

Enforcement and Monitoring of Sentences in the Modern War Crimes Process:
Equal Treatment before the Law?

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The Yugoslavia, Rwanda, and Sierra Leone war crimes tribunals have convicted and sentenced nearly 100 persons to terms of imprisonment. The tribunals have rejected the death penalty sanction and rely on the custodial sentence as the principal mode of punishment. Lacking an international prison system, these courts must negotiate sentence enforcement agreements with individual countries in order to incarcerate the persons they have convicted. The International Criminal Court is following the same approach as the ad hoc tribunals in developing its own network of sentencing enforcement agreements. As of February 2011, some 54 prisoners were spread among the national prison systems of eleven European and three African countries. An additional 70 indictees were detained in United Nations-operated detention centers in The Hague and Arusha while awaiting the outcome of their trials or appeals. Another 38 tribunal offenders have been released from prison after completing their sentences or otherwise qualifying for early release.

This emerging, international punishment system has evolved in an unplanned and sometimes chaotic fashion, with prisoners spread among different national prison systems on two continents. Although ostensibly guided by the same UN-based standards for prison conditions and practices, modern prison systems display considerable variation. Most national prison systems have adopted progressive goals of rehabilitation and reintegration while the tribunals remain focused on the backward-looking goal of retribution, leading to goal conflicts between these component court and correctional systems. Mechanisms of prison inspection and oversight also vary from country to country, and from tribunal to tribunal, leading to potential inconsistencies in quality control. Although the international tribunals have asserted that equal treatment before the law requires there be no significant disparity in punishment regime from one country to another,¹ we know from comparative penology that there are major differences in the conditions of confinement and the nature of correctional services in the prison systems of sentence enforcement countries. There are also distinct and sometimes overlapping oversight regimes set up to monitor prison conditions in the various countries enforcing tribunal sentences. These include the European Committee for the Prevention of Torture (CPT)² and the International Committee of the Red Cross (ICRC).³ Additionally, there are national prison service inspection regimes, a few hybrid oversight mechanisms set up by the courts, other regional human rights bodies, such as the African Commission on Human and

¹ Erdemovic (IT-96-22-T), Sentencing Judgment, 29 November 1996, para. 72.

² The "European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment," or CPT, was created as the monitoring mechanism for the 1989 "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment" within the 47 member states of the Council of Europe that have ratified the convention.

³ The prison and detention inspection regimes of the International Conferences of the Red Cross and Red Crescent (ICRC) are based on the Geneva Conventions of 1949 and their Additional Protocols. ICRC is an independent, neutral organization whose purpose is to help ensure humanitarian protection and assistance for victims of war and armed violence.

Peoples' Rights, and a handful of NGO's that are involved to a greater or lesser extent in prison inspection and oversight in sentence enforcement countries.⁴ Lastly, there is the emerging inspection and monitoring regime of the Optional Protocol for the Convention on Torture (OPCAT) that is to become a factor in prison standards oversight in the future.⁵ This discussion paper endeavors to explain the more substantial differences in prison regimes and monitoring mechanisms within the international tribunal process and present a case for greater standardization of penal practices and monitoring within the international justice system. We'll consider, in turn, the standards that underpin prison conditions in the world, the organizations and mechanisms that monitor them, and key differences between the prisons of different countries in the sentence enforcement network. This includes a fundamental difference in how incarceration of tribunal prisoners is organized in the prison systems of Europe and Africa. The paper concludes by asking the reader to consider whether the interests of international justice in general and equal treatment before the law in particular might be better advanced through the development of a network of genuinely international prisons.

International Prison Standards

International standards for the operation of prisons emerged in the post-World War II era as a convergence of the international humanitarian law and international human rights movements.⁶ International humanitarian law focused on the treatment of prisoners of war and civilian detainees during times of armed conflict while international human rights law was more generally focused on recognizing and preserving the human dignity of all persons, including prisoners. Article 5 of the Universal Declaration of Human Rights of 1948 affirmed that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁷ This principle became the crux of all subsequent standards as terms such as "cruel," "inhuman," and "degrading" have become more strictly defined by evolving standards. Meanwhile, the Geneva Conventions of 1949 created standards for the human treatment of prisoners of war and for the protection of civilians during time of war.⁸ The ICRC assumed the primary role in monitoring compliance with Geneva Conventions regarding imprisonment and detention, and performs its work on a voluntary basis as an independent organization. No formal mechanism of prison inspection was created to enforce these international standards. But these seminal expressions of humanitarian responsibility and human rights are echoed in more detailed and region-specific standards that have followed.

In 1955, the UN adopted the Standard Minimum Rules for the Treatment of Prisoners (UNSMR). The rules remain fairly comprehensive, including general provisions regarding separation of categories of prisoners, accommodations, clothing, food, exercise, medical service,

⁴ Van Zyl Smit, D. (2010). Regulation of prison conditions, in Michael Tonry ed. (2010). *Crime and Justice: A Review of Research, Volume 39*. Chicago: University of Chicago Press.

⁵ The "Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" was adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations (resolution A/RES/57/199).

⁶ Delaplace, E. & Pollard, M. (2005). Visits by human rights mechanisms as a means of greater protection for persons deprived of their liberty. *International Review of the Red Cross*, 87(857), 69-82.

⁷ United Nations, Universal Declaration of Human Rights, 1948. Available at: <http://www.un.org/en/documents/udhr/index.shtml>

⁸ The Third Convention relates to prisoners of the war; The Fourth Convention to civilians in times of war. Available at: <http://www.redcross.lv/en/conventions.htm#geneva>

discipline and punishment, contact with the outside world, and access to books and religion.⁹ For example, the separation requirements under UNSMR require that men be separated from women, juveniles from adults, and persons who have yet to be tried from those that have been convicted. Accommodation provisions require that cells or dormitories provide adequate “cubic content of air, minimum floor space, lighting, heating and ventilation.”¹⁰ These standards were further defined in the UN’s Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (1988), and the Basic Principles for the Treatment of Prisoners (1990).¹¹ The 1990 principles effectively reinforced the UNSMR while urging the elimination of solitary confinement, underscoring the reintegration goal of imprisonment, and encouraging the building of partnerships between the prison and social institutions in the local community. Notable for our purposes is that the individual sentence enforcement agreements between the tribunals and participating nations typically establish these UN standards as the criteria for correctional practice in all of the sentence enforcement states that house tribunal prisoners.

In addition to the UN prison standards, regionally-based standards have been developed in the US by the American Correctional Association (ACA), in Europe by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT), and in Africa by the African Commission on Human and Peoples’ Rights. In the US and Europe, standards emerged in response to a need for more specific, practitioner-oriented guidance than that provided by the UN standards and were prompted, in part, by prisoners’ rights litigation in both the US federal courts and the European Court of Human Rights.¹² The Inter-American Commission on Human Rights, an autonomous organ of the Organization of American States (OAS), is also actively involved in prison standards and prison oversight in countries in the Americas.¹³

Although the United States has not entered into sentence enforcement agreements with any of the tribunals, it played an important role in influencing the development of practitioner-oriented prison standards worldwide. The American Correctional Association (ACA) was founded in 1870 at a time when the US was in the vanguard of modern correctional practice. The non-profit ACA and its affiliated Commission on Accreditation for Corrections began promulgating standards in the 1960s as a way of correcting deficiencies in prison conditions identified in prisoners’ rights litigation and actually promoted its accreditation services as a way of helping correctional facilities avoid court judgments based on unconstitutional conditions of confinement. According to recent data, about 80 percent of all US departments of correction actively seek ACA accreditation.¹⁴ The ACA standards are expressive of principles similar to those issued under UN auspices and have much greater influence in the

⁹ 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 Available on the website of the Office of the United Nations High Commissioner for Human Rights (<http://www2.ohchr.org/english/law/treatmentprisoners.htm>)

¹⁰ *Ibid*, para. 10.

¹¹ Standard Minimum Rules for the Treatment of Prisoners, approved by UN Economic and Social Council (ECOSOC) resolutions 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977; the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988; and the Basic Principles for the Treatment of Prisoners as adopted by General Assembly resolution 45/111 of 14 December 1990.

¹² Morgan, R. (2000). Developing prison standards compared. *Punishment & Society*, 2(3), 325-343

¹³ The IACHR released a report in March 2011 condemning the US for unjust treatment of immigration detainees, citing inadequate access to lawyers, insufficient medical care, and excessive use of prison-style detention, see Semple, K. (2011, March 17). Immigrant Detentions Draw International Fire. *The New York Times*, online edition.

¹⁴ Morgan, *op. cit.*; Sechrest, D. (1978). The legal basis for commission standards. *American Journal of Corrections*, 40(6), 14-23.

US than do the UN standards. The ACA accreditation process is voluntary and based on pre-planned and announced inspections that occur only once every three years and at the request of the prison being visited.

A similar process of self-regulation by correctional authorities is being promoted in Africa through a newly constituted Africa Correctional Services Association (ACSA).¹⁵ Africa, of course, is home to two of the three ad hoc tribunals as well as home continent of all present ICC indictees. Three African countries – Mali, Benin, and Rwanda – currently house tribunal inmates. The Tanzania-based ICTR has sentence enforcement agreements with four African countries (Mali, Benin, Swaziland, and Rwanda) while the Special Court for Sierra Leone has an agreement with only one – Rwanda.

There are several foundational documents that endorse human rights-based prison standards for countries in Africa, all of which flow from the UN standards. These include the Kampala Declaration (1996), the Arusha Declaration on Good Prison Practice (1999), the Robben Island Guidelines (2000), and the Ouagadougou Declaration (2002). During the ACSA biennial conference in Accra in 2008, attended by correctional authorities from 14 African countries, the delegates acknowledged that these minimum prison standards are routinely violated throughout Africa. The delegates noted that the quality of prison conditions of confinement appears related to the level of economic development and to the disparity in resources allocated to prisons in developed countries (about 6% of national budgets) and the prison budgeting norm in Africa (about 1%). The ACSA expressed concern that little was being done to improve prison conditions on the ground and adopted a strategic plan with the goal of improving prison governance, research and data collection, technical assistance, human resource development, and staff training and education through the efforts of its own members.¹⁶

The European region began developing its own set of standards in the 1950s when the Council of Europe sought to adapt the UNSMR to European conditions.¹⁷ This process led to the creation of European Standard Minimum Rules for the Treatment of Prisoners in 1973. These, in turn, were codified by the Council of Europe as the European Prison Rules (EPR) in 1987. The EPRs have been revised a couple of times, most recently in 2006, in response to the “many developments in prison law and practice in Europe” and to “evolutionary changes in society, crime policy, sentencing practice and research, together with the accession of new member states to the Council of Europe, [that] have significantly altered the context for prison management and the treatment of prisoners.”¹⁸ Like the ACA standards, the EPRs are voluntary, but have no specific enforcement mechanism (like ACA accreditation) to monitor implementation at the national level. This function has been passed along to the CPT, a prison inspection mechanism established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The 47 member states in the Council of Europe are all accountable to standards developed by the CPT.

¹⁵ South African Government Information (2011). ACSA on course to harmonize corrections in Africa. Available: <http://www.info.gov.za/speeches/2010/10021509451001.htm>

¹⁶ United Nations, African Institute for the Prevention of Crime and the Treatment of Offenders (2008, 19 March). African prisons after 50 years, are they any better? Available: <http://www.unafri.or.ug/news/index.htm>

¹⁷ Council of Europe (2006). European Prison Rules. Strasbourg: Council of Europe Publishing.

¹⁸ *Ibid*, p. 39.

Monitoring Mechanisms

Monitoring prison conditions is a different matter, of course, than simply creating codes of minimum standards for prison operation. For the most part, monitoring of prison conditions is the responsibility of the national prison service within each country and any inspection and oversight mechanisms that may operate at the national level. At the supranational level, overseeing the prisons involved in tribunal sentence enforcement, are the two independent organizations actively involved in monitoring conditions in the prisons: the ICRC and the CPT. The inspection regime varies from country to country, depending on the stipulations of the sentence enforcement agreement. The ICRC has been designated as the primary organization responsible for inspection of facilities where tribunal detainees or sentenced prisoners are being held in both European and African countries. However, four of the ICTY's sentence enforcement agreements with European countries designate the CPT as the party responsible for inspections and two of the European agreements specify other alternatives.

Traditionally, the ICRC's involvement in prison oversight has been limited to inspecting detention facilities for prisoners of war and other detainees in countries engaged in armed conflict. In 1995, when the ICTY was still organizing its facilities and prior to issuing any indictments, the tribunal entered into a long term lease with the government of the Netherlands for detention space in the Dutch Prison Service's Penitentiary Complex Scheveningen. Around the same time, the President of the ICTY wrote to the President of the ICRC requesting that the ICRC, at its own expense, begin to conduct regular inspections of the tribunal's detention facility and interview any detainees held. The ICRC responded that

It is indeed within the mandate of the ICRC to visit persons detained in relation to armed conflicts and internal strife. Therefore, the ICRC is ready to carry out visits to detainees held under the authority of the Tribunal in its Detention Unit.¹⁹

As all prisoners convicted by the tribunals are also "persons detained in relation to armed conflicts and internal strife," the idea that the ICRC would conduct prison inspections was carried over into ten of the sixteen sentencing agreements the ICTY has signed with individual countries.²⁰ ICRC is also the designated oversight body in the sentence enforcement agreements signed by the ICTR and the SCSL.

The unique situation in Rwanda in the aftermath of the 1994 genocide, where the domestic prison population became dangerously overcrowded due to the number of persons facing genocide-related charges, prompted a more active role in prison operations on the part of the ICRC. The organization began its traditional role of monitoring conditions in prisons in Rwanda at the end of 1994 but shifted to providing limited aid to help purchase water, food dispensary equipment, sewer system repairs, and septic ditches.²¹ According to Jean-Daniel Tauxe, the former ICRC Delegate General for Africa,

Normally, (the ICRC) does not get involved in the direct maintenance of prisons, so as not to become a substitute for the authorities and thus lose its status as a neutral

¹⁹ ICRC (1996). Agreement between the International Criminal Tribunal for the former Yugoslavia and the ICRC on procedures for visiting persons held on the authority of the Tribunal. *International Review of the Red Cross*, 311, 30 April 1996.

²⁰ Finland, Poland, Denmark, Italy, Slovakia, Estonia, France, Sweden, Belgium, and Norway.

²¹ Norwegian Council for Africa (2003). Rwanda seeks to close overpopulated prisons by year-end. Downloaded November 3, 2010 from: <http://www.afrika.no/Detailed/3398.html>

intermediary between them and the detainees. In Rwanda, in view of the exceptional gravity of the situation, the ICRC went one step further. It committed itself to taking an active role in the detainees' struggle for survival. It began by overhauling sanitary installations in the existing prisons. It also began providing basic food and medical care to the detainees. The ICRC decided to become involved in setting up new temporary places of detention to ease the overcrowding in the existing premises. In cooperation with a Rwandan interministerial commission and the UN agencies on the spot, it helped to install the accommodation, kitchens and sanitary and medical facilities for six new prisons capable of housing around 10,000 detainees.²²

The ICRC has gradually reduced its direct involvement in prison operations as the conditions incrementally improved and population declined. It ended food assistance in 2006 but maintains a full time operation that provides support to the Rwanda Prison Service in the areas of personal and collective hygiene, sanitary conditions, cooking facilities, and access to primary health care.²³

The ICRC has a longstanding practice of keeping its reports confidential. Its reports are privileged information, viewed only by ICRC staff and key government officials in the country where the inspection occurs or, in the case of the tribunals, with the tribunal's senior management. The practice, which effectively means not embarrassing government officials by publicizing unvarnished prison inspection findings, certainly helps the ICRC to gain access to detention facilities that would otherwise be off limits, particularly those in areas of active hostilities. The ICRC reports are only available to the public if the officials who receive the report decide to release it. Further, the ICRC does not provide any information to the general public on its prison inspection regime, even such simple things as the names and dates of prisons it visits.²⁴ While such lack of transparency is understandable when it involves protection of vulnerable populations in conflict areas, it is less so in an open society where established governments are contracting with international justice institutions to provide modern correctional services. Notwithstanding the ICRC's concerns, the experience of the CPT suggests that greater transparency in this area is possible.

The ICTY entered into an agreement with the CPT in 2000 that creates the option of designating the CPT as the prison oversight agency in the ICTY's sentence enforcement agreements.²⁵ The ICTY agreements with four European countries (Albania, UK, Portugal, and Ukraine) have subsequently listed the CPT rather than the ICRC as the designated prison monitor. The sentence enforcement agreement with Austria does not appoint a specific organization to conduct visits, stipulating only that the country will allow visits of the prisoner(s) by the International Tribunal, or an entity designated by it... in accordance with Austrian law. The frequency of these visits is to be determined by the International Tribunal and reports on the conditions and treatment of the prisoner "will be issued, as appropriate."²⁶ In practice, the

²² Tauxe, Jean-Daniel (1998). Why did the ICRC help to build prisons in Rwanda? *Red Cross Red Crescent: The Magazine of the International Red Cross and Red Crescent Movement*, 28 February 1998. Available: redcross.int/EN/mag/magazine1998_2/28.html.

²³ US State Department Human Rights Report on Rwanda, 2007. Available: <http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm>; ICRC, (2011); The ICRC in Rwanda. From the website of the International Committee for the Red Cross. Available: <http://www.icrc.org/eng/where-we-work/africa/rwanda/overview-rwanda.htm>

²⁴ The author made requests to the ICRC for this information but was informed that it is confidential.

²⁵ 15th General Report on the CPT's activities, covering the period 1 August 2004 to 31 July 2005, Strasbourg, 22 September 2005

²⁶ ICTY sentence enforcement agreement with Austria

ICRC is the tribunal sentence enforcement monitor in Austria.²⁷ The ICTY has three ad hoc sentence enforcement agreements with Germany, each one specific to an individual prisoner.²⁸ The first two specified in general terms that prisoners would be visited by representatives of the International Tribunal, at any time and on a periodic basis, with the frequency of visits to be determined by the International Tribunal and, reports on the visits to be shared with competent authorities in Germany and the President of the International Tribunal. The most recent ad hoc sentence enforcement agreement provides that the CPT will perform this oversight function.²⁹ Spain's inspection regime is unique among sentence enforcement countries. Spain created a Parity Commission, composed of two representatives of the International Tribunal and two representatives of Spain that is given responsibility for monitoring the conditions of imprisonment in facilities where tribunal inmates are held. The Parity Commission is empowered to conduct inspections of the relevant prison facilities and to study and evaluate any possible measures that may affect the situation of imprisonment of the convicted persons. Parity Commission inspections can be requested any time that two members of the Commission so stipulate. Parity Commission reports are to be submitted to the President of the International Tribunal and to the Ministry of Justice of Spain.³⁰

The CPT is much more transparent than the ICRC. While the CPT assures confidentiality of its findings if the affected state requests it, in practice its position is to publish the findings of their reports on their public website unless country officials specifically object. "Peer pressure" by other countries results in most reports being published, as it is arguably embarrassing for a country to keep its reports secret when their counterparts are making their reports freely available. The CPT maintains a comprehensive data base of all these cleared reports on a publically-available website. The reports detail the result of all CPT visits and the country's response, if there is one. These reports also provide an historical record of prison visits, some going back as far as the date of the CPT's first visits in 1990 (see table of available CPT inspection reports in Appendix I). Visits by both the ICRC and the CPT are typically planned in advance, however the sentence enforcement agreements allow for unannounced visits. Both organizations are provided with unfettered access to all areas of prisons they visit and to private interviews with inmates.

The European countries with tribunal sentence enforcement agreements bear all costs relating to imprisonment, with the exception of costs relating to transferring the prisoner to and from the receiving state, which are paid by the tribunals. Interestingly, the letters of agreement between the ICTY and the ICRC specify that the ICRC will absorb the costs of prison visits while the agreement with the CPT provides that "the International Tribunal shall bear all reasonable costs and expenses incurred in sending delegations to carry out visits."³¹ It seems the CPT has forged the better deal with the ICTY.

The ICTR sentence enforcement agreements with African countries differ from the European agreements in that they provide for covering some of the costs of incarceration. In the Rwanda, Swaziland, Mali, and Benin agreements, there is a provision that the receiving country

²⁷ Correspondence with Róisín Mulgrew, Lecturer in Law, Faculty of Social Sciences, University of Nottingham.

²⁸ The German situation is unique in that, due to its federal structure, the national government does not enter into a general agreement with the Tribunal on the enforcement of sentences, but can enter into case-by-case agreements "on the basis of an exchange of notes" (IT-94-1 and IT-94- 1-Abis, Order Designating the State in which Duško Tadić is to serve his prison sentence).

²⁹ Germany, ad hoc agreement re Galic, 16 Dec. 2008, para. 5(2); note 27.

³⁰ ICTY sentence enforcement agreement with Spain.

³¹ Appendix 5, 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 September 2001.

will receive financial assistance for improvements to prison facilities. The agreement includes the assurance that “the tribunal undertakes to approach donor countries and donor agencies with a view to securing financial assistance for projects aimed at upgrading to international standards imprisonment conditions under which convicted persons are to serve their sentence.”³² The ICTR’s agreements with European countries, including Sweden, France, and Italy, include no provision for underwriting costs.

The SCSL has enforcement of sentences agreements with Finland, Sweden, Rwanda, and the UK. The agreements are essentially the same as the ICTR agreements, with the ICRC designated as the prison oversight agency. Also like the Rwanda tribunal, the SCSL sentencing agreements require that the participating European countries bear the costs of incarceration. But the agreement with Rwanda stipulates that “the Government of Rwanda and the Registrar (of the SCSL) will conclude a Memorandum of Understanding detailing the average yearly costs that are to be borne by the Special Court for Sierra Leone.”³³

Since 1996, the African Commission on Human and Peoples’ Rights, through an appointed Special Rapporteur on Prisons and Conditions of Detention in Africa, has also been conducting prison inspections in Africa but only on a limited basis. Between 1996 and 2005, the Rapporteur made visits to Benin, the Gambia, Malawi, Mali (twice), Mozambique, the Central African Republic and Zimbabwe.³⁴ However, according to reports posted on the ACHPR website, very little progress has been made since 2005. In addition, there are regional organizations in Africa working to improve human rights compliance in prisons (e.g., the Human Rights League of the Great Lakes (LDGL), an umbrella group that includes Burundian, Congolese, and Rwandan organizations). But, like the prison systems in Africa, resource constraints impede the development of a more proactive monitoring and inspection program by these human rights oriented organizations.

Finally, an international movement toward worldwide standardization of prison oversight and inspection is underway, based on implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).³⁵ OPCAT adds an inspection and oversight regime to the UN based Convention against torture.³⁶ As of early 2011, 67 countries had signed the convention and 57 had become States Parties. OPCAT is presently building an inspection regime that involves a complementary system of National Preventive Mechanisms comprised of independent prison inspection authorities in each States Party, and an internationally-based Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) that essentially operates like the CPT, except with a worldwide reach.³⁷ All of the European countries with sentence enforcement agreements with the tribunals have signed on to OPCAT along with Mali, Benin, and Sierra Leone in Africa. Rwanda and Swaziland have not yet signed on, and neither has the United States. Because so many of the prisoners sentenced by the tribunals are facing very long prison sentences – many will still be incarcerated in the 2020s and beyond – the OPCAT may one day take on the role of monitoring conditions in sentence enforcement countries.

³² ICTR Sentence Enforcement Agreements with Benin and Mali

³³ Special Court for Sierra Leone, Sentence Enforcement Agreement with Rwanda

³⁴ Delaplace & Pollard, *op. cit.*, note 5

³⁵ Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199; Entered into force on 22 June 2006.

³⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

³⁷ Ledwidge, F. (2006). The Optional Protocol to the Convention Against Torture (OPCAT): A major step forward in the global prevention of torture. *Security and Human Rights* (formerly Helsinki Monitor), 17(1), 69-82.

Differences in Prison Regimes

As most countries of the world have moved away from corporal and capital punishment in favor of the custodial sentence, the punishment of offenders has become an administrative, bureaucratic process that occurs in places that are largely hidden from public view. When prisons are discussed at all in the literature on the war crimes process, they tend to be viewed monolithically and homogeneously, as if “prison is prison,” that all prisons are the same. But there is considerable variability in the way prisons are run from country to county. Comparative penology studies underscore that there are major differences in national prison regimes. Some scholars have observed that that punishment practices are directly related to the form of political economy in a country, with different penal regimes in neo-liberal, conservative corporatist, and social democratic countries. According to the model, the more neo-liberal countries have more restrictive and punitive penal systems than social democratic countries.³⁸ Lappi-Sappala (2008) identified “clusters” of countries with similar penal regimes including southern European countries and the former socialist countries of Europe. Brodeur (2007) added sharper distinctions between the characteristics of prison in European countries (e.g., the Nordic countries, Ex-Warsaw Pact countries, and the Baltic countries) while noting differences in other parts of the world (the Caribbean and the Indian subcontinent). Additionally, Green (2007) observed that a distinction between majoritarian democracy (as in England) and consensus democracy (in Norway) helped to explain differences in national appetites for punishment, as reflected in the prevailing media culture. Comparative penology studies on Africa have examined how the form and conditions in African penal systems are direct products of colonialism and how African prisons continue to be influenced by neocolonial motives of western nations.³⁹

Prisons and jails, as “total institutions,” are notoriously closed to outside scrutiny, making it difficult for the public to obtain a clear picture of what goes on inside. Some of this strict control on public access is certainly necessary in order to protect public safety and assure institutional security. Justifiable concern for security issues, however, can lead to system opacity and a tendency of prison authorities to avoid public scrutiny. As Jon Vagg poignantly observed, “prison systems tend to consume their own smoke if they can”.⁴⁰

Expressive of this phenomenon, available information on the facilities where international tribunal prisoners are held typically comes to public light only when the news media pays attention to it. A case in point is media attention to conditions of confinement of tribunal inmates in Norway and Britain and the opposite results it can generate. In 2004 a

³⁸ Cavadino, Michael & Dignan, James (2006). *Penal systems: A comparative approach*. London: Sage Publications; Esping-Andersen, G. (1990). *The three worlds of welfare capitalism*. Cambridge: Polity Press.

³⁹ See Lappi-Seppala, T. (2008). Trust, welfare, and political culture: Explaining differences in national penal policies (pp. 316-387) in Michael Tonry ed.(2008). *Crime and Justice: A Review of Research, Volume 37*. Chicago: University of Chicago Press.; Brodeur, J. (2007). Comparative Penology in Perspective (pp. 49-91) in Michael Tonry ed. (2007). *Crime and Justice: A Review of Research, Volume 36*. Chicago: University of Chicago Press; See also, Green, D. A. (2007). Comparing penal cultures: Child-on-child homicide in England and Norway. In M. Tonry (2007) *Crime, punishment, and politics in comparative perspective*. Chicago: University of Chicago Press; Dikotter, F. (2007). Introduction: the Prison in the World. In F. Dikotter & I. Brown (Eds.), *Cultures of Confinement: A History of the Prison in Africa, Asia, and Latin America* (pp. 1-13). Ithaca, NY: Cornell University Press; and Cohen, S. (1982). Western Crime Control Models in the Third World: Benign or Malignant? Research in *Law, Deviance and Social Control*, 4, 85-119.

⁴⁰ Goffman, E. (1961). *Asylums : Essays on the social situation of mental patients and other inmates*. New York: Anchor; Gentry, J. T. (1986). The panopticon revisited: The problem of monitoring private prisons. *96 Yale L. J.* 353; Vagg, J. (1994). *Prison systems: A comparative study of accountability in England, France, Germany, and the Netherlands*. Oxford: Clarendon Press, p. 250.

Norwegian journalist wrote a series of articles noting that three ICTY inmates were being housed in open-type prisons. The articles included interviews with victims who complained that, in their view, the sentences were too lenient. Prompted by public and political pressure following the series, the Norwegian government moved the prisoners to more secure facilities. In contrast, in early 2010 the British press reported widely on a violent attack on Radislav Krstic who was serving a 35 year ICTY sentence in the maximum security Wakefield Prison. Three other inmates attacked Krstic, beating him and slashing his neck with prison-made weapons. Krstic survived the attack, but the incident generated criticism of the UK's ability to provide for his safety. Krstic took the matter to local court, and in August 2010 a court in Manchester ruled that Krstic's security status should be downgraded, allowing him to be placed in facility with greater freedom and privileges.⁴¹ Beyond minimum standards of care, there is an absence of standardization in prison regime in the places where tribunal inmates are sentenced and an ongoing risk that war crime sentencing policy will be driven by sensationalistic news media coverage rather than by rational debate and policymaking.

There are also radical differences between typical prison regimes for tribunal offenders in Africa and in Europe, or what might be described as the consolidation model and the dispersion model. The use of the terms here is borrowed from their traditional meaning in penology, where the two models describe alternative methods of dealing with prisoners who present management problems.⁴² In the dispersion model, a particular type of prisoner (e.g., violent prisoners, or prisoners in need of protective custody) are scattered among as many prisons in the system as possible in order to limit their total number in any single facility. The alternative is to consolidate them in a dedicated, stand-alone facility or section of an existing prison with specially trained staff and distinctive security features. The approaches taken by the Europe-based ICTY and the Africa-based ICTR/SCSL are illustrative of these different models. The ICTY relies on a dispersion strategy, with the 60 persons currently or formerly serving ICTY sentences scattered among individual prisons in a dozen European countries, with no more than 3 or 4 inmates in any one country at the same time. ICTY prisoners are integrated into the domestic prison populations of participating European countries. The ICTR and the SCSL, on the other hand, have taken the consolidation approach. Among the 21 inmates currently under sentence of the ICTR, 14 are held in a dedicated section of a prison in Mali and seven in a special facility in Benin. Only two persons convicted by the ICTR have been dispersed to other sentence enforcement states, Georges Ruggiu to Italy and Michel Bagaragaza to Sweden. All eight persons sentenced by the Special Court for Sierra Leone are currently placed in a special unit within a larger prison in Rwanda. In the (European) dispersion model, tribunal prisoners are intermixed and interact with domestic prisoners. Tribunal inmates experience regular prison accommodations and participate in regular prison programming. By contrast, in the (African) consolidation model, tribunal prisoners interact exclusively with one another and are routinely separated from domestic prisoners. Special accommodations are provided for tribunal inmates that exceed those provided to regular inmates. For example, in the international units, prisoners receive three meals per day while inmates in the domestic units receive two; international

⁴¹ Nemitz, J.C. (2006). Execution of sanctions imposed by supranational criminal tribunals (pp.125-144), in Roelof Haveman & Olaoluwa Olusanya, (eds.)(2006). *Sentencing and sanctioning in supranational criminal law*. Antwerp-Oxford: Intersentia; Williams, D. & Wright, S. (2010, May 8). Brutal revenge. *Daily Mail*; BIRN (2010, August 16). Krstic has UK high-security jail status scrapped. Balkan Investigative Reporting Network. Available: <http://www.balkaninsight.com/en/main/news/29996/>.

⁴² Ward, D. & Carson, N. (1995). Super-maximum custody prisons in the United States. *Prison Service Journal*, no. 97, January, 1995.; Riveland, Chase (1999). *Supermax prisons: Overview and general considerations*. Washington, DC: U.S. Department of Justice, National Institute of Corrections.

prisoners have private rooms while domestic prisoners share congregate sleeping areas; international prisoners are provided with access to cable television while domestic prisoners are not.

Both models have potential advantages and disadvantages over one another. On the plus side, under the consolidation model, a majority of tribunal inmates receives essentially the same program and conditions of confinement. Kept together in a group, they are able to speak the same language and share cultural similarities. As special facilities are used to house them, they are also protected from violent encounters with inmates from the host country. On the negative side, however, there is the possibility that the offenders, many of whom are high-level former government officials, can maintain a "government-in-exile"⁴³ that discourages accepting responsibility for their actions and reinforces the ideology that endorsed war crimes. Decamped to a foreign prison, the group could continue to direct ongoing acts of insurgency in their home country or otherwise engage in criminal enterprise and terrorism.

The dispersion model has plusses and minuses as well. Advantages of the model include the cost savings that inure to the tribunals as receiving countries provide the service for free. Moreover, it is a generally more cost efficient model as the individual prisons receiving the tribunal inmates incur marginal costs when accepting only one or two inmates. Dispersing former comrades-in-arms may also assist them in breaking away from their former life and engage in meaningful rehabilitation. However, as only one or two inmates may be in the sentence enforcement country, it is difficult to provide language and culturally appropriate services. The receiving country may lack professional staff including physicians, psychiatrists and psychologists who can communicate with the inmates in their native language. Countries vary considerably in their experience with foreign-born inmates (e.g., in Austria, 43% of prisoners are foreign born; in Finland, only 10%)⁴⁴ and tribunal inmates may experience a greater sense of isolation in some countries than in others.

Neither model of tribunal sentence enforcement has been without problems. A number of issues were raised by professional staff from the ICTY, ICTR, and SCSL at a colloquium held in Arusha in 2004. Participants noted that the process of developing sentence enforcement agreements has been difficult for all of the tribunals. Some countries have been reluctant to accept tribunal inmates who cannot speak the language of the sentence enforcement country. Others expressed concern that distance from their homeland impedes the maintenance of family relationships and is counter to reintegration goals. Even with the assistance of the ICRC it was noted, visits are difficult and expensive to arrange (note: the tribunals fund some family contact while subjects are detained but relinquish this responsibility to the country of imprisonment once sentenced). Some countries (such as Spain) have limited the maximum length of imprisonment to 20 years and are unwilling to accept inmates with life sentences. Others noted that some persons who had served their sentences became quasi stateless, as there was either no country willing to accept them upon release or it was too dangerous to return them to their country of origin.⁴⁵ Staff from all four of the tribunals has expressed how

⁴³ O'Donnell, E., former Deputy Registrar of the ICTR, comments at the International Symposium, Geneva, "International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspective of the Stakeholders," 9-11 July, 2009.

⁴⁴ World Prison Brief, International Centre for Prison Studies, Kings College London. Available: <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/>

⁴⁵ ICTR (2004). *Colloquium of Prosecutors of International Criminal Tribunals on "The Challenges of International Criminal Justice"*. Arusha: International Criminal Tribunal for Rwanda.

difficult it is to recruit “willing states” to participate in sentence enforcement agreements.⁴⁶ In the past few years particularly, as the ICTR, ICTY, SCSL, and ICC have been actively seeking sentence enforcement partners, a sense of “sentence enforcement fatigue” has developed among countries that have been approached repeatedly about taking custody of inmates.⁴⁷

Should we develop an international prison system?

There is considerable variability in standards, monitoring, and regimes in the sentence enforcement structure of the criminal tribunal process. Some of these differences are superficial, and do not substantively alter the way in which international inmates are treated. But others need to be considered with a more critical eye as to whether simple variation rises to the level of unequal treatment before the law. International prison standards continue to evolve, influenced by developments in international human rights law. There are differences between the prisons housing tribunal prisoners in the level of restrictions imposed, the degree of personal safety provided, the scope and quality of professional services offered, the extent of family visitation (including conjugal visits) facilitated, whether inmates are able to hold jobs at market rate wages, and the range of services to help released prisoners reintegrate into the community. These are all matters that beg for greater standardization as correctional agencies and the courts access how to appropriately balance human rights with modern correctional practice.

The well-developed and transparent CPT process is currently the state of the art in prison inspection and oversight, but its reach is limited to Council of Europe countries. The ICRC is a well-respected independent organization that fills a vital role in assuring that the principles of international humanitarian law are universally practiced, even in conflict areas. But as it has adapted its mission to include prison monitoring in sentence enforcement countries, its rigid confidentiality procedures are incongruous with modern expectations of open and transparent governance. The emerging OPCAT process has the prospect of eventually standardizing the oversight and inspection of prisons throughout the world. Full development of the OPCAT process requires that all tribunal sentence enforcement countries become states parties to the treaty, but a number of key states, including the current sentence enforcement countries of Rwanda, Swaziland, and Slovakia, as well as Tanzania, host of the ICTR detention facility, are not yet on board.

The differences between the dispersion and consolidation models of incarceration are problematic. The higher level of confinement conditions provided to international prisoners then is customary throughout Africa has dissuaded some African countries from entering into sentencing agreements with the courts. Both South Africa and Benin expressed concern that the relatively better conditions for tribunal inmates could serve to destabilize their prisons by giving prisoners cause for protest.⁴⁸ Although that has not happened, the practice of two levels of care feeds into criticism by local media reminiscent of US media depictions of “country club prisons” or “Club Fed” where high-level government officials or business leaders are reputedly sent. The effect of this sort of pressure can lead to more austere prison conditions or more secretive

⁴⁶ Abtahi, H. (2010, May 11). Acting Chief of Cabinet, International Criminal Court. Interview; Amoussouga, R. K. G. (2010, February 9). Senior Legal Advisor and Chief, External Relations and Strategic Planning Section, International Criminal Tribunal for Rwanda. Interview; Fofana, S. (2010, May 12). Legal Officer, Immediate Office of the Registrar, International Criminal Tribunal for the former Yugoslavia. Interview; Townsend, G. (2010, May 10). Head of Office/Senior Legal Officer, Special Court for Sierra Leone, The Hague Sub Office. Interview.

⁴⁷ *Ibid*, Fofana interview; Townsend interview.

⁴⁸ Abtahi interview, Amoussouga interview, *op. cit.*, note 43.

officials, or both. The current structure of the tribunal punishment system simply invites this sort of problem.

A de facto international prison system is already in existence in the form of the United Nations Detention Unit (UNDU) in The Hague and the United Nations Detention Facility (UNDF) in Arusha. Although the two facilities are officially detention facilities and not prisons, they have effectively served as sentence enforcement facilities for quite a few inmates. As persons convicted by the courts are routinely credited with time served during trial, the trials themselves take a long time (several years in some cases), and the tribunals typically approve the release of sentenced prisoners after serving two-thirds of their sentence,⁴⁹ it is not uncommon for persons receiving sentences of less than 10 years to complete their sentence in the UNDU and UNDF. This has already happened with twelve ICTY prisoners and four ICTR prisoners.

The UNDU operates under a contract with the Netherlands Prison Service for which the court pays about \$175,000 per bed per year.⁵⁰ Costs are greater during the detention/trial phase, as detainees are presumed innocent until proven guilty and provided with a higher level of programming than is typically available in a prison facility. Finland, which operates a modern prison system that has a good compliance record with both the ICRC and the CPT, estimates per prisoner annual costs to be about \$80,000.⁵¹ Assuming the greater overhead and operational costs of a standalone facility, and estimating approximately \$125,000 per bed per year for a UN prison, a 50-bed facility would cost approximately \$6.25 million per year. This is a small amount when compared to what it costs to operate the courts. In its first six years of operation, for example, the ICC has cost over \$500 million. Although it is prosecuting only three cases at present, it is geared up to do much more, with an annual budget of about \$125 million and over 500 full time staff in its employ. By comparison, the ICTY has an annual budget of about \$150 million and employs over 1,100 employees.⁵²

The UNDU is not without problems. The ICTY and ICC (and the Lebanon Tribunal currently in development) all contract with the Dutch Prison Service for separate detention space in the Scheveningen (The Hague) Penitentiary. Former Liberian President Charles Taylor is being held in the ICC area of the UNDU though an agreement between the SCSL and the ICC. The policy of both the SCSL and the ICTY has been to provide limited financial assistance in arranging visits from family members for detainees. The Assembly of States Parties, the governing body of the ICC, however, has not yet allocated any funding for a similar service for ICC detainees and the matter of how to fund family visits in the long run remains up in the air.⁵³ At present, there is apparent inequality in visitation support, within the same facility, depending on which court is hearing the case of a given detainee.

⁴⁹ The tribunals have routinely approved release of inmates after serving two-thirds of their sentences. According to the sentence enforcement agreements, the prisons where tribunal inmates are ultimately sent are operated according to procedures in the country where they are incarcerated. This includes release procedures. This practice will be tested in the near future in regards to Belgium's sentence enforcement agreement with the ICTY. Belgium routinely permits early release after an inmate completes one-half of his or her prison term. The standard throughout Europe is two-thirds. Belgium is currently incarcerating Dragon Zelenović who was sentenced to 15 years. Zelenović was transferred to Belgium on 27 Feb 2008 and was given credit for time served in detention beginning on 22 Aug 2005. Thus, he will become eligible for release in Belgium after completing 7 years, 6 months of his sentence in February 2013. The question of whether or not the ICTY will permit an inmate to be released after serving half of his sentence is yet to be decided.

⁵⁰ United Nations (1999). Treaty Series; Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Volume 2085; I:36188-36202 II:1232-1233.

⁵¹ Matinpuro, R. (2009, December 18). Senior Inspector, Criminal Sanctions Agency, Finland. Interview.

⁵² Mettraux, G. (2009). The Cost of Justice – Is the ICC living beyond its means? International Criminal Law Bureau, 6 August 2009. Downloaded on Aug 11, 2010 from: <http://www.internationallawbureau.com/blog/?p=503>.

⁵³ Abtahi interview, note 43; Mulgrew correspondence, note 27.

Ultimately, the problem of penology is to locate an acceptable median where prison is both punishing and respectful of human dignity. Prescient of the debate that continues to this day, noted prison reformer John Howard advocated in eighteenth century England for improvement in prison food, hygiene, and medical care while maintaining strict regulations and austere conditions such that “confinement in prison, though it may cease to be destructive to health and morals, will not fail to be sufficiently irksome and disagreeable, especially to the idle and profligate.”⁵⁴ The issue of “less eligibility,” the idea that prisoners ought to be provided with a standard of living no higher than what can be afforded by the poorest of law-abiding citizens, continues to exert influence on prison policy today as it did two centuries ago. It is difficult to balance the public’s demand for punishment of persons who have committed genocide, war crimes, and other crimes against humanity while at the same time protecting the human dignity of offenders and proactively working toward their eventual reintegration into the community. But just as the international community has made a commitment to a supranational legal process through the establishment of the International Criminal Court, perhaps it is now time to devote greater attention to a concomitant supranational penal process.

Appendix I

CPT reports in database as of Feb 25, 2011

Countries with Sentence enforcement agreements with the ICTY

Country	Years visited
Albania	2010, 2008, 2006, 2005, 2003
Austria	2010, 2009, 2004, 1990
Belgium	2010, 2009,
Denmark	2008, 2002, 1996, 1990
Estonia	2003, 1997
Finland	2009, 2008, 2003, 1998, 1992
France	2010, 2006, 2003, 2000, 1996, 1991
Germany	2010, 2005, 1996, 1991
Italy	2010, 2009, 2008
Norway	2005, 1999, 1997, 1993
Poland	2009, 2004, 2000, 1996
Portugal	2008, 2002, 1999, 1995, 1992
Slovakia	2010, 2009, 2005, 2000, 1995
Spain	2009, 2007, 2005, 2003, 1998, 1997, 1994, 1991
Sweden	2009, 2003, 1998, 1994, 1991
Ukraine	2009, 2005, 2002, 2000, 1998
United Kingdom	2010, 2009, 2008, 2005, 2004, 2003, 2002, 2001, 1997, 1994, 1990

⁵⁴ Howard, J. (1777). *The State of the Prisons in England and Wales, with preliminary observations, and an account of some foreign prisons.* Warrington: William Eyres. Digital copy of this edition available at: <http://google.com/books>, p. 77.