Enforcement of Sanctions Imposed by the International Criminal Tribunals for Rwanda and the Former Yugoslavia

1. INTRODUCTION

Several years after their establishment, the International Criminal Tribunals for Rwanda and the former Yugoslavia have reached the stage where sanctions will be imposed and subsequently must be executed by states. Both the determination of the sentence as well as its enforcement contain various interesting practical and legal aspects. This article is an attempt to deal with these issues. An important question is how (and according to which rules) enforcement will take place? With regard to the termination of the enforcement other questions come up. Which authority may pardon the convicted person and on which criteria? To what extent is pardon a decision of political character?

Sentences imposed by the Tribunals are limited to imprisonment. The death penalty cannot be imposed. The highest sentence is life imprisonment. Special treatment for those who are mentally ill is not provided for. Article 24 of the Yugoslav Statute (Art. 23, Rwanda) instructs the Trial Chambers to have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

In the case of Yugoslavia decisions of courts of the Socialist Republic of Yugoslavia exist relating to war crimes committed during World War II. With regard to the Rwandese atrocities, it seems much harder to have recourse to the general practice in that country. In addition, there is an imbalance between the maximum penalty under the Statute and the maximum penalty for genocide and other crimes in the relevant act of Rwanda. The latter provides for the death penalty in the most serious cases.²

2. DETERMINATION OF THE SENTENCE

Under the structure of the Statute and the Rules of Procedure and Evidence (RPE), the sentence and the designation of the state, where the penalty shall be executed constitute two separate procedures. Unlike national criminal courts as well as the International Military
Tribunals of Nürnberg and Tokyo, the Tribunals present do not know in advance in which country the sentence will be executed. Since the place of detention determines the conditions of imprisonment, the designation of the enforcing state is an integral part of the decision imposing the sentence. This follows from the sentencing judgement of the International Criminal for the former Yugoslavia for Erdemovic:

'The principle of *nulla poena sine lege* must permit every accused to be cognisant not only of the possible consequences of conviction for an international crime and the penalty but also the conditions under which the penalty is to be executed.'

I fully agree with the Trial Chamber on this point. However, the Trial Chamber seems to overlook that it should also be aware itself of the conditions under which the penalty is to be executed *at the moment of determining the penalty*. Unlike the earlier ad hoc International Criminal Tribunals in Tokyo and Nürnberg defendants cannot possibly know where they will have to serve their sentence. They only know that it varies between the volunteering states like Iran and Norway. The Trial Chamber seems to be uncertain whether equality of treatment of convicted persons could be achieved through the designation of the enforcing state. Otherwise it would not have been necessary to include the Presiding Judge of the Trial Chamber in the group that decide on the designated state. However, in my opinion, if the Trial Chamber were really concerned about this, the logical consequence would be that the convicted person would have the opportunity to give his views on the state of enforcement.

The designation of a specific country is of great significance. It determines the detention regime; the political surrounding of the prisoner; the question of whether conversion or continued enforcement applies; parole policy; distance to the former Yugoslavia and Rwanda; whether credit will be given for detention on remand; and the applicability of international (or regional) supervisory human rights mechanisms. In my opinion these factors are of great relevance and concern information that may assist the Trial Chamber in determining the appropriate sentence as meant in Rule 100 RPE.

### 3. THE LIST OF ENFORCING STATES

Article 27 of the Yugoslavia Statute (Art. 28 Rwanda Statute) reads:

'Imprisonment shall be served in a State (in Rwanda or any of the states on a list of states) 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 law of the State concerned, subject to the supervision of the International Tribunal.' This is repeated in Rule 103 RPE, that deals with the place of imprisonment.

The Yugoslav Tribunal provides a list of eleven states that have declared their readiness to carry out enforcement of prison sentences. Although the host state, the Netherlands, appears on the list, there is no official declaration of that country as required under Article 27 of the

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4. *See Erdemovic decision, custody and provisional detention will be deducted.*