

Aging Out: Elderly Defendants and International Crimes

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“In view of the fact that he has had such an impact on my life, I have no sympathy for this depraved individual . . . Why should he be shown any compassion, when he had none for his many victims?”†

“There is no justice without mercy.”‡

One of the most salient characteristics of international criminal justice is delay. Whether at international tribunals, hybrid “internationalized” courts, or domestic ones, seldom do courts reach or adjudicate atrocity crimes quickly. Although much has been said about the speed or lack thereof of international criminal trials, little attention has been given to the almost inevitable side effect of the slow pace of international criminal justice: elderly defendants and prisoners.

This Article attempts to fill this void. It explores the human rights implications of prosecuting and punishing elderly, and often extremely elderly, atrocity perpetrators and the degree to which prosecution of elderly alleged atrocity criminals furthers the objectives of international criminal justice. Whereas international human rights law recognizes that criminal proceedings must accommodate the special needs of the elderly person on trial and that serious physical or mental ailments can render prosecution and incarceration inhumane, at present, age alone is no impediment to prosecution or punishment. Age is, however, a permissible consideration at sentencing or reviews thereof. Further complicating matters, there is a tension between age-related arguments in favor of release or home confinement of defendants and prisoners and human rights norms demanding the investigation, prosecution, and punishment of perpetrators of atrocity crimes.

This Article contends that, in most instances, prosecution and, if convicted, punishment of now-elderly perpetrators of atrocities comports with international human

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† Stephen Rex Brown & John Annese, *‘Why Should He Be Shown Any Compassion’: Prosecutors Say Dying Madoff Shouldn’t Be Released Early from Jail, Reveal Letters from Ponzi-Scheme Victims*, DAILY NEWS (Mar. 4, 2020), <https://tinyurl.com/y2c9j7nw> (quoting a victim submission regarding Bernie Madoff’s request for humanitarian release).

‡ Claudia Gonzalez, *Hugo Dolmestch “No Hay Justicia sin Misericordia,”* CARAS (May 5, 2016) (on file with author) (then-Chief Justice of the Chilean Supreme Court stating in a magazine interview that he was not sure whether or not elderly persons convicted of human rights crimes ought to be permitted alternative forms of incarceration, but adding that, if international human rights law precluded it, Chilean courts would have to adhere to human rights law, and noting “there is no justice without mercy”/“No hay justicia si no hay misericordia”). All translation from Spanish are my own.

rights law and further the aims of international criminal justice, including retribution, deterrence, and even incapacitation. Moreover, they serve important expressive and didactic functions. However, there are limits. To pursue imprisonment in the face of a stark incompatibility with the medical needs of an elderly defendant or prisoner would betray the human rights obligations owed the elderly and prisoners alike and impede the important human rights-affirming function of atrocity prosecutions. Judges thus must continue to engage in the messy task of assessing the physical and mental health needs of elderly defendants and prisoners and the adequacy of institutions and resources to accommodate them. Wherever possible, even if meaningful punishment cannot be reconciled with the humane treatment of the elderly defendant, perpetrators should be still be prosecuted. These prosecutions, though likely unsatisfying to victims and families their families, send a message of condemnation of the conduct—these crimes are sufficiently grave that they merit our attention, regardless of the passage of time or the age of the defendant—and of educating the public about atrocities and the circumstances that gave rise to them.

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I. INTRODUCTION

Be it Harvey Weinstein's walker,¹ Bernie Madoff's bid for humanitarian release based on terminal cancer,² or the push to release elderly and sick prisoners due to the coronavirus,³ recently, the link between old age, sickness, and criminal justice has garnered significant attention. Nowhere does the tension between old age and justice present itself so starkly as it does in the prosecution and punishment of atrocity criminals.

In the field of international criminal law (ICL), strikingly little scholarly attention has been given to the old, who make up a significant percentage of defendants charged with international crimes.⁴ This omission highlights a glaring need for clarification of the human rights constraints inherent in trying and punishing elderly defendants for international crimes. This Article seeks to fill that gap.

Two central questions loom over the prosecution of elderly atrocity defendants: What are the human rights implications of trying and punishing these defendants and what do such prosecutions mean for international criminal justice? The Article seeks to answer these questions by situating the prosecution of older defendants in international human rights law and within the context of international criminal justice. It does not restrict its analysis to international criminal tribunals, but rather looks broadly at trials for atrocity crimes, wherever they may occur—international tribunals, hybrid courts, and domestic courts.

It concludes that there is no international human rights norm precluding trial and even imprisonment of elderly defendants based on age alone, regardless of whether the defendants are charged with international crimes. Conversely, however, courts are not prohibited from considering old age in matters of sentencing and conditions of confinement, even when dealing with atrocity crimes. In addition, the accessories of old age—such as mental incompetence or serious illness—implicate human rights obligations and thus should affect decisions on whether to proceed with investigations and charges, the pace and structure of a trial, sentencing decisions, and conditions of confinement.

1. Drew Schwartz, *We Asked a Doctor If Harvey Weinstein Really Needs That Walker*, VICE (Jan. 7, 2020), <https://tinyurl.com/yxc58843>.

2. Merrit Kennedy, *Bernie Madoff Seeks Early Release Because He Has 'Less Than 18 Months' to Live*, NPR (Feb. 6, 2020), <https://tinyurl.com/yfz4ma2>.

3. Press Release, Inter-Am. Comm'n on Hum. Rts., Org. of Am. States, *The IACHR Urges States to Guarantee the Health and Integrity of Persons Deprived of Liberty and Their Families in the Face of the COVID-19 Pandemic* (Mar. 31, 2020), <https://tinyurl.com/y2us94la>.

4. See *infra* Part I. This Article uses the terms "atrocity crimes" and "international crimes" interchangeably to denote serious international crimes, such as war crimes, crimes against humanity, and genocide.

This Article proceeds in three parts. Part I sets out the problem. A high number of defendants charged with international crimes in international tribunals, hybrid tribunals, and domestic courts are elderly. Part II explores international norms governing trial and detention of elderly prisoners. Part III attempts to reconcile norms related to trial and detention of the elderly with the aims and idiosyncrasies of international criminal justice. It assesses the merits of charging, trying, and detaining elderly persons for atrocity crimes in light of the manifold objectives of atrocity trials. It argues that charging and trying elderly defendants makes sense and may further retributive, utilitarian, and expressive aims. So, too, does imprisonment. However, at the point at which detention becomes manifestly inconsistent with the medical needs of the elderly accused or convicted person, as unpopular and retributively unsatisfying as it may be, alternative forms of incarceration or alternatives to incarceration are appropriate. Even if imprisonment is not a viable outcome, prosecutions should still be pursued unless the trial itself is incompatible with the physical and mental health of the accused. By taking this nuanced approach, courts can ensure respect for human rights and align the prosecution of elderly defendants with broader aims of international criminal justice.

II. THE SILVER WAVE OF ATROCITY CRIMINALS

A. *The Prevalence of Elderly Persons Accused and Convicted of Atrocity Crimes*

Many countries are contending with growing elderly prisoner populations.⁵ In the United States, the growing population of elderly prisoners has been called a “silver tsunami.”⁶ In the world of international criminal law (ICL), it is perhaps a silver wave, since the total number of defendants is lower, but there are a lot of silver waves in the ICL ocean. Elderly defendants make up a significant proportion of the defendants at international tribunals, hybrid courts, and even domestic courts addressing atrocity crimes.

Germany’s latest wave of trials of old Nazis likely have garnered the most international attention. After German courts embraced a broader conception of accessory liability that permitted prosecutions of guards and

5. See also AM. C.L. UNION, *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* (2012), <https://tinyurl.com/yybbngse>; Violet Handtke et al., *New Guidance for an Old Problem: Early Release for Seriously Ill and Elderly Prisoners in Europe*, 97 PRISON J. 224, 226 (2017) (noting the growing numbers of elderly prisoners in Europe). See generally PENAL REFORM INT’L & THAI INST. OF JUST., *GLOBAL PRISON TRENDS 2020*, at 25 (2020) [hereinafter *GLOBAL PRISON TRENDS*] (describing rapid growth in elderly prisoner populations in Singapore, South Korea, Switzerland, Canada, Japan, and the United States).

6. Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937 (2018).

others at concentration camps without evidence of their direct involvement in killings,⁷ the country has seen a spate of nonagenarians on trial for their roles in the Holocaust.⁸ These cases include the trial of Bruno Dey, recently tried in Hamburg, Germany for his role as an SS guard in the killings of over 5,000 Jewish detainees at the Stutthof concentration camp.⁹ Some cases have ended because courts deemed the defendants unfit to stand trial.¹⁰ Others have gone forward, but defendants, including John Demjanjuk, died before serving their sentences.¹¹ Since six decades have elapsed since the crimes, somewhat paradoxically, defendants by definition were quite young at the time of the offenses. Dey, for example, was tried for crimes committed as a juvenile (at age seventeen).¹²

Although the German cases present perhaps the starkest example due to the time that has elapsed since the crimes, they are far from unique in their prosecution of elderly alleged atrocity criminals. Chile likewise has been prosecuting and detaining elderly human rights violators from the country's dictatorship, which has provoked a heated debate over the propriety of doing so.¹³ Guatemala has also prosecuted various now-elderly senior

7. Eliza Gray, *Nazi Trials: The Case of Auschwitz Guard Reinold Hanning*, TIME (June 7, 2018), <https://time.com/nazi-trials/> (“With the Demjanjuk case, they finally created a prosecutorial approach that got the logic of genocide down: if you were working in a factory of death, that made you an accessory to murder because your job was to facilitate the killing of human beings,” says Douglas, the Amherst historian. “That’s an incredible legal breakthrough.”).

8. Reinold Hanning, *Convicted Nazi Guard Dies Before Going to Prison*, BBC NEWS (June 1, 2017) <https://tinyurl.com/y2r5ace2> (“According to German media, 28 prosecutions are under way against alleged war criminals and concentration camp guards, but the accused are generally over 90 years old.”).

9. Philip Oltermann, *‘We Were Indifferent to the Horror’: Nazi Camp Inmate to Give Testimony at Trial*, GUARDIAN (Oct. 27, 2019), <https://tinyurl.com/yyxv2q3m>; Doree Lewak, *New Jersey Woman Testifying in Trial of Nazi Guard Bruno Dey: ‘He’s Not Human,’* N.Y. POST (Dec. 7, 2019), <https://tinyurl.com/qrlk879>.

10. See, e.g., *‘Unfit for Trial’: German Court Ends Case Against Former Nazi Camp Guard, 95*, LOCAL (Apr. 3, 2019), <https://tinyurl.com/yy67qxx9>; Jessica Ware, *Most-Wanted Nazi Gerhard Sommer— Accused of 342 Murders — is ‘Unfit for Trial’ Says German Court*, INDEPENDENT (May 29, 2015), <https://tinyurl.com/y4dyak8g>.

11. Robert D. McFadden, *John Demjanjuk, 91, Dogged by Charges of Atrocities as Nazi Camp Guard, Dies*, N.Y. TIMES (Mar. 17, 2012), <https://tinyurl.com/y2txwz9e>. In 2015, Oscar Groening, known as the “bookkeeper of Auschwitz,” was sentenced to four years imprisonment at age ninety-six. *Convicted Auschwitz Guard Oskar Groening Pleads for Mercy*, BBC NEWS (Jan. 16, 2018), <https://tinyurl.com/yymzj3fq>. Groening, like Reinhold Hanning, was a former guard at Auschwitz; both were convicted in their mid-nineties and died before serving their sentences. ‘Unfit for Trial,’ *supra* note 10.

12. Anna Noryskiewicz, *Ex-Nazi Guard Goes on Trial at Age 93 as Accessory to 5,230 Murders*, CBS NEWS (Oct. 10, 2017), <https://tinyurl.com/yxsvpynp>; see also *Holocaust Trial: Former Stutthof Guard on Trial in Germany*, BBC NEWS (Oct. 17, 2019), <https://tinyurl.com/y6lkwwww>.

13. See, e.g., Lilian Olivares, *Ex-Comandante en Jefe de la FACH Ricardo Ortega Perrier: “No están humillando al general (r) Orozco; están humillando a toda la institución,”* EL MERCURIO (Aug. 27, 2017) (criticizing the decision to detain then eighty-nine year old former General Orozco, convicted of two killings in 1973, and his being hauled off to jail in his pajamas); *Proporcionalidad y Humanidad de las Penas*, EL MERCURIO (Aug. 28, 2017) (“El rechazo de cualquier mitigación de las condenas frente a este tipo de circunstancias nos aleja de la creciente conciencia que ha adquirido la sociedad chilena sobre el valor de los derechos humanos y parece incompatible con el trato digno que le corresponde a toda persona.”)

officials—including Guatemala’s former head of state, Efraín Ríos Montt—for genocide and crimes against humanity committed in the early 1980s. Ríos Montt was convicted in his mid-eighties, but had his conviction overturned on appeal. By his second trial, Ríos Montt suffered from dementia, and the court used special procedures, including conducting his trial behind closed doors and precluding sentencing.¹⁴

Of the internationalized bodies, the Extraordinary Chambers of the Courts of Cambodia (ECCC) offers another example of a court racing the clock in atrocity trials against eighty and ninety-somethings, or as two commentators have dubbed them, the “barely alive” (a few, in fact, are no longer alive).¹⁵ The court, which is continuing its work at the time of writing, is charged with prosecuting senior leaders of the Khmer Rouge for crimes committed in the late 1970s.¹⁶ The combination of a focus on senior leaders and those most responsible for crimes and the time that has elapsed since the crimes, some forty years, means that trials of the elderly, with all of the attendant physical and mental health issues of old age, are almost inevitable.

At the Special Court of Sierra Leone, which had jurisdiction over those who “bear the greatest responsibility” for serious crimes committed during the country’s civil war, defendant Samuel Hinga Norman likewise died prior to judgment in his case at age sixty-seven.¹⁷ Norman had been charged with

[“The rejection of any mitigation of sentences in the face of these sorts of circumstances [age and, according to some, dementia] distances us from the growing consciousness that Chilean society has acquired on the value of human rights and seems incompatible with humane treatment that all people deserve.”].

14. See also Jo-Marie Burt & Paulo Estrada, *Ríos Montt to Face Second Genocide Trial for the Dos Erres Massacre*, INT’L JUST. MONITOR (Apr. 3, 2017), <https://tinyurl.com/y6b3vbgq>; *Guatemala Court: Former Dictator Can Be Tried for Genocide—But Not Sentenced*, GUARDIAN (Aug. 25, 2015), <https://tinyurl.com/y2sfgv84> (discussing the retrial of Montt on genocide charges). See generally *Efraín Ríos Montt & Mauricio Rodríguez Sánchez: Before the National Courts of Guatemala*, INT’L JUST. MONITOR, <https://tinyurl.com/y3yvulzw> (last updated Sept. 28, 2018).

15. Peter Manning, *Cambodia Hurries to Prosecute Ageing Khmer Rouge Leaders*, CONVERSATION (Feb. 11, 2014), <https://tinyurl.com/y39fj95c>; Caroline Fournet & Mark Drumbl, *The Judicialized Infirmary. Legal Sightseeing ECCC Phnom Penh*, LEGAL SIGHTSEEING (Oct. 21, 2019), <https://tinyurl.com/y5b6fowb> (discussing the death of ECCC convict Nuon Chea at age ninety-three, the death of defendant Ieng Sary in detention in his late eighties, and the death of Ieng Sary’s wife Ieng Thirith, who was found incompetent to stand trial due to dementia, and the other old and infirm defendants or “the barely alive” of the ECCC and the “architecture of rhythmic convalescence” that marks the court).

16. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, Oct. 27, 2004, Reach Kram No. NS/RKM/1004/006, <https://tinyurl.com/y7d2cql2> (unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 26 August 2007) (“Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”).

17. *Samuel Hinga Norman*, TRIAL INT’L (May 8, 2016), <https://tinyurl.com/y2wsylwk>.

crimes against humanity and war crimes.¹⁸ Although not very old by comparison to other international defendants, Norman would have been considered elderly under many domestic standards.¹⁹

Even the ad hoc tribunals, which were set up shortly after and, in the case of the International Criminal Tribunal for the former Yugoslavia (ICTY), during the conflicts they were to address, wound up with a significant docket of old men. The average age of detainees held by the United Nations Detention Unit (UNDU) at the ICTY in 2012 was around sixty, twice the average age of detainees in European prisons.²⁰ At the ICTY, 12 of 161 defendants, including most notoriously, Slobodan Milosevic,²¹ died from a number of age-related illnesses prior to conviction or serving their sentences, and many others met judgment as old men with a host of physical ailments.²²

The ICC's mandate is to go after those "most responsible." This category, though not restricted to senior leaders,²³ in many cases is likely to encompass both senior leaders and seniors. Usually, the young are not "most responsible" for atrocity crimes. Given typical and often unavoidable delays that are a common, if not endemic, feature of international criminal trials,²⁴ it may be many years before ICC defendants face charges and many more years until cases are resolved.

18. *See id.*

19. *See infra* Part III.A.

20. *Detention*, U.N. INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <https://www.icty.org/en/about/detention> (last visited Aug. 16, 2020) ("The Detention Unit has a well equipped medical facility, staffed with a medical officer and an assistant. It is designed to provide detainees with basic healthcare and emergency services. This is especially important considering that, unlike most national detention unit facilities, the average age of detainees is relatively high and that most of them arrive to the DU with various health problems. As of 11 May 2012, the average age of detainees was 59.6 years. However, the high medical service standards afforded by the ICTY result in the health of many detainees improving while they are incarcerated.").

21. This Article uses accents in Spanish, but not diacritics in Serbo-Croatian due to a limitation in the author's version of Microsoft Word, which has the former, but lacks the latter.

22. Erna Mackic, *Deaths Spotlight Hague Tribunal's Ageing Defendants*, BIRN (Feb. 10, 2016), <https://tinyurl.com/yxyc2vcx>; *see also* *Once-Brash General Reduced to Frail, Elderly Defendant*, STRAITS TIMES (Nov. 23, 2017), <https://tinyurl.com/y3jyvzjd> ("In the 1990s he was the burly, brash general leading nationalist Bosnian Serbs towards a seemingly sweeping victory in Bosnia's war. Two decades later, he is reduced to an ailing old man awaiting judgment on genocide charges in a United Nations court. Yesterday, the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague found Ratko Mladic, 74, guilty of genocide and crimes against humanity in one of the highest-profile war crimes cases since the post-World War Two Nuremberg trials of Germany's Nazi leadership.").

23. *See* Situation in the Democratic Republic of Congo, ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (July 13, 2006).

24. *See* Alex Whiting, *In International Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323, 340 (2009) ("Apart from the complexity and challenges of the cases themselves, the circumstances under which these crimes occur mean that time, and even delay, can be essential to successful war crimes prosecutions. War crimes are born out of armed conflict or significant societal disruptions, which are themselves years in the making. In order to prosecute crimes that occur during such periods of intense unrest, some stabilization, reconstruction, and distance from the events is often

B. *The Potential Impacts of Old Age*

Old age creeps into international criminal justice in a variety of ways. Defendants' actual age, as in their age independent of any physical or health challenges, matters for reasons of "biological impunity"²⁵ and the logistics and "aesthetics"²⁶ of prosecuting or punishing them. The accessories of age, including physical and mental frailty as well as the greater potential to feign both, likely have even more significance. They impact decisions on whether or not to pursue charges, the pace and physical space of trials, sentencing, and possible reductions in sentences.

Starting with "biological impunity," when one is dealing with an elderly defendant, human biology means that any investigation or trial is inherently a race against the clock. The defendant may die before conviction or punishment. This race is very much in the minds of all participants in the judicial proceedings,²⁷ particularly the defendants and their lawyers. In Chile, for example, defendants have been accused of delay tactics, such as raising frivolous claims before the Constitutional Court, to delay proceedings and, given the advanced age of many defendants, evade conviction or punishment by running out the clock.²⁸

required. This settling process occurs at both the state and individual levels, and in time, allows evidence to emerge regarding crimes that occurred during the period of conflict.").

25. See discussion *infra* notes 27-28.

26. See Fournet & Drumbl, *supra* note 15; discussion *infra* note 40.

27. Efraim Zuroff, *Those Poor, Frail, Old, Nazi Murderers*, TIMES ISR. (May 2, 2019), <https://tinyurl.com/y3wmtmqy> ("Just last year [2018], the German authorities opened investigations against 8 individuals, 2 who served in Auschwitz, 2 in Buchenwald, 2 in Ravensbruck, 1 in Mauthausen, and 1 in Einsatzgruppe B. I hope and pray for their health, so that they too can finally be prosecuted."); see also *Es Necesario Impedir la "Impunidad Biológica" en Crímenes de Lesa Humanidad*, LONDRES 38 (Mar. 25, 2014), <https://tinyurl.com/y2e9nye9> (decrying biologic impunity and advocating measures to ensure perpetrators of atrocities be brought to trial expeditiously and punished).

28. See Francisco Jara Bustos & Francisco Ugás Tapia, *Resumen de Antecedentes, Causas Sobre Comisión de Crímenes de Lesa Humanidad ante el TC* (Apr. 2, 2018) (on file with author) ("For a while now, and particularly coinciding with the Supreme Court's refusal to apply Article 103 of the Criminal Code [on statutes of limitations], we have seen various initiatives and strategies of perpetrators and their lawyers, questioning the legitimacy of the trials, seeking to delay them, obtaining prison privileges [alternative forms of incarceration], among others. It is in this context that we situate the strategy [of appealing to] the Constitutional Court.") ("De un tiempo a esta parte, y en particular, coincidiendo con la no aplicación del artículo 103 del Código Penal (CP) por parte de la Sala Penal de la Excm. Corte Suprema de Justicia, hemos visto diversas iniciativas y estrategias de los victimarios y de sus defensas letradas, cuestionando la legitimidad de los juicios, buscando retrasarlos, obtener beneficios penitenciarios, entre otros. En este contexto situamos la estrategia ante el Tribunal Constitucional (TC)."); see also Felipe Harboe, *Tribunal Constitucional, Trinchera para la Impunidad*, REPUBLICA DE CHILE SENADO (Apr. 20, 2018), <https://tinyurl.com/y48baqdx> (advocating time limits for claims to the Constitutional Court and stating "it is sad to attest the Constitutional Court has become a bastion of impunity. Its judges must know that the perpetrators prefer to die before going to jail or, worse still, prefer that the victims, their family members or witnesses [die], prior to conviction.") ("Es lamentable constatar que el TC se ha convertido en una verdadera trinchera para la impunidad. Sus magistrados no pueden desconocer que los victimarios prefieren morir antes de ir a la cárcel o, peor aún, prefieren que mueran las víctimas, sus familiares o testigos, antes que se dicte condena.").

A person's actual age likewise matters for optics, or as Mark Drumbl and Caroline Fournet have more elegantly called it, the “aesthetics and visualities” of prosecution.²⁹ Even where a defendant is in relatively good health, the public is likely to have a preconceived notion of the typical state of someone at a certain advanced age, and this notion may well lead the public to be less supportive of trials, even for those accused or convicted of atrocity crimes.³⁰

Old age also makes it easier to fake illness. Our preconceptions, even if often true, about old age and infirmity, make it easier for a defendant to feign mental or physical frailty and take advantage of the “aesthetics of disability,” both in the eye of the fact-finder and that of the public.³¹ Augusto Pinochet, for example, seemed to have dementia and frailty that ebbed and flowed according to its legal and political convenience.³² Some find Harvey Weinstein's walker a bit convenient.³³

Malingering notwithstanding, old age almost inevitably eventually brings with it physical and mental frailty. As Ronald Aday and Jennifer Krabill have observed “in old age, the onset of dementia becomes more prevalent.”³⁴ The trouble is that these infirmities strike some decades earlier than others, and prison tends to age people faster than the outside world.³⁵ Still, it is the

29. See Fournet & Drumbl, *supra* note 15.

30. See Eliza Gray, *The Last Nazi Trials*, TIME, <https://time.com/nazi-trials/> (video interviewing young Germans who question the point of trying ninety something year old Nazis); see also *supra* text accompanying note 13 (discussing the push back in Chile related to the detention of elderly persons found guilty of crimes for dictatorship-era human rights violations); Mark Aarons, *Hideout*, MONTHLY (Mar. 2009), <https://tinyurl.com/yxu2fxvq> (“[In Australia,] Prime Minister Bob Hawke reversed the longstanding policy of turning a blind eye to mass murder – but after 40 years the trail had gone cold. Many of the killers had died or grown old, as had many surviving eyewitnesses, and a hysterical campaign was launched in defence of “old men” who had led ‘blameless’ lives in Australia.”).

31. Jasmine E. Harris, *The Truth About Harvey Weinstein's Walker*, N.Y. TIMES (Jan. 30, 2020), <https://tinyurl.com/vuya5zf>; see also Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895 (2019) (arguing that disability law, in particular with its emphasis on contact and integration, has failed to engage sufficiently with aesthetics research).

32. NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 67-68 (2005) (“Pinochet descended from the plane. But the decrepit, pitiable figure of Jack Straw's invocation had disappeared. Instead a Rosy-cheeked Pinochet left his wheelchair behind, walked form the plane, lifted his cane to show he could walk unaided, and strolled through the crowd, greeting supporters by name.”).

33. Drew Schwartz, *We Asked a Doctor If Harvey Weinstein Really Needs That Walker*, VICE (Jan. 7, 2020), <https://tinyurl.com/yxc58843>.

34. Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ. ELDER'S ADVISOR 237, 253 (2006).

35. See *id.*; see also TINA CHIU, VERA INST. OF JUST., *IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE* 5 (2010), <https://tinyurl.com/yy7pqbp9> (noting that in the United States, “[c]ompared with their younger peers, older inmates have higher rates of both mild and serious health conditions, such as gross functional disabilities and impaired movement, mental illness, increased risk of major diseases, and a heightened need for assistance with daily living activities. Hearing loss, vision problems, arthritis, hyper-tension, and dementia, for example, are all more common among older inmates, who are also more likely to require frequent dental and periodontal work. According to the *Journal of the American Medical Association*, inmates older than 55 have an average of three chronic conditions and as many as 20 percent have a mental illness. Their need for medical

quite rare nonagenarian who is hale and retains the mental acuity of their younger years.

These common age-related mental and physical challenges can impact cases in a host of ways. First, mental and physical challenges of defendants are likely to impact discretionary decisions of investigators and prosecutors on whether to dedicate resources to investigation and prosecution and whether a case would be likely to proceed even if investigated, based on competence or illness grounds.³⁶ Second, age-related illnesses of defendants may factor into decisions on whether and where to detain them before and during trial. Third, mental challenges may lead to suspension of proceedings based on competence grounds. Fourth, age-related mental and physical challenges affect the pace of trials. At the ICTY, trials were frequently interrupted based on the health issues of defendants.³⁷ Likewise, the Bruno Dey trial in Germany took place for only two hours a day, twice a week due to the frailty of the defendant.³⁸

Age-related illnesses also can impact the physical space of trials.³⁹ As Mark Drumbl and Caroline Fournet noted of their visit to the ECCC, the ECCC had an ambulance on standby, staircases retrofitted with wheelchair lifts, and a bathroom adjacent to the courtroom for the defendants only that is “modelled in the most accessible manner.”⁴⁰ Similarly, in the second trial of former leader, Ríos Montt, in Guatemala, the trial took place behind closed doors due to the defendant’s dementia.⁴¹

Age-related illnesses and mental frailty may play into sentencing determinations. Although courts often refuse to recognize age as a mitigating circumstance in and of itself, though they sometimes do,⁴² the

services and devices (such as walkers, wheelchairs, hearing aids, and breathing aids) is consequently greater as well.”)

36. In 1961, the Australian government decided to “close the chapter” on Nazi war crimes. Seth Mydens, *Australia Is Investigating 200 for Nazi Crimes*, N.Y. TIMES (Feb. 4, 1988), <https://tinyurl.com/yygxml93> (In 1986, the Australian government reversed the “25-year-old . . . policy to ‘close the chapter’ on Nazi war crimes, and [made] a decision to seek out and prosecute any offenders who had found refuge here.”)

37. See, e.g., Denis Dzidic, *Ratko Mladic Seeks Appeal Delay Over Health Problems*, BIRN (Mar. 2, 2020), <https://tinyurl.com/wcomvw5>; Prosecutor v. Hadžić, Case No. IT-04-75-T, Decision on Urgent Motion for Provisional Release Filed on 28 April 2015 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2015), <https://tinyurl.com/y56h7fxm> (granting the defendant provisional release for cancer treatment).

38. Tobias Buck, *Inside the Trial of a Nazi Concentration Camp Guard*, FIN. TIMES (Feb. 5, 2020), <https://tinyurl.com/yy2uhqry>.

39. Aday & Krabill, *supra* note 34, at 244 (noting that age-related physical challenges sometimes require accommodations at trial).

40. Fournet & Drumbl, *supra* note 15.

41. See sources cited *supra* note 14.

42. The U.S. Federal Sentencing Guidelines, for example, provide that “[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.” U.S. SENT’G GUIDELINES MANUAL § 5H1.1. (U.S. SENT’G COMM’N 2010). In particular, old age may be a ground for a lesser

mental and physical accessories of age are likely to be considered. Physical and mental frailty may be factored in as a mitigating circumstance or merely creep into the judgment in determinations on the appropriateness and conditions of confinement.⁴³

Even for defendants who are healthy enough for prison at the time of their sentencing, advanced age means that good health may be ephemeral. A change in the convicted person's health for the worse may lead to a motion for humanitarian or compassionate release and thus reduce the time that a convicted person spends in prison.⁴⁴

In sum, whether due to political reality that there is often a significant time lapse between the commission of the crimes and criminal prosecutions, a focus on senior leaders and the relationship between seniority and age, or some other reason, ICL frequently deals with elderly defendants. The next Part explores the human rights implications of this reality.

III. INTERNATIONAL HUMAN RIGHTS NORMS ON AGING DEFENDANTS AND PRISONERS

Although international human rights law requires the humane treatment of all defendants and prisoners and requires the provision of medical and psychological care to detained persons, it permits the prosecution and detention of elderly defendants. This Part canvasses international human rights norms on the rights of elderly persons in the context of criminal justice and incarceration. It also explores the practice in some states of providing alternatives to incarceration for persons over a certain age. Finally, it explores arguments in academic literature about the humane treatment of elderly detainees. It concludes that, although there is support for humanitarian release or alternative forms of incarceration for elderly

sentence or home confinement. *Id.* (“Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed [in a separate provision].”).

43. See discussion *infra* notes 122-126 (discussing the practice at the ICTY and the law of the ICC).

44. See Aday & Krabill, *supra* note 34, at 256 (discussing compassionate and early release); Jefferson-Bullock, *supra* note 6, at 982-88 (proposing compassionate release of certain elderly offenders); MARY PRICE, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES (2018), <https://tinyurl.com/ybqche3t>; see also Code de Procédure Pénale [C. pr. pén.] [Criminal Procedure Code] art. 720-1-1 (Fr.) (“Unless there is a grave risk of the offence being repeated, suspension may also be ordered, whatever the type of penalty incurred and the length left to be served, and for an unspecified length of time, where it is established that prisoners are suffering from fatal illnesses, or that their state of health is incompatible in the long term with being kept in prison; but this does not apply to persons hospitalised and held in mental institutions. Suspension may only be ordered if two independent expert reports concur in establishing that the convicted person falls into one of the categories outlined in the previous paragraph . . . If suspension has been ordered of a penalty imposed in a felony case, an expert medical report to determine whether the conditions of suspension are still met must take place every six months.”).

convicts in the academic literature discussing national judicial systems (and ordinary crimes), there is no international norm precluding the trial of elderly persons or even their imprisonment based on age alone. Mental and physical infirmities by contrast do implicate significant human rights obligations, and trials and detention must be compatible with the mental and physical health care needs of the defendants.

At present, although there are various regional instruments on treatment of the elderly,⁴⁵ there is no comprehensive UN convention on elderly people. Human rights for older persons is a nascent line of inquiry.⁴⁶ The United Nations has set up a working group to discuss a possible convention on the rights of elderly persons.⁴⁷ Other international instruments on the rights of the elderly include: the UN Principles for Older Persons (1991), the Proclamation on Ageing (1992), and the Political Declaration and Madrid International Plan of Action on Ageing (2002), but these instruments do not expressly address the implications of old age in the context of criminal justice.

There is also a plethora of international and regional instruments on human rights standards related to detention and punishment of persons charged with crimes. With few exceptions,⁴⁸ these instruments, however,

45. These instruments include the Inter-American Convention on Protecting the Human Rights of Older Persons. *See* Organization of American States, Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, 55 I.L.M. 798 [hereinafter Inter-American Convention]. Other regional instruments include: U.N. Regional Intergovernmental Conference on Ageing, *Regional Strategy for the Implementation in Latin America and the Caribbean of the Madrid International Plan of Action on Ageing* (Nov. 19-21, 2003); U.N. Second Regional Intergovernmental Conference on Ageing, *Brasilia Declaration* (Dec. 6, 2007); World Health Org. [WHO], 164th Session of the Executive Committee, *Plan of Action on the Health of Older Persons, Including Active and Healthy Aging: Final Report*, CE164/INF/6 (Apr. 18, 2019), <https://tinyurl.com/y3h3rsrv>; Org. of Am. States [OAS], Fifth Summit of the Americas, *Declaration of Commitment of Port of Spain: Securing Our Citizens' Future by Promoting Human Prosperity, Energy Security and Environmental Sustainability*, ¶ 41 (Apr. 19, 2009), <https://tinyurl.com/y6eob7vb> (“We will continue working to incorporate issues of aging into public policy agendas. To this end, we request that the Economic Commission for Latin America and the Caribbean (ECLAC) further strengthen its programmes in this area, through the creation of enhanced information and data systems on the social and economic impacts of aging, as well as technical assistance, as appropriate, for the development of policies and programmes in support of the elderly.

42. In this context, we will promote, in the regional framework and with support from PAHO and ECLAC, a review of the feasibility of preparing an inter-American convention on the rights of older persons.”); and U.N. Third Regional Intergovernmental Conference on Ageing, *San José Charter on the Rights of Older Persons in Latin America and the Caribbean* (May 8-11, 2012), <https://tinyurl.com/y2vqdbc9> [hereinafter San José Charter].

46. *See* CLAUDIA MARTIN ET AL., HUMAN RIGHTS OF OLDER PEOPLE—UNIVERSAL AND REGIONAL LEGAL PERSPECTIVES 2 (2015) (“Frameworks for older persons’ rights are starting to emerge.”); *id.* at 6 (“[A]t the opening of the 50th Session of the African Commission on Human Rights and Peoples, the situation of older persons were [sic] recognized as being ‘one of the most pressing human rights issues for states and public institutions.’”).

47. *Open-ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons*, U.N. DEPT OF ECON. & SOC. AFFS., <https://social.un.org/ageing-working-group/> (last visited Aug. 14, 2020).

48. A couple of notable exceptions appear in African human rights instruments. One is the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa

address the rights of elderly defendants and prisoners only fleetingly or by implication.⁴⁹ There is however an emerging tendency for NGOs and even UN agencies calling on states to consider early release of elderly prisoners due to the unsuitability of most prisons to meeting the needs of the elderly.⁵⁰

This Part explores the different rights that bear on the prosecution, treatment, and detention of elderly persons accused or convicted of atrocity crimes. These include rights related to non-discrimination (or equal treatment), adequate health care, access to justice, respect for dignity and humane treatment. It bears noting that the human rights standards related to the elderly and prisoners alike may not be binding and, in many instances, may not reflect the actual practice of states.⁵¹ They nevertheless offer an indication of human rights best practices.

which states reducing the prison population as a goal and proposes “early and conditional release schemes, furloughs, and home leave – criteria for early release should include compassionate grounds based on health and age.” Afr. Comm’n on Hum. and Peoples’ Rts., Ouagadougou Conference on Penal and Prison Reform in Africa, *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* (Sept. 18-20, 2002), <https://www.achpr.org/legalinstruments/detail?id=42> (emphasis added) [hereinafter Ouagadougou Declaration]; *see also* Afr. Comm’n on Hum. and Peoples’ Rts., International Seminar on Prison Conditions in Africa, *Kampala Declaration on Prison Conditions in Africa* (Sept. 19-21, 1996), <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf> [hereinafter Kampala Declaration] (“Urgent and concrete measures should be adopted that improve conditions for *vulnerable groups* in prisons and other places of detention; such as: juveniles, women, mothers and babies, the *elderly*, terminally ill and very sick, the mentally ill, the disabled, foreign nationals. Procedures that take into account their special needs and adequate treatment during their arrest, trial and detention, must be applied to these groups”) (emphasis added). The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also refers directly to the elderly in the context of the right to health and in noting that special measures to protect vulnerable prisoners shall not be considered discrimination. Inter-Am. Comm’n on H.R. [IACHR], Res. 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Mar. 13, 2008), <https://tinyurl.com/y29rmcp7> [hereinafter IACHR Principles & Best Practices].

49. As the United Nations Resolution commanding the Working Group on Older Persons to “consider proposals for an international legal instrument to promote and protect the rights and dignity of older persons” acknowledged, “there are numerous obligations vis-à-vis older persons implicit in most core human rights treaties but that explicit references to age in core international human rights treaties are scarce, that there is no such instrument for older persons and that only a few instruments contain explicit references to age.” G.A. Res. 67/139, ¶ 1 (Feb. 13, 2013).

50. *See, e.g.*, DIRK VAN ZYL SMIT, U.N. OFF. ON DRUGS & CRIME, HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT, at 54, U.N. Sales No. E.07.XI.2 (2007), <https://tinyurl.com/y2wlnj1> (“Criminal justice systems should also consider releasing the very elderly on compassionate grounds, even if they are not terminally ill. Prisons are not suitable institutions for old people. A practical difficulty is that the elderly may not have a ready-made support network when they return to society. The criminal justice system should therefore pay particular attention to finding them appropriate accommodation on release.”).

51. *See generally* S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PENN ST. L. REV. 347, 361 (2018) (observing that, with the exception of the European Convention of Human Rights, “[m]any human rights documents are considered non-binding and ‘aspirational’ in nature, which means they are not often subjected to litigation that could clarify ambiguous treaty language.”).

A. *How Old is Old?*

Even the threshold question of how old is old has no clear answer. In the domestic context, discussions of old age and incarceration appear to put the line of old age between fifty and seventy. It depends on where one is and the particular reason age is on the table. In the United States, for example, most writing about this defines “elderly” prisoners as age fifty and older.⁵² By contrast, legislation seen in a number of South American countries providing for alternative forms of incarceration for the elderly tends to use the age of seventy as the cut off.⁵³

In the international context, the number seems closer to sixty. The Inter-American Convention On Protecting The Human Rights Of Older Persons defines “an older person” as a person over the age of sixty, unless the legislature has provided otherwise, but in any event no greater than sixty-five.⁵⁴ The UN General Assembly Resolution creating the Working Group does not define old age, but noted “that, by 2050, more than 20 per cent of the world’s population will be 60 years of age or older,” which suggests that perhaps sixty and above may be a tentative guidepost for old age.⁵⁵

This Article does not embrace any particular definition of old age, in large part, because it concludes that old age standing alone does not signify much in terms of the human rights obligations owed defendants. Nevertheless, it bears noting that many defendants accused of atrocity crimes would be elderly by any definition.

B. *Nondiscrimination*

Nondiscrimination appears in human right instruments related to the elderly, as well as instruments related to persons in detention. Triangulating between these sets of norms, states may not discriminate against elderly prisoners.

A central principle related to the human rights of the elderly is nondiscrimination.⁵⁶ Human rights instruments on the rights of the elderly

52. Evan A. Jenness, *The ‘Silver Tsunami’ and Sentencing—Age and Health as Mitigating Factors*, 37 CHAMPION 30 (2013) (citing the National Institute of Corrections).

53. See *infra* Part III.G.

54. Inter-American Convention, *supra* note 45, art. 2 (“‘Older person’: A person aged 60 or older, except where legislation has determined a minimum age that is lesser or greater, provided that it is not over 65 years. This concept includes, among others, elderly persons.”).

55. G.A. Res. 67/139, *supra* note 49.

56. Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, ¶ 13 (Apr. 8-12, 2002), <https://tinyurl.com/y3qqfwa9> (“Combating discrimination based on age and promoting the dignity of older persons is fundamental to ensuring the respect that older persons deserve.”). The Inter-American Convention, for example, refers to discrimination twenty-three times and lists “equality and nondiscrimination” among the general principles that apply to the Convention. Inter-American Convention, *supra* note 45, art. 3; see also Martin et al., *supra* note 46, at 32-

recognize, however, that nondiscrimination does not mean undifferentiated treatment. The Inter-American Convention, for example, lists both nondiscrimination and “[d]ifferentiated treatment for the effective enjoyment of rights of older persons” as “general” guiding principles of the convention.⁵⁷ Likewise, the African Charter on Human and People’s Rights encourages special protection for the elderly: “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”⁵⁸

The UN Minimum Prison Standards identify nondiscrimination as a fundamental principle in the context of incarceration but do not appear to contemplate age as a possible vector of discrimination. The Minimum Standards provide: “The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁹

In fact, the Minimum Standards appear to encourage differential treatment based on age. They permit using age as a basis for separating prisoners into different institutions or units within an institution. However, the provision explicitly addresses only separation of juveniles from adults, so it is somewhat unclear whether it includes the separation of elderly prisoners from other adults.⁶⁰ Significantly, its provisions on separating prisoners make no mention of any obligation to provide alternative forms of incarceration for elderly prisoners.

Other human rights-promoting instruments on the treatment of prisoners make clear that differentiated treatment designed to protect the elderly does not constitute discrimination. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

33 (arguing that the ICCPR’s guarantees of equality and nondiscrimination “of any kind” or “on any ground” include age).

57. Inter-American Convention, *supra* note 45, art. 3; *see also* San José Charter, *supra* note 45, ¶ 6(a) (“Declare that we will strengthen actions designed to increase the protection of human rights at the national level and undertake to: [a]dopt appropriate legislative, administrative and other measures which guarantee differential, preferential treatment of older persons in all spheres and prohibit all forms of discrimination against them.”).

58. African [Banjul] Charter on Human and People’s Rights, art. 18(4), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

59. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, ¶ 6(1) (1955) [hereinafter U.N. Minimum Prison Standards].

60. *Id.* ¶ 8 (“The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus, (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate; (b) Untried prisoners shall be kept separate from convicted prisoners; (c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence; (d) Young prisoners shall be kept separate from adults.”).

adopted by a UN General Assembly Resolution distinguishes between discrimination and “measures applied under the law and designed solely to protect the rights of [various vulnerable groups and] aged, sick or handicapped persons [which] shall not be deemed to be discriminatory.”⁶¹ Likewise, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas specify that measures taken to protect the elderly in detention are not discrimination.⁶²

The nondiscrimination argument has been used to advocate for the release of at least one elderly prisoner convicted of human rights crimes. In a 2018 Chilean Supreme Court decision refusing to grant release based on old age, the dissent combined a nondiscrimination argument and a right to rehabilitation argument to say that courts cannot discriminate against the elderly by writing rehabilitation out of the equation.⁶³ Jail, when one is relatively near the end of one’s life, the dissent contended, is inherently incompatible with the aim of rehabilitating offenders.

C. *Health Care (Mental and Physical)*

Unsurprisingly, human rights instruments on treatment of the elderly and instruments on prison standards alike require the provision of adequate health care. The Inter-American Convention contains a wide variety of guarantees related to access to and forms of health care and informed consent.⁶⁴ For example, it provides that:

Older persons have the right to physical and mental health without discrimination of any kind.

States Parties shall design and implement comprehensive-care oriented intersectoral public health policies that include health promotion, prevention and care of disease at all stages, and rehabilitation and palliative care for older persons, in order to promote enjoyment of the highest level of physical, mental and social well-being.⁶⁵

61. G.A. Res. 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 5 (Dec. 9, 1988) (“These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status. 2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.”).

62. IACHR Principles & Best Practices, *supra* note 48.

63. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, at 15-16, 20 (Chile) (dissenting opinion).

64. *See, e.g.*, Inter-American Convention, *supra* note 45, art. 19.

65. *Id.*

Although this provision does not speak directly to people charged with crimes or incarcerated, it does not exclude them.

Similarly, human rights standards on incarceration demand that prisoners' health needs be met. The UN Minimum Prison Standards provide that detention facilities are to furnish health care for prisoners, and the medical officer is to "report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment."⁶⁶

Regional instruments are more specific about the right to adequate health care for elderly prisoners. The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Inter-American Commission on Human Rights, provide:

Persons deprived of liberty shall have the right to health, understood to mean the enjoyment of the highest possible level of physical, mental, and social well-being, including amongst other aspects, adequate medical, psychiatric, and dental care; permanent availability of suitable and impartial medical personnel; access to free and appropriate treatment and medication; implementation of programs for health education and promotion, immunization, prevention and treatment of infectious, endemic, and other diseases; and *special measures to meet the particular health needs of persons deprived of liberty belonging to vulnerable or high risk groups*, such as: the elderly, women, children, *persons with disabilities*, people living with HIV-AIDS, tuberculosis, and *persons with terminal diseases*.⁶⁷

Likewise, the Kampala Declaration on Prison Conditions in Africa demands measures to improve conditions for vulnerable groups, including the elderly, adequate attention to the special needs of these groups, and "adequate treatment during their arrest, trial, and detention . . ."⁶⁸

Human rights courts that have addressed the issue of detention of elderly persons for crimes have recognized the need for humane treatment and the provision of medical care but have not found that age, standing alone, bars prosecution or confinement. The European Court of Human Rights (European Court) has found that:

66. U.N. Minimum Prison Standards, *supra* note 59, ¶ 25 ("The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.").

67. IACHR Principles & Best Practices, *supra* note 48, at Principle X (emphasis added).

68. Kampala Declaration, *supra* note 48, ¶ 9(d) ("Urgent and concrete measures should be adopted that improve conditions for vulnerable groups in prisons and other places of detention; such as: juveniles, women, mothers and babies, the elderly, terminally ill and very sick, the mentally ill, the disabled, foreign nationals. Procedures that take into account their special needs and adequate treatment during their arrest, trial and detention, must be applied to these groups . . .").

There is no prohibition in the Convention against the detention in prison of persons who attain an advanced age. Nevertheless, a failure to provide the necessary medical care to prisoners may constitute inhumane treatment, and there is an obligation on States to adopt measures to safeguard the well-being of persons deprived of their liberty.⁶⁹

Moreover, the European Court has found violations of the European Convention for the failure to provide adequate medical treatment and listed age among the factors that should be taken into consideration to determine whether a person has been treated inhumanely.⁷⁰

D. Access to Justice and Rights to a Fair Trial

Prosecutions of elderly atrocity criminals also implicate human rights standards relating to access to justice and the right to a fair trial. Here, the desirability of timely justice and the requirement that a defendant be competent to stand trial come into play.

A couple of regional human rights instruments recognize rights related to “access to justice” for the elderly.⁷¹ The Inter-American Convention contemplates tailoring judicial proceedings to persons of advanced age, including in criminal cases. In its provision on access to justice, the Convention demands timely justice:

69. *Sawoniuk v. United Kingdom*, 2001-VI Eur. Ct. H.R. 375 (citing *Kudla v. Poland*, 2000-IX Eur. Ct. H.R. 512, § 94); see also *Papon v. France* (No. 1), 2001-VI Eur. Ct. H.R. 445 (finding no violation of Article 3 in Papon’s detention at the age of ninety and noting that advanced age did not preclude pre-trial detention or a prison sentence in any of the Council of Europe’s member States).

70. The European Court found that an applicant who was terminally ill with leukemia was being held in violation of Article 3, since he required medical care in a hospital, and noting ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. *Mouiel v. France*, 2002-IX Eur. Ct. H.R. 191 (“The assessment of this minimum is . . . relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.”).

71. In addition to the Inter-American Convention, the Protocol to the African Charter on Human and Peoples’ Rights likewise recognizes that states must ensure “[a]ccess to justice” for elderly persons, but only two states have ratified the protocol. Org. of African Unity [OAU] Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, art. 4 (Jan. 31, 2016), <https://tinyurl.com/y56j7d2k>; see also African Union, *List of Countries Which Have Signed, Ratified/ Acceded to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons* (June 18, 2020) <https://tinyurl.com/y28gcwyy>. The UN Working Group on the Elderly likewise selected Access to Justice as one of the key themes to explore in its 2020 session. See Rep. of the Open-ended Working Group on Ageing on Its Tenth Working Session, U.N. Doc. A/AC.278/2019/2 (May 20, 2019) <https://undocs.org/en/A/AC.278/2019/2> (“Regarding the selection of the focus areas for the eleventh session of the Working Group, to be held in 2020, following informal consultations with Member States and observer States by the Bureau during the intersessional period, the Working Group made an oral decision to select the areas of ‘Access to justice’ and ‘The right to work and access to the labour market.’”).

Older persons have the right to a hearing, with due guarantees and *within a reasonable time*, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against them or for the determination of their rights and obligations of a civil, labor, fiscal, or any other nature.⁷²

In the criminal justice context, this right to timely justice seems somewhat analogous to the better-established due process rights to prompt charging and speedy trial for criminal defendants generally.⁷³ The difficulty in the context of atrocity cases is that these rights are relatively weak.⁷⁴ International human rights law prohibits statutes of limitations for atrocity crimes, because the need for accountability for these crimes is deemed more important than any rights of the defendant to prompt charging.⁷⁵

The Inter-American Convention likewise requires that states provide procedural accommodations for the elderly in judicial proceedings: “States Parties shall ensure effective access to justice for older persons on an equal basis with others, including through the provision of *procedural accommodations in all legal and administrative proceedings at any stage*.”⁷⁶ States are also obligated to “develop and strengthen public policies and programs to promote: . . . [t]raining in protection of the rights of older persons for personnel associated with the administration of justice, including police and prison staff.”⁷⁷

72. Inter-American Convention, *supra* note 45, art. 31 (emphasis added); *see also* San José Charter, *supra* note 45, ¶ 4 (“We, the representatives of the Governments gathered in San José, Costa Rica, from 8 to 11 May 2012 at the Third Regional Intergovernmental Conference on Ageing in Latin America and the Caribbean . . . [r]ecognize that access to justice is an essential human right and the fundamental instrument for guaranteeing that older persons are able to exercise and effectively defend their rights.”).

73. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter European Convention on Human Rights] (“In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).

74. *See, e.g.*, Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Nov. 3, 1999) (dismissing indictment against defendant based on preindictment delay); Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration) (Mar. 31, 2000) (reversing the decision to dismiss the indictment).

75. *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73; Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001); La Cantuta v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006).

76. Inter-American Convention, *supra* note 45, art. 31 (emphasis added).

77. *Id.* (requiring State Parties to additionally “ensure due diligence and *preferential treatment* for older persons in processing, settlement of, and enforcement of decisions in administrative and legal proceedings. Judicial action must be particularly expedited in instances where the health or life of the older person may be at risk.”) (emphasis added).

Relatedly, issues of fitness to stand trial or mental competence implicate fair trial rights guaranteed in various human rights instruments.⁷⁸ The European Court of Human Rights has recognized that “effective participation” in proceedings is part of the right to a fair trial.⁷⁹

E. Rehabilitation

Although human rights instruments on the treatment of the elderly are silent on the issue, human rights instruments relating to criminal justice and civil rights often focus on rehabilitation as the primary goal of punishment.⁸⁰ This focus, in tandem with a right to equal treatment, gives rise to the argument that elderly persons should benefit equally from programs aimed at rehabilitation and that the objective of reintegration in society should be equally available to the elderly.⁸¹

The International Covenant on Civil and Political Rights (ICCPR), for example, provides: “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social

78. European Convention on Human Rights, *supra* note 73, art. 6(1) (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”); Organization of American States, American Convention on Human Rights art. 8(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights] (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”).

79. See Liselotte van den Anker, Lydia Dalhuisen & Marije Stokkel, *Fitness to Stand Trial: A General Principle of European Criminal Law*, 7 *UTRECHT L. REV.* 120 (2011); see also David Collins, *Re-Evaluating Competence to Stand Trial*, 82 *LAW & CONTEMP. PROBS.* 157, 181-82, 189 (2019) (advocating the “effective participation” test); Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgement, ¶¶ 41-51 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008) (noting the European Court’s discussion of fitness to stand trial in relation to rights under Article 6 [fair trial] and precedent at the ICTY and the post-World War II tribunals dealing with fitness); Prosecutor v. Ieng Thirith, Case No. 002/19-09-2007/ECCC/TC, Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011, ¶ 18 (Extraordinary Chambers in the Cts. of Cambodia Sept. 13, 2012) (noting that the Trial Chamber had defined the standard of fitness as “meaningful participation which allows the accused to exercise [her] fair trial rights to such a degree that [she] is able to participate effectively in [her] trial and has an understanding of the essentials of the proceedings” and finding Ieng Thirith unfit to stand trial and ordering her release).

80. See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Human Rights Comm., General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Apr. 10, 1992) [hereinafter H.R. Comm. General Comment No. 21]; Ouagadougou Declaration, *supra* note 48 (“Greater effort should be made to make positive use of the period of imprisonment or other sanction to develop the potential of offenders and to empower them to lead a crime-free life in the future. This should include rehabilitative programmes focusing on the reintegration of offenders and contributing to their individual and social development.”).

81. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, ¶ 4 (Chile) (dissenting opinion) (arguing that humanitarian release for those over the age of seventy-five was necessary to ensure compliance with the right to rehabilitation and equal treatment).

rehabilitation.”⁸² Likewise, the UN Human Rights Committee has stated: “As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.”⁸³ Thus, whether or not representative of actual state practice,⁸⁴ human rights instruments on punishment state that rehabilitation should either be the primary aim, or at a minimum, among the aims of any criminal justice system. Section B of Part IV examines whether rehabilitation is or should be the primary aim of atrocity trials.

F. *Respecting Dignity and Humane Treatment*

An evaluation of norms requiring that elderly people and prisoners be treated humanely and with dignity is where things get messy. Human rights standards on treatment of the elderly and human rights standards on prisons generally recognize a right to dignity and a right to humane treatment. In the context of detaining the elderly, these rights merely beg the question—does detention of the elderly (or very elderly) inherently offend their dignity or constitute inhumane treatment?

The Inter-American Convention speaks of dignity for older persons in a variety of contexts—health care, hygiene, safety, training of health care and care providers, older women, and social security⁸⁵—but it does not explicitly address the contours of dignity in the context of criminal proceedings or incarceration.

82. ICCPR, *supra* note 80, art. 10(3).

83. H.R. Comm. General Comment No. 21, *supra* note 80.

84. In the United States, for example, rehabilitation has been deemphasized in recent years. Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 386-87 (2015) (discussing rehabilitation and its role in recent Supreme Court caselaw and noting the “prevailing anti-rehabilitative trend in both legislative and judicial fora”) (emphasis in original). Likewise, the Special Rapporteur on Prisons for the African Commission on Human Rights has criticized the practice in some African states for prioritizing retribution over rehabilitation. Med S.K. Kaggwa (Comm’r of the Afr. Comm. on Hum. and Peoples’ Rts.), *Rep. of the Special Rapporteur on Prisons and Conditions of Detention in Africa*, at 8 (Oct. 9-22, 2012) (“The investigations in prisons in Sierra Leone, Tanzania and Zambia revealed that some African states are still confronted with criminal justice systems that are the legacy of the colonial era and prison systems justified by a retributive philosophy that is at odds with rights-based approaches emphasising rehabilitation and reform.”).

85. Inter-American Convention, *supra* note 45, art. 6 (right to life and dignity in old age); art. 9 (safety); art. 9(f) (“Train and sensitize government officials, social workers, and health care personnel responsible for attending to and caring for older persons in long-term care facilities or at home about the different forms of violence, in order that they are treated with dignity and to prevent negligence, violence, and mistreatment.”); art. 9(i) (“Actively promote the elimination of all practices that generate violence and affect the dignity and integrity of older women.”); art. 12 (rights of older persons receiving long-term care); art. 17 (right to social security).

Likewise, human rights norms related to people in detention require humane treatment and respect for the dignity of the person.⁸⁶ The UN Minimum Prison Standards, for example, provide:

(1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.

(2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a *gradual return to life in society*. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.⁸⁷

Some have argued that the incarceration of the elderly, particularly the very elderly, is inherently inconsistent with their dignity,⁸⁸ but human rights instruments seem to consider dignity in relation to the conditions of confinement, services, and treatment of the detained person, potentially with heightened requirements for the elderly or vulnerable, but not necessarily as a command to release them. The UN Minimum Standards encourage measures to assist in transitions back into society for those whose sentence is ending. It does not require the ending of the sentence.

G. *Practice in National Courts and International Tribunals*

Some states, particularly states in Latin America, have provided for early release or alternative forms of incarceration for elderly persons. The contours and justifications for these laws vary significantly, often even within countries. The applicability of these laws to persons convicted of atrocity crimes (or their domestic equivalents) is highly contested and likewise varies country to country. Looming in the background in cases dealing with international crimes is the competing norm that requires states to investigate, prosecute, and *punish* international crimes.⁸⁹

86. See, e.g., ICCPR, *supra* note 80, art. 5(1)-(2), 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”); American Convention on Human Rights, *supra* note 78, art. 5 (“Article 5. Right to Humane Treatment 1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”).

87. U.N. Minimum Prison Standards, *supra* note 59, art. 60(1), (2).

88. See discussion *infra* notes 94-95.

89. See discussion *infra* notes 107, 143.

In Chile, where the debate about what to do with elderly prisoners is very closely tied to the debate about what to do with elderly prisoners convicted of dictatorship-era human rights violations,⁹⁰ the Supreme Court has rejected age, standing alone, as a reason for special treatment.⁹¹ In a 2018 Chilean Supreme Court decision,⁹² the majority surveyed the international human rights norms and concluded that, although there is an obligation to treat all prisoners, including elderly ones and persons convicted of crimes against humanity, humanely, there is no international human rights norm precluding the incarceration of elderly defendants based on age alone.⁹³ The appellant had argued that, since elderly persons are a very vulnerable group, “the simple fact of being in jail serving a sentence is an affront against their dignity.”⁹⁴ The dissent embraced this argument that incarcerating the elderly was inconsistent with their rights to dignity and equal treatment was a jus cogens norm and cited legislation in several Latin American countries permitting home confinement for elderly persons.⁹⁵

As the dissent in *Aravena* noted, several Latin American countries have passed legislation allowing for or requiring alternative forms of incarceration

90. See Francisco Maldonado, *Adulto Mayor y Cárcel: ¿Cuestión Humanitaria o Cuestión de Derechos?* [*The Elderly and Prison Policy: A Matter of Humanity or Legal Rights?*], 14 POLÍTICA CRIMINAL [POLY CRIM.] 1, 38 (2019) (Chile), <https://tinyurl.com/yxgn4ogl> (arguing that Chilean legal reform proposals related to elderly prisons have not gone far in the legislative process based on the “strictly political and contingent nature” of the debate in Chile since almost the entirety of Chile’s elderly imprisoned population are people serving sentences for dictatorship era human rights crimes).

91. There have been various, politically fraught, legal reform proposals to permit home detention on humanitarian grounds. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, ¶ 4 (Chile); see also Gabriel Muñoz, *Comenzó Análisis de Proyecto que Busca Beneficiar a Criminales de Lesa Humanidad* [*Analysis of a Project to Benefit Criminals that Commit Crimes Against Humanity Began*], EL CIUDADANO (May, 17, 2017), <https://tinyurl.com/y2pkxt5n> (noting that human rights groups have opposed the initiative as a way of granting provisional release to persons convicted of crimes against humanity).

92. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, ¶ 4 (Chile).

93. *Id.*

94. *Id.* (dissenting opinion) (“[E]l Derecho Humano Internacional de los viejos dice que son un grupo muy vulnerable y que el simple hecho de estar en una cárcel cumpliendo una pena atenta contra su dignidad.”) [“International Human Right law on the elderly says that they are a very vulnerable group and that the simple fact of being in a prison serving a sentence threatens their dignity.”].

95. The dissent agreed with the appellant stating: “La comunidad internacional toda, reprocha la privación de libertad de los adultos mayores, por su alta edad, así como también prohíbe expresamente – como se plasma manifiestamente en instrumentos internacionales y en el Derecho Internacional de los Derechos Humanos—los sufrimientos físicos y psíquicos. Se estima que ante estas situaciones la privación de libertad en la cárcel comprende un daño desproporcionadamente severo, lo que es atentatorio contra los derechos humanos de los condenados.” [“The entire international community reproaches the deprivation of liberty of the elderly, due to their advanced age, as well as expressly prohibits - as manifestly reflected in international instruments and in International Human Rights Law - physical and mental suffering. It is considered that in these situations, deprivation of liberty in prison involves disproportionately severe damage, which is an infringement of the human rights of the convicted persons.”]. *Id.* ¶ 2.

for the elderly.⁹⁶ Argentina,⁹⁷ Uruguay, Brazil,⁹⁸ and Nicaragua have laws allowing for home confinement of anyone over the age of seventy,⁹⁹ and the Peruvian criminal procedure code provides for home confinement for anyone over the age of sixty-five.¹⁰⁰ Several countries have provided for

96. *See also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, ¶ 4 (Chile) (dissenting opinion).

97. Law No. 26472, Jan. 12, 2009, 31.576 B.O. 1 (Arg.) (“Art. 1° — Modifícase el artículo 32 de la Ley 24.660, el que quedará redactado de la siguiente manera: El Juez de ejecución, o juez competente, podrá disponer el cumplimiento de la pena impuesta en detención domiciliaria: a) Al interno enfermo cuando la privación de la libertad en el establecimiento carcelario le impida recuperarse o tratar adecuadamente su dolencia y no correspondiere su alojamiento en un establecimiento hospitalario; b) Al interno que padezca una enfermedad incurable en período terminal; c) Al interno discapacitado cuando la privación de la libertad en el establecimiento carcelario es inadecuada por su condición implicándole un trato indigno, inhumano o cruel; d) *Al interno mayor de setenta (70) años . . .*”) (emphasis added) [“Art. 1 — Article 32 of Law 24.660 is amended in the following manner: The sentencing judge, or competent judge, may convert the fulfillment of the sentence to home detention a) For the sick prisoner when the deprivation of liberty in the place of incarceration prevents him from recuperated or adequately treating his illness and it is not appropriate for him to be in hospital; b) For the prisoner who suffers from an incurable disease in the terminal period; c) For the handicapped prisoner when the deprivation of liberty in the place of incarceration is inadequate for his condition implicating undignified, inhumane or cruel treatment; d) For the prisoner over the age of seventy (70) years old . . .”].

98. CÓDIGO PENAL [C.P.] art. 77 (Braz.) (“A execução da pena privativa de liberdade, não superior a 2 (dois) anos, poderá ser suspensa, por 2 (dois) a 4 (quatro) anos, desde que: I - o condenado não seja reincidente em crime doloso; II - a culpabilidade, os antecedentes, a conduta social e personalidade do agente, bem como os motivos e as circunstâncias autorizem a concessão do benefício; III - Não seja indicada ou cabível a substituição prevista no art. 44 deste Código. § 1° - A condenação anterior a pena de multa não impede a concessão do benefício. § 2° A execução da pena privativa de liberdade, não superior a quatro anos, poderá ser suspensa, por quatro a seis anos, desde que o *condenado seja maior de setenta anos de idade*, ou razões de saúde justifiquem a suspensão. [“The execution of the custodial sentence, not exceeding 2 (two) years, may be suspended, for 2 (two) to 4 (four) years, provided that: I - the convicted person is not a repeat offender; II - the culpability, background, social conduct and personality of the agent, as well as the reasons and circumstances authorize the granting of the benefit; III - The substitution provided for in article 44 of this Code is not indicated or applicable § 1 - The previous sentence of a fine does not prevent the granting of the benefit. § 2. The execution of the custodial sentence, not exceeding four years, may be suspended for four to four years. six years, provided the convict is over seventy years of age, or health reasons justify the suspension.”] (emphasis added) (internal citations omitted); *see also* MATÍAS MEZA-LOPEHANDÍA & CHRISTINE WEIDENSLAUFHER, ASESORÍA TÉCNICA PARLAMENTARIA, BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, ALTERNATIVAS A LA RECLUSIÓN POR RAZONES HUMANITARIAS: DERECHO INTERNACIONAL Y LEGISLACIÓN EXTRANJERA CON ESPECIAL ATENCIÓN A LA CUESTIÓN DE LOS CONDENADOS POR DELITOS DE LESA HUMANIDAD (2019), <https://tinyurl.com/y5e3nh28>.

99. *See also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010 (Chile) (dissenting opinion) (discussing similar legislation in Honduras and Ecuador).

100. CÓDIGO PROCESAL PENAL [CÓD. PROC. PEN.] [CRIMINAL PROCEDURE CODE] art. 290 (Peru) (“Se impondrá detención domiciliaria cuando, pese a corresponder prisión preventiva, el imputado: a) Es mayor de 65 años de edad; b) Adolece de una enfermedad grave o incurable; c) Sufre grave incapacidad física permanente que afecte sensible- mente su capacidad de desplazamiento; d) Es una madre gestante.”) [“House arrest will be imposed when, despite the appropriateness of preventive detention, the accused: a) Is over 65 years of age; b) suffers from a serious or incurable disease; c) suffers a serious permanent physical disability that significantly affects his ability to move; d) is a pregnant mother.”].

alternative forms of incarceration for prisoners suffering from serious or terminal illness.¹⁰¹

The applicability of these provisions for alternative forms of incarceration for the elderly to those convicted of international crimes varies and, in some cases, is in flux. The Colombian home confinement and humanitarian release provisions exclude international crimes, as well as a long list of other serious offenses.¹⁰² Until 2017, the Uruguayan provision explicitly excluded certain serious offenses, including homicide, rape, and offenses covered by the Rome Statute, which include crimes against humanity, genocide, war crimes, and the crime of aggression.¹⁰³ However, new legislation in 2017 dropped these exclusions.¹⁰⁴ In Brazil and Peru, the current legislation is silent on the applicability of these provisions to human rights violators, but legislation is under consideration to preclude applicability of home confinement provisions to human rights violators in Brazil, and to permit it, in Peru.¹⁰⁵

101. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, ¶ 8 (Chile) (dissenting opinion) (citing laws in Uruguay, Nicaragua, and Colombia).

102. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 68A (Colom.) (“Exclusión de los beneficios y subrogados penales No se concederán; la suspensión condicional de la ejecución de la pena; la prisión domiciliaria como sustitutiva de la prisión; ni habrá lugar a ningún otro beneficio, judicial o administrativo, salvo los beneficios por colaboración regulados por la ley, siempre que esta sea efectiva, cuando la persona haya sido condenada por delito doloso dentro de los cinco (5) años anteriores. Tampoco quienes hayan sido condenados por delitos dolosos contra la Administración Pública; delitos contra las personas y bienes protegidos por el Derecho Internacional Humanitario; delitos contra la libertad, integridad y formación sexual; [long list of other serious offenses excluded] . . .”) [“Exclusion from benefits and substitutions. The following shall not be granted: conditional suspension of the sentence; home confinement as a substitution for prison; nor will any other benefit, judicial or administrative, apply, other than benefits granted for cooperation as provided for by law, as long as this the cooperation is effective, when the person has been convicted for an intentional crime within the preceding five (5) years. Nor will those convicted for intentional crimes against public administration, crimes against persons or interests protected by international humanitarian law, crimes against sexual liberty, integrity or development . . .”].

103. *See* Law No. 17.897, Sept. 14, 2005, [401] D.O. 482-A, art. 9 (Uru.) (“Agréganse al artículo 127 del Código del Proceso Penal, las siguientes disposiciones: ‘El Juez podrá disponer la prisión domiciliaria de personas procesadas o condenadas mayores de setenta años, cuando ello no involucre riesgos, considerando especialmente las circunstancias del delito cometido. *Esta última disposición no será aplicable a los procesados y condenados que hayan cometido los siguientes delitos:* 1) El delito de homicidio cuando concurren las circunstancias agravantes previstas en los artículos 311 y 312 del Código Penal. 2) El delito de violación. 3) Los *delitos previstos en el Estatuto de Roma de la Corte Penal Internacional* (Ley N° 17.510, de 27 de junio de 2002).’) [“The following provisions shall be added to Section 127 of the Penal Code: ‘The judge may order home confinement of persons tried or convicted who are over seventy years old, when it does not involve risks, considering in particular the circumstances of the offense committed. This provision is not applicable to persons tried or convicted who have committed the following offenses: 1) The crime of homicide when the aggravating circumstances set out in Articles 311 and 312 of the Criminal Code exist. 2) The crime of rape, 3) The crimes set out in the Rome Statute of the International Criminal Court (Law Number 17.510, of June 27, 2002).’].

104. *See* MEZA-LOPEHANDÍA & WEIDENSLAUFHER, *supra* note 98, at 16.

105. *See id.* at 14, 15.

In contrast to the Chilean Supreme Court's reluctance to allow for alternative forms of confinement in atrocity cases based on age, in a 2017 decision, the Argentine Supreme Court held that persons convicted of dictatorship-era atrocity crimes could benefit from laws permitting home detention on humanitarian grounds. However, the Court grounded the decision in the state's obligation to ensure adequate health care, not age.¹⁰⁶ The Court emphasized that, although international law compelled investigation and prosecution of human rights abuses, it also constrained Argentine courts in their treatment of the defendant:

The existence of international obligations assumed by the Argentine state to guarantee the investigation, judgment and sanction of crimes against humanity and grave violations perpetrated against human rights, whose rigorous observance, beyond a shadow of a doubt, must be fulfilled by Argentine courts without jeopardizing constitutional principles of legality and due process previously invoked, the violation of which also can incur international responsibility.¹⁰⁷

The Court also flagged that an international body, the Committee on the Rights of Persons with Disabilities (CRPD), had already faulted Argentina for failing to guarantee the highest levels of health care to a person convicted of a crime against humanity.¹⁰⁸ This case, like the case before the CRPD, did not rely on the age of the detainee alone. Rather, it emphasized his poor health and the human rights obligations of the state to provide health care.¹⁰⁹

106. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/4/2017, "Alespeiti, Felipe Jorge / incidente de recurso extraordinario," Fallos (2017-340-493) (Arg.).

107. *Id.* at 514 (Rosatti, J., concurring) ("[C]abe poner de manifiesto que la existencia de obligaciones internacionales asumidas por el Estado argentino para garantizar la investigación, el juzgamiento y la sanción de los crímenes de *lesa humanidad* y las graves violaciones perpetradas a los derechos humanos, cuya rigurosa observancia no se pone en tela de juicio, debe ser cumplida por los tribunales argentinos sin vulnerar los principios constitucionales de legalidad y debido proceso invocados precedentemente, cuyo principios constitucionales de legalidad y debido proceso invocados precedentemente, cuyo incumplimiento también puede acarrear responsabilidad internacional.") ["It should be emphasized that the existence of international obligations taken on by the Argentine state to guarantee the investigation, judgment and sanction of crimes against humanity and grave violation against human rights, whose rigorous observance cannot be doubted, must be met by Argentine courts without violating the constitutional principles of legality and due process invoked previously, the non-compliance with which also carries international responsibility."].

108. *Id.* at 503 ("Que a lo expresado en los considerandos precedentes, este Tribunal entiende oportuno agregar que recientemente en sede internacional se ha dictado un pronunciamiento censurando al Estado argentino por no garantizar el acceso al máximo nivel de salud de un imputado de un delito de lesa humanidad privado de su libertad en un establecimiento carcelario (Comité sobre los derechos de las personas con discapacidad, CRPD/C/11/D/8/2012, 11 de abril de 2014).").

109. *Id.* at 497, 499, 502-06 (citing Inter-American Court judgments linking the right to life and personal integrity to healthcare and international instruments requiring authorities to act with diligence in providing care to persons in custody suffering from terminal illnesses as part of the right to life) ("[D]ebe recordarse que la Corte Interamericana de Derechos Humanos ha afirmado en forma

The Court's emphasis on health rather than age echoes the approach of the European Court.¹¹⁰

The Argentine Supreme Court did not rely exclusively on international law. It also framed the issue in terms of domestic law and separation of powers concerns. It noted the legislature had not created separate rules for human rights convicts, and thus the Court could not go inventing them itself. It thus overturned the lower court's decision to deny an elderly and sick prisoner home detention.¹¹¹

In Guatemala, in recent months, courts have repeatedly rejected petitions for home confinement from senior military officials charged with or convicted for atrocity crimes who had argued that old age and poor health put them at risk for the coronavirus in detention. Reporting on the decisions indicates that judges denied release on the basis that the military hospital, where petitioners were housed, was equipped to provide necessary care and, in one case, on the basis, that the Guatemalan criminal procedure code prohibits persons "accused or convicted of aggravated sexual assault from being granted alternative coercion measures."¹¹² In the *Molina Thiessen* case,

constante que 'Los derechos a la vida y a la integridad personal se hallan directa e inmediatamente vinculados con la atención a la salud humana. Así, esta Corte ha establecido que el Estado tiene el deber, como garante de la salud de las personas bajo su custodia, de proporcionar a los detenidos revisión médica regular y atención y tratamiento médicos adecuados cuando así se requiera" y que "toda persona privada de libertad tiene derecho a vivir en condiciones de detención compatibles con su dignidad personal, lo cual debe ser asegurado por el Estado en razón de que éste se encuentra en posición especial de garante con respecto a dichas personas" (cf. Corte Interamericana de Derechos Humanos, "Vera Vera y otra vs. Ecuador", sentencia de 19 de mayo de 2011, párrafo 43; "Yvon Neptune vs. Haití", sentencia del 6 de mayo de 2008, párrafo 130) Asimismo, en virtud de los estándares internacionales en la materia antes relevados se ha remarcado que "las autoridades judiciales a cuyas órdenes se encuentran las personas privadas de libertad (sean los jueces de la causa o jueces de ejecución penal) juegan un papel fundamental en la protección del derecho a la vida de personas que se encuentran gravemente enfermas. En este sentido, las autoridades judiciales deben actuar con diligencia, independencia y humanidad frente a casos en los que se haya acreditado debidamente que existe un riesgo inminente para la vida de la persona debido al deterioro de su salud o a la 'presencia de enfermedad mortal" (Comisión Interamericana de Derechos Humanos, Informe sobre los Derechos Humanos de las Personas Privadas de Libertad en las Américas, OEA/Ser. L/V/II. Doc. 64, 31 diciembre 2011).")

110. As noted above, the European Court of Human Rights likewise has given more credence to arguments rooted in health concerns of elderly prisoners than those based on age alone. In several decisions, the European Court of Human Rights has held that age alone does not make detention unlawful under the European Convention. *See* discussion *supra* notes 69-70.

111. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/4/2017, "Alespeiti, Felipe Jorge / incidente de recurso extraordinario," Fallos (2017-340-493), at 505-06 (Arg.) ("En efecto, el a quo resolvió recovar la prisión domiciliaria de Alespeiti, omitiendo ponderar debidamente tanto si, en función de las particulares circunstancias de salud que registra el defendido además de su avanzada edad, la detención en un establecimiento penitenciario podía comprometer o agravar su estado como también si la unidad carcelaria correspondiente resultaba efectivamente apta para alojarlo, resguardar su estado y tratarlo en forma adecuada.")

112. *See* Jo-Marie Burt & Paulo Estrada, *Court Rejects Release Request of Convicted Military Officials in Molina Thiessen Case*, INT'L JUST. MONITOR (Aug. 20, 2020); Jo-Marie Burt & Paulo Estrada, *Judge Denies CREOMPAZ Defendants' Request for Prison Release*, INT'L JUST. MONITOR (May 12, 2020) (noting

the Guatemalan court made this decision under the watchful eye of the Inter-American Court of Human Rights¹¹³ from whom victims' representatives had requested "precautionary measures" in order to try to block the release.¹¹⁴

Outside of Latin America, there is little uniformity. In many jurisdictions, old age and poor health may be mitigating circumstances at sentencing, but do not preclude imprisonment.¹¹⁵ In 2001, the European Court noted that no States Party to the European Convention recognized an upper age limit for detention in their domestic law.¹¹⁶ The many instances of states introducing either specialized facilities or programs to address the needs of elderly prisoners suggest that many states do not require release of or releasing prisoners based on advanced age.¹¹⁷

testimony that the defendants' health was stable, the absence of COVID cases at the Military Hospital, and the ability of the Military Hospital to adequately treat defendants).

113. The Inter-American Court monitored the case pursuant to its 2004 judgment finding Guatemala responsible for violations of numerous rights under the American Convention in connection with the case, including, among others, violations of the right to life, liberty, and humane treatment, as well as rights to a fair trial, a family life, and judicial protection. See Jo-Marie Burt & Paulo Estrada, *Convicted Military Officials in Molina Theissen Case Seek Release*, INT'L JUST. MONITOR (Aug. 18, 2020), <https://tinyurl.com/y3pbw37n>; *Molina-Theissen v. Guatemala, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 105(15) (July 3, 2004) ("In accordance with its usual practice, the Court reserves its inherent authority to monitor comprehensive and complete compliance with the instant judgment."); see also *Molina-Theissen v. Guatemala, Merits*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 106 (May 4, 2004).

114. Burt & Estrada, *supra* note 113; see also *Guatemala: Corte IDH Tramita Solicitud de Medidas de Protección ante Riesgo de que Militares Condenados por el Caso Molina Theissen Evadan la Justicia*, CEJIL (Aug. 18, 2020), <https://tinyurl.com/y6jhbe5x> (noting that the request for precautionary measures emphasized that "[s]e destaca que esta audiencia se suma a una serie de acciones promovidas por sectores afines al ejército guatemalteco para evitar que la condena quede en firme y que los militares cumplan su sentencia en prisión.") ["[T]his hearing is just the latest in a series of actions on the part of sectors aligned with the Guatemalan military to avoid the implementation of the sentence and the military officers serving their sentence in prison."].

115. See *supra* note 42 (discussing old age as a mitigating factor in the U.S. federal system); see also *Ljuboja v The Queen* (2011) 210 A Crim R 274 (Austl.) (noting that at common law old age was a mitigating consideration at sentencing and that "Australian authorities have established that advanced age is a relevant consideration in determining whether a sentence will be crushing. The rationale is that each year of a sentence represents a substantial proportion of the period of life which is left to an offender of advanced age . . . whether and, if so, to what extent leniency should be given to an offender of advanced age, depends on all of the facts and circumstances of the particular case . . . the authorities emphasise that age is only one factor in the sentencing process, and that advanced age can never be a justification for a sentence which is not fairly proportionate to the offence or otherwise inappropriate . . . An offence may be so serious that humanitarian considerations cannot be accommodated."); *General Sentencing Principles: Sentencing Factors: Age*, NAT'L JUD. COLL. OF AUSTL., <https://tinyurl.com/y4ukvckj> (last visited Sept. 26, 2020) (surveying Australian caselaw on old age and poor health in sentencing and finding that both were potentially mitigating factors at sentencing, but not determinative and do not override other purposes of sentencing).

116. *Papon v. France* (No. 1), 2001-VI Eur. Ct. H.R. 445 (finding no violation of Article 3 [torture or to inhuman or degrading treatment or punishment] in Papon's detention at the age of ninety).

117. See GLOBAL PRISON TRENDS, *supra* note 5, at 25 (discussing such programs in the United States (specifically, in California), Japan, and Switzerland); see also Robert D. Hanser & Wenhua Hu, *Elderly Offender Prison Programming in the People's Republic of China and the United States*, U. LA. MONROE, <https://tinyurl.com/y23w2sv6> (discussing the United States and China) ("In 2017, Shanghai established the first prison to specialize in the collection of elderly, ill, and disabled offenders.").

Outside of sentence mitigation, there are also examples of geriatric or compassionate release in other countries, including in Europe, but there is great variety in the practice and there are often significant obstacles to release.¹¹⁸ Moreover, geriatric release initiatives are often based on local initiatives or laws, not national ones,¹¹⁹ or are ad hoc decisions to deal with particular problems, such as overcrowding, cost-cutting, or infectious disease concerns.¹²⁰ There are also sometimes categorical exclusions to geriatric release, including based on the gravity of the crimes for which the person was convicted.¹²¹

As to the sentencing practice at the international criminal tribunals, at the ICTY and the International Criminal Tribunal for Rwanda (ICTR), a few trial chambers purported to view age as a mitigating factor at sentencing and cited humane treatment as the reason. According to a recent empirical study,

[T]he ICTY . . . declared that it has discounted the sentences of older perpetrators, offering three reasons: serving time in prison is more demanding on older persons due to the “physical deterioration associated with advanced years”; an older defendant may have “little worthwhile life left upon release” from prison; and the Tribunals must be wary of imposing

118. *See, e.g.*, Handtke, *supra* note 5, at 230-31 (outlining the differing provisions in England and Wales (possible release for health reasons), Spain (possible probation for those over the age of seventy), France (short term health release or possible geriatric release for those over seventy); Germany (temporary release to seek health care), and Switzerland (“interruption of the sentence for good cause (such as to seek care not available in prison)” or “for transfer to another institution for health reasons”).

119. Evidently, one country with a national rule is Sudan. After former President Omar Al Bashir was found guilty of corruption and sentenced to two years imprisonment, they ordered that Al Bashir serve his sentence in an administrative reform institution, rather than a prison, because Sudanese law purportedly forbids the imprisonment of anyone over the age of seventy. Al Bashir was seventy-five at the time. *Sudan's Former President Exempted from Prison Sentence for Being Old Despite Conviction for Corruption*, XINHUA NEWS (Dec. 14, 2019), <https://tinyurl.com/y5rwtxt>.

120. *See, e.g.*, PRICE, *supra* note 44, at 17 (“At least 17 states [in the United States] . . . provide for geriatric parole, using age — combined in some states with time- served requirements — as eligibility indicators. These include Texas (65 years old), California (at least 60 years old with 25 years served), and Virginia (at least 60 years old with 10 years served or 65 years old with five years served)” but noting that, in general, procedures are byzantine, there are many categorical exclusions, and releases are rare); CHIU, *supra* note 35; GLOBAL PRISON TRENDS, *supra* note 5, at 25 (“Under a new prison law, authorities in Sindh province, Pakistan, announced in 2019 that they would commute the sentences of older people in prison who had served half their sentence as well as those with life threatening illnesses. Such early release mechanisms can provide an opportunity for older persons to live their final days and die in the community, but they are not common.”); *Nigeria to Free Half Its Prisoners*, BBC NEWS (Jan. 5, 2006), <http://news.bbc.co.uk/2/hi/africa/4583282.stm> (describing Nigeria’s release of up to 25,000 prisoners in 2006, including elderly prisoners to address overcrowding).

121. CHIU, *supra* note 35, at 5 (“The eligibility requirements [for geriatric parole] may also include restrictions that preclude consideration: many states make inmates ineligible for geriatric release due to the severity of their offense of conviction, and in some states older prisoners may not be eligible until they have served a minimum length of their sentence.”).

“inhumane and degrading treatment” by incarcerating elderly defendants for lengthy periods.¹²²

The study also notes that other trial chambers downplayed the importance of old age.¹²³ Nevertheless, it concludes that overall mitigating factors, age included, had little bearing on sentences.¹²⁴

Although they provide no defined age cut off, the foundational documents of the International Criminal Court (ICC) contemplate the potential relevance of poor health and advanced age for sentencing. The Rome Statute provides that in sentencing, judges are to “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.”¹²⁵ The ICC’s Rules of Procedure and Evidence add that judges should impose a sentence that “reflect[s] the culpability of the convicted person,” “balance all the relevant factors,” including mitigating and aggravating circumstances, and “consider the circumstances both of the convicted person and of the crime.”¹²⁶ The rules also require judges to “give consideration” to a series of other factors, including “the age, education, [and] social and economic condition of the convicted person.”¹²⁷ Judges also may later reduce sentences based on factors, including worsening health and advanced age.¹²⁸

In sum, international human rights law requires non-discrimination against the elderly, but also the accommodation of their special needs, access to justice and a fair trial, that elderly persons be treated with dignity as defendants and, if convicted and incarcerated, as prisoners, and that they be

122. Joseph W. Doherty & Richard H. Steinberg, *Punishment and Policy in International Criminal Sentencing: An Empirical Study*, 110 AM. J. INT’L L. 49, 61-62 (2016) (citing Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Judgement, ¶¶ 104-05 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003)).

123. *Id.* (citing Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgement, ¶ 1130 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, Judgement and Sentence, ¶ 91 (June 12, 2006)).

124. *See id.* (noting that some have found “inconsistencies in the extent to which age is in fact a consideration in Tribunal sentencing. One analyst has found that sometimes the Tribunals have used age as a mitigating factor when the perpetrator was beyond his or her formative years, yet at other times have assigned no relevance to the age of younger defendants.”).

125. Rome Statute of the International Criminal Court art. 78, July 17, 1998, 2187 U.N.T.S. 3.

126. ICC Rules of Procedure and Evidence, Rule 145, ICC-ASP/1/3 (2013) [hereinafter ICC Rules of Procedures & Evidence].

127. *Id.* Rule 145(1)(c).

128. *Id.* Rule 223 (“Criteria for review concerning reduction of sentence: In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria: (a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) The prospect of the resocialization and successful resettlement of the sentenced person; (c) Whether the early release of the sentenced person would give rise to significant social instability; (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; (e) Individual circumstances of the sentenced person, including a *worsening state of physical or mental health or advanced age.*”).

treated humanely. Humane treatment means the provision of medical care and discontinuing proceedings, trial, or confinement if they preclude meeting the detainee's medical needs or if the defendant is unfit to stand trial. There is increasing discussion of the rights of the elderly in international and regional human rights fora, as well as national legislation providing for alternative forms of or alternatives to incarceration in several countries, particularly in Latin America. At the moment, however, there is no bar to the prosecution or even detention of elderly persons for ordinary crimes in international human rights law, let alone for serious international crimes. There is even an argument that elderly perpetrators have a right to be tried. The next Part explores the purposes of prosecuting and punishing elderly persons in the context of international crimes.

IV. RECONCILING INTERNATIONAL HUMAN RIGHTS NORMS ON TREATMENT OF THE ELDERLY WITH THE REALITIES AND OBJECTIVES OF INTERNATIONAL CRIMINAL JUSTICE

Atrocity crimes are not just any crimes, and atrocity trials are not just any trials. This Part examines the special context of atrocity trials and the purposes of punishing elderly persons who are alleged to have perpetrated or have been found guilty of perpetrating, sometimes as young people, horrific crimes. Some things stay the same—physical and mental health problems, isolation, and dementia are unlikely to discriminate between ordinary criminals and international criminals. Some things, however, are very different, including the context of trials, the gravity of crimes and resultant desert of offenders, the deterrence calculus, the expressive value of international criminal trials, and the potential for alternative transitional or restorative justice mechanisms.

A. Idiosyncrasies of Atrocity Trials

Context matters. Although perhaps the most significant distinction between prosecutions for atrocity crimes and ordinary ones is the gravity of the offenses, there are a few common characteristics of international criminal justice proceedings that bear on the age of defendants idiosyncratically. These include the passage of time prior to trials, the slow pace of trials, international norms requiring prosecution of atrocity crimes, and the potential for alternative or complementary transitional justice mechanisms.

A common, though not uniform, feature of atrocity crime cases is the passage of time before prosecution and the often-intensive investigation of the crimes. And this passage of time is often what turns middle-aged perpetrators into elderly defendants, elderly perpetrators into extremely

elderly defendants, and, sometimes, young perpetrators into elderly or extremely elderly defendants.¹²⁹ Whether at international tribunals, hybrid “internationalized” institutions, or domestic courts, frequently the political context is such that a trial in the immediate wake of atrocities is impossible, due to political instability in the region, the lack of international support to set up an institution, or myriad other reasons. Sometimes, the defendants are the ones causing the delay, as fugitives from justice.¹³⁰ Trials in Germany, Cambodia, Chile, and, even Argentina (for the vast majority of the country’s atrocity trials) are prime examples of this delay.¹³¹ The investigative mechanisms—importantly, not courts—in place for Myanmar, Syria, and Venezuela, are institutional embodiments of and attempts to address this political reality.¹³² These mechanisms seek to collect and preserve evidence in the hopes that someday, *not today*, perpetrators of atrocities will be brought to justice.

129. See, e.g., *supra* note 30 (discussing the recent Nazi prosecutions in Germany).

130. Two high level ICTY defendants, Radovan Karadzic and Ratko Mladic, are prime examples of defendants whose trials were delayed for years (and who consequently aged prior to their trials) because they were fugitives for many years. *The Fugitives*, U.N. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/about/office-of-the-prosecutor/the-fugitives> (last visited June 30, 2020). Most recently, France arrested a man wanted by the ICTR who had evaded justice for decades. Press Release, INTERPOL, Rwanda Genocide Suspect Arrested in France with INTERPOL Support (May 16, 2020), <https://tinyurl.com/y6so759p>.

131. See, e.g., Graciela Fernandez Mejjide et al., *The Role of Historical Inquiry in Creating Accountability for Human Rights Abuses*, 12 B.C. THIRD WORLD L.J. 269, 283-85 (1992) (explaining the impossibility of trials in Chile at the time based on the amnesty and domestic political situation).

132. See generally Human Rights Council Res. 39/2, U.N. Doc. A/HRC/RES/39/2, ¶ 22 (Oct. 3, 2018) (“Decid[ing] to establish an ongoing independent mechanism to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, *in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes*, in accordance with international law”) (emphasis added); see also Julia Crawford, *Myanmar: The UN Body is Building Up, and Watching*, SWISSINFO.CH (Jan. 11, 2020), <https://tinyurl.com/y4nhch3s>. On the Syrian mechanism, see generally G.A. Res 71/248, at 2 (Jan. 11, 2017) (“Decid[ing] to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 under the auspices of the United Nations to closely cooperate with the Independent International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyses evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, *in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes*, in accordance with international law.”) (emphasis added); Jessica Hatcher-Moore, *Is The World’s Highest Court Fit For Purpose?*, GUARDIAN (Apr. 5, 2017) <https://tinyurl.com/lcav8ja> (“[T]he UN security council, tasked with maintaining global peace, tried to refer the conflict to the ICC in May 2014 but was blocked by Russia and China. Frustrated by their obstruction, the UN general assembly voted in December 2016 to create a special mechanism for Syria to investigate crimes committed since 2011 ‘in order to ensure the preservation of evidence and enable effective accountability in the future.’”); Press Release, General Assembly, Head of International Mechanism on Syria Describes Progress Documenting Crimes Committed by Both Sides, as General Assembly Takes Up Report, U.N. Press Release GA/12139 (Apr. 23, 2019) (noting that the mechanism was created because of the Security Council’s inability to refer the Syria situation to the ICC).

There are downsides for defendants in the passage of time between the commission of crimes and prosecution. If they are innocent and eventually are prosecuted, it is harder to marshal evidence to mount a defense. These evidentiary disadvantages are a central argument in favor of statutes of limitations for ordinary crimes, but, notably, the argument is deemed insufficiently important relative to the goals of atrocity prosecutions for statutes of limitations to apply.¹³³ Moreover, this argument is not particular to elderly defendants. It is not clear that it is any less fair to old defendants than to younger ones, unless the defendant suffers from cognitive problems that prevent him from remembering events. Therefore, the unfairness more likely rides on the condition and availability of witnesses and physical evidence.

Of course, for many perpetrators of atrocity crimes, there are also significant benefits to the passage of time. Particularly for defendants who benefit from a political context in which prosecutions are not yet feasible, they get to lead normal lives in freedom. As Alan Rosenbaum has argued, fugitive Nazi war criminals are living on “borrowed or privileged freedom.”¹³⁴ This is a common complaint, for example, of survivors and family members of victims of atrocities.¹³⁵

Another common, though again not uniform, feature of atrocity trials is the great length of the proceedings. This feature may be more pronounced in trials at international tribunals, which are notoriously,¹³⁶ though some argue justifiably,¹³⁷ long. However, domestic proceedings for atrocity crimes can also last many years, in part due to the inability or unwillingness of the domestic system to handle the cases expeditiously, the sheer volume of cases, or complexity of the investigations.¹³⁸ Here too, defendants sometimes intentionally drag out proceedings in an effort to delay and possibly escape conviction. In Chile, for example, human rights observers and victims’ groups have complained about the tendency of human rights defendants to make frivolous appeals to the Constitutional Court (distinct

133. *See supra* note 75 (discussing the prohibition of statutes of limitations in the context of atrocity crimes).

134. *See* ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS 121 (1993).

135. *See* Interview with Alicia Lira, Head, Agrupación de Familiares de Ejecutados Políticos (AFEP) [Association of Relatives of Executed Political Prisoners], in Santiago, Chile (Oct. 23, 2017).

136. *See* Whiting, *supra* note 24, at n.1 (citing a long list of commentary criticizing the tribunals for being too slow).

137. Whiting, *supra* note 24, at 326-29.

138. In Chile, for example, in the early days, courts typically either dismissed cases or would let them drag on without making any progress on investigations. *See* ROHT-ARRIAZA, *supra* note 32, at 69-70. Later, when there was a greater will in the judiciary to take on dictatorship era human rights violations, particularly with the specialized human rights judges designated to handle the cases, the volume of cases, complexity of investigations, and defense delay tactics nevertheless have meant that cases often take years to complete.

from the Supreme Court) as a delay tactic.¹³⁹ Likewise, with the Ríos Montt genocide trial in Guatemala, observers argued that “[t]he chief strategy of Ríos Montt’s defense team was not to engage in a substantive debate about the past, but rather to stall the proceedings and prevent them from reaching a conclusion.”¹⁴⁰

Atrocity prosecutions also differ from ordinary criminal prosecutions in that states are obligated to investigate and punish perpetrators of these crimes under international law.¹⁴¹ Domestic jurisdictions, regional human rights courts, and international criminal courts alike frequently give voice to this notion. Domestic courts cite these obligations to investigate, prosecute and punish as reasons to override domestic legal barriers to prosecution.¹⁴² Regional human rights courts, like the Inter-American Court of Human Rights, have chastised domestic courts for failure to comply with these obligations and ordered the states to investigate and prosecute.¹⁴³ International courts, though not the intended subjects of international human rights treaties,¹⁴⁴ are billed as mechanisms for fulfilling obligations

139. *See supra* note 28.

140. Jillian Blake, *Should Domestic Courts Prosecute Genocide? Examining the Trial of Efraín Ríos Montt*, 39 BROOK. J. INT’L L. 563, 578 (2014) (quoting Jo-Marie Burt & Geoff Thale, *The Guatemala Genocide Case: Using the Legal System to Defeat Justice*, WASH. OFF. LATIN AM. (June 5, 2013), <https://tinyurl.com/y2bd7vy7>).

141. This principle is better established for some international crimes than others. Several conventions require states to investigate and prosecute violations. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment art. 2-7, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]. Whether there is a customary international law norm requiring states to prosecute and punish crimes against humanity is contested. *See* Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework*, 16 TUL. J. INT’L & COMPAR. L. 117, 123 (2007) (comparing the “idealist” position that such an obligation exists and the “realist” position that contends that the widespread use of amnesties suggests otherwise). The Rome Statute recognizes such an obligation for States party to the Rome Statute. *See id.*

142. *See* Caroline Davidson, *ICL By Analogy—The Role of International Criminal Law in the Chilean Human Rights Prosecutions*, 25 U.C. DAVIS J. INT’L L. & POL’Y (forthcoming 2020).

143. *See, e.g.*, *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001); *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); *Almonacid-Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011); *Gomes Lund (“Guerrilha do Araguaia”) v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010); *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012); *see also* Aldana-Pindell, *infra* note 186, at 1402 n.76 (listing international and regional court decisions affirming a duty to prosecute right to life and inhumane treatment violations).

144. International human rights law deals with the obligations of states vis-à-vis individuals. *See generally* U.N. Office of the High Commissioner for Human Rights, International Human Rights, <https://www.ohchr.org/en/professionalinterest/pages/internationalallaw.aspx> (last visited Sept. 25, 2020) (“International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect

to provide victims with justice, i.e. investigating international crimes and prosecuting and punishing those responsible for them.¹⁴⁵

Courts and attorneys cite these obligations as arguments in favor of prosecuting elderly defendants and punishing them with imprisonment. A veteran Chilean human rights lawyer, for example, has argued that in granting alternative forms of punishment, such as home imprisonment or provisional release, to human rights convicts, Chile runs afoul of its obligations under international human rights law (IHRL) and ICL to prosecute and punish those who have perpetrated international crimes.¹⁴⁶ The Supreme Court of Chile, in upholding the denial of humanitarian release to a defendant convicted of crimes based on dictatorship-era human rights violations, likewise cited international obligations to investigate and prosecute atrocity crimes.¹⁴⁷

Another common feature of atrocity trials, at least at international courts, is relatively high sentences. High sentences eventually can make for elderly prisoners and have contributed to graying prison populations in national jurisdictions.¹⁴⁸ Sentences at international courts, though perhaps not very high by American standards, are high enough to make old prisoners of some defendants not old at the time of their sentences. A 2011 study on sentencing practices at the ICTY and the ICTR found, for example, that “the median sentence at the ICTY is 15 years and at the ICTR 33.5 years.”¹⁴⁹ National practice on sentencing of persons convicted of atrocity crimes varies considerably, even within countries.¹⁵⁰

requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”).

145. S.C. Res. 955, pmbl., art. 6 (Nov. 8, 1994); Updated Statute of the International Tribunal for the Former Yugoslavia, art. 1-5, 7 (Sept. 2009), <https://perma.cc/7ESY-RWUC> [hereinafter ICTY Statute].

146. C. Medrano & G. Castillo, *Beneficios a Reos de Punta Penco Contravendrían al Derecho Internacional*, DIARIOCHILE (Dec. 22, 2016), <https://tinyurl.com/y664k5jc> (“El abogado [Nelson Caucoto] puso énfasis además en lo que señala el derecho internacional al respecto donde se especifica la obligación de los Estados por evitar que los crímenes contra la humanidad queden impunes. Por lo mismo, cualquier beneficio carcelario que se pueda otorgar a estos criminales debe cumplir con estándares elevados.”).

147. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 marzo 2018, “Aravena Ruiz, José c. Carroza Espinosa, Mario,” Rol de causa: 85-2010, ¶ 4 (Chile).

148. According to a report out of the United Kingdom, long sentences and life sentences are the drivers of a growing elderly population in prisons in a number of countries, and some jurisdictions in the United States and the United Kingdom have created special units to house these elderly prisoners. ANDREW COYLE, INT’L CTR. FOR PRISON STUD., A HUMAN RIGHTS APPROACH TO PRISON MANAGEMENT 141 (2002), <https://tinyurl.com/y6a976gz>.

149. Barbora Holá, Alette Smeulers & Catrien Bijleveld, *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 J. INT’L CRIM. JUST. 411, 420 (2011).

150. See, e.g., Karinna Fernández Neira, *Breve Análisis de la Jurisprudencia Chilena, en Relación a Las Graves Violaciones a Los Derechos Humanos*, 8 ESTUDIOS CONSTITUCIONALES 467, 481-87 (2010) (Chile) (noting that the use of domestic crime categories combined with a Chilean legal doctrine reducing punishment when time has passed prior to prosecution (media prescripción) has meant for very low sentences or no imprisonment for many defendants); ORG. FOR SEC. & COOP. IN EUR., MISSION TO

A final contextual particularity of trials for international crimes is that, unlike with ordinary domestic crimes, they sometimes are not the only game in town. A number of trials for atrocity crimes, on the international level and domestically, have occurred either in parallel with or after truth commissions. The Special Court for Sierra Leone, for example, operated alongside a previously established truth commission.¹⁵¹ In Latin America, a number of domestic jurisdictions, including Argentina, Chile, Guatemala and Peru, have engaged in criminal trials for atrocity crimes after, and in many instances, long after, domestic truth commissions.¹⁵² This particularity does not speak directly to the age of defendants in a criminal trial, but it does bear on considerations of the purposes of and need for criminal trials, particularly of frail, elderly defendants. At least where a truth commission is a viable alternative, the trials are only worth it if they achieve something beyond what has been achieved, or perhaps could be achieved in a truth commission. The next section explores the potential goals of prosecuting elderly atrocity criminals.

B. *The Purposes of Prosecuting and Punishing Elderly Atrocity Criminals*

The purposes of international criminal trials are often manifold, and their relative importance is contested. Proponents of atrocity trials, whether in the form of international criminal tribunals or domestic trials, list retribution,¹⁵³ deterrence,¹⁵⁴ expressing condemnation of violations of

BOSN. & HERZ., MOVING TOWARDS A HARMONIZED APPLICATION OF THE LAW APPLICABLE IN WAR CRIMES CASES BEFORE COURTS IN BOSNIA AND HERZEGOVINA 8-9 (2008), <https://tinyurl.com/y4pgts5t> (noting higher sentences stemming from convictions at the State Court of Bosnia and Herzegovina versus local (“entity”) courts).

151. See generally Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139 (2003); Marieke Wierda, Priscilla Hayner & Paul van Zyl, *Exploring the Relationship Between the Special Court and the Truth and Reconciliation Commission of Sierra Leone*, INT’L CTR. FOR TRANSITIONAL JUST. (June 24, 2002), <https://tinyurl.com/y5yn2azd>.

152. See generally KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011); Naomi Roht-Arriaza, *After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*, 37 HUM. RTS. Q. 341 (2015).

153. Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT’L L. 969, 969 (2014); see also Zuroff, *supra* note 27 (“These trials are very important because they fulfill our obligation to the victims, to try and bring to justice those who murdered innocent men, women, and children, simply because they were categorized unjustly as ‘enemies of the Reich,’ a vital point always emphasized by famous Nazi-hunter Simon Wiesenthal.”).

154. Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 MINN. J. INT’L L. 179, 221-34 (2018) (arguing that deterrence is the most important goal of international criminal courts and that empirical data suggests that international courts can contribute to deterring future crimes).

human rights norms,¹⁵⁵ promoting reconciliation,¹⁵⁶ creating a historical record,¹⁵⁷ and educating the public¹⁵⁸ among the goals.

In stark contrast to the notion of rehabilitation as the only permissible basis for punishment touted in human rights instruments, it seems quite clear that for atrocity crimes, at least other than in the context of child soldiers,¹⁵⁹ rehabilitation is *not* the primary goal. We may care about a trial or tribunal's ability to encourage peace and stability in the region,¹⁶⁰ but we

155. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007); 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, 70 (2007); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 312-19 (2012).

156. S.C. Res. 827 (May 25, 1993) (establishing the ICTY as a measure for the "restoration and maintenance of peace"); *see also* Payam Akhavan, *Beyond Impunity: Can International Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001).

157. *See also* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 260-61 (2001) (assessing Holocaust trials as didactic instruments and arguing that, if anything the trials prioritized legal legitimacy too highly relative to the goal of writing history of trauma); Graciela Fernandez Meijide et al., *The Role of Historical Inquiry in Creating Accountability for Human Rights Abuses*, 12 B.C. THIRD WORLD L.J. 269, 279-80 (1992) (arguing, almost thirty years ago, that "today's reality is that the prosecutions of Nazi war criminals have been delayed too long—the defendants are old and frail, the memories of witnesses are failing, and the witnesses themselves are old and dying. In my opinion, however, there are still strong reasons to pursue the cause of justice for the next decade" and that "[t]he purpose of Nazi war crimes trials . . . is to establish an historical record, to prevent the transmission or rebirth of dangerous ideologies, and to enable us to address analogous situations that have already arisen in various countries around the world or that may arise in the future."). *Compare* Ford, *supra* note 154, at 197-98 ("There are many impediments to a court's ability to create an accurate historical record. For one thing, the need to establish a historical record is sometimes at odds with the primary purpose of the trial, which is to determine whether the accused is guilty. Straying too far from this central question could undermine the accused's right to a fair trial."), *with* RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 17 (2011) (arguing that international tribunals, and particularly the ICTY, have done a credible job of writing history).

158. Zuroff, *supra* note 27 ("[P]rosecutions are also very helpful in the fight against Holocaust denial and distortion, and serve as extremely effective public history lessons.").

159. The Special Court for Sierra Leone, for example, did not prosecute any minors, but its statute contemplated their prosecution and included special procedures and special measures to be applied for child soldiers with an eye to rehabilitation and reintegration, rather than punishment. *See* Statute of the Special Court of Sierra Leone, art. 7 (Jan. 16, 2002), <http://www.rscsl.org/Documents/scsl-statute.pdf> ("1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child. 2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.") and art. 15(5), ("5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.").

160. The ICTY and the ICTR were both created under the Security Council's Chapter 7 powers to establish and restore peace and security in the region. S.C. Res. 955/1994, ¶ 1 (Nov. 8, 1994).

are not necessarily striving for peace and stability of the defendant (or their reintegration into society). What, then, are we striving for in prosecuting international criminals and, in particular, elderly international criminals? The following assesses the purposes of trying and punishing elderly defendants in light of the aims of ICL. It also attempts to address the related issue of the purposes of prosecuting individuals long after the commission of the crimes.

1. *Retribution*

Retribution, often framed colloquially in human rights circles as “getting justice for victims,” is an oft-cited goal of international criminal trials.¹⁶¹ Mark Drumbl has flagged that retributive justifications for atrocity trials are highly imperfect. The sporadic and selective nature of international criminal trials and the difficulty in assigning any penalty that could equate to the harms created with atrocity crimes, mean that few, if any, atrocity criminals are getting their just deserts.¹⁶² Others have defended retributive arguments for international criminal justice.¹⁶³

This Article does not purport to settle the debate. It merely seeks to illustrate the ways that the retributive calculation for elderly defendants and prisoners may differ in the context of international crimes. In retributive calculations, particularly as to quantum of punishment,¹⁶⁴ the gravity of the crimes in ICL may negate some of the arguments seen in domestic jurisdictions for refusing to punish the elderly. For example, Jalila Jefferson-Bullock has argued that, in the American criminal justice system, “for the elderly, conditions of imprisonment are almost universally disproportionate.”¹⁶⁵ Indeed, arguably a sentence of a fixed number or years is a more significant punishment to an elderly defendant, because it is more likely to mean a life sentence.¹⁶⁶

In cases involving atrocity crimes, the disproportionality of harsh sentences is less clear. Atrocity trials involve, almost by definition, serious crimes.¹⁶⁷ The harm inflicted is often far more serious than anything seen in

161. deGuzman, *supra* note 155, at 302 (“Retribution, along with deterrence, are the most frequently invoked justifications for international criminal law punishment.”).

162. DRUMBL, *supra* note 155.

163. *See* Greenawalt, *supra* note 153.

164. Concededly, not all retributivists rely on retributive principles alone to determine the amount of punishment.

165. Jefferson-Bullock, *supra* note 6, at 980.

166. *Cf.* Doherty & Steinberg, *supra* note 122 (citing ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 176 (2005)) (discussing age and retributivism).

167. *See generally* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT'L L.J.* 1400, 1405 (2008) (questioning whether all international crimes are grave); GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND*

a domestic jurisdiction.¹⁶⁸ Thus, proportional punishment analysis arguably allows for more punishment than would be appropriate in an ordinary criminal case. Although there may be a moral, line-in-the-sand, human rights-based argument against incarceration, disproportionality of the punishment is likely not the problem.

The cognitive effects of old age likewise have retributive implications. For an elderly person suffering from dementia, a person's lack of awareness that they are being punished undermines retribution.¹⁶⁹

Delayed justice exacerbates the problems with retributive justifications for punishment in ICL cases. We punish too much and too little. On the one hand, age can convert a relatively modest sentence into a life sentence. On the other, it can convert a life sentence into a sentence of only a few years or even months. Perpetrators get to live their whole lives, often in stark contrast to their victims, without punishment and will serve only a fraction of their sentences before death.¹⁷⁰ The argument that some measure of retribution is better than none is what justifies retributively the prosecution of elderly defendants even years after their crimes. It also is an argument in favor of criminal justice and punishment over truth commissions. Even without a sentence, the experience of prosecution may be some measure of retribution. At one point in his trial Bruno Dey lamented, "this is not how I thought I'd spend my sunset years."¹⁷¹ It may be a small punishment in relation to the atrocities committed at the concentration camp at which Dey was a guard, but it is something.

Still, the passage of time also may weaken retributive arguments for punishment. It may affect the public's sense of the amount of punishment that is retributively justified. When a lot of time has passed since the violence, "the intensity of the general demand for retribution" may wane.¹⁷² This is not to say that less punishment is in fact retributively justified, but it speaks to the likely political and financial support for investigations, prosecution, and punishment. Moreover, as Carlos Nino and Jon Elster have noted, "the offender may in a real if elusive sense no longer be 'the same person' twenty or forty years later."¹⁷³ This notion that the person is no longer the same person not only matters for utilitarian reasons, but may

INTERNATIONAL 31-32 (2007) (noting that while most international crimes are *malum in se*, some are "not always morally obvious").

168. See DRUMBL, *supra* note 155, at 157.

169. See Handtke et al., *supra* note 5.

170. Janine di Giovanni, *Flawed Justice for the Butcher of Bosnia*, N.Y. TIMES (Nov. 22, 2017), <https://tinyurl.com/ybozpvce> ("Mr. Mladic will go to jail for life. But he is 75 years old. What does it mean, so little, so late? . . . What about those families who are still seeking the remains, the bones, of their loved ones? Justice sometimes comes slow. But 22 years is too long for people to wait.").

171. Buck, *supra* note 38.

172. Jon Elster, *Retribution*, in *RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY* 33, 46 (Jon Elster ed., 2006).

173. *Id.* (quoting CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 182 (1998)).

matter at least to some retributivists in terms of the punishment warranted.¹⁷⁴

The dignity arguments raised earlier also have retributive implications. As noted above, among the rights recognized in international human rights instruments relating to the elderly are the rights to dignity and non-discrimination. Somewhat counterintuitively, it can be argued that dignity and non-discrimination require prosecution and punishment of elderly people who have committed crimes. Under one version of retributivism, perpetrators have a right to punishment. According to Herbert Morris, people have a right to punishment that derives from a fundamental natural, inalienable human right to be treated as a person.¹⁷⁵ Thus, applying Morris's way of thinking to the elderly, elderly people have a right to (prosecution and) punishment for atrocity crimes for the very purpose of affirming their human dignity. Concededly, this is a right that many elderly defendants would happily waive.

2. *Deterrence*

Deterrence is perhaps the most frequently cited rationale for prosecuting elderly human rights violators. Its proponents argue that it is important to send the message to would be perpetrators of atrocities—do this, and sooner or later, you will pay. The appeal of this rationale notwithstanding, the deterrent value of atrocity trials generally is contested.¹⁷⁶ This Article does not answer the question—ultimately an empirical one—of whether atrocity trials work to deter future crimes, though recent scholarship suggests that commentators have perhaps been unduly pessimistic about deterrence.¹⁷⁷ This Part has the far more modest goal of noting that prosecutions of the elderly implicate deterrence in somewhat unique ways in atrocity trials.

As to specific deterrence, or deterring the defendant on trial from committing future crimes, atrocity crimes and criminals may be different

174. A retributivist who looks to the moral culpability of the offender generally might call for lesser punishment. By contrast, a retributivist who focuses on the harm caused or even the intent of the offender at the time of the acts would be unswayed by the passage of time.

175. Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 476-79 (1968).

176. Compare Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 *J. INT. CRIM. JUST.* 683, 694-97 (2007) (arguing that deterrence should be a central objective of international criminal justice efforts and that higher sentences than those seen at the ICTY are needed for effective deterrence), with DRUMBL, *supra* note 155 (arguing that international criminal justice is bad at achieving deterrence because the likelihood of any perpetrator being tried is so low and perpetrators are often likely to be acting rationally), and Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 *EUR. J. INT'L L.* 561, 590 (2002) (questioning the deterrence justification for ICL), and David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 474 (1999) (describing the deterrent effect of international prosecutions as “at best a plausible but largely untested assumption”).

177. See Ford, *supra* note 154.

from ordinary criminals. In the domestic context, it is argued that the elderly are, as a whole, low risk and it is not worth society's money to detain them either to incapacitate them or to deter them from committing future crimes.¹⁷⁸

With elderly defendants accused or convicted of atrocity crimes, this argument may be overstated. For the nonagenarian wheeled in for two-hour court sessions who has played relatively low-level roles in atrocities decades ago, this argument likely holds true. The defendant is a risk to no one. For high-level perpetrators, like Slobodan Milosevic, Vojislav Seselj, or Augusto Pinochet, for whom the distance between their tenures in power and prosecution was comparatively short, this is likely untrue.¹⁷⁹ Many defendants retain power when charged and, some do so even when convicted of atrocity crimes.¹⁸⁰ As the current slate of presidential candidates in the United States illustrates, one does not need to be in the prime of one's life to wield political power.¹⁸¹ In sum, for masterminds and other relatively senior perpetrators, there is likely a longer potential criminal lifespan.

Nevertheless, general deterrence is the bigger prize. General deterrence is often listed as a central objective in international criminal justice.¹⁸² In Holocaust studies circles, it is also listed as key reason for proceeding even with elderly defendants and after the passage of a lot of time.¹⁸³ On the one hand, deterrence is arguably significantly impeded when justice is meted out

178. Mirko Bagaric et al., *A Principled Approach to Separating the Fusion Between Nursing Homes and Prisons*, 44 PEPP. L. REV. 957 (2017) (arguing that older people present a lower risk to the community and therefore should be given alternative forms of punishment, in particular electronic monitoring); see also Jefferson-Bullock, *supra* note 6, at 941 (stating that “studies consistently isolate age as one of the most significant predictors of criminality for most crimes, with the likelihood to commit crimes peaking in late adolescence or early adulthood and decreasing as a person ages”). Bagaric goes farther and argues that specific deterrence is a bogus ground for punishing anyone. Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159, 1200 (2014) (“The available empirical data suggest that specific deterrence does not work, so inflicting less severe sanctions on offenders than imprisonment will not make them more likely to re-offend in the future. The level of certainty of this conclusion is very high, so high that specific deterrence should be abolished as a sentencing consideration so it cannot influence the development of aggravating and mitigating considerations.”).

179. Seselj, for example, gave inflammatory speeches while on release from the ICTY for cancer treatment. Denis Džidić et al., *Seselj 'Hate Speech' Angers War Victims*, BIRN (Nov. 28, 2014), <https://tinyurl.com/yxgdvex> (quoting one member of a Serbian organization saying “It is not only hate speech, but also pro-fascist discourse. What he says is dangerous for the victims of the crimes he participated in and it is bad for the fragile regional stability,” Zajovic told BIRN.”).

180. See Denis Dzeko et al., *Balkan War Crime Suspects Maintain Political Influence*, BIRN (Dec. 7, 2016), <https://tinyurl.com/y2omf8hg>.

181. Bernie Sanders, Joe Biden, and Donald Trump are all in their seventies.

182. See, e.g., Harmon & Gaynor, *supra* note 176, at 694-96.

183. Zuroff, *supra* note 27. Trials of Nazis, despite age and the passage of time also send a powerful message, “that if one commits such terrible crimes, even decades later there will still be efforts to hold that person accountable, a particularly important message in a world in which large-scale atrocities still occur periodically.” *Id.*

slowly because it gives rise to the impression that atrocities are met with impunity and that the possibility of punishment is low. On the other, if international, internationalized, and domestic courts, make clear that—sooner or later—perpetrators of atrocity crimes will be punished, it may help to correct this perception. The more examples of justice, even after time, the more likely a would-be perpetrator is to realize that they will eventually be made to pay for their crimes.¹⁸⁴ This message may be particularly important to send when the defendant is the one that has caused the delay by being a fugitive from justice.

This general deterrence argument may favor a criminal justice response rather than exclusive reliance on a truth commission.¹⁸⁵ Truth commissions often do not identify perpetrators individually¹⁸⁶ and they do not punish, regardless of perpetrators' age or state of health. With a criminal prosecution, even after the passage of time, the possibility of an individualized finding of guilt and punishment remains on the table. Thus, it preserves the possibility of deterring some who do not wish to live with the fear of, sooner or later, being branded an international criminal (genocidaire, war criminal or perpetrator of crimes against humanity), and punished. The question is whether this individual shaming and punishment of elderly defendants deters better (or significantly better) than the exposition of events that might unfold in a truth commission.

3. *Rehabilitation?*

The importance of rehabilitation is an example of a disconnect between human rights and ICL. Although human rights instruments tend to tout rehabilitation as a central, if not the only permissible, aim of criminal punishment, “[r]ehabilitation is a marginal concern in transitional justice . . .”¹⁸⁷ Only when one is speaking of child soldiers does the topic of rehabilitation occupy much space in discussions of ICL. With child soldiers, the notion is that their youth and vulnerability at the time of the offenses

184. There is of course a potential downside here, which is that high-level perpetrators will cling to power in an effort to stave off prosecution.

185. Compare PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: TEXTS AND MATERIALS 1441 (2013) (“Truth commissions [may explore structural or systemic causes and allow for broad-based public participation, but] . . . generally do not serve other objectives often associated with criminal justice such as deterrence and retribution.”), with Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMPAR. & INT’L L. 375, 379 (1997) (“Truth commissions serve four primary purposes: (1) to establish an historic record; (2) to obtain justice for the victims; (3) to facilitate national reconciliation; and (4) to deter further violations and abuses.”).

186. Raquel Aldana-Pindell, *In Vindication of Justiciable Victims’ Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT’L L. 1399, 1443 (2002) (“With few exceptions, truth commissions or reports do not name individual perpetrators because doing so violates the fundamental precept that the accused is innocent until proven guilty.”).

187. Elster, *supra* note 172, at 51.

make them less culpable, and, given the long lives they have yet to live, rehabilitation should be the focus of any prosecution.¹⁸⁸

Based on the gravity of the crimes, outside of the context of child soldiers, retribution, deterrence, and expressive aims tend to cloud out any concerns of rehabilitation of a given offender. In a rare instance of commentary on rehabilitation and ICL, Kelder et al. surveyed rehabilitation practices at the ad hoc tribunals. They noted that rehabilitation tended to come in as a consideration in decisions on sentencing reductions after a convicted person had served some significant portion of their sentences and not at the time of sentencing. Even then, the inquiry into rehabilitation was relatively perfunctory.¹⁸⁹

Thus, at least in the context of ICL at international tribunals, the argument that elderly defendants deserve equal access to rehabilitation (and an implicit possibility of reintegration to society) relative to other adults does not get them very much. It is possible, however, and perhaps even advisable that in domestic jurisdictions, particularly where they deal with lower level perpetrators, rehabilitation be a more prominent goal of punishment. In that case, the argument that elderly persons likewise enjoy the possibility of someday being integrated into society has more force.

4. *Expressive and Didactic Aims*

Due in part to the view that retributive and utilitarian justifications for atrocity trials are unrealistic, many commentators on ICL, including this one, have justified prosecution for atrocity crimes to express condemnation of atrocities and to teach the public.¹⁹⁰ This rationale, according to one of its leading proponents in ICL, maintains that “punishment affirms the value of law, strengthens social solidarity, and incubates a moral consensus among the public” and “trials and punishment also serve powerful pedagogical roles.”¹⁹¹ This expressive and didactic rationale is a frequent justification for

188. Jessica M. Kelder, Barbara Holá & Joris van Wijk, *Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR*, 14 INT'L CRIM. L. REV. 1177 (2014).

189. *Id.* at 1178, 1203 (arguing that, despite inattention to the topic, “the question is not whether or not rehabilitation should remain included as a goal of international criminal justice, but rather what form it can or should have in this particular context.”).

190. See DRUMBL, *supra* note 155, at 17 (“[A]lthough it seems a reach for liberal legalist punishment to exact retribution or deter individuals from killing in cataclysmic times by instilling a fear of getting caught, punishment bears greater promise to educate future generations about the effects of extreme evil and edify a moral consensus that repudiates discrimination-based violence and those who peddle it.”); Sloane, *supra* note 155, at 42 (“It would be ironic and counterproductive were [international criminal law] trials to undermine some international human rights standards in an effort to vindicate others.”); see also Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 355-56 (2008) (noting that it would be ironic if the judicial system disregarded humanistic values).

191. DRUMBL, *supra* note 155, at 17; see also Micah Halpern, *Above the Fold: Why Try Nazis in Their 90s*, JERUSALEM POST (Nov. 19, 2017), <https://tinyurl.com/y529vnjf> (“These trials are teaching moments for the world, especially for our youth. History will be introduced and written into the court record, media will cover the trial and the horrors that took place in Stutthoff will be exposed to some

trials of old Nazis for crimes committed decades ago—trials serve to educate the public on the atrocities committed and the forces that gave rise to them.¹⁹²

A tweak on this rationale seen in domestic jurisdictions is the objective of showing that that state is taking the crimes seriously.¹⁹³ As Roberto Garretón, a veteran Chilean human rights lawyer, explained to the press when asked what the state can do: “All [victims] can have from the state is that it give them justice, that the case be important to them, that the Ministers of the Interior, of Defense, the President of the Republic . . . take on the pain.”¹⁹⁴ Likewise, a commentator on the trials in Germany has argued that despite the bad “optics” of prosecuting the very elderly, the latest trials are “symbolically important, a way to show that a German legal system that struggled for decades to hold ex-Nazis accountable can finally bring them to justice.”¹⁹⁵

But, as I have argued elsewhere, it is also important to send the message that trials and potential sanctions comport with human rights.¹⁹⁶ It is also the right thing to do.¹⁹⁷ Trying or punishing perpetrators in a manner inconsistent with human rights undermines the human rights-affirming nature of trials and the message that respect for human rights is essential.¹⁹⁸

people who, before this, had no idea of the atrocities of the Holocaust. And hopefully, they will remember what they saw and heard and learned. In the end, it is the memory of the horror that brings justice to the victims. Trials and courts are the vehicles that get us there.”)

192. See ROSENBAUM, *supra* note 134, at 119-21 (also advocating trials on retributive and deterrent grounds).

193. See Alexandra Huneus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 100 (2010) (arguing that the Chilean judiciary in recent years began taking dictatorship-era human rights cases seriously as an effort to redeem the judiciary for its failings during the dictatorship).

194. CNN Chile, *Roberto Garretón Por Punta Peuco: “Es la Máxima Representación de la Discriminación,”* YOUTUBE (Sept. 12, 2015), https://www.youtube.com/watch?v=i_oTz2b0UZQ (“Lo único que pueden tener ellos [las víctimas] del estado es que les haga justicia, que les importe el caso, que a los ministros del interior, de la defensa, de la presidenta de la republica . . . asume el dolor.”). Garretón also advocated ending privileged treatment for Chileans convicted of crimes related to dictatorship-era repression and systemic human rights violations who are sent to a special (nicer) detention center to serve their sentences.

195. Gray, *supra* note 30 (“Not everyone is comfortable with the idea of prosecuting the very elderly. But some experts believe these trials have a moral purpose that goes beyond black-and-white legal responsibility. ‘The optics are not brilliant, obviously,’ says Lawrence Douglas, a legal scholar at Amherst College who has studied Nazi crimes. ‘But these new trials are considered symbolically important, a way to show that a German legal system that struggled for decades to hold ex-Nazis accountable can finally bring them to justice.’ As Douglas puts it, ‘It is better late than never.’”).

196. Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1 (2010).

197. See DARRYL ROBINSON, *EXPLORING JUSTICE IN EXTREME CASES: CRIMINAL LAW THEORY MEETS INTERNATIONAL CRIMINAL LAW* (forthcoming 2020) (advocating a deontic cosmopolitan coherentist approach to ICL interpretation, as in, interpreting ICL in light of duties owed to the accused, drawing from the best available evidence of those duties).

198. Sloane, *supra* note 155, at 42 (“It would be ironic and counterproductive were [international criminal law] trials to undermine some international human rights standards in an effort to vindicate

Thus, all stages of the criminal process must comport with human rights norms vis-à-vis treatment of the elderly in the criminal justice system. As seems to be common practice at international criminal courts,¹⁹⁹ trials must accommodate the particular needs of elderly alleged atrocity criminals in trials. If convicted and sentenced to imprisonment, people should be provided adequate medical care.²⁰⁰ If incarceration is or becomes fundamentally incompatible with medical needs of people convicted of atrocity crimes, they should be transferred to a more appropriate setting, such as a hospital or home.²⁰¹ This transfer to a less punitive setting arguably dilutes the message of condemnation for the atrocities committed, but any court judicial orders for such arrangements can take care to condemn the underlying crimes and craft and publicize the human rights-affirming message. This is something of a Michelle Obama-ian “they go low, we go high” for atrocity crimes.

As to sentencing, international human rights law appears not to require that age be given consideration at sentencing, nor does it preclude the consideration of age at sentencing. However, since many international courts already contemplate consideration of age as a factor with respect to potential reductions in sentences, it would be far from aberrant for domestic jurisdictions to do so as well. As noted above, at the ad hoc tribunals, judges were directed to sentence based on such factors as “gravity of the offense and the individual circumstances of the convicted person” in light of “the general practice regarding prison sentences” in the former Yugoslavia and Rwanda, respectively.²⁰² Whether or not advanced age was considered an appropriate sentencing characteristic varied by trial chamber.²⁰³ Likewise, the ICC statute and Rules of Procedure contemplate the individual circumstances of the defendant, including age and health, as relevant to sentencing and that poor mental or physical health or advanced age are considerations that could support sentence reductions.²⁰⁴

others.”); *see also* Damaska, *supra* note 190, at 355-56 (noting that it would be ironic if the judicial system disregarded humanistic values).

199. At the ECCC, courtrooms have been specially equipped to meet the health needs of the elderly defendants. *See* Fournet & Drumbl, *supra* note 15. At the ICTY, there were also frequent court breaks so defendants could attend to medical needs. As noted above, the Bruno Dey trial in Germany took place for only two-hours a day to accommodate the elderly defendant.

200. *See supra* Part III.C (discussing international human rights norms related to ensuring adequate health care for the elderly and persons in detention).

201. This has been the case for some of the elderly Nazis convicted in Germany. Andrew Nagorski, *Here's Why We Have to Put the Last Nazi Death Camp Guards on Trial*, DAILY BEAST (Apr. 13, 2017), <https://tinyurl.com/yyqok7o2> (“Some of these late convictions, such as that of former SS Captain Erich Priebke, who organized the execution of 335 men and boys, including 75 Jews, near Rome in 1944, resulted in house arrest, since he was too ill to serve his life sentence in prison.”).

202. ICTY Statute, *supra* note 145, art. 27; S.C. Res. 1966, annex 1, art. 26 (Dec. 22, 2010); Statute of the International Tribunal for Rwanda, art. 23 (as amended Jan. 31, 2010) [hereinafter ICTR Statute].

203. *See* discussion *supra* notes 122-24.

204. *See* discussion *supra* notes 125-28.

Permitting judges to consider reduced penalties or alternative forms of incarceration based on age and health, which may spare some perpetrators of heinous acts years of prison, may be deeply dissatisfying for victims and family members of victims and even members of the public. Estela de Carlotto, leader of the Grandmothers of the Plaza de Mayo, has stated “our organization rejects this type of decision given by judges that converts home detention into a privilege for persecutors. The only place for these genocidaires is in ordinary jail.”²⁰⁵

Victims, family members of victims, and even the general public may well react badly to perceived leniency on atrocity criminals. In Argentina, hundreds of thousands of people took to the streets to protest a 2017 Supreme Court decision allowing for early release of a prisoner convicted for human rights crimes during the dictatorship under the country’s then-existing two-for-one rule.²⁰⁶ Days later, the Argentine Congress passed a law making the rule inapplicable to people convicted of dictatorship-era human rights crimes.²⁰⁷ The public was not unhappy about the two-for-one rule generally, but rather its application to persons convicted of gross human rights violations. Although this decision and public backlash was not rooted in the health needs of defendants, it illustrates the potential unpopularity of being perceived to go easy on atrocity criminals.

If expressing condemnation for crimes is the primary objective of trials and prison is off the table for at least some elderly defendants or convicts, it begs the question whether such trials of elderly persons for international crimes add anything more than a truth commission. This Article cannot hope to do justice to the robust debate over the merits of truth commissions versus trials and the compatibility of the two transitional justice tools.²⁰⁸

205. Andrés Klipphan, *La Mayoría de los Genocidas Condenados Están en sus Casas con Prisión Domiciliaria*, INFOBAE (Oct. 1, 2018), <https://tinyurl.com/y2bnch6y> (“[N]uestra organización rechaza este tipo de decisiones dictada por los jueces que convierten la prisión domiciliaria en un privilegio para los represores. El único lugar para los genocidas es la cárcel común, no sus casas o la calle.”).

206. The two for one rule permitted convicted persons to get two days of credit on their sentences for every one day spent in pre-trial detention. Daniel Politi, *Argentines Fight Court’s Leniency for Human Rights Crimes*, N.Y. TIMES (May 13, 2017), <https://tinyurl.com/mglbtfd>.

207. Caroline Stauffer & Maximiliano Rizzi, *Argentines Protest Supreme Court Ruling on Dirty War Sentences*, REUTERS (May 10, 2017), <https://tinyurl.com/y3lf39ot>; *People Power: Argentina Blocks Early Release for Human Rights Criminals*, EURONEWS (May 11, 2017), <https://tinyurl.com/y45baxgq>.

208. See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 20 (2d ed. 2010) (“Truth commissions are typically tasked with some or all of the following goals: to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to “counter impunity” and advance individual accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past . . . The first and most straightforward objective of a truth commission is sanctioned fact-finding: to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.”); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 58-59, 88-89 (1998) (arguing that truth commissions may be better response to mass atrocity than trials at achieving some goals, including gaining “public acknowledgement of harms” and “accounts, as full as possible, of what happened,” “restoring dignity to victims” and reconciliation); Hun Joon Kim & Kathryn Sikkink, *How Do Human Rights Prosecutions*

Moreover, a decision whether to pursue perpetrators of atrocity crimes via prosecutions, to set up a truth commission, or to do both, is a multi-faceted inquiry, and is unlikely, in most cases, to ride on the age of the perpetrators.²⁰⁹

However, it bears noting that the answer to whether a trial without the possibility of imprisonment upon conviction for some participants offers anything in expressive terms beyond a truth commission likely depends on the particular truth commission, trial, and potential defendants. Truth commissions abound, and they have taken widely varying forms. Again, many do not name perpetrators, but there are some notable exceptions.²¹⁰ Many are circumscribed in time and have limited investigative powers. Many focus on broader patterns and less on individual actors. By contrast, in a criminal prosecution, the perpetrators' acts are assigned legal labels—genocide, crime against humanity, war crime, etc. Legal labels, on the one hand, may be limiting, particularly in domestic courts where legality problems may limit domestic courts to convicting perpetrators for domestic crimes,²¹¹ but the naming of international crimes also may help to situate the acts in a narrative of international opprobrium.

And, after a criminal prosecution, many, albeit not all, perpetrators will be punished.²¹² The punishment itself, particularly imprisonment where people convicted of atrocity crimes are imprisoned alongside ordinary criminals, arguably expresses something beyond the exposition of facts and the labeling of the perpetrator's crimes. Even for infirm individuals who are given home or hospital confinement rather than prison, their freedom is still

Improve Human Rights after Transition?, 7 INTERDISC. J. HUM. RTS. L. 69 (2012); Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction*, 88 INT'L REV. RED CROSS 245 (2006); Scharf, *supra* note 185.

209. Hayner, *supra* note 208, at 94 (“Whether trials result from the work of the commission is usually decided by many factors outside of a commission’s control: the strength and independence of the judiciary; political will to challenge powerful perpetrators; the strength of independent entities to push for accountability or block or overturn an amnesty; and the skill, experience, and resources of a prosecutor to move on big cases.”).

210. In contrast with many prior truth commissions, such as those in Argentina and Chile, the South African Truth and Reconciliation Commission (TRC) did name perpetrators. 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, at 90, ¶ 152 (1998) (“The Act required the publication of the names of those who received amnesty in the Government Gazette.”). El Salvador’s truth commission likewise named perpetrators. See Priscilla B. Hayner, *Fifteen Truth Commissions 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 102, 647 (1994) (“Few issues have attracted as much controversy around truth commissions as the question of whether a commission should publicly name those individuals found to be responsible for human rights crimes.”).

211. See Davidson, *supra* note 142.

212. The second prosecution of Ríos Montt in Guatemala, who was found incompetent to stand trial, involved something of a hybrid between a prosecution and a truth commission, wherein Ríos Montt was prosecuted in a High Risk Court in a criminal trial, but one in which, from the outset, the possibility of a sentence was off the table based on his mental incompetency. See sources cited *supra* note 14.

constrained, and the constraints not only punish but also express a judicial assessment of the appropriateness that the person be punished.

One advantage of a truth commission of particular relevance here is that it does not require a competent defendant who is healthy enough to attend a trial or set up the unrealizable expectation that the defendant will be punished in a manner proportional to their crimes. Of course, those too ill to participate in criminal proceedings are likely too ill to participate in a truth commission, though a truth commission that will not punish reduces incentives to malingering. A truth commission could, however, still pursue the “truth” of what happened, naming the perpetrator or not, and express condemnation of the atrocities. Thus, for atrocities that have occurred in the very distant past, where defendants are too infirm to participate, a truth commission, if a viable alternative, may be a superior choice.

C. Practical Implications for Prosecuting and Punishing Elderly Persons for Atrocity Crimes

Accepting that prosecuting and punishing even elderly perpetrators of atrocity crimes may serve the purposes of international criminal justice and that international human rights law does not prohibit the detention of the elderly on age grounds alone, practical questions about detention and punishment of offenders remain. For defendants on trial at international tribunals, housed separately in The Hague or elsewhere, it may be easier to accommodate elderly persons. There is a relatively small number of defendants, and relatively abundant resources for the provision of medical care,²¹³ as well as an awareness of the distinct characteristics of international criminal defendants, including their ages, the length of their detentions, distance from home, and trust issues.²¹⁴ Even then, accommodating

213. See, e.g., ICTY Manual on Developed Practices 179 (2009), <https://tinyurl.com/y2ex62hv> (“As a result of this medical profile, the UNDU is equipped to handle a range of medical situations involving the detainees. The UNDU Medical Service has a small but well-equipped medical clinic that undertakes diagnostics and treatment of detainee illnesses and injuries. At admission, all detainees receive an extensive medical examination tailored to produce a comprehensive medical profile that includes a full set of blood analyses. Medical care provided by the UNDU Medical Service includes first line healthcare including mental healthcare.”).

214. See, e.g., *id.* at 178 (“Detention Unit staff awareness of the detainee population. The UNDU operations are governed by the presumption of innocence, and the principle of respect between staff and detainees. The monitoring of detainees is a critical aspect of the UNDU’s task. Experience has shown that all UNDU staff must be aware of the individual aspects of each detainee. The detainee population housed in the UNDU has a unique profile which informs and determines the UNDU’s operation and focus: the detainees are not habitual criminals; most detainees are being deprived of their freedom for the first time; the detainees are held on remand for long periods; the detainees are *older than the average prisoner in a detention facility*, have fewer coping mechanisms for dealing with the prison environment, and are of increased age and medical complications; most detainees have (or had) important or high status in their countries or regions; many of the detainees have a higher than average intellect when compared to a national detention setting; there is high media interest in the ICTY and individual cases; the distance from the detainees’ homes, families, familial social support network,

detainees' medical needs has been a challenge.²¹⁵ In domestic jurisdictions, the situation may be more challenging as resources are often scarcer.

Persons convicted of atrocity crimes at international tribunals have received early release, sometimes based on age or ill health. The statutes of the ICTY and the ICTR permit pardon or commutations of sentences, pursuant to the law of the incarcerating state and in accordance with "the interests of justice" and "general principles of law."²¹⁶ According to one study on the topic, the ICTY has often considered old age in early release decisions.²¹⁷ At the ICC, the Rome Statute likewise contemplates the possibility of a later sentencing reduction and "advanced age" is listed as an "individual circumstance" the court may consider in reviewing a request for sentencing reduction.²¹⁸

cultural environment and the lack of familiarity with the surroundings are considerable; the psychological status of each detainee must be taken into consideration. A.1.2 Medical patient and staff trust issues 11. It is vital to the UNDU's functioning for detainees to have confidence and trust in the staff. However, this trust relationship can be undercut by the natural distrust, even paranoia, of detainees arrested and brought into a foreign country and culture, often against their will. Keeping the Medical Officer free from the judicial process as much as possible, and maintaining the confidentiality of all medical records, help strengthen the trust relationship."

215. *See, e.g., id.* at 178 ("Health of detainees 8. The health of detainees is a crucial consideration for any international court or tribunal, and an important factor for efficient trial proceedings. The UNDU management has struggled to meet the increasing healthcare requirements of detainees. Even though the UNDU is a remand institution, the average period of detention is significantly longer than that of most national remand institutions, and possibly closer in length to that of ordinary penitentiaries. This situation has a detrimental effect upon the mental state of the detainees as they work their way through trials and appeals over an extended period of time. The conditions can cause long term stress and can induce or exacerbate health conditions. Also, the average age of a detainee at the UNDU is currently 57 years, which is significantly higher than in national detention facilities. Most detainees arrive at the UNDU with various pre-existing health problems due to their age. 9. The detainees often suffer health ailments due to lifestyle issues earlier in life and advanced age. Post-Traumatic Stress Disorder (PTSD) and other psychiatric disorders are very common. Due to the nature of PTSD and psychiatric disorders, the fostering of personal relationships with the detainees while providing medical care becomes crucial.").

216. The ICTR statutes provided: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. The President of the International Tribunal for Rwanda, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law." ICTR Statute, *supra* note 145, art. 27.

217. Jonathan H. Choi, *Early Release in International Criminal Law*, 123 *YALE L.J.* 1784, 1815 (2014) ("Three out of the seven criminals at the high-profile Nuremberg Trials were released early for old age or ill health; similarly, the ICTY often considers old age in its early release decisions.").

218. ICC Rules of Procedures & Evidence, *supra* note 126, Rule 223 ("In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria: (a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime; (b) The prospect of the resocialization and successful resettlement of the sentenced person; (c) Whether the early release of the sentenced person would give rise to significant social instability; (d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release; (e) *Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.*") (emphasis added).

What then for persons convicted of atrocity crimes in domestic courts? When possible (as in, when their mental and physical health needs can be met adequately in prison and their safety ensured), elderly persons convicted of atrocity crimes should be punished and, normally, housed with people convicted of ordinary crimes.²¹⁹ Avoiding special (lighter) treatment is retributively appropriate as country club prisons are unlikely to give atrocity criminals their just deserts. Moreover, to the extent deterrence works in ICL (or at all), the message to would be atrocity criminals that they might in their old age have to go to a luxury jail may not be enough of a stick. Perhaps most importantly, though, detaining atrocity convicts with ordinary criminals, where possible, sends the strongest message of condemnation. They are not special political prisoners owed special privileges. They are criminals.

Caveat: it may not always be possible. Political considerations and, yes, old age and infirmity may at times make it impossible to detain atrocity criminals with ordinary criminals based on security or medical concerns. Depending on the political context, particularly in the domestic context, those convicted of atrocity crimes may be targeted in prison and the elderly may be especially vulnerable targets.²²⁰ Thus, decisions on where to house atrocity defendants and convicts is fact and context-specific, and for elderly defendants, like other defendants, consideration must be given to whether their safety can be assured and their medical needs met. If not, judges or decisionmakers should rely on whatever safety valve from incarceration exists in that jurisdiction. If none exists, one should be created. What seems critical is that if there be special preferential treatment for elderly or infirm people in detention, it should not be exclusively for elderly persons accused or convicted of atrocity crimes.

In Chile, for example, the housing of persons convicted of human rights crimes²²¹ has proven highly controversial. The human rights community has fought for years to close the special prison for human rights criminals of the

219. In Chile, for example, victims and human rights groups have denounced the special prison for dictatorship-era human rights abusers as a country club. *Chile's Ex-Army Chief Defends Controversial Prison for Human Rights Offenders*, SANTIAGO TIMES (July 9, 2017), <https://tinyurl.com/yxbsdey5> (“Punta Peuco is a prison reserved for human rights violators built in 1995 in the town of Tiltil, some 35 kilometers (22 miles) north of Santiago and defined by victims of the dictatorship as a ‘five star’ prison, with tennis courts, patios on which to cook barbecue and large dining rooms.”).

220. Aging Inmate Comm. of the MSBA Correctional Reform Council, *Aging Inmates: Correctional Issues and Initiatives*, 2011 MD. B.J. 22 (“Some older prisoners live in fear and suffer at the hands of younger inmates in prison, who have been known to hustle and cheat older inmates in a wolf-prey syndrome.”).

221. Technically, they have been convicted of domestic criminal offenses but courts have taken pains to clarify that what they are really addressing is crimes against humanity and war crimes. This characterization was also necessary to avoid the domestic amnesty and statute of limitations. *See generally* Davidson, *supra* note 138.

dictatorship.²²² Although one facility was closed, another special prison for persons convicted of dictatorship-era human rights violations, Punta Peuco, remains open.²²³ The human rights community laments the special treatment given these prisoners. It bears recognizing, however, that for elderly human rights convicts, special facilities may address some of the security and medical concerns about detaining the elderly and thus undermine arguments for their release. The problem is not a special prison for the elderly—that is, if anything, laudable. The problem is that it is a special prison for *these* elderly prisoners only. As noted above, running alongside the fight over whether to close Punta Peuco in Chile, the Chilean right and family members of human rights violators have been promoting legislation to permit humanitarian release of elderly prisoners.²²⁴

This Article does not weigh in on the merits of any proposed Chilean legislation, short of noting that if there be any humanitarian release provision, it should benefit all elderly criminals, not just those convicted of human rights crimes.²²⁵ Nevertheless, this example serves to illustrate that arguments in the ICL context bleed over into the domestic criminal context.²²⁶ Although there are strong arguments for prosecuting and punishing atrocity criminals, even old ones, we must be mindful that any efforts to excuse mistreatment, including incarceration incompatible with the safety of prisoners or their medical needs, will make it easier to justify ignoring the human rights of ordinary prisoners and may stymie important reforms in that area. This is not the example ICL should seek to set.

222. Alejandra Jara, *Punta Peuco: La Historia tras la Polémica Cárcel que no fue Cerrada por Bachelet*, LATERCERA (Mar. 13, 2018), <https://tinyurl.com/y4634odz>.

223. *See id.*

224. *See discussion supra* note 194.

225. *Cf.* Medrano & Castillo, *supra* note 146 (“Cabe recordar que según cifras del Servicio Nacional del Adulto Mayor (Senama), existen alrededor de diez mil reos que tienen más de 60 años de edad en recintos de Gendarmería, por lo que no queda claro si el debate sobre beneficios carcelarios apunta a todos ellos o sólo a los internos de Punta Peuco.”) [“It bears remembering that, according to the figures from the National Service for Elderly Persons (SENAMA), there are approximately ten thousand prisoners over the age of 60 in prison, and it is thus not clear whether the debate over prison benefits [alternative forms of incarceration] refers to all of them or just the prisoners at Punta Peuco.”].

226. *Cf.* Silvio Cuneo Nash, *Columna: ¿Cerrar Punta Peuco?*, CLINIC (Mar. 9, 2018), <https://tinyurl.com/y3obd54c> (“Es indignante que mientras los presos pobres tengan que subsistir en depósitos insalubres, los violadores de derechos humanos gocen de un encarcelamiento relativamente digno en Punta Peuco. Sin embargo, resulta inaceptable que este gobierno, en vez de preocuparse por mejorar las condiciones carcelarias comunes, prefiera bajar el estándar de vida de una cárcel digna.”) [“It is shocking that while poor prisoners have to live in unsanitary conditions, violators of human rights enjoy a relatively humane imprisonment in Punta Peuco. Nevertheless, it is unacceptable that this government, instead of occupying itself with improving the conditions in ordinary jails, prefers to lower the living standard of an adequate prison.”].

V. CONCLUSION

Elderly persons must be treated in a manner consistent with their human rights, even when accused or convicted of heinous crimes. These rights include adequate medical treatment, nondiscrimination, access to justice, fair trials, respect for dignity, and humane treatment. Nevertheless, human rights norms do not envisage age as an impediment to prosecution or imprisonment of elderly persons for atrocity crimes. Moreover, the prosecution and punishment of elderly perpetrators of atrocities still have the potential to serve the aims of international criminal justice, including retribution, deterrence, incapacitation, expressing condemnation of the crimes, and educating the community.

Where detention is inconsistent with humane treatment (or other human rights norms) based on serious medical or mental health problems that exceed the capabilities of the relevant institutional setting, a defendant or convicted person should benefit from alternative forms of or alternatives to incarceration—whether in a hospital setting or at home.

Wherever possible, particularly in the absence of robust alternative transitional justice mechanisms, the person should still be tried, as atrocity trials serve an expressive and didactic function—perhaps even more so for crimes that occurred in the distant past where there is a real risk of the crimes falling from the public consciousness. Where, however, even the proceedings cannot be conducted humanely, in particular based on an elderly defendant's serious physical or mental incapacity, such prosecutions run afoul of international human rights norms and risk undermining the most important expressive function of atrocity trials: promoting respect for human rights.

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