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Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment

Steven Arrigg Koh

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ABSTRACT

This Article is the first to analyze prison location and its relationship to U.S. and international theories of criminal punishment. Strangely, scholarly literature overlooks criminal prison designation procedures—the procedures by which a court or other institution designates the prison facility in which a recently convicted individual is to serve his or her sentence. This Article identifies this gap in the literature—the prison location omission—and fills it from three different vantage points: (1) U.S. procedural provisions governing prison designation; (2) international procedural provisions governing prison designation; and (3) the relationship between imprisonment and broader theories of criminal punishment. Through comparison of U.S. and international prison designation systems, this Article argues that prison location materially advances core rationales of criminal punishment.

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I. INTRODUCTION

Sentencing constitutes the backbone of criminal justice, the culmination of criminal adjudication.[1] Indeed, the criminal justice system inflicts pain—in the form of deprivation of life, liberty, or property—on those convicted of criminal conduct.[2] *Where* a prisoner serves time often crucially determines how much of a deprivation he or she will suffer, yet academic literature has neglected this crucial sentencing component.[3] Indeed, scholars have never systematically reviewed prison designation procedures—the procedures by which a court or other institution designates the prison facility in which a convict will serve his or her sentence—at the state, federal, or international levels. Furthermore, commentators have failed to analyze how prison location advances the broader goals of criminal justice—deterrence, retribution, incapacitation, and rehabilitation—as well as emerging theories of victim-related "restorative justice" and "transitional justice." Regrettably, most scholarship singularly focuses on prison *duration* as the defining aspect of a sentence, although prison location may be as, if not more, important to the retributive or deterrent effect of a sentence. For example, had Osama bin Laden been captured, convicted of crimes, and sentenced to a term of imprisonment, it would have undoubtedly mattered whether he served his time in New York, The Hague, Saudi Arabia, or elsewhere.

This Article contends that prison location itself endows a sentence with additional meaning that in turn advances overarching theories of criminal punishment, such as deterrence to the individual and the community, incapacitation of the offender, and the provision of justice to victims. The Article reviews both U.S. federal and international prison designation procedures and then compares the essential features of these U.S. and international prison designation paradigms in an effort to contribute to criminal law theory, American criminal legal studies, and international criminal legal studies.

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1. ANTONIO CASSESE ET AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1752 (2002).

2. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 11 (6th ed. 2012).

3. This Article will use the terms *prison location*, *place of imprisonment*, and *imprisonment location* interchangeably.

A. *The Prison Location Omission in Current Scholarship*

Simply put, scholarship undervalues prison location. This Article hereinafter uses the term *prison location omission* to denote the gap in scholarly attention to the procedures by which prison facilities are designated and the way such locations fulfill the broader goals of criminal punishment.

This prison location omission reveals itself throughout U.S. scholarship on criminal sentencing. Often, sentencing articles have focused on the duration of sentences,[4] as well as the reasoning underlying sentencing decisions[5] or the use of private prisons in the state and federal system.[6] Indeed, one commentator has underscored the centrality of sentence duration as a yardstick for measuring retribution:

> The length of a term of imprisonment is, obviously, not the *only* possible indicator of retributive value. Nor is it evidence that the mere addition of several years to a sentence necessarily augments its retributive force; or that shortening a sentence by several years guts that force. However, length of a sentence constitutes the central—and, basically, only—measurement device that liberal legalist institutions practically avail themselves of when it comes to operationalizing punishment in extant sentencing frameworks.[7]

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4. *See, e.g.*, Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 123–24 (2013) (reviewing and testing the "hypotheses underlying [the] empirical desert theory" and suggesting, ultimately, that formulating criminal sentences in light of societal views does not optimize crime control); *see also* Jesse J. Norris, *Should States Expand Judicial Sentence Modification? A Cautionary Tale*, 35 HAMLINE L. REV. 101, 131 (2012) (supporting the allowance of sentence modifications at any time throughout the duration of a sentence as an effective means of enabling courts to correct unfair sentences); Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010) (promoting judicial sentence modification); Nancy Armoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69 (2006) ("[E]xplor[ing] the role of sentencing discounts in the guilty-plea decisions of international defendants."). More generally, "[t]he lack of attention to sentencing procedures has been one of the greatest failings of the last century's sentencing reform movement and is the cause of much of the current upheaval in federal sentencing." Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN. L. REV. 309, 310 (2005).

5. *See* Etienne, *supra* note 4, at 310 (positing that, among other things, sentencing decisions are affected by a conscious commitment to the elimination of sentence disparities).

6. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 440 n.4 (2005) (describing the debate over private prisons as having "generated a voluminous literature"); *see also, e.g.*, Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 540 (1989) ("The idea is to remove the operation (and sometimes the ownership) of an institution from the local, state, or federal government and turn it over to a private corporation.").

7. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 106 (2007).

In this commentator's submission, sentence length is the *sole* means of gauging the retributive nature of a sentence. Furthermore, with regard to deterrence, another commentator has similarly noted that "there has been no systematic attempt to estimate the deterrent effect of punitiveness other than incarceration length."[8]

The prison designation omission may owe itself to the visibility of sentence duration, which is often delivered by a federal judge or jury. This prominent aspect of criminal sentencing thus gains academic traction, along with other salient procedural aspects such as, say, the *Miranda* rights of a criminal suspect. As such, scholars have completely neglected the prison designation process, which falls under the exclusive authority of a subdivision of the U.S. Department of Justice (DOJ). Existing literature only tangentially refers to the plain statutory designation language en route to an argument unrelated to imprisonment location.[9,10] Indeed, the Bureau of Prisons'

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8. *Id.* at 148.

9. *See, e.g.*, Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 793 (2012) ("When assigning prisoners to federal prisons, the Bureau of Prisons (BOP) is required to consider 'the resources of the facility contemplated,' 'the nature and circumstances of the offense,' 'the history and characteristics of the prisoner,' 'any statement' by the sentencing court 'concerning the purposes for which the sentence . . . was determined to be warranted,' and Sentencing Commission policy statements.") (footnotes omitted); Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1574 n.17 ("Similarly, federal statutes require that when the Bureau of Prisons makes prisoner facility assignments, 'there shall be no favoritism given to prisoners of high social or economic status.'" (quoting 18 U.S.C. § 3621(b))); S. David Mitchell, *Impeding Reentry: Agency and Judicial Obstacles to Longer Halfway House Placements*, 16 MICH. J. RACE & L. 235, 243 (2011) ("Congress specifically required that the Bureau of Prisons, under § 3621(b), designate an inmate's place of imprisonment, but granted the agency the discretion to determine the appropriate facility.") (footnote omitted); Amy L. Codagnone, Comment, *Administrative Law—Bureau of Prisons Statutory Mandate Permits Creation of Categorical Rules to Guide Prison Placement Discretion*—Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008),* cert. denied*, 129 S. Ct. 115 (2008)*, 42 SUFFOLK U. L. REV. 285, 285, 287 (2009) ("Congress delegates authority to the Bureau of Prisons (BOP) to place inmates. In determining inmate placement, the BOP must consider five individualized factors before selecting a suitable penal facility for each inmate. . . . Congress vested the BOP with the authority to assign inmates to any available penal or correctional facility that meets the minimum standards of health and habitability after considering five factors.") (footnotes omitted); Robbins, *supra* note 6, at 758–67 (reviewing the legislative history and plain language of 18 U.S.C. § 3621(b)). There has also been one article reviewing *court* location and its effect on criminal sentences. Thomas L. Austin, *The Influence of Court Location on Type of Criminal Sentence: The Rural-Urban Factor*, 9 J. INT'L CRIM. JUST. 305 (1981). Indeed, often designation is overlooked as a step in criminal procedure, including in those that review criminal sentencing. *See, e.g.*, ELLEN S. PODGOR ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 8–47 (2005) (reviewing as integral to criminal sentencing the role of the lawyer, the burden of proof, the standard of review, indeterminate sentencing, sentencing guidelines, mandatory sentencing guidelines and mandatory minimum sentences, proportionality, and capital punishment, with no consideration of prison location as an essential aspect of a criminal sentence).

(BOP) *Program Statement* regarding prison designation—the primary source for every prison designation at the federal level—has never received substantial scrutiny.[11]

Though more scholars have considered international designation procedures,[12] the prison location omission also manifests itself in

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10. Indeed, the only law journal article to include the phrase "place of imprisonment," "location of imprisonment," or any related phrase dates from 1903. *See* Recent Case, *Conflict of Laws – Territorial Laws – Place of Imprisonment*, 16 HARV. L. REV. 521 (1903).

11. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT (2006) [hereinafter BOP PROGRAM STATEMENT], *available at* http://www.bop.gov/policy/progstat/5100_008.pdf; *see also, e.g.*, Volokh, *supra* note 9, at 793 n.63 (2012) ("While the BOP's regulations seem to accommodate sentencing court recommendations, generally there's no guarantee that the court will convey the prisoner's preferences and no systematic way for prisoners to have their preferences satisfied."); Eumi K. Lee, Commentary, *An Overview of Special Populations in California Prisons*, 7 HASTINGS RACE & POVERTY L.J. 223, 235 n.61 (2010) (noting that in the federal prison system higher security classification is based merely on noncitizenship).

12. *See generally* Hirad Abtahi & Steven Arrigg Koh, *The Emerging Enforcement Practice of the International Criminal Court*, 45 CORNELL INT'L L.J. 1, 6–10 (2013) (discussing pre-enforcement requirements and procedures); Ariel Zemach, *Reconciling Universal Jurisdiction with Equality Before the Law*, 47 TEX. INT'L L.J. 143, 163–64 (2011) (advocating reform to limit universal jurisdiction); Cesare P.R. Romano, *Can You Hear Me Now? The Case for Extending the International Judicial Network*, 10 CHI. J. INT'L L. 233, 263 n.123 (2009) ("According to the Statute of the Tribunal, sentences of 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 ICTR.'"); Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 290 (2001) ("Prison sentences are to be served in a state designated by the ICTY."); Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 93 (1999) (reviewing the ICTY Rule of Procedure and Evidence 103, which governs the place of imprisonment); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 364 n.82 (1997) ("A prison sentence imposed by the ICTR may be served in Rwanda or in any other State that has 'indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda.'"); David Tolbert & Åsa Rydberg, *Enforcement of Sentences*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 533–43 (Richard May et al. eds., 2001); OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1647–85 (2d ed. 2008); WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 1065–114 (Philip Alston & Vaughan Lowe eds., 2010) (broadly covering the ICC's enforcement regime); CASSESE ET AL., *supra* note 1, at 1751–840. Some articles have addressed the theories underlying international criminal punishment, though without considering designation. *See, e.g.*, Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 656–57 (2012); Inés Mónica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 2 (2008) (reviewing the "discrepancies between the sentencing and incarceration practices of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda"); Dirk van Zyl Smit, *International Imprisonment*, 53 INT'L COMP. L.Q. 357 (2005) (reviewing the status and condition of

international legal scholarship.[13] Each relevant article reviews designation procedures within the context of one particular tribunal; there has been little to no comparative work describing the overall framework of international prison designation nor any contemplation of the relationship between prison location and key theories of international criminal justice.[14]

This Article will not analyze the length of sentence, the type of sentence, or any other sentence-related matters previously emphasized in criminal legal scholarship. While existing literature amply addresses the duration and type of criminal sentence, a dearth of scholarship focuses on the *interstitial link* between the moment of sentence delivery and the first step a prisoner takes into his or her cell.

Some might claim that the prison location omission is not accidental, but only proves that this area is unworthy of critical study. The aim of punishment, this argument goes, is "simply to mete out an appropriate punishment to a wrongdoer."[15] But even this claim implicitly assumes that punishment serves retributive ends, thus invoking the prospect of additional sentencing rationales. Furthermore, punishment never transpires in a vacuum; it inexorably occurs within the confines of a physical space located in a city, state, and country. Thus, prison location *inherently* binds itself to every sentence and demands academic scrutiny.

B. *The Benefit of International Comparison*

International criminal justice provides an additional perspective that helps rectify the prison location omission. The distinctive international prison designation procedure operates more overtly—involving the transfer of prisoners across national borders pursuant to bilateral enforcement agreements concluded between States[16] and the international tribunals—than at the U.S. federal level.[17] Furthermore, the emerging field of international criminal justice has now reached its adolescence, making it an ideal time for renewed academic review.[18] The International Criminal Court (ICC) has

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ICTY and ICTR detainees and convicted prisoners without considering the process by which individuals may move from detention to imprisonment).

13. *See supra* note 12.

14. *See supra* note 12.

15. DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 4 (12th ed. 2008).

16. Throughout this Article, *States* (capitalized) will refer to countries whereas *states* (uncapitalized) will refer to states within the United States of America.

17. *See* BOP PROGRAM STATEMENT, *supra* note 11, ch. 3, at 1–11 (discussing the security designation procedures for new commitments).

18. Though these six international criminal institutions differ in nomenclature (e.g., tribunal, court, chamber, special court, special tribunal), for ease of discussion they will collectively be referred to as *tribunals*.

delivered its first judgment of conviction and issued its first sentence; the first sentencing appeal judgment is imminent. [19] The International Criminal Tribunal for the former Yugoslavia (ICTY) is in the process of trying its final major trials[20] alongside a bevy of significant appeals. [21] The International Criminal Tribunal for Rwanda (ICTR) is concluding operations now falling under the Mechanism for International Criminal Tribunals (MICT). [22] The Special Court for Sierra Leone and Extraordinary Chambers in the Courts of Cambodia are significantly advanced in their mandates, while the Special Tribunal for Lebanon begins its first trials next year. [23] As these institutions have matured, the lion's share of academic literature has focused upon matters such as joint criminal enterprise, [24] the scope of genocide, [25] or complementarity. [26] But

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19. *See* INT'L CRIM. CT., CASE INFORMATION SHEET: SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO: *THE PROSECUTOR V. THOMAS LUBANGA DYILO*, CASE NO. ICC-01/04-01/06 (2012), *available at* http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf (finding Thomas Lubanga Dyilo guilty "of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities").

20. *The Cases: Cases at Trial*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/action/cases/4 (last visited Oct. 18, 2013) (noting, e.g., the Prosecutor v. Karadžić, Prosecutor v. Mladić, and Prosecutor v. Hadžić cases).

21. *The Cases: Cases on Appeal*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/action/cases/4 (last visited Oct. 18, 2013) (noting, e.g., the Prosecutor v. Popović et al., Prosecutor v. Šainović et al., and Prosecutor v. Prlić et al. cases).

22. *See Status of Cases*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/Cases/tabid/204/Default.aspx (last visited Oct. 18, 2013) (noting that the ICTR currently has no cases in progress, having completed seventy-five cases).

23. *Trial Chamber Holds Its First Pre-trial Hearing*, SPECIAL TRIB. FOR LEBANON, http://www.stl-tsl.org/en/media/press-releases/29-10-2013-trial-chamber-holds-its-first-pre-trial-hearing (last visited Nov. 19, 2013).

24. *See, e.g.*, Jared L. Watkins & Randle C. DeFalco, *Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia*, 63 RUTGERS L. REV. 193 (2010); Ian M. Ralby, *Joint Criminal Enterprise Liability in the Iraqi High Tribunal*, 28 B.U. INT'L L.J. 281 (2010); Catherine H. Gibson, *Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law*, 18 DUKE J. COMP. & INT'L L. 521 (2008); Allen O'Rourke, Recent Development, *Joint Criminal Enterprise and Brđanin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307 (2006); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

25. *See, e.g.*, Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations* Ad Hoc *Tribunals*, 21 HARV. HUM. RTS. J. 241 (2008); Jide Nzelibe, *Courting Genocide: The Unintended Effects of Humanitarian Intervention*, 97 CAL. L. REV. 1171 (2009); Daphne Anayiotos, *The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?*, 22 N.Y. INT'L L. REV. 99 (2009); George A. Critchlow, *Stopping Genocide Through International Agreement When the Security Council Fails to Act*, 40 GEO. J. INT'L L. 311 (2009); David L. Nersessian, *Comparative*

scholars have given comparatively little attention to the mechanics or theories of international criminal sentencing, despite the incarceration of over one hundred individuals pursuant to this regime.[27]

Part II of this Article reviews U.S. federal prison designation procedures and argues that certain essential features characterize this U.S. prison designation paradigm. Part III reviews the analogous international procedures and similarly distills the essence of the international prison designation paradigm. Part IV compares these two paradigms to reveal the key issues at stake in the prison designation process. Part V argues that prison location advances core theories of criminal punishment. Part VI is a conclusion.

II. THE U.S. PRISON DESIGNATION PARADIGM

This Part begins redressing the prison location omission by reviewing and analyzing the U.S. system of prison designation and arguing that certain essential features characterize this U.S. prison designation paradigm. This Part ultimately contends that this paradigm has four defining features: (1) a federal court conviction and sentence, (2) the transfer of relevant sentencing materials to the BOP, (3) the BOP's designation of a prison facility based on minimum

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Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity, 43 STAN. J. INT'L L. 221 (2007).

26. *See, e.g.*, Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85 (2012); Alhagi Marong, *Unlocking the Mysteriousness of Complementarity: In Search of a* Forum Coveniens *for Trial of the Leaders of the Lord's Resistance Army*, 40 GA. J. INT'L & COMP. L. 67 (2011); Lars Waldorf, *"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 FORDHAM INT'L L.J. 1221 (2010); Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115 (2010); Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107 (2009); Dawn Yamane Hewett, *Sudan's Courts and Complementarity in the Face of Darfur*, 31 YALE J. INT'L L. 276 (2006); Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002).

27. *See* SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN AD HOC TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC 2–3, 34 (2011) ("[T]here is a serious need to re-examine the current justifications of punishment in international sentencing practice, as recent approaches are confused and unclear and there is a lack of clarity from the ad hoc Tribunals in addressing the fundamental issues of sentencing."); *Key Figures of the Cases*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sections/TheCases/KeyFiguresoftheCases (last visited Oct. 18, 2013) (reporting statistics about proceedings before the ICTY); *Completed Cases*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/Cases/tabid/77/Default.aspx?id=4&mnid=4 (last visited Oct. 18, 2013) (listing 44 completed cases to date); *Cases*, SPECIAL CT. FOR SIERRA LEONE, http://www.sc-sl.org/CASES/tabid/71/Default.aspx (last visited Oct. 18, 2013).

guarantees and discretionary factors, and (4) the convicted individual's transfer to the designated prison facility.[28]

Before embarking on this analysis, as a preliminary matter, one may ask—What is criminal punishment? First, punishment is performed by and directed against responsible individuals.[29] Second, it entails designedly harmful or unpleasant consequences.[30] Third, such unpleasantness is "preceded by a judgment of condemnation" in which the punished individual is blamed explicitly for the wrongdoing.[31] Fourth, it is imposed by a person or individual with the requisite authority to do so.[32] Fifth, it is imposed because of a violation of some established rule of conduct.[33] Sixth, it is imposed on a violator of such a rule.[34] Criminal punishment may take many forms, including capital punishment, incarceration, fines, and community service.[35]

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28. In the interest of concision, this Article has omitted U.S. state prison designation procedures. However, future research could illuminate the similarities and differences between state and federal procedures, as well as the distinctions between state prison designation paradigms. For example, generally state legislatures endow state correctional officials with designation authority, leaving courts without authority to specify a particular place of imprisonment. *See, e.g.*, 24 C.J.S. *Criminal Law* § 2188 (2013) (citing People v. Lara, 202 Cal. Rptr. 262 (Cal. Ct. App. 1984); State v. Desjarlais, 714 P.2d 69 (Idaho Ct. App. 1986)). However, trial courts in some states may have discretion to designate the place of imprisonment. *See, e.g.*, 24 C.J.S. *Criminal Law* § 2188 (2013) (citing Thomas v. State, 301 S.W.2d 358 (Tenn. 1957)); *see also* 6A C.J.S. Assault § 163 (2013) (citing People v. Hayes, 96 Cal. Rptr. 879, 886 (Cal. Ct. App. 1971)). In other states, juries may also set the place of confinement. *See, e.g.*, 24 C.J.S. *Criminal Law* § 2188 (2013) (citing Hopper v. State, 326 S.W.2d 448 (Tenn. 1959)). Furthermore, designation of imprisonment at the state level relies on numerous factors, including: separation from companions, protection from enemies, requirements of varying levels of security, examination and treatment by medical authorities, availability of friends or family, possibility of employment or education, and past and anticipated future behavior of the prisoner. *See* 24 C.J.S. *Criminal Law* § 2188 (citing Petition of Peiffer, 166 A.2d 325 (Pa. Super. Ct. 1960); Thomas v. State, 301 S.W.2d 358 (Tenn. 1957); Meachum v. Fano, 427 U.S. 215 (1976)). A dominant consideration in sentencing is also whether a convicted individual may serve in a county or state penitentiary based on the type of offense (felony vs. misdemeanor) and length of time served (longer time served tends toward designation in a state facility). 24 C.J.S. *Criminal Law* § 2188 (citing Jackson v. State, 68 So. 2d 850 (Ala. Ct. App. 1953); In re Thomas, 306 S.W.2d 336 (Mo. Ct. App. 1957)).

29. Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1282 (Joshua Dressler et al. eds., 2d ed. 2002).

30. *Id.*

31. *Id.*

32. *Id.* at 1283.

33. *Id.*

34. *Id. See also* SUSAN EASTON & CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 4 (2005) ("Punishment rests on moral reasons, the expression of moral condemnation, in response to rule-infringements."); DRESSLER, *supra* note 2, at 12 (Unfortunately, "[t]here is no universally accepted non-arbitrary definition of the term 'punishment'").

35. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 12 (1986) ("The modern criminal penalties are: the death penalty, imprisonment

Additionally, American sentencing is broadly divisible into state and federal practices. As of 2011, there were 1,598,780 individuals serving sentences in state and federal prisons—an incarceration rate of 492 per 100,000 U.S. residents[36]—which ranks the United States amongst countries with the highest rates of incarceration in the world.[37] That same year, 89.8 percent of individuals convicted of federal offenses were convicted to a term of imprisonment.[38] As of November 2012, 199,729 individuals were serving federal sentences in federal prisons or prisons in other facilities sanctioned by the BOP, an institution within the DOJ.[39] The BOP, established in 1903, now includes a central office headquarters and six regional offices, which provide administrative oversight and support to 118 correctional institutions and 22 "residential reentry management offices."[40] Residential reentry management offices oversee both residential reentry centers and home confinement programs.[41]

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with or without hard labor, and the fine."); *see also, e.g.*, CONN. GEN. STAT. ANN. § 53a-28(b)–(c) (2013) (listing as authorized sentences, individually and in various combinations, a term of imprisonment; confinement; fine; suspended sentence of imprisonment with a fine, period of probation, conditional discharge; a sentence of unconditional discharge; or a term of imprisonment and a period of special parole); 18 U.S.C. §§ 3551–3586 (2012) (listing probation, fines, and imprisonment as the available federal sentences); Robert W. Sweet et al., *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 FORDHAM L. REV. 927, 946 n.99 (1996) (listing the aspects of a sentence imposed as entailing type of sentence (such as prison, probation, or a prison–community split), fines or restitution, and length of imprisonment).

36. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 1 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf.

37. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?page wanted=all&_r=0 ("The United States has less than 5 percent of the world's population. But it has almost a quarter of the world's prisoners.").

38. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2011, at 3–4 (2012).

39. *Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/facts.jsp (last visited Oct. 18, 2012).

40. *See Residential Reentry Management*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/cc/index.jsp (last visited Oct. 18, 2013); *Weekly Population Report*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp#bop (last visited Oct. 18, 2013).

41. *Residential Reentry Management*, *supra* note 40.

A. *Prison Designation Procedures in the U.S. Federal System*

1. Statutory Framework

Federal district courts lack authority to dictate the place of imprisonment.[42] Pursuant to 18 U.S.C. § 3621(a), first introduced in the Comprehensive Crime Control Act of 1984, a person sentenced to a term of imprisonment is committed to BOP custody until the prison term expires or until he or she is released earlier for satisfactory behavior.[43] The BOP, under the authority of its director, may designate any facility that meets "minimum standards of health and habitability,"[44] regardless of whether the facility is within or without the judicial district in which the person was convicted.[45]

When designating a prison, the BOP may consider a variety of factors, including: (1) the resources of a given facility; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) a statement by the court that imposed the sentence regarding either the purposes for such imprisonment or the type of penal or correctional facility; and (5) any pertinent policy statement issued by the Sentencing Commission regarding application of the guidelines or other aspects of sentencing or sentence implementation.[46] With regard to the final factor, the Sentencing Commission may issue a policy statement regarding how the sentence may comply with the court's consideration of the following factors: (1) a reflection of the seriousness of the offense, the promotion of respect for the law, and the provision of just punishment for the

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42. 24 C.J.S. *Criminal Law* § 2188 (2013) (citing Mares v. Federal Bureau of Prisons, 401 F. Supp. 2d 775 (S.D. Tex. 2005)). An individual convicted of an offense that is statutorily punishable for less than one year may not be confined in a U.S. penitentiary absent consent of the convicted individual. 18 U.S.C. § 4083 (2012).

43. 18 U.S.C. § 3621(a) (2012).

44. 18 U.S.C. § 3621(b) (2012); 28 C.F.R. § 0.96(c) states that

> the Director of the Bureau of Prisons is authorized to exercise or perform any of the authority, functions, or duties conferred or imposed upon the Attorney General by any law relating to the commitment, control, or treatment of persons . . . charged with or convicted of offenses against the United States, including the taking of final action in . . . [d]esignating places of imprisonment or confinement where the sentences of prisoners shall be served . . . .

28 C.F.R. § 0.96(c). The BOP may designate either a facility that it actively manages or one that it does not. 18 U.S.C. § 3621(b) (2012).

45. 18 U.S.C. § 3621(b) (2012). The BOP also has authority to place a convicted individual in a "shock incarceration program" when an individual is sentenced to a term of imprisonment between 12 and 30 months. 18 U.S.C. § 4046(a) (2012).

46. 18 U.S.C. §§ 3621(b)(1)–(5) (2012); *see also* 28 U.S.C. § 994(a)(2) (2012) (authorizing the Sentencing Commission to issue general policy statements regarding sentencing). The Federal Sentencing Guidelines only reference these provisions on one occasion, in relation to the permissibility of shock treatment. U.S. SENTENCING GUIDELINES MANUAL § 5F1.7 (2013).

offense; (2) the provision of adequate deterrence to criminal conduct; (3) the protection of the public from further crimes of the defendant; and (4) the provision to the defendant of correctional treatment such as education, vocational training, or medical care.[47] These four factors essentially boil down to retribution, deterrence, incapacitation, and rehabilitation, the subject of further discussion in Part V.

The designation process may be curtailed pending a convicted individual's appeal. As provided by Rule 38 of the Federal Rules of Criminal Procedure, a court may recommend that the individual be confined in close proximity to assist in preparing for the appeal.[48] In such cases, the BOP endeavors to place the individual in such a facility.[49]

2. Designation Practice of the BOP

Having reviewed the relevant statutory framework, consider the specific BOP practice governing prison designation. After an inmate is sentenced, the clerk of the court transmits the judgment to the U.S. Marshals Service, which then makes a request to the Designations and Sentence Computation Center (DSCC) in Grand Prairie, Texas.[50] There, staff members engage in a process of inmate classification, the stated objective of which is to "place each inmate in the most appropriate facility for service of sentence."[51] Eighteen teams, each responsible for different federal judicial districts,[52] enter into a computer database called SENTRY information from the sentencing court, U.S. Marshals Service, U.S. Attorneys Office or other prosecuting authority, and the U.S. Probation Office.[53] SENTRY then generates a point score that provides an initial designation of the type of prison by security level:

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47. *See* 28 U.S.C. § 994(a)(2) (2012) (authorizing the promulgation of policy statements by the Sentencing Commission to further the purposes discussed in 18 U.S.C. § 3553(a)(2)(A)); 18 U.S.C. §§ 3553(a)(2)(A)–(D) (2012) (enumerating factors courts should consider in sentencing).

48. FED. R. CRIM. P. 38(b).

49. BOP PROGRAM STATEMENT, *supra* note 11, ch. 3, at 3.

50. *Id.* In old law cases, the clerk transmitted the "Judgment and Commitment Order." *Id.* ch. 3, at 1. In the past decade, the BOP has changed its designation procedures and now processes all designations from the DSCC. Alan Ellis, *Bureau of Prisons Revamps Prison Designation Process*, 22 CRIM. JUST. 60, 60 (2007); *About Grand Prairie Office Complex*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/other/gra.jsp (last visited Oct. 18, 2013); BOP PROGRAM STATEMENT, *supra* note 11, ch. 1, at 2.

51. BOP PROGRAM STATEMENT, *supra* note 11, ch. 3, at 3.

52. Ellis, *supra* note 50, at 60.

53. BOP PROGRAM STATEMENT, *supra* note 11, ch. 1, at 2.

Points	Security Level	Custody Level
0–11 (male) 0–15 (female)	Minimum	"Community"[54] and "Out"[55]
12–15 (male) 16–30 (female)	Low	"Out" and "In"[56]
16–23 (male) N/A (female)[57]	Medium	"Out" and "In"
24+ (male) 31+ (female)	High	"In" and "Maximum"[58]
All point totals	Administrative	All levels of custody

This score provides the base-line level of security necessary at the designated prison. The DSCC may then vary the base line by applying a "pre-sentence factor" (PSF) or "management variable" (MGTV).[59] A PSF is relevant information that necessitates additional security measures for the safety and protection of the public.[60] For example, sex offenders, deportable aliens, and individuals deemed a threat to government officials must be confined in a low security level institution at the minimum.[61] An inmate is assigned up to three PSFs.[62] MGTVs are factors that were not part of the initial assessment of security level and include judicial recommendations

54. "Community custody" is the lowest level of custody. *Id.* ch. 2, at 1. An inmate in such custody "may be eligible for the least secure housing, including any which is outside the institution's perimeter, may work on outside details with minimal supervision, and may participate in community-based program activities if other eligibility requirements are satisfied." *Id.*

55. "Out custody" is the second lowest level of custody. *Id.* ch. 2, at 4. An inmate in such custody "may be assigned to less secure housing and may be eligible for work details outside the institution's secure perimeter with a minimum of two-hour intermittent staff supervision." *Id.*

56. "In custody" is the second highest level of custody. *Id.* ch. 2, at 2. An inmate in such custody "is assigned to regular quarters and is eligible for all regular work assignments and activities under a normal level of supervision," though the inmate does not qualify for work or other activities outsides of the secure perimeter of the facility. *Id.*

57. Female security level institutions are only classified as Minimum, Low, High, and Administrative. *Id.* ch. 1, at 3.

58. "Maximum custody" is the highest level of custody. *Id.* ch. 2, at 3. An inmate in such custody "requires ultimate control and supervision" as the individual has been "identified as assaultive, predacious, riotous, [a] serious escape risk[ ], or seriously disruptive to the orderly running of an institution." *Id.* Such individuals are thus given quarters and work assignments "to ensure maximum control and supervision." *Id.*

59. *Id.* ch. 1, at 2.

60. *Id.* ch. 5, at 7.

61. *Id.* ch. 5, at 7–13.

62. *Id.* ch. 5, at 4.

regarding specific institutions for designation, release residence,[63] medical or psychiatric considerations,[64] or length of sentence.[65] For example, old age may be an MGTV that in turn affects an inmate's placement.[66]

At the conclusion of this process, the DSCC staff forwards all relevant documentation to the designated institution within two working days.[67] Transfer of the convicted individual then occurs under the oversight of the U.S. Marshals Service.[68]

B. *Analysis: The U.S. Prison Designation Paradigm*

What emerges from this review of U.S federal designation procedures? The U.S. prison designation paradigm exhibits the following essential features, each key to grasping the importance of prison location:

First, *a federal district court renders a conviction and sentence.* An individual's sentence to a term of imprisonment is a condition precedent to the initiation of the U.S. prison designation process. This "trigger" may be short-circuited by detention pending appeal pursuant to Rule 38 of the Federal Rules of Criminal Procedure.

Second, *the relevant sentencing materials are given to the nonjudicial BOP*. While the power to decide the length and nature of a defendant's sentence rests exclusively in the hands of federal judges and juries, the power to place an individual in a penal or correctional facility rests exclusively with the BOP, a federal agency under the authority of the DOJ.

Third, *the BOP designates a prison facility based on minimum guarantees and discretionary factors*. Though the BOP has broad authority to designate a place of imprisonment that meets the "minimum standards of health and habitability," federal procedures include other discretionary factors. Relevant considerations include resources at a facility,[69] the nature and circumstances of the offense,[70] the history and characteristics of the prisoner,[71] a statement by the sentencing court about the purposes of

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63. The BOP endeavors to designate prison facilities "reasonabl[y] close" to the anticipated release area, usually within five hundred miles. *Id.* ch. 5, at 3.

64. *Id.* "An inmate who has a history of or is presently exhibiting psychiatric problems may need an initial designation to a psychiatric referral center." *Id.*

65. *Id.* ch. 5, at 5–6.

66. *Id.* ch. 5, at 5.

67. *Id.* ch. 3, at 5.

68. *Prisoner Operations*, U.S. MARSHALS SERV., http://www.usmarshals.gov/duties/prisoner.htm (last visited Oct. 18, 2013).

69. 18 U.S.C. § 3621(b)(1) (2012).

70. 18 U.S.C. § 3621(b)(2) (2012).

71. 18 U.S.C. § 3621(b)(3) (2012).

imprisonment or the type of penal or correctional facility,[72] a statement issued by an institution such as a Sentencing Commission regarding application of the guidelines or any other aspect of sentence implementation,[73] just deserts,[74] deterrence,[75] incapacitation,[76] and rehabilitation.[77] Upon consideration of such factors, the designating institution then designates a particular facility.

Fourth and finally, *the convicted individual is transferred to the designated facility*. Transfer occurs under the oversight of the U.S. Marshals Service.

Having argued for these four essential features of the U.S. prison designation paradigm, the following Part will make similar contentions regarding the analogous international procedures.

III. THE INTERNATIONAL PRISON DESIGNATION PARADIGM

International enforcement of sentences structurally differs from the U.S. model.[78] In contrast to U.S. federal courts—which rely on a federal prison system to carry out the judicially imposed sentence—international courts lack comparable affiliated institutions to enforce criminal sentences and thus rely on the international community for such enforcement.[79] Therefore, while prison location matters at both

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72. 18 U.S.C. § 3621(b)(4) (2012).

73. 18 U.S.C. § 3621(b)(5) (2012).

74. *See id.* (allowing the BOP to consider policy statements issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2)); 28 U.S.C. § 994(a)(2) (2012) (requiring the promulgation of policy statements by the Sentencing Commission to further the purposes discussed in 18 U.S.C. § 3553(a)(2)(A)); 18 U.S.C. § 3553(a)(2)(A) (2012) (citing the need for a sentence "to provide just punishment for the offense" as a factor to be considered when imposing a sentence).

75. *See* 18 U.S.C. § 3621(b)(5) (2012); 28 U.S.C. § 994(a)(2) (2012); 18 U.S.C. § 3553(a)(2)(B) (2012) (citing the need to consider deterrence when imposing a sentence).

76. *See* 18 U.S.C. § 3621(b)(5) (2012); 28 U.S.C. § 994(a)(2) (2012); 18 U.S.C. § 3553(a)(2)(C) (2012) (citing the need for a sentence "to protect the public from further crimes of the defendant" as a factor to be considered when imposing a sentence).

77. *See* 18 U.S.C. § 3621(b)(5) (2012); 28 U.S.C. § 994(a)(2) (2012); 18 U.S.C. § 3553(a)(2)(D) (2012) (citing the need for a sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" as a factor to be considered when imposing a sentence).

78. As a preliminary matter, this Article will only address the enforcement procedures of the ICC, ICTY, and ICTR in the name of concision. This is also due to the realities of international criminal practice at present, as the vast majority of international criminals have been incarcerated by the ICTY and ICTR. The ICC has also been included because, as the permanent international criminal institution, it will provide the foundation for international criminal enforcement of sentences for decades to come.

79. This is one of the myriad distinctions between U.S. and international criminal sentencing. For example, whereas the U.S. federal courts have advisory sentencing guidelines that further the basic purposes of criminal sentencing, the Rome

domestic and international levels, differences between the two systems are reflected in the work of three international criminal tribunals: the ICC, the ICTY, and the ICTR.

Taken together, the essence of these tribunals' prison designation procedures can be distilled into an international prison designation paradigm that has the following features: (1) an appellate chamber's judgment of conviction and sentence, (2) the transfer of relevant sentencing materials to another organ of the tribunal, (3) the tribunals' designation of a State of enforcement based on minimum guarantees and discretionary factors, and (4) the convicted individual's transfer to the designated State of enforcement.

A. *The International Criminal Tribunals: A Brief Overview*

The international criminal tribunals are heirs to the legacy of the Nuremburg and Tokyo Tribunals, which prosecuted war criminals in the wake of World War II.[80] These modern tribunals target "the most serious crimes of concern to the international community" and aspire to end impunity for those criminally responsible for mass atrocities.[81]

Statute "has virtually nothing to say about the purposes of sentencing" and has yet to articulate any such purposes in a sentencing decision because no such decision has yet been issued by an ICC chamber. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 163 (2d ed. 2004); United States v. Booker, 543 U.S. 220, 222, 245 (2005) (holding that the mandatory nature of the federal sentencing guidelines violated the Sixth Amendment right to a jury trial and that the guidelines were advisory); U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subsec. 2 (2011) ("The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."). The ICTY and ICTR statutes likewise fail to enumerate either the criteria that should guide sentencing or any objective of punishment, though the Security Council made various broad references to retribution and deterrence during the time of Security Council Resolution 827. *See* D'ASCOLI, *supra* note 27, at 135–40 (noting that, in light of references to retribution and deterrence, judges have assumed these purposes could be taken into account for sentencing). Note, *Laser Beam or Blunderbuss?: Evaluating the Usefulness of Determinate Sentencing for Military Commissions and International Criminal Law*, 120 HARV. L. REV. 1848, 1860 (2007) (noting that the ICTY and ICTR, for their parts, "have never espoused a single, coherent set of sentencing principles, in either their governing statutes or their case law").

80. *See* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 552 (2006), *available at* http://www.asil.org/files/4091370.pdf (noting that the successes in Nuremberg and Tokyo enabled the international community to establish modern international criminal tribunals).

81. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]; *see also* D'ASCOLI, *supra* note 27, at 1 ("International justice deals with the most heinous and

The ICC is a permanent institution, established by multilateral treaty, with "power to exercise its jurisdiction over persons for the most serious crimes of international concern" that is "complementary to national criminal jurisdictions."[82] This definition distinguishes the ICC from the ICTY and ICTR in several ways: (1) it is permanent, in contrast to the short-term lifespans of the ad hoc tribunals;[83] (2) it has jurisdiction over multiple regions, as opposed to the specific territorial jurisdictions of the ad hoc tribunals;[84] and (3) it has supplementary jurisdiction over matters that States are "unable or unwilling" to prosecute, in contrast to the concurrent but primary jurisdiction of the ad hoc tribunals.[85] The ICC currently has the

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serious criminal offences and one of its objectives is to achieve individual accountability for those atrocities.").

82. Rome Statute, *supra* note 81, at art. 1.

83. S.C. Res. 1966, U.N. Doc. S/RES/1966, at 1–2 (Dec. 22, 2010) (noting the ad hoc nature of the tribunals and thus the need to establish the MICT to take over any residual functions once the ICTY and ICTR have ceased to exist); *The Mechanism for International Criminal Tribunals*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/10874 (last visited Oct. 18, 2013) (reviewing the functions of the MICT after the ICTY and ICTR have completed their respective mandates).

84. *Compare* Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 9, Sept. 2009 [hereinafter ICTY Statute], *available at* http://www.icty.org/ x/file/Legal %20Library/Statute/statute_sept09_en.pdf which states that

> the International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. . . . The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

with Statute of the International Criminal Tribunal for Rwanda art. 8, Nov. 8, 1994 [hereinafter ICTR Statute], *available at* http://www.unictr.org/Portals/0/English/Legal/Statute/ 2010.pdf which states that

> the International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994. . . . The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

85. *Compare* ICTY Statute, *supra* note 84, at art. 8 ("The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters."), *with* ICTR Statute, *supra* note 84, at art. 7 ("The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda

power to prosecute individuals for genocide, crimes against humanity, and war crimes.[86] To date, twenty cases have been brought before the court, resulting in one conviction and sentence rendered thus far, with a sentencing appeal judgment pending.[87]

The United Nations Security Council (the Security Council) created the ICTY in 1993 pursuant to its authority under Chapter VII of the United Nations Charter.[88] It was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia after 1 January 1991."[89] The ICTY has the power to prosecute individuals for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.[90] To date, the ICTY has indicted 161 individuals, with ongoing proceedings against 25 individuals and proceedings concluded against 136.[91] Of the latter group, 69 individuals have been sentenced to imprisonment.[92]

The Security Council created the ICTR in 1994, again pursuant to its Chapter VII authority.[93] This tribunal was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."[94] The ICTR has the power to prosecute individuals for genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[95] To date, the ICTR has indicted ninety-nine individuals, with ongoing proceedings against

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including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.").

86. Rome Statute, *supra* note 81, at arts. 6–8. Beginning in January 2017, the ICC will also have the power to prosecute individuals for the crime of aggression. International Criminal Court Review Conference, *Crime of Aggression*, RC/Res.6, Annex I, §§ 3–4 (June 11, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

87. *Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Oct. 18, 2013).

88. *See generally* S.C. Res. 827, U.N. SCOR, 3217th Mtg., U.N. Doc. S/RES/827 (May 25, 1993).

89. *Id.* at 2.

90. ICTY Statute, *supra* note 84, at arts. 2–5.

91. *Key Figures of the Cases*, *supra* note 27.

92. *Id.*

93. *See generally* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d Mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

94. *Id.* at 2.

95. ICTR Statute, *supra* note 84, at arts. 2–4.

sixteen individuals, nine individuals still at large, and proceedings concluded against seventy-five individuals.[96] Of the latter group, fifty-two individuals have been sentenced to imprisonment.[97]

B. *Prison Designation Procedures of the ICC, ICTY, and ICTR*

1. Sentencing Designation Procedures of the ICC

Indictees of the ICC are held in a converted Dutch prison in Scheveningen, a coastal town just north of The Hague.[98] Though all indictees are detained within the same overall prison complex and some facilities are shared, the indictees of the tribunals are separated from one another. Thus, these facilities may be called by different names depending on the tribunal itself; the ICC Detention Center is allotted for ICC indictees.[99] There, as individuals remanded in custody, they are detained during pretrial, trial, and appellate proceedings.[100]

At first blush, the most logical place for ICC convicts to serve their sentences would be in the Netherlands itself. After all, the court sits in the same place as the ICC Detention Center, and such an arrangement seems analogous to that of the United States.[101] However, pursuant to prior agreements with the Netherlands, individuals may not remain in the United Nations Detention Unit (UNDU) after they have been sentenced to a term of imprisonment. The Headquarters Agreement between the International Criminal Court and the Host State[102] (Headquarters Agreement) elucidates this procedure.[103] Pursuant to Article 49(1) of the Headquarters Agreement, the ICC must first "endeavour to designate a State of enforcement" pursuant to Article 103(1) of the Rome Statute of the

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96. *Status of Cases*, INT'L CRIM. TRIB. FOR RWANDA, *supra* note 22.

97. *Id.*

98. *See also* Mary Margaret Penrose, *No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court*, 38 TEX. INT'L L.J. 621, 639 (2003) ("Currently, the ICTY Detention Unit in Scheveningen, the North Sea Port on the outskirts of The Hague holds forty-three individuals either awaiting trial before or awaiting transfer from the ICTY.") (footnotes omitted).

99. *See The ICC Detention Centre*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/detention/Pages/detention.aspxhttp://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/detention/Pages/detention.aspx (last visited Oct. 18, 2013).

100. *Id.*

101. *See* Penrose, *supra* note 98, at 639 (noting that where no willing state accepts a prisoner, he or she will be housed in The Hague).

102. The "host State" is the Netherlands.

103. *See* Headquarters Agreement between the International Criminal Court and the Host State, I.C.C.-Neth., art. 49(1), Mar. 1, 2008, ICC-BD/04-01-08.

International Criminal Court (Rome Statute).[104] If the ICC does not designate a State of enforcement, however, the ICC must inform the host State about the need for the host State to provide a prison facility for purposes of enforcement.[105] The sentence of imprisonment will then be served in a prison facility in the host State, with the costs of imprisonment being paid by the court.[106]

So if ICC convicts generally may not serve their sentences in the Netherlands, where may they serve their sentences? The answer lies in a nuanced system of "double consent" in which a State must both be placed on a list of States amenable to enforcing sentences—the "list phase"—and then subsequently accept a convicted person for the purposes of a specific sentence—the "designation phase."[107]

During the list phase, an individual State that has ratified the Rome Statute declares its willingness to accept sentenced persons, subject to any conditions that it may attach and has resolved with the ICC Presidency.[108] The reality of this approach is that the ICC enters into bilateral agreements with States in order to establish the practice and procedures by which a sentence may be enforced.[109] These agreements are ably negotiated by the Enforcement Unit of the ICC Presidency, based on a model enforcement agreement that is culled from relevant provisions of the Rome Statute and the Rules of Procedure and Evidence and supplemented by the practice of the ad hoc international criminal tribunals.[110] As of the time of writing,

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104. *Id.* at art. 49(1). As discussed further below, Article 103(1) provides that each prison sentence is served in a State that the court designates from a list of States that previously indicated a willingness to accept sentenced individuals. Rome Statute, *supra* note 81, at art. 103(1).

105. *See* Penrose, *supra* note 98, at 639 ("Currently, and only by default, all persons condemned by the ICC are assured that if no willing state proffers space in conformity with the Rome Statute, they will be housed at the seat of the ICC in The Hague.").

106. Rome Statute, *supra* note 81, at art. 103(4). Pursuant to both Article 106 of the Rome Statute and Article 49(4) of the Headquarters Agreement, the enforcement of the sentence is to be governed by the Rome Statute (provisions in Part 10) and the Rules of Procedure and Evidence (provisions of Chapter 12), while the conditions of imprisonment are to be governed by the Rome Statute (Article 6(2) of the Rome Statute). The host State would then communicate any humanitarian or other concerns to the court, while any other arrangements would be set out in a separate agreement between the court and the host State.

107. Claus Kress & Göran Sluiter, *Preliminary Remarks*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1751, 1787 (Antonio Cassese et al. eds., 2002); Abtahi & Koh, *supra* note 12, at 6.

108. Rome Statute, supra note 81, at art. 103(1)(b); INT'L CRIM. CT. R. P. & EVID. 200(2) (2002); Abtahi & Koh, *supra* note 12, at 7.

109. Abtahi & Koh, *supra* note 12, at 7.

110. *See* Gerard A.M. Strijards, *Article 103: Role of States in Enforcement of Sentences of Imprisonment*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, *supra* note 17, at 1647, 1653; Abtahi & Koh, *supra* note 12, at 7.

enforcement agreements exist with Belgium, Colombia, Denmark, Finland, Mali, Serbia, and the United Kingdom.[111]

During the designation phase, after the chamber has sentenced a convicted person, the Presidency goes about the task of designating a specific State of enforcement.[112] In making this decision, the Presidency shall consider relevant factors such as equitable distribution—including equitable geographical distribution and the number of persons already serving sentences in that State—widely accepted international treaty standards governing the treatment of prisoners, the views and nationality of the sentenced person, and other relevant information pertaining to the particular circumstances of the crime, the person sentenced, or the effective enforcement of the sentence.[113] If the State accepts the designation, the process of enforcing the sentence begins pursuant to the bilateral enforcement agreement previously negotiated. If the State declines, the Presidency may designate another State.[114] As mentioned above, should no State accept designation, enforcement procedures will commence pursuant to the Headquarters Agreement.[115]

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111. *See Official Journal of the International Criminal Court*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/index.aspx (last visited Oct. 18, 2013) (containing agreements with Austria, Belgium, Finland, Mali, Serbia, and the United Kingdom); *see also The ICC Signs Enforcement Agreements with Belgium, Denmark, and Finland*, INT'L CRIM. CT. (June 1, 2010), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/Pages/pr533.aspx (announcing the signing ceremony for agreements with Belgium, Denmark, and Finland); *ICC President to Sign Enforcement of Sentences Agreement During His Visit to Colombia*, INT'L CRIM. CT. (May 16, 2011), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/Pages/icc%20president%20to%20sign%20enforcement%20of%20sentences%20agreement%20during%20his%20visit%20to%20colombia.aspx (discussing Colombia's agreement to enforce ICC sentences); Abtahi & Koh, *supra* note 12, at 8. Due to ratification procedures within Colombia and Denmark, these two enforcement agreements have not yet come into force. *Id.* at 8 n.39.

112. Rome Statute, *supra* note 81, at art. 103.

113. *Id.* at art. 103(3) ("In exercising its discretion to make a designation under paragraph 1, the Court shall take into account . . . [t]he principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence . . . ."); INT'L CRIM. CT. R. P. & EVID. 201 ("Principles of equitable distribution for purposes of article 103, paragraph 3, shall include . . . [t]he principle of equitable geographical distribution; . . . [t]he need to afford each State on the list an opportunity to receive sentenced persons; . . . [t]he number of sentenced persons already received by that State and other States of enforcement . . . ."); *id.* at 203 ("The Presidency shall give notice in writing to the sentenced person that it is addressing the designation of a State of enforcement. The sentenced person shall, within such time limit as the Presidency shall prescribe, submit in writing his or her views on the question to the Presidency."); Abtahi & Koh, *supra* note 12, at 9.

114. INT'L CRIM. CT. R. P. & EVID. 205.

115. Rome Statute, *supra* note 81, at art. 103(4) ("If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the

Finally, as noted above, there has been little enforcement practice at the ICC beyond the conclusion of enforcement agreements, though the court will likely make its first designation this year if the conviction and sentence of Thomas Lubanga is affirmed on appeal.

2. Sentencing Designation Procedures of the ICTY

Indictees of the ICTY are held in the same converted Dutch prison in The Hague suburb of Scheveningen, though such facilities are referred to as the UNDU.[116] There, as individuals remanded in custody, ICTY indictees are detained during pretrial, trial, and appellate proceedings.[117] The UNDU also holds prisoners convicted of contempt or perjury and individuals whose convictions have been affirmed on appeal and are thus awaiting transfer to a prison facility outside of the Netherlands.[118] Facilities include sleeping quarters, offices for self-represented indictees, recreational rooms, and eating spaces.[119] Similar to the ICC, the ICTY Headquarters Agreement has been interpreted by the government of the Netherlands as precluding the enforcement of sentences within Dutch prison facilities.[120]

Thus, the ICTY also undergoes a list phase, in which it concludes bilateral enforcement agreements with individual States that have shown a willingness to enforce sentences against convicted individuals.[121] This negotiation occurs on the basis of a model enforcement agreement.[122] Then, once a convicted individual has completed his or her appeal and time remains to be served on his or her sentence of imprisonment, the tribunal must enter its own designation phase. Article 27 of the ICTY Statute states generally:

> 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

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headquarters agreement . . . . In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.").

116. *Detention*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sections/AbouttheICTY/Detention (last visited Oct. 18, 2013). Author Visit to the UNDU (May 5, 2012).

117. *See Detention*, *supra* note 116. The ICTY has developed a somewhat robust regime of rules governing detention at the UNDU. *See generally* Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, May 5, 1994, U.N. Doc. IT38/Rev. 9 (amended July 21, 2005).

118. van Zyl Smit, *supra* note 12, at 367.

119. *See Detention*, *supra* note 116; Author visit to the UNDU (May 5, 2012).

120. Author meeting with member of ICTY Registry (Jan. 10, 2013).

121. Tolbert & Rydberg, *supra* note 12, at 533–35.

122. *Id.* at 540–41.

> State concerned, subject to the supervision of the International Tribunal.[123]

The UN secretary-general, and subsequently the Security Council, have conclusively interpreted Article 27 as precluding enforcement of sentences within the territory of the former Yugoslavia.[124]

The ad hoc tribunals' "[c]hambers have always been silent as to the countries where sentences may be carried out."[125] Indeed, the ICTY's registrar[126] makes a preliminary inquiry of States that have indicated a willingness to accept convicted persons and signed a related agreement with the tribunal.[127] At this stage, the registrar provides any documents of relevance, including a copy of the judgment and a statement regarding how much of the sentence the individual served in pretrial detention or otherwise.[128] In deciding which government to approach, the registrar considers the equitable

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123. ICTY Statute, *supra* note 84, at art. 27.

124. *See* U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 121, U.N. Doc. S/25704 (May 3, 1993) ("The Secretary-General is of the view 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."). Rule 103 of the Rules of Procedure and Evidence for the ICTY states:

> (A) 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. (B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed. (C) Pending the finalisation of arrangements for his or her transfer to the State where his or her sentence will be served, the convicted person shall remain in the custody of the Tribunal.

INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, R. P. & EVID. 103, U.N. Doc. IT/32/Rev.49 (May 22, 2013), at 106.

125. Weinberg de Roca & Rassi, *supra* note 12, at 42.

126. The ICC, ICTY, and ICTR each have a "Registrar" who oversees the Registry organ of the tribunal and thus all nonjudicial activities of the court or tribunal. *Office of the Registrar*, COALITION FOR THE INT'L CRIM. CT., http://www.iccnow.org/?mod=registrar (last visited Oct. 18, 2013) [hereinafter *Office of the Registrar*, ICC]; *Structure of the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx (last visited Oct. 18, 2013) [hereinafter *Structure of the Court*, ICC]; *The Registry*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/AboutICTR/ICTRStructure/TheRegistry/tabid/105/Default.aspx (last visited Oct. 18, 2013) [hereinafter *The Registry*, ICTR]; *The Registrar*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/168 (last visited Oct. 18, 2013) [hereinafter *The Registrar*, ICTY]; *Registry*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sections/AbouttheICTY/Registry (last visited Oct. 18, 2013) [hereinafter *Registry*, ICTY].

127. Int'l Crim. Trib. for the Former Yugoslavia, Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his/her Sentence of Imprisonment, ¶ 2, IT/137/Rev. 1 (Sept. 1, 2009), *available at* http://www.icty.org/x/file/ Legal%20Library/Practice_Directions/it_137_rev1_en.pdf.

128. *Id.*

distribution of convicted persons among all the States and the ability of the State to enforce the particular sentence, such as its national laws relating to the pardon or commutation of a sentence.[129] After this point, the registrar prepares a confidential memorandum to the ICTY president, indicating the State that has indicated its willingness to enforce the sentence.[130] The registrar may also provide other information to the president, including: (1) the convicted person's marital status or other relevant familial considerations; (2) whether the person is expected to serve as a witness in any future ICTY proceedings; (3) any medical or psychological reports on the convicted person; (4) the linguistic skills of the convicted person; and (5) the State's laws regarding pardon and commutation of sentences.[131] The ICTY president will then, on the basis of the submitted information and any other inquiries, decide whether the convicted person will serve his sentence in the State named in the confidential memorandum.[132] Should the president determine that the suggested State is inappropriate, he or she will instruct the registrar to approach another State.[133] The president may consult with the Sentencing Chamber, its presiding judge, the convicted individual, or the Office of the Prosecutor when making the determination.[134]

In practice, sixteen countries have signed agreements on enforcement of ICTY sentences.[135] The countries that are enforcing or have enforced ICTY sentences—as well as the number of sentences that they have enforced—are: Austria (6), Belgium (1), Denmark (4), Estonia (2), Finland (5), France (4), Germany (4), Italy (5), Norway (5), Portugal (1), Spain (5), Sweden (3), and the United Kingdom (3).[136]

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129. *Id.* ¶ 3.
130. *Id.* ¶ 4.
131. *Id.*
132. *Id.* ¶ 5.
133. *Id.*
134. *Id.*
135. The countries and dates of ratification are: Albania (Sept. 19, 2008), Belgium (May 2, 2007), Austria (July 23, 1999), Poland (Sept. 18, 2008), the United Kingdom (Mar. 11, 2004), Norway (Apr. 24, 1998), Slovakia (Apr. 7, 2008), Denmark (June 4, 2002), Finland (May 7, 1997), Estonia (Feb. 11, 2008), Spain (Mar. 28, 2000), Italy (Feb. 6, 1997), Portugal (Dec. 19, 2007), France (Feb. 25, 2000), Ukraine (Aug. 7, 2007), Sweden (Feb. 23, 1999). *Member States Cooperation*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/137#sentences (last visited Oct. 18, 2013).
136. *Enforcement of Sentences*, MECHANISM FOR INT'L CRIM. TRIBS., http://unmict.org/enforcement-of-sentences.html (last visited Oct. 18, 2013).

3. Sentencing Designation Procedures of the ICTR

Individuals in detention on remand are held in the United Nations Detention Facility (UNDF) in Arusha, Tanzania, which is situated on the premises of a local Tanzanian prison.[137] Like the ICTY's UNDU, the UNDF also holds prisoners found guilty of contempt or perjury, as well as convicts whose appeals have completed and who are awaiting transfer to another prison facility.[138] It contains eighty-nine individual cells, as well as a kitchen, medical facilities, a classroom, and a gymnasium.[139] Furthermore, similar to the arrangement with the ICC and ICTY, Tanzania has stated that it will not serve ICTR sentences unless it indicates its willingness to the Security Council.[140]

Article 26 of the statute of the ICTR, however, 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.[141]

Pursuant to this article, the ICTR first negotiates a series of bilateral enforcement agreements highly similar to those of the ICC and ICTY.[142] After an ICTR chamber sentences an individual, appellate proceedings have concluded, and time remains to be served on the sentence,[143] the registrar engages in communications with States that have declared their willingness to accept convicted persons and

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137. Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 NW. J. INT'L HUM. RTS. 403, 413 (2011); Penrose, *supra* note 98, at 639.

138. van Zyl Smit, *supra* note 12, at 367 n.13 (2005). Like the ICTY, the ICTR also operates pursuant to rules of detention. Int'l Crim. Trib. for Rwanda, Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal (June 5, 1998), *available at* http://www.unictr.org/Portals/0/English/Legal/Defence%20Counsel/English/detention_07.pdf.

139. *See Detention of Suspects and Imprisonment of Convicted Persons [in] The Detention Facility*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/AboutICTR/FactSheets/DetentionofSuspectsandConvictedPersons/tabid/114/Default.aspx (last visited Oct. 18, 2013).

140. *See* President of the Int'l Crim. Trib. for Rwanda, *First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994*, attach. I, U.N. Doc. A/51/399-S/1996/778 (Sept. 24, 1996).

141. ICTR Statute, *supra* note 84, at art. 26.

142. *Id.*

143. *See* INT'L CRIM. TRIB. FOR RWANDA R. P. & EVID. 103(b) (1995) ("Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed.").

have signed an agreement with the ICTR.[144] The registrar requests that the States provide an indication of their readiness to receive a convict.[145] Upon receipt of this response, the registrar gives the following information to the State: (1) a certified copy of the judgment; (2) a statement indicating how much of the sentence the individual has already served; (3) any medical or psychological reports regarding the convicted person, any recommendations regarding treatment for the person, and other information relevant to the enforcement of the sentence; and (4) certified copies of the identification papers of the convicted person.[146]

On the basis of such communications, the registrar then prepares a confidential memorandum to the president of the tribunal, enumerating the States which may enforce the sentence.[147] The memorandum will also include information about: (1) the marital status, dependents, and other family relations of the convicted person and usual place(s) of residence of such individuals, as well as their financial resources; (2) whether the individual may serve as a witness in future ICTR proceedings; (3) whether the person is expected to be relocated as a witness and which State(s) have entered into relocation agreements with the tribunal; (4) any relevant medical or psychological reports; (5) linguistic skills of the convicted person; and (6) the "general conditions of imprisonment and rules governing security and liberty" in the State(s); and (7) any other considerations.[148] On the basis of this and other inquiries the president makes, the president will designate a particular country as the State of enforcement and request that the government of that State enforce the sentence.[149] If the government declines, the president will designate another State on the basis of the information already received from the registrar.[150]

The ICTR has concluded enforcement agreements with the governments of Benin, France, Italy, Mali, Rwanda, Swaziland, and

144. Int'l Crim. Trib. for Rwanda, Practice Direction on the Procedure for Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment, ¶ 2(a), (as amended Sept. 23, 2008), *available at* http://www.unictr.org/Portals/0/English%5CLegal%5CPractice%20Direction%5CEnglish%5Cdesignation_state_08.pdf.

145. *Id.* ¶ 2(a).

146. *Id.* ¶ 2(b).

147. *Id.* ¶ 3.

148. *Id.*

149. *Id.* ¶ 4.

150. *Id.* ¶ 8.

Sweden.[151] In practice, sentences have been enforced in Benin and Mali.[152]

As noted only briefly in previous scholarship,[153] the ICTR differs from the ICC and ICTY by explicitly providing for the enforcement of sentences within Rwanda itself in Article 26 of its statute.[154] The meaning of this article was illuminated in remarks made by the registrar[155] of the ICTR, Mr. Adama Dieng, during the signing of the Rwandan Agreement on Enforcement of Sentences in Kigali in March 2008:

> I know that some Rwandan authorities have claimed in the past, and even now, that Rwanda should be the exclusive destination of ICTR's convicts, if one wants to give meaning to the maxim according to which "…justice must be seen to be done". But this disputation ought not to take place, if one wants to defer to the choice made by the international community which set up the *ad hoc* tribunals. The Security Council decided that in respect of the former Yugoslavia, no convict would serve his/her sentence in his/her country of origin. . . . As for Rwanda, the position was not that drastic. But it was still decided that Rwanda could qualify as a destination of ICTR convicts, just as any other country which has expressed the wish to be considered for that purpose. This of course, does not mean that Rwanda is forbidden to make its case as the normal place of service of sentence for ICTR convicts. But it will be up to the judges of ICTR, and particularly the President, based on the merits of each case, to decide where the sentence will be served. As the Registrar, I have no role in the decision making process, apart from providing the President of ICTR with a full report regarding the particular circumstances of each convict, and regarding the countries which may potentially accommodate the convict.[156]

The registrar also addressed the criteria for prison designation:

> The parameters to be taken into account when deciding the country for the enforcement of sentence are now known. They are set forth in a directive issued since May 2000 by the then President of ICTR. The satisfaction of the victims is important but it is not the only factor determinative of the choice of the place of service of sentence. The

151. *Detention of Suspects and Imprisonment of Convicted Persons [in] The Detention Facility*, *supra* note 139; Dieng, *supra* note 137, at 413 n.13.

152. *Status of Detainees*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/tabid/173/Default.aspx (last visited Oct. 18, 2013); Dieng, *supra* note 137, at 413.

153. Penrose, *supra* note 98, at 636 n.83; May Margaret Penrose, *Spandau Revisited: The Question of Detention for International War Crimes*, 16 N.Y.L. SCH. J. HUM. RTS. 553, 566 (1999).

154. ICTR Statute, *supra* note 84, at art. 26.

155. The ICC, ICTY, and ICTR each have a "Registrar" who oversees the Registry and thus all nonjudicial activities of the court or tribunal. *See supra* note 126.

156. Adama Dieng, Registrar, Int'l Crim. Trib. for Rwanda, ICTR Registrar's Statement During the Signing of the Agreement on Enforcement of Sentence, ¶ 6 (Mar. 4, 2008), *available at* http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/dieng080304.html.

> whereabouts of the family of the convict are also a factor, as well as many others, designed to protect competing interests.[157]

Dieng also stated that as a "fervent supporter of the Rwandan reconciliation" he believed that an important step toward reconciliation would include "having Rwandan convicts serve their sentence in Rwanda, being visited by their relatives in Rwanda, and eventually settling in Rwanda, upon completion of their prison term."[158] Dieng further noted that Rwanda had recently completed construction of a new prison facility that included a section dedicated to ICTR convicts.[159]

Crucially, Dieng recognizes that prison location itself advances the goals of transitional justice and victim-related restorative justice.[160] He notes that "justice must be seen to be done" and acknowledges that convicted individuals must be visible.[161] He also notes that the presence of sentenced convicts within Rwanda would serve to assist in the "satisfaction of victims" as well as that of the convict's family.[162] This Article will address the larger implications of these insightful remarks in Part V.

C. *Analysis: The International Prison Designation Paradigm*

In reviewing the prison designation procedures of the ICC, ICTY, and ICTR, a dominant international prison designation paradigm emerges with the following characteristics:

As a threshold matter, *sentences are not enforced within the "host country" where the tribunal sits*, and *the tribunal therefore negotiates bilateral enforcement agreements with other States*. Host State considerations effectively bar the ICTY and ICTR from such enforcement in The Hague and in Arusha, respectively. For the ICC, such enforcement is possible only when no other State is available. Thus, based on a model enforcement agreement, the tribunal negotiates the enforcement of sentence agreements with States that have expressed a willingness to enforce sentences on a case-by-case basis.

The first step in the international designation paradigm, then, is that *an appellate chamber renders a judgment and sentence with time remaining to be served*. The designation process begins once the judicial process ends—at the conclusion of appellate proceedings

157. *Id.* ¶ 7.
158. *Id.* ¶ 9.
159. *See id.* ¶ 10 (discussing ways Rwanda has eased fears associated with transferring convicts into its country, including the construction of a new prison facility).
160. *Id.*
161. *Id.* ¶ 6.
162. *Id.* ¶ 7.

resulting in a conviction and sentence with time remaining to be served.

Second, *the relevant sentencing materials are given to another organ of the tribunal.* Once a convicted individual's sentence becomes final, the relevant organ of the tribunal will balance a number of factors in order to designate a State of enforcement from amongst the States that have signed bilateral enforcement agreements. The relevant organ is either the Presidency (ICC) or the Registry acting in conjunction with the president (ICTY, ICTR).

Third, *the tribunal designates a State of enforcement based on minimum guarantees and discretionary factors.* For the ICC, the president must consider, *inter alia*, widely accepted international treaty standards governing the treatment of prisoners as well as the views and nationality of the sentenced person. For the ICTY and ICTR, no strict statutory requirement exists. However, all three tribunals consider discretionary factors such as the location of the convicted individual's family, his or her language abilities, and medical or psychological reports regarding the person. Furthermore, with regard to the specific State of enforcement, the ICTR presumes that individuals serve their sentences in Rwanda itself, whereas ICTY convicts may not serve their sentences in the former Yugoslavia, and the ICC neither prohibits nor presumes enforcement in any State.

Fourth and finally, *the convicted individual is transferred to the designated State of enforcement.* Transfer occurs under the supervision of the authorities of both the tribunal and State of enforcement.[163]

IV. COMPARISON OF U.S. AND INTERNATIONAL PRISON DESIGNATION PARADIGMS

To review, the essence of the U.S. and international prison designation paradigms are:

163. *See, e.g.*, Agreement between the International Criminal Court and the Government of the Kingdom of Denmark on the Enforcement of Sentences of the International Criminal Court, art 3, July 5, 2012, ICC-Pres/12/02/12, *available at* http://www.icc-cpi.int/NR/rdonlyres/D9462230-4163-4747-BC7C-CB0141C5004B/284720/Sentencing agreementwithDenmarkEng.pdf ("The Registrar of the Court, in consultation with the competent national authorities of Denmark, shall make appropriate arrangements for the proper conduct of delivery of the sentenced person from the Court to the territory of Denmark.").

	U.S. Paradigm	International Paradigm
Threshold Matters	N/A	Sentences are not enforced within the host country. The tribunal negotiates bilateral enforcement agreements with other States.
Step 1	A federal district court renders a conviction and sentence.	An appellate chamber renders a judgment and sentence with time remaining to be served.
Step 2	The relevant sentencing materials are given to the BOP.	The relevant sentencing materials are given to another organ of the tribunal.
Step 3	The BOP designates a prison facility based on minimum guarantees and discretionary factors.	The tribunal designates a State of enforcement based on minimum guarantees and discretionary factors.
Step 4	The convicted individual is transferred to the designated facility.	The convicted individual is transferred to the designated State of enforcement.

These two models provide the basis for further redressing the prison designation omission in existing scholarship. Certain key insights emerge from this comparison:

First, *in both the United States and international paradigms, nonjudicial bodies designate the place of imprisonment*. In neither the United States nor the international paradigm is the federal court or international chamber itself designating a prison facility. In the U.S. paradigm, only the BOP has authority to designate a prison facility pursuant to the DSCC procedures outlined above. In the international paradigm, the president and registrar of the tribunal have such authority.

Second, *designation often does not occur in the place where a crime was committed*. In the U.S. paradigm, federal authorities possess statutory authority to designate outside of the location of conviction, with a policy preference to designate within five hundred miles of the convict's release residence. The authority is even broader in the international paradigm, where a convict could theoretically serve a sentence in any corner of the globe, provided the country has concluded an enforcement agreement with the tribunal. An ICTY convict from Sarajevo, for example, could serve his sentence in Finland, which is geographically, historically, and culturally remote from the former Yugoslavia.

The rationale underlying location of imprisonment thus contrasts with location of prosecution. Indeed, *lex loci delictus*—the notion that someone should be tried in the location where the act was committed—is an axiomatic principle of criminal justice.[164] Almost

164. *See* FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for

indisputably, "the best judicial forum for [a] prosecution is the court of the territory where the crime has been committed"[165] because the crime breaches the local values and legal rules of the given community and goes against its public order, the victims reside there, evidence is available there, there is a common language shared in judicial proceedings, and any sentence the person serves can be in the community, close to his or her family.[166] In both the U.S. and international paradigms, however, the same has not held true for enforcement of sentences. In the U.S. paradigm, considerations of resources, geographic distribution of federal facilities, and the varying levels of security at different institutions govern designation. In the international paradigm, designation is constrained by the tribunals' role as a "backup" forum for criminal prosecution. Indeed, the ICC only has jurisdiction if a State is "unwilling or unable" to prosecute,[167] while the ICTY and ICTR exist because the former Yugoslavia and Rwanda could not deliver justice during and after their armed conflicts. Thus, in the absence of a competent domestic prison system, international enforcement requires designation in States other than those where the crimes were committed.

In fact, only the ICTR provides for enforcement in the region where crimes occurred. As noted previously by the ICTR registrar, *location* itself is integral to a notion that "justice must be seen to be done" and that the interests of victims are relevant to prison designation. Though neither the ICTY nor the Rome Statute provide for enforcement of sentences in the State where crimes occurred,[168] neither statute *precludes* enforcement of sentences in the State. For example, Croatia could, pending Security Council approval, still enforce sentences against its own nationals. The ICC provokes further thought, as one of the six States with whom the court has

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the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice."); 22 C.J.S. *Criminal Law* § 226 (2013) ("The place where the crime was committed is determined by the nature of the offense and the location in which acts constituting the offense occur."); BLACK'S LAW DICTIONARY 995 (9th ed. 2009); Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 635 (2012) (tracing the concept to the Justinian Code).

165. Antonio Cassese, *The Rationale for International Criminal Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 123, 123 (Antonio Cassese ed., 2009).

166. *Id.*

167. Rome Statute, *supra* note 81, at art. 17(1)(a).

168. As noted above, Article 27 of the ICTY Statute only lists generally that imprisonment occurs "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," whereas Article 103(1)(a) of the Rome Statute mandates imprisonment "in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons." ICTY Statute, *supra* note 84, at art. 27; Rome Statute, *supra* note 81, at art. 103(1)(a).

concluded enforcement agreements could ultimately enforce the sentence of a convicted individual.

Third, *prison designation occurs pursuant to few mandatory requirements and numerous discretionary considerations*. In the U.S. paradigm, only the standard of "minimum health and habitability" governs the BOP's choice of prison location. In the international paradigm, the ICTY and ICTR lack concrete mandatory prison designation requirements, whereas the ICC president shall consider, *inter alia*, widely accepted international treaty standards governing the treatment of prisoners. Both paradigms then contemplate a number of discretionary factors, focusing largely on the characteristics of the offender and the offense. For example, in both models the relevant institutions consider the residences of the offender, his or her family, or both.

Fourth, *the characteristics of the offender and offense play a large role in determining the location of imprisonment*. In the U.S. paradigm, the DSCC initially scores and then later varies inmate classification based almost entirely on the characteristics of the offender and nature of the offense itself. For example, the DSCC may consider length of sentence, medical or psychiatric conditions, or threat to government officials. In the international paradigm, the tribunals similarly consider factors such as linguistic skills, medical needs, or the location of relatives.

Fifth, *the role of victims is not a central focus of prison designation procedures*. In the U.S. paradigm, victims may be considered in the presentence report, though it is unclear how much weight such statements are given. In the international paradigm, neither the ICC nor the ICTY explicitly contemplates the role of victims when designating a State of enforcement. Indeed, the decision to designate a State of enforcement is based on factors such as familial considerations of the convicted person, equitable distribution between States, and the views and nationality of the sentenced person. Only the ICTR scheme accommodates victims' sense of "local justice" by allowing Rwanda to enforce sentences. Though this victim-related rationale was publicly explicated by the ICTR registrar in 2008, it is unclear the degree to which victims are considered during the actual designation process.

Sixth and finally, *the core rationales of criminal punishment are not explicitly considered during the designation process*. As noted above, the U.S. paradigm accounts for all four core rationales of criminal punishment, as the BOP is statutorily authorized to consider just deserts, deterrence, incapacitation, and rehabilitation when designating a prison location. However, DSCC practice never weighs such considerations explicitly, though this does occur more implicitly (i.e., the medical and psychiatric needs of a convict relate to rehabilitation). The international paradigm, by contrast, does not

explicitly consider the core rationales in its statutes, though its discretionary factors may serve broader penological goals.

In sum, the following table reviews the above arguments and findings:

	U.S. Paradigm	International Paradigm
1. Who designates?	BOP	Registry/Presidency of the tribunal
2. Where?	Within five hundred miles of release residence	In States that concluded enforcement agreements
3. Mandatory requirements?	"Minimum standards of health and habitability"	Equitable distribution of States, views/nationality of sentenced person, international treaty standards (ICC). None (ICTY, ICTR)
4. Discretionary factors?	Yes (wide variety of considerations)	Yes (wide variety of considerations)
5. Offender/offense characteristics considered?	Yes	Yes
6. Victims considered?	No	Yes (ICTR) No (ICTY, ICC)
7. "Core rationales" considered?	Yes (statute) Somewhat (in practice)	No (statute) Somewhat (in practice)

V. WHY PRISON LOCATION MATTERS IN THEORIES OF CRIMINAL PUNISHMENT

The procedures and comparisons above partially rectify the prison location omission by identifying the critical issues at stake when a U.S. or international institution designates a particular place of imprisonment. This Part goes a step further by begging the question—What ends does this process serve? The scholarly failure to address the prison location omission overlooks the relationship between prison location—in both the international and domestic realms—and broader criminal legal theory. This Article thus proceeds with a final, central argument: prison location itself materially advances rationales for criminal punishment.

As a preliminary matter, the aims of criminal sentencing are distinct from the broader aims of criminal justice. As one scholar has noted:

> It is important to distinguish the aims of the criminal justice system from the aims of sentencing . . . . The [criminal justice] system encompasses a whole series of stages and decisions, from the initial investigation of crime, through the various pre-trial processes, the provisions of the criminal law, the trial, the forms of punishment, and then post-sentence decisions concerned with, for example, supervision, release from custody and recall procedures. It would hardly be possible

> to formulate a single meaningful 'aim of the criminal justice system' which applied to every stage.[169]

By contrast, four "core considerations" constitute the foundational theoretical framework for understanding criminal sentencing—namely: (1) deterrence of the defendant and others more generally, (2) retributive just deserts for the committed crime, (3) incapacitation of the criminal, and (4) rehabilitation of the offender.[170] Given that the U.S. Constitution is silent regarding penological theories, a sentence may have multiple justifications and is open to the policymaking process of state legislatures.[171] Indeed, as once noted by Justice Kennedy: "The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."[172] At the international level, the ad hoc tribunals elucidate the theoretical foundation of their sentencing decisions only in passing.[173]

For reasons explained below, this Part will also argue that prison location strikes to the heart of two other emerging theories of criminal punishment relating to victims and transitional justice. What follows is a brief description of each of the six rationales, followed by concrete arguments as to how and why prison location advances each of these theories.[174]

A. *Deterrence*

The deterrence rationale focuses on the preventive consequences of sentences.[175] Though some scholarship emphasizes individual deterrence—preventing the same individual from committing the same offense in the future—often the focus is on general deterrence—deterring others from committing the same offense.[176] Pursuant to

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169. ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 67 (4th ed. 2005).

170. 24 C.J.S. *Criminal Law* § 1997 (2013) (outlining the purposes of punishment); MARKUS D. DUBBER & MARK G. KELMAN, AMERICAN CRIMINAL LAW: CASES, STATUTES AND COMMENTS 7 (2d ed. 2008) (citing United States v. Blarek, 7 F. Supp. 2d 192, 198–99 (E.D.N.Y. 1998)); ASHWORTH, *supra* note 169, at 74 (critiquing courts' consideration of multiple purposes of sentencing but prioritizing one); DAVID R. LYNCH, INSIDE THE CRIMINAL COURTS 239 (2004); David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1951 n.10 (2012).

171. 24 C.J.S. *Criminal Law* § 1997 (2013).

172. Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

173. *See* D'ASCOLI, *supra* note 27, at 2–3, 34 ("[T]here is a serious need to re-examine the current justifications of punishment in international sentencing practice, as recent approaches are confused and unclear and there is a lack of clarity from the ad hoc Tribunals in addressing the fundamental issues of sentencing.").

174. The sketches of each rationale are of course very brief, as each alone has been the subject of vast amounts of debate. *See* ASHWORTH, *supra* note 169, at 72–90 (explaining the rationales of sentencing).

175. *See id.* at 75 (describing the deterrence rationale).

176. *See id.* at 240 (distinguishing the two types of deterrence rationales).

this utilitarian theory, most associated with Jeremy Bentham, punishment may be justified if the benefits of deterrence outweigh the pain inflicted on the punished individual and if the same benefits cannot otherwise be achieved.[177] From this perspective, then, a sentence must be precisely calculated to deter others from committing a particular offense.[178]

Many academic discussions of the deterrent effect of sentences have either focused on the length of the sentence or implicitly assumed that this is what serves the deterrent effect.[179] However, other elements of criminal justice also implicate the deterrence rationale:

> Sentences are not the only form of general deterrent flowing from the criminal justice system. In some cases it is the process that is the punishment—being prosecuted, appearing in court, receiving publicity in the local newspaper—rather than the sentence itself. In some cases the shame and embarrassment in relation to family and friends are said to have a more powerful effect than the sentence itself.[180]

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177. *Id.*; *see also* PODGOR ET AL., *supra* note 9, at 5 (explaining that the severity of punishment under deterrence theory may depend on the mental state of the wrongdoer).

178. ASHWORTH, *supra* note 169, at 75.

179. Kelly Bedard & Eric Helland, *The Location of Women's Prisons and the Deterrence Effect of "Harder" Time*, 24 INT'L REV. L. & ECON. 147, 148 (2004) ("To the best of our knowledge, there has been no systematic attempt to estimate the deterrence effect of punitiveness other than incarceration length."); *see also, e.g.*, Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 449 (2001) ("Without any empirical study, there is simply no reliable way to determine how much deterrent effect a particular sentence will have, even assuming that marginal differences in sentence length exert different deterrent effects."); Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 106 (2010) ("Certainly deterrence theory has always been able to justify indeterminately long sentences. If a certain length of sentence is not deterring the crime sufficiently, then there seems no reason on deterrence grounds not to punish those who commit that crime much longer and much harsher."); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 155 (2002) ("We can suppose that the length of the sentence for an accurate rape conviction here will exceed the likely sentence for a theft conviction, in part because society has more interest in deterring individual instances of rape than theft."); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 77 (2007) ("Analysis of the viability and coherence of deterrence in ICL thus yields [an] overarching conclusion[ ] relevant to sentencing . . . that while deterrence may offer sound reasons to establish an international criminal justice system, it provides scant 'guidance in determining the lengths of particular sentences.'"). *But see* Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 750 n.186 (2010) (noting that a wide body of literature undermines the purported relationship between sentence length and deterrence).

180. ASHWORTH, *supra* note 169, at 79 (citing H.D. WILCOCK, DETERRENTS AND INCENTIVES TO CRIME AMONG YOUTHS AGED 15–21 YEARS (1963)).

This argument underscores the deterrent effect of prison location. At the level of *specific* or *individual deterrence*, if a convicted individual were placed in a location where he or she committed a crime, which is usually where he or she resides, the continuing shame and embarrassment of serving a sentence close to home may have a more powerful deterrent effect than serving the sentence in a prison in a remote location. With regard to *general deterrence*, on the other hand, the effect of having a known member of the community incarcerated for having committed a certain crime may deter others in that same community from committing that same crime or other offenses in the future.

Having said this—noting especially that "[w]hile it is easy to show the failure of deterrence, it is very difficult to prove its success"—preliminary empirical research suggests that greater distance increases individual deterrent effect.[181] Only one study, reviewing crime rates from 1980 to 1995, has investigated the link between prison location and deterrence. The study reviewed the distances between the prisons and the inmates' places of residence,[182] noting that distance reduced visitation by convicts' families and friends[183] and that such reduced visitation was punitive unto itself.[184] It concluded that increasing the average distance to a women's prison by forty miles reduces the female violent crime rate by approximately 6 percent.[185] The article also noted that reduced visitation was neither the only nor even the major source of punishment, as indeed "the threat of violence, reduced freedom, the physical environment and so on are clearly punitive."[186]

Other factors also suggest that physical distance may increase specific deterrence. As reviewed above, international convicts are placed in foreign countries, thus isolating them culturally and often linguistically. Such a prolonged sense of "not belonging" would never exist if the person were serving his or her sentence domestically. For example, Dragomir Milošević—who was convicted of murder, inhumane acts, and terror in 2007—was subsequently sent to Estonia

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181. *See* Jan Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 Y.B. INT'L HUMANITARIAN L. 87, 91–92 (2001)*; see also* JANET DINE ET AL., CASES AND MATERIALS ON CRIMINAL LAW 61 (2006) (noting the difficulty of measuring a negative—"the incidence of those who do not commit crimes").

182. *See* Bedard & Helland, *supra* note 179, at 150 (explaining the methodology of their study).

183. *See id.* at 152–57 (noting, for example, that inmates incarcerated further from their city of residence were less likely to receive visits and phone calls from family and friends).

184. *See id.* at 156–57 (noting the punitive nature of female inmates being separated from their children).

185. *Id.* at 165.

186. *Id.* at 152.

to serve his sentence of imprisonment.[187] Milošević unsuccessfully petitioned the ICTY president to serve his sentence in another country, arguing that financial constraints prohibited his wife and other relatives from visiting and that a warmer climate would be more agreeable for his age and health.[188] On the national level, though less extreme, a person born and raised in one region of the country may have difficulty adapting to life in another; the "five hundred miles" preference is no guarantee, and even that distance means someone from New York City could serve a sentence as far away as the federal prison in Butner, North Carolina.

With regard to general deterrence, as noted above, the effect of having a known member of the community incarcerated for having committed a certain crime could deter other locals. At the international level, for example, deterrence may be directed at three audiences: the region where the crimes occurred, potential perpetrators of mass atrocities in the world at large, and a narrower Western audience monitoring the evolution of international criminal jurisprudence.[189] A tribunal must therefore be mindful of these audiences and the deterrent effect of its designation. If the goal is to deter a Western audience, any European country may be suitable for transfer; if the goal is deterrence in the region where the crimes occurred, an "on the ground" designation would be superior.

In sum, prison location advances the deterrence rationale because: (1) the shame of serving a sentence in a local community may increase specific deterrence, (2) the publicity of serving a local sentence may increase general deterrence, (3) preliminary research and considerations of the designation paradigms suggest that greater distance may increase specific deterrence, and (4) different prison locations may deter different intended "audiences."

B. *Retribution*

The retribution rationale focuses on the notion that a criminal "gets what he or she deserves."[190] As such, this "an eye for an eye, a tooth for a tooth" rationale hinges on an individual conceived with the free will to choose right from wrong.[191] Three key components ground

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187. Prosecutor v. Milošević, Case No. IT-98/29/1-ES, Decision on Dragomir Milošević's Request for Reconsideration of Order Designating State in Which He Is to Serve His Sentence, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 10, 2011).

188. *Id.*

189. Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 695 (2007).

190. PODGOR ET AL., *supra* note 9, at 5; DRESSLER, *supra* note 2, at 16.

191. *See* DINE ET AL., *supra* note 181, at 60 (2006) (noting the core rationale "that criminals are punished because they deserve to be"); LYNCH, *supra* note 170, at

classical retributivist theory: (1) a punishment is given in response to it being deserved, (2) the given punishment is appropriate for the wrong action, and (3) the consequences of the punishment are irrelevant.[192] Retributive theories consider the wrongfulness of the act, the degree of harm that the act has caused, and the mental state of the offender at the time of acting.[193]

Under the just deserts formulation of retribution, a punishment is imposed to rectify the wrong of an individual who has broken the social contract to restrain oneself from certain benefits gained outside the law.[194] In other words, justice demands that he or she "repay" whatever the person has taken in a form of unjust enrichment.[195] Under the communicative conception of retribution, punishment helps to reassert that all human beings, including the individual victimized by the criminal's offense, have the same worth as all other human beings:[196]

> [This conception] looks not only to injuries to victims and to society as a whole, but also to groups that may suffer special harm from individual crimes, for example, racial or ethnic or religious groups. The theory is both backward-looking—what did the victim deserve for his past wrong—and forward-looking—how does punishment help to reaffirm social bonds and fundamental social values and rules so that society will in the future better promote recognition of everyone's equal worth.[197]

This conception is proportionate to the crime committed and the gravity of such commission.[198]

Prison location amplifies the retribution of a criminal sentence. First, it does so for the same reasons that it affects the deterrent nature of a criminal sentence: the shame of being in the local community or the difficulties of being removed from it may contribute to the punitiveness of the sentence. Second, conditions of imprisonment may vary widely between distinct prison locations and in turn affect the retributive nature of the sentence.[199] Indeed, "the

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241 (contrasting the difference between being the victim of bad genes and choosing to do wrong); *Leviticus* 24:17–22 (New Oxford Annotated).

192. EASTON & PIPER, *supra* note 34, at 49.

193. PODGOR ET AL., *supra* note 9, at 6.

194. *Id.* at 5–6.

195. *Id.*

196. *Id.* at 6.

197. *Id.*

198. *See* ASHWORTH, *supra* note 169, at 84 ("[R]espect for individual rights suggests that the duration of programmes should remain within the bounds set by proportionality . . . .").

199. *See* Bedard & Helland, *supra* note 179, at 152 ("[I]nmates incarcerated farther from their city of residence are less likely to receive visits and phone calls from family and friends."); Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15

threat of violence, reduced freedom, the physical environment and so on are clearly punitive,"[200] and the quality of prison facilities thus correlates with the intensity of the retribution.[201]

As discussed above, quality is often noted only as a "floor," representing the lowest acceptable standard of prison quality. For example, the former ICTR registrar has stated that "the ICTR attaches great importance to the promotion of at least the minimum standards of prisoners' rights."[202] This Article contends that not only the floor but in fact the spectrum—in which the floor represents the lowest acceptable standard of prison quality and the "ceiling" represents the highest level, beyond which the sentence loses retributive effect—must be actively considered in prison designation because this "sliding scale" impacts the retributive nature of the sentence.

International authorities implicitly consider the spectrum of prison quality when considering enforcement in various States. With respect to the floor, the ICTR accommodates convicted individuals who fear incarceration in Rwanda itself because they fear that they will be murdered in jail. It almost goes without saying that death goes far beyond the proportionality contemplated by a term of imprisonment of years and drops below the floor of prison quality that fundamentally alters the retribution of a sentence. With regard to the ceiling, for the ICTY, Croatian prisoners could be treated to a hero's welcome upon arrival if their sentence were enforced in Croatia. This would surpass the ceiling contemplated by a chamber in imposing a term of years and weaken any sense of just deserts. This spectrum is a looming issue for the ICC especially, whose enforcement agreements require that prison conditions be no more or less favorable than those convicted of similar offenses.[203]

The spectrum of prison quality—and its effect on retribution—places an affirmative obligation on U.S. and international authorities to actively monitor their own facilities. At the federal level, the BOP must remain vigilant that every federal prison facility meets "minimum standards of health and habitability."[204] Furthermore,

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LAW & INEQ. 127, 154 (1997) ("Prison policies that cut back on prison recreation and education add to the retributive quality of incarceration.").

200. Bedard & Helland, *supra* note 179, at 152.

201. *See* Burley, *supra* note 199, at 154 ("[P]risoner chain gangs . . . undeniably serve a more immediate and simple purpose: retribution.").

202. Dieng, *supra* note 137, at 413.

203. *E.g.*, Agreement Between the International Criminal Court and the Government of the Republic of Finland on the Enforcement of Sentences of the International Criminal Court, I.C.C.-Fin., art. 6(1), April 24, 2011, ICC-PRES/07-01-11.

204. 18 U.S.C § 3621(b) (2012). What is intriguing here is that this provision was amended, replacing the term "penal or correctional facility that meets minimum standards of health and habitability established by the Bureau" with "suitable, and appropriate institution, facility, or program, and where appropriate, to a home

given that the BOP has authority to designate a prison facility that is not itself federal, the BOP monitors institutions, such as private prisons, which claim to perform either the same or better in terms of quality.[205] International authorities also monitor the stark quality differences between States.[206] Indeed, an ICTR convict could plausibly serve his sentence in Sweden or in Swaziland, drastically distinct countries.[207] Such a wide discrepancy persists between prison

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detention program." H.R. REP NO. 101-681(I), §1404 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6550. S. REP. NO. 98-225, at 141 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3324–25 notes:

> Proposed 18 U.S.C. [§] 3621(b) follows existing law in providing that the authority to designate the place of confinement for Federal prisoners rests in the Bureau of Prisons. The designated penal or correctional facility need not be in the judicial district in which the prisoner was convicted and need not be maintained by the Federal Government. Existing law provides that the Bureau may designate a place of confinement that is available, appropriate, and suitable. Section 3621(b) continues that discretionary authority with a new requirement that the facility meet minimum standards of health and habitability established by the Bureau of Prisons.

205. *See generally Developments in the Law—III. A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1882 (2002) ("[P]rivate prisons are, if anything, more accountable for their constitutional violations than are public prisons."); Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 594 (1992) ("[T]he results across a wide range of evaluative measures tend to favour the privately operated prison over . . . facilities operated by governmental entities."); Scott D. Camp & Dawn M. Daggett, *Quality of Operations at Private and Public Prisons: Using Trends in Inmate Misconduct to Compare Prisons*, 7 JUST. RES. & POL. 27–51 (2005) ("The results demonstrated that the private prison did not perform as well as the three comparison prisons in the public sector, on the whole. For certain measures, the performance of the private prison was exemplary . . . .").

206. *States: Documents and Visits*, EUR. COMM. FOR THE PREVENTION OF TORTURE, http://www.cpt.coe.int/en/states.htm (last visited Oct. 18, 2013); van Zyl Smit, *supra* note 12, at 370–71 (reviewing the status and condition of ICTR and ICTY detainees and convicted prisoners without considering the process by which individuals may move from detention to imprisonment). Unforeseen circumstances in a place of enforcement may increase the retributive nature of a criminal sentence. For example, General Radislav Krstić, a Bosnian Serb convicted of genocide in Srebrenica in 1995, was slashed across the neck in May 2010 while serving his prison sentence in the United Kingdom. *See Inmates 'Plotted to Kill' War Criminal Radislav Krstic*, BBC NEWS (Feb. 7, 2011), http://www.bbc.co.uk/news/uk-england-bradford-west-yorkshire-12382433; *Radislav Krstic: Serbian War Criminal Attacked in British Jail*, THE TELEGRAPH (May 8, 2010), http://www.telegraph.co.uk/news/uknews/crime/7694530/Radislav-Krstic-Serbian-war-criminal-attacked-in-British-jail.html. Such conditions have also been present within Bosnian prisons. *See Rodić and 3 Others v. Bosnia and Herzegovina*, no. 22893/05, § 4 ECHR, 2008 ("The applicants alleged . . . that they had been persecuted by their fellow prisoners from the time of their arrival in Zenica Prison . . . .").

207. Agreement between the Kingdom of Swaziland and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, Swaz.-U.N., Aug. 30, 2000, 2122 U.N.T.S. 255; Agreement between the United Nations

conditions of ICTY and ICTR inmates,[208] which may explain why the ICTR engages in capacity building for the prisons in Benin and Mali.[209] Furthermore, members of the ICTY and ICTR Registry always travel to the relevant State to evaluate quality before concluding enforcement agreements with the States that have expressed an interest in concluding such an agreement with the tribunal.[210] The European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) also supervises the conditions of imprisonment in the national systems where ICTY convicts are serving their sentences, giving the ICTY a concrete means by which to supervise the treatment of prisoners.[211]

In sum, prison location advances the retribution rationale because: (1) the sentence is made more retributive by either the shame of being in the local community or the difficulties of being removed from it, (2) conditions of imprisonment may vary widely, constituting a spectrum of prison quality, and thus (3) where a prison facility falls on the spectrum amplifies or undermines the retribution of the sentence.

C. *Incapacitation*

The incapacitation rationale emphasizes rendering a convicted individual incapable of committing further offenses for substantial periods of time.[212] The aim is protection of the public, particularly

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and the Government of Sweden on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, U.N.-Swed., Apr. 27, 2004, 2256 U.N.T.S. 405.

208. *See* Weinberg de Roca & Rassi, *supra* note 12, at 43 ("The ICTY and ICTR Rules . . . attempt to achieve consistency. Achieving consistency is particularly difficult due to the wide range of countries involved in the incarceration scheme at the tribunals, especially the ICTY.").

209. *See* Dieng, *supra* note 137, at 413 ("[T]he majority of convicts have been transferred to Mail and Benin; these are two of the eight countries that have signed agreements with the United Nations for the purpose of enforcing ICTR sentences."). Norway has similarly proposed amending the Rome Statute to allow for States with lower prison quality to qualify for financial assistance in order to rectify this disparity. *See* Asian-African Legal Consultative Organization, Mar. 30–31, 2010, Putrajaya, Malay., Report of the Round Table Meeting of Legal Experts on the Review Conference of the Rome State of the International Criminal Court, 41 (2010) [hereinafter Asian-African Legal Consultative Organization], *available at* http://www.aalco.int/converted%20report%20ICC%202010/WorkingSession3.pdf ("Norway was concerned that only a limited number of Stated had so far agreed to accept sentenced persons for enforcement purposes.").

210. Author meeting with member of ICTY Registry (Jan. 10, 2013).

211. *See* van Zyl Smit, *supra* note 12, at 370–71 (reviewing the status and condition of ICTR and ICTY detainees and convicted prisoners without considering the process by which individuals may move from detention to imprisonment).

212. *See* ASHWORTH, *supra* note 169, at 80 ("A second possible rationale for sentencing is to incapacitate offenders, that is, to deal with them in such a way as to make them incapable of offending for substantial periods of time.").

from "dangerous" offenders, career criminals, and other persistent offenders.[213] In other words, the key is that "[a] criminal behind bars cannot commit crimes in society";[214] retribution and deterrence are not relevant to this end.[215] Incapacitation is often seen as the primary criterion justifying criminal punishment.[216]

The specific place of imprisonment strikes at the heart of incapacitation. If the facility itself is not sound in terms of its infrastructure or security protocols, the ultimate risk is escape. This is not merely a theoretical consideration, as escape has occurred in both the national and international arenas. In the U.S. federal context, for example, the Metropolitan Correctional Center (MCC) in downtown Chicago has had a history of similar escapes from its facility.[217] In 1985, two individuals convicted of murder had escaped the facility by breaking a window and then descending through the window using a rope made of bed sheets and an electrical cord.[218] In December 2012, two inmates also escaped from the prison.[219] Though the facility itself had been constructed in order to reduce the number of blind spots for guards,[220] clearly its structure, the security policies, or both contributed to a failure of the MCC to serve its incapacitative function.

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213. *Id.*

214. Catherine M. Sharkey, *Out of Sight, Out of Mind: Is Blind Faith in Incapacitation Justified?*, 105 YALE L.J. 1433, 1433 (2012).

215. *See* LYNCH, *supra* note 170, at 240 ("Incapacitation does not seek to rehabilitate or deter, it simply seeks to 'remove the problem' and thus provide relief."). *But see* EASTON & PIPER, *supra* note 34, at 132 ("[I]ncapacitation does not rest on a particular theory of human nature, but it is still justifiable on utilitarian grounds, the aim being to maximise happiness and restrain dangerous offenders, to protect the majority of society by removing harmful individuals.").

216. 24 C.J.S. *Criminal Law* § 1997 (2013) (citing State v. Cope, 129 P.3d 1241 (Idaho 2006); State v. Harrold, 722 P.2d 563 (Kan. 1986); State v. Hill, 431 So. 2d 871 (La. Ct. App. 1983); State v. Craig, 361 N.W.2d 206 (Neb. 1985); State v. Walker, 713 P.2d 666 (Or. Ct. App. 1986); State v. Anderson, 546 N.W.2d 395 (S.D. 1996); State v. Taylor, 710 N.W.2d 466 (Wis. 2006)).

217. *MCC Chicago*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/institutions/ccc/index.jsp (last visited Oct. 18, 2013).

218. *See* Don Babwin & Michael Tarm, *Chicago Jail Escape Resembles 1985 Breakout*, ASSOCIATED PRESS (Dec. 20, 2012), http://news.yahoo.com/chicago-jail-escape-resembles-1985-break-085549910.html ("During the 1985 escape, two convicted murderers used a weight to break a cell window, then shimmied down the side of the Metropolitan Correctional Center using bed sheets and an electrical cord.").

219. *See 2 Inmates Escape from Federal Prison in Chicago*, USA TODAY (Dec. 18, 2012, 3:48 PM), http://www.usatoday.com/story/news/nation/2012/12/18/chicago-jail-escape/1777905/ ("Two convicted bank robbers were on the run after using a knotted rope or bed sheets to escape from a federal prison window high above downtown Chicago . . . ."). *See generally MCC Chicago*, *supra* note 217.

220. *2 Inmates Escape from Federal Prison in Chicago*, *supra* note 219 ("[The building's] triangular shape is supposed to reduce the number of blind spots for guards . . . .").

In the international context, escape may be related to the specific State of enforcement. Ranko Stanković, who the ICTY indicted in June 1996, was referred pursuant to Rule 11 *bis* to the authorities of Bosnia and Herzegovina for trial.[221] In 2007, he was convicted and sentenced to 20 years imprisonment for participating in the abuse of women in Foča but escaped en route to a medical examination in May 2007.[222] Though Stanković was ultimately found in January 2012 and prosecuted on charges relating to his escape,[223] it is clear that the insufficient security of the Bosnian authorities led to a fundamental failure of incapacitation.

In sum, prison location advances the incapacitation rationale because the physical space where a person is incarcerated—including its security vulnerabilities—dictates the effective removal of the offender from society.

D. *Rehabilitation*

Rehabilitation involves a range of programs of treatment at prisons, facilities dedicated to a convicted individual's "improvement," or both.[224] At the core of this utilitarian rationale is the notion that a convict is a person of free will, capable of changing and positively contributing to society.[225] Such improvement may involve the modification of behaviors or attitudes, as well as the provision of educational skills leading to future occupational opportunity.[226] Methods may include psychiatric care, drug addiction therapy, academic training, or vocational education.[227] The emphasis of this

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221. *See* Prosecutor v. Stanković, Decision on Referral of Case Under Rule 11 *bis*, Case No. IT-96-23/2-PT (May 17, 2005); INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, R. P. & EVID. 11 *bis*, U.N. Doc. IT/32/Rev. 43 (July 24, 2009) (providing for the referral of an indictee to a domestic jurisdiction for trial). The referral pursuant to Rule 11 *bis* allowed for Bosnia to have responsibility for enforcing the sentence. By contrast, as noted in Part III *infra*, individuals who have been tried and convicted by the ICTY may not be sent to any former Yugoslavian countries for the purpose of enforcement of sentences.

222. *Stanković Sentenced for Prison Escape*, BALKAN TRANSITIONAL JUST. (Dec. 24, 2012), http://www.balkaninsight.com/en/article/stankovic-sentenced-for-prison-escape.

223. *Id.*; *Court Enters Not Guilty Plea for Stanković*, BALKAN TRANSITIONAL JUST. (Sept. 26, 2012), http://www.balkaninsight.com/en/article/court-enters-not-guilty-plea-for-stankovic/btj-topic-criminal-justice-efforts-latest-headlines-right-column/5.

224. *See* ASHWORTH, *supra* note 169, at 82 ("[R]ehabilitative theory is aimed at those who are regarded as being in need of help and support.").

225. PODGOR ET AL., *supra* note 9, at 5. The theory is utilitarian because it focuses on the future reduction of crime. DRESSLER, *supra* note 1, at 15.

226. *See* ASHWORTH, *supra* note 169, at 82 ("Sometimes the focus is on the modification of attitudes and of behavioural problems. Sometimes the aim is to provide education or skills, in the belief that these might enable offenders to find occupations other than crime.").

227. DRESSLER, *supra* note 1, at 15.

rationale is on the needs of the offender as opposed to the gravity of the offense committed[228] or the immediate need to protect society.

In effect, rehabilitation assumes a "medical model" of crime.[229] It is enshrined in the International Covenant on Civil and Political Rights,[230] though the U.S. Constitution itself does not mandate that a sentencing court consider reformation or rehabilitation. [231] The American approach for much of the last two centuries has been on rehabilitation of the prisoner in hopes of protecting society against any further crimes, though this approach has come under increasing criticism of late.[232]

Distance from one's family, place of residence, or home country affects rehabilitation because it undermines the capacity of the institution to effectively administer rehabilitative programs. Indeed, if a person is imprisoned outside of his or her own country, "without possibility of transfer to his or her own country, the offender may have little real opportunity for effective rehabilitation or reintegration." [233] This has potentially dire consequences for the convicted individual:

> [T]o argue that an offender can spend several years in a foreign prison and then, following deportation, immediately readapt to life at home without correctional supervision, stretches credulity. Indeed, this reasoning is why nations with modern criminal justice systems have some type of parole, probation, or community supervision system for domestic offenders. Without access to systems of meaningful restoration and reintegration, justice remains elusive for the victim and recidivism by the offender is more likely. The latter consequence translates into greater risk of harm to the public; repeated contact with the criminal justice system for the offender; heavier caseloads for police, prosecutors, defense counsel, the bench, prisons, and community correction agencies; and a greater criminal justice tax burden to be borne by the public.[234]

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228. ASHWORTH, *supra* note 169, at 82.

229. LYNCH, *supra* note 170, at 239.

230. International Covenant on Civil and Political Rights art. 10(3), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("The penitentiary system shall comprise treatment of prisoners 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.").

231. *See* 24 C.J.S. *Criminal Law* § 1997 (2013) (citing United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984) for the proposition that "the Constitution does not mandate that every sentencing court consider [reformation and rehabilitation] when imposing sentence").

232. DUBBER & KELMAN, *supra* note 170, at 8 (citing United States v. Blarek, 7 F. Supp. 2d 192, 200 (E.D.N.Y. 1998)).

233. Mark Andrew Sherman, *Some Thoughts on Restoration, Reintegration, and Justice in the Transnational Context*, 23 FORDHAM INT'L L.J. 1397, 1399 (2000).

234. *Id.* at 1400.

Indeed, if a common approach to rehabilitation includes vocational training, for example, What may the quality of such training be if it is ill suited to the language of the convicted individual and divorced from the economics of one's home country?

Furthermore, the quality of the prison affects the degree of rehabilitative, medical, psychological, educational, or vocational programs. All of these considerations are at play, for example, in Finland, which has a relatively well-considered prison rehabilitation program.[235] Among others, Finland has enforced the sentence of Momir Nikolić, who pleaded guilty in 2003 to the charge of persecutions on political, racial, and religious grounds as a crime against humanity, relating to the murder of Bosnian Muslim civilians in Srebrenica and surrounding areas in 1995.[236] Nikolić was ultimately sentenced to 20 years imprisonment.[237] During his cross-examination in a subsequent ICTY proceeding, he testified:

> If I were to be in—in a similar situation knowing what I know now, trust me, I wouldn't be fooled by anyone. I wouldn't carry out anyone's order. I would simply flee if in the same situation.
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> ….
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> But then, things were completely different. The situation was different, and I carried out my superiors' orders, and by having done so I made mistakes. As a human being I accepted that, and I believe anyone in such a situation should. When things are fine and going well, one needs to accept the praise. In case of mistakes, one needs to take the blame, and I do to the extent of my guilt and the mistakes I made. I did that, and I feel no regret for having done that. I felt much relieved once I accepted my responsibility and said that I was sorry for what I had done. In a way, I feel better.[238]

It is unclear to what degree Nikolić would have made such a statement if he had been incarcerated in a place with fewer or no rehabilitative programs.

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235. *See* European Comm. for the Prevention of Torture and Inhuman Degrading Treatment or Punishment, *Report to the Finnish Government on the Visit to Finland Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 20 to 30 April 2008*, ¶¶ 84, 121 (Jan. 20, 2009), *available at* http://www.cpt.coe.int/documents/fin/2009-05-inf-eng.htm ("The delegation was impressed by the high quality of material conditions in the establishment's detention units . . . . Despite the age of the building, which dated back to the 19th century, living conditions were very good. The patient accommodation areas were bright, airy and impeccably clean. Further, the delegation noted efforts to create a personalised environment.").

236. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: MOMIR NIKOLIĆ "SREBRENICA" (IT-02-60/1), *available at* http://www.icty.org/x/cases/nikolic/cis/en/ cis_nikolic_momir.pdf.

237. *Id.* at 1 (detailing that Nikolić's initial sentence of 27 years was reduced to 20 years on appeal).

238. Prosecutor v. Karadžić, Case No. IT-02-60/1, Transcript of Record, at 24895 (Feb. 16 2012), *available at* http://www.icty.org/x/cases/karadzic/trans/en/120216IT.htm.

In sum, prison location advances the rehabilitation rationale because both distance and quality affect the nature of rehabilitative programs.

E. *Victim-Related Rationales*

Victim-related rationales for criminal punishment, which involve restoration and reparation, are gaining traction in recent decades due to "the increasing recognition of the rights and needs of the victims of crime."[239] Though they vary in conception and implementation, they rest on the fundamental proposition that the central goal of sentencing is justice to victims, meaning that all stakeholders become involved in discussions of the appropriate response to the offense.[240] Indeed, this increasingly popular framework "seeks to include the victim in the process in an effort to make an offender appreciate the significance of his crime, apologize and gain forgiveness."[241]

Prison location plays a crucial restorative role for victims. One commentator has raised such considerations in the context of transnational prosecutions and extraditions:

> When a nation refuses to extradite a national who has committed an offense in another country, this situation leaves the victim without practical recourse to justice, even if the offender is tried and convicted in his or her own country. Similarly, if the foreign offender is extradited, tried, and convicted in the requesting state, then the victim cannot be made whole if the offender is transferred or deported. In these situations, the offender is treated fairly, but the victim is not.[242]

Similarly, a convicted individual transferred out of the region or country in which he or she committed a crime may similarly render the victim incomplete. Thus, the words of the ICTR registrar ring true once again: "justice must be seen to be done." As he correctly recognized, the process of enforcement of sentences must accommodate the victims. Many victims require a sense of inclusion

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239. ASHWORTH, *supra* note 169, at 88; *see* EASTON & PIPER, *supra* note 34, at 180 ("The focus on victims in the last two decades has had two very different aspects: one could be called a victims' welfare approach . . . whilst the other approach is to give victims a status to influence outcomes."). The U.N. "Declaration on the Basic Principles of Justice for Victims" exemplifies this trend. EASTON & PIPER, *supra* note 34, at 180–81; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985) ("The General Assembly . . . [a]ffirms the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power . . . .").

240. *See* ASHWORTH, *supra* note 169, at 90 ("[A] restorative justice agreement, involving restoration of the victim and of the wider community, is intended to be constructive rather than punitive."). Relevant stakeholders would include the victim(s), offender(s), their families, and the community, however *community* may be defined. *Id.*

241. ORMEROD, *supra* note 15, at 5.

242. Sherman, *supra* note 233, at 1399.

in the prosecutorial process, as to be treated fairly means to be geographically close to the proceedings themselves. A victim who is in another country or five hundred miles from a release residence may do neither.

Various theories of restorative justice underscore the importance of prison location in serving larger goals of victim-related justice. For example, victim–offender confrontation is a trend that has received increased attention of late.[243] First, it allows victims to convey hurt and receive answers, providing an opportunity for victims to tell criminals how the crime has affected their lives.[244] Second, it avoids the feeling of being "twice victimized" by a criminal justice system focused on prosecuting offenders and overlooking any input from the victims themselves.[245] And finally, such confrontation may address "emotional and material wounds left in the wake of a serious crime" consistent with the broader finding that many victims prefer restorative to retributive justice.[246] In order for this to occur, victims must be within a manageable distance of the place of incarceration. In reality, the convict may be imprisoned prohibitively far, especially given the various socioeconomic statuses of victims of crimes. Indeed, the BOP has a preference for incarceration within five hundred miles of the *release* residence; no analogous considerations weigh toward distance from victims.

Victim considerations may balance in the other direction as well, however, with victims preferring a farther distance from the convict. For example, federal officials are statutorily required to inform victims of the date on which an offender will be eligible for parole and, if necessary, the scheduling of a release hearing for the offender;[247] escape, work release, furlough, or any other form of release of the offender from custody;[248] or the death of the offender in custody.[249] Some European countries, furthermore, allow a victim to request the detention of a prisoner in a location farther from their own place of residence.[250]

In sum, prison location advances victim-related rationales because: (1) a convict serving a sentence far from the victims may undermine restorative justice, (2) opportunities for victim–offender

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243. Mark S. Umbreit, *Survivors of Homicide Victims Confront Offenders*, THE CRIME VICTIMS REPORT (1997), *in* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 679–80 (1999).

244. *Id.* at 680–81.

245. *Id.*

246. *Id.*

247. 42 U.S.C. §§ 10607(c)(3)(G), (c)(5)(A) (2012).

248. 42 U.S.C. § 10607(c)(5)(B) (2012).

249. 42 U.S.C. § 10607(c)(5)(C) (2012).

250. D'ASCOLI, *supra* note 27, at 135–40.

confrontation are diminished, and (3) some victims may in fact prefer greater distance from the offender.

F. *Transitional Justice*

Turning to the final rationale, international criminal justice elevates an additional theory of criminal punishment: facilitating transitional justice.[251] Transitional justice may be defined as "judicial and non-judicial measures . . . implemented . . . in order to redress the legacies of massive human rights abuses."[252] Criminal prosecutions—at the domestic or international level—are one of the key mechanisms that may advance that goal.[253] In essence, in the wake of an armed conflict in a given region, international criminal justice—and its concomitant sentencing procedures—may advance the ideal of reconciliation.[254] Indeed,

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251. *See* Woods, *supra* note 12, at 656–57 ("International criminal law has numerous goals . . . . These goals, in addition to retribution for past crimes, include deterrence, rehabilitation, reconciliation, dissipating calls for revenge, individuation of guilt, and establishing an accurate historical record. Several of these goals are distinct from the goals of the domestic criminal regime . . . .") (footnotes omitted).

252. *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST., http://ictj.org/about/transitional-justice (last visited Oct. 18, 2013) ("These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.").

253. *See* Fannie LaFontaine, *Transitional Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 165, at 539 ("As for the main transitional justice mechanisms, judicial proceedings, notably criminal prosecutions, constitute a form of punitive policy the purpose of which is to repress international crimes and/or serious human rights violations, according to the different courts' mandates. These tribunals can be domestic, international or 'mixed' . . . ."). Other mechanisms include truth and reconciliation commissions. *Id.*

254. *See* M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 165, at 140 ("Among the goals of international criminal justice are to: contribute to peace and reconciliation, provide a remedy to victims and eventually some closure, and to generate prevention through deterrence. Additionally, prevention is also accomplished by memorialization."). *See generally* Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT'L L. 247, 247 (2010) ("The issue of 'justice versus peace' has long been at the center of the controversy on international prosecutions for crimes in transitional and post-conflict societies."); Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325–26 (1997) ("Calamity acted as catalyst, however, and the post-Cold War political context allowed for the unprecedented establishment . . . of two ad hoc international criminal jurisdictions to punish serious violations of humanitarian law."); Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT'L & COMP. L. REV. 667, 668 (1999) ("[I]nternational humanitarian law applies to cases of internal and external armed conflicts. It applies when war prevents people from exercising their rights.").

> [i]nternational criminal courts purport to fulfill much more than the traditional objectives of national criminal law enforcement, such as deterrence or retribution. At various times, these courts have expressed their intention to produce a reliable historical record of the context of international crime, to provide a venue for satisfying its many victims, and to produce the socio-pedagogical effect of promoting a sense of accountability for gross human rights violations. They have also expressed their aspiration to make advances in ICL, and to achieve objectives related to peace and security—such as stopping an ongoing conflict—that are far removed from the normal concerns of national criminal justice.[255]

The location of imprisonment is key to transitional justice, especially if states previously involved in internal or international armed conflict develop their enforcement systems to the point of enforcing international criminal sentences. Serbia, for example, has pressed on multiple occasions for the Security Council to change the rule precluding former Yugoslavian countries from enforcing sentences.[256] In making its argument in June 2012, for example, Serbia noted that it achieved "full cooperation" with the ICTY and, in doing so, "contributed to the achievement of international justice and further normalization of the situation and improvement of relations between the states of the Balkans."[257] Serbia thus stated:

> My Government will continue to work on the initiative that countries of the former Yugoslavia be allowed to sign agreements on enforcement of sentences with the Tribunal. It is evident that Serbia, as well as the whole region, has changed to a great extent since the time when the [Secretary General on] 3 May 1993 stated that he is of the view that the enforcement of sentences should take place outside the territory of the former Yugoslavia. . . . [T]he Republic of Serbia is ready to share the responsibility with other countries in regard to this issue. We believe that Serbia and other countries of the former Yugoslavia willing to do the same will be allowed to sign agreement on enforcement of sentences with the Tribunal.[258]

Here Serbia links prison location to the ideal of transitional justice in the former Yugoslavia. In their submission, the mere responsibility of *enforcing* sentences—as opposed to trying the

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255. Mirjan Damaška, *Problematic Features of International Criminal Procedure*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 165, at 177.

256. *See* Feodor Starčević, Permanent Rep. of Republic of Serb., Statement dated June 7, 2012 to the Security Council (June 7, 2012) [hereinafter Starčević Statement], *available at* http://www.un.int/serbia/Statements/129.pdf; Marija Ristić, *Serbia Wants ICTY Convicts in Local Prisons*, BALKAN TRANSITIONAL JUST. (Dec. 3, 2012), http://www.balkaninsight.com/en/article/serbia-wants-icty-convicts-to-servce-sentence-in-serbia ("The Serbian National Council for ICTY Cooperation has requested several times for Serbia to be listed among countries were [sic] the ICTY convicts could serve their sentences.").

257. *See* Starčević Statement, *supra* note 256.

258. *Id.*

individual and delivering the appropriate sentence—may bring greater peace and reconciliation to the formerly war-torn region.

In sum, prison location advances the transitional justice rationale because it allows countries to themselves foster reconciliation, build capacity in their judicial and nonjudicial institutions, and demonstrate their commitment to the rule of law.

VI. CONCLUSION

Where should a convict serve time? And why does it matter? The short answer is that prison location is as important as duration in determining whether and to what extent a convict is being appropriately punished.

The prison location omission constitutes a conspicuous scholarly oversight neglecting the importance of prison location. This Article has filled this gap by explicating relevant prison designation procedures at the national and international level and by showing how prison location advances overarching theories of criminal punishment. Just as sentence length directly implicates retribution, deterrence, and other rationales for criminal punishment, so too does imprisonment location.

In light of this review, this Article calls for renewed academic attention to the importance of prison location. Future commentary may scrutinize the statutory practice of U.S. states, given that, as noted in Part II, some U.S. states endow courts with the power to designate a particular prison facility.[259] Might state courts more explicitly consider the deterrent effect of prison location, in addition to length of imprisonment? Future research could also probe more deeply into the designation statistics at the federal and international levels, reviewing the numbers and distribution of convicts across the field of potential prison locations. It could also pursue a more empirical track, for example, such as that forged by the study that concluded that increasing the average distance to a women's prison by forty miles reduces the female violent crime rate by approximately 6 percent.[260] Might similar changes to a crime rate be perceptible if, for example, the quality of rehabilitation were higher or lower, especially if such rehabilitation were limited by culture or language?

This Article also demonstrates the need for reform. As suggested above, prison location has significant consequences for the convict, victims, and families of both parties. In light of this, the BOP must

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259. *See supra* note 28.

260. *See* Bedard & Helland, *supra* note 179, at 165 ("When the full set of law enforcement and socioeconomic variables are included, the estimates imply a 6.8% reduction in violent crime . . . for a 40-mile increase in average prison distance.").

provide a more transparent, public explication of its designation procedures and the way in which they may accommodate retribution, deterrence, and other goals of criminal justice so as to be better tailored to the needs of the particular individual and victims. Such reforms would then "trickle down" to convicted individuals and victims. Indeed, at the federal level, there has been limited review of ways in which attorneys may assist their clients in ending up in a particular prison facility,[261] and one practitioner has already noted the challenges for attorneys representing clients designated pursuant to the DSCC process.[262]

At the international level, a fuller consideration of prison location illuminates the path forward for the ICC and the MICT, both permanent institutions that will soon have designatory and supervisory authority over hundreds of international prisoners.[263]

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261. *See generally* Alan Ellis, *Securing the Best Placement and Earliest Release*, 22 CRIM. JUST. 53 (2008) ("There is a lot defense attorneys can do to ensure that their clients do their time in the best possible facilities.").

262. Allen Ellis, a prominent postconviction attorney, has noted:

> While this new system may be cost-effective for the Bureau, it makes it more difficult for defense counsel to help clients receive particular designations. Under the old system, an attorney could always call the regional designator to discuss particular areas of concern. That level of personal attention is not always possible for many attorneys unfamiliar with the BOP under the new system. It is often not possible for them to speak with the specific senior designator assigned to a particular client because designations are randomly divided between the seven senior designators. Attorneys who are not personally acquainted with the senior designators are limited to speaking with someone on the team responsible for the pertinent judicial district.

Ellis, *supra* note 50, at 60–61. Preliminary research has also indicated that some U.S. states have not even made explicit their reasons for designating a particular prison facility, but continued scholarly review could provide a stronger motivation for states to do so.

263. The MICT is the successor institution to the ICTY and ICTR and will have designatory and supervisory authority over the tribunals' sentences after July 2013. Article 25 of the Statute of the International Residual Mechanism for Criminal Tribunals provides:

> 1. Imprisonment shall be served in a State designated by the Mechanism from a list of States with which the United Nations has agreements for this purpose. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Mechanism. 2. The Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States, and other agreements with international and regional organizations and other appropriate organisations and bodies.

Statute of the International Residual Mechansim for Criminal Tribunals art. 25, S.C. Res. 1966, Annex 1, U.N. Doc. S/RES/1966 (Dec. 22, 2010); MECHANISM FOR INT'L CRIM. TRIBS., R. P. & EVID. 127–28, U.N. Doc. MICT/1 (June 8, 2012) (governing the place of imprisonment and supervision of imprisonment).

Sustained academic attention may also, hopefully, encourage more States to ratify bilateral enforcement agreements with the tribunals and ultimately accept more prisoners. Indeed, as of now, States Party to the Rome Statute are calling on more States to ratify such agreements.[264] The ICTY is similarly calling on States to be more willing to enforce sentences.[265] More States ratifying enforcement agreements means more opportunity for tribunals to designate a State that best balances the needs of the offender and victims while also being mindful of the key rationales of criminal punishment.

Finally, scholarly scrutiny may impact the evolution of jurisprudence in this area. Some federal appellate jurisprudence holds that a convict has no constitutional or other right to serve a term of imprisonment in a particular prison facility, a certain type of facility, or in close proximity to his or her family.[266] And yet, federal jurisprudence is equally clear that sentences must be proportional under the Eighth Amendment,[267] while other courts have held that prison conditions may constitute cruel and unusual punishment,[268]

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264. *See* Asian-African Legal Consultative Organization, *supra* note 209, at 41 ("Norway was concerned that only a limited number of States had so far agreed to accept sentenced persons for enforcement purposes.").

265. In a June 2011 address to the Security Council, Judge Patrick Robinson stated:

> The third area in which we need the support of the Member States of the Security Council is in the enforcement of our sentences. The Tribunal has signed enforcement of sentence agreements with 17 States, most of which have been enforcing our sentences for years. We are very grateful for that. However, some of these States have become hesitant to enforce further sentences and have called for a more equal burden sharing among Member States. Other States have signaled that they would only enforce a fixed number of sentences at any one time, and have declined the Tribunal's requests to receive additional convicted persons. Considering that up to 40 additional sentences may have to be enforced over the next few years, depending upon the outcome of trials and appeals, it has become evident that the Tribunal's current enforcement capacity is rapidly approaching its limit.

Judge Patrick Robinson, President, Int'l Crim. Trib. for the Former Yugoslavia, Address to the U.N. Security Council 4 (June 18, 2011), *available at* http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/110606_pdt_robinson_un_sc.pdf.

266. 24 C.J.S. *Criminal Law* § 2188 (2013) (citing Meachum v. Fano, 427 U.S. 215, 224–25 (1976)); 24 C.J.S. *Criminal Law* § 2188 (2013) (citing Petition of Peiffer, 166 A.2d 325, 327 (Pa. Super. Ct. 1960)); s*ee also* McKune v. Lile, 536 U.S. 24, 39 (2002) ("It is well settled that the decision where to house inmates is at the core of prison administrators' expertise.").

267. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("[T]he basic precept of justice [is] that punishment for [a] crime should be graduated and proportioned to [the] offense.") (internal quotation marks omitted) (internal citations omitted); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977) ("[T]he Eighth Amendment bars . . . those punishments that are . . . 'excessive' in relation to the crime committed.").

268. *See, e.g.*, William H. Danne, Jr., Comment Note, *Prison Conditions as Amounting to Cruel and Unusual Punishment* 51 A.L.R.3d 111 (2013) (citing Wilson v.

suggesting that location-related issues could theoretically be construed to implicate proportionality. Furthermore, the jurisprudence may evolve to better accommodate victims, affecting the BOP's preference for incarceration within five hundred miles of the *release* residence but lack of an analogous consideration for distance from victims. In *Kelly v. Robinson*, for example, the Supreme Court considered whether a Connecticut restitution order constituted a fine or other penalty "for the benefit of a governmental unit" pursuant to § 523(a)(7) of the Bankruptcy Code.[269] In doing so, the court reasoned:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him.Although restitution does resemble a judgment "for the benefit of" the victim, ... [t]he victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.
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> . . . .
>
> Because criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate "for the benefit of" the State. Similarly, they are not assessed "for . . . compensation" of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State. Those interests are sufficient to place restitution orders within the meaning of § 523(a)(7).[270]

Although in a restitution context, the Court maintained a key distinction: though criminal punishment may "benefit" the victim, the victim may not dictate the nature of a criminal punishment. The aspiration of this Article is that a fuller conception of prison location may someday serve to benefit both victims and society as a whole.

Seiter, 501 U.S. 294 (1991); Estelle v. Gamble, 429 U.S. 97 (1976); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 2008); De'Lonta v. Angelone, 330 F.3d 630 (4th Cir. 2003); Bagola v. Kindt, 131 F.3d 632 (7th Cir. 1997)) ("[M]odern courts in general have overwhelmingly subscribed to the view that those confined within penal institutions can be subjected to cruel and unusual punishment by reason of offensive practices, treatments, or conditions which originate within the prison setting itself and are not in any way mandated by the express terms of a court-imposed sentence.").

269. Kelly v. Robinson, 479 U.S. 36, 38–43 (1986).

270. *Id.* at 52–53 (footnote omitted).