International criminal trials: A normative theory

Vasiliev, S.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
### SUMMARY TABLE OF CONTENTS

**VOLUME I: NATURE**

Table of acronyms ........................................................................................................... xvi
Table of abbreviated sources ............................................................................................ xviii
Table of cases .................................................................................................................... xx
Table of instruments ......................................................................................................... xciv

**PART 1. A THEORY FOR TRIALS:**
**METHODOLOGICAL FRAMEWORK**

Chapter 1. Background and Purpose of the Study:

Chapter 2. Fairness and its Metric in International Criminal Procedure:
Drawing from Human Rights Law .................................................................................... 89

Chapter 3. Measuring Effectiveness: Teleology and Efficiency of
International Criminal Justice ......................................................................................... 159

**PART 2. PHENOMENOLOGY OF THE TRIAL PHASE:**
**CONCEPTUAL APPROACHES**

Chapter 4. Trial Phase: A Theoretical and Comparative Outlook .................................. 221

Chapter 5. Functions of International Criminal Trials .................................................... 283

Chapter 6. Centrality of Trial in International Criminal Proceedings .......................... 369

**VOLUME II: ORGANIZATION**

**PART 3. ANATOMY OF THE TRIAL PHASE:**
**DESCRIPTIVE AND ANALYTICAL APPROACHES**

Chapter 7. Defining the Trial Stage .................................................................................. 451

Chapter 8. Trial Preparation: Setting the Scene ............................................................... 488

Chapter 9. Opening Stage of Trial .................................................................................... 613

Chapter 10. Presentation of Evidence .............................................................................. 649
Chapter 11. Closing Stage of Trial

PART 4. FACES OF TRIAL:
FROM PRESENT TO THE FUTURE

Chapter 12. Towards a Normative Theory of International Criminal Trial

Summary
Samenvatting
Bibliography
# DETAILED TABLE OF CONTENTS*

**VOLUME I: NATURE**

<table>
<thead>
<tr>
<th>Table of acronyms</th>
<th>xvi</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of abbreviated sources</td>
<td>xviii</td>
</tr>
<tr>
<td>Table of cases</td>
<td>xx</td>
</tr>
<tr>
<td>Table of instruments</td>
<td>xcv</td>
</tr>
</tbody>
</table>

## PART 1. A THEORY FOR TRIALS:
**METHODOLOGICAL FRAMEWORK**

**Chapter 1. Background and Purpose of the Study:**
*‘What’, ‘Why’, and ‘How’ of the Theory* .............................................. 3

1. Introductory remarks ................................. 3

2. International Criminal Justice: The Prime of Life or a Midlife Crisis? ................................. 4
   2.1. Mapping the Context .............................................. 4
   2.2. Scholarship at the Turning Point ......................... 12

3. International criminal procedure: From Convoluted Legacy to Considered Paradigm ................. 18
   3.1. ‘Orphan’ without ‘identity’? ................................. 18
      3.1.1. Ontological question ........................................ 18
      3.1.2. No primary obligations? .................................. 22
   3.2. Nature and genesis: From judge-made law to legislation and back again ......................... 24
      3.2.1. General features .............................................. 24
      3.2.2. Activating judge-legislators: IMT and IMTFE .......... 26
      3.2.3. ‘Judge-made law’ era: ICTY, ICTR, and SCSL ........ 30
      3.2.4. Paradigm shift: ICC and SPSC ............................ 42
      3.2.5. Back again: Recent courts (ECCC and STL) .......... 50
   3.3. Taking stock and charting the way ahead: From practice to theory ......................... 56

4. A Normative Theory for International Criminal Trial .............................................. 62
   4.1. What theory? .............................................. 62
   4.2. Objectives and questions ................................. 65
   4.3. Approach .............................................. 66
      4.3.1. Focus on the trial stage .................................. 66
      4.3.2. Perspective and limitations ............................ 68
   4.3.3. Key definitions and courts covered .................. 70
   4.3.4. Evaluative framework .................................. 75
      A. Fairness perspective ........................................ 77
      B. Effectiveness perspective: Goals and functional efficiency .................................. 78
      C. Comparative law: A non-parameter .................. 79

5. Outline and methods .............................................. 84

* The detailed Table of Contents of volume II can be found at the beginning of that volume.
5.1. Structure 84
5.2. Sources and methodology 86

Chapter 2. Fairness and its Metric in International Criminal Procedure: Drawing from Human Rights Law………………………………..89

1. Introduction 89
2. ‘Fairness’ as external framework: Drawing from human rights law 90
   2.1. Duality of human rights law and its questions 90
   2.2. Human rights law as binding law 96
      2.2.1. From the nature of obligation… 96
      2.2.2. ... to sources of law 99
   2.2.3. Human rights law as applicable law
      2.2.3.1. Treaty law 104
      2.2.3.2. General international law 105
         A. Question of applicability, again 105
         B. Custom 108
         C. General principles of law 114
         D. Moving beyond sources 116
      2.2.3.3. Precedents of other courts and monitoring bodies 116
      2.2.4. Law or policy, and does it matter? 124
   2.3. Human rights as a methodological framework: Place in the normative hierarchy
      2.3.1. Ad hoc tribunals 129
      2.3.2. ICC 132
      2.3.3. Other courts 136

3. Metric of ‘Fairness’: Contextualization and its Limitations 138
   3.1. The need and duty to contextualize 138
   3.2. ‘Fairest’ or ‘fair enough’? 145
   3.3. What is ‘enough’? Setting the limits 150

4. Conclusion 155

Chapter 3. Measuring Effectiveness: Teleology and efficiency of international criminal justice…………………………………………………159

1. Introduction 159
2. Teleology of justice: Confronting the ongoing mix-up 164
3. Inventory of special goals 171
   3.1 Sources, typology, and formal recognition of goals 171
   3.2 Reconciliation and restoration of peace and security 174
   3.3 Establishment of a historical record 177
PART 2. PHENOMENOLOGY OF THE TRIAL PHASE:
CONCEPTUAL APPROACHES

Chapter 4. Trial Phase: A Theoretical and Comparative Outlook...... 221

1. Introduction 221
2. ‘Adversarial’ v. ‘inquisitorial’ distinction: Value and limitations 224
3. Trial as the Phase 231
   3.1 Evidentiary continuity and finality of decisions 231
   3.2 Character and layout of trial 237
   4.1 Objectives of justice and functions of trial, and truth 243
   4.2 Concepts of truth and criminal procedure 245
   4.3 Truth in a comparative perspective 247
   4.4 A superior model for truth-finding:? 254
5. Communicative role and effects of trials: A socio-legal view 262
6. Role of the trial phase: Impact of pre-trial process and bargaining 269
7. Conclusion 278

Chapter 5. Functions of International Criminal Trials......................283

1. Introduction 283
2. Procedural functions v. communicative aspects: The Legalist and Law-
   and-Society perspectives 284
3. Procedural function of international trials: Truth-finding revisited 288
   3.1 Formal commitment to truth 288
3.1.1 ICTY, ICTR, and SCSL 289
3.1.2 ICC 293
3.1.3 Hybrid and other courts 296
3.2 Scope of truth in trials 298
3.2.1 Dimensions of truth 298
3.2.2 Competing truths and the role of trials 300
3.2.3 Historical truth v. trial truth 304
   A. Are trials fit for ‘historical function’? Purposes, objects and methods of inquiry 305
   B. Are trials appropriate conduits of historical truth? Legal v. historical facts 311
3.3 What kind of truth? 316
3.3.1 Comparative outlook: ‘Contest’ v. ‘material’ truth 318
3.3.2 Truth and institutional goals: The case of plea bargaining 323

4. Communicative aspect of trial process 330
4.1 Trial as didacticism 330
4.2 Between show and political trials 334
   4.2.1 Disentangling notions and quasi-notions 334
   4.2.2 International trials as ‘show trials’ 340
   4.2.3 Making and curbing a political show: Ideological defence and its limits 348
      A. Political dissent in and beyond courtroom 348
      B. Political defence and self-representation 351
      C. Political prosecution 354
4.3 Liberalism as unostentatious didacticism 357
   4.3.1 Fetters on didacticism: ‘Due process’ message 357
   4.3.2 Enhancing didacticism by other means: Outreach, venue, space 361
   4.3.3 Calling to account? 364

5. Conclusion 365

Chapter 6. Centrality of Trial in International Criminal Proceedings…………………………………………………………………………………………………………………………369
1. Introduction 369
2. Trial as the prime stage: Select factors affecting the role of trial 371
3. Pre-trial process and expanding judicial functions 373
   3.1 IMT and IMTFE 374
   3.2 ICTY, ICTR, and SCSL: Managerial judging reforms 374
      3.2.1 Nature and evolution of judicial pre-trial involvement: An overview 374
      3.2.2 Pre-trial judge (ICTY) 386
      3.2.3 Case-management conferences 390
      3.2.4 Preliminary motions 393
   3.3 ICC: Pre-Trial Chamber and confirmation of charges 394
      3.3.1 Pre-Trial Chamber 394
      3.3.2 Confirmation of charges 395
      3.3.3 Mini-trial before trial? 398
      3.3.4 Continuity of evidence 405
3.4 SPSC 406
3.5 ECCC 408
3.6 STL 411

4. Use of negotiated justice 414
4.1 IMT and IMTFE 416
4.2 ICTY, ICTR, and SCSL 418
  4.2.1 Guilty pleas: Nature and potential effects on trials 418
  4.2.2 Plea-bargaining and actual impact 424
4.3 ICC 433
4.4 SPSC 437
4.5 ECCC 442
4.6 STL 444

5. Conclusion: International trial under attack? 445