

Penal rehabilitation in the jurisprudence of the International Criminal Tribunal of Rwanda: pardon and commutation of sentence

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ABSTRACT

This paper seeks to critique the International Criminal Tribunal of Rwanda's (ICTR) application of sentencing theory that justifies retribution and general deterrence as a means of contributing to the Rwandan reconciliation processes. Moral justification based on desert is founded on the notion of inflicting pain on the perpetrators so as to condemn and express social disapproval for heinous crimes in the strongest terms while deterrent moral justification is about deterring others from committing similar crimes. The purpose of this article is to illustrate that the application of these theories results in the violation of the right to rehabilitation and pardon, on one hand, and has a negative impact on reconciliation, on the other, and that, in order to avoid this, punishments should comprise of rehabilitative theories so as to transform detainees thereby making them conform. This includes pardoning certain detainees.

1. Introduction

Generally, international criminal jurisprudence explicitly provides that the penalty which can be imposed on a criminal, is imprisonment.¹ According to the International Criminal Tribunal for Rwanda (ICTR),² the penalty imposed upon criminals must be directed at both retribution and general deterrence.³ These theories of punishment are understood to be consistent with the spirit and object of the Statute of the ICTR, that is, to put an end to impunity and thereby to

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¹ Article 77 of the Rome Statute of the International Criminal Court of 1998; article 23 of the Statute of the International Tribunal for Rwanda of 1994; and Article 24 of the Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993.

² ICTR or Tribunal will be used interchangeably.

³ *Prosecutor v Kambanda* Case No. ICTR 97-23-S at 28. See too *Prosecutor v Serushago* Case No. ICTR-98-39-S at 20.

promote national reconstruction, the restoration of peace, justice and reconciliation.⁴ Retribution (desert) is given precedence, because it is viewed as:

‘...the expression of the social disapproval attached to a criminal act and its perpetrator and demands punishment for the latter for what he has done. The sentences...are therefore an expression of humanity’s outrage against serious violations of human rights and international humanitarian law which an accused has been found guilty of committing. [It] meets the needs for justice and may also appease the anger caused by the crime to the victims and within the community as whole.’⁵

This suggests that imposed punishment must have an expressive function that seeks to pronounce social disapproval of a criminal’s behaviour.⁶ Wringer and Hudson argue that the expressive function supports the notion of punishment.⁷ Expressive function facilitates the making of what seems to be ‘a morally and legally significant’ distinction between punishment on the one hand and non-punitive actions taken by the state on the other.⁸ Punishment in the form of pronouncement of a prison term is, according to Hudson, an expressive yardstick of the condemnation of a criminal’s behaviour.⁹ For this perspective, the ICTR justifies its effectiveness (and, perhaps, communicating a strong message to would-be offenders) by imposing a retributive punishment.¹⁰ This is a line of thought that this author will be critically analysing.

In so doing, section two will start by exploring the purposes of punishment focusing on utilitarian and non-utilitarian punishments. Then there will be discussion on how the Tribunal relies heavily on the retribution principle because the notion of international criminal justice is concerned with condemning egregious crimes in the strongest terms and to ensure that the perpetrators do not escape retribution.¹¹ Its sentencing is directed at preventing and deterring others from committing breaches of international order. Desert is regarded by Oldenquist and Nygaard as ‘revenge both historically and

⁴ Preamble of the Statute of the ICTR; *Prosecutor v Kambanda* supra (n3) 26 and also *Prosecutor v Bisengimana* Case No. ICTR 00-60-T at 106.

⁵ *Prosecutor v Rutaganira*, Case No. ICTR-95-IC-T at 108.

⁶ B Wringer ‘Why punish war crimes? Victor’s justice and expressive justifications of punishment’ (2006) 25 *Law and Philosophy* 176. See too N Hanna ‘The passions of punishment’ (2009) 90 (2) *Pacific Philosophical Quarterly* 236.

⁷ Loc cit. See too B Hudson ‘Restorative justice: the challenge of sexual and racial violence’ (1998) 25 (2) *Journal of Law and Society* 253.

⁸ Loc cit. See too Hudson op cit (n7) 253.

⁹ Hudson op cit (n7) 253.

¹⁰ *Prosecutor v Rutaganira* supra (n5) at 112.

¹¹ F Hassan ‘The theoretical basis of punishment in international criminal law (1983) 15(1) *Journal of International Law* 52.

conceptually'.¹² For this reason, this author will be arguing that the Tribunal should impose punishments directed towards rehabilitative theories with a view to eliminating detainees' propensity to repeat crimes. This author will also be defending Zacklin's contention that desert and deterrence cannot achieve reconciliation, because, to achieve reconciliation, other mechanisms such as truth commissions are needed at a national level.¹³

Section three will examine the historical justification of punishments. The main concern is to show that although *ad hoc* tribunals established after World War II endorsed desert and general deterrence, rehabilitation played a major role in granting clemency, pardon, and commutation of sentence. On this basis this author argues that rehabilitation theories should be considered when imposing a sentence. Moreover, pardon or commutation should be granted to those who demonstrated rehabilitative tendencies/behaviours whilst in detention or to those who served three-fourths of their sentence, whichever occurs first.

In section four, this author will argue that rehabilitation and pardon are basic human rights which detainees are entitled to and that the ICTR, in recognising this, held that pardon is unconditional in circumstances where a convicted offender has served three-fourths of the sentence. Following this the author will illustrate divergence in enforcing sentences that result in the denial of the right to pardon and unfair differentiation or uncertainty of parole eligibility.

In section five and six, this author will work under the presupposition that pleading guilty is a starting point towards rehabilitation. The focus will be on those detainees who were blameworthy for, pained by, and felt badly about themselves for what they did. This author will explore the understanding of the Tribunal that pleading guilty and showing genuine remorse are merely mitigating factors. Given the fact that the ICTR seeks to impose sanctions that express social condemnation for the crime, parole and rehabilitation are sidelined, requiring the criminals to serve full sentences and not to escape retribution. This author will argue that disregarding rehabilitation of convicts and denial of pardon violates the detainees' basic human rights to reformation and pardon and that harsher punishment and long confinement will not yield positive results in respect of contributing to reconciliation. It will instead reinforce ethnic conflict. This author will recommend that the special tribunals should consider imposing punishment supportive

¹² A Oldenquist 'Retribution and the death penalty' (2004) 29 *University of Dayton Law Review* 339 and RL Nygaard 'Crime, pain and punishment: A skeptic's view' (1998) 102 *The Dickinson Law Review* 355.

¹³ R Zacklin 'The failings of ad hoc international tribunals' (2004) 2 *Journal of International Criminal Justice* 544.

of rehabilitative theories. This author will conclude by proposing that the United Nations Security Council (Security Council) should adopt pardon guidelines applicable to domestic prisons hosting international criminals to ensure equal protection, uniformity, certainty and consistency.

2. The purposes of punishment

The rationale for punishment is a deeply jurisprudential question. The answers to the questions why and how the perpetrators of egregious atrocities should be punished, and what should be done with them depend on two competing and philosophical world views, namely, the 'utilitarian theory' and the 'non-utilitarian theory'. Utilitarian theory (e.g. deterrence and rehabilitation) regards punishment as 'a means to a secondary end or purpose'; while non-utilitarian (retribution) theory regards punishment as 'an end in itself'.¹⁴ Whereas utilitarian theory considers the utility and usefulness of the penalty to be imposed, most notably social control/order, non-utilitarian theory needs neither an end goal, nor purpose, convicts must simply be punished and 'get what they deserve'.¹⁵

Retribution theory is worryingly all about the infliction of harm to a criminal, which is proportionate to 'moral atrocity'.¹⁶ The desert theory is given priority by international criminal law in general and by the Tribunal in particular. This line of thought is supported by Duff's contention that criminals found guilty 'deserve to suffer the pain of being censured,' condemned and rebuked and that they must 'suffer the pain of remorse' and remorse must necessarily be painful, since it must pain the convicts 'to recognise and admit the wrong'.¹⁷

On other hand, deterrence may be either individual or general. Whereas individual deterrence justification is that the court/tribunal should impose punishment that will teach criminals a lesson so that they will be deterred from committing a second crime,¹⁸ general deterrence justification holds that an exemplary/severe punishment must be meted out on criminals so as to deter or dissuade those who are tempted to commit crimes in the future from doing so.¹⁹

¹⁴ CR Snyman *Criminal Law* 5ed (2008) 11. See too Hassan op cit (n11) 48.

¹⁵ J Burchell *Principles of Criminal Law* 3ed (2005) 72.

¹⁶ Wringe op cit (n6) 159. See too A Von Hirsch, A Ashworth, & J Roberts *Principled Sentencing: Readings on Theory and Policy* 3ed (2009) 11.

¹⁷ Von Hirsch et al op cit (n16) 127, Hanna op cit (n6) 236 and D Zolo, 'Peace through criminal law?' (2004) 2 *Journal of International Criminal Justice* 733.

¹⁸ Burchell op cit (n15) 74-76. See too Snyman op cit (n14) 15 -16 and *Prosecutor v Rutaganira* supra (n5) at 110.

¹⁹ Loc cit. See too Wringe op cit (n6) 159; Zolo op cit (n17) 732; and *Prosecutor v Rutaganira* supra (n5) at 110.

Exceptionally, rehabilitation is aimed at reforming and transforming detainees into leading a crime-free life after serving a sentence.²⁰ The punishment is accordingly aimed at treating criminals in a way that encourages them to abandon their tendencies to commit crimes in future. A detainee is re-educated or is given particular treatment 'to become a useful member of the society'.²¹ In addition to this, proponents of the rehabilitative ideal argue that the right to dignity and not to be treated or punished in a cruel, inhuman or degrading way requires that convicts be placed into reformation in a truly humane environment.²² Besides, it is their basic right to be socially rehabilitated.²³ However, the rehabilitation is overlooked because, as Hassan puts it, retribution or deterrence lies at the heart of international criminal justice jurisprudence.²⁴ It is not concerned with reforming criminals but rather to express and communicate social disapproval attached to crimes that shock the moral judgment of the international community.²⁵ It makes it clear that the punishment must deter, for good, future would-be criminals by showing them that the international community is not ready to tolerate the serious breaches of international order.²⁶ It imposes a punishment which is an appropriate response to an individual criminal's behaviour.²⁷

Indeed, focusing on retribution theory obscures the notion of the rehabilitative ideal. Hovil and Quinn observed that desert theory is inappropriate in 'modern conflict in which civilians are often caught up in the front line'.²⁸ Punishment for the sake of retribution or general deterrence rules out the goal of rehabilitation or any other alternative measures to imprisonment.²⁹ According to Zolo, retributive punishment turns detention into a place of custody where harm is inflicted, and a non-contextual mechanism for excluding and isolating criminals as social outcasts.³⁰ Taking this into consideration, this

²⁰ Burchell op cit (n15) 78-9. See to Snyman op cit (n14) 18 and Hassan op cit (n11) 49.

²¹ Burchell op cit (n7) 79.

²² Loc cit. See too Von Hirsch et al at op cit (n16) 29; and DVZ Smit *Taking Life Imprisonment Seriously in International Law* (2002) 14.

²³ Article 10(3) of the ICCPR. In *Prosecutor v Rutaganira* supra (n5) at 107: The Tribunal identified retribution, deterrence and rehabilitation as the main purpose of a punishment.

²⁴ Hassan op cit (n11) 51.

²⁵ Ibid at 50-51. See too Wringe op cit (n6) 161; Zolo op cit (n17) 732; *Prosecutor v Rutaganira* supra (n5) at 108; and *Prosecutor v Kambanda* supra (n3) at 28.

²⁶ *Prosecutor v Kambanda* supra (n3) at 28.

²⁷ Ibid at 29.

²⁸ L Hovil & JR Quinn 'Peace first, justice later: traditional justice in northern Uganda' (2007) 17 *Refugee Law Project Working Paper* 37.

²⁹ Zolo op cit (n17) 733 and Snyman op cit (14) 16.

³⁰ Loc cit.

author argues that the Tribunal should consider reforming those who are convicted not just focusing on potential would-be criminals. There is a need to impose punishment that comprises rehabilitative ideals such as educational, occupational, and psychological services for the purpose of transforming criminals into socially acceptable citizens. The rehabilitative interventions are further elaborated on under part six. This author now turns to briefly examine the history of international criminal sentencing

3. International sentencing system in historical context

The first trial of an international nature took place in 1474 during the era of the Holy Roman Empire, in Breisach, Germany.³¹ The panel of the tribunal was composed of 27 judges, each representing a member state or unity of the Roman Empire.³² The tribunal was established to hear a matter of 'crimes against the laws of God and the laws of men', today known as 'war crimes and crimes against humanity.'³³ The accused, Peter von Hagenbach, was found guilty and put to death for violating these laws.³⁴ Only after World War I, were there other international bodies of this type such as those that were established by the allied powers in terms of the Treaty of Versailles of June 28, 1919 to hear a matter of war crimes committed by German nationals.³⁵ These German nationals were tried at Leipzig (Germany) in the German Supreme Court and the trials were conducted under the 1907 Hague Convention.³⁶ From a long list of suspects compiled and submitted by the allied powers, Germany selected only 45 but only 23 suspects were indicted. Of these 23, only 12 were eventually tried and six of these 12 were convicted. The maximum sentence, from a range of sentences that included 'beatings and killing prisoners', was three years' imprisonment, of which six months were served.³⁷ It is unclear whether the prisoners were granted early release because they demonstrated that they had been rehabilitated or merely for political reasons.

Various international tribunals were established after World War II to try the perpetrators of war crimes, crimes against peace, and crimes

³¹ MC Bassiouni 'The International Criminal Court in historical context' (1999) 55 *Saint Louis-Warsaw Transatlantic Law Journal* 56.

³² Loc cit.

³³ Loc cit.

³⁴ Loc cit.

³⁵ Ibid at 58. See too MC Bassiouni *Crimes Against Humanity in International Criminal law* (1992) 200.

³⁶ Bassiouni op cit (n31) 57.

³⁷ Ibid at 59. See Bassiouni op cit (n35) 201.

against humanity, which were committed during this war.³⁸ The London Charter of August 8, 1945 established the first international military tribunal at Nuremberg known as the International Military Tribunal (IMT), followed by the International Military Tribunal for the Far East (IMTFE), established in 1946 in Tokyo under the General Order issued by General Douglas MacArthur.³⁹ These military tribunals tried war criminals under the Nuremberg Charter and Tokyo Charter respectively.⁴⁰ Shortly after the establishment of the IMT and the IMTFE, Control Council Law No. 10 was adopted for the purpose of enabling the allies to prosecute war criminals arrested in their four zones of occupation under the Nuremberg Charter. In addition, other tribunals were established, geographically scattered, and conducted trials under municipal laws.⁴¹

When the IMT and the IMTFE came into existence, an international criminal jurisprudence concerning sentencing was, according to Hassan, not well developed. Punishment was justified in the context of retribution theory. War criminals were punished for the sake of future crime prevention and maintenance of social control.⁴² As a result, some were hanged; some were sentenced to life imprisonment; and others were sentenced to a specified number of years imprisonment. But most of those who were serving a prison term were, at a later stage, released either by way of being pardoned or a successful petition for clemency or on medical parole.⁴³ Wilson and Shattuck observed that the early release of war criminals was influenced by post-war international relations and was actually the result of political campaigns and negotiations with neighbouring countries.⁴⁴

The historical provision of pardon needs to be considered at this juncture. It is, for example, desirable to look at 'The Interim Mixed Parole and Clemency Board' (the Board), established in 1953 for the purpose of administering and granting pardon, clemency, and commutation to

³⁸ Bassiouni op cit (n31) 60.

³⁹ Ibid at 60-66. See Bassiouni op cit (n35) 206.

⁴⁰ The Allied Powers adopted 2 similar documents: The Charter of the International Military Tribunal of August 8, 1945 (Nuremberg Charter) and the Charter of the International Military Tribunal for the Far East of January 19, 1946 (Tokyo Charter).

⁴¹ Bassiouni op cit (n35) 213-214: They include United States, United Kingdom, France, Australia, Canada, Netherlands, Norway, Denmark, China, Poland and Russia. See too S Wilson, 'After the trials: Class B and C Japanese war criminals and the post-war world' (2011) 31 (2) *Japanese Studies* 141-2.

⁴² Hassan op cit (n11) 48.

⁴³ Bassiouni op cit (n31) 59. See too Wilson op cit (n41) 142-143; HL Shattuck 'The Interim Mixed Parole and Clemency Board' (1964) 76 *Proceedings of the Massachusetts Historical Society, 3rd Series* at 69; and BU Meyer 'The Nuremberg SS-Einsatzgruppen trial 1945-1958' (2011) 13 (1-2) *Journal of Genocide Research* 183.

⁴⁴ Wilson op cit (n41) 143 and see Bassiouni op cit (n31) 59-60.

German war criminals.⁴⁵ This Board closed its business in 1958, all prisoners having been set free.⁴⁶ It is useful to analyse this process in order to ascertain whether the Security Council should have adopted a similar approach with regard to ICTR detainees. The following were factors considered by the Board in granting parole:⁴⁷ (1) the nature of the offences and any disparity between sentences, (2) the detainee's behaviour and attitude, (3) their work record, (4) their age, (5) their physical and mental condition, (6) opportunity for employment, and (7) other factors bearing on rehabilitation. Parole was granted under strict conditions, and the most frequent condition was that the parolee 'could not engage in the practice of the profession which they have disgraced'.⁴⁸ While clemency was primarily granted on the basis of 'the opinion that no useful purpose would be served by much longer confinement within prisons walls',⁴⁹ commutation could be granted if a detainee had obtained a certificate of good-conduct, or upon review, the Board found that there had been a miscarriage of justice.⁵⁰ Compassion might be considered in support of clemency.⁵¹ Issuing of the certificate of good conduct meant that war criminals were subject to rehabilitative programmes, the practice of which should be adopted by the ICTR.

Another historical development worthy of noting is the introduction of pardon or commutation and rehabilitation as 'basic human rights' under the International Convention on Civil and Political Rights (ICCPR). In article 7 of the ICCPR, torture or cruel, inhumane or degrading treatment or punishment is prohibited. This led to the death penalty which was imposed on war criminals, losing its place in international criminal jurisprudence.⁵² The harshest punishment that can be imposed is life imprisonment.⁵³ Regardless of this, some international crimes such as genocide are also subject to the jurisdiction of the state, especially the state in whose territory the genocide crimes complained

⁴⁵ Shattuck op cit (n43) 69.

⁴⁶ Ibid at 81. See further Meyer op cit (n43) 183.

⁴⁷ Ibid at 74.

⁴⁸ Ibid at 79.

⁴⁹ Ibid at 76.

⁵⁰ Loc cit.

⁵¹ Loc cit.

⁵² Article 23 of the Statute of the ICTR. See too *Prosecutor v Rutaganira* supra (n5) at 106.

⁵³ Loc cit.

of had taken place.⁵⁴ Capital punishment can therefore be imposed if the state having jurisdiction has not yet abolished it. For example, Rwanda imposed the death penalty on genocide perpetrators prior to the abolition of the death penalty in 2007.⁵⁵ Having illustrated that war criminals were pardoned and that pardon, commutation, and rehabilitation are today fundamental human rights, this author now turns to explore ICTR practices regarding detention and pardon.

4. Divergence in detention and pardon practices

In enforcing sentence, detainees' basic human rights must be observed. Article 4(1) and (2) of the ICCPR provides non-derogatory fundamental rights including the right to life, equality before the law, freedom from torture and cruel treatment or punishment. The Covenant guarantees a dignified, compassionate, and respectful treatment of a detainee.⁵⁶ In the lens of humanity, the Covenant requires of a judicial system to impose punishment reflecting the social rehabilitative principle⁵⁷ and to grant pardon or commutation, even to a detainee who is condemned to death.⁵⁸ A right to be pardoned is further entrenched in article 26 of the Statute of the ICTR and rule 126 of the ICTR Rules of Procedure and Evidence. The Tribunal had set a pardon rule in the case of *Bagaragaza*, in which it held that detainee who has served 'three-fourths' of the sentence is eligible to apply.⁵⁹ It noted with approval that where a detainee has served 'three-fourths' of his/her sentence, early release is in fact 'unconditional.'⁶⁰ Where a detainee applies for early release before serving 'three-fourths', the President of the ICTR must consider whether early release is appropriate by taking into consideration the following factors: (i) the gravity of the crime, (ii) the treatment of similarly-situated prisoners, (iii) demonstration of rehabilitation, and (iv) any substantial cooperation with prosecutor.⁶¹

⁵⁴ Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948 states: 'Persons charged with genocide... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.'

⁵⁵ *Prosecutor v Kambanda* supra (n3) at 24: As related to the events of 1994, Rwandan courts passed the death penalty on several occasions. Death penalty was abolished by the Organic Law No. 31/2007 of July 25, 2007.

⁵⁶ Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) of 1966.

⁵⁷ Article 10(3) of the ICCPR.

⁵⁸ Article 6(4) of the ICCPR.

⁵⁹ *Prosecutor v Bagaragaza* Case No. ICTR-05-86-S, Early Release Decision 2.

⁶⁰ *Prosecutor v Muvunyi* Case No. ICTR-00-055A-T, Early Release Decision 11.

⁶¹ Rule 126 of the ICTR Rules of Procedure and Evidence.

The ICTR president considers parole application once a detainee's application was approved by the state in which they are incarcerated.

The Tribunal typically maintains agreement with fourteen countries⁶² for enforcement of sentence under their municipal law. Of the fourteen countries, the Tribunal prefers to transfer convicts to Mali and Benin. Currently in Mali there are 19 detainees, in Benin, there are 14.⁶³ Some of the persons convicted by the Tribunal remain in detention in Arusha, Tanzania. As of 30 June 2011, there were 36 detainees in the UN Detention Facility in Arusha, established in the wake of the Rwandan genocide.⁶⁴ Of the 36 detained persons, 12 have been convicted,⁶⁵ and three were acquitted but remain under the protection of the Tribunal.⁶⁶ Concerns have been raised that these acquitted persons are being detained as if they still have a case to answer.⁶⁷ Others are detained by states trying them. Two cases were transferred to France, one to Sweden, and six cases to Rwanda.⁶⁸

Because the detainees are being imprisoned in different states under different municipal law, the rules regarding parole and commutation differ greatly. Sweden and France have a mechanism for early release. In France and Sweden, a prisoner is eligible for early release after serving 'two-thirds' of the sentence.⁶⁹ In Rwanda, genocide prisoners

⁶² They are United Kingdom, Finland, Denmark, Germany, Austria, Norway, Sweden, Italy, France, Swaziland, Benin, Senegal, Mali and Rwanda.

⁶³ See ICTR. 'More ICTR Convicts Transferred to Mali and Benin to Serve their Sentences' 3 July 2012, available at http://www.unictr.org/Default.aspx?TabId=155&id=1301&language=en-US&mid=560&Skin_Src=%5BG%5DSkins/UNICTR/PrintSkin&ContainerSrc=%5BG%5DContainers/UNICTR/PrintContainer&dnnprintmode=true, accessed on 24 July 2012.

⁶⁴ UN Security Council. *Report of the International Criminal Tribunal for Rwanda*, A/66/209/-S/2011/472, 29 July 2011 at 69.

⁶⁵ Loc cit.

⁶⁶ Ibid at 54.

⁶⁷ GO BW' Omanwa 'Parole and Early Release – An Evaluation of the Practice of ICTR', 25 April 2010, available at http://www.tpirheritagedefense.org/Conference2/Papers/Gershomb_Otachi_BW_Omanwa_Parole_and_early_release_an_evaluation_of_the_practice_at_the_ICTR.pdf, accessed on 16 May 2012.

⁶⁸ Ibid. See too Report of the ICTR op cit (n64) 37 and SU Kim 'ICTR Transfers Another Genocide Case to Rwanda Court' 29 June 2012, available at <http://jurist.org/paperchase/2012/06/ictr-transfers-another-genocide-case-to-rwandan-court.php>, accessed on 24 July 2012. The cases transferred to Rwanda include *Uwinkindi*, *Kayishema*, *Sikubwabo*, *Ntaganzwa*, *Munyashari*, *Ndimbati* and *Munyarugarama*.

⁶⁹ IM Weinberg De Roca & CM Rassi, 'Sentencing and incarceration in the ad hoc tribunals' (2008) 44 (1) *Stanford Journal of International Law* 58.

have ‘provisionally’ been released by presidential decree.⁷⁰ In 2006, the Rwandan parliament passed legislation that sets out the requirement for provisional release. A detainee is eligible if he or she has completed a quarter (¼) of his or her sentence.⁷¹ In Benin, of the 14 detainees, one of them was released prior to the completion of his sentence.⁷² The offender in *Rugambarara* was granted parole after serving nine years of his 11-year sentence.⁷³ This suggests that other detainees might enjoy early release. Unlike in Benin, no formal commutation or parole has been accorded to the 19 detainees who are serving prison terms in Mali by the government of Mali. However, the head of state has the authority to grant pardon and commutation.⁷⁴ Of nine accused who pleaded guilty, three are being detained in Mali:⁷⁵ *Kambanda* is serving life sentence; *Serushago* has so far served 14 of his 15 year sentence; and *Bisengimana* has served 11 of his 15 year sentence. Evidently, *Serushago* and *Bisengimana* are eligible for “unconditional” parole in terms of the ‘*Bagaragaza* parole rule’. This rule is not followed by Mali simply because Mali, in enforcing sentence, applies its own municipal law. Mali has no pardon regulations.⁷⁶

All European countries enforcing the ICTR sentences have parole regulations in place. For example, *Bagaragaza*, who was detained in Sweden and *Ruggiu*, who was detained in Italy were granted pardon. *Ruggiu*’s pardon is exceptional as the state of Italy unilaterally granted early release without notifying the Tribunal.⁷⁷ In 2005, after serving eight years in the ICTR detention, he filed application for pardon, but the decision was turned down by the Tribunal on the ground that the crimes he committed were of the utmost gravity and the length of the term of imprisonment thus far served could not warrant his

⁷⁰ C Mibenge ‘Enforcing international humanitarian law at the international level: The *Gacaca* Jurisdiction for Rwanda’ (2004) 7 *Yearbook of International Humanitarian Law* 418 and see also Article 111 of the Constitution of Republic of Rwanda, 2003 provides that: ‘The President of the Republic has authority to exercise the prerogative of mercy in accordance with the procedure determined by law and after consulting the Supreme Court on the matter.’

⁷¹ Article 36 of the Law No. 38/2006 of 25/09/2006: Establishing and Determining the Organization of National Prisons Service.

⁷² *Prosecutor v Rugambarara* Case No. ICTR-00-59, Early Release Decision.

⁷³ *Rugambarara* Early Release *supra* (n72).

⁷⁴ Weinberg De Roca & Rassi *op cit* (n69) 59.

⁷⁵ According to ICTR Detainees and Convicted Persons – Status: 28th June 2011, available at <http://www.unictr.org/Cases/StatusofDetainees/tabid/202/Default.aspx>, accessed on 25 June 2012, they are *Bisengimana*, *Kambanda* and *Serushago*.

⁷⁶ BW Omanwa *op cit* (n67) 3 and Weinberg De Roca & Rassi *op cit* (n69) 59.

⁷⁷ See D Montgomery ‘ICTR Grants Convict Early Release for First Time in its History’, 26 October 2011, available at <http://www.internationalallawbureau.com/blog/?p=3413>, accessed on 24 July 2012.

early release.⁷⁸ Afterward, he was transferred to Italy. According to the applicable Italian law, *Ruggiu* was eligible for parole upon (i) demonstration of rehabilitation and after serving at least 30 months of the sentence, or (ii) serving half of the punishment imposed, as long as the remaining term did not exceed five years.⁷⁹

As regards detainees at the UN Detention Facility, the Tribunal acknowledged that these detainees are similarly-situated with detainees in European countries and that it has no jurisdiction over the transferred convicts.⁸⁰ This ironically means that the Tribunal rejected its mandate to oversee the incarceration of its detainees in terms of article 26 of the Statute of the ICTR and to react if conditions of pardon and commutation are violated, or the '*Bagaragaza* pardon rule' is infringed.⁸¹ If one compares the early release applications to the Tribunal from similarly-situated detainees with the situation of the detainees held in Mali, the inequality becomes apparent. The Tribunal has provided early release to *Muvunyi* after serving 12 of his 15 years' sentence in the Tribunal detention.⁸² *Muvunyi* did not plead guilty.⁸³

More generally, the ICTR decisions are characterised with inconsistencies. Humane treatment is sometimes noted by the Tribunal and it is seriously considered in some cases. For example, Rwanda should be given precedence over other hosting countries to incarcerate convicts given that crimes were committed in its territory.⁸⁴ Until 2010, the Tribunal was adamant in its reluctance to transfer convicts to Rwanda due to the following reasons: lack of impartiality and judicial independence, hostility towards perpetrators of genocide, and a record of multiple violations of prisoners' human rights.⁸⁵ For these reasons, no acquitted or released person has ever returned to Rwanda. After acquittal or being released, they opt for asylum.⁸⁶ Concerning the seeking of asylum, the Security Council noted with concern the

⁷⁸ *Prosecutor v Georges Ruggiu* Case No. ICTR-97-32-S, Early Release Decision.

⁷⁹ Weinberg De Roca & Rassi op cit (n69) 59.

⁸⁰ *Muvunyi* Early Release supra (n60) at 10-11.

⁸¹ Ibid at 10.

⁸² Ibid at 9.

⁸³ Loc cit.

⁸⁴ Article 26 of the Statute of ICTR and Article 7 of the Genocide Convention.

⁸⁵ KJ Heller 'What happens to the acquitted?'(2008) 21 *Leiden Journal of International Law* 663 at 664; and CP Erlinder 'The UN Security Council Ad Hoc Rwanda Tribunal: international justice or juridically-constructed "Victors' impunity"?' (2010) 4 *DePaul Journal for Social Justice* 210-3; and see Amnesty International 'Rwanda: Suspects Must Not be Transferred to Rwandan Courts for Trial Until it is Demonstrated that Trials will Comply with International Standards of Justice', 12 November 2007, available at <http://www.amnesty.org/es/library/asset/AFR/47/013/2007/en/04cd6827-d369-11dd-a329-2f46302a8cc6/af470132007en.pdf>; accessed on 14 May 2012.

⁸⁶ Report of the ICTR op cit (n64) 54.

problem faced by the Tribunal to relocate (i.e. seek asylum for) acquitted persons and detainees who have completed serving their sentences in other countries.⁸⁷ The Security Council urged the Tribunal to take all possible measures to successfully seek asylum for them.⁸⁸ This raises serious questions as to whether the ICTR can effectively contribute to the process of national reconciliation if asylum has replaced the reintegration process.

In the next section, whether a plea of guilty ought to be considered as a starting point for proof of rehabilitation will be examined.

5. Pleading guilty: A starting point towards rehabilitation

Of the 69 cases thus far completed by the Tribunal, ten of the accused pleaded guilty,⁸⁹ thus recognising their culpability in the 1994 genocide and publicly expressing remorse.⁹⁰ Most of them asked for pardon for failing to discharge their duties from the families who suffered loss.⁹¹ They were willing to tell the whole truth, thus contributing to the search for the truth into the causes of the human disaster.⁹² They believed that by pleading guilty this would encourage other perpetrators to come forward.⁹³ By pleading guilty, they wanted to contribute to the administration of justice; the process of national reconciliation and unity; the restoration of peace in Rwanda, and, above all, to save the genocide victims from the trauma associated with testifying and cross-examination.⁹⁴ For instance, in the case of *Bisengimana*, the defence submitted:

[He] has already expressed his deepest apologies to the victims of the Rwandan genocide...He also sincerely regrets not having had the courage to personally oppose the massacres and having supported them by his presence. He hopes that his expressions of regret will be heard by Rwandans and the international community, and will help to contribute to the process of peace and national reconciliation.⁹⁵

⁸⁷ Resolution S/RES 2054 (2012): Preamble.

⁸⁸ Loc cit.

⁸⁹ Those who pleaded guilty includes *Kambanda*, *Bisengimana*, *Nzabarinda*, *Rugambarara*, *Rutaganira*, *Serugendo*, *Serushago*, *Bagaragaza*, *GAA*, and *Ruggiu*.

⁹⁰ *Prosecutor v Bisengimana* supra (n4) at 140. See too *Prosecutor v Rutaganira* supra (n5) at 158; *Prosecutor v Serushago* supra (n3) at 40; and *Prosecutor v Rugambarara* Case No. ICTR-00-59-T at 34.

⁹¹ Ibid at 137. See too *Prosecutor v Serushago* supra (n3) at 40.

⁹² Ibid at 136. See too *Prosecutor v Rutaganira* supra (n5) at 114.

⁹³ Loc cit.

⁹⁴ *Prosecutor v Bisengimana* supra (n4) at 128, 136 & 139. See too *Prosecutor v Rutaganira* supra (n5) at 114; *Prosecutor v Serushago* supra (n3) at 40; and *Prosecutor v Rugambarara* supra (n90) at 33.

⁹⁵ Ibid at 132.

At the sentencing stage, the Tribunal held that a plea of guilt, confession, genuine remorse, repentance, good conduct/behaviour, the potential for rehabilitation, a contribution to reconciliation, the establishment of the truth, and encouragement of other perpetrators to come forward each constitute a mitigating factor.⁹⁶ The Tribunal pointed out that when an accused pleads guilty he or she takes an important step towards rehabilitation and reintegration.⁹⁷ Although a plea of guilt is viewed as a mitigating factor, it is, in a motion of pardon or commutation, considered as a strong positive factor for granting early release.⁹⁸

5.1 Self-rehabilitation approach

The Tribunal has adopted the self-rehabilitation approach for consideration of a parole motion. This is substantially illustrated by the fact that the Tribunal assesses whether an accused has been rehabilitated, based on the prisoner's statements, demeanour in court, and a statement from the prison authorities as to his or her conduct whilst in detention.⁹⁹ In sentencing, the Tribunal takes into account the potential for rehabilitation as demonstrated by an accused while in detention.¹⁰⁰ When considering whether an early release is appropriate, good behaviour towards fellow detainees and correctional service staff plays a pivotal role in the court deliberations.¹⁰¹ In two of the successful applications for early release granted by the Tribunal, where the accused had pleaded guilty during the trial, the Tribunal held that their plea was a strong positive factor that pointed towards voluntary rehabilitation, and which was central to upholding their applications.¹⁰² Therefore, a detainee's demonstration of remorse and good character is indispensable in considering whether pardon or commutation is appropriate.¹⁰³ Even in the early release application of *Muvunyi*, who did not plead guilty, an exemplary character and behaving in a civilised manner were given credit to support a claim of successful rehabilitation.¹⁰⁴ For these reasons, the Tribunal should not stand idly

⁹⁶ Ibid at 132 & 145-150. See too *Prosecutor v Rutaganira* supra (n5) at 149.

⁹⁷ *Prosecutor v Rutaganira* supra (n5) at 114.

⁹⁸ *Prosecutor v Rugambarara* Case No. ICTR-00-59 Early Release at 13 and *Bagaragaza* Early Release supra (n59) at 11.

⁹⁹ *Rugambarara* Early Release supra (n98) at 13 and *Bagaragaza* Early Release supra (n59) at 11.

¹⁰⁰ *Prosecutor v Rutaganira* supra (n5) at 170 and *Prosecutor v Rugambarara* supra (n90) at 43.

¹⁰¹ *Bagaragaza* Early Release supra (n59) at 11.

¹⁰² *Rugambarara* Early Release supra (n98) at 9.

¹⁰³ Ibid at 10.

¹⁰⁴ *Muvunyi* Early Release supra (n60) at 6.

by and wait for detainees to self-rehabilitate. It should reform them by committing them to rehabilitation programmes, which holistically engage them at all levels – physically, morally, psychologically, spiritually, mentally, and educationally. A commutation of sentence should be granted for those who have successfully completed these programmes. Even where offenders are self-rehabilitated, rehabilitation does not always warrant early release. According to the Tribunal, a detainee cannot be granted early release if he or she has committed crimes which are heinous in nature and shock the collective conscience. These are the reasons which the Tribunal based its decision to reject *Ruggiu's* application on, regardless of his good conduct and favourable prospects for reintegration into society.¹⁰⁵ This decision is in conflict with the provision of the ICCPR that guarantees early release even if a detainee is facing the death penalty.¹⁰⁶ Further, article 10(3) of the ICCPR requires of authorities to reform or socially rehabilitate detainees so that they can be reintegrated back into the community as a productive and law-abiding citizen. The latter is demonstrated by expressing remorse and willingness to change. This leads this author to investigate how rehabilitation is understood by the Tribunal and to seek to illuminate the importance of the rehabilitative principle.

6. The Tribunal and the rehabilitation ideal

Contemporary international criminal justice discourse asserts that if criminals can be made uncomfortable with the infliction of harm (which is proportionate to the moral atrocity), it will incapacitate them and, simultaneously, deter or persuade others from committing heinous crimes.¹⁰⁷ Deterrence and desert do not require the Tribunal to reform the convicts, but simply to inflict the pains that accompany the deprivation of liberty (or of material resources).¹⁰⁸ The principles of desert and deterrence have only exacerbated the plight of convicts before and after their incarceration.¹⁰⁹ Dignan argues that desert is problematic because its justification is based on two key elements: censure and hard treatment.¹¹⁰ Ensuring the offender suffers the pain of being censured is achieved by the Tribunal by imposing longer confinement and harsher sentences, and this theoretical justification eliminates the possibility of rehabilitating detainees and pardoning them. This author's main concern is if the Tribunal intends contributing

¹⁰⁵ *Ruggiu* Early Release supra (n78).

¹⁰⁶ Article 6(4) of the ICCPR.

¹⁰⁷ Hassan op cit (n11) 48.

¹⁰⁸ Von Hirsch et al op cit (n16) 29. See too Hassan op cit (n11) 48.

¹⁰⁹ Ibid.

¹¹⁰ Ibid at 203.

to national reconciliation and restoration of peace, penal rehabilitation theories should be taken into account so as to transform the persons who are responsible for genocide crimes into realising the harm caused and, ultimately, reforming.¹¹¹ The Tribunal should consider that longer confinement will serve no useful purpose. The utilitarian outcome would be achieved only if the Tribunal is willing to punish its detainees humanely. The emphasis should be placed not on the horrific abuses themselves, nor on the level of harm caused, or the effect which punishment may generally have, but on the convicts. Prevention and deterrence should not be so important that they override the rights of offenders. They need to be reformed to such extent that they are not likely to re-offend once they are released from prison. Although the ICTR detainees choose to go into exile, it is anticipated that they will return to the Rwandan community and that, as former politicians, they might still have influence over their supporters. If not rehabilitated, they are capable of fuelling ethnic division.

The Tribunal also noted that rehabilitation goes hand in hand with the reintegration of an accused into society.¹¹² But, theories of rehabilitative ideals such as 'a fine and penal servitude' cannot be accommodated as an emphasis should be placed on deterrence and desert; a just sentence is a prison term including life imprisonment.¹¹³ In determining an appropriate penalty, the Tribunal places emphasis on the gravity of a crime. The gravity of these shocking crimes is embedded in the understanding of their nature. They are heinous and shock the collective conscience and they are committed against civilians on a discriminatory basis.¹¹⁴ In particular, genocide constitutes the 'crime of crimes'¹¹⁵ and its gravity outweighs the mitigating factors. In this context, the Tribunal focuses on the gravity of crimes and the harm caused, and pays little attention to an individual in sentencing.¹¹⁶ An individual is overlooked when imposing penalties, in favour of achieving retribution and the general deterrence goal.¹¹⁷

The harshness of desert can be well captured by the following example. One of the ten accused who pleaded guilty, *Serugendo*,

¹¹¹ Ibid. See too B Hudson 'Human rights, Public Safety and the Probation Service: Defending Justice in the Risk Society' (2001) 40 (2) *The Howard Journal* 109-10, who argues that criminal justice system should attempt to eliminate the risk of re-offending or committing crimes. This can be achieved if the court wholeheartedly embraces the idea of human rights.

¹¹² *Prosecutor v Rutaganira* supra (n5) at 113.

¹¹³ *Prosecutor v Serushago* supra (n3) at 12.

¹¹⁴ Ibid at 14.

¹¹⁵ Ibid at 15.

¹¹⁶ Ibid at 17.

¹¹⁷ Ibid at 20.

was suffering from terminal illness at the time of sentencing,¹¹⁸ and subsequently died while serving his prison term.¹¹⁹ Nonetheless, the Tribunal imposed a single term of six years of imprisonment which was, at the sentencing stage, considered to have elements of clemency. Plainly, the purpose of punishing *Serugendo* was not aimed at fully reforming him, but, on one hand, to relay a strong dissuading message to potential perpetrators, and, on the other, to make clear to *Serugendo* and potential perpetrators that the international community will not tolerate these heinous crimes. These are parameters within which the Tribunal considers an application for early release.¹²⁰

Giving priority to the desert ideal obviously results in the imposition of harsh punishment. Similarly, retribution punishment results in the deprivation of the right to parole. If convicts enjoy early release, they will not be censured and social disapproval will not be communicated. The justification for retribution and deterrence principles fit snugly with the mandate of the Tribunal, which is to reform the convicts and, ultimately reintegrate them into Rwandan society and thereby participating in and contributing to national peace and reconciliation.¹²¹

In this author's view, the Tribunal should place emphasis on the risk of reoffending once convicts are reintegrated. Instead, the Tribunal views them as social outcasts who must be locked away out of the view of society. How then should they reconcile with the victims and society? Or how should they contribute to reconciliation if locked away without possibility of a parole? As Zolo comments, to do justice implies using all 'appropriate means of criminal justice, to the reconciliation of the communities involved in the atrocities of war and devastation of war'.¹²²

7. Conclusion

Retribution and deterrence alone will not promote the Tribunal's important role of contributing to national reconciliation and the restoration of lasting peace. However, punishment that takes cognisance of rehabilitative theory can still play an important role and greatly contribute to the reconciliation processes. Rehabilitative interventions

¹¹⁸ *Prosecutor v Serugendo* Case No. ICTR 2005-84-I at 70-74.

¹¹⁹ A Cassese *The Oxford Companion to International Criminal Justice* (2009) 916: He was arrested on 16 September 2005, sentenced to six years' imprisonment on 12 June 2006, and died on August 22, 2006.

¹²⁰ *Ruggiu* Early Release *supra* (n78): Ruggiu' application for early release was turned down because of the crimes for which he was sentenced include those utmost gravity, including the direct and public incitement to commit genocide.

¹²¹ *Prosecutor v Serusbago* *supra* (n3) at 19-20.

¹²² Zolo *op cit* (n17) 730.

can transform detainees into conforming, law-abiding, and productive citizens with a realisation that international law must be respected. Rehabilitated persons can contribute to healing ethnic divisions and establishing a society united in its diversity. It must be understood that these crimes of genocide are crimes committed largely by former politicians and military leaders and their supporters with motivations regarding the advancement of their political vendetta, agendas or ideology.¹²³ They could abandon their deadly ideology through an educational programme.

It is undeniable that the ICTR detainees are former leaders who sowed ethnic conflict and instigated mass killings for political gain. Those detainees who were blameworthy for, and pained by what they did, have an important role to play in uniting conflicting groups. This is so because they are, like other international convicts, viewed by their supporters as 'heroes'.¹²⁴ The ICTR is viewed as the victors' justice or one-sided justice.¹²⁵ These perceptions of reality complicate reconciliation and reinforce social conflict, division, mistrust, and hostility.

On the basis of *Bagaragaza's* decision, all detainees should, after serving three-fourths of their sentences be given the opportunity to apply for early release. Otherwise they will not contribute to reconciliation where they have been censured and subjected to harsher and longer punishment, without a possibility of parole. As this author has argued, there is a divergence in detentions as well as parole applications, and the Security Council which establishes special tribunals, should also establish an 'International Pardon and Commutation Board', modelled on the 'Interim Mixed Parole and Clemency Board' to effectively, adequately, and uniformly deal with parole and commutation. The Security Council should understand that the consequences of punishment, which will benefit global society, will not be served by longer confinement within prison walls. There should be a universal mechanism to apply for pardon and commutation to ensure certainty and consistency in early release practices. This would avoid discriminatory procedures. This author concludes by emphasising that a sentence without a hope of release compromises the principles of human rights and human dignity, and it ignores the

¹²³ RJ Goldstone 'Justice as a tool for peace making: Truth Commissions and international criminal tribunals' (1995) 28 *New York University Journal of International Law and Politics* 485-498.

¹²⁴ Zolo op cit (n17) 732: In Japan, the seven Japanese executed by the Tokyo Tribunal are being paid the honours reserved to martyrs of the Japanese fatherland. In Serbia, the Slobodan Milosevic party gained popular support due to his highly publicised trial.

¹²⁵ Erlinder op cit (n85) 202-214.

capacity of redemption and rehabilitation.¹²⁶ And to the convicts, detention becomes a place of pure despair, of physical, emotional and psychological torture.

¹²⁶ See C Appleton & B Glover 'The pros and cons of life without parole' (2007) 47 *British Journal of Criminology* 612.