are rather based on managerialism and incapacitation (such as the UK, France, Spain, Estonia or some German federal states) are generally less inclined to provide focused rehabilitative treatment to ICTY prisoners or to adapt existing programmes to suit their crime etiology.¹⁵²⁶ When this is combined with restrictions, the prisoners might suffer from their high-security classifications in foreign prisons, a possible lingual and cultural incompatibility with

1525 See in detail *Chapter 6.3.5.4*.

1526 With exceptions noted for some prisoners in Spain and the UK, see *Chapter 6.3.5.4*.

their immediate environment as well as potential attacks coming from other prisoners – due to which they might be forced to ask for protective isolation (as reported in the case of some states). This can considerably hinder any rehabilitative outcome and increase feelings of isolation and aggravation.

Next to the incompatibility of most offered rehabilitative programmes in national prisons as well as to the general penal orientation of national prison policies, other reasons that prevent enforcement states from offering meaningful rehabilitative services to ICTY prisoners are of a security and pragmatic nature. Given the small number of ICTY prisoners hosted by each enforcement state, national authorities are concerned about the impact which highlighting ICTY prisoners might have on other inmates in foreign prisons – e.g. by offering them specially-tailored rehabilitative services. This, in particular, pertains to a possible pressure the other prisoners might then be inclined to put on the prison administration to being provided special and individual rehabilitative services, too. Also, “singling out” ICTY prisoners is understood to cause security issues, making them more visible targets for potential retaliatory attacks in prisons. On the other hand, given that ICTY prisoners are not nationals of enforcement states – which means that they will not be reintegrated into their societies after release (unless they might, for security reasons, apply for asylum in the host state) –, the states are not inclined to invest additional resources so as to offer them rehabilitative services and programmes beyond those already in place for ordinary prisoners.

Besides the already challenging situation with regard to services that pertain to the personal and moral facets of rehabilitation, there were no reported instances that any measures were implemented to facilitate the restorative-based social rehabilitation of ICTY prisoners.¹⁵²⁷

Understanding that due to their status, the standard of sentence enforcement for ICTY prisoners can sink well below the one usually provided for national prisoners, it is necessary to point to the venues of complaint and legal aid provided to them. This pertains to the basic division of prerogatives between the ICTY/MICT and national justice authorities, regarding the enforcement of sentences. Normative provisions of enforcement agreements as well as the observed practice point to the exclusive authority of the ICTY/MICT over terms of the sentence, in the sense that only the Tribunal/Mechanism has the prerogative to decide over the state where the sentence shall be enforced and when the enforcement is to be terminated. This is problematic from the standpoint of the prisoners’ right to appeal judicial decisions as no mechanism was envisaged to oversee the ICTY/MICT decisions with regard to the designation of the state and the release of prisoners. For instance, with respect to the obvious disregard for the principle of legality in the case of (arbitrary) release eligibility thresholds for lifers, there is no complaint venue provided where ICTY life

1527 Compare with *Chapters 4.1.2.3 and 4.1.3.3*.

prisoners could, for example, demand a review of the Tribunal/Mechanism's decision to refuse them release (e.g. by arbitrarily claiming that the amount of years ICTY lifers spent in prison would still not make them eligible for release consideration,¹⁵²⁸ even though their age, rehabilitation and risk assessment may in fact very well be in favour of their release). Another problem is the inability of prisoners to complain about the clearly discretionary manner in which the Tribunal/Mechanism has decided to evaluate different factors for release over the years, such as a substantial cooperation with the prosecution and the rehabilitation progress by prisoners.

In addition to the terms of the sentences, the ICTY/MICT upholds the prerogative to supervise the conditions of imprisonment, for which a third monitoring body has been assigned in most cases, even though only the Tribunal/Mechanism representatives are mandated to conduct monitoring in some instances, or national authorities in combination with ICTY/MICT representatives. The practice shows a discrepancy with regard to monitoring diligence, as there were instances where no visits occurred during the whole time of enforcement (Finland), or they occurred only after continuous pleas from the prisoner as well as pressure on the ICTY/MICT by other bodies monitoring international human rights after having been additionally contacted by the prisoner (Germany). Besides irregularities in the frequency of visits between different monitoring bodies, the apparent lack of standards is also problematic according to which the monitoring bodies and the ICTY/MICT evaluate violations of prisoners' rights in national prison systems as well as the available remedies to such violations. The term "conditions of imprisonment" (over which the ICTY/MICT maintains supervision according to the enforcement agreements) is broad and encompasses the aspects of both the general and the special rehabilitative framework. To that extent, practice shows that the ICTY/MICT does not have a possibility to influence the treatment of its prisoners in national prisons other than by providing recommendations to national authorities and – in extreme situations such as the *Krstić* case that also featured high publicity – by terminating the enforcement and transferring the prisoner to another state. With regard to a standard of evaluation, the ICTY/MICT is rather discretionary in its decision on how to treat a specific situation, which further increases the unequal treatment of its prisoners. Practice indicates that the only probable situation in which the ICTY/MICT would be more adamant to demand an improvement of the conditions and treatment of its prisoners is when their physical health and safety might be at risk, even though that is not a rule either. Discrepant reactions to situations of a similar health emergency, as featured with prisoners in Germany and Estonia, are illustrative of this point.¹⁵²⁹ Additionally, despite the evidence that the ICTY prisoners are likely to be under the serious threat of attacks in certain enforcement states and that national authorities cannot guarantee

1528 For a problematic and ambiguous formulation of the ICTY lifers being eligible for release after having served "more than 30 years", see *Chapter 6.3.5.3*.

1529 See *Chapter 6.3.4*.

their safety, the ICTY/MICT did not shy away from approving the continuous transfer of its prisoners to those states or their transfer to another state when an initial attack occurred.

Normatively, enforcement agreements allow the ICTY/MICT to be more intensively involved in the day-to-day modalities of enforcement, e.g. by maintaining permanent consultations with enforcement states with regard to all aspects of enforcement. In practice, the aforementioned pragmatic concerns (e.g. that any additional pressure put on national authorities regarding prison conditions and treatment might place the ICTY/MICT out of the state's favour for its future acceptance of prisoners) hinder their efforts to efficiently sensitize national authorities towards the needs of the ICTY prisoners. Improvements are possible, although they might take quite a long time, and they might be more dependent on how vocal and persistent the prisoners are in demanding their rights to be upheld than on the self-initiative of the ICTY/MICT or the states.

With regard to the day-to-day modalities of enforcement, i.e. conditions, regime and treatment in prison, the fact they are placed under the governance of national law enables ICTY prisoners to also use national legal remedies and institutions (i.e. the national court system) to appeal decisions of national prison authorities regarding their treatment. This allows for a dual complaint track with respect to the conditions of enforcement where the prisoners can appeal to the ICTY/MICT personally or through a monitoring body if they feel their prisoners' rights have been infringed – and, on the other hand, to national courts. In this sense, a margin of appreciation is left to national authorities to decide on the standard according to which they might evaluate potential violations of ICTY prisoners' rights. For example, to what extent does the rigid application of national prison regulations (tailored in accordance with the needs of domestic prisoners) to ICTY prisoners provide for a practical inequality of their status when compared with the one of domestic prisoners? An example is a prisoner in Germany who successfully appealed to the district court to be granted a limited number of annual visits to the nearby town with his spouse, which ought to meliorate the detrimental effects of his long-term punishment and the fact that he, due to his status, was not eligible to benefit from earlier national release eligibility thresholds. An additional example is *Radislav Krstić* who, upon the initial attack in Wakefield, requested his transfer to another prison and successfully sued the UK government in front of a domestic court over the violation of his rights.

The aggravating impact the inequality of conditions and treatment that is experienced by ICTY prisoners throughout different enforcement states imposes on their experience and perceptions of punishment is apparently intended to be compensated by a rather automatized system for the release review of their sentences, where prisoners are mostly released upon having served 2/3 of their sentences. Even though an achieved rehabilitation features high on the list of factors the ICTY/MICT considers for their release, the analysis has shown that in general, this is only superficially

addressed. Due to the lack of a suitable/adapted risk assessment system, rehabilitation programmes as well as practical conundrums (such as the lingual barrier between ICTY prisoners and national prison authorities that in most cases disable any meaningful assessment of the achieved personal or moral rehabilitation in prisoners), national authorities – as well as subsequently the ICTY/MICT – rely on the evaluation of those criminogenic needs areas that are most commonly addressed in ordinary criminality: good conduct in prison, integration into the prison community, maintenance of family relations and possibility of reintegration in their home societies on the basis of job opportunities. This is problematic as it reduces to automatism not only the release evaluation process but the whole concept of serving the sentence. Given that a satisfactory evaluation with regard to standard areas of criminogenic needs is not challenging for ICTY prisoners – after all, many have been high achievers in their past lives or at least featured no criminal record prior to the conflict, which would otherwise point to certain criminogenic areas as being problematic –, they might premeditatively resort to simply maintaining a good conduct in prison in the hope that they might be released once they reach 2/3 of their sentences. In turn, a more complex blend of criminogenic needs (featured, for instance, in radicalized attitudes and the lack of an empathical reflection on committed crimes) might still be latent in offenders and perhaps even intensified by the aggravated experiences of imprisonment in a foreign country. Without addressing these needs meaningfully, there is a chance that the ex-prisoners might resort to a re-establishment of their past reputations (potentially with the same means as before) after they are released to their home societies without any supervision and with still existing popular support. On the other hand, the enforcement states themselves are likely to support this automatism as there is no threat the prisoners – in case they fail to show rehabilitative progress – might remain on their territories up to the full terms of their sentences; therefore, they are not pushed to offer more effective rehabilitation services to ICTY prisoners or to monitor the achieved rehabilitation more rigorously.¹⁵³⁰ As long as the prisoners behave properly and do not pose any security problems, the states are happy to maintain the status quo.

A subsequent release prior to serving the full term of the sentence and without any formal supervision amounts to a factual commutation of ICTY-imposed sentences, which can look – particularly to victims – as if they had “gotten away” with a lenient punishment. In addition, the fact that prisoners are mostly released on the basis of their good behaviour and that upon return to their home countries, many can count on support for their past reputation as well as on immediate judicial rehabilitation (i.e. attaching no further restrictions on their rights), means the overall enforcement

1530 This pertains to general political attitudes in enforcement states and might not reflect the attitudes of, e.g., the authorities directly involved in the prison treatment and monitoring of ICTY prisoners, as there were instances where national authorities had explicitly warned the ICTY/MICT about the substantive lack of moral rehabilitation featured in ICTY prisoners, and yet, the ICTY/MICT President still granted them release (see *Chapter 6.3.5.4*).

mechanism could be seen as greatly detracting from the reconciliatory efforts of the conflicting parties, which is certainly an unwanted outcome in terms of achieving the overarching aims of the ICJ. On the other hand, if international convictions seem to be recognized in the home countries of the ICTY prisoners, the ex-prisoners are subjugated to a non-transparent and discretionary system of restrictions which expands negative consequences of punishment beyond the scope mandated by the proportionality principle. This, in turn, solidifies negative psychological mechanisms in perpetrators as well as in their supporting social circles insofar as it reinforces the flawed myth of martyrdom and self-victimization, rendering the penal reaction as illegitimate violence against an individual (and a nation, as often perceived) instead of conveying the message of legitimate and credible condemnation, which, however, offers the opportunity of atonement as well as of personal and social improvement.

Chapter 7

Summary and Suggestions for Improvement

The above analysis has shown that some of the issues affecting the legitimacy of the imposition of ICTY sentences also seem to be present within the mechanism of their enforcement. Accordingly, the penological framework is still undeveloped, particularly with regard to the lack of a meaningful reflection on the purposes of imprisonment and standardized methods to achieve them. These shortcomings have resulted in an ambiguous set of rules which in practice can lead to discretionary decisions, politization and inequality in the approach to and treatment of international prisoners. Similarly, while in general, the vertical enforcement system represents a move away from the unbridled penal reaction as experienced in the Spandau prison, some of the same problems faced by the Nuremberg convicts throughout their incarceration are recognized in the prison experiences of ICTY prisoners. For instance, even though many are arguably subjected to better prison conditions than the Spandau prisoners were, the isolation of serving their sentence in a socially, culturally and lingually foreign environment – often increased by high security measures, scarce family contacts and apparently without a coherently conceptualized rehabilitative purpose towards which the ICTY prisoners could and should work for – in many cases reflects the monastic ideal of penance through isolation, work, discipline and self-reflection, as also encountered in the treatment of the Spandau prisoners. In this sense, both systems might be seen as a form of “penal exile”.

While having been incarcerated in Germany, the Spandau prisoners were nevertheless to a high degree isolated from the society by a strict prison regime, strong international supervision and a lack of independent monitoring of prison conditions. As a consequence, this amounted to an “internal penal exile”. While the imposed isolation represented the moral condemnation of the Nazi crimes, for the prisoners, it had no other consequence but consolidating them in their previous moral beliefs. Any self-reflection and moral introspective were strongly diluted by the austere prison conditions and the rigid regime, thus even increasing the sense of aggravation in prisoners. Not only was no rehabilitative treatment provided to meliorate the detrimental effects of such imprisonment – there was also no promise of a future,¹⁵³¹ so

1531 As discussed in *Chapters 4.2.4* and *4.2.5*, early release for the Spandau prisoners was a matter of discretionary decision as it was not envisaged prior to their incarceration. What is more, given the advanced age of some of the prisoners and the length of their sentences, there was a

their criminal past was the only thing the prisoners were able to turn to. When finally released, some prisoners immediately resorted to sharing their former reputations within more or less confined social circles. In turn, this influenced many other Nazi perpetrators to attempts of restoring their past reputations, which had a hindering effect on the momentum of the transitional process in post-WWII Germany.

A similar outcome can be observed in the case of ICTY prisoners. Imprisonment outside one's home state based on an arbitrary dispersion among different foreign states amounts to a historically recognized "external penal exile". While Article 9 of the Universal Declaration of Human Rights prohibits arbitrary arrest, detention or exile, it is concerning to see that in the practice of the ICTY/MICT, sending convicted persons to different foreign prisons on the basis of random choice or sheer availability of enforcement states (rather than on a substantiated rehabilitative policy) in many aspects amounts exactly to arbitrary exile. Similar to the Spandau prisoners, the intense isolation such a penal exile entails in many cases may only solidify the prisoners in their former attitudes. They are not only morally unchanged but are looking for ways of restoring past reputations upon their return to their home countries. This can in many ways obstruct the transitional process in the post-conflict society and hinder reconciliatory efforts.

This chapter aims at delineating some general postulates which are, from the author's perspective, seen as potentially benefiting the evolving practice of enforcing international sentences – particularly with regard to the enforcement of ICC sentences – towards more efficiently achieving the rehabilitative penal aim. By allowing a space for the rehabilitation of individual perpetrators through their imprisonment as well as after they are released, the pedagogical component of punishment is re-affirmed and broadened. Resorting the punishment simply to retributive condemnation has only a limited educational effect. Subsequently, the consequence of an increased educational effect such an enforcement (based on rehabilitative principles) produces is also recognized in the positive effect individual penal proceedings have on the overarching aims of ICJ. Rehabilitated former macro-criminals, many of whom are still accepted as the only legitimate moral agents of the conflict narrative in their home countries, are able to not only personally desist from further engagement in real or latent hostilities, but can also influence changes in the collective perception of the conflict. First and foremost, this pertains to a personal acknowledgment and condemnation of one's committed crimes. If the main actors of the conflict admit their personal guilt and wrongness of the committed acts, they would hinder the distortion of a legal and historical truth, the creation of false victim myths as well as their manipulation for amassing power on behalf of further polarizing the population. Con-

chance they might not live to see the freedom if left in prison up to whole terms of their sentences.

sequently, this would create a healthier environment for dialogue and reparative action between different stakeholders in the conflict, which in turn could positively benefit the maintenance of peace and break future cycles of violence.

7.1 The Hippocratic Principle: “Primum Non Nocere” – First, Do No Harm

The current vertical system for the enforcement of international sentences that argues for a dispersion of convicts among many different states is harmful for their rehabilitation insofar as it produces inequality in their prison conditions, regime and treatment. Such inequality – which is observed not only between different national prison regimes under which the ICTY prisoners serve their sentences but also between them and ordinary national prisoners – gravely impacts their perception of imprisonment as arbitrary violence. The punishment is thus deprived of its legitimacy and the potential of having a pedagogical impact on its subjects. Their inability to equally exercise their rights reinforces their personal conviction of being wronged, subsequently strengthening the same psychological mechanisms used for the justification of previously committed crimes. It is therefore mandatory for the punishment to be stripped of the stigma of violence and to distribute justice equally.

A consideration towards the standardization of the enforcement of international sentences is all the more important for the legitimacy of the ICC mandate. Based on the analysis of the Rome Statute’s provisions pertaining to the enforcement, there is an equally grave (if not even greater) possibility for the enforcement of ICC sentences to suffer from their lack of standardization. In this respect, the ICC generally follows the dispersion model of the ICTY and has so far concluded enforcement agreements with 11 states, including two ad hoc agreements with the Democratic Republic of Congo (DRC). Given the jurisdiction of the Court over crimes committed in different parts of the world, the scope of enforcement states has also been broadened to include South American countries such as Argentina¹⁵³² and Colombia.¹⁵³³ Theoretically, this would allow for offenders from Africa, Europe or other parts of the world to be incarcerated on other continents, too, thus further increasing the already detrimental effects of imprisonment in a foreign state. Additionally, the states are explicitly al-

1532 See ICC’s press release of 19 April 2017, “ICC signs enforcement agreement with Argentina”; icc-cpi.int/Pages/item.aspx?name=pr1297 [01/03/2018].

1533 See ICC’s press release of 16 May 2011, “ICC President to sign enforcement of sentences agreement during his visit to Colombia”; asp.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202011/Pages/icc%20president%20to%20sign%20enforcement%20of%20sentences%20agreement%20during%20his%20visit%20to%20colombia.aspx [01/03/2018].

lowed to attach conditions to their acceptance of convicted persons, which also allows for various manipulations of the designation procedure and the standardization of enforcement.¹⁵³⁴

The first postulate then argues that if international sentences are still to be enforced in foreign states, a range of aspects were to be considered for a standardization of enforcement in order to strengthen adherence to the rehabilitative principle.

Obviously, the number of enforcement states should be reduced. This, in turn, concerns the geographical location of these enforcement states, the number of states, the facilities and the prison regime for international prisoners as well as the funds provided for such an enforcement. Considering the jurisdiction of the ICC, it would not make much sense to consolidate all these states in Europe, Africa or somewhere else. Rather, given the inextricable bundle of ties (potential) offenders have with their communities or societies worldwide, it would seem more reasonable to create regional prison centres for international criminals in the close proximity of the respective (post-)conflict zones. It could be argued that something similar has already been created by both the ICTY and the ICTR. However, the above study of the ICTY enforcement practice shows to what extent the realities of “regional” enforcement can be discrepant when occurring in many different states, as well as being aggravating when happening far-off from the home states of the prisoners. This would then present an argument for regional perpetrators to be consolidated in a single regional enforcement state, i.e. close to their home states. An allocation within the same enforcement state is preferable insofar as it allows for a standardization of prison conditions and treatment. Being allocated within the scope of the same region also allows for the prisoners’ needs to be more efficiently addressed – for example by employing prison staff that has a knowledge of prisoners’ language, culture, tradition and history.¹⁵³⁵ The latter is important not only for prisoners to be able to convey their needs to prison staff more clearly (e.g. the same language) but also as a precondition for prison staff and experts to enter into more meaningful discussions with the prisoners on the circumstances, meanings and consequences of their crimes. As pointed out in the evaluation above, foreign prison staff are ill-equipped to do so, lacking both lingual capacities and adequate background knowledge about the conflict and the crimes. What is more, a consolidated allocation not only within the same state but within the same institution would allow the prisoners to enter discussions between themselves, challenging each other’s attitudes and held beliefs with regard to the committed crimes. One interviewed ICTY prisoner said that the consolidated detention regime in the UNDU had helped detainees enter into a mutual dialogue regarding wartime grievances, even though they had been fighting on opposite sides during the war.¹⁵³⁶ According to this prisoner, the possibility of such an interaction

1534 The Rome Statute, Article 103, para. 1(b).

1535 Cf. *Penrose* 2003, p. 641.

1536 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

greatly improves the chances of personal self-reflection and questioning one's previously held beliefs – something the prisoners dearly lacked during their subsequent imprisonment in foreign states. Similar benefits a dialogue between imprisoned adversaries could mean for their personal, moral and social rehabilitation were also previously recognized in the historic cases of Irish and Italian terrorists.¹⁵³⁷ Of course, having all prisoners consolidated within the same institution also raises potential security concerns as some of them are likely to retain past animosities which they might, at least in the beginning, decide to display towards their fellow inmates. This would dictate the provision of enough available prison sections or wings for a suitable allocation of inmates within the facility so as to ensure the tranquility and safety of prison life. While properly trained prison staff would be an important requirement for a smooth operation of the facility, it is open to discussion whether intensified security measures would have to be applied to all the prisoners and what kinds of measures these would actually be. For example, some authors proposed a default implementation of heightened security measures towards international prisoners on the basis of the predicted risks they pose for prison staff and other prisoners due to the nature and gravity of their crimes.¹⁵³⁸ Such a default premise is flawed – as shown in the above analysis, in the great majority of cases, there was no security risk for the physical safety of prison staff or other prisoners from the part of ICTY prisoners. If anything, they were exposed to attacks from their fellow inmates. Additionally, the majority of release decisions indicated predominantly good behaviour by the ICTY prisoners. The other type of risk some authors hypothesize to be associated with inmates in a consolidated model concerns the collective discouragement from an acceptance of responsibility for the committed crimes and actually the reinforcement of the ideology that had endorsed war crimes – going so far as arguing that the prisoners might direct ongoing acts of insurgency in their home countries or might otherwise engage in criminal enterprises and terrorism if imprisoned together.¹⁵³⁹ This is something the prison regime should be aware of and which, arguably, pertains to a more nuanced type of risk assessment of macro-criminals where personal and micro-situational circumstances of individual offenders are assessed in relation to wider socio-political developments in (post-)conflict societies.¹⁵⁴⁰ However, as with the risk of physical violence, the imposition of stricter security measures on the basis of such a risk should be grounded in a valid risk assessment – something which aforementioned experts with a decent knowledge of lingual, cultural and socio-political traditions pertaining to the prisoners' home regions can efficiently do.

1537 See *Chapter 4.1.3.3*.

1538 Penrose 2003, p. 640.

1539 *Culp* 2011, p. 11.

1540 For a discussion on this aspect within preliminary considerations of the application of the rehabilitative framework to macro-criminality, see *Chapter 4.1.3.3*.

A discussion on an allocation within a single regional enforcement state – or even in a single prison facility – should also consider what kind of prison facility actually ought to be provided for international prisoners. Should a special prison facility be created, or should international prisoners be incarcerated in already existing national prison facilities (or parts thereof, i.e. dedicated prison wings)?¹⁵⁴¹ The Rome Statute omitted the chance to more firmly mandate the adherence to international prison standards (such as the SMR, the BoP and the BP) in the enforcement of its sentences by generally indicating that “the conditions of imprisonment shall be [...] consistent with widely accepted international treaty standards governing treatment of prisoners”.¹⁵⁴² Contrary to the ICTY regime (where the states bear the monetary expenses of enforcements and which results in the international prisoners being simply mixed with the ordinary prison population), in the enforcement agreements the ICTR has made with the enforcing African states (Rwanda, Swaziland, Mali, Benin), the UN has promised financial assistance to the receiving state for making improvements to prison facilities where ICTR prisoners would be allocated.¹⁵⁴³ As a consequence, the ICTR prisoners were allocated in national prisons but separated from the ordinary prison population, in conditions that not only abide to international prison standards but surpass the national standards to which many ordinary prisoners are subjected.¹⁵⁴⁴ Despite potential criticism that such a setup discriminates between international and national prisoners, it is necessary to point to differences in the legal status between the two groups, as well as to the fact that in the enforcement system as it is now in place, international prisoners share very little with the domestic prison population of a foreign state that would mandate their abidance to national prison regimes and conditions. If international criminal justice institutions are willing to monetarily support the conditions and treatment of international prisoners, they should also have the authority to decide upon the quality of those conditions.

Therefore, the principle of “First, Do No Harm” requires an adherence to international humane prison standards and the uniformity of their practical application to international prisoners. This would consequently also require an abandonment of the current practice of enforcement states to solely carry the monetary expenses of enforcement. This practice should be replaced with either a system where the costs are taken over on an international level only or in a shared venture with the regional enforcement state. For instance, the ICC is mainly financed through assessed contributions made by State Parties, with additional monetary support by the UN and various voluntary contributions.¹⁵⁴⁵ If State Parties can already monetarily provide the functioning of the Court, it can be reasonably assessed that they can also monetarily

1541 Cf. *Mulgrew* 2013, p. 286.

1542 The Rome Statute, Article 106, para. 2.

1543 *Culp* 2011, pp. 7–8.

1544 *Culp* 2011, p. 10.

1545 The Rome Statute, Article 115.

support a standardization of the prison conditions and the treatment of ICC prisoners in the enforcement states.¹⁵⁴⁶ This would not necessarily require building new regional prison centres for international prisoners, but could be achieved by simply leasing already existing prison facilities (or parts thereof) from the enforcement state and potentially improving them in accordance with international prison standards. In order to appease potential concerns, the enforcement state might have with regard to hosting an international prison facility (e.g. thus risking a popular or political opposition), an especially negotiated price could be considered for the lease of the facility that would take these concerns into account. Furthermore, taking care of the costs of imprisonment would also give legitimacy to the ICC to implement its own *sui generis* prison regime towards international prisoners and to have particularly assigned personnel to uphold it on a daily basis. For instance, this is already implemented in a way in the case of the Scheveningen prison complex in The Hague, where both the ICTY and the ICC utilize certain facilities of the Scheveningen prison to keep their international defendants in remand detention, separated from national prisoners and under an especially envisaged detention regime. Having the State Parties or the UN take care of the costs of enforcement would result in an equality of prison conditions and treatment of international prisoners, regardless of where such an international prison facility would find a place. Additionally, this would allow the Assembly of the State Parties to the ICC to be more directly involved in the creation of a prison regime for international prisoners, by devising prison rules that would regulate the day-to-day modalities of enforcement. Regional human rights monitoring bodies could then also be commissioned to monitor any potential violations of prisoners' rights and to report to the ICC. Consequently, a system of appeal, or legal remedy, would have to be devised that would enable prisoners to address any such violations, as the discussed system could not depend on national judicial systems anymore to address violations of prisoners' rights regarding the conditions of imprisonment. By making the State Parties more responsible for the monetary costs of enforcement – which would subsequently give them more prerogatives to devise and implement a *sui generis* international penal policy through the Assembly and the ICC –, rehabilitative programmes or services could be introduced that are better suited to the criminogenic needs of international offenders, especially those coming from higher political or military echelons.

1546 Similar to the ICTY enforcement regime and according to the ICC Rules of Procedure and Evidence (Rules of Procedure and Evidence, Official Records of the Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session [ICC-ASP/1/3 and Corr. 1], New York., 03–10 September 2002; hereinafter: ICC RPE), the enforcement states are supposed to solitarily bear the costs of enforcing ICC sentences (ICC RPE, Rule 208 [1]).

7.2 More Transparency/More Cooperation with National Authorities in Perpetrators' Home States

The demand for more transparency in the enforcement of international sentences rests on the important premise that the rehabilitation of offenders does not happen in a social vacuum. The perpetrators are inherently connected with the society/community within which their crimes were committed. This has been repeatedly indicated throughout the sentencing practice of the ICTY. For example, part of the criticism directed towards the founding legitimacy of the ICTY was based on the perception in the post-Yugoslavian states that the UN Tribunal forcefully took the conflict, its crimes and the perpetrators away from them. Similarly, it has been indicated that the outreach programme – that was subsequently launched in order to make the proceedings and outcomes of the ICTY's sentencing practice more visible and understandable to the population of the states concerned – actually came too late and in a too small scope to meaningfully counter local manipulations of the Tribunal's reputation and image. Additionally, it has been shown that the ex-prisoners do not shy away from returning to their home societies where their international convictions might not be legally recognized and where the popular support for their past reputations is as dependent on local distortions of the ICTY's legitimacy as it is on the Tribunal's own inability to efficiently convey its aims, mandate and practice to the local population.

Certainly, part of the problem for the ICTY/MICT has been its distance from the conflict zone where the crimes occurred, which has significantly hindered various stakeholders in the conflict to attend trials and to thus be personally exposed to the distribution of justice and its expressivist potential. Furthermore, the omission to also have the trial transcripts prepared in the local Serbo-Croatian language – instead of opting only for English and French versions – has significantly hindered not only the outreach impact of the Tribunal's proceeding in the concerned states, but has also eliminated any external control of potential misrepresentations of testimonies made during trials.¹⁵⁴⁷

The lack of transparency that hindered the outreach impact of the ICTY's trials can also be transplanted to the stage of the enforcement of sentences where, given the fact that sentences are enforced in foreign states – many of which are pretty far away from the post-Yugoslavian states –, the population in the post-Yugoslavian states has little substantial knowledge of how and under which conditions the sentences are actually enforced, nor is there much knowledge about the regime under which ICTY prisoners serve their sentences. Policies of commissioned monitoring mechanisms, such as the ICRC, may mandate a confidentiality of gathered data,¹⁵⁴⁸ which further obstructs the impartial evaluation of enforcement by the international community,

1547 For this point, see also *Hoffmann* 2016, p. 66.

1548 See *Culp* 2011, p. 6.

thus also allowing for popular/political manipulation of perceptions of justice in this regard. For instance, social/political circles in the states concerned that negate or openly support past atrocities might exaggerate the gravity of conditions and treatment in foreign prisons by symbolically equating the imprisonment pains of the convicts they claim allegiance to with the "historic pains and struggles" their nation (on behalf of which the crimes were committed) has allegedly undergone in the past. Equally, they might downplay the gravity of the position where the prisoners of the adversary's side find themselves in, making general claims of privileged treatment in "country club prisons", while in reality, the prisoners might have their rights denied, are struggling with increased isolation or even have to fend off frequent attacks from other inmates.

Bringing regional prison facilities for international prisoners closer to post-conflict societies would not only benefit the prisoners with regard to maintaining easier contact with family and friends, it would also allow for a more transparent view on the enforcement practice by the regional stakeholders in the conflict. For instance, having regional prison facilities for international prisoners under an international mandate and governance could open ways for regional NGOs to access and report on the situation of prisoners, without having to worry that the enforcement state might deny access or censor the reports because of the concern that the conditions of ordinary prisoners might also come under scrutiny. Such independently obtained reports could then dispel any false claims with regard to the actual situation of international prisoners; what is more, the reports could also be another "checks and balance" instance for maintaining the equality of treatment and respect for prisoners' rights. A closer proximity of international prisoners to post-conflict societies could also open the door for meaningful communication (e.g. in the form of restorative conferencing) between the prisoners and other stakeholders in the conflict, which could subsequently positively influence the rehabilitation of offenders as well as reconciliatory efforts.

It is worthwhile here to briefly consider the justification for an infrastructural setup of the aforementioned regional prison facilities for international prisoners. If there are enough reasons to support the development of such regional prisons close to (post-)conflict areas worldwide, would it not make more sense then to simply return international convicts to their home states to be imprisoned there? The possibility to serve a prison sentence in a familiar environment (i.e. via social, lingual, cultural and family ties) is nowadays strongly encouraged by instruments regulating international prison transfers on the grounds of supporting effective rehabilitation. Consequently, it can be presumed that the most effective way to support the rehabilitation of international offenders is to return them to their home states, to earn back their rightful place in those communities whom they have previously done wrong, without suffering the aggravating effects of imprisonment in a foreign environment. Furthermore, from the standpoint of the transparency of imprisonment, the most effective way for

stakeholders in crime to be aware of the conditions and the consequences of punishment – subsequently reinforcing their perception of re-owning the conflict and justice – would be for convicted macro-criminals to serve sentences in their midst. Additionally, by returning the perpetrators who have been adjudicated on an international level to serve their sentences in their home states would to a certain extent also equate their position with those macro-criminals who are being adjudicated before national courts in the transitional period and are bound to serve their sentences in national prisons. By doing so, the perception of an equal distribution of justice would be reinforced.

The argument against this proposition is the same one the UN Security Council still upholds with regard to ICTY prisoners: given the popular and political support for past reputations of ICTY prisoners in their home states, national justice institutions are not trusted to guarantee an impartial and effective enforcement of sentences. This viewpoint was criticized above on the grounds of general and unsubstantiated reasoning where the implication that ICTY prisoners might destabilize a fragile peace in the region if they were brought back is preferably based on the projected impact their reputation as a group might then have, rather than on an individual risk assessment in a concrete case.¹⁵⁴⁹ However, the basic idea (and concern) behind this is not without merit. One of the reasons the whole system of ICJ has been established in the first place was to ensure that those most culpable for atrocious violations of human rights are punished and prevented from further doing so. Despite differences in their jurisdiction, both the UN ad hoc tribunals and the ICC were founded as last-instance judicial bodies to punitively address atrocities and their perpetrators for the purpose of breaking the climate of impunity that allows for such atrocities to further occur. They are the last stand when there is not enough political will or possibility for domestic justice institutions to prosecute macro-criminals. Accordingly, international prison facilities outside the immediate conflict zone but within its regional proximity are to ensure the effective and purposeful incarceration of macro-criminals when there is not a sufficiently similar willingness and/or possibility to impartially imprison them in their home state – and if the risk of the perpetrators themselves somehow meddling with the administration of justice is probable.

However, contrary to the general prohibition with regard to ICTY prisoners, it is worth considering whether all internationally convicted macro-criminals pose a sufficiently high risk of a destabilization of peace that would justify their imprisonment outside their home states. Despite international criminal tribunals adjudicating perpetrators of all ranks, it could be tentatively predicted that dynamic risk factors usually featured in high- or mid-ranking perpetrators – such as criminal masterminds, fanatics, careerists and devoted warriors (being also mindful of how different etiological types can overlap in reality) – would necessitate the enforcement of their sentences as well as a simultaneous rehabilitative treatment outside the home state.

1549 See *Chapter 6.4*.

These perpetrators are usually the creators of overarching policies and the condoning climate that allows atrocities to happen. Given the high-ranking positions they previously occupied, the support for their reputations in the transition period might still be quite strong, even within the current state structures. They might be tempted to restore their reputations, which could mean tampering with the justice system, resorting to bribery, corruption, assassinations or even terrorist attacks in order to escape imprisonment, or they might at least try to make a deal with the government that would create an impression of imprisonment, while in reality, they would be quite free in their affairs. In order to reduce the risk of them obstructing the transitional process (and to allow state structures to be rid of criminogenic agents), it would be necessary to imprison them outside their home state. Less so could perhaps be claimed for followers and conformists as their crimes depend on such extraordinary circumstances. Therefore, if these circumstances cease to exist within the period of transition or are considerably weakened, any risk of a destabilization of peace and the impartial justice administration is arguably smaller.

With regard to this argument, an interesting practical development can be observed in the case of the enforcement of two sentences imposed by the ICC. On 19 November 2015, following two especially crafted agreements with the Democratic Republic of Congo (DRC), the ICC transferred two of its convicted defendants, Congolese nationals *Thomas Lubanga Dyllo* and *Germain Katanga*, to serve the remainder of their sentences in a national prison facility in the DRC.¹⁵⁵⁰ This transfer represents a precedent in the practice of enforcing the ICTY's, the ICTR's or the ICC's sentences, as for the first time, the state of origin of the perpetrator was effectively chosen as the enforcement state. Contrary to ICTY practice, there is no ban for ICC convicts to return to their home states for enforcement, even though the list of states with whom the ICC has made enforcement agreements indicates that the Court might share the same sentiment as the UN Security Council in the ICTY case and would prefer an enforcement outside contemporary conflict zones over which it currently has jurisdiction.¹⁵⁵¹ The decision in the *Lubanga* and *Katanga* cases was therefore surprising, and certain authors have questioned whether it was a purely pragmatic choice influenced by trials and tribulations the ICTY had and continues to have through its enforcement practice; or was it a carefully thought-through decision intended to promote the further development of the complementarity of international and national justice institutions in reaction to atrocity crimes?¹⁵⁵² Given the ICC's

1550 See BBC News (19 December 2015), "ICC transfers war criminals to serve sentences in the DRC"; bbc.com/news/world-africa-35144123 [05/03/2018].

1551 Other than the two ad hoc agreements with the DRC, at the time of writing, the ICC had also concluded enforcement agreements with Austria, Belgium, Colombia, Denmark, Finland, Mali, Sebia, the United Kingdom, Argentina and Sweden (see *Abtahi & Koh* 2012, p. 8); for enforcement agreements with Argentina and Sweden, also see ICC 19 April 2017 (icc-cpi.int/Pages/item.aspx?name=pr1297 [06/03/2018]), and ICC 26 April 2017 (icc-cpi.int/Pages/item.aspx?name=PR1299 [06/03/2018]).

1552 *Vojta* 2018, p. 35.

prerogative of supervising its sentences and the fact that most international prisoners have so far been released from prison to their home states anyway, it was argued that making the latter accountable for a purposeful imprisonment of their citizens might just be a valid way of how to mutually and more directly engage both perpetrators and (post-)conflict societies in a proactive transition – i.e. from violating internationally recognized human rights and values to supporting them.¹⁵⁵³ The fact that the ICC placed a significant emphasis on the opinions of Messers. *Lubanga*¹⁵⁵⁴ and *Katanga*¹⁵⁵⁵ regarding their state of preference (as well as the possibility to ensure an effective enforcement in the DRC)¹⁵⁵⁶ speaks in favour of a new balanced approach the ICC might be developing towards the designation of enforcement states – guided by both a rehabilitative concern for prisoners and their case-by-case risk management. As such, this development could also be seen as being supportive of the above-proposed policy for the transfer of international prisoners, where a designation either into regional prison centres for international prisoners or into national prisons in their home states could be claimed on the grounds of a meaningful individual risk assessment and a rehabilitative concern for prisoners.

In both instances, however, meaningful cooperation with national authorities in the perpetrators' home states would be required to ensure an impartial and efficient enforcement as well as abidance to the rehabilitative principle. For instance, for those prisoners sent back to their home states, the authority of the ICC over the terms of the sentence as well as the appropriate standard of prison conditions would have to be guaranteed by national authorities, also allowing for inspections of conditions and for prisoners' complaints to be heard. Arguably, the demand for upholding internationally recognized prison standards in the perpetrators' home states could be a positive incitement for the new government to improve also them for other domestic prisoners. This could also have broader implications for the harmonization of domestic sentencing frameworks and practices with the one developing on the international level. For example, the dismissal of the death penalty by the ICC dictates

1553 *Vojta* 2018, p. 35.

1554 See Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dylo*, Decision designating a State of Enforcement (ICC-01/04–01/06, 08 December 2015), para.7: “The Presidency notes that the sentenced person has expressed a clear view [...] that his preference is to return to the DRC, his state of nationality, in order to serve his sentence of imprisonment, noting in particular his need to maintain ties with his family and his capacity to be properly integrated into a prison community.”

1555 See Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Germain Katanga*, Decision pursuant to article 108(1) of the Rome Statute (ICC-01/04–01/07, 07 April 2016), para. 1: “[...] Mr. Katanga provided such views, indicating that he strongly desired to serve the remainder of his sentence in the DRC and requesting the Presidency’s assistance in pursuing this possibility.”

1556 See Situation in the Democratic Republic of Congo, In the Case of *The Prosecutor v. Germain Katanga*, Decision pursuant to article 108(1) of the Rome Statute (ICC-01/04–01/07, 07 April 2016), para. 1: “The Presidency ordered the Registry to consult and prepare a feasibility assessment in relation to the possible enforcement of Mr. Katanga’s sentence in the DRC.”

that convicted persons sent to serve their sentences in their home states which still might support the death penalty for international crimes would not be under the threat of losing their life if they are returned. Accordingly, in order to provide for the equal distribution of justice and to reinforce the complementarity of national and international jurisdictions, such states would be pushed to harmonize their sentencing catalogue with the ICC in a promotion of the sentencing practice that abides to fundamental human rights principles. Such a sentencing practice would then also have to exclude the death penalty as the punishment for perpetrators adjudicated at the national level, bringing their status more in line with that of perpetrators adjudicated at an international level. One other major point of cooperation would be the introduction of the parole system for international prisoners. Regardless of whether convicted persons are imprisoned in especially designated regional prison facilities or immediately in their home state, their post-release supervision in the home state would to a large extent rely on the efforts of national authorities. A system for the unimpeded communication between the international and the national level would have to be ensured in order to provide for timely reports on the post-release status of the ex-prisoners and the state's ability to apprehend and return them to prison in case of a parole violation. Unfortunately, due to the formal adherence to the same enforcement system as the ICTY, the ICC has dismissed the institution of parole from the start, with the Rome Statute explicitly stipulating that any positive release-related review of the sentence would result in its reduction.¹⁵⁵⁷ For example, regarding the *Lubanga* and the *Katanga* cases, it could be argued that if the national authorities are willing to ensure the impartial enforcement of international sentences in the first place, they can also be entrusted with assistance in the post-release supervision of those prisoners who are released earlier.

7.3 Openness to Communication

The current vertical system for the enforcement of international sentences allows little room for communication, which is the catalyst for rehabilitative change. As previously stressed, therapeutic dialogue and opportunity both to listen and to be heard are at the core of the moral transformative process of perpetrators.¹⁵⁵⁸ Unfortunately, conundrums such as lingual barriers, poor awareness from the side of foreign prison staff of the circumstances and background of committed crimes as well as their sometimes prejudicial attitudes towards international prisoners have all hindered attempts at developing a more meaningful communication-based approach to tackling their crime etiology. Also, the evident external and internal inequality of conditions and support for basic prisoners' rights (as indicated through the analysis

1557 The Rome Statute, Article 110.

1558 See *Chapter 4.1.3.3*.

of the enforcement of ICTY sentences) plays a significant role for international prisoners to harbour resentments and an unwillingness to commit to a self-reflection and re-evaluation of held beliefs and attitudes.

The suggestions delineated above regarding infrastructural and regime-related improvements should also create a healthier environment for communication as an important staple in the rehabilitative treatment of international prisoners. Previously, the importance of developing protective risk factors, such as a positive empathical disposition, has been advocated as being beneficial for their personal and moral rehabilitation.¹⁵⁵⁹ The regional establishment of international prison facilities should allow for more easily supplementing personnel who are more familiar with the context and circumstances of prisoners' crimes, therefore being able to show a better understanding for why and how the crimes were committed. Based on empathy, this understanding has a positive potential to also provoke an empathical response from the perpetrators, which is another step towards the re-activation of their cognitive dissonance and a realization of the gravity and wrongness of their committed crimes. The ability to empathically relate to victims disrupts neutralization techniques such as dehumanization and increases inhibitions against radicalized attitudes. Given the proximity of prison facilities to the places of residence of prisoners' families, a friendlier visitation regime can also reduce grievances on the prisoners' sides and integrate family members into the rehabilitative process, thus providing continuous support for the prisoners in their transformative efforts. The experience some ICTY prisoners shared of how the psychologist in the UNDU helped both them as well as their family members cope with many years of separation due to remand detention speaks favourably of this potential.¹⁵⁶⁰ Particularly commended was the effort provided by the psychologist to guide family members in their interaction with detainees after their judgements would become final, a period in which they were prone to tremendous psychological turmoil and despair.¹⁵⁶¹ Furthermore, consolidating prisoners together with the necessary safety precautions could open a way for them to enter into mutual restorative dialogues, challenging each other's beliefs and attitudes, thus further stimulating the process of personal re-evaluation and coming to terms with what they have committed. It is important that a rehabilitative plan is developed that would set goals for prisoners and estimate the time frame for an evaluation of the achievement of these goals. Personal motivation of prisoners is crucial in this regard, so competent interlocutors should be able to reach out to them so as to maintain this motivation. The understanding of the etiological mechanisms that led to their criminality is of particular significance. For example, being aware in which way the gradual neutralization of cognitive dissonance in the perpetrator led to the commission of crime(s) would consequently also allow to gradually reverse the process

1559 See *Chapter 4.1.3.3*.

1560 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

1561 Interview with ICTY prisoner C in Germany, 23–24/10/2016.

without risking a sudden lapse into potentially harmful psychological states such as suicidal considerations.

The practical availability of rehabilitative services should be ensured on the basis of individual risk assessment and responsiveness of prisoners. It could be tentatively predicted that those perpetrators whose determined risk factors – such as radical attitudes, megalomania or a selfish and apathic outgoing disposition – indicate a higher risk level for relapse into past behavioural patterns (and, consequently, for a destabilization of peace in the post-conflict society) should have a priority in terms of rehabilitative assistance. Of course, they might vehemently oppose any attempt at communication, so their personal commitment to a rehabilitative plan might also be ensured through soft-pressure means, such as conditioning benefits (e.g. furloughs, lessening the security regime), their progress through the prison gradation system or an early release with an engagement in the programme and a positive evaluation of its outcome.

The benefit of therapeutic communication allows for a higher probability of remorse, which is a precondition for any restorative action. While any form of restorative action towards other stakeholders in crime can arguably breach the proportionality of punishment if mandated from the prisoners during imprisonment, it is worthwhile to consider it as an obligation during parole release. What kind of reparative action might be best suited ought to be determined on a case-by-case basis: for example, monetary reparations do not make much sense if ex-prisoners are insolvent. Similarly, demanding a public apology from the perpetrators can appease the need of victim groups for a recognition of their suffering, yet it might not truly reflect the perpetrators' attitudes. Mandating personal encounters in the form of VOM might even be harmful for both parties if they are not sincerely ready to face each other. This is a matter of finding the right balance and of maintaining flexibility where, for example, the engagement of ex-prisoners who still retain conflicting attitudes towards their crimes into less personally intrusive restorative action, such as communal work, can positively affect their personal evaluation and subsequently stimulate parolees towards more personally involving restorative attempts.

Communication is a two-sided endeavour. It is therefore worthwhile to consider what a society can offer to those ex-prisoners who show a rehabilitative potential or, with their development during imprisonment, have clearly earned the right to be fully and legitimately accepted back as members of the society. This does not concern the type of reception based on the support for past (destructive) reputations, but the reception from state structures and the population that acknowledges the human rights ethos and supports equality instead of difference. Contrary to the current practice in the vertical enforcement system (which is plagued by inconsistencies and ambiguities), any restrictions of the perpetrators' rights due to their criminal records ought to be clearly stated, including the temporal time frame of such restrictions. Instead of opting for an indefinite stigmatization of ex-prisoners, which (due to the preservation of

the international criminal records and archives) is quite likely in the current ICJ system, it is worthwhile to consider the appeal of the aforementioned concept of a “certification of rehabilitation” for macro-criminals.¹⁵⁶² Reiterating the previous observation, the concept of a merit-based certification of rehabilitation is inherently grounded in the contemporary human rights movement, which has been progressively developing along the increased condemnation of large-scale atrocities such as international crimes. In this sense, the support for human life and dignity, which is upheld as the basis of the current ICJ system, should also be expressed in the rehabilitative approach that acknowledges the past, but also takes into consideration that people can change: that good people can do bad things, but that they should be given a chance to redeem for them and to move away from their past convictions.

¹⁵⁶² See in detail *Chapter 4.1.2.4*.

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