INTRODUCTION

Debates about pluralism are all the rage in international criminal scholarship. Whereas a mere twenty-five years ago, crimes such as genocide, war crimes, and crimes against humanity were greeted with impunity, now the international landscape is dotted with criminal courts and tribunals established to prosecute those who commit such offenses. At the same time that international criminal courts have proliferated, domestic courts have also begun prosecuting international crimes, and the dramatic diversity of international criminal justice has become apparent. That diversity extends both to substance and procedure, and it gives rise to startlingly different rules and results, depending on which international or domestic court is doing the prosecuting. Plainly said, although the moniker “international criminal law” implicitly...
suggests a unified body of norms, no such universal norms exist. Sometimes, international courts apply international laws. But sometimes they apply domestic laws. When applying domestic laws, international courts sometimes apply the laws of a particular domestic jurisdiction, but at other times they apply laws that are a synthesis of a number of domestic jurisdictions. When international courts apply domestic laws, it is sometimes pursuant to express instructions in their statutes, but it is sometimes not. When international courts apply international rules, they sometimes apply the same rules that other international tribunals apply (even though their statutes might differ on the point in question), and at other times they apply different rules (even though their statutes might be the same on the point in question). Finally, domestic courts that prosecute international crimes typically apply their own laws, but because such prosecutions are so rare, domestic courts frequently borrow from the international tribunals and the sometimes-richer jurisprudence to be found there.

In recent years, international criminal law’s increasing diversity has been matched by an increasingly robust scholarly discussion of that diversity. Initially labeled “fragmentation,” early scholars expressed concern that it would lead to conflicts between international courts, forum shopping, and a general erosion “in the unity of international law.” More recently, the pejorative “fragmentation” has given way to the more neutral “pluralism,” but whatever term is used, scholarly debate continues over its normative implications. Whereas some scholars focus on pluralism’s tendency to undermine the reliability, predictability, and credibility of a legal regime, others accept it as a necessary and potentially beneficial feature of international law in general and international criminal law in particular.

This Article extends the scholarly discussion of pluralism to a realm in which that discussion is particularly needed: sentencing. Throughout international criminal law’s history, sentencing has been approached from a universalist perspective. Early sentencing scholars criticized international courts for issuing inconsistent sentences that treat similarly situated defendants differently and that lead to unfair disparities, uncertainty, and incoherence.

Whereas some of these criticisms focused on inconsistent sentencing practices within one court, most focused on inconsistencies across courts. More recently, scholars have conducted empirical studies that suggest that sentencing across international courts is not as inconsistent as it initially appeared. However, even these scholars recognize the limitations of their studies, and they exhort the international courts to improve various aspects of their sentencing practices in order to make sentencing across international courts still more consistent and coherent.

Sentencing scholars thus may disagree about the level of sentencing consistency that exists across international courts, but both sides to this debate presume a normative position that this Article challenges. That is, they presume that sentencing should be consistent across international courts. This
normative stance is also apparent in the work of scholars who seek to improve sentencing practices through the identification of appropriate normative principles. For instance, William Schabas has suggested that international criminal sentencing be guided by human rights principles, which favor rehabilitative over retributive goals.12 Allison Danner and Jens Ohlin, among others, reach the opposite conclusion and contend that international criminal sentencing should be based on retributive norms.13 Robert Sloane advocates international sentencing that is guided by expressive notions of punishment,14 whereas Mirko Bagaric and John Morss conclude that the only justification for the punishment of international criminals is general deterrence.15 Applying those and other theoretical principles, some sentencing scholars advocate relatively lenient sentences for international crimes,16 while others recommend much harsher penalties.17 Some scholars promote searching appellate review between the tribunals”); William A. Schabas, Sentencing by International Tribunals: A Human Rights Approach, 7 DUKE J. COMP. & INT’L L. 461, 481 (1997) (“Imposing a different sentence on [an ICTY defendant and an ICTR defendant] merely because of the place where the crime was committed is difficult to reconcile with the notion of equality before the law.”); Robert D. Sloane, Sentencing for the Crime of Crimes: The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda, 5 J. INT’L CRIM. JUST. 713, 716 (2007) (noting “the ultimate need for the international criminal justice system to develop a coherent, relatively uniform, sentencing regime”); Witsch, supra note 5, at 146 (arguing that, in sentencing its first defendant, the ECCC “should have relied more heavily on the existing body of international sentencing jurisprudence”). The Tribunals themselves seem to agree. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶¶ 12-15 (July 10, 2012) [hereinafter Lubanga Sentencing Decision]. In addition, prosecutors and defense counsels frequently point to sentences from other international tribunals to bolster their arguments that a given sentence should be harsher or more lenient. See, e.g., Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecution’s Document in Support of Appeal against the “Decision on Sentence Pursuant to Article 76 of the Statute,” ¶¶ 45-55 (Dec. 3, 2012) (appealing to SCSL sentences to support the argument that the ICC Appeals Chamber should increase the sentence imposed on Thomas Lubanga).


13. Danner favors retributivism on both theoretical and practical grounds. As for the former, she observes that retributivism’s core edict—that sentences should be determined in accordance with the harm inflicted on a victim—“is surely a legitimate metric in the sentencing decisions of the Tribunals.” Danner, supra note 11, at 452. Turning to practical concerns, Danner suggests that “retribution offers the Tribunals a sentencing method they can employ on a case-by-case basis without recourse to the complex calculations of costs and benefits endemic to the deterrent model.” Id. at 453. Ohlin, for his part, contends that the standard views of punishment fail when it comes to international crimes; consequently, he develops a retributive theory of sentencing that takes specific account of the consequentialist needs of international law. See OHLIN, supra note 5, at 388-92; see also Steven Glickman, Victims’ Justice: Legitimizing the Sentencing Regime of the International Criminal Court, 43 COLUM. J. TRANSNAT’L L. 229, 230 (2004).


as a means of ensuring fairness and consistency, while others seek the same end through sentencing guidelines. Some scholars are skeptical about the need and value of such guidelines, though, while still others take the middle path of advocating the use of flexible "guiding principles."

Although these proposals diverge in virtually every other respect, they share the same contestable feature that appears in the scholarship on sentencing consistency: these proposals assume that there is—or should be—such a thing as "international sentencing." That is, the proposals are intended to influence the development of a set of uniform international sentencing norms that apply in all of the tribunals and to all of the International Criminal Court (ICC)'s situations. Thus, in the jargon of the pluralism literature, they assume and promote a universalist conception of sentencing. To be sure, they typically do not announce that normative stance. Rather, most commentators simply discuss "international criminal sentencing" as though it is self-evident that such a thing does exist and should exist.

I argue that it should not exist.

At first glance, my position may seem counterintuitive. After all, a crime against humanity is a crime against humanity whether committed in Yugoslavia or Sierra Leone. The elements of the international crimes over which the tribunals have jurisdiction are largely the same across the tribunals, and the concepts underlying them are more similar still. Of course, international crimes can be committed in different ways. A crime against humanity, for instance, can involve murder or merely imprisonment, and it can feature 10,000 victims

18. See, e.g., JAN PHILIPP BOOK, APPEAL AND SENTENCE IN INTERNATIONAL CRIMINAL LAW 13 (2011); Clark, supra note 4.


20. Meernik & King, supra note 8, at 748-49.

21. AMBOS, supra note 5, at 302; D'ASCOLI, supra note 5, at 287-320; see also Barbora Holá, Consistency and Pluralism of International Sentencing, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 187, 204-06 (Elies van Sliedregt & Sergey Vasiliev eds., 2014) (recommending "narrative sentencing guidelines").

22. See Ohlin, supra note 5, at 399 ("International criminal law must establish a coherent theory of punishment applicable to its context."); Bagaric & Morss, supra note 15, at 191 (2006) (discussing the need for a coherent "international sentencing" framework); Uwe Ewald, 'Predictably Irrational' — International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices, 10 INT'L CRIM. L. REV. 365, 381 (2010) (discussing "international sentencing" as though it is a unified system); Galbraith, supra note 4, at 800 (criticizing the fact that "judgements both within and across tribunals contain wide disparities on questions like when such mitigating evidence should matter" and suggesting a "theoretical framework for when and how evidence of good deeds should matter for sentencing mitigation"); Ralph Henham, The Philosophical Foundations of International Sentencing, 1 J. INT'L CRIM. JUST. 64, 64 (2003); Pickard, supra note 19, at 138 ("For international criminal law to be valid it needs sentencing uniformity."); Schabas, supra note 11, at 481 ("Imposing a different sentence on [an ICTY defendant and an ICTR defendant] merely because of the place where the crime was committed is difficult to reconcile with the notion of equality before the law."); Sloane, supra note 14, at 53 (providing recommendations for developing "a fair, principled, and consistent regime for international sentencing").

23. One exception is Margaret deGuzman, who provides a preliminary defense for universalist sentencing norms. See deGuzman, supra note 16, at 24-28.
or one. These sorts of differences should lead to the imposition of different sanctions. However, these sorts of differences do not give rise to claims of sentencing inconsistency. What is inconsistent by contrast—and inappropriate according to commentators—is for a crime against humanity that is similar to another crime against humanity to be sentenced differently depending upon the international court that is doing the prosecuting. To the extent those sorts of disparities exist, there may seem to be no justification for them.

In this Article, I will advance the pluralist view that those disparities not only can be justified but are normatively desirable. In doing so, I will challenge the two assumptions that underlie each of the universalist views of sentencing that I described above. First, scholars who uncritically expect international tribunals to sentence their defendants consistently with other international tribunals presume that the international courts form part of a unified international criminal justice system. Second, scholars who advance sentencing principles that are intended to apply to all of the international courts presume that international criminal law, or at least international criminal sentencing, is or should be a uniform body of norms. After setting the stage in Part I by briefly describing the law that governs sentencing at the international courts, I will challenge each of these presumptions in Parts II and III.

Part II acknowledges that it might have been reasonable to presume a unified criminal justice system in the very early years of the modern international criminal justice era; however, it no longer is. Indeed, Part II asserts that, rather than constituting components of a unified international criminal justice system, the international courts are most accurately conceived as discrete entities that provide supplemental criminal jurisdiction to domestic courts that are either unable or unwilling to prosecute offenders themselves. Because international courts are best conceived as disparate, independent bodies, we should not reflexively expect them to sentence consistently with one another. Just as we would not necessarily expect the courts of California to sentence first-degree murder in the same way as the courts of Texas—even if their substantive and sentencing laws were similar—we cannot expect the International Criminal Tribunal for the former Yugoslavia (ICTY) necessarily to sentence murder as a crime against humanity the same way that the Special Court for Sierra Leone (SCSL) does.

Although they are not part of a unified criminal justice system such that we can expect sentencing consistency, the international courts nonetheless could choose to adopt uniform sentencing principles and thereby create global norms of sentencing. However, in Part III, I assert that they should not. Part III first highlights the difficulty of agreeing upon shared sentencing norms across different cultures and conflicts and the concomitant likelihood—if such an effort is undertaken—of privileging the views and proclivities of Westerners (who are unlikely to be subject to these rules) over members of the Global South (who are far more likely to be subject to them). However, even if such practical difficulties did not exist, Part III contends that different mass atrocities are best punished through sentencing schemes that take account of their particular circumstances. A host of factors, including the nature of the
atrocities, the percentage of offenders who can be prosecuted, the responsiveness of the post-conflict government, and even the jurisdictional mandate of the international court in question, can be relevant to the goals a court should seek to accomplish and to the sentencing laws that it uses to do so.

Ideally, therefore, an analysis of these and many other circumstances would be undertaken in order to develop an optimal sentencing scheme for a given court or a given situation, in the case of the ICC. In the real world, however, much of the information relevant to such an analysis is unknowable at the time that crucial decisions must be made, so our ability to tailor a sentencing scheme to the particular circumstances in question is decidedly limited. One crucially important factor that is usually knowable, however, is the domestic sentencing norms governing both international and domestic crimes in the location where the atrocities occurred. In Part III, I argue that consideration of these norms provides the international courts valuable benefits, most notably in increased legitimacy for the international courts' own sentences. Victims of international crimes from Bosnia to Cambodia to Sierra Leone have long criticized international tribunal sentences.24 Incorporating domestic law into international sentencing will not magically silence domestic critics, but it will inject local norms into international prosecutions in a way that is particularly likely to enhance community buy-in and respect for those international criminal prosecutions. In addition, international sentences that are informed by domestic sentencing norms will reduce a truly unjustifiable sentencing inconsistency that has dogged the International Criminal Tribunal for Rwanda (ICTR) among other courts; that is, the sentencing inconsistency between offenders who are prosecuted by an international court and offenders who are prosecuted for similar crimes in domestic courts.

Incorporating domestic norms into international sentencing gives rise to certain implementation questions, and I address these questions in Part IV. First, I examine the optimal way in which to consider domestic law, which includes determining when domestic law should be considered and what influence it should carry. I next ask which jurisdiction's law an international court should consider. The answer will usually be straightforward when the conflict giving rise to the crimes occurred entirely on the territory of one state, but complexities can arise even on these facts, and additional complications must be addressed when the crimes span more than one state. Finally, Part IV advises international courts on how they should proceed when relevant domestic sentencing law either does not exist, cannot be ascertained, or is objectionable for one reason or another.

In some respects, my proposal returns us to the inception of the modern international criminal tribunals. As Part II describes, the sentencing provisions of the first two modern international tribunals instruct their trial chambers to "have recourse to the general practice regarding prison sentences" in the states where the crimes took place.25 The new tribunals immediately ignored that

24. See infra text accompanying notes 164-179.
instruction,26 most scholars supported the tribunals' willful blindness,27 and the ICC rejected consideration of domestic norms entirely.28 This Article recommends a different use for domestic law, and it bases its recommendation on a different normative foundation, but this Article nonetheless applauds the creators of the early tribunals for seeking to include domestic norms in international sentencing in some fashion. Many international scholars shun anything domestic, but if the intervening twenty years since the first tribunals were created have taught us anything, it is that international criminal justice needs the support of every major constituency. Incorporating domestic sentencing norms into international sentencing will be no panacea for the many challenges facing international criminal justice, but it will help secure the support of perhaps the most crucial constituency of all—local communities.

I. THE SENTENCING LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Because international sentencing is already the subject of numerous articles and monographs, this Part will only briefly summarize that body of law. The sentencing provisions of the international courts are characterized by their brevity, their similarity, and the discretion they grant to judges. The sentencing provisions of all of the courts delineate imprisonment as either the sole or the primary form of punishment,29 but they do little to constrain decision makers

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26. See infra text accompanying notes 33-36.
27. See Bassett, supra note 4, at 23 (arguing that "[c]omparing international and domestic sentences is inappropriate"); Mary Margaret Penrose, Lest We Fail: The Importance of Enforcement in International Criminal Law, 15 AM. U. INT'L L. REV. 321, 375 (1999) (noting that the recourse-to-domestic-practices "provisions, which tie sentencing practices to domestic sentencing patterns, are terribly disconcerting" and praising the Rome Statute for "distancing the ICC from sentencing procedures based primarily on domestic schemes"); William A. Schabas, Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals, 11 EUR. J. INT'L L. 521, 538 (2000) (describing the recourse-to-domestic-practices provisions as "virtually unworkable," "unnecessary," and "an unfortunate gesture to appease a spirit of zealous positivism"); Schabas, supra note 11, at 468-82 (criticizing the recourse-to-domestic-practices provisions and concluding that "[t]he solution may well be . . . to treat the issue of 'relevant practice' as directive but not binding"); Yuval Shany, Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals, 11 J. INT'L CRIM. JUST. 5, 21 (2013) (noting that "important differences between [international criminal law] and the applicable [domestic criminal law] rendered full harmonization between the sentencing practice of the ICTY and domestic courts impractical"). But see authorities cited infra note 209.
28. See infra text accompanying notes 41-45.
in any other way. The ICTY, ICTR, SCSL, and the Special Tribunal for Lebanon (STL), for instance, instruct trial chambers to “take into account such factors as the gravity of the offence and the individual circumstances of the convicted person,” but they provide little guidance as to how such factors should be taken into account, except to instruct the trial chambers (1) to consider (largely unnamed) aggravating and mitigating factors and (2) to have recourse to the sentencing practice of domestic courts in the location where the crimes took place. In response to the former provision, the trial chambers developed a lengthy list of aggravating and mitigating factors, on which they routinely rely in their sentencing determinations. In response to the latter provision—instructing trial chambers to have recourse to domestic sentencing practices—the trial chambers did nothing. In its very first case, the ICTY determined that it was obliged to consider the sentencing practices of the courts of the former Yugoslavia but was not bound by them. The ICTR reached the same conclusion, and the SCSL went so far as to hold that it did not need even to consider Sierra Leonian sentencing law unless the accused had been convicted of Sierra Leonian crimes. Indeed, commentators agree that, for

30. STL Statute, supra note 29, art. 24(2); ECCC Statute, supra note 29, art. 10; SCSL Statute, supra note 29, art. 19(1); Rome Statute, supra note 29, art. 77; ICTR Statute, supra note 25, art. 23(1); ICTY Statute, supra note 25, art. 24(1).


32. For a detailed treatment of the tribunals’ use of aggravating and mitigating factors, see D’ASCOLI, supra note 5, at 42-43, 150-84; Barbora Holá, Sentencing of International Crimes at the ICTY and ICTR, 4 AMSTERDAM L. FORUM 3, 14-22 (2012); Stephen M. Sayers, Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia, 16 LEIDEN J. INT’L L. 751, 761-67 (2003); Schabas, supra note 11, at 483-98.


35. See Prosecutor v. Brima, Case No. SCSL-04-16-T, Sentencing Judgment, ¶ 32 (July 19, 2007) [hereinafter Brima Sentencing Judgment]. This conclusion is not compelled by the text. Admittedly, the text of the SCSL and STL provisions varies slightly from that of the ICTY and ICTR provisions. The SCSL provision, for instance, reads, “In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.” SCSL Statute, supra note 29, art. 19(1) (emphasis added). The STL provision likewise includes the words “as
one reason or another, the tribunals have largely ignored domestic sentencing practices in their own sentencing determinations.\(^{36}\) In reaching sentencing decisions, the tribunals have, however, relied upon their own precedents\(^{37}\) and the precedents of other international courts.\(^{38}\)

As for the ICC, its sentencing provisions are similar to those of the ad hoc tribunals. The primary differences are that the ICC’s sentencing provisions (1) delineate a non-exhaustive list of aggravating and mitigating factors;\(^{39}\) (2) permit the imposition of fines;\(^{40}\) (3) constrain very slightly judicial discretion regarding imprisonment;\(^{41}\) and, most notably, (4) do not require sentencing appropriate."\(^{42}\) STL Statute, \textit{supra} note 29, art. 24(1). As Shahram Dana has observed, the addition of the words “as appropriate” makes clear that Sierra Leonean and Lebanese laws were not binding on the tribunals, Shahram Dana, \textit{The Sentencing Legacy of the Special Court for Sierra Leone}, 42 GA. J. INT’L & COMP. L. 615, 658-59, but it does not suggest that recourse to Sierra Leonean law is required only when Sierra Leonean crimes will be sentenced, \textit{id. at} 676; Margaret M. deGuzman, \textit{The Sentencing Legacy of the Special Court for Sierra Leone, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW} 373, 375 (Charles C. Jalloh ed., 2013).

36. \textit{See} Holá, \textit{supra} note 21, at 193 ("[T]he directive to have recourse to local sentencing practices was not taken seriously by the judges."); Faiza P. King & Anne-Marie La Rosa, \textit{Penalties Under the ICC Statute, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT} 311, 314 (Flavia Lattanzi & William A. Schabas eds., 1999); KAI AMBOS, 2 \textsc{TREATISE ON INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING} 282 (2014) (referring to the fact that domestic law invoked “as mere lip service”); Bassett, \textit{supra} note 4, at 23; Shahram Dana, \textit{Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing}, 99 J. CRIM. L. & CRIMINOLOGY 857, 897 (2009); Holá et al., \textit{supra} note 9, at 541 (noting that “judges cite applicable domestic provisions mostly as a formality”); Alexander K.A. Greenawalt, \textit{The Pluralism of International Criminal Law}, 86 IND. L. J. 1063, 1079 (2011); Sayers, \textit{supra} note 32, at 760. \textit{But see} Penrose, \textit{supra} note 27, at 376-77 (asserting, in 1999, that the tribunals were “fixated on” domestic practices”); Beresford, \textit{supra} note 19, at 49 (assuming that the divergences in the sentencing practices of the ICTY and ICTR stemmed from their reliance on the domestic sentencing laws of the former Yugoslavia and Rwanda, respectively).


41. Whereas the ICTY, ICTR, and STL can impose any term of imprisonment, up to and including life, ICTY RPE, \textit{supra} note 31, R. 101; ICTR RPE, \textit{supra} note 31, R. 101; STL Statute, \textit{supra} note 29, art. 24(1), ICC judges are authorized to impose a term of imprisonment of up to thirty years or a life sentence, Rome Statute, \textit{supra} note 29, art. 77. Judicial discretion is also slightly constrained, but in different ways, at the SCSL and ECCC. SCSL judges are not authorized to impose terms of life imprisonment, but they can impose a term of any number of years, SCSL RPE, \textit{supra} note 31, R. 101, and they have imposed sentences that effectively constituted life sentences, Prosecutor v. Sesay et al., Case No. SCSL-04-15-T-1251, Sentencing Judgment, Disposition (Apr. 8, 2009) (sentencing Sesay to 52 years’ imprisonment); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment, Disposition (May 30, 2012) (sentencing Taylor to fifty years’ imprisonment). ECCC judges, like their counterparts at the ICTY, ICTR, STL, and ICC, are also permitted to impose life sentences, but their sentences, unlike those of their counterparts, are additionally subject to a minimum five-year sentence. ECCC Statute, \textit{supra} note 29, art. 39.
judges to have recourse to any domestic sentencing laws or principles. During the early stages of negotiations, proposals were made to include domestic law in the ICC’s sentencing provisions in some fashion. For instance, the International Law Commission’s Draft Statute for an International Criminal Court had authorized the ICC to have regard to the domestic penalties of the defendant’s nationality state or the state where the crime took place when deciding on its own sentences. Later, during the drafting of the Rome Statute, certain states pressed for an even larger role for domestic sentencing law, primarily as a means of including the death penalty in the ICC’s panoply of sanctions. A proposal advanced by fifteen Middle Eastern states, for instance, authorized the ICC actually to impose “one or more of the penalties provided for by the national law of the State in which the crime was committed.”

However, in the end, these proposals were rejected. Those opposed to them argued that recourse to domestic sentencing law “would allow for different regimes of penalties to be applied by the Court and would mean the application of a discriminatory system of sanctions.”

Because international sentencing provisions do not serve to constrain the judges’ discretion in any meaningful way, early litigants who were concerned with perceived inconsistencies and unfairness encouraged the trial chambers to constrain their own discretion either by ranking international crimes by their gravity or by developing sentencing guidelines that would help the tribunals sentence consistently. The tribunals declined both invitations. Early ICTY cases did hold that, all things being equal, crimes against humanity are more serious than war crimes, but later cases came to the opposite conclusion, so

42. The Rome Statute’s Article 21, on “applicable law,” does make reference to the law of the state that would otherwise have jurisdiction, but it does not reference sentencing in particular; moreover, it instructs the court to apply such domestic law only as a last recourse.


46. For instance, in the same case, Furundžija, the defendant urged the Appeals Chamber to adhere to a hierarchy of crimes articulated in past cases, whereas the prosecution encouraged the Appeals Chamber to develop sentencing guidelines. See Prosecutor v. Furundžija, Case No. IT-95-171-A, Judgment, ¶¶ 217, 224 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000) [hereinafter Furundžija Judgment].


48. See Furundžija Judgment, supra note 46, ¶¶ 240-43 (concluding that “there is in law no distinction between the seriousness of a crime against humanity and that of a war crime”); Stakić Judgment, supra note 37, ¶ 375 (“There is no hierarchy of the crimes within the jurisdiction of the Tribunal.”); Prosecutor v. Strugar, Case No. IT-01-042-T, Judgment, ¶ 459 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v. Tadić, Case No. IT-94-1A, Judgment in Sentencing Appeals, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000) [hereinafter Tadić Judgment in Sentencing Appeals]. According to the Appeals Chamber, the appropriate punishment “level in any particular case [should be] fixed by reference to the circumstances of the case” and not by the labeling of
no hierarchy was created. Similarly, ICTY Trial Chambers initially seemed well-disposed to adopting sentencing guidelines, but its Appeals Chamber decided against them in 2000, holding that it would be inappropriate to "establish a definitive list of sentencing guidelines for future reference," when only certain matters relating to sentencing were before the Chamber at the time.

The virtually unfettered sentencing discretion provided to international judges has had the advantage of allowing them to individualize sentences by taking account of a variety of large and small factors. At the same time, the virtually unfettered sentencing discretion wielded by international judges has had the disadvantage of leading to wide variations among sentences within the same court and, as relevant here, across courts. It became apparent early on, for example, that the ICTR imposed considerably longer sentences than did the ICTY. Whereas some saw unjustified inconsistency in that divergence, others have sought to explain it either by pointing to the different crimes that formed the basis for convictions at each of the tribunals or by utilizing elaborate empirical methods. An example of the latter is Silvia D'Ascoli, who examined ICTY and ICTR sentencing practices and found "general patterns of consistency" in regard to sentence length and the influence of aggravating and mitigating factors. Barbora Holá et al. reached similar conclusions, finding that the sentencing practice of the ad hoc tribunals is as consistent as the sentencing practice of domestic courts. However, a variety of factors

the particular crime. Tadić, Judgment in Sentencing Appeals, supra, ¶ 69. However, some ICTR Chambers have labeled genocide the "crime of crimes" and indicated that it is more serious than other international crimes. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 14 (Sept. 4, 1998); Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 15 (Feb. 5, 1999). But see Prosecutor v. Kayishema Case No. ICTR-95-1A, ¶ 367 (June 1, 2001) (remarking that "there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are 'serious violations of international humanitarian law,' capable of attracting the same sentence").

49. Prosecutor v. Aleksovski, Case No. IT-95-14, Judgment, ¶ 243 (Int'l Crim. Trib. for the Former Yugoslav June 25, 1999) ("The Trial Chamber is strongly of the view that, in order to implement the Tribunal's mandate, it is crucial to establish a gradation of sentences, depending mainly on the magnitude of the crimes committed and the extent of the liability of the accused.").

50. Furundžija Judgment, supra note 46, ¶ 238.

51. See Chifflot & Boas, supra note 4, at 154 (contrasting the sentences imposed on Biljana Plavšić and Miroslav Bralo); see also Mark A. Drumbl, Collective Violence and Individual Punishment: The Criminality of Mass Atrocity, 99 NW. U. L. REV. 539, 558 (2005) ("The 'unfettered discretion' to sentence delegated to international judges inexorably leads to a broad range of actual sentences.").

52. DRUMBL, supra note 4, at 11; Beresford, supra note 36, at 49; Clark, supra note 4, at 1691-92 (2008); Penrose, supra note 27, at 377-78; Sayers, supra note 32, at 752; Weinberg de Roca, supra note 4, at 4, 10 ("[I]t is clear that sentences handed down at the ICTR are heavier than those at the ICTY.").

53. In particular, most ICTR convictions are for genocide whereas most ICTY convictions are not, and some scholars have highlighted that fact as the cause of the divergence. See, e.g., D'ASCOLI, supra note 5, at 218-20; Beresford, supra note 36, at 50; Holá et al., supra note 9, at 549.

54. The earliest of the empirical studies examined the consistency of only one tribunal—the ICTY—and so are not precisely relevant to this Article. See, e.g., Meermik & King, supra note 8; Barbora Holá et al., Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice, 22 LEIDEN J. INT' L. L. 79 (2009).

55. D'ASCOLI, supra note 5, at 259-60.

56. Holá et al., supra note 9, at 548-49; see also Holá, supra note 21, at 200; Chifflot & Boas, supra note 4, at 153 ("Broadly speaking, these studies suggest a degree of coherency, consistency, and predictability in sentencing at the ad hoc Tribunals.").
combine to undermine the certainty of these conclusions. Moreover, no studies to date have included the sentences of the SCSL, many of which appear harsh in comparison to similar ICTY and ICC sentences, or the sentences of the Special Panels for Serious Crimes in East Timor (Special Panels), many of which appear lenient in comparison to other international sentences.

For the purposes of this Article, it does not matter whether or not international courts sentence consistently with one another because scholars on each side of this divide agree on the point with which I am concerned. Namely, most scholars agree that the sentences across different international courts should be consistent. Indeed, that point is so self-evident to most commentators that they assume it without expressly articulating it, let alone defending it. The international tribunals themselves apparently concur, as they cite one another’s precedents when making their own sentencing determinations. Part II will now explore why scholars expect sentencing consistency across international courts and whether that expectation is justified.

II. INTERNATIONAL COURTS AND TRIBUNALS: UNITY IN DIVERSITY OR JUST PLAIN DIVERSITY?

The expectation that the various international criminal courts will impose sentences that are consistent with one another has a great deal of surface appeal, but it is premised on an unstated—and untested—assumption, namely, that the international courts form part of a single, unified criminal justice system. If it were not for that assumption, the expectation of sentencing consistency would make no sense. For instance, no one expects American courts and Canadian courts to sentence premeditated murder similarly. Indeed, no one expects California courts and Utah courts to sentence the same federal crimes similarly.

57. See D’ASCOLI, supra note 5, at 220-26 (detailing the “numerous elements” that “produce slightly artificial findings”); Holá et al., supra note 9, at 549 (addressing “the limitations of our study”).

58. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecution’s Document in Support of Appeal against the “Decision on Sentence Pursuant to Article 76 of the Statute,” ¶¶ 45-55 (Dec. 3, 2012); deGuzman, supra note 35, at 377 (noting that the SCSL’s Taylor sentence for aiding and abetting is “significantly higher than sentences awarded at the ICTY and ICTR for aiding and abetting crimes”); Dana, supra note 35, at 680.

59. See DRUMBL, supra note 4, at 11 (“The length of fixed terms of imprisonment is palpably lower at the Special Panels [than at the ICTY].”). Some of the Special Panels’ leniency stemmed from its widespread use of guilty pleas. See NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 114-25 (2007). But the Panels also sentenced relatively leniently after trials.

60. See Bassett, supra note 4, at 25 (“[I]nternational sentences must be examined relative to one another rather than relative to domestic sentences.”); Sloane, supra note 11, at 716 (highlighting “the ultimate need for the international criminal justice system to develop a coherent, relatively uniform, sentencing regime”).

61. Drumbl, supra note 51, at 583-84; Beresford, supra note 36, at 85; Harmon & Gaynor, supra note 4, at 710 (advocating sentencing guidelines in part because they might reduce “the general disparity in sentences imposed by the ICTY and the ICTR”); Penrose, supra note 27, at 381-83.

62. See, e.g., Lubanga Sentencing Decision, supra note 11, ¶ 12 (determining that the SCSL’s sentencing of similar crimes is relevant to its own sentencing because “the ad hoc tribunals are in a comparable position to the Court in the context of sentencing”); see also supra note 38.
because both federal courts are part of the same criminal justice system. Likewise, those scholars who criticize international courts for sentencing inconsistently from one another seem implicitly to assume that these courts stand as components of a unified criminal justice system.

I argue that that assumption lacks any empirical basis. Certainly, there is no "international criminal justice system" in the legal sense in the way that there is a New Jersey court system or a United States federal bankruptcy court system. That fact notwithstanding, international criminal courts could form part of an "international criminal justice system" in a non-legal but descriptively plausible sense. However, even for that proposition, the evidence suggests otherwise. Although there are no widely-accepted standards to apply to this inquiry, it seems reasonable to assume that if these courts are to be considered components of a single criminal justice system, then they must feature certain key similarities, either in their creations, their structures, or the goals they were established to advance.

On the basis of that standard, it could be said that the first two modern international criminal tribunals—the ICTY and ICTR—form part of the same international criminal justice system. The two tribunals were created in close succession and through the same mechanism—a Security Council resolution. Moreover, they initially shared a prosecutor, and they still share an appeals chamber, and they prosecute cases in accordance with very similar procedural rules. After establishing the ICTY and ICTR, the Security Council was asked to create additional courts, modeled on the ICTY and ICTR, to prosecute international crimes that took place in Sierra Leone, East Timor, and Cambodia, among other places. Had the Security Council acceded to these requests, then we might conclude that the resulting courts, along with the ICTY and ICTR, formed part of a unified international criminal justice system. However, the Security Council declined to establish any additional courts. Subsequent courts were created, but through a variety of disparate methods and institutions.

63. See Stephanos Bibas, Regulating Local Variations in Federal Sentencing, 58 STAN. L. REV. 137, 137 (2005) (noting that federal sentencing is supposed to be consistent across the country).
64. ICTR Statute, supra note 25, art. 15(3).
65. Id. art. 12(2).
66. Id. art. 14.
71. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 349 (2001) (Cambodia); SCHEFFER, supra note 67, at 327-33, 366-67 (Sierra Leone and Cambodia); Sandholtz, supra note 68, at 138 (East Timor).
The SCSL, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the STL, for instance, were established via bilateral agreements between the United Nations and the states where the crimes took place. Although all of these tribunals were created through the same formal mechanism, they featured dramatically different processes, as a de facto matter, because they featured dramatically differing levels of state involvement in and consent to their creations. Sierra Leone, for instance, very much sought the creation of an international court to prosecute the crimes that were committed during its civil war, so it had no difficulty concluding a bilateral agreement with the United Nations to create the SCSL. By contrast, Cambodia was not enthusiastic about the creation of an international court to try Khmer Rouge crimes, and it clashed with the United Nations over several important issues, including the structure of the court, the composition of the court, and the relationship between Cambodian law and international law. Despite serious qualms, the United Nations eventually capitulated to many of Cambodia’s demands, and it created a court that differs in key respects from other international courts. As for the STL, Lebanon initially asked the Security Council to establish an international tribunal, and it negotiated and signed an agreement with the United Nations to establish the STL; later, however, the speaker of the Lebanese Parliament refused to convene a parliamentary session to ratify the agreement, so the Lebanese Prime Minister, along with seventy

72. Sierra Leonean President Kabbah initially asked the Security Council to establish a court similar to the ICTY and ICTR. Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2015); see also SCHEFFER, supra note 67, at 322-27. However, when it became clear that it would be more politically palatable to create the court via a treaty between the United Nations and Sierra Leone, then Kabbah also acceded to that plan, and the Sierra Leonean government was heavily involved in negotiating the provisions of the eventual agreement. See SCHEFFER, supra note 67, at 330-39.


74. Although Cambodia sent a letter to the United Nations asking for its “assistance” in “responding to past serious violations of Cambodian and international law,” the letter was penned by U.N. officials who were actively encouraging Cambodia to establish a tribunal. See Steve Heder, A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia, Cambodia Tribunal Monitor 13 (Aug. 1, 2011), http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf; see also Craig Etcheson, The Politics of Genocide in Cambodia, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 181, 199 (Cesare P.R. Romano et al. eds., 2004).


76. See id. at 218-23.

77. See id. at 209-11.


Members of Parliament, asked the Security Council to establish the tribunal.\textsuperscript{80} Thus, the Security Council formally created the STL,\textsuperscript{81} but pursuant to the bilateral agreement already concluded between Lebanon and the United Nations. Finally, other international tribunals were established through still other mechanisms. The ICC, for instance, was created following multi-year, multilateral negotiations that culminated in a treaty to which 123 states are now parties,\textsuperscript{82} whereas the United Nations unilaterally created the Special Panels in East Timor\textsuperscript{83} and the Regulation 64 panels in Kosovo.\textsuperscript{84}

Although each of the above courts was established through different routes and mechanisms, all except the ICC featured the substantial involvement of the United Nations, and the nearly uniform involvement of the preeminent international organization could provide reason to view the courts as part of a unified criminal justice system. However, the results of the United Nation’s involvement—the courts themselves—diverge in such a large number of important ways that the common denominator of U.N. involvement pales in comparison to the divergences.

Some of the most important divergences, for instance, stem from the fact that some of the courts, such as the ICC, ICTY, and ICTR, are fully international, whereas others are so-called “hybrids.” The fully international courts contain no domestic elements. They have subject matter jurisdiction only over international crimes, they are located far from the states where the crimes took place, and their personnel is appointed by international bodies. By contrast, hybrid courts, which include the SCSL, ECCC, Special Panels, and STL, do feature domestic elements, but these appear in greater or lesser quantities in the different courts. For instance, although the SCSL was located in Sierra Leone,\textsuperscript{85} its prosecutions featured few other domestic elements. Its jurisdictional provisions authorized the prosecution of domestic crimes,\textsuperscript{86} but SCSL prosecutors never charged any.\textsuperscript{87} Similarly, Sierra Leone was permitted to appoint a deputy prosecutor and judges, but it frequently appointed

\textsuperscript{85} However, one of the four SCSL cases was tried in The Hague. S.C. Res. 1688, U.N. Doc. S/RES/1688 (June 16, 2006).
\textsuperscript{86} SCSL Statute, \textit{supra} note 29, arts. 1, 5.
internationals to serve in those positions. Not surprisingly, then, scholars have commented on the SCSL’s strong international orientation. At the other end of the continuum is the ECCC, in which domestic elements predominate. Cambodians constitute a majority of the ECCC’s judiciary, and the ECCC’s procedures derive from Cambodian law. Other hybrid tribunals fall somewhere in between these two extremes.

The procedures, funding mechanisms, jurisdictional scopes, and expected life spans of the tribunals also differ substantially. Some tribunals, such as the ICTY, ICTR, and SCSL, employ largely common law, adversarial procedures, whereas the ECCC prosecutes its crimes through a predominantly civil law, non-adversarial system, and the ICC and STL stand as common law/civil law hybrids. Some tribunals, such as the ICTY and ICTR, finance their prosecutions through fixed and stable funding mechanisms, whereas others, such as the SCSL and ECCC, fund their work through voluntary donations that frequently fail to cover the necessary

93. Both the Special Panels and the STL, for instance, have employed some domestic personnel. STL Statute, *supra* note 29, arts. 8(1), 11(4); Regulation on the Establishment, *supra* note 83. As for domestic crimes, the STL can prosecute only domestic crimes pursuant to its subject matter jurisdiction provision. STL Statute, *supra* note 29, art. 2. The Special Panels were able to, and did, prosecute domestic crimes. Suzannah Linton, *Correspondents’ Reports*, 2 Y.B. INT’L HUM. L. 471, 481 (2000); Prosecutor v. Joao Fernandez, Case No. 01/00.C.G.2000, Judgment, ¶ 5 (Special Panel for Serious Crimes Jan. 25, 2001).
98. Annex to the Letter from the President of the Security Council addressed to the Secretary-
expenses.\textsuperscript{99} Finally, and perhaps most notably, the different tribunals have vastly different mandates. For one thing, the scope and magnitude of the crimes to be prosecuted in each tribunal vary markedly. The ICTR, for instance, was created to prosecute those who participated in a genocide that killed approximately 800,000 people. The STL, by contrast, was created to prosecute those who participated in a single terrorist attack that killed twenty-two people. For that reason alone, the STL will prosecute dramatically fewer defendants than the ICTR, but the mandates and expectations of the tribunals also vary, even when the crimes that they are prosecuting are similarly massive. For instance, the ICTY, SCSL, and ECCC were each created to prosecute atrocities that killed more than 100,000 victims.\textsuperscript{100} Yet, whereas the ICTY has prosecuted 161 offenders,\textsuperscript{101} the SCSL and ECCC were required to limit their prosecutions only to those who “bear the greatest responsibility” for the crimes at issue.\textsuperscript{102} Due to these restrictions, the SCSL prosecuted ten individuals,\textsuperscript{103} and the ECCC will likely prosecute fewer than five.\textsuperscript{104} Finally, the ICC differs

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\textsuperscript{100} The Bosnian war, for instance, resulted in more than 150,000 deaths, Prosecutor v. Delalić and Others, Case No. IT-96-21-T, Judgment, ¶ 107 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), approximately 20,000 rapes, Makau Matua, \textit{Savages, Victims, and Saviors: The Metaphor of Human Rights}, 42 HARV. INT’L L.J. 201, 223 (2001), and the forced relocation of more than 2,000,000 people, 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, at xiii (1995). The Sierra Leonean war left approximately 200,000 dead, Rod MacJohnson, Sierra Leone Riveted to Radios as War-Crimes Court Opens, THE GLOBE AND MAIL (Toronto), Mar. 11, 2004, at A16, and hundreds, if not thousands, with amputated limbs, 1999 U.S. DEP’T OF STATE COUNTRY REP. HUM. RTS. PRACS. 436. Finally, the brutal Khmer Rouge regime presided over what some describe as “worst mass murder of the twentieth century,” Etcheson, supra note 74, at 194, during which more than 2,000,000 Cambodians perished. Craig Etcheson, A Talk at the Montreal Institute of Genocide and Human Rights Studies (Sept. 12, 2003).

\textsuperscript{101} Key Figures of the Cases, ICTY, http://www.icty.org/sid/24.

\textsuperscript{102} SCSL Statute, supra note 29, art. 1; Annex to the Letter from the President of the Security Council, supra note 98. The ECCC Statute features similar wording and limits jurisdiction to those “who were most responsible” for the crimes. ECCC Statute, supra note 29, art. 2.

\textsuperscript{103} The SCSL heard four cases. The \textit{AFRC, RUF,} and \textit{CDF} cases each featured three defendants, whereas the \textit{Taylor} case featured Charles Taylor as its one defendant. The ECCC has convicted three defendants, Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-OCU, Judgment (Extraordinary Chambers in the Courts of Cambodia July 26, 2010) [hereinafter Duch Judgment]; Prosecutor v. Nuon Chea & Khieu Samphan, Case No. 002/01, Judgment (Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014), and it is...
from all of the other tribunals both in its prospective orientation and in its indefinite life span. All of the other tribunals were created to prosecute a discrete set of crimes that had already been committed. These tribunals, therefore, were expected to conduct their work for a relatively fixed period of time.\textsuperscript{105} The ICC, by contrast, was provided prospective jurisdiction over international crimes and consequently is expected to remain in existence indefinitely.

In sum, modern international criminal tribunals differ in a host of fundamental respects. They were created through different mechanisms, and they function in different ways. They prosecute different crimes, through the use of different procedures. Their mandates differ, and their respective abilities to carry out their mandates differ still more. These and other differences described above consequently undermine the notion that the tribunals are components of a single international criminal justice. Scholars within the pluralism debate recognize these differences and recognize the way in which they contribute to the diversity of international criminal law.\textsuperscript{106} However, despite that recognition in some quarters of international criminal law scholarship, sentencing scholarship for the most part continues to maintain an expectation of consistency.

All that said, I must acknowledge a number of factors that lend a certain surface appeal to the notion of a unitary international criminal justice system. For one thing, all of the modern international criminal tribunals have been established recently and within a short period of time. Although the fifty years that followed the Nuremberg and Tokyo trials saw mass atrocities that led to the deaths of tens of millions, the international community made no effort to prosecute perpetrators. However, soon after the Security Council established the ICTY in 1993, a spate of additional tribunals were created. This flurry of international law-making activity in the once-fallow field of criminal law could reasonably be understood as part of an effort to create a comprehensive and unified international criminal justice system, particularly because each of the tribunals was created to advance the same end: accountability after mass atrocity. Possibly adding to this perception of unity is the fact that the personnel of international criminal tribunals tend to migrate from one tribunal to another.

\textsuperscript{105} That relatively fixed period of time has differed from one tribunal to another. Initially, the life spans of the ICTY and ICTR were somewhat open-ended, though, in 2004, the Security Council began pressing the tribunals to develop completion strategies that would enable them to close their doors more expeditiously. See S.C. Res. 1534, U.N. SCOR, 59th Sess., 4935th mtg., U.N. Doc. S/RES/1534, at 1 (Mar. 26, 2004); S.C. Res. 1503, U.N. SCOR, 58th Sess., 4817th mtg., U.N. Doc. S/RES/1503, at 3 (Aug. 28, 2003). The SCSL and ECCC, by contrast, were expected to exist for only three years. Valerie Oosterveld, \textit{The International Criminal Court and the Closure of the Time-Limited and Hybrid Criminal Tribunals}, 8 LOY. U. CHI. INT'L L. REV. 13, 13 (2010).

Frequently, prosecutors, along with defense counsel and even judges, boast tenure at several international tribunals. Finally, because international criminal justice is so new, the tribunals themselves tend to cite one another’s precedents. Thus, there exist both a core cadre of international criminal professionals, who frequently serve in more than one tribunal, and jurisprudential cross-pollination between the tribunals.

Although these factors might create an impressionistic sense of a unified international criminal justice system, what they more accurately reflect is the international community’s newly found interest in using criminal law as a means of suppressing and punishing large-scale human rights violations. The creation of international criminal courts manifests and implements that interest, but their creation stands as only one component of a larger effort to increase accountability following mass atrocities. Other components of that effort include domestic courts’ increasing use of universal jurisdiction to prosecute international crimes and human rights courts’ increasing emphasis on domestic criminal prosecutions as a remedy for large-scale human rights violations. All of these courts are seeking to advance a common goal, but that does not render them components of a common criminal justice system. Similarly, the overlapping personnel and sharing of precedents among the international courts can be explained by the nascent state of the field. That is, because international crimes have only recently begun to be prosecuted, it stands to reason that those who are experts in that field would be in high demand when a new international body is created and that the precedents of existing bodies would be persuasive to newer bodies. Indeed, on the latter point, even domestic criminal justice systems that prosecute international crimes cite the precedents of the international tribunals—because they have no precedents of their own to rely upon. However, no one would mistake a domestic court for being part of the international criminal justice system or—as particularly relevant here—expect it to model its sentences on those of the international courts. Of course, overlapping personnel and precedents could also signify deeper institutional linkages among the tribunals, but because the previous discussion shows no reason to believe such linkages exist, the overlapping personnel and precedents alone are better explained by the nascent state of the field.

An alternative and descriptively more accurate conception of the


108. See, e.g., sources cited supra note 62; Holá, supra note 32, at 5; deGuzman, supra note 35, at 379; Dana, supra note 35, at 655 (noting the frequency with which the SCSL cites the ICTY).


international courts is as discrete bodies designed to take the place of domestic courts when the prosecution of international crimes is not possible in those domestic courts. The ICC self-evidently fits this conception, given that cases are admissible before the ICC only when the states that otherwise would have jurisdiction over the cases are unwilling or unable to prosecute. Thus, as a de jure matter, the ICC stands as a substitute for domestic jurisdiction when domestic jurisdiction cannot or will not be exercised. The jurisdiction of some of the ad hoc tribunals is not similarly restricted, but the only reason those tribunals were created in the first place was because there were no domestic courts willing or able to prosecute the crimes within their jurisdictions. Concededly, many atrocities go entirely unpunished, so domestic inability or unwillingness to prosecute is by no means a sufficient condition for the creation of an international court. However, it is a necessary condition. When states are willing and able to prosecute their own domestic crimes, the international community does not create an international court. Indeed, history shows that the international community can be deterred from establishing an international court.

112. Alexander Greenawalt develops a theory of international criminal offense that relies on a variation of this argument. See Greenawalt, supra note 36, at 1096-99.

113. Rome Statute, supra note 29, art. 17.

114. Domestic prosecutions were entirely impossible in the former Yugoslavia at the time the ICTY was created because the civil war that gave rise to the crimes was still raging. The violence in Sierra Leone, Cambodia, and Lebanon had come to an end by the time the SCSL, ECCC, and STL were created, but none of those countries was considered able to carry out domestic prosecutions. See, e.g., Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 9, 2000) (Sierra Leonean President Kabbah stating that “Sierra Leone does not have the resources or expertise to conduct trials for” the international crimes that took place in Sierra Leone and that unless an international tribunal was established, no justice would be done); Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, Annex, United Nations Secretary-General, U.N. Doc. A/51/930-S/1997/488 (June 24, 1997) (Cambodia acknowledging that it “does not have the resources or expertise to” prosecute international crimes); Secretary-General, Report of the Security Council Pursuant to Paragraph 6 of Resolution 1644, ¶ 5, U.N. Doc. S/2006/176 (Mar. 21, 2006) (discussing the Security Council’s and Lebanon’s “shared assumption that a purely national tribunal would not be able to effectively fulfill the task of trying those accused of the crime”); see also WILLIAM G. O’NEILL, KOSOVO: AN UNFINISHED PEACE 84 (2002) (discussing the inability of Kosovar domestic courts to prosecute fairly and effectively). Rwanda did wish to prosecute genocide crimes in its own courts, but it also desired the creation of an international tribunal to do so, see VIRGINIA MORRIS & MICHAEL P. SCHARF, I THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 62 (1998), and the international community complied with that desire largely due to its belief that the Rwandan criminal justice system was not up to the task, see U.N. SCOR, 49th Sess. 3453d mtg., U.N. Doc. S/PV.3453, at 6 (Nov. 8, 1994) (remarks from the Representative of the United Kingdom); MORRIS & SCHARF, supra, at 100. But in making that decision, members of the Security Council made a point to emphasize the supplementary nature of the ICTR. See U.N. SCOR, 49th Sess. 3453d mtg., U.N. Doc. S/PV.3453, at 11 (Nov. 8, 1994) (remarks from the Representative of China); id. at 13 (remarks from the Representative of Nigeria).

court merely by promises of domestic prosecutions,\(^\text{116}\) even when such promises blatantly lack credibility.\(^\text{117}\)

To conclude, this Part has sought to unpack a claim that appears—sometimes implicitly—in a great deal of international criminal law scholarship on sentencing. The claim is that different international courts should sentence similarly situated defendants similarly. Some scholars think the tribunals already do, whereas other scholars contend that they do not, but virtually all scholars agree that they should. I maintain that that normative claim—that international criminal courts should have consistent sentencing practices—is founded on an untested factual assumption. The factual assumption is that the international courts are components of a unitary international criminal justice system. Without that assumption, the normative expectation of sentencing consistency between the international criminal tribunals is not viable. No one expects the domestic courts of different jurisdictions to sentence consistently with one another; we expect consistency only from courts that are part of the same judicial system.

This Part has shown that it is descriptively untenable to consider the international criminal courts as part of the same criminal justice system; they are far better conceived as substitutes for domestic criminal courts. As a consequence, any expectation of sentencing consistency between the international courts is misplaced. Just as we would have no reason to expect Bosnian and Rwandan domestic courts to sentence similar crimes against humanity similarly, we likewise have no reason to expect their internationally created substitutes to do so.

My conclusions are bolstered by analogies to other international processes, where no consistency is expected. Consider, for instance, the European and Inter-American systems of human rights enforcement. The European Convention on Human Rights and the American Convention on Human Rights are similar in many respects,\(^\text{118}\) and the courts that implement those similar treaties—the European Court of Human Rights and the Inter-American Court of Human Rights—are likewise similar in many respects.\(^\text{119}\) Despite these similarities, the European and Inter-American courts have developed very different practices regarding remedies for treaty violations.

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\(^{116}\) The first and most famous example of this phenomenon occurred following World War I, when the Allies abandoned plans for international prosecutions of German leaders after Germany promised to conduct its own prosecutions. Sheldon Glueck, *War Criminals—Their Prosecution and Punishment: The Record of History*, 5 LAW. GUILD REV. 1, 4-5 (1945). Similarly, the international community relied on Indonesia’s promise to conduct domestic prosecutions of crimes in East Timor in deciding not to create an international tribunal similar to the ICTY and ICTR. Identical Letters from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, U.N. Doc. A/54/726 (Jan. 31, 2000).


\(^{119}\) See McCann, supra note 118, at 617-20; Weston et al., supra note 118, at 604-05, 624.
Through most of its history, the European Court limited itself to issuing declaratory statements that announced a violation of the treaty and that awarded monetary compensation.\textsuperscript{120} In recent years, the European Court has—in the rare case—been willing to expand the remedies it awards, but even then, it does not award the broad range of remedies that are customary for the Inter-American Court.\textsuperscript{121} Indeed, the Inter-American Court not only awards the same remedies that are the standard fare for the European Court but also routinely requires violating states to “apologize, initiate a criminal investigation, locate the victim’s remains, publish excerpts of the Court’s judgment in national newspapers,” and provide psychological treatment to victims and/or their close family members.\textsuperscript{122} The Inter-American Court’s wide-ranging and innovative remedies practice has generated an outpouring of praise; so, it should come as no surprise that many commentators urge the European Court to follow the Inter-American Court’s lead.\textsuperscript{123} But they do so, not because they expect the two courts to have consistent remedies practices, but rather because they consider the Inter-American Court’s approach more efficacious and therefore worthy of emulation. That is, despite many similarities between the European Convention and the Inter-American Convention, along with many similarities between the European Court and the Inter-American Court, along with the very similar goals that both human rights systems are aiming to achieve, no one expects these two human rights courts to issue similar remedies for similar violations, nor does anyone criticize them for failing to do so.\textsuperscript{124} The two courts are part of different regional systems that have different histories and face different challenges and obstacles. Thus, despite the many similarities just delineated, it is understood that the European Court and the Inter-American Court not only are independent from one another but are not components of a unified, international human rights system.

An even closer analogy can be found in the sentencing that took place in some of the very earliest international criminal trials. Following World War II, the Allies not only held two large-scale international trials in Nuremberg and Tokyo to prosecute high-level German and Japanese offenders but also promulgated Control Council Law No. 10, which authorized the Allied countries that were occupying Germany to prosecute individuals who were accused of having committed international crimes during the war.\textsuperscript{125} Control


\textsuperscript{121} Antkowiak, supra note 120, at 332.

\textsuperscript{122} Id. at 289. For a fuller discussion of the Inter-American Court of Human Rights’ remedies practices, see Thomas M. Antkowiak, \textit{Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond,} 46 COLUM. J. TRANSNAT’L L. 351, 365-87 (2007).


\textsuperscript{124} Cf. Nerlich, supra note 107, at 779 (asserting that no one would seriously argue that “the European Court of Human Rights should follow the same procedural rules as the Inter-American Court of Human Rights”).

\textsuperscript{125} Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes
Council Law No. 10 set forth and defined specific offenses to ensure that each of the Allied powers conducted their prosecutions in accordance with the same legal standard. As a consequence of this law, American, British, French, and Soviet authorities held trials of Nazi war criminals in their zones of occupation. Although these trials were conducted pursuant to the same international instrument—Control Council Law No. 10—they differed in key ways,\(^{26}\) including in the sentences imposed upon convicted defendants.\(^{27}\) However, whereas commentators have criticized sentencing inconsistencies when the sentences were imposed in trials conducted by the same occupying power,\(^{128}\) they did not criticize similar inconsistencies—or expect sentencing consistency—when the trials were conducted by different occupying powers.\(^{129}\) Presumably, there was no expectation of sentencing consistency because the various Allied tribunals prosecuting international crimes were not considered to be part of a unified criminal justice system despite the fact that they conducted their prosecutions pursuant to the same law. Rather, they were considered to be discrete and independent entities.

In sum, this Part has shown that international criminal courts are best conceived not as components of a unified criminal justice system but as discrete bodies designed to take the place of domestic courts when the prosecution of international crimes is not possible in those courts. Thus, there is no empirical basis for expecting consistency in sentencing across different international courts. As a presumptive matter, then, each tribunal is entitled to develop its own diverse set of sentencing practices. In the following pages, Part III will explore what those sentencing practices should look like. Optimally, each court would adopt sentencing standards that are carefully calibrated to meet the needs of the particular court and advance the goals that the court desires and is able to achieve. Part III, however, will show that ideal to be likely unattainable. As a second-best measure, Part IV will advocate the


126. See DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 3 (2001) ("The quality of the justice dispatched varied greatly, as did the profiles of the defendants and the nature of the trials themselves.").


128. DRUMBL, supra note 4, at 113, 244-45 & n.241; KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 314 (2011); cf. R. John Pritchard, The Historical Experience of British War Crimes Courts in the Far East, 1946-1948, 6 INT’L REL. 311, 322 (1978) ("One major problem that did recur throughout the British Far Eastern War Crimes Trials was that there was a lack of consistency in meting out sentences for similar offences.").

129. Indeed, Uwe Ewald discusses inconsistent post-World War II sentences in order to prove "the normality of disparity in international sentencing." Ewald, supra note 22, at 376. Ewald includes in his description not only post-World War II trials conducted by the United Kingdom, United States, France, and Russia pursuant to Control Council Law No. 10 but also those conducted by Poland and Australia. Id. at 375.
incorporation of domestic sentencing standards into international sentencing.

III. A PLURALIST ACCOUNT OF INTERNATIONAL CRIMINAL SENTENCING

A. The Value of Custom-Made Sentencing

As noted in the Introduction, international criminal law scholarship is replete with proposals to improve sentencing at the international courts. Some scholars focus on the purposes of punishment and advocate for such purposes as deterrence or retribution, whereas others focus on sentencing mechanics and advocate for guidelines or hierarchies of crimes, for instance. But whatever principle or plan the scholars advance, virtually all assume that their preferred option is appropriate for, and should be applied to, all international crimes, wherever they are prosecuted.

Part II has revealed that there is no empirical basis for expecting international courts to sentence pursuant to uniform sentencing norms, but that does not necessarily mean that there is no normative basis for advocating that they do. Indeed, one scholar—Margaret deGuzman—does just that. Expressly advocating for the “development of . . . global sentencing norms,” deGuzman maintains that “the central project of international criminal courts is to build a normative community” and that building that normative community “requires identifying and enforcing shared normative commitments.” deGuzman views the process of building a “community of shared criminal law norms at the global level” as “part of the broader process of strengthening the ‘international community.’”

deGuzman’s universalist sentencing proposal stands in contrast to the views of scholars who advocate greater pluralism in international criminal law. To my knowledge, only one scholar has considered pluralism specifically with respect to sentencing, and that scholar is Alexander Greenawalt, who includes sentencing in his comprehensive pluralist account of the sources of international criminal law. Greenawalt constructs a four-tiered model that categorizes international criminal law rules according to the need for system uniformity. When it comes to the tier that includes general questions of criminal law, such as defenses, modes of responsibility, and sentencing, Greenawalt concludes that “the specific purposes of [international criminal law] do not override reasonable differences among national systems.” Thus, with respect to issues in this tier, Greenawalt believes that domestic law should

130. See supra text accompanying notes 13-15.
131. See supra text accompanying notes 16-21.
132. Although deGuzman does offer a defense of her global vision of sentencing norms, she warns that the “full development” of her arguments “must await a future work.” deGuzman, supra note 16, at 26-27.
133. Id. at 27.
134. Id. at 26.
135. The basic elements of international offenses fall within this category. Greenawalt, supra note 36, at 1122.
136. Id. at 1124.
prevail. However, given the broad scope of his project, Greenawalt’s pluralist account can only briefly touch on sentencing. The approach that I develop below not only dramatically expands on Greenawalt’s treatment but also charts a middle path between his pluralist account and deGuzman’s universalist account.

deGuzman’s universalist approach gives rise to both practical and normative difficulties. As for the practical, deGuzman recognizes that any effort to develop shared norms will prove challenging, but I believe that even that recognition underestimates the true difficulty of developing genuinely shared global norms. Although research suggests that abstract moral intuitions about the most serious crimes are largely shared across cultural and national boundaries, it also shows that these intuitions diversify dramatically when they must be applied to real-world situations. It is one thing to agree in the abstract that murder should be severely punished, and even, perhaps, that murder justifies the harshest punishment that a criminal justice system can impose. But what if the murderer was provoked? Or what if the murderer faced peer or societal pressure to commit the crime? Empirical research suggests that any cross-cultural consensus that might have existed on initial, big-picture questions breaks down when such real-world circumstances are introduced. Moreover, divergences in opinion are apt to become more dramatic when the circumstances in question extend beyond those ordinarily arising from domestic crimes. So, for instance, what if the murder victim is a civilian killed during an armed conflict? Should the punishment for that crime vary depending on whether the murderer is a soldier in the army that illegally launched the conflict rather than a soldier in the army defending against the illegal aggression? Does it matter if the murder takes place in the context of widespread persecution against members of the murderer’s ethnic group? Individuals from different cultures, ethnic groups, and nations answer these questions differently. Indeed, the very fact that the sentencing provisions of domestic criminal justice systems diverge so dramatically suggests that the prospect of developing truly shared global norms of sentencing is a distinctly

137. Id. at 1125.
138. deGuzman, supra note 16, at 28.
140. Woods, supra note 5, at 651-52.
143. Woods, supra note 5, at 637.
unlikely one.

Indeed, I contend that efforts to develop universal sentencing norms are far less likely to result in shared global norms as they are to result in the adoption of Western norms over the objections of non-Western stake-holders. We have already seen this dynamic play out in the short history of the international tribunals. When the ICTR was being created, for instance, Rwanda pressed hard to include capital punishment as a potential penalty, but members of the Security Council categorically rejected the proposal.145 Similarly, negotiations over the ICC’s sentencing provisions turned contentious when certain African, Caribbean, and Middle Eastern states sought to include the death penalty over the vehement opposition of other states—many from Europe and Latin America.146 The Western position again prevailed: the maximum sentence the ICC can impose is life imprisonment, and only “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”147 Even using imprisonment as a criminal sanction reflects a Western cultural bias, as some cultures favor reparations and other forms of punishment over imprisonment.148 Some victims of international crimes, indeed, barely consider imprisonment to constitute a sanction because individuals sentenced to imprisonment are provided free food and shelter, commodities that can be hard to come by in impoverished post-conflict settings.149 Thus, if international sentencing norms are developed to apply in all of the international courts, then these sentencing norms will almost certainly reflect the views and proclivities of Westerners (who are unlikely to appear before an international court) and not members of the Global South (who are far more likely to appear before an international court). For several years, international criminal law has been battling the claim that its law and practice

145. Morris & Scharf, supra note 114, at 68-72.
147. Rome Statute, supra note 29, art. 77(1)(b), at 54. Some Latin American states and Portugal also opposed the inclusion of life imprisonment, but this position did not prevail. See Fife, supra note 146, at 1446.
embody an imperialist, pro-Western bias. Developing "universal" sentencing norms that are in fact Western sentencing norms only adds credibility to that claim.

Turning now to the normative, I contend that even if it were possible to develop truly shared global sentencing commitments at the international level, it would be undesirable to do so for the simple fact that no one set of sentencing norms will be optimal for each of the tribunals or ICC situations. It is hard to imagine, for instance, that a sentencing regime that is ideal for international crimes that occurred in East Timor would be equally appropriate for international crimes that occurred in the Democratic Republic of the Congo or in Bosnia. For one thing, as discussed above, different local communities have different intuitions about sentencing. As applied to international crimes in particular, the Max Planck Institute's large-scale empirical study of international victims across eleven conflicts showed that different victim communities hold vastly different views regarding the purposes that prosecutions of international crimes should serve and the sanctions that should be used to effectuate those purposes.

Moreover, even if we chose not to consider community views or (implausibly) assumed that sentencing intuitions were constant across different local communities, that would not justify a uniform international sentencing scheme because other key differences—relating to the atrocities that occurred, the perpetrators who can be prosecuted, and the tribunal's own mandate and capabilities—would create the need for differentiated sentencing schemes across international tribunals and across different ICC situations. For example, it might be appropriate for an international court's sentencing scheme to place greater emphasis on incapacitation if the court is prosecuting crimes from an ongoing conflict, where offenders will continue to fuel the atrocities unless they are apprehended. Deterrence as a sentencing goal will be more or less salient depending on the offender population that the court is able to target. One might expect, for instance, that high-level offenders who instigate and orchestrate the atrocities would be more capable of being deterred than lower-level offenders, who might be more inclined to blindly follow orders or be unduly influenced by the hate ideology that the high-level offenders promulgate. Conversely, a sentencing scheme that emphasizes rehabilitation over retribution or deterrence is apt to be better suited to a situation in which the international court is primarily prosecuting mid-range or lower-level offenders. Indeed, rehabilitation might be a particularly compelling goal if the offender population features a substantial proportion of child soldiers or other youthful offenders who have


151. KIZA ET AL., supra note 148, at 135-36.
relatively promising future prospects. Offender characteristics additionally can be relevant to the mitigating and aggravating circumstances that an international court is willing to consider. Although all of the international courts consider a defendant’s cooperation with the court to be a mitigating factor,\(^{152}\) for some populations of offenders, it arguably should be considered less mitigating than for others. For instance, virtually all of the Special Panels’ East Timorese defendants cooperated with the court, but they did so pursuant to cultural norms that require offenders to publicly acknowledge wrongdoing before they can be reintegrated into local communities.\(^ {153}\) The East Timorese defendants’ cooperation was appropriately treated as a mitigating factor, as it did benefit the Special Panels regardless of its motivation; however, even greater mitigation might be appropriate in settings where a defendant’s cooperation bucks local norms or endangers the defendant or his family.\(^ {154}\)

The international courts’ own characteristics and goals may also be relevant to the optimal sentencing scheme for that court. Much has been written about the differing purposes that animate national and international prosecutions,\(^ {155}\) but different international courts also might pursue different goals. For instance, courts with limited mandates and the ability to prosecute only a token number of offenders may consider expressive notions of punishment to be more efficacious than would courts that have the capacity to prosecute a larger proportion of offenders. A comparison of the STL and ECCC provides a concrete example. The STL was established to prosecute all or nearly all of the defendants who perpetrated one terrorist attack that killed twenty-two people.\(^ {156}\) By contrast, the ECCC was established to prosecute fewer than ten of the many thousands of offenders responsible for the deaths of more than two million Cambodians during the Khmer Rouge reign.\(^ {157}\) Given this dramatic disparity, one could imagine the STL using its sentences to advance goals that the ECCC, due to its more restricted mandate, is simply unable to advance.

The bottom line is that mass atrocities and international prosecutorial responses to mass atrocities are characterized by profound differences. Given these differences, it seems highly unlikely that a sentencing scheme developed for one atrocity and one international prosecutorial response would be suitable, let alone optimal, for a different atrocity and a different prosecutorial response. It is similarly unlikely that global sentencing norms—or what might be called a

\(^{152}\) See supra note 31.


\(^{154}\) For instance, the cooperation provided by one ICTR indictee, Juvenal Uwilingiyimana, very likely led to his death. Marlise Simons, *A Belgian Mystery: Rwandan Who Aided Tribunal on Genocide Is Found Dead in a Canal*, N.Y. TIMES, Dec. 24, 2005, at A8; see also Judge Kevin Parker, *Report to the President: Death of Milan Babic, INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA* (June 8, 2006), http://www.icty.org/x/cases/babic/custom2/en/p1087-babicreport.pdf (detailing the circumstances surrounding the death of Milan Babic while he was held in U.N. detention).


\(^{156}\) Letter from the Chargé d’affaires, supra note 80.

\(^{157}\) Etcheson, supra note 74, at 194.
one-size-fits-all sentencing scheme intended for all of the international courts—would be optimal for any one of these situations.

However, recognizing that vastly different conflicts and courts would be best served by tailor-made sentencing schemes is the easy part. What is far more difficult is isolating all of the relevant factors and circumstances and using them to create an ideal sentencing regime for a particular court or situation. For one thing, a great deal of relevant information may not be available at the time the sentencing scheme must be developed. Perhaps at the outset, we expect a court to prosecute high-level offenders, but in the end it cannot. Perhaps the conflict is still underway when the court begins its prosecutions, but it ends soon thereafter. In addition, even when a substantial amount of relevant information is available, it may create a conflicting picture, with some features of the conflict or court seeming to point in favor of some sentencing goals or principles and other features pointing in a different direction. Thus, even though we might know that a one-size-fits-all sentencing scheme will not suit any one set of prosecutions particularly well, it might nonetheless seem to be our best option given the difficulty and uncertainty that would attend any effort to tailor a sentencing scheme to a particular court or situation.

Indeed, we might conclude that the provisions currently governing sentencing at most international courts strike a tolerable balance. Although these provisions vary in some minor respects, as discussed in Part II, they all provide judges with a wide range of sentences to choose from and the discretion to tailor their sentences to the facts and circumstances of particular cases. As scholars have noted, that discretion can lead judges to sentence similar cases differently, which is a problem if those similar cases are prosecuted in the same court. But if they are not, then the inconsistencies are not problematic, and the discretion valuably enables international judges to use the available facts and circumstances to seek to advance one sentencing goal (or combination of goals) in one tribunal, situation, or case and another sentencing goal (or combination of goals) in a different tribunal, situation, or

158. For instance, the Serious Crime Panels in East Timor indicted high-level Indonesian defendants, but Indonesia refused to surrender them, David Cohen, Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?, 61 ASIA PAC. ISSUES 1, 4 (2002), and the international community refused to pressure Indonesia to do so. David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 STAN. J. INT’L L. 1, 26 (2007). The ICTY has suffered similar disappointments with respect to its high-level indictees. For instance, after unsuccessfully seeking Sudanese President al-Bashir’s apprehension for a decade with little help from the international community, the ICTY Prosecutor suspended her investigations in Sudan. Marlise Simons, Sudan: Prosecutor Halts Darfur Inquiry, N.Y. TIMES (Dec. 12, 2014), www.nytimes.com/2014/12/13/world/africa/sudan-prosecutor-halts-darfur-inquiry.html. The Prosecutor was also forced to withdraw her indictment against Kenyan President Kenyatta after numerous prosecution witnesses withdrew from the case and Kenya refused to provide the prosecution with allegedly key evidence. See Press Release, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta (Dec. 5, 2014), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx.

159. The ICTY was established in 1993, while the war in the former Yugoslavia was still raging, but the war ended a few years later. See General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugoslavia, Dec. 14, 1995, 35 I.L.M. 75.
case. Phrased this way, the current sentencing state of affairs sounds promising; in fact, however, it remains suboptimal because, either de jure or de facto, the courts’ current sentencing schemes fail to take into account one crucial factor that is (reasonably) knowable and that should be relevant to every international criminal sentence, namely, the sentencing norms of the local communities where the crimes took place.

B. The Need for Domestic Sentencing Norms

At first glance, it is not apparent why international courts should care about local sentencing norms. It is one thing to say that international courts should craft sentencing schemes that take account of a wide variety of facts and circumstances related to the particular conflict, the particular offenders, and the particular court doing the prosecuting. But those facts and circumstances do not necessarily include domestic norms. Domestic sentencing norms themselves may have been crafted with some of the relevant facts and circumstances in mind, but they may not have been, and even if they were, they were considered with a view toward advancing domestic policy goals, which might differ from international policy goals. Despite that, domestic sentencing norms remain vitally relevant to international sentencing largely because a key constituency of the international criminal courts—local communities—considers them vitally relevant. Victims and local communities appear to care little about whether the crimes being prosecuted are domestic or international. They likewise seem largely unconcerned about the elements of various defenses, the modes of liability, or the other components of the general part of international criminal law. However, victims and local communities do care—often intensely—about whether defendants get convicted and about what

160. It may not be promising in practice because international courts may not be willing or able to use their discretion in so principled and goal-oriented a way. Certainly some scholars would say that they have not done so thus far. See sources cited supra note 5.

161. Although, as noted above, some of the hybrid tribunals have subject matter jurisdiction over domestic crimes, see supra note 93, the tribunals do not necessarily prosecute those crimes, see supra notes 86-87. Yet, I have not heard of any victim dissatisfaction regarding the tribunals’ failure to prosecute domestic crimes. See also KIZA ET AL., supra note 148, at 98-99 (finding that a majority of victims favored the application of international law in prosecutions for international crimes, but a substantial proportion favored the application of domestic law or a combination of domestic and international law).

162. The Erdemović case, for instance, required the ICTY to delineate the elements of the duress defense and to decide, in particular, whether the defense was applicable in a case of intentional killing. Erdemović Joint Separate Opinion, supra note 47, ¶ 32. The court’s holding generated a great deal of scholarly analysis, see, e.g., Luis E. Chiesa, Duress, Demanding Heroism, and Proportionality, 41 VAND. J. TRANSNAT’L L. 741, 742-48 (2008); Sarah J. Heim, The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians, 46 CORNELL INT’L L. J. 165, 171-75 (2013), but little or no victim reaction, to my knowledge. Similarly, the ICTY’s joint criminal enterprise doctrine has given rise to tremendous controversy in the scholarly community, see COMBS, supra note 94, at 324-25 (describing some of the voluminous scholarly commentary), but victims seem to have little interest in the contours of the various modes of liability.

163. COMBS, supra note 94, at 229-32 (describing the victim outrage that often attends acquittals at the international tribunals); Diane F. Orentlicher, That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia, OPEN SOC’Y JUST. INITIATIVE & INT’L CTR. FOR TRANSITIONAL JUST. 51 (2010), http://wcjcp.unicri.it/proceedings/docs/ICTJ-OSJI_The%20impact%20of%20the%20ICTY%20in %20Bosnia_2010_eng.pdf.
sentences those convicted defendants receive.

Victims and local communities expressed intense unhappiness, for instance, when the tribunals provided sentencing discounts to defendants who pled guilty.\textsuperscript{164} Any benefits that might have resulted from the guilty pleas\textsuperscript{165} seemed lost on most victims, who instead focused almost exclusively on the reduced sentences that the guilty pleas procured.\textsuperscript{166} The sentences imposed on defendants after trial have also generated keen interest. When the ECCC finally convicted its first offender, nearly forty years after he committed his crimes, the primary response from Cambodians was outrage about the defendant’s thirty-year sentence.\textsuperscript{167} Many victims were particularly galled by the sentence’s comparative leniency, noting that low-level drug dealers in Cambodia were generally sentenced to life imprisonment.\textsuperscript{168} Comparisons such as these have also been common in Bosnia, where ICTY sentences are often considered unjustly lenient compared to domestic sentences.\textsuperscript{169} One Bosnian, for instance, asserted that, in a Bosnian court, “you could get more years for killing someone in traffic” than the ICTY imposes for war crimes.\textsuperscript{170} Notably, it is not only


\textsuperscript{165} These benefits can range from the intangible value of the defendant’s acknowledgement of the crime, see COMBS, \textit{ supra} note 59, at 9, 171, to the tangible fact that guilty pleas enable the tribunals to prosecute more offenders than they otherwise would be able to prosecute, see id. at 129-30.


\textsuperscript{168} Bari, \textit{supra} note 167, at 203. The fact that the defendant would not have been released until he was eighty-six years old did not ameliorate the dissatisfaction. Richard L, Kilpatrick, Jr., Prosecutor v. Kaing Guek Eav alias Duch: In First Round of Proceedings, the Extraordinary Chambers in the Courts of Cambodia Convicts Former Chairman of Khmer Rouge Interrogation Center of Atrocity Crimes, 19 TuL. J. INT’L & COMP. L. 669, 687 (2012); John D. Ciorciari, \textit{The Duch Verdict}, CAMBODIAN TRIAL MONITOR (Oct. 5, 2015, 9:30 PM), http://www cambodiatribunal.org/sites/default/files/resources/the_duch_verdict.pdf.

\textsuperscript{169} Orentlicher, \textit{supra} note 163, at 51.

\textsuperscript{170} Id.
perceived leniency that generates criticism from local communities. Sierra Leoneans criticized as too harsh the SCSL sentences imposed in the CDF and RUF cases.\textsuperscript{171} Dissatisfaction with the CDF sentence came as no surprise because many Sierra Leoneans opposed the prosecution of the CDF defendants in the first place.\textsuperscript{172} However, most Sierra Leoneans favored the prosecution of the RUF defendants in general and Issa Sesay in particular,\textsuperscript{173} but many nonetheless felt that Sesay’s sentence was too harsh given his valuable contributions to the peace process.\textsuperscript{174}

Large-scale empirical studies of international victims, witnesses, and local communities also confirm their deep and abiding concern with sentencing and the effect that concern can have on their overall perceptions of international criminal justice. For instance, Diane Orentlicher’s study of the ICTY’s impact in Bosnia found that the dissatisfaction that some Bosnians feel over the ICTY’s sentencing undercuts their otherwise positive view of the tribunal.\textsuperscript{175} Eric Stover’s research reached the same conclusion. After interviewing more than a hundred ICTY witnesses, Stover reported that the tribunal’s sentencing practices had “clearly embittered many witnesses toward the ICTY.”\textsuperscript{176} Finally, Sanja Ivković’s surveys of ICTY witnesses show perhaps most clearly the enormous emphasis that local communities place on sentencing. Not only do many witnesses desire the imposition of harsher sentences than the ICTY is able or willing to impose, but their perception of the tribunal’s success and legitimacy is strongly influenced by the sentences that the tribunal does hand down.\textsuperscript{177} As Orentlicher put the point, “one of the most important factors affecting the quality of justice that victims experience is the sense that there should be a just proportion of the sentence imposed to the gravity of a perpetrator’s crime.”\textsuperscript{178} By this measure, Orentlicher concludes that “ICTY sentences have on the whole been cause for profound disappointment and often anger.”\textsuperscript{179}

\textsuperscript{171.} See Woods, supra note 5, at 651-52.

\textsuperscript{172.} Jalloh, supra note 149, at 424-26. But see Edward Sawyer & Tim Kelsall, Truth v. Justice? Popular Views on the Truth and Reconciliation Commission and the Special Court for Sierra Leone, 7 ONLINE J. CONFLICT RES. 36, 62-63 (2007) (suggesting that the CDF indictments were not as unpopular as some believe).

\textsuperscript{173.} Sawyer & Kelsall, supra note 172, at 57-58, 60.

\textsuperscript{174.} See Woods, supra note 5, at 651-52.

\textsuperscript{175.} Orentlicher, supra note 163, at 51, 53.

\textsuperscript{176.} ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE 142 (2005). One study, for instance, shows that victims of domestic crimes frequently suffer serious psychological harm when their perpetrators receive lower than expected sentences, Uli Orth, Secondary Victimization of Crime Victims by Criminal Proceedings, 15 SOC. JUST. RES. 313, 319 (2002), and the same is likely true for the victims of international crimes. See also Sanja Kutnjak Ivković, Justice by the International Criminal Tribunal for the former Yugoslavia, 37 STAN. J. INT’L L. 255, 321 (2001) (describing study results and concluding that a “potential explanation for why some respondents perceived the ICTY’s decisions in general or decisions in specific cases to be unfair may be the choice of punishment used (or those available to the ICTY), the punishment’s severity, or the purpose of the punishment”).

\textsuperscript{177.} Ivković, supra note 176, at 321-26.

\textsuperscript{178.} Orentlicher, supra note 163, at 51.

\textsuperscript{179.} Id. at 53 (“The intensity of victims’ dissatisfaction with ICTY sentences varies, but all whom we interviewed in the municipality of Prijedor were disappointed.”); see also Diane F. Orentlicher, Shrinking the Space for Denial: The Impact of the ICTY in Serbia, OPEN SOCIETY JUST.
The fact that victims of international crimes and their local communities care so intensely about sentencing should come as no surprise. Victims of domestic crimes and their local communities are also heavily invested in sentencing, and their views of local criminal justice systems are similarly colored by their satisfaction with the state’s sentencing scheme in general and with the sentence their offenders received in particular. In the United States, for instance, victims’ keen interest in sentencing and other aspects of the criminal process led states to adopt a variety of laws that provide victims with greater involvement in the criminal prosecutions of their offenders, including in their sentencing. Lately, victims of international crimes have been provided with comparable opportunities for involvement at some of the international courts. When it comes to sentencing in particular, ICC and STL victims are permitted to make written submissions and oral presentations during sentencing hearings. Consequently, Congolese victims of Thomas Lubanga and Germain Katanga made their sentencing views known during ICC proceedings against those two defendants. But, crucially, these and other international victims lack what domestic victims take for granted, namely, the opportunity to have their offenders sentenced under sentencing laws that reflect the norms of their communities.

Domestic sentencing laws are understood to reflect and incorporate community norms. In democratic states, sentencing laws are enacted by
elected officials, who are expected to represent local constituencies. Of course, actual sentencing laws and community norms do not always align; however, at least in theory, any divergences can be rectified at the ballot box. Even in non-democratic states, where sentencing provisions may be promulgated by official fiat, there is little reason to conclude, on that basis alone, that they are not in line with community values. By contrast, the sentencing provisions and practices of the international courts have not been informed by community norms. In some cases, the sentencing provisions make no reference to local norms and were drafted by diplomats or other international actors without local input. In other cases, the sentencing provisions instruct trial chambers to have recourse to local sentencing practices, but because the trial chambers have never taken this instruction seriously, one cannot say that their sentencing practices reflect community norms.

This potential disconnect between international sentencing provisions and local sentencing norms is problematic for a number of reasons. Paul Robinson and John Darley have compellingly contended that when a domestic criminal justice system diverges from community norms, it loses moral credibility and relevance. Any divergence between an international criminal justice system and community norms is apt to have an even greater deleterious effect. Under the best of circumstances, local populations see international courts as foreign and unfamiliar; the courts are sometimes the subject of misinformation, and they are often regarded with suspicion. Thus, because international courts do not naturally inspire the respect and legitimacy that is far more reflexively accorded to domestic criminal justice systems, they have to be
all the more concerned when their prosecutions—including their sentences—
diverge too dramatically from local norms. Indeed, international prosecutions
are expected to advance a whole host of goals that crucially depend on
community buy-in. Some of the most central of these goals are ending the cycle
of violence, preventing collective blame, and enhancing peace and
reconciliation among formerly warring parties. If the tribunals are going to
take even the first step towards advancing any of these goals, they will need
victims and local communities to respect their judgments. And if the
tribunals are going to take even the first step towards obtaining respect for their
judgments, they will need their sentencing laws to reflect—at least in broad
outlines—community norms.

What is the best way for international courts to infuse their sentences with
community norms? One might argue that the international courts that permit
victim participation already take account of local norms in sentencing. As noted
above, these courts typically receive the victims’ views about the sentencing of
specific defendants. So, as long as the courts genuinely consider such views
when determining the defendants’ sentences, we could conclude that local
norms are already playing a valuable role in sentencing. One problem with that
argument, however, is that victim participation provides the court with the
opinions of only one subset of the local population—the victims—and their
views may be colored by the horror they experienced during the conflict. In
addition, considering local norms only through victim participation may not be
sufficiently visible to produce optimal benefits.

A more accurate, objective, and transparent way for the tribunals to take

194. Cf. Timothy Longman et al., Connecting Justice to Human Experience: Attitudes Toward
Accountability and Reconciliation in Rwanda, in MY NEIGHBOR, MY ENEMY 206, 212 (Eric Stover &
Harvey Weinstein eds., 2004) (stating that Rwandan respondents wanted trials of genocide to “punish
the guilty” and “build community trust”); MEMUNATU BABY PRATT, CONSULTANT TO THE SPECIAL
COURT FOR SIERRA LEONE, NATION-WIDE SURVEY REPORT ON PUBLIC PERCEPTIONS OF THE SPECIAL
COURT FOR SIERRA LEONE 25 (Mar. 2007) (on file with author).

195. Thorsten Bonacker & Christoph Safferling, Introduction, in VICTIMS OF INTERNATIONAL
CRIMES: AN INTERDISCIPLINARY APPROACH 1, 2 (Thorsten Bonacker & Christoph Safferling eds.,
2013).

the ICTY “would contribute to the restoration and maintenance of peace”); S.C. Res. 955, para. 7,
U.N. Doc. S/RES/955 (Nov. 8, 1994) (asserting that “in the particular circumstances of Rwanda, the
prosecution of persons responsible for serious violations of international humanitarian law . . . would
contribute to the process of national reconciliation and to the restoration and maintenance of peace”);
Hideaki Shinoda, Peace-Building by the Rule of Law: An Examination of Intervention in the Form of
International Tribunals, 7 INT’L J. PEACE STUDIES 25, 26 (2002) (“[T]he ICTR is the first international tribunal
established for national reconciliation in history.”); cf. Ewald, supra note 129, at 368 (noting that
sentencing creates a “strong announcement to contribute to justice and peace-making in the post-conflict
society”).

Perceptions of the International Criminal Tribunal for Rwanda, 26 FLETCHER F. WORLD AFF. 21, 22
(2002) (maintaining that the perception of whether international trials can attain their anticipated goals is
“just as important as what happens in the[] courtrooms”); Jo-Anne Wemmers, Victims and the
International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims, 16
INT’L REV. VICTIMOLOGY 211, 224 (2009) (reporting on an empirical study showing that key staff at the
ICC is “very aware that how victims perceive the ICC is important for the success of the Court”).

198. See KIZA ET AL., supra note 148, at 141 (finding that “a rising degree of victimization
provides for a rising demand for punishment”). But see Hough & Roberts, supra note 189, at 21; Sprott
& Doob, supra note 188, at 287.
account of local sentencing norms is through consideration of domestic sentencing laws. Domestic sentencing laws are more likely to reflect the views of the entire society, not just the victims, and, in most cases, they will have been adopted during a period of relative calm. Thus, we can be reasonably confident that they stand as accurate reflections of community norms. Explicit appeal to domestic sentencing norms also provides international courts with a particularly visible and transparent way of conveying the court’s concern for and interest in the values of the community. Participants in Sanja Ivković’s study indicated that local communities both desired and expected international judges to know domestic law, and this is one way of meeting that expectation. To be sure, appealing to domestic sentencing norms will not wholly do away with victim dissatisfaction about tribunal sentencing. Some say that victims of unspeakable crimes “are always dissatisfied with sentences imposed by a court”, at the least, some victims will not be satisfied with anything less than the imposition of capital punishment. But appealing to domestic sentencing laws will bolster the legitimacy of international sentencing in the eyes of both victims and the larger community. It is one thing to feel aggrieved because an international court has imposed an unjustifiably lenient sentence on a brutal offender. It is far worse to know that the unjustifiably lenient sentence was imposed pursuant to unfamiliar, foreign norms. Local communities may still be dissatisfied with a given sentence, even if domestic norms are consulted before its issuance, but they are less likely to view that sentence as wholly illegitimate.

Consulting domestic sentencing norms also will help reduce a set of sentencing inconsistencies that are wholly unjustified but that have received little attention over the years. These are the inconsistencies that result when some individuals who have committed crimes as part of a conflict are prosecuted by international courts while other individuals who have committed similar crimes as part of the same conflict are prosecuted by domestic courts. These inconsistencies occur infrequently because most atrocities that are prosecuted in international courts are not also prosecuted in domestic courts. But the issue can arise, as it did in Rwanda, when, soon after the genocide, Rwandan domestic courts began actively prosecuting mid- and low-level offenders at the same time that the ICTR was prosecuting their high-level counterparts. Not surprisingly, given their different sentencing laws, Rwandan domestic court sentences diverged, (often counterintuitively), from ICTR
sentences, and these divergences upset local communities and subjected the ICTR to considerable criticism. Bosnians, likewise, criticize ICTY sentences when they perceive them to be more lenient than the sentences that local courts impose. Requiring international courts to consult domestic sentencing laws will not eliminate disparities between international and domestic sentences, but it will help better align them in defensible ways.

At first glance, my proposal to appeal to domestic sentencing laws might seem to resemble existing tribunal sentencing provisions that instruct trial chambers to have recourse to the “general practice regarding prison sentences” in the domestic courts where the crimes took place. However, although these provisions and my proposal both seek the inclusion of domestic norms in international sentencing, that is where the resemblance ends. In discussing the implementation of my proposal below, I will advocate the inclusion of domestic norms at a different time and in a different fashion from the tribunals’ recourse-to-domestic-practice provisions contemplate. In addition, my proposal is motivated by different concerns, features a different underlying rationale, and, most importantly, seeks to advance different goals. The creators of the early tribunals included the recourse-to-domestic-practices provisions because they were concerned that imposing sentences that were completely untethered from domestic law would violate the prohibition on retroactive punishment embodied in the *nulla poena sine lege* principle. Some scholars considered that concern overblown, and the early tribunals themselves paid scant attention to it, so the provisions were never properly implemented. My proposal, by contrast, does not seek to avert a human rights violation but rather is the end result of a normative analysis. That analysis first concluded that international sentencing laws ideally would take account of a host of relevant facts and circumstances. Recognizing, however, that many of those facts and circumstances would be unknowable at the relevant time, my analysis isolated

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204. Mark A. Drumbl, *The Curious Criminality of Mass Atrocity: Diverse Actors, Multiple Truths, and Plural Responses*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* 68, 72-73 (Elies van Sliedregt & Sergey Vasiliev eds., 2014). Initially, while the ICTR was sentencing the highest-level offenders to terms of imprisonment, ICTR Statute, *supra* note 25, art. 23(1), Rwandan courts were sentencing some mid- and low-level offenders to death, HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE 185 (1999). However, Rwanda no longer applies the death penalty. [*Rwanda Scraps the Death Penalty*, BBC NEWS (June 8, 2007), http://news.bbc.co.uk/2/hi/africa/6735435.stm.]


207. Indeed, some inconsistencies are appropriate. For instance, the Special Panels sentenced its defendants to longer terms of imprisonment than Indonesian domestic courts did, but that was because the Indonesian courts were not genuinely seeking to impose accountability on offenders. See Cohen, *supra* note 158, at 4.

208. D’ASCOLI, *supra* note 5, at 115-16; Schabas, *supra* note 11, at 468-69, 482.

local community norms as a particularly important, relatively ascertainable factor that should be considered in every sentence. Why is that particular factor so important? Primarily because its consideration can enhance the perceived legitimacy of international criminal sentences and, by extension, international criminal law more generally.

Enhancing the legitimacy of international criminal prosecutions in the eyes of local communities is among the most valuable aims that modern international criminal justice can seek to achieve. International criminal justice—once heralded as a virtual post-conflict panacea—is now suffering from a public affairs crisis. Always under attack from governments whose officials were its targets, the international tribunals are now also facing wide-ranging criticism from those who theoretically support international criminal law. Scholars no longer unquestioningly accept that international criminal prosecutions can attain the lofty and ambitious goals previously ascribed to them, and practitioners increasingly criticize various aspects of tribunal proceedings. Most worrying, however, is that international criminal prosecutions have not delivered the expected benefits to victims and local communities. At first, when local communities did not respond positively to early international criminal prosecutions, it was assumed that the tribunals’ inadequate outreach efforts were to blame. However, that rationale is no longer persuasive. Now we know that many victims and local communities are deeply dissatisfied with the international courts and that their dissatisfaction does not stem primarily from ignorance. Indeed, a recent survey of Cambodians showed that the victim participants in the ECCC’s first trial, who better understood and more often attended the court’s proceedings, held less positive...


211. COMBS, supra note 94, at 2-3 (outlining the various criticisms recently leveled against international criminal law).

212. Many of the most critical views emanate from defense counsel, Jenia Ioncheva Turner, Defense Perspectives on Law and Politics in International Criminal Trials, 48 VA. J. INT’L L. 529, 531 (2008), but even former prosecutors and legal officers have been known to offer critiques, see Harmon & Gaynor, supra note 4, at 685; Alexander Zahar, Pluralism and the Rights of the Accused in International Criminal Proceedings, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 225, 233-38 (Elies van Sliedregt & Sergey Vasilev eds., 2014).

213. See, e.g., Miklos Biro et al., Attitudes Toward Justice and Social Reconstruction in Bosnia & Herzegovina and Croatia, in MY NEIGHBOR, MY ENEMY 183, 200 (Eric Stover & Harvey Weinstein eds., 2004); Lal C. Vohrah & Jon Cina, The Outreach Programme, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE 547, 550-51 (Richard May et al. eds., 2001); Kerr & Lincoln, supra note 149, at 21.

214. See, e.g., Rachel Kerr, Lost in Translation? Perceptions of the ICTY in the former Yugoslavia, in PROSECUTING WAR CRIMES: LESSONS AND LEGACIES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 103, 108-09 (James Gow et al. eds., 2014). The news is not all bad, however. A nationwide survey of Sierra Leoneans revealed that large majorities believed that the SCSL had contributed to peace building and that its trials were fair and had helped deter future violence. PRATT, supra note 194, at 23-24; see also Sawyer & Kelsall, supra note 172, at 57-58, 60 (finding that the SCSL had “broad public support”).
perceptions towards trials than members of the general public in Cambodia or than victim participants who were less involved in and less knowledgeable about the trial. The study’s authors consequently concluded that “more nuanced knowledge of the trial proceedings may translate into more critical perceptions and attitudes towards the Court.” Similar findings have been made about the views of Yugoslavians on the ICTY. Admittedly, including domestic sentencing norms in international criminal sentencing is no more a panacea for the tribunals’ legitimacy problems than international criminal prosecutions are a panacea for a post-conflict state’s transitional justice problems. But because the tribunals’ legitimacy deficits threaten to undermine their work in so many wide-ranging and fundamental ways, every effort that can be made to enhance the tribunals’ legitimacy with local populations must be seriously considered.

IV. IMPLEMENTING SENTENCING PLURALISM

Suggesting that international courts should consider domestic sentencing norms is one thing. Answering the how, when, and what if questions regarding that consideration is quite another. Indeed, those scholars who have advanced sentencing proposals for international crimes typically have explicated only the theoretical dimensions of their proposals. Given that, I will conclude this Part with a much-needed discussion of the practical questions involved in the implementation of my proposal. In particular, I will consider three broad-based questions. First, in what fashion should an international court consider domestic sentencing law? Second, which domestic law should an international court consider? And finally, how should an international court proceed when relevant domestic law either does not exist, cannot be ascertained, or is objectionable for one reason or another? Some of these questions contain their own sub-questions, which will also be addressed.

A. The Method of Consideration

Our first question—which pertains to the way in which international courts should consider domestic sentencing laws—includes two sub-questions. The first pertains to timing and the second to influence. As for timing, we must consider at what stage of the international proceedings domestic law should be considered. One possibility is to consider domestic law at the time that the international court’s sentencing scheme is being drafted. For an ad hoc tribunal, that will mean at the time the tribunal is created. For the ICC, that will usually mean at the time a situation is referred to the court. If domestic law is

216. IVKOVIĆ & HAGAN, supra note 192, at 37, 50, 134-37, 150 (reporting survey data showing that negative views increased as respondents learned more about actual ICTY cases).
217. Most of the situations currently before the ICC came to the court via a state party referral or a Security Council referral. Uganda, the Democratic Republic of the Congo, Central African Republic, Ivory Coast, and Mali each referred the situations in their countries to the ICC, Ottilia Anna Maunganidze & Antoinette Louw, Implications of Another African Case as Mali Self-refers to the ICC, INST. FOR SECURITY STUD. (July 24, 2012), http://www.issafrica.org/iss-today/implications-of-another-african-case-as-mali-self-refers-to-the-icc, and the Security Council referred the Darfur and Libyan
considered at this stage, it will be used to inform the sentencing rules that the international court adopts. Alternatively, international courts could consider domestic law at the conclusion of each case, when the defendants in that case have been convicted and are awaiting sentence. This is the model already appearing in the sentencing provisions of certain tribunals.

Although both models have merit, I favor using domestic law to inform the drafting of the international court’s sentencing provisions. Admittedly, that alternative does have one key disadvantage, namely, that the location of the atrocities may not be known with sufficient certainty at the time a tribunal is created or a situation is referred to the ICC. The ICTY was created while the conflict in question was in full swing, and the ICC regularly receives referrals for situations that are part of ongoing conflicts. In these cases, the international court might draft sentencing laws that are substantially informed by the domestic laws of State A—where the initial crimes took place—only to later find themselves prosecuting crimes that took place in State B. These subsequently occurring atrocities, along with any subsequently discovered atrocities, might require the court to amend its sentencing scheme. They might not, however, as we will see below. In addition, the advantages of appealing to domestic law at the macro, international lawmaking level outweigh the disadvantages.

One such advantage is that domestic law is likely to have a greater real and perceived impact if it influences the contours of the international court’s actual sentencing provisions than if it is merely taken into account in individual sentencing determinations. To what degree domestic law can and should influence international sentencing provisions is a topic to which I will turn next, but suffice it to say here that, even if its influence on the international court’s final sentencing provisions is not profound, it will certainly be more visible—and it will be perceived as more important—than if the court takes account of local law only in its determination of an individual sentence. If courts consider domestic law when drafting their sentencing provisions, then the sentencing provisions of different international tribunals and ICC situations will differ from one another. The differences may not be dramatic in every instance, but they are apt to be noticeable, traceable to domestic law, and consequently meaningful to local constituencies. By contrast, when domestic

situations to the ICC, S.C. Res. 170, U.N. Doc. S/RES/170 (Feb. 26, 2011); S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). However, the ICC’s Prosecutor also can initiate investigations proprio motu, Rome Statute, supra note 29, art. 15, and in that case, a sentencing scheme would not be considered at least until the Pretrial Chamber has authorized investigations and perhaps not until charges have been confirmed.

law is considered only at the sentencing of individual offenders, its impact is apt to be reduced or, at the least, obscured.

It is the sentencing practices of the ICTY, ICTR, and SCSL that give us good reason to fear reduced impact of domestic laws that are considered only at the sentencing phase, as those early tribunals paid mere lip service to domestic norms. But even courts that genuinely seek to take account of domestic law may have difficulty determining what degree of influence to accord that law at the sentencing stage given the host of other factors that will also be relevant to an individual defendant’s sentence. Those factors must also be considered, but doing so is likely to obscure, if not diminish, the influence of the domestic sentencing law. Further, as we will see next, domestic laws sometimes delineate broad ranges of appropriate sentences for each crime. Thus, because consideration of domestic law at the sentencing stage will not inexorably lead to a certain sentence or even a narrow range of sentences, its influence may not be visible to local constituencies. The visibility of domestic law is particularly important because a primary reason for considering that law in the first place is to enhance the legitimacy of the international sentences. If local communities do not know how, or even if domestic law influenced a given sentence, then its inclusion will not provide the anticipated benefits.

Next, we must consider the degree of influence domestic law should have over international sentencing schemes. If we wanted to accord domestic law maximal influence, we would require international courts to adopt domestic law as their own law, so long as the domestic law did not violate human rights norms. Presumably, pluralists such as Alexander Greenawalt would favor such an approach. As noted above, Greenawalt asserts that when the specific purposes of international criminal law do not override reasonable differences among national systems, then domestic law should prevail. Applying his criteria, Greenawalt concludes that international courts should apply domestic law in a wide variety of realms, including modes of liability, defenses, the general standards of individual responsibility, and sentencing. An alternative proposal, at the opposite end of the influence continuum, would be to give international courts the discretion to consider domestic sentencing law if they so choose.

In my view, the optimal path lies between these two poles. The latter option—providing international courts the discretion to consider domestic laws when drafting their sentencing schemes—is apt to give insufficient weight to domestic norms and will result in undesirable inconsistencies, as some international courts (or ICC situations) will take account of domestic norms and others will not. Because we have reason to believe that all international courts would benefit from the inclusion of local sentencing norms, we should require all courts to consider domestic laws in some fashion. However, at the other extreme, requiring the adoption of domestic law ties the international courts’

219. See supra notes 33-36.
220. These include the number of victims and the level of the defendant’s responsibility, among many other factors.
221. Greenawalt, supra note 36, at 1124-25.
hands too tightly. For one thing, it is not uncommon for states to seek to shield international criminal offenders from punishment, and domestic sentencing laws might reflect this perverted perspective. Obviously, we would not want to require international courts to adopt these sorts of laws. In addition, even where domestic laws set forth punishment ranges that are prima facie appropriate, international courts will benefit from some sentencing leeway. I concluded earlier in this Part that international courts should take account of a variety of facts and circumstances to construct an optimal sentencing scheme for a particular conflict or court. Although, as noted, many of those facts and circumstances will not be knowable at the relevant time, some will. For this reason, one could imagine instances in which other factors combine to suggest that the unthinking adoption of domestic sentencing law would be ill-advised.

Given these conflicting concerns, we might decide that an ideal compromise would be to require international courts to consider domestic law in the creation of their sentencing schemes, but along with all of the other facts and circumstances that will be relevant to the court’s sentencing scheme. I worry, however, that if no particular weight is placed on domestic law, it will get lost among other relevant facts and circumstances. My fear stems in part from the fact that those who participate in the creation of international courts are typically Westerners who favor more lenient sentences than the ones usually governing crimes in states where atrocities take place. Thus, they may bring to the table a substantive disinclination toward domestic sentences. However, even if that substantive disinclination does not exist, I fear that an undifferentiated consideration of factors will not provide domestic law either the real or perceived influence that would be most beneficial. Given that and because the inclusion of domestic sentencing law ordinarily provides such clear benefits, I propose imposing on international courts a presumption that domestic sentencing law will have substantial and demonstrable influence on their sentencing schemes unless clear countervailing considerations require it to play a lesser role.

B. The Relevant Domestic Law

Our second question—which domestic law should an international court consider—also includes two sub-questions: namely, which jurisdiction’s law should be considered and which subset of sentencing rules. Turning to the second sub-question first, an international court should consider the sentencing law that is most directly relevant to the crimes within the court’s jurisdiction. Most international courts primarily prosecute international crimes (as opposed to domestic crimes), so they would consult domestic sentencing laws governing international crimes.

As to which jurisdiction’s law should be considered, the question is relatively easy when the atrocities occurred exclusively on the territory of one state. In that case, the international court would consider the law of the state where the atrocities occurred. The question could seem more complicated if it is known that a substantial proportion of offenders are not nationals of the state where the crime took place. However, even then, the international court should
look primarily to the law of the state where the crimes occurred. For one thing, as a matter of international law, territoriality is "the principal ground for the exercise of criminal jurisdiction." 222 In addition, a primary reason for appealing to domestic laws in the first place is to enhance the legitimacy of the international court in the eyes of local communities. The views of the defendants' compatriots are by no means irrelevant, but the views of victims and the local communities that actually suffered the atrocities are of particular importance to an international court's reputation and its ability to carry out its goals. Hence, appealing to their law will provide the greatest advantages.

Of course, more than one domestic law could be relevant, even when all of the atrocities occurred within the territory of one state, if the atrocities spanned more than one governmental subdivision, and the subdivisions have different sentencing laws for international crimes. 223 This scenario is unlikely. As we will see, many states have enacted no sentencing laws for international crimes at all, and those that have have typically enacted them at the national level, not the state or local level. In the unlikely event that a state does boast different national and local sentencing laws for the same international crime, then, in principle, the most local of the relevant sentencing laws should have primary influence because it is that law that is likely to be the most familiar and legitimate to local populations. In reality, however, the relevant international officials probably will not have sufficiently certain information about the locations of the atrocities at the time the sentencing scheme is being drafted, so appeal to national sentencing law may be required. As it happens, sentencing norms for violent crimes do not usually vary dramatically between different regions of the same state, 224 so any differences that do exist are not apt to have significant practical effect.

The question could seem more complicated if the crimes spanned more than one state; however, the principles articulated above continue to apply. First off, as above, the complications may be more theoretical than real. That is, although there is greater sentencing variation between different states in a region than there is between different governmental units in a state, the different states of the same region sometimes apply similar sentencing laws. 225


223. deGuzman, supra note 16, at 27-28 (noting that "sentencing norms can differ dramatically even within national communities").


225. This statement is certainly true for domestic crimes. See Stefan Harrendorf, How to Measure Punitiveness in Global Perspective: What Can Be Learned from International Survey Data, in PUNITIVITY: INTERNATIONAL DEVELOPMENTS 125, 136 (Helmut Kury & Evelyn Shea eds., 2011) (showing graphically sentencing similarities among the countries of Western Europe, on the one hand, and among the countries of Eastern Europe, on the other, but dramatic differences between the practices in Western and Eastern Europe). When it comes to international crimes, the picture is harder to decipher, though some regional similarities can also be identified. For instance, several Caribbean countries have enacted sentencing schemes for international crimes that differentiate between genocide that results in death and genocide that does not. For the latter, the penalty in each of these countries is fourteen or
Thus, an international court may be able to consider the sentencing laws of more than one state in drafting coherent international sentencing standards that are both familiar to and respected by local communities. In the event that the sentencing laws of multiple states where crimes took place do diverge substantially, the international court can create and apply alternative sentencing schemes, so that crimes occurring in one state will be sentenced pursuant to one set of rules and crimes occurring in another state pursuant to another. Although this may seem burdensome, it is simply an application of the general principle that domestic norms should substantially inform international criminal sentencing rules. Most courts and most ICC situations will need only one sentencing scheme, but in the rare case, more than one will be required.

C. The Absence of Relevant Domestic Law

Our final question asks how an international court should proceed when relevant domestic sentencing law for international crimes either does not exist,\textsuperscript{226} cannot be ascertained,\textsuperscript{227} or is objectionable for one reason or another. The last of these possibilities is the most straightforward to address. Domestic sentencing laws that contravene human rights norms can have no effect at the international tribunals.\textsuperscript{228} A closer question concerns the death penalty, which is ostensibly consistent with human rights norms,\textsuperscript{229} and which is permitted by numerous domestic laws for the punishment of international crimes,\textsuperscript{230} but...
which is nonetheless abhorred by a substantial number of states.\textsuperscript{231} One tempting possibility would be to suggest that the death penalty cannot be applied in the international courts. This suggestion is tempting, first, because it accords with reality. The widespread and vigorous opposition to the inclusion of the death penalty in the ICC’s sentencing provisions shows that, no matter what domestic sentencing laws provide, the death penalty is not a sanction that will be acceptable to those who create international courts. Thus, a scholarly proposal to apply the death penalty is a scholarly proposal that will have no impact in the real world. The suggestion to remove the death penalty from the range of possible sanctions is also tempting to me in particular because my previous scholarship has painstakingly detailed the fact-finding difficulties that plague international courts.\textsuperscript{232} The potential for these fact-finding difficulties to lead to inappropriate convictions should give pause to even the most committed proponents of capital punishment for international crimes.

Neither of the reasons just articulated for placing the death penalty off-limits is entirely satisfying, however. The fact that a group of powerful states disapproves of the sanction is not by itself a principled reason to eschew it for crimes taking place in states that do approve it. And if the fact-finding difficulties that I identify are so problematic, then they should caution against the imposition of any form of criminal punishment, not just the death penalty. Further, removing the death penalty as a possible sanction runs the risk of undercutting all that we are trying to achieve through the inclusion of domestic law. Our primary reason for considering domestic law is our belief that doing so will help legitimate international court sentences in the eyes of local populations. But perhaps that beneficial effect will not occur if the resulting sentencing scheme does not include the death penalty. Certainly, many victims of international crimes desire—intensely—the imposition of the death penalty for those who commit international crimes.\textsuperscript{233} Equally certainly, they and others in their local communities will be disappointed—perhaps intensely—if the death penalty cannot be imposed.

Given these circumstances, perhaps the best rule is no rule at all specifically about the death penalty. My proposal—that international courts afford domestic sentencing laws substantial and demonstrable influence on an international court’s sentencing scheme unless clear countervailing considerations require it to play a lesser role—does not mandate the acceptance or rejection of the death penalty or any other sanction. Thus, it should remain for each international court to decide. In some cases, the international court will face such intense opposition to the death penalty from states instrumental to the court’s success that the court may have no real “choice” but to eschew the death penalty. However, courts that decline to include the death penalty when it is authorized by domestic law should make substantial efforts to alleviate any negative effects of that decision on local populations. In particular, these courts

\textsuperscript{232} COMBS,\textsuperscript{ supra} note 94.
\textsuperscript{233} Ivković,\textsuperscript{ supra} note 176, at 323.
should seek to ensure that the remaining domestic laws significantly influence the international court’s sentencing scheme and, even more importantly, that they are understood by local communities to have significantly influenced the international court’s sentencing scheme.

What should an international court do when domestic sentencing law for international crimes either does not exist or cannot be ascertained? In that case, the international court should consider as a proxy the comparative harshness of the state’s sentencing regime for domestic crimes. For instance, the United States has not criminalized crimes against humanity, so an international court seeking to consider American sentencing law on crimes against humanity would have nothing to consider. However, the international court would be able to ascertain that American sentencing law for violent domestic crimes is at the harsh end of the global continuum, and it could consider that fact in drafting its sentencing scheme. Considering the comparative harshness of domestic sentences might prove useful even when the state in question has easily ascertainable sentencing laws for international crimes, if those sentencing laws delineate broad ranges of sentences. Argentina, for instance, prescribes a sentence of between three and twenty-five years for a crime against humanity where no death occurred. Equally indeterminate is Germany’s law, which requires a sentence of “not less than three years for certain crimes against humanity.” Certainly, international courts could adopt similarly broad ranges in their own sentencing provisions, but because the ranges are so broad, they will not provide international judges much useful guidance. In theory, international courts could consult domestic case law to help narrow the ranges. However, domestic prosecutions of international crimes are exceedingly rare, so the international courts would find little case law to consult. In these cases, then, useful guidance can be found in the relative leniency or harshness of sentencing laws for violent domestic crimes.

CONCLUSION

In his 2011 posthumous book, The Collapse of American Criminal Justice, William Stuntz maintains that the American criminal justice system is in disrepair largely because it is no longer deemed legitimate by those most affected by it. Stuntz points out that, whereas in the past, local control over criminal justice systems legitimated those systems in the eyes of local communities, local control no longer exists. Those most affected by the American criminal justice system nowadays are urban African Americans, who have little influence over the criminal processes that impact them so heavily.

239. Id. at 31-32.
240. Id. at 32.
As Stuntz puts it, "Today, black crime is mostly governed by white judges and white politicians, and by the white voters who elected them."\footnote{Id. at 61.} In Stuntz's view, restoring control to local communities would provide the American criminal justice system a legitimacy it now lacks.\footnote{Id. at 39.}

Stuntz's conclusions about the American criminal justice system apply with even greater force to the international criminal courts. As empirical researchers Sanja Ivković and John Hagan put it about the ICTY, "To be seen as legitimate, justice . . . must be seen as local justice."\footnote{Ivković & Hagan, supra note 192, at 81.} International criminal justice systems are no more controlled by those most impacted by them than modern-day American criminal justice systems are, and, for a host of good reasons, international criminal justice systems have little likelihood of becoming locally controlled. But increasing local influence over sentencing—a feature of international criminal justice that is of particular importance to local communities—has the potential to substantially enhance the legitimacy of international courts in the eyes of those communities.

Embracing local influence over sentencing will increase variation in sentencing between different international courts, but this Article has shown that sentencing pluralism is all to the good. Although most international criminal scholarship reflexively assumes that sentencing across tribunals should be consistent, that assumption has little descriptive or normative foundation. Descriptively, the international courts are best conceived as discrete bodies that are not components of a unified criminal justice system. Given that, there is no empirical basis to assume that they should be governed by the same sentencing rules or that they should apply the sentencing rules they have in a consistent fashion. As a normative matter, one might conclude that consistent sentencing practices would provide certain benefits, but forging genuine agreement on what those practices should be may be impossible, and any benefits that might accrue would be outweighed by the costs of uniformity. International crimes are perpetrated by high-level leaders who orchestrate the atrocities and low-level sadists who implement the atrocities. International crimes occur during international armed conflicts that involve multiple states, civil wars that involve rebel forces, and large-scale human rights violations that are perpetrated by one state against its own citizens. International crimes are prosecuted in bodies that blend international and domestic elements and bodies that do not; they are prosecuted in bodies that have broad mandates and plentiful resources and bodies that have narrow mandates and limited resources; and international crimes are prosecuted in bodies that are created unilaterally, bilaterally, and multilaterally. Each of these differences matters when it comes to sentencing, but uniform sentencing practices fail to take any of them into account.

Ideally, each of the above factors—and more—would be considered when crafting the optimal sentencing scheme for a particular international court. However, limited information and other constraints often will prevent such a nuanced and multi-faceted analysis. Happily, what they will not prevent is
consideration of one factor that is usually knowable and always relevant: the sentencing laws of the state where the crimes took place. These laws are relatively familiar to local communities, and they typically reflect local values. Their inclusion in an international court’s sentencing scheme, therefore, can help legitimize that scheme in the eyes of victims and local communities. Crime victims—whether international or domestic—are often dissatisfied with the sentences imposed upon their perpetrators. Including local norms in international sentencing laws will not dramatically reduce any dissatisfaction that victims might otherwise feel, but it will add a visible element of local influence in a realm of tremendous importance to local communities. Some scholars argue that international courts should apply domestic laws in a wide variety of arenas. Those claims may have theoretical appeal, but I suspect that their practical implementation would have little impact on the views and/or satisfaction of local communities. Local influence over sentencing, by contrast, has the potential for significant, positive impact.

Such positive impact is keenly needed. International courts face considerable challenges in their efforts to win the hearts and minds of local communities. International courts can prosecute only a miniscule proportion of international offenders, leaving most to walk the streets with impunity. International courts conduct their prosecutions far from crime scenes and pursuant to unfamiliar procedures.\(^244\) International courts spend vast sums to provide fair trials to defendants,\(^245\) but they are able to provide virtually no financial assistance to victims who desperately need it.\(^246\) When expressing disappointment, local communities point to these and other perceived failings of the international courts, and they point to the courts’ sentencing. Local communities perceive international court sentencing to carry tremendous weight and convey crucial messages, messages as fundamental as the international community’s interest in their suffering and respect for their status as victims. Incorporating local norms into international criminal sentencing may or may not change any individual sentences, but it will send a very welcome message of respect and inclusion to local communities.

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\(^{244}\) See, e.g., Des Forges & Longman, supra note 190, at 56.

