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.
CHAPTER 1.

BACKGROUND AND PURPOSE OF THE STUDY:
WHAT, WHY, AND HOW OF THE NORMATIVE THEORY

1. Introductory remarks
2. International Criminal Justice: The Prime of Life or a Midlife Crisis?
   2.1. Mapping the Context
   2.2. Scholarship at the Turning Point
3. International criminal procedure: From Convoluted Legacy to Considered Paradigm
   3.1. ‘Orphan’ without ‘identity’?
   3.1.1. Ontological question
   3.1.2. No primary obligations?
   3.2. Nature and genesis: From judge-made law to legislation and back again
   3.2.1. General features
   3.2.2. Activating judge-legislators: IMT and IMTFE
   3.2.3. ‘Judge-made law’ era: ICTY, ICTR, and SCSL
   3.2.4. Paradigm shift: ICC and SPSC
   3.2.5. Back again: Recent courts (ECCC and STL)
   3.3. Taking stock and charting the way ahead: From practice to theory
4. A Normative Theory for International Criminal Trial
   4.1. What theory?
   4.2. Objectives and questions
   4.3. Approach
   4.3.1. Focus on the trial stage
   4.3.2. Perspective and limitations
   4.3.3. Key definitions and courts covered
   4.3.4. Evaluative framework
      A. Fairness perspective
      B. Effectiveness perspective: Goals and functional efficiency
      C. Comparative law: A non-parameter
5. Outline and methods
   5.1. Structure
   5.2. Sources and methodology

1. INTRODUCTORY REMARKS

This Chapter introduces the theme of the book—a normative theory for international criminal trial—and gives a preview of what this theory entails, how it should be constructed, and, most importantly, why it may be necessary.

The Chapter provides a rationale for a normative theory, first by outlining the status quo in the institutional sphere of international criminal justice and the transitional phase in which the scholarship on international criminal law finds itself (section 2). As the next step, it
turns to the inevitable question of the origins and nature of international criminal procedure which account for its wrongly, as will be argued, perceived deficit of normative identity (section 3). Having dealt with these preliminary matters, the Chapter sets out the objectives and approach of the study. Given the explosive development of this field of law and practice, and notable sophistication of scholarly debate on it over the past two decades, section 4 explains what added value a coherent theory for the conduct of trial proceedings has in international criminal law, and how the new account may relate to other, more established perspectives.

The ‘trial phase’ is then positioned as a distinct object of study, and the core notions used throughout the book (‘international criminal trial’ and ‘international criminal procedure’) are tentatively defined: they are key to understanding the purport of the book and explain the choice of courts and tribunals covered in the following chapters. Likewise, the main perspectives from which the performance of international criminal tribunals will be examined in the subsequent Chapters, including evident limitations of those perspectives, are briefly presented. These remarks set the stage for more in-depth discussion of the methodology of international criminal procedure. Finally, section 6 introduces the structure of the study and elucidates research methods, including the use of empirical sources. This discussion prepares ground for the detailed exploration of the phenomenon of international criminal trials in the subsequent chapters and an attempt to offer a coherent trial theory for international criminal tribunals.

2. INTERNATIONAL CRIMINAL JUSTICE: THE PRIME OF LIFE OR A MIDLIFE CRISIS?

2.1. Mapping the Context

Almost seventy years after the Nuremberg and Tokyo trials of major war criminals, twenty years after the establishment of the UN ad hoc international criminal tribunals for the former Yugoslavia (1993) and for Rwanda (1994), and at the ten-year anniversary of the International Criminal Court, international criminal justice finds itself at an intriguing cross-road. The combined anniversaries aside, the system has now not only come of age but also reached a remarkable benchmark of maturity in its journey of unexpected longevity and impact. The journey dates back to as early as the false start marked by the failed endeavour to ensure individual accountability for atrocities pursuant to the Treaty of Versailles in the wake of the World War I.

In significance, the advancements made by the international community in the domain of international criminal adjudication since early 1990s do not pale in comparison with the impetus given to the project of international criminal justice by the legal firsts and breakthroughs of the post-WWII International Military Tribunals at Nuremberg (IMT) and

---


Chapter 1: Background and Purpose of the Study

Tokyo (IMTFE). The project has in the meantime materialized in a manifold and interconnected ‘community’, or ‘family’, of international and hybrid criminal courts. Besides the ICTY and ICTR, which sparked the modern movement against impunity for international crimes, and the ICC, the ‘family’ comprises—or comprised in the recent past—the younger internationalized criminal courts. These have included the Special Panels for Serious Crimes in the Dili District Court in East Timor (2000-2005), the Special Court for Sierra Leone (SCSL) established in 2002, the Extraordinary Chambers in the Courts of Cambodia (ECCC) set up in 2007, and the latest arrival (2009) – the Special Tribunal for Lebanon (STL).

The IMT and IMTFE framed the enforcement of some of the most imperative international law norms into the novel paradigm of individual criminal responsibility for international crimes. Like their antecedents, the second-generation tribunals—the UN ad hoc tribunals—have spurred seminal developments in the last two decades. Through the refinement of the legal bases for holding individuals accountable for crimes under international law and through the steady enforcement of accountability regime, the ICTY and ICTR irredeemably recast the landscape of the international legal order. The degree of success of international criminal justice is yet to be credibly established, especially since the parameters of such acclaimed successes are not agreed upon and remain a divisive methodological matter. The difficulties which attend the choices of an evaluative framework are echoed in the wide variance in political assessments of the project of international criminal justice. Whilst detractors decline to recognize its value and accomplishments, for the like-minded, a handful of international and hybrid criminal tribunals have achieved more in terms of restoring and reaffirming the fundamental values on which the international order

---

10 The paradigm is symbolized by the oft-quoted excerpt from the Nuremberg judgment: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’. See Judgment in The Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945-1 October 1946, Vol. I (Nürnberg: International Military Tribunal, 1947) 223; K. Jaspers, ‘The Significance of the Nurnberg Trials for Germany and the World’, in (1946-47) 22 Notre Dame Lawyer 150, at 154 (‘today the halo about the heads of political rules has vanished. Today these rulers are regarded simply as men, and as men, answerable for their deeds. ... Political acts are at the same time personal acts. Men as individuals are responsible for their acts and must answer for them.’).
Chapter 1: Background and Purpose of the Study

rests than the aggregate of non-penal efforts undertaken for that end by the international community.\(^{11}\)

The international criminal justice institutions promote a shared culture, or ideology, centered upon the aspirations of universal appeal: preventing mass atrocities, eliminating impunity, rendering justice for the victims, reinserting the rule of law and sustainable peace in war-torn communities and societies in transition while also protecting fair trial rights.\(^{12}\) At the same time, the tribunals are impaired by formidable operational challenges and congenital weaknesses limiting the scope of what is practically achievable by them. Besides inevitable budgetary constraints, this includes their complete dependence on the cooperation of states and other actors and entities for conducting investigations, effecting arrests of suspects and accused and carrying out other coercive measures, and ensuring the cooperation and appearance of witnesses. This circumstance demonstrates the incompleteness and at any rate peculiarity of the tribunals as criminal justice systems and has a disabling effect on the enforcement and execution of basic functions without which no court can effectively operate.\(^{13}\) The fundamental critiques echo the early views of international criminal justice as a non-equitable application of law by the strong states against the weak.\(^{14}\) In case of the ICC, the charge is that international criminal justice remains a selective—perhaps even imperialist or neo-colonialist—endeavour, in particular given the ICC’s current predominant focus on African countries.\(^{15}\)

Riddled with controversy as it were, the system is irreducibly legalist and pretends to hinge upon itself – legal prescriptions, courts, and procedures.\(^{16}\) It is, as yet, premature to say that the ‘right’ has substituted for ‘might’ in international relations, but some advances have clearly been made in that direction.\(^{17}\) By aspiring to address systemic criminality which traditionally remained in the ephemeral political realm through uncompromised legalism, the tribunals purport to reclaim from politicians and diplomats the prerogative of tackling crises previously beyond lawyers’ reach.\(^{18}\) According to some assessments, many of which come

\(^{11}\) M.S. Ellis, ‘Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability – The Role of War Crimes Tribunals’, (2006) 2 Journal of National Security & Policy 111, at 119 (‘These tribunals have had a profound effect on international law, signaling a shift away from “toothless monitoring and supervision”.’).


\(^{14}\) G. Schwarzenberger, ‘The Problem of an International Criminal Law’, (1950) Current Legal Problems 263, at 295 (‘in the present state of world society international criminal law in any true sense does not exist … [T]he real swords of war and justice are still “annexed to the Sovereign Power”. In such a situation an international criminal law that is meant to be applied to the world powers is a contradiction in terms.’). See e.g. A. Garapon, ‘Three Challenges for International Criminal Justice’ (2004) 2 JICJ 716, at 717; G. Robertson, ‘General Editor’s Introduction to Essays on Fairness and Evidence in War Crimes Trials’, (2006) 4(1) International Commentary on Evidence 1, at 1.

\(^{15}\) For a comment, see C. Stahn, ‘How Is the Water? Light and Shadow in the First Years of the ICC’, (2011) 22 Criminal Law Forum 175, at 187.


\(^{17}\) Y. Shany, ‘Assessing the Effectiveness of International Tribunals: Can the Unquantifiable be Quantified?’, Research Paper No. 03-10, September 2010, Law Faculty Hebrew University of Jerusalem, 1 September 2010, available at <http://www.effective-intl-adjudication.org/admin/Reports/6522776dd407e9e3875da218ebc70d5bUnquantifiable.pdf>, at 5 (observing that international courts are ‘the lynchpin of a new rule-based international order, which increasingly displaces the previous power-based international order’).

\(^{18}\) Garapon, ‘Three Challenges’ (n 14), at 716 (the purpose of international criminal justice is ‘to rebuild politics’). See also M. Damaška, ‘What is the Point of International Criminal Justice?’, (2008) 83(1) Chicago-
from insiders, the tribunals have succeeded in shrinking the space for impunity for grave international crimes and contributed to reconciliation and political stability in their target regions.\textsuperscript{19} While the views from other quarters are far less rosy, the existence of the ambition and some progress to that effect is not denied.\textsuperscript{20}

By attempting to channel the evaluation of, and reaction to, gross political misconduct into a legal discourse, those institutions themselves emerged as important actors in the world of politics. Although the professed isolation from politics inheres in the legalist bent of international criminal justice culture, it would be naïve to think that institutions, which regularly engage with a plethora of players outside of the courtroom, operate in a political vacuum and are politics-free.\textsuperscript{21} On the issues of whether, whom and when to prosecute, political considerations surreptitiously enter into the domain of decision-making, even though the same considerations may become irrelevant and improper during subsequent stages. The tribunals are increasingly relied upon by those players in pursuit (or under pretext) of the far-reaching goals of conflict prevention and post-conflict reconstruction – and are resisted too, rhetorically and politically, by the others. To benevolent supporters—the constellations of states and international organizations (UN)—the tribunals may be imperfect instruments. But they appear to have no better alternative in many (post-)conflict situations as solutions for putting an end to crimes, extinguishing armed conflicts and strife, and laying down the foundations of a lasting peace.\textsuperscript{22} Thus, despite the demonstrated indifference and even opposition to the ICC, some of the world’s superpowers (notably the US) have changed their attitude to passive endorsement. The UN Security Council, three out of five permanent members of which are not parties to the Rome Statute, has twice referred situations—those in Darfur (Sudan) and in Libya—to the ICC, acting under Chapter VII of the UN Charter, rather than extending the ICTR’s jurisdiction or establishing a new ad hoc tribunal.\textsuperscript{23} The latter, however, remains within the spectrum of possibilities as an alternative to the ICC, as
demonstrated by the recent debates about the optimal avenues for achieving accountability in the conflict in Syria and a high-profile initiative to establish an extraordinary criminal tribunal.24

Furthermore, international criminal adjudication has triggered a profound shift in the attitudes towards international criminal prosecutions: it positively influenced the willingness and ability of states to prosecute such crimes. Given that national courts will continue to bear the main burden of prosecuting international crimes in the future after the closing of ad hoc tribunals and in keeping with the ICC’s complementary role, capacity-building at the level of municipal criminal justice systems is arguably where the most significant legacy of international criminal tribunals lies.

But like any ‘family’ at a certain stage, international criminal justice is facing the inevitable: a change of generations.25 Some judicial institutions have already been closed down (SPSC)26 or are about to do so (ICTY, ICTR, and SCSL), whereas others will remain at least for a few more years (ECCC, STL) or permanently (ICC). The veterans of the modern international criminal justice movement, the UN ad hoc tribunals are rushing to complete the ongoing trials and appeals until 31 December 2014. For other purposes, they were replaced by the UN Residual Mechanism to ‘continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR’: deciding any new appeals, conducting retrial, review and contempt proceedings, and supervising the enforcement of sentences.27 The SCSL has completed its judicial mandate with the conclusion of appellate proceedings in its fourth and last case – that of the former Liberian president Charles Taylor.28 The ongoing and residual functions of the SCSL, including the possible trial of one remaining fugitive (Johnny Paul Koroma), will continue to be exercised by the Residual Special Court for Sierra Leone.29

Much less speedily and triumphantly than one may have wished, the ICC has completed its first two trials in the Situation in the Democratic Republic of the Congo (Lubanga and Ngudjolo Chui) and is well on the way to completing the third trial (Bemba Gombo), in the Situation in the Central African Republic.30 The ICC is now far beyond the


26 The SPSC were closed down prematurely on 20 May 2005, when the mandate of the UNTAET’s successor, UN Mission of Support in Timor-Leste, ended: see UNSC Resolution 1573 (2004), 16 November 2004, and UNSC Resolution 1599 (2005), 28 April 2005.

27 UNSC Resolution 1966 (2010), UN Doc. S/Res/1966 (2010), 22 December 2010 and, annexed thereto, Statute of International Residual Mechanism for Criminal Tribunals (MICT) which establishes two branches. The commencement date of the ICTR branch was 1 July 2012, whereas the ICTY branch started its work on 1 July 2013.


29 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Residual Special Court for Sierra Leone, signed on 11 August 2010 and ratified by Sierra Leone on 1 February 2012 (Residual Special Court for Sierra Leone Agreement (Ratification) Act, 2011, Supplement to the Sierra Leone Gazette Vol. CXLIII, No. 6, 9 February 2012).

30 The trial judgment and sentence were rendered in the Lubanga case: Judgment pursuant to Article 74, Prosecutor v. Lubanga Dyilo, Situation in the DRC, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012 and, in the same case, Decision on Sentence pursuant to Article 76 of the Statute ICC-01/04-01/06-2901, TC I, ICC, 10 July 2012. See also Judgment pursuant to Article 74, Prosecutor v. Ngudjolo Chui, ICC-01/04-02/12-4, TC II, ICC, 18 December 2012.
start-up period of trial-and-error. The evaluations of its performance have been varied and it has been subject to pointed critiques by observers and insiders alike.\textsuperscript{31} As of October 2013, it is facing the daunting task of dealing with a burgeoning docket consisting of 17 cases in 8 situations, involving 22 individuals charged, accused, or convicted, including three former or sitting heads of states.\textsuperscript{32} Some of the cases pending before the ICC pose serious challenges in terms of acquiring custody over the suspects and ensuring state cooperation.\textsuperscript{33}

The more recent ECCC—a hybrid court established jointly by the Cambodian government and the UN to adjudicate crimes committed in Cambodia during the Khmer Rouge era (1975-79)—has completed Case 001 (Kaing Guek Eav), including both trial and appeal stages.\textsuperscript{34} The ECCC have been struggling to bring to an end the second trial involving four alleged senior Khmer Rouge leaders (Case 002), but the senior age and frail physical and mental health of the accused casted a shadow on the prospect of the successful completion of the trial. The proceedings against the two of them came to a halt.\textsuperscript{35} In addition, the Chambers have been facing an unprecedented credibility and legitimacy crisis. In addition to widespread reports of corruption within the institution itself, they have operated in an unfavourable climate of overt disdain and political interference by Cambodian authorities.\textsuperscript{36} For the fear of a link being drawn between the ruling Cambodia’s People Party’s members to the Khmer Rouge regime, the authorities have persistently denounced investigations into Cases 003/004 against five suspects which were opened upon insistence by the international side of the court.\textsuperscript{37} As a result, the Co-Investigating Judges prematurely closed the

\begin{footnotesize}
\begin{enumerate}
\item See e.g. W.A. Schabas, ‘The International Criminal Court at Ten’, (2011) 22 Criminal Law forum 493, at 507.
\item The ICC’s present workload (pre-trial, trial, and appellate proceedings) includes: one case against four accused in the Situation in Uganda (Kony, Otti, Odhiambo, and Ongwen); five cases against five accused in the Situation in the Democratic Republic of the Congo (Lusanga Dyilo; Katanga; Ngendjo Chui; Bosco Ntaganda; Mudacamura); one single-accused case in the Situation in the Central African Republic (Bemba Gombo); four cases in the Situation in Darfur, Sudan (Harun and Abd-Al-Rahman; al Bashir; Banda Abakar Nourain; Hussein), two cases against three accused in the Situation in Kenya (Ruto and Sang; Kenyatta); one case against one accused in the Situation in Libya (Saïd Gaddafi) and three cases in the Situation in Côte d’Ivoire (Laurent Gbagbo; Simone Gbagbo; Charles Blé Gouédé). Pre-Trial Chambers have declined to confirm charges against Bahar Idriss Abu Garda (Darfur), Callixte Mbarushimana (DRC), Henry Kiprono Kosgey (Kenya I case) and Mohammed Hussein Ali (Kenya II case). The investigation into the Situation in Mali was opened in January 2013 by the ICC Prosecutor following a self-referral (no cases at the time of writing).
\item This is particularly so in relation to the cases in the Situation in Northern Uganda and in Darfur. The four suspects in the Kony et al. case, against which the warrants for arrest dated 8 July 2005, have not yet been apprehended. The four accused in Darfur cases, including the incumbent President of Sudan Omar Hassan Ahmad al Bashir (arrest warrants 4 March 2009 and 12 July 2010), still remain at large.
\item Judgement, Kaing Guek Eav, Case File/Dossier No. 001/18-07-2007/ECCC/TC, TC, ECCC, 26 July 2010 and, in the same case; Appeal Judgement, SCC, ECCC, 3 February 2012.
\item The proceedings against Ieng Thirith were stayed due to her medical condition (progressive dementia) and she was released, subject to judicial supervision: see Decision on Immediate Appeal against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith, Case File/Dossier No. 002/19-09-2007 ECCC/TC/SC(16), SCC, ECCC, 14 December 2012. The proceedings against Ieng Sary were terminated due to his death on 14 March 2013; see Termination of the Proceedings against the Accused IENG Sary, Case File/Dossier No. 002/19-09-2007/ECCC/TC, TC, ECCC, 14 March 2013.
\item See e.g. a non-decision split along the national/international lines both in the Pre-Trial Chamber and between the Co-Prosecutors: Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-
\end{enumerate}
\end{footnotesize}
Chapter 1: Background and Purpose of the Study

in investigation.\textsuperscript{38} In addition, the senior members of the cabinet afforded statements prejudging the guilt of the accused in the ongoing Case 002.\textsuperscript{39}

Established pursuant to the Agreement between Lebanon and the UN to investigate and prosecute those allegedly responsible for the terrorist attack resulting in the death of the Lebanese Prime Minister Rafiq Hariri and 29 others as well as the authors of the similar related attacks,\textsuperscript{40} the STL is battling with its security and state cooperation challenges, which are as unique as its limited material jurisdiction.\textsuperscript{41} Against this backdrop, the Tribunal confirmed an indictment against four accused in the Ayyash et al. case\textsuperscript{42} and established jurisdiction and requested deferral by Lebanese judicial authorities in the three connected cases.\textsuperscript{43} In the Ayyash et al. case, the STL has taken a decision to try the accused \textit{in absentia} in accordance with Article 22 of its Statute.\textsuperscript{44}

This snapshot demonstrates that international criminal justice of today is a highly dynamic field and far from a stagnant phenomenon. But the complacent and triumphalist rhetoric of a ‘success story’, conjuring the imagery of a once illusory project in its heyday that has defeated its demurrers on all fronts and definitively won the struggle for legitimacy, is deceiving. The institutions and the project of international criminal justice they embody continue to face serious legitimacy challenges and operational hurdles that manifest themselves differently in each of them.\textsuperscript{45} Most of those challenges are of a rather unique nature and extraneous to the well-established domestic criminal justice systems, which, despite the possibility of drawing parallels, allows distinguishing the situation of international


\textsuperscript{38} Notice of Conclusion of Judicial Investigation, Case File No: 003/07-09-2009-ECCC-OCIJ, OCIJ, ECCC, 29 April 2011. Given the unsatisfactory quality of the investigation conducted by Co-Investigative Judges You Bunleng (Cambodia) and Siegfried Blunk (UNAKRT), the dismissal of the case was criticized as unreasonable, erroneous and politically motivated, being brought about by the lack of impartiality and independence on the part of the CIJs. See in detail OSJI, ‘Recent Developments at the ECCC: November 2011’ (n 36), at 11-15. The resignation of the international judge citing the appearance of political interference as the reason was followed by an even more controversial failure to formally appoint his successor Judge Kasper-Ansermet following a three-month period of supposed deliberation by the Supreme Council of Magistracy, in violation of Article 5(6) ECCC Agreement. See IBA, ‘The ECCC – a Failure of Credibility’ (n 36), at 15-17.


\textsuperscript{40} Art. 1 STL Statute.

\textsuperscript{41} The opposition from political forces within the country (Hezbollah) and outside it (Syria) posed serious difficulties in terms of obtaining cooperation and effecting arrests of the suspects, who remain at large. See further B. Swart, ‘Cooperation Challenges for the Special Tribunal for Lebanon’, (2007) 5 \textit{JICJ} 1153.

\textsuperscript{42} Decision relating to the Examination of the Indictment of 10 June 2011 Issued against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, \textit{Prosecutor v. Ayyash et al.}, Case No. STL-11-01/1/PTJ, PTJ, STL, 28 June 2011.

\textsuperscript{43} See Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, Case No. STL-11-02/D/PTJ, PTJ, STL, 19 August 2011; Order Directing the Lebanese Judicial Authority seized with the Case Concerning the Attack Perpetrated against Mr George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon, Case No. STL-11-02/D/PTJ, PTJ, STL, 19 August 2011; Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated against Mr Marwan Hamadeh On 1 October 2004 to Defer to the Special Tribunal for Lebanon, Case No. STL-11-02/D/PTJ, PTJ, STL, 19 August 2011.

\textsuperscript{44} Decision to Hold Trial \textit{in absentia}, \textit{Prosecutor v. Ayyash et al.}, Case No. STL-11-01/1/TC, TC, STL, 1 February 2012.

\textsuperscript{45} See also N. Combs, ‘Legitimizing International Criminal Justice: The Importance of Process Control’, (2011-12) 33 \textit{Michigan Journal of International Law} 321, at 325 (‘Admittedly, the field of international criminal justice continues to face myriad challenges, but it is now unquestionably a field and one that is expected to endure.’).
courts from that of their national counterparts. In its present developed state, international criminal justice finds itself in a ‘midlife crisis’. It has been around for a while and has had its share of achievements and missteps, but it is not completely settled and is still on the quest for its true nature and identity.\(^{46}\)

In the ‘post-ontological’ era, the euphoria that attended the establishment and formative stages in which the novel institutions such as the ICTY and ICTR were building up their legitimacy, is long gone and has given place to the ‘donor fatigue’, giving rise to legitimacy challenges of another kind.\(^{47}\) The high costs and low efficiency leads the international community to increasingly vest hope on national authorities for the investigation and prosecution of international crimes and experiment with the creation of hybrid tribunals embedded in the domestic legal systems to maximize the local ownership of the project. The dialectics between the tribunals and domestic layer of enforcing international criminal law were reformatted from the original position of primacy into that of dialogue and partnership. The idea of complementarity as embodied in the ICC Statute epitomizes the future role of international criminal tribunals vis-à-vis the national judiciaries. It is against this backdrop that ‘[h]aving reached its climactic point, the age of proliferation [of international criminal tribunals] is now giving way to an era of recession or, at least, to a slowdown of the institution-building efforts’.\(^{48}\)

Despite the ambitious institutional goals (peace, reconciliation, redress for the victims, and a historical record), the tribunals have also gradually come to be perceived as regular elements of the criminal law landscape and not only as extraordinary means to address extraordinary criminality. This is reflected on the idea of ‘normalization’ of international criminal justice as a system for criminal law adjudication.\(^{49}\) The tribunals are no longer perceived as a fledgling system but as an established business or industry of justice.\(^{50}\) As a result, they turn into bearers of the relevant expectations in terms of fairness, accuracy of fact-finding, and effective disposition of criminal cases.\(^{51}\) The newly acquired ‘normalcy’ and the need to deliver on the demands of stakeholders are the token of the tribunals’ long-awaited maturity. The ‘normalcy’ has dissolved the initial euphoria about these institutions and rendered the mere fact of their existence not self-sufficient to validate them.\(^{52}\)

The tribunals’ performance is increasingly judged against reference points such as, on the one hand, domestic criminal justice systems and, on the other, institutions tasked with fostering international peace and security. The simultaneous application of this dual set of


\(^{48}\) In a similar vein, see \textit{ibid.}, at 253 (‘there is a growing sense that the time of experiments is over.’).
ambitiously set yardsticks is paradoxical and not necessarily justified.\textsuperscript{53} By virtue of their proximity to both species of mechanisms, international criminal courts have to respond to multifaceted and at times contradictory expectations piled upon them by stakeholders. Leaving to one side the impossible mission of having to prove themselves against elevated expectations from different quarters, there is a visible paradox in treating them as ‘normal’ for either criminal justice or societal-reconstruction purposes.

If one takes the former reference point, their enforcement potency is far more limited than that of national criminal justice systems, despite grand ambitions.\textsuperscript{54} In this respect, handicaps of the international criminal justice system are so significant that the questions arise about its being a ‘true’ criminal justice system that can adequately be judged by the same metric of fairness as domestic courts.\textsuperscript{55} It is also clear that, in relation to the second reference point, the tribunals fall short of capacities of international institutions vested with quasi-constitutional and executive powers. Despite being endowed with limitations not found in their supposed counterparts from among international-security and domestic judicial organs, the tribunals must be up to this double task and continue to prove their legitimacy. On the one hand, they should fairly and effectively administer criminal justice in highly complex cases while appearing to national courts as role models. On the other, they are expected to contribute to the attainment of the lofty societal objectives of atrocity prevention and social reconstruction in its aftermath, which are the functions falling outside of the criminal justice business. Depending on which function is prioritized, observers come to strikingly different assessments of the tribunals’ performance and viability. The debates as to the preferred future directions to be taken in developing the system continue beyond this point.

2.2. Scholarship at the Turning Point

The historical progress and pace of international criminal justice has been inseparable from the scholarly reflection on it. The growth and increasing sophistication of the international criminal law scholarship both anticipated and propelled the actual developments in the field. The work of the ‘interpretive community’ has been instrumental in rationalizing and exposing the complex relationship between the manifold mandates and functions of the tribunal system and served as a factor in triggering policy change. It closely tracked the advances of putting the institutions in place and elaborating their substantive and procedural law, as well as providing external assessments of their jurisprudence and impact. Mirroring the fluctuations of \textit{zeitgeist} in practice, the academia has itself changed at least two ‘generations’. The term ‘generation’ in this context is less than ideal, not least due to the diversity of existing accounts and the difficulty of definitely categorizing them. The fact that international criminal justice has been approached from various—idealist and realist; conceptual, political, institutional, and legalist—perspectives and that there have always been ‘lone voices’ speaking against the tide, renders any broad classification relative. With this proviso in mind,


\textsuperscript{55} Henham and Findlay, ‘Rethinking International Criminal Justice?’ (n 49) at 3 (noting ‘the expanding divide between the massive investment of political, human and financial capital in adversarial trial process and the lack of attention to other aspects that one might expect of a true ‘system’ of international criminal justice: effective and rights-respecting policing and enforcement systems, effective detention arrangements, and alternative remedial avenues for those to whom the system of “high” international criminal justice is not accessible.’).
three major and mainstream waves can nonetheless be distinguished, each marked by a predominant attitude towards the object of inquiry and by its contribution to the discipline.

Characteristic of the early days of the *ad hoc* tribunals and the ICC, the first wave of scholarship was celebratory as it adopted a like-minded attitude of an almost unconditional enthusiasm about the nascent international criminal justice system. During the ‘honeymoon’ period between the tribunals and the international civil society and academia, the novel institutions were univocally saluted as the prime means for establishing the rule of law, preventing future atrocities, and promoting genuine reconciliation and peace in war-torn regions. The scholarship tended to be idealistic and pro-active. In the period predating the postmodern international criminal justice boom of the 1990s, scholars advocated for the establishment of courts and spearheaded the policy debate as to the need for a permanent international criminal court. When the ICTY and ICTR were established, the tendency was to defend these tribunals from misconceived critique by providing them with conceptual support and by strengthening their normative foundations. This kind of scholarship set out legal and policy rationales underpinning the ‘fight against impunity’ and offered valuable analyses of the tribunals’ applicable substantive and procedural law and of past precedents that were relevant in that context.

The second wave has been marked by a change of tone and rather espoused the recognition of the ‘normalcy’ of the international criminal tribunals as integral components of the new international legal reality and their embedment into the international body politic. As this perception took hold, the attitude of unqualified support gave way to more careful and critical reflection that put an end to the previous ‘honeymoon’ tinted dialogue. The ‘faith-based’ valorization of international criminal justice yielded to demands for hard data and a ‘fact-based’ mode of assessing the tribunals’ performance. By providing a vigorous scrutiny

56 P. Akhavan, ‘The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability’, (2003) 97 *American Journal of International Law* 712, at 720 (‘In the judicial dawn of the ICC, much of the literature is approving, if not celebratory, in tone or is focused on the threshold task of establishing the rudiments of international criminal law. As such, the literature gravitates either toward a reaffirmation of the principles and assumptions underlying international criminal justice, or toward points of procedure and doctrine that are still in the process of formation and elucidation.’)


58 R. Zacklin, ‘The Failings’ (n 47), at 541 (referring to such academics and human rights activists ‘marginal and quixotic’).


61 Zacklin, ‘The Failings’ (n 58), at 542 (describing the establishment of the ICTY and ICTR as ‘acts of political contrition’).

62 See e.g. interview with Payam Akhavan, cited in F. Mégré, ‘The Legacy of the ICTY as Seen Through Some of its Actors and Observers’, (2011) 3 *Goettingen Journal of International Law* 1011, at 1049 (‘because the tribunal [ICTY] is a sort of sacred cow that we do not want to criticize because we stand for international justice, so much so that we are sometimes not sufficiently critical about whether the institutions resources were spent properly and by qualified people.’).

63 Stahn, ‘Between “Faith” and “Facts”’ (n 46), at 256 (‘The idea of ‘faith’ … has become unpopular in international discourse and the ‘DNA’ of The Hague.’).
of the substantive and procedural aspects and processes, the critical support scholarship has produced more balanced and thorough (including the much needed empirical) evaluations of both performance and impact. Unlike the profoundly and unabatedly skeptical neo-realist accounts on international criminal justice, this strand of thought is benevolently disposed towards the phenomenon but is prepared to raise fundamental criticisms potentially fatal to its viability and legitimacy. While the starting position has been supportive critique, many analyses grew to be more pessimistic about the courts and noticeably enthusiastic in their—often justified—critique. This notable change of discourse clearly had an impact on the prevailing tone of performance evaluations made on the international criminal justice institutions of the ‘post ad hoc tribunals’ era’. There has hardly ever been a lengthy ‘honeymoon’ phase in this matrimony – for instance, the euphoria surrounding the entry into force of the ICC Statute quickly gave way to a substantive critique of the first steps made by the institution. Against the backdrop of success of the ad hoc tribunals, there were already specific and high expectations towards the Court’s output in its first years, and far from all of them had been met.

Like its antecedent, this generation of scholars has achieved much as they exposed conceptual gaps and practical dysfunctions in the various areas of the enterprise of international criminal prosecutions. Problems were identified in relation to many aspects of international criminal justice, ranging from the foundations to technical issues of procedure. Thus, scholars have challenged selectivity inherent in the way a retributive system is deployed with regard to specific humanitarian crises and criticized the widespread assumptions underlying the policy choices between international criminal tribunals and other avenues of dealing with mass atrocity (municipal courts and alternatives such as truth commissions). On a more specific level critics have noted the perceived politicization and one-sidedness of the prosecutorial policies, disturbing deviations from the principles of liberal justice in applying crime definitions and substantive law doctrines, the uncritical

---


67 For a scathing critique, see Schabas, ‘The International Criminal Court at Ten’ (n 31), at 507-509 (‘There is a strong impression that after the euphoric success of the Rome Conference and the precocious entry into force of the Statute, the actual operations of the Court have been a disappointment. The Court has been unable to complete its first trial. Afflicted with a cumbersome and inflexible procedural regime, there is nevertheless resistance to contemplation of any reforms. The Court lacks vision and leadership. Its employees exude frustration and even demoralization.’


reliance on domestic penological theories,71 institutional inefficiency,72 inadequacy of procedural law and practice73—particularly in some key domains74—and the courts’ questionable ability to promote broader objectives.75 In the latter respect, the second wave has considerably enriched the methodology of international criminal law, by insisting on the importance of empirical studies rather than and by advancing the critique against faith-based approaches based on the empirical data. Scholars have thus sought to debunk the myths about the courts’ ability to deter future atrocities, reconcile the members of the society, and to provide victims with redress, by producing ‘hard data’ that international criminal proceedings do not necessarily promote those goals and might even be counterproductive.76

The serious conceptual and practical flaws thus revealed in the work of the tribunals indicate that international criminal justice may have failed a range of core expectations of stakeholders and constituencies. As has emerged from Nancy Combs’ research, those include even the most basic task for any criminal court – accurately establishing the factual basis for convicting or acquitting persons charged with having committed a crime.77 Combs produced a revealing and scathing critique of the low quality of evidence on which convictions are based in some tribunals (ICTR, SPSC, and SCSL) and, what is of greater concern, the cavalier way in which the numerous fact-finding impediments are dealt with by the bench. As a result of this critique alone, the viability of the system as it stands and its legitimacy as a whole seriously come into question.78

Without diminishing the accomplishments of the second wave of scholarship, it has to a large extent been reactive and retrospective rather than conceptual, methodological and future-oriented. It was focused on the specific problems identified in some—not necessarily all79—of the tribunals and aimed at providing an ex post facto—albeit excellent—critique on

72 Zacklin, ‘The Failings’ (n 58), at 542-43 (referring to the tribunals as ‘unwieldy instruments, with a cumbersome bureaucratic structure’ and ‘enormous and extremely costly bureaucratic machines that outstrip or rival in size many of the specialized agencies of the United Nations, and dwarf core offices and departments of the UN Secretariat’, rendering the verdict: ‘too costly, too inefficient and too ineffective’).
73 Robertson, ‘General Editor’s Introduction’ (n 14), at 1 (‘the sort of justice … remains controversial: these new courts have been beset by crippling delays, by massive escalations in cost, by procedures which appear to give defendants not hours but years to strut and fret upon a televised stage.’); R. Skilbeck, ‘Frankenstein’s Monster: Creating a New International Procedure’. (2010) 8(2) JICJ 451.
76 Stover, The Witnesses (n 75), at 15 (criminal trials of local perpetrators from divided small communities cause fear and entrench divisions).
78 Thus, the falsely assumed and stated fact-finding competence of international criminal tribunals has conjured a parallel with ‘show trials’, which ‘calls into question the very foundation of the international criminal justice project’. See ibid., at 6 and 173-86.
79 For instance, Nancy Combs chose to exclude the ICTY from her study as the fact-finding impediments (e.g. linguistic, educational and cultural differences between witnesses and court staff) there were not as distortive as in the ICTR, SCSL, and SPSC context – the assumption which in itself might well prove wrong if it were to be
Chapter 1: Background and Purpose of the Study

specific issues of concern. In tackling them as they arose, it has been one step behind the institution-building process and jurisprudential advances pioneered by the courts. Due to the difficulty of keeping track of the ever-growing jurisprudence spawned in numerous jurisdictions in substantive and procedural law, it was not quite up to the task of anticipating developments before they occur, providing courts guidance, let alone having a meaningful effect on the overall direction the enterprise was taking.

At the crest of this second, critical wave, the third generation of international criminal law scholarship has emerged which may be referred to as ‘methodological’ or ‘reconstructive’. It seeks to engage in earnest with the normative presumptions underlying international criminal justice on a more elementary level. The methodological purport of this school is that it recognizes the need for both normative and empirical approaches to international criminal justice but it demands that any research preferences and analytical choices are made explicit and become an object of inquiry in themselves. This wave thus adopts an interdisciplinary approach in studying the phenomena of international criminal law and is by necessity methodologically inclusive and pluralist. On the basis of the experience and legacy of international criminal tribunals and the related critique, it pursues the objective of defining the terms on which the reality of international criminal justice can be understood and embraced or reformed. With the benefit of hindsight, it seeks to develop coherent normative accounts of how international criminal justice should have been if the system were to be designed ‘from the scratch’. 80 The contours of this—still fledgling—school are blurry as yet, but its distinctive feature is thus ‘going back to the roots’ in an attempt to make the system more viable, internally coherent and at peace with itself and its main stakeholders.

One strand in this line of thought is represented by commentaries trying to make sense of the increasing diversity of faces of international criminal justice in domains of both substantive and procedural law by offering more or less elaborate methodologies for closer approximation and convergence. 81 Thus, several private codifications or systematizations of international criminal law and procedure, as applied in multiple jurisdictions, were carried out recently on an agreed—albeit not undisputable—conceptual and methodological basis. 82 Another strand attempts to provide a framework for the evaluation of international criminal justice by questioning and improving methods that were theretofore taken for granted. 83 This recent scholarship also sought to clarify how the conventional assessment criteria are to be applied to international criminal tribunals. 84 Other scholars took issue with influential misconceptions and excessive or unfair criticisms left behind by the second wave. 85

What may unite the works belonging to the ‘third wave’ is that they all try to go beyond criticizing international criminal tribunals for its own sake or in order to improve tested by way of an empirical study similar to the one she undertook. See Combs, Fact-Finding without Facts (n 77), at 5.


82 See e.g. L.N. Sadat (ed.), Forging a Convention for Crimes against Humanity (Cambridge: Cambridge University Press, 2011); Sluiter et al. (eds), International Criminal Procedure (n 48).

83 See e.g. Stahn, ‘Between “Faith” and “Facts”’ (n 46).

84 E.g. Damaška, ‘What is the Point’ (n 18); id., ‘Reflections on Fairness in International Criminal Justice’, (2012) 10(3) JICJ 611.

85 E.g. D. Robinson, ‘The Controversy over Territorial State Referrals and Reflections on ICL Discourse’, (2011) 9 JICJ 355, at 357 (observing that ‘opinion within the interpretive community can coalesce around incorrect propositions, in which case our received wisdom is distorted’ and showing how this occurred in relation to states’ auto-referrals to the ICC).
their performance in limited respects.\textsuperscript{86} This generation is firmly embedded in the critical method which it uses to reconstruct the law and practice of the courts, but it employs that method on the basis of a more profound conceptual and empirically grounded understanding of the nature, goals, and limitations of international criminal justice. Occasionally, it will therefore pose itself as critical on the critics. In an attempt to discern an ‘ideal’ or at least ‘acceptable’ international criminal justice order, the third wave conjoins the critical assessment of the tribunals’ provisional legacy with the conceptual outlook that is emancipated from the methodological axioms and unpronounced assumptions that had controlled the discourse for two decades. By taking the first generation’s preoccupation with the project’s success to the next level,\textsuperscript{87} such accounts try to come up with a realist and future-oriented theory of international criminal justice.

The doctrinal bases and practical experience of international criminal adjudication in the last decennia make a seminal legacy yet to be fully assessed. The notion of ‘legacy’ has firmly established itself in the discourse and outreach efforts of the outgoing ICTY, ICTR, and SCSL in their final years.\textsuperscript{88} The imminent ‘turn of epochs’ is a unique opportunity for taking stock of achievements and failures and for drawing important lessons for the future. The persistent dilemmas of credibility and viability of international criminal justice call for a careful reflection on the validity of those lessons for the antecedent courts. The pragmatic yet ambitious forward-looking approach that is emerging from the third-generation scholarship, is exactly what the international criminal justice realm, in the midst of a ‘midlife crisis’, needs in order to move on.

The purpose of the present study is to contribute to solving the manifestations of such crisis in the domain of the organization of trial proceedings in international criminal tribunals. It draws inspiration from the approaches evinced by the ‘third wave’ of literature in particular, which explains the angle of inquiry assumed in relation to the topic of international trials. Before sketching the contours of a proposed normative theory, it is necessary to address the nature and development of international criminal procedure. Why would a new normative account be apposite and what gaps or problems with that body of law and practice would be suited to address?

\textsuperscript{86} The earlier-mentioned Combs’s book is a good example of the ‘transitional phase’ literature. Although she placed her book, where she takes issue with assumptions surfacing in the previous writings, firmly in the ‘critical wave’, her account is not only ‘retrospective’ (at 365) but also clearly normative or ‘reconstructive’ (at 366). In particular, she does not only suggest a number of measures aimed at the amelioration of fact-finding at the tribunals, including far-reaching procedural reforms. Combs also proposes (more controversially) to align the professed and actual grounds for the verdict through wider resort to associational doctrines (such as JCE) in charging and the reconceptualization of the ‘beyond-reasonable-doubt’ standard as a variable one: \textit{ibid.}, at 4, 285-333, 343-64.

\textsuperscript{87} E.g. Combs, \textit{Fact-Finding without Facts} (n 77), at 373 (considering that although her pessimistic findings about the quality of evidence ‘by no means enhance prospects for the long-term success of the international criminal justice project’, they also do not ‘doom the endeavour to failure’).

3. International Criminal Procedure: From Convoluted Legacy to Considered Paradigm

3.1. ‘Orphan’ without ‘identity’?

3.1.1. Ontological question
The frantic effort of building institutions of international criminal justice has been matched by the incremental growth and refinement of both substantive and procedural law applied by the courts and tribunals, channeled through legislative and judicial interpretive efforts. The two limbs of international criminal law—substantive and procedural—have been developed by different law-making agencies and subject to their unique regularities.

The former corpus of norms—substantive ICL—establishes definitions of international (core) crimes, modes of liability, justifications and excuses, penalties and sentencing principles. From the historical IMT and IMTFE, to the ad hoc tribunals, to the ICC and hybrid courts, it has been a central issue in the negotiations leading to the creation of the courts and thus has emerged as the product of the purposeful legislative effort by the international community. Since questions related to the jurisdiction and crime definitions are of the greatest concern to self-interested sovereign states, international law-making in that domain tended to take the traditional consensual avenue of adopting the Tribunals’ charters or statutes as multilateral treaties or bilateral agreements. But where that approach seemed disadvantageous or unproductive, be it due to urgency and political obstacles in situations like those of the ICTY, ICTR and STL, the Statutes were adopted or brought into force through UN Security Council resolutions under Chapter VII of the UN Charter.89 In those cases, the resolutions establishing the courts as subsidiary organs of the UNSC have generally aspired to go no further than reflect the status of customary law in keeping with the principle of legality.90 The body of substantive ICL was thus, from the outset, grounded on a primary statutory basis. Over time the courts have fleshed that basis out, down to the ultimate detail, in jurisprudence when filling lacunae and occasionally pushing its frontiers forward through creative interpretation.

The ICL’s procedural adjunct—the law of international criminal procedure; the body of international law regulating the conduct of proceedings before the international and some hybrid criminal courts—has evolved following its own path independently of the logic that accompanied the evolution of substantive law. From its modest beginnings at the Nuremberg and Tokyo Tribunals to the increasingly sophisticated and dynamic procedural regimes of the ad hoc tribunals, it culminated in the adoption of a comprehensive procedural codification for the ICC. More recently, the field advanced through the experiments embodied in the largely ‘inquisitorial’ procedure adopted for the ECCC and the innovative process of the STL geared to tackle special challenges of criminal trials concerning the crime of terrorism. With the narrow exception of the ICC, international criminal procedure was developed by the judges of the respective courts, with or without input by other organs of the courts, rather than by the usual international legislators – states or international organizations.

89 See n 1.
90 See e.g. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, paras 19-29. But cf. Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995 (‘SG Report on the establishment of the ICTR’), para. 12 (‘the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.’)
When comparing the evolution and status of substantive ICL with that of its procedural counterpart, the perception often arose (and was reproduced repeatedly) that international criminal procedure is a body of law that has systematically suffered from the lack of attention of the primary legislators. Procedural scholars have noted jealously that substantive ICL benefitted from the careful treatment by the architects of the tribunals’ charters and statutes to the disadvantage of the procedural law. Göran Sluiter questioned in 2006 ‘to what degree a corpus iuris of international criminal procedure has in fact developed’ and considered that ‘[b]oth the growing number of international criminal tribunals, with their own distinctive law of criminal procedure, and numerous amendments to their rules … may make it difficult to identify firmly established rules of international criminal procedure.’ Subsequently, he stated that, despite the ‘identity crisis’, substantive law was brought ‘far ahead in its development of general rules and principles’ through a legislative and interpretive effort. But for international criminal procedure, ‘an identity crisis would be a luxury’, due to the ostensible lack of the identity as ‘a unified core or shared values’ in the first place and the indeterminacy of its relation to the national models of criminal procedure.

Originating from protagonists of international criminal procedure, these perceptions are striking, not least because they draw a rather dim picture which has served as a departing point in the subsequent research. As a result, the authors of the recent treatise on international criminal procedure open it with the proposition that while ‘[f]ew today would dispute the existence of substantive international criminal law and its legitimacy under international law’,

[the same cannot be said, however, for the procedural rules that govern the conduct of international criminal proceedings. Despite fifteen years of procedural activity at the international criminal tribunals, generating far more jurisprudence on matters of procedure than on substantive law, considerable skepticism remains about the legitimacy of international criminal procedure as a body of international law’,

The other recent specialized literature on international criminal procedure has sometimes—and not univocally—echoed that skepticism.

---

91 Safferling, International Criminal Procedure (n 3), at 2 (‘The concentration on the substantive law has worked to the disadvantage of procedural law.’)
92 G. Sluiter, ‘The Law of International Criminal Procedure and Domestic War Crimes Trials’, (2006) 6 International Criminal Law Review 605, at 605. See also G. Boas et al., International Criminal Law Practitioner’s Library. Volume III: International Criminal Procedure (Cambridge: Cambridge University Press, 2011) 5 (reporting the concern that ‘while a myriad of international criminal tribunals have developed and applied rules of international criminal procedure, there remains too much diversity, in both the varying regulatory structure of these institutions and in the apparently divergent application of the same or analogous rules in different tribunals, for these rules to be regarded as a coherent body of international law.’)
94 Ibid. (qualifying this claim, however, by the existence of a ‘self-evident aspiration of fair and effective trials’).
95 Boas et al., International Criminal Law Practitioner’s Library, vol. III (n 92), at 1. For an earlier inquiry into whether international criminal procedure amounts to a body of law and what would be the preconditions for characterizing it as such, see S. Vasiliev, ‘General Rules and Principles of International Criminal Procedure: Definition, Legal Nature and Identification’, in Sluiter and Vasiliev (eds), International Criminal Procedure (n 80), at 20-25.
96 E.g. K. Ambos and S. Bock, ‘Procedural Frameworks’, in L. Reydams et al. (eds), International Prosecutors (Oxford: Oxford University Press, 2012) 540 (‘a uniform international criminal procedure does not exist. Rather, each tribunal has developed its own, more or less unique, procedural code.’); Combs, ‘Legitimizing International Criminal Justice’ (n 45), at 321-22 (‘to the extent such a body of law can be said to exist across tribunals’). Rejecting this view, see n 357.
Chapter 1: Background and Purpose of the Study

The very need for, and the contours of, the normative theory for international criminal trials which this book seeks to define are determined by the extent to which these perceptions accurately reflect the evolution and foundations of international criminal procedure and its current state. Is international criminal procedure really an unprivileged and fractured branch of international law – an ‘orphan’ unjustifiably deprived of the paternal attention of lawmakers, having no identity and residing in too many homes to call any of them its own? If not, what is the exact problem with international criminal procedure? In answering these preliminary questions, this section revisits assumptions which underlie the present discourse on international criminal procedure.

To begin with, comparing the two autonomous bodies of law in terms of ‘maturity’ and ‘coherence’ is not fitting. While both result from different legislative processes, with different forces having been at work in shaping their consolidation, the two bodies of law hinge upon divergent purposes, non-identical values and principles (compare, for example, the different relevance and meaning of the principle of legality), and methods of norm interpretation. Normally, they should thus be subjected to distinct evaluative frameworks to ascertain their coherence. Even if the two fields of ICL are to be contrasted thus, the degree of uniformity and coherence of the substantive part should not be overestimated, so long as there are significant differences between the legal regimes and judicial interpretations of substantive law doctrines in various international criminal tribunals. The pluralism of substantive law and its considerable fragmentation across multiple tribunals in a decentralized system is fraught with the unpredictable and uneven enforcement, which impacts on the unity and authority of international criminal justice. The way in which the tribunals have interpreted and applied crime definitions and principles of liability, relying on the ostensibly existing customary norms, were held to attest to an ‘identity crisis’ of which ICL is yet to come out. Within any given jurisdiction, uncertainties transpiring from the conflicting underpinnings and aspirations of substantive ICL worked to undermine the idea of a uniform and coherent regime. It is thus difficult to agree with the belief that international criminal procedure is by definition in a worse state of development. From within the boxes of the two sub-disciplines, the grass will always seem greener on the other side.

Furthermore, it is easy to overestimate the degree of fragmentation of international criminal procedure as a result of its application in various courts and tribunals (as well as the negative effects of any such fragmentation). With hindsight, it should be noted that the recent in-depth research into international criminal procedure has shown that a great number of fundamental principles and shared (general) rules can nevertheless be established. It is true that there are many remaining differences conditioned by the (procedural) nuances of each courts and the specifics of their institutional models. But it is difficult to deny at this stage that international criminal procedure is underpinned by a normative core of shared principles,

---

97 Robinson, ‘The Identity Crisis in International Criminal Law’ (n 70).
98 See e.g. E. van Sliedregt, International Criminal Responsibility in International Law (Oxford: Oxford University Press, 2012) 12 (‘After all, as a result of its nature and above-discussed “identity crisis”, substantive international criminal law is under-theorized and lacks a common “grammar”’).
100 See generally Sluiter et al., International Criminal Procedure (n 48). In a similar vein, Boas et al., International Criminal Law Practitioner’s Library, vol. III (n 92), at 9 and 13 (‘despite the skepticism of some academic commentators, considerable homogeneity does exist in the content of many rules of international criminal procedure and the tribunals’ interpretation of them, even though the rules may differ in certain details, and may be created by significantly different processes.’; ‘Far from being a set of discordant and disembodied rules created and applied in a haphazard manner, international criminal procedure is a coherent body of rules (albeit with internal variations’).
rules and established practices which are not subject to deviation in view of their fundamental nature or in the absence of sufficient justifications.

Besides the ‘fragmentation’ claim, another ontological uncertainty about international criminal procedure is its perceived deficit of legitimacy which flows from its not being ‘rooted to a formal source of international law’.\textsuperscript{101} Put differently, the concern is about the rather unconventional way in which that law has been created. Indeed, as noted, the law-creating mechanisms and agencies in the domain of procedure have not been the same as for substantive ICL. To varying extent at various tribunals, the judges were granted the power to develop the rules of procedure and to promulgate them formally as sub-laws valid within—and only within—their court. May the continuing unease about the legitimacy of international criminal procedure justifiably be rooted in its subordinate (sub-law) and judge-made nature?

The decision of international legislators (states and international organizations) to delegate the elaboration of procedural lawmaker to the judges on almost every institution-building round in international criminal justice (with the important exception of the ICC and SPSC) is explained by several reasons. First, the principled concern about fair and effective procedure to be adopted by the tribunals may not have been on the top of priorities of states and international organizations from the outset. But contrary to the ‘legislative inattention’ thesis, serious deliberations on the best procedure did in fact occur when agreements for the establishment of the tribunals were negotiated. Such negotiations were pursued not only to the extent that procedure had to be stipulated in the constituent agreements at least in a skeletal form but also far beyond that. Any statutory provisions on procedure in fact crown the strenuous efforts at attaining compromises that not only were agreeable to the signing parties but were also expected to be workable in practice. This required a broad and good faith endeavour on the part of negotiators, as they had to discuss and learn about the differences between their respective national procedural systems and arrive at a series of interrelated agreements that constituted the procedural framework of the court to be created. Indeed, in the subsequent debates, the output of negotiations on the procedure tended to be overshadowed by the insuperable primacy of jurisdictional issues and substantive law as the prime object of regulation. This is understandable: those issues had an obvious political implication as drawing jurisdictional boundaries too broadly could backfire against the mandating states. Moreover, negotiations raised the spectre of state compliance with their pre-existing obligations to ensure the prosecution and punishment of crimes under international law.\textsuperscript{102} But, again, this does not diminish or erase the fact that procedure was indeed a matter of debate which vigorous and not superficial.

The time pressure and the sense of urgency attending the process of creation of most international criminal justice institutions, which were particularly typical for the \textit{ad hoc} tribunals, rendered it impracticable for parent states and organizations to dwell upon and anticipate the technicalities of the process for too long.\textsuperscript{103} Neither multilateral diplomatic negotiations for the adoption of a treaty between plenipotentiaries nor closed consultations within the UN Secretariat’s Office of Legal Affairs make for ideal opportunities for an expert-driven process geared at the fundamental reflection and attainment of a coherent set of principled agreements outlining the procedure that would best serve the purposes of the new

\textsuperscript{101} Boas \textit{et al.}, \textit{International Criminal Law Practitioner’s Library, vol. III} (n 92), at 5.

\textsuperscript{102} Sluiter, ‘Trends’ (n 93) at 585.

\textsuperscript{103} H.-J. Behrens, ‘Investigation, Trial and Appeal in the International Criminal Court Statute’, (1998) 6/4 \textit{European Journal of Crime, Criminal Law and Criminal Justice} 113, at 113; G. Sluiter, ‘Procedural Lawmaking at the International Criminal Tribunals’, in S. Darcy and J. Powderly (eds), \textit{Judicial Creativity at the International Criminal Tribunals} (Oxford: Oxford University Press, 2010) 315 (‘The role of the judges of the \textit{ad hoc} Tribunals as procedural lawmakers tends to be accepted as an inevitable aspect of ad hoc institutions that were created under great pressure and time constraints, and for which no detailed procedural framework could be created by the drafters of their constituent Statutes.’)
institution. From the international legislators’ perspective, this reflection was better left to the judges when putting the operational framework in place or adjudicating cases.

Eventually, the hands-off approach was revisited because the proof of international criminal justice turned out to be as much in its effective administration and procedure as in the substantive law, if not more. So it is only later—several years into the ICTY and ICTR operations—that states and the parent organization (UN) came to realize the value and systemic importance of an adequate and coherent procedural framework for the steady implementation of substantive law and for the overall success of the international criminal justice project. The unbearable length and costs of criminal proceedings combined with the apparent difficulty with which ICTY and ICTR disposed of cases in their growing dockets led law and policy-makers to adjust the initial approach, but at that stage their concern was reactive and problem-based rather than fundamental and anticipatory in any sense. A series of post hoc remedial measures were taken, such as initiating expert reviews of the procedural practices with a view to expediting proceedings and imposing rigid completion strategies on the ad hoc tribunals. These steps have to some extent catalyzed the proceedings yet they proved only partially successful. But the lesson has been learnt for the purpose of establishing the permanent ICC. When elaborating the ICC Statute and the Rules of Procedure and Evidence, questions of suitable procedural law enjoyed increased attention by state delegations to, respectively, the Rome Conference and Preparatory Commission; legal and procedural experts played a notably more important role in the context of those diplomatic exercises oriented at compromise.

The second reason to entrust the elaboration of the bulk of procedural standards to the judges, particularly in the context of the ad hoc tribunals, was a constitutional consideration: states and parent UN organ (Security Council) wished to refrain from legislating on procedure. This decision is to be placed in the context of the unprecedented nature of the exercise of establishing subsidiary judicial organs of the UNSC, the role of powerful states in the respective conflicts, and the democratic deficit permeating the international governance system. In the circumstances, reserving procedural law-making to impartial and independent judicial authorities rather than having a political body with stakes in the outcome to define procedures was seen as the prudent solution. It was meant to deflect, to the extent possible, the victor’s justice critique and to strengthen the perceptions of legitimacy of the ensuing prosecutorial and adjudicative work. But, as noted, it came with costs, including the aforementioned diversification and incoherence, as well as the recurring legitimacy question. Those were the consequences of international criminal procedure being produced essentially by an extraordinary lawmaking agency and being relegated to the sub-law status.

3.1.2. No primary obligations?
The judge-made nature of international criminal procedure has clearly had effects on the dynamics and current state of its development. Besides the reasons discussed above, the claimed inattention by primary legislators to the need to codify procedural law of tribunals was attributed to the absence of positive international obligations upon states to ensure that the process for war crime trials satisfies certain standards.

---

104 Such review was initiated by the UN Secretary-General in relation to the ICTY, ICTR, and SCSL: see Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, 22 November 1999; Report on the Special Court for Sierra Leone submitted by the Independent Expert Antonio Cassese, 12 December 2006 (‘Cassese SCSL Report’).

105 See Chapter 3.

106 Sluiter, ‘Trends’ (n 93), at 585 (‘The development of general rules and principles of substantive international criminal law seems obvious in light of the international and mutual obligations between States underlying the direct responsibility under international law for international crimes. Similar obligations do not exist in respect
This argument deserves qualification: it is submitted that this could not have been the motive for the ostensible disregard of the importance of the process. Admittedly, the Genocide Convention 1948 and the UN Convention against Torture envisage, respectively, no or only cursory obligations upon states to organize the relevant criminal trials in a certain manner. But it can be argued that any fair trial guarantees and other relevant norms contained in the international and regional human rights treaties valid at the time would necessarily have to be respected by states parties when creating international criminal tribunals. Next to that, states are also directly bound by the procedural regime established in international humanitarian law. It should not be overlooked that the Geneva Conventions of 1949 and Additional Protocols thereto contain an extensive number of state obligations relevant to the penal repression of grave breaches or, as appropriate, other unlawful conduct in the context of both international and non-international armed conflicts. Specifically with regard to grave breach prosecutions, Protocol Additional I to the Geneva Conventions of 1949 provides that,

In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

of the procedural … for the prosecution of war crimes’; id. (n 92), at 605 (‘there is no rule of international law compelling a State to organize war crimes trials in a certain fashion.’).

107 See Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UNGA Resolution 260 (III) A, 9 December 1948; Art. 12 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UNGA Resolution 39/46, 10 December 1984, entry into force 26 June 1987 (‘Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.’)

108 In more detail, see Chapter 2.

109 Art. 49 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Art. 50 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Art. 129 Convention (III) Relevant to the Treatment of Prisoners of War, Geneva, 12 August 1949; Art. 146 Convention (IV) Relevant to the Protection of Civilian Persons in the Time of War, Geneva, 12 August 1949 (‘In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.’). See further Art. 105 Convention (III) Relevant to the Treatment of Prisoners of War, Geneva, 12 August 1949 (envisaging prisoner of war’s right to ‘assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter’, to be advised of these rights by the Detaining Power in due time before the trial’, or failing a choice of counsel, to have his appointed counsel dispose of ‘two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused’, including the right to ‘freely visit the accused and interview him in private’ and ‘to confer with any witnesses for the defence, including prisoners of war’ and finally, the right to have particulars of the charges on which the prisoner is to be arraigned and related documents, communicated to him ‘in a language which he understands, and in good time before the opening of the trial’ as well as to the advocate or counsel conducting the defence on behalf of the prisoner of war’).

110 Art. 3(1)(d) Convention (IV) Relevant to the Protection of Civilian Persons in the Time of War, Geneva, 12 August 1949 (prohibiting ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’) and Art. 6(2) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (‘No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; … (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt.’).
Chapter 1: Background and Purpose of the Study

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.111

The Protocol further details the content of the ‘applicable rules of international law’ by providing for a long list of due process guarantees for the purpose of prosecuting and trying by the detaining power of persons suspected of committing offences, including grave breaches.112 One may speculate as to whether those provisions would directly inform any possible law-making effort by states and international organizations if they were to legislate on international criminal procedure on the ground of pre-existing obligations. But this certainly refutes the thesis that their choice to refrain from enacting detailed procedural legislation for the tribunals was determined by the absence of such obligations.

3.2. Nature and genesis: From judge-made law to legislation and back again

3.2.1. General features

The general history of the procedural law of the tribunals has been presented in detail elsewhere and need not be reproduced in full detail for our purposes. 113 The following chapters in this book will examine more closely the features and evolution of trial procedure in various international and hybrid criminal jurisdictions. This section elaborates on the dynamics of the development of that law shaped by the fact that it is largely judge-made, insofar as those features account for its current state and the perceptions of its authority and legitimacy.

As noted by scholars, the circumstance that judges were responsible for the adoption and amendment of the Rules of Procedure and Evidence in most courts accounts, at least partially, for the lack of a premeditated design and a consensual and programmatic concept of

111 See e.g. Art. 75(7) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (emphasis added).
112 Art. 75(3) and (4) Protocol I (‘Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.’; ‘No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; … (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt; (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.’).
what it should amount to.\footnote{Sluiter, ‘The Law of International Criminal Procedure’, (n 92), at 607 (‘there is no true international design of criminal procedure’).} With an important, yet limited, exception of the ICC legislative process, international criminal procedures have not emerged from an endeavor of comprehensive theoretical reflection on what procedural model—one of the domestic legal traditions, any particular combination thereof, or a totally novel \textit{sui generis} system—would fare best for the purpose of prosecuting and adjudicating international crimes in the special legal, institutional, and operational circumstances of the tribunals. At the time of drafting and adopting the ICC Statute and its other legislative texts (Rules of Procedure and Evidence and the Regulations of the Court) and when establishing the more recent hybrid courts, there has already been rich empirical knowledge of ‘what works’ among the academia and the community of practice, based on the significant practical experience in the domain of international criminal proceedings. Some lessons have been taken into consideration and applied directly when structuring the proceedings in the more recent tribunals, but the conceptual component to buttress those experiments is yet to be added.

The nature of international criminal procedure tends to (sweepingly) be described as predominantly ‘adversarial’ or ‘common-law’, but incorporating, and increasingly so over time, some non-adversarial or civil law elements.\footnote{For recent expositions of this view, see Boas et al., \textit{International Criminal Law Practitioner’s Library, vol. III} (n 92), at 15 (‘international criminal law is infrastructurally adversarial but … it has many civil law overlays which can or do impact profoundly on the conduct of proceedings’); R. Vogler, ‘Making International Criminal Procedure Work: From Theory to Practice’, in R. Henham and M. Findlay (eds), \textit{Exploring the Boundaries of International Criminal Justice} (Aldershot: Ashgate, 2011) 105 (noting ‘the fact that while the rest of the world is moving inexorably towards more adversarial forms of process, the tribunals apparently are moving in exactly opposite direction.’).} The numerous pick-and-choose exercises undertaken within the discrete institutional and procedural frameworks of the tribunals, as well as some cross-fertilization effectuated without a master plan to ensure continuity, served to obscure that nature. Therefore, some choices made by the architects of the statutes and the drafters of the Rules between the existing national models, as well as any subsequent adjustments combining the seemingly incompatible components, might indeed appear conceptually arbitrary and incoherent, or even politically deterministic.\footnote{Sluiter, ‘The Law of International Criminal Procedure’ (n 92), at 608 (observing that ‘in every major negotiating effort the Americans played a vital and dominant role’).} From the first experiments with procedure at the IMT and IMTFE, the way those elements were blended into a single procedural system was borne out of a mix of practical realities and convenience as well as compromises achieved through negotiations. The result thus obtained may appear to have emerged from a set of unprincipled considerations.

The same could be said about choices made over time in order to recast the combinations of procedural elements and to add new elements. Even if meant to remedy specific deficiencies and streamline the procedural practice, they worked to fog the final destination and to undermine the sense of direction. Uncertain origins of, and philosophy behind, the procedure could be acceptable had the system worked seamlessly. But this has not been the case: in certain respects, the procedural mechanisms of the tribunals and courts may be deemed dysfunctional.\footnote{See e.g. Sluiter, ‘Procedural Lawmaking’ (n 103), at 327 \textit{et seq.} (discussing the initial Rule 65 which made provisional release conditional upon the defendant’s showing of ‘exceptional circumstances’ as an example of ‘bad law’ made by the judges); D. Tolbert and F. Gaynor, ‘International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies’, (2009) 27 \textit{Law in Context} 33, at 33-34 (calling the record of international criminal tribunals in respect of the expeditious trial requirement ‘poor, and in some instances shocking’ and as raising ‘serious questions regarding the practices of international courts as well as the efficacy of international justice generally.’).} In the extreme, one is led to wonder if the cumulative effect of
deficiencies in the process of administering international justice cancels the value of the project as a whole in an ‘ends—means’ assessment.

3.2.2. Activating judge-legislators: IMT and IMTFE

A largely common-law logic of proceedings embodied in the IMT Charter served to appease the sensitivities of the US representatives which became apparent during the London Conference (26 June – 8 August 1945) during which the Agreement with the IMT Charter annexed thereto was drafted and signed. While consistently advocating the need for a simplified and streamlined process not overburdened by ‘due process paraphernalia of domestic courts’, Americans persisted in their principled demand to hold a fair and public trial. By the time of the Conference, that demand prevailed over both the initial reported British preference for an extra-judicial solution and had to compete with the Soviet preference to deal with ‘major war criminals’ through a show trial leading to their imminent punishment. It is sometimes claimed that Soviets were agreeable with any avenue allowing the punishment the Nazis while French were content enough with just being included in that process. This is not fully accurate and certainly not what the insiders of the negotiations and the trial reported, at least not in relation to all stages of negotiations and matters at stake. In fact, during the London Conference, fundamental and extensive, albeit largely unanticipated, debates on the procedure and the roles of participants occurred and proved more contentious than the matters such as definitions of crimes, conspiracy and responsibility of organizations, location of the trial, selection of defendants etc. These accounts of the

---

119 T. Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir (Boston: Little, Brown and Co., 1992) 58 (noting the surviving differences between the British and Americans in London regarding the projected scale of the trial, as the British wished it to be over within two weeks) and 59 (reporting the view Gen. Nikitchenko, the Soviet delegate to the London Conference, expressed on 29 June 1945, that the chief war criminals had already been convicted by both the Moscow and Crimea (Yalta) declarations and that the IMT’s task would be ‘only to determine the measure of guilt of each particular person and mete out the necessary punishment’). See also D. Sprecher, Inside the Nuremberg Trial: A Prosecutor’s Comprehensive Account, vol. I (Lanham: University Press of America, 1999) 44 (citing Justice Jackson’s response: ‘These declarations are an accusation and not a conviction. That requires a judicial finding. Now we could not be parties to setting up a mere formal body to ratify a political decision to convict. The judges will have to inquire into the evidence and reach an independent decision. …I have no sympathy with these men, but, if we are going to have a trial, then it must be an actual trial.’).
120 Bush, ‘Lex Americana’ (n 118), at 521 (noting that ‘[t]he road to Nuremberg led essentially through Washington’) and 522 (‘it is simplistic but not inaccurate to say that the French seem to have been content just to be included among the Big Four victorious powers with the opportunity to punish offenders against the French victims, and the Soviets were agreeable to any plan that would lead to the punishment of Nazis’).
122 Report of Robert H. Jackson (n 121), at vi (the discords on procedure were ‘stubborn and deep’ and ‘it is less surprising that clashed developed at the Conference than that they could be reconciled’); Sprecher, Inside the Nuremberg Trial (n 119), at 44 (‘On several occasions there were fundamental disagreements during the discussions on procedures.’) and ibid. (citing the statement of Justice Robert Jackson made on 29 June 1945: ‘As to substantive law of the crimes we have little difference. But in the matter of procedure we are quite apart because of the fact that our legal traditions are so far apart. We will reconcile these differences only with difficulty … I think we are in a philosophic difference that lies at the root of a great many technical differences and will continue to lie at the root of differences unless we can reconcile our basic viewpoints.’) See also Taylor, The Anatomy of the Nuremberg Trials (n 119), at 63 (‘Perhaps the most intractable problem was the technical one of stating the respective functions and responsibilities of the Tribunal and the prosecution—a
debates during the Conference123 prove the simplistic descriptions which downgrade the importance of procedural discussions and the contributions by non-US delegations wrong.124

When faced with the task of developing the IMT procedure, it became clear to the conferees that none of the domestic systems could be taken as a blueprint.125 The major challenge for them was therefore to tackle and to understand their radically different approaches to procedure and to reconcile them in one blended system.126 The first real encounter of the two legal traditions with a view to creating a hybrid process exposed ‘much ignorance and suspicion of unfamiliar trial procedures on all sides’.127 But the delegates managed to overcome this considerable difficulty through dialogue.128 The process involved ‘trade-offs, compromises, or combinations of the two systems’,129 which ‘were crude but proved workable’.130

The ‘deep impress’131 of the US legal culture on the Nuremberg process manifested itself in the adoption of the essentially adversarial (two-case) approach in presenting evidence at trial, including the possibility for defendants to testify in person as witnesses.132 The representatives of the Continental legal tradition demonstrated greater flexibility and were better prepared to move along with the largely adversarial concept of trial.133 The primary

---

123 Report of Robert H. Jackson (n 121), at vi.

124 Cf. Bush, ‘Lex Americana’ (n 118), at 523 (‘specific procedural points were handled with dispatch. Occasionally uncertainty arose concerning how to harmonize Anglo-American trial procedure with civil law procedure. ... These issues were readily resolved, typically along common law lines’).

125 R.H. Jackson, ‘Nürnberg in Retrospect: Legal Answer to International Lawlessness’, (1949) 27 Canada Bar Review 761, at 766 (‘All agreed in principle that no country reasonably could insist that an international trial should be conducted under its own system and that we must borrow from all and devise an amalgamated procedure that would be workable, expeditious and fair.’); id., ‘Introduction’, in W.R. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of the World War II at Nuremberg Germany 1945-1946 (London: Barnes & Noble, 1995) xxxv.

126 Report of Robert H. Jackson (n 121), at vi; Tusa and Tusa, The Nuremberg Trial (n 121), at 76; Taylor, The Anatomy of the Nuremberg Trials (n 119), at 64 (‘our greatest problem is how to reconcile two very different systems of procedure’).


128 Report of Robert H. Jackson (n 121), at x (describing the Charter’s procedural provisions as ‘the first tried and successful effort by lawyers from nations having profoundly different legal systems, philosophies, and traditions to amalgamate their ideas of fair procedure so as to permit a joint inquiry of judicial character into criminal charges.’)

129 Sprecher, Inside the Nuremberg Trial (n 119), at 44. See also Tusa and Tusa, The Nuremberg Trial (n 121), at 85 (‘The Charter expressed the eventual happy union between the Common Law and Continental systems of procedure’).

130 Taylor, The Anatomy of the Nuremberg Trials (n 119), at 64. See also Report of Robert H. Jackson (n 121), at x (‘we had not achieved theoretical reconciliations in disregard of practical considerations’).

131 Bush, ‘Lex Americana’ (n 118), at 521.

132 Arts 16(e) and 24 IMT Charter. Sprecher, Inside the Nuremberg Trial (n 119), at (‘the manner of presenting evidence at the Trial followed closely the adversarial system, the Prosecution taking the lead in presenting evidence to the Tribunal and alter the Defense submitting its evidence.’)

133 Taylor, The Anatomy of the Nuremberg Trials (n 119), at 64 (‘The French and Russians went a long way to meet their allies’ psychological needs for the adversarial process, even though they understood it very imperfectly’). See also Tusa and Tusa, The Nuremberg Trial (n 121), at 77-78 (‘On all procedural matters the French and Russians were the more prepared to compromise. Jackson was less willing to meet half way ...[and] was the first to confess he was stubborn.’) On the serious difficulties Justice Jackson (but not his British counterpart) had understanding the civil-law indictment procedure, see ibid.
reason for that may have been the fact that the Americans had in captivity ten out of twenty-two defendants (including Goering) – a forceful argument which the US representative did not shun to use from time to time.\footnote{Taylor, The Anatomy of the Nuremberg Trials (n 119), at 62 (referring to Justice Jackson’s ‘show of force’ in this regard); Sprecher, Inside the Nuremberg Trial (n 119), at 45 (noting ‘Jackson’s constant reminder that the Americans held captive a majority of the top Nazi leaders, and that, one way or another, the Americans were determined to have an international trial.’)}

That said, the impact of the Soviet and French sides on refining the nuances of Nuremberg procedure cannot be deemed insignificant, despite the fact that it may not have been reflected as visibly in all aspects of the Charter or attracted detailed commentary. There were significant digressions from the US criminal procedure, which included the absence of technical rules of procedure,\footnote{Art. 18 IMT Charter (‘The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it seems to be of probative value.’)} the requirement of the specificity of indictment,\footnote{Art. 16 IMT Charter.} the right of defendants to make a final statement without being cross-examined,\footnote{Art. 24(j) IMT Charter.} and the possibility of holding trials in absentia.\footnote{Art. 12 IMT Charter.} It is true that for some of these features, the underlying rationale was in large part other than to approximate the trial to the civil-law tradition of the USSR, France or Germany. For example, while being perfectly in the spirit of the continental practice, the flexible regime for the admission of evidence accommodated the US concern—shared by others—that the incorporation of its overly complicated evidentiary law would render the process ineffectual and fail to meet the trials’ unique evidentiary needs.\footnote{The deliberate choice was made by the Americans and British to rely predominantly on written evidence. Tusá and Tusá, The Nuremberg Trial (n 121), at 76. See also Report of Robert H. Jackson (n 121), at xi; Jackson, ‘Introduction’ (n 125), at xxxv (‘we worked out an amalgamation of Continental and common law procedures which enabled the trial to proceed with fair speed and with less bickering over evidence and procedure than is common in most American criminal trials.’); Bush, ‘Lex Americana’ (n 118), at 524-25 (the adoption of a streamlined procedure at the IMT resulted from ‘the fear … that a court freighted with the due process paraphernalia of domestic courts would be ineffectual’).}

But other features clearly reflected the Continental logic and impact. Besides the right of unsworn defendants to speak, which may have been inspired as much by the British as by the continental practice,\footnote{Cf. Sprecher, Inside the Nuremberg Trial (n 119), at 45 and 48; Taylor, The Anatomy of the Nuremberg Trials (n 119), at 64 (noting the Continental origin of the practice). As correctly noted by Roberts, the characterization of the element as ‘contrary to Anglo-American’ is an inaccurate generalization, given that until 1898 criminal defendants in England and Wales were generally not allowed to testify in their own defence, while the unsworn statements from the dock were allowed at the time (being abolished only by the Criminal Justice Act 1988): see Roberts, ‘Comparative Law for International Criminal Justice’ (n 127), at 351 n30. However, the prosecution would not be required to present all of its evidence with the indictment, contrary to the Continental practice. See Sprecher, Inside the Nuremberg Trial (n 119), at 44; Taylor, The Anatomy of the Nuremberg Trials (n 119), at 64; E.J. Wallach, ‘The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Criminal Procedure’?, (1998-99) 37 Columbia Journal of Transnational Law 851, at 861 (on Article 16 as ‘a nod to continental practice’).} the notable result of the influence exerted by the Soviet and French was the procedure for the service of the indictment and the advance defence access to evidence. It featured a much longer charging instrument than in the Anglo-American practice (‘full particulars specifying in detail the charges against the defendants’) followed by disclosure of copious documents to the defence.\footnote{Report of Robert H. Jackson (n 121), at x.}
adversarial procedure. The projected design of the IMT as an essentially military tribunal not overburdened with the ‘due process paraphernalia’ of US civilian courts did not fully bear out. Although the paraphernalia of the evidence law was not there, the due process standards were more generous than those applied at home, as the incidental consequence of the negotiators’ endeavour to equip the IMT with a truly ‘international’ procedure.

The IMTFE Charter was modeled on the IMT Charter and similarly bore strong imprints of the adversarial procedure, save for non-technical rules for the admissibility of evidence. The vesting of full legislative authority in the Supreme Commander of Allied Powers removed the need for negotiations analogous to those which took place during the London Conference. This means that the continental positions did not have to be accommodated, and the influence of the US was decisive. For instance, unlike Article 16 of the IMT Charter, Article 9 of the IMTFE Charter did not require a continental-style indictment containing ‘full particulars’ of the charges, which led to the vague indictments. Nor were the IMTFE defendants accorded the right to make an unsworn final statement. Trials in absentia were not envisaged.

Both the Nuremberg and Tokyo Charters mandated the respective Tribunals to draw up rules of procedure that were to be consistent with the provisions of the Charters. At the IMT, the Committee of Chief Prosecutors was to draw up such rules and to submit them for approval to the judges who could adopt them, with or without amendment. Laconic documents consisting of respectively eleven and nine rules were adopted and subsequently supplemented by the additional rules issued in the form of oral decisions by the Tribunal later during the trial. Thus the judges engaged in the residual procedural lawmaking by discretion in order to cover the gaps in the IMT and IMTFE procedural frameworks.

Given that the Charter texts, amorphous as they were, gave indications as to the essential features of trials, the scope of procedural and evidentiary matters to be legislated

---

143 Bush, ‘Lex Americana’ (n 118), at 526-28 (observing that the tribunals’ ‘charters gave defendants many rights that went beyond anything allowed in the American system, federal or state’, with reference specifically to the IMT defendants’ (i) right to address the court without being sworn in and not subject to cross-examination in addition to the right to testify, (ii) right to an appointed counsel of their choice; and (iii) and access prosecution’s documentary evidence). See also Report of Robert H. Jackson (n 121), at xi (referring to (i) as the example of how the amalgamated procedure worked to the defendants' advantage).

144 Bush, ‘Lex Americana’ (n 118), at 530, 533, 540 (for example, as a result of the defence’s ability to locate and present evidence, the Nuremberg trial 'was a far cry from the American plan to have speedy, summary, martial-style proceedings without the full panoply of due process.').

145 Report of Robert H. Jackson (n 121), at x (referring to ‘internationalizing of the judicial process’ as a step toward ‘an effective world government’).

146 Art. 15 IMTFE Charter
147 Art. 13 IMTFE Charter.
150 Wallach, ‘The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials’ (n 141), n56 and at 877.
151 Art. 15(f) and (g) IMTFE Charter.
152 Art. 13 IMT Charter and Art. 7 IMTFE Charter.
153 Art. 14(e) IMT Charter.
155 For instance, the IMT promulgated rules of procedure to govern the defence phase of the trial: see ‘Sixty-Sixth Day, Saturday, 23 February 1946’, in Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol. 8, (Nuremberg: International Military Tribunal, 1947) 159-61.
Chapter 1: Background and Purpose of the Study

upon by the IMT and IMTFE judges and their direct legislative input was limited.\textsuperscript{156} This circumstance has been explained as follows: there was more time at the disposal of the allied powers for developing procedural provisions subject for inclusion in the Charters; and it was more difficult for the IMT and IMTFE judges to agree on specific rules in the absence of a developed international human rights corpus.\textsuperscript{157} More time taken in negotiations as such is no guarantee that an agreement can be reached by the signing parties on specific matters. Only where there is no serious polarization on the issues, can it facilitate the drafting process. Despite serious controversies with regard to procedure, the diplomatic work of the London conferees proved successful.

As for the drafting and adoption of the IMT and IMTFE Rules by the judges, neither the Charters’ texts nor the limited span of time available for the drafting and adoption of the Rules left judges room for extensive creative exercises in relation to the process.\textsuperscript{158} Reaching consensus on key directions with the statutory framework and laying down any more detailed rules would pose intractable challenges for the judges. As to the second point (unavailability of a conclusive body of human rights law), one can speculate whether the modern standards contained in human rights conventions or customary law, which allow for a margin of appreciation to states, could have greatly promoted the procedural judicial law-making at the IMT and IMTFE. Because the pre-existing notions of due process had certainly informed their Charters, the same standards could have guided judges in adopting the Rules. The most plausible reason for regulating the essentials of the procedure through the Charters rather than the Rules is the broad consensus among the delegates representing the allied powers, whereby the adversarial trial insisted upon the US was not fundamentally objectionable to any of them.\textsuperscript{159}

\subsection*{3.2.3. ‘Judge-made law’ era: ICTY, ICTR, and SCSL}

Arguably due to the prevalence of common-law lawyers in the UN Secretariat’s Office of Legal Affairs (OLA) team which drafted the UN Secretary-General Reports and the ICTY and ICTR Statutes, those Statutes contained several indicia of the common-law inclination.\textsuperscript{160} The latter manifested itself most notably through the express possibility for the accused to ‘enter a plea’ and the right to be tried in one’s presence.\textsuperscript{161} The absence of a judicial (investigative) role in the pre-trial stage (Articles 16 and 18 ICTY Statute and Articles 15 and 17 ICTR Statute) and the vesting of the investigative powers in the independent Prosecutor

\textsuperscript{156} Sluiter, ‘Procedural Lawmaking’ (n 103), at 317-18.

\textsuperscript{157} Ibid.

\textsuperscript{158} At the IMT, the meeting of the Tribunal members during which the Rules were discussed was held on 11 October 1945, and the Rules were promulgated on the 29\textsuperscript{th} (in less than three weeks). See Taylor, \textit{The Anatomy of the Nuremberg Trials} (n 119), at 123. The IMTFE judges expounded the view that the Charter’s rule on the non-availability of technical rules for the admissibility of evidence precluded them from ‘substituting any other body of technical rules of our own. … We cannot lay down technical rules. We might spend months in trying to agree upon them and then fail to reach an agreement.’ See Wallach, ‘The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials’ (n 141), at 869 (citing President Webb).

\textsuperscript{159} See Taylor, \textit{The Anatomy of the Nuremberg Trials} (n 119), at 74 (‘no matter of principle was at stake’ with Art. 24 IMT Charter).


\textsuperscript{161} Arts 20(3) and 21(4)(d) ICTY Statute; Art. 19(3) and 20(4)(d) ICTR RPE. On the contested question of \textit{in absentia} trials in the context of adopting the ICTY Statute, see R. Zacklin, ‘Some Major Problems in the Drafting of the ICTY Statute’, (2004) 2 Journal of International Criminal Justice 361, at 364-65.
are placed by a number of authors into the same category. However, these elements do not *per se* evince such an inclination because the status in many ‘inquisitorial’ civil law countries is comparable, in that the prosecution is vested with pre-trial investigation functions and his role is that of an officer of the court, not merely that of a partisan actor.

Overall, the Statutes provided fewer directions regarding the nature of the proceedings than the historical military tribunals and the penchant for the adversarial process was less explicit than in those antecedents. Due to the urgency of establishing the tribunals and the perceived inappropriateness for a political organ to formally adopt the procedure, the Statute drafters granted the ICTY and ICTR judges broader legislative powers, responsibilities, and opportunities in relation to the process than those vested in the IMT and IMTFE judges. Such competences were not made subject to veto or supervisory powers of the primary legislators. ICTY and ICTR Statutes merely obligated the judges to ‘adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters’.

Given the rather open-ended character of the texts and the numerous lacunae to be filled in respect of the procedure, the Statutes did not foreclose the adoption of rules departing from the common-law script. The above-mentioned features such as the prosecutorial investigative powers and guilty pleas had no strong deterministic pull. The Statute as a legislative text on its own is inconclusive and does not embody an unequivocal preference for any specific type of procedure and (adversarial, inquisitorial, or mixed) character of judge-made RPE. The provision in the Statute that is directly relevant in that regard (Art. 15) is silent on the expected nature of the Rules. Moreover, judges had a leeway to re-interpret the amorphous procedural constructs in the Statute. For example, they were not...

---

162 E.g. A. Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’, in B. Swart et al. (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 89 (‘The Statute already tilted the structure towards an adversarial system, creating an independent prosecutor with the power to investigate cases and initiate prosecutions.’); Sluiter, ‘Procedural Lawmaking’ (n 103), at 318.
164 UNSC Resolution 808 (1993), 22 February 1993, para. 2 (requesting the Secretary-General ‘to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter’).
165 L.D. Johnson, ‘Ten Years Later: Reflections on the Drafting’, (2004) 2 *JICJ* 368, at 374-75 (‘It was felt that it would be highly inappropriate for a political body to be involved in the drafting or even approval of such Rules; the integrity and impartiality of the proceedings required that only judicial branch of the Tribunal be responsible.’ See also V. Morris and M.P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the former Yugoslavia* (Irvington-on-Hudson, NY: Transnational, 1995) 176.
166 Sluiter, ‘Procedural Lawmaking’ (n 103), at 319.
167 This caused objections in some quarters. For example, the Helsinki Watch reacted to what it saw as ‘near-complete abdication of responsibility of responsibility in drafting rules of evidence and procedure’ by urging the UNSC ‘to amend the statute to retain oversight over the judiciary’s adoption of rules …, or to issue a statement that makes clear that it intends to exercise oversight responsibilities over rulemaking.’ Helsinki Watch, ‘Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal’, in Morris and Scharf (n 165), at 493-94.
168 Art. 15 ICTY Statute; Art. 14 ICTR Statute.
169 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1464 (pointing out correctly that the judges’ choice was not self-explanatory). Cf. Sluiter, ‘Procedural Lawmaking’ (n 103), at 320 (‘the fact is that the Statute contains no basis for a mixed procedure, as in procedural terms it is purely adversarial. For example, an active fact-finding role for the judiciary and the creation of a pre-trial judge are outspoken legislative procedural choices that seem not to be in keeping with the Statute.’)
bound to define the exact meaning of ‘entering a plea’ in Art. 20(3) ICTY Statute strictly in terms of the common-law ‘guilty pleas’. It is implausible that the Statute architects did not anticipate or wished to preclude a degree of amalgamation of procedures drawn from various legal traditions during the judges’ drafting of the Rules; at least there is no evidence to that effect. \(^\text{170}\)

The draft ICTY Rules were discussed by the judges in the course of four months and adopted at the second plenary session on 11 February 1994 as a comprehensive and substantial document consisting of 125 rules. \(^\text{171}\) In the drafting task the judges were assisted by the UN OLA and a number of states, organizations and NGOs that submitted their proposals. \(^\text{172}\) It is a notorious fact that the Rules eventually adopted to a large extent relied upon the proposed sets of rules with commentaries modeled on the Federal Rules of Procedure drafted by the US Department of Justice and a draft prepared by the American Bar Association. \(^\text{173}\) That draft was particularly influential because it was comprehensive and timely. \(^\text{174}\) The availability of such a draft at the time of elaborating the ICTY Rules was, again, a situational and prosaic factor that had, however, considerable importance. For the purpose of that exercise, the Nuremberg and Tokyo precedents and their respective Rules of Procedure were of limited value, due to their ‘very rudimentary’ character \(^\text{175}\) and because they predated the significant developments that had occurred since in the domain of international standards of due process. \(^\text{176}\) In this sense, the ICTY judges developed their Rules from a blank slate. \(^\text{177}\) The crucial idea behind the drafting effort was to provide the participants with a procedural codification that would be sufficiently precise yet neither ‘hyper-technical’ nor repetitive of the provisions in the Statute. \(^\text{178}\)

It is thus the ICTY judges’ reading of the procedure embodied in the Statute as ‘largely adversarial’ that is responsible for the common-law direction in which the Rules were drafted. Like half a century earlier with the IMTs, the exercise essentially amounted to

170 Indirect evidence to the contrary, however, exists, given that some statutory provisions were in itself of a mixed or novel nature: e.g. Johnson, ‘Ten Years Later’, (n 165), at 369 (‘many provisions of the Statute had to be drawn up by “patchwork” or “from scratch” (e.g. the provision on appellate proceedings).’)

171 First ICTY Annual Report (n 160), paras 2, 39, and 55. See ICTY RPE (IT/32, 14 March 1994).


174 Morris and Scharf, An Insider’s Guide to the ICTY (n 165), at 177 (‘Of several States and organizations that submitted comments and draft provisions for the Rules, the United States submitted by far the most comprehensive set of proposed rules with commentary, numbering approximately seventy-five pages. This was particularly influential because of its detailed coverage of procedural and evidentiary issues, the explanation of the reasons for the proposals contained in the commentary and the timeliness of the submission.’)

175 First ICTY Annual Report (n 171), paras 54 and 71.


178 Kirk McDonald, ‘Trial Procedures and Practices’ (n 176), at 554.
an amalgamation and hybridization of concepts from different legal traditions in a ‘workable’ and ‘sensible’ fashion. An amalgamation and hybridization of concepts from different legal traditions in a ‘workable’ and ‘sensible’ fashion. Besides the limited precedent of Nuremberg and Tokyo pointing in the common law direction and the situational factor of having a comprehensive US draft, the adversarial tilt was rationalized as strengthening the essential appearance of impartiality whereby judges were not to be seen as siding with the prosecution. Accordingly, the structure of the ICTY pre-trial and trial proceedings embody the common-law based approach, in the sense of being party- rather than judge-led, hinging upon distinct cases for each party, and reflecting the adversarial approach to ordering the examination of evidence (examination-in-chief, cross-examination, and re-examination).

Other than that, ‘three important deviations’ from the adversarial systems were incorporated in the Rules: (i) no technical rules for the admissibility of evidence (being seen as the remnant of ‘the ancient trial-by-jury system’); (ii) the Tribunal’s power to order the production of additional or new evidence *pro proprio motu* ‘to ensure that it is fully satisfied with the evidence on which its final decisions are based’; and (iii) no granting of immunity (from prosecution) and no envisaged practice of plea bargaining. In addition, ICTY judges adopted a number of rules implementing the provisions of the Statute and filling any gaps therein in a way that reflected the unique subject-matter of the proceedings and purported to meet the special needs of the Tribunal. Those included the rules for the protection of victims and witnesses as envisaged by Article 22 of the Statute and the law of evidence on which the Statute—unlike the IMT and IMTFE Charters—was silent and thus fully deferred to the ‘judicial legislature’.

While the ICTY scheme of trial proceedings has remained largely unchanged since, it was further detailed and refined through judicial rule-making. Given the diverging interpretations of the law by different benches, the trial practice has varied significantly, depending on the Chamber in question, on a range of issues. Those have included, among others, the judicial approaches in calling evidence, questioning witnesses, defining the scope

---

179 E.g. Meron, ‘Procedural Evolution in the ICTY’ (n 19), at 521 and 522.
180 Meron, ‘Procedural Evolution in the ICTY’ (n 19), at 522.
182 First ICTY Annual Report (n 160), paras 72-74. In the drafting process of the ICTY Statute, the idea of granting immunity to a potential indictee in exchange for becoming a witness against another alleged perpetrator was rejected as ‘highly inappropriate for crimes of this magnitude and viciousness.’ See Johnson, ‘Ten Years Later’ (n 165), at 372-73.
183 *Ibid.*, paras 75-83, referring to Rules 34, 69, 71, 75, 90 93, 96 ICTY RPE (IT/32, 14 March 1994). See *ibid.*, para. 75 (‘In drafting the rules of procedure and evidence, the judges of the Tribunal have endeavoured to incorporate rules that address issues of particular concern arising from those aspects of the conflict, namely patterns of conduct, the protection of witnesses and sexual assault.’)
184 Sluiter, ‘Procedural Lawmaking’ (n 103), at 319.
185 For example, Rule 85(A)(vi) was added in 1998 to envisage a stage for the submission of ‘any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty’. See Rule 85(A)(vi) ICTY RPE (IT/32/Rev. 13, 10 July 1998). Rule 84bis was adopted in 1999 to allow the accused to make a statement under the control of the TC without being submitted to cross-examination: Rule 84bis ICTY RPE (IT/32/Rev. 17, 17 November 1999). Rule 86 was amended recurrently in 1997-2000 to refine the procedure for closing arguments. The new rule was added in July 1998 (the current Rule 90(F) and (G)) to envisage the TC’s power to control the mode and order of evidence examination and laying down the detailed rules on the admissible scope of cross-examination, respectively: see Rule 90(G) and (H) ICTY RPE (IT/32/Rev. 13, 10 July 1998).
of cross-examination and so on, being informed, among others, by the national backgrounds of the judges. In relation to other aspects of the process, the judges also have continually amended the Rules to flesh out and further perfect the open-textured ICTY procedural system. Although that power was not specified in the Statute, it was assumed by them and codified in the Rules as a logical extension of the competence to adopt the procedural rules in the first place.187 The vote of ten out of fourteen permanent judges required for amending the rules at the plenary insured the flexibility with which the relatively open-ended procedural system could develop.188 In the course of two decades (1994-2013), the Rules grew into a ‘thick’ set of norms regulating the procedural practice in great detail. By the time of writing, the ICTY RPE have been adjusted in forty-nine rounds and hence the pace of amendments was an average of more than five every two years. Many of the amendments went far beyond mere technical and language adjustments. From 1998 onwards, they purported to overhaul the various aspects of process which proved to be wanting in light of the need to expedite the proceedings, which became more urgent with the advent of the Completion Strategy in 2002-2003, as well as due to difficulties faced by the parties in collecting and presenting evidence in complex international crime cases. The amended rules were born out of experience of adjudication and codified, in the interest of clarity, the established (appellate) jurisprudence that settled specific issues definitively.189

With the initial character of the procedural mechanism as envisaged in the Rules already being rather uncertain in terms of common law v. civil law taxonomy, the ceaseless amendment process further served to obscure the nature of the ICTY proceedings. This fueled the debate as to whether international procedure is largely ‘adversarial’, mixed/hybrid, or sui generis – the debate which has hardly been satisfactorily concluded, presumably in part due to the far from uniform understanding of the terms.190 At present, the tide of opinion

---

188 Rule 6(A) and (B) ICTY RPE (Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than ten permanent Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges. … An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the permanent Judges’). See also Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 85.
189 S. Zappalà, ‘Comparative Models and the Enduring Relevance of the Accusatorial—Inquisitorial Dichotomy’, in Sluiter et al. (eds), International Criminal Procedure (n 48), at 48. For example, the adoption in September 2006 of Rule 92ter ICTY RPE allowing the admission of written statements in lieu of examination-in-chief codifies the appellate decision in Milošević: Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, Prosecutor v. S. Milošević, Case No. IT-02-54-AR73.4, AC, ICTY, 30 September 2003. See Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 99-100.
vindicates the view that the ICTY process is perfectly *sui generis*, in that it blends the elements associated with common law and civil law in the way that distinguishes it from any other (national) procedural mechanism.191

The conspicuous absence from the original ICTY Rules of the norms governing plea-bargaining, initially presented as a significant departure from the common law adversarial scheme, was one aspect which underwent a legislative reform as judges chose to provide regulation of activities which in fact had been taking place between the parties.192 Likewise, the far-reaching reforms embarked upon by the ICTY from mid-1998 onwards to increase the involvement of judges in the pre-trial management of the case, including the institution of a pre-trial judge and various conferences to be held at the pre-trial stage,193 were meant to streamline trials against the criticism that those are overly lengthy.194 Those measures were also to enable the ICTY to meet the completion strategy objectives endorsed by the UN Security Council.

The common belief is that the tenor of legislative reforms undertaken by the judges was such as to move the procedure from the initial common-law oriented approach in the civil-law direction.195 But its accuracy has rightly come to be questioned because the reformed procedure stopped short of transforming the procedural model into a civil law one and has never really approximated the ostensible civil-law destination.196 The nature of the procedural shifts has been more appropriately rationalized in terms of the ‘managerial judging’ model – a mutation of the common law approach.197 It aimed at activating judges at

---

191 See, however, challenges to the ‘*sui generis*’ paradigm: Langer, ‘The Rise of Managerial Judging’ (n 181), at 837; Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 83 (‘these descriptions risk obscuring rather than illuminating the nature of the ICTY procedural system. While emphasizing the *specialness* of the ICTY procedures, they also suggest that there can be no point of comparison, either in the world today or in history.’). See e.g. F. Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?’, in J. Walker and O. Chase (eds), *Common Law, Civil Law and the Future of Categories* (Markham, Ontario: Lexis Nexis, 2010) 439 (arguing that in the ICTY framework, ‘[a] synthesis between common law and civil law systems has been reached – their convergence has been completed’).


193 See Rules 65bis, 65ter, 73bis and 73ter ICTY RPE. The reform was enacted as a result of the 18th Plenary session (9-10 July 1998), whereby 6 new Rules were added and 25 others amended: for an overview, see Mundis, ‘From “Common Law” Towards “Civil Law”’ (n 190), at 370-73.

194 Kirk McDonald, ‘Trial Procedures and Practices’ (n 176), at 556 and note 374 (observing that ‘[t]he main goal of these amendments was to develop means of better expediting trials and improving the management of cases’ and comparing them to reforms undertaken by some national systems when ‘faced with a drastic increase in the number of cases while judicial resources remain scarce’); Mundis, ‘From “Common Law” Towards “Civil Law”’ (n 190), at 370 et seq.

195 E.g. Boas, ‘A Code of Procedure and Evidence for International Criminal Law?’ (n 177), at 1-2; Mundis, ‘From “Common Law” Towards “Civil Law”’ (n 190), at 368 (arguing that the increased level of control exercised by the Trial Chambers moved the ICTY process ‘in the direction of the civil law approach’ and that ‘[a]s a result, a truly mixed jurisdiction … that contains elements of both the common law and civil law … is emerging’); Meron, ‘Procedural Evolution in the ICTY’ (n 19), at 522-23 (with reference to Rules 65bis, 65ter, 73bis, and 73ter: ‘the extensive amendments since then [1994] show that the Rules have progressively taken much guidance from the civil-law system.’); C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (The Hague: T.M.C. Asser Press, 2010) 187-88 (‘The advent of a pre-trial judge could be regarded as a shift towards civil law, insofar as it promotes exchange between the parties and supplies a chamber with more information that is the case in the common law “two cases approach”’ and 307. But see Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 87 (noting that the ‘shift’ terminology (wrongly) suggests that ‘the Rules have been reshaped or moulded towards a certain pre-conceived framework’).

196 For a comprehensive and seminal study on this issue: Langer, ‘The Rise of Managerial Judging’ (n 181). For example, the ICTY institution of pre-trial judge and the delivery of parties’ materials to him are no analogues to investigating judge and *dossier* at civil law. See further Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1465, 1470; Tochilovsky, ‘International Criminal Justice’ (n 160), at 336.

Chapter 1: Background and Purpose of the Study

the pre-trial stage and vesting them with the role as managers responsible for narrowing down the issues in dispute between the parties, facilitating agreements on facts and evidence, and removing obstacles for the efficient conduct of the trial proceedings, but fell short of granting judges investigative powers.\textsuperscript{198} Along with the mentioned allowance made for plea-bargaining and the removal of the preference, all of the procedural reforms pursued the practical purposes of case-management, alleviating the docket, and expediting proceedings.\textsuperscript{199}

In sum, the ICTY judges’ legislative activities undertaken over the past two decades mostly worked to strengthen the Tribunal’s ability to meet the institutional objectives as determined by its parent organization, to remedy the initial choices which proved unfortunate, and/or to respond to the procedural problems arising in individual cases.\textsuperscript{200} Based on the uncertain bases from the outset, the ICTY procedural law thus developed in an incremental and piecemeal fashion, whereby changes and innovations were introduced \textit{post hoc} in response to specific challenges, rather than stemming from a coherent legislative policy and theoretical foundation.\textsuperscript{201}

Adopted on 29 June 1995, the ICTR RPE largely mirrored the original ICTY RPE in accordance with the ICTR Statute.\textsuperscript{202} But, as clarified in the Secretary-General’s report,

\begin{quote}
It was thus the intention of the Council that, although the rules of procedure and evidence of the Yugoslav Tribunal should not be made expressly applicable to the Rwanda Tribunal, they should nevertheless serve as a model from which deviations will be made when the particular circumstances of Rwanda so warrant.\textsuperscript{203}
\end{quote}

The subsequent evolution of the ICTR Rules generally followed the trajectory taken by the ICTY. But it also tended to ‘lag behind’, as the ICTR judges did not uncritically incorporate all the ICTY’s progressive innovations and generally adopted a more conservative legislative stand than their ICTY counterparts.\textsuperscript{204} More than the ICTY blueprint, the specific needs and circumstances of the ICTR guided its judges in amending the procedural rules.

When the SCSL Statute was adopted in 2002, it was decided that the ICTR RPE ‘obtaining at the time of the establishment of the Special Court shall be applicable \textit{mutatis}

\begin{quote}
\footnotesize
\textsuperscript{198} \textit{Ibid.}, at 877-85. See e.g. at 878 (while ‘the inquisitorial system presumes an official investigation that impartial officials conduct to find the truth, the managerial judging system conceives of procedure as a device that the court uses with (even involuntary) collaboration and coordination from the parties to process cases as swiftly as possible.’).

\textsuperscript{199} According with Langer’s explanation, see e.g. Sluiter, ‘Procedural Lawmaking’ (n 103), at 320 (‘there is no real and significant move towards the inquisitorial procedural system. … We thus witness a preference for elements of every system and legal tradition which assist the judges in disposing quickly of their case load.’)

\textsuperscript{200} Kirk McDonald, ‘Trial Procedures and Practices’ (n 176), at 615 (‘Each modification has been based on the experience gained from the actual trials’) and 621 (‘Numerous amendments and new Rules have been adopted, reflecting the experience gained from their application and the lack of significant precedent to guide the Tribunals.’)

\textsuperscript{201} The characterization of the ICTY as a ‘laboratory of international criminal procedure’ and its reforms as ‘experimentation’ may be misleading, in the sense that judges themselves may not have held similar perceptions when amending the Rules. Rather than staging experiments for learning \textit{in abstracto} how the new procedures would function, their concern was to devise workable and fair solutions. Due to the important interests at stake, the ‘experiments’ bearing a risk of failure could simply not be afforded. Cf. Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), \textit{passim}.

\textsuperscript{202} \textsc{Art. 14 ICTR Statute} (‘The Judges … shall adopt … the Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.’)

\textsuperscript{203} UNSG Report on the establishment of the ICTR Statute (n 90), para. 18 (emphasis added).

\textsuperscript{204} In 1995-2012, the ICTR RPE were amended 19 times, thus the average amendment rate was slightly more than 1 amendment a year. For an example of ‘progressive’ ICTY provisions which the ICTR did not take over (in their entirety), see Rules 65\textsuperscript{ter} and 73\textsuperscript{bis} (D) and (E), and 90 (G) ICTY RPE. See Boas et al., \textit{International Criminal Law Practitioner’s Library, vol. III} (n 92), at 25 n18 and 28.
\end{quote}
mutandis to the conduct of the legal proceedings before the Special Court’. The SCSL judges were authorized to amend the Rules or ‘adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation’ and, in so doing, be guided, as appropriate by the Criminal Procedure Act 1965 of Sierra Leone. The SCSL judges approached this task seriously and creatively and already at the second plenary meeting held in March 2003 in London they considerably changed the Rules inherited from ICTR to adapt them better to the specific objectives and circumstances of the Special Court.

The dynamic and logic of subsequent amendments to the SCSL Rules, of which there have been twelve rounds in ten years, reflected the Court’s aspiration to address the unique challenges facing it through experimentation and problem-based innovations. Like ICTR judges, the SCSL judges adopted a pick-and-mix approach for that end. Depending on what they deemed appropriate in the circumstances of the Court, they sometimes took over solutions pioneered by the ICTY (or ICTR), declined to do so, or introduced novel alternatives. The SCSL judges’ approach towards carrying out their legislative duties has been comparable to that of the other two tribunals. The President’s annual reports as well as case law have occasionally elucidated the rationales for the procedural reforms.

Many of the reforms were aimed at expediting the process in view of the more limited resources than those available to the ICTY and ICTR. The SCSL’s effective abolition of interlocutory appeals arising from preliminary motions and making exceptional interlocutory appeals against decisions on other motions is a good example, albeit certainly not the only one. But generally such clarifications have been brief and superficial. The SCSL judges have not been more transparent in explaining and justifying the rule amendments than their counterparts at the ICTY and ICTR. This accounts for the fact that there has been lesser

---

205 Art. 14(1) SCSL Statute.
206 Art. 14(2) SCSL Statute.
207 First Annual Report of the President of the Special Court for Sierra Leone for the Period 2 December 2002 – 1 December 2003 (‘First SCSL Annual Report’), at 7 and 12 (noting, in particular, the amended procedure for the review of an indictment pursuant to Rule 47 and, more generally, that ‘the applicable body of the Rules was generally harmonised with the particular features contained in both the Agreement and the Statute and other specific situations.’)
208 E.g. Rule 73bis (G) SCSL RPE (vesting in the Chamber the power to ‘invite the Prosecutor to reduce the number of counts charged in the indictment’ and ‘determine a number of sites or incidents comprised in one or more of the charges made by the Prosecutor, which may reasonably be held to be representative of the crimes charged’, which existed at the ICTY but not the ICTR). See Fourth Annual Report of the President of the Special Court for Sierra Leone, January 2006 to May 2007, at 24 (in relation to the 8th Plenary Meeting. 21-24 November 2006). At the same time, the SCSL followed the suit of the ICTR rather than ICTR in choosing not to institute pre-trial judge: see Cassese SCSL Report (n 104), para. 106 (the SCSL Plenary rejected the proposal for a rule specifying the tasks of a Pre-Trial Judge analogous to Rule 65ter ICTY RPE).
209 Sub-Rules 72 (E)-(G) were added at the 3rd plenary meeting (28 July - 1 August 2003) and further amended at the 4th meeting, obligating the TC to refer preliminary motions raising ‘serious questions of jurisdiction’ or ‘issues significantly affecting fair and expeditious conduct of the proceedings or the outcome of a trial’ directly to the bench of at least three judges of the AC for final resolution at first instance. The other ‘preliminary motions’ would be disposed of by the TC itself, without a possibility of appeal. This reform was explained by the consideration that ‘such procedure would substantially expedite proceedings and the judicial workload.’ See First SCSL Annual Report (n 207), at 12-13; Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, Prosecutor v. Norman, Prosecutor v. Kallon, Prosecutor v. Gbao, Cases Nos SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, AC, SCSL, 4 November 2003, paras 9-13. Motions other than ‘preliminary motions’ generally without appeal, save for exceptional circumstances and to avoid irreparable prejudice to a party (Rule 73(B) SCSL RPE).
210 Concerning the amendment of Rule 98 (procedure for the judgment on the motion for acquittal), see Third Annual Report of the President of the Special Court for Sierra Leone, January 2005 to January 2006, at 16.
211 The SCSL is the only tribunal whose website does not make accessible all versions of the Rules of Procedure and Evidence; only the current version is published.
knowledge, critical reflection and open engagement concerning the validity and fairness of the SCSL procedural model.\textsuperscript{212}

The experience of the second-generation tribunals makes clear that the approach of outsourcing legislation of procedural rules from political bodies (states and the UN organs) to the judicial authorities of the respective tribunals is advantageous in several respects. Collapsing of the law-maker and adjudicator into one body removes the distinction between the creation and interpretation of rules and imbues the procedural system with extraordinary dynamism.\textsuperscript{213} This feature has been subject to varying assessments. For one, bypassing the need to await an intervention by an external law-making body conveniently enabled the ICTY, ICTR, and SCSL to quickly amend their procedures in light of unanticipated eventualities and operational challenges or to reflect the lessons learnt from particular cases.\textsuperscript{214} Blessed (or cursed) with the power to adopt and amend the Rules, judges have—to varying degrees in the three courts—considered it as their important obligation to hold their finger on the pulse of the institution and to constantly revise and perfect the procedural solutions adopted ‘in the interests of justice’.\textsuperscript{215} The legislative initiative as performed by the judges was aimed at responding to specific issues arising in practice and hardly ever forward-looking.

At the same time, the judicial provenance of the procedural law has given rise to objections of a general nature (as opposed to specific concerns raised by the substantive quality of some rules). For example, outsourcing of procedural lawmaking to the judges with a view to preserving the appearance of impartiality of the courts was regarded as somewhat paradoxical from a constitutional perspective of the division of powers.\textsuperscript{216} It was argued that the enactment of the procedural law by a political body would not be unusual in light of the domestic practice since the parliaments legislate on criminal procedure, but the merging of legislative and adjudicative competences in one organ is problematic from the perspective of a separation of powers.\textsuperscript{217} This argument cannot readily be accepted as such because it overstates the concern about the accumulation of legislative and adjudicative functions in one body as being inherently problematic and irreconcilable with constitutional principles.\textsuperscript{218}

\textsuperscript{212} For an important exception, see Cassese SCSL Report (n 104) and Suggestions for Consideration by the Plenary of Possible Amendments to the Rules of Procedure and Evidence of the Special Court, submitted 23 October 2006 by Antonio Cassese, Independent Expert (‘Cassese Suggestions on SCSL’)
\textsuperscript{214} Providing examples, see Boas et al., \textit{International Criminal Law Practitioner’s Library}, vol. III (n 92), at 31.
\textsuperscript{215} E.g. Address by President Cassese to the UN General Assembly, 4 November 1997 (‘essential, in the interests of justice, to amend the Rules in light of new problems … or unanticipated situations’), cited in Morris and Scharf, \textit{An Insider’s Guide to the ICTY} (n 165), at 423; Jorda, ‘The Major Hurdles’ (n 19), at 583 (‘each reform reveals new needs, adaptation is a constant obligation’).
\textsuperscript{218} The additional issue of the politicized nature of selecting judicial candidates are of more general nature and do not make the accumulation of functions inherently problematic (cf. Sluiter, ‘Procedural Lawmaking’ (n 103), at 326 and 331). The system is not built and cannot operate on the assumption that the appointment process will not lead to the election of eligible and qualified candidates; otherwise, one may wonder why any judges should be appointed at all. However, the related concern of the absolute lack of supervision over the legislative
First, courts in some common law countries also legislate on the procedure without involvement of the legislature.\textsuperscript{219} Secondly, the validity of the analogy (or even identification) between constitutional and law-making processes on the domestic and international level is contestable.\textsuperscript{220} The need to separate the legislative from political process may be not as strong in the domestic context as was the case when establishing the ad hoc tribunals. The national legislative process is democratically accountable and parliaments neither face nor need to shield themselves from ‘victor’s justice’ objections which haunt international criminal justice. Thirdly, the combination of law-making and law-enforcing functions in one organ is not, as such, objectionable in the context of an international legal order. On the contrary, it accords with the conventional practice in international adjudication, dispute settlement, and arbitration that it is up to adjudicators to draw the applicable procedural rules. Indeed, in all other international, albeit non-criminal, courts and tribunals—including the International Court of Justice, the European Court of Human Rights and the International Tribunal for the Law of the Sea—procedures were crafted by the judges themselves.\textsuperscript{221} That said, some of the general concerns raised by the functioning of the ICTY merged judge-legislator model are valid, in particular in relation to the rules of which the judges are themselves primary addressees.\textsuperscript{222}

The second criticism has been leveled at the frequency of amendments (especially at the ICTY).\textsuperscript{223} Save for the arguably excessive and unnecessary exercises in codifying rules already firmly established in the jurisprudence,\textsuperscript{224} this critique is not fatal \textit{per se}. It can be rebutted, for instance, from the position of an earlier asserted need for procedural dynamism, if it is to be assessed positively.\textsuperscript{225}

The third point gives a reason to pause. It concerns the accountability of judges in exercising their rule-making powers while ensuring the viability of the procedural system, in the virtual absence of external oversight concerning their compliance with the Statute.\textsuperscript{226} This

\begin{itemize}
\item authority of judges (such as through \textit{ex post facto} judicial review) has merit. See Guariglia, ‘The Rules of Procedure and Evidence of the ICC’ (n 215), at 1122-3.
\item Boas et al., \textit{International Criminal Law Practitioner's Library, vol. III} (n 92), at 23 (this is the case for some US state supreme courts).
\item Cf. Sluiter, ‘Procedural Lawmaking’ (n 103), at 324 (‘little attention has been given to the problematic aspect of the accumulation of judicial and legislative functions in the same body. This is surprising, \textit{because legislation has to be the result of a political process}, and transparent in its creation’, emphasis added).
\item Art. 30(1) ICJ Statute (‘The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.’); Art. 25(d) ECHR (‘The plenary Court shall … adopt the Rules of Court’); Art. 16 Statute of the International Tribunals for the Law of the Sea.
\item See Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1117-18 (discussing the example of the 1999 amendment of ICTY Rule 15 concerning disqualification of judges).
\item Sluiter, ‘Procedural Lawmaking’ (n 103), at 322 and 324 (‘the number of amendments may be said to exceed what has been reasonably necessary … instead of [judges] adopting a highly reserved attitude towards it, as they should do’ but cf. \textit{ibid.} (n 213)); Boas et al., \textit{International Criminal Law Practitioner’s Library, vol. III} (n 92), at 28 (‘By any regulatory standard, this is an unusual number of amendments’).
\item Sluiter, ‘Procedural Lawmaking’ (n 103), at 322 (providing an example of Rule 45ter ICTY RPE which ‘adds nothing to the case law on self-representation’) but cf. Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 104 (seeing several rationales for the adoption of the same rule and its effective use in \textit{Karadžić}); Combs, ‘Legitimizing International Criminal Justice’ (n 45), at 353-54 (Rule 45ter ‘signaled the ICTY’s adoption of a more restrictive approach that shows less solicitude for a defendant’s desire to self-represent.’). Generally positive about the practice of codifying norms established in the AC case law: Boas et al., \textit{International Criminal Law Practitioner’s Library, vol. III} (n 92), at 31.
\item ICTY judges have acknowledged the frequency of rule amendments, explaining this by the need to devise ways allowing them to deal with specific issues: P. Robinson, ‘Rough Edges of the Alignment of Legal Systems in the Proceeding at the ICTY’, (2005) 3(5) \textit{HJC} 1037, at 1038.
\item See e.g. Karnavas, ‘The ICTY Legacy’ (n 69), at 1065 (‘the judges have been unimpeded in interpreting the contours of the Statute and defining the extent to which the Rules can be amended. In other words, no entity is judging or monitoring the judges to ensure that they are not improperly amending the Rules or instituting
\end{itemize}
Chapter 1: Background and Purpose of the Study

charge should be taken seriously especially in light of the related criticism concerning the non-transparent and non-democratic process of law-making by the judges. It is a result of the non-public nature of consultations at the plenary meetings during which the amendments are decided. To the extent that it focuses on the need for more openness as opposed to the ‘political nature’ of the legislative process, it is certainly a valid consideration. The ICTY, ICTR, and SCSL Presidents’ annual reports submitted in accordance with the Statutes227 give only short—indeed too short—shift to the rationales for the rule amendment on crucial matters.228 Those reports list and/or summarize the rules amended at the plenary sessions that took place in the reported period and/or indicate, in a rather enigmatic and oracular fashion, the ‘object and purpose’ of the amendments.229 The considerations underlying the specific legislative action and preferences for certain approaches instead of alternatives remain unpronounced. As if the principle of secrecy of deliberations extended also to their legislative activities, the ICTY, ICTR, and SCSL judges never released the public transcripts or minutes of the plenary meetings, record of deliberations, explanatory document, or a list and summary of rejected amendments. Moreover, the applicable Practice Direction provides that ‘[n]o commentary or explanation will accompany the amendments’.230 While the judges wish to preserve the integrity of their judicial functions from speculations about the motives behind certain amendments,231 this is problematic from several perspectives.

Indeed, the non-transparent culture obscures the purport and merit of the legislative output. The lack of ‘travaux préparatoires’ makes it difficult to appreciate the intent of the legislators of the bench, including the rationales of legislative choices made and the grounds for believing that reforms would achieve the goals set.232 On a practical level, this deprives judges (particularly those who did not participate in the respective plenary) of the potentially useful tool for the interpretation of the Rules. It also reduces the certainty the parties have regarding their proper application. Further, while the judicial legislation on procedure is not problematic in se, the non-transparency detracts from the legitimacy of the process and that of the rules eventually adopted, particularly where the judges choose not to consult other actors.233 As in any decision-making process without any form of democratic participation, the rules involving contested issues passed by judges in a closed plenary unilaterally and without hearing the views of other participants will lack in legitimacy and likely meet with proceedings that violate the Statute. Such unchecked authority is vulnerable to abuse especially considering the ease with which it can be suggested that something is implied by, and thus need not be explicitly stated in, the Statute or the ease in making the artful argument that justifies a desired result. Footnote omitted.)

227 Art. 34 ICTY Statute; Art. 33 ICTR Statute; Art. 25 SCSL Statute.
228 Boas et al., International Criminal Law Practitioner’s Library (n 92), at 37; Sluiter, ‘Procedural Lawmaking’ (n 103), at 322
229 See e.g. Fifth Annual Report of the ICTY, UN Doc. A/53/219-S/1998/737, 10 August 1998, paras 105-108 (providing a highly laconic explanation for the reforms as far-reaching as the adoption of Rules 65ter, 73bis and 73ter and simply listing the other rules amended at the 14th, 17th and 18th plenary meetings). See also Third Annual Report of the ICTR, UN Doc. A/53/429-S/1998/857, 23 September 1998, paras 7 (‘to eliminate anything that might slow down proceedings, in order to expedite trials’) and 15 (‘the Tribunal adopted substantial amendments to the Rules, with a view to expediting proceedings before it.’)
230 ICTY Practice Direction (n 187), para. 8.
232 Boas, ‘A Code of Evidence and Procedure’ (n 213), at 31-32 (recommending to improve explanatory reporting so as to enhance transparency and to provide an interpretive basis for the amended Rules); Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1121.
233 Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 105 (‘while in fact the [ICTY] judges have often sought input from the prosecution and defence representatives when considering changes to the Rules, they are not obligated to do so, and on occasion amendments have been adopted with virtually no consultation at all.’)
Chapter 1: Background and Purpose of the Study

resistance of other court organs whose (procedural) interests are affected. Clearly, the legitimacy challenge is related to the way in which judges have been exercising their quasi-legislative powers rather than from the delegation to them of such powers by the primary legislators. While it may well be contended that ‘rules adopted by a collective body of external legislators pursuant to open discussions attract an enhanced legitimacy that further fosters compliance with, and respect for, those rules’, it would be going too far to argue that judge-made procedural rules are per se lacking in legitimacy.

In this light, the experience of these tribunals embodies the era of judge-made international criminal procedure in its prime. What can be gleaned from this is that the essential nature and general directions of development of that law are difficult to establish and/or that those directions have been constantly fluctuating in reaction to the changing circumstances. As the procedural law has been growing more elaborate, complex, and eclectic, one could question whether any sense of direction was there at all in developing it. This may have to do with the essence of a judicial rather than purely legislative and political (parliamentary) approach. Judges simply exercised their quasi-legislative tasks in the same pragmatic and practice-oriented—that is, more tactical than strategic—way as if they were executing their primary adjudicative function. When seized of a problem, they mostly tried to solve it through the application of what they saw as the best solution as a matter of fairness and sound legal policy, be it the adoption of a tailored procedural rule or amendment that either retrospectively codified the established case law or anticipated any foreseeable problems. At least some of their solutions may appear rather expedient or even short-sighted.

In devising such rules, the judges were guided more by what was of direct concern to them: the pragmatic objectives of ensuring the fair trial and efficiency in individual cases and the demands of the completion strategy. That did not necessarily require them to develop a theoretically coherent and scientifically verified system of principles and rules uniquely and fundamentally tailored to the needs and challenges of international crime cases.

---

234 For example, the ICTY Prosecutor questioned the consistency with the Statute of Rule 28(A) which empowered the Bureau constituted of the President, Vice-President and the Presiding Judges of the three TCS to conduct a judicial check on whether the newly filed indictments concerns the most senior leaders suspected of being most responsibility for the crimes. See Assessment of Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc. S/2004/420, 21 May 2004, para. 13. See also D. Mundis, ‘Judicial Effects of “Completion Strategies” for the Ad Hoc International Criminal Tribunals’, (2005) 98 American Journal of International Law 142, at 147-48 (the amendment caught the Prosecutor by surprise).


236 See also F. Mégret, ‘The Sources of International Criminal Procedure’ (in L. Gradoni et al., ‘General Framework’), in G. Sluiter et al. (eds), International Criminal Procedure: Principles and Rules (Oxford: Oxford University Press, 2013) 69 (noting that the judges’ legislative function in relation to revising the Rules was ‘largely informed by practical policy considerations’ but also amounted to ‘an exercise in creating a procedure that conforms to the broad orientations given by the statute’).

237 Robinson, ‘Rough Edges’ (n 225), at 1038.

238 See e.g. Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 105 (‘the process of easy amendment of the rules may lead to expedient or short-term solutions that sacrifice long-term or more diffuse interests or the rights of the accused’).

239 The appropriateness of taking the completion strategy as guidance in the application of the ICTY RPE has been vigorously contested, and suspicions to the effect that this consideration had any impact were no less vigorously dismissed: see Dissenting Opinion of Judge David Hunt on Admissibility of Evidence-in-Chief in the Form of Written Statements, Prosecutor v. S. Milošević, Case No. IT-02-54-AR73.4, AC, ICTY, 21 October 2003, paras 21-2 and, in the same case, Separate Opinion of Judge Shahabuddeen Appended to Appeals Chamber’s Decision Dated 30 September 2003 on Admissibility of Evidence-in-Chief in the Form of Written Statements, 31 October 2003, para. 21.

240 Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 88-89 (the development of an international criminal procedure was not among the goals set before the ICTY by the founders).
Thus, the ceaseless and piecemeal amendment process they implemented occurred in the absence of an overarching and comprehensive vision, philosophy or a strong sense of strategy to inform the development of the procedure. But except for limited instances of legislative miscalculation, the ICTY, ICTR, and SCSL judges have done very well in the circumstances. Having been forced into exercising legislative functions (rather than having ‘usurped’ that role), judges have in fact demonstrated the virtues of good legislators. Among these are preoccupation with the adequacy of the law and the dynamism and creativity in ensuring that provides effective solutions to the myriad of practical challenges arising on a daily basis in the conduct of complex international criminal proceedings. It would be going too far to blame them for not having developed a theoretically impeccable, uniform and fully coherent blueprint for international criminal proceedings, especially next to what they were already achieving in constructing a workable procedure from scratch. This was not their goal, and such a theory would require a concerted effort and an investment of considerable scholarly energy.

3.2.4. Paradigm shift: ICC and SPSC

Significant institutional and procedural nuances distinguish the courts established after the ad hoc tribunals. Different as they are, the ICC and the SPSC share one common feature: their procedural law was adopted (and amended) by the primary legislators—the Assembly of States Parties and the United Nations Transitional Administration in East Timor (UNTAET) respectively. The departure from the concept of ‘judge-made law’ in case of these courts was caused by different circumstances.

In case of the ICC, this was a deliberate decision of state delegations to the Preparatory Committee to develop a codification of both substantive and procedural law of the permanent ICC that was as comprehensive, complete, and coherent as possible. The procedural provisions of the Statute, encountered throughout the Statute and concentrated in particular in Parts 5, 6 and 8, amount to a fully-fledged procedural code, albeit that more specificity is required to ensure the effective operation of the Court. The universal aspiration and permanence of the ICC predetermined a hands-on approach by states who, in relation to this institution, clearly wished to retain legislative powers in full rather than to delegate them to the judges. Their objective was to revert from the paradigm of the ad hoc tribunals, by reducing the need and opportunities for judicial activism, which came to be seen as potentially problematic. Furthermore, some participants of the Preparatory Committee were determined, through intervention, to correct what they perceived as defects of the common-law oriented process at the ad hoc tribunals and the ‘domination’ of common law in

---

241 Ibid., at 87 (judges were ‘acting not as theorists seeking to impose an overarching system on the Rules, but rather as participants trying to devise pragmatic solutions to specific challenges that arose in specific cases.’) See also Sluiter, ‘Procedural Lawmaking’ (n 103), at 324-25 (in their ‘managerial function’, judges ‘may pay little attention to fundamental issues underlying criminal procedure, such as the goals and objectives [procedure] should pursue in international society and what procedural model would best correspond to that. …[I]t is clear that judges are not meant to be legislators.’)

242 Cf. ibid., at 326.


244 Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1112 (observing that the ICC Statute ‘contains a full procedural scheme.’)


the ICC procedure. Unlike the bureaucratic and hasty efforts in drafting the ICTY and ICTR Statutes, the state delegations engaged in genuine and even scholarly reflections on the procedural law appropriate for the ICC through the partly informal expert-driven process within the Preparatory Committee in the lead-up to the Rome Diplomatic Conference. The proposals generated by the Committee took the form of an unfinished draft Statute. This entered the domain of formal negotiations where the further substantive work was carried out to refine and supplement the Committee proposals in developing compromises required for the adoption of the Statute.

Being a product of intensive and in-depth preparatory work and negotiations in Rome, the ICC Statute is an unprecedented instrument not least in the degree of detail with which it regulates procedure. A principled and genuine effort was made to combine, in an innovative and practicable fashion, the best features of the main procedural traditions and to accommodate and reconcile preferences of both sides in the civil law versus common law divide through solutions that would not be objectionable to any of them. In numerous respects, the negotiators succeeded in finding common denominators and in ensuring greater evenness between the main procedural traditions, while at the same time making fundamental choices regarding the ICC procedure. In making and further refining those choices towards a coherent and workable system, creative use was made of the elements that proved valuable in the experience of the ICTY and ICTR and their solutions were rejected if perceived as unfortunate. Legal experts from those Tribunals were consulted on various issues during negotiations. Moreover, some of their procedural solutions were incorporated and further adjusted to fit the special nature and institutional features of the ICC. By nature and in comparative terms, the ICC procedure has been characterized as a sui generis system representing a ‘unique compromise’ between the main procedural traditions. Essentially, it is an artificial and innovative hybrid or amalgam that employs the features drawn from both common law and civil law systems as building blocks. In trying to achieve a fair mix

---


249 For discussion of the ‘Herculean’ drafting task in Rome, in particular of the Working Group on Procedural Matters, see Friman, ‘Inspiration from the International Criminal Tribunals’ (n 248), at 378.

250 Behrens, ‘Investigation, Trial and Appeal’ (n 103), at 113; Friman, ‘Procedural Law of a Criminal Court’ (n 245), at 201 (noting ‘a concerted effort by a large number of delegations to find common denominators and bridges between different legal traditions and national systems.’); Ambos, ‘The Structure of International Criminal Procedure’ (n 190), at 433 (‘real discussions between common and civil law’).


252 Ibid., at 1493.

253 Friman, ‘Procedural Law of the Criminal Court’ (n 245), at 202; id., ‘Inspiration from the International Criminal Tribunals’ (n 248), at 376.


255 In this sense, see e.g. Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1442; Ambos, ‘The Structure of International Criminal Procedure’ (n 190), at 431.
between the two systems, it recasts those elements in a pointedly neutral and at times awkward terminology in order to avoid the semantic trappings of the domestic procedural traditions.

Despite the tremendous scholarly energy invested in devising the detailed technical regime for the ICC, the traces of the diplomatic method towards drafting can be felt all over the Statute’s text which left various aspects of the ICC procedure ‘constructively ambiguous’, or open-textured, on key procedural issues. This drafting technique has been criticized for the failure to choose and follow through a clear theoretical direction and to supply the judges who apply the law with sufficient clarity as to the content of the legal provisions. But this is seen as the cost of the compromise that made the adoption of the Statute possible. While common grounds could be identified in relation to many issues, amalgamating the elements drawn from the Continental and common-law systems and ensuring the high level of precision in relation to all technical detail proved difficult: delegations could not reach agreement with respect to all aspects of the process. As a consequence, some issues were left to be defined in the secondary and subordinate (to the Statute) piece of legislation adopted by the Assembly: the Rules of Procedure and Evidence.

Furthermore, another, more pernicious, aspect of the compromises is the coherence of the resulting procedural system. Whereas the ad hoc tribunals’ approach towards devising and ameliorating their procedural law has been referred to as ‘experimentation’, the exercise undertaken for the purpose of creating the ICC’s procedural system is even more experimental and bold. One notable example is the generous allowance for the victims to participate in the ICC proceedings in their own capacity, in addition to the right to seek reparations from the Court. This arguably poses greater risks than the ICTY, ICTR, and SCSL judges’ efforts to continuously ensure the adequacy of the procedural law because any defective outcomes of the experiments by the Rome Statute architects are almost fixed in stone and cannot easily be undone or corrected. In equipping the system with a number of novel features, unparalleled in domestic systems and antecedent tribunals, the drafters of the

---

256 The Board of Editors, ‘The Rome Statute: A Tentative Assessment’, in Cassese/Gaeta/Jones (eds), *The Rome Statute* 1908 (‘an admirable attempt to achieve the right mixture—the golden mean—between the inquisitorial and accusatorial systems.’) The reference is made to the ICC Pre-Trial Chamber: see also Ambos, ‘The Structure of International Criminal Procedure’ (n 190), at 455-56.

257 Behrens, ‘Investigation, Trial and Appeal’ (n 103), at 113-14; Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 254), at 605 (‘technical terms … have been replaced by neutral terms . . . to avoid language carrying too much baggage from one particular legal family’); Ambos, ‘The Structure of International Criminal Procedure’ (n 190), at 477.


259 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1493; Zappalà, ‘Comparative Models’ (n 189), at 49-50 (stating that ‘creative ambiguity … which is essential to reaching a viable diplomatic compromise and to ensuring the adoption of a treaty does not necessarily fit with the need for coherence which is indispensable for a procedural system’ and that ‘the procedural law of the ICC is largely undefined’).


261 For example, the issues of disclosure are not covered by the Statute: see Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1475.

262 Art. 51(1) ICC Statute.

263 See also Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1494 (‘many-headed compromise’ between adversarial and inquisitorial features embodied in the ICC procedure resulted in ‘basic elements of the procedure hav[ing] lost their anchorage in a coherent system’).

Chapter 1: Background and Purpose of the Study

ICC Statute did not draw upon the practical experience obtained in the actual proceedings as directly and considerably as did the ad hoc tribunal judges.

The factors other than strictly pragmatic considerations played a significant role in the making of the ICC. These are presented by the mix of the drafters’ deliberate choices of fundamental values to be integrated into the system, their further reaching effort to blend the best elements drawn from national procedural traditions, and the nature of diplomatic negotiations with its specific drafting methods allowing compromises to be achieved through trade-offs and ‘constructive ambiguities’. The ICC Pre-Trial Chambers, distinguished by a unique set of powers and functions without a perfect match in any specific domestic system, is one of the many examples of a procedural experiment to which the compromise between the negotiators gave its final shape.\(^{265}\) This combined experimental and political method of creating procedure made the ICC system a true ‘laboratory’, next to which the ad hoc tribunals might appear as mere ‘workshops’.

Although the political process of traditional law-making has been deemed more legitimate and conducive to ensuring the overall coherence of the procedural system, it is far from certain that the ICC system is superior—more workable and coherent—than the ICTY system constructed by the judges.\(^{266}\) The coherent procedural system does not depend on what law-making agency is engaged. The diplomatic negotiations as a law-making method involve factors which may diffuse the coherence of the system and turn it into a greater patchwork than if it had been created by the judges.

The Finalized Draft Rules of Procedure and Evidence were agreed upon on 30 June 2000 after two years of intensive negotiations within the Preparatory Commission (open to states signatories of the Final Act of the Rome Conference and other participants).\(^{267}\) As had been expected, the draft Rules were adopted without much debate, negotiations and further amendments at the first session of the Assembly of States Parties in 2002.\(^{268}\) The drafting process by the PrepComm was largely an expert-driven exercise,\(^{269}\) and it necessarily


\(^{266}\) Mentioning some of the evident discrepancies, see Tochilovsky, ‘Proceedings before the International Criminal Court’ (n 173), at 268 (‘The Statute and the Rules give victims an autonomous role and procedural rights, yet they envisage a bipolar litigation between the two parties. The Statute and Rules impose a duty on the Prosecution to equally investigate both incriminating and exonerating circumstances, and, at the same time, they assume that each party would prepare and present its own case. The Rules do not exclude plea bargaining in the tradition of common-law litigation, yet at the same time, they obligate judges to seek the truth regardless of any agreements reached by the parties.’).


Chapter 1: Background and Purpose of the Study

unfolded within the strict boundaries set by the Statute. Reconciling the different domestic approaches in a fair, coherent and workable system in the framework of the Statute continued to pose a serious challenge when drafting the Rules – in particular, the issue of the structure of trial, governed vaguely by Article 64(8)(d) of the Statute, proved to be contentious and led to an embittered debate between the delegations concerning the contents of the proposed Rule 140. Totaling over 225 detailed procedural norms, the Rules were meant to resolve the uncertainties in the Statute and to flesh out and supplement its provisions further to the effect of creating ‘a fairly complete although not exhaustive procedural regime’. Inevitably some—including fundamental—issues still remained to be settled by the judges in the case-law through exercise of discretion and resort to implied powers, in view of gaps and/or the resort to the same familiar ‘constructively ambiguous’ drafting approach of the architects of the Rules. Certain matters were deliberately left for judicial determination while others were left because of the inability of the state delegations to agree on the best standards or to foresee specific eventualities. Thus, while the Statute and the Rules together epitomize the ambition to construct a gapless system of procedural law, the ICC regime allows considerable room for flexibility and judicial creativity in relation to procedural matters designated for that purpose by the negotiators.

In relation to issues covered by the Statute and Rules in great detail, however, the power of judges to legislate on procedure was taken out of their hands almost completely. The procedural provisions of the Statute may only be amended by two-thirds of States Parties subject to the previous decision made by majority to take up the proposal for the amendment. Nor may the judges adopt or amend the Rules of Procedure and Evidence. By using their non-exclusive prerogative, shared with any State Party and the Prosecutor, the judges acting by an absolute majority may propose amendments to the Rules which shall enter into force upon adoption by a two-thirds majority of the members of the Assembly. While the amendment of the Rules was regarded as very unlikely at the dawn of the ICC, this eventuality was not ruled out completely. Indeed, several proposals for the amendment of

---

270 Ibid., at 292 ('delegations were … extremely cautious while drafting the Rules, in order not to inadvertently affect statutory obligations or create additional ones, most particularly when developing the rules relating to the regime on cooperation and enforcement').

271 Ibid., at 296-97 ('some civil law lawyers … considered that the Judges should be the sole arbiters of the procedure with no further guidance from the Rules, and others, mainly from common law … insisted that a predictable procedural scheme was essential to ensure a fair trial and protect the rights of the accused.').

272 Fernández de Gurmendi and Friman, ‘The Rules of Procedure and Evidence’ (n 267), at 291-92. Some rules are not explicitly mandated or contemplated by the Statute and are supposed to fill the gaps or to clarify the relationship between between statutory provisions in the interest of having a coherent regime: Ibid., at 293-96. See also Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1114 (the ICC RPE are marked by ‘a remarkable (and sometimes excessive) degree of detail’).

273 Fernández de Gurmendi and Friman, ‘The Rules of Procedure and Evidence’ (n 267), at 292 (‘The gaps and flexible solutions in some of the Rules reflect the recognition that the Court will be able to assert implied powers with respect to its own procedures, in the exercise of which it will be able to fill the voids and engineer its own approach to some issues through its own decisions.’); Tochilovsky, ‘Proceedings in the International Criminal Court’ (n 173), at 268.

274 Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1115 (noting that the level of detail in the Rules ‘appears to reflect that the States involved in the negotiations wishes to leave as little room as possible for judicial development of procedural rules’).

275 Art. 121(1)-(3) ICC Statute.

276 Art. 51(2) ICC Statute.

277 Fernández de Gurmendi and Friman, ‘The Rules of Procedure and Evidence’ (n 267), at 290 (observing that ‘the possibility that the Assembly could amend the Rules cannot be discounted’, although ‘[i]t is … highly improbable that States Parties will substantially amend what constitutes a delicate “compromise package” agreed, after much negotiating effort, in a forum open to the international community as a whole.’)
Chapter 1: Background and Purpose of the Study

the ICC Rules have been tabled before and taken on by the Assembly of States Parties. In 2011, Rule 4 was amended and new Rule 4bis added to transfer the decision on the assignment of judges to divisions from the plenary to the Presidency; and in November 2012 Rule 132bis was inserted to authorize a single judge or single judges to exercise the functions of the Trial Chamber, in respect of trial preparation, ‘in order to expedite proceedings and ensure cost efficiency’.

Importantly, in urgent cases, where the Rules do not provide for a specific situation, the ICC judges are authorized, by a two-thirds majority, to draw up provisional Rules to be applied until the Assembly decides to adopt, amend or reject them at the next ordinary or special session. Thus far, judges have refrained from employing the extraordinary power and preferred to channel their proposals through the ASP, which is the avenue that ensures greater transparency and dialogue with the States Parties. Finally, the ICC judges’ role as primary legislators was limited to the adoption and amendment, by an absolute majority and upon mandatory consultation with the Prosecutor and the Registrar, of the Regulations of the Court ‘necessary for its routine functioning’. But even in relation to this tertiary piece of ICC legislation, the States Parties chose to retain control over the exercise of lawmaking powers by the judges, by obligating them to circulate the Regulations upon adoption among the States Parties and authorizing the latter to object, with any objections having the effect of cancelling their legal force. The Regulations of the Court were adopted and, at the time of writing, amended by the judges twice. They contain a number of provisions that arguably go beyond those ‘necessary for its routine functioning’ and regulate the core procedural matters. Nevertheless, the subordinate character of that instrument to the Statute and the

---


281 Art. 51(3) ICC Statute. Art. 51(4) ICC Statute further reads: 'The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.'


283 Art. 52(1)-(2) ICC Statute. Such Regulations of the Court shall be ‘in accordance with this Statute and the Rules of Procedure and Evidence’ (Art. 51(1) ICC Statute).

284 Art. 52(3) ICC Statute.

285 Regulations of the Court, adopted by the judges of the Court on 26 May 2004, as amended on 14 June and 14 November 2007 (entry into force 18 December 2007) and on 2 November 2011 (entry into force 29 June 2012) ICC-BD/01-03-11.

286 One example is Regulation 55 which authorizes the Trial Chamber to modify the legal characterisation of facts ‘without exceeding the facts and circumstances described in the charges and any amendments to the charges’ for the purpose of the Article 74 decision and establishes the duty to give notice to the participants. The power has proved controversial in the Court’s practice: see e.g. Décision relative à la mise en œuvre de la norme 55 du Règlement de la Court et prononçant la disjonction des charges protéées contre les accusés, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-3319, TC II, ICC, 21 November 2012 (with Dissenting Opinion of Judge Christine van den Wyngaert).
Rules of Procedure and Evidence entails that the ICC judges’ role as legislators is more limited, as compared to respective powers of their counterparts in the ad hoc tribunals.

Given the permanence and broad jurisdictional reach of the institution, the reasons for international legislators to adopt a hands-on and consensus-oriented approach in creating the procedural mechanism of the ICC in 1998-2000 are understandable. In order to ensure greater clarity as to the contents of their obligations (in particular in the domain of cooperation with the Court) and the better protection of their sovereign interests, the states chose to retain legislative powers in relation to most issues covered by the Statute, including the procedures. State delegations deliberately did not grant judges a broader role in the rule-making, even though the ICTY judges repeatedly emphasized the need for allowing judges flexibility in the application of the Rules. The grounds for and merit of what may appear as a mistrust of the judiciary as a legislative agency with respect to procedure have been questioned. Thus, if they had been granted a legislative role, they would have been able to settle the different interpretations of procedural rules stemming from their decisions and to ensure systemic coherence. The ICC procedural—and more generally legal—framework is a rather inflexible system, which negates the benefits of the dynamism characteristic of the ICTY and ICTR’s procedural lawmaking process in terms of ensuring an efficient system. It is uncertain whether the Assembly is prepared to track the ICC procedural practice closely enough to identify and timely address problems which may call for prompt legislative intervention. Since the ICC procedure is more static and fixed, the procedural approaches taken by the judges in the exercise of their discretion to deal with the issues arising in the early cases might create ‘path dependency’.

287 Cf. Fernández de Gurmendi and Friman, ‘The Rules of Procedure and Evidence’ (n 267), at 290 (noting, with reference to the practice in other international tribunals, that in case of the ICC, ‘[t]he decision to mandate states to draft the Rules may seem surprising’).
288 Friman, ‘Inspiration from the International Criminal Tribunals’ (n 253), at 375 (‘The criminal procedures were considered important and States were unwilling to cede their decision-making powers or lose their influence over the rules to the judges.’)
289 Ibid. at 375 note 8, referring to a note of the ICC Liaison Committee of the ICTY Chambers to the ICC PrepComm, UN Doc. PCNICC/1999/WGRPE/DP.38, 13 August 1999, at 3-5. See Remarks to the Preparatory Commission for the International Criminal Court, Her Excellency, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia, New York, 30 July 1999 <http://untreaty.un.org/cod/icc/prepcomm/julaug/speech.htm> (Rules ‘can only be a framework; the Rules cannot, no matter how well crafted, foresee every courtroom situation. That is what Rules should be – a framework, not a straitjacket. … For the judges to effectively manage and direct the proceedings, the Rules must be sufficiently flexible to allow them to exercise discretion when necessary. They must allow the judges to address evolving situations and respond to issues that could not be anticipated during the drafting process.’);
ICTY Press Release, ‘Remarks of Judge Richard May, Judge of the International Criminal Tribunal for the former Yugoslavia, to the Fourth Session of the Preparatory Commission for the International Criminal Court’, The Hague, 20 March 2000, JL/P.I.S./479-E (‘while it is important for Rules to be clear, they also need to be flexible enough to allow Judges to deal with the different sets of circumstances which arise daily in the courtroom, many of which cannot be anticipated.’)
290 Zappalà, ‘Comparative Models’ (n 189), at 51 (‘entrusting the judges with the task to adopt and amend the RPE might have resulted in reaching an agreement in plenary, a codification of specific interpretations of the rules, and perhaps some measure of coherence’); Schabas, ‘The International Criminal Court at Ten’ (n 31), at 495 (‘the amendment process at the Court should not be so terribly difficult.’); Critical of the ICC Statute drafters’ effort to preclude judicial creativity in interpreting substantive law doctrines, see D. Hunt, ‘The International Criminal Court: High Hopes, “Creative Ambiguity” and an Unfortunate Mistrust in International Judges’, (2004) 2 JICJ 56; A. Pellet, ‘Applicable Law’, in Cassese/Gaeta/Jones (eds), The Rome Statute 1056.
291 Sluiter, ‘Procedural Lawmaking’ (n 103), at 321-22 (observing that such monitoring is not organized and that at least one uncertainty in the Statute—the relationship between Arts 54(3)(e) and 67(2)—which is in need of reform, has not been addressed).
292 In a similar vein, see Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 107 (‘the danger is that procedural decisions in the early cases will become fixed and will dictate the structure for later cases without the possibility for adaptation. The risk is accentuated because the ICC, as a permanent
readily available to the judges, the positions developed early on might be difficult—but not completely impossible—to overcome in subsequent cases, although substantial changes in the circumstances are likely due to the ICC’s institutional evolution. However, the solution of providing for a detailed procedural regime also has recognizable benefits such as greater transparency, legitimacy, and stability, which are deemed to outweigh the dangers the inflexibility may pose.

As regards the Special Panels in the Dili District Court, the situation of this hybrid court established to deal with serious criminal offences, particularly those committed between 1 January and 25 October 1999, was unique. Its parent body UNTAET was mandated by the UNSC under Chapter VII of the UN Charter and vested with ‘[a]ll legislative and executive authority with respect to East Timor, including the administration of the judiciary’ and ‘to issue legislative acts in the form of regulations’. In the transition period between the withdrawal of Indonesia and East Timor acquiring sovereignty (1999-2002), the UNTAET effectively played the role of a national government and was expected to legislate in a full range of matters. It was thus in a position to adopt and subsequently amend a comprehensive Regulation governing the conduct of criminal proceedings in all courts of East Timor, including the SPSC. The UNTAET was the sole legislative authority, and the judiciary was not authorized to legislate on these or other matters. The UNTAET’s goal with the adoption of the TRCP was to supplement or replace, to the extent necessary, the effect of the criminal procedure legislation of the former occupying power, Indonesia, which had been the law in force prior to 25 October 1999 and remained such on a residual basis until the adoption of legislation by the democratically established institutions of East Timor. Consisting of fifty-six provisions, the Transitional Rules of Criminal Procedure (TRCP) amounted to a detailed code regulating all aspects of criminal proceedings in East Timor. In contrast with the fragmented and judge-led legislative process in respect of Rules of Procedure and Evidence in the ad hoc tribunals, the TRCP were a coherent legislative act which bore marks of clear procedural design and did not undergo ceaseless and far-reaching amendment process. In terms of correlation between the adversarial and non-adversarial

institution, is likely to evolve over time, and the perceived procedural needs of the early cases may not be suitable as the institution changes.’)

See nn 276-281.

Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1123 (‘excessive regulation and normative rigidity combined can suffocate the Court.’)

The consequences of adopting a ‘democratic path’ for the elaboration of RPE are inter alia that the progressive developments would be perceived as reflecting ‘a firm trend in international thinking’ rather than ‘a product of the personal views of judges’ and that the legislative solutions embodied in the ICC RPE are subject to judicial review under Art. 51(3) ICC Statute: Guariglia, ‘The Rules of Procedure and Evidence for the International Criminal Court’ (n 216), at 1115, 1120, and 1123.

Regulations 1.1, 1.3, 4-9 UNTAET Regulation 2000/15 (n 6).

Regulations 1.1 and 4 UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, 27 November 1999. See UNSC Resolution 1272 (1999), 25 October 1999, paras 1-2 (UNTAET ‘will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice’; its mandate shall be: (a) To provide security and maintain law and order throughout the territory of East Timor; (b) To establish an effective administration…’)


Until such date, the Indonesian law continued to be applicable de jure only to the extent that it did not conflict with the internationally recognized human rights standards, the UNTAET mandate or any of its regulations and directives. See section 3 UNTAET Regulation 1999/1 (n 297). The Transitional Rules of Criminal Procedure were repealed by Art. 2 Code of Criminal Procedure (Timor-Leste) (Código do Processo Penal de Timor-Leste). Art. 2 (1) Decree-Law No. 13/2005, 22 November 2005, in force since January 2006 (revoking UNTAET Regulation 2000/31 as amended by Regulation 2001/25).
elements in the procedure, the Rules represented a unique mix and a *sui generis* model. While the TRCP were drafted with the imperative need to comply with human rights standards in mind, the inquisitorial legacy inherited by East Timor from both its former colonial power Portugal (until 1975) and occupying power Indonesia was an important reference point. Notably, some of the provisions were clearly based on the articles of the newly adopted ICC Statute, while others clearly draw upon the *ad hoc* tribunals’ model. Overall, despite the fact that the TRCP bear resemblance to the ICC in some respects, it can be recognized as an independent procedural model.

### 3.2.5. Back again: Recent courts (ECCC and STL)

The legislative approach towards criminal procedure before the latest generation of internationalized courts, represented by the ECCC and STL, marks the return to the judge-made paradigm. It remains to be seen how this factor influenced the nature of their procedural law and its coherence and legitimacy.

The process before the ECCC is governed by the ECCC Agreement and the ECCC Law amended in accordance with the Agreement. Each of the instruments contains procedural provisions most of which relate to the institutional matters and unique features of the court. These provisions include but are not limited to the composition of the benches and rules applicable to voting and decision-making, duties and powers of the bi-partite organs—Co-Investigating Judges and the Co-Prosecutors—and mechanisms for resolving disagreements between them. Given that this is a regulatory framework that is far from complete and certain, both instruments also contain blanket references to ‘procedural rules established at the international level’ which may be sought for guidance by the ECCC organs. Thus, the ECCC Agreement provides that while ‘[t]he procedure shall be in accordance with Cambodian law’, where it ‘does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.’ The ECCC Law provides that the ECCC at the level of trial court ‘shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses’; but ‘[i]f these existing procedures do not deal with a particular

---

300 E.g. note the *sui generis*—more limited than at the ICC—model of victim participation (section 12 TRCP) and elaborate rules governing investigations (sections 13-18 TRCP).

301 Section 2 UNTAET Regulation 1999/1 (n 297) (‘In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in [listing UDHR, ICCPR, ICESCR, CAT etc.]'). See e.g. section 6 TRCP.

302 E.g. Section 9 (institution of the investigating judge to protect the suspect’s rights during investigation’), 34-33.1 (presentation of evidence)

303 See e.g. Section 7.2 TRCP (the duty of the Prosecutor to investigate incriminating and exonerating circumstances equally) and section 29A TRCP (proceedings on an admission of guilt).

304 See e.g. Sections 33.1-33.2 TRCP (presentation of evidence), Section 34.1 and 34.2 TRCP (admissibility of evidence)

305 See e.g. Section 7.2 TRCP (the duty of the Prosecutor to investigate incriminating and exonerating circumstances equally)

306 Arts 11new, 14new, 17new, 18new, 20new, 23new, 24new, 33new-37new ECCC Law; Arts 3-7, 12-13 ECCC Agreement.


308 Art. 12(1) ECCC Agreement.
matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level.’

The provision of Article 12(1) of the ECCC Agreement to the effect that the procedure shall be in accordance with Cambodian law (which is strongly influenced by the French law) and the rules in both instruments which entrust the responsibility for the conduct of investigation to the Co-Investigating Judges point clearly to the ‘inquisitorial’ predisposition of the ECCC process. Notably, neither the Agreement nor the ECCC Law empower the Court or its judges to adopt the Rules of Procedure and Evidence for detailed regulation of the proceedings. The ECCC constituent instruments are clear in stipulating the primacy of the Cambodian procedure: the ‘existing procedures in force’, that is, Cambodian procedures, should be applied by default and that only where the Cambodian law contains gaps, gives rise to uncertainties regarding interpretation, or is inconsistent with international standards may recourse be had to ‘procedural standards established at the international level’. These provisions imply that the finding of a gap, uncertainty, or inconsistency in light of international standards—such that would warrant the misapplication of Cambodian law—must be a case-by-case determination by the Court. Such determination should not be supplanted by a summary dismissal of the national legal framework and the adoption of the new law drawing on international standards and only loosely based on the Cambodian law.

However, in June 2007 after a lengthy and difficult drafting process and consultations, the ECCC adopted its comprehensive Internal Rules (IR) to govern the proceedings consisting of 110 Rules. The modest goal professed by the drafters was ‘to consolidate applicable Cambodian procedure for proceedings before the ECCC’ and pursuant to the cited provisions of the ECCC Law and ECCC Agreement, ‘to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.’

Despite the deliberately unambitious title, the adoption of the ECCC IR is a bold and controversial act of legislation (or, as the ECCC put it, consolidation). Firstly, the idea behind such a consolidation and its practical effects are that the Internal Rules are applied as a self-sufficient and primary procedural framework, next to which Cambodian law is reserved the role of the *ultima ratio* at best, where the IR do not regulate a certain matter.

This is not consistent with the wording of the ECCC Agreement and ECCC Law. Second, it amounts

---

309 Art. 33new ECCC Law. The same formula is reproduced in Arts 20new and 23new ECCC Law concerning the Co-Prosecutors and the Co-Investigating Judges respectively, which also provide that these organs shall apply ‘existing procedures in force’.

310 The drafting process of the ECCC IR took eleven months from the moment when the Committee on the Rules of Procedure was set up (3 July 2006 – 12 June 2007). The difficulty is explained by the rift between international and national ECCC judges concerning the degree to which international standards were to be allowed to form part of the ECCC procedure. See S. Starygin, ‘The Internal Rules of Extraordinary Chambers in the Courts of Cambodia (ECCC): Setting an Example of the Rule of Law by Breaking the Law?’, (2011) 3(2) Journal of Law and Conflict Resolution 20, at 21 and notes xiv and xxxviii (detailing the problems faced in the drafting process).

311 See Preamble, ECCC IR (12 June 2007).

312 Rule 2 ECCC IR (‘Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, [it] shall [be] decide[d] in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.’)

Chapter 1: Background and Purpose of the Study

to the usurpation of the procedural law-making authority by the Court. Essentially, the ECCC arrogated the authority ‘to adopt additional rules’ whereas the statutory authorization was only ‘to seek guidance in procedural standards established at the international level’. This is against the terms of Article 12(1) of the ECCC Agreement which was an important aspect of the delicate political compromise between the Cambodian government and the UN that made the establishment of the ECCC as a hybrid court possible. Despite the Preamble of the ECCC IR acknowledging the terms on which the judges may legislate, it is far from certain that all of the codified provisions are duly limited to consolidating the applicable Cambodian procedure. On many occasions, they effectively substituted it irrespective of whether or not the threshold for resort to ‘procedural rules established at the international level’ was met. The legislative exercise thus seems to have proceeded on the basis of the sweeping assumption that the Cambodian procedural law is wanting and on the impermissibly liberal interpretation of the test under Article 12(1) of the Agreement. In this light, particularly given the concurrent enactment of the Code of Criminal Procedure of the Kingdom of Cambodia in 2007, an argument can legitimately be made that where the ECCC adopted procedural rules without having properly satisfied themselves of the absence, lack of clarity, or normative inadequacy of the existing Cambodian provisions, the ECCC have acted ultra vires. The questionable legitimacy of the IR is further undermined by the non-transparent character of the process by which they were adopted and the absence of explanatory memoranda justifying the judges’ legislative solutions and their frequent recourse to international standards despite the existing and not self-evidently invalid Cambodian law.

Be that as it may, the IR have served as the de facto primary procedural basis for the ECCC proceedings. Although the IR contain occasional—and unexplained—references to

direct applicability of other, not consolidated, provisions’ and that the ECCC staff ‘will likely work on the assumption that the IR form a sort of ‘code’ of its own’). For the reasoning of the ECCC along these lines, see n 320.  

314 Starygin, ‘The Internal Rules’ (n 310), at 22, 38 note xxxvi (observing that the ECCC judges ‘impermissibly altered the statutory language to create such authority.’)  

315 For a detailed analysis of unexplained discrepancies between ECCC IR and Cambodian law, see Starygin, ‘The Internal Rules’ (n 310), at 23 et seq.  

316 This assumption is distinct from the recognized problems of independent and impartial judiciary in Cambodia and provision of fair trial: see e.g. Acquaviva, ‘The New Paths’ (n 313), at 130; G. Sluiter, ‘Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers’, (2006) 4 JICJ 314.  


318 See Decision on Nuon Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, Nuon Chea, Case File No. 002/19-09-2007/ECCC/TC, TC, ECCC, 8 August 2011, paras 6-7 (dismissing the argument on the ground that ‘[n]othing in Article 12(1) or elsewhere in the ECCC Agreement prohibits the adoption of procedural rules by a Plenary Session convened for that purpose’ and referring to the differences between the ECCC and domestic trials). This reasoning is untenable given the clear terms of Article 12(1) ECCC Agreement. See also Starygin, ‘The Internal Rules’ (n 310), at 36-37.

319 Starygin, ‘The Internal Rules’ (n 310), at 39 note xxxix (reporting that criticism was leveled against the confidentiality of the drafting process of the ECCC IR by NGOs). See e.g. Press Release, ‘Civil Society Deeply Concerned about the ECCC IR’, Cambodian Human Rights Action Committee, Phnom Penh, 24 January 2007, available at <http://www.licadho-cambodia.org/press/files/138CHRACPRECCCImpasse07.pdf> (underscoring ‘the need for more transparency in the rules drafting process, including NGO monitoring of committee meetings’).

320 E.g. Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annullment, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC06), PTC, ECCC, 26 August 2008, para. 14 (‘The Internal Rules … form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Code of Criminal Procedure of the Kingdom of Cambodia (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialised system. Therefore, the Internal Rules constitute
Chapter 1: Background and Purpose of the Study

‘adversarial process’, the criminal procedure envisaged for the ECCC remains clearly ‘inquisitorial’ by nature. The Co-Investigating Judges rather than the parties are primarily responsible for the conduct of investigation. At trial, it is the Trial Chamber who decides what witnesses to summon and the judges who take lead in the examination of the accused (who is questioned in his own capacity as a party and not as a witness), witnesses, experts and civil parties and determine the order in which questioning is to be conducted.

The power to amend the IR is exercised by the Plenary of the ECCC on the basis of proposals relayed by the Rules and Procedure Committee, which may originate from different organs and actors of the Court. Since their adoption in 2007, the ECCC IR have been amended by the Plenary eight times and have extended far beyond cosmetic changes. The amendments concerned various areas of the ECCC process and sought to fill the gaps or correct deficiencies identified in the IR through practice. More often than not, the goal has been to expedite the proceedings and to facilitate trial management, given the special nature of the ECCC and the challenges posed by cases before it. For example, in 2010, based on the experience gained in the first trial in the Duch case and the expected high number of victims in Case 002, a far-reaching reform was enacted to streamline the civil party action by envisaging the Civil Parties’ participation at trial as a single, consolidated group with their interests being represented by Lead Co-Lawyers. The later amendments aimed at providing the ECCC with avenues to effectively manage trial proceedings should the accused be prevented from attending due to ill health, which proved a particular challenge in Case 002. Thus, neither the IR as originally adopted in 2007 nor the subsequent amendments thereto steered the ECCC proceedings away from the ‘inquisitorial’ program delineated in the ECCC Agreement and ECCC Law.

The latest addition to the family of international and hybrid courts, the Special Tribunal for Lebanon, which is more accurately termed as the tribunal of an international

the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.” (Emphasis added.)

321 Rule 21(1)(a) ECCC IR (‘ECCC proceedings shall be fair and adversarial’, emphasis added). For a criticism, see Starygin, ‘The Internal Rules’ (n 310), at 30 (noting that the provision ‘bear[s] no reference to the inquisitorial nature of the Cambodian judicial process.’)

322 Rules 80bis(2), 85, 90, 91, 91bis ECCC IR.

323 Rule 3(1)-(2) ECCC IR: the requests for amendment may be made to the Rules and Procedure Committee by a Judge, a Co-Investigating Judge, a Co-Prosecutor, the Head of the Defence Support Section, the Victims Support Section, the Civil Party Lead Lawyers and the Director or Deputy Director of the Office of Administration.

324 The latest amendments consolidated in ECCC IR (Rev. 8, 3 August 2011).

325 Rule 2 ECCC IR.

character, demonstrates a number of remarkable features in relation to the applicable procedural law and the legislative framework. While the UN/Lebanon Agreement establishing the STL speaks exclusively to the institutional matters, the Statute—loosely based on the *ad hoc* tribunals’ statutes—generally outlines the STL procedure. It contains provisions concerning the structure of the Tribunal, the rights of defendants and victims, and powers of the Tribunal organs at various stages of the proceedings. The procedural regime established by the Statute incorporates, in addition to a number of progressive features found in other courts, groundbreaking innovations that distinguish the Tribunal from the previous experiments in international criminal justice and altogether make a new model of international criminal procedure. To a greater extent than in the case of antecedent courts, the STL’s unique blend of familiar and novel elements render its procedural framework truly *sui generis* and indeterminate by nature in terms of the adversarial and inquisitorial divide.

A notable example is that the STL Statute establishes the ‘inquisitorial’ mode of proceeding with the questioning of witnesses by the Trial Chamber as default, subject to its power to depart from it. According to the first STL President’s interpretation of the Statute, it is ‘substantially based on the adversarial system’ (no investigating judge proper and the responsibility for investigation rests with the parties) but also ‘substantially acknowledges the inquisitorial system’.

For the sake of completeness of the STL’s procedural edifice, Article 28 authorizes the STL judges to adopt and amend the Rules of Procedure and Evidence governing the conduct of the proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses, and other appropriate matters. It prescribes that in doing so ‘the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.’ Unlike with the ECCC, the Statute’s express granting of procedural law-making powers to the judges, subject to the duty to seek guidance in the Lebanese criminal procedure (as opposed to providing for direct applicability thereof in the STL proceedings), is a

---

329 Arts 7-13 STL Statute.
330 Arts 15-17 STL Statute.
331 Arts 18-23, 25-27 STL Statute.
332 See e.g. Art. 17 STL Statute, modeled on Art. 68(3) ICC Statute and authorizing the STL to permit victims to present their ‘views and concerns’ where their personal interests are affected, at stages determined to be appropriate and in a manner that is not prejudicial, or inconsistent with the rights of the accused. However, unlike at the ICC, victims have no right to obtain reparations from the STL: Art. 25 STL Statute. See also Art. 16(5) STL Statute, drawing upon Art. 67(1)(h) ICC Statute and according the accused the right to make statements in court at any stage, provided that they are relevant to the case at issue.
333 The most notable is the possibility of holding trials in absentia: Art. 22 STL Statute. See further P. Gaeta, ‘To Be (Present) or Not To Be (Present): Trials In Absentia before the Special Tribunal for Lebanon’, (2007) 5 *JICJ* 1165.
335 Art. 20(2) STL Statute (‘Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.’)
336 STL Rules of Procedure and Evidence (as of 12 April 2012) – Explanatory Memorandum by the STL’s President (‘STL RPE Explanatory Memorandum’), para. 4 (mentioning, *inter alia*, to the position of Pre-Trial Judge, role for the victims, allowance made for the trials *in absentia* and admissibility of written evidence subject to safeguards and limitations; and the accused’s ‘right to be heard’).
337 Art. 28(1) STL Statute.
338 Art. 28(2) STL Statute.
circumstance which renders the adoption of the STL RPE in March 2009 and subsequent amendments thereto unquestionable from the legitimacy perspective. 339

In a notable departure from the practice in other tribunals in which the power to legislate on procedural matters is vested in the judges, the STL’s approach towards judges’ law-making mandate is marked by a much-needed increase in transparency vis-à-vis the public at large and democratic accountability. These features of the STL’s rule-making process allow minimizing the ‘perceived legitimacy’ deficit arising on the account of the delegation of legislative authority to adjudicators. 340

The internal acceptance of the judge-made rules is furthered by promoting the consultation with the other organs of the STL from a mere possibility to an obligation. Proposals for amendment may be made by a Judge, the Prosecutor, the Head of the Defence Office or the Registrar and shall be adopted if agreed to by not less than seven Judges at the plenary meeting or otherwise unanimously. 341 But the Prosecutor, the Head of the Defense Office and the Registrar (or their staff) may participate in the Rules Committee as non-voting representatives and shall in any case be allowed to provide their views on any proposed amendment. 342 As a way to maximize the transparency of the legislative process, Rule 5 obliges the STL President, after the entry into force of the amendments, to make public: (i) a summary of the accepted rule amendments together with the original proposals; (ii) the changes adopted by the Judges and the reasons for the changes; it also empowers the President, in consultation with the Judges, ‘to make public a summary of rejected proposed amendments’. 343

In keeping with these rules, the STL Judges have adopted the practice of releasing and publishing after every plenary, in the form of a single document, an extensive summary of accepted rule amendments and key rejected proposals accompanied by specific explanations of the rationale for each amendment. 344 This degree of candour, unprecedented in international criminal law, is laudable. Besides submitting the underlying considerations to public scrutiny and thus indirectly enhancing the quality of the legislative output of the judges, this attitude helps elucidate the ‘legislative intent’ behind the judge-made rules, facilitates their interpretation and application in the proceedings, and ultimately enhances legitimacy and acceptance thereof by parties and participants. 345

In addition, the adoption of the original STL RPE was followed by the publication of the Explanatory Memorandum by the President, which was updated three times since to reflect the RPE amendment rounds. 346 This substantial and illuminating text provides the STL President’s first-hand and personal explanation of how the STL judges have interpreted and

---

339 STL Rules of Procedure and Evidence, adopted on 20 March 2009. The STL RPE have been amended four times since, the latest amendment dated 8 February 2012 (STL/BD/2009/01/Rev.4).
340 Expressly referring to ‘transparency’ as the fundamental consideration in the process of adopting and amending the Rules, see STL RPE Explanatory Memorandum (n 336), para. 2 (referring to ‘the interests of promoting transparency in the “legislative” process envisaged by the Statute’).
341 Rule 5(A) and (F)-(G) STL RPE.
342 Rule 5(C) and (D) STL RPE.
343 Rule 5(I) STL RPE.
344 See e.g. Summary of Accepted Rules Amendments and Some Key Rejected Rule Amendment Proposals (Fourth Plenary of Judges, February 2012), STL, 21 March 2012; Summary of the Accepted Rule Amendments and Some Key Rejected Proposals (Third Plenary of Judges November 2010), STL, 1 December 2010
345 The summaries evince the fact that the views of the Prosecutor and the Defence Office are taken into account by the Judges and shape the (non-)adoption of the amendment and/or the formulation of the rules: see e.g. Summary of Accepted Rules Amendments, 21 March 2012 (n 344), at 3.
346 Rules of Procedure and Evidence (as of 10 June 2009), Explanatory Memorandum by the Tribunal’s President, STL. The more recent versions of the Memorandum comment on the STL RPE as amended on 10 November 2009, 25 November 2010, and 12 April 2012.
executed their task under Article 28 of the Statute in relation to key procedural issues.\footnote{According the President’s disclaimer, the memorandum ‘does not have any official status. It has not been adopted by the Judges, although its drafting has benefited from the comments of a few of them. Since it is not intended to serve as an authoritative, let alone legally binding, interpretation of the RPE, it can in no way substitute for the interpretation of these Rules by the Judges. Its main purpose is to express the President’s view as to the principal procedural problems likely to arise before the STL and the rationale underpinning their solutions in the RPE.: STL RPE Explanatory Memorandum (n 336), para. 7.} The cross-cutting perspective in the Memorandum concerns, first, the right balance between the influences drawn from the different sources (Lebanese Code of Criminal Procedure and ‘other reference materials reflecting the highest standards of international criminal procedure’) and, secondly, the adaptation of the result to the specific nature and context of the STL in the way that would ensure fair and expeditious proceedings.\footnote{Ibid., paras 1 (interpreting ‘reference materials’ under Art. 28 STL Statute) and 3-6 (discussing the possibility of combining the Lebanese civil law model and the procedural model adopted by antecedent tribunals in solving ambiguities of the Statute).}

For example, the Memorandum justifies the approach taken by the judges in the Rules in relation to structuring the victim participation not in accordance with the civil law \textit{partie civile} model (ruled out by Article 25 of the Statute), but as a \textit{sui generis} model comparable to, yet in some aspects less ambitious than, the ICC approach.\footnote{Ibid., paras 15-21.} Another example is that, with respect to the conduct of trial, the Memorandum states that the preference for the ‘inquisitorial’ mode of questioning witnesses at trial (Article 20(2) STL Statute) has been supplemented in Rule 145 by the ‘adversarial scheme’ should the case file compiled by the Pre-Trial Judge be insufficiently complete to enable the Presiding Judge to lead witness questioning.\footnote{Ibid., para. 29 (‘Whenever … the Trial Chamber does not … possess an exhaustive file of the case, Rule 145 (B) envisages a return to the adversarial mode of conduct. However, it leaves open the possibility of applying Article 20(2) literally.’ Emphasis removed.)} In comparative law terms, the need to draw upon Lebanese procedural law predetermines the presence of what may appear as features of an ‘inquisitorial’ nature of the STL procedure (being in fact legal transplants rather unadulterated inquisitorial forms). But overall, a coherent set of creative and pragmatic solutions embodied in the STL Rules serves to flesh out and to reinforce the unique character of the Tribunal’s procedural framework rather than move it in a single preset direction.

3.3. Taking stock and charting the way ahead: From practice to theory

The overview of the development of international criminal procedure illustrates that this law has historically evolved, with each successive institution-building effort, by moving from the sphere of \textit{de facto} primary responsibility of judges to that of the more usual international legislators and back again. The approach in assigning legislative responsibilities wandered between entrusting judges with significant law-making powers and the flashes of increased interest towards procedure and legislative initiative on the part of the states and/or founding international organizations. With the return to the ‘judge-made law’ paradigm in the most recent tribunals, international criminal procedure traveled in full circle and the approach adopted for the ICC (and the SPSC) may appear exceptional. The weight of the exception is reduced by the open texture of those procedural frameworks and the considerable discretion that the judges retained (and have eagerly exercised) in fleshing out the minutiae of the criminal process, sometimes overriding the texts completely (as was the case with the SPSC).

Unlike what is sometimes claimed, international criminal procedure has not been an ‘afterthought’ and has not suffered from ‘disinterest’ or ‘inattention’ of primary legislators: to the contrary, on every occasion of their direct involvement (for example, at the London Conference in the process leading to the IMT or at the Rome Conference leading to the ICC),
much thinking was invested in developing the suitable procedure. On other occasions, the legislative task was delegated to the judges due to the inherent difficulty of creating a coherent and workable system by consensus in the context of political negotiations. Both legislative modalities have their benefits and inherent flaws: this is the choice between the dynamic and pragmatic procedural law-making by the judges, which lacks in legitimacy, and the law-making by primary legislators, which is less questionable from the legitimacy perspective but has a greater inertia and incorporate untested and unworkable solutions. In any event, despite having spent most time in the periphery and in the shadow of conventional international law-making, international criminal procedure has been on the minds of primary legislators.

The evolving nature of international criminal procedure got it lost somewhere in the cracks in between the principal procedural traditions which are not directly determinative of any of the issues of international criminal procedure. The ‘master plan’ was to form a set of hybrid, amalgamated, or patchwork systems combining different building blocks in a way that could presumably offer fair and effective solutions to the practical challenges of proceedings. Within those courts whose initial system was open-ended and which afforded more flexibility by entrusting the judges with the adoption and amendment of the RPE (ICTY, ICTR, and SCSL), the procedures have evolved considerably over time which has led to an even greater divergence amongst them. For no court did it amount to a decided move in either the ‘adversarial’ or ‘inquisitorial’ direction; rather, it perpetuated the initial open-endedness and indeterminacy of their procedural systems. The amalgamation of various procedural traditions and their associated elements has been acclaimed as ‘workable’, ‘sensible’ and ‘meritorious’ by some. Others viewed it as either potentially or actually incoherent, and, in what may seem as an overstatement, even monstrously so because it results in eroding the fair trial rights of the defendants. Combining of elements of different procedural traditions or cultures does not in itself create a new coherent culture. As aptly noted by Orie, ‘[t]he integration of elements of both systems in a new well-balanced system calls for a search for a new coherence, an intrinsic balance between all the elements of the system in its various procedural stages’, something that took domestic jurisdictions centuries. Other scholars have formulated the existential task of this body of law and a discipline in a similar fashion – ‘to forge its own identity’, as ‘a truly international criminal

351 C. Jorda, ‘The Major Hurdles and Accomplishments of the ICTY’, (2004) 2 JICJ 572, at 574 (‘one of the meritorious features of international courts is the blending of legal and judicial cultures’, yet wondering whether the judges have ‘taken the plunge and somehow metabolized the various cultural approaches in the extremely sensitive area of criminal procedure’).


353 Skilbeck, ‘Frankenstein’s Monster’ (n 73), at 452 (‘there is a risk that by adopting a “pick and mix” approach, international courts and tribunals end up with a system that contains none of the checks and balances that bring order to a national system, instead ending up with a Frankenstein’s monster that fails to adequately protect the rights of the defence’); Murphy, ‘No Free Lunch’ (n 173), at 573 (speaking of the ‘danger of creating a forensic Frankenstein monster which, if not restrained, will become ungovernable’); Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 114 (‘what appears to have been happening in practice in the international tribunals and elsewhere is exactly the kind of illicit amalgamation which should be impossible between the two opposites.’); S.T. Johnson, ‘On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia’, (1998) 10(1) International Legal Perspective 111, at 119-20 (‘The cobbling together of common law and civil law traditions erodes the rights of the defendants. Both of these systems offer protections to an accused through different means. But these protections are endangered when elements of both systems are appropriated and combined to form a new legal process.’)

procedure’ rather than the one modeled upon national systems and used to experimentally establish their credentials.\(^\text{355}\)

This brings us back to the question of what the problem of international criminal procedure is and to the claims that lay at the forefront of the early research on international criminal procedure. These need to be revisited in light of the foregoing survey and considerations flowing from a more recent research approach relevant to the determination of the nature and current state of that body of law. As noted, formidable ontological challenges to international criminal procedure stem from different sources: its perceived fragmentation and incoherence, its alleged lack of identity, reduced legitimacy as a result of being judge-made (giving rise to non-transparency and, yet again, incoherence), and the lack of the overall theoretical design.

To tackle these issues in turn, it is true that international criminal procedure remains widely diversified. The ‘fragmentation’ has taken place on at least two planes. The first dimension is the macro-level of diversity in the procedural models which operate in various international and hybrid criminal courts (and sometimes within the same institutions due to nuances of practice among the various Trial Chambers). Secondly, it is the micro-level of each individual court, whose procedural rules underwent more than cosmetic evolution over the years. The recently completed research aimed at systematizing international criminal procedure has shown that fragmentation can make the task of identifying fundamental principles and general rules difficult but not a ‘mission impossible’.\(^\text{356}\) At least in part, it appeases the concern that the coherence of that law is undermined by the lack of a unified and coherent corpus of norms. In fact, a panoply of fundamental principles and generally shared (non-fundamental) rules have been established in different areas of international criminal procedure. Many of those are not necessarily limited to the human rights protections—which remain an undisputable backbone of international criminal procedure—and in normative terms are more than mere coincidences or reflections of shared best practices among the different tribunals. A degree of convergence has been preserved or achieved, partly due to the legislative coordination (or mimicry) between the drafters of the Statutes and Rules and partly due to a judicial cross-fertilization in practice. The differences existing due to divergent institutional frameworks and dynamics as well as legal and cultural contexts do not rule out ‘the idea of an emerging common “international criminal procedure” that has a life of its own’.\(^\text{357}\) Arguably, the procedural pluralism across different international and hybrid jurisdictions evidences the maturity and pragmatism of international criminal procedure as it ensures its flexibility and adaptability to different contexts subject to compliance with the normative core of fundamental ‘common denominator’ principles.

As for the alleged lack of identity, it appears that international criminal procedure is not (and has not been) completely bereft of it. Certain of its fundamental normative aspirations (fairness towards the accused and efficiency) and distinctive traits (e.g. flexible

\(^{355}\) E.g. C. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2003) 2 (‘the aim must be a truly international criminal procedure which should not be used as a test for the credibility of domestic penal systems, but stands solidly on the various traditions of criminal procedure.’); G.S. Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’, (2007) 45 *Columbia Journal of Transnational Law* 635, at 705 (‘Instead of trying to model themselves [sic] on national systems, international criminal procedure will have to forge its own identity.’)

\(^{356}\) Sluiter et al. (eds), *International Criminal Procedure* (n 48).

\(^{357}\) Zappalà, ‘Comparative Models’ (n 189), at 72. Similarly, as noted by Zappalà, ‘the actual existence of a common “toile de fond” —a shared general context in which all procedural systems for international criminal courts and tribunals have functioned so far and which has influenced procedural rules or principles resorted to by such courts.’ *Ibid.*, at 41 and 44.
law of evidence, the absence of a jury) have been part of its DNA since Nuremberg.\(^{358}\) As noted, the requirement of a fair trial and international human rights law more generally are the essential elements of the normative groundwork of international criminal procedure, gluing it together into a coherent and legitimate body of law.\(^{359}\) The fragmentation of procedures in result of the proliferation of international criminal courts and the decentralized and ceaseless rule-amendment may have blurred the contours and particulars of that identity, or rather submitted the courts to a number of competing identities. The inadmissible forms of fragmentation (going beyond what may be allowed under the fundamental principles) may have posed the danger for both coherence and legitimacy. Furthermore, the ‘identity’ has not been static as the new fundamental values and interests were added to it over time; the prime example from the ICC, ECCC and STL is the recognition that the interests of victims should be better and more directly served by the international criminal process through providing victims with a more active role in such. But this does not counter the fact that the modern international criminal procedure is not deprived of an ‘identity’. The real problem is that it now bears multiple identities drawn from different sources of normative aspirations and influences. The ‘identity crisis’ is thus rather a crisis of self-definition and it is to be solved by ordering and balancing the multiple identities and by drawing clear priorities in specific areas of international criminal practice.

The third point—the alleged legitimacy deficit of international criminal procedure due to its origins in judicial discretion and creativity rather than in the more traditional political legislative processes—is not an all-defeating ontological problem. The judge rather than state-made character of that law, which has shaped the dynamics of its development, does not pose formidable constitutional objections to its authority. In the ad hoc tribunals, the combination of the legislative and adjudicative functions in one body is not necessarily problematic, even though it strikes some (especially continental) lawyers as perplexing. The procedural rules adopted by the ICTY, ICTR, and SCSL judges under their explicitly delegated authority by the architects of their Statutes do have the formal legitimacy, in the sense of being legally adopted. Their perceived legitimacy may have been reduced as a result of the non-transparent and non-democratic processes employed for the adoption of the Rules, particularly as compared to the relatively open process of drawing up the ICC Rules.\(^{360}\) But as the STL judges’ legislative approach shows, a remedy to that does exist. It is a matter of making the legislative processes more transparent and ‘democratically accountable’, by moving them as much as possible from ‘closed and reduced discussions’ to the ‘system of

\(^{358}\) On the (aspired) fairness of the Nuremberg trial, see Report of Robert H. Jackson (n 121), at x; Morris and Scharf, *An Insider’s Guide to the ICTY* (n 165), at 9-10 (more critical on the IMTFE due process record); Bush, ‘Lex Americana’ (n 118), at 525 (IMT and IMTFE Charters, Rules of Procedure, and bench rulings ‘embody a clear vision of familiar due process for criminal trials’), 532, 536; Q. Wright, ‘The Scope of International Criminal Law: A Conceptual Framework’, (1974–75) 15 *Virginia Journal of International Law* 561, at 572. For a more critical view on the IMT’s and particularly IMTFE’s rules and practice, see Wallach, ‘The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials’ (n 141), at 868 et seq. (‘the rules of evidence and procedure which governed the trials were flexible beyond not just the norms of criminal trials in democratic systems, but beyond the bounds of fairness as well’).

\(^{359}\) Boas et al., *International Criminal Law Practitioner’s Library, vol. III* (n 92), at 4 (‘it is in fact the human rights principle of a right to a fair trial that is the foundation of international criminal procedure, providing coherency and legitimacy to it as a body of international law.’).

\(^{360}\) The differences in the perceptions of legitimacy of the procedural rules of the ad hoc tribunals and the ICC ultimately relate to the *processes* rather than the choice of a law-making agency, where it is properly empowered to legislate. See e.g. Guariglia, ‘The Rules of Procedure and Evidence for the ICC’ (n 216), at 1119 (‘there is … a significant difference in terms of perceptions of legitimacy between norms adopted pursuant to relatively open discussions within the international community, with reasons and explanations being provided by the drafters and a record of the process of adoption being established, vis-à-vis norms adopted behind closed doors by a reduced community of judges.’ Footnotes omitted.)
open collective negotiations’. On the other hand, the legitimacy of the ECCC Internal Rules is a real issue: besides the closed nature of the ECCC judges’ legislative activities, their authority to enact such Rules was not expressly conferred by the UN and the Royal Government of Cambodia. Some of the provisions may have been adopted ultra vires and failed to grant deference to the non-objectionable Cambodian law in accordance with the ECCC’s constituent documents. Otherwise, there are no fundamental objections to the judge-made procedural law as such.

In terms of the overall conceptual coherence, it is not self-evident that the making of procedural law by the judges rather than by ‘true’ legislators has made international criminal procedure any more diffuse and eclectic. On the contrary, the traditional international procedural law-making process, with its well-meaning but occasionally bold experimentation, poses challenges distinct from the more careful, incremental, and problem-driven legislative effort by the judiciary. In reforming the procedural system, judges tend to exercise great care about the rules whose eventual application is their responsibility and are prepared to intervene promptly with remedial legislative measures if necessary. By contrast, formulating the common legislative intent of multiple negotiators—with their divergent interests and preferences requiring translation into a fully coherent, fair, and workable procedural system—through diplomatic compromises, is a daunting undertaking. From the experience of creating the procedural edifice of the ICC, the non-pragmatic and at times arguably quixotic influences—including the aspiration to accommodate the positions of the major legal traditions to secure consensus—may enter through the backdoor of trade-offs and package deals. This approach leads to insufficient attention being spent on ensuring the procedural system’s efficiency, to duplication of functions serving the same objective, and gaping holes in the procedural design that are ultimately left to the judges for resolution.

This relates to the fourth and final issue: the lack of what scholars interchangeably refer to as a uniform theory, model, or coherent and unitary legal tradition of ‘international criminal procedure’. International criminal procedure has grown out of its idyllic infancy, survived serious teething problems and troubles of adolescence, and has come to the point of maturity. However, twenty years into modern ICL adjudication, the coherent normative theory of procedure is yet to be developed. This gap is not helped by continuing uncertainty regarding the content of the notions of fairness and efficiency in the specific context of international criminal tribunals.

361 Guariglia, ‘The Rules of Procedure and Evidence for the ICC’ (n 216), at 1120 (‘the system of open collective negotiations is, by definition, closer to these [democratic] principles than a model of decision-making based on closed and reduced discussions within a committee or board.’)

362 As noted by Zappalà, at the Rome Conference, ‘the process did not assume the form of a thorough reflection on international criminal procedure. It rather took the form of an in-depth discussion among delegations on various technical aspects of the procedural law for the ICC. However, it is far from certain that the details of any procedural system can be devised and make sense all together without a broader vision of the overall system.’ See Zappalà, ‘Comparative Models’ (n 189), at 49.

363 See e.g. Zappalà, ‘Comparative Models’ (n 189), at 41; G. Sluiter, ‘Adversarial v. Inquisitorial Model’, in A. Cassese (ed.), Oxford Companion to International Criminal Justice (Oxford: Oxford University Press, 2009) 231 (‘an independent theory of international criminal procedure still needs to be developed’). To the same effect but on the ICL generally: B. Perrin, ‘Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials’, (2007-8) 39(2) Ottawa Law Review 367, at 393 (‘international criminal law has no longstanding tradition, only a tentative and uncertain existence with little theoretical basis. Without a tradition behind it, international criminal law is a law seeking out a tradition—hence the paradox of it being an emerging legal tradition.’).

364 For a defeatist view, see Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 105 (‘After two decades of debate and experimentation it is still not clear whether a definitive model of “international” criminal procedure has emerged … Initial hopes that the scientific deliberations of the world’s leading jurists, followed by a period of rigorous testing in practice, would lead us rapidly to the holy grail of a procedure which was both efficient and rights-respecting, have been dashed.’).
process, incremental in some tribunals and boldly experimental in others, the limited historical continuity between the efforts, and the fragmentation of procedural legislation over multiple tribunals all account for the persisting absence of the well-thought-through and scientific design of procedure. Neither the piecemeal and quick-fix judicial approach to reforming international criminal procedure, nor the diplomatic solutions of reinventing it by ‘practical politics’ have resulted in a fully coherent system that is more than a patchwork, however innovative it is. Arguably, legislators can hardly be expected to faithfully pursue such a grand scientific objective, and the problem is that they have been left largely to their own devices by the scholarship. That outcome can only be hoped to emerge from a focused ‘search for a new coherence’, driven by both trial-and-error and theoretical insights and, therefore, best conducted in close synergy between practitioners and scholars.

Resounding calls have been made ‘to turn to [the] nuts and bolts’ of international criminal procedure in order to ‘work out how to deliver justice fairly and effectively and in particular, cost effectively’. With the ‘nuts and bolts’ in place, after several decades of practice-driven experiments, the time is more than ripe to move from practice to theory and to try and create a coherent theoretical outline of procedure on the basis of the previous empirical experience of conducting international criminal proceedings. This calls, first, for a systematic examination and critical assessment of the quality and adequacy of the procedural law and related experiences of international criminal adjudication in various tribunals; second, for revisiting the choices made early on, rather gropingly and arbitrarily, in creating and reforming international criminal procedure in various institutional frameworks; and, thirdly, for filling in the theoretical gaps which tend to be ignored but affect the practical operation of international criminal justice. The whole system’s prospects for the future and viability as an effective and legitimate mechanism for dealing with international crime cases depends, to a large extent, on the directions that will be chosen for its procedure. The existence of an overarching theory to bolster its further evolution is a question of the project’s survival.

---

365 E.g. ibid. (criticizing tribunals’ ‘procedural instability characterised by sudden and sometimes damaging changes in direction over a very limited period of time.’)

366 P.C. Keen, ‘Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals’, (2004) 17 Leiden Journal of International Law 767, at 812; Whiting, ‘The ICTY as a Laboratory of International Criminal Procedure’ (n 161), at 107 (noting the need to take care to develop a system that is coherent and not simply a patchwork); Tochilovsky, ‘Proceedings before the ICC’ (n 173), at 274 (‘A mere mechanical implantation of elements from one system into another is a rather risky experiment.’)

367 Keen, ‘Tempered Adversariality’ (n 366), at 813. For a more negative view, see Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 105 (‘the disappointment of original hopes and the confusion which has arisen as procedure was extemporized, point to a failure of the academic community to provide coherent and principled guidance.’)

368 Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1495.

369 Robertson, ‘General Editor’s Introduction’ (n 14), at 1.

370 This research agenda was formulated as early as in the late 1940s and was occasionally restated in the more recent literature: T. Taylor, ‘An Outline of the Research and Publication Possibilities of the War Crimes Trials’, (1948-49) 9 Louisiana Law Review 496, at 501 (‘Based on the records of the Nurnberg trials alone a most useful study could be made, but a full treatment would require examination of the records of many other trials in order to make a comparative study. From such a study, the outlines of international legal procedure should emerge.’); Keen, ‘Tempered Adversariality’ (n 366), at 812.

371 Safferling, International Criminal Procedure (n 3), at 2 (pointing to several issues, e.g. victim participation, witness protection etc, which ‘warrant a new and more systematic way of thinking about procedural matters’).

372 See also Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 105 (‘The task of assessing these new prototypes of international criminal justice is urgent if the whole project of defeating impunity for grave international offending is to survive beyond its infancy.’).
4. **A NORMATIVE THEORY FOR INTERNATIONAL CRIMINAL TRIAL**

4.1. What theory?

As the title of the book gives away, the principal objective pursued here is to attempt to offer a coherent normative theory for the conduct of international criminal trials, or at least to make some initial steps in that direction. The term in the title is rather pretentious, and some clarifications as to the proposed theory’s purport, scope, and limitations are in order. ‘Normative theory’ refers to an overarching theoretical account seeking to explain the rationales and the logic of developing the standards of the trial process and practice in principal international criminal jurisdictions and, on that basis, proposing an internally coherent model of a procedural system characterized by enhanced fairness and efficiency.\(^{373}\)

Given the present state of the field and in order for the theory to be serviceable in the future, it must be practice-oriented, sufficiently pragmatic and context-bound – that is, not a universalist and a-historical attempt. Hence it must build upon the critical lessons learnt from the procedural legacy and experience of the historical and contemporary international and hybrid criminal tribunals as much as upon the conceptual considerations as to how international trials should be organized. Drawing upon the richness of the emerging theoretical discourse on international criminal procedure, the plurality of relevant jurisdictions, and the significant volume of procedural practice they have accumulated, the envisaged theory seeks to come up with an overarching yet nuanced explanation of the evolution and the present state of the tribunals’ trial process. It also seeks to highlight the trends and to recommend avenues for reforming international trial procedure in the future.

At present, such a theory of international criminal procedure focusing on the trial stage is lacking. The reasons for this gap may be difficult to comprehend. The body of emerging theoretical research on international criminal tribunals has barely started to scratch the surface of this topic, which has until most recently remained an invisible ‘elephant in the room’. The scholarship, particularly belonging to the most recent wave, went beyond the static and descriptive accounts of the contents of procedural rules and proffered general conceptual explanations that addressed the foundations of international criminal procedure, evolution, and key determinants.\(^{374}\) Some of the accounts have tackled doctrinally the variants of procedure operating at specific tribunals or focused on particular stages or areas of practice, including the elements falling within the conduct of trial.\(^{375}\)

But the trial has so far not been tackled as a distinct unit of theoretical inquiry, resulting in a seemingly insuperable fragmentation of the debates on procedure and mirroring, in this respect, the state of similar debates on national criminal process.\(^{376}\) As a notable example of the more general accounts, Mégré’s analysis of the development of international criminal procedure engages with its mainstream conceptualizations as, on the one hand, the clash between the two main procedural traditions and, on the other hand, a quest for achieving fairness in accordance with human rights law.\(^{377}\) The explanation it offers

---

\(^{373}\) In this sense, the term ‘normative’ is used to denote the preferred (from a legal and policy perspective) state of procedural law and practice, achievable under the theoretical framework. This understanding subsumes, and makes one step further away from, descriptions and critical assessments of their present state in terms of fairness, efficiency, legitimacy etc.


\(^{376}\) See A. Duff et al. (eds), The Trial on Trial, Vol. 3: Towards A Normative Theory of the Criminal Trial (Oxford: Hart, 2007) 5 (‘Various different features of the criminal trial can be evaluated independently, in terms of either the promotion of accuracy or of the protection of defendants’ rights. Theorising about the trial then quickly fragments into theorizing about particular evidential and procedural questions’).

\(^{377}\) Mégré, ‘Beyond “Fairness”’ (n 374), at 42-43.
as to ‘why international criminal procedure has become what it is’ is caught by the notion of ‘becoming international’, in result of ‘an attempt to develop a procedure that is uniquely suited to the reality and the values of the tribunals’ international nature while simultaneously drawing from domestic traditions and seeking to respect the right to a fair trial.’ The theory usefully frames the development of international criminal procedure as the search for identity and spots the weaknesses of the traditional—comparative and human rights—accounts. But it neither specifically focuses on trial nor goes into detail of the procedure at different international courts. In turn, both Keen’s description of the trial process at the ad hoc tribunals as ‘tempered adversariality’ and Langer’s previously mentioned account of the increased role of judges at the preparatory stage as a ‘managerial judging’ model explain the meaning and effects of the procedural reforms at the ad hoc tribunals and the ICC regarding the scope of judicial powers. Given the fact that they focus on judicial role and do not extend coverage to other jurisdictions, the proposed theory seeks, at least, to complement these accounts in light of the additional and more recent comparative data.

Developing a theory for international criminal trials requires harnessing the pluralism of procedural arrangements across multiple jurisdictions and their parallel and seemingly haphazard development as well as the conceptual eclecticism and inadequacies of any given mechanism. It is to be built upon a comprehensive and dynamic account of international criminal procedure, which addresses and compares the trajectories of evolution of procedure in all of the international and hybrid criminal tribunals. Each of the tribunals is vested with distinct institutional traits, espouses distinct procedural philosophies, and has followed an individual path of procedural reforms. The challenge lies in identifying the rationale for and, where possible, common denominators of, the diverging trial procedures, looking not only into forms but also into the more foundational considerations and values at stake. Where the existing procedural solutions are irreconcilable, the interests of coherence require that specific choices be made and justified so that the theory could serve as a readymade blueprint for the future.

In national criminal justice research, scholars have engaged in similar exercises. They readily recognized the paradoxically embryonic state of the normative theorization about trials, despite the prevalence of the ‘trial’ phenomenon in public and policy perceptions of criminal justice. However, the import of these more philosophical (rather than procedural) accounts with respect to the present undertaking is indirect at best. Those insights have

---

378 Ibid., at 42 (‘the main ingredient in the development of international criminal procedure is a process of defining an international procedural “identity” based on the specificity of international tribunals.’).
379 Ibid., at 59.
380 Ibid., at 42, 48 (critical of the ‘human-rights’ account on the ground of the indeterminacy and open-endedness of the human-rights standards and of the ‘clash of traditions’ vision for its failure ‘to explain how, over time, one tradition is prioritized over the other’).
381 Mégret’s central paradigm, ‘becoming international’, is also contestable, not least because international criminal procedure has been properly ‘international’ from inception: states (and subsequently judges) set and collectively were willing to create and perfect a novel and sui generis procedural regime different from criminal and military justice at the national level. Hence there is no real ‘becoming’ in the evolution of the tribunals’ procedure. The driving forces (and sources of normative indeterminacy) have lain equally in the need to adjust the process to unique circumstances of the courts as in the ‘due process’ competition and compromises between the main procedural traditions. Demonstrating this point in relation to the IMT, see Bush, ‘Lex Americana’ (n 118), at 538 (‘In defining due process for the war crimes trials, [the American negotiators] were writing on a blank slate and could afford a due process that was more capacious, better funded, and less limited by federalism, lax precedent, and the ongoing needs of street policing.’) See further supra section 3.2.
382 Duff et al. (eds), The Trial on Trial 3 (n 376), at 2 (noting little progress in developing a normative theory of the criminal trial) and 4 (‘theorists have shown relatively little interest in developing overall normative theories of the trial’).
Chapter 1: Background and Purpose of the Study

sought to provide relatively abstract explanations of the phenomenon of trial.\textsuperscript{383} They have not been underpinned by a strong comparative approach being the equal emphasis on different procedural traditions.\textsuperscript{384} At the same time, the diversity of procedures observed within the national context by far exceeds the fragmentation of international criminal procedure applied in a handful of international courts; international criminal procedure might thus lend itself more readily to an effort of discerning a ‘trial theory’. But this also means that such effort cannot readily fall back on any coherent normative theory developed within or for the national jurisdictions by the comparative criminal procedure scholarship. While the normative theory of international criminal trials might draw on the components of theories prevalent in national justice research, the present objective will require the balanced and careful assessment of their validity in the international context.

While relying on these previous and undoubtedly valuable analytical accounts of international criminal (trial) procedure and accepting their elements in different degrees, the theory the present book seeks to develop is not a quest for a ‘philosopher’s stone’ in international criminal procedure. The objective is not to formulate a catchy overarching ‘model’ or concept of procedure, along the lines of ‘calling to account’, ‘becoming international’, or the like, which might serve the purpose of bringing intellectual entertainment to the theorists of procedure. The theory will not be as nearly conceptual, philosophical, or captivating. Its contours are primarily procedural and technical, although the institutional and sociological factors are given consideration, to the extent this author’s limited knowledge of the relevant fields may allow.

The key tasks are, firstly, to tease out and lay bare the fundamental values lying at the core of the standards and practices of the organization of the trial stage in international criminal court. These would constitute a methodological basis and meta-theory of the proposed trial framework. Second, the translation of those values into specific procedural forms will be addressed. This objective requires paying attention both to the ‘ideological’ or value-laden foundations for the trial process and to the form of process and, most importantly, to the linkage between the two. It has been proposed above that international criminal procedure does have a ‘normative identity’ and possibly several of them. It is as yet unclear how this ‘identity set’ is translated into, and anchored to, any particular system of defining and distinctive procedural features, being a recognizable ‘face’ of international criminal trial. The open-endedness of the parameter of ‘fairness’ of international criminal process, multiplicity and abstract nature of the overarching goals of international trials, and the range of the options of procedural arrangements in the comparative toolkit, entail that international criminal trials can remain faithful to their ‘identity’ while putting on different ‘faces’ in relation to specific phases or activities.

For instance, they can remain essentially fair and effective despite adopting different approaches to truth-finding, varying structure and modes of evidence presentation, diverging roles of procedural actors, and by adding or disallowing active victim participation. In case of cross-jurisdictional divergence, the normative theory is concerned with defining what issues

\textsuperscript{383} R.A. Duff, Trials and Punishments (Cambridge: Cambridge University Press, 1986) 34, 115-19, 114 (conceptualizing criminal trials as the way to call the defendant, as a rational agent, to account, to engage in a rational inquiry with him, requiring his active rational participation, to communicate to him, and ensure his acceptance of, the judgment); Duff et al. (eds), The Trial on Trial 3 (n 376), at 3 (taking up the same ‘idea of calling to account: the criminal process … is a process through which the defendants are called to answer a charge of criminal wrongdoing and, if they are proved to have committed the offence charged, to answer for their conduct.’) and 13.

\textsuperscript{384} E.g. Duff, Trials and Punishments (n 383), at 100; Duff et al. (eds), The Trial on Trial 3 (n 376), at 3 (clarifying that they ‘draw primarily on the history of the trial in England and Wales’) and 10-11 (‘it is unlikely that the normative theory that we develop can, in a very simple and straightforward way, be transplanted into other systems.’).
in the trial procedure may or even should remain pluralistic and which of them must be subject to greater convergence. The resulting normative model would then evince the constitutive principles of international criminal procedure that can serve as the axis of, and the framework for, any possible harmonization in the future. But harmonization should not be seen as the aim in itself and is not to be advocated unless there is a cogent normative or utilitarian reason for doing so. It would not be evident where a diverging procedural practice still embodies a satisfactory application of constitutive principles of fairness and effectiveness in the specific institutional framework. The pluralism of international criminal procedure may be a compelling need within the overarching system of international criminal justice, insofar as the tailored procedures are likely to be better equipped to service the specific demands of the relevant tribunal operating in the unique circumstances of a post-conflict society. As the possible basis for future harmonization, the ‘normative’ model of an international criminal trial may therefore need to be sufficiently open-ended and not as ‘thick’ in regulatory terms as to foreclose any alternative arrangements that are not inconsistent with the normative framework.

4.2. Objectives and questions

Regardless of any conceptual and practical value the proposed theory may have next to the primary normative objective the study pursues, it also contributes to three intermediary objectives en route to that outcome: methodological, conceptual, and descriptive, each entailing its own set of research questions.

The methodological objective is to provide a theoretical framework to be used for the normative assessment of the soundness and adequacy of the trial procedure in international and international criminal jurisdictions. The first part of the study responds to the need for the evaluation algorithm which is subject to pronounced criteria and is thus accountable: it identifies and justifies the parameters to be used. What requirements and perspectives should shape one’s assessment of the organization of international criminal trials? More importantly, it engages with the question of how the chosen criteria—fairness, goals of international criminal justice, and efficiency—are to be employed in the appraisal of the procedural standards and practices relating to the trial stage. As noted, the question of the choice of the framework for measuring the performance of international criminal justice remains unsettled. The study attempts to make a contribution in this domain within the boundaries of its subject matter, first by putting forth the proposed evaluative framework and, as part of the normative analysis, probing its actual validity and possibly revisiting it if it proves unworkable. Selecting yardsticks from among the many potentially relevant criteria with a view to applying them jointly as part of a single set should be such as to maximize the conclusiveness of considerations flowing from such an evaluation.

The conceptual objective, tackled in the second part of the book, is to address the phenomenon of international criminal trial from a theoretical perspective by approaching it as an autonomous unit and object of inquiry. For that, the trial stage is to be distinguished from other procedural phases and to be demarcated in the chronology of international criminal proceedings as a whole. The underlying questions, which aim to unravel the nature of the phenomenon of international trials, are: what place the trial stage occupies in the context of the proceedings at the tribunals, what procedural functions it serves, and how the functions relate to the institutional goals. The phenomenology of international criminal trials would be enriched by contrasting these aspects with the position and specific role of the trial stage in the context of national criminal proceedings, which warrants taking a comparative perspective to the respective issues. For example, if the establishment of the truth is a function of the trial phase, what does it entail, how far does it extend – and (how) did the
tribunals manage to reconcile the fundamentally different visions of that function espoused by the main procedural traditions?

Third, the study pursues the manifold descriptive and analytical objective, as it aims to: (i) comprehensively discuss, (ii) compare and distinguish, and (iii) critically evaluate, against the criteria chosen, the legal standards governing the design and organization of the trial stage and the practice of their application in all main international criminal jurisdictions. This exercise, which consumes the bulk of this study, is geared towards the stock-taking and principled assessment of the procedural legacy accumulated by international criminal tribunals to date, and in particular the choices made for the design of the trial stage. Moreover, it aims at discerning and rationalizing the key overlaps and differences between international criminal courts in relation to the design of trial proceedings, and making sense of the diversity of the trial models in use at those courts, both historically and contemporaneously.

The array of practical problems in the operation of international criminal trials makes the questions regarding adequacy of the current format of international criminal proceedings and optimal ways of addressing the existing concerns pressing. The results of the critical assessment and comparative exercise—the proposed ways to remedy the problems and inadequacies of the law and practice—should feed in the ultimate, normative objective of the study; they will serve as foundations of the ‘normative theory’ of international criminal trial as set out above. It cannot be excluded that the insights gained from the application of the evaluative framework will, incidentally, prompt review of the methodological choices and use made of the yardsticks employed in the analytical part of the study. This will be achieved by re-interrogating the normative value of the parameters that were used. In this sense, by reaching the end, this study would send the readers ‘back to the drawing board’, in methodological terms, but this outcome can be equally gratifying: the end of one journey is the beginning of the other.

4.3. Approach

4.3.1. Focus on the trial stage

The subject-matter scope of the proposed theory is demarcated by a deliberate focus on the trial stage. Despite its importance as an integral component of international criminal proceedings, the trial has neither been dealt with as an independent object of inquiry nor systematically overviewed as a procedural unit on its own. Paradoxically, more attention may have so far been devoted to the pre-trial process, commonly seen as a key to expediting trials and ensuring fairness. Thus far, the titles focusing on the trial have mostly been parts of composite and comprehensive works on international criminal procedure, intermingling discussion of cross-cutting themes such as rights of the accused and the law of evidence. In

385 On the choice of jurisdictions, see section 4.3.3.
386 In this sense, the study builds upon and complements the earlier research aimed at distilling and systematizing the formal and shared principles and rules of international criminal procedure: Sluiter et al. (eds), International Criminal Procedure (n 48).
387 Section 4.1.
389 E.g. Boas et al., International Criminal Practitioner’s Library, Vol. III (n 92), Chapter 7; Safferling, International Criminal Procedure (n 3), Chapter 8. But see Sluiter et al. (eds), International Criminal Procedure (n 48), Chapter 5.
addition, the trial stage has become subject to limited consideration in the context of the ICC statutory framework and early operations thereof.³⁹⁰

One possible reason for the limited attention for the international trial as a separate object of scholarly inquiry is that, despite the broad resort to the categories denoting the division of the proceedings into phases, the discipline of international criminal procedure has not yet developed a structural approach and well-established taxonomy that would enable the distinct phases to be addressed separately.³⁹¹ Often, ‘trial’ has been referred to generically as international criminal proceedings as a whole—the overall procedural form that shrouds the implementation of substantive law in the tribunals—and without limiting it strictly to the specific trial phase or stage.³⁹² This corresponds to the common-law penchant for viewing a public trial hearing before a jury as a one-day-in-court event.³⁹³ At common law, the trial is a true culmination of criminal proceedings and essentially the only full-fledged stage, given the partisan nature of the activities conducted in the pre-trial and the limited scope of post-trial review of factual findings.

The limited conceptualization of the trial phase as a separate object of inquiry is also related to the strong links between the procedural activities at various stages of criminal process (investigation, pre-trial, trial, and appeal and review). Similarly, the rights, powers and duties enjoyed or exercised by the various actors and participants are inexorably connected and are not always susceptible to a waterproof division that would justify a per-stage approach. The extraction and isolation of any given procedural phase from the overall context of criminal process can rightly be seen as inherently artificial and amounting to a theoretical exercise.³⁹⁵ And yet, the division into stages is widely used in ICL and jurisprudence of the tribunals. Terms such as pre-trial and trial are established terminology, even though there is no agreed understanding of what procedural activities fall under these phases and how these are to be distinguished.

Tackling the trial phase of international criminal proceedings as an autonomous object of inquiry would provide greater clarity and a better understanding of the linkages between

³⁹⁵ Exceptionally, employing a stadial approach, see Ambos, ‘The Structure of International Criminal Procedure’ (n 190). For a more established issue-per-issue analytical approach, see e.g. Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149).
³⁹⁹ In this vein, see e.g. Mégret, ‘Beyond “Fairness”’ (n 374), at 39. M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International Criminal Tribunals’, (2001) 50 International and Comparative Law Quarterly 26, at 29 ('the consideration of difference and synthesis of procedural styles need not be limited to origins or to the manner in which evidence is elicited.'

67
the different stages. The quest for a configuration of elements originating from different traditions to ensure the coherence of the procedural system undoubtedly requires that full attention be paid to the interplay of those elements and links between procedural stages. But provided that a contextual vision of the entire process is preserved, breaking it down into stages and tackling the trial autonomously sheds light on how the procedural mechanism works as a whole. The expected benefits of this approach may well surpass its evident limitations. It must be noted that in the national theory of criminal procedure, the trial phase has been subject to serious and thorough efforts of multifaceted analysis, and this study on international criminal trials can usefully draw upon the various theoretical aspects of those works.\footnote{Note the seminal three-volume work by Duff et al. (eds), \textit{The Trial on Trial} 1 (n 393); \textit{id.} (eds), \textit{The Trial on Trial, Volume 2: Judgement and Calling to Account} (Oxford/Portland: Hart Publishing, 2006) and \textit{id.}, \textit{The Trial on Trial} 3 (n 395).}

For these reasons, and in order to fill said gap, this book will specifically and primarily focus on the trial stage of international criminal proceedings, while remaining aware that the criminal process is to be conceived as a whole. Where it is impossible to understand the rationales behind trial rules and practices without insight into the pre-trial or appellate procedure, the latter are touched upon. Providing a panoramic view on international criminal process with equal attention to the linkage between the stages and to the specific micro-areas of practice is reserved for future efforts. The ultimate aim is to contribute to the developing notions of what a coherent and workable system of international criminal procedure should entail. It is hoped that this study can serve as a bolster for future exercises in constructing a coherent comprehensive theory of international criminal procedure.\footnote{See Duff et al., \textit{The Trial on Trial} 3 (n 376), at 13 (‘any adequate normative theory of the trial will need to be integrated into a larger account of criminal law, criminal justice and the criminal process.’).}

\subsection*{4.3.2. Perspective and limitations}

The focal point of the study—the trial proceedings—invites a further qualification of the angle and limitations of the inquiry, in addition to the chosen procedural (and, whenever warranted, institutional) approach. The trial is a thematically rich field and numerous issues may come into consideration. The objectives set will not necessarily be promoted by a comprehensive coverage. Rather, the treatment of the trial proceedings in the following will centre on matters which speak more directly to the \textit{nature} and \textit{organization} of international criminal trials.\footnote{For a chapter taking a broader perspective, see Acquaviva et al., ‘Trial Process’, in Sluiter et al. (eds), \textit{International Criminal Procedure} (n 48), at 489-938.}

The ‘nature’ of trial is determined by its objectives, role, and functions in the criminal process. Its face and identity in terms of comparative law are also determinative, to the extent that its nomenclature can be used for heuristic purposes and subject to the caveat that the trial arrangements in international courts are not only \textit{sui generis} but are so in their own unique ways. The ‘organization’ of trials refers to the structure of trial as the sequence of its distinct components, activities, and ‘significant sites for decision-making’ and for the exercise of discretion\footnote{Findlay, ‘Synthesis in Trial Procedures?’ (n 395), at 29.} – from the preparatory steps to the issuance of the trial and sentencing judgments. The chronological, or sequential, perspective on the organization of trial is chosen as the principal organizing framework for examining trial arrangements.

This warrants a clarification given that the chosen approach predetermines the book’s structure and content as well as the coverage of issues in the theoretical and descriptive parts of the account it constructs. For instance, the arrangements for guilty pleas and negotiated justice are only addressed insofar as they relate to the truth-finding function of trials and cancel the need for full-fledged contested trials. Such arrangements possibly affect the...
position of the trial stage in the overall context of procedure and have implications for the structure of the trial stage. But the related policy aspects of guilty pleas and plea agreements fall outside the scope of this study and have received detailed treatment elsewhere.\(^{400}\)

Indeed, a meaningful discussion of trial procedures cannot be conducted without addressing, in relation to distinct components of the trial process, the overarching themes such as the legal status of key participants (being the accused, defense counsel, prosecution, judges, witnesses and victims) and the law of evidence. The dilemma of conducting international trials fairly and effectively can only be disentangled if these cross-cutting themes, which make the life and body of procedural law and practice, are paid adequate attention. Essentially, the trial process is an interaction between the actors (judges, prosecutors, defence counsel, accused, witnesses, participating victims, etc.) who exercise their competences or rights with respect to evidence adduced to prove or disprove criminal allegations.

While the law of evidence and the roles of actors are issues vital to appreciating the nature and organization of trials, they are inseparable from the ‘chronology’ perspective. Self-evidently, each evidence- and competence-related interaction occurs and gives rise to litigation at appropriate temporal phases. The actors exercise powers and/or rights at no other stadium than that reserved for the activity in question. The disclosure, admission and presentation of evidence abide by sequential logic imparted in the proceedings that defines the relevance of issues to the case at trial and the appropriateness of dealing with them at a particular moment. Hence the chronological approach may well be the most basic and important analytical tool in criminal procedure.\(^{401}\)

But indeed, as noted, the sequential perspective is not exhaustive and should be combined with the thematic approach. For instance, when tackling the order of the presentation of oral evidence at trial, one cannot avoid discussing the rights, duties and/or powers of the prosecution, defence counsel, and judges (which is essentially an actor-based categorization). Similarly, there may also be an overlap with the law of evidence in relation to issues such as the sequence of parties’ cases (or blocks of evidence distinguished otherwise) and the different modes of questioning. Inevitably, the role and legal status of key actors and the law of evidence shall be addressed in, and form part of, the ‘normative theory’ of trial, to the extent necessary. But these perspectives are not given an independent place in this study, as they have been subject to detailed consideration in other works.\(^{402}\)

Furthermore, the procedural outlook of the study warrants excluding the largely substantive law issues, albeit that they may fall within the temporal scope of the trial phase. Thus, sentencing principles and practices, going beyond the sentencing procedure proper as

---


\(^{401}\) J.F. Nijboer, ‘Comparative Perspectives on the Judicial Role’, in S. Doran and J.D. Jackson (eds), *The Judicial Role in Criminal Proceedings* (Oxford/Portland: Hart Publishing, 2000) 21-2 (‘The concept of “process” itself is related to a chronological order of reality. A process is something that is “going on”…. The law tends to regulate and limit the process. One of the most important forms of regulation and limitation is a strict division between the various stages.’).

\(^{402}\) Besides the numerous articles on the law of evidence, see e.g. K.A.A Khan et al. (eds), *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010); M. Klamberg, *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events* (Stockholm: Stockholm University, 2012). Taking the actors’ perspectives on trial, see Acquaviva et al., ‘Trial Process’ (n 398), at 689-817 (judges), 818-938 (witnesses); S. Vasiliev, ‘Trial’, in Reydams et al. (eds), *International Prosecutors* (n 96), at 700-97 (on prosecutors).
the part of trial stage, fall beyond the scope of the study, without amounting to a gap given
the wealth of literature on the subject.\footnote{403}

4.3.3. Key definitions and courts covered
The notion of ‘international criminal procedure’ is crucial to defining the contours of this
inquiry, which focuses on the phenomenon of international criminal trials, not least in terms
of agreeing on which courts can be regarded to hold such trials and need to be systematically
examined. For the present purpose, international criminal trials are broadly understood as the
trials conducted under international criminal procedure by both international and hybrid
tribunals, as opposed to courts that are purely domestic. Most recently, international criminal
procedure was defined as ‘the specialized body of international law which governs the
conduct of criminal proceedings, including matters of both procedure and evidence, in the
context of the international legal order’,\footnote{404} and this definition is hereby adopted. As this body
of law’s main objective and the usual function are ‘the effective and fair enforcement of
substantive international criminal law by international criminal tribunals’, the embedment of
the respective procedural principles and rules in the international institutional framework and its
‘adjectival’ relation to substantive criminal law may be descriptive but hardly defining
features.\footnote{405}

Indeed, there are no reasons for restrictively defining an autonomous body of law, to
which international criminal procedure undoubtedly amounts, by the criteria of which
institutions apply it and in relation to which category of cases (core international crimes).\footnote{406}
The direct application of international criminal procedure in national courts cannot be ruled
out, at least in theory, and it could also be extended to investigation, prosecution and
adjudication of crimes which may fall beyond the somewhat elastic and fluid notion of ‘core
crimes’. However, this would not \textit{per se} render the criminal trials conducted domestically as
international under the standards of international criminal procedure because those trials
would still run under the national authority and the resultant practices would amount to the
domestic interpretations and versions of international procedural standards. Thus, in
accordance with the definition of international criminal trials suggested above, the nature-of-
court (or agency) related parameter (whether the court is international/hybrid or purely
national) and the criterion of the origin of the procedural law in international law are
cumulative.

The first parameter is met whenever the relevant court or tribunal possesses an
international legal capacity, i.e. its legal personality has been conferred, explicitly or
implicitly, under international law and it draws its authority from an international treaty,
bilateral agreement between an international organization and a state, or by a resolution of an
international organization. There can be no identical post-conflict societies and two fully
coincidental forms of international participation in the legal responses to the atrocities. This

\footnote{403} See e.g. O. Olusanya, \textit{Sentencing War Crimes and Crimes against Humanity under the International
Criminal Tribunal for the Former Yugoslavia} (Groningen: Europa Law Publishing, 2005); S. D’Ascoli,
\textit{Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC}

\footnote{404} Editors, ‘Introduction’ (n 48), at 13.

\footnote{405} Ibid., at 14.

international law of criminal procedure sets rules to be followed in determining whether a person is responsible
for a crime under international law. … The only area in which international criminal procedure in its genuine
sense in actually applicable is in trials before international courts.’). But see also Acquaviva, ‘The New Paths’
(n 313), at 131 (‘a common set of basic procedural due process guarantees that each international judicial body
is called to examine individual criminal responsibility is required to follow’: the definition seemingly suggesting
a narrower subject-matter and/or regulatory method (fair trial for the accused) which does not exhaust the
contents of the modern law of international criminal procedure).
explains the existence of a spectre of hybrid (mixed) criminal jurisdictions with international component, being the variations of ‘internationalized national’ (essentially national) and ‘nationalized international’ (essentially international) forms of criminal justice. But characterizing a judicial institution as essentially international depends on whether it is a subject of international law, established as an independent international organization, a treaty-based organ, or as a part of international (UN) administration. It is the delegation of legal personality by the subjects of international law (states and international organizations) in accordance with international law and their recognition to that effect as such that imbues the institution with the international character. 407 The other criteria including the composition and applicable law are consequences rather than the indicia thereof, and are possibly relevant for determining the extent of (inter)nationalization. The second criterion seems to be whether or not the procedural standards the court or tribunal applies are derived from international, as opposed to national, law.

Thus, criminal trials in domestic courts, even if they rely on international procedural standards and/or apply substantive international criminal law, are excluded from the inquiry, e.g. the Iraqi High Tribunal 408 and the Bangladesh International Crimes Tribunal. 409 The same goes for trials conducted by (hybrid) courts applying substantive international criminal law and having an international component (most notably, international staff) but relying exclusively or mainly on national laws of criminal procedure – e.g. the War Crimes Chamber in the State Court of Bosnia and Herzegovina 410 and the UNMIK ‘Regulation 64’ panels in the courts of Kosovo, now run and supervised under the auspices of the EU. 411

As the previous discussion of the genesis and evolution of international criminal procedure already makes clear, this definitional framework limits the inquiry to the legal

407 M.N. Shaw, International Law (Cambridge: Cambridge University Press, 1997) 138-9 (‘Personality in international law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and capacity to enforce claims. . . . International personality is participation and some form of community acceptance.’) and 191 (‘Whether an organisation possesses personality in international law will hinge upon its constitutional status, its actual powers and practice’).


411 UNMIK Regulation 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000. Although international judges and/or prosecutors were assigned by the Special Representative of the Secretary-General ‘to ensure the independence and impartiality of the judiciary or the proper administration of justice’ as a part of ‘international civil presence’, the domestic procedural law was relied upon.
arrangements and practices of the trial process in nine international and hybrid jurisdictions: IMT, IMTFE, ICTY, ICTR, SCSL, ICC, SPSC, ECCC, and STL. All of these courts are deemed, for the purpose of this study, to have conducted international criminal trials or to have been availed of international criminal procedure which may inform the ‘normative theory’. The following observations will demonstrate briefly how the proceedings before those courts meet said criteria and what considerations apply when relying on their trial procedure and practice for the purpose of ascertaining the status of international criminal procedure.

Doubts expressed as to the international nature of the Nuremberg Tribunal can confidently be dismissed because it was not merely a joint tribunal run by the Allied Powers but the one based on the international agreement between them, subsequently formally adhered to by nineteen other nations. While the international legal personality of the IMTFE appears more tenuous, given its establishment by a Special Proclamation of General MacArthur, his authority in doing so, at least formally, was rooted in international law and consented to by the other Powers. As discussed above, the IMT and IMTFE procedure, as outlined in their respective Charters and complemented by the subordinate Rules of Procedure, was genuinely international by nature and origin. By contrast, the subsequent trials of war criminals conducted by each of the four Allied Powers in their zones of occupation under the authority of the Allied Control Council and pursuant to Control Council Law No. 10 were subject to their domestic procedural standards of criminal (military) justice. Thus, these were no international trials for the present purpose and they are therefore excluded from the scope of the study.

The modern criminal courts and tribunals, bearing the word ‘international’ in their titles—the ICTY and ICTR, on the other hand, and the ICC on the other—are truly international, given their establishment by UNSC resolutions and by treaty, respectively. The international nature of their procedural law and the fact that they conduct international

---

412 Although substantively relevant to the study, the procedure of the Residual Mechanism for International Criminal Tribunals is not covered for the reason that the MICT was established, and its Rules adopted, when this book was in the advanced stage of preparation. See supra n 27 and MICT RPE (MICT/1, 8 June 2012) and Corrigendum (MICT/1/Corr. 1, 17 August 2012).

413 G. Schwarzenberger, ‘Province of International Judicial Law’ (1983) 1 Notre Dame International Law Journal 21, at 25 (the IMT and IMTFE Charters ‘were international only in the formal sense that several cobelligerents did jointly what each could have done singly under the laws and customs of war: the exercise of its extraordinary jurisdiction against persons accused of being war criminals.’)

414 Declaration of Potsdam, 26 July 1945; Instrument of Surrender, 2 September 1945; Moscow Conference Agreement, 26 December 1945.

415 See supra section 3.2.2.


417 Art. III(2) Control Council Law No. 10 (‘The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone.’) For example, in the US occupation zone, the military proceedings were governed generally by Military Ordinance No. 7 (as amended); in addition, each tribunal adopted its own Rules, and which were subsequently consolidated in the Uniform Rules of Procedure. See Art. V(f) Military Government—Germany, United States Zone Ordinance No. 7 of 18 October 1946 ‘Organization and Powers of Certain Military Tribunals’, and Ordinance No. 11 of 17 February 1947, 15 NMT 28-35; and Uniform Rules of Procedure, Military Tribunals, Nuremberg, revised to 8 January 1948, 15 NMT 70-78.

418 See Art. 4(1) ICC Statute (‘The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes’). All three tribunals have concluded a number of international agreements with states, e.g. concerning the enforcement of sentences, and with international organizations, concerning cooperation, which serves to confirm their legal personality under international law.
criminal trials in the proper sense are uncontestable and need not be dwelled upon.\textsuperscript{419} As for the courts not expressly denominated ‘international’ and pertaining to the blurry category of hybrid, mixed, or special courts, such as the SCSL, SPSC, ECCC and STL, not all of them can be deemed to conduct, or to have conducted, \textit{international} criminal trials in the strictest sense – but they still do qualify for inclusion. Although not all of them are essentially ‘international’ institutions and subjects of international law, their procedural rules and practices will be surveyed nevertheless, to the extent that they may be considered to reflect the status of international criminal procedure, rather than domestic criminal procedure. The examples of the SPSC, ECCC, and STL are instructive in demonstrating what format a criminal trial might be given if international criminal procedure is seasoned with standards and practices obtaining in domestic criminal process.

Established by a bilateral agreement between the UN and Sierra Leone,\textsuperscript{420} the SCSL represents a form of ‘nationalized’ international criminal justice. It is a ‘treaty-based \textit{sui generis} court’ which does not form part of the Sierra Leone judiciary and which draws legal personality directly from international law.\textsuperscript{421} Thus, unlike national courts, it is authorized to enter into agreements with states ‘as may be necessary for the exercise of its functions and for the operation’.\textsuperscript{422} Although the Statute authorizes the SCSL to draw upon Sierra Leone’s own Criminal Procedure Act 1965 and the possibility of relying on such was referred to in its case law,\textsuperscript{423} it is uncertain whether and to what extent the procedural law of Sierra Leone exerted influence on the SCSL practice. It in fact remained essentially subject to the SCSL RPE, which, as mentioned, are based on the ICTR Rules, and on the interpretations of the SCSL RPE by the judges in the unique circumstances of the Court.\textsuperscript{424}

By contrast, the SPSC was a mixed court established as part of the UN Transitional Administration in East Timor and on the basis of the UNTAET Regulation, but functioning \textit{within} the Dili District Court and the Court of Appeal of East Timor, as a variation of ‘internationalized national justice’.\textsuperscript{425} It was neither conceived nor identified itself as an international tribunal.\textsuperscript{426} Although its legal capacity can be traced back to the UNSC,\textsuperscript{427} the conclusion that the SPSC formed part of the international legal order and that the trials it held can be considered ‘international’ is not self-evident. As noted above, the situation with its applicable procedural law was also complex. Although the Indonesian law remained in effect

\textsuperscript{419} See \textit{supra} sections 3.2.2. and 3.2.3. See also Editors, ‘Introduction’ (n 48), at 15-16.

\textsuperscript{420} SCSL Agreement (n 7).


\textsuperscript{422} Art. 11(d) SCSL Agreement. See also \textit{Kallon et al. appeal decision on constitutionality} (n 421), para. 50.

\textsuperscript{423} Art. 14(2) SCSL Statute. See Decision on Amendment of the Consolidated Indictment, \textit{Prosecutor v. Norman, Fofana, and Kondewa}, Case No. SCSL-044-14-AR73, AC, SCSL, 16 May 2005, para. 46 (presupposing the relevance of the Criminal Justice Act, 1965 ‘precisely because that Act lays down the basic procedures of adversary criminal trials that are followed in Sierra Leone, which may be appropriate for our circumstances’).

\textsuperscript{424} Art. 14(1) SCSL Statute.

\textsuperscript{425} UNTAET Regulation 2000/15 (n 6).

\textsuperscript{426} UNTAET Regulation 2000/11 on the Organization of Courts in East Timor, 6 March 2000, section 10.4 (‘The establishment of panels with exclusive jurisdiction over serious criminal offences shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established.’). See also Final Decision, \textit{Prosecutor v. Lino de Carvalho}, Recurso Crime No. 2001/04, 29 October 2001, at 10-11 (in the context of determining the applicable law, observing that the Panels are ‘no international courts, but rather a national tribunal integrated in the Dili District Court’).

to the extent that it did not conflict with any UNTAET law, the fulfilment of the UNTAET mandate, and ‘internationally recognized standards’, the UNTAET’s TRCP governed the conduct of criminal process comprehensively. Moreover, the courts were mandated to apply ‘internationally recognized principles’ on matters not covered by the TRCP, which de jure left little to no room for the application of Indonesian criminal procedure. In practice, however, that procedural law was occasionally tacitly followed, which may be due to the fact that East-Timorese judges sitting on the panels were trained in, and most familiar with, criminal procedure in force prior to 25 October 1999. Therefore, the trial practices of the SPSC were not always in accordance with the procedural model embodied in the TRCP, which makes the characterization of SPSC trials as ‘international’ even less arguable. The value of SPSC practice as a descriptor for international criminal procedure and its import on the ‘normative theory’ of trial are thus inherently limited. Still, this does not detract from the relevance of the unique model designed by the UNTAET to this study, given the international provenance and nature of the Transitional Rules. Therefore, exceptionally in part of the focus on truly ‘international’ courts, the Special Panels are included among the jurisdictions covered in the descriptive part of this study, under the caveat that it is the formal procedural regime under the TRCP—and not as much the actual SPSC practice—that is of interest.

Similarly, the ECCC were established as an integral part of the existing Cambodian court structure and, initially, pursuant to national law. The subsequently promulgated ECCC Agreement only regulates the cooperation between the UN and Cambodia with respect to the prosecution and punishment of senior political leaders of Democratic Kampuchea ‘in accordance with Cambodian law’; it neither establishes a new legal entity nor confers a distinct international legal personality on the ECCC. While the ECCC is thus a variant of an ‘internationalized national’ form of justice, its proceedings qualify de facto as ‘international’. As noted, they are governed comprehensively by the Internal Rules that are presented by the court as a ‘consolidation’ of Cambodian procedural law for the application in the ECCC within the ECCC Agreement and the ECCC Law with a view to filling lacunae and addressing inconsistencies with international standards. In reality, the IR effectively provide for a sui generis procedural regime, which departs from the Cambodian criminal process and is distinct from the previous experiments of devising international criminal procedure.

The last jurisdiction out of nine to be examined in the following chapters, the Special Tribunal for Lebanon, is referred to as a ‘tribunal of an international character’ but is essentially an international criminal tribunal. As a subject of international law, it possesses juridical capacity and an international personality deriving from the UNSC Resolution 1757(2007). Due to the country’s failure to ratify the agreement between the UN and the Republic of Lebanon, to which the STL Statute was annexed, it was the Resolution that brought the agreement in force. As noted previously, by nature, its procedural law as contained in the STL Statute and the Rules reflects a self-

---

428 Sections 2-3 UNTAET Regulation 1999/1 (n 297); section 3 TRCP.
429 See supra section 3.2.4.
430 Section 54.5 TRCP.
431 Art 2 new ECCC law (‘Extraordinary Chambers shall be established in the existing court structure’).
432 See supra section 3.2.5.
433 STL Agreement, preamble.
434 B. Fassbender, ‘Reflections on the International Legality of the Special Tribunal for Lebanon’, (2007) 5 JICJ 1091, at 1101 (the STL ‘was established by Security Council Resolution 1757 (2007) not as a treaty-based institution but as independent international tribunal under the authority of the United Nations.’)
435 Art. 7(4) STL Statute (‘The Special Tribunal shall possess the juridical capacity necessary: ... to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.’)
standing model of international criminal procedure.\textsuperscript{436} The fact that the Lebanese criminal procedure has served as one of the major sources of guidance for the judges in constructing it, next to the ‘highest standards of international criminal procedure’,\textsuperscript{437} does not affect this conclusion. As the previous discussion makes clear, any one of the versions of international criminal procedure is to varying degrees based upon the influences drawn from different national legal traditions.

4.3.4. Evaluative framework

International criminal justice, and its procedural side in particular, may be assessed on the basis of a variety of freely chosen criteria, yardsticks, and ideals – liberal principles of justice, fairness, and efficiency, to name just a few candidates. The determination of the normative parameters and methods to be employed in passing a judgement on the adequacy of the law and practice of international criminal procedure predetermines the outcome of any evaluations, and may therefore not be taken lightly. It is a key methodological question that ought to be answered given the ultimate purpose of the assessment. As noted, there is no single master framework for assessing the adequacy of international criminal proceedings; the debate as to which criteria are to be used and, even more importantly, how, is still in the nascent stage.\textsuperscript{438} It is certain, however, that an effective—and at very least transparent—framework for evaluation is required in order to avoid sweeping judgements issues on unclear premises, which would be against the spirit and promise of a fair assessment of the tribunals’ performance.

In evaluating the adequacy of the past and present procedural arrangements of the trial stage in the international and hybrid jurisdictions which fall within the scope of this book, the commonly used evaluative perspectives will be employed: the ‘fairness’ perspective and the ‘effectiveness’ perspective. It is not difficult to notice that these bear some resemblance to the famous dichotomy of ‘due process’ and ‘crime control’ offered by Herbert Packer to refer to the competing demands and interests of two value systems that can be distinguished in each criminal justice system.\textsuperscript{439} Although these models have been widely criticized and complemented since, they are still valid as analytical devices and possess considerable explanatory power. In the following chapters, Packer’s models will not be relied upon directly for the evaluation of procedural arrangements at the international criminal courts and tribunals to avoid any constraints and limitations associated with them. But their underlying logic has partially shaped the way in which the evaluative framework is conceived, as a combination, if not dichotomy, between fairness and efficiency.

It must be recognized that these are certainly not all relevant parameters and perhaps others should form part of an ‘ideal’ evaluative framework for the credible and productive assessment of international trial practice: some alternatives have incorporated additional parameters.\textsuperscript{440} For example, a promising line of inquiry would have been to systematically revisit the validity of Mirjan Damaška’s four ‘ideal types’ of officiandom and purposes of state authorities (‘hierarchical’ v. ‘coordinate’ and ‘conflict-solving’ v. ‘policy-implementing’).\textsuperscript{441} This author is at present not convinced that this paradigm constitutes a ready-made analytical framework that could effectively be utilized for evaluating

---

\textsuperscript{436} See supra section 3.2.5.

\textsuperscript{437} Art. 28(2) STL Statute.

\textsuperscript{438} To the same effect, see Stahn, ‘Between “Faith” and “Facts”’ (n 46); Henham and Findlay, ‘Rethinking International Criminal Justice?’ (n 49), at 3-4 (noting that ‘[a]fter a decade and a half of the latest phase of international criminal justice, scholars are no closer to a multi-disciplined appreciation of this regulatory frame’ and indicating several plausible reasons for this failure).


\textsuperscript{440} E.g. Stahn, ‘Between “Faith” and “Facts”’ (n 46), at 260 (proffering the framework based not only on ‘efficiency’ and ‘fairness’, but also on ‘fact-finding’ and ‘legacy’).

\textsuperscript{441} M. Damaška, The Faces of Justice and State Authority (New Haven; Yale University Press, 1986).
Chapter 1: Background and Purpose of the Study

**international** criminal proceedings.\(^{442}\) It is an inherently cumbersome undertaking to try to square the obscure nature of international legal order and the *sui generis* institutional structures of international judicial organs into the ‘hierarchical’ or ‘coordinate’ ideal types, or, for that matter, their multifarious and complex objectives into the ‘conflict-solving’ or ‘policy-implementing’ purposes developed with reference to domestic legal traditions.\(^{443}\)

This is not to say that this task is impossible—which cannot be averred without trying—but rather that it would constitute a research mission in its own right (and, possibly, for its own sake). The heuristic value of this—just as any other—methodology cannot be assumed and ought to be verified along the lines pursued by Bert Swart, before one embarks on a substantive analytical exercise. At least on the basis of the existing research, one cannot be overly confident about the positive prospects in this respect.\(^{444}\) It must be recalled that the primary objective of Damška’s influential theory is to offer an alternative framework for examining, systematizing and analyzing domestic procedural arrangements while eschewing traditional comparative taxonomies. In the context of the present study, the normative or even descriptive value of such taxonomies comes into question and, therefore, the importance of alternative frameworks to replace them appears rather limited. Furthermore, as will be shown, the relationship between institutional goals and procedural arrangements in the context of international criminal law is not a straightforward issue and it is not readily susceptible to simple determinism or alignment.\(^{445}\) It is thus not obvious that said theory could operate as an optimal descriptor of international criminal process or as a generator of conclusive guidance on what the trial arrangements would be optimal.

This book does not hold solving the numerous methodological quandaries of international criminal procedure definitively as an objective. Instead, it proceeds on the consideration that no framework that fails to incorporate at least said two principal and widely-used parameters would be satisfactory.\(^{446}\) The requirements of ‘fairness’ and ‘effectiveness’ are the explicit normative aspirations of all courts belonging to the system of international criminal justice.\(^{447}\) The consistency of the legal regime and practice with these normative aspirations should, however, be tested against external—and hopefully more objective—yardsticks, as opposed to the system’s own notions of what performance amounts to a fair and effective one. Hardly any autonomous system, international criminal courts included, can be relied upon for being reasonably self-critical if it is left to determine the standards of assessment; it is a well-known tendency of bureaucratic structures to be self-...

---


\(^{443}\) Similarly, Jackson, ‘Finding the Best Epistemic Fit’ (n 163), at 20 (‘International tribunals are unable to latch on to any particular national conception of justice and there is no available international machinery of government that would dictate whether its role should be activist or reactive.’); Combs, *Fact-Finding without Facts* (n 77), at 302 (wondering ‘which [procedural system] would better reflect and advance the complex, multifaceted goals of international criminal trials as they are conducted in the complex, messy world of interstate relations and global politics.’). Despite a recognition to the same effect, Swart attempts such a classification: Swart, ‘Damška’ (n 442), at 94, 97-98.

\(^{444}\) See also Editors, ‘Introduction’ (n 48), at 26-30.

\(^{445}\) Cf. *ibid.*, at 100 (noting Damška’s contribution of a ‘systematic and thorough analysis of the relationship between ends and means in the realm of procedural justice’). See further Chapter 3.

\(^{446}\) E.g. Art. 1 IMT Charter (‘International Military Tribunal … for the just and prompt trial and punishment’), see also Art 18 IMT Charter; Arts 1 and 12 IMTFE Charter; Art. 20(1) ICTY Statute (‘The Trial Chambers shall ensure that a trial is fair and expeditious.’); Art. 19(1) ICTR Statute; Art. 64(1) ICC Statute; Art. 33 ECCC Law (‘The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious’); Arts 18(2) and 28(2) STL Statute.
indulgent and defensive particularly when it comes to their ‘survival interests’. The need to evaluate their performance in a detached manner entails that this should be done through the lenses of the ‘external’ perspective, which shapes the interpretation of the parameters that are chosen as part of the methodology.

The following paragraphs briefly outline what considerations fall within the parameters of fairness and efficiency, reserving the methodological discussion of what notions have shaped the understanding of the relation between said parameters and the procedural arrangements of international criminal trials for the subsequent chapters of this part of the book.\(^{448}\) It is also explained why the parameter of ‘comparative law’ is not adopted as a normative parameter, but only as a descriptive aid and background source in the examination of the trial proceedings of international and hybrid courts.

**A. Fairness perspective**

Next to having been exalted to the status of a supreme principle in the tribunals’ jurisprudence that is too exuberant to cite in full,\(^ {449}\) ‘fairness’ is the evaluative parameter for international criminal procedure which is relied upon in nearly every inquiry when it comes to the operation of international criminal courts. It has a broader dimension, extending beyond procedure, and has been employed as a master yardstick in the assessment of the tribunals’ legitimacy throughout their history.\(^ {450}\) Prescriptions drawn from human rights law have regularly been used to evaluate the adequacy of the tribunal proceedings. This is because fairness is commonly deemed to be the best lens and the main frame of reference for regulating and analyzing criminal proceedings in general, whether one adopts a natural law or formalist perspective.\(^ {451}\) The focus on fairness is required by all liberal accounts of

---

\(^{448}\) Chapters 2 and 3.

\(^{449}\) See e.g. Separate Opinion of Judge Shahabuddeen, Judgement, *Prosecutor v. Galić*, Case No. IT-98-29-A, AC, ICTY, 30 November 2006, paras 19 (‘The supreme goal is fairness’) and 21 (‘The governing criterion is fairness.’).

\(^{450}\) As famously stated by Justice Robert Jackson, ‘We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.’; ‘Second Day, Wednesday, 21 November 1945’, in 3 IMT 101. To the same effect, see R. Goldstone, ‘Address before the Supreme Court of the United States’, 1996 CEELI Leadership Award Dinner, 2 October 1996 (‘Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.’); F. Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *JICJ* 655, at 658 (‘It is by now a commonly shared consideration that the legacy of the Tribunal will be measured not only by whether it succeeds in judging those responsible …, but also by whether it does so in accord with the strictest standards of fairness.’); Mégret, ‘Beyond “Fairness”’ (n 374), at 50; S. Siebert, ‘The Pull of Criminal Law and the Push of Human Rights: Challenges in the International Criminal Process’, (2003) 11 *Irish Student Law Review* 29, at 31-32; G.J. Simpson, ‘War Crimes: A Critical Introduction’, in T.L.H. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997) 30.

\(^{451}\) S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) 1 (characterizing human rights law as the ‘backbone’ of international criminal process and the ‘ideal lens for investigating the structures and functioning of international criminal justice. This body of law provides one of the best interpretative tools for the analysis of the procedural mechanisms of international criminal justice, since it helps identify the proper balance between the rights of individuals and the interests of society.’); Jackson and Summers, *The Internationalisation of Criminal Evidence* (n 163), at 78 (‘Whatever the philosophical justifications, fairness is currently the principal frame of reference for regulating criminal proceedings.’)
international criminal justice.\textsuperscript{452} There is a wide agreement that this is one of the few parameters that are imperative to use.\textsuperscript{453}

The normative prevalence of human rights standards as \textit{lex superior} and policy guidance over all other applicable law, policy considerations, and perspectives (including the choice between procedural models), can rightfully be asserted.\textsuperscript{454} However, as will be shown in the next chapter, when it comes to the scope of human rights before the tribunals, one of the difficulties is that the human rights treaties, such as the ECHR and ICCPR, are addressed to states, and were elaborated for the enforcement by states. It may be not self-evident on what bases and to what extent the standards they contain are binding on international criminal courts. Similarly, the interpretations of those standards in the jurisprudence and decisions of human rights courts (e.g. ECtHR and IACtHR) and monitoring bodies (e.g. HRC) bear no express authority for international criminal jurisdictions, given the absence of hierarchy between them. The major methodological question of measuring the ‘fairness’ of international criminal proceedings by an external human-rights framework is whether the contextual interpretations and application of human rights standards by international tribunals can still be deemed legitimate and, if so, what kind and extent of deviation is acceptable. The answers to these conceptual questions, which have, however, proved to be of urgent practical relevance, will inform the way the human-rights parameter of fairness is employed in the descriptive and analytical parts of this study.

\textbf{B. Effectiveness perspective: Goals and functional efficiency}

The second set of requirements, in light of which the procedural law and practice of the international criminal courts is evaluated and which complements (and counter-balances) the ‘fairness’ perspective, relates to the ‘effectiveness’ perspective on the tribunals’ operations. The underlying criteria on this other side of the criminal justice equation are derived from the legal and factual context and essentially focus on the institutional objectives of international criminal tribunals (goals of international criminal justice). The goals are qualified by what is practically achievable by the tribunals given the numerous practical or utilitarian (that is, not value-based) limitations on their ambitions. This aspect of the framework hinges on the courts’ institutional mandates on the one hand. On the other, the more down-to-earth considerations of functional and structural effectiveness, rationality and expediency of procedural arrangements, and resource (time, finance) economy come into consideration. While these parameters impact on the expeditiousness of proceedings, they are distinct from the narrower and more formal perspective deriving from the right to be tried without undue delay to which the accused—and only the accused—are entitled. The aspect of efficiency is meant to speak to the proper administration and management of scarce judicial resources.


\textsuperscript{453} Sluiter, ‘Trends in the Development’ (n 93), at 598. See also L. Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (in L. Gradoni et al., ‘General Framework’), in G. Sluiter et al. (eds), \textit{International Criminal Procedure: Principles and Rules} (Oxford: Oxford University Press, 2013) 74 (‘An account of the procedural practices of international criminal courts and tribunals would therefore be defective were it to ignore the interplay between human rights norms and the rules which more directly govern the conduct of international criminal trials.’).

\textsuperscript{454} Robinson, ‘Rough Edges’ (n 225), at 1056 (‘ultimately the question is not the legal system from which a particular measure or procedure comes, but whether its incorporation in the law of the Tribunals produces a result that is consistent with international standards of fairness.’); Findlay, ‘Synthesis in Trial Procedures?’ (n 395), at 51 (‘Fair trial will be a measure both for the uniqueness of international trial procedure, and the manner in which it merges and elaborates on competing procedural styles.’); Ambos, ‘The Structure of International Criminal Procedure’ (n 190), at 429.
Both sides of effectiveness—goals as ‘aspirations’ and functionality as ‘limitation’—shape the ‘life’ and ‘letter’ of international criminal procedure in subterranean ways, and present significant vantage points from which the procedural practice can be assessed.\(^{455}\)

The following methodological question concerning the use of this parameter is to be answered before proceeding to evaluation. This question is whether and to what extent, the consideration of long-term institutional objectives of international courts and tribunals should influence the trial arrangements and practice for one to take them as a credible yardstick.\(^{456}\)

Somewhat underappreciated in the research on international criminal justice, the parameter of efficiency has emerged as important and autonomous.\(^{457}\) It qualifies the achievability of institutional goals but should never constrain the normative aspirations deriving from the notion of ‘fairness’, which is postulated as the first evaluative parameter. As the tribunals have held, it is rather the efficiency considerations that are appropriately qualified by the need to ensure fairness.\(^{458}\) It is therefore more appropriately tackled along with the ‘goals’ perspective on international criminal procedure.

C. Comparative law: A non-parameter

As noted earlier, comparative criminal procedure is deliberately excluded from among the normative parameters used in the assessment of the law and practice of international criminal courts and tribunals. Essentially, this perspective does not speak to the determination of an optimal trial procedure in that context. Such determination is rather to be made based on considerations that have a normative bearing in relation to these matters, such as human rights law and unique objectives and circumstances of international criminal justice.\(^{459}\)

As a result, comparative criminal procedure does not form part of the evaluative framework, and is not a factor (directly) informing the normative theory of international criminal trials.\(^{460}\) The seasoned method of comparative law has been used more than extensively in the earlier scholarship on international criminal justice. The thrust of this method has been to contrast the ‘adversarial’ with ‘inquisitorial’ models of procedure exhibited, respectively, in ‘common law’ and ‘civil law’ traditions, and to apply any resulting insights to the domain of international criminal procedure.\(^{461}\) However, this is neither a

\(^{455}\) See also M. Heikkilä, ‘The Balanced Scorecard of International Criminal Tribunals’, in C. Ryngaert (ed.), *Effectiveness of International Criminal Justice* (Antwerp: Intersentia, 2009) 54 (observing that ‘[e]valuations of effectiveness are imperative to find means to improve the working of the tribunals’ and that ‘they function as eye-openers’).

\(^{456}\) Compare Mégret, ‘Beyond “Fairness”’ (n 374), at 70 (‘the mandate of tribunals can also be seen as having at least a distant impact on the development of procedure.’) with Jackson, ‘Finding the Best Epistemic Fit’ (n 163), at 20 (‘one has to develop structures that accord best with the objectives that have been set by the international community for international criminal justice.’ Emphasis added.)

\(^{457}\) Editors, ‘Introduction’ (n 48), at 29-30; Zappalà, ‘Comparative Models’ (n 189), at 43 and 45; Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1442.


\(^{459}\) In a similar vein, see Schuon, *International Criminal Procedure* (n 195), at 7 (proposing that ‘when assessing the suitability of a procedural element for international criminal trials, [t]he unique setting should be taken into particular consideration.’).

\(^{460}\) See also Editors, ‘Introduction’ (n 48), at 28-29 (for the purpose of the project, allowing comparative law to feature among assessment criteria, but ‘without expecting that it would, in itself, result in strong value judgements on any of the contested issues’); Sluiter, ‘Trends in the Development’ (n 93), at 598 (proposing national law as a part of evaluative framework for international criminal procedure, albeit according it with ‘less of a corrective role’).

\(^{461}\) Employing this approach, see e.g. Findlay, ‘Synthesis in Trial Procedures?’ (n 395), at 29.
conceptually sound nor helpful avenue on which one should seek normative guidance in the field of international criminal procedure. There are no cogent reasons why normative preferences for procedural rules, practices, and ideologies adopted in specific domestic jurisdictions, or shared amongst them, should define the procedural arrangements in the tribunals or serve as a yardstick in their critical reappraisal. It should not matter from what background a rule or practice emanates to determine its suitability for incorporation into international criminal process.\footnote{See e.g. C. Warbrick, ‘International Criminal Courts and Fair Trial’ (1998) 3(1) Journal of Conflict and Security Law 45, at 46 (‘no imperative reason why the standards of any particular state for national trials … should determine the answer, however relevant they might be to reaching one’).}

The question is rather whether the rule or practice, as it operates in the context of international criminal procedure, would be consistent with its principles and whether it would promote the values at the heart of international justice, including but not limited to fair trial.\footnote{The meaning and suitability of these terms has been widely debated and contested in the comparative law literature. Preferring the terminology ‘legal cultures’ and ‘traditions’ to ‘legal families’, see H. Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’, in M. Reimann and R. Zimmermann (eds), Oxford Handbook of Comparative Law (Oxford: Oxford University Press, 2006); Findlay, ‘Synthesis in Trial Procedure?’ (n 395), at 30-31 (proposing to discuss ‘styles’ rather than (origin-based) traditions).}

From their inception, international criminal procedures have been constructed by putting together the ‘best’ elements of the procedure drawn from the two main domestic ‘models’ ('families', ‘cultures’, ‘traditions’, or ‘styles’).\footnote{The meaning and suitability of these terms has been widely debated and contested in the comparative law literature. Preferring the terminology ‘legal cultures’ and ‘traditions’ to ‘legal families’, see H. Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’, in M. Reimann and R. Zimmermann (eds), Oxford Handbook of Comparative Law (Oxford: Oxford University Press, 2006); Findlay, ‘Synthesis in Trial Procedure?’ (n 395), at 30-31 (proposing to discuss ‘styles’ rather than (origin-based) traditions).} This exercise has been described as ‘amalgamation’,\footnote{M. Delmas-Marty, ‘The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law’. (2003) 1(1) JICJ 13, at 18 (defining the ‘hybridization’ as a method ‘going beyond mere juxtaposition, requiring genuine, creative re-composition through the search for a synthesis of, or equilibrium between, diverse elements or diverse systems.’) and 21. A number of scholars doubt whether ‘hybridization’ is achievable at all, in light of the irreconcilable differences in the foundational notions and philosophy underlying criminal process, e.g. in part of the concepts of fairness and methods of truth-finding: Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 114 (‘procedures which are supposedly polar opposites, or “antinomies” existing in a dialectical relationship with each other …, cannot be amalgamated. … If the adversarial and the inquisitorial represent conflicting epistemologies, “hybridization”, makes no sense.’); Mégret, “Beyond “Fairness” (n 374), at 46.}

‘hybridization’ or ‘combination-fusion’.\footnote{E.g. Orie, ‘Accusatorial v. Inquisitorial Approach’ (n 149), at 1440-41; Pocar, ‘Common and Civil Law Traditions in the ICTY Criminal Procedure’ (n 191), at 437; W. Pizzi, ‘The American “Adversary System”’, (1998) 100 West Virginia Law Review 847. But cf. Schuon, International Criminal Procedure (n 195), at 11 (mistakenly asserting the same as regards ‘common law’ and ‘civil law’, a historically and objectively based typology that is (still) helpful for distinguishing between the broad classes of actual domestic legal systems). See e.g. Pocar, ibid., at 438 (‘although most of the modern legal systems have attributes of both the civil law and the common law traditions, they are usually based predominately on one or the other.’).}

As widely admitted, the procedural systems that embody the ‘pure’ forms of ‘adversarial’ and ‘inquisitorial’ process do not exist (anymore) at the domestic level.\footnote{F. Tulkens, ‘Main Comparable Features of the Different European Criminal Justice Systems’, in M. Delmas-Marty (ed.), The Criminal Process and Human Rights: Towards a European Consciousness (Dordrecht: Martinus Nijhoff, 1995) 8.} This is in part due to the borrowing and gradual convergence between domestic systems.\footnote{They combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of civil-law tradition).} This finding a fortiori holds true for
international and hybrid criminal tribunals. Being a result of a creative blending exercise, international criminal procedure is—and arguably can be—neither ‘inquisitorial’ nor ‘adversarial’ by nature. It is difficult to establish conclusively what typical permanent and immutable features define a given legal system as either one or the other. Qualifying the characterizations along the lines ‘inquisitorial’ or ‘adversarial’ by a degree (‘of a largely adversarial nature’, ‘more inquisitorial than adversarial’) or by a shift dynamics renders it even more imprecise. The terms are substandard descriptors of international criminal procedures and practice, and a dichotomist approach to international procedural systems is best abandoned, both in theory and in practice. Some scholars went as far as to argue that the discipline of comparative criminal procedure has thus far ‘signally failed’ to provide a satisfactory and overarching explanation for and analysis of international criminal procedure due to under-development, shortcomings and limitations of the comparative law discourse. But one should be cautious not to unfairly diminish the contributions of the discipline to conceptualization and development of international criminal procedure. When adequately nuanced and done with the level of sophistication that enables one to ‘cut through’ the established labels, models, and dichotomies, comparative research holds a significant promise in terms of a better understanding of the evolution and internal logic of the procedure before the tribunals. However, dwelling solely on this perspective leads one nowhere in normative terms and, when combined with the misuse of its method, carries grave conceptual risks which may have unfortunate consequences for practice.

In international criminal law, the traditional and neutral comparative categories of ‘adversarial’ and ‘inquisitorial’ and the two legal traditions with which they are associated became rather polarized. The dichotomy has proved to be susceptible to ideological use (and abuse). Practitioners and scholars have not always resisted the temptation to operate on the

---

469 Separate and Dissenting Opinion of Judge Cassese, Erdemović appeal judgment (n 465), para. 4 (‘This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems.’)

470 Ambos, ‘The Structure of International Criminal Procedure’ (n 190), at 503 (‘national boundaries in criminal procedure may be overcome with increasing experience and practice in a system of international criminal justice which is heading towards a harmonic convergence of both, the “inquisitorial” and “adversarial” systems.’); G. Boas, The Milošević Trial: Lessons for the Conduct of Complex International Proceedings (Cambridge: Cambridge University Press, 2007) 286.

471 Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 105 (‘the debates over the creation of the international tribunals and their subsequent procedural instability have revealed starkly the poverty of comparative law discourse regarding criminal justice’) and 121 (‘existing comparative law scholarship has failed to offer guidance to the international tribunals in their struggle to develop a truly global concept of justice capable of mobilizing universal aspirations for the defeat of impunity for grave crimes.’)

472 For a more hopeful view on the possible contribution of comparative law to the conceptualizations of international criminal justice, see Roberts, ‘Comparative Law for International Criminal Justice’ (n 127), at 354 (‘comparative analysis should help to dispel all-too-familiar caricatures of domestic legal systems as inflexibly static, exclusively parochial, ciphers of national mores.’); Findlay, ‘Synthesis in Trial Procedures?’ (n 395), at 31-32 (‘A unique dimension of the comparative project is its potential to ground aspirations for law reform in an understanding of the criminal trial in its practical context, beyond models and rhetoric.’).

473 For a more hopeful view on the possible contribution of comparative law to the conceptualizations of international criminal justice, see Roberts, ‘Comparative Law for International Criminal Justice’, at 354 (‘comparative analysis should help to dispel all-too-familiar caricatures of domestic legal systems as inflexibly static, exclusively parochial, ciphers of national mores.’); Findlay, ‘Synthesis in Trial Procedures?’ at 31-32 (‘A unique dimension of the comparative project is its potential to ground aspirations for law reform in an understanding of the criminal trial in its practical context, beyond models and rhetoric.’).

474 P. Roberts, ‘Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?’, (2011) 11(2) Human Rights Law Review 213, at 229 (praising, in another context, ‘a more systematic and methodologically sophisticated approach to comparative legal analysis, drawing distinctions at a fairly refined level of doctrinal detail within as well as between the conventional procedural “families” (common law versus civilian law; adversarial procedure versus inquisitorial procedure, etc.)’ as ‘further evidence of the growing importance of comparative legal method in an era of cosmopolitan legality’); Pizzi, ‘The American “Adversary System”’ (n 467), at 852 (‘Comparative study is a way of cutting through these labels and slogans to help us see our system more clearly.’)
assumption of, or even to assert, the superiority of one model over the other.\textsuperscript{474} Understandably, the models are often underlain by the deeply held—and not always pronounced—beliefs, loyalties, and predilections of professionals assuming that their own system or procedural tradition is a fairer and more adequate one.\textsuperscript{475} But the ‘contest of will’ between the proponents of different legal cultures in the context of international criminal procedure tends to obfuscate the vision of its genesis, evolution, and unique nature.\textsuperscript{476} The use of models devised for describing and comparing procedural systems, but not for normatively assessing and passing value judgements thereon, has unnecessarily polarized the debates.\textsuperscript{477} Its extreme manifestations led to what may be called ‘comparative chauvinism’.\textsuperscript{478} The cross-cultural dialogue was been limited by the primary focus on the different forms of process, rather than on the similarity of fundamental values (truth, justice, fairness) and different ways of realizing them through process in the domestic traditions. As noted, the normative theory of trial should be value-based rather than merely a form-oriented construction.

Despite supplying international criminal procedure with imperfect tools, the traditional comparative categories could still be useful in elucidating the provenance of certain procedural practices and notions as a heuristic tool, but not as a credible descriptor of the institutions and practices of the tribunals. The normative discourse that attempts to construct a theory for international criminal procedure on the ‘solid basis’ of ‘adversarial’ and ‘inquisitorial’ models is inherently flawed in another important respect. Its ambition goes no further than merely to mirror the less than pluralistic and inclusive approach taken in reality towards developing the international criminal procedure, to the exclusion of non-Western forms of process (for example, Islamic law).\textsuperscript{479} The inability of international legislators and judges creating international criminal procedure to try in earnest to accommodate a truly pluralistic concept of procedure can be explained by the (politically and economically) predominating legal-cultural influences. The research bases and the time allocated for the legislative task are limited, with the result that

\textsuperscript{474} While this may take form of (uncritically) eulogizing the foreign system (as a justification for transplanting foreign procedural solutions), vouching for the superiority of one’s own system has been more common in the domain of the ICL. This tendency is noted, \textit{inter alia}, in Delmas-Marty, ‘The Contribution of Comparative Law’ (n 466), at 20 (the encounter of two systems is likely to lead to ‘confrontation aimed at mutual domination’); Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 122 (comparative law scholarship ‘tended to encourage the binary conception of international justice’); Mégret, ‘Beyond “Fairness”’ (n 374), at 43 (‘tribunals have been seen diffusely as an opportunity to showcase the merits of particular traditions in what is a latent “regulatory competition”.’); Schuon, \textit{International Criminal Procedure} (n 195), at 12 (mentioning ‘misconceptions of, or even prejudices against, a particular system’ among problems her study is supposed to assist against).

\textsuperscript{475} J. Crawford, ‘The ILC Adopts a Statute for the International Criminal Court’, (1995) 89 \textit{American Journal of International Law} 404, at 408 (pointing to ‘the tendency of each duly socialised lawyer to prefer his own criminal justice systems’ values and institutions’).

\textsuperscript{476} Mégret, ‘Beyond “Fairness”’ (n 374), at 45.


\textsuperscript{478} C. van den Wyngaert (ed.), \textit{Criminal Procedure Systems in the European Community} (London: Butterworths, 1993) i (‘It is hardly surprising that States have a tendency, not only to be chauvinistic about their own criminal justice systems, but also to be suspicious about foreign systems. Efforts towards harmonisation in this field are therefore very often considered as an unacceptable interference in their domestic affairs.’).

\textsuperscript{479} See e.g. C. Safferling, \textit{Towards an International Criminal Procedure} (Oxford: Oxford University Press, 2001) 5 (‘The search for an international criminal procedure has to be based on the two main systems of national criminal procedure, namely the Anglo-American and the Continental European tradition.’); G. Gordon, ‘Toward an International Criminal Procedure: Due Process Aspirations and Limitations’, (2007) 45(3) \textit{Columbia Journal of Transnational Law} 635, at 707 (‘truly international criminal procedure’ as an attempt to ‘mix and match the best features that each system (the adversarial and inquisitorial) has to offer.’).
only the comparative data that are easily available and comprehensible, can be taken into account. For judges as law-makers, the fundamental approach to carrying out those tasks is problem-driven rather than conceptual and academic. Be it as it may, it is not justifiable to misrepresent the results of a non-pluralistic and incomplete comparative research as a sufficient basis for making normative judgments on the appropriate and legitimate procedure. It is unclear why the limitations of the comparative discourse should continue to constrain what is supposed to be a more inclusive theoretical and normative exercise. One may therefore be rightly critical of limiting the available construction material to the ‘two main’ systems for the purpose of creating the international criminal procedure, while at the same time recognizing the practical improbability of adding ‘the laws of the developing world’ or Islamic law into the ‘procedural equation’.

For these reasons, resort to traditional models of comparative law to evaluate the coherence, fairness, and efficiency of international criminal procedure is a flawed approach. The same holds true for the use of the process in specific domestic jurisdictions that are seen to employ those models, at least on matters of principle. Firstly, the choice for specific domestic jurisdictions to be covered is difficult to justify on principled grounds as one may be uncertain whether and to what extent specific domestic systems can be deemed representative or typical of broader classes; secondly, any conclusions to the effect that international criminal procedure should be reformed to be more alike one of the systems amount to a one-way argument. The traditional comparative law method and any data it may obtain cannot be effectively used as normative criteria against which the adequacy of international procedural systems should be assessed and on the basis of which it can be reformed. This view resonates in the more recent scholarship on international criminal procedure, which tends to view domestic traditions as ‘repositories of certain practices rather than as a real constraint’ on international criminal procedure. Indeed, the established comparative dichotomies elaborated for classifying domestic systems are not normatively

---

480 Delmas-Marty, ‘The Contribution of Comparative Law’ (n 466), at 20 (acknowledging the criticism that ‘hybridization is essentially limited to “Western” law, as if the concept of “civilized nations” had resurfaced, with the danger that other legal traditions will be reduced to progressive domination by Western law.’); Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 115 (‘This is hardly internationalism. … [T]he international tribunals are intended to be truly global and it is extraordinary that the debates over procedure have remained so Atlanticist and introspective. As a result, the practice of the international tribunals increasingly gives the impression that defendants from the developing world, and in particular from Africa, are being dragged unwillingly before alien, western courts.’); M. Bohlander, ‘Radbruch Redux: The Need for Revisiting the Conversation between Common and Civil Law at Root Level at the Example of International Criminal Justice’, (2011) 24 Leiden Journal of International Law 393, at 395-96 (critical of the neglect of Islamic law in comparative law research); Mégret, ‘The Sources of International Criminal Procedure’ (n 236), at 72 (‘Whilst this may be understandable in view of international criminal justice’s overarching mandate to conform to international human rights standards, it also in practice greatly reduces the claim that general principles are truly derived from all of the world’s legal systems. This phenomenon is compounded by issues of language and accessibility of sources that make certain legal systems (North American and European in particular) over-represented in the assessment of general principles’); Schuon, International Criminal Procedure (n 195), at 11.

481 Attempting a justification along these lines for using Germany and US as case studies, see e.g. Schuon, International Criminal Procedure (n 195), at 9-10. Schuon’s conclusions on the preferred form of international criminal procedure invariably gravitate towards the assertion that it ought to follow a civil-law (more specifically, German) approach: ibid., at 134 (advocating a broader scope of disclosure and an open dossier approach) and 171, 192 (advocating ‘dispensing with the special need to test the adversary’s evidence’ and even ‘abandoning the adversarial style of proceedings for international criminal trials altogether’ in favour of ‘a judge-steered civil law model to further improve the proceedings’).

482 Mégret, ‘Beyond “Fairness”’ (n 374), at 47.
consequential in this new context, and certainly less so than the proposed parameters of fairness and effectiveness (goals and efficiency) of international justice.\textsuperscript{483}

That said, the traditional comparative law discourse and its influential ‘adversarial’ and ‘inquisitorial’ models may be useful heuristic tools to elucidate the provenance of certain procedural practices and notions acquired by the historical and contemporary courts and tribunals. As shown, the limited and qualified use of the models as analytical devices and, as opposed to normative parameters, may provide one with a convenient vocabulary and a helpful perspective on the history of criminal procedure development in domestic jurisdictions and the evolution of the various aspects of procedure in the tribunals. They may enlighten one on the origins and the initial rationales of certain procedural elements in the (domestic) contexts and the interplay between those elements within a procedural system, as well as how they might contribute to the achievement of the overall goals of the criminal justice systems.\textsuperscript{484} Therefore, comparative criminal procedure is used in the descriptive and analytical chapters of this study (chapters 8 through 12) as background information preceding the exploration of the distinct sub-phases of the trial process. In going beyond the traditional dichotomies, those analyses endeavour to be sufficiently empirical and contextual by referring to the status in specific domestic jurisdictions.\textsuperscript{485} The resulting observations are not treated as guidelines or arguments that shape the determination of the optimal procedure and the contours of the proposed trial theory.

\textbf{5. OUTLINE AND METHODS}

\textbf{5.1. Structure}

The book is divided into four parts and twelve chapters. The division into parts logically follows the four research objectives set out above.\textsuperscript{486} Part I, which develops the methodological framework of the book, explains and justifies the use of the parameters for the evaluation of the law and practice of international criminal trials. Chapter 2 argues that ‘fairness’, as derived from the tribunals’ external human rights framework, is the right parameter for both legal and policy reasons, not least because it is a part of the law binding on the tribunals. It engages with the ‘contextualization’ issue in order to clarify how the authoritative interpretations of human rights norms by other (judicial) bodies have affected, or should affect, international criminal adjudication and under what conditions the tribunals may ‘re-interpret’ those human rights standards in their procedural regimes. In turn, Chapter 3 fleshes out the ‘effectiveness’ perspective by analyzing why and how the goals of international criminal justice, and any considerations of institutional and procedural

\textsuperscript{483} In a similar vein, see Vogler, ‘Making International Criminal Procedure Work’ (n 115), at 122 (‘the existing comparative law typologies fail to establish either a practical or a normative basis for reform. They cannot do so because they are unable to link the nature and design of the procedure which is operated with the purposes of the tribunals at each stage. It is only by identifying the essential constituencies whose conflicting interests provide the necessity for the existence of international tribunals, and analyzing their participation at each stage, that a clearer picture of the type of procedure which we need to develop can begin to emerge.’); Mégret, ‘Beyond “Fairness”’ (n 374), at 47 (‘discussion about the merits of each tradition in the context of forging an international criminal procedure, while part of the discursive environment of tribunals, is unlikely to have much actual traction.’)

\textsuperscript{484} Roberts, ‘Comparative Law for International Criminal Justice’ (n 127), at 354 (on a possible contribution of comparative law being ‘building into an indispensable reference-library of `do’s and don’t’s’ and supplying `invaluable models, experiences and juridical resources for robust institution-building at the international level.’)

\textsuperscript{485} Findlay, ‘Synthesis in Trial Procedures?’ (n 395), at 31 (‘a productive analysis of criminal procedures … requires more than a binary comparative analysis. It must be contextual in a detailed sense, and empirical at valid levels of comparison.’).

\textsuperscript{486} See \textit{supra} section 4.2.
effectiveness, shape the tribunals’ operations. This Part paves the way for the subsequent application of the normative parameters in the descriptive and analytical Part III.

Part II contains the theoretical framework of the study and approaches the trial phase as an autonomous unit and object of socio-legal and procedural inquiry. The term ‘trial phase’ is the procedural translation of the broader, not exclusively legal, notion of an ‘international criminal trial’. The objective of chapters in Part II is to provide a conceptual apparatus for the subsequent analysis of the trial arrangements in the tribunals, including the notion of ‘truth’, the functions of the trial process generally and in the tribunals in particular, and the position of that phase in the chronology of the proceedings.

Proceeding from the recognized limitations of the ‘comparative law’ discourse in relation to international criminal procedure, Chapter 4 discusses the general features of the nature and organization of the trial process in national jurisdictions. This will be surveyed across the comparative lines of ‘adversarial’ v. ‘inquisitorial’ and ‘common law’ v. ‘civil law’ paradigms, as a background to the more nuanced exposition of the domestic arrangements in relation to distinct components of the trial process. Chapter 5 discusses the procedural ‘functions’ of the trial stage, which is a vantage point for tackling the question of the true nature of international criminal trials. The distinction, which is sometimes questioned or denied, between political and show trials, on the one hand, and international criminal trials, on the other, is ascertained. However, it is important to respect this distinction and refrain from ascribing to ‘trial’ functions other than ‘truth-finding’ in a procedural and forensic sense. It is misconceived to attribute to the exercise of international criminal adjudication any broader purposes of a socio-political nature. Chapter 6 addresses the role of the trial stage in the procedural chronology, in particular, to what extent it is to be viewed as the culmination of international criminal proceedings and whether pre-trial process and resort to negotiated justice is apt to affect the centrality of ‘trial’ as the mechanism for processing cases in international criminal law.

Part III of the study comprises chapters that have both descriptive and analytical bent. It systematically describes and compares the arrangements falling within the temporal bounds of the main components of the trial stage in all of the courts included in the inquiry. In relation to each sub-phase of trial, the detailed treatment of the tribunal law and jurisprudence is preceded by a brief and synthetic discussion of principal domestic approaches, by way of background to the exposition of the status in the tribunals. This is followed by a critical analysis of the tribunal procedures and case law arrangements in light of the evaluative criteria. The problematic aspects are identified and recommendations made for rectifying them. The limited objective of Chapter 7 is to demarcate the temporal boundaries of the trial phase in international criminal proceedings; to formally distinguish its sub-units. This serves as a roadmap to the subsequent chapters, all of which are devoted to distinct phases of the trial: trial preparation (Chapter 8), opening stage (Chapter 9), presentation of evidence (Chapter 10), and the closing stage (Chapter 11). The portions of trial proceedings that occur in the post-trial stage—deliberations as well as drafting and delivery of judgment and, in case of a guilty verdict, sentence are not covered in the present book.

The ‘normative’ Part IV, consisting of Chapter 12, pulls the threads of the normative analyses in the preceding chapters together and formulates the ‘normative theory’ on that basis. Based on the critical review of the trial practices in conformity with the methodology proposed in Part I and applied in Part III, the Chapter starts by reappraising the evaluative framework. It then synthesizes the insights about the problems of trial practice and possible solutions that are to be incorporated into the normative theory. The book concludes with the observations on the virtues and risks of procedural pluralism in trial arrangements before the tribunals and reflects on the feasibility of a truly coherent amalgamated trial culture in that context.
5.2. Sources and methodology

The nature of the inquiry entails the predominant reliance on traditional sources and methods of international and comparative law research. This includes the use of comparative models for the analysis of the procedural arrangements in domestic criminal justice systems and in international and hybrid criminal tribunals. The analytical approach draws heavily on formal legal texts, including the relevant treaty law, resolutions of international organizations, as well as the courts’ statutes, rules of procedure and evidence and other internal instruments governing the institutional structure and procedure (for example, the ICC Regulations of the Court and practice directives adopted by Trial Chambers at various tribunals). Where the purpose is to gain an insight into the rationale for the adoption and amendment of certain procedural rules, the available preparatory works (records of diplomatic conferences, reports of experts and expert commissions, annual reports and memoranda issued by the tribunals’ principals, and, importantly, the previous versions of the tribunals’ constituent documents and rules of procedure) are consulted. Particular attention is paid to the actual practice of the application of procedural rules, and the tribunals’ jurisprudence is a primary source. It reflects the ‘life’ of the law of international criminal procedure, without which the legal texts are akin to an ‘unperformed music’.

The approach taken in this study is predominantly legal. It distinguishes itself from the methodological positions adopted in the currently booming transitional justice and law-and-society literature on international trials, although those views will, where appropriate, be taken up and discussed. That said, the treatment of the subject matter is not entirely formalist. The procedural systems of the international criminal tribunals are conceptualized in a way similar to any procedural tradition, i.e. going beyond the letter of the rules and permeated by distinct institutional philosophies and dynamics that shape the interpretation and application of said rules. In this light, extrajudicial writings and statements of judges and other participants of international criminal proceedings are key to understanding how the procedural standards are actually interpreted and applied; in particular, why certain rights or discretionary powers available to the participants are not resorted to while there are practices not governed by codified rules, and what factors influence the exercise of discretion in such cases.

The theoretical and descriptive chapters of the book also strive to approach the procedure from a socio-legal perspective, which views the tribunal proceedings and surrounding activities as social processes driven by the actors pursuing their own procedural interests and having their own agendas. Being a lawyer rather than a social scientist, the author recognizes the risk of treading on a methodological area he does not fully master, but believes that this avenues are, nonetheless, worth pursuing. An effort of understanding procedural practice without trying to gain an insight into the underlying subjective considerations and opinions of key players would be wanting. A strictly legalist approach cannot fully explain why the procedural law and practice of the tribunals has developed unless the date is indicated in the citations of the Rules of Procedure and Evidence, their latest version is used, as specified on the Table of Abbreviated Sources. The book generally covers developments in the law and jurisprudence up to 1 September 2013. Chapters 9-11 were subsequently updated during the final editing to reflect selected developments up to early March 2014.

Notes:
487 Unless the date is indicated in the citations of the Rules of Procedure and Evidence, their latest version is used, as specified on the Table of Abbreviated Sources. The book generally covers developments in the law and jurisprudence up to 1 September 2013. Chapters 9-11 were subsequently updated during the final editing to reflect selected developments up to early March 2014.
489 Mégret, ‘Beyond “Fairness”’ (n 374), at 46 (‘each procedural tradition is far more complex than its discreet rules, or even the totality of its rules, and thus should be understood as an amalgamation of rules and the understandings, institutions, and social types that come with them.’)
490 See R.A. Wilson, Writing History in International Criminal Trials (Cambridge: Cambridge University Press, 2011) 14-16 (who employs similar rationales in justifying the socio-legal and anthropologic methods in studying the tribunals’ handling of historiographic evidence).
similarly or differently in each court and what the factors informing the legislative dynamics are. The same concern is reflected in the notable increase in recent studies of the ‘methodological’ wave that examine international criminal procedure and practice from empirical and socio-legal and legal anthropology perspectives.\footnote{See, among others, Combs, Fact-Finding without Facts (n 77); Wilson, Writing History (n 490); Byrne, ‘The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice’ (n 186); M. Langer and J.W. Doherty, ‘Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms’, (2011) 36 Yale Journal of International Law 241.}

Therefore, it was deemed necessary to expand the available research basis of (scholarly) sources by first-hand information and to include an empirical component. The purpose was to benefit from the procedural participants’ professional knowledge and perspectives on the law and related practical problems, since they are directly involved in making and applying the law. With this objective in mind, a number of personal in-depth qualitative and semi-structured interviews on international criminal procedure were held by the author with practitioners from jurisdictions other than the more ‘accessible’ Hague-based tribunals. In May and June 2008 thirty-eight interviews were conducted at the ICTR in Arusha, Tanzania.\footnote{This included interviews with nine judges, nine with the staff of the Chambers; nine with the OTP staff; and ten with defence counsel.} In October 2009, meetings were conducted with the SCSL staff and procedural participants in Freetown and in December 2009 several follow-up interviews were held in The Hague sub-office with the SCSL staff working on the Taylor trial.\footnote{Totaling six interviews with members of defence teams and the staff of the Office of Public Defender, one with the OTP staff, two with judges, and four with the staff in the Chambers.} During the field research in the Extraordinary Chambers in the Courts of Cambodia (Phnom Penh) in November 2009 and follow-up meetings in The Hague, three interviews were held with the members of the Office of the Co-Prosecutors and eight interviews with defence counsel and members of the Defence Support Section.\footnote{Unfortunately, no interviews were granted by the judges of the Trial Chamber and their legal officers, despite repeated requests.}

One must exercise care when preparing the empirical research and \textit{a fortiori} when translating the results of the empirical research into normative findings.\footnote{M.R. Damaška, ‘Presentation of Evidence and Fact-Finding Precision’, (1975) 123 University of Pennsylvania Law Review 1083, at 1084 (‘our modern eagerness for empirical information must not blind us to the need for careful theoretical preparation before we descend to the empirical plane. … it is mainly through their theoretical underpinnings that values are smuggled into supposedly value-free research paradigms.’)} Some clarifications of the methodology in approaching interviews, conducting and recording interviews, and using them in this study are in order. This would facilitate the assessments of the value of the information obtained. The key interviewees (including the principals of the tribunal organs) were contacted with a request to grant interviews in advance, being thus a result of targeted sampling. Most interlocutors were, however, recruited by way of snowball sampling on the basis of candidacies suggested by other interviewees, and as a result of occasional contacts the author made during his stay at the tribunals. The snowball technique has proved particularly useful for identifying potential interviewees among legal officers in Chambers (per indication by the judges), members of the OTP (per indication of senior OTP staff) and the members of defence teams (per indication by defence counsel).

The interviews were conducted on the basis of structured questionnaires tailored to the organ or party that the interviewee represented. Such questionnaires had been communicated to the interviewees in advance and featured twenty to twenty-five questions, with length interviews ranging from one to three hours.\footnote{In the preparation for the interviews, the author familiarized himself with the methodology of ‘elite interviewing’: see e.g. L.A. Dexter, Elite and Specialized Interviewing (Colchester: ECPR Press, 2006).} The absolute majority of conversations were conducted in English, two in French, and one in Russian. The
interviewees were expected to develop their answers freely and focus on relevant issues they deemed to be important. Follow-up questions were occasionally raised in reaction to the points made, in order to clarify the answer or to request interlocutors to provide more information or a personal opinion on the subject. Each interview was audio-recorded and transcribed and, in respect of the interviews that were eventually to be cited, the transcript was sent to the person interviewed for review and approval. Since all interviews were conducted under the strict condition of confidentiality, the interviewees were requested to indicate, at that stage, whether they preferred the views expressed during the meeting to be attributed to them by name or whether they wished to remain anonymous. In the latter case, the transcripts are anonymized whenever cited and only the organ of the court or party with which the person is associated and his or her position indicated, except where that would lead to identification (for example, for legal officers in Chambers).

The interviews’ function as an additional source of information on the procedural law and trial practice of the tribunals as perceived by the participants limits the use of the data obtained to sampling and non-statistical purposes only. While the categories of professionals interviewed are a fair cross-section of the respective institutions, the actual number of the interviews conducted is insufficient to represent a prevailing view within the same class of professionals. The method of selecting interlocutors to some extent reduced the representative character of the findings. The data contained in the sample opinions are especially inconclusive where low levels of cooperation were provided. The tailored questionnaires were used in each tribunal, and questions were meant to obtain clarifications about specific aspects of trial practice from the professional perspective of the interviewee, rather than to draw a comparison between the jurisdictions they represented.

\[497\]

The audio-recordings and the revised and approved transcripts are on file.