

SENTENCING BY INTERNATIONAL TRIBUNALS: A HUMAN RIGHTS APPROACH

WILLIAM A. SCHABAS*

I. INTRODUCTION

The post-World War II trials established many important principles. Specifically, they defined crimes against humanity as part of customary law or of general principles of law, rendered unavailable certain defenses such as superior orders, and established notions of criminal participation through the principle of command responsibility.¹ However, the international tribunals at Nuremberg and Tokyo, and the successor trials held by various national military tribunals in the aftermath of World War II, left few sentencing guidelines applicable to cases of war crimes and crimes against humanity. Despite contrary procedures before British military tribunals, the international and American military tribunals appeared to have no practice of holding distinct hearings to address matters concerning the sanction once guilt had been established.² The tribunals occasionally appended a perfunctory final paragraph to their judgments reviewing “mitigating factors” in the rare cases where these were deemed to be present.³ Thus, there is little precedent to assist courts now that international justice has been revived some fifty years later with the

* M.A. (Toronto), LL.D. (Montreal), Professor and Chair, Département des sciences juridiques, Université du Québec à Montréal. The author would like to thank Anne-Marie La Rosa for her comments and suggestions on an earlier draft of this text.

1. *In re Göring et al.*, 13 Ann Dig. 203 (1946). See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992); ANNETTE WIEVIORKA, *LES PROCÉS DE NUREMBERG ET DE TOKYO* (1996).

2. See *United Kingdom v. Eck et al.* (“Peelus Trial”), 1 UNITED NATIONS WAR COMMISSION: LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 13-14 (1947) [hereinafter L.R.T.W.C.]; *United Kingdom v. Grumfelt* (“Scuttled U-Boats Case”), 1 L.R.T.W.C. 55, 65 (1947); *United Kingdom v. Kramer et al.* (“Belsen Trial”), 2 L.R.T.W.C. 1, 122-25 (1947).

3. See 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MIL. TRIBUNAL 524 (1946) (Göring at 527; Keitel at 536; Jodl at 571; Speer at 597; Von Neurath at 582); see also *United States of America v. Pohl et al.* (“Pohl Case”), 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 193 (1948) (Klemm at 1107; Rothaug at 1156; Oeschey at 1170) [hereinafter T.W.C.].

creation of the international tribunals for the former Yugoslavia⁴ and for Rwanda.⁵

The Statute of the International Criminal Tribunal for Rwanda and the Statute of the International Criminal Tribunal for the Former Yugoslavia (collectively "Statutes") contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labor, and fines) and that they be established taking into account the "general practice" of the criminal courts in the former Yugoslavia or Rwanda, as the case

4. The Statute of the International Criminal Tribunal for the former Yugoslavia is an annex to the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 808 (1993)*, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter *Yugoslavia Statute*], reprinted in 32 I.L.M. 1159 (1993). On the International Criminal Tribunal for the former Yugoslavia, see generally VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995); M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993); Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360 (1994); Jelena Pejic & Liz Egan, *Prosecuting War Crimes in the Former Yugoslavia: The Two Tiers and the Linkage*, 1 E. EUR. HUM. RTS. REV. 11 (1996); Alain Pellet, *Le Tribunal Criminal International pour l'Ex-Yougoslavie. Poudre aux Yeux ou Avancée Décisive?*, 98 REV. GEN. DT. INT'L. PUB. 7 (1994); Maria Castillo, *La Compétence du Tribunal Pénal pour la Yougoslavie*, 98 REV. GEN. DT. INT'L PUB. 61 (1994); Éric David, *Le Tribunal International Pénal pour l'ex-Yougoslavie*, 25 REV. BELGE DT. INT'L 565 (1992); Morten Bergsmo, *The Establishment of the International Tribunal on War Crimes*, 14 HUM. RTS. L.J. 371 (1993); Nicholas Howen, *From Nuremberg to the Balkans: The International War Crimes Tribunal for the Former Yugoslavia*, in *MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS* 261-283 (Arie Bloed et al. eds., 1993); Roman A. Kolodkin, *An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 381 (1994); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994); KARINE LESCURE, *LE TRIBUNAL PÉNAL INTERNATIONAL POUR L'EX-YOUGOSLAVIE* (1994); Christopher Greenwood, *The International Tribunal for Former Yugoslavia*, 69 INT'L AFF. 641 (1993); Jules Deschênes, *Toward International Criminal Justice*, 5 CRIM. L.F. 249 (1994); David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994); Pavel Dolenc, *A Slovenian Perspective on the Statute and Rules of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 451 (1994).

5. The Statute of the International Criminal Tribunal for Rwanda is an annex to Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter "Rwanda Statute"]. On the International Criminal Tribunal for Rwanda, see generally Melissa Gordon, *Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda*, 1 ILSA J. INT'L & COMP. L. 217 (1995); Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996); Roy S. Lee, *The Rwanda Tribunal*, 9 LEIDEN J. INT'L L. 37 (1996); Mark R. von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the 'Elementary Dictates of Humanity'*, 22 BROOK. J. INT'L L. 111 (1996).

may be.⁶ The Rules of Procedure and Evidence (“Rules”) adopted by the judges in accordance with the Statutes provide somewhat more detail, identifying some of the aggravating and mitigating factors that may be taken into account by the trial court during the sentencing process.⁷

There is no provision for distinct sentencing hearings and nothing in the Statutes or the Rules would preclude joining merits and sentencing hearings.⁸ The conduct of the Trial Chamber in the *Prosecutor v. Tadic* hearing suggests that it will proceed otherwise, holding distinct sentencing hearings subsequent to findings of guilt.⁹ In some cases, it may be preferable for the parties to elicit evidence that is apparently relevant only to sentencing during their case in chief, for example, because of the availability of witnesses. Although this may often suit the prosecution, as a general rule the defense will prefer to wait for conviction before presenting sentencing evidence so as not to prejudice the outcome on the merits. For the same reason, the defense may legitimately challenge efforts by the prosecution to enter evidence that is germane to sentencing but irrelevant to merits during the guilt phase of the proceedings.

Somewhat unexpectedly, on May 31, 1996, an individual accused before the International Criminal Tribunal for the Former Yugoslavia with war crimes committed against the civilian population in July, 1995 in the Srebrenica area offered to plead guilty to a charge of crimes against humanity.¹⁰ Drazen Erdemovic, by his own admission, was part of a detachment of the Bosnian Serb army sent to a collective farm where unarmed Muslim civilians who had surrendered after the fall of the United Nations “safe area” at Srebrenica were

6. Yugoslavia Statute, *supra* note 4, art. 24; Rwanda Statute, *supra* note 5, art. 23.

7. *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, Rules of Procedure and Evidence*, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.1 (1994), amended by U.N. Doc. IT/32/Rev.2 (1994), amended by U.N. Doc. IT/32/Rev.3 (1995) [hereinafter Yugoslavia Rules], reprinted in 5 CRIM. L.F. 651, Appendix C, (1994); *International Criminal Tribunal for Rwanda Rules of Procedure and Evidence*, U.N. Doc. ITR/3/Rev.1 (1995) [hereinafter Rwanda Rules]. On the Rules, see generally Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507 (1994).

8. Rwanda Rules, *supra* note 7; Yugoslavia Rules, *supra* note 7.

9. *Prosecutor v. Tadic*, Case No. IT-94-1-T (1996).

10. See *Prosecutor v. Erdemovic, Sentencing Judgment of Trial Chamber I for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in The Territory of Former Yugoslavia since 1991*, paras. 76-78, Case No. IT-96-22-T (Nov. 29, 1996).

brought.¹¹ Erdemovic was part of a firing squad that executed hundreds of these innocent victims.¹² A trial chamber of the Tribunal, presided over by Judge Claude Jorda and composed of Judges Elizabeth Odio Benito and Fouad Riad, accepted the guilty plea and, on November 29, 1996, sentenced Erdemovic to ten years' imprisonment.¹³ The fifty-eight-page judgment represents by far the most extensive consideration of sentencing principles by an international criminal court. Erdemovic has since filed an appeal which will be reconsidered by the five-member Appeals Chamber of the Tribunal, headed by Tribunal President Antonio Cassese.

Criminal law has evolved considerably since 1946 when several of the Nuremberg defendants were sentenced to death and hanged only weeks later. The death penalty has now been abolished in a majority of Member States of the United Nations.¹⁴ More generally, after initial suggestions that it fell within the reserved domain of sovereign states, as protected by Article 2(7) of the Charter of the United Nations,¹⁵ criminal law has become imbued with legal principles derived from international human rights law that barely existed in 1945.¹⁶ For example, Article 10(3) of the International Covenant on Civil and Political Rights declares that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."¹⁷ Yet there is not a word about reformation and social rehabilitation in the post-World War II judgments, and their frequent resort to capital punishment is plainly inconsistent with such an orientation.

This Article addresses some of the issues raised in sentencing offenders before the international tribunals for the former Yugoslavia and Rwanda, including a consideration of the comments and conclusions of the trial chamber's judgment in *Prosecutor v. Erdemovic*. It is hoped that a practice will develop that takes account of the synergy between criminal law and human rights law, both of which have flourished in recent decades, and of the delicate imperatives imposed by the search for national reconciliation within the context of the

11. *See id.* para. 77.

12. *See id.*

13. *See id.* para. 111.

14. *See* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 347 (1996).

15. U.N. CHARTER art. 2, para. 7.

16. *See* ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM (1994).

17. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 10(3), 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

struggle against impunity.

II. RELEVANT PROVISIONS OF THE STATUTES AND THE RULES

The Statutes of the two international tribunals are annexed to decisions of the Security Council. They are “subsidiary organs” created pursuant to Article 29 of the Charter of the United Nations.¹⁸ Not only are they binding upon all Member States in accordance with Article 25 of the U.N. Charter,¹⁹ they are also definitive of jurisdiction for the judges of the court.²⁰ In fixing sentences, the judges are therefore called upon to interpret the terms of the Statutes. Their objective should be to establish the Security Council’s intent, relying, where appropriate, upon the various preparatory documents, including the Secretary-General’s report²¹ and the materials submitted to the Security Council by Member States and non-governmental organizations, as well as the statements of the permanent representatives during the meetings of the Security Council itself. Article 24 of the Statute of the International Criminal Tribunal for the former Yugoslavia states:

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.²²

18. See Prosecutor v. Tadic, *Judgment of the Appeals Chamber*, para. 15, U.N. Doc. Case No. IT-94-1-AR72 (Oct. 2, 1995), reprinted in 7 CRIM. L.F. 51, 59 (1996).

19. U.N. CHARTER art. 25.

20. Prosecutor v. Tadic, *Decision on the Defence Motion on Jurisdiction of the Trial Chamber for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in The Territory of Former Yugoslavia since 1991*, para. 8, Case No. IT-94-1-T (Aug. 10, 1995); Tadic, *supra* note 18, para. 14.

21. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter Report of the Secretary General].

22. Yugoslavia Statute, *supra* note 4, art. 24.

The Statute of the International Criminal Tribunal for Rwanda contains an identical provision, except that the word "Rwanda" replaces "former Yugoslavia" at the end of paragraph 1.²³ Article 28 of the Yugoslav Statute (Article 27, in the case of the Rwanda Statute) states that pardon or commutation may subsequently be accorded, based upon the "interests of justice and the general principles of law."²⁴

The judges of the tribunals have completed the laconic text of the Statutes with certain provisions in the Rules. Rule 101 for the Yugoslav tribunal states:

Penalties

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24(2) of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Sub-rule 102(B).

Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.²⁵

Rule 101 for the Rwanda tribunal is virtually identical.²⁶ Two changes have been made to this provision since it was initially adopted in 1994. Sub-rule B(iv) originally referred to "the extent to

23. Rwanda Statute, *supra* note 5, art. 23.

24. Yugoslavia Statute, *supra* note 4, art. 28; Rwanda Statute, *supra* note 5, art. 27.

25. Yugoslavia Rules, *supra* note 7, Rule 101.

26. Rwanda Rules, *supra* note 7, Rule 101(B)(iii) replaces "former Yugoslavia" with "Rwanda." *Id.* Paragraph B(iv) refers to Article 9(3) of the Statute. *Id.*

which any penalty imposed by a national court on the convicted person," and paragraph E was added.²⁷

Although from a strictly technical standpoint the Security Council and the Tribunal may not be bound in law to the terms of modern human rights instruments, it seems inconceivable that the provisions of the Universal Declaration of Human Rights²⁸ and the International Covenant on Civil and Political Rights (ICCPR)²⁹ are not respected. In some cases, these are specifically incorporated into the Statutes. Article 21 of the Statute for the former Yugoslavia (Article 20 of the Statute for Rwanda) is inspired by the provisions of Article 14 of the ICCPR, dealing with fair trial guarantees. The report of the Secretary-General indicates that other international norms should also apply: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights."³⁰ But also relevant to the specific issue of sentencing are Articles 7, 10, and 15 of the ICCPR which state:

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.³¹

...

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners

27. Yugoslavia Rules, *supra* note 7, Rule 101.

28. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

29. ICCPR, *supra* note 17.

30. *Report of the Secretary-General*, *supra* note 21, para. 106.

31. ICCPR, *supra* note 17, art. 7.

the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.³²

...

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.³³

Article 7 encompasses the notion of proportionality in criminal punishment. Both Articles 7 and 10, the former implicitly, the latter explicitly, insist upon the importance of rehabilitation. Article 15 prohibits retroactive crimes and punishments, stating a rule known by the maxim *nullum crimen nulla poena sine lege*.³⁴

III. "GENERAL PRACTICE" IN SENTENCING

The directive in the Statutes that judges of the tribunal have "recourse to the general practice regarding prison sentences"³⁵ in the former Yugoslavia or Rwanda, as the case may be, appears to be a response to concerns about the prohibition of retroactive sentences. This principle is set out in several major human rights instruments,³⁶

32. *Id.* art. 10.

33. *Id.* art. 15.

34. This doctrine prevents punishing actions that, at the time committed, were not crimes. *See* HANS CORELL ET AL., PROPOSAL FOR AN INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA, 68-69 (1993).

35. Yugoslavia Statute, *supra* note 4, art. 24(1); Rwanda Statute, *supra* note 5, art. 23(1).

36. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 28, art. 11(2); American Declaration of the Rights and Duties of Man, Doc. O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6, art. XXVI (1948); American Convention on Human Rights, Nov. 22, 1969, art. 9, 1144 U.N.T.S. 123 (entered into force Jul. 18, 1978); European Convention of Human Rights, Nov. 4, 1950, art. 7(1), 213 U.N.T.S. 221, (entered into force Sep. 3, 1953); African Charter of Human and Peoples' Rights, Jun. 26, 1981, art. 7(2), O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986).

including Article 15 of the International Covenant on Civil and Political Rights, and is enshrined in the legal maxim *nullum crimen nulla poena sine lege*. This principle “requires that punishments for criminal acts must be laid down in law when the crime was committed in order that the Court may mete out the punishment.”³⁷ It has been suggested that if the international tribunals are guided by existing sentencing practices in the territory where the crime took place, then the *nulla poena* principle is not offended.³⁸ Such concern about the issue of retroactivity is difficult to understand given that this question was supposedly well settled at Nuremberg. Defendants in the post-World War II trials systematically argued *nullum crimen* without any success. Perhaps this was because it was widely believed, as the official commentary in the Law Reports of the Trials of the War Criminals suggests, that “[i]nternational law lays down that a war criminal may be punished with death whatever crime he may have committed.”³⁹ Certainly the idea that the *nullum crimen* argument could succeed, in spite of a blackletter text, only to stumble because no blackletter sanction was attached, is paradoxical and even absurd.⁴⁰ Yet this is what seems to have happened in the case of the new ad hoc tribunals.

A preoccupation with the *nulla poena* issue is evident in some of the early draft statutes for the former Yugoslavia. Decades earlier, concerns had emerged about the issue during deliberations of the General Assembly’s Committee on International Criminal Jurisdiction⁴¹ and the International Law Commission. In 1953, the General

37. CORELL, *supra* note 34, at 68-69.

38. *See id.*

39. 15 L.R.T.W.C. 1, 200 (1949); *see also* Public Prosecutor v. Klinge, 13 Ann. Dig. 262, 263 (1946).

40. A 1949 judgment of the Netherlands Special Appeals Court was cited by the International Criminal Tribunal for the former Yugoslavia: “In so far as the appellant considers punishment unlawful because his acts, although illegal and criminal, lacked a legal sanction precisely outlined and previously prescribed, this objection also fails. The principle that no act is punishable in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. Such legal interests would be endangered if acts as to which doubts could exist with regard to their deserving punishment were to be considered punishable after the event. However, there is nothing absolute in that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent.” *Erdemovic*, *supra* note 10, para. 38 (citing Rauter, Special Appeals Court, Netherlands, I.L.R., 12 January 1949, at 542-3).

41. *Report of the 1953 Committee on International Criminal Jurisdiction*, U.N. GAOR, 9th

Assembly Committee resolved "to include in its report an expression of the view that it would be desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable national law to serve as some guidance for its decision."⁴² The same year, special rapporteur J. Spiropoulos, in his report to the International Law Commission, noted the validity of criticisms by experts and governments that a sentencing provision in the "Draft Code of Offences Against The Peace and Security of Mankind"⁴³ did not take into account the *nulla poena sine lege* principle.⁴⁴ In their February, 1993 proposal for an international tribunal, the three rapporteurs, Hans Corell, Helmut Türk and Gro Hillestad Thune, acting under the CSCE Moscow Human Dimension Mechanism, wrote:

The sentence *nullum crimen sine lege* requires that punishments for criminal acts must be laid down in law when the crime was committed in order that the Court may mete out this punishment. As already explained (Section 8.2) it will be necessary for the Tribunal to rely on the pertinent national legislation in this respect.

According to the criminal law of the former Socialist Federal Republic of Yugoslavia the following punishments may be imposed: capital punishment, imprisonment and fines.

Already in their report on Croatia the Rapporteurs concluded that it was in their opinion inconceivable that the CSCE should endorse the death penalty (cf. Section 7.1 of that report). The draft Convention therefore includes a provision to the effect that the Court shall not pass a sentence of capital punishment, although this punishment appears in provisions of the national law (Article 29, paragraph 2).

Since capital punishment will be excluded, it is necessary to examine more in detail how imprisonment is imposed according to the pertinent national law. It appears that the general rule on imprisonment (Article 38 of the Penal Code) lays down that imprisonment may not be shorter than fifteen days, nor exceed fifteen years. However, for crimes for which capital punishment is prescribed, the Court may also impose the punishment of imprisonment for twenty years. The question is, therefore, if it is possible to lay down in the

Session, Supp. no. 12, para. 118, U.N. Doc. A/2645 (1954).

42. *Id.*

43. *Report of the International Law Commission to the General Assembly, in 2 Y.B. INT'L. L. COMM'N 123, 134-37 para. 59, U.N. Doc. A/1858 (1951).*

44. *Draft Code of Offences Against the Peace and Security of Mankind, Troisième Rapport de J. Spiropoulos, Rapporteur Spécial, 2 Y.B. INT'L L. COMM'N 112, U.N. Doc. A/CN.4/85 (1954); Summary Records of the 268th Meeting, 1 Y.B. INT'L L. COMM'N 134, 139, U.N. Doc. A/CN.4/SER A/SR.268 (1954).*

Convention the possibility of imposing imprisonment for life. A first look at the national law may indicate that this is not possible. On the other hand, it could be argued that, if capital punishment cannot be imposed, there would be a possibility of imposing imprisonment for more than twenty years, n.b. lifetime, according to the principle *maius includit minus*.⁴⁵

It is clear from the Corell-Türk-Thune report that the rapporteurs were ill at ease with the Nuremberg precedent on retroactive offenses and punishments. They drew particular attention to the absence of sentencing provisions⁴⁶ in international humanitarian and human rights treaties such as the Convention for the Prevention and Punishment of the Crime of Genocide.⁴⁷ The draft provision proposed by the rapporteurs stated:

1. The Court shall have the power to impose the penalties provided for in the Penal Code of the former Yugoslavia. Such penalties include:
 - (a) deprivation of liberty;
 - (b) fines; and
 - (c) confiscation of the proceeds of criminal conduct.
2. The Court shall not pass sentence of capital punishment.⁴⁸

A subsequent Italian proposal manifested the same concern with retroactivity:

Article 7

Penalties

1. For the crimes referred to in Article 4, the Court shall apply the penalties provided for by the criminal law in force at the time of commission in the State in whose territory the crime was committed.
2. If the crime is committed in a place not subject to the sovereignty of any State, the Court shall apply the penalties provided for by the criminal law in force at the moment of its commission in the State born from the dissolution of the former Yugoslavia of which the offender is a national or, subordinately, of which the victim is a na-

45. CORELL, *supra* note 34, at 68-69.

46. *See id.* at 49-53.

47. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

48. CORELL, *supra* note 34, at 111-112.

tional.

3. In no case, however, may the death penalty be inflicted.⁴⁹

The accompanying commentary makes clear the preoccupation of the Italian jurists:

All war crimes and those against humanity provided for under Article 4 are considered international crimes as set forth by international law or far-ranging conventions. However, these international law sources do not envisage any penalties for such crime; the need to respect the principle "*nullum crimen, nulla poena sine lege*", the basis of fundamental human rights, has induced the Italian Commission to decide in favor of the penalties set forth by the criminal law of the State of the *locus commissi delicti* (according to paragraph 1 of Article 1, reference is inevitably to one of the States resulting from the dissolution of the former Yugoslavia). If the principle is inapplicable (because the crime has been committed in a place which is not subject to the sovereignty of any State), recourse shall be made to the principle of active or passive personality in order to determine the law to be enforced.

Nevertheless, the death penalty has been excluded, in line with a principle that is now part of the European legal heritage, as shown by Additional Protocol No. 6 to the European Convention on Human Rights.⁵⁰

The Russian Federation's proposal, similar to that of Italy's, was concerned with the same issues:

Article 22. Penalties

1. Subject to the provisions of paragraph 3, for the crimes in article 12 of this Statute, the Court shall designate the penalties established under the legislation of the State in which the crime was committed which was in force at the time the crime was committed.
2. If a crime has been committed in a place which is not under the sovereignty of any State, the Court shall designate a penalty provided for under the legislation of the State of which the perpetrator is a national or the State of which the victim is a national, which was in force at the time the crime was committed.
3. Sentence of death shall not be imposed. When determining the penalty, the Court shall take into account any extenuating or ag-

49. *Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General*, U.N. SCOR, art. 7, U.N. Doc. S/25300 (1993).

50. *Id.* at 12 (explanatory notes to art. 7 of the draft statute for an International Tribunal).

gravating circumstances.⁵¹

The Netherlands was also concerned with the question of retroactivity:

An appropriate sanction norm has to be created both for war crimes and for crimes against humanity to be applied by the *ad hoc* tribunal. In the opinion of the Netherlands this sanction norm should be derived from the norms which were applicable under former Yugoslav national law: the sanctions should not be more severe in principle than those imposed under national norms, in order to safeguard the *nulla poena sine lege* principle.⁵²

Other contributors to the debate seemed less traumatized by the *nulla poena* issue. The Committee of French Jurists, with Professor Alain Pellet as rapporteur, did not appear to be at all troubled with the matter.⁵³ The Organization of the Islamic Conference, in what was probably the simplest and perhaps wisest proposal, said: "Penalties shall be based on 'general principles' of law as they exist in the world's major legal systems."⁵⁴ The United States's proposal was similarly succinct and appropriate: "The Trial Court shall have the power to sentence convicted persons to imprisonment or other appropriate punishment."⁵⁵

It is worth recalling Article 15 of the International Covenant on Civil and Political Rights, which prohibits retroactive offenses and

51. *Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, U.N. SCOR, art. 22, U.N. Doc. S/25537 (1993).

52. *Note Verbale Dated 30 April 1993 from the Permanent Representative of The Netherlands to the United Nations Addressed to the Secretary-General*, U.N. SCOR, at 5, U.N. Doc. A/25716 (1993).

53. *Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General*, U.N. SCOR, paras. 157-59, U.N. Doc. S/25266. A French scholar associated with one of the members of the expert committee, Karine Lescure, also warns that a mechanical application of the rule would be both unfair and impractical. She said that the rule *nulla poena* should be applied flexibly, "c'est-à-dire comme imposant le respect de la légalité des peines du seul point de vue de leur nature et éventuellement de leur quantum mais rien au-delà." LESCURE, *supra* note 4, at 120-21.

54. *Letter Dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General*, U.N. GAOR, at 13, U.N. Doc. A/47/920; U.N. SCOR, Annex, at 3, U.N. Doc. S/25512 (1993).

55. *Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, U.N. SCOR, Annex 2, at 10, U.N. Doc. S/25575 (1993).

punishments but, obviously attune to the issue of war crimes and crimes against humanity, states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."⁵⁶ Indeed, the *nullum crimen nulla poena* principle did not prejudice the post-World War II trials, and it is troubling to see the issue return half a century later. The judgments at Nuremberg and Tokyo and of the various successor tribunals provide ample authority for custodial sentences up to and including life imprisonment.⁵⁷

Some useful guidance in this respect comes from the European Court of Human Rights which took a less "positivistic" approach to the *nullum crimen nulla poena* problem in two judgments issued on November 22, 1995.⁵⁸ The rule *nullum crimen nulla poena sine lege* is enshrined in Article 7 of the European Convention of Human Rights.⁵⁹ The cases before the Strasbourg Court dealt with English common law and the existence of an offense of spousal rape despite the absence of any legislated text.⁶⁰ The accused argued that while it was open for Parliament to create a new offense of spousal rape, they could not be condemned for rape of their wives given that the common law defines rape as non-consensual intercourse with a woman other than one's wife.⁶¹ Endorsing the report of the European Commission on Human Rights, the European Court affirmed that "laws" as they are meant in the maxim *sine lege* include unwritten laws, and, moreover, these laws may be redefined over time by judges in accordance with changing social values.⁶² The question, said the Court, is not whether a positive law text enacted by Parliament exists prior to

56. ICCPR, *supra* note 17, art. 15.

57. See *Göring*, *supra* note 3; *United States et al. v. Araki et al.*, in R. JOHN PRITCHARD & SONIA MAGBANUA ZAIDE, 20 THE TOKYO WAR CRIMES TRIAL 47,769-49,858 (1981); *United States of America v. Alstötter et al.* ("The Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

58. See *S.W. v. United Kingdom*, 335-B Eur. Ct. H.R. (ser. A) paras. 35-36 (1995) *reprinted in* *S.W. v. United Kingdom*, App. No. 20166/92, 21 Eur. H.R. Rep. para. 1, 32-47 (1995); *C.R. v. United Kingdom*, 335-C Eur. Ct. H.R. (ser. A) paras. 33-34 (1995) *reprinted in* *C.R. v. United Kingdom*, App. No. 20190/92, 21 Eur. H.R. Rep. para. 1, 30-40 (1995).

59. European Convention of Human Rights, *supra* note 36, art. 7. Article 7 provides: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

60. See *S.W.*, *supra* note 58, 21 Eur. H.R. Rep. at 365-73; *C.R.*, *supra* note 58, 21 Eur. H.R. Rep. at 365-73.

61. See *id.* para. 50.

62. See *id.* paras. 46-48.

the commission of the offense, but only whether criminal liability was sufficiently foreseeable and accessible to the accused.⁶³ Significantly, while the Court addressed the existence of the offense itself, it did not even consider the appropriate sanction, assuming that if the offense was known, so was the maximum punishment. The Court said:

From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment [*Kokkinakis v. Greece*, Series A, No. 260-A] the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.

However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.⁶⁴

Thus, the European Court of Human Rights would have little difficulty with a sentencing provision relying on general principles of law or customary law, as was the case at Nuremberg. Can an accused seriously argue that since Nuremberg the possibility of a serious prison sentence for war crimes and crimes against humanity, up to and including life imprisonment, was not "accessible and foreseeable"? It is unfortunate, therefore, that the Security Council implied

63. *See id.* para. 48.

64. *See S.W.*, *supra* note 58, 21 Eur. H.R. Rep. paras. 35-36; *C.R.*, *supra* note 58, 21 Eur. H.R. Rep. paras. 33-34. The requirements of accessibility and foreseeability have been set out by the European Court in other judgments, such as: *Kokkinakis v. Greece*, 260-A Eur. Ct. H.R. (ser. A) *reprinted in* App. No. 14307188, 17 Eur. H.R. Rep. 397 (1993); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) *reprinted in* 2 Eur. H.R. Rep. 245 (1979); *Barthold v. Germany*, 90 Eur. Ct. H.R. (ser. A) *reprinted in* App. No. 8734/79 7 Eur. H.R. Rep. 383 (1985).

the existence of a problem by requiring the sentencing judges to “have recourse to the general practice regarding prison sentences” in Yugoslavia and Rwanda. The Trial Chambers have no choice but to apply this provision, which creates a number of difficulties in its application. However, they need not, it is submitted, go beyond what the Statutes require and insist, as some have proposed, on what would be a mechanical and ultimately exaggerated application of the *nulla poena* principle.

Neither the Statutes nor the Rules suggest a time frame for the appreciation of “general practice.” Given the fact that the objective of the reference to “general practice” seems to be to allay suggestions of retroactivity, the period under consideration should be that prior to adoption of the Statute. In the case of the former Yugoslavia, the Statute was adopted on May 25, 1993, more than a year after the break-up of Yugoslavia. Is it the Statute’s intent to contemplate general practice in Yugoslavia before its break-up or general practice in the successor states? This distinction could be relevant where the death penalty is concerned, because it was abolished in Slovenia, Croatia and Macedonia in 1990 and 1991.⁶⁵ In the case of the Rwanda tribunal, whose Statute was adopted on November 8, 1994, there had been no functioning criminal courts since the outbreak of genocide in April, 1994, so this is not an issue.⁶⁶

As in most countries, there are few useful precedents similar to those cases likely to be heard by the tribunals. Yugoslavia’s Federal Penal Code did define distinct infractions for genocide and war crimes, based on the applicable international conventions, and subject to imprisonment of not less than five years or by death.⁶⁷ According to research conducted by students at Duke University, there have only been two significant trials for genocide in Yugoslavia, one of Mikhailovic et al. in 1946, and the other of Artukovic in 1986.⁶⁸ In

65. See *Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty, Report of the Secretary-General*, U.N. ESCOR, paras. 19, U.N. Doc. E/1995/78 (1995).

66. See William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Seeking Solutions to Impossible Problems*, 8 CRIM. L.F. 523 (1997); COLETTE BRAECKMAN, TERREUR AFRICAINE: BURUNDI, RWANDA, ZAÏRE: LES RACINES DE LA VIOLENCE 319-23 (1996).

67. KRIVICNI ZAKON SOCIJALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE (1977) [CRIMINAL CODE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA], [hereinafter SFRY CRIMINAL CODE (1977)], SLUZBENI LIST SOCIALISTICKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE (SFRJ) [OFFICIAL GAZETTE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA (SFRY)], no. 44/1977, ch. XVI.

68. Dylan Cors & Siobhan Fisher, *National Law in International Criminal Punishment*:

the former, a majority of the defendants were sentenced to death and executed; in the latter, the offender was sentenced to death but died in prison of natural causes.⁶⁹ Another study, prepared by Ivan Jankovic and Vladan Vasilijevic for the International Tribunal, concludes that the number of prosecutions for genocide and war crimes "is far too small to allow for meaningful inferences regarding sentencing practices."⁷⁰ In Rwanda, although various international conventions dealing with international criminal law were ratified and presidential decrees were issued,⁷¹ there was no direct implementation of them within the country's Code Pénal. Even if the offenses had existed, at least in name, it is unlikely that the corrupt regime of President Habyarimana would have tolerated prosecutions for genocide and similar crimes.⁷²

Although the Trial Chamber would be well-founded in recognizing that there simply is no relevant "general practice," the provision in the Statutes must be given an *effet utile*. Thus, in the absence of materials concerning genocide, war crimes, and crimes against humanity specifically, it may be appropriate to look at sentencing practices for the underlying crimes of murder, rape, and assault. In their thorough study, Jankovic and Vasilijevic note, for example, that from 1982 to 1990 there were 749 sentences for murder in Yugoslavia, resulting in twelve death sentences (1.6%), 150 sentences of twenty years imprisonment (20%), and 227 of ten to fifteen years imprisonment (30%). In Rwanda, such an exercise seems to be impossible. Upon verification with the country's Department of Justice, it appears that no meaningful statistics exist; they were probably never kept, and if they were, they were destroyed or lost during the 1994 conflict. In any case, be it in Yugoslavia or Rwanda, basing sentencing practice on those factors involved in the underlying crimes is flawed because it fails to take into account the essential and fundamental aggravating circumstance, namely that the offenses before the

Yugoslavia's Maximum Prison Sentences and the U.N. War Crimes Tribunal, 3 PARKER SCH. J.E. EUR. L. 367 (1997).

69. *Id.*

70. IVAN JANKOVIC & VLADAN VASILJEVIC, SENTENCING POLICIES AND PRACTICES IN THE FORMER YUGOSLAVIA (1994).

71. The Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 47, was ratified by Rwanda on February 12, 1975: *Décret-loi no. 8/75, J.O.*, 1975, at 230, reprinted in *Codes et Lois du Rwanda*, 444 (FILIP REYNTJENS & JAN GORUS EDS., 2d ed., Vol. I 1995).

72. On the culture of impunity in Rwanda under the Habyarimana regime see REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY INTO HUMAN RIGHTS VIOLATIONS IN RWANDA (1993).

ad hoc tribunals are indeed crimes against humanity or war crimes. The tribunals have been created precisely to deal with crimes that are inherently more serious than the underlying common law offenses committed in peacetime. If the crimes are not the same, why should the sentences be the same?

Even a summary examination of ordinary criminal sentences imposed in the former Yugoslavia and Rwanda shows the futility of such an exercise. Quite correctly, sentencing was individualized in order to take into account all circumstances of the offender and of the offense.⁷³ An "ordinary" rape simply cannot be compared with one committed in the types of circumstances likely to be confronted by the ad hoc tribunals. Consideration ought also to be given to the severity of the sentence, taking into account the penitentiary system. In Rwanda, prison conditions prior to the genocide were gravely inferior to recognized international standards.⁷⁴ A five-year sentence in a Rwandan prison was a dramatically more severe punishment than a comparable term in, for example, a Scandinavian institution.

Alternatively, the issue of "general practice" can be examined strictly from the standpoint of the legal texts in force. Such an approach does not entirely respect the terms of the Statutes, but it has the advantage of being straightforward and simple to apply. The French-language version of the Statutes is slightly more open to such an interpretation than the English-language text, referring to "recours à la grille générale des peines appliquée par les tribunaux de l'ex-Yougoslavie," suggesting that the Tribunal is to consider the sentences actually applied rather than those set out in legislation.⁷⁵ Under Yugoslav federal law, the maximum custodial for grave forms of homicide was twenty years' imprisonment.⁷⁶ Although Yugoslav law provided for the death penalty, which was imposed seventeen times from 1982 to 1990, it did not allow for life sentences.⁷⁷ Life impris-

73. See JANKOVIC, *supra* note 70, at Table 9; Cors & Fisher, *supra* note 68.

74. See REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY INTO HUMAN RIGHTS VIOLATIONS IN RWANDA (1993), *supra* note 72.

75. Is the Vienna Convention on the Law of Treaties applicable, at least by analogy, to interpretation of a Security Council resolution? Article 33(4) of the Convention states that where there are authentic texts in more than one language, and where the traditional rules of interpretation fail to resolve the issue, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." Vienna Convention on the Law of Treaties, May 23, 1969, art. 33(4), 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

76. SFRY CRIMINAL CODE (1977), *supra* note 67, art. 38 (setting fifteen-year general maximum for prison terms with the option for a twenty-year sentence under special circumstances).

77. *Id.*

onment was deemed to be too cruel, indeed, presumably crueler than a death sentence. Punishment for rape under the Yugoslav Code was from one to ten years and, in the case of aggravating circumstances such as serious bodily harm to the victim, a minimum of three and a maximum of fifteen years.⁷⁸ Rwandan law also provides for the death penalty, although it has not been imposed since 1982. The Secretary-General of the United Nations considers states that have not imposed the death penalty for ten years to be *de facto* abolitionist;⁷⁹ consequently, Rwanda appears in the list of abolitionist States. The Rwandan *Code Pénal* also provides for life imprisonment,⁸⁰ and for a maximum fixed term of twenty years in cases where life imprisonment is not imposed.⁸¹ Under Rwandan law, every offender may be “rehabilitated” after five years if he or she has demonstrated “good conduct.”⁸² According to the *Code Pénal*, the sentence for premeditated murder is death, and for voluntary homicide it is life imprisonment.⁸³ The sentence provided for rape is from five to ten years and may be doubled in cases of “gang rape” or serious bodily harm to the victim.⁸⁴

These facts simply confirm what we already know: all societies provide very heavy penalties for serious crimes against the person, subject of course to allowance for mitigating and aggravating factors. The same conclusion is reached whether we look at sentencing practice or whether we confine ourselves to the legal texts. These are nothing more than “general principles of law”, as the term is meant by Article 38, paragraph 1(c) of the Statute of the International Court of Justice and Article 28 of the Statute of the International Tribunal for the former Yugoslavia (Article 27 of the Statute for the Rwanda tribunal).⁸⁵

The most vexing question when attempting to apply the “general practice” provision concerns the absence of a life imprisonment sentence in Yugoslav law. The problem was well-known to the Security Council when it adopted the Statute, and had been discussed in the

78. See JANKOVIC, *supra* note 70, at 15.

79. U.N. Doc. E/1995/78, *supra* note 65, para. 4.

80. REYNTJENS & GORUS, *supra* note 71, at 383-430, para. 34.

81. *Id.* para. 35.

82. *Id.* paras. 141-142.

83. *Id.* paras. 311-312.

84. *Id.* paras. 360-361.

85. Rule 89(B) also refers to “general principles of law” for rules of evidence in cases not otherwise provided for in the Yugoslavia Rules, *supra* note 7, and the Rwanda Rules, *supra* note 7, Rule 89(B).

comments on the CSCE draft.⁸⁶ Because the Statute excludes the death penalty, the maximum available sentence would seem to be twenty years.⁸⁷ It has been argued that a life sentence may be imposed because it simply replaces the death penalty. This was stated expressly by the United States Permanent Representative to the United Nations at the time the Yugoslav Statute was adopted by the Security Council.⁸⁸ It appears that the International Tribunal has already made up its mind on the subject, because Article 101(A) of the Rules declares: “[a] convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.” Cherif Bassiouni, taking a rigorous view of the *nulla poena* principle, has written that this rule may “violate the principles of legality and the prohibition against *ex post facto* laws,” and he argues that it should be amended, presumably to limit sentences to twenty years’ imprisonment.⁸⁹

It is clear that the Yugoslav lawmakers viewed life imprisonment as a cruel punishment. They were not alone; other European States such as Norway, Spain, and Portugal, in the interest of enlightened penal policy, have also done away with life imprisonment and established maximum prison terms of twenty to twenty-five years.⁹⁰ During discussion of the “Draft Code of Crimes against the Peace and Security of Mankind” in the International Law Commission, many members expressed reservations about life imprisonment on the ground that it had been abolished in many countries “as contrary to certain fundamental principles of human rights.”⁹¹ While such sentences may fall short in terms of retribution or “just desserts” for offenders, they are surely more conducive to goals such as rehabilitation and reconciliation. Would it be a bad thing for the International Tribunal to follow these progressive guidelines and limit sentences

86. See CORELL, *supra* note 34, at 69.

87. See Cors & Fisher, *supra* note 68.

88. *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. SCOR, at 17, U.N. Doc. S/PV.3217 (1993).

89. BASSIOUNI & MANIKAS, *supra* note 4, at 701-02.

90. See JEAN PRADEL, *DROIT PÉNAL COMPARÉ* 576 (1995).

91. *Draft Code of Crimes Against the Peace and Security of Mankind*, 2 Y.B. INT'L L. COMM'N 79, U.N. Doc. A/CN.4/Ser.A/1991/Add.1 (Part 2), A/46/10, para. 88. See also *Summary Records of the 2208th Meeting*, 1 Y.B. INT'L L. COMM'N 9, 10, 12, U.N. Doc. A/CN.4/SR.2208 at para. 10 (Graefrath), para. 21 (Calero Rodriguez) (1991); *Summary Records of the 2209th Meeting*, 1 Y.B. INT'L L. COMM'N 14, 16, U.N. Doc. A/CN.4/SR.2209, para. 19 (Barboza) (1991); *Summary records of the 2210th Meeting*, 1 Y.B. INT'L L. COMM'N 19, 26, U.N. Doc. A/CN.4/SR.2210, para. 47 (Njenga) (1991); *Summary Records of the 2212th Meeting*, 1 Y.B. INT'L L. COMM'N 53, U.N. Doc. A/CN.4/SR.2212, para. 4 (Solari Tudela).

for crimes committed in the former Yugoslavia to a maximum of twenty years? This would create an anomaly with respect to the Rwanda Tribunal, where the same problem does not arise. Article 21(1) of the Yugoslav Statute states that “[a]ll persons shall be equal before the International Tribunal” (Article 20(1) for the Rwanda Statute).⁹² Although the two tribunals are autonomous, they share the Appeal Chamber. Imposing a different sentence on individuals merely because of the place where the crime was committed is difficult to reconcile with the notion of equality before the law.⁹³

The solution may well be, as some scholars have suggested, to treat the issue of “relevant practice” as directive but not binding. This would enable the Tribunal to impose sentences in excess of twenty years, in the case of the former Yugoslavia, and to achieve consistency in sentencing for crimes committed in the former Yugoslavia and Rwanda. According to Virginia Morris and Michael P. Scharf, “[w]hile the International Tribunal is required to look to the relevant judicial practice of former Yugoslavia for general guidance, it is not bound by that practice in the independent exercise of its functions or in the establishment of its own uniform sentencing guidelines.”⁹⁴ Cherif Bassiouni takes a more severe view of the Statute. He admits that “use of the term ‘shall have recourse to’ is somewhat ambiguous,” adding that “[i]t implies that the prison sentences contained in the codes of the former Yugoslav republics are one source that shall be consulted, but that their provisions are not necessarily binding on the Tribunal.”⁹⁵ Thus, both authorities concur that the Statute can bear the ‘directive but not binding’ interpretation. But, Professor Bassiouni argues, “the Tribunal should follow the law of the former Yugoslavia to satisfy the principles of legality.”⁹⁶ Certainly, the Tribunal must respect the *nulla poena* rule, regardless of the wording of the Statute or the Rules.

Much of the above reasoning appears to have been adopted by the Trial Chamber in its judgment in *Erdemovic*. The three judges note that the relevant provisions of the law in the former Yugoslavia in effect at the time of the events offer little guidance, except to sug-

92. Yugoslavia Statute, *supra* note 4, art. 21(1); Rwanda Statute, *supra* note 5, art. 20(1).

93. In Canada, the criminal law system is governed by federal jurisdiction, and there are discrepancies in terms of procedural and sentencing provisions that may vary from province to province. The Supreme Court of Canada has not considered that this violates the principle of equality before the law. *R. v. Turpin* [1989], 1 S.C.R. 1296, 69 C.R. (3d) 97; 96 N.R. 115.

94. MORRIS & SCHARF, *supra* note 4, at 276.

95. BASSIOUNI & MANIKAS, *supra* note 4, at 700.

96. *Id.*

gest the obvious, namely that Yugoslav law “reserves its most severe penalties” for offenses such as crimes against humanity.⁹⁷ The case law of the courts of the former Yugoslavia is so sparse that the Trial Chamber says no significant conclusions may be drawn to assist in sentencing under the Statute and the Rules.⁹⁸ As has been demonstrated above, the *travaux préparatoires* of the Statute leave no doubt that the reference to general practice arose because of concerns about the *nulla poena* principle. Nevertheless, the Trial Chamber refuses to apply the provision in the Statute in such a way as to give effect to the intent of its drafters, as this “would mean not recognising the criminal nature universally attached to crimes against humanity.”⁹⁹ In conclusion, the Trial Chamber states that:

[R]eference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognised by the community of nations whereby the most severe penalties may be imposed for crimes against humanity. In practice, the reference means that all the accused who committed their crimes on the territory of the former Yugoslavia could expect to be held criminally responsible. No accused can claim that at the time the crimes were perpetrated he was unaware of the criminal nature of his acts and the severity of the penalties sanctioning them. Whenever possible, the International Tribunal will review the legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.¹⁰⁰

Thus, the Trial Chamber eschews the highly positivistic view of many of the Member States, which is supported by some academic commentators, and returns to a more teleological view of the *nulla poena* rule that animated the post-World War II trials. Henceforth, and subject to the possibility of a contrary ruling by the Appeal Chamber, technical arguments focusing on discrepancies between the Statute and the domestic law and practice should be of little assistance to convicted war criminals. The Tribunals can satisfy the principle of legality without having to follow, in a strict sense, the sentencing practice in the former Yugoslavia and Rwanda.

97. *Erdemovic*, *supra* note 10, para. 35.

98. *Id.* para. 37.

99. *Id.* para. 38.

100. *Id.* para. 40.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

The Statute states that when imposing sentences, the Trial Chamber “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”¹⁰¹ In another provision, it declares that “[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not . . . mitigate punishment.”¹⁰² Nevertheless, “[t]he fact that an accused person acted pursuant to an order of a Government or of a superior . . . may be considered in mitigation of punishment if the International Tribunal for the former Yugoslavia [or Rwanda] determines that justice so requires.”¹⁰³ The Rules recall that the Trial Chamber shall take into account the gravity of the offense and the individual circumstances of the offender, as well as any aggravating circumstances and/or mitigating circumstances, “including the substantial cooperation with the Prosecutor by the convicted person before or after conviction.”¹⁰⁴ As the Trial Chamber notes in *Erdemovic*, the Statute and the Rules do not require that all factors enumerated in the relevant provisions be applied in every case, nor do they limit the Tribunal to factors mentioned in these texts.¹⁰⁵

The judgments at Nuremberg and Tokyo and of the various national military tribunals do not as a rule address themselves to aggravating factors. Given the horror of the crimes over which such tribunals had jurisdiction, discussion of aggravating factors must have seemed superfluous. The sole example would appear to be in the *Justice Trial*, where defendant Oswald Rothaug was found guilty of crimes against humanity, and despite the fact that the court found there to be no mitigating circumstances, it also said there was “no extenuation” and sentenced him to life imprisonment rather than death.¹⁰⁶ In *Erdemovic*, the Trial Chamber states that “when crimes against humanity are involved, the issue of the existence of any ag-

101. Yugoslavia Statute, *supra* note 4, art. 24 (2); Rwanda Statute, *supra* note 5, art. 23(2).

102. Yugoslavia Statute, *supra* note 4, art. 7(2); Rwanda Statute, *supra* note 5, art. 6(2).

103. Yugoslavia Statute, *supra* note 4, art. 7(4); Rwanda Statute, *supra* note 5, art. 6(4). This provision echoes the text of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, art. 8, 82 U.N.T.S. 279, 288 (entered into force August 8, 1945).

104. Yugoslavia Rules, *supra* note 7, Rule 101(B)(ii); Rwanda Rules, *supra* note 7, Rule 101(B)(ii).

105. *Erdemovic*, *supra* note 10, para. 43.

106. *Alstötter*, *supra* note 57, at 1156, 1201.

gravating circumstances does not warrant consideration.”¹⁰⁷ The Chamber supports its view by noting that the Statute makes no reference to aggravating circumstances, and that such a view is consistent with the practice of the International Military Tribunal.¹⁰⁸ Curiously, however, the Trial Chamber ignores the very specific and unambiguous reference in the Rules, which state at Rule 101(B)(i) that “[i]n determining the sentence, the Trial Chamber *shall* take into account . . . any aggravating circumstances.”¹⁰⁹ It is interesting that the Rules were adopted by the judges of the Tribunal, and they have been amended frequently as practice has developed. However, such explicit refusal to apply them by three judges of a Trial Chamber would seem to be unprecedented.

The relevance of mitigating factors is somewhat more obvious, as the Trial Chamber notes in *Erdemovic*. “These have particular significance for crimes against humanity because of the intrinsic gravity of the crimes.”¹¹⁰ The post-World War II tribunals also focused upon mitigating factors when sentencing. However, there was no distinct sentencing phase in the Nuremberg trial of the major war criminals. The verdicts of guilt or innocence together with the sentences, where applicable, were pronounced at the same time.¹¹¹ The International Military Tribunal appears to have presumed that guilt for the offenses charged was justification for the death penalty, absent any mitigating factors. In Göring’s case, the judgment simply concludes:

There is nothing to be said in mitigation. For Göring was often, indeed almost always, the moving force, second only to his leader. He was the leading war aggressor, both as political and as military leader; he was the director of the slave labor program and the creator of the oppressive program against the Jews and other races, at home and abroad. All of these crimes he has frankly admitted. On some specific cases there may be conflict of testimony, but in terms of the broad outline his own admissions are more than sufficiently wide to be conclusive of his guilt. His guilt is unique in its enormity. The record discloses no excuses for this man.¹¹²

107. *Erdemovic*, *supra* note 10, para. 45.

108. *See id.*

109. Yugoslavia Rules, *supra* note 7, Rule 101(B)(i) (emphasis added).

110. *Id.* para. 46.

111. *See Göring*, *supra* note 3, at 524-587.

112. *Id.* at 527.

Of course, the full scope of the accused atrocious conduct was reviewed in the judgment on the merits, and in this sense aggravating factors were addressed indirectly. Often, the sentencing portion of judgments began, as in Göring's case, with the simple phrase "there is nothing to be said in mitigation"¹¹³ or, in other cases, with the phrase "in mitigation"¹¹⁴ followed by a succinct consideration of the relevant factors.

In the *Hostage Case*, the American Military Tribunal presented a rare discussion of relevant mitigating factors:

Throughout the course of this opinion we have had occasion to refer to matters properly to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed, and the provocation, if any, that contributed to its commission.¹¹⁵

The Tribunal also said, "[i]t must be observed, however, that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defense."¹¹⁶

Following the post-war trials, the United States set up an Advisory Board on Clemency for War Criminals, attached to the High Commissioner for Germany. No appellate remedy had been provided, and this clemency review was seen as somewhat of a substitute. The Board's report noted that a few defendants had "the courage and the character by one means or another to remove themselves" from appalling assignments, but that "the main impression given, and one that is most disappointing, is that the majority of the defendants still seem to feel that what they did was right, in that they were doing it under orders."¹¹⁷ The High Commissioner for Germany later announced several factors that he considered in dealing with requests for clemency, including "the relatively subordinate authority and responsibility of the defendants," the fact that a defendant "had the

113. See, e.g., *Göring*, *supra* note 3 (Göring at 527; Keitel at 536; Jodl at 571). See also *Pohl*, *supra* note 3 (Klemm at 1107; Rothaug at 1156; Oeschey at 1170).

114. *Göring*, *supra* note 3, (Speer at 579; Von Neurath at 582).

115. United States of America v. Wilhelm List *et al.* ("Hostage Trial"), 11 T.W.C. 757, 1317 (1948).

116. *Id.*

117. *Report of the Advisory Board on Clemency for War Criminals to the United States High Commissioner for Germany*, 15 T.W.C. 1157, 1161 (1948).

courage to resist criminal orders at personal risk,” and “the acute illness of the prisoner or other special circumstances of similar nature.”¹¹⁸

During the drafting of the Statute of the International Tribunal for the Former Yugoslavia, the only contribution to address the issue of aggravating and mitigating factors in sentencing came from the Committee of French Jurists. It urged respect for “[t]he fundamental principles of proportionality and individualization,” and suggested that the Tribunal could consider the gravity of the offense (intention, premeditation, motives and goals of the perpetrator, state of mind, etc.), the values safeguarded by treating the act as a serious crime (human dignity, right to life, right to physical and/or moral integrity, right to own property), the extent of harm caused (either actual or threatened, number of persons involved, value of property affected), as well as the personality of the offender, his or her background and personal situation, and his or her conduct following the offense.¹¹⁹ The United States later made proposals concerning the Rules, and these appear to have been substantially accepted. “In reaching a sentence, the Trial Chamber shall take into account such factors as the gravity of the offense, the individual circumstances of the convicted person, and the evidence submitted during presentencing, such mitigating circumstances as meaningful and substantial cooperation provided to the Prosecutor by the accused, and the extent to which any penalty imposed by a national court on the same person for the same act has already been served.”¹²⁰

The only mitigating factor specifically allowed by the Statutes of the ad hoc tribunals is that of superior orders.¹²¹ Although entitled to do so by its Statute,¹²² the Nuremberg Tribunal refused in practice to admit the argument of superior orders in mitigation. In Keitel’s case it said, “[s]uperior orders, even to a soldier, cannot be considered in

118. *Statement of the High Commissioner for Germany, 31 January 1951, Upon Announcing His Final Decisions Concerning Requests for Clemency for War Criminals Convicted at Nuremberg*, 15 T.W.C. 1176, 1177 (1948).

119. *Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General*, U.N. SCOR, paras. 129-31, U.N. Doc. S/25266 (1993).

120. *Suggestions Made by the Government of the United States of America, Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, U.N. Doc. IT/14, para. 26.3, reprinted in 2 MORRIS & SCHARF, *supra* note 4, at 550.

121. Yugoslavia Statute, *supra* note 4, art. 7(4); Rwanda Statute, *supra* note 5, art. 6(4).

122. *Agreement for the Prosecution and Punishment of Major the War Criminals of the European Axis*, *supra* note 103, art. 8.

mitigation where crimes so shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.¹²³ It said the same of Jodl: "Participation in such crimes as these has never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes."¹²⁴ Superior orders were viewed as a mitigating circumstance by the British Military Tribunal in *United Kingdom v. Eck (Peleus Trial)*, and brought a reduced sentence of fifteen years' imprisonment.¹²⁵ In an American case, superior orders were admitted as a mitigating factor where an accused "exercised no initiative to any marked degree"; he was sentenced to hard labor for five years.¹²⁶ In the *High Command Trial*, Wilhelm von Leeb received the very light sentence of three years in prison, with the tribunal noting that there was much to be said in mitigation. Von Leeb was not a Nazi, and there was no evidence of criminal orders signed by him. The United States Military Tribunal specifically noted that this was a case for application of the excuse of superior orders not as a defense but as a factor in mitigation of punishment.¹²⁷

There may be cases where orders were followed, but only after being initially resisted. For this reason, in the *Peleus Trial*, the ship's engineer received life imprisonment rather than death by firing squad. According to the official commentary published with the case report, "the Court probably took into consideration, on the one hand, that he did, to a certain extent, oppose the order given by the commander to the other accused (not to him), and that, on the other hand, he had, without being personally ordered, eventually taken part in the shooting."¹²⁸ In the *Einsatzgruppen Trial*, Gustav Nosske received a life sentence, the tribunal noting that on one occasion he opposed a superior order involving killing.¹²⁹ Erwin Schulz also received a sentence of twenty years. The court pointed out that he was courteous in court, had asked to be relieved of his post, and had protested an execution order, adding that "it can be said in his behalf that, con-

123. *Göring*, *supra* note 3, at 536.

124. *Id.* at 571.

125. *Eck*, *supra* note 2, at 21.

126. *United States of America v. Sawada et al.*, 5 L.R.T.W.C. 1, 7-8 (1948).

127. *United States of America v. Von Leeb ("High Command Trial")*, 11 T.W.C. 1, 563 (1948).

128. *Eck*, *supra* note 2, at 21.

129. *United States of America v. Ohlendorf et al. ("Einsatzgruppen Trial")*, 4 T.W.C. 1, 558 (1948), 4 L.R.T.W.C. 470, 15 Ann. Dig. 656 (1948).

fronted with an intolerable situation, he did attempt to do something about it.”¹³⁰ Hubert Lanz, a defendant in the *Hostage Case*, was sentenced to twelve years’ imprisonment with credit for time served in light of evidence that he had refused or resisted unlawful orders.¹³¹

In the Nuremberg Trial, Rosenberg argued that he had objected to the excesses and atrocities committed by his subordinates. However, an unimpressed Tribunal noted that “these excesses continued and he stayed in office until the end.”¹³² Frank too argued that he had objected to Hitler, and the Tribunal accepted the fact that he might have objected occasionally to certain policies. The Tribunal also noted, however, Frank’s involvement in the atrocities.

But it is also true that Frank was a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave laborers of over a million Poles; and in a programme involving the murder of at least three million Jews.¹³³

Seyss-Inquart, who was responsible for administration of the Netherlands, made similar arguments. The Tribunal accepted evidence showing that he opposed some of the more extreme measures and did not control all of the Nazi activities in the occupied territory, “[b]ut the fact remains that Seyss-Inquart was a knowing and voluntary participant.”¹³⁴ Von Neurath fared better on this count. According to the Nuremberg judgment:

In mitigation it must be remembered that he did intervene with the Security Police and SD for the release of many of the Czechoslovaks who were arrested on 1 September 1939, and for the release of students arrested later in the fall. On 23 September 1941 he was summoned before Hitler and told that he was not being harsh enough and that Heydrich was being sent to the Protectorate to combat the Czechoslovakian resistance groups. Von Neurath attempted to dissuade Hitler from sending Heydrich, and when he

130. *Id.* at 519-521. The sentence was later reduced to fifteen years. *Announcement of Decisions by the United States High Commissioner for Germany, 31 January 1951, Upon Review of the Sentences Imposed by Tribunals Established Pursuant to Ordinance No. 7, 15 T.W.C. 1180, 1187 (1948).*

131. *Wilhelm, supra* note 115, at 1312, 1319.

132. *Göring, supra* note 3, at 541, 544.

133. *Id.* at 543-44.

134. *Id.* at 576.

was not successful offered to resign. When his resignation was not accepted he went on leave, on 27 September 1941, and refused to act as Protector after that date. His resignation was formally accepted in August 1943.¹³⁵

The issue of superior orders involves an assessment of where the defendant stood within the military or civilian hierarchy. The lower the subordinate is found in the hierarchy, the more the excuse of superior orders is likely to be accepted in mitigation of sentence. Moreover, this is coupled with the notion that resistance to superior orders by a low-level functionary or soldier would be of no effect, while a more senior individual might well have influenced the order by objecting. The British Military Tribunal imposed relatively light sentences, such as five years' imprisonment, on "small people with very little responsibility" who had been conscripted into service of the Nazis.¹³⁶ In the *Einsatzgruppen Trial*, Felix Ruehl, who belonged to the *Einsatzgruppen* for only three months and took no active part in executive operations, but who was a member of the Gestapo and the SS, received a sentence of ten years. The court noted Ruehl's low rank, observing that his lack of objection to Nazi atrocities was of no significance because he would not have been listened to in any case.¹³⁷ In the *Justice Trial*, the court cited individual mitigating factors in rendering custodial sentences less than life imprisonment. In sentencing him to seven years, with credit for time served, the court noted that Curt Rothenberger had been deceived and abused by his superiors, and that "he was not sufficiently brutal to satisfy the demands of the hour."¹³⁸ As for Ernst Lautz, a German prosecutor, the court said that "[t]here is much to be said in mitigation of punishment," including the fact that Lautz had not been active in the Nazi Party and that he had resisted efforts to influence him. Lautz was sentenced to ten years, with credit for time served.¹³⁹ Even the Nuremberg trial of the major war criminals recognized distinctions of this sort. In Funk's case, it stated, "[i]n spite of the fact that he occupied important official positions, Funk was never a dominant figure in the various programs in which he participated. This is a mitigating fact of

135. *Id.* at 582.

136. *Kramer*, *supra* note 2, at 124-25.

137. *Ohlendorf*, *supra* note 129, at 581.

138. *Alstötter*, *supra* note 57, at 1118, 1200.

139. *Id.* at 1128, 1200.

which the Tribunal takes notice.”¹⁴⁰ Funk was sentenced to life imprisonment but was released from Spandau prison in 1957.¹⁴¹ In the one case at the Tokyo trial where the Tribunal accepted mitigating factors, it said that “the military completely controlled Japan while [Shigemitsu] was Foreign Minister so that it would have required great resolution for any Japanese to condemn [war crimes].”¹⁴²

The issue of superior orders was central to the sentencing debate in *Erdemovic*. After considering the fact that the International Military Tribunal had not accepted superior orders as a mitigating factor in the case of the major war criminals, the Trial Chamber notes that “the rejection by the Nuremberg Tribunal of the defense of superior orders, raised in order to obtain a reduction of the penalty imposed on the accused, is explained by their position of superior authority and that, consequently, the precedent setting value of the judgment in this respect is diminished for low ranking accused.”¹⁴³ The Trial Chamber adds that it is not enough, however, to establish a subordinate position. The accused must demonstrate that superior orders did in fact influence his or her behavior: “If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.”¹⁴⁴ And citing a United Kingdom military tribunal sitting at the close of World War II, the Trial Chamber notes “a man who does things only under threats may well ask for greater mercy than one who does things *con amore*.”¹⁴⁵ In the specifics of *Erdemovic*, the Trial Chamber found insufficient evidence to accept what was really a form of duress argument,¹⁴⁶ although it accepted as relevant the fact that he had followed orders and held a subordinate position in the military hierarchy.¹⁴⁷

Superior orders is expressly excluded as a defense in the Statutes

140. *Cöring*, *supra* note 3, at 552. Telford Taylor writes: “I could not be sorry that anyone had escaped the gallows, but I saw no basis for Funk’s ‘mitigating facts’ which spared his life. Certainly Funk’s range of crimes was far wider than Streicher’s, and it was annoying to see Funk profiting by his own cowardice when others were facing death bravely.” TAYLOR, *supra* note 1, at 599.

141. See TAYLOR, *supra* note 1, at 617.

142. PRITCHARD & ZAIDE, *supra* note 57, at 49,831- 49,832.

143. *Erdemovic*, *supra* note 10, paras. 51, 52-53.

144. *Id.* para. 53.

145. *Id.* para. 54.

146. *Id.* para. 91.

147. *Id.* paras. 92-95.

of the ad hoc Tribunals, as it was at Nuremberg.¹⁴⁸ In *Erdemovic*, the Trial Chamber notes that the provisions in the Statute dealing with superior orders are “practically identical” to those applicable at Nuremberg.¹⁴⁹ Other defenses which may be admissible but which are rejected by the court may be renewed with respect to sentence, as they are also mitigating factors. All of the classic justifications and excuses ought to be considered in this context, including necessity, duress,¹⁵⁰ voluntary intoxication, automatism, insanity and self-defense. In the *Erdemovic* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that “in general, national criminal practice in this respect authorises taking into consideration any grounds of defence which might have been rejected as grounds for exculpating the accused.”¹⁵¹ Although rejecting the possibility of duress as a defense, the Trial Chamber recognized that it is still germane in the context of sentencing:

On the basis of the case-by-case approach and in light of all the elements before it, the Trial Chamber is of the view that proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided. Thus, the defence of duress accompanying the superior order will, as the Secretary-General seems to suggest in his report, be taken into account at the same time as other factors in the consideration of mitigating circumstances.¹⁵²

Command responsibility as a form of criminal participation is specifically provided for in the Statutes of the two ad hoc tribunals. It imposes criminal liability on a “superior” where “he or she knew or had reason to know that the subordinate was about to commit

148. Yugoslavia Statute, *supra* note 4, art. 7(4); Rwanda Statute, *supra* note 5, art. 6(4).

149. *Erdemovic*, *supra* note 10, para. 48.

150. For a case where duress was rejected as a mitigating factor, see *United Kingdom v. Tesch et al.* (“Zyklon B Case”), 1 L.R.T.W.C. 93, 102 (1947).

151. *Erdemovic*, *supra* note 10, para. 56.

152. *Id.* para. 20. The Tribunal acknowledged that the defendant was entitled to choose to plead guilty, “as established in common law legal systems,” *id.* para. 13, but considered that if the facts disclosed a complete defense, this would “eliminate the *mens rea* of the offence and therefore the offence itself,” *id.* para. 14, thereby invalidating the guilty plea. Consequently, it gave summary consideration to the admissibility of a duress defense, but ultimately rejected it para. 83. The reference to the Secretary-General’s report is a sentence in the Secretary-General’s report on the International Tribunal which states that superior orders, although excluded as a defence, could be considered “in connection with other defences such as coercion or lack of moral choice.” *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), *supra* note 21, para. 57.

[violations of the Statute] or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”¹⁵³ Some of the indictments issued by the *ad hoc* tribunals suggest that the principle applies not only to military commanders, but also to civilians acting in a non-military capacity.¹⁵⁴ In *United States of America v. Yamashita*, which established the principle of command responsibility, it was argued that the death sentence was “disproportionate” to a crime that did not include any criminal intent, and that was no more than “unintentional ordinary negligence.” This plea was rejected.¹⁵⁵ However, in *Canada v. Meyer (Abbaye Ardenne case)*, Kurt Meyer was held responsible on the basis of the command responsibility principle and was sentenced to death. However, the Convening Authority reviewed the sentence and “commuted the death sentence to life imprisonment” on the grounds that Meyer’s degree of responsibility did not warrant the extreme penalty.”¹⁵⁶

War crimes tribunals have taken into account efforts by an accused to reduce suffering of the victims.¹⁵⁷ At the trial of Waldemar Von Radetzky, in the *Einsatzgruppen Trial*, the court stated that “he did on occasion endeavor to assist potential victims of the Fuehrer Order and in one particular instance issued passes which allowed some persons to escape from the camp in which there were being held.”¹⁵⁸ Van Radetzky received a sentence of twenty years.¹⁵⁹ In the *Hostage Case*, Ernst Dehner received a seven-year sentence, with credit for time served. The Tribunal found that he had attempted to apply the actual rules of warfare, and not Nazi deviations from them. The Tribunal concluded that, “[s]uch examples of conscientious efforts to comply with correct procedure warrant mitigation of the

153. Yugoslavia Statute, *supra* note 4, art. 7(3); Rwanda Statute, *supra* note 5, art. 6(3).

154. The Rule 61 decision in the case of civilian leader Karadzic recognizes the applicability of the command responsibility principle, although reference is made to the fact that he was also the supreme military commander by virtue of his position. See Prosecutor v. Karadzic and Mladic, *Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95-5-R61, IT-95-18-R61, para. 82 (July 11, 1996).

155. *United States of America v. Yamashita*, 4 L.R.T.W.C. 1, 36-37 (1948). On the Yamashita case, see A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* 173-74 (1949); Ann Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS Q. 303 (1992).

156. *Canada v. Meyer (“Abbaye Ardenne Case”)*, 4 L.R.T.W.C. 97, 109 (1948).

157. See, e.g., *Kramer*, *supra* note 2, at 124-25 (Ilse Forster).

158. *Ohlendorf*, *supra* note 129, at 578.

159. *Id.*

punishment.”¹⁶⁰ The United States Military Tribunal considered as mitigating factors the fact that Flick sheltered a conspirator in the attempt to murder Hitler, and that Steinbrinck attempted to respect the laws of war by rescuing survivors of a sinking ship.¹⁶¹ Albert Speer received a mitigated sentence of twenty years’ imprisonment at Nuremberg, principally because:

In mitigation it must be recognized that Speer’s establishment of blocked industries did keep many laborers in their homes and that in the closing stages of the war he was one of the few men who had the courage to tell Hitler that the war was lost and to take steps to prevent the senseless destruction of production facilities, both in occupied territories and in Germany. He carried out his opposition to Hitler’s scorched earth program in some of the Western countries and in Germany by deliberately sabotaging it at considerable personal risk.¹⁶²

Age or infirmity are among the classic “personal circumstances” to be taken into account. In *United States of America v. Krupp (Krupp Trial)*, several offenders were elderly and in ill health. The court expressed concern about the consequences of a prison sentence, and although it took no specific action, it urged the Military Governor, who was in charge of supervising the execution of the sentence, to act accordingly.¹⁶³ According to United States prosecutor Telford Taylor, Nuremberg defendant Von Neurath, whose sentence was set at fifteen years, “undoubtedly benefited by his age.”¹⁶⁴ In *United States of America v. Alstötter (Justice Trial)*, Franz Schlegelberger, a distinguished German jurist, was in his late seventies and too ill to attend much of his trial. Although the court described him as a tragic character, noting that he had resigned his position within the Nazi judicial hierarchy, it nevertheless sentenced him to life imprisonment.¹⁶⁵ There is one reported case of a defendant who was too ill to attend much of the trial, and for whom a custodial sentence would have been “equivalent to a death sentence.”¹⁶⁶ Erhard Milch, originally

160. *Wilhelm*, *supra* note 115, at 1300.

161. *United States of America v. Flick et al.* (“Flick Trial”), 9 L.R.T.W.C. 1, 29 (1949).

162. *Göring*, *supra* note 3, at 579.

163. *United States of America v. Krupp von Bohlen et al.* (“Krupp Trial”), 10 L.R.T.W.C. 69, 158 (1949).

164. TAYLOR, *supra* note 1, at 599.

165. *Alstötter*, *supra* note 57, at 1199-1200.

166. *United States of America v. Weizsaecker et al.* (“Ministries Case”), 14 T.W.C. 1, 869-70 (1948).

sentenced to life imprisonment, had his term reduced to fifteen years following a recommendation by the Advisory Board on Clemency. Milch had invoked "instability of temperament due to nervous strain, aggravated by a head injury."¹⁶⁷ Similarly, in the *RuSHA Case*, dissenting judge Daniel T. O'Connell opposed not only life imprisonment for the accused, but also "sentences which in duration carry the person to an age which, based upon normal life expectancy, is the equivalent of a life sentence."¹⁶⁸ In *Erdemovic*, the Trial Chamber considers in mitigation the relatively young age of the accused (twenty-three years) and his family status (recent common law marriage, two-year old child).¹⁶⁹

The place and conditions of detention should certainly be considered as mitigating factors in the sentencing determination. The Statute of the Yugoslav Tribunal declares that "[i]mprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons."¹⁷⁰ The Secretary-General considered that "given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia,"¹⁷¹ a view which the Trial Chamber in *Erdemovic* says that it shares.¹⁷² The Statute of the Rwanda Tribunal has a similar provision, although it does expressly contemplate the possibility of detention within Rwanda.¹⁷³ At present, however, there is no prison in Rwanda that even approaches internationally recognized minimum prison conditions. Short of a major prison construction program in Rwanda, financed by international donors, it is unlikely that condemned prisoners will be detained in that country. In the Yugoslav tribunal at the very least, and probably the Rwanda tribunal, prisoners will therefore be isolated from their families and probably from other support sys-

167. *Announcement of Decisions by the United States High Commissioner for Germany, 31 January 1951, Upon Review of the Sentences Imposed by Tribunals Established Pursuant to Ordinance No. 7*, 15 T.W.C. 1180, 1181 (1948).

168. *United States v. Greifelt et al. ("RuSHA Case")*, 5 T.W.C. 1, 169 (1948).

169. *Erdemovic*, *supra* note 10, para. 111.

170. *Yugoslavia Statute*, *supra* note 4, art. 27.

171. *Report of the Secretary-General*, *supra* note 21, para. 121.

172. *Erdemovic*, *supra* note 10, para. 70.

173. The Rwanda Statute provides: "Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda." *Rwanda Statute*, *supra* note 5, art. 26.

tems. They may find themselves in relative isolation, in a culturally unfamiliar environment, and unable to communicate and socialize with fellow inmates and prison personnel. The situation will possibly be even harsher in the case of protected or segregated prisoners, and particularly informers, who find themselves set apart even from their own compatriots and ostracized, even by ordinary prisoners in the various foreign institutions. If the place of detention is far from the former Yugoslavia or Rwanda, it may be difficult to ensure adequate psychiatric and related services in Serbo-Croat or Kinyarwanda. Consequently, it seems important that the sentencing tribunal be in a position to assess certain aspects of the conditions of detention, as these most definitely bear on the gravity of the sentence.¹⁷⁴ In *Erdemovic*, the Trial Chamber quite appropriately accords considerable attention to these matters. Although it admits that the Statute and the Rules confer responsibility for aspects of sentence administration to the Registrar and the President, “[t]he Trial Chamber will, however, take account of the place and conditions of enforcement of the sentence in an effort to ensure due process, the proper administration of justice and equal treatment for convicted persons.”¹⁷⁵ In practice, it was impossible for the Trial Chamber to apply this principle fully because the Registrar had not yet determined where sentences might be served. It did, however, recognize as a mitigating factor in sentencing “the fact that the sentence pronounced will be served in a prison far from his own country.”¹⁷⁶

Although there is no suggestion of this in the Statute, the Rules specifically provide that “the substantial cooperation with the Prosecutor by the convicted person before or after conviction” shall be a mitigating factor in sentencing.¹⁷⁷ According to Morris and Scharf:

The reduction of sentence based on cooperation with the Prosecutor represents a compromise between the judges who favored the U.S. proposal for granting full or limited testimonial immunity in exchange for meaningful cooperation with the Prosecutor, and those who opposed conferring any kind of immunity on the perpetrators of the crimes referred to in the Statute as a matter of international law and policy. The proposal was intended to encourage low-level offenders who actually committed the heinous acts to turn

174. See *Erdemovic*, *supra* note 10, paras. 74-75.

175. *Id.* paras. 69-70.

176. *Id.* para. 111.

177. Yugoslavia Rules, *supra* note 7, Rule 101(B)(ii); Rwanda Rules, *supra* note 7, Rule 101(B)(ii).

“State’s evidence.” There were suggestions that it was less important to convict and punish the “mere rapist” than it was to convict and punish the person who gave the orders and established the policies without which the atrocities would never have been carried out on such a widespread and massive scale. Providing for the possibility of a reduced sentence is intended to provide the necessary incentive for those who would be inclined to cooperate. Given the fact that the alleged perpetrators are faced with the prospect of a life sentence if convicted, the incentive provided by the possibility of a reduced sentence should not be underestimated.¹⁷⁸

A guilty plea is a form of cooperation with the prosecutor that should be considered as a mitigating factor. It spares the prosecution considerable effort and expense, and may eliminate the need for victims to undergo the pain and embarrassment of public testimony. It is also, of course, a sign of remorse that is germane to sentencing. The Trial Chamber of the International Tribunal for the Former Yugoslavia considers that in addition to “substantial co-operation,” it may, in the same spirit, “take into account that the accused surrendered voluntarily to the International Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse or contrition, and stated his willingness to supply evidence with probative value against other individuals for crimes falling within the jurisdiction of the International Tribunal.”¹⁷⁹ The Trial Chamber, however, adds a condition: “[I]f this manner of proceeding is beneficial to the administration of justice, fosters the co-operation of future witnesses, and is consistent with the requirements of a fair trial.”¹⁸⁰ In *Erdemovic*, the Trial Chamber did in fact accept as mitigating factors the sincere remorse of the accused¹⁸¹ and his cooperation with the Office of the Prosecutor.¹⁸²

Recognition of guilty pleas as a mitigating factor in sentencing opens the door to “plea bargaining.” This practice, which is well-known in common law courts, enables a defendant and prosecutor to negotiate the sentence in return for a guilty plea.¹⁸³ The prosecutor will frequently drop or reduce some of the counts in exchange for a deal. Normally, an agreement between prosecutor and defendant

178. MORRIS & SCHARF, *supra* note 4, at 279-80.

179. *Erdemovic*, *supra* note 10, para. 55.

180. *Id.*

181. *Id.* paras. 96-98.

182. *Id.* paras. 99-101.

183. For justifications of plea bargaining, see *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970).

does not formally bind the court, although judges are generally respectful of such practices and appear to value the contribution they make to the smooth operation of criminal justice. If the ad hoc tribunals recognize a guilty plea as a factor in mitigation, this will no doubt encourage such a practice. Judge Richard J. Goldstone, former Prosecutor for the two tribunals, addressed the issue indirectly in Regulation No. 1 of 1994 (amended May 17, 1995), entitled "Prosecutor's Policy on Nolle Prosequi of Accomplices." Admitting that in some cases it may be fitting to negotiate with an accused where he or she is prepared to cooperate in return for certain advantages, such as immunity, he wrote:

Recognizing that in principle international criminal justice should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by refraining from prosecuting an accomplice in return for the testimony of the accomplice against another offender);

But noting that it has long been recognised that in some cases this course may be appropriate in the interests of justice.¹⁸⁴

Judge Goldstone stated that in making such an assessment, account should be taken of the degree of involvement of the accused and the relative strengths and weaknesses of prosecution evidence. He declared that it was "permissible" for the Prosecutor not to indict an accomplice in return for cooperation.¹⁸⁵ The entire Regulation could be made to apply to plea bargaining, *mutatis mutandis*, as the arguments made and the points raised are equally relevant.

Although plea bargaining offers considerable advantages to both defense and prosecution, it is not without its flaws. Plea bargaining may discredit the integrity of the entire judicial process and, in some cases, may incite defendants to renounce their rights to full answer and defense because they are seduced by the advantages of a reduced prison term. The problem is particularly acute when the risks to the accused are great, notably in cases where the prosecution seeks life imprisonment or death. Some states in the United States have legislation that actually provides that a guilty plea will entitle the convicted person to life imprisonment instead of the death penalty. The

184. Richard J. Goldstone, *Prosecutor's Policy on Nolle Prosequi of Accomplices*, Regulations No. 1 of 1994 (as amended May 17, 1995), in BASIC DOCUMENTS 135 (1995).

185. *Id.* at 137.

constitutionality of such provisions has been upheld by the United States Supreme Court.¹⁸⁶ But the Court cautioned that “[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.”¹⁸⁷ In a recent communication presented to the United Nations Human Rights Committee, the respondent State party argued that plea bargaining was a legitimate technique used by prosecutors in capital cases in order to obtain guilty pleas. According to the published views: “The Committee notes that the author claims that the plea bargaining procedures, by which capital punishment could be avoided if he were to plead guilty, further violates his rights under the Covenant. The Committee finds this not to be so in the context of the criminal justice system in Pennsylvania.”¹⁸⁸

V. OBJECTIVES OF SENTENCING

Classical criminal law theory proposes several objectives for punishment: deterrence, retribution, protection of the public, and rehabilitation. Some of these are echoed in the resolutions setting up the two international tribunals. For example, referring implicitly to the notion of deterrence, the Security Council affirmed its conviction that the work of the two tribunals “will contribute to ensuring that such violations are halted.”¹⁸⁹ The effective prosecution and punishment of offenders is therefore intended to deter others from committing the same crimes, and perhaps to convince those already engaged in such behavior that they should stop. The Security Council also alludes to retribution when it says that the violations must be “effectively redressed.”¹⁹⁰ However, the Statutes themselves are rather laconic as to the criteria that should guide the judges in establishing appropriate levels of punishment, and they make no specific mention of such factors as deterrence, whether general or individual, or retribution. They state simply, “In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted per-

186. See *United States of America v. Jackson*, 390 U.S. 570 (1968); *Brady v. United States*, 397 U.S. 742 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Corbett v. New Jersey*, 439 U.S. 212 (1978).

187. *United States of America v. Jackson*, 390 U.S. 570, 581 (1968)

188. *Cox v. Canada* (no. 539/1993), 15 H.R.L.J. 410, at 416 (1995).

189. S.C. Res. 827, *supra* note 4, at 1.

190. *Id.*

son.”¹⁹¹

In *Erdemovic*, the Trial Chamber turns to the declarations of Security Council members at the time Resolution 827 was adopted in May 1993. These show, according to the Trial Chamber,

that they saw the International Tribunal as a powerful means for the rule of law to prevail, as well as to deter the parties to the conflict in the former Yugoslavia from perpetrating further crimes or to discourage them from committing further atrocities. Furthermore, the declarations of several Security Council Members were marked by the idea of a penalty as proportionate retribution and reprobation by the international community of those convicted of serious violations of international humanitarian law.¹⁹²

The Trial Chamber continues:

The International Tribunal's objectives as seen by the Security Council—i.e. general prevention (or deterrence), reprobation, retribution (or “just deserts”), as well as collective reconciliation—fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity.¹⁹³

Much of the struggle for international justice, and the battle against impunity, is a search for truth. As United States permanent representative Madeleine Albright told the Security Council at the time of the adoption of the Statute for the Yugoslav tribunal, in May 1993, “Truth is the cornerstone of the rule of law and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.”¹⁹⁴ The eternal contribution of the Nuremberg judgment is not so much the individual punishment of the handful of accused, most of whose names have been long forgotten

191. Yugoslavia Statute, *supra* note 4, art. 24(2); Rwanda Statute, *supra* note 5, art. 23(2).

192. *Erdemovic*, *supra* note 10, para. 58. The statements are contained in the *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting*, U.N. SCOR, U.N. Doc. S/PV.3175. The Trial Chamber refers specifically to comments by France, Morocco, Pakistan, United Kingdom, Hungary and New Zealand.

193. *Erdemovic*, *supra* note 10, para. 58.

194. *Provisional Verbatim Record of the Three Thousand Two-Hundred and Seventeenth Meeting*, U.N. SCOR, U.N. Doc. S/PV.3217, at 12 (1993).

by all but the experts, but rather in its affirmation of the facts of Nazi atrocities. The jurisprudence of Nuremberg and the subsequent national military tribunals remains the most authoritative argument against revisionists who attempt to deny the existence of the gas chambers at Auschwitz and the other horrors of Nazi rule. Yet, once the truth is determined and guilt or innocence pronounced, the court's work is not completed. It must also render an individualized sentence, one that fits the crime. The precedents set by the post-World War II tribunals, as well as general principles derived from comparative criminal law, provide some guidance in this respect.

At Nuremberg and Tokyo, and in the various successor trials of the national military tribunals, retribution played a major role in fixing sentences, as shown by widespread use of the death penalty.¹⁹⁵ The statement by Winston Churchill on October 25, 1941 focused exclusively on retribution as the objective of war crimes prosecutions.¹⁹⁶ Yet it is interesting to note the Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders of 1946, drafted by Prosecutor Robert H. Jackson, which argued:

Punishment of war criminals should be motivated primarily by its deterrent effect, by the impetus which it gives to improved standards of international conduct and, if the theory of punishment is broad enough, by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends. The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied case. A purely political disposition of the Axis leaders without trial, however disguised, may be regarded eventually, and probably immediately, as adoption of the methods of the Axis itself. It will retard progress towards a new concept of international obligations simply because those who have sought in this war to preserve democracy will have made their most spectacular dealing with the vanquished a negation of democratic principles of justice. They will have adopted methods repugnant alike to Anglo-American and Continental traditions.¹⁹⁷

195. See discussion at *Erdemovic*, *supra* note 10, para. 62.

196. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 88 (1948).

197. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 14 (1992).

As the Trial Chamber notes in *Erdemovic*, retribution was also a major factor in the death sentence handed down by the Supreme Court of Israel in the *Eichmann case*.¹⁹⁸ Historically, retribution derives from the *lex talionis*: "If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered."¹⁹⁹ Retribution is synonymous with vengeance. Accompanying the new focus of human rights law upon the battle against impunity, the significance of retribution as an objective in sentencing is heard with disconcerting frequency. Activists whose social vision is normally pervaded by tolerance and forgiveness become, in the name of retribution, militant advocates of severe punishment. It is often said that society cries out for punishment or justice. Retributive theorists argue that if the authorities fail to punish, then individual self-help will take over, and vigilante action will become the rule.²⁰⁰ But while it may be important to recognize the danger of such developments, surely a human rights approach must aim at combating these tendencies in society, which run counter to the rule of law and the protection of individual rights. Hannah Arendt, in *Eichmann in Jerusalem*, wrote:

We refuse, and consider as barbaric, the propositions that "a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal" (Yosal Rogat). And yet I think it is undeniable that it was precisely on the ground of these long-forgotten

198. *Erdemovic*, *supra* note 10, para. 62.

199. *Leviticus* 24:19-20. Although the contemporary perception of *lex talionis* focuses on its retributive aspect, originally, it represented a progressive development in penology because of its insistence upon proportional punishments. *Lex talionis* was an early expression of the notion that "the punishment shall fit the crime."

200. *Wallen v. Baptiste (no. 2)*, 45 W.I.R. 405, 443 (Court of Appeal, Trinidad and Tobago, July 27th 1994): "When law-abiding citizens reach the point where they perceive that the trials of perpetrators of the most vicious and inhuman crimes not only take precedence over their cries for justice but that those perpetrators no longer face their just desserts simply because by their excessive criminal behavior the system of justice affordable in a particular country can no longer keep abreast of prescribed or even self-prescribed deadlines then, amidst the platitudes of the purists and those who perceive capital punishment to be barbaric, the law of the jungle will one again prevail." *Id.* "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart J., concurring).

propositions that Eichmann was brought to justice to begin with, and that they are, in fact, the supreme justification for the death penalty.²⁰¹

In the Security Council, when the Statute of the International Tribunal for Rwanda was being adopted, New Zealand's representative Keating stated, "We do not believe that following the principle of 'an eye for an eye' is the path to establishing a civilized society, no matter how horrendous the crimes the individuals concerned may have committed."²⁰² At best, the retributive sentiments of victims and their families, and of the public in general, must be taken into account in developing appropriate policies to deal with punishment for gross human rights abuses. But their encouragement may have unwanted and unhappy side effects, particularly where society is concerned with rebuilding and reconciliation. It should not be forgotten that many of the most appalling crimes in both the former Yugoslavia and Rwanda were committed in the name of retribution for past grievances.

To the extent it recognizes the legitimacy of retribution, the Security Council's reference to "redress" is perhaps unfortunate. But it is possible to separate redress from retribution. For the victims, and for the public in general, the thirst for justice may be better satisfied by society's condemnation of anti-social behavior than by the actual punishment of the offenders. What is desired is a judgment, a declaration by society, and the identification and stigmatization of the perpetrator. This alone is often sufficient redress. What is actually done to the offender as a result of conviction may be far less important. Voluminous examples of the opposite exist where alleged offenders are punished without being judged and condemned. For example, in Rwanda, since the genocide of April-June 1994, tens of thousands of suspects have been detained in appalling conditions.²⁰³ This is surely a form of punishment, but one that gives little satisfaction because it does not result from a trial and judicial determination of guilt. Society cries out for justice, but justice is not delivered, only some ersatz substitute.

201. HANNAH ARENDT, EICHMANN IN JERUSALEM, A REPORT ON THE BANALITY OF EVIL 277 (1994).

202. *The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighboring States*, U.N. SCOR, 49th Sess., 3453rd mtg., at 5, U.N. Doc. S/PV.3453 (1994) [hereinafter U.N. Doc. S/PV.3453].

203. BRAECKMAN, *supra* note 66, at 330-32.

Punishment is also expected to fulfill an objective of rehabilitation. This seems to be of great significance in the context of human rights violations, where reconstruction and reconciliation are paramount. The Security Council resolution creating the Rwanda Tribunal expresses the view that prosecutions will “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”²⁰⁴ That punishment must take this goal into account can also be discerned with reference to human rights norms. Article 10(3) of the International Covenant on Civil and Political Rights states that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” The United Nations Human Rights Committee, in its second general comment on Article 7 of the International Covenant on Civil and Political Rights, has stated that “[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.”²⁰⁵ Rehabilitation’s importance in criminal sentencing is also recognized in the Standard Minimum Rules for the Treatment of Prisoners.²⁰⁶ The American Convention on Human Rights states: “Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”²⁰⁷ In the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, the Participating States undertake to “pay particular attention to the question of alternatives to imprisonment.”²⁰⁸ It may be difficult or impossible for society to reconcile and rebuild without serious rehabilitation efforts undertaken within the context of effective action against impunity.²⁰⁹

In the *Erdemovic* judgment, the Trial Chamber considers international and national precedents, and in particular examines some

204. S.C. Res. 955, *supra* note 5, at 1.

205. *General Comment 21/44*, U.N. GAOR, Human Rights Committee, 47th Sess., para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992).

206. *The Standard Minimum Rules for the Treatment of Prisoners*, U.N. ESCOR, U.N. Doc. E.S.C. Res. 663C(XXIV) (1957); as amended, U.N. ESCOR, U.N. Doc. E.S.C. Res. 2076(LXII) (1977). On the *Standard Minimum Rules*, see ROGER S. CLARK, *supra* note 16, at 145-79. The Trial Chamber refers to the *Standard Minimum Rules* in *Erdemovic*, *supra* note 10, para. 74.

207. American Convention on Human Rights, *supra* note 36, art. 5(6).

208. *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, art. 23(2)(ii) (1993).

209. An important effort in this direction has been made by the Government of Rwanda in its legislation dealing with genocide prosecutions. See Colette Braeckman, *Difficile reconstruction au Rwanda*, LE MONDE DIPLOMATIQUE, at 23, July 1996.

Yugoslav judgments. Unfortunately, it gives short shrift to human rights principles, at least in the theoretic portion of its judgment, and plainly rules out the relevance of rehabilitation as a factor. Although it does not deny the possibility of rehabilitation, which would seem to be serious and genuine in the case of a young and repentant convict such as Erdemovic, the Trial Chamber says such a concern "must be subordinate to that of an attempt to stigmatise the most serious violations of international humanitarian law, and in particular an attempt to preclude their recurrence."²¹⁰ For the three members of the Trial Chamber, deterrence and retribution are decisive in determining a fit sentence:

It further notes that in the context of gross violations of human rights which are committed in peace time, but are similar in their gravity to the crimes within the International Tribunal's jurisdiction, reprobation (or stigmatisation) is one of the appropriate purposes of punishment. One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole.²¹¹

...

On the basis of the above, the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity. In addition, thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who had been unjustly killed.²¹²

Dusen Erdemovic was found guilty of having summarily executed anywhere from 10 to 100 innocent, unarmed civilians. By any precedent derived from either international or national court practice, if retribution and deterrence, as well as stigmatization, are pre-eminent factors, he should be subject to life imprisonment or its equivalent. In fact, the Trial Chamber has sentenced him to only ten years in prison, following the Prosecutor's recommendation, with credit to be given for time served.²¹³ The Trial Chamber specifically

210. *Erdemovic*, *supra* note 10, para. 66.

211. *Id.* para. 64.

212. *Id.* paras. 64-65.

213. *Id.* para. 111.

noted "a series of traits characterising a corrigible personality."²¹⁴ Thus, despite the theory, the Trial Chamber appears to have imposed a sentence that is fundamentally clement, that appropriately considers a host of mitigating factors, and that notably takes into account the fact that the condemned man is remorseful and a good candidate for rehabilitation. The sentence should be a model for criminal law jurisdictions throughout the world.

VI. AVAILABLE SENTENCES

The recognized principles of punishment, foremost among them deterrence and retribution, are derived from criminal law, and are applicable generally, and not just to the context of human rights violations. Human rights law has its own contribution to make to the debate, by its prohibition of punishment which is "cruel, inhuman and degrading."²¹⁵ Although this is a norm which remains subject to a degree of vagueness and imprecision, and one which is also liable to evolve over time, clearly punishment which is disproportionate or arbitrary is unacceptable.²¹⁶ Certain punishments, notably corporal punishments and the death penalty, are also difficult to reconcile with the prohibition of cruel, inhuman, and degrading punishment.²¹⁷ It is no doubt for this reason that the Security Council, in the statutes of the two ad hoc tribunals, has excluded all forms of punishment that violate the offender's physical integrity, and has specified that punishment "shall be limited to imprisonment."²¹⁸ This represents enormous progress since the Nuremberg tribunal, whose Statute provided: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just."²¹⁹ Although corporal punishment was

214. *Id.*

215. Universal Declaration of Human Rights, *supra* note 28, art. 5; International Covenant on Civil and Political Rights, *supra* note 17, art. 7; American Convention on Human Rights, *supra* note 36, art. 5; African Charter on Human and People's Rights, *supra* note 36, art. 5.

216. Among general works on the issue of cruel punishment and torture in international law, see NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987); Steven Ackerman, *Torture and Other Forms of Cruel and Unusual Punishment in International Law*, 11 VANDERBILT J. TRANSNAT'L L. 653 (1978); Barry Klayman, *The Definition of Torture in International Law*, 51 TEMPLE L.Q. 449 (1978).

217. *The State v. Makwanyane and Mchunu*, 16 H.R.L.J. 154 (1995); see also WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS* (1996).

218. Yugoslavia Statute, *supra* note 4, art. 24(1); Rwanda Statute, *supra* note 5, art. 23(1).

219. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, *supra* note 103, art. 27.

not imposed either by the International Military Tribunal or the various national tribunals,²²⁰ capital punishment was applied widely. In some cases, prisoners were sentenced to “hard labour,”²²¹ forfeiture of property,²²² and deprivation of civil rights.²²³ As the Trial Chamber notes in *Erdemovic*, any form of punishment other than imprisonment “such as a death sentence, forced labour, or fines is excluded” by the Statute and the Rules of the International Criminal Tribunal.²²⁴

Exclusion of the death penalty is a significant benchmark in the progressive abolition of capital punishment, which has been a theme of both criminal and human rights law since the end of World War II.²²⁵ In their proposal for an international tribunal, the CSCE rapporteurs said, “it was in their opinion inconceivable that the CSCE should endorse the death penalty.”²²⁶ The Committee of French Jurists strongly opposed the death penalty.²²⁷ As discussed above, the commentary on the Italian Proposal states, “the death penalty has been excluded, in line with a principle that is by now part of the European legal heritage, as shown by Additional Protocol No. 6 to the European Convention on Human Rights.”²²⁸ In its note verbale, Canada “strongly oppose[d] the imposition of the death penalty, notwithstanding that the offence committed may be of a particularly heinous nature.”²²⁹ The Netherlands stated that it “agree[d] with the other proposals already submitted to the Secretary-General that this

220. “[C]orporal punishment has never been the sentence, or part of the sentence, passed upon anyone found guilty of offences against international criminal law, and has never appeared among the various types of punishment explicitly made permissible by special war crimes legislation.” 15 L.R.T.W.C. 200, 200-201.

221. *United States of America v. Sawada et al.*, *supra* note 126; *France v. Becker et al.*, 7 L.R.T.W.C. 67 (1948); *France v. Holstein et al.*, 8 L.R.T.W.C. 22,26 (1949).

222. Forfeiture of property was declared only in the case of Alfred Krupp. The High Commissioner later found that this constituted “discrimination”, and quashed the order: “General confiscation of property is not a usual element in our judicial system and is generally repugnant to American concepts of justice.” *Announcement of Decisions by the United States High Commissioner for Germany, 31 January 1951, Upon Review of the Sentences Imposed by Tribunals Established Pursuant to Ordinance No. 7*, 15 T.W.C. 1180, 1188 (1948).

223. *Judgments of the Tribunals and Sentences Imposed by the Tribunals, Review of Sentences by the Military Governor and the U.S. High Commissioner for Germany*, 15 T.W.C. 1140, 1141 (1948).

224. *Erdemovic*, *supra* note 10, para. 25.

225. See WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2d ed. 1997).

226. CORELL, *supra* note 34, at 69.

227. U.N. Doc. S/25266, *supra* note 53, para. 127(b).

228. U.N. Doc. S/25300, *supra* note 49, art. 7(1)-(2).

229. *Letter dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General*, U.N. SCOR, U.N. Doc. S/25594 (1993).

sanction should be ruled out.”²³⁰ The United States²³¹ and the Organization of the Islamic Conference,²³² both of which might have been expected to argue in favor of capital punishment, were silent on the subject. This may amount to recognition by them that the current state of human rights law calls for abolition of the death penalty, despite their own domestic practices, and may come back to haunt them in future debates about *opinio juris*, the development of customary norms, and the notion of “persistent objectors.” In any case, the exclusion of capital punishment in the Statute of the Yugoslav tribunal appears to have been uncontroversial.

Rwanda, which by pure chance was one of the elected members of the Security Council in 1994 when the Statute of the Rwandan tribunal was being adopted, opposed the prohibition on capital punishment, which it still retains in its own domestic legislation for murder. It claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts to execution if those tried by the international tribunal—presumably the masterminds of the genocide—would only be subject to life imprisonment.²³³ “Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence,” said Rwanda’s representative to the Council. “That situation is not conducive to national reconciliation in Rwanda.”²³⁴ But to counter this argument, the New Zealand representative stated that “[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable and a dreadful step backwards to introduce it here.”²³⁵

Rwanda’s own position on the death penalty is far from unequivocal. The death penalty has not been imposed in Rwanda since the early 1980s,²³⁶ and the program of the Rwandan Patriotic Front, which won military victory in July 1994, calls for its abolition.²³⁷ Fur-

230. U.N. Doc. S/25716, *supra* note 52, at 5.

231. U.N. Doc. A/25575, *supra* note 55.

232. U.N. Doc. A/47/920, U.N. Doc. S/25512, *supra* note 54.

233. U.N. Doc. S/PV.3453, *supra* note 202, at 16.

234. *Id.*

235. *Id.* at 5.

236. All death sentences were commuted to life imprisonment by presidential decree on March 13, 1992. JOURNAL OFFICIEL, at 446, March 13, 1992.

237. William A. Schabas, *Abolition of the Death Penalty in Africa*, in SOURCEBOOK ON THE ABOLITION OF THE DEATH PENALTY BOSTON (Schabas ed., 1997).

thermore, in the 1993 Arusha peace accords, which have constitutional force in Rwanda, the government undertook to ratify the Second Optional Protocol to the ICCPR,²³⁸ although it has not yet formally taken this step.²³⁹ Rwanda is faced with a dilemma. It seems unthinkable that the masterminds of the genocide, who will hopefully be judged by the international tribunal in Arusha, receive detention sentences, while their subordinates find themselves condemned to death. Nevertheless, legislation adopted in August 1996 by the National Assembly maintains the death penalty in the case of genocide and crimes against humanity, at least in the case of organizers and commanders.²⁴⁰ The Rwandan government could, of course, recognize the unfairness of the situation and carry through with its obligations, under the Rwandan Patriotic Front program and the Arusha agreements, to abolish capital punishment.²⁴¹ Failing such an initiative, it will be left to Rwanda's judges and to executive clemency to see that death sentences are not imposed.²⁴² They should be encouraged to take such a course, if for no other reason than that modern sentencing theory and the imperatives of reconciliation require it. The death penalty is the only sanction that can be justified solely from the standpoint of retribution. As for deterrence, the other basic argument in favor of severe sanctions, modern criminology and jurisprudence indicate that capital punishment has no demonstrably greater deterrent effect than lengthy imprisonment.²⁴³ But should a country anxious to rebuild and to reconcile its citizens base its crimi-

238. Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty, *adopted* Dec. 29, 1989, G.A. Res. 44/128, (entered into force July 11, 1991).

239. Protocole d'Accord entre le Gouvernement de la République Rwandaise et le Front Patriotique Rwandais Portant sur les Questions Diverses et Dispositions Finales Signé à Arusha, JOURNAL OFFICIEL, Aug. 15, 1993, at 1430, art. 15. In the Security Council, New Zealand representative Keating said, "We can only say that our expectation is that in the domestic courts weight must be given to the Arusha human rights commitments." U.N. Doc. S/PV.3453, *supra* note 202, at 5.

240. See Schabas, *supra* note 66.

241. See *Justice for Some*, THE ECONOMIST, Jan. 6, 1996, at 32.

242. For an attempt by a European scholar to justify use of the death penalty in post-genocide Rwanda, see GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 355 (1995). In an emotional conclusion to his overview of the Rwandan genocide, Prunier says that perhaps 100 individuals "have to die. This is the only ritual through which the killers can be cleansed of their guilt and the survivors brought back to the community of the living." *Id.*

243. U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, CAPITAL PUNISHMENT, 1962, at 53-57, U.N. Doc. ST/SOA/SD/9; U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, CAPITAL PUNISHMENT U.N. Doc. ST/SOA/SD/10 (1968), at 55, 115-123; G. Pierce, M. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 715-16 (1990-91).

nal law policy on retribution or, to be more accurate, vengeance? Such a course can only doom Rwanda to new cycles of violence and brutality. As Chief Justice Gubbay of the Zimbabwe Supreme Court stated in a 1993 death penalty case, "retribution has no place in the scheme of civilized jurisprudence."²⁴⁴

Life imprisonment is expressly allowed by the Rules, subject to the argument, as reviewed above, that this may be incompatible with "general practice" in the former Yugoslavia. But even if the tribunals determine life imprisonment to be validly authorized by the Statute, they must consider whether it is an appropriate sentence under the circumstances. It is submitted that life imprisonment without possibility of parole or other mitigation of sentence constitutes punishment which is cruel, inhuman, and degrading. Walter Tarnopolsky, sitting as a member of the Human Rights Committee, stated that "rigorous imprisonment" of even thirty years could infringe Article 7 of the International Covenant, which prohibits cruel, inhuman and degrading punishment.²⁴⁵ The Convention on the Rights of the Child forbids "life imprisonment without possibility of release."²⁴⁶ Life imprisonment without possibility of release effectively excludes the possibility of rehabilitation which is not only a legitimate goal of sentencing but one which is dictated by human rights law. It is therefore necessary to consider whether release is in fact possible once an offender has been sentenced by the tribunals to life imprisonment.

The Statute of the tribunals provides for the possibility of pardon or commutation, "[i]f, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence."²⁴⁷ If the legislation of the detaining State does not provide for pardon or commutation, then presumably the offender has no alternative but to serve the entire term. There is no provision for conditional release or parole in either the Statutes or the Rules.²⁴⁸ It might, however, be possible to read this into the Statute, which provides that imprisonment shall be served in a State designated by the Tribunal and "shall be in accordance with

244. Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe *et al.*, 14 H.R.L.J. 323 (1993); *see also* Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall J., dissenting); Rajendra Prasad v. State of Uttar Pradesh, A.I.R. 1979 S.C. 916, 938.

245. U.N. GAOR, Committee on Civil and Political Rights, para. 6, U.N. Doc. CCPR/C/SR.142 (1979); *see also* MANFRED NOWAK, CCPR COMMENTARY 134 (1993).

246. *Convention on the Rights of the Child, adopted Nov. 20, 1989*, U.N. GAOR, Annex, art. 37(a), G.A. Res. 44/25 (1989) (entered into force Sep. 2, 1990).

247. Yugoslavia Statute, *supra* note 4, art. 28; Rwanda Statute, *supra* note 5, art. 27.

248. *See* BASSIOUNI & MANIKAS, *supra* note 4, at 710.

the applicable law of the State concerned, subject to the supervision of the International Tribunal.”²⁴⁹ Conditional release or parole is normally an integral part of service of a prison term. Thus, if the State’s domestic law provided for partial or full parole in association with a prison sentence, this might fall within the terms of the Statutes. Alternatively, the Trial Chamber might provide specifically for parole in issuing a sentencing judgment. Nevertheless, it seems doubtful that this was the intention of the Security Council, given its specific reference to pardon or commutation, and there is nothing in the preparatory materials or the debates to support such a thesis. Parole requires an administrative infrastructure, of which there is no suggestion whatsoever in the Statutes. Pardon or commutation are quite distinct from parole and conditional release. The former modify definitively a custodial sentence, whereas the latter simply provide for its suspension, on the condition that certain terms are respected. In *Erdemovic*, the Trial Chamber addresses the issue of execution of sentences, but makes only an isolated, enigmatic reference to “measures affecting the enforcement of the sentences, such as the remission of sentence and provisional release.”²⁵⁰

Pardon implies complete release, whereas commutation is the substitution of the sentence imposed by the court with a reduced term or a discharge. Both are normally totally discretionary executive acts,²⁵¹ distinguished from conditional release or parole, which is often associated with legislated rights that protect the offender.²⁵² The Charter of the Nuremberg Tribunal had empowered the Control Council for Germany to reduce or otherwise alter the sentence, but not to increase its severity,²⁵³ and this power was effectively exercised in some cases. In other cases, however, it did not utilize the ability to alter sentences, as evidenced by Rudolf Hess serving his entire life sentence. According to the Statutes of the ad hoc tribunals, it shall first be determined whether an offender is eligible for pardon or commutation under the applicable law of the State in which the convicted person is imprisoned.²⁵⁴ Where this is the case, the President of

249. Yugoslavia Statute, *supra* note 4, art. 27; Rwanda Statute, *supra* note 5, art. 26.

250. *Erdemovic*, *supra* note 10, para. 73.

251. “La grâce collective ou individuelle est exercée discrétionnairement et pour le bien général, par le Président de la République.” *Codes et lois du Rwanda*, *supra* note 71, art. 124.

252. See PRADEL, *supra* note 90, at 638-42, 656-57.

253. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, *supra* note 103, art. 29.

254. Yugoslavia Statute, *supra* note 4, art. 28; Rwanda Statute, *supra* note 5, art. 27. Although it seems unlikely that the Tribunal would authorize detention in Saudi Arabia, it is in-

the Tribunal shall then decide the matter, in consultation with the judges, on the basis of the interests of justice and the general principles of law.²⁵⁵ In the case of the Rwanda tribunal, the Rules add that the President of the Tribunal is to provide “notification to the Government of Rwanda,” suggesting that it may intervene and make submissions on the matter.²⁵⁶

Morris and Scharf, in their study of the Yugoslav tribunal, have suggested that it may be inappropriate to contemplate pardon or commutation for crimes such as those over which the International Tribunals have subject matter jurisdiction.²⁵⁷ Citing provisions of the Convention for the Prevention and Punishment of Genocide²⁵⁸ and the Geneva Conventions of August 12, 1949,²⁵⁹ they argue that “[a]ction that spares the offender from serving the full sentence initially considered to be commensurate to the crime could be construed as contrary to the importance attributed to providing effective penalties for the crimes concerned by the international conventions referred to in the Statute.”²⁶⁰ The International Covenant on Civil and Political Rights actually contemplates pardon or commutation, at least in capital cases: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”²⁶¹

teresting to note that an offender becomes eligible for a fifty percent reduction in his or her sentence by learning the Koran by heart. PRADEL, *supra* note 90, at 644.

255. *Id.*

256. Rwanda Rules, *supra* note 7, Rule 125.

257. MORRIS & SCHARF, *supra* note 4, at 306-09.

258. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 47, art. 5. Actually, the Genocide Convention does not prohibit pardon or commutation, although it does oblige States parties “to provide effective penalties for persons guilty of genocide.” *Id.*

259. Geneva Convention of August 12, 1949 For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 63 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 3418, 75 U.N.T.S. 135, 237 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilians, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 3616, 75 U.N.T.S. 287, 387 (entered into force Oct. 21, 1950). Again, the Geneva Conventions do not in any way prohibit pardon or commutation. They simply require that States parties provide “effective penal sanctions.”

260. MORRIS & SCHARF, *supra* note 4, at 306.

261. International Covenant on Civil and Political Rights, *supra* note 17, art. 6(4); *see also* American Convention on Human Rights, *supra* note 36, art. 4(6) (“Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is

But it is a fact that pardon and commutation have been somewhat stigmatized in recent years with the new focus of the human rights movement upon impunity.

The reference to domestic legislation may well create inequality in treatment of offenders, if they are imprisoned in different States. Indeed, it seems totally inappropriate to leave the matter to the imprisoning State, which "shall notify the International Tribunal" whether or not such legislation exists.²⁶² The International Tribunal should review the domestic legislation before determining in which States sentences are to be served, so as to avoid injustice. But even with such review, a State could subsequently alter its domestic legislation, and an offender who was eligible for pardon or commutation at the time of sentence might not be some years hence. In general, the Charter provision is cumbersome and difficult to apply. In some legal systems, an executive pardon is always possible. But does this mean that any offender is therefore "eligible" for pardon, within the meaning of the Statutes?

Assuming that offenders are eligible for pardon or commutation, the President of the Tribunal, in consultation with the judges, is to review the matter "on the basis of the interests of justice and the general principles of law."²⁶³ Here, the Rules provide additional detail concerning the criteria to be applied by the President in consultation with the judges: "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."²⁶⁴ Use of the terms "interests of justice" and "general principles of law" provide the President of the Tribunal with enormous discretion, although there is some legal authority to assist in interpreting the latter phrase. "General principles of law recognized by civilized nations" is one of the three principal sources of international law recognized in Article 38(1) of the Statute of the International Court of Justice, and the scope of the term has been interpreted on several occasions by the Court.²⁶⁵

pending decision by the competent authority"); *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ESCOR, art. 7, E.S.C. Res. 1984/50 (1984).

262. Yugoslavia Statute, *supra* note 4, art. 28; Rwanda Statute, *supra* note 5, art. 27.

263. *Id.*

264. Yugoslavia Rules, *supra* note 7, Rule 125; Rwanda Rules, *supra* note 7, Rule 125.

265. *See, e.g.*, Effect of Awards of Compensation made by the United Nations Administra-

It seems impossible to affirm with any certitude that there exists a right of release, in appropriate cases, following a sentence of life imprisonment. There is no assurance that release will be allowed by the domestic legislation of the detaining State, and there is the danger that even if it exists now it may be withdrawn subsequently. The system seems uncomfortably similar to that in effect in the United Kingdom in the case of juvenile offenders sentenced to indefinite terms "at Her Majesty's Pleasure." The absence of any statutory right of review of such sentences led the European Court of Human Rights, in its judgment of February 21, 1996, to find the United Kingdom in breach of the European Convention on Human Rights.²⁶⁶

The Statutes also provide that in addition to imprisonment, "the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."²⁶⁷ The Security Council had, prior to adoption of the Statute of the Yugoslav tribunal, endorsed the principle that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void.²⁶⁸ The post-World War II tribunals were also empowered to order confiscation of stolen property and its return to the legitimate owners.²⁶⁹

The United States delegation, in its comments on the Yugoslav Statute before the Security Council, stated that "with respect to Article 24, it is our understanding that compensation to victims by a convicted person may be an appropriate part of decisions on sentencing."²⁷⁰ It seems hard to reconcile this comment with the text of Article 24 (Article 23 of the Rwanda Statute).²⁷¹ The Statute also appears to exclude the possibility of fines. This had been proposed in the CSCE draft.²⁷² The report of the Secretary-General confirms the fact that fines are excluded when it suggests that confiscation of property is possible "[i]n addition to imprisonment."²⁷³ Nevertheless,

tive Tribunal Advisory Opinion, 1954 I.C.J. 47, 53; Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), 1984 I.C.J. Rep. 246, paras. 129-148; Chorzow Factory Case, 1928 P.C.I.J. Ser. A, No. 17, at 29.

266. Hussain v. United Kingdom, February 21, 1996, unreported; Singh v. United Kingdom, February 21, 1996, unreported.

267. Yugoslavia Statute, *supra* note 4, art. 24(3); Rwanda Statute, *supra* note 5, art. 23(3).

268. S.C. Res. 779, U.N. SCOR, 47th Sess., S/RES/779 (1992).

269. *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, *supra* note 103, art. 28.

270. U.N. Doc. S/PV.3217, *supra* note 194, at 17.

271. Yugoslavia Statute, *supra* note 4, art. 24; Rwanda Statute, *supra* note 5, art. 23.

272. CORELL, *supra* note 34, art. 29(1)(b), at 111.

273. *Report of the Secretary-General*, *supra* note 21, para. 114.

the judges have provided for fines in the case of offenses that they themselves have created as part of the Rules, in the case of contempt of the tribunal and false testimony under solemn declaration.²⁷⁴

No civil consequences of a judgment by the tribunals are provided for. In the case of the former Yugoslavia, these do exist by virtue of the Dayton Agreement. The Constitution of Bosnia and Herzegovina (Annex IV of the Dayton Agreement) states: "No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia . . . may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina."²⁷⁵ There is a similar provision concerning the Commission to Preserve National Monuments.²⁷⁶

VII. CONCLUSION

The establishment of the ad hoc international tribunals for the former Yugoslavia and Rwanda draws upon three distinct but related areas of law: international criminal law, international humanitarian law and international human rights law. It is the presence of this third area that sets it apart from its predecessors. An early effort at international justice, proposed in the 1919 Versailles Treaty but never effectively implemented, was concerned essentially with punishing individual leaders for their responsibility in breaches of international treaties by sovereign states.²⁷⁷ International human rights law was in its infancy when the allies planned the Nuremberg Tribunal in August 1945, and to the extent that human rights abuses were punished, this was only on the condition that they were related, as crimes against humanity, to the armed conflict. Lest we forget, this seminal experiment in justice for humanity was entitled the "international *military* tribunal."²⁷⁸ Thus, until the 1990s, interna-

274. Yugoslavia Rules, *supra* note 7, Rule 77(A), Rule 91(E); Rwanda Rules, *supra* note 7, Rule 77(A), Rule 91(E).

275. *Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes*, 35 I.L.M. 75, 118, 125 Annex IV art. IX § 1 (1996).

276. *Agreement on Commission to Preserve National Monuments*, 35 I.L.M. 75, 142 Annex 8, art. II (1996).

277. Treaty of Peace between the Allied and Associated Powers (Treaty of Versailles), June 28, 1919, arts. 127-130, 225 C.S.T. 188, 285 T.S. 4, arts. 228-230.

278. Obviously, I am not in agreement with a recent statement in a ruling of one of the Trial Chambers: "The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence." Prosecutor v. Tadic, *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, Case No. IT-94-1-T, para. 28 (Aug. 10, 1995), *reprinted in* 7 CRIM. L.

tional justice addressed primarily the laws of armed conflict. Yet it was because of the danger of legitimizing armed conflict that the United Nations originally chose to remain aloof from the field of international humanitarian law. War was outlawed by the Charter, and an area of law whose purpose was only to regulate the waging of war could hardly be compatible with the organization's aims.

Our new models eschew the nexus with illegal war. They do not even include a category of "crimes against peace," one of the three categories of infraction for which offenders were tried at Nuremberg. Moreover, they muddle the classic dichotomy between international and non-international armed conflict, a distinction rooted in the specifics of humanitarian law but one which is irrelevant from a human rights standpoint. Nor are the new tribunals created by treaty, as in the past, but rather by decision of a rejuvenated Security Council that now considers abuses of human rights within the borders of sovereign states to be matters that concern international peace and security and that compel its intervention.²⁷⁹ To be sure, the Yugoslav and Rwandan tribunals bear the imprimatur of their legal predecessors, notably in the somewhat anachronistic catalog of infractions. Indisputably, however, the new courts are fundamentally interested in massive violations of human rights which we continue to label violations of the laws and customs of war, or grave breaches of the humanitarian law conventions, or crimes against humanity, out of concern for the *nullum crimen* principle.

An appreciation of this new and original perspective on international justice is important from a number of standpoints, among them the issue of punishment. To date, little attention has been given to sentencing per se. This may be partially explained by the fact that human rights activists are ill at ease with punishment. It is only in recent years, with the new focus on impunity as a human rights violation in and of itself,²⁸⁰ that the human rights community has adjusted its historic predisposition for the rights of the defense and the protection of prisoners to a more prosecution-based orientation. For ex-

FORUM 139 (1996).

279. See, e.g., S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/688 (1991); see also Kelly Kate Pease & David P. Forsythe, *Human Rights, Humanitarian Intervention, and World Politics*, 15 HUM. RTS. Q. 290 (1993); Olivier Corten & Pierre Klein, *L'Assistance Humanitaire Face à la Souveraineté des États*, 3 REV. TRIM. DR. H. 343 (1992); Payam Akhavan, *Lessons from Iraqi Kurdistan: Self-Determination and Humanitarian Intervention Against Genocide*, 11 NETH. Q. HUM. RTS. 41 (1993).

280. See, e.g., IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995).

ample, the international non-governmental organization Amnesty International, whose traditional concern has been with prisoners and with the mitigation of punishment, is now one of the most aggressive advocates of international criminal justice and an enthusiastic supporter of the work of the ad hoc tribunals. This change in the emphasis of Amnesty International is perhaps no better demonstrated by the fact that it recently took a formal position opposed to amnesties.²⁸¹

The lessons of history must be repeated for future generations in order to help prevent the political consequences of the crimes that were associated with undemocratic regimes, and to ensure that those who seek to return to the past remain pariahs of the body politic. Historical revisionism and negationism must be combated. The declaratory value of criminal law is probably its most important contribution to the struggle against impunity. Society declares that certain specific kinds of behavior are wrong and anti-social. This process takes place publicly, and its conclusions add to the collective memory. To the extent the victims seek retribution, if only as a form of emotional catharsis, they are given at least partial satisfaction in the form of truth. In international justice, the finding of guilt will be far more important than the actual sentence which is meted out.

The elimination of the death penalty is already an important step away from retributive punishment. Although the ad hoc Tribunals are probably entitled to impose sentences of life imprisonment without violating the *nulla poena sine lege* principle, serious thought should be given to the wisdom of such a course, except in the rare cases where offenders are so disturbed that protection of the public against recidivism overrides all other sentencing considerations. As a general rule, they should never lose sight of rehabilitation, conscious of its close relationship to the social imperative of reconciliation in a war-torn country. If parole or some other form of release cannot be assured, then life sentences should not even be considered.

As human rights tribunals, the ad hoc tribunals should be aware that they are mandated to provide a model of enlightened justice. Judges around the world, sitting in the most mundane criminal cases, will be influenced by their approaches to criminal law. Wrong or even confusing signals from The Hague and Arusha may set human rights back decades, within the context of criminal justice. That the

281. Amnesty International, *Policy Statement on Impunity*, in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, Vol. 1, 219-221 (Neil Kritz ed., 1995).

judges of the International Criminal Tribunals understand the importance of their mission when questions of procedural fairness or conditions of preventive detention are concerned now seems to be beyond question. The judgment of the Trial Chamber in *Erdemovic* shows that they are animated by the same progressive philosophy in matters of sentencing.