

Some Remarks on the Enforcement of International Sentences in Light of the Galić case at the ICTY

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I. Outline

This article sets out the legal basis for the enforcement of international criminal judgments, especially from the ad hoc Tribunals, and highlights a number of practical problems arising from the enforcement of these sentences in various national systems. Special emphasis will be placed on the principle of equal treatment at the enforcement stage. To illustrate some of the issues, the case of Prosecutor v. Galić¹ of the International Tribunal for the former Yugoslavia (ICTY) will be examined in somewhat more detail.

Art. 23 of the ICTY Statute² provides that the ICTY Trial Chambers shall render judgments. Art. 24 ICTY Statute limits the penalties to imprisonment. When deciding about the term of imprisonment, the general practice regarding prison sentences in the courts of the former Yugoslavia shall be taken into account (Art. 24 (1) ICTY Statute) and such factors as the gravity of the crime and individual personal circumstances (Art. 24 (2) ICTY Statute).³ Art. 27 ICTY Statute stipulates that the enforcement regime follows the applicable law of the enforcing state, subject to the supervision of the Tribunal.⁴ The International Community depends on individual states that are willing to receive convicted persons and to enforce the internationally rendered sentences as there is no international prison where any such convicts could serve their prison term.⁵

Hence, the enforcement of international sentences of the ICTY – based upon the Statute and the Rules of Procedure and Evidence (RPE) – follows the specific domestic law of the enforcing state. As there are no more specific provisions or conditions set by the ICTY legislation with regard to the enforcement regime, the *Trial Chambers* especially in some of the early cases included findings as to the specific re-

quirements for a proper national enforcement of the international sentences in the respective judgments.⁶

One of the key questions is to what extent the national courts are bound by the terms of imprisonment set by the ICTY judgments. The term “life imprisonment” is used in the ICTY Statute, but also in various national legal systems, but in practice life imprisonment may mean very different time periods. In some European countries, a minimum period between 15 and 25 years is set in the respective Criminal Codes, in some countries “life” means lifelong imprisonment, as a rule.⁷

Generally, the international community should aim at an enforcement system governed by the principle of equal treatment. This article explores whether and how the supervision authority of the ICTY can act to this effect.

II. Procedure to Designate the State of Enforcement

According to Art. 103 ICTY Statute, imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons. Such a provision is needed as there is no permanent international prison available. Following a verdict of the *Trial Chamber*, the Registrar, pursuant to Section 2 of the relevant ICTY Practice Direction,⁸ shall make preliminary inquiries with states that might be willing to

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¹ ICTY – IT-98-29 (Prosecutor v. Galić).

² Statute of the Tribunal, Sept 2009, at: http://icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

³ Similar provisions with a bit more detail can be found in Rules 98^{bis} and 98^{ter} of the ICTY Rules of Procedure and Evidence (RPE).

⁴ Art. 27 ICTY Statute: “Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.”

⁵ See for an ICTY interactive map showing the various enforcing states at: <http://icty.org/sid/10276>.

⁶ See e.g. ICTY, Sentencing Judgment of 29.11.1996 –, IT-96-22-T (Prosecutor v. Erdemović), paras. 68-75. See also *Kress/Sluiter*, in: Cassese/Gaeta/Jones (Hrsg.), *The Rome Statute of the International Criminal Court, A Commentary*, Bd. 2, 2002, p. 1779.

⁷ In Germany, as explained below, the minimum period to be served is only 15 years. A similar provision can be found in Section 46 (6) of the Austrian Criminal Code. In Romania (Art. 55 [1]) and the Czech Republic (Section 88 [5]) the minimum period is 20 years, while in Cyprus it is 25 years. The same period applies in Poland (if not a longer period has been set in the judgment, Art. 77-82 Polish Criminal Code) and Slovakia (with the extra provision that such an early release is not possible if it is not the first conviction to life imprisonment, Sections 47 and 67 Slovak Criminal Code). In the Netherlands, life imprisonment means generally lifelong imprisonment (Art. 10 Dutch Criminal Code). In Scotland, following the Convention Rights (Compliance) Act (Scotland), 2001, every conviction to life imprisonment contains a “punishment part” that fixes the time period that has to be served before any early release. Decisive factors for the determination of that period are deterrence and retribution. After such a period, the Parole Board decides on early release, considering the necessary protection of the public.

⁸ ICTY, Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to serve his/her sentence of imprisonment of 1.9.2009 – IT/137/Rev.1 (“PD Designation”).

enforce the sentence.⁹ Once the verdict has become final, the formal procedure to designate the enforcing state begins and it ends with a formal enforcement agreement between the ICTY and the designated state. Under Art. 103 (3) (c) of the ICC Statute, the convicted person must be heard in the designation procedure. Neither the ICTY Statute nor the Rules of Procedure and Evidence provide for such a hearing. The relevant Practice Direction leaves it to the discretion of the President whether or not he requests the opinion of the convicted person.¹⁰ In any case, the President has wide discretion when it comes to the designation of the enforcing state.¹¹ But practice has also shown that it may turn out to be very difficult to find a state willing to enforce such a sentence. It should be noted that the ICTY Statute provides no solution if no enforcing state can be found.¹²

III. Enforcement according to national law and supervision by the ICTY

Generally, the designated enforcement state is bound by the terms of imprisonment. Even if this is not as clearly stated as in Art. 105 ICC Statute, it does follow from the principal system that the ICTY renders a judgment which is then only enforced by a designated state on “behalf of the international community”. As a matter of principle, the enforcement as such cannot be altered by the enforcing state.¹³ The enforcement of the sentence shall be supervised by the Tribunal or a body designated by it.¹⁴

However, a certain term of imprisonment, or at least its understanding at the international level, may create a conflict with the national (constitutional) law of the state of enforcement. The concept of life imprisonment is understood very differently in various countries.¹⁵ Should the concept of life imprisonment under the law of the ICTY be understood as truly lifelong imprisonment, a conflict with domestic law is

likely to arise in countries such as Germany where the constitution requires that the sentenced person retains a possibility to early release. In such a conflict the issue of primacy of the international judgment arises. The issue may also be addressed in the individual enforcement agreement between an international court and the state of enforcement.¹⁶

The jurisprudence of the Tribunals has identified retribution and deterrence as the two primary objectives of sentencing. Rehabilitation is also an objective which the *Trial Chamber* should consider when determining a sentence.¹⁷ These factors are also of importance when it comes to decisions about pardon or early release.

1. Early release and pardon

Article 28 of the ICTY Statute stipulates that, if a convicted person is eligible for early release or pardon according to the applicable domestic law, the state concerned shall notify the ICTY’s President accordingly who will “decide the matter on the basis of the interests of justice and the general principles of law”. Rule 125 provides that the following factors should be taken into account: the gravity of the crime or crimes for which the prisoner was convicted, the treatment of prisoners in similar cases, the prisoner’s demonstration of rehabilitation,¹⁸ as well as any substantial cooperation of the prisoner with the Prosecutor. In the Tadić Case, the President ruled that the ICTY Prosecution is in no position to comment on the convicted person’s behavior while in prison.¹⁹ With regard to post-conviction cooperation, the President did not attach much weight to this factor, in part because the Prosecution appeared to not have sought any such cooperation.²⁰

¹⁶ See below Part IV. for specific comments on the Galić case.

¹⁷ ICTY, Judgment of 5.12.2003 – IT-98-29-T (Prosecutor v. Galić), para. 757.

¹⁸ In this respect, the President examines the detainee’s conduct in prison and the question whether the detainee shows any sign of remorse. See e.g. ICTY, Decision of President on Application of Haradin Bala for Sentence Remission of 15.10.2010 – IT-03-66-ES (Prosecutor v. Bala), paras. 18 et seq.; ICTY, Decision of President on Early Release of Ivica Rajić of 22.8.2010 – IT-95-12-ES (Prosecutor v. Rajić), paras. 17 et seq.; ICTY, Decision of President on Early Release of Johan Tarčulovski of 23.6.2011 – IT-04-82-ES (Prosecutor v. Tarčulovski), paras. 20 et seq.; ICTY, Decision of President on Early Release of Veselin Šlišančanin of 5.7.2010 – IT-95-13/1-ES (Prosecutor v. Šlišančanin), paras. 22 et seq.; ICTY, Decision of President on Early Release of Milomir Stakić of 15.7.2011 – IT-97-24-ES (Prosecutor v. Stakić), paras. 29 et seq.

¹⁹ ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadić of 17.7.2008 – IT-94-1-ES (Prosecutor v. Tadić), para. 10.

²⁰ ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadić of 17.7.2008 – IT-94-1-ES (Prosecutor v. Tadić), para. 18.; see also ICTY, Decision of President on Application of Haradin Bala for Sentence Remission of 15.10.2010 – IT-03-66-ES

⁹ Following the report of the UN Secretary General of 1993 (UN Doc. S/25704, para. 121), the ICTY does not transfer any prisoners to the countries of the former Yugoslavia for enforcement of their sentences. The example of Stanković whose case was transferred from the ICTY (Case No. It-96-23/2) to Bosnia and Herzegovina and who was imprisoned in the prison where he had worked during the war and from which he could escape shortly after the judgment certainly stopped any further consideration of enforcement of sentences in the former warring countries for a while.

¹⁰ ICTY, Practice Direction on the Procedure for the International Tribunal’s Designation of the State in which a Convicted Person is to serve his/her sentence of imprisonment of 1.9.2009 – IT/137/Rev.1, section 5, 5th sentence.

¹¹ The situation at the ICC is similar, based upon Art. 103 (3) (c) ICC Statute; see also *Kress/Sluiter* (fn. 6), p. 1789.

¹² See in comparison Art. 103 (4) ICC Statute, that foresees enforcement in the host state.

¹³ See for the necessary and useful distinction between the “enforcement as such” and the “enforcement modalities”, *Kress/Sluiter* (fn. 6), Chapter 43 (I), p. 1751 et seq.

¹⁴ Rule 104.

¹⁵ See esp. supra fn. 7.

The President issued a specific Practice Direction (PD) on the issues of pardon, commutation of sentences and early release.²¹ Under the PD, the initiative for early release is with the national authorities, but the final decision is left with the President.²² During the procedure, the convicted person shall be provided with all necessary information and he or she shall then be heard by the President.²³ Interestingly enough, though, Section 8 of the PD does not require the President to even consider the comments of the convicted person in his final decision.

Practice has shown that the President often consents to the early release as proposed by the national authorities. With a growing number of early releases, in most cases after having served $\frac{2}{3}$ of their sentence, the principle of equal treatment more and more requires to consent to respective applications in similar circumstances.²⁴ It remains to be seen whether the President will consider the very different enforcement regimes in European countries when it comes to life imprisonment.

2. Comparison to ICC Rules

As in the ICTY case, the ICC is to supervise the enforcement of its sentences (Art. 105 ICC Statute). Art. 110 of the ICC Statute and ICC Rule 224 foresee an International Review Mechanism that applies generally if no specific conditions are agreed upon according to Art. 103 (1) and (2). In the latter case, the domestic court applies the national law, but

(Prosecutor v. Bala), para. 27. In the Rajić Decision, ICTY, Decision of President on Early Release of Ivica Rajić of 22.8.2010 – IT-95-12-ES (Prosecutor v. Rajić), para. 23, post-conviction cooperation was considered a militating factor. However, in ICTY, Decision of President on Application for Pardon or Commutation of Sentence of Dragan Jokić of 13.1.2010 – IT-05-88-R77.1-ES (Prosecutor v. Jokić), para. 17, the President did not attach much weight to a Prosecution' report of a lack of cooperation; similarly in ICTY, Decision of President on Early Release of Milomir Stakić of 15.7.2011 – IT-97-24-ES (Prosecutor v. Stakić), para. 37, the lack of cooperation was considered a neutral factor.

²¹ Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Person Convicted by the International Tribunal, Rev. 3, 16.9.2010.

²² According to the PD Release, Section 2, a convicted person may also directly petition the President.

²³ Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Person Convicted by the International Tribunal, Rev. 3, 16.9.2010, Section 5.

²⁴ ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadić of 17.7.2008 – IT-94-1-ES (Prosecutor v. Tadić), para. 17. See also ICTY, Decision of President on Application of Haradin Bala for Sentence Remission of 15.10.2010 – IT-03-66-ES (Prosecutor v. Bala), para. 14: "I am under an obligation to treat all ICTY detainees in a similar manner, despite the state in which they are serving their sentence."

the final decision is left with the ICC.²⁵ Under the international review mechanism, early release can only be granted by the ICC and at the earliest after 25 years in case of life imprisonment (Art. 110). Relevant factors in favor of early release are: early and continuous willingness to cooperate with the court and prosecutor, any other voluntary assistance and clear and significant change of circumstances (Art. 110 (4)). The decision is rendered by judges of the ICC Appeals Chamber and not by the President (Rule 224 (1)). This important difference compared with the practice at the ICTY indicates that the Rome Statute qualifies the reduction of a sentence as a substantive matter rather than a pure matter of enforcement. Generally an oral hearing with the sentenced person present, as well as the Prosecutor, the enforcing state and victims or their representatives is required. In the case of a negative decision, a further review will generally follow every three years (Rule 224 (3)).

IV. The Galić case

1. The Facts

The *Trial Chamber* rendered its judgment on 5.12.2003 and convicted Stanislav Galić for violation of the laws or customs of war and crimes against humanity to a prison term of 20 years. Both the Prosecution and the Defence appealed the judgment. Upon the Prosecution's appeal, the Appeals Chamber on 30.11.2006 reversed the initial judgment and increased the sentence to life imprisonment.

Without reviewing in details the findings of the *Trial Chamber* and the *Appeals Chamber*, it has to be stressed that the *Appeals Chamber* found that the *Trial Chamber* committed a discernible error when determining the adequate sentence for General Galić. In the present context, the following findings of the *Appeals Chamber* are of utmost importance:

"Although the *Trial Chamber* did not err in its factual findings and correctly noted the principles governing sentencing, it committed an error in finding that the sentence imposed adequately reflects the level of gravity of the crimes committed by Galić and his degree of participation. The sentence rendered was taken from the wrong shelf. Galić's crimes were characterized by exceptional brutality and cruelty, his participation was systematic, prolonged and premeditated and he abused his senior position of VRS Corps commander. In the *Appeals Chamber's* view, the sentence imposed on Galić by the *Trial Chamber* falls outside the range of sentences available to it in the circumstances of this case. The *Appeals Chamber* considers that the sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct, that it is able to infer that the *Trial Chamber* failed to exercise its discretion properly. Accordingly, the *Appeals Chamber* finds that the *Trial Chamber* abused its discretion in imposing a

²⁵ Art. 103 (2) (b) and Art. 104 ICC Statute. See also *Kress/Sluiter* (fn. 6), at p. 1794 et seq.

sentence of only 20 years and allows the Prosecution's appeal."²⁶

2. Enforcement agreement

Following the respective decision of the President of the ICTY, the Registrar concluded an agreement with Germany with respect to enforcing Galić's prison sentence on 16.12.2008.²⁷ While the Enforcement agreement generally follows the previous practice and the model agreement, there is one interesting point. If Galić is eligible for early release under German law, but the ICTY President decides that such release is not appropriate, Galić will be transferred back to The Hague and will not serve the remainder of his prison sentence in Germany.²⁸ There is no indication why this provision was included. It is clearly not in the interest of Galić to be transferred to yet another state of enforcement. Such a transfer is also not justified by his conviction and seems to be in contradiction of the aim of rehabilitation. It may be assumed, that these considerations may make the President of the ICTY more amenable to agree to early release than he or she might be in light of the previous practice.

3. Applicable German law

Section 57a of the German Criminal Code²⁹ provides that in case of life imprisonment, the convicted person can be set free on parole after 15 years if certain conditions are met. Therefore, in German practice life imprisonment often means only 15 years service of the sentence. This does not apply, however, when the Trial Chamber has determined that the culpability of the sentenced person is "particularly serious".³⁰ Obviously, such a specific finding cannot be expected from any Trial Chamber at the ICTY, especially as the state of enforcement is not yet designated at the time of the judgment. Yet, in the Galić case the specific findings of the *Appeals Chamber*³¹ regarding the adequate sentence with regard to his individual guilt seem to match the described requirements for a longer period to be served and should be taken into account when deciding about early release.

In an earlier ICTY case, Tadić was sentenced to 20 years imprisonment and he also served his sentence in Germany. Interestingly enough, the German courts at the time applied section 57 of the German Criminal Code which applies to sentences of imprisonment of a determinate number of years, although under German law the maximum sentence of imprisonment amounts to 15 years. As such the Tadić judgment should have arguably fallen under section 57a for life impris-

onment. In the Tadić case, the application of section 57 (instead of 57a) favoured Tadić as he was hereby eligible to early release after 2/3 of his prison term. In case the 20 years imprisonment would have been regarded as a life imprisonment under German law, he would have served at least 15 years. This situation obviously changes if a perpetrator is convicted to more than 23 years of imprisonment. In such a case, the more favourable treatment will follow when the international sentence is considered as one of life imprisonment for the purposes of enforcement in Germany – a somewhat surprising result. It should be added that, as a matter of principle, German courts will apply the rule that is most favorable to the perpetrator.

The most important factors for early release are social rehabilitation and public security. However, social rehabilitation in the context of domestic cases is hard to compare with that in a situation of macro-criminality which is the typical environment of crimes under international law. Here, the perpetrators, as a rule, act in conformity with and not in deviance from their immediate social system and the majority of perpetrators of crimes under international law are unlikely to commit similar crimes after their release. It is therefore questionable if these factors can be attached great weight when deciding about early release.

V. Conclusion

In short, it seems that the designation of the state of enforcement amounts to something like a lottery for the person sentenced by the ICTY. The national criminal systems of enforcement differ widely and the ICTY lacks the decisive power to influence the national level in a way that the principle of equal treatment would be satisfied.³² This is unsatisfactory because it contradicts the overall aim to achieve equal justice and uniform enforcement,³³ as reflected, for example, in the Erdemović Sentencing Judgment.³⁴ One wonders whether the sentenced person should not at least be heard in the designation procedure and whether his or her views should not at least be taken into account in the final decision. One must however concede that there will often be no choice between several states and the conditions and circumstances of the international criminals will be the same in the majority of cases.

With the growing number of international courts and hence with a growing number of convicts, the question arises whether it would not be preferable to establish a truly international prison with a set of international rules for imprison-

²⁶ ICTY, Judgement of 30.11.2006 – IT-98-29-A (Galić Appeals Judgment), paras. 455 and 456.

²⁷ The Galić enforcement agreement can be found online at: http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/enforcement_agreement_germany_galic_161208en.pdf.

²⁸ Galić Enforcement Agreement (fn. 27), section 2 (4).

²⁹ Galić Enforcement agreement (fn. 27), section 2 (3), specifically refers to section 57a.

³⁰ Section 57a (1) No. 2 of the German Criminal Code.

³¹ See *supra* at IV. 1.

³² Neither Art. 27 of the Statute nor Rule 103 (RPE) provide for the possibility to transfer a prisoner at any time to another enforcing state, as foreseen in the ICC Statute under Art. 104 (1).

³³ One could imagine that two brothers are convicted by the same Trial Chamber for the same crimes to life imprisonment, but then sent to different enforcing states. One brother might be set free after 15 years in Germany, while the other brother might stay in prison for the rest of his life in the Netherlands.

³⁴ See *supra* fn. 8.

ment, its conditions and for early release. Already today, many perpetrators spent a number of years during pre-trial and trial stages in the UN prison in Scheveningen/The Hague.³⁵ In case of very short prison sentences, some convicted prisoners have never been transferred to another state of enforcement. An international prison would have a number of advantages, among which a better treatment for the convicted war criminals. Currently, they serve their sentence in various national prisons. No special program can be devised by the domestic prison authorities in terms of rehabilitation and regarding prison conditions reflecting the specific circumstances of war criminals, if such a prisoner is the lone exception within the prison population. Most importantly, an international prison with a unified set of rules would ensure equal treatment of all such prisoners.

Until this vision comes true, it will be up to the *Trial Chambers* of the respective courts and Tribunals to set clear minimum standards in each verdict when it comes to the issue of imprisonment and the duration of such sentences. Specific findings as to a minimum period that needs to be served (like in the Tadić case³⁶ or Stakić case³⁷) could be at least helpful guidelines to the national courts. The same applies to specific findings as to the individual degree of guilt or specific findings as to when early release may be appropriate. Another option is to establish a more detailed set of international rules on enforcement. However, the negotiations on the Rome Statute have shown that many states are very reluctant when it comes to binding international rules on enforcement. Such international standardized rules would also not automatically solve a possible conflict with national constitutional law.³⁸

It may be worth for the Office of the Prosecutor to be in contact with the domestic Prosecutor to ensure that appropriate reports are filed by the domestic prison authorities and that factors like rehabilitation, showing of remorse and good cooperation are adequately reflected in such reports. Otherwise these factors cannot be really considered when the final decision is made.³⁹

Concerning the Galić case, one can only hope that the German courts and authorities as well as the ICTY will not ignore the fact that the *Appeals Chamber* found it necessary, based on the facts of the case and the individual guilt of the Accused, to increase the initial sentence of 20 years to life imprisonment. It would be irritating to see Galić released

much earlier than even the 20 years that were found clearly insufficient by the *Appeals Chamber*. With regard to the specific enforcement agreement between the ICTY and Germany regarding Stanislav Galić, it seems advisable that both renegotiate the agreement to deal with a situation where the President may not consent to early release, to avoid the immediate transfer of Galić back to The Hague.⁴⁰ It is hard to understand why Galić should serve the rest of his prison term in yet another state of enforcement. Such a transfer might cause additional hardship that is not required and justified by the conviction as such.

Finally, it seems worth to review the concept of international enforcement with regard to the actual aim of such enforcement. Is social rehabilitation the main purpose as in purely domestic cases? Or is the enforcement of the international sentence more about serving justice and the strengthening of the international rule of law? The outcry of many victims at the early release of some ICTY prisoners (e.g. Plavšić) should also send a warning signal to the international community. A similar outcry can be predicted in other cases, like in the Galić case. Only with a clear and uniform concept of international enforcement can national authorities and courts render appropriate decisions on enforcement and early release.

³⁵ In separated parts of the prison, suspects before the ICTY, ICC and Special Court for Sierra Leone are detained during the pre-trial, trial and appeals stage.

³⁶ ICTY, Sentencing Judgment of 14.7.1997 – IT-94-1-T 8 (Prosecutor v. Tadić), para. 76.

³⁷ ICTY, Judgment of 31.7.2003 – IT-97-24-T (Prosecutor v. Stakić), Disposition, V. (1), p. 253.

³⁸ As in Germany, the Constitutional Court found that every convicted person has to have a chance to be released after a minimum period to be served.

³⁹ See ICTY, Decision of the President on the Application for Pardon or Commutation of Sentence of Dusko Tadić of 17.7.2008 – IT-94-1-ES (Prosecutor v. Tadić), para. 16.

⁴⁰ Galić Enforcement Agreement (fn. 27), Section 2 (4).