
NOTES

LASER BEAM OR BLUNDERBUSS?: EVALUATING THE USEFULNESS OF DETERMINATE SENTENCING FOR MILITARY COMMISSIONS AND INTERNATIONAL CRIMINAL LAW

I. INTRODUCTION

Over the last thirty years, federal sentencing reform has meant one thing: more determinate sentencing. The federal government has steadily moved away from a scheme in which judges choose sentences case by case and toward one more tightly controlled by Congress and the President. Although recent Supreme Court decisions, along with many observers' growing dismay at the results of these reforms, have dampened this trend, sentencing guidelines and mandatory minimum sentences continue to play primary roles in determining who goes to prison and for how long. Yet two new criminal tribunals — one international and one within the U.S. military — depart sharply from the determinate sentencing model prevalent in U.S. federal courts. At first glance, these tribunals appear susceptible to the same critiques applied years ago to the federal system: that without guidelines, punishment will end up too arbitrary or too lenient. However, when the goals of the new tribunals are examined, strictly determinate sentencing appears inappropriate. A better solution is “bounded discretion” — a middle ground between determinate and indeterminate sentencing.

Both tribunals examined in this Note are essentially experimental: The International Criminal Court (ICC) was created by a multilateral treaty, the Rome Statute,¹ in July 2002 and only recently confirmed charges against its first defendant.² The U.S. military commissions, established last autumn by the Military Commissions Act of 2006³ (MCA), have so far reached a disposition in only one case.⁴ Both tribunals face major hurdles in achieving long-term success. The legiti-

¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Rome Statute was negotiated and adopted by the Rome Conference in July 1998 and took effect upon ratification by sixty countries. See Int'l Criminal Court, Establishment of the Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited Apr. 6, 2007).

² See Press Release, Int'l Criminal Court, Pre-Trial Chamber I Commits Thomas Lubanga Dyilo for Trial, ICC-CPI-20070129-196-EN (Jan. 29, 2007), <http://www.iccpi.int/press/pressreleases/220.html>.

³ Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

⁴ See William Glaberson, *Australian To Serve 9 Months in Terrorism Case*, N.Y. TIMES, Mar. 31, 2007, at A10.

macy of the ICC has been weakened by the noninvolvement of the United States⁵ as well as by inherent limits on its power as a nonsovereign, international body.⁶ The MCA, meanwhile, may ultimately fail under constitutional scrutiny, given the abbreviated due process and denial of habeas corpus it imposes on defendants. Moreover, Congress may yet overhaul the MCA.⁷ But this Note looks beyond these important, ideologically charged battles to the questions of punishment and, more specifically, the questions of how and by whom individual sentences should be determined.

In contrast to U.S. domestic sentencing policy, both the ICC and the military commissions provide for primarily court-determined sentences, with only minimal guidance offered by statutes or court rules. Importing determinate sentencing might improve the legitimacy of both tribunals by making their punishments appear more consistent and appropriately severe. But detailed guidelines would also impose serious costs. At the ICC, the institutional barriers to formulating such guidelines would be high, and the loss of flexibility in sentencing could hamper the court's efforts to promote social healing and national reconciliation in delicate political circumstances. Although creating guidelines for U.S. military commissions would involve fewer institutional hurdles, political involvement in sentencing would likely produce more harshness than justice, ultimately undermining the credibility of the tribunal. In both cases, the failure of the Federal Sentencing Guidelines to create an equitable and humane sentencing regime should caution against any model that is too closely managed by political actors.

This Note proceeds in several parts. Part II explores the Federal Sentencing Guidelines and the existing sentencing rules governing the ICC and U.S. military commissions. Part III examines the goals of determinate sentencing and compares them to the goals of the ICC and the military commissions. Part IV looks at the challenges that each institution would face in implementing guidelines and concludes that the

⁵ Although President Clinton signed the Rome Statute on December 31, 2000, President George W. Bush removed the United States as a signatory a few months later and subsequently secured dozens of bilateral agreements and several Security Council resolutions aimed at protecting U.S. troops from prosecution. See CITIZENS FOR GLOBAL SOLUTIONS, FACT SHEET: U.S. POLICY ON THE INTERNATIONAL CRIMINAL COURT (2004), available at http://www.globalsolutions.org/programs/law_justice/faqs/uspolicy.pdf. Yet at least one scholar has characterized these attacks as relatively minor, arguing that "[i]f this is the worst the United States can throw at the Court, the institution cannot be in any great danger." See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 21–23 (2d ed. 2004).

⁶ See, e.g., Alfred P. Rubin, *The International Criminal Court: Possibilities for Prosecutorial Abuse*, 64 LAW & CONTEMP. PROBS. 153, 164 (2001).

⁷ Some Democrats, having gained a majority in Congress in the 2006 midterm elections, hope to amend key provisions of the MCA. See, e.g., Restoring the Constitution Act of 2007, S. 576, 110th Cong. (as introduced by Sen. Dodd, Feb. 13, 2007).

balance already struck by the U.S. military commissions — “bounded discretion” — is preferable for both courts. Under this framework, sentencing is largely discretionary within broad codified boundaries. These boundaries can both prevent outlier sentences and serve as expressions of certain values held by the court. For the military commissions, these boundaries are appropriately limited to mandatory maximum sentences. Given the unique jurisdiction of the ICC, however, broad mandatory *minimums* might help ensure the basic level of consistency and severity needed for the court to establish its legitimacy in a skeptical world.

II. OVERVIEW OF SENTENCING REGIMES

A. U.S. Federal Courts

Historically, sentencing in the American criminal justice system was largely within judges’ discretion.⁸ Statutes set broad ranges of possible sentences, and judges chose sentences based on the factors they thought relevant.⁹ But beginning in the 1970s, a chorus of critics argued that indeterminate sentencing gave judges undue power and discretion. Advocates of defendants’ rights complained that prejudice and arbitrariness infected judges’ decisions.¹⁰ Proponents of “law and order” blamed the steadily rising crime of the 1960s and ’70s on lenient sentencing and the stealth use of parole.¹¹ Responding to this confluence of criticism,¹² Congress passed the Sentencing Reform Act of 1984¹³ (SRA), which abolished parole, established the U.S. Sentencing Commission, and directed that body to promulgate sentencing guidelines. In addition, Congress passed a series of laws in the mid-1980s

⁸ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225 (1993).

⁹ This system was thus more akin to the bounded discretion this Note advocates for the ICC and military commissions than to the pure discretion of the ICC’s current sentencing rules.

¹⁰ See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 12–25 (1973).

¹¹ See, e.g., ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* 153–77 (1975).

¹² These two strains of criticism have been described as representing “progressivism” and “populism.” The progressives, trying to fill the void left by the decline in the rehabilitative ideal, sought guidelines as an expert-based response to the problems of crime and unequal or arbitrary sentences. Populists, on the other hand, saw guidelines as a legislative check on permissive, politically unaccountable judges and as a means of ratcheting up punishment. See U.S. SENTENCING COMM’N, *FIFTEEN YEARS OF GUIDELINES SENTENCING* 1–3 (2004), available at http://www.ussc.gov/15_year/15year.htm. Not surprisingly, therefore, early, “progressive” templates for a federal sentencing commission envisioned the commission as being entirely within the judicial branch, whereas later, more “populist” revisions closely entwined it with the executive and legislative branches. See *id.* at 6.

¹³ Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

setting mandatory minimum sentences for many drug, sex, and fire-arms crimes, as well as for repeat offenders.¹⁴

The Federal Sentencing Guidelines assign ranges of possible sentences based on two axes: the offense level, which is determined by the seriousness of the crime, and the defendant's criminal history, which is measured by the "extent and recency" of the defendant's previous misconduct.¹⁵ The intersection of these two values corresponds to a "guidelines range" of potential sentences.¹⁶ Until *United States v. Booker*,¹⁷ judges were required to choose a sentence within this range unless they found that a departure was warranted based on a limited set of factors. Now judges must "consult" and "take . . . into account" the Guidelines during sentencing.¹⁸ As a result, sentences continue to conform to Guidelines recommendations.

In practice, the Federal Sentencing Guidelines severely circumscribed judicial power. Some of this power was transferred to Congress and the President, who maintain some control over the Sentencing Commission and the Guidelines.¹⁹ But the greatest shift in power was in favor of prosecutors. The proliferation of severe mandatory sentences increased the importance of prosecutors' decisions: the determinations of whether to bring charges or drop them, what charges to bring, and whether to engage in plea bargaining eclipsed the traditional power of the judge to determine a defendant's fate.²⁰

B. *The International Criminal Court*

The ICC lacks specific guidelines regarding appropriate penalties. Except for a ban on the death penalty,²¹ it has no hard limits on sentences, and judges weigh many factors in attempting to craft consistent, appropriate sentences for a wide range of serious crimes.

¹⁴ U.S. SENTENCING COMM'N, *supra* note 12, at 3.

¹⁵ U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2 (2005), available at http://www.ussc.gov/general/USSCoverview_2005.pdf; see also U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2006).

¹⁶ The upper end of a guideline range must exceed the lower end by the greater of six months or twenty-five percent. U.S. SENTENCING COMM'N, *supra* note 15, at 2.

¹⁷ 125 S. Ct. 738, 756, 764 (2005) (holding the guidelines unconstitutional under the Sixth Amendment and remedying the conflict by severing the provision making the guidelines mandatory).

¹⁸ *Id.* at 767.

¹⁹ Congress can reject or modify amendments to the Guidelines. 28 U.S.C. § 994(p) (2000 & Supp. III 2003). The President appoints the seven Commission members to six-year terms, though no more than four members may belong to a single political party. *Id.* §§ 991(a), 992(a).

²⁰ Cf. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 803 (2006) (noting that "[p]rosecutors treat laws defining crimes and sentences as bargaining chips, while legislators liberally supply the chips").

²¹ See GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 274 (2005).

1. *Historical Precedent.* — Although precedent for the punishment of international crimes stretches back to the Middle Ages,²² few of the earlier international criminal tribunals thought seriously about how to set consistent, appropriate punishments.²³ The first international criminal courts of the modern era, at Nuremberg and Tokyo, likewise provided little guidance for future prosecutions.²⁴ These tribunals handed down sentences including death, life in prison, and terms of years, but did so with little explanation and without a mechanism for judicial review.²⁵

In the early 1990s, the U.N. Security Council launched the next two experiments with international criminal law — the International Criminal Tribunals for the former Yugoslavia²⁶ (ICTY) and for Rwanda²⁷ (ICTR). These courts' nearly identical governing statutes add little in the way of sentencing guidance. Both restrict acceptable punishments to imprisonment and restitution, effectively banning the death penalty.²⁸ Both also direct the Trial Chambers to take into account the "gravity of the offence" and "individual circumstances."²⁹ Court rules refer to aggravating or mitigating evidence but do not define these factors.³⁰ Finally, though both charters call for reference to national laws (that is, the criminal law of either Yugoslavia or

²² The first recorded international prosecution for war crimes was of Peter von Hagenbach in 1474, who was convicted of committing atrocities during the occupation of Breisach, Germany, and was beheaded. See SCHABAS, *supra* note 5, at 1.

²³ Indeed, the laws of war — essentially the criminal code for these tribunals — were developed without an accompanying sentencing structure. See William A. Schabas, *Penalties, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1497, 1498* (Antonio Cassese et al. eds., 2002) ("The customary law of war crimes has little to contribute to the subject of sentencing, apart from declaring that a court may impose death or such lesser punishment as it may deem appropriate.")

²⁴ See SCHABAS, *supra* note 5, at 6.

²⁵ See Steven Glickman, Note, *Victims' Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 COLUM. J. TRANSNAT'L L. 229, 231 (2004). The Nuremberg Charter required only that some reason be given for a particular sentence. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, art. 26, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

²⁶ See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

²⁷ See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

²⁸ See ICTR Statute, *supra* note 27, art. 23; ICTY Statute, *supra* note 26, art. 24; see also Int'l Criminal Tribunal for Rwanda, Rules of Procedure & Evidence, R. 101(A) (Nov. 10, 2006) [hereinafter ICTR RPE], available at <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf>; Int'l Criminal Tribunal for the Former Yugoslavia, Rules of Procedure & Evidence, R. 101(A), U.N. Doc. IT/32/Rev/39 (Sept. 22, 2006) [hereinafter ICTY RPE], available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf>.

²⁹ ICTR Statute, *supra* note 27, art. 23; ICTY Statute, *supra* note 26, art. 24.

³⁰ See ICTR RPE, *supra* note 28, R. 101(B); ICTY RPE, *supra* note 28, R. 101(B). Only one mitigating factor — cooperation with prosecutors — is listed specifically.

Rwanda) in determining sentences,³¹ neither court has paid much attention to this provision in practice.³²

2. *The Rome Statute.* — The ICC is governed by the Rome Statute, which grants the court jurisdiction over four often overlapping categories of crimes: genocide, crimes against humanity, war crimes, and aggression.³³ The Rome Statute provides only slightly more guidance on sentencing than do the ICTY and ICTR charters. In general, it permits sentences only up to thirty years, along with fines or forfeiture.³⁴ Life imprisonment is permitted only when justified by the “extreme gravity” of the crime and the “individual circumstances” of the defendant.³⁵

The ICC’s rules require sentencing courts to consider a number of factors relating to the circumstances of the crime and the culpability of the offender,³⁶ and to consult a nonexclusive list of aggravating and mitigating factors.³⁷ The aggravating factors are particularly extensive: they include prior convictions, abuse of authority, a defenseless victim, multiple victims, particular cruelty, motive to discriminate, and any “similar” circumstance.³⁸ To impose a sentence of life, the court must make a showing of “extreme gravity” by finding at least one aggravating factor.³⁹ Nevertheless, trial chambers are not explicitly required to accompany a sentence with a written opinion.⁴⁰

As a result of the multiplicity of factors that ICC trial courts must balance and the lack of instruction as to their relative weight, these chambers retain broad discretion in sentencing.⁴¹ Judges even have wide latitude in imposing life sentences: given the particularly egregious nature of the offenses under ICC jurisdiction, it is hard to imag-

³¹ See ICTY Statute, *supra* note 26, art. 24; ICTR Statute, *supra* note 27, art. 23.

³² See Faiza P. King & Anne-Marie La Rosa, *Penalties Under the ICC Statute*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 311, 314–15 (Flavia Lattanzi & William A. Schabas eds., 1999); see also Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 433 (2001).

³³ Rome Statute, *supra* note 1, art. 5.

³⁴ Monetary penalties must be in addition to, rather than in lieu of, prison terms. *Id.* art. 77.

³⁵ *Id.*

³⁶ These factors include, inter alia, the extent of the harm done, the defendant’s degree of participation and intent, and the defendant’s age, education, and social and economic conditions. See Int’l Criminal Court, Rules of Procedure & Evidence, R. 145(1)(c), U.N. Doc. ICC-ASP/1/3 (2002) [hereinafter ICC RPE], available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf.

³⁷ *Id.* R. 145(2).

³⁸ *Id.* R. 145(2)(b). Mitigators include traditional defenses to prosecution, such as duress or diminished capacity, that fall just short of excluding responsibility, as well as a defendant’s positive conduct after commission of the crime. *Id.* R. 145(2)(a).

³⁹ *Id.* R. 145(3).

⁴⁰ This requirement might, however, be implied by the balancing the court is directed to perform. See King & La Rosa, *supra* note 32, at 319.

⁴¹ See *id.* at 329.

ine any case that would fail to include at least one aggravating factor and thus meet the “extreme gravity” test.

C. U.S. Military Commissions

The MCA established the first American military commissions since the aftermath of World War II.⁴² The Act permits war crimes trials to be held by a commission of uniformed military officers for any defendant labeled an “alien unlawful enemy combatant.”⁴³ Twenty-eight substantive offenses are triable by these commissions, ranging from the traditional violations of the law of war (such as attacking civilians, denying quarter, pillaging, using human shields, and spying) to offenses crafted in response to the ongoing war on terror (such as hijacking, engaging in terrorism, and providing material support for terrorists).⁴⁴ Depending on the charges, convictions may result in death, life in prison, or a term of years.⁴⁵

Although the MCA has generated wide-ranging controversy,⁴⁶ relatively little attention has been paid to the Act’s discretionary sentencing provisions, which bear little resemblance to the more constrained

⁴² See Warren Richey, *First US War Trial Since World War II Tests Limits of Fairness in Terror Cases*, CHRISTIAN SCI. MONITOR, Aug. 25, 2004, at 3 (noting that the last U.S. military commission was convened in 1948). President Bush pushed the MCA through Congress in reaction to the Supreme Court’s invalidation, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), of his previous plan to try detainees in military tribunals created through military order. So far, only one defendant has been convicted under the MCA, see Glaberson, *supra* note 4, but the Pentagon already has plans to try between sixty and eighty of the roughly four hundred detainees at Guantanamo Bay, Cuba, under the new procedures. See R. Jeffrey Smith, *Pentagon Releases Rules for Trials of Terrorism Suspects*, WASH. POST, Jan. 19, 2007, at A13.

⁴³ The Act defines “alien unlawful enemy combatants” as non-U.S. citizens who have engaged in hostilities against the United States or its allies, or materially supported such hostilities, except those who do so as part of a regular armed force, like a national army. See Pub. L. No. 109-366, sec. 3, § 948a, 120 Stat. 2600, 2601–02. Members of the Taliban and al Qaeda are explicitly listed as unlawful enemy combatants. See *id.*

⁴⁴ See *id.* sec. 3, § 950v, 120 Stat. at 2625–30; U.S. DEP’T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS pt. IV, § 6 (2007) [hereinafter MMC], available at [http://defenselink.mil/pubs/pdfs/Part%20II%20-%20MMCs%20\(FINAL\).pdf](http://defenselink.mil/pubs/pdfs/Part%20II%20-%20MMCs%20(FINAL).pdf).

⁴⁵ MMC, *supra* note 44, pt. IV, § 6.

⁴⁶ Among other controversial provisions, the Act permits the use of secret evidence, sec. 3, § 949d(f), 120 Stat. at 2612–13, hearsay, *id.* sec. 3, § 949a(b)(2)(E), 120 Stat. at 2608–09, and evidence obtained through coercion (so long as the coercion falls short of “torture”), *id.* sec. 3, § 949a(b)(2)(C), 120 Stat. at 2608. It also abolishes the right to a speedy trial, *id.* sec. 3, § 948(b)(d), 120 Stat. at 2602; *id.* sec. 3, § 949e, 120 Stat. at 2613. Perhaps most alarming, the MCA bars habeas corpus review. *Id.* sec. 5, 120 Stat. at 2631–32 (amending 28 U.S.C. § 2241). As a result, judges have begun dismissing detainees’ habeas challenges. See, e.g., *Boumediene v. Bush*, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 WL 506581 (D.C. Cir. Feb 20, 2007), *cert. denied*, Nos. 06-1195, 06-1196, 2007 WL 957363 (U.S. Apr. 2, 2007). In January 2007, the Pentagon ruffled still more feathers by releasing detailed procedural rules without notice or public comment. See Roxana Tiron, *Detainee Debate Rages at Pentagon, Justice and on Capitol Hill*, THE HILL, Jan. 23, 2007, at 16, available at <http://thehill.com/leading-the-news/detainee-debate-rages-at-pentagon-justice-and-on-capitol-hill-2007-01-23.html>.

federal system. Regardless of the punishment sought, attorneys present aggravating and mitigating evidence in a separate penalty phase conducted after the commission finds a defendant guilty.⁴⁷ Although the MCA starts with the assumption that the penalty imposed will be decided by the members of the military commission,⁴⁸ the officer convening the tribunal — the “convening authority” — has essentially unlimited discretion to accept, reject, or reduce the sentence.⁴⁹ The resulting sentence need not be accompanied by a written opinion, and commission members may not be polled on their reasoning.⁵⁰

The Manual for Military Commissions (MMC) sets maximum punishments for each of the twenty-eight substantive offenses.⁵¹ Fourteen carry possible death sentences. All but one of these — spying — are crimes of violence, such as murder and torture. For these violent offenses, death of a victim is a prerequisite for seeking capital punishment; if no victim dies, prosecutors may generally seek up to life imprisonment.⁵² A handful of other crimes, including rape and material support for terrorism, carry a maximum sentence of life in prison. Finally, seven other offenses, including certain property crimes and violations of fair play on the battlefield, are punishable by only up to a certain number of years (twenty in most cases).⁵³

The MMC places further restrictions on a commission considering a death sentence. A unanimous commission of at least twelve members is needed to impose the death penalty,⁵⁴ whereas other sentences can be imposed without unanimity and by smaller commissions.⁵⁵ Moreover, to sentence a defendant to death, a commission must unanimously find that at least one aggravating factor is present and that, overall, the aggravators “substantially outweigh[]” the mitigators.⁵⁶ The first requirement, however, is no more meaningful than the

⁴⁷ MMC, *supra* note 44, pt. II, R. 1001. Many of the trial procedures set out in the MMC are based on court-martial procedures. Compare *id.*, with JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II, R. 1001 (2005 ed.) [hereinafter MCM], available at <http://www.jag.navy.mil/documents/mcm2000.pdf>.

⁴⁸ Sec. 3, § 948d(d), 120 Stat. at 2603; MMC, *supra* note 44, pt. II, R. 1002.

⁴⁹ Sec. 3, § 950b(c), 120 Stat. at 2619; MMC, *supra* note 44, pt. II, R. 1107(d) (noting that the convening authority “may for any or no reason disapprove a legal sentence in whole or in part” but may not increase a sentence’s severity).

⁵⁰ MMC, *supra* note 44, pt. II, R. 918, 922, 1007(c).

⁵¹ *Id.* pt. IV, § 6.

⁵² See *id.* However, for two such crimes — intentionally causing serious bodily injury and mutilating or maiming — the commission may impose a maximum sentence of only twenty years if no victim dies. See *id.*

⁵³ See *id.*

⁵⁴ See *id.* pt. II, R. 501(a)(2), 1006(d)(4)(A).

⁵⁵ See *id.* pt. II, R. 501(a)(1), 1006(d)(4)(B)–(C). Only three-fourths of a commission composed of as few as five members must agree to a prison sentence of ten years to life, and only two-thirds need agree to any sentence below ten years. *Id.* pt. II, R. 501(a), 1006(d)(4).

⁵⁶ *Id.* pt. II, R. 1004.

aggravator requirement in the Rome Statute: many of the aggravators listed in the MMC are duplicative of elements of capital offenses.⁵⁷ What is left is simply a balancing of aggravating and mitigating factors — hardly a meaningful restraint on the imposition of the death penalty.⁵⁸

The broad mandatory maximums thus stand as the only meaningful substantive restraints on the sentencing discretion of military commissions. In practice, these maximums may help commissions — and the public — gauge the relative seriousness of the various crimes. They may also prevent commissions from handing down outlier sentences that are obviously disproportionate to the crime charged — like imposing death for destruction of property. In the average case, however, these maximums give commissions significant leeway in sentencing. Because the commissions face hard limits only at the margins, these conditions can be described as “bounded discretion.”

III. THE PURPOSES OF PUNISHMENT

Despite superficial parallels between the ICC and U.S. military commissions, the two institutions serve vastly different functions. The ICC is designed as a court of last resort, to be used only for the most heinous crimes and only when domestic prosecution has failed. The U.S. military commissions, in contrast, are designed to circumvent traditional civilian courts to try individual terrorists and their supporters. Although both tribunals cover traditional war crimes, only the ICC specifically includes crimes of aggression, genocide, and crimes against humanity, and only the MCA includes terrorism, material support for terrorists, hijacking, and spying. Moreover, while the Rome Statute limits the ICC to prosecuting “the most serious crimes of concern to the international community as a whole,”⁵⁹ the MCA specifically excludes many of the groups most likely to be responsible for such crimes — namely, “lawful” combatants, including members of a state’s regular armed forces.⁶⁰

⁵⁷ For example, spying is both a death-eligible offense and an aggravating circumstance, and death of a victim both renders many offenses death-eligible and serves as an aggravator. *See id.* pt. II, R. 1004; *id.* pt. IV, § 6.

⁵⁸ The MCA adds a further wrinkle by allowing execution for any crime if “authorized under . . . the law of war.” Pub. L. No. 109-366, sec. 3, § 948d(d), 120 Stat. 2600, 2603. Given the fluidity and multiple sources of the law of war, *see* JENNIFER ELSEA, CONG. RES. SERVICE, TRYING TERRORISTS AS WAR CRIMINALS 2 (2001), the import of this provision is uncertain. Under customary international law, and even at Nuremberg and Tokyo, the death penalty was imposed “with unhesitating enthusiasm.” SCHABAS, *supra* note 5, at 163. Yet the modern international tribunals have each banned the practice, *see supra* p. 2852, suggesting the law of war may no longer countenance the death penalty.

⁵⁹ Rome Statute, *supra* note 1, art. 5.

⁶⁰ *See* sec. 3, § 948a(2), 120 Stat. at 2601.

These functional differences reveal a divergence in the purposes of punishment at the two institutions. This Part analyzes the goals of punishment in these institutions alongside those of determinate sentencing in U.S. federal courts to evaluate the extent to which sentencing guidelines would be appropriate for either institution. Although all three systems share a diffuse group of goals, including retribution and crime control through deterrence and incapacitation, the ICC also aims to achieve restoration and reconciliation, whereas the MCA is preoccupied with national security. These last goals are not necessarily best served by increased uniformity and severity, the main products of determinate sentencing.

A. Purposes of Determinate Sentencing in U.S. Federal Courts

1. *Goals of the Guidelines.* — The Sentencing Reform Act aimed to reduce unwarranted sentencing disparity and to achieve “honesty in sentencing” so that “the sentence the judge gives is the sentence the offender will serve.”⁶¹ The first goal arose from Congress’s concern that sentences varied widely based on the preferences of individual judges and even more insidious factors, such as an offender’s sex or race.⁶² Because this concern cut across ideological boundaries, reduction in sentencing disparity was settled upon as the primary purpose for the Sentencing Guidelines.⁶³ The second goal, though cloaked in language of transparency, was intimately linked with a desire for more severe punishment.⁶⁴

Despite coalescing around goals for reform, the commissioners charged with creating the Guidelines failed to settle on an underlying purpose for criminal punishment. Although the SRA refers to proportionality, deterrence, incapacitation, and rehabilitation,⁶⁵ the commissioners found themselves unable to apply any of these goals in a uniform manner across each offense category. In the end, they “explicitly declined to articulate a philosophy of sentencing that could explain the

⁶¹ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). “Honesty in sentencing” was partially accomplished by abolishing parole. *Id.*

⁶² U.S. SENTENCING COMM’N, *supra* note 12, at 11.

⁶³ See Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295–96 (1993); Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 762–63 (2006); see also 28 U.S.C. § 994(f) (2000 & Supp. III 2003).

⁶⁴ See U.S. SENTENCING COMM’N, *supra* note 12, at 38. The goal of increased severity substantially diverged from the goals of early progressive proponents of sentencing guidelines, who thought guidelines would *reduce* severity. See FRANKEL, *supra* note 10, at 58; O’Hear, *supra* note 63, at 761.

⁶⁵ See 18 U.S.C. § 3553(a)(2) (2000 & Supp. IV 2004); see also U.S. SENTENCING COMM’N, *supra* note 12, at 12.

Guidelines' priorities and which purpose of sentencing should control in cases where the purposes conflict."⁶⁶

The experience of the Commission suggests that detailed guidelines are unlikely to faithfully reflect a single purpose for punishment, and that they have limited utility in bringing rationality to a system of punishment. Proportionality was certainly a driving force behind many of the sentences set by the Guidelines, as indicated by the "crime seriousness" axis on the Guidelines' grid.⁶⁷ Yet the Commission was unable to agree on any all-encompassing ranking of crimes, due to the variety of crimes covered by the federal code, the different views of the Commission members, and the absence of any reliable, objective model for such a ranking.⁶⁸ Similarly, the Guidelines incorporated concerns about deterrence into the "criminal history" axis⁶⁹ but did not use deterrence as an overarching organizing principle, in part due to a lack of comprehensive data.⁷⁰ Overall, rather than adopt a uniform, principled methodology, the Commission punted: with a few exceptions, it based Guidelines ranges on average past practices.⁷¹ The result is that any systematic irrationality in past practices was carried forward in the Guidelines. As Justice Breyer put it, the Sentencing Commission, in devising the Guidelines, came to realize that punishment "is more of a blunderbuss than a laser beam."⁷²

2. *Effects of Determinate Sentencing.* — The Guidelines have been only moderately effective at reducing sentencing disparity, but they have been quite effective at increasing the certainty and severity of punishment. On the first count, disparity based on judges' preferences has largely been rooted out,⁷³ but other sources of disparity have gone unaddressed or even been aggravated. For example, charging and plea bargaining decisions continue to lead to unequal sentences for similarly situated defendants, with greater disparities for crimes with larger sentence ranges. Data suggest that racial, ethnic, and gender discrimina-

⁶⁶ Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 21 (2003). Attempts to divine a governing purpose from the structure of the Guidelines have succeeded only in ranking the importance of the four goals considered by the Commission: proportional punishment is paramount, incapacitation second in importance, deterrence but a "side benefit of just punishment," and rehabilitation receives the "lowest priority." *Id.* at 51.

⁶⁷ See U.S. SENTENCING COMM'N, *supra* note 12, at 12–13.

⁶⁸ Breyer, *supra* note 61, at 15–16.

⁶⁹ *Id.* at 16–17.

⁷⁰ *Id.*

⁷¹ *Id.* at 17–18.

⁷² *Id.* at 14.

⁷³ James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. LAW & ECON. 271, 273 (1999).

tion remain salient sentencing factors in this regard.⁷⁴ Notably, disparities between penalties prescribed for certain crimes have exacerbated racial disparities: the enormous gap between penalty ranges for crack and powder cocaine possession, in particular, has led to far higher incarceration rates for blacks than whites because blacks are more likely to be convicted of crack possession, while whites are more likely to be convicted of possessing powder cocaine.⁷⁵

If the Guidelines' effect on equity has been mixed, their effect on severity has been clear: determinate sentencing is far harsher than the indeterminate system that preceded it.⁷⁶ Use of the Guidelines, along with the abolition of parole and the increased use of mandatory minimums, has caused the use of probation as an alternative to imprisonment to decrease and prison terms actually served to rise dramatically.⁷⁷

Though scholars quibble about the precise reasons why sentence lengths have risen so dramatically, there is general consensus that the increased politicization of sentencing, through the SRA and mandatory minimum laws, has been a factor.⁷⁸ As Professor William Stuntz notes, changes to sentencing laws are one-dimensional — sentences either rise or fall — and few political leaders are willing to stand up for convicted criminals, a uniquely powerless class.⁷⁹ Yet different politics may lead to different outcomes: several states have created their own sentencing commissions and implemented guidelines while experiencing only modest growth in incarceration rates.⁸⁰

B. Purposes of Punishment at the International Criminal Court

The ICC, like the U.S. Sentencing Commission, lacks a well-articulated sentencing policy. The overriding purpose of the ICC is to

⁷⁴ See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311–12 (2001) (concluding that gaps based on race, gender, education, income, and citizenship persist in many aspects of sentencing).

⁷⁵ U.S. SENTENCING COMM'N, *supra* note 12, at 131–32. Possession of either form of cocaine is punished according to weight, but the punishment for one gram of crack is equivalent to that for one hundred grams of powder, despite rough equivalence in the drugs' potencies. See *id.*

⁷⁶ See *id.* at vi (noting that “careful analysis of sentencing trends for different types of crimes demonstrates that the sentencing guidelines themselves made a substantial and independent contribution” to the increased severity of the federal system).

⁷⁷ See *id.* at 43–44, 46–47. However, these changes have been less pronounced for violent crimes (which have always been punished fairly harshly) than for other categories, such as drug offenses and immigration violations. See *id.* at 47–75.

⁷⁸ Professor William Stuntz, though asserting a more complex causation, has noted that “[t]he academic trend these days is to blame democracy” for harsh sentences. Stuntz, *supra* note 20, at 803.

⁷⁹ See *id.* at 804.

⁸⁰ See Richard S. Frase, *Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States*, 36 GEO. WASH. INT'L L. REV. 227, 233 (2004) (book review).

ensure that “the most serious crimes of concern to the international community” do “not go unpunished.”⁸¹ Yet the Rome Statute “is virtually silent regarding the purposes and principles which should inform the sentencing of offenders.”⁸² Likewise, other international criminal tribunals, including the ICTY and ICTR, have never espoused a single, coherent set of sentencing principles, in either their governing statutes or their case law.⁸³ Scholars have, however, identified four main sentencing goals in international criminal jurisprudence: retribution, deterrence, rehabilitation, and protection of society through incapacitation.⁸⁴ Social healing, in the form of restorative justice⁸⁵ and national reconciliation, is another recognized goal.⁸⁶

Retribution clearly plays a role in international sentencing. The Nuremberg and Tokyo tribunals were strongly retributive, imposing a total of nineteen death sentences and nineteen life terms among the forty-seven major war criminals who stood accused.⁸⁷ Several trial chambers at the ICTY and ICTR have also emphasized retribution in handing down particular sentences.⁸⁸ Others, however, have noted that retribution may be contrary to the greater mission of the tribunals to bring peace and reconciliation to troubled regions.⁸⁹ Furthermore, scholars have suggested that the cases to be heard at the ICC “dwarf ordinary conceptions of wrongdoing and punishment,” making retribution an insufficient basis for determining penalties.⁹⁰ At the very least,

⁸¹ Rome Statute, *supra* note 1, pmb1.

⁸² RALPH HENHAM, PUNISHMENT AND PROCESS IN INTERNATIONAL CRIMINAL TRIALS 16 (2005); *see also* SCHABAS, *supra* note 5, at 163 (“[T]he Rome Statute has virtually nothing to say about the purposes of sentencing . . .”).

⁸³ *See* KNOOPS, *supra* note 21, at 273 (“[A] clear and comprehensible philosophical justification, which legitimizes these sentencing practices, seems absent.”).

⁸⁴ JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE § 9.8, at 770 (3d ed. 2003).

⁸⁵ *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91 (1998).

⁸⁶ Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. JEFFERSON L. REV. (forthcoming 2007) (manuscript at 3), available at <http://ssrn.com/abstract=940050> (arguing that restorative justice can effectively complement the ICC’s retributive function to achieve “healing of victims and society”); *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1970–71 (2001) (noting that international criminal tribunal prosecutions might remove dangerous public figures, provide a forum to address past atrocities, and cause communities to coalesce around condemnation of wrongdoing).

⁸⁷ King & La Rosa, *supra* note 32, at 329 & n.53.

⁸⁸ *See* JONES & POWLES, *supra* note 84, § 9.9, at 771.

⁸⁹ *See* Prosecutor v. Delali, Case No. IT-96-21-T, Judgment, ¶ 1231 (Nov. 16, 1998); *see also* King & La Rosa, *supra* note 32, at 330 & n.56.

⁹⁰ Danner, *supra* note 32, at 418; *see also* King & La Rosa, *supra* note 32, at 333 (arguing that “[t]he proportionality principle is of great relevance at the national level where the spectrum of criminal acts is wide so that distinctions can be made based on the seriousness of a range of crimes,” but that the principle is less relevant at the ICC, where jurisdiction is already limited to particularly egregious crimes).

however, the ICTY and ICTR appear to have accepted the concept of proportionality — “a fair and balanced approach to the exaction of punishment for wrongdoing.”⁹¹

Deterrence is often cited as another justification for international criminal punishment.⁹² Indeed, the Rome Statute’s preamble includes “prevention” among its goals.⁹³ Yet deterrence will likely prove unhelpful as an organizing principle for sentencing at the ICC, just as it did for the U.S. Sentencing Commission: not only is data on the deterrent effect of various international criminal sanctions lacking, but research suggests that, in general, certainty of punishment is a far better determinant of deterrence than sentence length.⁹⁴

Notably, a few ICTY and ICTR opinions focus more on restoration and reconciliation than on strictly proportional punishment.⁹⁵ In *Prosecutor v. Erdemovic*,⁹⁶ for example, the ICTY trial chamber held that in addition to prosecuting and punishing violations of humanitarian law, the tribunal had a duty “to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia.”⁹⁷ The Rome Statute, in providing for reparations to victims,⁹⁸ appears even more preoccupied with healing society in the wake of atrocities.⁹⁹ Achieving such a purpose requires special attention to the national and local context in setting punishments.¹⁰⁰ Depending on the local culture, an emphasis on restitution or even admission of wrongdoing rather than a long sentence might best heal victims and their communities.

Finally, although the ICC has no obligation to impose equal sentences in similar cases,¹⁰¹ the creators of the Rome Statute regarded the principle of equity as important,¹⁰² and trial chambers at the

⁹¹ *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, ¶ 29 (July 31, 2001).

⁹² See, e.g., JONES & POWLES, *supra* note 84, §§ 9.15–9.16, at 771–72; King & La Rosa, *supra* note 32, 330–31; see also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 8–9 (2001) (suggesting that international criminal tribunals have been effective tools for preventing further violence).

⁹³ Rome Statute, *supra* note 1, pmb1.

⁹⁴ Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 377–82 (1997).

⁹⁵ See KNOOPS, *supra* note 21, at 271–73.

⁹⁶ Case No. IT-96-22-Tbis, Sentencing Judgment (Mar. 5, 1998).

⁹⁷ *Id.* ¶ 21; accord KNOOPS, *supra* note 21, at 272.

⁹⁸ Rome Statute, *supra* note 1, art. 75.

⁹⁹ See Keller, *supra* note 86 (manuscript at 2–3).

¹⁰⁰ See Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT’L CRIM. JUST. 64, 84–85 (2003) (advocating “a context of meaning rooted in communities”); see also *Developments in the Law*, *supra* note 86, at 1971–73 (suggesting that the failure of the ICTR and ICTY to engage with the communities they aim to serve has discouraged reconciliation in those communities).

¹⁰¹ KNOOPS, *supra* note 21, at 281.

¹⁰² See King & La Rosa, *supra* note 32, at 315.

ICTY have given it substantial consideration in their sentencing decisions.¹⁰³ ICC trial chambers likely will also attempt to adhere to this principle to avoid possible charges of arbitrariness or bias toward particular countries or regions.¹⁰⁴ Yet equity may clash with a peculiar attribute of the ICC: its jurisdiction is “complementary” to national criminal jurisdictions,¹⁰⁵ which means the ICC may prosecute an individual only when the country with national jurisdiction is “unable or unwilling” to do so.¹⁰⁶ Some have suggested that this requirement means that a sentence cannot depart too far from those that would be handed down for analogous crimes in the accused’s home country.¹⁰⁷ Even if this assertion is rejected, the ICC may need to pay attention to local culture and sentencing practices in order to retain its legitimacy in the countries in which it operates¹⁰⁸ and to prevent countries from defecting. Uniformity thus cuts both ways: on the one hand, it may be essential to perceptions of fairness; on the other, it may undermine the flexibility needed in a treaty-based global court.

C. *Purposes of Punishment at U.S. Military Commissions*

The military commissions authorized by the MCA were created for the specific purpose of trying and convicting foreign detainees currently held at Guantanamo Bay, Cuba, on suspicion of involvement in terrorism.¹⁰⁹ Thus, as with U.S. courts-martial,¹¹⁰ the overriding concern of the Act appears to be protection of national security.¹¹¹

¹⁰³ See, e.g., Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶¶ 526–32 (Mar. 15, 2002).

¹⁰⁴ See Danner, *supra* note 32, at 441.

¹⁰⁵ Rome Statute, *supra* note 1, art. 1.

¹⁰⁶ *Id.* art. 17.

¹⁰⁷ See, e.g., King & La Rosa, *supra* note 32, at 311. Indeed, some delegates at the Rome Conference suggested ICC penalties should be entirely governed by the laws of the state where the crime took place, or by those of the home state of the defendant or the victims. These proposals, however, were all defeated. *Id.* at 315.

¹⁰⁸ See Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 602–07 (2005).

¹⁰⁹ See Press Release, President George W. Bush, President Bush Signs Military Commissions Act of 2006 (Oct. 17, 2006), <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> (“The Military Commissions Act will . . . allow us to prosecute captured terrorists for war crimes through a full and fair trial.”).

¹¹⁰ See MCM, *supra* note 47, pt. I, para. 1 (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”).

¹¹¹ See Press Release, *supra* note 109 (“With the Military Commission Act, the legislative and executive branches have agreed on a system that meets our national security needs.”); see also Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty: An Examination of Principles That Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL’Y 347, 413 (2006).

An emphasis on national security can certainly inform sentences — for example, spying carries a potential death sentence under the MCA and a mandatory death sentence at court-martial. More generally, concern for national security could lead to a sentencing policy aimed at controlling criminal acts through deterrence or incapacitation. Yet neither the MCA nor the MMC specifically endorses any such sentencing philosophy. They do, however, permit attorneys arguing before the commission to “refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution.”¹¹²

The military commissions’ sentencing procedures and maximum sentences also seem to accept proportionality and crime control as sentencing goals. The presentation of aggravating and mitigating factors in a dedicated hearing implies that a sentence should be proportional to a defendant’s blameworthiness — the essential characteristic of retributivism. Concern with retribution is also evident in penalties: with the exception of spying, only the death of a victim permits a prosecutor to seek the death penalty.¹¹³ Other features of the rules, such as prosecutors’ ability to introduce evidence of past convictions¹¹⁴ and the severe maximum punishments for potentially nonviolent crimes,¹¹⁵ may reveal an effort at crime control through deterrence or incapacitation. In emphasizing proportionality and crime control, the MMC echoes the rationales traditionally espoused for punishing war criminals in U.S. military tribunals.¹¹⁶

Some purposes of punishment that figure prominently in other systems are minimized in the military commissions. Unlike the ICC, the MCA and MMC appear to be unconcerned with reconciliation or restoration — in fact, the rules prohibit military commissions from ordering restitution to victims.¹¹⁷ Meanwhile, equity — the primary goal of federal sentencing reform — seems to play at most a minor role in punishment under the MCA. Historically, domestic military commissions have not been designed to promote equity; they are usually set up on an ad hoc basis, sentencing a few defendants after a particular con-

¹¹² MMC, *supra* note 44, pt. II, R. 1001(g).

¹¹³ *See id.* pt. IV, § 6.

¹¹⁴ *See id.* pt. II, R. 1001(b)(1).

¹¹⁵ Defendants may receive a maximum of twenty years for “intentionally mistreating a dead body,” *id.* pt. IV, § 6(20), or life in prison for “using protected property as a shield,” *id.* pt. IV, § 6(10).

¹¹⁶ An Army manual first published in 1956 and still in force explains: “The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. . . . Punishments should be deterrent . . .” U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 508 (1956).

¹¹⁷ *See MMC, supra* note 44, pt. II, R. 201(a)(1).

flict and then disbanding.¹¹⁸ The MCA, with procedures and punishments hastily designed to try a specific group of suspected terrorists, appears to be no exception. A high tolerance for variability in sentencing may help the commissions respond to the shifting demands of the war on terrorism. On the other hand, uniform sentencing could foster the perception, both domestically and overseas, that the commissions are legitimate organs of justice and are not biased against defendants of a particular religion or nationality.

IV. APPLYING SENTENCING GUIDELINES TO THE ICC AND MILITARY COMMISSIONS

A. *Application to the International Criminal Court*

The lack of clear sentencing principles at the ICC may harm the tribunal's legitimacy.¹¹⁹ Yet the experience of the U.S. Sentencing Commission demonstrates that codified guidelines are unlikely to demystify the principles underlying a system of punishment. Still, if one assumes that determinate sentencing would have effects in international criminal law similar to those it has had in the United States — moderately more equitable and substantially harsher penalties¹²⁰ — then such guidelines might be an attractive option for the ICC. After all, the ICC must maintain the support of treaty members in order to be relevant, and sentencing guidelines could act as a showing of good faith: a promise to sentence impartially, regardless of the nationality or ideology of the defendant or his victims. Likewise, respect for the court would be increased by ensuring that convicted defendants face stiff penalties.

Yet there is also reason for caution. The Rome Conference chose to give judges broad discretion rather than setting mandatory maximum and minimum sentences for particular crimes.¹²¹ This decision may have been wise for at least three reasons: guidelines may be unnecessary to ensure uniform, severe sentences at the ICC; guidelines are unlikely to aid deterrence and could interfere with the ICC's secondary but important role in promoting national reconciliation; and reaching agreement on specific guidelines would be difficult in a

¹¹⁸ See Eun Young Choi, Note, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, 42 HARV. C.R.-C.L. L. REV. 139, 141 (2007).

¹¹⁹ Cf. Danner, *supra* note 32, at 440–43 & n.108 (noting that articulation of a clear rationale for punishment is important for consistent sentencing, which in turn is key to the ICC's legitimacy).

¹²⁰ These assumptions may be incorrect, especially with respect to harshness; the social and political conditions that led Congress to pass severe sentencing laws are not necessarily present in the case of the ICC. Cf. *supra* p. 1859.

¹²¹ King & La Rosa, *supra* note 32, at 328.

treaty-based court. “Bounded discretion,” however, might allow the ICC to obtain some of the benefits of determinate sentencing while avoiding most of the drawbacks.

First, the ICC can likely maintain reasonably uniform and severe sentences without legislation.¹²² As to equity, unlike the U.S. federal courts, in which hundreds of federal judges sentence tens of thousands of defendants every year, the ICC is designed to operate with as few as six trial judges, divided into chambers of three judges each.¹²³ In such a small-scale operation, conscientious judges will have little trouble reviewing sentences in past cases and conforming to them when appropriate. Moreover, the ICC appellate chambers can revise sentences it finds too high or low.¹²⁴ All this suggests that questions of equity might be resolved judicially, rather than legislatively.¹²⁵

Whether ICC sentences, absent guidelines, are likely to be insufficiently harsh is a more difficult question. As noted, the Rome Statute clearly permits strict penalties, with the requirement of “extreme gravity” serving as the only limit on life sentences.¹²⁶ And there is little reason to think that sentences at the ICTY or ICTR are so weak that they are not taken seriously. Thus, legislative guidelines may not be necessary to ensure sufficiently severe sentences at the ICC.

Second, even if guidelines would increase the uniformity and severity of ICC sentences, the question remains whether these changes would further the ICC’s underlying purposes. Mandatory minimums and maximums may serve expressive and retributive purposes, signaling both the relative gravity of crimes the ICC addresses and the meaningfulness of the punishment imposed by the ICC. Indeed, some have recommended mandatory minimums precisely because they

¹²² See Danner, *supra* note 32, at 442–43 (arguing that sentencing consistency at international tribunals can be achieved through development of case law, without legislative involvement).

¹²³ Rome Statute, *supra* note 1, art. 39. While the future case volume of the ICC is uncertain, the ICTR and ICTY, both established more than a decade ago, have sentenced only twenty-eight and forty-eight defendants, respectively. See Int’l Criminal Tribunal for Rwanda, Status of Detainees, <http://69.94.11.53/default.htm> (follow “Status of Detainees” hyperlink) (last visited Apr. 6, 2007); Int’l Criminal Tribunal for the Former Yugo., Key Figures, <http://www.un.org/icty/glance-e/index.htm> (follow “Key Figures” hyperlink) (last visited Apr. 6, 2007).

¹²⁴ The ICTR and ICTY appellate chambers have not been shy about revising sentences. See Int’l Criminal Tribunal for Rwanda, *supra* note 123; Int’l Criminal Tribunal for the Former Yugo., *supra* note 123; see also Danner, *supra* note 32, at 443 n.107.

¹²⁵ One caveat here is that sentencing has varied between the ICTR and ICTY. See Drumbl, *supra* note 108, at 557. The ICTR has issued longer prison terms, including twelve life sentences and only a handful of sentences under fifteen years, see Int’l Criminal Tribunal for Rwanda, *supra* note 123, while the ICTY has issued shorter sentences, including only a single life term, see Int’l Criminal Tribunal for the Former Yugo., *supra* note 123. Of course, neither tribunal was obligated to take into account the decisions of the other, so this divergence, even if not caused by legitimate differences in the cases, would not necessarily be replicated in the trial chambers of the ICC.

¹²⁶ Rome Statute, *supra* note 1, art. 77.

would help express “extreme moral outrage” toward perpetrators of war crimes and crimes against humanity.¹²⁷

Guidelines seem less likely to increase the deterrent effect of ICC punishment. As noted above, it is the certainty of punishment, not its severity, that provides the most deterrence.¹²⁸ On the international level, where the universe of offenders is large and the reach of the court is limited, deterrence may be difficult to achieve regardless of how sentencing is determined.¹²⁹

Determinate sentencing might be even less adept at promoting “accountability, reconciliation, and establishing the truth”¹³⁰ after major humanitarian crises. For example, a court may wish to issue a lower sentence to avoid perpetuating a simmering conflict or because a defendant provided information about past acts. Tying the ICC to a determinate sentencing scheme would prevent such flexibility. Moreover, a conscientious prosecutor, constrained by guidelines unsuitable for a particular case, might decide not to prosecute at all or to seek lesser charges, reducing the expressive value of the prosecution.

Finally, rational legislative guidelines would be especially difficult to create. Were the Assembly of States Parties, the legislative body in charge of the ICC, to attempt to fashion sentencing guidelines, it would likely run into obstacles far greater than those faced — and only partly overcome — by the U.S. Sentencing Commission. If seven commissioners could not agree on governing principles for the U.S. Sentencing Guidelines, imagine the difficulty in reaching consensus among the 104 state parties of the Rome Statute.¹³¹ Even if guidelines did pass, states that objected to them might be prompted to defect, reducing the legitimacy of the court.

Given the likely disputes over principles, international sentencing guidelines would probably rely, as the U.S. Sentencing Commission did, on past practices. But this reliance would run into another obstacle: the sparseness of the case law. The U.S. Commission sifted through tens of thousands of past cases to determine average prison terms and relevant sentencing factors.¹³² But the only useful international precedents so far are the seventy-six convictions at the ad hoc tribunals. Thus, guidelines would freeze international criminal law in

¹²⁷ See *supra* p. 1861.

¹²⁸ See Glickman, *supra* note 25, at 230.

¹²⁹ See MINOW, *supra* note 85, at 49–50 (arguing that the low probability of punishment and the irrationality of defendants are obstacles to deterrence through international criminal sanctions).

¹³⁰ *Prosecutor v. Erdemovic*, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶ 21 (Mar. 5, 1998).

¹³¹ Cf. Rubin, *supra* note 6, at 164–65 (arguing that different cultures have fundamentally different perspectives on the law and the social needs that it serves).

¹³² Breyer, *supra* note 61, at 7 & n.50.

its early stages, robbing future generations of the wisdom that might otherwise accumulate over time. Nor would using national sentencing regimes as templates resolve the impasse. Any such proposal would have to overcome the wide variation in crime definition and sentencing practice across borders and the difficulty of choosing which countries to use as templates.¹³³

Bounded discretion would be a better option. The bounds might consist of rather lenient mandatory minimums applied to the four categories of crime punishable by the ICC: for example, a minimum of three years for war crimes, eight for crimes of aggression and crimes against humanity, and fifteen for genocide. Professor Allison Danner has proposed precisely such a hierarchy, arguing that it would serve a range of expressive and retributive purposes.¹³⁴ Confining the guidelines to these four categories would have several salutary effects. First, unlike the Byzantine federal guidelines, these categories could be easily understood and compared by the public, and could express both the relative seriousness of the crimes and the ICC's commitment to equitable sentencing. Second, the simplicity of such guidelines would leave less room for contention among treaty signatories, easing institutional constraints. Finally, these marginal limits, while constraining outliers, would still afford trial chambers enough flexibility to take into account individual, local, and national factors in sentencing.

B. Application to U.S. Military Commissions

Application of determinate sentencing to military commissions would be relatively simple because of the military's streamlined decisionmaking process, the availability of analogous crimes in federal law and military law to serve as precedents, and the straightforward goals of the military commissions. Furthermore, guidelines could be helpful in promoting equity. Nevertheless, given the public's intense focus on terrorism, a shift to determinate sentencing could unjustifiably ratchet punishment upward.

As with the ICC, the first inquiry should be whether more determinate sentencing serves any purpose in U.S. military commissions. Undue leniency hardly seems a realistic concern in a court made up of active-duty military officers, in which the defendants are all noncitizens accused of hostilities against the United States or its allies. But to

¹³³ At least one author has attempted to create such guidelines by taking the numerical averages for particular crimes from a sampling of twelve countries. See Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123 (1997). This proposal suffers acutely from the drawbacks described above, including the rather random choice of twelve "representative" legal systems. See *id.* at 140.

¹³⁴ See Danner, *supra* note 32, at 462–83; see also King & La Rosa, *supra* note 32, at 322–23 (proposing similarly broad guidelines).

the extent uniformity is desired, codified sentencing might help. Although the small scale of the commissions might suggest that equity could be achieved judicially, this possibility is reduced by the fact that sentences under the MCA are initially imposed not by a judge but by a group of commissioners. Assuming the commissioners are not repeat players,¹³⁵ and given the wide array of mitigating and aggravating evidence permitted, similar defendants could receive wildly different sentences. Such sentences, though subject to discretionary rejection or modification by the convening authority, are unreviewable by appellate courts.¹³⁶ Codified guidelines could remedy this problem.

If guidelines are necessary, the rulemaking process under the MCA would be far simpler than in the ICC. The MCA empowers the President or Secretary of Defense unilaterally to prescribe “limitations” on punishments.¹³⁷ As explained above, the Pentagon has already used this prerogative to set maximum limits on sentences for particular crimes. To be sure, creating rational guidelines based on past practices might be difficult. In theory, guideline drafters could look back to the punishments imposed by U.S. military commissions during World War II and before. But the different nature of those conflicts and the small number of cases might limit the usefulness of those decisions. A better option would be to look to federal criminal law, which encompasses nearly all of the war crimes contained in the MCA.¹³⁸ Although the Sentencing Commission has not attempted to develop guidelines for traditional war crimes, it has ventured into areas relevant to the military commissions’ jurisdiction, setting offense levels for crimes such as providing material support for terrorism.¹³⁹ Where no exact match can be found, commissions might look to analogous crimes, just as federal courts are instructed to do in such circumstances.¹⁴⁰

Further codification, however, would also have serious drawbacks, including reduced sentencing flexibility and, most importantly, vulnerability to politicization and undue harshness. The cases heard by military commissions are likely to be high profile, and short sentences might embarrass the President, especially because the detainees at

¹³⁵ Any commissioned, active-duty military officer may serve on a commission. MCA, Pub. L. No. 109-366, sec. 3, § 948i(a), 120 Stat. 2600, 2603-04 (2006).

¹³⁶ *Id.* sec. 3, § 950f(d), 120 Stat. at 2621; *id.* sec. 3, § 950g(b), 120 Stat. at 2622.

¹³⁷ *Id.* sec. 3, § 948d(d), 120 Stat. at 2603; *id.* sec. 3, § 949t, 120 Stat. at 2617.

¹³⁸ The MCA amended 18 U.S.C. § 2441, which outlaws war crimes, to specify several offenses triable by military commission as grave breaches of Article 3 of the Geneva Conventions. *See id.* § 6(b), 120 Stat. at 2633-35. For crimes related to terrorism, see 18 U.S.C. § 2332 (2000).

¹³⁹ U.S. SENTENCING GUIDELINES MANUAL § 2M5.3 (2006).

¹⁴⁰ *Id.* § 2X5.1 background.

Guantanamo have been billed as the “worst of the worst”¹⁴¹ and many have already sat in prison for several years. Moreover, if the Pentagon did permit public comment on sentence codification — or if Congress became directly involved — the debate would likely be one-sided: advocating lower sentences for suspected terrorists would be politically hazardous. As a result, sentencing in the war on terror might soon come to look like sentencing in the war on drugs: escalating mandatory minimums ensnaring even low-level offenders, often disconnected from any valid goal of punishment.

Given the possibility of inequitable sentences set by one-time commissions, and the countervailing likelihood of unduly severe guidelines, the current balance struck by the MMC — discretionary sentencing tempered by broad mandatory maximums — should be preserved. Broad statutory maximums send a public signal that the military commissions will not seek disproportionate punishment, but they still preserve flexibility to adjust punishments in the interest of national security.

V. CONCLUSION

Given the multiplicity of purposes behind criminal punishment and the difficulty of discerning the “correct” punishment for a particular crime on the basis of any such purpose, sentencing guidelines are not a panacea for an unclear sentencing policy. At best, they can distill the results of past decisions and enforce some sort of average. Where past decisions are sparse, as they are under international law and domestic military law, guidelines hold even less promise. Their primary benefits are reducing sentence variation for similar defendants and signaling a tribunal’s intent to sentence fairly and severely. These benefits, however, come at the price of lost flexibility to craft punishments appropriate to a particular crime and a particular defendant — flexibility that may be particularly valuable for war crimes trials held in the context of delicate humanitarian and political crises. In addition, the creation of guidelines always risks turning criminal sanctions into political footballs, thereby leading to unnecessary severity. Bounded discretion preserves the expressive benefits of guidelines without overly politicizing sentences or eliminating sentencing discretion.

¹⁴¹ Anthony Shadid & Colin Nickerson, *Heavy Guard Ushers Detainees to Cuba*, BOSTON GLOBE, Jan. 12, 2002, at A13 (quoting Navy spokesman Roberto Nelson) (internal quotation marks omitted).