INTERNATIONAL IMPRISONMENT

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I. INTRODUCTION

Every State in the modern world has a prison system, established and purportedly administered in terms of formal legal rules. Most such systems house both sentenced and unsentenced prisoners and have minimum standards and rules that are common to all prisoners. Although there is now a considerable body of international law that aims to provide a human rights framework for the recognition of the rights of all prisoners, the universality of the prison and the ubiquity of international human rights law have not meant that there is international consensus about what imprisonment should be used for and how prisons should be administered. The prison as a penal institution has remained firmly rooted in the nation State and in national legal systems. In this respect penal institutions are different from other detention facilities, most particularly those for prisoners of war, which have long been governed by the rules of international humanitarian law.

Against this background it is significant that imprisonment has become the dominant, indeed almost the only, form of punishment endorsed by the emerging system of international criminal justice. The international community now has at least two penal institutions of its own, in Scheveningen near The Hague and in Arusha in Tanzania.[1] The numbers held in these institutions are relatively small,[2] and technically they are only detention units, although sentenced prisoners are sometimes held there for considerable periods before being

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[1] In addition, the Special Court for Sierra Leone, which is a mixture of an international and a national tribunal, has its own detention unit attached to the Court: See <http://www.sc-sl.org>.

[2] On 16 July 2004 there were 65 prisoners in the detention unit at The Hague of whom six had been sentenced and were awaiting transfer. A further 13 were serving sentences imposed by the ICTY in various European countries: see <http://www.un.org/icty/glance/index.htm>.

According to the undated fact sheet of the ICTR (accessed on 14 July 2004 at <http://www.ictr.org/default.html>). Fifty-five detainees are held at its detention unit. The fact sheet does not reveal how many of these are sentenced or how many have been transferred to the States that volunteered to take sentenced prisoners.

The detention unit of the Special Court for Sierra Leone housed eight prisoners awaiting trial on 15 June 2004: See 'The Problem with the Special Court for Sierra Leone' *The Independent* (Freetown) 15 June 2004. Accessed at <http://allafrica.com/stories/200406150493.html> on 17 June 2004.

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transferred to countries that agree to take them. Such prisoners, sentenced by the International Criminal Tribunals for the former Yugoslavia and for Rwanda, are eventually incarcerated in national prisons administered by nation States bound legally, and in practice, to administer the detention of these prisoners in accordance with international standards. A similar scheme of an international facility with regional outlyers is contained in the Statute and Rules of the new International Criminal Court.

How did imprisonment come to play this key role in international criminal justice and what is the wider significance of the emergence of the international prison?

II. TOWARDS THE INTERNATIONAL PRISON

Scholars of international criminal justice are fond of pointing out that the subject has deep historical foundations. However, there is a strong case to be made for saying that its modern history starts with the International Military Tribunals (IMT) that sat at Nuremberg and Tokyo after the Second World War.[3]

At Nuremberg a tribunal composed of judges from the four allied powers that had been the most important victors in the war, tried and sentenced offenders, most of whom subsequently served their sentences in a prison run not by a single country but by the four powers. Much has been written about those trials but very little of it deals with the imposition of sentence and even less with the enforcement of the sentences that were imposed.

The attention that was paid to sentencing turned mostly on the question of on whom the sentence of death should be imposed, and the primary enforcement question was whether those who were sentenced to death should be shot or hanged.[4] In fact, seven offenders convicted by the IMT at Nuremberg were sentenced to imprisonment.[5] The Tribunal did not give reasons directly linking the crimes of which these offenders were convicted to the terms of imprisonment, nor did it even consider matters relating to when the offenders should be released or how their sentences should be served. In terms of its Charter all these matters were left to the Allied Control Council.[6] The Council regarded itself as a political rather than a legal body. Not only the Soviet but also the British representative had orders to dismiss the representations that the Nuremberg prisoners made on their sentences immediately after the trial.[7]

[3] See the Charter of the International Military Tribunal (Nuremberg) 8 Aug 1945 UNTS 82, 279, and the Charter of the International Military Tribunal for the Far East (Tokyo) 19 Jan 1946 TIAS 1589.

[4] In spite of their protests that convicted soldiers 'deserved' to be shot, those sentenced to death were all hanged like 'common criminals': T Taylor *The Anatomy of the Nuremberg Trials* (Bloomsbury London 1993) 603–7.

[5] Ibid.

[6] Art 29 of the Charter of the International Military Tribunal.

[7] S Douglas *Combat and Command: The Story of an Airman in Two World Wars* (Simon & Schuster New York 1963) 736–55.

Political expediency was crucial in the further treatment of these prisoners too, in determining both the conditions of imprisonment to which they were subject and their eventual release. The regime at Spandau prison was initially said to be very harsh.[8] It soon improved, but erratically. During the periods when the Soviets were in charge, for example, the prisoners were given very limited rations and lost considerable weight, only to recover again in the ensuing months.[9] Even after the adoption of the path breaking United Nations Standard Minimum Rules for the Treatment of Prisoners[10] in the mid-1950s little attempt was made to apply international standards,[11] but the regime remained the subject of negotiations based on appeals to the 'common sense' of the allied representatives. There was no independent legal supervision of the prison regime and an attempt by the family of the longest serving prisoner, Rudolf Hess, to get the European Commission of Human Rights to intervene failed on jurisdictional grounds.[12] The release policy too was not informed by any penological theory. While three prisoners were released on grounds of ill health, the remaining four served their full sentences. Most notoriously Hess served 43 years of his life sentence before allegedly committing suicide in 1987.[13] As Kress and Sluiter have concluded: 'Overall the treatment of prisoners at Spandau emphasised their exclusion from society rather than their belonging to it.'[14]

The history of the prisoners sentenced by the International Military Tribunal for the Far East (the Tokyo Tribunal) was different, although the Tribunal also had no supervisory role and prisoners had no effective recourse to an outside court.[15] Some thought, however, was given to questions of early release from the start. Thus Judge Röling, a highly respected member of that Tribunal, specifically gave a dissenting judgment with the sole purpose of assisting the Supreme Commander who originally had the authority to determine early release.[16] The Supreme Commander, General MacArthur, did lay down criteria for early release: prisoners could get up to two-thirds reduction for good behaviour and offenders sentenced to life imprisonment were to be considered for parole after they had served 15 years. In fact, only a single prisoner was

[8] See the postscript by Lord Hankey to Viscount Maugham *UNO and War Crimes* (John Murray London 1951) 124.

[9] A Speer *Spandau The Secret Diaries* (Collins London 1976) 116–33.

[10] ESC Res 663 C (XXIV), 31 July 1957, 24 UN ESSCOR Supp (No 1) 11, UN Doc E/3048 (1957) and 2076 (LXII) (1957).

[11] C Kress and G Sluiter 'Imprisonment' in Cassese, Gaeta and Jones (eds) *The Rome Statute of the International Criminal Court* vol 2 (OUP Oxford 2002) 1761.

[12] *Hess v United Kingdom* DR 2, 72 (Decision of 28 May 1975).

[13] A Klip 'Enforcement of Sanctions Imposed by the International Tribunals for Rwanda and the Former Yugoslavia' (1997) 5 European Journal of Crime Criminal Law and Criminology 161.

[14] Kress and Sluiter above n 11 at 1761.

[15] See the unsuccessful habeas corpus application to the US Supreme Court in *Hirota v MacArthur* 338 US 197.

[16] Published in BVA Röling and CF Rüter (eds) *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946—12 November 1948* vol 2 (Amsterdam University Press Amsterdam 1977) 1041.

released under this scheme for good behaviour. In 1952 the prisoners were transferred to Japanese authority and by 1958 all 18 prisoners, including those sentenced to life imprisonment, had been released.[17]

Too little is known about the conditions under which the Tokyo prisoners were detained,[18] or about how decisions to release them were made by the Japanese authorities[19] (except that they were determined to release them as soon as possible), to draw firm conclusions about the extent to which decisions relating to the various aspects of imprisonment were based on clear legal rules. It seems, however, that, as in the case of the Spandau prisoners, release decisions were taken on an overtly political basis and with no specific penological policy in mind.

This absence of clear penological thinking did not relate directly to the most important criticisms of the Nuremberg and Tokyo processes but they were not entirely irrelevant. The most prominent criticism was that what the victors meted out at the International Military Tribunals was retrospective justice, since the crimes with which the offenders were charged had not been clearly specified in law at the time that the offenders had committed them. Initially, it seemed that this problem could be easily remedied by international legal action. Thus the Genocide Convention[20] was introduced in 1948 to define the most important crime and in 1950 the General Assembly of the United Nations adopted the Nuremberg Principles[21] to consolidate the legal rules that emerged in the post Second World War trials. However, these instruments did nothing to create legal certainty in the area of the imposition and implementation of punishment. While they confirmed that a person who committed a crime under international law was liable to punishment, they did not indicate what punishments might be appropriate, or how any such punishments should be imposed or implemented. The issue of appropriate punishment for crimes against international law was not an item on the international agenda for the next 40 years, that is, until after the end of the Cold War at the beginning of the 1990s when the International Law Commission began to debate the issue again.[22]

[17] Kress and Sluiter above n 11 at 1763–4.

[18] A very rosy account of the conditions of detention of the Japanese prisoners is to be found in JL Ginn *Sugamo Prison, Tokyo an Account of the Trial and Sentencing of Japanese War Criminals in 1948, by a U.S. Participant* (McFarland Jefferson NC 1992).

[19] RJ Pritchard 'The Gift of Clemency following British War Crime Trials in the Far East, 1946–1948' (1996) 7 Criminal Law Forum 15–50

[20] Convention on the Prevention and Punishment of Genocide adopted 9 Dec 1948 78 UNTS 277.

[21] UNGAOR 5th Session Supp 12, UN Doc A/1316 (1950).

[22] W Schabas 'War Crimes, Crimes Against Humanity and the Death Penalty' (1997) 60 Albany Law Review 733 at 742–3.

III. INTERNATIONAL HUMAN RIGHTS LAW AND IMPRISONMENT

In the same four decades from the early 1950s onwards, a coherent body of international human rights law was beginning to emerge. Questions began to be asked about its implications for punishment in general and for imprisonment, both as a form of punishment and as a means of detaining persons, who, for whatever reason, were being held in prison without being sentenced.[23] In 1948 the Universal Declaration of Human Rights had provided that no-one should be subjected to torture, or to cruel, inhuman or degrading forms of punishment.[24] This prohibition was reflected in the 1950s and 1960s in regional human rights standards. It was reinforced by a myriad of national constitutions[25] that followed recent international law, as well as the much older restrictions on cruel and unusual punishments in the English Bill of Rights of 1689[26] and the Eighth Amendment to the US Constitution a century later. These provisions provided the constitutional bedrock for the prisoners' rights movement that flourished in the United States of America and elsewhere as prisoners haltingly came to be recognised as citizens with fundamental rights in national law.[27]

Rights to human dignity and to due process are key elements of international human rights law, with particular implications for penal law and practice. Some of these relate directly to the interpretation of the prohibition on cruel, inhuman or degrading punishments. This prohibition has long been interpreted as comprising two complementary elements: a prohibition on punishments that are inherently incompatible with the standard and a prohibition against all punishments that 'by their excessive length or severity' are grossly disproportionate to the seriousness of the offence.[28]

In determining what punishments should be regarded as inherently incompatible with human rights standards, the right to human dignity has been particularly prominent. Nowhere is this more true than in the debate about whether the death penalty is to be regarded in international law as inherently cruel, inhuman and degrading.[29] The evolution of international law restricting

[23] As human rights law impacts on all aspects of imprisonment, this paper deliberately deals with them together.

[24] Art 5 of the Universal Declaration of Human Rights, GA Res 217A (III), 10 Dec 1948, 3 UN GAOR Supp (No. 11A) 71, UN Doc A/810, 7 (1948).

[25] MC Bassiouni 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and the Equivalent Protection in National Constitutions' (1993) 3 Duke Journal of Comparative and International Law 263.

[26] 1 Wm and Mary 2d Sess (1689).

[27] For the wider context of this movement in the USA, see JB Jacobs *New Perspectives on Prison and Imprisonment* (Cornell University Press Ithaca 1983) ch 1, 'Macrosociology and Imprisonment'.

[28] *Weems v United States* 217 US 349 (1909) at 371. The implications of proportionality in this context are explored more fully in D van Zyl Smit and A Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 67 Modern Law Review 541–60.

[29] W Schabas *The Death Penalty as Cruel Treatment and Torture* (North Eastern University Press Boston MA 1996).

the use of the death penalty has been gradual in the years since Nuremberg.[30] The result has been that in many societies long periods of imprisonment, sometimes but not always or necessarily for life, have emerged as the ultimate penalty for the most serious offences.

Human dignity and due process principles have also played a part in deciding how imprisonment must be implemented to meet the requirements of international human rights law. One insight is that it requires the imposition and implementation of punishment, including imprisonment, to be viewed holistically.[31] Thus, for example, the International Covenant on Civil and Political Rights (ICCPR) contains mutually reinforcing provisions. The prohibition on cruel, inhuman or degrading punishment in Article 7 and on servitude and forced or compulsory labour in Article 8,[32] combine with a further prohibition on loss of liberty without due legal process in Article 9. This is followed immediately in Article 10 by the requirement that all persons deprived of their liberty be treated with 'humanity and respect for the inherent dignity of the human person'[33] and the instruction, of particular relevance to setting the objectives of the sentence of imprisonment, that 'the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation'.[34]

It is a substantial undertaking to elaborate the interrelated meaning of provisions and their further delineation by specialist instruments such as the venerable 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners[35] and its more modern counterparts.[36] Although these instruments, which typically contain both general rules dealing with all prisoners and rules focusing more specifically on sentenced prisoners, are at best 'soft' international law, the Human Rights Committee has applied them in its interpretation of the ICCPR. [37]

Further development of international human rights standards relating to prisons may eventually be achieved through the implementation of an optional protocol to the International Convention against Torture and Other Cruel,

[30] W Schabas *The Abolition of the Death Penalty in International Law* (3rd ed) (CUP Cambridge 2002); F Zimring *The Contradictions of American Capital Punishment* (OUP Oxford 2003).

[31] *Mbenge v Zaire*, Communication No. 16/1977 (25 Mar 1983), UN Doc CCPR/C/OP/2 at 76 (1990) where a trial conducted *in absentia* was considered to be a ground for setting aside the death penalty.

[32] The partial exception for prison labour in Art 8.3 ICCPR does not allow labour of 'an afflictive nature': see Rule 71(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners. For the status of these rules see the text at n 37 below.

[33] Art 10(1) of the International Covenant on Civil and Political Rights.

[34] Art 10(3). For an analysis of these articles that makes some of these links, see C Safferling *Towards an International Criminal Procedure* (OUP Oxford 2001) 341–6.

[35] See n 10 above.

[36] See the 1988 Basic Principles for the Treatment of All Persons under Any Form of Detention GA Res 173 (XXXXIII), 9 Dec 1988) and the Basic Principles for the Treatment of Prisoners GA Res 111 (XXXXV), 14 Dec 1990.

[37] N Rodley *The Treatment of Prisoners under International Law* (OUP Oxford 1999) 279–81.

Inhuman and Degrading Treatment or Punishment.[38] The Optional Protocol,[39] which is currently open for ratification, provides for the establishment of a regular system of visits by independent international bodies to all places where persons who are deprived of their liberty are detained. Inevitably the proposed Subcommittee on Prevention, which will be responsible for such inspections, will have to develop guidelines for what is to be regarded as torture and as cruel, inhuman or degrading punishment or treatment. In doing so it is bound to draw on existing international standards.

The task of describing the substance of these emerging international standards becomes even greater when one considers that a similar process of standard setting is underway at the regional level. In Europe this is most prominent. The European Court of Human Rights, by interpreting the prohibition on inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights, has somewhat haltingly developed its own standards for the imposition[40] and implementation[41] of punishment, as well as for imprisonment generally.[42] The 1987 European Prison Rules[43] and other recommendations[44] of the Council of Europe on punishment and prisons have bolstered this process. Also in 1987 the Committee for the Prevention of Torture (CPT), was established in terms of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment.[45] The CPT has been developing practical standards and trying to use them to effect a process of evolutionary improvement in European prisons.[46]

Ideally an understanding of all these processes should be combined in sketching the substance of the supranational guidelines, rules and restrictions potentially applicable to penal institutions, a task of legal synthesis that is not

[38] GA Res 39/46, 10 Dec 1984, 39 UN GAOR Supp (No 51) 197, UN Doc E/CN 4/1984/72.

[39] GA Res A/Res/57/199, 18 Dec 2002.

[40] See B Emmerson and A Ashworth *Human Rights and Criminal Justice* (Sweet & Maxwell London 2001) 479–514.

[41] S Livingstone 'Prisoners' Rights in the Context of the European Convention on Human Rights' (2000) 2 Punishment and Society 309–24.

[42] *Peers v Greece* (2001) 33 EHRR 1192.

[43] Recommendation R (87)3 of the Committee of Ministers of the Council of Europe

[44] eg, Recommendation R (82) 16 of the Committee of Ministers of the Council of Europe on Prison Leave; Recommendation R (82)17 of the Committee of Ministers of the Council of Europe Concerning Custody and Treatment of Dangerous Prisoners; Recommendation R (84)12 of the Committee of Ministers of the Council of Europe Concerning Foreign Prisoners; Recommendation R (89)12 of the Committee of Ministers of the Council of Europe on Education in Prison; Recommendation R (92)17 of the Committee of Ministers of the Council of Europe Concerning Consistency in Sentencing; and Recommendation R(2003) 23 of the Committee of Ministers on the Management by Prison Administrators of Life Sentence and Other Long-Term Prisoners.

[45] Art 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment ETS 126.

[46] MD Evans and R Morgan *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment* (Clarendon Press Oxford 1998); A Cassese *Inhuman States Imprisonment, Detention and Torture in Europe Today* (Polity Cambridge 1996).

undertaken here. What is clear, however, is that some common international understandings about prison standards had begun to emerge at a regional level in Europe by the late 1980s and, subsequently, in Africa[47] and the Americas.[48]

These emerging understandings did not yet create an international prison order, either in the sense of prisons administered directly by an international body, or by a national prison authority on behalf of, or in cooperation with, such a body. However, it is noteworthy that, as human rights norms governing prisons were developing, States were increasingly cooperating on the transfer of sentenced prisoners.[49] Most scholars agree that the purposes of such transfers are primarily humanitarian and to increase the opportunities for resocialization that a prisoner may be offered.[50] Transfer agreements for such purposes imply a degree of international recognition of prisoners' rights. Interestingly, the transfer of prisoners also means that national authorities have increasingly to pay attention to how they will implement sentences of imprisonment imposed by courts outside their jurisdiction.[51] As a rule, States are prepared to carry out a sentence as closely as possible to the manner determined by an extra-national court, that is, to accept that the term will be the same and the type of prison will be as similar as possible. The generally recognized exception to this is that the receiving State has the right to release the prisoner earlier or to commute his sentence. Often a pardon or commutation allowed by the sentencing State is recognised by the receiving State as well.[52] In general, international agreements, such as the Convention on the Transfer of Sentenced Prisoners pioneered in 1983 by the Council of Europe,[53] require not only formal cooperation between prison authorities but also some thought about the acceptability of both prison standards and release processes applied in partner countries.

[47] In Africa the 1996 Kampala Declaration on Prison Conditions in Africa is both a substantive catalogue of prison standards and an instrument that called successfully for the African Commission on Human and People's Rights to institute a Special Rapporteur on Prisons and Conditions of Detention: Prison Reform International *Prison Conditions in Africa* (Paris Prison Reform International 1997).

[48] See the Inter-American Convention on Forced Disappearance of Persons (1994) 33 ILM 1529, art 18 of which provides that States Parties that accede to the Convention by means of ratification or accession adopt the United Nations Standard Minimum Rules for the Treatment of Prisoners as part of their domestic law. Also of relevance is the Inter-American Convention to Prevent and Punish Torture 25 ILM 519.

[49] M Plachta *Transfer of Prisoners under International Instruments and Domestic Legislation* (Freiburg im Breisgau Max Planck Institut für ausländisches und internationales Strafrecht 1983).

[50] Kress and Sluiter above n 11 at 1766.

[51] This relates both to the term of imprisonment and to the conditions of imprisonment. In some countries it is still possible to sentence prisoners to a particular type of prison— a 'penitentiary' for example, which has a harsher regime than an 'ordinary' prison. Two solutions have presented themselves, that of 'conversion' of the sentence into a sentence of the State to which the prisoner is transferred and that of 'adoption' of the sentence by such a State: Plachta above n 49 at 411–18.

[52] Plachta above n 49 at 435–8.

[53] Strasbourg 21 Mar 1983 CETS 112. This is a European-based convention that is also open to non-European countries.

The essential point for present purposes is that, when debates about an appropriate penal framework for the international criminal justice system were re-ignited in the 1990s, they occurred against the background of a large and dynamic, if somewhat inchoate, body of international human rights law dealing with punishment. They also took place in a world with some practical experience of international cooperation in the implementation of sentences of imprisonment.

Initially, the primary locus of debate was the International Law Commission, which turned its attention to the penal provisions of the draft Code of Crimes against the Peace and Security of Mankind. That such a topic was on the agenda at all is already an indication that punishment raised fundamental issues, which an international penal code would have to address. The debates make fascinating reading. Not only were arguments about the death penalty rehearsed, but, for the first time in an international forum, the Commissioners also considered whether life imprisonment as an alternative ultimate penalty would satisfy human rights norms. Of particular concern was the notion that no system of punishment that recognised the human dignity of offenders could impose a penalty that excluded them permanently from society. Not only was the death penalty fundamentally unacceptable from this perspective but life sentence prisoners would also have to have a prospect of release.[54] Implicit in this debate also was the notion that prisons that in the future might house the detainees of an international tribunal and enforce its sentences of imprisonment would have to meet the standards of international human rights law as well.

IV. THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

In the 1990s events in Yugoslavia and Rwanda overtook this somewhat leisurely process of developing a new system of international criminal justice. When the Security Council decided to establish international tribunals to try individual offenders for crimes against international law committed in those countries, it was immediately confronted in a most direct way by the lack of a mature penal framework at the international level as well as with the absence of any clear direction on how prisoners who might be tried by an international tribunal should be detained while awaiting trial.

[54] See 'Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind' 2(1) *Yearbook of the International Law Commission* (1990) 27–39, para 101 (UN Doc A/CN.4/430) and Add 1. 'Ninth Report on the Draft Code of Crimes Against the Peace and Security of Mankind' 2(1) *Yearbook of the International Law Commission* (1991) 37–44 (UN Doc A/CN 4/435 and Add 1) Detailed descriptions of the debates are to be found in Schabas above n 22 at 743-756 and D van Zyl Smit 'Life Imprisonment as the Ultimate Penalty in International Law. A Human Rights Perspective' 10 Criminal Law Forum (1999) 5 at 19–25.

As with the Nuremberg Charter, the penal provisions of the Statutes that the Security Council adopted for the two Tribunals are very brief. Article 24 (1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (the Yugoslavia Tribunal or ICTY) provides:

> The penalty imposed by the Trial Chamber *shall be limited to imprisonment*. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.[55]

Two further key articles deal with the enforcement of sentences[56] and with pardon and commutation[57] respectively. The three brief provisions, which are repeated substantially in identical terms in the Statute of the Rwanda Tribunal,[58] reveal some important developments in penal policy since Nuremberg. One is that the death penalty should not be imposed. The second is that imprisonment had been recognised as the primary sentence and that the determination of its term should be linked to an existing penal system in order to create legal certainty and to avoid the charge of retrospective legislation in the sphere of punishment.[59] The third is that the Tribunal itself should supervise the manner in which sentences are implemented. And the fourth is that it should play a key role in the release of sentenced prisoners.

The determination of the abolitionist members of the Security Council to exclude the death penalty was clear.[60] This was an important indication that capital punishment was totally unacceptable to such a powerful grouping that it could not be used any more as a penalty in international law. But it is also a significant indication that the acceptability of penalties in international law in general should now be tested against the standard of whether they are cruel, inhuman or degrading.

The attempt to create legal certainty by requiring the Tribunals to have recourse to the general practice regarding prison sentences in the former Yugoslavia and Rwanda was less successful. In brief,[61] neither Tribunal has

[55] Emphasis added. There is also a subsection 3 that deals with asset forfeiture, which is not relevant here.

[56] Art 27. [57] Art 28.

[58] Art 23 (penalties), Art 26 (enforcement of sentences), and Art 27 (commutation of sentences) of the ICTR Statute.

[59] H Corell 'Nuremberg and the Development of an International Criminal Law' (1995) 149 Military Law Review 87 at 93–5.

[60] The Security Council was prepared to alienate the government of Rwanda, which had initially called for the establishment of an international tribunal, but in the end formally opposed it and refused to co-operate with it, on the grounds that offenders convicted by the national courts of Rwanda would face the death penalty while those convicted by the Tribunal of arguably more serious crimes would not. See P Akvahan 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 American Journal of International Law 501.

[61] More fully, see D van Zyl Smit 'Punishment and Human Rights in International Criminal Justice' (2002) 2 Human Rights Law Review 1–17; S Beresford 'Unshackling the Paper Tiger—The Sentencing Practices of the ad hoc International Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 International Criminal Law Review 33–90; J Meernik and K King 'The

found much of value on which to rely in the sentencing jurisprudence to which they were referred. In the case of the ICTY moreover, the Tribunal ignored an important limit and ruled that it could impose life sentences even though there was no provision for them in the Yugoslavian sentencing law. More generally, although superior to Nuremberg in respect of giving reasoned sentencing judgments, the Tribunals have not been very successful in developing coherent sentencing principles or guidelines for determining the length of prison sentences.

Where the Tribunals have gone much further than their post-World War II predecessors is in using the powers provided by these brief provisions to shape the implementation of imprisonment. The Tribunals have done so both through their judgments and by taking a wide view of their administrative functions. Among the latter must be included the setting up of detention units near the headquarters of the two Tribunals.

Although these units are designed primarily for the detention of prisoners awaiting trial, they also hold sentenced prisoners of three kinds. First, prisoners who are convicted of perjury or contempt are held there. Secondly, prisoners whose appeals are pending may be detained; and, thirdly, prisoners may be held pending their transfer to prisons in the countries where they are to serve their sentences. In practice, this may mean that prisoners who are serving short terms spend their entire sentences in these units. The reality is that these two detention units, which fall directly under the auspices of the United Nations,[62] are the first truly international penal institutions.

The prison regimes that were adopted for these United Nations penal institutions are of considerable interest. Their administration has not been left to the penal 'experts'. Instead the Tribunals themselves spelt out Rules of Detention. The Yugoslavia Tribunal, which drafted its Rules first, was conscious that it was creating history. The President of the Tribunal noted in his First Annual Report that:

> [f]or the first time in history, the accused will be held in a special detention unit governed not by national rules of detention, be they military or civilian, but under a unique system of international standards created specifically by the international body before which they will be tried.[63]

As the President explained:

> When drafting the rules of detention, the Tribunal took into account the existing body of international standards created by the United Nations as a set of basic

Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis' (2003) 16 Leiden Journal of International Law 717–50.

[62] Rule 1 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal It/32/rev 8 ('Rules of Detention').

[63] First Annual Report of the 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 29 Aug 1994 UN Doc A/49/342–S/1994/1007, para 98.

> guidelines for States. It thus drew upon the 1977 United Nations Standard Minimum Rules for the Treatment of Prisoners, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the 1990 Basic Principles for the Treatment of Prisoners. The Tribunal also took into account, wherever possible, the higher standards suggested by the European Prison Rules, issued by the Council of Europe in 1987 [and, as t]he Detention Unit is located in the Netherlands, . . . the Tribunal took care to ensure that the regime it prepared for the Detention Unit was consistent with the Dutch prison system in all relevant aspects.[64]

Close analysis of the Rules of Detention reveals that they do indeed display the pedigree that the President of the Tribunal claimed for them. Two international lawyers, Bassiouni and Manikas,[65] have undertaken the laborious task of comparing the individual Rules of Detention laid down by the Yugoslavia Tribunal to the four key international instruments explicitly referred to by the President of the Tribunal in his first Annual Report. The overall conclusion to be drawn from their work is that the Rules of Detention of the Yugoslavia Tribunal and also the Rules of Detention of the Rwanda Tribunal, which are substantially the same, form an operational prison code that reflects directly the more abstract standards set by the international instruments.

An important characteristic of this Code is the prominent role of officials of the Tribunal and its judges, in the functioning of its detention units.[66] The Registrar of the Tribunal, as its senior official, is called upon by the Rules of Detention to make some controversial determinations of penal policy.[67] Thus, for example, the Deputy Registrar has recently restricted the rights of two high-profile detainees to communicate with the outside world because their involvement in the politics of the Balkans while in detention undermined the Tribunal's mandate to assist in the restoration and maintenance of peace in the former Yugoslavia.[68] Such intervention,[69] in which an official is called upon to balance the right of the detainees to communication and visits against wider policy concerns, poses a potential risk to the rights of prisoners as the policy considerations might undermine the right entirely and lead to the long-term

[64] Ibid para 99.

[65] M Cherif Bassiouni and P Manikas *The Law of the International Tribunal for the Former Yugoslavia* (Transnational Publishers Irving-on-Hudson NY 1996) 705–74.

[66] It flows directly from Rule 24 of the Rules of Evidence and Procedure, which provides that 'the Judges shall meet in plenary to . . . (v) determine or supervise the conditions of detention'.

[67] See, eg, Rule 63B of the Rules of Detention, which provides that the '[t]he Registrar may refuse to allow a person to visit a detainee if there is reason to believe that the purpose of the visit is to obtain information which may be subsequently reported to the media.'

[68] See the Decision of the Deputy Registrar in the Case of *Prosecutor v Slobodan Milosević* IT-02-54 on 8 Jan 2004; and the Decision of the Deputy Registrar in the Case of *Prosecutor v Vojislav Seselj* IT-03-67-PT of 6 Feb 2004.

[69] Similar action was taken by the registrar of the Special Court for Sierra Leone to restrict contact with a high profile detainee, Hinga Norman, for a period of 14 days. Its validity was upheld by the Acting President of the Court: 'Decision on Motion to reverse the Order of the Registrar under Rule 48(C) of the Rules of Detention 18 May 2004 *Prosecutor v Hinga Norman* SCSL-04-14-PT.

isolation of the prisoners concerned. In practice, however, the limitation did not amount to a total ban on communication. It thus restricted rather than denied it completely. Nevertheless, further thought needs to be given to the relationship between prisoners' rights and restrictions based on policies that do not concern the management of the facility but rather the wider objectives of the detention.

Prisoners in the detention units can complain about decisions such as these, as they can about other aspects of their conditions of detention,[70] to the President of the Tribunal, who is also the final arbiter of appeals against disciplinary measures. Moreover, the judges collectively have the power to appoint inspectors who have to report to them on conditions generally and also make regular and unannounced inspections.[71] The judges must act on such reports, in consultation with the host State if necessary. The inspections of these two detention units are undertaken by the International Committee of the Red Cross (ICRC), which reports to the President of the Tribunals. In an instance where a prisoner committed suicide the President of the ICTY has appointed a judge from the Tribunal to investigate directly.[72]

The Tribunals may also have an impact through their judgments on the detention of prisoners who are held in other countries before being sent to the detention units. This impact is inevitably indirect, as it is mediated through the rules relating to the admissibility of evidence. An example is the case of Zdravko Mucić who was detained in Vienna in Austria prior to being transferred to The Hague. In Vienna he was refused access to counsel during the investigation. The Trial Chamber conceded that this restriction on access to legal counsel during a criminal investigation was acceptable in Austrian law and was not inconsistent with the current interpretation of Article 6(3) of the European Convention on Human Rights.[73] Nevertheless, it held that it was inconsistent with the unfettered right of access to counsel granted by the Statute[74] and Rules of Procedure and Evidence[75] of the Tribunal. Accordingly it found the statements made by Mucić to the Austrian police inadmissible. The wider implication is that Austrian rules governing this aspect of the rights

[70] See the 'Regulations for the Establishment of a Complaints Procedure for Detainees' issued by the Registrar of the ICTY pursuant to Rules 84–88 of the Rules of Detention.

[71] Rule 24(v) of the Rules of Procedure and Evidence IT/32/Rev 24 and Rule 6 of the Rules of Detention.

[72] See the Press Release of the ICTY: 'Completion of the Internal Inquiry into the Death of Slavko Dokmanović': CC/PIU/334-E, The Hague, 23 July 1998: Accessed on 9 June 2004 at <http://www.un.org/icty/latest/index.htm>. The inquiry has met with a critical reception from Aleksandar Fatić who claims that Judge Rodrigues, who conducted the inquiry, made a cynical report which failed to uncover the poor supervision of prisoners in the Tribunal's detention unit: A Fatić *Reconciliation via the War Crimes Tribunal?* (Ashgate Aldershot 2000). Fatić is, however, highly critical of all aspects of the Tribunal's work

[73] 'Decision on Zdravko Mucić's Motion for the Exclusion of Evidence' Case no IT-96-21-T, 21 April 1997.

[74] Art 18(3) of the Statute.

[75] Rule 42A of the Rules of Procedure and Evidence.

of detained suspects will have to be changed to meet the standard set by the Tribunal.

The judgments of the Tribunals may also have some impact on how sentenced prisoners held in national prisons are treated. Their statutes provide that imprisonment in States that volunteer to accept persons convicted by the Tribunals shall be subject to the supervision of the international Tribunals. This was underlined by the Yugoslavia Tribunal in its first sentencing judgment, *Prosecutor v Erdomović*[76] in which it dealt comprehensively with the treatment of prisoners and held that 'the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons'.[77] The Trial Chamber then went on to refer to a number of international instruments on human rights generally, and the rights of prisoners in particular, before concluding that

> [t]he significance of these principles resides in the fact that a person who has been convicted of a criminal act is not automatically stripped of all his rights. The Basic Principles for the Treatment of Prisoners state that 'except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights'. . . [T]he Trial Chamber considers that the penalty imposed on persons declared guilty of serious violations of humanitarian law must not be aggravated by the conditions of its enforcement.[78]

This passage is of considerable significance because it subjects the implementation of the prison sentences of prisoners who are held in national prisons to the same set of international instruments that were used to structure the regimes that are followed at the detention units at the headquarters of the Tribunals. Indeed, it also refers to the Tribunal's own Rules of Detention as authority on how prisoners should be treated by nation States. It assumes that there is a vertical hierarchy between the ICTY, which can lay down standards, and the States that will follow them. Moreover, the ICTY has insisted on a direct supervisory role over prisoners held in national prisons. What it has done in practice is to contract the CPT, the prison inspection authority of the Council of Europe to undertake such inspections on its behalf.[79]

The practical effect of all these steps is that international tribunal prisoners held in *national* systems now have to be treated in terms of *international* stan-

[76] IT-96-22-T Trial Chamber, 29 Nov 1996.

[77] Ibid at para 74, internal references omitted. The Trial Chamber based its right to supervise how persons it has convicted are treated on Art 27 of the Statute and Rule 104 of the Rules.

[78] Ibid.

[79] See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) *11th General Report on the CPT's Activities Covering the Period 1 January to 31 December 2000* Strasbourg, 3 Sept 2001, CPT/Inf (2001) 16 para 17 (and Appendix 5 which contains the agreement reached between CPT and the Tribunal).

dards and supervised by a *regional* body (the CPT), which normally may only make recommendations, but which now reports to an International Tribunal (the ICTY), which is responsible for supervising the treatment of prisoners held on its behalf in national prison systems. The implication of this is undoubtedly that the international prison has managed to spread its tentacles into national systems in a way that would be unthinkable, were it not for the recognition of a common set of values about how prison sentences should be enforced. This is an important preliminary conclusion that should not be lost in the qualifications that follow.

Even if there are these shared values, one may expect the relationship between the tribunal and the national States to be complicated. Article 28 of the ICTY Statute[80] stipulates that *if* in terms of the law of the State in which a convicted person is imprisoned, such person is eligible for 'commutation or pardon' the State must inform the Tribunal. Only then will the President of the Tribunal, in consultation with the judges, decide whether to release the person concerned 'on the basis of the interests of justice and the general principles of law'.[81] This is a vague standard that gives little guidance on the criteria to be applied in the decision on release.

It is clear that this provision is seriously flawed in other ways too. The major difficulty is that the trigger lies in the national laws of States. These laws may vary greatly and result in the same sentence being implemented for different periods depending on where it is served. The Yugoslavia Tribunal has tried to overcome this by a series of model agreements with the States that undertake to incarcerate sentenced prisoners.[82] However, the resultant 'system', in which European States are assumed to require two-thirds of a sentence to be served prior to the consideration of executive release, has the advantage neither of flexibility nor of legal certainty. This is particularly obvious in the case of life sentences. There could be major legal problems if, for example, someone were detained in terms of a life sentence in a country whose laws do not provide for such a sentence.[83]

The flaw is so blatant that one wonders why such a clumsy provision was introduced at all. One answer is much the same as the explanation for the reference in the sentencing provisions to having 'recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'. The Statute sought to incorporate existing law in order not to be accused of making retrospective law (equally now in respect of the enforcement of punishment as

[80] Cf also Art 27 of the ICTR Statute.

[81] Art 28 of the ICTY Statute.

[82] D Tolbert and A Rydberg 'Enforcement of Sentences' in R May et al (eds) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer The Hague 2001) 533–43.

[83] A pragmatic way of avoiding this difficulty has been found in the case of Spain, where the maximum sentence allowed by national law is 30 years. The agreement with Spain specifies that it will only accept prisoners who have been sentenced to fixed terms of less than 30 years: see ICTY Press Release, The Hague, 11 Dec 2001.

well in the definition of offences). Another reason may of course be that the question of pardon is a matter closely tied to national sovereignty. That is why, as we have seen, when prisoners are transferred 'horizontally', from one State to another, the receiving State retains the power to pardon or commute.

There are further problems created by the incomplete nature of the release provisions. They refer only to 'pardon and commutation of sentence,' while most ordinary prison systems envisage forms of conditional release. For example, most offenders convicted of murder, which is often an underlying offence in these cases, could be expected to be subjected to an extensive period of supervision in the community—in the UK, where life imprisonment is the mandatory sentence for all forms of murder, that period extends until their death. Conditional release, however, is not necessarily something that happens only at the end of a sentence. In Germany, for example, all prisoners, including those sentenced to life imprisonment, have a statutory right to be considered for a form of home furlough after they have served part of their sentences, and long before their permanent conditional release is contemplated.[84]

How this has been dealt with in practice is again by way of individual agreement. For example, a detailed study of the enforcement of the ICTY sentence by Germany in the *Tadić* case points out that the enabling legislation that the Germans passed to allow the implementation of sentences imposed by the Tribunal did not consider the supervisory role of the Tribunal outside its powers in respect of pardon.[85] In the ensuing exchange of diplomatic notes the German government recognised, however, that it was foreseeable that 'according to German provisions Tadić could be eligible for conditional release ('parole') or for a prison programme or any other measure according to German law which might encompass activities outside the penitentiary without custody of the German authorities of the prisoner'.[86] The German government therefore agreed that it would 'inform the Tribunal beforehand about the intended measures'.[87] It would then be 'up to the ICTY to decide whether it want[ed] to "take the risk" or ask for the immediate return of Tadić'.[88] In the latter instance Tadić would then presumably be transferred to another country whose prison system was more conservative.

A further difficult question is what criteria will be applied by the Tribunals in making their part of the assessment on whether offenders should be released, conditionally or otherwise, before the end of their sentence? The Rules of Procedure and Evidence, which the Tribunal has made for itself, provide that:

[84] D van Zyl Smit *Taking Life Imprisonment Seriously* (Kluwer The Hague 2002).

[85] J MacLean 'The Enforcement of Sentence in the Tadić Case' in H Fischer, C Kress and SR Lüder (eds) *International Prosecution of Crimes Under International Law: Recent Developments* (Berlin Verlag Berlin 2001) 728–50.

[86] Quoted by MacLean, op cit at 735.

[87] Ibid.

[88] Ibid.

> In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.[89]

Penal theorists will immediately recognise the problems that are inherent in this catalogue of diverse factors. One problem is that of double jeopardy. The gravity of the offence is presumably already the most powerful determinant of the sentence—an argument supported by the sentencing jurisprudence of the Tribunal itself. To consider it again at the release stage seems palpably unjust. These problems are compounded by the fact that the national systems, which must trigger the release procedure in the first place, may apply quite different criteria from those set down by the Tribunals.

Perhaps the biggest difficulty in making final decisions about release is that in making sentencing judgments the Tribunals have not clarified their penal objectives. On the one hand there is the need to impose sentences that demonstrate the determination of the international community to punish perpetrators of international crimes and show that offenders will not be allowed to get away with their crimes. On the other hand, there is the international obligation, set by the International Covenant on Civil and Political Rights for example, of implementing sentences humanely, and with an eye to the social rehabilitation of the prisoners. The tension between these objectives has proved difficult to resolve. In most cases the Tribunals, when sentencing, have downplayed or ignored the latter objective and avoided wider questions about the role of the sentence itself in achieving not only the rehabilitation of the offender but also peace in the strife-torn areas from where these cases originate.

There are some interesting exceptions to this rule. In an early sentencing judgment in the *Tadić* case the Tribunal indicated that Tadić should serve at least ten years before being considered for release.[90] There was no specific legal basis in the Statute for this ruling. Such rulings have generally not been made in other cases, but in the recent case of *Stakić,* where the ICTY imposed a life sentence for the first time, it added that the offender should be considered for release after 20 years.[91] This latter ruling is problematic in another respect too. Consideration of release after 20 years will mean that the prisoner serving a life sentence will have the prospect of release earlier than those sentenced to long determinate terms of 40 years and more, of which two-thirds must be served.

Most dramatic was the intervention of the President of the Tribunal in the case of *Kolundzija*.[92] Kolundzija was sentenced to three years' imprisonment

[89] Rule 125 General Standards for Granting Pardon or Commutation
[90] *Prosecutor v Tadić,* IT-94-1-S, 14 July 1997 para 76.
[91] *Prosecutor v Stakić* IT-97-24-T, 31 July 2003 section V 'Disposition'.
[92] Recorded as 'Order of the President on the Early Release of Dragan Kolundzija' Judicial Supplement 30 *The Prosecutor v Sikirica, Dosen and Kolundzija* IT-96-8-S.

and ordered, because of time spent on remand, to serve six months of his sentence. On the day after his sentence he applied for immediate release. He was not transferred to one of the States that had agreed to enforce the sentences of the Tribunal but, instead, 23 days into his sentence, the President of the Tribunal, ordered his release.

The procedurally interesting aspect of this decision is that the judge had no specific authority on which to base his ruling. He simply ruled that, as there were no provisions in the Statute forbidding such action, the Tribunal could exercise its 'inherent powers' and acted accordingly. Of wider interest are the reasons given by Judge Jorda for his actions. The factors which he took into account included the offender's 'resolve to be reintegrated into society', his 'irreproachable behaviour' while in detention, and confidential reports on the cooperation which he had offered the prosecution.

The importance of this unusual case has been reinforced by the consideration given to the post-offence conduct of the accused in the recent decision of the Yugoslavia Tribunal in the case of Biljana Plavšić,[93] the former co-president of the Republika Srpska. Ms Plavšić pleaded guilty and was duly convicted of a crime against humanity. However, there was testimony that, after she had committed her grievous offences, she had played a vital reconciliatory role in securing support for the Dayton Accord prior to being charged. After being charged she had continued her good work. Her plea showed remorse and, while at liberty in the community pending the completion of her trial, she had continued to support peace. On sentence both Elie Wiesel, the Nobel Peace Prize winner, and Alex Boraine, the Deputy Chair of the South African Truth and Reconciliation Commission, testified that both her confession and admission of guilt were very important, as they could be crucial for peace in the region, inter alia, because they could demonstrate to victims of the atrocities that their personal suffering was being acknowledged. This latter testimony forced the Tribunal to consider, at the sentencing stage, difficult questions about what the relationship of the ICTY itself was to the peace process in Bosnia and about what responsibilities it had to victims. In reality very little thought had been given to either question when the Tribunals had been established. It had simply been assumed that a fair penal process would lead automatically to reconciliation and that victims would largely be satisfied by a verdict and an appropriately severe sentence that would be duly enforced.

Finally, it is important to underline that the judgments of Tribunals as sentencing authorities cannot be separated from their decisions about when to release prisoners and from intervention, both directly by the Tribunals and through their administrative arms, in how prison sentences are served. In some national jurisdictions an analytical distinction is drawn between aspects of the sentence of imprisonment that relate to its enforcement, such as the length of

[93] *Prosecutor v Plavšić* IT-00-29&40/1-S, Trial Chamber, 27 Feb 2003.

term and the determination of the date of release, and those that deal with the modalities of enforcement that determine day-to-day life in prisons.[94] This thinking may have informed the idea that the Tribunals should impose the sentences and control the release procedure but leave the actual modalities of enforcement to national States that volunteer to do so. The overall practice of the ICTY in cases such as *Tadić* demonstrates that Constantijn Kelk, the leading Dutch scholar of prison law, is correct when he argues that what he calls the 'outside' and the 'inside' of the sanction are inevitably interrelated in the implementation of punishment.[95] The way in which release is approached, for example, impacts on the rules according to which the sentence is served. To understand the impact of international Tribunals on prison life all these factors therefore need to be considered together.

V. IMPRISONMENT AND THE INTERNATIONAL CRIMINAL COURT

The penal systems of the Tribunals are of course up and operating, but they are essentially temporary systems, in contrast to the new permanent International Criminal Court. Will the ICC operate in a similar way? The short answer is that it will, at least as far the place of imprisonment in the new structure is concerned. As in the case of the existing Tribunals, the ICC will have its own detention unit in The Hague, but sentenced prisoners will be housed by States that volunteer to do so.[96] However, there is specific provision for the eventuality that, where no State volunteers, prisoners may serve their sentences in a 'prison facility made available by the host State'.[97] The host State only provides the facility. It does not have responsibility for its administration. If this were to happen, the ICC would be directly responsible for managing a prison for sentenced prisoners.

A strength of the legal framework of the ICC is that its Statute and its Rules of Procedure and Evidence have been drafted by the States Parties and not by the judges and are, therefore, much harder to alter. This has resolved some of the problems relating to imprisonment by an international tribunal. Thus the question of life imprisonment is put beyond doubt by a provision that the ICC will be able to impose life imprisonment but only in circumstances of 'extreme gravity' of the offence.[98] The ordinary sentence of imprisonment will be limited to 30 years,[99] a shorter term than that currently imposed in a number of cases by the ICTY. There is cause for optimism that a more nuanced

[94] In German law, for example, this distinction between *Strafvollstreckung* and *Strafvollzug* is of considerable significance: for an analysis of its place in the law governing the enforcement of international sentences see Kress and Sluiter above n 11.

[95] C Kelk *Recht voor Gedetineerden* (Alphen aan de Rijn Samson 1978).

[96] Art 103.1 of the ICC Statute.

[97] Art 103.4 of the ICC Statute.

[98] Art 77.1(b). The individual circumstances of the offender must be considered as well.

[99] Art 77.1(a).

sentencing framework that is more parsimonious in its use of imprisonment may emerge from the ICC.[100]

The most important changes are at the level of enforcement of sentences of imprisonment. There are additional controls over the national prisons systems that may house offenders sentenced by the ICC. Article 106 of the Rome Statute provides directly:

> 1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
>
> 2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
>
> 3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Let me gloss this provision briefly. First, the reference to international treaty standards means that the existence of a body of international human rights law governing the treatment of prisoners is formally acknowledged. It is true that instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners are not international treaties, but one may be confident that they will consistently be called upon in the interpretation of these treaties.

Secondly, and perhaps most interestingly, paragraph 2 means that there will be enormous pressure on countries that take these prisoners to operate their prison systems entirely in terms of these international standards. They have to ensure that the treatment of the ICC prisoners, which has to conform to international standards, is not more (or less) favourable than that offered to their own prisoners convicted of similar offences. This parity can only be achieved if prison conditions in national systems meet international standards in all respects. The unintended consequence may well be that prisoners in national systems look closely at how prisoners detained on behalf of the ICC are treated to ensure that international standards that are applied to international prisoners are applied to them too.

Thirdly, the supervisory function of the Court, combined with the unimpeded, confidential access of prisoners to it, should ensure that the Court will both intervene actively on its own initiative and respond to prisoner pressure to develop further modes of implementation that set and meet international standards.

Other provisions of the ICC statute are significant also for the legal certainty that they should bring to the procedures for the discretionary release

[100] For a more critical view, see R Henham 'Some Issues for Sentencing in the International Criminal Court' (2003) 53 ICLQ 81–114.

of prisoners. Instead of leaving the initiation of the process to the vagaries of the individual States where prisoners may serve their sentences, the Rome Statute provides that the Court itself shall review sentences after offenders have served two thirds of their terms, or 25 years in the case of life sentences.[101]

Rule 223, which supplements the grounds for reduction of sentence, is equally promising. It explicitly provides for the prospect of the resocialization and successful reintegration of the sentenced person to be considered when making this decision,[102] echoing the allegiance of the International Covenant on Civil and Political Rights to the reformative aim of imprisonment. The Rule also reveals a concern with the position of victims by including within the criteria for early release 'any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of their early release'.[103] It is still very unclear what the impact on victims will be. However, there is certainly scope for developing their role in the imposition and implementation of prison sentences. From a civil libertarian point of view there are obvious dangers here. Certainly, the spectre of an active, politically driven, victims' movement pressing the ICC to continue to detain sentenced persons for longer periods is real. On the other hand, the engagement of victims at least allows for the introduction of more imaginative restorative processes than have hitherto ever been contemplated in the international prison context.

VI. THE SIGNIFICANCE OF THE INTERNATIONAL PRISON

So much for the legal framework of international imprisonment. What is the significance of the new international prison and of the form in which it has been constituted?

[101] Art 110.3. Only in instances where the State designated to carry out the sentence insists on retaining its own powers of pardon may the case be referred back to the court at an earlier stage. Kress and Sluiter describe these two forms that release process could possibly take as the 'model case scenario' and the 'exceptional case scenario' respectively: Kress and Sluiter (n 8 above) at 1791–1794. If in these instances the Court were to order release before the otherwise mandatory minimum terms had been served, it would reintroduce discrimination by the back door, as prisoners held in some States but not in others could benefit. However, in my view, States are unlikely to adopt this course of action and the Court could systematically nullify it by transferring prisoners if its use were threatened.

[102] Rule 223 (b) of the draft Rules of Evidence and Procedure.

[103] Rule 223 (d). This rule fits the increased emphasis that the Rome Statute, in contrast with the statutes of the ICTY and the ICTR, places on the importance of victims: W Schabas *An Introduction to the International Criminal Court* (CUP Cambridge 2001) at 147–50. This is in line with the increased recognition given to victims in international human rights law, but it does raise questions about the position of offenders whose interests might be in tension with those of victims.

A. International Prison Law

Most significant is the recognition that has been given to legal standards in the international prison regime, both in the sense of a prison regime that is formally subject to the rule of law, and of one that follows the substantive requirements of international human rights law in its regimes and objectives. This recognition applies both to the international prisons and to prisoners of the international Tribunals who are held in other countries. It is also a feature of prisoner transfer between nation States. Within international law these are important developments in their own right, as they widen the scope of the international legal order and declare that the recognition of human rights in the prison context is an inherent part of it.

In many ways the international legal order is only partially developed. The recognition and enforcement of international human rights guarantees for prisoners generally are still patchy. Moreover, what has been achieved is under threat and this threat applies to the treatment of prisoners as well. The comparison, which one cannot avoid here, is between the treatment of prisoners by the international criminal Tribunals and the treatment of detainees being held by the United States of America at Guantánamo Bay in Cuba.[104] Most of these detainees were captured by the United States of America during the war in Afghanistan. Most, if not all, international lawyers regard them as prisoners of war who should be subject to the humanitarian laws of war contained in the various Geneva Conventions.[105] These Conventions set requirements for conditions of detention[106] similar to those of international human rights law. Even more international lawyers believe that at very least the individual prisoners at Guantánamo Bay are entitled under Article 5 of Geneva Convention III[107] to hearings to determine whether or not they qualify to be recognized as prisoners of war.[108]

The United States government denies flatly that any of the detainees held at Guantánamo Bay are prisoners of war, but at the same time has argued

[104] For a journalistic but comprehensive published account, see *The Independent* 'Guantanamo Bay' 18 Jan 2002 at 4. For a critical view of the conditions of detention see J Steyn 'Guantánamo Bay: The Legal Black Hole' (2004) 53 ICLQ 1 at 7–8.

[105] For an example of scepticism about the prisoner of war status of the detainees but support for it in individual cases, see K Anderson 'What to do with Bin Laden and Al Qaeda terrorists? A qualified defense of military commissions and United States policy on detainees at Guantánamo Bay naval base' (2002) 25 Harvard Journal of Law and Public Policy 591.

[106] For a summary of these conditions, see H McCoubry *International Humanitarian Law (*2nd ed Ashgate/Dartmouth Aldershot 1998) 155–9; D Fleck (ed) *The Handbook of International Humanitarian Law in Armed Conflict* (OUP Oxford 1995) 347–61.

[107] Art 5 of Geneva Convention III (Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949, 75 UNTS 135).

[108] GH Aldrich 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' (2002) 96 AJIL 891. See also N McDonald and S Sullivan 'Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror" ' (2003) 44 Harvard International Law Journal 301.

strenuously that they are not subject to the jurisdiction of US courts.[109] Ultimately, albeit on grounds that many find legally unpersuasive, the US government succeeded until very recently in convincing US courts that they have no jurisdiction in this matter.[110] The US Supreme Court has now reversed this ruling[111] and habeas corpus actions are likely to be brought to challenge the legality of the detention of several of the detainees. However, it remains possible that some detainees who may be found not to be prisoners of war will continue to be held at Guantánamo Bay or elsewhere in places where the US authorities will deny that they have the all the rights of domestic prisoners.

To what regime will such detainees then legally be subject? The US response up to now seems to be that they are subject to whatever standards the US military chooses to set, and to no independent review. Admittedly, the US government claims that it treats all detainees like prisoners of war, even while denying them that status,[112] and has allowed inspections by the ICRC, but its confidential reports made to the US government itself are not justiciable. This is not only because no court has exercised jurisdiction over them but also because the rules and standards against which the treatment of such detainees can be evaluated are highly elastic, as in the view of the US government that there are no specific rules that *have* to be applied to such 'illegal combatants'.

If some prisoners at Guantánamo Bay are found not to be prisoners of war, an alternative approach would be to treat them in the same way as prisoners of the International Criminal Tribunals. That would entail a regime that reflects international human rights law, as it has developed in the area of imprisonment. That in turn would imply a substantive regime, much like that applied by the Tribunals' detention facilities in The Hague and Arusha.

It would also require independent supervision by a judicial body assisted by an international inspection agency. Such an agency may be an arm of the judicial body or it may be an independent international agency. What is important is that, since rule of law standards require ultimate judicial supervision of prisoners' rights, and since these standards are an inherent part of international human rights law, such investigating agencies should report to an independent body and not to the executive directly responsible for the prisons. At very least, their reports must be available to such a judicial body, which, when

[109] For an outline of the approach adopted by the US government, see DM Amann 'Guantánamo' (2004) 42 Columbia Journal of Transnational Law 263 at 269–70.

[110] *Odah v United States* 321 F. 3d 1134 (DC); *Coalition of Clergy, Lawyers and Professors v Bush* 310 F. 3d 1153 (9th Cir 2002). A subtle but telling critique of the attitude of the US and its courts may be found in the judgment of the Court of Appeal for England and Wales in *Abbasi and Another v Secretary of State of Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598 at paras 58–67.

[111] *Rasul v Bush* 124 S Ct 2686 (2004), 2004 WL 1432134 (US)

[112] The fact that the US eventually undertook to treat them more or less like prisoners of war without recognising their status was a diplomatic concession rather than an acceptance of a body of humanitarian or human rights-based prison law.

requested by a prisoner or otherwise, can effectively order whoever is responsible for prisons to act. In the absence of any ultimate judicial supervision the confidential reports are of little value as a safeguard.

The US detention facility in Guantánamo Bay is only one example of a deliberate attempt to detain people outside the framework of law that might otherwise be too restrictive. One may also think of the attempts to hold potential refugees and asylum seekers in 'secure facilities' outside Europe as a conscious strategy for detaining such persons more cheaply and under conditions that are probably subject to less rigorous human rights standards and less scrutiny by independent bodies than what might be provided in Europe.[113]

These strategies of exclusion are, however, less likely to succeed in the face of the impetus given to recognition of human rights norms relating to imprisonment by their application in the international prisons. Moreover, there is increasing recognition that countries are responsible for their actions that may lead to persons being detained outside their jurisdiction in conditions that do not meet the standards of fundamental human rights.[114]

B. National Prisons

Secondly, one may consider the influence of the emerging international prison system on national penal systems. For the moment the consideration will have to proceed mostly on the basis that it is possible to argue in national situations that international practice sets an example which nation States, as upholders of international standards, should be prepared to follow at home as well. If heinous crimes against humanity cannot be punished by death in the International Criminal Court, this must make the argument for domestic capital punishment harder to sustain, even although the ICC Statute makes it clear that its penalty provisions do not apply to penalties prescribed by national law.[115]

Analogies may affect aspects of the imposition of imprisonment too. Even for genocide, which typically involves multiple homicides, life imprisonment is discretionary: the International Criminal Court may only impose it if the

[113] See, in general, J Hughes and F Liebaut (eds) *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (Martinus Nijhof The Hague 1998).

[114] *Soering v United Kingdom* (1989) 11 EHRR 439. Cf. also *D v United Kingdom* (1997) 24 EHRR 423 where an analogous question arose. In this instance the European Court ruled that if D, who was suffering from AIDS, was released from prison and deported to the Caribbean, that would be a form of inhuman treatment in contravention of art 3 of the ECHR as he could not obtain adequate medical treatment there.

[115] Art 80 ICC Statute. At the end of the meeting in Rome that adopted the ICC's Statute the chair also read out a statement that declared that there was no international consensus on the death penalty and that the exclusion of the death penalty in the ICC Statute should have no impact on the development of customary international law. Schabas, who quotes the statement in full, argues that its effect may be the opposite of what its supporters intended. By stating that the ICC Statute does not impact on customary international law about the death penalty, the statement may be conceding that in other circumstances the abolition of the death penalty is a concern of customary international law: W Schabas 'Life, death and the crime of crimes' (2000) 2 Punishment and Society 263–85.

crime is extremely grave and aggravated. This will serve to make the mandatory sentences of life imprisonment for murder in countries that strongly support the ICC, such as the United Kingdom and Germany, even more inappropriate than they already are,[116] for in many cases the mandatory sentence is grossly disproportionate to the culpability of the offender.

The most important impact is likely to be found in the role of the law in determining how imprisonment both for unconvicted persons and those serving terms of imprisonment should be implemented. In this regard the example set by the law governing international prisons is complemented by the jurisprudence of both the Human Rights Committee and the European Court of Human Rights. The latter in particular has increasingly been prepared to declare that specific national practices, such as the number of prisoners held in a cell,[117] provision for prisoners to have visits,[118] or the manner in which disciplinary proceedings are conducted,[119] infringe universally recognised rights: in these instances, the prohibition of degrading treatment, and the right to family life and to due process in the trial of criminal offences. The direct result has been that national prison practices in these areas have had to be modified.

The emerging practices of the current international Tribunals for the enforcement of their rules on conditions of detention, and the steps that may be taken by the ICC, are moves toward creating a clear, justiciable set of prison standards, which are enforced by a judicial body either by its own proactive actions or by prisoners who complain to it. Even a simple analogy with these practices would take English prison law beyond its current state of development, for in matters relating to substantive prison conditions the English courts still defer to a large extent to the expertise of the prison authorities.[120] The same applies to many other countries in the world where access to the courts in prisoners' rights matters is limited.

[116] The mandatory life sentence for murder in the United Kingdom has been subject to devastating criticism, which has simply been ignored by politicians and the courts over many years. For a summary of the political debates, see Windlesham *Responses to Crime* vol 2 (Clarendon Press Oxford 1993) at 308–46; Windlesham *Responses to Crime* vol 3 (Clarendon Press Oxford 1996) at 331–84. For a recent example of the UK courts still failing to recognize the objections, see *R v Lichniak; R v Pyrrah* [2002] UKHL 47, [2003] 1 AC 903 (HL(E)).

Similarly powerful critiques of mandatory life imprisonment, indeed of life imprisonment generally, have been made in Germany: See HM Weber *Die Abschaffung der lebenslangen Freiheitsstrafe: für die Durchsetzung des Verfassungansprüchs* (Nomos Baden-Baden 1999).

[117] *Kalashnikov v Russia* (2003) 36 EHRR 587 and cf also *Iorgov v Bulgaria* and *GB v Bulgaria*, both decided on 11 Mar 2004 (contravention of Art 3 ECHR).

[118] *Messina v Italy* 25498/94 28 Sept 2000 (contravention of Art 8 ECHR). See also *Öcalan v Turkey* (2003) 37 EHRR 238.

[119] *Ezah and Connors v United Kingdom* 39665 and 40086/98 (Grand Chamber)—9 Oct 2003 (Contravention Art 6 ECHR).

[120] See, eg, *Regina v Secretary of State for the Home Department and another, Ex Parte Hargreaves and others* [1997] 1 WLR 906. On the deference still displayed by English courts in this area of prison law generally, see L Lazarus *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany* (OUP Oxford 2004); S Livingstone, T Owen, and A MacDonald A *Prison Law* (OUP Oxford 2003).

The active system of reporting by outside bodies such as the ICRC and the CPT also raises the possibility of standards at the international level evolving even further, as proactive attempts are made to improve prison conditions. This last point is important because of the danger that standard setting for prisons may be a double-edged sword. Rod Morgan has drawn attention to the different roles played by the standards set by the American Correctional Association and those being developed by the CPT.[121] The former are designed primarily by professional prison practitioners to allow prisons to be accredited as meeting easily measurable norms. Prisons, which are so accredited by a professional body, are able to use this to defend themselves against court actions. In contrast, the standards of the CPT evolve constantly and are driven by a broader human rights agenda, which allows the CPT to ask wider questions about the desirability and necessity of using detention or continuing the imprisonment of a sentenced prisoner. While the findings of the CPT may also be of relevance in litigation, most prominently in the judgments of the European Court of Human Rights, it has developed concepts such as 'inhuman or degrading' when applied to treatment or punishment in prison beyond the strict confines of legal definitions. Thus the CPT has asked questions, for example, about the necessity for using maximum-security prisons, which might not immediately be inhuman or degrading but have that effect in their long-term impact on prisoners. It is hoped that if the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[122] is adopted it will provide for similar proactive inspections of all forms of detention in the countries that accede to it worldwide.

It is still unclear how international imprisonment will evolve. What we have seen is that the existing Tribunals have used the gaps in their legal frameworks to intervene in shaping the regimes of the prisons they control directly and in determining not only who is detained there on remand but even in some instances what part of their sentences convicted offenders will serve. At the same time the Tribunals have sought to influence the enforcement of the prison terms of those prisoners whose sentences are imposed by the Tribunals but served in national prisons. What we do not yet know is whether they will see their function as narrowly one of ensuring only that prisoners' rights are protected when measured against a static standard. Or will they use their powers of inspection and control to expand the use of the human rights standards in a way that will not only improve prison conditions but will also recognize the dangers of unrestricted use of imprisonment itself? Which route they adopt will determine largely their impact on national prison systems too.

[121] R Morgan 'Developing Prison Standards Compared' (2000) 2 Punishment and Society 325–42; R Morgan 'International Controls on Sentencing and Punishment' in M Tonry and R Frase (eds) *Sentencing and Sanctioning in Western Countries* (OUP Oxford 2001) 379–403

[122] Adopted on 18 Dec 2002 at the fifty-seventh session of the General Assembly of the United Nations by Resolution A/RES/57/199. Protocol available for signature, ratification and accession as from 4 Feb 2003.

Even a narrowly rights-based approach will be important for those countries that are prepared in principle to adopt the example of what is being done at the international level. However, the exemplary function will clearly be reduced in those countries that are opposed to the International Criminal Court in principle and who historically have not allowed international norms to influence the development of their nation's jurisprudence. It is probably too much to expect US courts, which have been moving away from the prisoners' rights that they initially pioneered, to be influenced directly by what the ICC may do with the prisoners under its control. Nevertheless, a wider approach by international tribunals present and future may just have a more general influence at the national level in inspiring more fundamental questions about how prison sentences are imposed and implemented.

C. Penology and the International Prison

Thirdly, one may ask what role penology as an empirical discipline can play in describing and understanding the role of international imprisonment. Clearly, there are questions to be answered about the operation of the international prison itself. What are the micro-sociological dynamics of an international prison that is staffed by officers of the host country with a sprinkling of 'internationals' and that detains prisoners who are by definition all foreigners? Similarly, how do prisoners, sent by an international tribunal or court to a country that is prepared to accept them, experience their sentences? Are these experiences similar to the assumptions that sentencing courts make about what their experiences there will be?

Empirical studies designed to answer these questions need to be combined with studies of the impact of law on the lives of prisoners in the international prisons. In this regard, scholars, such as Sparks, Bottoms and Hay[123] in the United Kingdom, and Jacobs[124] and Feeley and Rubin[125] in the United States, have done important pioneering work at a national level. Kieran McEvoy[126] has taken this further and considered the use made by political prisoners in Northern Ireland not only of national law but also of the European Convention on Human Rights in their struggle for improved conditions of imprisonment (and also as a form of political resistance generally). What needs to be studied in the international context is how prisoners (who may also regard themselves as political prisoners) held in the international and national prisons to which

[123] R Sparks, A Bottoms, and W Hay *Prisons and the Problem of Order* (Clarendon Press Oxford 1994).

[124] JB Jacobs *Stateville: The Penitentiary in Mass Society* (University of Chicago Press Chicago 1997).

[125] M Feeley and E Rubin *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (CUP Cambridge 1998).

[126] K McEvoy *Paramilitary Imprisonment in Northern Ireland: Resistance Management and Release* (OUP Oxford 2001) at 137–77.

they are sent by international Tribunals use international law and, more specifically, the law governing the Tribunals that I have described in this article. This sociological inquiry also needs to be taken further to study the wider impact of international prison law on national prison systems, about which I have speculated.

A study of the international prisons should lead to a wider analysis of the impact of international human rights on domestic institutions. The international criminal justice apparatus that is currently being created is the product of the international human rights movement that has favoured the due process of the criminal trial above the brutality of summary executions. It has brought with it ideas about enforcement of punishment, which have been concretized in the international prisons in a very specific way. What is required is a study of how acceptance of human rights doctrine, both generally and in the form that it is reflected in international imprisonment, is socially and politically mediated. Perhaps this will help us understand the limits of human rights as organising principles, even where efforts are made to uphold them. It should also assist in explaining why States that pay lip service to human rights in some instances hold prisoners with disregard for such rights.

VII. CONCLUSION

This article has described the emergence of international imprisonment, and of its legal framework and its relationship to international human rights law. It has argued that the emergence at the international level of specific rules, governing not only the imposition of prison sentences and the release of prisoners but also the regimes to be followed, is of particular significance in the evolution of prison law and practice. It is important because it means that international human rights law has been compelled to adopt positions on a range of specific prison-related issues that go beyond the abstract recognition of prisoners' rights. These positions may have a significant impact on how incarceration is handled at the national level. When one examines the details of these developments it appears that most, but not all, of them are positive, in the sense of leading the way towards the more humane implementation of imprisonment.

At the same time, the foundations of international imprisonment and the values that underpin it are still shaky. There is a powerful counter-tendency that is opposed to these values and that may well undermine the qualified advances that are symbolized by international penal institutions that seek to uphold international human rights norms. Incarceration outside national boundaries may be used as a deliberate strategy to avoid the constraints of national law without recognising the alternative constraints of international human rights law.

There are positive indications of national prison practices changing as a

result of the decisions of international human rights tribunals and inspection systems. These changes may be reinforced by the example of human rights-based international imprisonment. The extent of the impact of the rise of international imprisonment on national practice is, however, not yet clear. Empirical penological studies have a role to play, not only to enable us to learn more about the practice of international imprisonment but also to shed light on how human rights norms, especially those related to imprisonment, are spread internationally. The study of international imprisonment in all its facets has just begun.