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**RETHINKING THE ROLE OF NATIONAL SENTENCING PRACTICE IN THE INTERNATIONAL
TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA**

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INTERNATIONAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA**

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ABSTRACT

The establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda famously engendered a new era in international criminal law. While the development of the tribunals provoked an enormous body of literature, the sentencing practice of the courts is understudied. This paper addresses this gap by analyzing the tribunals' use of national sentencing practice. Rather than creating a separate sentencing structure, the statutes of both tribunals direct that the judges "shall have recourse to the general practice regarding prison sentences" from the respective national courts. Despite the authority to consider national sentencing practice, the tribunals have interpreted their statutory obligations narrowly—requiring only that the trial chambers consult national sentencing practice. The procedures and laws of the respective national government is thus not binding on the international tribunals. Moreover, the jurisprudence of the tribunals shows a pattern of perfunctory recitation of national law, one that lacks extensive analysis. This paper aims to examine, first, the reasons tribunals have cited to justify limited use of national sentencing practice, and, second, the implications of the circumscribed use of that practice. The author concludes that the tribunals may be diluting the reconciliatory features of their sentencing function and also perhaps weakening the role of national law in the international legal system.

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Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY), established by the United Nations Security Council in 1993 in the aftermath of the Balkan conflict, and the International Criminal Tribunal for Rwanda (ICTR), established by the same in 1994 following the Rwandan genocide,¹ engendered a new era in international criminal law.² This development ensured that violations of human rights norms were no longer subject only to domestic enforcement, as had been the practice following World War II.³ In creating the two ad hoc tribunals, the U.N. Security Council also provided a forum for individual defendants to be tried for violations of international law⁴—even if the crimes committed were not illegal under national law. The tribunals have jurisdiction over a number of international crimes, including the commission of genocide and crimes against humanity and violations of the 1949 Geneva Conventions that protect civilians during times of war.⁵

The creation of the ad hoc tribunals, so heavily grounded in international law, might suggest that national law would have no place in those institutions. In fact, the opposite is true. The Security Council deliberately carved out a small—yet critical—role for at least one form of national law. Both statutes direct that the international tribunals have “recourse to the general practice regarding prison sentences” in the respective national courts,⁶ this provision is incorporated in Article 23 of the Statute of the ICTR, and Article 24 of the ICTY Statute. Each tribunal’s Rules of Procedure and Evidence further incorporates this provision. In the ICTY, Rule 101 provides that “[i]n determining the sentence, the Trial Chamber shall take into account . . . the general prison sentences in the courts of the former Yugoslavia;”⁷ in the ICTR, Rule 101 provides the same, with reference to the national courts in Rwanda.⁸

¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, annex (1993) 32 I.L.M. 1192 (2003), adopted in S.C. Res 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, 33 I.L.M. 1602 (1994), adopted in United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute), S.C. Res. 955, P 106, 49 U.N. SCOR, 48th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

² See AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (Robert Cryer et al. eds., 2007) 3 (“Until the establishment of the international courts and tribunals in the 1990s, the concept of international criminal law tended to be used to refer to those parts of a State’s domestic criminal law which deal with transnational crimes . . . crimes with actual or potential transborder effects.”).

³ See *id.* (reviewing important national prosecutions following the Second World War).

⁴ ICTR Statute, *supra* note 1, art. 1. See *infra* note 5.

⁵ ICTY Statute, *supra* note 1, art. 2 (“Grave Breaches of the Geneva Conventions of 1949”), art. 3 (“Violation of the Laws or Customs of War”), art. 4 (“Genocide”), art. 5 (“Crimes Against Humanity”). The ICTR Statute states that the tribunal has jurisdiction over genocide, crimes against humanity and “violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II” of 1977. ICTR Statute, *supra* note 1, arts. 2-4. See also Cryer, *supra* note 3, at 113 (explaining key differences in definition of crimes and the jurisdiction of the ICTY and ICTR).

⁶ ICTR Statute, *supra* note 1, art. 23; ICTY Statute, *supra* note 1, art. 24.

⁷ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 19, 12 January 2001 [hereinafter ICTY Rules].

⁸ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/Rev. 6, 26 June 2000 [hereinafter ICTR Rules].

Despite the authority to consider national sentencing practice, the tribunals have made limited use of national sentencing laws of the former Yugoslavia and Rwanda. They have interpreted Articles 23 and 24 to require only *consultation* with national law, holding that national sentencing practice is not binding on the tribunals. The jurisprudence of the courts has gone even further. The tribunals have exhibited significant reluctance to give any real consideration to complying with national laws—many judgments easily dispose of the national sentencing law by noting briefly that it is non-binding without any further analysis. This pattern exposes a rich and under-studied area of law: while scholars have remarked that national sentencing practice is not important to the tribunals, few have tried to understand why its role is so limited and what that might mean for the function of the tribunals and the role of national law in international law generally. This paper aims to help remedy this imbalance by making some key observations about the sentencing practice of the ad hoc tribunals.

The purpose of the paper is thus two-fold. First, to provide an extensive analysis of the motivations underlying the limited use of national sentencing laws in the tribunals. Second, the paper aims to examine the implications of the tribunals' circumscribed reference to national sentencing practice. I argue that the tribunals' approach conflicts with the reconciliatory role of the tribunals. By issuing sentencing decisions that are in many cases more lenient than the perpetrator would have received under national law and by otherwise ignoring national law in their decisions, the tribunals have diluted the reconciliatory function of their sentencing practice and undermined its expressive value. This approach also weakens the role of national law in the international legal system, which has exhibited a strong preference for domestic criminal processes. These two problems threaten the ability of the tribunals to properly incorporate national claims and values in their decisions. In conclusion, I suggest that a partial solution lies in a re-reading of Articles 23 and 24 that would require the Trial Chambers to use national sentencing law as a default and cite that practice whenever possible, unless the municipal legal system violates fundamental human rights or norms of due process.

This paper's analysis of the role of national sentencing practice begins in Part I with an inquiry into the text and drafting history of the ICTY and ICTR Statutes to determine what, if any, guidance they provide for the provisions on national sentencing practice. In Part II, I identify and discuss the main principles the tribunals have invoked to justify their limited recognition of national sentencing practice, and provide some examples of how national sentencing law has actually been treated by the tribunals in their decisions. The following part explores the thesis that the tribunals' current approach ultimately frustrates both the reconciliatory function of the ad hoc tribunals and the important role of national law in the international legal system. Finally, Part IV explores the suggestion that the tribunals should undertake a new direction based on more rigorous adherence to national sentencing law.

I. The Language and Drafting History of the Statutes

A. The Text

The most obvious place to begin analyzing the purpose of the provisions on national sentence practice is in the text of the statutes themselves. The ICTR and ICTY are "sister institutions" in many respects: "they share an Appeals Chamber, have nearly identical Statutes

and Rules of Procedure and Evidence, and have mostly harmonized their case law.”⁹ Article 24 of the ICTY Statute and Article 23 of the ICTR Statute controls the penalties that can be imposed by the ad hoc tribunals and includes the language on national sentencing practice. Articles 23 and 24 provide only for sentences of imprisonment; sentences of probation, conditional release, or the death penalty are not available to them.¹⁰ Article 24, which defines the penalties available to the ICTY, states:

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the term of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, by their rightful owners.¹¹

The ICTR Statute is identical.¹²

Thus, even a cursory reading of the statutes reveals the paucity of instructions they provide. The statutes enumerate only three factors that must be considered, the “gravity of the offense,” “individual circumstances,” and “national sentencing practice.” However, the statutes do not specify how those factors affect incarceration, nor do they provide any guidelines or framework for imposing a sentence. This lack of guidance has troubled the tribunals.¹³

The Rules of Procedure and Evidence, on the other hand, are slightly more detailed. Rule 101 of the ICTY Rules of Evidence and Procedure, which is identical to the relevant rule in the ICTR,¹⁴ offers some explanation of how “gravity of the offense” and “individual circumstances” enumerated in Rule 24 are defined. The Rule provides that:

- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24(2) of the Statute, as well as such factors as:
- (i) any aggravating circumstances;
 - (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
 - (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
 - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute.¹⁵

⁹ Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 711 (2008).

¹⁰ This was made expressly clear by Article 24(1). ICTY Statute, *supra* note 1, art. 24. However, the Rules of Procedure and Evidence provide some additional guidance: “(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.” ICTY Rules, *supra* note 7, Rule 101(A).

¹¹ ICTY Statute, *supra* note 1, art. 24.

¹² ICTR Statute, *supra* note 1, art. 23.

¹³ See *Prosecutor v. Erdemovic*, Case No. IT-96-2, Sentencing Judgement, ¶ 26 (Nov. 29, 1996) (“Except for the reference to the general [national] practice regarding prison sentences . . . the Trial Chamber notes that the Statute and the Rules provide no further indication as to the length of imprisonment to which the perpetrators . . . might be sentenced.”).

¹⁴ See ICTR Rules, *supra* note 8, Rule 101; ICTY Rules, *supra* note 7, Rule 101.

¹⁵ ICTY Rules, *supra* note 7, Rule 101.

Thus, the Statutes and Rules of Procedures and Evidence jointly provide that in determining the length of incarceration, the ad hoc tribunals must consider the national practice of the relevant state, mitigating circumstances relating to the defendant, and aggravating circumstances generally, and explain what those circumstances might be. The Statutes' restraint when it comes to sentencing gives great discretion to the tribunals.

The provisions calling for consideration of national sentencing practices are unique. No other part of the statutes directly calls for the international tribunals to draw from national law or national practice—unless that practice would constitute international customary law. In general, the Statutes do not promote deference to the national courts. They state that the international tribunals “shall have primacy over national courts” and may “formally request national courts to defer to the competence of the International Tribunal.”¹⁶ In some cases, the tribunals may even displace an earlier municipal judgment and re-try defendants who have already been tried in national courts.¹⁷ In light of this pattern, the fact that the tribunals are required to consider national sentencing practice is very unusual, suggesting that national sentencing practice contains special characteristics that make it relevant, as I will discuss later.

B. The Drafting History

As we have observed, the text of the statutes and rules does little more than lay out that national sentencing practice shall be made available to the tribunals. In this section, I examine the drafting history of the Statutes to uncover what led the U.N. Security Council to specifically identify this factor. Unfortunately, the drafting history, or the *travaux préparatoires*, are also of limited assistance. While the tribunals have suggested that several principles motivated the drafters, as we will discuss in Part II, the actual drafting history is largely silent on this question.

In 1992, the Security Council requested that the Secretary-General establish an “impartial Commission of Experts” to analyze “evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.”¹⁸ The following year, the Security Council decided in Resolution 808 that “an international tribunal shall be established.”¹⁹ Resolution 808 further requested that the Secretary General issue a report “on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implement of the decision [to create an international tribunal].”²⁰ The Secretary-General's Report, presented in May of 1993, contained a draft Statute,²¹ a key document in the *travaux préparatoires*. A few weeks after the presentation of the Secretary General's report, the Security Council passed a resolution that

¹⁶ ICTR Statute, *supra* note 1, art. 8(2); ICTY Statute, *supra* note 1, art. 9(2).

¹⁷ ICTR Statute, *supra* note 1, art. 9(2); ICTY Statute, *supra* note 1, art. 10(2).

¹⁸ S.C. Res. 780, ¶ 2, U.N. Doc. S/Res/780 (October 6, 1992).

¹⁹ S.C. Res. 808, ¶ 1, U.N. Doc. S/Res/808 (February 22, 1993).

²⁰ *Id.* ¶ 2.

²¹ The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc S/25704 (May 3, 1993) [hereinafter Report of the Secretary-General].

created the International Criminal Tribunal for the Former Yugoslavia,²² claiming authority under Chapter VII of the United Nations Charter.²³

The establishment of the ICTR followed a similar pattern. Prior to creating the tribunal the Security Council established a Commission of Experts to examine “evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including evidence of possible acts of genocide.”²⁴ The U.N. High Commissioner for Human Rights also established a Special Rapporteur to conduct a separate investigation.²⁵ With strong support from the United States, the Security Council was encouraged to consider creating an international tribunal.²⁶ In November 1994, it established the International Criminal Tribunal for Rwanda.²⁷ The new tribunal’s statute was based largely on that of its Yugoslav predecessor, with some differences that expanded its jurisdiction.²⁸ The ICTR Statute contained the same language with regards to national sentencing practice.

The Secretary-General’s Report for the ICTY contained the draft statute that was ultimately adopted by the Security Council.²⁹ The Report identified several sources that formed the basis of these draft articles—but without identifying which sources influenced what particular provisions. The Secretary-General explained that the draft articles, “are based upon provisions found in existing international instruments” “[s]uggestions and comments, including draft articles, received from States, organizations and individuals.”³⁰ In Paragraph 13 and 14, the Secretary-General identified those organizations and States that submitted comments and suggestions, both informally and formally, but without describing the substance of those recommendations.³¹ Additionally, he explained that “[t]exts prepared in the past by United Nations or other bodies for the establishment of international criminal courts were consulted by the Secretary-General, including texts prepared by the United Nations Committee on International Criminal Jurisdiction, the International Law Commission, and the International Law Association.”³²

The Secretary General’s Report, with its model Statute, contained the exact same version of Article 24, “Penalties,” that was later adopted. It stated that “[i]n determining the terms of

²² S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

²³ Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 192-95 (1995).

²⁴ S.C. Res. 935, ¶ 1, U.N. Doc. S/RES/935 (July 1, 1994). See also David P. Rawson, *Prosecuting Genocide: Founding the International Tribunal for Rwanda*, 33 OHIO N.U. L. REV. 641, 647 (2007).

²⁵ *Id.* at 647-48.

²⁶ *Id.* at 647-57 (describing political machinations and position of different states leading up to creation of International Criminal Tribunal for Rwanda).

²⁷ The Statute of the International Tribunal for Rwanda, S.C. Res. 955, ¶1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁸ The ICTR Statute provided jurisdiction over crimes committed by Rwandan citizens in neighboring states, while the Yugoslav tribunal had jurisdiction over crimes committed only in the territory of the former Yugoslavia. Rawson, *supra* note 24, at 658 (suggesting that provision “evolved from the Security Council concern over what perpetrators of the genocide who fled Rwanda might do”).

²⁹ The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc S/25704 (May 3, 1993) [hereinafter Report of the Secretary-General].

³⁰ Report of the Secretary General, ¶ 17.

³¹ *Id.* ¶¶ 13-14.

³² *Id.*

imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”³³ However, unlike other parts of the Report suggesting model provisions, draft Article 24 was not accompanied by any explanation of this choice of language. At least one other section however, could provide some guidance. In its discussion of subject-matter jurisdiction, the Secretary General noted that “[s]uggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law.”³⁴ The Report rejected that suggestion, noting that international humanitarian law alone provides “sufficient basis for subject-matter jurisdiction.”³⁵ It went on, however, to state that “one related issue . . . would require reference to domestic practice, namely penalties.”³⁶ However, the Secretary-General does not explain *why* reference to national sentencing practice would be admissible, when consideration of national law in other areas is inappropriate. There is no indication of what specific principles, discussions, or theories informed that choice. Thus, the drafting history of the documents provides little insight into the decision to include national sentencing law in the penalty scheme of the tribunals.

II. Judicial Interpretations of Articles 23 and 24

Without much guidance from the statutes, the tribunals have held that national sentencing practice is non-binding. In this section, I explore how the tribunals arrived at that conclusion. In Part II.A, I review the tribunals’ key conclusions on national sentencing practice, and in the following section discuss how they have applied this approach in practice. Part II.C then identifies the different rationales the Appeals and Trial Chambers have invoked to justify a limited use of national sentencing practice.

A. The Finding that National Sentencing Practice is Merely Consultative

The ad hoc tribunals have chosen to sharply limit the application of Articles 23 and 24. The provision requiring “recourse” to national sentencing practice has been interpreted as requiring only that the Trial Chamber *consider* the national sentencing practice of the municipal legal system, but the Trial Chamber has no obligation to *comply* with those local practices.³⁷ As the ICTY Trial Chamber expressed in *Erdemovic*, “the general practice regarding prison sentences in the courts of the former Yugoslavia, the Trial Chamber considers that the reference to this practice can be used for guidance, but is not binding.”³⁸ It explained that “[w]henver possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.”³⁹ Significantly, the tribunal’s “discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system”⁴⁰ nor would it be bound by any minimum standard.

³³ *Id.*, art. 24(1), ¶ 111.

³⁴ *Id.*, ¶ 36.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Prosecutor v. Delalic, Case No. IT-96-21, Judgement, ¶¶ 1200-1202 (Nov. 16, 1998).

³⁸ Prosecutor v. Erdemovic, Case No. IT-96-2, Sentencing Judgement, ¶ 39 (Nov. 29, 1996).

³⁹ *Id.* ¶ 40.

⁴⁰ Prosecutor v. Tadic, Case No. IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals, ¶ 21 (Jan. 26, 2000).

In one decision, the ICTY Trial Chamber justified this result with a textual approach.⁴¹ In *Delalic*, the Trial Chamber considered the imposition of a lifetime sentence of incarceration, which the defendant argued violated Yugoslav law, which permitted sentences of only up to fifteen years, or twenty years for crimes that would have been punishable by death.⁴² In order to resolve this conflict, the Trial Chamber analyzed the meaning of the phrase “have recourse to” in Article 24(1). In deciding that the expression was an “ordinary English expression and not a term of art,”⁴³ the Trial Chamber was able to turn to the Concise Oxford Dictionary for a definition of the term. The dictionary defined the word as “resorting to a possible source of help.”⁴⁴ The Trial Chamber consequently adopted the position that “recourse” thus “suggests that the source of help to which recourse is had need not be mandatory or binding. . . . [I]t is a mere aid to elucidation of the principles to be followed.”⁴⁵ In doing so, the Trial Chamber easily concluded that Article 24 imposed a limited requirement on the tribunal to be permitted to merely *consider* municipal practice, rather than being bound by that practice.

Other decisions have further shaped the role of Article 24. In *Dragan Nikolić*, the Appeals Chamber engaged in one of its most thorough treatments of the national sentencing practice provision.⁴⁶ In his appeal, the defendant asserted that the Trial Chamber erred by not relying on the general practice of prison sentences in Yugoslavia, which would have led to a lower sentence. As in *Delalic*, the defendant Dragan Nikolić claimed that the Trial Chamber erred in finding that “life imprisonment was the appropriate starting point for sentencing,” because that conclusion ignored the fact that life imprisonment was not a legal sentence in the former Yugoslavia.⁴⁷ Nikolić made a two-part argument. First, he contended that Article 24(1) involved a *mandatory requirement* to follow national sentencing law, and second, that the Article reflects “a principle of natural justice that demands that the sentence ultimately passed must bear some proportionate quality that reflects that sentencing practice and its norms.”⁴⁸

The Appeals Chamber rejected both these claims. It emphasized that the tribunal had consistently interpreted the term “recourse” as discretionary, such that the provision did not impose a mandatory obligation to conform to that practice.⁴⁹ Instead, it “only obliges the Trial Chambers to take account of that practice.”⁵⁰ The Appeals Chamber noted that the sentencing judgment in *Kunarac* provides an excellent discussion of Article 24. *Kunarac* stated that:

Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important

⁴¹ Prosecutor v. Delalic, Case No. IT-96-21-A, Judgement, ¶ 1194 (Nov. 16, 1998).

⁴² *Id.* ¶ 1193. In the system of the legal code of former Yugoslavia, the court could substitute a sentence of capital punishment with a sentence of twenty years. See *id.* ¶ 1207 (citing expert testimony).

⁴³ *Id.* ¶ 1194.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Prosecutor v. Nikolić, No. IT-94-2-A, Judgement on Sentencing Appeal, Case, ¶ 69 (Feb. 4, 2005).

⁴⁷ *Id.* ¶ 67.

⁴⁸ *Id.* ¶ 68.

⁴⁹ *Id.* ¶ 69.

⁵⁰ *Id.*

underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal [for the Former Yugoslavia] do not allow for automatic application of the sentencing practices of the former Yugoslavia.⁵¹

Kunarac clearly sets an elaborate ritual for the use of national sentencing practice. It is not merely to be “considered,” instead national sentencing practice is the preliminary standard. As described in *Kunarac*, the obligations of the Trial Chambers can be summarized as follows: it must take into account the sentencing practices in the former Yugoslavia but need not conform to those practices. If the Trial Chambers depart from those sentencing limits, it must give reason for such departure. This approach enables the tribunal to use national sentencing law at its discretion—but as Part II.B shows, the tribunals have in practice given short thrift to the mandate to justify sentences that do not conform to national law.⁵²

The Rwandan tribunal has adopted the same interpretation in reference to Article 23, viewing its language as imposing an obligation to consider, but not to comply with national sentencing practice. The Trial Chamber pointed out that it is “[i]t is the settled jurisprudence of the ICTR that the requirement that ‘the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of Rwanda’ does not oblige the Trial Chamber to conform to that practice; it only obliges the Trial Chamber to take account of that practice.”⁵³ In *Kambanda*, the tribunal also addressed the question of whether the Rwandan sentencing practice is mandatory or “used only as a reference.”⁵⁴ It chose the latter, asserting that the Trial Chamber “maintains its unfettered discretion to pass sentence on persons found guilty” even “[w]hile referring as much as practicable to such [national] practice of sentencing.”⁵⁵ Other Rwandan decisions have held similarly, explaining that “[r]eference to the practice of sentencing in Rwanda and to the Organic Law is for purposes of guidance.”⁵⁶

The role of Article 23 and 24 is thus quite limited, since national sentencing practice is not dispositive and is only a factor that must be “taken account of” or “considered.” Despite this clear-cut approach, the ICTY has indicated that the Trial Chamber should go further. The court must explicitly state to the national sentencing practice for those crimes. However, it has cautioned that “what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia.”⁵⁷ There must be some analysis or application of that national practice to the case at hand. The Trial Chamber has stated that when the tribunal’s sentence diverges from national practice, “care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia.”⁵⁸ This approach suggests that national sentence law is the default, or at least the preferred grounds for sentencing, since any deviations must be justified.

⁵¹ *Id.* (citing Serushago Sentencing Appeal Judgement).

⁵² *See supra* Part II.B.

⁵³ Prosecutor v. Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, ¶ 30 (April 6, 2000).

⁵⁴ Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence, ¶ 23 (Sept. 4, 1998)

⁵⁵ *Id.* ¶¶ 23, 25.

⁵⁶ Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 984 (Jan. 27, 2000).

⁵⁷ Prosecutor v. Kunarac, Case No. IT-96-23&23/1, Judgement, ¶ 829 (Feb. 22, 2001).

⁵⁸ *Id.*

B. Practical Application of Articles 23 and 24

Close analysis of the tribunals' sentencing pronouncement expose a different approach in practice. National sentencing law is not treated as a default; it is given cursory treatment and disposed of easily. The tribunals exhibit significant hesitation to invoke national sentencing practices. With the exception of the few cases that included extended discussions of the issue, the majority of the sentencing judgments make only perfunctory references to national sentencing schemes.

For example, *Sikirica* examined the sentencing practice of the former Yugoslavia in five short paragraphs.⁵⁹ It identified the two relevant statutes of the Criminal Code of the Socialist Republic of Yugoslavia⁶⁰ and explained that under the Yugoslav penal provisions, “the crime of persecution of which each of the accused stand convicted, would have attracted a sentence of between 5 and 20 years’ imprisonment.”⁶¹ The Trial Chamber goes on to conduct an extensive analysis of *other* factors it is authorized to consider for each defendants, including mitigating and aggravating factors, such as the existence of a guilty plea, the mental health of the defendants, and the extent of their involvement in the criminal acts.⁶² It then issued sentences for the three defendants of between three years to fifteen years in length,⁶³ sentences that appear lower than would have been imposed in national court. While the Trial Chamber’s analysis of the mitigating and aggravating circumstances suggests that a sentence other than that provided for in national courts may be appropriate, the Trial Chamber at no point drew that connection. It did not expressly state that these other factors permit a sentence greater than that permitted by the penal provisions of the former Yugoslavia, nor does it discuss how the recourse to national sentencing practice affected its decision.

The International Criminal Tribunal for Rwanda has treated national law similarly. In *Musema*, for example, the Trial Chamber made a brief reference to the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting Genocide or Crimes against Humanity, explaining that the law provides for four categories of culpability based on participation.⁶⁴ It observed that individuals with extensive involvement in the acts could be subject to the death penalty or to life imprisonment, and then noted that the Rwandan law was used for “guidance only” and that the tribunal always retains its discretion.⁶⁵ Despite ultimately imposing a sentence of life imprisonment, which was also available under national law,⁶⁶ the Trial Chamber’s reasoning avoided grounding this sentence in national practice. In doing so, the tribunal explicitly separates its authority, legitimacy, and purpose, from any national proceedings.

For the most part, the tribunals’ treatment of national sentencing has been perfunctory—merely citing the relevant national law and then reasserting the tribunals’ discretion to assign its

⁵⁹ Prosecutor v. Sikirica, Case No. IT-95-8-S, Sentencing Judgment (Nov. 13, 2001)

⁶⁰ *Id.* ¶ 113.

⁶¹ *Id.* ¶ 116.

⁶² *Id.* ¶¶ 172-94.

⁶³ *Id.* ¶¶ 235, 239, 243.

⁶⁴ Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, ¶ 983 (Jan. 27, 2000).

⁶⁵ *Id.* ¶ 983-84.

⁶⁶ *Id.* (resolution following judgment sentencing Musema to life imprisonment).

own sentence has been sufficient. One significant exception is the ICTY decision in *Nikolić*, famous for its extensive treatment of national law. There, the defendant argued that the sentence issued was beyond the scope of national law.⁶⁷ The Trial Chamber solicited the assistance of an expert witness to provide evidence on the national sentencing practice in the former Yugoslavia and ultimately rejected those arguments.⁶⁸ On appeal, the Appeals Chamber agreed with the lower chamber's arguments about the powers of the court.⁶⁹ It concluded however, that the sentence imposed on *Nikolić* was "clearly within the sentencing range in the former Yugoslavia at the time of the commission of the offenses."⁷⁰ *Nikolić* is unusual for the close attention paid to national sentencing practice: not only does the tribunal conduct an extensive inquiry into national sentencing law, but it also finds authority for the Trial Chamber's sentence in the national sentencing law. In doing so, the Appeals Chamber drew its legitimacy from national law; as I argue in Part IV, the tribunals should model their decisions on this approach.

C. Justifying Limited Reference to National Sentencing Practice

While the textual analysis put forward in *Delalic* is significant, the tribunals have also advanced a number of other theories to justify their limited invocation of national sentencing practice. In this section, I identify various functions the tribunals have ascribed to Articles 23 and 24 and explore how the tribunals have justified their limited invocation of national sentencing practice. Ultimately, these explanations reveal the abrupt and ex-post reasoning employed by the tribunals with regard to its sentencing decisions.

First, the international tribunals have been clear that Articles 23 and 24 embody the principles of *nullum crimen nulla poena sine lege*. There have been serious disputes over whether non-observance of national sentencing provisions violated this fundamental principle of law. This was the position articulated by Hazim Delic, who was charged a number of crimes, including rape and murder.⁷¹ In his defense, lawyers argued the imposition of a sentence greater than that authorized by the national sentencing laws of the former Yugoslavia—fifteen years—violated this principle of legality. In their view, any sentence greater than fifteen years "would be greater than that authorized at the time of the offence and therefore in violation of the *nullum crimen sine lege* principle."⁷² Cherif Bassiouni, a well-known international jurist, has agreed with this interpretation. He has argued that the ICTY, for example, cannot impose a sentence of more than twenty years without violating the principle of legality and "*ex post facto* laws;" thus he noted that the rule authorizing life imprisonment should be amended.⁷³

⁶⁷ See *supra* notes 46-51 and accompanying text.

⁶⁸ *Id.*

⁶⁹ Prosecutor v. *Nikolić*, No. IT-94-2-A, Judgement on Sentencing Appeal, Case, ¶ 71 (Feb. 4, 2005).

⁷⁰ *Id.* ¶ 71.

⁷¹ Prosecutor v. *Delalic*, Case No. IT-96-21-T 16, Judgment ¶ 1192 (Nov. 16, 1997).

⁷² *Id.* at ¶ 1197.

⁷³ CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 702 (1996) ("A more serious problem arises in that penalties for international crimes . . . are only punishable by a maximum of 20 years under the applicable national criminal codes. A higher penalty . . . would violate principles of legality and the prohibition of *ex post facto* laws."). See also Prosecutor v. *Delalic*, Case No. IT-96-21-T 16, Judgment ¶ 1209 (Nov. 16, 1997).

Yet, the tribunal has found that the *nullum crimen* principle is not violated by sentences longer than national practice. The Trial Chamber in *Delalic* rejected this argument on two grounds. First, it emphasized the discretion of the court, finding that “[t]here is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia.” The legal framework is only an *aid* to the ad hoc tribunals. Most importantly, Article 24 and Rule 101 do not violate the fundamental principle of legality because the same crimes were illegal under national law. The Trial Chamber described the defendant’s interpretation of the principle of legality as “an erroneous and overly restrictive view of the concept.” In its view, the provided sentence for that crime is irrelevant. The principle of *nullum crimen sine lege*, it explained, applies only to *new laws*⁷⁴ thus where only the penalty changes the principle does not apply. The Trial Chamber emphasized that at the time these serious violations of international law were committed, they were also illegal under municipal law; thus, “[n]ationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.”⁷⁵ In the view of the tribunals, the threshold question must be whether there existed “punishment with respect to the offence,”⁷⁶ if there was, the *nullum crimen sin lege* principle has not been offended. No accused can claim that he was unaware that crimes against humanity were not punished in the municipal legal system.

The second justification put forward by the ad hoc tribunals is that national penalties should be consulted because they ensure uniformity in the sentencing practice of the tribunal. As articulated by the Trial Chamber in *Delalic*, the purpose of having recourse to the general practice regarding prison sentences is “aimed at uniformity of the length of sentences.”⁷⁷ *Delalic* thus suggested that the first two sections of Article 24 thus have different, yet complementary purposes. While the other factors the court must consider, including aggravating and mitigating circumstances, go to the “consideration of the imposition” of the sentence, Article 24(1) ensures uniformity among sentences.⁷⁸ Under this theory, we would expect rigorous adherence to national sentencing law. It would serve as a consistent limitation to the discretion of the tribunals, and national law would ensure that all subsequent international sentences were based on the national model. However, as we have seen in practice, the tribunals have not used national sentencing practice as a tool for ensuring uniformity.⁷⁹

A third justification is that national sentencing practice should be a guide for the development of international sentencing law. In this view, “international law . . . must rely on the experience of domestic jurisdictions”⁸⁰ while not being bound by state law. Given the nascent nature of international criminal law, the tribunal would require discretion to create its own sentencing scheme. This explanation assumes that national sentence practice is an

⁷⁴ See Prosecutor v. Delalic, Case No. IT-96-21-T 16, Judgment ¶ 1210 (Nov. 16, 1997) (“This concept is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.”).

⁷⁵ *Id.* ¶ 1212.

⁷⁶ *Id.*

⁷⁷ *Id.* ¶ 1192.

⁷⁸ *Id.*

⁷⁹ See *supra* Part II.B (discussing practice application of national sentencing law).

⁸⁰ Prosecutor v. Delalic, Case No. IT-96-21-T 16, Judgment ¶ 1195 (Nov. 16, 1997).

appropriate model for the international tribunals in that enough similarities exist between the two institutions and their penal provisions for national law to be valuable.

This explanation incorporates two interesting, and unexplored assumptions that are not supported by the statutes. First, this justification assumes that, at a point in the future, recourse to national practice would no longer be necessary, presumably when international legal sentencing doctrine is more developed. Thus, the utility and relevance of national practice is only momentary. However, nothing in the *travaux préparatoires* or the text of the statutes suggests that the drafters envisaged such a limited role for the national courts. In fact, the text of the language suggests instead that that this function is a permanent one: no reference is made to a temporal element. Second, even if the drafters did foresee this reliance on national sentencing practice as part of the evolution of international law, it does not follow that the tribunals would be limited to drawing from sentencing practice only in the states where the original offenses occurred. If the purpose of Articles 23 and 24 is to ensure the appropriate development of international criminal law, it might be more logical to cast a broader net and draw from criminal sentencing practices in other states. This might ensure, for example, that the Trial Chambers could consider criminal sentences imposed in national courts for crimes that more closely approximate the atrocious crimes against humanity being adjudicated in the ad hoc tribunals. Sentencing decisions from Israeli courts, in the Eichmann case, for example, or French courts, in the Barbie case, would be a relevant guide.

The fourth justification asserted by the tribunals is rather vague: it proposes that national sentencing practice in general supports the severity of the tribunals' sentences. This argument as expressed in *Erdemovic*, suggests that because domestic sentencing laws provided for the "harshest penalties" possible under the Yugoslav criminal system,⁸¹ the Trial Chamber is thus also permitted to impose the most severe penalties. The central inquiry thus becomes whether the scale of penalties in the international and municipal criminal systems is the same, not whether the precise punishment is the same. The tribunal described this as a "general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems."⁸² This "general principle" enables the ad hoc tribunals to apply "the severest penalties . . . [to] crimes against humanity."⁸³ Thus, the fact that the charges at issue are crimes against humanity is central to this justification. It is precisely because crimes against humanity are "recognized as very grave crimes which shock the collective conscience"⁸⁴ that national courts permitted the severest penalties to be applied. The *nature* of these crimes gives rise to the "general principle of law" identified by the tribunal, but the tribunal leaves open the question of whether lesser or more "ordinary" crimes would give rise to this same principle and would allow the court to draw the same analogies.

This fourth argument thus makes a significant leap of logic: it justifies international criminal penalties by measuring the *relative* length of sentences, as if punishments were on a

⁸¹ Prosecutor v. Erdemovic, Case No. IT-96-22, Sentencing Judgement, ¶ 30 (Nov. 29, 1996) ("[A]t this point it need only be mentioned that the Criminal Code of the Socialist Federative Republic of Yugoslavia . . . prescribed the harshest penalties for the commission of acts of genocide or war crimes against the civilian population.").

⁸² *Id.* ¶ 31.

⁸³ *Id.*

⁸⁴ *Id.* ¶ 27.

continuum, rather than comparing the *substantive* sentences. Thus, because the municipal legal system adopted the harshest penalty possible—in the Yugoslav case, fifteen to twenty years, the international legal system is justified in adopted the most severe penalties possible available to it, namely, life imprisonment. In one decision, the ICTY explained that all “the States which included crimes against humanity in their national laws provided that the commission of such crimes would entail the imposition of the most severe penalties permitted in their respective systems.”⁸⁵ In drawing this relationship, the argument neatly also avoids the *nullum crimen sine lege* critique levied by Bassiouni and defense lawyers.⁸⁶

These last two explanations—that national courts permit the most severe penalties and that national courts are a model for the undeveloped field of international criminal sentencing—are complicated, if not contradicted, by a fifth justification proposed by the ad hoc tribunals. Common to both these arguments is the underlying assumption that national practice has some validity and utility as a guide for international jurisprudence. However, in at least one case, the Trial Chamber explained that national sentencing practice should be non-binding precisely because there is an *absence* of meaningful, relevant, national judicial precedent.⁸⁷ In Yugoslavia for example, the Criminal Code of the former Yugoslavia did not punish crimes against humanity, but did cover genocide and war crimes perpetrated against a civilian population.⁸⁸ In *Erdemovic*, the Trial Chamber noted that “[g]iven the absence of meaningful national judicial precedents and the legal and practical obstacles to a strict application of the reference to the general practice regarding prison sentences in the courts of the former Yugoslavia, the Trial Chamber considers that the reference to this practice can be used for guidance, but is not binding.”⁸⁹ This is because the paucity of relevant national decisions did not permit the ICTY to “draw significant conclusions.”⁹⁰

This last justification undermines the other principles put forward by the ad hoc tribunals in its case law, which suggest instead that national sentencing practice is an important, if limited, guide. Instead the *Erdemovic* Court indicates that national sentencing practice is actually inapplicable—if not completely irrelevant—to the ad hoc tribunals. The ad hoc tribunals have put forward at least five explanations justifying their argument that national sentencing practice should not be binding on the international courts. These justifications have tended to focus both on what national penalty schemes can bring to international sentencing practice—functioning as a model, providing uniformity and permitting harsh sentences as a parallel—while also noting where national sentencing practice fails to be useful. However, the sentencing doctrine presented by the ad hoc tribunals is muddled; some of the justifications put forward contradict others, and the drafting history provides no clear road signs.

⁸⁵ *Id.*

⁸⁶ See *supra* note 73 and accompanying text.

⁸⁷ Prosecutor v. Erdemovic, Case No. IT-96-22, Sentencing Judgement, ¶ 37 (Nov. 29, 1996) (“[T]here have been no decisions relating to cases similar to those before the International Tribunal which might serve as precedents for the matter at hand.”)

⁸⁸ *Id.* ¶ 34.

⁸⁹ *Id.* ¶ 39.

⁹⁰ *Id.* ¶ 37.

III. The Challenges and Advantages of Relying on National Sentencing Practice

In this Part, I examine whether the tribunals should ignore national practice to the degree that they do. In Part III.A I argue that the hesitancy of the tribunals to draw on national practice neglects the reconciliatory function of the ad hoc tribunals. In the following subsection, I analyze whether the secondary role given to national courts and law in the tribunals' interpretation of the statute conflicts with the international legal systems' preference for national adjudication of criminal issues. I argue that it does—and that the ad hoc tribunals may have come to view their sentencing decisions as *separate* and *apart* from events on the local level, ultimately undermining their success.

A. Reconciliation and National Sentencing Practice

The role of national sentencing practice in the ICTY and ICTR depends in part on the purpose of their criminal judgments. The tribunals have asserted different guiding principles, including retribution, deterrence, incapacitation, reconciliation, and rehabilitation⁹¹ In *Furundzija*, the ICTY asserted that punishment was essential for “retribution, stigmatisation, and deterrence.”⁹² Both the ICTY and ICTR have noted that retribution is one of their fundamental objectives,⁹³ with the ICTR Trial Chamber explaining specifically that “[t]he penalties imposed by this Tribunal must be directed at retribution, so that the convicted perpetrators see their crimes punished, and, over and above that, at deterrence, to dissuade for ever others who may be tempted to commit atrocities by showing them that the international community does not tolerate serious violations of international humanitarian law and human rights.”⁹⁴ Elsewhere, the ICTY has noted that “deterrence [is] probably . . . the most important factor in the assessment of appropriate sentences.”⁹⁵

While the tribunals may represent a myriad of goals, one of its most important functions is to further reconciliation. The ICTY stated this most clearly in *Erdemovic*, when it wrote that:

The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the Former Yugoslavia. Discovering the truth is the cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.⁹⁶

Reconciliation was also cited as an important objective during the debates leading up to the establishment of the tribunals. The Security Council resolution creating the ICTR stated that criminal prosecution “would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”⁹⁷ The Rwandan tribunal has also emphasized this

⁹¹ Mark. A. Drumbl, *Collective Violence And Individual Punishment: The Criminality of Mass Atrocity*, 99 *Nw. U. L. Rev.* 539, 559-60 (2005).

⁹² Prosecutor v. Furundzija, Judgement, Case No. IT-95-17/1-T, ¶ 290 (Dec. 10, 1998).

⁹³ Prosecutor v. Nikolic, Case No. IT-02-60, ¶ 90 (Dec. 2, 2003) (retribution is a “primary objective”).

⁹⁴ Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 986 (Jan. 27, 2000).

⁹⁵ Prosecutor v. Delalic, Case No. IT-96-21-T, ¶ 1234 (Nov. 16, 1998).

⁹⁶ Prosecutor v. Erdemovic, Case No. IT-96-22-T, ¶ 21 (Nov. 29, 1996).

⁹⁷ See Security Council Resolution 955 (1994) S/RES/955 (1994).

function, and has stated that “[i]n determining the sentencing, the Chamber must be mindful that . . . the Tribunal [was established] . . . with a view of ending impunity, promoting national reconciliation, and restoring peace.”⁹⁸

The ad hoc tribunals can help achieve reconciliation in numerous ways. Criminal judgments uncover the truth—that is, they make known the facts underlying the criminal acts. States, communities, and individuals can thus find out who the perpetrators were, what happened to the victims, and how and when these events occurred. This process can be understood as the narration of history,⁹⁹ or the process of making the historical record more complete.¹⁰⁰ However, the reconciliatory power of the international tribunals is not limited to uncovering and publicizing facts. As the *Erdemovic* passage above reveals, reconciliation is in part secured by what some scholars call the “expressive” qualities of criminal judgments.

The “expressive” value of criminal law assumes that because laws embody norms, violations of the law express meaning about the value of that law.¹⁰¹ Thus, criminal judgments express condemnation of particular acts or philosophies.¹⁰² The expressive theory looks at the “message” conveyed by the law.¹⁰³ The expressive value of a judgment or sentence is relative: it must have meaning for a particular person or community, and that meaning may change. There may be numerous “audiences” at whom the “message” conveyed by the expressive value of various sentences or judgments are aimed,¹⁰⁴ or who are impacted by legal decisions.

Punishment is an important component of the expressive value of the law,¹⁰⁵ David Garland suggests this is because the law “communicates meaning . . . about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other matters.”¹⁰⁶ Ideally, punishment for a violation of the law stigmatizes both the offender and the act.¹⁰⁷ However, just as imposition of *any* punishment matters in and of itself, the *type* of punishment informs its expressive power. This may be because punishment “is the facet of the criminal law

⁹⁸ Prosecutor v. Musema, Case No. Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 985 (Jan. 27, 2000).

⁹⁹ Ruti Teitel has provided extensive discussion of how transitional justice institutions re-create legitimate historical narratives in her important work on transitional justice. See RUTI G. TEITEL, TRANSITIONAL JUSTICE 8 (2000) (“Historical inquiry and narrative plan an important transitional role linking past to present. Transitional accountings incorporate a state’s repressive legacy and by their very account draw a line that both redefines a past and reconstructs a state’s political identity.”).

¹⁰⁰ One scholar describes the function of “truth telling” as ensuring national reconciliation, peace, and justice. MARK AMSTUTZ, THE HEALING OF NATIONS 44 (2005).

¹⁰¹ See, e.g., Herbert Morris, *Professor Murphy on Liberalism and Retributivism*, 37 ARIZ. L. REV. 95, 97 (1995) (describing expressive theory of punishment as “treat[ing] punishment as stigmatizing, and as condemnatory”).

¹⁰² See Kenneth W. Simon, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 664 (2000); Drumbl, *supra* note 91, at 592-95 (discussing expressive theory of the law).

¹⁰³ Drumbl, *supra* note 91, at 592.

¹⁰⁴ Most obviously, the expressive value of incarceration is deterrence. Proponents of deterrence would argue that the length of incarceration is aimed at sending a “message” that violations of the law carry enormous consequences.

¹⁰⁵ Drumbl, *supra* note 91, at 592.

¹⁰⁶ DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 252 (1990).

¹⁰⁷ Drumbl, *supra* note 91, at 592 (“There is an assumption, which at first blush seems perfectly plausible, that punishment inflicted by an international tribunal . . . has enhanced expressive value in asserting the importance of law and the stigmatization of the offender who transgresses that law.”).

process that the general public is most aware of and most likely to remember years later.”¹⁰⁸ Thus, punishment is one of—if not the—most visible aspects of the judgments of the ad hoc tribunals and the expressive value of criminal law extends to sentencing.

One of the most important “audiences” for an international tribunal should be victims’ families and survivors of human rights violations. Because the judgments of the criminal tribunals express certain morals and values to victims, it is likely that victims may view the tribunal’s sentences as making a statement about the value of the suffering. Punishing perpetrators of these crimes makes it clear that human rights violations will not be tolerated. Alvarez notes that “victims of mass atrocity and their family members, like victims of crime everywhere, care about the types of penalties imposed on perpetrators.”¹⁰⁹ Thus, the imposition of punishment and the type of punishment should be in part oriented towards the claims of victims’ families and survivors. For these communities, criminal convictions serve as recognition of their experience and as moral condemnation of the acts done unto them. This is because the severity of a penalty has symbolic, political, cultural and emotional meaning.

Punishment thus plays a part in the reconciliatory process. The premise of restorative justice is that victims must be healed by the restorative process.¹¹⁰ Punishment plays an important role in this dynamic in two ways. First, the victims’ groups should feel that the punishment was sufficient to capture the brutality of their experiences. Second, victims must feel that they have participated in the criminal process, and thus that the tribunal’s judgment in a sense “belongs” to them—or at least responds to their claims. Different sentences for would thus contain different “messages.” For example, the reluctance of the earlier tribunals to consider rape a war crime of a tool of genocide acted to undermine the value of that victim’s violation.¹¹¹

By not following national sentencing practice, the international tribunals have exacerbated the gap between local communities and international institutions, thus diluting the expressive value of their jurisprudence. In his critique of the ICTR’s decision in *Kambanda*, for example, Ralph Henham explained that when “sentences fall short of the retributive expectations of the victim community” the tribunals make excuses, “rationaliz[ing them] for international consumption in terms of vaguely articulated alternative penal justifications such as rehabilitation and deterrence.”¹¹² In other words, the tribunals have at times legitimized their sentences with an eye for their international audience, rather than for their national audiences. This has only helped to weaken the relationship between the tribunals and the state. While traditionally

¹⁰⁸ Shahram Dana, *Revisiting the Blaskic Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT’L CRIM. L. REV. 321, 323 (2004).

¹⁰⁹ José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 406 (1999).

¹¹⁰ David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT’L L. & POL. 1019, 1029 (2008) (“In particular, there has been a growing argument, manifest in the ability of victims to participate in proceedings before the ICC, that international criminal trials can also provide ‘restorative justice’ to victims.”).

¹¹¹ See generally Stephanie N. Sackellares, *From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict*, 20 WIS. WOMEN’S L.J. 137, 146-52 (2005) (discussing the historical evolution of rape and sexual violence as prosecutable offenses in international law).

¹¹² Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT’L CRIM. JUST. 64, 67 (2003).

criminal law has not given victims a prominent role,¹¹³ the highly public nature of the ad hoc tribunals lends victims a greater role that must be acknowledged.

Tying sentencing to national practice is an important way that the ad hoc tribunals can ensure that the reconciliatory and restorative aspects of its function are satisfied. Current differences in sentences may lead survivors groups to see the international tribunals as unmoved by their claims. “International justice” becomes a type of justice that is meted out in institutions and by judges removed from local social, historical, political, and cultural dynamics. Professor Alvarez has also noted this problem, explaining that:

[For] many surviving family members of the victims of the Rwandan genocide, it matters a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that they can understand, subjected to local procedures, and given a sentence that accords with local sentiments, including perhaps the death penalty.¹¹⁴

The danger for the ad hoc tribunals is that by operating so independently of national sentencing practice, they may be seen as irrelevant by those very communities they were created to serve. In order to maintain their relevancy to domestic constituencies, the ad hoc tribunals should forge a strong relationship with the domestic criminal justice processes.

Punishment should be correlated to the expectations of the national community. When this occurs, the criminal process properly acknowledges the suffering of victims. However, when a disjuncture exists between what victims feel is an appropriate sentence and the sentence meted out by the court, there is a danger that the tribunal would lose legitimacy.¹¹⁵ This is because when punitive norms diverge from the expectations of local society, the success of the reconciliatory process is undermined.¹¹⁶ Victims may no longer look to the ad hoc tribunals as adequate or fair arbiters of criminal liability; in time they may become unwilling to participate in the criminal proceedings and distance themselves from the project.¹¹⁷

¹¹³ JONATHAN DOAK, VICTIMS’ RIGHTS, HUMAN RIGHTS AND CRIMINAL JUSTICE 30 (2008) (“[T]he criminal trial has been traditionally viewed in both international and domestic law as a contest between the State and the alleged perpetrator. Victims have been seen as mere witnesses to the State’s case against the accused, with little or no consideration given to their interests.”).

¹¹⁴ Alvarez, *supra* note 109, at 403-04 (1999).

¹¹⁵ Burke-White notes that the ad hoc tribunals have generally been considered to have “minimal impact on the states over which they exercise jurisdiction. William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT’L L. 279, 279 (2008).

¹¹⁶ Mark Drumbl noted this problem of “disenfranchisement” between how national and international groups interact with international tribunals. Drumbl, *supra* note 91, at 597. He warned about a “paradox” where “the society reeling from violence becomes disenfranchised from the redressing of that violence which, instead, becomes a task suited to the technocratic savvy of the epistemic community of international lawyers.” *Id.*

¹¹⁷ Such was the case in Rwanda, where victims complained about their treatment in the tribunal. KINGSLEY CHIEDU MOGHALU, RWANDA’S GENOCIDE 69 (2005) (noting that victims resented the lack of material support they received). Moghalu further reported that “victims [felt] ‘used’ as witnesses by the tribunal to establish the guilt of their erstwhile tormentors for purposes of retributive justice and then ‘discarded.’” *Id.*

This problem has been most clearly laid out in the ICTR. The Rwandan tribunal has been heavily criticized for the role victims played in its proceedings,¹¹⁸ despite some important institutional reforms.¹¹⁹ There is a strong sense that what occurs at the tribunals, so far removed from Rwanda, is irrelevant for Rwandan citizens.¹²⁰ Rwandan survivor groups protested the tribunal's indifference to the claims of victims and witnesses on numerous occasions.¹²¹ Advocates in the victims' community described the process of testifying at the trials as "torture."¹²² Rwanda thus presents one example of where differences between national and international criminal trials can be frustrating for local communities.

One critical point of contention has been the applicability of the death penalty. Under Rwandan law, perpetrators of genocide could be subject to the death penalty.¹²³ However, when the statutes for the ICTY and ICTR were being considered, the international community rejected the application of the death penalty.¹²⁴ Article 23 expressly limited punishment to incarceration only, with a maximum sentence of life imprisonment. The Rwandan government cited the inapplicability of the death penalty as one of the most important reasons it ultimately voted against the creation of the ICTR in the United Nations.¹²⁵ It considered the "death penalty a punishment commensurate with the gravity of the crime of genocide"¹²⁶ and was also concerned that low-level participants in the genocide tried in national courts would be sentenced to death while organizers and commanders tried in the international tribunal would receive much lower sentences.¹²⁷ Rwanda's representative to the United Nations stated that the sentencing disparities that would be created by the prohibition against capital punishment would not be "conducive to national reconciliation in Rwanda."¹²⁸

The sentencing practice of the ICTR has in general been more lenient than the Rwandan sentencing scheme would permit. The case of Omar Serushago embodies these differences. The

¹¹⁸ *Id.* See also *infra* note 120.

¹¹⁹ The first Registrar of the ICTR proposed a new procedural rule that ensured that victims and other witnesses would receive psychological and physical rehabilitation. *Id.* at 67. The ICTR also instituted a compensation program for victims. *Id.* at 65-69.

¹²⁰ A recent article reported that "[m]any Rwandans remain unaware of the ICTR because of its distance from Rwanda and its limited impact on everyday citizens." Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in Rwanda*, 36 DENV. J. INT'L L. & POL'Y 125, 130 (2008). The Rwandan Deputy Attorney General, who was also a representative to the ICTR for four years, has stated that "[t]he tribunals was not created to get justice, but to nurse the guilt of the international community." *Id.*

¹²¹ MOGHALU, *supra* note 117, at 198 (reaction to arrest of ICTR defense investigator for participation in Rwandan genocide); *id.* at 199-200 (survivors' outrage at incident where ICTR judges were seen as laughing at testimony of rape victim); *id.* at 200-02 (two main survivors group called on all survivors to boycott and refuse to cooperate with ICTR); *id.* at 215-16 (protests in Kigali upon arrival of Chief Prosecutor and Registrar).

¹²² *Id.* at 200 (citing official who stated "[w]itnesses are tortured when they go to Arusha . . .").

¹²³ Alvarez, *supra* note 109, 406-07 (discussing importance of death penalty for Rwandan survivors and victims' families).

¹²⁴ The liberal European states refuse to permit the inclusion of the death penalty, while the United States "expressed sympathy for Rwanda's position." *Id.* at 39.

¹²⁵ *Id.* at 129 ("The Rwandan government feared that the masterminds of the genocide would receive prison terms, while subordinates and lower-ranked perpetrators, found guilty in the national court, would receive the death penalty.").

¹²⁶ VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 163 (2008).

¹²⁷ MOGHALU, *supra* note 117, at 39.

¹²⁸ PESKIN, *supra* note 126, at 163.

Trial Chamber considered several mitigating and aggravating factors, including that he played a lead role in planning the genocide, and that he cooperated with the prosecutor.¹²⁹ Had he been tried in the national courts, Serushago would have been a “Category I” offender, reserved under local law for the most serious crimes, and most likely would have been sentenced to death.¹³⁰ Even if he had been considered a Category II offender, he would have received a sentence of life imprisonment.¹³¹ Instead, the Trial Chamber sentenced him to fifteen years,¹³² a sentence later affirmed by the Appeals Chamber.¹³³

This problem extends to the ICTY as well. In general, the sentences meted out by the ad hoc tribunals have been lower than those that would have been available in a national court.¹³⁴ In *Erdemovic*, for example, the ICTY found that the defendant participated in the killings where over one thousand Bosnian Muslim men were killed.¹³⁵ Erdemovic was found personally responsible for killing between ten to one hundred people and ordering the deaths of hundreds of others.¹³⁶ Several mitigating factors, including his age, remorse, and cooperation with the prosecution resulted in a prison sentence of only five years.¹³⁷ Had he been sentenced under national law, he would have received a *minimum* sentence of between five up to fifteen years or a capital sentence, and in the alternative to a capital sentence, twenty years imprisonment.¹³⁸ While national law did not expressly prohibit the commission of genocide, the Trial Chamber noted that the national codes “cover *inter alia* genocide and war crimes perpetrated against the civilian population.”¹³⁹ The retributive aspect of the Yugoslav tribunal is belied by these lenient sentences.

While the manner in which the ad hoc tribunals have treated local communities and national sentencing practice is problematic, any institutional corrections must take care not to err too far to the other side. There must be safeguards to protect against *too much* victim participation and too much consideration of local factors. The due process rights of the defendants must be respected and the criminal process must remain fair, just, and transparent.

¹²⁹ Prosecutor v. Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, ¶ 30 (April 6, 2000).

¹³⁰ Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 17 (February 5, 1999). *See also* Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and the ICTR*, 12 IND. INT’L & COMP. L. REV. 53, 64 (2001)

¹³¹ Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 17 (February 5, 1999).

¹³² *Id.* (verdict).

¹³³ Prosecutor v. Serushago, Case No. ICTR-98-39-A, Reasons for Judgement, ¶ 33 (April 6, 2000).

¹³⁴ Keller, *supra* note 130, at 62-66 (discussing case of Erdemovic and noting that it was inconsistent with national sentencing practice); *see also* Jennifer J. Clark, *Zero to Life: Sentencing Appeals At the international Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L. J. 1685 (2008) (reviewing sentencing disparities within and between the ICTY and ICTR).

¹³⁵ Prosecutor v. Erdemovic, Case No. IT-96-2, Sentencing Judgement, ¶ 34 (Nov. 29, 1996).

¹³⁶ *Id.* ¶ 34 (“Mr. Erdemovic, depending on which of his numerous accounts is accurate, is responsible for killing between 10 and 100 people. His role in this mass execution was significant.”).

¹³⁷ Prosecutor v. Erdemovic, Case No. IT-96-22-Tbis, Sentencing Judgement, ¶¶ 8, 23 (Mar. 5, 1998); *see also* Keller, *supra* note 130, at 62.

¹³⁸ Prosecutor v. Erdemovic, Case No. IT-96-2, Sentencing Judgement, ¶ 34 (Nov. 29, 1996).

¹³⁹ *Id.*

B. Implications for the Role of National Courts in International Law

The approach of the ad hoc tribunals towards national sentencing practice conflicts with the international legal system's preference for domestic criminal processes. While international law does not mandate that criminal trials occur in the municipal legal framework, it does exhibit an inclination for relying on domestic legal processes to adjudicate criminal cases. The international legal system is structured in such a way that domestic courts are primarily responsible for the enforcement of international norms, including criminal law.¹⁴⁰ International criminal institutions, through ad hoc tribunals or the International Criminal Court, are the exception, not the norm. Instead, national courts are the "primary fora for holding individuals accountable."¹⁴¹ As Professor Benvenisti explains, "[i]nternational law assumes that national courts can be instrumental in enforcing international obligations upon recalcitrant governments."¹⁴² The preference for municipal criminal processes is usually considered as resulting from the monopoly of force exerted by domestic government within the state, making municipal legal systems more efficient and appropriate loci of enforcement.¹⁴³

In some respects, the ad hoc tribunals reflect this pattern of promoting national courts. The ICTR Statute provides that an individual tried in national court may not be re-tried by the international tribunal, except in two narrow circumstances: if the charged act was characterized as merely an "ordinary crime" rather than a serious violation of international law, or if the "national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."¹⁴⁴ The ICTY statute provides for the same.¹⁴⁵ Unlike the International Criminal Court, the ad hoc tribunals have concurrent jurisdiction with the national courts.¹⁴⁶ However, both statutes permit the international tribunals to claim "primacy" over the national courts and request that the latter defer to them if necessary.¹⁴⁷

The role that the ICTY and ICTR have carved out for national courts undermines this important function. The provisions regarding national sentencing practice play an important role in this dynamic by balancing the concurrent jurisdiction and primacy exercised by the international tribunals. This is because Articles 23 and 24 suggest that even when the tribunals

¹⁴⁰ STEVEN R. RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 162 (2d ed. 2001) (the international legal system "envisages domestic courts as the primary arena for the trials of those accused of acts incurring individual responsibility under international law").

¹⁴¹ STEVEN R. RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 160 (2d ed. 2001)

¹⁴² Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 160 (1993).

¹⁴³ See, e.g. Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 501 (2000) ("[I]t is the ability of the domestic legal system to enforce law through sanctions . . . that recommends domestic courts.").

¹⁴⁴ ICTR Statute, *supra* note 1, art. 9(2)(a)-(b).

¹⁴⁵ ICTY Statute, *supra* note 1, art 10.

¹⁴⁶ *Id.* art. 9.

¹⁴⁷ Article 9 of the ICTY provides that the ICTY "shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." *Id.*

have sole jurisdiction over an individual, they may not try and sentence that individual with complete disregard for national law: national sentencing practice must be considered. Thus, theoretically, Article 23 and 24 can act as a counterweight to the otherwise uniquely international orientation of the tribunals by ensuring that national law and domestic process are at least taken into account.

The sentencing jurisprudence of the ad hoc tribunals threatens the international legal system's commitment to recognizing, respecting, and promoting domestic prosecutions. The inclusion of Articles 23 and 24 should be read as an effort to institutionalize the role of national courts in the international tribunals. While the drafting history is silent on this issue, we can assume that the drafters of the statutes recognized the importance of drawing a relationship between national and international sentencing—the former contains independent value that is reflected in the tribunals' recourse to national sentencing practice. Otherwise, there would have been no reason to provide for access to national sentencing practice. Yet the approach of the tribunals towards these provisions has undermined this relationship. Rather than viewing national sentencing practice as part of their sentencing structure, the international tribunals have created a system where their sentences are logically distinct from any national processes. In doing so they have created a hierarchy of criminal adjudicatory processes, where the international sentencing practice appears superior to, or better than, national law. This reluctance to follow national sentencing practice suggests that the municipal criminal framework is ill-equipped to handle cases of serious violations of international law. There may be circumstances where this is true, but the ICTY and ICTR statutes already foresee that by explicitly recognizing that in some cases, the tribunals have “primacy” over national courts.

IV. Rethinking Articles 23 and 24: A Partial Solution

The ad hoc tribunals have not articulated a strong philosophy of punishment. For the ad hoc tribunals to develop a coherent approach towards sentencing, they must begin by answering several important questions and developing this philosophy.¹⁴⁸ These questions include uncertainties about the role of victims in sentencing; the importance of reconciliation and retribution; and how to respect and recognize domestic courts. In Part IV, I suggest that first step to strengthening their approach to penalties would be to reconsider the limited role of national sentencing practice in Yugoslavia and Rwanda.

While the statutes are clear that national sentencing law is not binding, the Appeals Chamber should take occasion to pronounce a philosophy of sentencing that would rely more heavily on national sentencing practice. Under this new approach, the Appeals Chamber would require stricter adherence with national sentencing practice, particularly where the prospective sentence under national law would be higher than that contemplated by the international tribunal. It should create an explicit preference for sentences based on national sentencing practice and hold the lower chambers accountable to that preference; national sentencing practice would act as a true “default.” Thus, most Trial and Appeals Chambers sentences would be based explicitly

¹⁴⁸ See, e.g., Alvarez, *supra* note 109, at 408 (“Despite the voluminous literature on the ad hoc tribunals, there is scant attention paid to addressing the theories of punishment—whether retributive, rehabilitative or other—that are supposed to underlie the effort.”).

on national law. This approach was already hinted at by the Appeals Chamber in *Nikolić*,¹⁴⁹ where it found that because the sentence issued by the Trial Chamber was within the sentencing range of the national laws, it did not need to determine whether the sentence was outside the Trial Chamber's discretion.¹⁵⁰

However, the international tribunals would still retain some discretion when serious difficulties in the local system exist. This discretion would be based on the principles that already allow the tribunals to claim jurisdiction from the national courts in certain cases. In this new sentencing structure, the Trial Chambers could avoid national sentencing practice where the domestic legal system has not been "conducted independently or impartially in accordance with the norms of due process."¹⁵¹ This would enable the tribunals to ensure that when they complied with domestic penalties, those penalties were the result of a fair and just legal system. The Trial Chamber could decide, for example, that any national sentencing scheme that provided for exceptionally low sentences for serious crimes did not meet that threshold.

The death penalty issue in Rwanda raises an important criticism of this proposed change. Where the domestic legal system is fundamentally violative of an international legal human rights norm, must the ad hoc tribunals continue to follow it? To do so would only engender more problems than it aims to solve. In fact, this paper's proposed reform would not compel the ad hoc tribunals to blindly follow national practice. Instead, what are required are a thoughtful analyses and consideration of the meaning and substance of local penalties. Thus, where the local practice was not "conducted independently or impartially in accordance with the norms of due process,"¹⁵² as the death penalty arguably does, the tribunal would not need to follow it. Like all United Nations institutions, the ad hoc tribunals must respect fundamental human rights principles. Thus, basic human rights would function as an important limiting principle for implementing Articles 23 and 24—where local laws violate basic human rights, the tribunals need not comply with local sentencing practice.

Determining whether national practice violates a fundamental human right or a principle of due process would require some investigation into the domestic judicial system. Some would argue that it should not be the role of the international tribunals to evaluate municipal legal systems. However, this new framework for sentencing does not require the ad hoc tribunals to make inappropriate findings about the national courts. Instead, it adopts and builds upon an existing provision that *already* allows the tribunals to determine that national legal systems do not comply with international legal standards. Those cases where national law is inappropriate would remain, as it is now, the exception. In most cases, especially considering that most state conduct parallel criminal processes, the domestic judicial processes would be sufficient to comply with the statutes.

¹⁴⁹ See *supra* notes 67-70 and accompanying text.

¹⁵⁰ Prosecutor v. Nikolić, No. IT-94-2-A, Judgement on Sentencing Appeal, Case, ¶ 71 (Feb. 4, 2005) ("There is accordingly no need to determine whether the Trial Chamber ventured outside its sentencing discretion.").

¹⁵¹ Rome Statute of the International Criminal Court art. 1, 20 July 17, 1998, 2187 U.N.T.S. 90.

¹⁵² *Id.*

The *Musema* case discussed earlier¹⁵³ provides an interesting example of how this re-imagining of Articles 23 and 24 might affect the tribunals' decisions. In *Musema*, the tribunal sentenced the defendant to life imprisonment, which was also available under the Rwandan law it cited, but it explicitly noted that its decision was not based on Rwandan law, since Rwandan law served only as a guide.¹⁵⁴ Under our new approach, the tribunal would instead acknowledge the reconciliatory and expressive relationship between national and international sentencing. By explicitly grounding its sentence in part on national law, the tribunal would reaffirm the ability of local institutions to address serious crimes, and also mitigate the bifurcation between the international and national proceedings—ultimately thus creating a *rapprochement* between local communities and the international tribunal.

Thus, the solution to some of the challenges identified in this paper is already contained in the ICTY and ICTR Statutes. Stricter and more thorough adherence to national sentencing practice would anchor the sentencing framework. The new framework for sentencing would accord national courts the authority that the international legal system envisages. It would re-focus the international proceedings on national courts and their communities, thus alleviating many of the complaints of victims in the current criminal trials. Victims' rights groups and survivors may feel closer ties with the international tribunal if that tribunal imposes sentences in consideration of the local norms that are invariably expressed in national sentencing schemes. In the Rwandan case, where the isolation felt by survivors has been especially acute,¹⁵⁵ consistent reference to national sentencing practice would re-orient the international tribunal towards Rwanda and ground their judgments in norms that are more accessible to survivors. Thus, while the ad hoc tribunals would retain their international nature, more rigorous adherence to national sentencing practice would carve out a small but important role for national laws and courts; this would respect the international legal system's preference for national criminal processes while also facilitating the reconciliatory role of the trials.

This approach would also act as an important balancing force in another manner. Articles 23 and 24 can ensure that the sentences meted out by the ad hoc tribunals do not diverge widely from sentencing in parallel domestic criminal processes. Currently, the chambers do not consider whether and how their sentences diverge from *ongoing* domestic criminal processes. The new approach would thus promote uniformity, not only *within* the sentencing scheme of the tribunal, but also *between* the tribunals and domestic courts. Even when the ad hoc tribunals have jurisdiction over certain crimes, they can not provide a forum for all violations of the law. It would be nearly impossible for the two tribunals to oversee the prosecution of all the individuals charged with serious violations of international law in Rwanda and the former Yugoslavia. In 1997, for example, Rwanda had additional 90,000 criminal cases relating to the genocide.¹⁵⁶ Without a mechanism that enforces consistency in sentencing, it would be easy for the municipal and domestic legal processes to devolve into two distinct spheres, operating independently and without regard for each other, as they already have. Stricter and more consistent application of local sentencing practice would forge a link between these two spheres.

¹⁵³ Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 984 (Jan. 27, 2000).

¹⁵⁴ *Id.* ¶ 983.

¹⁵⁵ See Alvarez, *supra* note 109, at 403-08.

¹⁵⁶ Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 357 (1997).

Inherent in this reform is a shift away from the thesis espoused by some scholars that the international tribunals are solely an expression of the international community. While the international community, acting through the United Nations, created the ICTY and ICTR, these institutions are not organs of the international community. Unlike the International Criminal Court, which can be properly viewed as a forum for all member states for trying criminal cases, the ad hoc tribunals were created with a much more limited design. Their mission is not merely to appease a sense of moral failure at failing to prevent mass atrocities, nor were they created only for the purpose of developing international criminal law and sentencing. The provisions on national sentencing practice reflect the close ties that the ad hoc tribunals are intended to have with a particular state and local communities. Rather, this re-imagining of Articles 23 and 24 properly situates local communities at the heart of the international tribunals. If the “audience” for the international criminal tribunals are domestic survivors and victims’ families, then rejecting national sentencing practice—particularly in favor of more lenient sentences—seems incompatible with the ethos of these reconciliatory and retributive institutions.

Conclusion

The sentencing practice of the international tribunals is in disarray. While the tribunals’ statutes give them significant flexibility to consult national sentencing practice, the tribunals have instead chosen to limit the application of national law. Ultimately, the reconciliatory function of the courts has suffered, while the question of the interplay of national and international sentencing law has only grown more complicated. In proposing this re-reading of Articles 23 and 24, I do not intend to suggest that this reform will address all of the challenges facing the International Criminal Tribunals for Rwanda and for the Former Yugoslavia. Instead, I hope to shed new light on the complicated role between national courts and international law in the jurisprudence of the tribunals and begin a debate about the possibility of sentencing reform.