

Sentencing and Penalties

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The underlying Protocol on the Statute of the African Court of Justice and Human Rights (Statute) – adopted on July 1, 2008, in Sharm El-Sheikh, Egypt – is silent when it comes to sentencing and penalties for international crimes. The content of the sanctioning regime, therefore, lies in the Malabo Protocol adopted on June 27, 2014, in particular Article 43A of the Statute as amended by the Malabo Protocol. Article 43A addresses sentencing and penalties in the context of the African Court of Justice and Human Rights’ international criminal jurisdiction (the International Criminal Law Section). For purposes of brevity and convenience, from here on this chapter uses the term “Court” to refer to the International Criminal Law Section of the African Court of Justice and Human Rights. One further terminological aspect: all references in this chapter to “Articles” mean those articles in the Statute as amended by the Malabo Protocol.

Article 43A resembles the sentencing provisions of the enabling instruments of the two *ad hoc* tribunals (ICTY and ICTR), SCSL, STL, Mechanism (MICT), and the ICC. Article 43A also differs, however, in important regards from its companions in these other instruments.

This chapter proceeds in four steps. First, it unpacks key elements of Article 43A and other provisions in the Malabo Protocol that touch upon matters of sentencing and penalties. Second, this chapter distills instructive elements of the antecedent sentencing practice of international and internationalized courts. The purpose of this exercise is to guide the Court if and when it sentences (assuming that the Court would take this prior practice into account). Any recent practice at the international level involves sentencing individual defendants (natural persons) for core international crimes (genocide, crimes against humanity, and war crimes). While the Court’s jurisdiction includes such crimes and defendants, it also transcends them in

two important ways: (a) by adding transnational crimes (what Charles Jalloh describes as “ICC+”) and (b) by contemplating corporations (“legal persons”) as potential defendants. Any guidance offered by antecedent practice would therefore thin out in these two scenarios; the Court would have to break new ground. The Court thereby has an opportunity to leave an African footprint on the development of international law or, in the least, develop an African version of continental international law.¹ This discussion pivots to the third of this chapter’s four steps, namely, setting out the penological aspirations of sentencing in the case of mass crimes and querying how the Court might design and, eventually, attain such goals. Fourth, this chapter considers the enforcement of sentences following conviction. This section inquires as to what the Court might glean from prior international experiences when it comes to determining the location where the sentence is to be served, the availability of early release, appropriate conditions of confinement, and modalities of rehabilitation. A brief conclusion ensues.

This chapter does not assess the politics behind the push to create the Court; nor whether its creation is politically or financially feasible; nor the politics of the African Union generally or that of its individual members; nor the relationships between the Court and the ICC and/or the Security Council.² Rather, this chapter unpacks the substantive aspects of sentencing and penalties in the Malabo Protocol with a view to guiding the Court, in the event it ever became established and operational, in its work. This chapter’s value lies with assisting the Court, if created, to mete out appropriate sentences and penalties and, in turn, to suggest that the Court seize this moment to engage more deeply with one of the most

¹ I derive this phrase from “comparative international law,” that is, the observation that, as national courts play an increasing role in applying international law, they serve both as law enforcers and law creators, thereby leading to pluralism at the national level in terms of the content of international rules. See A. Roberts, “Comparative International Law?: The Role of National Courts in Creating and Enforcing International Law”, 60 *International and Comparative Law Quarterly* (2011) 57.

² For a flavor of these debates, see A. Abass, “Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges”, 24 *European Journal of International Law* (2013) 933, at 936 (noting that the Court’s “added value [...] is extremely doubtful”) and V. O. Nmeihelle, “‘Saddling’ the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?”, 7 *African Journal of Legal Studies* (2014) 7 (noting that despite the potential political motivations behind the establishment of the Court, nothing in international law prevents the AU from creating the Court and, moreover, that essentializing these motivations belies the reality that African countries are not homogeneous in terms of their thinking).

poorly mapped areas of international criminal law, that is, the penology of mass atrocity.

1. ANATOMY OF ARTICLE 43A

Article 43A's core features are:

- ▶ The Court can impose “sentences and/or penalties” for “persons” convicted of “international crimes” under the Statute (Article 43A(1)).
- ▶ The term “persons” in Article 43A assumptively refers both to “legal persons” and to “natural persons.” The phrases “legal persons” and “natural persons” derive explicitly from Article 46C(6) (on corporate criminal liability), which specifies that: “The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.” The Court’s jurisdiction over “legal persons” expressly excludes states, however.³ The *ad hoc*s, SCSL, and the ICC cannot sentence legal persons: they retain jurisdiction only over natural persons. The STL has – somewhat controversially – ruled that it has jurisdiction to try legal persons on charges of contempt.⁴ Although Article 46C offers some instruction regarding the determination of corporate intent and knowledge, it fails to provide any specifics with regard to sentencing of corporate actors. Hence, the Court’s judges are left largely unguided as to how to approach corporate sentencing.
- ▶ The death penalty is impermissible (Article 43A(1)).
- ▶ The Court can impose only “prison sentences” and/or “pecuniary fines” (Article 43A(2)). Hence, it is doubtful that community service, apologies,

³ Art. 46C(1).

⁴ In January 2014, an STL judge found that a Lebanese media company could be tried for contempt for the disclosure of the identities of protected witnesses. See The Case against Akhbar Beirut S. A. L. and Ibrahim Mohamed Al Amin, STL-14-06/I/CJ/, Redacted Version of Decision in Proceedings for Contempt with Orders in Lieu of an Indictment, January 31, 2014. In July 2014, a different judge at the STL concluded that he did not have jurisdiction over the company even in the case of contempt. The STL Appeals Chamber ultimately affirmed that legal persons (television and print news corporations) could be liable before the STL for crimes of contempt; the Appeals Chamber based itself in an inclusive interpretation of the term “persons” as appearing within the STL’s Rules of Procedure and Evidence. Akhbar Beirut S.A.L. (Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings) (Case No. STL-14-06/PT/AP/AR126.1, January 23, 2015). To be clear, contempt is not an international crime, nor even a transnational crime; hence, the STL’s aforementioned jurisprudence might be distinguishable. The STL has not issued a sentence or penalty in this case.

or alternative/restorative sanctions could be awarded in the case of natural persons. In cases of legal persons, remedies such as dissolution or winding-up, referred to by Joanna Kyriakakis as a “form of corporate death penalty,”⁵ are not expressly mentioned. It may be possible, however, that a “pecuniary fine” could be sufficiently onerous to bankrupt a corporation as a legal person.

- ▶ Sentences and/or penalties “shall be pronounced in public and, wherever possible, in the presence of the accused” (Article 43A(3)). It is not entirely clear whether presence is also required for corporations or whether they could be tried in absentia.
- ▶ The Malabo Protocol provides no minimum sentences; no sentencing grid; no specified maximum sentence for any crime; nor does it gesture toward any specified range of fines. Hence, as is the case at the *ad hocs* and the ICC, in principle prison terms could range from one-day to life. The judges have considerable discretion.⁶ The Statute of the SCSL excludes life imprisonment, but the SCSL’s practice to impose some sentences in the fifty-year range basically substitutes for life. The STL Statute permits sentences to range from life to “a specified number of years.”⁷ The East Timor Special Panels could punish through a fixed term of imprisonment, capped at 25 years for a single crime.
- ▶ In determining the length of prison sentence and the quantum of pecuniary fines, the Court should take into account such factors as “the gravity of the offense” and “the individual circumstances” of the convicted person (Article 43A(4)). This language is standard among international and internationalized tribunals.
- ▶ In addition to sentences and/or penalties, the Court may “order the forfeiture of any property, proceeds or any asset acquired unlawfully or

⁵ See Chapter 27 in the present volume.

⁶ Art. 46I(3) does require the Court, in considering the penalty, to “take into account the extent to which any penalty imposed by another Court on the same person for the same act already has been served.” This clause pertains to *ne bis in idem*.

⁷ STL Statute Art. 24 (penalties) reads as follows:

- (1) The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.
- (2) In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

by criminal conduct, and their return to their rightful owner or to an appropriate Member state.”⁸ In the case of legal persons, where the amount of forfeited property is considerable in relation to corporate holdings, the result could be compelled dissolution/winding-down. The Court might additionally have to determine whether equity owners, directors, or corporate officials could be liable in their personal capacity for the fines or forfeitures awarded against the corporation. Any such move would presumably necessitate a turn to ascertaining general principles of corporate law and perhaps also the approach that international juridical institutions (for example, the International Court of Justice) have taken in this regard. These principles, to be sure, suggest considerable reticence to lift the corporate veil.

- ▶ Comparable to the Rome Statute, but unlike the case with the enabling instruments of the *ad hocs* and the STL, Article 43A does not refer to any obligation to look at national sentencing practices. This silence may paradoxically inhibit the Court from identifying and turning to continental/regional practices when it comes to punishing crimes of concern to Africans; or, on the other hand, judges might come to note the silence but not equate it with a prohibition.⁹
- ▶ The jurisdiction of the Court excludes minors (Article 46D, defined as persons under the age of 18), thereby foreclosing the need for a special juvenile sentencing regime such as the one that had been established (but never deployed) for the SCSL.
- ▶ The Court may make an “order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” Natural persons who have been convicted by other international penal institutions are largely indigent; hence, cause does not arise for optimism that any such orders, if made by the Court, would yield tangible results. That said, the fact that the Court can enter such orders against legal persons might enhance the viability of actual compensation to victims.

⁸ Art. 43A(5), *see also* Art. 46Jbis, discussed *infra*, which provides specifics for State Parties on the enforcement of fines and forfeiture measures.

⁹ Note on this aspect the preamble to the Malabo Protocol, which acknowledges “the pivotal role” the Court “can play” to “promote justice and human and peoples’ rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa.”

2. SENTENCING AND PENALTIES: METHODOLOGICAL GUIDANCE FROM ELSEWHERE

The *ad hoc* tribunals, SCSL, and ICC have developed a sentencing practice when it comes to natural persons charged with “core” international crimes. They have done so despite their institutional independence *inter se*, differences among their various mandates and directives, the formal absence of the doctrine of *stare decisis*, and notwithstanding the recognized need to individualize the penalty. Perhaps because of these important limitations, however, international criminal courts and tribunals affirm that previous sentencing practices – whether internally to the institution or as among institutions – provide only limited assistance. These institutions nonetheless cite extensively to each other’s jurisprudence. Ample cross-references may occur despite solid proof that the affirmed principle in fact constitutes a general principle of law.

While the Court is assuredly in no way obliged or even encouraged to consider the practices of other institutions, the fact remains that Article 43A shares certain framework elements with the sentencing provisions of these other institutions. On the one hand, then, the Court’s judges may not wish to entirely reinvent the wheel. The Court may wish to consult prior practice and thereby join this broader dialog. On the other hand, the Court’s jurisdiction sharply departs from that of other international institutions, notably, in that it may assess corporate criminal liability and can prosecute transnational crimes.¹⁰ Some of the transnational crimes, although classified as within the Court’s international criminal jurisdiction, are novel entrants to the *corpus* of international law, for example, unconstitutional change of government, mercenarism, and illicit exploitation of natural resources.¹¹ Nor are the “core” crimes that lie within the Court’s jurisdiction mirror images of the “core” crimes proscribed by other international criminal tribunals. For example, the Court’s jurisdiction over child soldiering war crimes extends the protected age to eighteen, rather than fifteen as is the case at the SCSL, ICC, and under *lex lata* custom. The Malabo Protocol’s modes of responsibility (Article 28N of the Statute), moreover, also depart textually from those available at other

¹⁰ These crimes are of great concern to Africa and, in the case of corporate liability, involve entities responsible for pilfering resources and fueling violent conflicts. Nmehielle, *supra* note 2, at 30–1.

¹¹ Questions arise whether unconstitutional change of government is even a pre-existing crime at all within a framework of liberal criminal law, which prompts the broader question as to how to sentence a person convicted for such conduct.

international criminal tribunals. Hence, judges on the Court may elect to ignore (or distinguish) the work of other institutions and opt instead to begin *tabula rasa*. The Court, furthermore, may simply see itself as regional rather than international in character. This self-perception might dissuade it from considering the work of all international institutions, or perhaps to consider only the work of institutions with an unequivocal African connection (*i.e.* the ICTR and SCSL).

Still, it seems overall improbable that the Court will abstain from previous international experiences when it comes to sentencing in cases of international crimes, in particular, in light of how the Court's sentencing law partly derives from that found elsewhere internationally. Ostensibly, the fact that the Malabo Protocol's drafters elected language that corresponds with prior practice suggests some intent that the judges would have recourse to consult such practice. Any such consultation could advance important goals tethered to legitimacy, predictability, and credibility.

The Court's *sui generis* jurisdiction over corporations presumably explains why it is empowered under Article 43A to award "penalties" (defined as "pecuniary fines"). It is also important to underscore that the Court's jurisdiction to "order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member state" (which in part tracks the language found in the *ad hoc* tribunals)¹² is in addition to the jurisdiction to award "pecuniary fines."¹³ Nevertheless, the Malabo Protocol does not limit the Court to award pecuniary fines only against legal persons. Textually, the Court is in no way precluded from ordering them against natural persons (the use of "and/or" language intimates these are not mutually exclusive). That said, as mentioned earlier, the experiences of the international criminal tribunals suggest that convicts overwhelmingly are indigent.

State parties to the amended Statute could develop sentencing guidelines on their own accord. Or the elucidation of any such guidelines could be left to the Court's judges either formally (by promulgating some sort of understanding) or informally in judgments through a process of *bricolage*. Either way, some precision beyond the content of the Malabo Protocol would help advance the crucial requirement of *nulla poena sine lege*. The lack of

¹² Unlike the ICTY and ICTR Statute, Art. 43A(5) permits the return of the forfeited property, proceeds, or asset to "an appropriate Member state."

¹³ As with the ICC, but different from the SCSL and the *ad hoc*s, the Malabo Protocol creates a separate compensation and reparations procedure for victims (Art. 45 and 46M). The interplay of these with Art. 43A(5) will have to be mapped out over time both *de jure* and *de facto*.

reference to national sentencing practices in the Malabo Protocol intimates that there is no need for the Court to consider general principles of sentencing law among the African states parties. That said, initiating such a review would undoubtedly be of considerable value. This review could involve general practices in African states in matters of ordinary criminal law. References to national sentencing practices have animated the practice of the ICTY and ICTR. Their Statutes provide that, in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia or Rwanda respectively. That said, judges have been clear that this does not create an obligation to conform to the relevant national sentencing practice.

Or this possible review could be more specific, for example, by examining national initiatives in cases of mass crimes. On this latter note, developments in Uganda could be instructive. On the one hand, the Ugandan government has enacted an extensive amnesty regime for fighters of the Lord's Resistance Army who have surrendered. On the other hand, and concurrently, the specially created International Crimes Division of the Ugandan High Court is tasked with the prosecution of serious crimes, including international crimes, arising out of the lengthy conflict between the Ugandan government and the Lord's Resistance Army. In 2011, the jurisdiction of this Division was expanded beyond core international crimes to include crimes such as terrorism and trafficking. Penalties for the crimes within the Division's jurisdiction range from a minimum sentence of 14 years' imprisonment *per* offense to a maximum of life imprisonment.¹⁴ Uganda's Supreme Court has determined the national amnesty law to be legal.¹⁵ In 2015, it held that this law does not contravene Uganda's international obligations because it abstains from granting a blanket amnesty for all crimes. It held that amnesties cannot be granted for grave crimes as recognized under international law, specifically, crimes committed against innocent communities or civilians. The Supreme Court determined that such crimes, in fact, fall outside the scope of the amnesty legislation itself, which only covers crimes that are committed in furtherance or cause of the war or armed rebellion. The deployment of a minimum sentence under Ugandan national law departs from the enabling instruments of international or internationalized tribunals (with the exception of the Extraordinary Chambers in the Courts of Cambodia, which have a five-year minimum). In terms of other national practices in cases of atrocity

¹⁴ Ugandan Geneva Conventions Act Cap 363 (1964); Ugandan International Criminal Court Act, Act No 11/2010 (2010), sections 7(3), 8(3), and 9(3).

¹⁵ *Uganda v. Thomas Kwoyelo*, Constitutional Appeal No. 1 of 2012 (April 8, 2015).

crimes, the Court might consider the Rwandan experience. In Rwanda, hundreds of thousands of defendants have been sentenced domestically in cases of genocide and crimes against humanity. Rwandan legislators opted for a detailed sentencing grid for both the specialized chambers of national courts and for the neo-traditional *gacaca* proceedings. This grid paired the severity of the sentence with the charges and categorization of the convict. While not eliminating it entirely, this grid cabined the scope of discretion of the sentencing authorities. Suspended sentences, *dégradation civique* (the removal of certain civic rights), and community service (*travaux d'intérêt général*, or TIG) were actively contemplated as sanctions, especially in cases where a defendant pleads guilty. Participation in political resocialization programs also was required.

As with their counterparts at the *ad hocs*, SCSL, MICT, STL, and ICC, the judges of the Court retain broad discretion in imposing sentence. Article 43A (4) sculpts the exercise of this discretion. It does so in a fashion that corresponds to the enabling instruments of these other institutions. Article 43A directs judges to “take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.” This methodology has led to a two-step approach in the jurisprudence of other institutions: first, assessment of the gravity of the offense and, second, assessment of the individual circumstances.

At the ICTR, for example, the gravity of the offenses is “the deciding factor in the determination of the sentence;”¹⁶ gravity has also been described as “the primary consideration for imposing a sentence.”¹⁷ When it comes to gravity, the sentencing jurisprudence to date suggests an absence of any formal hierarchy of crimes. In other words, genocide is not *ipso facto* a more serious crime than war crimes. When it comes to determining the gravity of the offense, the ICTR has weighed the numbers of victims, the way in which the accused participated, personal involvement, and the nature of the victims.¹⁸

It is at the second step – namely, “the individual circumstances” – that aggravating and mitigating factors are to be considered. These, too, fall within the discretion of the judges both in terms of deciding whether they arise and, if so, what weight to attribute to them. Whereas factors in mitigation need to be

¹⁶ *Prosecutor v. Nyiramasuhuko et al.* (ICTR-98–42-T), Judgment and Sentence, 24 June 2011, ¶ 6189.

¹⁷ *Setako v. The Prosecutor*, ICTR Appeals Chamber, Case No. ICTR-04–81-A (September 28, 2011) at ¶ 280.

¹⁸ *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01–63-T (ICTR Trial Chamber III, November 12, 2008) ¶ 388 (discussing within the context of gravity that “principal perpetration generally warrants a higher sentence than aiding and abetting”).

established only on the balance of probabilities, aggravating factors need to be proven beyond a reasonable doubt.

The following aggravating circumstances have arisen in the jurisprudence of the *ad hoc* tribunals, the SCSL, and the ICC: the breadth of the crimes (e.g., numbers of victims) and the suffering inflicted; the youth of the victims or their general vulnerability; the nature, degree, and form of the perpetrator's involvement (active role, principal perpetrator, secondary/indirect involvement, or aider and abettor)¹⁹; premeditation and discriminatory intent; abuse of a leadership position or a position of stature; promoting an environment of impunity; depraved motivations, zeal, great effort, and enthusiasm in committing the crimes; and deportment of the accused during trial.

Preserving differentiations between elements of the crime, factors that pertain to gravity, and individualizing factors can be quite tricky.²⁰ Yet respect for the due process rights of the defendant, and the principle of legality, require that considerations not bleed from one category into the other and thereby become "double counted." Malabo Protocol Article 46A enshrines the rights of the accused and presumably would act as a buffer to this sort of "double counting." Vigilance is particularly important when it comes to disaggregating the factors that influence determinations of gravity from factors taken in aggravation. One potentially tricky variable in this regard is leadership position, which may serve as a basis for conviction (on command responsibility), as a factor to be considered in gravity, and as an aggravating circumstance in cases where an exercise of leadership is abused.

¹⁹ This factor remains quite controversial. In its 2013 decision in *Taylor*, the SCSL Appeals Chamber resisted the submission that aiding and abetting generally triggers a lower sentence. The SCSL Appeals Chamber found no textual support for this proposition in the SCSL Statute; it warned that such a presumption would depart from the obligation to individualize punishment, to consider the defendant's actual conduct, and to respect the defendant's due process rights. *Prosecutor v. Taylor*, Case No. SCSL-03-01-A (Appeals Judgment, Spec. Ct. Sierra Leone, September 26, 2013) ¶¶ 663–70. *But see contra* on nature of involvement *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, ¶ 813 (ICTR Trial Chamber, February 25, 2004) (systematizing ICTR sentencing patterns of fifteen years to life for principal perpetrators, and lower sentences for secondary or indirect forms of participation); *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-A ¶¶ 252 (ICTR Appeals Chamber, December 16, 2013) (noting that a conviction for participating in a joint criminal enterprise, as opposed to aiding and abetting, suggests an increase in overall culpability in cases where the underlying crime is the same).

²⁰ *De jure*, the ICTR insists that "[a]ny particular circumstance that is included as an element of the crime for which an accused is convicted will not be considered as an aggravating factor." *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01-63-T (ICTR Trial Chamber III, November 12, 2008) ¶ 389. In practice (*de facto*), however, this compartmentalization may be difficult to attain.

Commonly referenced mitigating factors include: whether and when the accused pled guilty and/or admitted guilt; substantial cooperation by the offender with the prosecution; the remote or tangential nature of the convict's involvement in the crime; voluntary surrender; remorse; the youth, advanced age, health, and other personal circumstances of the offender (including whether married and with children); the extent to which the offender was subject to duress, orders, or coercion; good character; the chaos of constant armed conflict; that the offender did not have a previous criminal record for ordinary common crimes; expressions of remorse; assistance to victims; and activities to end conflict and remedy its effects. Human rights violations, moreover, endured by the offender during pre-trial or trial proceedings may also count in mitigation. ICC Trial Chamber I, for example, highlighted Lubanga's notable and consistent cooperation and determined that he "was respectful and cooperative throughout the proceedings, notwithstanding some particularly onerous circumstances."²¹ In *Katanga*, ICC Trial Chamber II accorded some weight to the convict's young age at the time of the offenses (24 years) and his family situation (including his six children).²² The Special Court for Sierra Leone has, however, insisted that mitigation should not be granted based on the perceived "just cause" for which a convict may have fought.

Pleading guilty is a particularly significant mitigating factor in the international case-law. It is unclear how this will play out at the Court (*quaere* whether there is even a specified procedure for pleading guilty). Article 46B(2) expressly precludes the "official position of any accused person" from mitigating punishment; Article 46B(4), much like its companions in the *ad hoc* Statutes, recognizes that acting "pursuant to the order of a Government or of a superior . . . may be considered in mitigation of punishment if the Court determines that justice so requires."

At times in the international jurisprudence, a factor may be referenced in mitigation, and established on a preponderance of the evidence, but then not be assigned any weight. Hence, wide latitude emerges when it comes to identifying a mitigating circumstance and, then, deciding whatever value it may carry. The MICT has noted that "the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of

²¹ *Prosecutor v. Lubanga* (ICC-01/04-01/06), Decision on Sentence Pursuant to Art. 76 of the Statute, 10 July 2012, ¶¶ 91, 97.

²² *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04-01/07, Décision relative à la peine (Art. 76 du Statut), Chambre de première instance II, (23 mai 2014) ¶ 144.

a particular sentence.”²³ Mitigating factors, to be clear, only attenuate the punishment: they do not diminish the gravity of the crime. Mitigating factors, moreover (and unlike aggravating factors), do not need to be linked specifically to the impugned conduct or directly related to the offense. The absence of a possible aggravating factor, finally, does not constitute a circumstance to consider in mitigation.

Article 78(2) of the Rome Statute provides that “[i]n imposing a sentence of imprisonment, the [ICC] shall deduct the time, if any, previously spent in detention [...]” This reflects the general practice at contemporary international criminal tribunals, which means that any time spent in custody awaiting trial and in trial will be removed from the sentence. This text does not appear in the Malabo Protocol. Hence, the Court would have to clarify whether it would adhere to this general norm or not. It would seem implausible not to do so, in particular, because trials for extraordinary international crimes can as a general matter prove to be rather lengthy.

Another nebulous aspect for the Court will be how to sentence in those situations that fall within Article 46C(6).²⁴ When natural persons and legal persons are both found liable, would the dual liability mitigate punishment for one or the other or, perhaps, serve as an aggravating factor (or be neutral in this regard)? Once again, principles of transparency and legality would be enhanced with *ex ante* clarity.

What is the quantum of sentence issued by other international and internationalized tribunals? The SCSL has sentenced its nine convicts with comparative severity: an average term of nearly 39 years and a maximum term of 52 years.²⁵ The ICC’s 3 sentences thus far are 14, 12, and 9 years (a fourth sentence of 18 years was overturned on appeal owing to the acquittal of the accused Bemba). Professor Barbora Holá has conducted extensive empirical analysis of the ICTY and ICTR sentencing practices. She determines that the ICTY has issued a modest number of life sentences (approximately 6 percent of the total): its fixed-terms sentences range from 2 years to 40 years (as of the time of writing); among term sentences the median sentence is 15 years and the mean sentence is a touch over 15 years. The ICTR has finalized

²³ *Ngirabatware v. The Prosecutor*, MICT Appeals Chamber, Case No. MICT-12-29-A (December 18, 2014) ¶ 265.

²⁴ “The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.” The one-way nature of the preclusion of the exclusion of responsibility is telling, and suggests a reflexive move towards the responsibility of natural persons as the first-best vision of justice.

²⁵ A. Smeulers, B. Holá, and T. van den Berg, “Sixty-Five Years of International Criminal Justice: The Facts and Figures,” 13 *International Criminal Law Review* (2013) 7, at 22.

59 sentences, 17 of which are life sentences. Among the determinate sentences, according to Hola, the median is 25 years and the mean is 24.67 years. The range among determinate sentences at the ICTR is 6 to 47 years.²⁶ In *Nchamihigo*, an ICTR Trial Chamber held that:

[A] sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who participated in the crimes with especial zeal or sadism. Offenders receiving the most severe sentences also tend to be senior authorities.²⁷

The Appeals Chamber in *Nchamihigo* (a defendant who had been a deputy prosecutor, so importantly not a senior authority within the government) ultimately reversed some of the convictions and substituted a term sentence of forty years. Life sentences, however, have been routinely imposed against senior government authorities, along with persons of stature who did not hold government positions (such as a tea factory director and high-level official in the *Interahamwe* military).

When it comes to corporate defendants, the Malabo Protocol makes no mention of sanctions such as satisfaction, apology, suspension of registration/incorporation, requirement to abide by internationalized standards, adverse publicity, positive action programming, trusteeship, transparency, or local investment of profits. A broader range of sanctions for legal persons could nonetheless assist in purposes of moral denunciation and also cultivate a more robust sense of citizenship and reciprocal obligation for corporate entities.

In cases where an accused is convicted on multiple charges, the ICTY and ICTR Rules of Procedure and Evidence allow the Trial Chambers the option to impose either a single sentence reflecting the totality of the criminal conduct or a sentence in respect of each conviction with a declaration regarding whether these sentences are to be served consecutively or concurrently.²⁸ Barbora Holá notes that, in the case of the *ad hoc* tribunals, defendants are mostly convicted on multiple counts but only one global sentence is issued.²⁹ Procedurally, in the early years of the *ad hoc* tribunals separate sentencing

²⁶ Mark A Drumbl, 'And Where the Offence Is, Let the Great Axe Fall': Sentencing under International Criminal Law, in Kastner ed. *International Criminal Law in Context* (Routledge, 2018) pp 297–316, at 309 (citing the research of Barbora Holá, with permission, and available from the author).

²⁷ *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-01–63-T (ICTR Trial Chamber III, November 12, 2008) ¶ 388.

²⁸ Rule 87(C). See also *Prosecutor v. Delalić* (IT-96–21), ICTY, Judgment, 20 February 2001, ¶ 771.

²⁹ B. Holá, "Sentencing of International Crimes at the ICTY and ICTR", 4 *Amsterdam Law Forum* (2012) 3, at p. 9.

hearings were held; the Rules, however, were soon amended to unify the trial and sentencing hearing process.³⁰ Parties are entitled to present evidence related to sentencing in the course of the trial but, as per Rule 86(C), submissions regarding sentencing should be rendered during closing arguments. Procedurally speaking, at the ICC the sentencing hearing may occur right at the close of the trial phase; pursuant to Article 76(2) of the Rome Statute, however, a separate sentencing hearing may occur upon the discretion of the Trial Chamber or upon the request of either the Prosecutor or the accused. Evidence regarding sentencing may in any event be adduced over the course of the trial. The Malabo Protocol appears to be silent on these procedural matters. Nonetheless, it can readily be seen that aspects of these could be, as in the *ad hoc* tribunals and the ICC, addressed under the Rules of Procedure and Evidence of the Court. A key advantage of that would be their amenability to amendments at a technical level without requirement of involving states.

The Rome Statute also establishes guidelines regarding appeals against sentence. In practice at the ICC, and at the *ad hocs*, an appeal may be granted against sentence on the basis of discernible error on the part of the trial judge. Appeals on this basis, however, are relatively uncommon in light of the broad discretion awarded to trial judges when it comes to sentencing. Sentences may be adjusted, however, because the appeals chamber may quash or substitute convictions. Pursuant to the Statute as amended by Malabo Protocol Article 16 (2), the International Criminal Law Section shall have three Chambers: pre-trial, trial, and appellate. Article 18(2) empowers the prosecutor or the accused to appeal a “decision” of the Pre-Trial or Trial Chamber on grounds of a procedural error, an error of law, and an error of fact. Article 18(3) provides that an appeal may be made “against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.” No mention is herein made of an appeal against sentence. Presumably, however, “decision” in Article 18(2) would be interpreted broadly enough so as to include an appeal of a sentence, or pursuant to Article 18(3) the appeal against conviction could also include an appeal of the sentence. Even if not explicitly stated, therefore, it appears that the issue is impliedly addressed through appeal of a decision on conviction.

3. PENOLOGICAL ASPIRATIONS

The Court would do well to identify, as soon as practicable, what it values as the penological goals of sentencing. In terms of natural persons, international

³⁰ K. Ambos, *Treatise on International Criminal Law, Vol. II: The Crimes and Sentencing*, (Oxford: Oxford University Press, 2014) 278.

criminal law has posited a number of penological aspirations. Retribution and general deterrence emerge as the two most frequently cited punishment goals.³¹ The Court will also need to assess whether and how these goals map onto legal persons: in other words, will these goals be identical in cases of corporate liability as in the case of natural persons?

The many facets of retributivist theory share a common thread, namely, that the infliction of punishment rectifies the moral balance, in particular, when imposed through public condemnation of the criminal conduct. Punishment is to be proportionate to the extent of the harm caused by the perpetrator's criminal conduct and also to the perpetrator's degree of responsibility. In international crimes, to be sure, grievous harms may be caused by persons with attenuated intent. This apparent paradox arises because of the collective nature of the violence, the diffusion of authority within groups, the reality of following orders, and the normalization of violence under rubrics of self-defense or group survival. Notwithstanding retributivism's initial roots in *lex talionis* and just deserts, international tribunals have emphatically emphasized that "retribution should not be misunderstood as a way of expressing revenge or vengeance."³² Consequently, these sentencing institutions conceptualize retribution deontologically as the "expression of condemnation and outrage of the international community."³³

³¹ *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04-01/07, *Décision relative à la peine* (Art. 76 du Statut), Chambre de première instance II, ¶ 38 (23 mai 2014) ("[L]a peine a donc deux fonctions importantes: le châtiement d'une part, c'est-à-dire l'expression de la réprobation sociale qui entoure l'acte criminel et son auteur et qui est aussi une manière de reconnaître le préjudice et les souffrances causées aux victimes; la dissuasion d'autre part, dont l'objectif est de détourner de leur projet d'éventuels candidats à la perpétration de crimes similaires."); *Prosecutor v. Stakić*, Case No. IT-97-24-A, ¶ 402 (ICTY Appeals Chamber, March 22, 2006) (stating that "the Appeals Chamber notes that the jurisprudence of the Tribunal and the ICTR consistently points out that the two main purposes of sentencing are deterrence and retribution"); *Prosecutor v. Marqués et al.*, Case No. 09/2000, ¶ 979 (Dili Dist. Ct. Serious Crimes Spec. Panel, Dec. 11, 2001) ("The penalties imposed on accused persons found guilty by the Panel are intended, on the one hand, as retribution against the said accused, whose crimes must be seen to be punished (*punitur quia peccatur*). They are also intended to act as deterrence; namely, to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate such serious violations of law and human rights (*punitur ne peccetur*).").

³² *Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-A, ¶ 1075 (ICTY Appeals Chamber, Dec. 17, 2004); *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04-01/07, *Décision relative à la peine* (Art. 76 du Statut), Chambre de première instance II, (mai 23, 2014) ¶ 38.

³³ *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S, ¶ 86 (ICTY Trial Chamber, December 2, 2003).

Retributive motivations thereby flirt with the goals of expressivism, which presents as another penological rationale in international criminal law. The expressivist punishes to strengthen faith in rule of law among the general public (including the aggressor community), rather than punishing simply because the perpetrator deserves it or will be deterred by it. Expressivism, in my opinion, may also transcend retribution and deterrence in claiming as a central goal the edification of historical narratives, the authentication of atrocity through judicial text, and the public dissemination thereof.³⁴ Whereas some scholars envision expressivism as a subset of retribution or deterrence, others prefer to see it as an independent goal. Others still, for example Saira Mohamed, see it as serving aspirational purposes, that is, to positively set forth goals for human behavior in extenuating circumstances rather than simply clarifying – retrospectively and in decontextualized fashion – what might be normal or deviant.³⁵ Mohamed encourages courts to become sites of storytelling to help elucidate how individuals choose to perpetrate unspeakable crimes. The prospect of corporate criminal liability at the Court adds the question how expressivism might interface with liability of legal persons and what sorts of aspirations could thereby be established for corporate conduct.

General deterrence posits that the purpose of prosecuting and punishing those who commit mass atrocity is utilitarian in nature, that is, to dissuade others (in the same jurisdiction, elsewhere, or anywhere) from re-offending. Specific deterrence implies that punishing the individual offender will deter recidivism in his or her specific case. The focus of international criminal law, however, remains oriented toward general deterrence. From a general deterrence perspective, punishment is inflicted because of the consequentialist effect of reducing the incidence of crime. The question whether international criminal trials actually fulfill deterrent aspirations remains unsettled; scholars and observers straddle a gamut of positions.

On occasion, judges on international criminal courts and tribunals also refer to other penological rationales. These other rationales include rehabilitation, incapacitation, restoration, and reconciliation.³⁶ These rationales, however, are not particularly influential. Although rehabilitation is among the

³⁴ See M. A. Drumbl, *Atrocity, Punishment, and International Law* 173–6 (2007).

³⁵ S. Mohamed, “Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law”, 124 *Yale Law Journal* (2015) 1628.

³⁶ When it comes to these rationales, an interesting question arises, that is, how the Court might interact with alternative justice measures that African states may deploy domestically as part of post-conflict transitions, for example, *mato oput*. While these questions are more appropriately considered in the framework of complementarity, they also bear upon penological conversations as well.

more frequently mentioned of this group of subjacent objectives, it is often pithily described as not deserving of undue weight.³⁷ Reconciliation arose in the 2014 *Katanga* judgment, where an ICC Trial Chamber actively recognized the convict's *post hoc* efforts to demobilize and disarm child soldiers as a mitigating factor in his eventual sentence of twelve years.³⁸ Restorative justice remains particularly marginal within the law-in-practice of international courts and tribunals, although in the case of the Rome Statute framework it may be better served through the compensation and victim reparations procedures, along with the Trust Fund for Victims. The Malabo Protocol, like the Rome Statute, contemplates reparations to victims and a Trust Fund (Article 46M). Many details still need to be resolved on this front, however. The Malabo Protocol is well aware of this need, insofar as Article 45(1) calls upon the Court to establish principles relating to reparations.

4. POST-CONVICTION ENFORCEMENT

Article 46J of the Statute as amended by the Malabo Protocol governs enforcement of sentences. This provision superficially parallels that of other international criminal justice institutions.³⁹ Pursuant to Article 46J, sentences are to be served in states designated by the Court from a list of willing states who would have concluded enforcement agreements with the Court in this regard. The *ad hoc* international tribunals, for example, and the MICT have made agreements with many different states to detain convicts.⁴⁰ Article 46Jbis obliges states parties to “give effect to” fines or forfeitures ordered by the Court, albeit “without prejudice to the rights of *bona fide* third parties.” It is

³⁷ *Prosecutor v. Milutinović et al*, Judgment Case No. IT-05-87-T, Trial Chamber (February 26, 2009), ¶ 1146.

³⁸ *Situation en République démocratique du Congo, affaire Le Procureur c. Germain Katanga*, No. ICC-01/04-01/07, Décision relative à la peine (Art. 76 du Statut), Chambre de première instance II, (mai, 23 2014) ¶¶ 88, 115, 144.

³⁹ MICT Statute Art. 25, along with *inter alia* a MICT practice direction from April 24, 2014, determine where a convict is to serve sentence. Such determinations involve four steps. First, the Registrar communicates with one or more states to determine their willingness to enforce the sentence. Second, the Registrar submits a report to the MICT President, which lists potential enforcing states and contains other pertinent information. Third, the President designates an enforcement state, based on the information submitted by the Registrar and any other inquiries he or she chooses to make. Fourth, the Registrar executes the decision. Imprisonment shall be in accordance with the applicable law of the concerned state, although the MICT has the power to supervise sentence enforcement.

⁴⁰ ICTY convicts have been incarcerated in Germany, Austria, Spain, Italy, Denmark, Finland, Norway, the United Kingdom, Sweden, Portugal, Estonia, and France. ICTR convicts have been incarcerated in Mali, Bénin, Italy, and Sweden (nearly all in Mali and Bénin, however).

unclear what exactly is meant by this latter caveat, though Joanna Kyriakakis suggests that it refers to shareholders and employees.⁴¹ Furthermore, the procedure for giving effect to fines or forfeitures is to be that “provided for in [the state’s] national law.”⁴²

Article 46K governs pardon or commutation of sentences. These terms have, notwithstanding their specific meaning, become equated with early release (“parole”) in the practice (and vernacular) of international criminal justice institutions. Pursuant to Article 46K, a convict may be eligible for pardon or commutation of sentence according to the national law of the state where sentence is being served. This shall be granted only “if the Court so decides on the basis of the interests of justice and the general principles of law.” The ICTY had adopted a “rule of thumb” to permit eligibility for conditional early release upon a convict’s having served at least two-thirds of the sentence; the ICTY did so despite the fact that this benchmark did not reflect the municipal law of all enforcing states.⁴³ In three cases of early release, the ICTR diverged and determined a three-quarters benchmark.⁴⁴ The Rome Statute of the ICC expressly adopts the two-thirds benchmark (or 25 years in the case of life imprisonment).⁴⁵ The SCSL’s first case of early release (definitively granted in 2015) involved Moinina Fofana, a CDF leader, who is serving his sentence in Rwanda. Fofana has spent roughly twelve years in detention. He will serve the remainder of his sentence (three years) in Sierra Leone under release supervised by Sierra Leonean authorities.⁴⁶ Another SCSL convict, former Liberian President Charles Taylor, is incarcerated in the United Kingdom. In 2015, the Residual Court for Sierra Leone, which has taken over the SCSL’s

⁴¹ See Chapter 27 in the present volume.

⁴² See also Art. 46L(2)(f), which requires states parties to comply without undue delay with any request for assistance or an order issued by the Court related to the “identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of *bona fide* third parties.”

⁴³ R. Mulgrew, *Towards the Development of the International Penal System 57–58* (Cambridge, UK: Cambridge University Press 2013).

⁴⁴ *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Decision on Application for Early Release (ICTR, March 6, 2012); *Prosecutor v. Rugambarara*, Case No. ICTR-00-59, Decision on Application for Early Release (ICTR, February 8, 2012); *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-S, Decision on Application for Early Release (ICTR, October 24, 2011).

⁴⁵ Rome Statute, Art. 110. A sentence reduction may be issued if the ICC determines the existence of one or more of the following factors: (1) “early and continuing willingness” of cooperation by the convict; (2) the convict’s “voluntary assistance . . . in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims”; or (3) other factors “establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules . . .”

⁴⁶ At trial, Fofana had been sentenced to a six-year term. The SCSL Appeals Chamber increased his sentence to fifteen years after it rejected fighting for a just cause as a mitigating factor in sentencing.

work as of December 2013, denied Taylor's motion to terminate the enforcement of his sentence in the United Kingdom (where he is segregated from the general prison population for security reasons in a maximum security facility in Durham) and to transfer him to Rwanda. Rwanda incarcerates all the other persons convicted by the SCSL. Taylor's counsel had unsuccessfully argued that Taylor's rights to a family life had been violated by incarcerating him so far from his home and family; moreover, this *sui generis* character of incarceration, it was submitted, also departed from the practice at other tribunals, including the SCSL itself, to arrange for convicts to be incarcerated in their continent of origin.⁴⁷ The judges of the Residual Court for Sierra Leone strongly rejected the defense motion on several grounds including, *inter alia*, that Taylor's case indeed was an exceptional one.

The MICT, which is now responsible for enforcement of all the sentences issued by the *ad hoc* tribunals, has declared the adoption of the two-thirds rule. A petition for pardon or commutation of sentence is to be made by a convict to the MICT President, who also decides thereupon. Rule 151 of the MICT Rules of Procedure and Evidence also impacts this decision, along with a practice direction from July 5, 2012. Rule 151 identifies a number of illustrative factors that the MICT President shall take into account in such determinations. These are: the gravity of the crime or crimes for which the prisoner was convicted; the treatment of similarly-situated prisoners; the prisoner's demonstration of rehabilitation; and any substantial cooperation on the part of the prisoner with the Prosecutor. In addition, the President may consider the interests of justice and the general principles of law (MICT Statute Article 26); any other information that he or she considers relevant; along with the views of any judges of the sentencing chamber who are MICT judges.⁴⁸

ICTY judges have ruled that the prospect of early release should not factor into the determination of the length of the sentence.⁴⁹ In other words, it would be improper to gross up the length of sentence to absorb the possibility of early release.

Overall, early release is an important aspect of the administration of international criminal law. As of July 2013, nearly half of all international convicts

⁴⁷ T. Reisman, "Charles Taylor Will Remain in Prison in the UK", *International Justice Monitor* (March 26, 2015).

⁴⁸ Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY, or the Mechanism. MICT/3 (July 5, 2012) at ¶ 9.

⁴⁹ *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, ¶¶ 97 (ICTY Appeals Chamber, February 4, 2005).

have been released; the vast majority of this group having been granted early release through the aforementioned procedures.⁵⁰

The pursuit of predictability and certainty might nudge the Court to develop further clarifications to operationalize Articles 46J and 46K, for example, in the Court's eventual rules (*see, e.g.*, Article 46J(2)). An aperture arises, perhaps, to more deeply integrate measurable rehabilitative goals. As Roisín Mulgrew astutely observes, the enforcement of sentences of *ad hoc* tribunal convicts is bereft of meaningful rehabilitative programming. According to Mulgrew, "[i]nternational prisoners serving their sentences in national prisons [...] may not have clear or structured sentence plans, access to offending behavior programmes or assistance with preparation for release."⁵¹ Holá and van Wijk flatly note that, following release, these individuals "simply disappear from the radar of the international community"; they do so notwithstanding great variation in their post-release experiences.⁵² Holá and van Wijk add that some "go back to their countries of origin and return to political posts they [previously] held" and some "return as celebrated war time heroes," while others "just go back to their old house, cannot find a job, feel rejected [by ...] society and fight to make a living."⁵³ Instead of the current "warehousing" practice that Mulgrew identifies as characterizing the enforcement of international sentences, the Court might push a more structured, supervisory, and consistent arrangement.⁵⁴

Alternately, the establishment of the Court opens an opportunity to reconsider the availability of early release. Early release remains controversial (particularly among victim communities) despite its ubiquity. Perhaps the opportunities for such release should be approached somewhat more differently so as to emphasize the centrality of retribution as a penological rationale. This is up to the Court.

Also of pressing salience is that some international prisoners cannot exit international detention notwithstanding being released since no country is willing to admit them. Such is the case with certain acquitted and released individuals from the ICTR who are effectively stranded in Tanzania. This situation, which presents as a grave human rights concern, should be

⁵⁰ B. Holá and J. van Wijk, "Life after Conviction at International Criminal Tribunals", *Supranational Criminology Newsletter* (June 2014) 6–7, at p. 6 (also noting the lack of structure in post-release policies which leads to considerable disparity in the prospects for social reintegration among former international prisoners).

⁵¹ Mulgrew, *supra* note 43, at 96.

⁵² Holá and van Wijk, *supra* note 50, at pp. 6–7 at p. 7.

⁵³ *Ibid.*

⁵⁴ Mulgrew, *supra* note 43, at 193.

pre-empted by the Court through the development of ententes as to the locations to which convicts who fear persecution upon release should be able to emigrate. Another important theme is defining the content of *ne bis in idem* ahead of time, insofar as a convict at the Court, upon release, might return to a state with jurisdiction over related crimes and thereby face prosecution. This is a situation that has arisen in the *Katanga* case at the International Criminal Court.

5. CONCLUSION

The Court's creation as a regional entity would offer an opportunity to break new ground in terms of refining penological rationales and streamlining carceral enforcement. In this regard, looking beyond political motivations, potential duplications, and financial contingencies, the Court – if established – opens a space for substantive and progressive development of the law – international as well as regional – in a vital area that is generally underserved.

The Court also could be groundbreaking in advancing a conversation about what sentencing and penalties actually mean in the context of corporate entities. A turn to a more sophisticated penology, moreover, also could help elucidate differences, or similarities, between gravity and conceptual assessments in cases of “core” international crimes, on the one hand, and transnational crimes, on the other, and thereby refine a much broader conceptual and theoretical landscape. Such a move might also better unpack, and possibly typologize, crimes according to the extent to which they are influenced by collective political and ideological forces rather than dispositional and material motivations. Core crimes may be more ecological in nature than transnational crimes. Or perhaps not.

Alternately, it may well be that a punishment heuristic rooted in social psychology can serve to differentiate, in principle, core crimes from transnational crimes yet also permit both to remain within the category of, in the least, regional international law. A distinction between the two categories, then, could retain its relevance when it comes to sentencing. Obversely, the Court could proceed in a fashion that sentences transnational crimes indifferently from core international crimes. Moving in this latter direction could peel back the conceptual distinctions between these two categories and, in this vein, soften the existence of these erstwhile boundaries. Once again, these moves are up to the Court.

Among the goals of creating the Court, and endowing it with jurisdiction over a broad array of crimes, is to guard against scattershot use of universal

jurisdiction proceedings and to promote a continental response to crimes of concern to Africa. Attainment of this goal would be furthered by the development of a coherent and cogent approach to sentencing. Sentencing and penalties have unfortunately proven to be afterthoughts in the historical development of international criminal law, but this neglected status is neither inexorable nor preordained. The space created by the Court offers a chance to develop regional norms regarding the sentencing of international and transnational crimes and also, through careful reference to the work of other international tribunals, hook those norms into – and improve – broader international legal practice. The creation of the Court offers an opportunity for Africa to take the lead in this area of great importance to victims.