International criminal trials: A normative theory

Vasiliev, S.

Citation for published version (APA):
SUMMARY TABLE OF CONTENTS

VOLUME I: NATURE

Table of acronyms…………………………………………………………………………………xvi
Table of abbreviated sources……………………………………………………………………xviii
Table of cases……………………………………………………………………………………xx
Table of instruments………………………………………………………………………………xcv

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
DETAILED TABLE OF CONTENTS*

VOLUME I: NATURE

Table of acronyms…………………………………………………………………………………………………xvi
Table of abbreviated sources……………………………………………………………………………………xviii
Table of cases…………………………………………………………………………………………………………xx
Table of instruments…………………………………………………………………………………………………xcv

PART 1. A THEORY FOR TRIALS:
METHODOLOGICAL FRAMEWORK

Chapter 1. Background and Purpose of the Study:

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 104
    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 129
    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
3.4 Promoting international rule of law (expressive or didactic goal) 179
3.5 Justice for victims 181

4. Special goals and procedure 183
4.1 Uncertain relationship: Two schools of thought 183
4.2 Voices from practice: A third view 190
4.3 Plea for a moderate approach 194
4.4 Ambiguity of goal priorities: Reductionism as ostensible solution to an imaginary problem? 201

5. Operational efficiency: A counter-parameter 207
6. Conclusion 215

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
3. Procedural function of international trials: Truth-finding revisited 288
3.1 Formal commitment to truth 288
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.4</td>
<td>SPSC</td>
<td>406</td>
</tr>
<tr>
<td>3.5</td>
<td>ECCC</td>
<td>408</td>
</tr>
<tr>
<td>3.6</td>
<td>STL</td>
<td>411</td>
</tr>
<tr>
<td>4.</td>
<td>Use of negotiated justice</td>
<td>414</td>
</tr>
<tr>
<td>4.1</td>
<td>IMT and IMTFE</td>
<td>416</td>
</tr>
<tr>
<td>4.2</td>
<td>ICTY, ICTR, and SCSL</td>
<td>418</td>
</tr>
<tr>
<td>4.2.1</td>
<td>Guilty pleas: Nature and potential effects on trials</td>
<td>418</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Plea-bargaining and actual impact</td>
<td>424</td>
</tr>
<tr>
<td>4.3</td>
<td>ICC</td>
<td>433</td>
</tr>
<tr>
<td>4.4</td>
<td>SPSC</td>
<td>437</td>
</tr>
<tr>
<td>4.5</td>
<td>ECCC</td>
<td>442</td>
</tr>
<tr>
<td>4.6</td>
<td>STL</td>
<td>444</td>
</tr>
<tr>
<td>5.</td>
<td>Conclusion: International trial under attack?</td>
<td>445</td>
</tr>
</tbody>
</table>