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### International criminal trials: A normative theory

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## CHAPTER 3.

# MEASURING EFFECTIVENESS: TELEOLOGY AND EFFICIENCY OF INTERNATIONAL CRIMINAL JUSTICE

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## 1. INTRODUCTION

This Chapter constructs the second pillar of the methodological framework. It elaborates on the meaning of *effectiveness* of international criminal tribunals – the parameter proposed for the evaluation of their procedural law and practice and the trial arrangements in particular, next to *fairness*.<sup>1</sup> The two parameters interweave and the relationship between them is a complex one. But essentially they correlate as ‘ends’ and ‘means’. How the effectiveness (efficacy) of the tribunals is to be measured and assessed remains an intractable methodological problem, despite the increased attention to this notion in recent years.<sup>2</sup> The piecemeal perspectives on effectiveness predictably lead to discordant qualitative assessments of international criminal justice.<sup>3</sup> The overarching approach to determine the degree of success and bankruptcy of the project is yet to be developed.

<sup>1</sup> Chapter 2.

<sup>2</sup> L.A. Barria and S.D. Roper, ‘How Effective Are International Criminal Tribunals?’, (2005) 9 *International Journal of Human Rights* 349, at 357; 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/6522776dd407e9c3875da218ebc70d5bUnquantifiable.pdf>>, at 40; M. Heikkilä, ‘The Balanced Scorecard of International Criminal Tribunals’, in C. Ryngaert (ed.), *Effectiveness of International Criminal Justice* (Antwerp: Intersentia, 2009) 28. See also C. Stahn, ‘Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice’, (2012) 25 *Leiden Journal of International Law* 251, at 254.

<sup>3</sup> L.D. Johnson, ‘Ten Years Later: Reflections on the Drafting’, (2004) 2 *JICJ* 368, at 378-79 (‘It is not readily apparent what is meant by the criticism that the Tribunal is ineffective. To ... persons so far convicted and sentenced to prison and ... [those] so far in custody at the UN Detention Unit in The Hague, the Tribunal presumably appears to be quite effective.’); D.F. Orentlicher, ‘Shrinking the Space for Denial: The Impact of the ICTY in Serbia’, Open Society Justice Initiative, May 2008, <[http://www.opensocietyfoundations.org/sites/default/files/serbia\\_20080501.pdf](http://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf)>, at 12.

The current gap warrants a more extended introduction to the problem, before the proposed approach is set out.

Although the empirical findings have started to emerge recently, they have already grown into a significant body of research that is gradually ousting the speculation-based accounts.<sup>4</sup> Overall, this is a welcome development. The empirical accounts, if properly conceived and constructed, usefully complement the extensive record of faith-ridden assessments, whose monopoly to truth is now over. The transitional literature has long been impaired by a failure to support its normative claims on the benefits of international criminal justice by actual,<sup>5</sup> i.e. not mere quasi-empirical or anecdotal, evidence.<sup>6</sup> For instance, the ‘hard data’ constitute a more credible basis of knowledge about the predominant attitudes toward the tribunals and local evaluations of their performance, impact, and legacy. By grounding the discipline more solidly in a scientific method, the empirical data are potentially a richer and more accurate foundation for future legal policy decisions. This is, of course, only the case where that the algorithms of collecting and evaluating the data follows a sound and bias-free methodology, lest the research would dangerously guise intuitive notions and preconceptions as empirical findings.

In the absence of a single consensual framework for assessments, it is uncertain how to handle, say, the cross-sectional analyses and/or statistical data on the reported local perceptions.<sup>7</sup> Further, one may wonder what weight ought to be attached to the output of limited case studies in the midst of a methodological quagmire that the discipline continues to be. The largely legal and normative character of the enterprise of international criminal prosecutions is one reason to question the sufficiency and relevance of numeric indicators regarding ‘perceptions’.<sup>8</sup> Like assumptive evaluations, fact- and number-based assessments have limitations which are important to acknowledge.<sup>9</sup> The number of persons indicted and arrested, witnesses heard, documents produced, convictions entered, or other similar performance parameters are often used in the audit and reporting procedures by the tribunals themselves. But this says little about their effectiveness.

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<sup>4</sup> J.N. Clark, ‘The ICTY and Reconciliation in Croatia: A Case Study of Vukovar’, (2012) 10 *JICJ* 397; *id.*, ‘The Impact Question: The ICTY and the Restoration and Maintenance of Peace’, in B. Swart *et al.* (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 55-80; *id.*, ‘The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina’, (2009) 7 *JICJ* 463; J. Meernik and K.L. King, ‘The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study’, (2001) 1 *International Criminal Law Review* 343; *id.*, ‘Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests while Doing Justice’, in Swart *et al.* (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 7-54; P.C. McMahon and D.P. Forsythe, ‘The ICTY’s Impact on Serbia: Judicial Romanticism meets Network Politics’, (2008) 30 *Human Rights Quarterly* 412; D.F. Orentlicher, ‘That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia’, Open Society Justice Initiative and International Center for Transitional Justice, 2010, <<http://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf>>.

<sup>5</sup> L.E. Fletcher and H.M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’, (2002) 24 *Human Rights Quarterly* 573, at 585 (postulating that the paucity of empirical evidence is the primary weakness of literature on transitional justice); Orentlicher, ‘Shrinking the Space for Denial’ (n 3), at 12 (‘Too often, public debate about the accomplishments of international tribunals has been driven by untested assumptions.’); McMahon and Forsythe, ‘The ICTY’s Impact on Serbia’ (n 4), at 413; Clark, ‘The Impact Question’ (n 4), at 56 and 58 (‘the benefits of criminal trials cannot be simply assumed or adduced from anecdotal evidence.’).

<sup>6</sup> E.g. P. Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, (2001) 95 *American Journal of International Law* 7, at 9 (stating that ‘[t]he empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies’. Emphasis added.)

<sup>7</sup> Adopting local perceptions as ‘a key measurement criterion’ to gauge the contribution of the ICTY to reconciliation, see Clark, ‘The ICTY and Reconciliation in Croatia’ (n 4), at 405; *id.*, ‘The Impact Question’ (n 4), at 63-64. But cf. *ibid.*, at 70 (sole reliance on local perceptions for assessing impact is problematic due to the manipulation of lay opinions by nationalist politicians and media).

<sup>8</sup> Heikkilä, ‘The Balanced Scorecard’ (n 2), at 29 (‘the numeric performance indicators are not as central to criminal court’), 41-46.

<sup>9</sup> Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 257 (‘Not all outcomes of international criminal justice can be reliably assessed or quantified.’) and 262 (‘A mere numeric assessment (i.e., of the number of defendants or cases, the defendant-cost ratio, or the length of investigations or trials) is too simplistic.’).

Studies on the management of public organizations clarify that a tendency to rely on workloads for measuring effectiveness is often a corollary of goal ambiguity and faltering prioritization policy.<sup>10</sup> In addition, the downside of imposing data-collection, analytical, and reporting obligations on the tribunals is that it diverts resources from core business, however defined.<sup>11</sup>

By the same token, no administrative or budgetary measurements of the effectiveness of international criminal justice are self-sufficient. Some of the projected achievements of the tribunals are obviously difficult to measure quantitatively or qualitatively. When they can be identified, the qualitative outputs can neither be rendered in quantifiable terms nor meaningfully compared with the resources invested.<sup>12</sup> Trying to do so would result in slanted and unfair assessments. For example, a widely shared view is that the major outcome of the work of the ICTY and ICTR, is the elaboration of the legal and conceptual vocabulary which has contributed to the progressive development of IHL and ICL and has triggered legislative advances on the domestic level, which vary by jurisdiction and remain to be properly appraised.<sup>13</sup> The issue that it was an unplanned and incidental outcome rather than a deliberate goal can be left aside. How many million dollars is it worth and how is one to determine whether the international community has ‘overpaid’? The profound and lasting transformative impact of the norm development on a broad range of societies throughout the world is not susceptible to a cost–benefit estimation. In relation to this and similar *qualitative* results, it would be misguided to judge the effectiveness of the tribunals by juxtaposing the numeric indicators of their performance with the funds expended by the international community in setting them up and running them.<sup>14</sup> Essential as it is for gauging the performance of the tribunals in a comprehensive way, the quantitative assessment is suited for some but not necessarily all parameters of efficiency.

However, as noted, it has been symptomatic to complain of the tribunals’ proceedings as overly lengthy and costly, as compared to domestic prosecutions and trials.<sup>15</sup> This aspect has also been a target for the harshest critique ever advanced against modern international criminal justice.<sup>16</sup> Throughout their lifetime, the *ad hoc* courts have been consumed by devising ways of streamlining the process and perfecting management in order to bring down the time and costs required. But on a conceptual level, a blunt comparison of the ‘price’ of international criminal justice with that of its national counterpart is a dubious method of measuring effectiveness. The more nuanced scholarship

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<sup>10</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 14-15.

<sup>11</sup> Stahn, ‘Beyond “Faith” and “Facts”’ (n 2), at 257.

<sup>12</sup> See e.g. Johnson, ‘Ten Years Later’ (n 3), at 378-79 (‘one would hope that international lawyers, interested in the development of the law, would not judge the Tribunal only on the basis of administrative and budgetary considerations. The test should focus on whether ... the Tribunal has contributed positively to the development of international criminal law, international humanitarian law and human rights law; the facts surrounding terrible atrocities have been uncovered and those who committed them held accountable; and judicial proceedings have been conducted in accordance with the highest standards of international due process, including fully honouring the rights of the accused.’).

<sup>13</sup> For an early recognition, see R.J. Goldstone, ‘Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals’, (1996) *NYU Journal of International Law & Policy* 485, at 499-500.

<sup>14</sup> See also S.M.H. Nouwen, ‘As You Set for Ithaka. Challenges as Findings: Practical, Epistemological, Ethical and Existential Questions of Socio-Legal Empirical Research in Conflict’, (2014) 27(1) *Leiden Journal of International Law* (on file with the author) (‘Empirical research that is limited to indexing, quantifying and counting the effects of international criminal justice is rightly resisted: it risks misrepresenting an inherently political concept such as ‘justice’ as a value-neutral unit that increases thanks to technical expertise.’ Footnote omitted.)

<sup>15</sup> See Chapter 1.

<sup>16</sup> S. Bourgon, ‘Procedural Problems Hindering Expeditious and Fair Justice’, (2004) 2 *JICJ* 526, at 527 (‘the length of proceedings, at all stages, ... appears to be uncontrollable. From a mission perspective, this has entailed problems of costs, time, credibility and, more importantly, the inability to significantly influence the return of peace, security and reconciliation in the former Yugoslavia. From a legal perspective, it is directly linked to potential infringements on the rights of the accused.’); R. Zacklin, ‘The Failings of Ad Hoc International Tribunals’, (2004) 2 *JICJ* 541, at 543; J. Rabkin, ‘Global Criminal Justice: An Idea Whose Time Has Passed’, (2005) 38 *Cornell Journal of International Law* 753, at 768 (using labels ‘agonizingly slow’ and ‘glacial’). For moderate critique and/or defence, see C.P.R. Romano, ‘The Price of International Justice’, (2005) 4 *The Law and Practice of International Courts and Tribunals* 281, at 295-96; D. Wippman, ‘The Costs of International Justice’, (2006) 100 *American Journal of International Law* 861.

points to their diverging objectives and desired output.<sup>17</sup> On a practical level, the cost-inefficiency critique tends to underestimate the specificity of the international context and the extraordinary challenges associated with the conduct of international criminal proceedings, most of which are unknown domestically even in the most complex of criminal cases.<sup>18</sup> Similarly, in assessing the duration of the proceedings, the structural features of the tribunals and their context must not be disregarded. Empirical data regarding the length of international trials actually disprove the claim that the pace of international criminal courts—at least the ICTY and ICJ, as opposed to the ICJ—is unreasonable as compared to complex criminal cases in some Western countries.<sup>19</sup> There is no way of knowing at this stage if domestic jurisdictions would have fared much better than the tribunals.<sup>20</sup> It may well be that they would have sagged under the caseload if the same had regularly included cases of comparable magnitude.

Hence, no narrow framework for assessing the tribunals is capable of covering the diverse aspects of their efficiency and impact. The dichotomy between empiricism and normativism is artificial, and the respective considerations will best complement each other. The evaluations of international criminal justice ought not to be one-sided but multidimensional and combine both fact-based and faith-based criteria.<sup>21</sup> An interdisciplinary approach drawing upon the methodology for evaluating performance of public institutions developed in other fields is a highly promising avenue for future inquiries.<sup>22</sup>

Given its limited ambition of clarifying the methodology, this Chapter does not aim at offering a precise metric for measuring the effectiveness of those courts. Nor is it meant to proffer empirical or normative assessments of specific tribunals, the impact on target communities, and legacy – or to revisit assessments made earlier.<sup>23</sup> Instead, the Chapter aims at making an analytical contribution and focuses on the methodological link between international criminal procedure and ‘effectiveness’ of international criminal justice. This preliminary task sets the stage for subsequent examination of trial process in which ‘effectiveness’ is employed as a part of evaluative framework.

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<sup>17</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 8 (critical of ‘assumptions ... about the role of international courts in the life of the international community, which seem to transpose the role that courts play in national legal systems onto the international realm.’); Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 262.

<sup>18</sup> Wippman, ‘The Costs of International Justice’ (n 15), at 877-78 (the ICTY trials are more expensive than an average criminal trial in the US, but the expenses are justified due to complexity of the cases and the need to provide for travel, witness support and protection, translation, etc).

<sup>19</sup> Galbraith’s calculations show that the ICTY and SCSL ‘process cases at a reasonable pace..., averaging between four to five years per defendant from custody to completion—numbers that are on par with the timeframes for complex criminal cases in developed Western countries’, while the ICJ’s average of 5.9 years is ‘substantially above the ballpark for complex domestic criminal law cases.’ See J. Galbraith, ‘The Pace of International Justice’, (2009) 79 *Michigan Journal of International Law* 79, at 127-28, 142. For a scathing criticism of the ICJ for lack of expedition, see D. Tolbert and F. Gaynor, ‘International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies’, (2009) 27 *Law in Context* 33, at 33-34 (citing ‘egregious examples’).

<sup>20</sup> See e.g. M. Harmon, ‘The Pre-trial Process at the ICTY as a Means of Ensuring Expeditious Trials: A Potential Unrealized’, (2007) 5 *JICJ* 377, at 383 (the reasons for the considerable length of ICTY trials are long and frequent adjournments, while the actual court time is shorter than in the cases of comparable complexity before national courts).

<sup>21</sup> Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 260 (‘a proper evaluation requires factual *and* normative judgement that is partly grounded in moral argument.’) and 280-81 (concerning ‘the need to recognize the limits of “facts” and the virtues of “faith”’ in ICL).

<sup>22</sup> Heikkilä, ‘The Balanced Scorecard’ (n 2), at 54 (making a valuable attempt to use a multi-dimensional framework for assessing effectiveness based on the method drawn from management accounting); Shany, ‘Assessing the Effectiveness’ (n 2), at 10 *et seq.* (constructing a helpful account of organizational effectiveness of international courts by borrowing from public administration studies).

<sup>23</sup> The notion of legacy has been in the spotlight lately in view of the imminent completion of the ICTY and ICJ mandates. See R.H. Steinberg (ed.), *Assessing the Legacy of the ICTY* (Leiden/Boston: Martinus Nijhoff, 2011); Swart *et al.* (eds), *The Legacy of the ICTY* (n 4); M. Swart, ‘Some Critical Comments on the Legacy and the Legitimacy of the ICTY’, (2011) 3 *Goettingen Journal of International Law* 985, at 989 *et seq.*; F. Mégret, ‘The Legacy of the ICTY as Seen Through Some of its Actors and Observers’, (2011) 3 *Goettingen Journal of International Law* 1011.

As noted earlier, effectiveness is viewed as the interplay and tension between the considerations related to the *goals* of the tribunals and those relating to *efficiency*.<sup>24</sup> To avoid the pitfall of an intuitive and arbitrary understanding of the term ‘effectiveness’,<sup>25</sup> it is essential to clarify the approach. The term as used here denotes the ability of the tribunals to produce the programmed effects and to practically achieve—or to come closer to achieving—the objectives set before them. The binary vision of *effectiveness* does not exhaust the perspectives potentially valid for the assessments of performance of international criminal justice (for instance, the unexpected benefits of developing the law would remain uncovered). But it does incorporate the angles of view that are most relevant to procedural setup and helps avoid a singular and one-sided framework.

The first, teleological, perspective on ‘effectiveness’ requires consideration of goals of international criminal justice and the extent to which those can be attained or subverted in the tribunals’ work. The discourse has traditionally employed the teleology of international criminal justice, paired with its supposed or empirical impact, as a tool for evaluating the project’s success or failure. The premise that it is a sensible method is commonly shared, although, as noted, assessments of the impact have mostly been assumption-based.<sup>26</sup> The method also finds justification in the ‘rational system approach’ drawn from public management.<sup>27</sup> The central element here is the special goals of international criminal tribunals which can be referred to as idiosyncratic or socio-political goals and are believed to distinguish the project from domestic criminal justice. There exists as yet scarce analytical research on whether and how the institutional goals are or should be normatively consequential for procedural law. This Chapter aims to start filling this gap. The recent literature draws a stronger link between the institutional objectives of the tribunals and their procedure.<sup>28</sup> Some scholars venture further to provide what can be deemed a goal-deterministic critique of international criminal procedure, which implies that the consideration of professed goals should inform the procedural arrangements in a direct sense.<sup>29</sup>

The second related dimension of ‘effectiveness’ proposed for inclusion is operational *efficiency*. It speaks to the ability of the tribunals to achieve, or to make an adequate contribution to achieving, said objectives with minimum expenditure of time and resources.<sup>30</sup> This no less

<sup>24</sup> See Chapter 1.

<sup>25</sup> ‘The “Achilles heel” of most publications in the field is the crude and/or intuitive definitions of “effectiveness” that they employ, which often equate effectiveness with compliance.’ Shany, ‘Assessing the Effectiveness’ (n 2), at 2.

<sup>26</sup> Orentlicher, ‘Shrinking the Space for Denial’ (n 3), at 12. E.g. Barria and Roper, ‘How Effective Are International Criminal Tribunals?’ (n 2), at 357 (‘If these are goals of international justice, then they should be the basis upon which we judge the relative success and failure of these tribunals.’).

<sup>27</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 10-11, 27 (‘If, according to the “rational system approach”, an effective organization is one that meets its goals, then assessing the effectiveness of international courts necessarily requires the ascertainment of those goals.’).

<sup>28</sup> B. Swart, ‘Damaška and the Faces of International Criminal Justice’, (2008) 6 *JICJ* 87; J.D. Ohlin, ‘Goals of International Criminal Justice and International Criminal Procedure’, in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 55-68.

<sup>29</sup> M. Damaška, ‘Problematic Features of International Criminal Procedure’, in A. Cassese *et al.* (eds), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2008) 175 (‘until greater clarity is achieved about the proper mission of international criminal courts, a secure foothold will be missing for the legal-technical analysis of many aspects of their procedure.’), 182 (expressing a preference for a judicially dominated trial model over a two-case approach with reference to goals of international criminal justice) and 186 (the ‘didactic goal’ should be ‘granted great importance in judging the desirability of ... procedures’); *id.*, ‘What is the Point of International Criminal Justice?’, (2008) 83 (1) *Chicago-Kent Law Review* 329, at 357; A. Eser, ‘Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY’, in Swart *et al.* (eds), *The Legacy of the ICTY* (n 23), at 108-48; *id.*, A. Eser, ‘The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? Reflexions of a Judge’, in T. Krueßmann (ed.), *ICTY: Towards a Fair Trial?* (Graz: Neuer Wissenschaftlicher Verlag, 2009) 207-27.

<sup>30</sup> See also Heikkilä, ‘The Balanced Scorecard’ (n 2), at 38 and 42 (suggesting efficiency and cost-effectiveness as aspects of ‘effectiveness’); Shany, ‘Assessing the Effectiveness’ (n 2), at 16 (defining ‘efficiency’ (as opposed to ‘effectiveness’) as ‘net benefits accrued independently of the organization’s goals) and referring to P.F. Drucker, *Managing the Non-Profit Organization* (HarperCollins: 1990) 155 (‘Efficiency is doing things right whereas effectiveness is doing the right things’).

important aspect of effectiveness cannot but qualify the grand ambitions of international courts. It limits the extent to which their public goods and projected contributions to the international society are feasible and determines how goals should be brought about more rationally and less resource-intensively. Although this perspective may be less established, it has received a greater prominence in the recent scholarship. Scholars speak in this connection of a shift from predominant value-driven assessments of the validity of courts to quantitative assessments such as economic cost-benefit analyses and rational resource-allocation, at times resulting in an ‘obsession with numbers’.<sup>31</sup> The objective or imposed practical limitations on the tribunals’ goal-setting are related to the practical realities in which they operate and distinguish the procedural arrangements that may be cogent and desirable from those that are not. This perspective emphasizes the need for efficiency, economy, and rational budget-management and demands that institutional structures be optimized and proceedings streamlined.

In the context of this book, a key question regarding the use of ‘effectiveness’ for the critical examination of international criminal process is whether and to what extent it is a persuasive or conclusive consideration when it comes to endorsing or striking down a certain procedural rule or practice. Does it matter if a given procedure appears to be in line or at odds with a certain overarching goal or with a compelling pragmatic consideration? The Chapter develops the argument that, unlike ‘fairness’, the dual parameter of ‘efficiency’ is as such neutral and does not directly predetermine or shape the process arrangements. The goals may be relevant and should be factored in when opting for specific legislative avenues in that domain, insofar as procedure should not effectively subvert the achievement of institutional objectives. Thus, it may be justified to assess international criminal procedure in light of its capacity of promoting institutional objectives as a matter of incidental spin-off effects. But the relationship between the process and socio-political goals is such that the normative power of this parameter is not decisive or particularly persuasive when determining the optimal procedure. As will be argued, attaching too much weight to institutional goals when applying and reforming the procedural law will tend to lead to de-liberalization of international criminal procedure, which is in all circumstances in an undesirable consequence given the primacy of fair trial and truth-finding among the functions and methods of the process.

The Chapter elaborates this line of reasoning and defines the terms on which the teleology and limitations of international criminal justice can be used as a part of the evaluative framework in sections 4 and 5. Prior to that, it attempts to introduce a greater conceptual clarity in the domain of goals. The vocabulary currently in use in the ICL discourse is a mishmash of various teleological categories which relate to different aspects of goal-setting but are seldom properly distinguished. The Chapter clarifies the relationship between the terms in section 2. Next to that, the inventory of special goals of international criminal proceedings coming under consideration as a part of the evaluative framework is proposed (section 3). These methodological considerations feed into the normative assessment of trial practices in descriptive and analytical chapters.<sup>32</sup>

## **2. TELEOLOGY OF JUSTICE: CONFRONTING THE ONGOING MIX-UP**

The institutional objectives pursued by the enterprise of investigating, prosecuting, and adjudicating international crimes by the tribunals is the issue that has been at the fore of the discourse on international criminal justice from the outset. In justifying the need for the new institutions, their founders and architects have occasionally made explicit their rationales for establishing the courts, presumably to endow them with philosophical foundations and a sense of legitimacy. The novelty of the courts and the legal and political circumstances in which they had been established warranted such justifications to a greater extent than domestic criminal justice systems which are well established tools for addressing criminal conduct. In courts ranging from historical military

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<sup>31</sup> Stahn, ‘Between “Faith” and “Facts”’ (n 20), at 255-6.

<sup>32</sup> Chapters 8-11.

tribunals to the most recent forms of international and hybrid justice, the goals of international criminal prosecutions have been subject to rumination and rhetorical uses by the parties in pleading their cases.<sup>33</sup> Perhaps more controversially, they may have also been integral elements of judicial rationales.

The traditional objectives of criminal justice as well as goals and rationales of punishment familiar from the domestic context (general and special deterrence, retribution, incapacitation, rehabilitation, etc.) have acquired a second life in international criminal law. The validity of some or even all of the goals recognized domestically has been challenged by ICL scholars. The normative foundations of the international penal structure, which had been put in place intuitively rather than by calculation, were declared in need of reinterpretation to fit the unconscionable gravity of this type of criminality and to reflect the institutional and moral values of international law-enforcement.<sup>34</sup>

Over and above the traditional penal goals, special ('idiosyncratic') goals of international criminal justice have been named which are believed to brand and distinguish its institutions from national counterparts.<sup>35</sup> The following passage is fairly representative of the goal-setting discourse:

The Tribunals were established to help bring about and maintain international peace and security. These innovative institutions vindicate the rule of law. They punish those who are found guilty; they seek to deter further commission of heinous crimes; and by exacting individual accountability, they encourage reconciliation by discouraging continued group stigmatisation. In short, they play the major role in ending the cycle of impunity for persons who have committed these horrific offenses, which threaten international peace and security.<sup>36</sup>

It bears noting that the celebrated idiosyncrasy of the goals does not make them exclusive to the pursuit of *international* justice. National criminal justice systems from time to time serve similar objectives, particularly when dealing with crimes of past regimes in endeavour to enforce transitional justice.<sup>37</sup> But it is true that goal-related differences between the international and national contexts generally are valid and revolve around the distinct constituencies and

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<sup>33</sup> About judges in the first and subsequent Nuremberg trials, see e.g. J.A. Bush, 'Lex Americana: Constitutional Due Process and the Nuremberg Defendants', (2001) 45 *Saint Louis University Law Journal* 515, at 524 ('The judges in particular, almost all of them, kept their trials focused on familiar issues of fairness and rights at least as much as on larger issues of political history and persecution.'). See also S. Karstedt, 'The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstruction', in D.A. Blumenthal and T.L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden/Boston: Martinus Nijhoff, 2008) 17 (observing that the Nuremberg trial 'was indeed conducted as a "monumental spectacle" of truth and justice with the clear objective not only to bring the perpetrators to justice but to educate the German public.').

<sup>34</sup> See e.g. D. Zolo, 'Peace through Criminal Law?', (2004) 2 *JICJ* 727, at 728-9; M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539, at 590-92; R.D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 *Stanford Journal of International Law* 39, at 40-41, 55.

<sup>35</sup> Swart, 'Damaška' (n 28), at 99 ('Some of these are traditional goals, likely to be pursued by all, or the large majority of, national systems of justice. Other goals seem to be peculiar to the machineries of international criminal justice.') and 100 ('Goals that do not seem to play the same prominent role in national systems of justice, at least not in proceedings in individual cases, and that, therefore, distinguish the pursuit of criminal justice at an international level from that at the national level.'). E. Møse, 'Main Achievements of the ICTR', (2005) 3 *JICJ* 920, at 934 ('It should also be remembered that trials in the Tribunals may have a number of objectives, some not readily comparable to those found in domestic criminal courts.'). Galbraith, 'The Pace of International Criminal Justice' (n 19), at 89.

<sup>36</sup> G. Kirk McDonald, 'Trial Procedures and Practices', in G. Kirk McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International and National Courts* (The Hague: Kluwer Law International, 2000) 622.

<sup>37</sup> See further *infra* 4.1.



communities which the international tribunals serve.<sup>38</sup> In turn, this is reflected (or should be reflected) on the processes through which the institutional goals are made operational.

The special goals of the tribunals frequently mentioned by the scholars include: reconciliation in the affected societies, restoration of peace and security, compiling a historical record of atrocities, redress for the crime victims, and the reaffirmation of international norms trampled by international crimes and grafting the rule of law in lawless settings of war-torn and post-conflict communities.<sup>39</sup> While this is a basic and standard list, even longer inventories have been compiled.<sup>40</sup> Since the goals included in various inventories are vaguely termed, vary widely, and at least partially overlap, the relationship between the different goals and their analogues is difficult to fathom.<sup>41</sup>

At a certain point, the plurality of goals has generated a sense of conceptual discomfort. It was felt that the expansive inventories of objectives are too overwhelming to be meaningful programmes of action not least because the tribunals are seriously constrained in terms of resources and capacities at the disposal.<sup>42</sup> The unavoidable mismatch between the high ambitions and feasible output was deemed to pose a threat to the tribunals' reputation and legitimacy.<sup>43</sup> Mirjan Damaška has argued that the list of goals should be prioritized and/or scaled down and that preferably one primary goal must be chosen.<sup>44</sup> There is also a general agreement that in order to be truly effective, international criminal justice should form part of a comprehensive coordinated strategy encompassing diplomatic, political, economic, developmental, and military measures as well as alternative justice mechanisms.<sup>45</sup>

While the latter argument is self-evident and less controversial, the proposals for drawing a ranking order among the numerous goals and selecting a master goal among them require closer attention in this context. If the argument is accepted, it would inform the usage of the goals criterion for evaluating the procedure. Before addressing these ideas in more detail, it is essential to try to introduce more orderliness into the expansive inventory of goals, objectives, rationales, and functions which are used rather chaotically and discordantly in the present ICL discourse. For this end, a number of important distinctions should be drawn.

Firstly, one ought to be clear on the terminology. Under goals and objectives one is to understand the ends pursued by a certain activity, irrespective of whether it is achievable in principle, whereas 'function' refers to 'a special kind of activity proper to anything; the mode of

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<sup>38</sup> Sloane, 'The Expressive Capacity' (n 34), at 55 ('Rather than persist in the futile and impracticable effort to make genuinely international criminal tribunals mimic national courts by dispensing proxy justice, ICL should candidly acknowledge that these tribunals serve distinct goals and constituencies.')

<sup>39</sup> Sloane, 'The Expressive Capacity' (n 34), at 45; Swart, 'Damaška' (n 28), at 100; Damaška, 'What Is the Point' (n 29), at 331; Eser, 'The "Adversarial" Procedure' (n 29), at 209-10; I. Bonomy, 'The Reality of Conducting a War Crimes Trial', (2007) 5(2) *JICJ* 348, at 353; Y. Beigbeder, *International Justice against Impunity: Progress and New Challenges* (Leiden: Martinus Nijhoff, 2005) 72-3; J. Iontcheva Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', (2008) *Virginia Journal of International Law* 529, at 536-43; Ohlin, 'Goals' (n 28), at 56.

<sup>40</sup> E.g. M. Shrag, 'Lessons Learnt from the ICTY Experience', (2004) 2 *JICJ* 427, at 429.

<sup>41</sup> Juxtaposing several lists of goals, see Eser, 'Procedural Structure' (n 29), at 109-14.

<sup>42</sup> Damaška, 'What is the Point' (n 29), at 331.

<sup>43</sup> Damaška, 'Problematic Features' (n 29), at 178 ('The prolixity of goals is far from harmless: the resulting disparities between aspiration and achievement may damage the reputation of any system of justice').

<sup>44</sup> Damaška, 'What is the Point' (n 29), at 330-31, 343-44.

<sup>45</sup> Goldstone, 'Justice as a Tool for Peace-Making' (n 13), at 486 ('one must not expect too much from justice, for justice is merely one aspect of a many-faceted approach needed to secure enduring peace in a transitional society.');

Sloane, 'The Expressive Capacity' (n 34), at 45-46 ('ICL remains only one tool, and by no means always the most appropriate or efficacious one, for addressing the diverse circumstances that give rise to large-scale human rights atrocities and violations of the laws of war.');

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 156 ('It would be unrealistic to expect the tribunals and the judicial process *alone* to bring about peace and stability in a post-conflict country. The operative word should be *assist*.')

action by which it fulfils its purpose'.<sup>46</sup> The terms 'goal' and 'objective' can be treated as synonymous and, although 'function' means something else, in some contexts their interchangeable use can be justified.<sup>47</sup> One example of a justified synonymic use of the terms in the context of procedure is the following: goals pursued by a given interval of proceedings (trial) or a certain procedural activity (presentation of evidence) is at the same time a 'job description' of the phase that has a broader span, or a means (function) by which it attains its objective. The *goals* of constituent parts of trial are *functions* of trial, in the same way as goals of trials are functions of the criminal proceedings more generally. For instance, the compilation of an evidentiary record as the basis for a decision is the *goal* of the proof-taking phase of trial and, at the same time, the *function* of trial proceedings generally, whose objective is to establish the guilt or innocence and to determine the sentence if appropriate.

Somewhat differently, a 'rationale' is a justification or a motive for any given institute or activity with reference to its expected ability to solve a problem or to promote a set goal or objective.<sup>48</sup> While the terms 'goal' or 'objective' denote a forward-looking perspective on the outcomes to be achieved, 'rationale' denotes a more retrospective meaning of inquiring into the original reasons to strive for the programmed outcome. The 'rationale' answers the question of not *what* should be achieved but *why*. Insofar as *what* and *why* are interrelated, the term can also be used to signify goals and objectives as outcomes to be achieved or values to be upheld which a legislator (or drafter, policy-maker) had in mind when conceiving a certain course of action.

Second, the teleological categories should be distinguished from those not relating to goal-setting. Thus, the goals of institutions, as intended and programmed outcomes, ought not to be confused with incidental and unintended side-effects or by-products of the legal process. Even if they are anticipated or subsequently assessed as beneficial and desirable, they are not proper motives driving behind the criminal justice process. By the same token, goals are to be kept apart from operational modes and requirements towards methods to be adopted in achieving the objectives and in carrying out functions of procedure. Although one finds in the literature references to 'efficiency' as a 'background goal' of procedure, it seems more proper to deem it as a normatively desirable way of processing criminal cases.<sup>49</sup> That said, a distinction is not always straightforward: for example, the views vary on whether fairness is a normatively obligatory *means*, rather than a proper *end*, of international criminal proceedings.<sup>50</sup>

What is striking in the current ICL discourse on goals is the ongoing mix-up between the goals, objectives, and functions which pertain to different categories of acts, processes, and phenomena. In this context, a distinction should be made between the following notions:

- (i) Objectives or rationales of (establishing) international criminal tribunals, including 'ordinary' objectives they share with national systems and 'idiosyncratic' objectives;

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<sup>46</sup> See Ohlin, 'Goals' (n 28), at 55.

<sup>47</sup> Defining and distinguishing between 'functions' and 'goals' in relation to procedural stages, see Chapter 4.

<sup>48</sup> Distinguishing between goals and motives, see Shany, 'Assessing the Effectiveness' (n 2), at 16-17 (noting that do not always fully overlap).

<sup>49</sup> Ohlin, 'Goals' (n 28), at 66 (defining 'background goals' as those which 'cannot, by definition stand as the only goals of international criminal procedure').

<sup>50</sup> Eser, 'Procedural Structure' (n 28), at 111 ('it would be difficult to conceive that the "purpose" of establishing the ICTY was to demonstrate "fairness": certainly the court has to proceed in this manner, but this does not mean that it was established for the sake of performing fairness' and considering fairness as 'a welcome by-product rather than the purpose of establishing an institution of international justice.'). Cf. P.L. Robinson, 'Rough Edges in the Alignment of Legal Systems at the ICTY', (2005) 3 *JICJ* 1037, at 1058; *id.*, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', (2000) 11(3) *European Journal of International Law* 569, at 580; J.D. Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 77; Ohlin, 'Goals' (n 28), at 66 (concerning standard-setting function of international criminal procedure vis-à-vis national jurisdictions).

### Chapter 3: Measuring Effectiveness: Teleology and Efficiency

- (ii) Purposes of punishment and sentencing rationales (retribution, general and special deterrence, incapacitation, rehabilitation, and reprobation);<sup>51</sup> and
- (iii) Goals and functions of international criminal process (and of its separate phases such as trial).

Despite the need to keep the different tiers of teleology apart, the different goals are often piled up together which obfuscates the debate. It is not uncommon to equate and use interchangeably the aims of punishment (sub. ii) and the ‘ordinary’ goals of (international) criminal justice (sub. i). Mirjan Damaška lists the ‘additional goals of international criminal justice’ next to (‘beside’) the ‘standard objectives of national criminal law’, which, according to him, include the rationales for punishment (‘retribution, general deterrence, incapacitation, and rehabilitation’).<sup>52</sup> He admits in a note that ‘these additional goals, properly interpreted, are aims of proceedings rather than aims of punishment’ but leaves the question of whether those categories are ‘analytically independent’ aside.<sup>53</sup> The present author believes they are, and that this distinction is too fundamental to be neglected.

In a similar vein, the ‘first and foremost goal’ specified by Bert Swart is ‘to hold the individual perpetrators for international crimes accountable ... and to punish them’.<sup>54</sup> Swart incorporates into the institutional teleology the aims of punishment: retribution, general and special deterrence, and rehabilitation. To those ‘four traditional goals of criminal justice’ (in fact, the converted punishment rationales), he adds what he sees as ‘idiosyncratic goals of international criminal justice’: reprobation, satisfaction to victims, halting and preventing conflicts, demolishing a culture of impunity, the restoration and maintenance of peace, re-establishment of the rule of law, providing an accurate historical record, and promotion of reconciliation. The scholarship often echoes this categorization. Thus, in a similar vein, Jens Ohlin notes ‘the connection between the procedure and the more general goals of punishment’ but apparently implies the systemic objective of criminal justice: ‘ensuring that the innocent are vindicated and the guilty are condemned through a fair procedure.’<sup>55</sup>

The interweaving of the systemic objective of criminal justice with the objectives which may be pursued in relation to one possible outcome of the proceedings (more specifically, punishment) is problematic. This may suggest that the punishment should be regarded as the only (main) objective of a criminal justice system. However, the institutes of punishment and sentencing do not exhaust the systemic goal to the exclusion of the other important objective (acquitting the innocent). It is misguided to reduce the enterprise of criminal justice to a single outcome or act, even though it is a distinctive feature of the system. Some scholars emphasized the importance of distinguishing the aims of sentencing from the cluster of aims of criminal justice.<sup>56</sup> Its overarching goal is more appropriately formulated as ensuring accountability and closing the impunity gap for international crimes by delivering justice to the accused, victims and the society.<sup>57</sup>

Another problem with inflating one function served by the system into its overarching rationale is that this elevates it to the same category of systemic or institutional goals which

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<sup>51</sup> General aims of criminal punishment are not the same as the sentencing rationales to be considered by the court when determining an appropriate sentence tailored to the accused and the crime, with a view to individualized punishment. While further distinction should be made between the goals of punishment and sentencing rationales, this nuance is not essential in the present context.

<sup>52</sup> Damaška, ‘What is the Point’ (n 29), at 331.

<sup>53</sup> *Ibid.*, n2 and at 339 n15 (acknowledging the difference by a disclaimer in a footnote but inexplicably conducting a discussion based on the conflation of two different categories of goals in the body of text).

<sup>54</sup> Swart, ‘Damaška’ (n 28), at 100.

<sup>55</sup> Ohlin, ‘Goals’ (n 28), at 61.

<sup>56</sup> See also A. Ashworth, *Sentencing and Criminal Justice* (London: Weigenfeld and Nicolson, 1992) 55 (noting also that attempts to combine the latter into ‘some overarching aim, such as “the maintenance of a peaceful society through fair and just laws and procedures” is surely to descend into vacuity’: such formula is inconclusive as regards specific stages).

<sup>57</sup> E.g. First Annual Report of the ICTY, UN Doc. A/49/342-S/1994/1007, 29 August 1994, paras 11-13; Ninth Annual Report of the ICTY, UN Doc. A/57/379-S/2002/985, 4 September 2002, para. 328 (‘to combat impunity and render justice to the victims of war crimes and crimes against humanity.’). See also Ellis, ‘Combating Impunity’ (n 45), at 155.

includes the special goals of international criminal justice.<sup>58</sup> However, the aims of punishment, disguised as a systemic objective, should not be smuggled into the same tier of teleology which hosts socio-political goals. The gulf between the former objectives and the purposes pursued by an act of punishment ought not to be collapsed lest their different nature and effects be neglected. In fact, the socio-political objectives of international justice are not easily transposable onto the realm of punishment and sentencing rationales.

If the two categories are used on an equal footing, tensions become visible between the systemic goals and principles governing punishment and sentencing. Inordinate attention to institutional objectives when determining an individual sentence may result in a failure to hand down the sentence faithfully reflecting the person's level of culpability, gravity, nature and circumstances of the crime, and the relevant individual circumstances.<sup>59</sup> As a matter of law, the role of such objectives among recognized aggravating and mitigating circumstances is of little to no relevance. Not a single aggravating or mitigating circumstance mentioned in the tribunals' statutes and RPE directly relate to socio-political concerns.<sup>60</sup> Besides the principled and self-sufficient moral reasons, this is also due to difficulties of conducting a cost-benefit analysis of a specific sentencing calculus in relation to remote institutional objectives.<sup>61</sup>

By the same token, the goals discourse has at times overstated interaction and degree of confluence between the traditional punishment rationale, 'incapacitation', and the special goal of restoring peace and security. The isolation and removal from the political scene of 'dangerous' and 'extremist' elements whose presence might complicate conflict resolution and transition to peace is seen as promoting the peace-building mandate of international criminal justice.<sup>62</sup> According to Payam Akhavan,

One of the immediate effects of the tribunal ... is the removal of certain individuals from the political space. And that is a very immediate and tangible effect: you take someone, who is a demagogical leader, who is responsible for violence, who cannot be trusted to conduct politics in any way except to incite hatred, and you remove that person. In criminological terms, it is a form of incapacitation, which in itself is extremely valuable.<sup>63</sup>

Albeit not evidently erroneous, the analogy between incapacitation as a possible rationale for punishment and the removal from political life (which is essentially a deprivation of civil and political rights the individual has in connection with pending legal proceedings) is sweeping. Paradoxically, it effectively amounts to the application of punishment already at the indictment stage. The translation of the political measure, which is a possible side-effect and incidental rather than preordained outcome of legal proceedings, into the proper goal of international criminal justice and even a function of *procedure* is objectionable. Conceptually – because it attributes wrong goals to wrong activities; practically – because it is bound to politicize the legal process. The legitimacy of such political outcomes, however desirable in the circumstances, will necessarily be questioned if achieving them is the true motive behind prosecutions and trials. The court's effort to directly

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<sup>58</sup> Ohlin, 'Goals' (n 28), at 59 (treating sentencing rationales next to specialized objectives).

<sup>59</sup> Art. 78(1) ICC Statute ('In determining the sentence, the Court shall ... take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.');

<sup>60</sup> Rule 145(2) ICC RPE. See also Rule 101(B)(ii) ICTY RPE (only explicitly mentioning 'the substantial cooperation with the Prosecutor by the convicted person before or after conviction' as a mitigating circumstance).

<sup>61</sup> In this vein on the role of deterrence considerations in international sentencing: A.M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Virginia Law Review* 415, at 447-49; Sloane, 'The Expressive Capacity' (n 34), at 77.

<sup>62</sup> E.g. Orentlicher, 'Shrinking the Space for Denial' (n 3), at 16, 41-42; Stahn, 'Between "Faith" and "Facts"' (n 20), at 529; Ellis, 'Combating Impunity' (n 45), at 160.

<sup>63</sup> Cited in Mégret, 'The Legacy of the ICTY' (n 23), at 1029; Akhavan, 'Beyond Impunity' (n 6), at 7 ('Stigmatizing delinquent leaders *through indictment*, as well as apprehension and prosecution, undermines their influence.' Emphasis added.)

promote the restoration and maintenance of peace and the reconciliation among social groups through punishment vitiates the legalist nature of the exercise.

Submitting considerations of fair retribution and individualized punishment to utilitarian objectives means nothing else than using an individual defendant as a mere object for achieving the desired socio-political results, whereas under retributivism the dignity of an individual must always be upheld in the act of punishment. The view of punishment as a means to an end conflicts with the categorical imperative which underlies retributive penal accounts.<sup>64</sup> In case of conviction, an unjustifiably light sentence entered with a view to assisting reconciliation may fall short of ensuring fair retribution and ‘just deserts’. It would work against the objectives of redressing victims and true reconciliation. Similarly, a disproportionately harsh sentence to satisfy victims in a misconceived attempt to reinstate peace in the society will effectively turn the judgment into an instrument of vengeance and might undermine the same objective. Inconsistency with the legalist virtues of fairness and proportionality, which are guiding beacons of retribution could subvert reconciliation in the long run. These observations are not aimed to provide a definitive defence of retributivism *vis-à-vis* utilitarian philosophy. But they suffice to illustrate that the confusion between the objectives of punishment and the systemic objective of international criminal justice risks resulting in incongruence that is liable to fail both categories of goals. This peril can be averted or at least managed by keeping the different layers of teleology apart.

The third category referred to above (sub iii.)—goals and functions of procedure—are of utmost relevance in this study. Their autonomous status raises the issue of distinction from other goals. The perils of conflating the procedural objectives with the aims of punishment and sentencing rationales and the absurdity of requiring alignment between them, is self-evident. Retribution, deterrence, rehabilitation and other similar purposes may not be regarded as the proper objectives a (liberal) criminal process is to pursue. Those should be neutral and inconclusive when it comes to determining the optimal procedural arrangements.<sup>65</sup> If they are not, the criminal procedure in itself mutates into a penal tool which retributes, deters, or incapacitates, thereby conjuring the imagery of trials by ordeal and mediaeval inquisition. While substantive criminal law is a legitimate tool for the realization of crime-control policies through criminalization of conduct, employing criminal procedure as a mechanism for implementing those policies is contrary to the presumption of innocence and fundamental notions of a fair trial. In liberal criminal justice, the procedure may not be punitive in and by itself. It precedes punishment and makes its imposition possible and legitimate but it never amounts to it. Criminal process should neither spearhead the ‘fight against impunity’ nor be a vehicle for retribution or incapacitation of individual offenders and a deterrent of future crimes.

Nor should the objectives of international criminal procedure be equated or aligned with substantive—ordinary or specialized—goals of international criminal justice.<sup>66</sup> On the one hand, the distinction of procedural objectives from ordinary goals of criminal law and justice poses no serious difficulty. It is apparent that the goals of ensuring individual criminal responsibility and of eradication of impunity are broader than procedural functions and are not directly pursued by the process as such. The latter is but a tool or mechanism through which such outcomes can be brought about.

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<sup>64</sup> Sloane, ‘The Expressive Capacity’ (n 34), at 82.

<sup>65</sup> In a similar vein, see Swart, ‘Damaska’ (n 28), at 101-102 (‘it is not possible to deduce, in a general way, from the traditional goals of criminal justice [in that context, rather the rationales for punishment are meant – SV] the shape proceedings before international courts should logically take.’) and 104 (‘sentencing goals have little or no relevance for the shape of proceedings that may lead to the conclusion that an accused is guilty. From the perspective of inflicting ‘just deserts’, it is irrelevant whether these proceedings are structured as a contest or as an inquest.’). See also Ohlin, ‘Goals’ (n 28), at 61 (while asserting the connection between the procedure and ‘the more general goals of punishment’ (for comment on this element see n 55), he rejects the conclusion that ‘the procedure is outcome determinative’).

<sup>66</sup> Turner, ‘Defense Perspectives’ (n 39), at 535 (drawing a distinction between the purposes of criminal justice and those of criminal trials); Ohlin, ‘Goals’ (n 28), at 55.

On the other hand, some of the ‘idiosyncratic’ goals may bear resemblance to the objectives and functions of criminal procedure. Hence they may sometimes be taken to suggest a normative preference for some procedural arrangements over the alternatives.<sup>67</sup> Consider the example of a procedural activity of truth-finding as the establishment of facts in the dimension of an individual case, which in a sense is akin to establishing a historical truth in the macro-dimension of a conflict through legal proceedings. On the basis of this analogy, it can be argued that international criminal trials are actually conducted in order to settle issues of awesome societal importance: promoting reconciliation, restoring peace, building a collective memory, and demonstrating the international rule of law in action. It is then suggested that the process must be geared to the promotion of those lofty objectives and be to a certain degree shaped by them.<sup>68</sup>

The principled position adopted here is that the mimicry of the objectives and functions of procedure to institutional and socio-political goals is deceptive and the conflation between the two is conceptually flawed. As will be argued, if not avoided in practice, it is bound to generate illiberal tilts and paternalist-pedagogical bents in the work of the courts and will pose a high risk of causing unfairness for the accused and other actors. Prior to delving into this,<sup>69</sup> one should define what objectives fall under the ‘special goals’ of international criminal justice, what authorities they are sourced from, and what normative expectations they can create, if at all, with respect to procedural arrangements.

### 3. INVENTORY OF SPECIAL GOALS

#### 3.1 Sources, typology, and formal recognition of goals

The various stakeholders, observers, and actors—including the tribunals themselves—may hold different views as to what goals the international criminal justice institutions pursue, next to objectives typical of criminal justice systems in general. In post-conflict settings, criminal trials are seen as mechanisms for reconstruction and transition, and their goals include and go beyond achieving legal accountability.<sup>70</sup> On a discursive level, the founders and architects of the tribunals readily embrace the generous approach to goal-setting.<sup>71</sup> One may feel uncertain as to the actual reasons for that. It may be a result of either an unbridled idealism and naïve optimism about the potential of retributive justice or a tacit scepticism about the prospects of success – or perhaps from both at the same time.<sup>72</sup>

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<sup>67</sup> Swart, ‘Damaska’ (n 28), at 102; Ohlin, ‘Goals’ (n 28), at 60 (objectives of procedure ‘in some cases track the goals of international criminal law but in other areas acquire unique content.’).

<sup>68</sup> Swart, ‘Damaska’ (n 28), at 102 (‘the ambition to change a culture of impunity, to provide an accurate historical record of events ... may ... well be best served by a legal process aspiring to maximize accurate fact-finding.’); Ohlin, ‘Goals’ (n 28), at 62 (suggesting that international criminal trials and procedure have a ‘historical truth-finding goal’); B. Elberling, ‘The Next Step in History-Writing through Criminal Law: Exactly How Tailor-Made Is the Special Tribunal for Lebanon?’, (2008) 21 *Leiden Journal of International Law* 529, at 530 (‘This historiographic aspect of international criminal trials may, of course, influence the law applied in such trials.’).

<sup>69</sup> *Infra* 4.

<sup>70</sup> See e.g. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, para. 39.

<sup>71</sup> *Ibid.*, para. 38 (in establishing the tribunals, the UN ‘has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.’).

<sup>72</sup> Scepticism is one of the plausible explanations: see 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 (‘In fact, it may have been *because* so little was expected of the ICTY in terms of actual cases and trials that it was so easy to pile on the goals. The aspirations expressed, it could be imagined, would never be tested. In fact, as the ICTY has proven itself over the years to be a success beyond most people’s expectations, ... there has been a concomitant effort to scale *down* the aspirations for the court, and be more realistic about its objectives and abilities.’ Footnotes omitted.); G. Bass, *Stay the Hand of Vengeance: the Politics of*

Be it as it may, there is no way around the fact that multifarious and sometimes conflicting expectations are piled upon these institutions.<sup>73</sup> It is thus desirable to establish which of them qualify as proper goals, i.e. outcomes failing to achieve or to adequately promote which would amount to a self-evident institutional failure. It is submitted that such selection must proceed from a mandate-based approach centering, first and foremost, on the institutional objectives that are formally recognized in the constituent documents (official goals) and/or admitted by the tribunals as having been assigned to them by the mandate-givers (operative goals).<sup>74</sup> Goals of international criminal tribunals must primarily be determined with reference to the expectations of entities which established them, as expressed in, or inferred from, the statutes and constituent resolutions, along with explanatory reports which shed light on the context of such legislative acts.

The statutes mostly do not explicitly provide for 'idiosyncratic' goals. For example, the Nuremberg and Tokyo Charters are silent on the broader objectives pursued in establishing the respective tribunals and limit their rationales to 'the just and prompt trial and punishment of the major war criminals'.<sup>75</sup> Similarly, the statutes of the *ad hoc* tribunals, SCSL, and the STL merely envision that those shall 'prosecute persons responsible' for respective violations.<sup>76</sup> In discerning the institutional objectives, it is useful to consult the UNSC Resolutions adopting the statutes, statements made by states in the UN Security Council, the UN Secretary-General reports on the statutes and other related issues,<sup>77</sup> and other similar sources analogous to preparatory works.

The official goal-setting may vary per tribunal depending on different emphases in their formal mandates and is not necessarily static for any given jurisdiction since the mandates can be amended.<sup>78</sup> The mandate-providers can re-focus the respective tribunal's broader mission, reformulate priorities, and add new objectives during the tribunal's lifetime in response to the changing circumstances and expectations of stakeholders. For instance, as a part of the Completion Strategy, to be dealt with below, the UNSC requested that the *ad hoc* tribunals assist national capacity-building and improve their outreach programmes for that end.<sup>79</sup> This clearly responded to the growing need for local empowerment and enhancing local ownership of criminal cases to enable the winding down of the tribunals' operations within a reasonable time. In concluding their mandates, the measures aimed at ensuring the effectiveness of national systems in dealing with war crimes, enhancing their expertise and capacities, and connecting the work of international justice to the target communities became urgent priorities. It can be argued that at least since 2003 onwards,

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*War Crimes Tribunal* (Princeton: Princeton University Press, 2000) 215 ('the tribunal was evidently intended by many countries to be just another kind of reprimand, not an actual court with defendants in the dock'); N. Combs, 'Legitimizing International Criminal Justice: The Importance of Process Control', (2011-12) 33 *Michigan Journal of International Law* 321, at 361 ('a fig leaf to conceal Western unwillingness to take truly effective [military] action.').

<sup>73</sup> Damaška, 'What Is the Point' (n 29), at 331; Swart, 'Damaška' (n 28), at 102; Heikkilä, 'The Balanced Scorecard' (n 2), at 48.

<sup>74</sup> On this typology, see Shany, 'Assessing the Effectiveness' (n 2), at 11-13, referring to C. Perrow, 'The Analysis of Goals in Complex Organizations', (1961) 26(6) *American Sociological Review* 854, at 855 (defining operative goals as 'the ends sought through the actual operating policies of the organization; they tell us what the organization is actually trying to do, regardless of what the official goals say are the aims').

<sup>75</sup> Art. 1 IMT Charter; Art. 1 IMTFE Charter.

<sup>76</sup> Art. 1 ICTY Statute; Art. 1 ICTR Statute; and Art. 1 SCSL Agreement (establishing the court 'to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law'); Art. 1 STL Statute ('to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons.').

<sup>77</sup> E.g. n 71.

<sup>78</sup> See also Stahn, 'Between "Faith" and "Facts"' (n 2), at 258 ('The determination of goals and priorities depends on the mandate and varies even inside the same institution according to the respective stage of existence').

<sup>79</sup> UNSC Res. 1503 (2003), 28 August 2003, preambular para. 10 ('Noting that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular) and para. 1 ('encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes').

the national capacity building has been a distinct formal mission of the *ad hoc* tribunals.<sup>80</sup> It is crucial that the approach to formulating the mandates remains dynamic and responsive to the changing demands of a post-conflict environment. But one downside of frequent mandate revisions, particularly those resulting in the addition of goals, is the ambivalence of the mission and difficulties of prioritizing among initial and added objectives.<sup>81</sup>

One must be mindful of the fact that the formal purposes of establishing international criminal courts are not necessarily identical with a plethora of expectations held by stakeholders, constituencies, and ‘customers’ (victims, accused, and communities who are supposed to benefit most directly from their work). Similarly, academic commentators, monitors, and interest groups tend to ascribe certain ambitions to the tribunals going beyond what has been provided for them or what they are ready to embrace. This might amount to a wishful thinking rather than proper goal-setting. Of course, the ability of the tribunals to meet some of the ‘external goals’<sup>82</sup>—for example, those of individual victims and victims’ groups—will be an important yardstick of success in the assessment of their performance and legacy, irrespective of whether such goals are sustained by mandate-providers or institutions at any given time. This invites them to remain sensitive to the context, to develop a strategic vision to formulating and detailing the mission, and to try to accommodate the fundamental needs of main stakeholders to the extent possible.<sup>83</sup>

However, certainly not all external expectations amount to formal goals.<sup>84</sup> Nor may they be realistic or even normatively acceptable, given the tribunals’ nature as *criminal* courts and the serious pressures resulting from manifold mandates and practical constraints. Victims in particular tend to expect too much of the tribunals and not all of their wishes can or should be accommodated by those institutions.<sup>85</sup> Failing at least some of the expectations raised appears unavoidable. Despite negative perceptions and critique from various quarters, which is far from always justified, the related disappointment does not doom the core missions of the tribunals to a failure and judgment of ineffectiveness. A catch-all framework of effectiveness that incorporates the entirety of societal and individual interests at stake in the operation of international criminal courts would be disserviceable.<sup>86</sup>

Finally, next to official goals, the goal-setting by the courts themselves in the context of adjudicating specific cases and reporting procedures, for example, before the UN Security Council, are equally relevant to establishing what their institutional purposes (or operative goals) are. For better or worse, any of the objectives—official or operative—acquires relevance only to the extent

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<sup>80</sup> See Heikkilä, ‘The Balanced Scorecard’ (n 2), at 31; Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 259-60 n46. For a view of the Completion Strategy as a ‘continued legacy building’, see F. Pocar, ‘Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY’, (2008) 6 *JICJ* 655.

<sup>81</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 15 (‘the tendency to gradually “overburden” organizations with an increasing number of functions, in response to changing needs or circumstances, without comprehensively revising their mandate (or structure), may increase their priority goal ambiguity.’ Footnotes omitted.)

<sup>82</sup> On a distinction between external and internal goals: Shany, ‘Assessing the Effectiveness’ (n 2), at 12.

<sup>83</sup> See Sloane, ‘The Expressive Capacity’ (n 34), at 55 n70 (‘Victims, in both national criminal law and ICL, may be, and ideally should be, beneficiaries of the criminal law. International tribunals should take steps to improve their solicitude for the victims and to enhance their legitimacy in the eyes of local communities.’).

<sup>84</sup> Eser, ‘Procedural Structure’ (n 29), at 108 (‘When people speak of the international criminal tribunals as a success, or, perhaps, more likely, as a failure, this may be judged from a very special, narrow, one-sided, or over-broad perspective and, not so rarely, nurtured by expectations that are not truly those which the founders of the Tribunals had in mind’).

<sup>85</sup> See e.g. Sloane, ‘The Expressive Capacity’ (n 34), at 55 n70 (‘criminal law, national and international alike, does not and should not function principally as a proxy for the victim’s desire for talionic vengeance. This is not to suggest that ICL need not concern itself with the needs of the victims; it is only to say that the failure of ICL tribunals to respond perfectly to desires of the community victimized ... do not condemn the enterprise.’). See also Ellis, ‘Combating Impunity’ (n 45), at 156 (citing J.P. Fomété: ‘The victims’ expectations are directly linked to the magnitude of their suffering; the occurrence of genocide warrants extremely high expectations.’).

<sup>86</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 26 (‘a comprehensive examination may be impractical as ascertaining some sets of preferences and impacts could prove to be extremely difficult and burdensome.’).



to which it is internalized and supported by the relevant institution itself, and in the way in which it is understood by it. As Shany put it,

While courts are not the primary stakeholders whose expectations serve as the principal yardstick for measuring effectiveness ..., their direct involvement in shaping their structure, process and outcome, renders them a key player in facilitating or hindering the fulfillment of the goals set by the mandate providers.<sup>87</sup>

Thus, the case law of the tribunals and their Presidents' statements to the UNSC in the context of respective reporting procedures constitute another credible source of the relevant views on institutional goals.<sup>88</sup> Given that the professed goals may vary by tribunal and be tailored to specific needs that triggered their establishment, the following discussion provides a transversal rather than an exhaustive and tribunal-specific survey of special goals of international criminal justice. As noted, the 'ordinary' goals of criminal justice are of no relevance and should not be considered in this context because the deterministic link between such goals and the procedural arrangements has been rejected.

### 3.2 Reconciliation and restoration of peace and security

The long-term objectives of promoting national reconciliation and the restoration and maintenance of international peace and security are recognized in the similarly drafted paragraphs of the preambles of the UN Security Council's resolutions establishing the ICTY and ICTR.<sup>89</sup> The same goals are implied in the legal authority under which the UNSC chose to do so (Chapter VII of the UN Charter). The UN Secretary-General in his Report on the ICTY Statute stated that: 'As an enforcement measure under Chapter VII ... the life span of the international tribunal would be linked to the restoration and maintenance of peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.'<sup>90</sup>

Next to formal recognition, the objective of contributing to the restoration and maintenance of international peace and security has been referred to by the tribunals themselves both in their annual reports to the UN General Assembly<sup>91</sup> and in the case law.<sup>92</sup> While the UNSC resolutions on the ICTY and ICTR refer to 'the restoration and maintenance of peace' as one of the aims of establishing these courts, it is only the resolution concerning the ICTR that is express in positing its

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<sup>87</sup> *Ibid.*, at 29.

<sup>88</sup> Ohlin, 'Goals' (n 28), at 56 (indicating case law as a source of objectives); Eser, 'Procedural Structure' (n 29), at 114 (the institutional objectives stem from a range of sources broader than preambles of instruments).

<sup>89</sup> UNSC Res. 808 (1993), 22 February 1993, preambular paras 7-9 ('Determining that this situation [widespread violations of IHL] constitutes a threat to international peace and security, Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace') and UNSC Res. 827 (1993), 25 May 1993, preambular paras 4-7; UNSC Res. 955 (1994), 8 November 1994, preambular paras 7-9 ('Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace, Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed').

<sup>90</sup> Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1995), UN Doc. S/25704, para 28.

<sup>91</sup> First Annual Report of the ICTY (n 57), para. 14 ('the Tribunal was conceived as one of the measures designed gradually to promote the end of armed hostilities and a return to normality.')

<sup>92</sup> Sentencing Judgement, *Prosecutor v. D. Nikolić*, Case No. IT-94-2-S, TC II, ICTY, 18 December 2003 ('*D. Nikolić* sentencing judgment'), para. 4 ('It is for this Trial Chamber to come as close as possible to justice for both victims and their relatives and the Accused, justice being of paramount importance for the restoration and maintenance of peace.');

Sentencing Judgement, *Prosecutor v. M. Nikolić*, Case No. IT-02-60/1-S, TC I, Section A, ICTY, 2 December 2003 ('*M. Nikolić* sentencing judgment'), para. 60.

expected contribution to the ‘process of national reconciliation’ as an institutional goal.<sup>93</sup> The omission of this item from the ICTY’s list does not mean, however, that this has not been that Tribunal’s operative institutional objective throughout its lifetime. The ICTY’s annual reports<sup>94</sup> and jurisprudence<sup>95</sup> both contain statements to the opposite effect. Notably, the UNSC resolutions use the language that excludes the immediacy of the impact of the tribunals on reconciliation and peace-building. Next to ‘bring[ing] to justice the persons’ responsible for crimes as the proper aims of the institutions, the resolutions refer to ‘contributing’ to, rather than ‘bringing about’ of, peace and reconciliation. In accordance with the UNSC Resolutions, the ‘sole purpose’ of both the ICTY and ICTR still remains ‘prosecuting persons responsible’ for the crimes such as serious violations of international humanitarian law and genocide.<sup>96</sup>

When establishing the ICC, the state delegations to the Rome Conference envisioned that a contribution to upholding ‘peace, security and well-being of the world’ is one projected outcomes of the institution. It is to be achieved by ensuring that ‘the most serious crimes of concern to the international community as a whole [do] not go unpunished’ and that an end is put to ‘impunity for perpetrators of these crimes’, contributing to ‘the prevention of such crimes’.<sup>97</sup> The relevance of this objective to the ICC’s involvement is reflected in particular in the UNSC Resolutions referring the situations in Darfur (Sudan) and Libya to the ICC.<sup>98</sup> The purpose of achieving reconciliation may not have been as prominent in the goal-setting discourse on the ICC at the time of its establishment, which, however, does not rule out that the Court is expected by states and other stakeholders to contribute to that objective.

By contrast, reconciliation is expressly mentioned next to peace-maintenance among goals pursued by the establishment of the ECCC. The ECCC Agreement acknowledges the recognition by the UNGA of ‘the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security’.<sup>99</sup> In a similar vein, the UNSC Resolution on the establishment of the STL reaffirms the Council’s determination that the Hariri attack and its implications ‘constitute a threat to international peace and security’ as the basis for the it to exercise its Chapter VII powers under in bringing the Agreement between the UN and Lebanon into effect.<sup>100</sup>

The relationship between the ‘ordinary’ objectives of criminal justice and the lofty goals of upholding international peace and security is at the heart of the perennial ‘peace v. justice’ debate.<sup>101</sup> Likewise, the genuine reconciliation between the groups in the post-conflict counties as a

<sup>93</sup> Noting this difference: Heikkilä, ‘The Balanced Scorecard’ (n 2), at 31 n21; Eser, ‘Procedural Structure’ (n 29), at 112; Barria and Roper, ‘How Effective Are International Criminal Tribunals?’ (n 2), at 357, 362.

<sup>94</sup> First Annual Report of the ICTY (n 57), paras 16-17 (‘Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace. ... the establishment of the Tribunal should undoubtedly be regarded as a measure designed to promote peace by meting out justice in a manner conducive to the full establishment of healthy and cooperative relations among the various national and ethnic groups in the former Yugoslavia.’)

<sup>95</sup> Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-T, TC I, ICTY, 29 November 1996, para. 58 (‘The International Tribunal’s objectives as seen by the Security Council—i.e. ... collective reconciliation—fit into the Security Council’s broader aim of maintaining peace and security in the former Yugoslavia.’); Judgment on Sentencing Appeal, *Prosecutor v. Bralo*, Case No. IT-95-17-A, AC, ICTY, 2 April 2007, para. 82 (endorsing the ICTR AC’s statement that ‘national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals’).

<sup>96</sup> UNSC Res. 827 (1993), 25 May 1993, para. 2; UNSC Res. 955 (1994), 8 November 1994, para. 1.

<sup>97</sup> ICC Statute, preambular paras 3-5.

<sup>98</sup> Ohlin, ‘Goals’ (n 28), at 57. See further UNSC Res. 1593 (2005), 31 March 2005, preambular para. 5 (‘Determining that the situation in Sudan continues to constitute a threat to international peace and security’); UNSC Res. 1970 (2011), 26 February 2011, preambular para. 15 (‘Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations’).

<sup>99</sup> ECCC Agreement, preambular para. 2.

<sup>100</sup> UNSC Res. 1757 (2007), 30 May 2007, preambular para. 13 and para. 1(a).

<sup>101</sup> Among others, see P. Akhavan, ‘The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond’, (1996) 18 *Human Rights Quarterly* 259; *id.*, ‘Are International Criminal Tribunals a Disincentive to Peace?’

precondition for lasting peace cannot be achieved by imposition channeled through a court judgment, although the adjudication of crimes is a preliminary and arguably mandatory step in that process.<sup>102</sup> The role of the tribunals in that context and their ability, potential as well as actual, to promote reconciliation and peace-building remain utterly contested, being a subject on which empirical and normative accounts clash most visibly.<sup>103</sup>

This quandary is closely related to another endless debate, concerning the ability of international criminal justice to deter future atrocities.<sup>104</sup> As is known from domestic contexts, the faith in the general preventive power of criminal law is speculative and largely untested in empirical terms, as opposed to the existing inquiries into special deterrence and recidivism.<sup>105</sup> By definition, any penal system is based on an assumption of such effects as already by proscribing and denouncing certain behavior as criminal it appeals to the rationality and morality of subjects as potential offenders in admonishing them to the adverse consequences of violating penal norms.<sup>106</sup> This is not different for international criminal courts.<sup>107</sup> In this regard, the experiments to test the general deterrent effect of international criminal justice by temporarily making it not operational are neither necessary nor affordable. The reason for establishing the tribunals in the first place was the compelling demand for dismantling the culture of impunity that had had devastating consequences for various countries around the world and the apparent absence of better alternatives.<sup>108</sup>

The normative faith in the ability of the courts to deter mass atrocities—even if indirectly through the development of law, enhancing national capacity, and reducing impunity—is strongly entrenched in the enterprise of international criminal prosecutions. Their expected contribution to the maintenance of peace and reconciliation rests on the same premise and is bolstered primarily by moral justifications. Often the ‘evidence’ which can best be described as quasi-empirical or anecdotal is adduced to corroborate the preventive concept, but it cannot truly compensate for the lack of the proper empirical proof.<sup>109</sup> Instead, it seems justified to acknowledge the normative nature of the claim in earnest and to proceed on that basis. Such recognition would dispense with the need for fail-proof and conclusive empirical evidence, which may be extremely difficult to

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Reconciling Judicial Romanticism with Political Realism’, (2009) 31 *Human Rights Quarterly* 624; Ellis, ‘Combating Impunity’ (n 45), at 112-4; Damaška, ‘What is the Point’ (n 29), at 332.

<sup>102</sup> Møse, ‘Main Achievements of the ICTR’ (n 35), at 938 (‘It is clear that reconciliation cannot be enforced from outside but must emerge from within the country concerned. This said, it is certainly an aim of the Tribunal to contribute to the process of reconciliation in Rwanda. ... The judicial proceedings at the Tribunal represent the core element in the process of reconciliation.’).

<sup>103</sup> See sources in n 4.

<sup>104</sup> Sloane, ‘The Expressive Capacity’ (n 34), at 75 (‘Because of the institutional and resource constraints that plague international tribunals, their mere existence cannot be expected to enhance the prospects for deterrence very much. Their efficacy depends more on their ability to contribute to the growth and development of national laws...’). See further J. Ku and J. Nzalibe, ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?’, (2006) 84(4) *Washington University Law Review* 777; Akhavan, ‘Beyond Impunity’ (n 6); *id.*, ‘Preventing Genocide: Measuring Success by What Does Not Happen’, (2011) 22 *Criminal Law Forum* 1; D. Wippman, ‘Atrocities, Deterrence, and the Limits of International Justice’, (1999) 23 *Fordham International Law Journal* 473; Damaška, ‘What is the Point’ (n 29), at 344-45.

<sup>105</sup> Johnson, ‘Ten Years Later’ (n 3), at 378 (‘Even on the domestic criminal level, the role ... [criminal] law plays as a deterrent is a much discussed issue.’). The author thanks B. Hola for the latter point.

<sup>106</sup> Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 265 (‘There is a thin line between rational criminal policy and moral justification.’).

<sup>107</sup> See e.g. ICC Statute, Preamble, para. 5 (‘Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’).

<sup>108</sup> For an overview of case-studies, see Ellis, ‘Combating Impunity’ (n 45), at 120 *et seq.*; Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 254 (as a ‘faith-based’ project, international criminal justice ‘was born partly out of hope, necessity, and lack of alternatives’).

<sup>109</sup> See critical views in Zolo, ‘Peace through Criminal Law?’ (n 34), at 730; Clark, ‘The Impact Question’ (n 4), at 62 (pointing out that ‘it is an argument that remains empirically under-explored’); Ellis, ‘Combating Impunity’ (n 45), at 161 (no empirical evidence for deterrent effect). Payam Akhavan has used the ICC case study to posit that tribunals incentivize peace and prevent atrocities when applied in concert with other measures: Akhavan, ‘Are International Tribunals a Disincentive to Peace?’ (n 101), at 634 *et seq.*

come about, let alone the need to rely on its surrogates. The grounds underpinning most of the claims about the peace-making and reconciliatory effects of the tribunals—distinct from arguments based in morality—remain contentious. The ‘faith-based’ character of the corresponding objectives of international criminal justice does *per se* not diminish their status and validity.

### 3.3 Establishment of a historical record

In the ICL discourse, the compilation of a credible historical record of the atrocities and of the events constituting a background to the commission of crimes is traditionally viewed as a distinct rationale for creating international criminal tribunals.<sup>110</sup> Intimately linked with the formal goals of deterrence and reconciliation as a guarantee of non-repetition of the similar conduct in the future, the truth-finding in the historical dimension is often espoused by the tribunals and their key players as an important (operative) mission. As Telford Taylor stated in a subsequent Nuremberg trial in *Karl Brandt et al.* (‘Medical case’), ‘it is far more important that these incredible events be established by clear and public proof, so that no one can doubt that they were fact and not fable: and that this Court ... stamp these acts, and the ideas which engendered them, as barbarous and criminal’.<sup>111</sup> The modern tribunals, including the ICTY and ICTR, repeatedly have made statements to a similar effect in their annual reports,<sup>112</sup> and in their jurisprudence.<sup>113</sup> However, the formalized

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<sup>110</sup> D. Joyce, ‘The Historical Function of International Criminal Trials: Re-thinking International Criminal Law’, (2004) 73 *Nordic Journal of International Law* 461; R.A. Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’, (2005) 27 *Human Rights Quarterly* 908; *id.*, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011); F. Gaynor, ‘Uneasy Partners – Evidence, Truth and History in International Trials’, (2012) 10 *JICJ* 1257; Elberling, ‘The Next Step in History-Writing’ (n 68), at 529-30.

<sup>111</sup> ‘Opening Statement of the Prosecution by Brigadier General Telford Taylor, 9 December 1946’, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council No. 10, Volume 1: “The Medical Case”* (Washington, DC: US Government Printing Office, 1949).

<sup>112</sup> Address of ICTY President Antonio Cassese to the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, at 2 (‘an historical record of what occurred during the conflict ... prevent[s] historical “revisionism”’); Fifth Annual Report of the ICTY, UN Doc. A/53/219-S/1998/737, 10 August 1998, para. 296 (‘ensuring that history listens is a most important function of the Tribunal. Through our proceedings we strive to establish as judicial fact the full details of the madness that transpired in the former Yugoslavia. ... [I]t is hoped to recognise warning signs in the future and to act with sufficient speed and determination to prevent such bloodshed.’); Twelfth Annual Report of the ICTR, UN Doc. A/62/284-S/2007/502, 21 August 2007, para. 84 (‘In the process of achieving its mandate, the Tribunal also contributes to bring justice to victims of the massive crimes that were committed, and is continuously establishing a record of facts that will aid reconciliation in Rwanda.’); Address to the UN General Assembly, 13<sup>th</sup> Annual Report, Judge Dennis Byron, President of the ICTR, 13 October 2008, available at < <http://ict-archive09.library.cornell.edu/ENGLISH/speeches/byron081013.html> > (‘Among the most basic and most important of the Tribunal’s achievements has been the accumulation of an indisputable historical record, including testimony of witnesses, testimony of victims, testimony of accused, documentary evidence, video recordings and audio recordings.’).

<sup>113</sup> See, among others, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, TC II *ter*, ICTY, 5 March 1998, para. 21 (‘in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, [the ICTY] has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process’); M. Nikolić sentencing judgment (n 92), para. 60 (‘through public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be determined, thereby establishing an accurate, accessible historical record. The Security Council hoped such a historical record would prevent a cycle of revenge killings and future acts of aggression.’ Footnotes omitted.); Sentencing Judgement, *Prosecutor v. Obrenović*, Case No. IT-02-60/2-S, TC I, Section A, ICTY, 10 December 2003, paras 19 (regarding it a factor to be considered when accepting a guilty plea resulting from a plea agreement ‘whether an accurate historical record will be created’) and 111 (‘The recognition of the crimes ... by a participant in those crimes contributes to establishing a historical record and countering denials of the commission of these crimes’); D. Nikolić sentencing judgment (n 92), paras 3 (by pleading guilty, the accused ‘has guided the international community closer to the truth in an area not yet subject of any judgement rendered by this Tribunal, truth being one prerequisite for peace.’) and 122 (‘a plea agreement pursuant to Rule 62 *ter* and 62 *bis* of the Rules does not allow the Trial Chamber to depart from the mandate of this Tribunal, which is to bring the truth to light and justice to

expressions of the same goal in the constituent documents, including the tribunals' statutes and rules, is not to be found<sup>114</sup> – unlike, for instance, the case with national truth and reconciliation commissions.<sup>115</sup>

As noted, domestic criminal justice systems may play a similar role in the transitional periods.<sup>116</sup> But the historiographical function is more firmly associated with international criminal courts as an organic element of their justice mission.<sup>117</sup> In finding facts concerning the broader circumstances surrounding the commission of the crimes for the purpose of establishing individual criminal responsibility, the tribunals amass and scrutinize enormous volumes of evidence on individual crimes as well as on the historical and political context in which they were committed. At least some of that information is of the nature that it would not have been readily available to historians otherwise, as it may include testimonies of the political and military leadership, insider witnesses, those who directly participated in the hostilities or eyewitnesses, and a national security and otherwise sensitive information. Accordingly, the evidentiary record compiled by any of the tribunals—incomplete and sieved through with gaps as it were due to confidentiality measures for the protection of witnesses and national security—has a considerable potential to produce the more complete knowledge and balanced evaluations of controversial events as well as to assist the collective remembrance. As such, the tribunals' record is a bulwark against the passive denial and silencing of crimes as well as the aggressive revisionism. This 'historiographical' function presumably enhances and reinforces the deterrent effect of international criminal prosecutions.<sup>118</sup> It is another matter that trial outcomes—rather than specific evidence on the record—sometimes become tools for manipulating and revising the 'historical truth'. Thus, acquittals of specific individuals on specific charges tend to be misrepresented as proving that no crimes at all were committed or that they were not part of broader state or organizational policies or wide-scale commission. As will be argued below, such arguments, apart from being ill-intentioned, are also ill-conceived in that they result from the attribution to judgments of broader historical truth-finding ambitions which they legally do not pursue.

The idea that international criminal trials have a capacity of assisting in the emergence of a credible and comprehensive historical narrative—and that they do contribute to that purpose—is

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the people of the former Yugoslavia.') and, in the same case, Transcript, 9 October 1995, at 59 ('the evidence will constitute a permanent judicial record for all time of the horrendous war crimes that have been committed in the former Yugoslavia. That public record will assist in attributing guilt to individuals and be an important tool in avoiding the attribution of collective guilt to any nation or ethnic group.')

<sup>114</sup> Shany, 'Assessing the Effectiveness' (n 2), at 35 ('the development of an historical record of events ... may not have been part of the official or even operative goals of international courts' but only 'unintended benefits'); Wilson, *Writing History* (n 110), at 16.

<sup>115</sup> The mandate of the Sierra Leone's TRC was 'to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement'. See The Truth and Reconciliation Commission Act 2000, Part III, Sierra Leone, para. 6(a). Cf.

<sup>116</sup> See *infra* 4.1.

<sup>117</sup> Gaynor, 'Uneasy Partners' (n 110), at 1263 (noting that while international courts 'bear a special responsibility to the collective memory is objective, clear and accessible', the same responsibility 'is not borne by domestic courts, which deal almost exclusively with trials of negligible historical significance').

<sup>118</sup> In a similar vein, see P.M. Wald, 'Foreword: War Tales and War Trials', (2008) 106 *Michigan Law Review* 901, at 915 (one 'aspiration of these courts is to record for history an accurate account of war crimes as a hedge against future disclaimers that they never happened at all. ... [I]nsofar as history is itself composed of a compilation and distillation of many views of the same events, there can be little question that the exquisitely detailed accounts of wartime atrocities, elicited in month- and year-long trials, contribute mightily to the process. They may in many cases tip the balance of historical judgment regarding factual controversies.'). Gaynor, 'Uneasy Partners' (n 110), at 1262 ('The debate as to whether major international criminal trials can or should produce a historical record is, to some extent, academic. Any trial involving top military or political leaders ... can hardly avoid creating a historical record, regardless of the wishes of its protagonists.').

generally accepted.<sup>119</sup> But, as a normative question, the issue of whether and how far that objective is to be deliberately pursued in individual proceedings and through specific procedural activities (e.g. charging, evidence presentation, and judgment-drafting), remains deeply contested. This is because the supposed added function of writing history is not fully attuned to the tribunals' priorities and core mission as *judicial* bodies and *criminal* courts and opens up ample space in which history can become subject to political manipulation by means of legal process. The inherent selectivity of charges, the necessarily contained scope of indictments, the rigid standards of proof, formalized methods of obtaining, presenting and testing evidence and, most importantly, the fair-trial and pragmatic limitations on the tribunals are factors which do not constrain historians and truth commissions but limit the ability of criminal judges and parties to serve as a collective historical truth-finding body. Putting the 'historiographical' function to the fore in the tribunals is precluded by the more compelling need for them to meet the primary procedural objective: conducting the proceedings in a fair and expeditious manner.

This tension has increasingly been acknowledged in the case law of the tribunals, at a stark contrast with rhetorical affirmations of the history-writing as a broader mission.<sup>120</sup> There is no evident conflict between the objectives of the process and the historiographical objective unless the latter is misrepresented as the proper function rather than an incidental benefit of the proceedings. In this lurks the risk of trying to hand down, through unilateral judicial imposition, an official version of a narrative of the conflict that may be seen as didactically desirable by some but that manipulates history and paints it in black and white. This issue is revisited in the subsequent Chapter that seeks to draw a distinction between the institutional objectives and the primary functions of trial process more precisely.<sup>121</sup>

### 3.4 Promoting international rule of law (expressive or didactic goal)

Strengthening the compliance with, and the enforceability of, the obligations under international humanitarian and human rights law and, most importantly, the prohibitions of gross violations of those norms, is widely viewed as a key objective (operative goal) of international criminal tribunals and the system of international justice.<sup>122</sup> The expressive ability of international judicial bodies to instill or compel compliance with rules of law is one authoritative criterion in measuring their effectiveness.<sup>123</sup>

<sup>119</sup> See e.g. B. Elberling, *The Defendant in International Criminal Proceedings* (Oxford: Hart Publishing, 2012) 199-200 (referring to historiography in international criminal trials as 'simply the fact that international criminal courts aim to, and in fact do, participate in the writing of history' for 'the facts established in such trials concern events which are of interest for the history books.').

<sup>120</sup> E.g. Sentencing Judgement, *Prosecutor v. Deronjić*, Case No. IT-02-61-S, TC II, ICTY, 30 March 2004, para. 135; Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-T, TC, ICTY, 2 August 2001, para. 2; Judgement on Sentencing Appeal, *Prosecutor v. Babić*, Case No. IT-03-72-A, AC, ICTY, 18 July 2005, para. 17; Decision pursuant to Rule 73 bis(D), *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, TC, ICTY, 4 February 2008, para. 21 ('the Tribunal was established to administer justice, and not to create a historical record'); Decision on the Accused's Holbrooke Agreement Motion, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, TC, ICTY, 8 July 2009, para. 46 ('The Chamber's purpose is not to serve the academic study of history').

<sup>121</sup> See Chapter 5.

<sup>122</sup> See e.g. Sloane, 'The Expressive Capacity' (n 34), at 44 ('tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions: publicly condemning acts deplored by international law, acting as an engine of jurisprudential development at the local level, and encouraging the legal and normative internalization of international human rights law and international humanitarian law.'); Wald, 'Foreword' (n 118), at 912 ('violators can no longer claim that they did not know certain acts were outlawed.');

D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', (2013) 11 *JICJ* 505, at 509 ('its aim is *norm projection*, the dissemination through trials, punishments and jurisprudence of a set of norms very different from the Machivellian brutality of the past.');

Ohlin, 'Goals' (n 28), at 58.

<sup>123</sup> E.g. L. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 273, at 290 ('we measure the effectiveness of a supranational tribunal in terms of its ability to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf.').

This goal—also referred to as expressive, educative, or didactic—is achieved by giving the underlying legal obligations teeth by ensuring that the violations inevitably become subject to scrutiny, reprobation, and criminal sanction by the international community. The enforcement of individual criminal responsibility sends out the message that, despite the underdeveloped state of international law enforcement, punishment is an unavoidable consequence of the commission of an international crime. The act of enforcement, besides its immediate objective of applying the law, has a beneficial side-effect of awakening the global consciousness (or at least debate) about the causes, dimensions, and nature of international crimes and may further consolidate the (international) civil society’s determination to act decisively upon them. It may thus have the calculated qualitative outcome of imbuing the international rule of law with a tangible meaning of precedent. Independently from strengthening deterrence due to the fear of punishment, the message is communicated to the general public and potential violators in its ranks as to the exact bounds of legitimate conduct in peace-time and in conflict, in the expectation that such limits will henceforth be respected because known.<sup>124</sup>

The goal of promoting the rule of law is arguably an operative goal. Presumably due to its nebulous and normative nature, it is not explicitly recognized in the constituent instruments. It can arguably be inferred from the circumstances in which international criminal tribunals are established or engaged in dealing with specific crises, with the typical mistrust towards national courts in that they would adequately deal with international crime cases. The jurisdictional arrangements of international criminal courts and tribunals hinge upon the presumed or demonstrated incapacity and reluctance of national criminal justice systems to genuinely process this category of cases. For example, the idea of the ‘presumed’ inability or unwillingness is embodied in the concurrent and primary jurisdiction of the ICTY (e.g. Art. 9 ICTY Statute). But the ICC’s complementary regime reflects a more deferential and less presumptive approach, as it requires a finding of the inaction by the state with jurisdiction or otherwise its unwillingness or inability to genuinely prosecute (Art. 17 ICC Statute). Notably, the didactic or norm-development goal finds recognition in the ICC Strategic Plan for Outreach, which indicates that ensuring long-lasting respect for international criminal justice is one of the Court’s indirect contributions.<sup>125</sup> The jurisprudence of the tribunals contains *obiter dicta* endorsing the expressive goal, particularly in the context of the discussion of punishment and sentencing rationales.<sup>126</sup>

Some scholars have argued—controversially, as will be shown—that the didactic objective ought to be turned into a prime or paramount goal of international criminal justice.<sup>127</sup> Like the case

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<sup>124</sup> *M. Nikolić* sentencing judgment (n 92), para. 59 (‘by highlighting breaches of obligations under international humanitarian law... the parties to the conflict would recommit themselves to observing and adhering to those obligations, thereby preventing the commission of further crimes. ... [T]his commitment to end impunity in the former Yugoslavia would promote respect for the rule of law globally.’).

<sup>125</sup> Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006, para. 1 (‘The Court is also intended, indirectly, to contribute to long-lasting respect for and enforcement of international criminal justice, the prevention of such crimes, and the fight against impunity.’).

<sup>126</sup> *M. Nikolić* sentencing judgment (n 92), para. 89 (‘During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law, and thereby deterring the commission of crimes.’); *D. Nikolić* sentencing judgment (n 92), para. 139 (‘One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.’); Judgement and Sentence, *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, TC I, ICTR, 2 September 1998, para. 28 (‘dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.’).

<sup>127</sup> Damaška, ‘What is the Point’ (n 29), at 343 *et seq.*; Damaška, ‘Problematic Features’ (n 29), at 182. See further *infra* 4.4.

with the ability of the tribunals to promote objectives of peace-building and reconciliation, their didactic effects and aptness to teach respect for human rights and humanitarian obligations are difficult to measure credibly, at least in a relatively short time frame. It is uncertain what consequences should be attached to the positive empirical evidence of compliance with law and deterrent effects which may have been impelled by adjudication. The controversy, however, is not unique to international criminal law. In the context of goal-setting, it does not diminish the validity of a largely faith-based expectation that the tribunals will contribute to strengthening the rule of law and promoting the adherence to human rights and humanitarian law.<sup>128</sup>

### 3.5 Justice for victims

Delivering justice for victims of international crimes and providing them with redress and closure, are operative goals that have been at the center of the discourse on international criminal justice from the outset. The goal is implicit in the preamble of the ICC Statute.<sup>129</sup> Even in the absence of its mention in the *ad hoc* tribunals' statutes and in their rules, it can be inferred from the various provisions dealing with victim protection, restitution, and compensation, as abundantly attested by the tribunals' public representations and outreach. The project itself owes its existence to the aspiration of a more effective protection of fundamental human rights of victims of flagrant abuses through the criminalization of such conduct. In the history of international criminal justice, this goal proved to be the most dynamic and acquired novel dimensions with time in the successive development of the institutional and legal frameworks of the tribunals. At its dawn, international criminal justice was viewed as the way to satisfy the victims' demand for justice by 'staying the hand of vengeance' and preventing resort to self-help measures.<sup>130</sup> Increasingly, the mission of redressing victims has been translated in the procedural mechanisms serving to expand the victims' instrumental and limited role as witnesses.

The *ad hoc* tribunals' Rule 105 allows ordering the restitution of property and proceeds obtained by unlawful conduct, while Rule 106 provides for the possibility of using the tribunal judgments as *res judicata* on the issue of criminal responsibility of the convicted person in domestic courts for the purpose of obtaining compensation. Criminal process can in principle perfectly operate without those measures being envisaged, and in that sense the latter are translations of the victim-servicing goal. It is another matter that these mechanisms had little impact, as no restitution of property and proceeds has ever been ordered. They were growingly viewed as insufficient, including by the tribunals' principals themselves. The tribunal processes, as it was argued, fell short dramatically of what victims have expected of an adequate criminal justice system.<sup>131</sup> In addition to the right to be informed on the progress of the proceedings and to be treated with respect by the procedural participants and the institution, this includes, at least, an enforceable right to claim compensation for the harm and possibly the right to having their voice heard at the key stages of the process. In early 2000s, the ICTY/ICTR Prosecutor proposed judges to grant victims participatory

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<sup>128</sup> See also Ohlin, 'Goals' (n 28), at 58.

<sup>129</sup> ICC Statute, preamble ('Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity').

<sup>130</sup> E.g. Fourth Annual Report of the ICTY, UN Doc. A/52/375-S/1997/729, 18 September 1997, paras 175 ('The Tribunal was established precisely to pre-empt such calls for revenge and to ward off "self-help" solutions.') and 177 ('Revenge is the last resort of persons who are denied due process. As the history of past genocides illustrates, when there is no justice in response to the extermination of a people, the result is that victims are led to take the law into their own hands, both to exact retribution and to draw attention to the denied historical fact.');

G.T. Blewitt, 'The Importance of a Retributive Approach to Justice', in D.A. Blumenthal and T.L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden/Boston: Martinus Nijhoff, 2008) 39 ('If justice is not achieved on their [victims'] behalf then their feelings of grievance and their desire for revenge could lead them taking the law into their own hands to achieve justice, or what they perceive in their eyes as justice – an eye for an eye!').

<sup>131</sup> For empirical studies, see e.g. E. Stover, 'Witnesses and the Promise of Justice in The Hague', in E. Stover and H.M. Weinstein (eds), *My Neighbor, My Enemy: Justice in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004) 104-20 and titles cited in *supra* nn 4-5.



and reparatory rights before the tribunals.<sup>132</sup> The judges rejected the idea that the responsibility for processing and assessing compensation claims would lie with the tribunals, on the ground that it might hamper their principal mandate, recommending alternative solutions to the relevant UN organs.<sup>133</sup>

Based on what was perceived as a negative experience, the realization came that international criminal courts ought to do more to accommodate their legitimate personal interests in the process of justice in order to prevent their frustration with the system and secondary victimization. The idea that victims should be given avenues to participate more actively before the court and to obtain reparations within the same proceedings caused a tectonic shift in relation to the ICC, where victims were activated as participants in the process beyond utilitarian role as witnesses. In particular, victims were granted the right to participate at various stages of the proceedings in their own capacity and to obtain reparations, next to traditional protective measures accruing to witnesses.<sup>134</sup> If not by the influence of the victim-servicing goal, the value-driven reforms and advancements in the domain of procedural rights of victims made at the ICC, ECCC, and STL would have been impossible to explain.

This shift in international criminal procedure reflects the deeper evolution of the concept of redressing victims from the idea that mere existence of the tribunals to adjudicate crimes that caused victimization is sufficient, to the recognition of victims' rights to directly participate in the process and to request reparations from the trial forum. This is clearly where the greatest risk of generating and failing unreasonable expectations towards the tribunal process lies, with the far-reaching implications for their perceived legitimacy. The effective and accurate outreach to counteract such expectations is essential to preserving the legitimacy and viability of international criminal justice. Due to the judicial and penal character of the institutions, there are objective limits to the radical trial transformation advocated by some proponents of victim rights who propose putting such rights at the heart of the system.<sup>135</sup> While such calls are well-intentioned and seek to reinforce or rehabilitate the legitimacy and acceptance of the tribunals, the unbalanced and experimental mode of implementing them is fraught with perils which are fatal to the project.<sup>136</sup>

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<sup>132</sup> Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, to the UN Security Council, The Hague, Press Release, JL/P.I.S./542-e, 24 November 2000 ('The voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. ... It is regrettable that the Tribunal's statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed.').

<sup>133</sup> Eighth Annual Report of the ICTY, UN Doc. A/56/352-S/2001/865, 17 September 2001, para. 49 ('the relevant United Nations bodies should explore in detail the methods of compensation for the victims of crimes in the former Yugoslavia.'). Annex (ICTR President's Letter), Letter dated 14 December 2000 from Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/1198, 15 December 2000, para. 4 ('any such proposal would not be efficacious, would severely hamper the everyday work of the Tribunal, and be highly destructive for the principal mandate of the Tribunal.'). Annex (ICTY President's Letter), Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2000/1063, 3 November 2000.

<sup>134</sup> Arts 15(3), 19(3), 68(3), 75 ICC Statute. See further S. Vasiliev, 'Article 68(3) and the Personal Interests of Victims in the Emerging Practice of the ICC', in G. Sluiter and C. Stahn (eds), *The Emerging Practice of the International Criminal Court* (Leiden/Boston: Martinus Nijhoff, 2009) 635-39.

<sup>135</sup> E.g. R. Henham and M. Findlay, 'Introduction: Rethinking International Criminal Justice?', in *id.* (eds), *Exploring the Boundaries of International Criminal Justice* (Aldershot: Ashgate, 2011) at 9 ('victim communities are the rightful constituency for international criminal justice. That being the case legitimate victim expectations should inform the procedures and outcomes of international criminal trials, remaining central as they are to the political imaginings of global justice. Surveys show that these interests expect retributive and restorative justice and that there is no acceptance of two separate tiers of justice to service these needs. In fact, the due process considerations of trial procedure should not be left to those very few victims attaining witness status.').

<sup>136</sup> See e.g. Damaška, 'What is the Point' (n 29), at 343.

## 4. SPECIAL GOALS AND PROCEDURE

### 4.1 Uncertain relationship: Two schools of thought

The foregoing overview of the main goals of international criminal justice gives a glimpse of the grandiose dimension and megalomaniac benevolence of the institutional missions of the international criminal courts. While the goals set out above are fairly typical of these institutions, the existence of other objectives is not ruled out. At this juncture, the relevance of these insights to the methodology of international criminal procedure will be turned to. The core question is whether it is appropriate to use 'effectiveness' as a part of the evaluative framework for the assessment of the procedure and, if so, to which conditions it should be subjected. The main issue here is the possible link to be drawn between procedure and ambitious objectives the tribunals are set to achieve. As noted above, the institutional objectives and the functions of procedure should not be equated. But what is the relationship between them?

Obviously, the institutional objectives have some impact on the procedural law and practices and may partly account for the features which distinguish them from ordinary national trials. If a certain goal is pursued on a systemic level, this cannot be without consequences for the procedural side of the operation. It is not a vacuum-sealed space and there are various ways in which the broader goals may inform processes or induce alignment to a certain extent. There is a big step separating the recognition of a limited and mediated impact of the mission statements on the notions of how trials should be organized, on the one hand, and the extrapolation of the professed goals of the institutions to the procedural domain, on the other hand. In the extreme, the latter would mean that trials should have the promotion of the institutional objectives as their core function and that actors involved in the trials must amend their ways accordingly. The objection to conflating the broad objectives with goals and functions of procedure is that this mistakenly attributes to a criminal trial the tasks that it should not and cannot serve if it is to remain what it purports to be, a criminal trial. Sloane noted pertinently that, unlike with sentencing matters,

The process of adjudication ... is an awkward stage at which to recognize and accommodate the salient distinctions. Efforts to modify the ICL trial process itself would be likely to raise questions about fundamental fairness to the defendants and to conflict with due process standards guaranteed by international human rights law.<sup>137</sup>

In a range of views on this question, it is possible to distinguish at least two major schools of thought that are evidently at odds with one another.<sup>138</sup> The first strand, classified as legal purism or liberal legalism,<sup>139</sup> denies a deterministic link between socio-political goals and the process as a matter of principle. It insists that the procedure should mind its own business and pay no regard to the ultimate purposes and far-reaching implications of international criminal prosecutions. The practical argument for hermetically sealing criminal process from extra-legal considerations which might be dictated by the socio-political objectives is the need to safeguard fairness procedural fairness and efficient conduct of proceedings. The principled moral argument for deflecting the impact of impertinent motives on decision-making is about guaranteeing substantive justice and not letting the individual accused be singled out and turned into a mere instrument for achieving utilitarian ends having little to nothing to do with his individual conduct, personal guilt, and culpability.

One of the eminent proponents of that view was Hanna Arendt who famously (and controversially at the time) criticized the demagogic style employed by the prosecution in

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<sup>137</sup> Sloane, 'The Expressive Capacity' (n 34), at 42.

<sup>138</sup> See also Stahn, 'Between "Faith" and "Facts"' (n 2), at 259 (noting 'a deeper friction between a security-oriented, a human rights-based, and a more traditional criminal justice oriented reading of mandates.').

<sup>139</sup> See e.g. Bass, *Stay the Hand of Vengeance* (n 72), at 7-8; M.A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007) 5; Wilson, *Writing History* (n 110), at 3.

presenting its case in the trial of Adolf Eichmann before the Jerusalem District Court.<sup>140</sup> Arendt arrowed her critique against what she saw as an unscrupulous attempt by Prosecutor Gideon Hausner acting under instructions from Israeli Prime Minister David Ben-Gurion, to hijack the process to pursue educational, historical, and political objectives. Instead, she believed, the trial ought to be conducted with a sole purpose of administering justice in the case of the individual accused, irrespective of how important his historical role was.<sup>141</sup> However high-minded or compelling the motives behind the prosecution—reinforcing the legitimacy of the young state, the collective identity of the people, and nation-building—any other uses of the legal process distort its nature:

The purpose of the trial is to render justice, and nothing else; even the noblest of ulterior purposes – ‘the making of the record of the Hitler regime...’ can only detract from the law’s main business: to weigh charges brought against the accused, to render judgment, and to mete out due punishment.<sup>142</sup>

The consecutive trials of the Auschwitz and Majdanek camp personnel of middle and lower rank held in Germany after the war brought back the collective memory of Holocaust.<sup>143</sup> While evoking the imagery and setting of the Nuremberg process, these trials effectively revisited its legacy which had been incomplete in respect of the Nazi crimes against Jews. Besides determining the guilt of the accused and punishing the perpetrators, the trials have reportedly exerted a profound effect on the collective memory of the German population and have shaped the modern German national identity, arguably overshadowing the imprint of Nuremberg on the public consciousness.<sup>144</sup> That said, there seem to have been no serious criticism against those proceedings that they had been conducted improperly or with inordinate attention to intended educative effects.

However, other national proceedings that took place in the aftermath of the *Eichmann* trial in Jerusalem did attract challenges that echoed Arendt. This goes in particular for the famous trials in France against Nazi collaborators Klaus Barbie (1987), Pierre Touvier (1994-5), and Maurice Papon (1997-8). Those proceedings were passing judgment on the popular myths of national resistance; they served to challenge the idea—convenient for the French government and some sections of the society—that the Vichy regime and its crimes against Jews had been imposed by Nazi Germany. They did so by addressing the counterclaim that those crimes had in fact been an outgrowth of state policy which enjoyed considerable support among the population.<sup>145</sup> Notably, at

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<sup>140</sup> *The Attorney-General of the Government of Israel v. Adolf Eichmann*, Criminal Case No. 40/61, District Court of Jerusalem, Israel, 12 December 1961 (Supreme Court 1962).

<sup>141</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994) 19, citing Ben-Gurion: ‘It is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history’. Arendt regarded the prosecution opening alluding to the persecution of Jews in ancient times as ‘bad history and cheap rhetoric’ (*ibid.*) and observed that ‘[j]ustice insists on the importance of Adolf Eichmann ... On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism.’ (*Ibid.*, at 5).

<sup>142</sup> *Ibid.*, at 253.

<sup>143</sup> The *Auschwitz* trials of 22 defendants were held in Frankfurt in 1963-65 (Frankfurt am Mein, Schwurgericht (Jury Court), Case 50/4 Ks 2/63). The third set of *Majdanek* trial involving 16 defendants trials were held in Düsseldorf in 1975-1981 (the first and second series of proceedings took place in Poland, in 1944 and 1946-48 respectively).

<sup>144</sup> See further Karstedt, ‘The Nuremberg Tribunal and German Society’ (n 33), at 17, 29-31 (the Auschwitz trial ‘became a defining moment for the identity of the younger generation, who were not directly involved, and it allegedly shaped the students’ movement in Germany.’).

<sup>145</sup> L.N. Sadat Wexler, ‘Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France’, (1995) 20 *Law and Social Inquiry* 191, at 192, 195-66 (‘To the public, Touvier’s conviction symbolized Vichy’s downfall by compelling the French government, after years of denial, to acknowledge and account for what really happened during World War II.’); R.J. Golsan, ‘Crimes-against-Humanity Trials in France and Their Historical and Legal Contexts’, in P. Heberer and J. Matthäus (eds), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln/London: University of Nebraska Press, 2008) 247-60; M. Koskeniemi, ‘Between Impunity and Show Trials’, (2002) 6 *Max Plank Yearbook of United Nations Law* 1, at 23-55. For a riveting account of the *Barbie* trial, see A. Finkelkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes against Humanity* (New York: Columbia University Press, 1992).

the Nuremberg trial some fifty years earlier, the issue of the Vichy crimes had not been raised, ‘thus helping to build the Gaullist myth of the French nation united by *résistance*’.<sup>146</sup>

Due to the unprecedented media coverage and government’s pressures on the courts, the French post-war trials were turned into didactic spectacles through which the government tried to defend that myth.<sup>147</sup> In other words, this was the opportunity for the country that found itself ‘in the dock’ either to attempt to preserve its identity untarnished or to abandon the ‘resistance narrative’ entrenched in the public conscience. According to Sadat, the outcome of the collaborator cases would mark the avenue to be taken in addressing the Vichy past after the years of amnesia.<sup>148</sup> Although as ‘media events’ the trials were moments for reviewing a controversial historical period, judicially rewriting history, and authoritatively settling a discourse of national importance, such use of the process was also seen as troubling. It raised suspicion that these considerations may have affected the judicial psyche and distracted the courts from the impartial pursuit of justice.<sup>149</sup>

These critiques of domestic war crimes prosecutions reflect the view that the trial processes should be isolated from the influence of political implications and effects expected or desired of them by the governments or national civil society. The ‘international society’ is more diffused than any of its national counterparts to whose benefit criminal proceedings are conducted.<sup>150</sup> This does not diminish, however, the relevance of the core point of the Arendt account to international proceedings. On the contrary, the temptation may be irresistible in that context to ‘use’ an individual defendant for appeasing communal sentiments, writing an official narrative of the conflict, teaching moral lessons, or for pursuing other political goals within a target society and beyond. Where that is the case and the procedural rules are bent to enable the court to approximate those outcomes, the process is effectively divested of its liberal nature and becomes show.

On the other side of the spectrum rests the position that the didactic and historical objectives should be fully embraced and unabashedly pursued in international criminal trials. If the lofty objectives of the tribunals are to be taken seriously at all, they should be reflected on the organization of the procedure and on how the rules are applied. The close interaction between the ends and means should equip the judicial process for directly vindicating the policies pursued in a broader context. The socio-political goals deserve a special emphasis in the context of international criminal proceedings and might redefine the traditional purposes of trials. Thus, Koskenniemi presents a view that the utmost gravity of international crimes renders any punishment inadequate

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<sup>146</sup> Koskenniemi, ‘Between Impunity and Show Trials’ (n 145), at 20.

<sup>147</sup> On the governmental manipulation behind the scenes of the *Barbie* trial, see R.J. Golsan, ‘History and the “Duty to Memory” in Postwar France: The Pitfalls of an Ethic of Remembrance’, in H. Marchitello (ed.), *What Happens to History: The Renewal of Ethics in Contemporary Thought* (New York: Routledge, 2000) 23-39; Wilson, *Writing History* (n 110), at 34-36 (explaining such manipulation by the pragmatic wish to prevent from exposure the controversial record of incumbent governmental officials and to prevent the need for paying out reparations to the victims).

<sup>148</sup> Sadat Wexler, ‘Reflections’ (n 145), at 218 (‘To the extent that the goal was to rehabilitate French society in the eyes of those who felt that the sins of the Vichy regime had been swept under the rug by successive governments, the emphasis of the trial was shifted away from the defendant’s culpability to the needs of society at large. That is, Touvier’s guilt or innocence became symbolic of a larger societal goal. This undermined the moral justification for his trial, to some extent, by justifying his punishment solely as a means to an end.’)

<sup>149</sup> T. Todorov, ‘The Touvier Trial’, in R.J. Golsan (ed.), *Memory, the Holocaust, and French Justice: The Bousquet and Touvier Affairs* (Hanover and London: University Press of New England, 1996) 120 (‘what is especially worth criticizing ... is not that they wrote bad history, it’s that they wrote history at all, instead of being content to apply the law equitably and universally.’); Sadat Wexler, ‘Reflections’ (n 145), at 215-18 and 220-21.

<sup>150</sup> Sloane, ‘The Expressive Capacity’ (n 34), at 41 (‘ICL purports to serve multiple communities, including both literal ones—for example, ethnic or national communities—and the figurative “international community”, which ... is not monolithic; it consists of multiple, often competing constituencies and interests.’). See also *ibid.*, at 43, 53 (‘no more than a convenient shorthand for a broad array of global actors (including but not limited to states), processes, values, and interests.’).

and shifts the purpose of trial from judging an individual person to establishing a wider truth about the events.<sup>151</sup>

One of the vocal proponents of the law-and-society school of thought, Mark Osiel, has argued that trials dealing with mass atrocities must be ‘didactic spectacles’ geared for therapeutic and pedagogical tasks of constructing a ‘collective memory’, promoting social solidarity, and reinforcing communal values.<sup>152</sup> Likewise, drawing upon popular surveys in post-WW II Germany, Karstedt observed that criminal trials have a crucial role in promoting both collective amnesia and collective memories: ‘they are intended as “monumental spectacles” which draw the line between an unspeakable past and the future.’<sup>153</sup> According to her, trials, on the one hand, assist amnesia in that ‘they draw final strokes and “close the books” by defining guilt and punishing the perpetrator, but on the other hand they lend themselves to ‘shaping collective memories for the future’.<sup>154</sup>

In a similar vein, Lawrence Douglas considers the legalist approach to interaction between the process and institutional goals as ‘a crabbed and needlessly restrictive vision of the trial as a legal form’ and praises the ‘didactic’ elements which Arendt took issue with.<sup>155</sup> Douglas’s attack on the ‘restrictive’ view of the function of trial hinges upon the claim that ‘the strenuous efforts to secure formal legal integrity ... often led to a failure fully to do justice to traumatic history’.<sup>156</sup> Instead, according to him, it is fully appropriate for the trials dealing with international crimes to serve as pedagogical events and ‘tools of historical instruction’.<sup>157</sup> He goes as far as to state: ‘Particularly in high profile perpetrator trials—which by their very nature will attract intense media attention—it is unrealistic to expect, and silly to demand, that the trial be conducted as an ordinary exercise of criminal law.’<sup>158</sup> Adjusting the life of the procedural law to the unique dimensions of such trials, for instance by allowing wide admission of hearsay, does not in itself compromise their fairness, as long as the necessary appearance of legality is preserved.<sup>159</sup> These accounts are clearly at variance with the legalist positions and develop the critique of the Arendt notion that a criminal trial must solely aim at delivering justice.

The points raised by these scholars deserve to be paused upon. As noted, the linkage between the means and ends of criminal justice is not disputed. It would be defying logic to assert that an international criminal tribunal can reasonably seek to achieve certain socio-political objectives equally effectively by employing any procedural arrangements at all. Many will find it disingenuous to let the hope that the expected outcomes will be attained rest idly on the mere fact of existence of the institutions which formally proclaim such outcomes to be the parts of their missions. However, the problem with the accounts of Osiel and Douglas is in the over-deterministic link they draw between the functions of legal procedure, and more specifically trial process, and the grandiose goals. When asserted thus, it is a sweeping analogy or equation between the autonomous categories of goals and functions which should be kept apart: they do not pertain to the same

<sup>151</sup> Koskenniemi, ‘Between Impunity and Show Trials’ (n 145), at 3 (presenting a view that the utmost gravity of international crimes renders any punishment inadequate and changes the purpose of trial from judging an individual person to establishing a wider truth about the events).

<sup>152</sup> M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick: Transaction, 1997) 2-10; *id.*, ‘In Defense of Liberal Show Trials – Nuremberg and Beyond’, in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2007) 704 *et seq.*

<sup>153</sup> Karstedt, ‘The Nuremberg Tribunal and German Society’ (n 33), at 16.

<sup>154</sup> *Ibid.*

<sup>155</sup> L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001) 2.

<sup>156</sup> *Ibid.*, at 260.

<sup>157</sup> Douglas, *The Memory of Judgment* (n 155), at 2-4 and *id.*, ‘Perpetrator Proceedings and Didactic Trials’, in A. Duff *et al.* (eds), *The Trial on Trial, Volume 2: Judgement and Calling to Account* (Oxford/Portland: Hart Publishing, 2006) 192 (‘the didactic function or quality of the trial is not an incidental feature of the inevitable process of proving charges or upholding well-accepted and largely uncontested social norms. Instead, the didactic purpose of the trial lies at the very heart of the proceedings.’)

<sup>158</sup> Douglas, ‘Perpetrator Proceedings’ (n 157), at 195.

<sup>159</sup> *Ibid.*, at 196.

activities or phenomena. The equation oversimplifies and distorts the relationship between the institutional and procedural goals, which is more detached and nuanced than presented.

In order to demonstrate the consequences of such approach, the stronger nexus can be established *arguendo* between the functions of procedure and the goals of constructing a historical record, promoting reconciliation, and redressing victims. Along these lines, the historiographical ambition of international criminal justice may be deemed to impel the trial process into assembling a nearly comprehensive historical record of atrocities. The tribunals would be expected to amass and process greater quantities of evidence than strictly required for probing individual charges and to extend the scope of inquiry to cover as many crime incidents in as many geographical locations as possible. This logic can be taken further by advocating a relaxation of admissibility rules as this would allow a wider volume of evidence speaking to the historical background to be placed on the record and to be discussed in the judgment, irrespective of its strict relevance to the charges against the accused.<sup>160</sup> The historical objective can then also be used to come to terms with the longer duration of international criminal trials.<sup>161</sup>

However, at this point, the trade-offs between the legalist functions of fair and expeditious proceedings and the socio-political goal of writing history become impossible to ignore.<sup>162</sup> The moderate proponents of the ‘historiographical function’ of international criminal procedure acknowledge the tension and that even the incidental pursuit of the historical objective in a trial may be impossible.<sup>163</sup> Jens Ohlin, for instance, writes that ‘in situations where the didactic and historical truth-seeking goals of international criminal procedure conflict with the essentially *criminal* nature of the trial process, the former ought to be abandoned’; this is so because ‘the truth-finding goal of international criminal procedure ... is arguably subordinate to the more primary and specific aim of adjudicating individual guilt’.<sup>164</sup> The present author’s view is that the latter prevails not because it is hierarchically superior but because the historiographical goal is not a procedural function at all, which defies any real competition between them.<sup>165</sup>

Another example concerns the argument that favours the direct procedural rendering of the victim-servicing goal, which, as seen, proved to be consequential for the evolution of international criminal procedure. The ICC, ECCC and STL architects deemed it appropriate to interpret said institutional goal as requiring the inclusion of victims as participants in the proceedings, resulting in a tangible expansion of their procedural status. While this currently reflects the prevalent trend, it is not the only possible interpretation. This is demonstrated by the ICTY, ICTR and SCSL models before which the victims’ role was limited to that of witnesses entitled to protection and support

<sup>160</sup> See e.g. Møse, ‘Main Achievements of the ICTR’ (n 35), at 934 (‘During the proceedings, the Judges have adopted a relatively liberal attitude with regard to evidence that may be considered admissible, even if it does not fall squarely within the charges brought against the accused. This allows both sides to convey their version of the events in Rwanda.’).

<sup>161</sup> *Ibid.* (‘Besides efficiently prosecuting a person for having allegedly committed a given crime, another aim of the trial may be to contribute to establishing a historical record. *This may require more time and effort than would be necessary simply to complete the case.*’); Kirk McDonald, ‘Trial Procedures and Practices’ (n 36), at 621 (‘although the trials are designed first and foremost to determine the guilt or innocence of the accused, the discharge of the Tribunals’ mandates requires that they develop an historical record of the conflict. It is, therefore, unrealistic and, indeed, undesirable to expect the pace of the trials to be the same as those conducted in national systems.’); Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 263 (‘A figure of four to five years may appear long for a trial, but it is less threatening if it is associated with a broader process of clarification of historical facts.’).

<sup>162</sup> Galbraith, ‘The Pace of International Criminal Justice’ (n 19), at 109 (‘If an international criminal trial incorporates more evidence than is needed for guilt and sentencing determinations in order to build a historical record, then the trial will undoubtedly take longer than it would if it pursued only domestic criminal law aims. Thus there seems to be an inevitable tradeoff between the scope of the aims of international criminal justice and its timeframe.’).

<sup>163</sup> E.g. Ellis, ‘Combating Impunity’ (n 45), at 159 (‘The desire to create a historical record must be tempered by the need to conduct efficiently run trials.’)

<sup>164</sup> Ohlin, ‘Goals’ (n 28), at 62 (advising to engage ‘a more appropriate mechanism, such as a national truth and reconciliation commission, as opposed to a criminal trial system’ for the pursuit of didacticism).

<sup>165</sup> See also Ellis, ‘Combating Impunity’ (n 45), at 159 (citing S. de Bertodano: ‘international tribunals should stop talking so much about making an historical record and focus more on the actual trial process.’)

measures but not to procedural standing. This has occasionally been attended by rhetorical use of ‘victimhood’ by the parties in the pleadings – the manoeuvre which has not been unusual in war crimes prosecutions across the board.<sup>166</sup> Yet the third option *in extremis* would be coming close to a complete overhaul of the process in line with restorative justice philosophy, which would require no less than abandoning the fundamental principles of the retributive justice paradigm.<sup>167</sup>

In the tribunals where victims have been involved solely as witnesses, such a way of translating a goal into the process might feature measures aimed at transcending the limitations of the witness role, e.g. by alleviating their testimonial burden and giving up the adversarial ‘questions and answers’ mode of questioning. At a minimum, victims would have to be granted an enhanced status (active participation) and the right to be consulted on principal decisions (e.g. the ability to veto the proposed outcomes of plea bargaining and the like). It is clear that the incorporation of the restorative elements into the process would hardly stop there, as the entire retributive justice setup and philosophy has to be dismantled.

Seemingly adhering to this vision, Henham and Findlay have faulted the ‘legal purist’ critique of ‘unrealistic and expansive aims for international criminal justice which should embrace the frameworks of adversarial retributivism, and eschew peace and conflict resolution’. In their view, the legalist arguments ignore ‘that the eventual legitimacy of international criminal justice rests on much more than show trials. Victims worlds-away from The Hague will not for long accept the declaratory dimension of the ICC as enough to merit their confidence and commitment.’<sup>168</sup> While the merits of the argument do not need to be addressed here, it is telling that their use of the notion of ‘show trial’ is the outright opposite of how it is understood by liberal legalist accounts.

In these examples, analogizing between the institutional goals and procedural functions is possible because the latter could be seen to ‘track’ the former. However, some of the socio-political goals of international criminal justice are so remote from and neutral to the mechanics of the legal process that it strains imagination to try to draw a direct link.<sup>169</sup> The objectives of restoring peace and reaffirming international law norms are under-determinative when it comes to defining the optimal procedural arrangements. This is where the major weakness of the theories asserting a direct interaction between the legal process and institutional goals comes to the surface.

The problem is that they collapse the two dimensions of criminal justice: the micro-level perspective focusing on the individual cases and consequences of specific proceedings, on the one hand, and the political macro-dimension of the longer-term and broad social consequences of the life of the tribunal, on the other hand. As rightly observed by Bert Swart, in order to assess the tribunals’ impact, one ought to distinguish between the macro-level of the system and micro level of individual proceedings, and that a failure to draw such a distinction obscures the debate.<sup>170</sup> While Swart notes that the question of the interaction between the procedure and the goals arises at the micro level in particular, the confusion starts one step earlier – with the assumed and unquestioned fact of interaction. Conversely, Shany considers an inquiry into the process as ‘a sub-optimal proxy

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<sup>166</sup> For example, in the opening statement in *Eichmann* the prosecutor resorted to the imagery of ‘six million victims’ of the Holocaust invisibly standing next to him, to whom he merely served as a ‘mouthpiece’. Arendt was critical of this dramatic gesture (Arendt, *Eichmann in Jerusalem* (n 141), at 260-1). See also C. del Ponte with C. Sudetić, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and Culture of Impunity* (New York: Other Press, 2009) 82 (the Prosecutor stating in 2000 before the ICTR Appeals Chamber in the *Barayagwiza* case: ‘I am the only person here to represent the victims, and on their behalf I pray you to allow the prosecutor to institute proceedings against Barayagwiza . . . In the name of justice, genuine justice, for the sake of the victims, for the sake of the survivors.’).

<sup>167</sup> Damaška, ‘What Is the Point’ (n 29), at 343 (‘effective measures to provide victims with satisfaction require that elements of restorative justice be injected into criminal proceedings, and, as is well-known, retributive and restorative forms of justice do not mix very well.’).

<sup>168</sup> Henham and Findlay, ‘Rethinking International Criminal Justice?’ (n 135), at 7.

<sup>169</sup> See also Swart, ‘Damaška’ (n 28), at 100 (‘While some of these goals seem to be more or less directly related to the individual offender, in the case of others this relationship is more remote or even absent.’).

<sup>170</sup> *Ibid.*, at 101.

for a goal-attainment centered investigation into effectiveness' as it tends to be based on incorrect assumptions of the relationship between process and outcomes.<sup>171</sup>

For instance, it is difficult to empirically relate the psychological processes unfolding at the micro-level (e.g. sentiments of forgiveness or a satisfied desire for retribution, or healing and closure experienced by an individual victim-witness as a result of contributing to the administration of justice) and the social processes taking place at the macro-level of community (national reconciliation). The causal link between the micro-level and macro-level is not self-evident and different methodologies should arguably apply in the appraisal of the two parameters. The micro-level, as a matter of subjective and individual experiences and sentiments, lends itself to opinion-based assessments. But the same is unlikely to produce credible results when employed in the evaluation of the macro-process of reconciliation, unless corroborated by the more objective quantitative (statistical) assessments capturing the representative views in a given society.

Consider this: an individual victim-witness is satisfied with the experience of testifying and feels she has made a step forward towards closure by telling her story in court and contributing to the criminal justice process. The collective therapeutic effects of the testimony, the process, and the resulting judgment at a macro-level in terms of reconciliation and restoring victims of this and similar crimes are impossible to ascertain, although they have too often been assumed.<sup>172</sup> It can equally be argued that the retributive justice and its process are more apt to entrench inter-ethnic divisions rather than to bridge them by assisting reconciliation in a direct sense.<sup>173</sup> To reverse the example, the 'day in court' may have been a probing experience for the testifying victim, and she leaves the courtroom anguished as a result of reliving the traumatic events or the insensitive treatment by her cross-examiner or judges. But her testimony might still be seen as contributing to the objectives of truth-finding, reconciliation, and the social reconstruction. Speculative arguments cut both ways, but empirically or even theoretically there is neither an evident link nor necessarily alignment between the micro- and macro-outcomes of the judicial process.<sup>174</sup>

This shows that even where systemic goals can with seeming ease be attributed to the process, the analogy is deceptive: the methods and outcomes of criminal trials should not be viewed as a courtroom miniature of broader social processes. Faith-based evaluations assume the desired macro-effects of individual experiences and misrepresent the numerous variables as permanent. The asserted nexus between the two dimensions should rest on credible findings arrived at as a result of an extensive empirical research and a rigorous methodology rather than facile syllogisms.

The validity of accounts suggesting that procedural arrangements can always be molded by, and usefully evaluated against, the ultimate goals of the institutions, rather than against the proper functions of those arrangements, is reduced by the typical assimilation of the two distinct sets of goals. This defies the principled distinction between the macro- and micro-dimensions of international criminal justice. The attribution to the criminal process of goals it is not meant to pursue without prior legislative translation into the procedural language contributes to the teleological mishmash discussed earlier.<sup>175</sup> The relationship between the goals and processes is more complex and indirect than suggested.

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<sup>171</sup> Shany, 'Assessing the Effectiveness' (n 2), at 39.

<sup>172</sup> See also J.E. Alvarez, 'Rush to Closure: Lessons of the Tadić Judgment', (1997-98) 96 *Michigan Law Review* 2031, at 2037.

<sup>173</sup> This is not contradicted by the available empirical evidence: E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005) 15 ('criminal trials—especially those of local perpetrators—often divided small multiethnic communities by causing further suspicion and fear.');

Clark, 'The ICTY and Reconciliation in Croatia', (n 4), at 412; *id.*, 'The Impact Question' (n 4), at 55 and 70. See also Zolo, 'Peace through Criminal Law?' (n 34), at 734; Stahn, 'Between "Faith" and "Facts"' (n 2), at 278.

<sup>174</sup> Denying the empirical link, see e.g. Clark, 'The ICTY and Reconciliation in Croatia' (n 4), at 399; E. Stover and H.M. Weinstein, 'Conclusion: A Common Objective, a Universe of Alternatives', in Stover and Weinstein (eds), *My Neighbor. My Enemy* (n 131), at 323 ('there is no direct link between criminal trials (international, national, and local/traditional') and reconciliation, although it is possible this could change over time.')

<sup>175</sup> *Supra* 2.



Finally, the goal-related confusion epitomized in calls for ‘didactic spectacles’ inevitably raises the spectre of a show trial.<sup>176</sup> The excessive attention by the judges and prosecutors to the socio-political objectives in their day-to-day work of pleading and deciding cases is bound to compromise fairness or result in the efficiency loss with the same adverse effect. This concern is widely recognized.<sup>177</sup> There is no such thing as Osiel’s ‘liberal show trial’ because the trial can be either liberal or show. Preserving the distinction between the two dimensions of justice and the different layers of teleology is essential. One of the following Chapters addresses the question of what a ‘show trial’ means and, in this light, what the boundary is between the proper functions of a trial (e.g. ‘search for truth’) and their macro-dimensional rendering (‘compilation of the historical record’).<sup>178</sup> The attempts to introduce the long-term impact of international tribunals as a value in the procedural equation start from the wrong foot. The likely result of the expansion of the goals of legal process beyond its legalist functions will be that it would drift in an illiberal direction. Instead of serving the socio-political goals in an immediate sense, as expected, such ‘liberal show trials’ would effectively be divested of the potential to ever contribute to the achievement of those goals in the long run.

#### 4.2 Voices from practice: A third view

Next to the two schools of thought discussed above, it is possible to detect a variety of more nuanced middle-ground approaches. These moderate positions fall in between the two extremes in that they do recognize the existence of a link between the goals of international criminal justice and procedural goals as well as the need for direct interaction, without collapsing them. These accounts are ‘bilingual’ and eschew literate translations of mission statements into the terms of procedure. The pursuit of socio-political goals invites the identification of the fitting procedural forms which are organic to the procedural system and consistent with its proper goals, or amending the procedural system as is necessary to give a meaningful effect to those goals. The procedural practice should only be informed by the immediate objectives of the process and should solely aim to perform its proper functions. The consideration of institutional goals and outcomes is secondary and, even if not totally irrelevant, can be reflected in the procedural form only to the extent that it does not conflict with it. The longer-term impact of international criminal trials on national reconciliation, peace, and the emergence of historical truth are but welcome side-effects and incidental consequences.

This line of reasoning finds broad support in the sobering views of practitioners. One scholar and former judge at the ICTY wrote that the ICTY’s general mission—bringing justice to the persons allegedly responsible for international crimes and to the victims, deterring future crimes, and contributing to the restoration of peace by promoting reconciliation—is ‘a leitmotif for each single proceeding’ and a contribution expected from it.<sup>179</sup> But in terms of real practice, based on his ‘impressions gained from trial observations and exchanges of judicial experience’, he acknowledges, that a ‘pessimistic’ view as to the extent to which the daily court practice at the ICTY is coloured by these lofty objectives ‘will come close to reality’:

the usual participants in a criminal proceeding—both from the prosecution and the defence side as well as from the bench—seem to have a hard time freeing themselves from their traditional role that is fixed on and limited to the question of the accused’s guilt or innocence; within this narrow

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<sup>176</sup> See also Akhavan, ‘Beyond Impunity’ (n 6), at 30 (‘the attractive spectacle of courtroom drama, which pits darkness against the forces of light and reduces the world to a manageable narrative, could lead international criminal justice to become an exercise in moral self-affirmation and a substitute for genuine commitment and resolve.’).

<sup>177</sup> E.g. Galbraith, ‘The Pace of International Criminal Justice’ (n 19), at 95 (‘The most commonly expressed concern is that the historical record aim and the transitional justice aims will interfere with the domestic criminal law aims.’)

<sup>178</sup> Chapter 5.

<sup>179</sup> Eser, ‘The “Adversarial” Procedure’ (n 29), at 210 (adding that ‘[a]lthough a single trial typically aims at determining the guilt or innocence of the defendant, it must also be led by the further reaching goals of the judicial mission of the ICTY’).

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understanding of a criminal proceeding, there seems to be little openness to conceive the judges' and the parties' role on the level of international criminal justice differently than on the familiar domestic stage.<sup>180</sup>

Other ICTY judges describe the reality of the proceedings in strikingly similar terms and, moreover, are noticeably less pessimistic about it. Thus, judge O-Gon Kwon expressed the view that 'The task of determining guilt or innocence must take precedence over other, not strictly judicial, considerations. Ours is first and foremost a criminal court: the successful prosecution of the guilty and the exoneration of the innocent must remain our central concern.'<sup>181</sup> Lord Bonomy opined to a similar effect:

While all these objectives are desirable, and can be contributed to by the Prosecution and by the trial process, I firmly believe that the best way in which we, as lawyers and judges, can give effect to them is to do the job we are trained for, and know well. That is to do what it says in the title of the Tribunal.... The real benefits of the judicial process are to be found in the successful prosecution of the guilty and exoneration of the innocent.<sup>182</sup>

This is echoed by Judge Fulford, who presided over Trial Chamber I in the ICC's first trial:

We are first, foremost and last a criminal court: our core business is to process criminal trials. All the rest, and I hasten to add some of the rest is very important indeed (such as our deterrent potential, reparations to victims and outreach), is secondary to the Court's obligation to investigate, arrest and try alleged criminals. The court will be judged by our ability to dispense international criminal justice at the highest level – that means securing those accused of the world's most egregious crimes before the court and delivering timely and fair justice.<sup>183</sup>

These positions are fairly representative of the views widely shared within the international criminal practice community. The present author inquired with a number of interviewees whether the remote goals of international criminal justice must be taken into account in the day-to-day operation of the courts and whether the trial process directly contributes to the attainment of those goals. The ICTR judges and legal officers in the Chambers who participated in the survey recognized that those goals are not to be ignored completely, but they do (and should) remain secondary to the proper functions of the judicial process. As seen from the following sample of quotes, the long-term effects and legacy of the tribunal, rather than proceedings as such, bear the weight of expectations related to bringing about peace and reconciliation.

Ideally the procedure in the courtroom should promote these additional goals. Whether they can in practice is another matter. ... Reconciliation is a complex phenomenon. It is a dynamic process which is achieved over a period of time and it should be achieved by bringing the opposing factions together. I do not think that the procedure in the *ad hoc* tribunals facilitates reconciliation. Witnesses and victims come here, they give their testimony and they go back. There is no procedure for bringing the parties together to facilitate reconciliation as is the case with truth commissions, which is a more restorative justice type of mechanism.<sup>184</sup>

We may not ignore these goals; we do take them into account. But there is a certain hierarchy, since we are a judicial institution. ... [T]he UN Security Council Resolution ... contains the language referring to the restoration of peace and so forth. These are the goals that flow from, or can be achieved owing to,

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<sup>180</sup> *Ibid.*

<sup>181</sup> O-G. Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench', (2007) 5(2) *JICJ* 360, at 373.

<sup>182</sup> I. Bonomy, 'The Reality of Conducting an International Criminal Trial' (n 39), at 353.

<sup>183</sup> A. Fulford, 'Reflections of a Trial Judge', (2011) 22 *Criminal Law Forum* 215, at 216.

<sup>184</sup> Interview with Judge Emile Francis Short of the ICTR, ICTR-PJ/05, Arusha, 23 May 2008, at 6-7.

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the existence of this organ. But it is difficult for me to judge, for one is to define what reconciliation means.<sup>185</sup>

[I]n the proceedings as such, it is a matter of guilt or innocence of the person before the Judges. The question of how these particular cases may help reconciliation in the long run, I do not think that plays a role. It is on the agenda, but as a consequence and as a result of the Tribunal's existence as such.<sup>186</sup>

The trial proceedings contribute to the achievement of the tribunals' mandates indirectly and in the long run rather than on a short term and immediately, if ever at all:

It is a great statement. Of course we all know that there cannot be reconciliation without justice, or without peace, and peace without justice. That is true. You cannot always just shove everything under the carpet. At one moment you have to clean up. Justice is important. I do not know if it were in the mid- or short-term path to reconciliation. The Nuremberg trials were great, but in the long term. I do not think that this works for reconciliation in the short term. ... You mentioned protective measures which is also one concern of this Tribunal, a much greater concern than at the ICTY. 90% of the witnesses testify as protected witnesses. How much can you rely on truth and reconciliation when witnesses do not give their name or identity and do not show their face? I have serious concerns, because you cannot anonymously strive for reconciliation.<sup>187</sup>

The practitioners tend to associate direct contributions to the tribunals' institutional objectives with non-judicial and restorative justice mechanisms. Such mechanisms are more amenable to aspects of reconciliation, peace-restoration, and redress for victims being integrated into their operational processes.

Among others, the interviewees mentioned in this context the greater potential of truth and reconciliation commissions and grassroots lay courts like *gacaca* in Rwanda:

I am not so sure how much they [trials] contribute to reconciliation and what more could be done to assist that. ... I am of the view that truth and reconciliation commission might be better designed to the extent that any sort of mechanism can be designed to achieve reconciliation. ... [P]erhaps truth and reconciliation commissions are better at empowering victims, and are a better venue for providing that sort of voice for them. Where they work, restorative justice mechanisms are also quite interesting, where you get a sit-down between a victim and their perpetrator, but I do not really see that working here.<sup>188</sup>

In the interlocutors' view, international tribunals should not be left alone to face the reconciliatory and restorative missions. Ideally, the judicial mechanisms (including national criminal justice) and non-judicial mechanisms must 'work side by side' in a post-conflict setting:

[T]he unique example of the SCSL is probably the way forward – having a combination of a court and a truth commission that can work side by side. You can obtain some synergy from the two

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<sup>185</sup> Interview with Judge Sergei Alekseevich Egorov of the ICTR, ICTR-PJ/06, Arusha, 20 May 2008, at 7. See also Interview with Judge Møse of the ICTR, ICTR-PJ-04, Arusha, 20 May 2008, at 8 ('I think it is difficult to measure to what extent our Tribunal contributes to peace generally, and in East Africa specifically, but it is our aim to do so. Reconciliation is part of our Statute, and it is our view that we are contributing.');

Interview with an ICTR Judge, ICTR-AJ/08, Arusha, 16 May 2008, at 5 ('I think that the results of the proceedings form an important judicial legacy, having reconciling and restorative effects.').

<sup>186</sup> Interview with a Legal Officer, ICTR Chambers, ICTR-AO/07, Arusha, 2 June 2008, at 4.

<sup>187</sup> Interview with Judge Inés Mónica Weinberg de Roca, ICTR, ICTR-PJ/07, Arusha, 19 May 2008, at 6-7. See also Interview with a Legal Officer, ICTR Chambers, ICTR-AO/09, Arusha, 30 May 2008, at 9 ('J'ai du mal à voir comment ces procès peuvent avoir comme objet immédiat la réconciliation. ... Le procès ne peut pas, à mon avis, permettre d'aboutir à la réconciliation, parce que vous avez des objectifs divergents.').

<sup>188</sup> Interview with Legal Officer, ICTR Chambers, ICTR-AO/05, Arusha, 3 June 2008, at 8-9. See Interview with Judge Emile Short (n 184), at 6-7 ('the courtroom is not the best place for achieving restorative justice. Even the truth commissions, which are a much better forum for restorative justice, do not always achieve it.');

Interview with ICTR Judge, ICTR-AJ/08 (n 185), at 6. See also Damaška, 'What Is the Point' (n 29), at 342 ('properly organized historic commissions are much better equipped than a criminal court to compile a comprehensive record of events').

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working side by side. In Sierra Leone there was some tension between the two bodies but that was because no provision had been made for the way they should work together. I think that if it is thought out well that is one way in which these goals can be achieved. The whole trial process makes it quite difficult to achieve these goals of reconciliation and restorative justice.<sup>189</sup>

The only practicable way for the tribunals to lay emphasis on their broader missions in their work and to maximize incidental reconciliatory and restorative effects of their proceedings is non-procedural. Setting a well-organized and comprehensive outreach programme up in a timely fashion is identified as crucial:

the SCSL has done a lot in that direction. They, of course, are located in the area where the crimes took place and, therefore, the local population is perceived as a part of the whole judicial process. They sit in communities and do a lot of outreach programmes. I believe that does help in achieving the goals of reconciliation and peace.<sup>190</sup>

The baseline transpiring from these opinions is that paying inordinate attention to the institutional objectives in the practice of the application of procedural law in a hope to ensure that those are achieved is ‘not how it works’. It is seen as inappropriate because of the tensions it creates with the effective operation of the judicial process – its ability to fulfil its primary functions may be undermined and fair trial rights are placed into the position of competing with paternalistic and utilitarian reasoning.

For instance, the current procedural setup of the *ad hoc* tribunals is not seen as enabling victims to ‘tell their story’ beyond what is necessary for establishing the truth regarding the charges in accordance with the applicable rules on examination.<sup>191</sup> Nor does this appear practically feasible in a routine practice of the courts, because actors are more preoccupied with the fair and efficient conduct of trials. The following statement by one ICTR Judge is in line with Eser’s observations cited above concerning the bounds and dictates of professional roles:

I am a professional Judge, so I am more inclined to think that it is more important for the trial process to be efficient and effective, that is my main concern. I do not want to say that if we did only that, we would achieve the other goals.<sup>192</sup>

This survey, anecdotal as it were, may give a fairly good idea about the prevalent perceptions on the relationship between the special goals and the process among judges at the ICTY

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<sup>189</sup> Interview with Judge Emile Short (n 184), at 7. To the same effect, see Judge Pocar as cited in Mégret, ‘The Legacy of the ICTY’ (n 23), at 1030 (‘I do not think that a judicial body can do all these things alone, it is clear that other measures are necessary in this respect. ...I do not think that further transformation can be brought about without a more generalized adjudication of all those cases, or a different treatment through procedures like truth commissions.’)

<sup>190</sup> *Ibid.* See also Interview with Legal Officer, ICTR Chambers, ICTR-AO/05 (n 188), at 8 (‘I think that our outreach would help – we have had to at least inform the Rwandan population, or whichever population is concerned about the activities of [the] tribunal...’). Confirming this positive assessment of the SCSL outreach programme, see Interview with a SCSL Judge, SCSL-AJ/02, The Hague, 9 December 2009, at 14 (‘The Special Court has had a very good and successful outreach programme, first of all. I think without the outreach programme we could not know the feedback from the people and the population whether we did well or not.’).

<sup>191</sup> Interview with Legal Officer, ICTR Chambers, ICTR-AO/05 (n 188), at 8 (‘You are saying, allowing [witnesses to relate] a full account even if it is not fully relevant to the case before the court...? I see no problem with that except for the possibility of protracting the trial phase. That could be a problem given that these trials are already so long. ... I do know that they [witnesses] sometimes get cut off. While that may seem insensitive, I do not think that this is the best place for that sort of thing to happen.’); Interview with ICTR Judge, ICTR-AJ/08 (n 185), at 6.

<sup>192</sup> Interview with an ICTR Judge, ICTR-AJ/09, Arusha, 16 May 2008, at 9. Compare this with an assessment of the judges’ efforts in this regard by another staff member: ‘the Judges are doing their best to achieve that. ... I believe that the Judges have really tried to accommodate all those aspirations, and you see that, especially in the sentencing.’: Interview with Legal Officer, ICTR Chambers, ICTR-AO/10, Arusha, 19 May 2008, at 7.

and ICTR.<sup>193</sup> No need to justify the value of such perspectives, being expressed by persons who effectively shape the tribunals' procedural practice.

### 4.3 Plea for a moderate approach

The earlier critique of the 'extreme' positions and the insights from the field point out that this author finds moderate legalist approaches more appealing, insofar as they acknowledge a complex yet indirect relationship between the functions of the trial process and the objectives of international criminal justice. The idea of interplay between the two sets of goals is not challenged here, but the point is that it is subtler and ought not to be reduced to plain equation or simplistic determinism. The trial proceedings and other segments of the process may be expected to contribute in some way to the fulfilment of specialized objectives of international criminal justice, but that contribution is neither direct nor decisive.<sup>194</sup>

The moderate approach holds that reimagining the justice process with a view to making it a servant of the socio-political goals is a misconceived attempt to hasten outcomes achievable at best only with the change of several generations.<sup>195</sup> Best exemplified by the lasting impact of the IMT in Germany,<sup>196</sup> premature assessments of the tribunals' impact run a high risk of error as the local appreciation of their legacy evolves over time.<sup>197</sup> It is impossible to accomplish the long-term missions of peace and reconciliation overnight. The insistence that the tribunals should invest in this grandiose enterprise directly is counterproductive. It puts at stake their legitimacy, undermines their important indirect contributions to said missions, and endangers the prospects of achieving those in the long run.

However desirable those might seem, the tribunals should refrain from attempts to influence the broader outcomes of their work or to exercise control over the societal effects through legal process. The legacy of the courts, like reputation, is not really susceptible to control.<sup>198</sup> Their proceedings must be modestly confined to the orderly implementation of the proper function of the process: establishing the facts and determining the guilt or innocence of the accused in accordance

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<sup>193</sup> For further 'hearsay evidence' to the same effect, see Mégret, 'The Legacy of the ICTY' (n 23), at 1036.

<sup>194</sup> See also D.M. Groome, 'Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials', (2006-7) 25 *Penn State International Law Review* 791, at 799 (while a constructive contribution of international criminal justice to reconciliation can be expected, it is only partial; an important role belongs to national criminal proceedings); Beigbeder, *International Justice against Impunity* (n 39), at 89 (the objective of assisting reconciliation can only be indirectly helped by the ICTY proceedings, as its main work remains 'to render justice') and 110 ('there is no evidence that the [ICTR] will contribute to the reconciliation of the Rwandan population: reconciliation is a political, not a judiciary, function.');

P. Pinto Soares, 'Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism', (2012) 23 *Criminal Law Forum* 161, at 176 ('It [international criminal justice] does not aim at ensuring international peace and security, national reconciliation or satisfying victims. These might amount to indirect effects of the activity of international courts but do not constitute the core of their mandate.').

<sup>195</sup> See also Beigbeder, *International Justice against Impunity* (n 39), at 234 (the ICC's 'primary role is to bring to justice those considered most responsible for atrocities or mass violence and to determine appropriate reparations to victims. Its more utopian and secondary role in preventing further crimes will take many prosecutions and judgments, and many years before it takes hold.');

Orentlicher, 'Shrinking the Space for Denial' (n 4), at 29 ('the impact of an international criminal tribunal is the work of generations, changing over time and in the light of myriad mediating factors.');

Ellis, 'Combating Impunity' (n 45), at 155 (citing M. Hellman: 'one has to be realistic and one can't expect war crimes tribunals to practice ... positive results such as restoration and the maintenance of peace in a short term; it is a long-term objective.').

<sup>196</sup> For revealing observations on the changing perceptions of the IMT and subsequent Holocaust trials among the German population, see Karstedt, 'The Nuremberg Tribunal and German Society' (n 33), at 25-33 (concluding that '[t]he civilising influence of the Nuremberg Trial was simultaneously direct and instantaneous, but it also took several decades and developed at a slow pace. ... This instantaneous impact was overridden by the long-term and slowly developing civilizing influence that needed to be supported by further trials and continuous debate.').

<sup>197</sup> See also Clark, 'The Impact Question' (n 4), at 56; V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008) 244.

<sup>198</sup> Swart, 'Some Critical Comments' (n 23), at 990.

with the applicable procedure. Conducting fair trials is already more than a significant challenge in the tribunals' operational circumstances, given their scarce resources and limited capacities, ultimate dependence on state cooperation and the wavering political will of states to provide it due to the *Realpolitik* at play.<sup>199</sup>

If the primary goal of dispensing procedural justice is heeded adequately, one can rest assured that the tribunals' legacy will stand the judgment of posterity. The courts' immaterial outputs—acquittals, convictions, evidentiary record, norm determination, local capacity building, and positive impact on victim communities and beyond—are indispensable contributions to the achievement of aims listed in the mission statements. As one ICTY Trial Chamber held persuasively in *Blaškić*,

The International Tribunal was established to aid in the restoration and maintenance of peace in the former Yugoslavia. *As a criminal court, its primary obligation is to provide a fair and expeditious trial and to guarantee the rights of the accused.* This adjudicatory process strengthens the rule of law, a fundamental principle shared by all members of the international community. *If effective, this may contribute to reconciliation, which is a precondition for lasting peace.*<sup>200</sup>

The expectation that the proceedings which comply with the tenets of fair trial and the rule of law will eventually bring about the desired result lays bare the deliberately 'faith-based' nature of the legalist and normative undertaking of the courts. From a judicial (as opposed to partisan, policy, or administrative) perspective, the proper discharge by the tribunals of their primary obligations is the true criterion for evaluating their ability to meet ambitious and distant institutional goals.

The moderate approach hereby advocated does not do away completely with the asserted link between the idiosyncratic goals and the procedure.<sup>201</sup> On the contrary, the need for a degree of consistency between them is recognized, but the link is deemed not to be overly deterministic or causal. International criminal practitioners rarely if ever situate themselves in the vanguard of the peace-building, reconciliation, victim-justice, and history-writing efforts undertaken by the international community or states pursuing post-conflict justice. But they keep said objectives in the back of their minds, not as an itemized program of action or a short-term plan but rather as an ideological foothold which informs how they do things in carrying out their daily functions. This is the understanding not only of the judges and legal officers, but equally of prosecution attorneys and defence counsel.<sup>202</sup>

What does this qualified effect of institutional goals on the procedural practice entail in normative terms? The actors should not strive to promote the goals that had guided the creators of the courts through procedural practice and ought to refrain from giving that impression. Nevertheless, they should make sure that the procedural law in action neither undermines nor is

<sup>199</sup> See among others Ellis, 'Combating Impunity' (n 45), at 141-42.

<sup>200</sup> Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, TC I, ICTY, 18 July 1997, para. 154 (emphasis added).

<sup>201</sup> See also G. Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (Hague: T.M.C. Asser Press, 2010) 598 ('it remains to be seen to what extent they [goals] shape the law of criminal procedure, because more than one procedural solution might correspond to one and the same objective. Yet, one can imagine a certain degree of influence.').

<sup>202</sup> See e.g. M.B. Harmon and F. Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', (2004) 2 *JICJ* 403, at 404, note 2 (the authors, both members of the ICTY OTP at the time, recognize that '[w]hile the establishment of a coherent historical record to thwart the efforts of future revisionists is not the core role of prosecuting trial attorneys at the ICTY, they must be mindful of the need to help to create [an historical record]'; M.G. Karnavas, 'Gathering Evidence in International Criminal Trials – the View of the Defence Lawyer', in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007) 77 ('defense lawyers practising before the ad hoc tribunals must always be aware of the larger context and purpose for which such institutions exist, lest they be taken by surprise when external affairs and larger goals affect the internal workings of the tribunal') and 78.

fundamentally inconsistent with the institutional goals.<sup>203</sup> The consideration of whether ‘the organizational process facilitates the aim of the organization’ is a principal method of assessing effectiveness under the ‘rational system approach’.<sup>204</sup> In order to remain valid, the mission statements ought to be vindicated through procedural form to the extent possible. Otherwise, they should be incorporated into the structure and features of the process through reforms.<sup>205</sup> In the absence of an adequate ‘translation’ of the institutional objectives into the fitting procedural modalities, they can only be accommodated in practice to a limited extent. If the procedure is not adjusted in a timely fashion in order to address any emerging mismatch with the goals, the latter will have to be interpreted narrowly or else remain dormant as rhetoric decorations. Of course, the gaps between ‘promises’ and ‘reality’ are not ideal and ought to be closed whenever possible, but the trial players can do little to ‘activate’ them procedurally without the law having being made suitable for that.

It bears emphasizing that the failures to ensure general consistency between the overarching goals and the actual procedural practice can be deeply problematic. Serious gaps between the aspirations and means sever the link, however tenuous and assumed, between the institutional missions and the procedural form. This may create an indelible impression of double standard and raise intractable credibility and legitimacy issues. If the evident consequence of a certain procedural practice is that it regularly and systematically sweeps aside, rather than facilitates, some of the goals of the project, the claim that the tribunal truly aspires to attain those goals cannot be sustained in a good faith.

The foregoing point about the supposed macro-dimensional consequences of an individual witness testimony can be taken as an example. If testifying victims routinely leave the courtroom embittered and if they are systematically murdered on account of their contact with the tribunal upon return (e.g. due to faltering witness protection and relocation schemes), the claim that the respective judicial institution genuinely serves the purpose of delivering justice to the victims becomes absurd. The aims of redressing victims and reconciling the society are ridiculed by inadequate institutional and procedural frameworks and cannot be believable unless sustained by the infrastructure required to prevent that the tribunals’ operations effectively become an antithesis to the professed objectives. Similarly, a tribunal may be so handicapped in its fact-finding methods that it is unable to credibly establish the facts directly relevant to individual criminal responsibility of the accused on the charges.<sup>206</sup> If so, the tribunal cannot be hoped to be in a position to make a meaningful contribution to the balanced assessments of controversial historical events and the compilation of an accurate record.

Whenever confronted with a serious inconsistency between the aspirations and realities like those just described, a fundamental choice should be made between ‘adjusting the means to the ends, adjusting the ends to the means, or a combination of both’.<sup>207</sup> The first option—not necessarily our first preferred choice, as will be shown—is to give up or scale down the objective that has proved to be overambitious or hollow philosophy, by omitting it from the mission statements of the tribunals. This reductionist solution has been advocated by Mirjan Damaška:

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<sup>203</sup> Similarly, see Eser, ‘Procedural Structure’ (n 29), at 114 (the tribunals are ‘to support, or at any rate, not to obstruct, goals typical of international criminal justice.’)

<sup>204</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 22.

<sup>205</sup> Swart, ‘Damaška’ (n 28), at 114 (The choice of goals to be pursued should preferably have consequences for the legal process adopted, and, conversely, a preference for one type of legal process over another should have consequences for the selection of goals to be pursued.); Heikkilä, ‘The Balanced Scorecard’ (n 2), at 50 (‘when something has been defined as a mission, it should *whenever possible* be reflected in every aspect of the functioning of the organization.’)

<sup>206</sup> For a revealing study regarding the ICTR, SCSL and SPSC, see N. Combs, *Fact-Finding without Facts: Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

<sup>207</sup> See e.g. Swart, ‘Damaška’ (n 28), at 100.

### Chapter 3: Measuring Effectiveness: Teleology and Efficiency

some presently accepted objectives of international criminal justice of international criminal courts should be altered—that is, scaled down, or even abandoned, and left to other mechanisms of public responses to massive human rights violations.<sup>208</sup>

For example, according to him, the goal of establishing a historical record cannot adequately be accommodated in the criminal process, particularly under a two-case approach, and the evidence accumulated through trials can at best ‘provide fragmentary material as scaffolding for subsequent historical inquiry’.<sup>209</sup> As a result, it is identified as the goal to be ‘abandoned, muted or downplayed’, especially given the existence of mechanisms that are more suitable for serving this objective.<sup>210</sup> The objective of satisfying victims is another candidate for reduction in view of the difficulty of integrating the enhanced participation by victims into the ‘bipolar trials’ and, again, provided that there are alternative avenues for obtaining reparation and restoration.<sup>211</sup> The objective of contributing to the restoration and maintenance of peace has been challenged on similar grounds and identified for ‘scaling down’.<sup>212</sup>

The second avenue, which can be called reformist, would be to look into what is wrong with the process in light of the institutional goals and whether any inconsistencies can be fixed by fine-tuning the procedures. Where the procedure (or the lack thereof) is deemed to subvert a recognized institutional objective, a legislative solution or a change of practice within the ‘margin of appreciation’ may be required to make the process more responsive to said goal. Travelling down this road, a number of scholars and practitioners have, for example, sweepingly questioned the wisdom of adopting the adversarial or party-driven method of conducting international criminal trials in view of its supposed departure from the institutional goals.<sup>213</sup> As a result, potentially far-reaching reforms aimed at reconciling the procedure with those goals have been contemplated. These arguments can be briefly introduced here without pronouncing on their merits at this juncture.

The first reason for the goal-based critique of the adversarial process is that in epitomizing the contradiction between the two parties and their opposing versions of the truth, it compels witnesses to side with a respective party and engenders unseemly loyalties along the partisan divides. The adversarial scheme, it is claimed, tends to polarize the truth, antagonizes witnesses, and thereby adds fuel to a discursive or even an armed conflict raging outside of the courtroom, instead of extinguishing it.<sup>214</sup> As regards who and how is to call and examine witnesses, this

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<sup>208</sup> Damaška, ‘What Is the Point’ (n 29), at 330.

<sup>209</sup> *Ibid.*, at 337-38.

<sup>210</sup> *Ibid.*, at 340-42. See also Damaška, ‘Problematic Features’ (n 29), at 183.

<sup>211</sup> Damaška, ‘What Is the Point’ (n 29), at 342-43; *id.*, ‘Problematic Features’ (n 29), at 183.

<sup>212</sup> Beigbeder, *International Justice against Impunity* (n 39), at 229 (contending that the ICTY and ICTR goal of ‘contributing to the restoration and maintenance of peace’ is ‘overambitious’ as it requires the tribunals to undertake a ‘political peace-keeping or peace-making role’); Damaška, ‘Problematic Features’ (n 29), at 183.

<sup>213</sup> For an expression of a weak normative preference for the ‘inquest’ model, see Swart, ‘Damaška’ (n 28), at 107 (‘It would seem that the peculiar goals of international criminal justice have a strong policy implementing character and are, therefore, better served by a choice in favour of an inquest model rather than a contest model. But the same is not obvious where the more traditional goals are concerned.’). See also *ibid.*, at 112 (speaking about ‘an undeniable tension between the goals of international criminal justice, on the one hand, and proceedings structured as a contest between two parties, on the other’).

<sup>214</sup> Interview with Judge Emile Short of the ICTR (n 184), at 7 (‘I think that the adversarial process of the *ad hoc* tribunals as they are at the moment is not geared towards achievement of the objectives of peace and reconciliation.’); Bonomy, ‘The Reality of Conducting an International Criminal Trial’ (n 39), at 350 (‘The confrontation which is an essential part of the adversarial process tends to antagonize witnesses, with the result that the conflict being explored is revived, this time as a contest between counsel representing the accused on one side and the witness whose sympathies lie naturally with the other.’); Damaška, ‘Problematic Features’ (n 29), at 176 (‘any procedure which incorporates two cases must produce polarization of the issues. Because each party is inclined to present and emphasize only information favourable to its claims, while playing down or ignoring the rest, a bipolar tension field emerges, casting a shadow over the undivided middle.’)



reasoning has been advanced to advocate for watering the adversarial nature of the process down.<sup>215</sup> Finally, the predictable outcome of this is the suggestion that the non-adversarial fact-finding arrangements would have been better for promoting the reconciliation and the rule of law, establishing the historical truth, and providing victims with redress.<sup>216</sup> Similarly, it has been contended that the norm projection (expressive or socio-pedagogical goal)—nominated by Damaška as the prime goal—would have better been served by the process that defies the bipolar model of presenting evidence. According to him, ‘the clash of conflicting positions tends to relativize, or weaken, both—including the court’s intended educational messages’.<sup>217</sup> Accordingly, if the didactic goal is to be made ‘central to the mission of international criminal courts’, the procedural arrangements with regard to case structure and the way of putting evidence on the record must be adjusted to fit this goal.<sup>218</sup>

While these arguments have so far had little impact on the evolution and reforms of procedural arrangements in the tribunals, on a number of other salient issues the ‘reformist approach’ has successfully been employed to channel the translation of institutional goals into the fitting procedural form. International criminal procedure has undergone the process of progressive development based on the lessons learnt from the operations of the predecessor tribunals. The procedure for the more recent courts had been modified when establishing them or during their lifetime in response to the perceptions that pre-existing practices had not fully been in line with the professed objectives.

For example, the critique of the adversarial model in view of the objections to the propriety of plea bargaining in ICL falls in this category. Such objections have been on account of the alleged inconsistency between this practice and the specialized goals of establishing the historical truth, redressing victims, and ‘spreading pedagogical messages’.<sup>219</sup> Ultimately, it may have had some effect, triggering a goal-driven reform towards adjusting the legal consequences of the admission of guilt at the ICC, as compared to guilty pleas in the *ad hoc* tribunals. The institute of the admission of guilt as envisaged in the ICC Statute draws upon the ICTY and ICTR approach under Rule 62 in part of the criteria of validity of a guilty plea.<sup>220</sup> But the approach distinguishes itself from that of the ICTY and ICTR in that it accords the judges a broader discretion to determine whether to convict on the sole basis of the admission of guilt or to proceed under ordinary trial arrangements despite the formally valid admission. The ICC Trial Chamber may thus exercise a tighter control over the scope of facts emerging from uncontested proceedings, for it has the power to request the Prosecutor to present additional evidence or to order that the trial be continued in an unabbreviated

<sup>215</sup> Eser, ‘The “Adversarial” Procedure’ (n 29), at 226 (‘[d]owngrading the “adversariality” of the proceedings, in treating witnesses as “witnesses of the court” rather than “prosecution witnesses” as opposed to “defence witnesses”, would more easily avoid projecting the national/ethnic conflict behind the criminal events ... into the courtroom, and perhaps from there even fortify this lesson back to the watchful communities at home. If witnesses, instead of being attached, and accordingly labelled, to one or the other adversary side, could simply understand themselves as being neutral “court witnesses” in search of truth, this could also be a contribution to promoting reconciliation.’).

<sup>216</sup> E.g. Swart, ‘Damaška’ (n 28), at 112; Damaška, ‘Problematic Features’ (n 29), at 182 (‘If the three objectives ... are indeed prominent among the goals of international criminal courts, then a procedure which emphasizes a single pre-trial investigation together with a judge-driven presentation of evidence at trial would seem preferable to the present two-cases system, in which the parties conduct their own parallel pre-trial investigations, and, at trial, may orchestrate their own cases.’). See also *ibid.*, at 184 (‘judge-driven fact-finding arrangements would become preferred over those in which parties mount and orchestrate their own competing cases.’).

<sup>217</sup> Damaška, ‘What Is the Point’ (n 29), at 357.

<sup>218</sup> Suggesting the relaxation of a bipolar case structure because the defendant’s right to self-representation and the freedom to propagate views inconsistent with ‘human rights culture’ can be curtailed with greater ease: *ibid.*, at 357-60.

<sup>219</sup> See e.g. Damaška, ‘Problematic Features’ (n 29), at 182 and 184 (‘because presenting evidence of atrocities in open court would be a priority the resulting focus on trials would reduce the allure of trial-avoidance mechanisms, currently so popular in most national and some ad hoc international criminal courts.’). In more detail, see Chapter 5.

<sup>220</sup> Art. 65 ICC Statute is a reflection of the ICTY’s experience with guilty pleas in *Erdemović*. See K. Roberts, ‘Aspects of the ICTY Contribution to the Criminal Procedure of the ICC’, in R. May *et al.* (eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (The Hague: Kluwer, 2001) 563-68; F. Guariglia and G. Hochmayr, ‘Article 65’, in Triffterer (ed.), *Commentary on the Rome Statute* 1223. In more detail, see Chapter 6.

form in spite of the admission.<sup>221</sup> The guiding consideration for the Chamber to continue with an ordinary trial is whether ‘a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims’. This reflects the wish of the drafters to repair the perceived flaws of the guilty plea procedure at the *ad hoc* tribunals whereby the consideration of victims’ interests had no impact whatsoever on diversionary decisions.

The other prominent example of a consummated goal-driven procedural reform is the earlier noted tectonic shift in international criminal justice on the matter of victim standing before the courts.<sup>222</sup> The calculated moves to enhance the procedural status of victims embarked upon at the ICC, ECCC and STL as compared to the ICTY and ICTR precedents were meant to fit the reality of trials to the programme of redressing victims. The institution of victim participation at the ICC clearly owes its existence to the recognition that the procedure at the *ad hoc* tribunals had not sufficiently accommodated the victims’ legitimate interests. There, victims had been given neither a distinct capacity other than witnesses nor the right to reparation, and this instrumental approach was believed to frustrate the victim-servicing goal.<sup>223</sup> The conception took root that the permanent ICC cannot afford keeping the crime victims out of the procedural equation,<sup>224</sup> especially against the backdrop of developments in national criminal justice systems.<sup>225</sup> The insertion of victims as participants in the ICC regime endowed its trials with a distinct function of providing them with a platform for expressing views and concerns, exercising other rights, and requesting reparations.<sup>226</sup>

Thus, the policy decision to embark on the unprecedented and bold experiment had been motivated by nothing else than goal-oriented and value-related concerns. It was hardly an outgrowth of any pragmatic desiderata which only militate against the ambitious victim participation scheme. The questions of whether participation is a sound way of translating the victim-redress goal into the procedural language, and how it should be implemented so as not to endanger the more traditional functions of criminal process remain contested.<sup>227</sup> Some of the (former) judges of the *ad hoc* tribunals are not too enthusiastic about the idea, although they do recognize the need for a reparatory system.<sup>228</sup>

<sup>221</sup> Art. 65(4) ICC Statute. For more detail, see Chapter 6.

<sup>222</sup> See *supra* 3.5.

<sup>223</sup> Ellis, ‘Combating Impunity’ (n 45), at 158 (‘Once witnesses and victims give testimony, however, they are often “lost in the process” and “unceremoniously” discarded’... The result can be a dramatic loss in confidence and a sense that justice is not being done.’); Swart, ‘Some Critical Comments’ (n 23), at 991 (reporting ICTY President Robinson’s view that ‘[i]t is problematic that victims did not receive any reparation or compensation. The ICTY did not position itself close enough to the victim communities.’).

<sup>224</sup> D. Donat-Cattin, ‘Article 68’, in Triffterer (ed.), *Commentary on the Rome Statute 1277* (the ICC victim participation regime emerged out of ‘widespread and strong criticism against the lack of provisions of this kind’ at the *ad hoc* tribunals); Roberts, ‘Aspects of the ICTY Contribution to the Criminal Procedure of the ICC’ (n 220), at 569 (‘With respect to the procedural rights and role of the victim, the drafters of the Rome Statute specifically addressed a perceived lacuna in the ICTY Statute and Rules, which deal with victims principally in their role as witnesses, focusing on their protection.’).

<sup>225</sup> See e.g. M.S. Groenhuijsen, ‘Herstel, schadevergoeding en normbevestiging. Naar een processuele vertaling van strafdoeleinden’, in B. van Stokkum (ed.), *Straf en herstel. Ethische reflecties over sanctiedoeleinden* (Den Haag: Boom Juridische Uitgevers, 2004) 281.

<sup>226</sup> Positing victim participation as a goal of *procedure*: Ohlin, ‘Goals’ (n 28), at 64-65.

<sup>227</sup> Damaška, ‘What Is the Point’ (n 29), at 333-4 (noting as ‘troubling’ the ‘rocky relationship between the desire to be solicitous of the accused’s procedural rights and the desire to provide satisfaction to victims of international crime’) and 342-3 (‘enlarged role of victims, even if properly controlled by the court, clashes with incentives needed to maintain the vitality of bipolar trials’).

<sup>228</sup> See e.g. Interview with Judge Emile Short of the ICTR (n 184), at 6-7 (‘The ICC is now trying to integrate ... victims into the whole process at every stage of the investigation and trial process. That is a step in the right direction and may contribute to reconciliation. But even there, it is a very difficult process because at what stage do you get the victims and witnesses to be integrated into the process and how do you do it without violating the rights of the accused persons? At every stage during the trial one has to be so careful about statements made or any act done which might be interpreted as violating the fair trial rights of the accused. That would be a paramount consideration at the back of the mind of the Chamber.’); C. van den Wyngaert, ‘Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’, (2012) 44 *Case Western Reserve Journal of International Law* 475, at 477

The third and final example of the goal-driven trend change in international criminal procedure is the reform towards the reinstatement of separate sentencing hearings at the ICC and STL. Such hearings are to be held upon conviction whereby the submissions assisting the court in the determination of an appropriate sentence can be heard.<sup>229</sup> The first convictions after contested trials were followed by a distinct sentencing process at the ICTY and ICTR.<sup>230</sup> But soon thereafter the tribunal judges decided to merge the guilt-determination and sentencing into one in order to expedite the process. This reform has come to be criticized by scholars from the perspective of the presumption of innocence and because it was seen as inconsistent with the ‘expressive’ goal. Namely, it relegated the sentencing into a mere ‘afterthought’ of international justice process.<sup>231</sup> This critique has apparently had impact because the structure of trial proceedings at the ICC and STL envisages the possibility of holding separate hearings devoted to sentencing matters upon the judgment of conviction.

This discussion demonstrates that the cogency of the proposed or consummated goal-driven reforms of procedure is more often than not subject to debate, either due to persisting doubts about the accuracy of negative evaluations of pre-existing arrangements as defective or due to the questioned validity of the goals. The objections against aligning the procedure with the goals rarely target the asserted link between them, which tends to confirm the logic underlying such reforms. In case a specific procedural form (or the lack thereof) is seen as fundamentally endangering the ultimate aims of the judicial institution, the avenues should be explored to adjust the process for it to square better with the tribunal’s broader mission. Since the special goals are ideological foundations of the system, they cannot be neglected or even actively subverted in its legal process.

However, as some of the goal-based critiques of the adversarial model demonstrate, such an inexorable nexus can far from always be established. The central point of this moderate account of the interplay between the goals and the procedural form is the plea for a more cautious and balanced approach when criticizing and amending the procedural law in light of institutional objectives. This approach is consonant with the view that such goals can be usefully employed as an external perspective and a normative parameter for evaluating international criminal procedure being an aspect of ‘efficiency’. This recognition contrasts with the common implicit use of ‘goals’ for evaluating international criminal process, resulting either in the affirmation of its validity or in proposals for reform.<sup>232</sup> The important nuance is that, as the terminological discussion above shows, the objectives drawn from the socio-political and the procedural domains should not be confused, despite a degree of similarity. The process may never be stretched or bent in order to meet any socio-political objectives through individual legal proceedings.

International criminal trials are tasked with their proper objectives and functions, which distinguish a trial from other phases. The establishment of the truth in the case with a view to establishing the guilt or innocence is identified as the cornerstone function, and it is the one that attracts special attention.<sup>233</sup> In addition, trials may exert certain educative and communicative effects. Although those effects may be valuable in terms of promoting and affirming the ideas of the

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(disagreeing that criticisms against the *ad hoc* tribunals concerning the lack of participatory rights were justified). See also Judge Fausto Pocar: ‘I believe that the absence of victims as parties from proceedings—which has been criticized actually—is a non-problem, and the current work of the ICC in this respect gives room for pause. The ICC is to a large extent prevented from functioning because when you have mass crimes it is almost impossible to have the victims participate in the proceedings. ... Victims mostly participate as witnesses and the ICTY had thousands of those. So participation was there.’ See interview with Judge Pocar cited in Mégret, ‘The Legacy of the ICTY’ (n 23), at 1028.

<sup>229</sup> Art. 76 ICC Statute; Rule 171 STL RPE.

<sup>230</sup> Sentence, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, TC I, ICTR, 2 October 1998; Sentencing Judgement, *Prosecutor v. Tadić*, Case No. IT-94-I-T, TC II, ICTY, 14 July 1997.

<sup>231</sup> Sloane, ‘The Expressive Capacity’ (n 34), at 88-91. See also Swart, ‘Damaska’ (n 28), at 104 (regarding the abolition of sentencing hearings as ‘in some respects unfortunate’).

<sup>232</sup> E.g. Groome, ‘Re-Evaluating the Theoretical Basis’ (n 194), at 797; Damaška, ‘Problematic Features’ (n 29), at 175-86.

<sup>233</sup> Chapter 5.

rule of law and fairness, they are neither goal-determined outcomes nor proper procedural functions but, rather, incidental by-products. From this perspective, it is questionable whether the deliberate and calculated pursuit of, say, didactic and historical truth-finding goals through legal process—beyond occasional and fleeting alignment—can ever be consonant with the true functions of criminal trials.<sup>234</sup> Arguably, such motives are in principle improper if extrapolated onto the dimension of procedure. This is why the notion of ‘instrumental objectives of procedure’ appears untenable.<sup>235</sup>

While the function-based distinction between phases is acceptable, the attribution to the various phases of proceedings of the objectives, which are rather to be served by the tribunals as a whole, in order to ensure that those objectives are vindicated as a matter of priority or ‘structural bias’ embedded in the relevant phase, is problematic.<sup>236</sup> This idea conflates the functions of process and the rationales for the establishment of the tribunals or espouses an undue degree of determinism in this regard. The moderate approach set out here is prepared to consider whether the procedural objectives negatively correspond (do not undermine) the institutional goals and, if they do, what modifications to the procedure are warranted in ensure greater consistency with the specialized goals and circumstances of international criminal justice. But it decidedly rejects the necessity or even appropriateness of forcing criminal process into directly implementing substantive criminal law policies and socio-political goals.

#### 4.4 Ambiguity of goal priorities and reductionism: Ostensible solution to imaginary problem?

One of the more influential strands in the literature on the goal-setting in international criminal justice advocates the need to draw clearer priorities among the multifarious institutional objectives of the tribunals. This claim has been referred to above as ‘reductionist’ and is eloquently and persuasively argued by Damaška.<sup>237</sup> The corollary of this assertion is that the goals the tribunals are not equipped to achieve, owing to insurmountable and objective limitations, should be abandoned or watered down.<sup>238</sup> Further, a priority status needs to be conferred on one ‘paramount goal’ (namely, the ‘didactic goal’). It would then wield an argumentative advantage over any other institutional objective, if any other are there to remain, in the weak sense that ‘if a procedural arrangement seemed disadvantageous from the standpoint of this goal, that arrangement would not ipso facto be rejected, but its survival would require a compelling justification.’<sup>239</sup> At least in part of the plea for narrowing down the range of valid objectives, the reductionist line of argument has proved impactful to a certain degree.<sup>240</sup>

This account needs to be revisited in the present context. If it were to be accepted, the state of confusion and irreconcilable tensions between the institutional goals it portrays might limit the normative value of the teleology of international criminal justice as a parameter relevant to procedure, except for the ‘paramount goal’. However, the identification of such a goal would

<sup>234</sup> Cf. Ohlin, ‘Goals’ (n 28), at 63 (‘to the extent that the didactic and historical truth-seeking goals of ICP can be fulfilled, consistent with the criminal trial’s *primary* aim of adjudicating individual guilt, then these goals are relevant to the design and operation of basic procedures of the international criminal process.’).

<sup>235</sup> Cf. *ibid.*, at 60 (suggesting that some ‘objectives of international criminal procedure ... are instrumental in nature because they service the goals of international criminal law.’)

<sup>236</sup> See Ohlin, ‘Goals’ (n 28), at 76 (‘It may even be ... that each stage of the trial process embodies a different ordering’), referring to M. Klamberg, ‘What are the Objectives of International Criminal Procedure? –Reflections on the Fragmentation of a Legal Regime’, (2010) 79 *Nordic Journal of International Law* 279. But Klamberg proposes a phase-specific attribution of *procedural* rather than institutional objectives, the difference which is essential. See *ibid.*, at 284–85, 295.

<sup>237</sup> Bert Swart raised the questions of compatibility of goals and which of them should take precedence but chose to leave them aside: Swart, ‘Damaška’ (n 28), at 102.

<sup>238</sup> See text to *supra* n 44.

<sup>239</sup> Damaška, ‘Problematic Features’ (n 29), at 183.

<sup>240</sup> This is seen from the concerns about the ‘overlapping and often conflicting goals’, the lack of ‘relative hierarchy’ between them and the need for ordering, and the greater recognition acquired by the ‘didactic goal’ in the literature. E.g. Ohlin, ‘Goals’ (n 28), at 60, 62, 67.

augment its relatively argumentative power and have broader consequences for the evaluative exercise. Hence the idea of prioritizing among institutional objectives and the implications it may have for the use of the 'goals' parameter deserves a comment.

To begin with, as follows from the inventory of objectives presented earlier,<sup>241</sup> this author is not fundamentally opposed the 'didactic' goal as such – or at least no more so than against any other special systemic goal.<sup>242</sup> What he takes issue with is the very approach of assigning any institutional goal a *primus inter partes* status for the purpose of reforming the procedural form accordingly. The deterministic link between the goals and procedure this position appears to assume has already received a detailed response and need not be dwelled upon. The initial premise of the reductionist paradigm is the claim about the overabundance of potentially conflicting objectives which may be harmful to the legitimacy and credibility of international criminal justice.

To a large extent, this claim results from the ongoing mix-up between the different tiers of teleology of international justice.<sup>243</sup> The factor which is likely responsible for it is the benevolent 'overzealousness' of some of the project's proponents.<sup>244</sup> They tend to indiscriminately ascribe a plethora of ambitious socio-political goals not only to international criminal justice and its institutions generally, but also to its specific processes and manifestations. The overblown presentations in turn feed unrealistic expectations among the tribunals' constituencies and, in particular, the victims. The confusion is detrimental, given the urgent need for accurate explanations of the fundamental principles underlying the tribunals' decision-making processes (the presumption of innocence, the burden of proof beyond reasonable doubt at trial etc.) among their beneficiaries.<sup>245</sup>

As part of the outreach, it is vital to emphasize the differences between the ultimate ends of the project and the more immediate goals, as well as functions and limitations, of the process of international justice. The communication enterprise ought, as a primary matter, to convey the message that the project's ability to directly contribute to the desired societal outcomes is normatively and practically limited.<sup>246</sup> Instead, the accounts which paint the aspirations of the trials too generously, work to entrench lay misconceptions about the mission of the courts and confirm the pre-existing local suspicions about their lack of impartiality and independence from politics.

The tribunals can seldom boast popular support in the target countries; the mostly negative perceptions on the ground are widely reported.<sup>247</sup> Cultivated by the nationalist politicians and vicious propaganda in the local media, bias against the courts is shared by the large segments of the population. As such it is a fertile soil for speculations about the ulterior motives behind convicting

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<sup>241</sup> *Supra* 3.4.

<sup>242</sup> This is not to say that didacticism does not have nasty sides to it. See e.g. Zolo, 'Peace through Criminal Law?' (n 34), at 731-32.

<sup>243</sup> *Supra* 2.

<sup>244</sup> In a similar vein, see Sloane, 'The Expressive Capacity' (n 34), at 45.

<sup>245</sup> Noted e.g. in Damaška, 'What is the Point' (n 29), at 349 ('a high priority demand on international criminal courts should be to establish effective lines of communication with local audiences.');

<sup>246</sup> Stahn, 'Between "Faith" and "Facts"' (n 2), at 282.

<sup>246</sup> To the same effect, see Clark, 'The ICTY and Reconciliation in Croatia' (n 4), at 399-400 ('It is ... essential not to over-rely upon criminal trials. ...[U]ltimately, one of its [ICTY's] most significant legacies will be to make people more aware of the fact that the tribunals are not a panacea, that trials cannot do everything and that a more creative and multi-dimensional approach to transitional justice and dealing with the past is required.');

Stover, *The Witnesses* (n 173) 153 (proposing 'a more realistic view of what criminal trials can accomplish in societies struggling with the immediate aftermath of war.').

<sup>247</sup> For instance, the ICTY did not (and, seemingly, does not) enjoy support in most parts of the former Yugoslavia (except for Kosovo). See e.g. M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', (2009) 7 *JICJ* 89, at 89; Orentlicher, 'Shrinking the Space for Denial' (n 4), at 27 (in Serbia, the ICTY's influence is 'profoundly constrained by factors beyond the court's control, notably including the entrenched and vocal opposition of key Serbian leaders'). For empirical findings, see Clark, 'The ICTY and Reconciliation in Croatia' (n 4), at 405-408 (reporting the perceptions of the ICTY in Croatia as 'anti-Croat'); *id.*, 'The Impact Question' (n 4), at 67-68 (based on the sampling data from BiH, reporting the perceptions of the ICTY among various ethnic groups as biased against those groups).

or acquitting someone. Internal processes of the tribunals are too easily misjudged based on the specific outcomes of adjudication. What should otherwise be seen as regular and acceptable result of a criminal trial (conviction or acquittal) is perceived as a failure by a tribunal of its ultimate objective.

This problem has surfaced recently in the public reactions in the countries of the former Yugoslavia to the ICTY's full acquittals of the KLA leadership in *Haradinaj et al.* (on retrial) and of Croat generals Gotovina and Markač (on appeal).<sup>248</sup> Rather than criticizing judgments for the fact-finding methods, quality of evidence and legal reasoning, or compliance with standards of proof and of appellate review, solely the verdicts have been at stake.<sup>249</sup> In Serbia, the acquittals were exploited by right-wing circles to the detriment of the ICTY's reputation, as confirming the veracity of the view of the ICTY as an anti-Serb court applying double standards. In Croatia, however, the acquittals of the generals were rejoiced and pompously celebrated, as if those meant that no crimes had been committed by the Croatian army during the Operation Storm or elsewhere.<sup>250</sup>

The ill-disposed apathy towards the court and intemperate reactions to its judgments—convictions of local 'heroes' or the equally despised acquittals of the former 'enemies'—are simultaneously the causes and consequences of predominantly imbalanced assessments of the ICTY work in the region. It is true that popular attitudes are often fueled by aggressive anti-Hague propaganda from the quarters particularly influential with the local populations other than politicians, including academic and religious circles.<sup>251</sup> They are therefore at least partly shaped by factors not within the court's control. However, the reduced impact of the tribunals on the target societies is also a result of an infirm and belated outreach, which is a failure attributable to the tribunals.<sup>252</sup>

The deficient understandings of the core objectives of international criminal proceedings are bound to have serious repercussions for the adequate evaluations of the tribunals' legacy and for their lasting impact on the target societies. The constituencies typically expect from the tribunals the specific trial outcomes, which are perceived as beneficial and necessary in terms of reconciliation and inter-ethnic justice. The various quarters want the tribunals to be more sensitive to their demand for adjudicative outcomes that fit better with their desired versions of historical truth. These undue expectations are bound to be frustrated, deepening cynicism, disillusionment, and denial. The nationalist rhetoric readily uses them to expose the gap between the promise of 'justice' and the (low) degree of closure and reconstruction the tribunals are apt to deliver. The problem is that no outcome of a criminal trial can be a win-win situation if extrapolated on a macro-level of groups and communities. They can be such only with a benefit of hindsight, if one adopts a detached perspective.

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<sup>248</sup> Judgement, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, TC II, ICTY 29 November 2012; Judgement, *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, AC, ICTY, 16 November 2012.

<sup>249</sup> For the same reason, the repercussions have been soothed by the more recent acquittal of ex-Yugoslav Army Chief Momčilo Perišić: Judgement, *Prosecutor v. Perišić*, Case No. IT-04-81-A, AC, ICTY, 28 February 2013.

<sup>250</sup> Reportedly, the public and media response in Croatia to the *Blaškić* appeal judgment (reducing the sentence of 45 years' imprisonment to 9 years' imprisonment) was strikingly similar: see D. Saxon, 'Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia', (2005) 4 *Journal of Human Rights* 559, at 565-66.

<sup>251</sup> R. Hodžić, 'Living the Legacy of Mass Atrocity: Victims' Perspectives on War Crimes Trials', (2010) 8 *JICJ* 113, at 114-15 (reporting the powerful impact of the local media, political and intellectual elites ill-disposed towards the ICTY).

<sup>252</sup> Clark, 'The Impact Question' (n 4), at 70 (the failure to establish the ICTY's outreach programme well before 1999 enabled local actors to 'heavily influence popular perceptions of the Tribunal'); Mégret, 'The Legacy of the ICTY' (n 23), at 1039 ('on the domestic side there were ... many efforts at "outreach" of a very different sort, which ended up drowning what might have been the ICTY's message.');

Ellis, 'Combating Impunity' (n 45), at 158 ('it took more than five years after the creation of the ICTY to initiate an outreach program. By that time, unfortunately, misconceptions and disinformation about the work of the ICTY were rampant in former Yugoslavia.').

From a legalist viewpoint, a watershed between the expected and actual trial outcomes is thus not a problem. Instead, it would have been disastrous for the credibility of the project if the judges had endeavoured to align them. The dangers of show trials would have been fully materialized if they had not disabused their minds from the possible socio-political implications of the verdicts whenever deciding on the individual guilt or innocence.<sup>253</sup> The international courts should come closer to the consumers of international justice, and the rift between the community expectations and the legalist microcosm should be bridged, but not through the process and outcomes of adjudication. It is the outreach programme that bears the bulk of responsibility for such approximation. Furthermore, in their public relations engagement, ICL practitioners ought to dispel popular myths about the grandiose missions of the tribunals, by clarifying that the ambitions of the trial process are utterly modest. International criminal justice institutions should accurately highlight what their core missions are and not feed undue expectations by lofty rhetoric and grandstanding. Otherwise, they ought to prepare for the alienating disconnect from the constituencies and the dramatic and permanent loss of legitimacy.

This should make clear the point that significant dangers lurk in the overblown presentations of the expected impact of the tribunals' work on the social realities. Notably, such dangers have little to do with the actual or ostensible *overabundance* of socio-political goals that are proclaimed as a part of the tribunals' mission statements. International criminal courts are indeed impeded by numerous weaknesses, among which the dependence on the good will cooperation by third parties, limited budgets and capacities etc. However, it is difficult to fathom how the high-minded aspirations and ambitious goals can in itself be a source of weakness, as opposed to a source of opportunities for a long-term impact.<sup>254</sup>

The source of the ostensible problem of overabundance is, yet again, in the teleological mess. The institutional goals and broad mission statements are but political rationales of the mandate-givers and perhaps ideological aspirations of the tribunals. It is not evident how they can be in a direct conflict with one another – that is, peace conflicting with reconciliation or with the compilation of a historical record, or the latter conflicting with the goal of providing redress to victims, or the redress goal conflicting with reconciliation, for that matter.<sup>255</sup> Broadly formulated as they are, goals are no conclusive directives that preordain a certain procedural setup once the choice is made to establish a criminal court. It would be strange to accept the 'conflict' claim. On the contrary, the socio-political goals recognized by the ICL discourse present a rather harmonious set of interconnected items which complement, mutually reinforce, and even are *sine qua non* to each other. Few would seriously doubt nowadays that there can be no lasting peace without reconciliation, no reconciliation without a single, consensual and credible historical record, and no such record without a prior pacification of social tensions. Since each of the goals is in some sense a precondition for achieving the other, why are we still speaking about the conflict among them?

The explanation is—and this is of course a quite different matter—that tensions may occur at the level of specific arrangements employed and processes instituted to give an expression to the various goals. This may be exemplified by the hollow ringing of the goal of redressing victims when not supported by mechanisms of reparations and at least some standing of victims in the proceedings. Similarly, a perceived conflict might arise between one goal and a mechanism or process vindicating another goal. Consider, for example, the proclaimed goals of national reconciliation, redressing victims, and historical truth-finding in a system which encourages extensive resort to plea-bargained outcomes, resulting in some serious charges and crime incidents

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<sup>253</sup> To the same effect, see also Damaška, 'Problematic Features' (n 29), at 184. Cf. Mégret, 'The Legacy of the ICTY' (n 23), at 1036 (reporting the view that this position denotes 'the huge gap between what people were expecting of the tribunal and what the tribunal was able to achieve.').

<sup>254</sup> Cf. Damaška, 'What is the Point' (n 29), at 330.

<sup>255</sup> Cf. Stahn, 'Between "Faith" and "Facts"' (n 2), at 259 ('In most situations, individual goals conflict with each other.').

being dropped by the prosecution.<sup>256</sup> It is perhaps in this sense that the rhetoric of goals ‘pulling in different directions’ is to be understood.<sup>257</sup>

Be it as it may, insurmountable and visible conflicts are rare. There are ample ways to harmonize the goals and the procedural form by reinterpreting the institutional missions and/or the rules. Instead of a ‘goal conflict’ discourse, it is more appropriate to speak of balancing them through the identification of the fitting procedural arrangements and harmonizing them where needed. The task of the tribunals is to arrive at a workable configuration of mechanisms and processes that together effectively and serve the essential values expressed by the goals. The baseline remains that even where the procedural form can be related to the goals, the same are not necessarily determinative of the procedural niceties.

What remains to be addressed in the ‘reductionist’ account are the arguments in favour of: (i) giving up some of the lofty institutional objectives and/or drawing a ranking order between them; and (ii) choosing a ‘paramount goal’. This approach offers solutions which appear attractive at first but upon closer look are objectionable. It proceeds on the premise that scaling down of the professed objectives is a necessary solution to the quandary of ineffective tribunals. This is, however, not the case, unless one wants to tackle the persisting teleological disarray by oversimplification and to require that the procedural forms slavishly be attuned to the ‘one and only’ chosen end. It may be true that some of the objectives attributed to the tribunals have no strong basis in the formal mandates and/or are not clearly recognized by them as operative goals. As unauthorized impositions or wishful thinking, they could be safely omitted or relegated from ‘goals’ to ‘side-effects’ or ‘by-products’.<sup>258</sup>

But as for the established and formally endorsed objectives, the call for abandoning some of them in order to enhance the tribunals’ efficiency is not so convincing.<sup>259</sup> In the long run it cannot be guaranteed that the scrapping of a few ‘idiosyncratic’ objectives from the mission statements would have positive effect on the performance and legitimacy of these institutions. On the contrary, the applied cure might exacerbate the malaise. In view of the current role and stature of international criminal courts in the context of post-conflict justice, a rhetorical reduction of institutional goals would likely be interpreted as the abdication of the normative faith in the tribunals and a partial recognition of their insolvency as far as long-lasting impact is concerned. This would be detrimental to their effectiveness and would unnecessarily curtail the indirect but important role they are expected to play. By denying the longer-term role, the reductionist approach will rather weaken international criminal justice. It might result in a decline of political will of international policy-makers and states to resort to it even where it should be a part of the framework for post-conflict settlement.<sup>260</sup> Clearly, this is not a good prospect for international justice and cannot be the one that has been intended by goal-reductionism.

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<sup>256</sup> N.A. Combs, ‘Copping a Plea to Genocide: The Plea Bargaining of International Courts’, (2002) 151 *University of Pennsylvania Law Review* 1, at 146 (‘charge bargaining virtually always distorts the factual basis upon which a conviction rests.’); Hodžić, ‘Living the Legacy of Mass Atrocity’ (n 252), at 128-29 (reporting negative attitudes of victims to bargained outcomes); Clark, ‘The Impact Question’ (n 4), at 73 n83. However, the plea-bargained outcomes might also make important contributions to establishing historical truth where the defendant supplies information not earlier available to the prosecution: Ohlin, ‘Goals’ (n 28), at 62.

<sup>257</sup> Damaška, ‘What is the Point’ (n 29), at 331-34. The examples used by Damaška speak to the tensions between non-equivalent goals (or not even proper goals) drawn from different teleological categories: peace (‘special goal’) v. justice (‘ordinary goal’); historical record (‘special goal’) v. individualization of responsibility (perhaps an ‘ordinary goal’, if at all); victim redress (‘special goal’) v. procedural rights of the accused (not a goal but a mandatory method, not of international criminal justice, but of procedure).

<sup>258</sup> See *supra* 3.1.

<sup>259</sup> See also Heikkilä, ‘The Balanced Scorecard’ (n 2), at 50 (speaking against ‘making the objectives of the tribunals at least significantly more modest’).

<sup>260</sup> E.g. Galbraith, ‘The Pace of International Criminal Justice’ (n 19), at 132 (‘the international community’s investment in international criminal tribunals is about peace and security as well as justice, and it is dubious whether it will or should choose to spend between ten and fifty million dollars per individual defendant to pursue only the domestic criminal law and historical record aims.’).



By the same token, the necessity and appropriateness of establishing a ‘ranking order’ between institutional objectives, in the sense of conferring on one of them an ‘argumentative advantage’ for the purpose of balancing it against other goals, is questionable.<sup>261</sup> The rationale behind the proposal is understandable and may have to do with the tendency of legal scholars (this author not excluded) to try to systematize unruly social and political realities. However, drawing priorities among the objectives by assigning them a relative weight in abstract is an exercise which is impracticable, as Damaška himself admits.<sup>262</sup> Moreover, it is arguably also normatively undesirable. Can such an ‘argumentative advantage’ enjoyed by a given objective vis-à-vis others ever be permanent, as opposed to situation-specific? The values to which the goals give expression are incommensurate yet equally benign and worthy. They are not easily susceptible to any abstract merit-based ranking.<sup>263</sup> There is simply neither a strong normative, let alone empirical, basis, nor a need to establish a general hierarchy of institutional goals in international criminal justice.

Even if one were to accept the powerful deterministic effect of goals on a procedural system, this way of ‘managing tensions’ between the objectives through assigning them a relative weight appears a solution that may be too sterile and mechanistic. The procrustean bed of the goal-ranking would unnecessarily limit the flexibility of architects and legislators. It would also dissuade them from giving full expression to the system’s values when devising the institutional and procedural arrangements and from making those values effective and operational in a true and not overly narrow sense. The position that it may be best, where necessary and appropriate, to balance the various objectives and prioritize them in respect of *specific* institutional features and procedural activities is more agreeable.<sup>264</sup>

Turning to the final issue raised by the reductionist account, the admittedly impracticable maneuver of prioritizing goals is abstract in fact nothing else than an indirect way to argue the need for a ‘paramount goal’.<sup>265</sup> If the problem of there being too many competing objectives is a problem at all, the proposed solution of watering down the institutional aspirations of the tribunals, let alone choosing one specific goal (the didactic goal or any other) is not a remedy. It is submitted that the supposed overabundance of, and tensions between, the goals is an imaginary problem. The reductionist account partially rests on a sweeping assumption of the direct societal impact of retributive justice and on the goal-determinist view of international criminal procedure.<sup>266</sup> This is contradicted by the central point of the ‘moderate approach’. The institutional goals do not (and should not) always preordain and directly impact on structure and features of a procedural system; on a variety of matters, the goals will prove procedure-neutral and normatively inconclusive.

While the difference in reasoning is important, one can notice that the reductionist position actually seeks to achieve the same outcome as the ‘moderate approach’. International criminal trials

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<sup>261</sup> See further Damaška, ‘What is the Point’ (n 29), at 339-40 (‘Managing tensions among the goals, and dealing with the courts’ limitations in attaining some of them, would be greatly facilitated if a set of priorities existed based on an understanding of the relative weights of competing goals’); *id.*, ‘Problematic Features’ (n 29), at 182 (arguing as concerns the goals that ‘it would be desirable to have a clearer sense of their relative weight’ since ‘[n]ot only could tensions among the goals then be resolved with greater confidence, but procedural means could be designed to facilitate the realization of what is agreed upon as most important to the mission of international criminal courts.’).

<sup>262</sup> Damaška, ‘Problematic Features’ (n 29), at 183.

<sup>263</sup> Damaška, ‘What is the Point’ (n 29), at 343 (making a limited recognition to that effect).

<sup>264</sup> Heikkilä, ‘The Balanced Scorecard’ (n 2), at 50 (‘An outcome that is result of the balancing of numerous conflicting but commendable goals can thus be “better” than an outcome that has been achieved through a narrow focus, even though effectiveness evaluations carried out with goal-result measurements could indicate that the narrow focus is better. ... If there are multiple and conflicting goals, this simply increases the need to *balance and prioritize*.’). Cf. Damaška, ‘What is the Point’ (n 29), at 365 (insisting on the importance of recognizing goal-relates weaknesses of international criminal justice and on the need for a narrower focus).

<sup>265</sup> Damaška, ‘Problematic Features’ (n 29), at 183 (‘a clear set of priorities is *not really necessary* in order to reduce the present indirection.... An immediate improvement over the present situation would be to select one goal as central, in the weak sense of providing a weighted argumentative advantage in balancing competing goals.’ Emphasis added.)

<sup>266</sup> Damaška, ‘What is the Point’ (n 29), at 357 (‘The decision to make the didactic objective central to the mission of international criminal courts is pregnant with implications for their procedural arrangements.’).

should solely be focused on the adjudication of individual guilt and not be concerned with any incidental benefits of proceedings for the society, unless the processes fundamentally undermine the long-term prospect of achieving institutional objectives.<sup>267</sup> The main difference thus lies in the conceptual avenues taken *en route* to the conclusion about the need for modesty when assigning the objectives and defining the course for the legal process. The present account refrains from manipulating with the ultimate objectives of the enterprise of international criminal prosecutions and merely suggests that those should be kept apart from the objectives and functions of *trials*. In a sense, this drives the discourse about abstract prioritizing, scaling down, and making choices among institutional goals into irrelevancy.

## 5. OPERATIONAL EFFICIENCY: A COUNTER-PARAMETER

In accordance with the interpretation of ‘effectiveness’ adopted earlier, the teleology of international criminal justice is but one pillar of this evaluative perspective. The effectiveness evaluations regarding the performance of courts should at least also incorporate the perspective of ‘operational efficiency’. No normative framework for evaluating procedural arrangements in international criminal courts that omits this more down-to-earth perspective would be serviceable. Distinct from the impact-based assessments of the courts in light of the stated goals, ‘efficiency’ stands for cost-effectiveness, expediency, and rationality of infrastructures and processes. An exploration of efficiency as an optimization requirement beyond what is in the domain of common knowledge demands, at least, familiarity with management of organizations. Given this author’s limited expertise and without implying the negligibility of this perspective, it can only be given a cursory treatment.

International tribunals are in essence public organizations availed of budgets that are considerable yet not elastic. The timeline at their disposal for implementing their substantive mandates is not boundless and may be limited, even if indirectly. The *ad hoc* tribunals, for instance, had implicitly been given finite temporal frameworks, demarcated by the peace-restoring mission pursued by the UNSC in the respective regions.<sup>268</sup> Additionally, they are subject to a plethora of trivial constraints ranging from the presence of qualified legal support staff and translators to the availability of courtrooms.<sup>269</sup> The efficiency of these institutions has been a cornerstone issue throughout their lifetime but gained much prominence from 2000 onwards. The donor fatigue grew as interest of the international community in the respective regions waned and the political enthusiasm about the tribunals with a narrow focus on two past conflicts decreased. The *ad hoc* tribunals were expected by the stakeholders, in particular the UN and states, to deliver more for their worth. Evaluated as cost-ineffective and inordinately expensive,<sup>270</sup> those courts were pressed to continuously improve management and to streamline proceedings in order to dispose of the remaining cases quicker.

The problem of efficiency being ubiquitous, this preoccupation is of course not exclusive to the *ad hoc* courts. They are especially relevant to hybrid courts such as the SCSL, ECCC, and SPSC. Next to the benefits of bringing the trials closer to the target community and ensuring their

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<sup>267</sup> See *ibid.*, at 360 (‘discourse in international criminal courts should be kept within narrow bounds. ... Judges should fasten their attention upon what they do best: establish whether particular individuals—especially those in positions of power—committed specific wrongs.’); Damaška, ‘Problematic Features’ (n 29), at 185 (‘Broader aspirations would need to be muted or downplayed. The main motive for functional parsimony is the concern that pursuit of a broader agenda is likely to breed dissension, and generate a gap between expectation and performance.’).

<sup>268</sup> See text accompanying n 90.

<sup>269</sup> See e.g. Decision on the Use of Time, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, TC, ICTY, xx 2006, at 5 (‘considering that, when there are six trials proceedings concurrently before the Tribunal, this TC can sit only half of each sitting day, sitting effectively between three and three-quarter and four hours, and that it is appropriate to sit longer when courtroom availability permits’).

<sup>270</sup> See *supra* n 15.

local ownership, the ‘hybrid court’ model was developed exactly to avoid flaws associated with the expensive and unwieldy *ad hoc* tribunals.<sup>271</sup> The challenges of hybrid courts, funded through voluntary contributions, are well-documented, and their shaky financial basis has certainly been consequential for the procedure they preferred to adopt.<sup>272</sup> While the situation of hybrid courts is highly conducive to opting for streamlined solutions, the relevance of efficiency is equally valid for the permanent ICC. In this regard, a retrospective look at its performance in the first ten years reveals that it faces even greater operational challenges than its predecessors.<sup>273</sup>

The ICC has already faced criticism for the slow pace of its proceedings, and the States Parties are constantly exploring ways to make the institution more efficient, including the measures aimed at expediting its process.<sup>274</sup> Given the ICC’s broad jurisdictional reach, the need for a closer oversight and pressures for enhanced efficiency will undoubtedly grow as the institution matures.<sup>275</sup> The Assembly of States Parties and, in particular, its Study Group on Governance, is therefore seriously looking into the matters of efficiency.<sup>276</sup> At least for these reasons, the experience of the *ad hoc* tribunals—positive as well as negative—in reforming their process with a view to expedition is highly relevant for the ICC, which is required to optimize its case- and trial-management. The validity of the *ad hoc* model has sometimes been questioned due to the elements which had been added to enhance efficiency.<sup>277</sup> But the pragmatic solutions integrated in it undoubtedly have an enduring value.<sup>278</sup> For instance, in respect of trial-preparation, the ICC RPE draw heavily upon the experience of the *ad hoc* tribunals, and it will only be helpful for the ICC to continue learning from their experience.

With the enduring relevance of the *ad hoc* tribunals’ lessons in mind, it is worth glancing at the profound impact the efficiency concerns have had on those courts. The procedural evolution of the ICTY and ICTR from early years reflects the growing importance of expediency in the conditions of the limited time and financial resources. As early as in 1997, the ICTY started to concern itself with the avenues of ‘conducting trials more expeditiously without jeopardising

<sup>271</sup> Report of the Secretary-General on the Rule of Law (n 70), para. 43.

<sup>272</sup> See 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, para. 10. The SCSL has been funded through voluntary contributions of states, the failed budgetary experiment resulting in a ‘court with a tin cup’: Romano, ‘The Price of International Justice’ (n 15), at 298-99.

<sup>273</sup> Romano, ‘The Price of International Justice’ (n 15), at 302; A. Ušacka, ‘Promises Fulfilled? Some Reflections on the International Criminal Court in its First Decade’, (2011) 22 *Criminal Law Forum* 473, at 487.

<sup>274</sup> For an insider criticism on the slow progress of the *Lubanga* trial and ICC process in general, see Fulford, ‘Reflections of a Trial Judge’ (n 183), at 217-18, 223 (‘delays and significantly extended proceedings are the single most corrosive problem for the ICC – they arguably stretch the notion of a fair trial, to say nothing of our limited resources’). See also War Crimes Research Office, ‘Expediting Proceedings at the International Criminal Court’, Report, June 2011, <<http://www.wcl.american.edu/warcimes/icc/documents/1106report.pdf>>.

<sup>275</sup> D. Raab, ‘Evaluating the ICTY and Its Completion Strategy’, (2005) 3 *JICJ* 82, at 97 (emphasizing the need for an effective oversight of the ICC by the ASP in matters of general legal policy, without impinging upon judicial and prosecutorial independence).

<sup>276</sup> Resolution ICC-ASP/9/Res.2 ‘Establishment of a Study Group on Governance’, Assembly of States Parties, 5<sup>th</sup> plenary meeting, 10 December 2010, para. 1 (‘Stresses the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence’).

<sup>277</sup> Cf. Damaška, ‘Problematic Features’ (n 29), at 175 (questioning if the *ad hoc* tribunals’ procedure represents the ‘model of international criminal justice’ given that the problems of high costs and ‘time limits on their existence’ induced the judges to adopt rules for expediting the proceedings that ‘might be regarded undesirable in the absence of those problems’).

<sup>278</sup> See e.g. G. Boas and G. Oosthuizen, ‘Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court’, International Criminal Law Services, January 2010, <<http://www.iclsfoundation.org/wp-content/uploads/2012/02/icls-report-lessonslearnedgapsstudy-final.pdf>>, at 9; Raab, ‘Evaluating the ICTY and its Completion Strategy’ (n 275), at 102 (the ICTY’s model ‘ought not to be discarded out of hand.’).

respect for the rights of accused persons'.<sup>279</sup> Shortly thereafter, an external expert review process was conducted 'with a view to evaluating the effective operation and functioning' of the ICTY and ICTR; the 'objective of ensuring the efficient use of the resources of the Tribunals' was stated explicitly in the respective UNGA resolution.<sup>280</sup> The Tribunals have taken on board many of the recommendations made as a result of that process.<sup>281</sup> The concern about the need to expedite trials, by streamlining the process and by increasing adjudicative capacities, became a dominant consideration for the *ad hoc* tribunals.<sup>282</sup> It was readily endorsed by mandate-givers.<sup>283</sup>

The efficiency has acquired supreme importance with the advent of the Completion Strategy. While it is not the only example,<sup>284</sup> the Strategy is conspicuous of the impact such concerns may have on all aspects of a judicial body.<sup>285</sup> The Completion Strategy originated from the ICTY itself.<sup>286</sup> The initial proposals that gave rise to it had been put before the UNSC by then-President Claude Jorda as early as in 2000.<sup>287</sup> In his 2000 report, endorsed by the UNSC, President Jorda requested the Council to take measures to increase judicial capacities so as to enable the court

<sup>279</sup> Fifth Annual Report of the ICTY (n 112), para. 105.

<sup>280</sup> UNGA Res. 53/212, 18 December 1998, para. 5.

<sup>281</sup> See further Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, 22 November 1999 ('Report of the Expert Group'); Comments on the 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/54/850, 27 April 2000; Comprehensive report on the results of the implementation of the recommendations 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/56/853, 4 March 2002.

<sup>282</sup> E.g. Report of the Expert Group (n 281), para. 35 (noting major concern about 'the slowness of the pace of proceedings, the associated length of detention of accused, the length and cost of Tribunal operations and the length of time that will be required before they discharge their mandates'); Sixth Annual Report of the ICTY, UN Doc. A/54/187-S/1999/846, para. 116 ('This amendment is part of the ongoing commitment of the Tribunal to speeding up the trial process while providing for the proper protection of the rights of the accused.').

<sup>283</sup> UNSC Res. 1166 (1998), 13 May 1998, para. 1 (establishing the third TC at the ICTY); UNSC Res. 1329 (2000), 5 December 2000, paras 2 and 4 (deciding that two additional ICTR judges be appointed to the Appeals Chamber and twenty-seven *ad litem* judges be elected to the ICTY); UNSC Res. 1431 (2002), 14 August 2002, para. 1 (establishing a pool of *ad litem* judges for the ICTR).

<sup>284</sup> Not unrelated the Completion Strategy, another example is the increased resort to plea-bargaining, for which the practical consideration of speed and economy is the strongest rationale: Galbraith, 'The Pace of International Criminal Justice' (n 19), at 111, 124; Swart, 'Damaška' (n 28), at 105.

<sup>285</sup> In detail, see Raab, 'Evaluating the ICTY and Its Completion Strategy' (n 275); Pocar, 'Completion or Continuation Strategy?' (n 80); D. Mundis, 'Completing the Mandates of the *Ad Hoc* International Criminal Tribunals: Lessons from the Nuremberg Process?', (2004-5) 28 *Fordham Journal of International Law* 591; *id.*, 'Judicial Effects of "Completion Strategies" for the *Ad Hoc* International Criminal Tribunals', (2005) 98 *American Journal of International Law* 142; L.D. Johnson, 'Closing an International Criminal Tribunal while Maintaining International Human Rights Standards and Excluding Impunity', (2005) 99(1) *American Journal of International Law* 158; E. Møse, 'The ICTR's Completion Strategy – Challenges and Possible Solutions', (2008) 6 *JICJ* 667.

<sup>286</sup> Pocar, 'Completion or Continuation Strategy?' (n 285), at 657 (adamantly rejecting the notion that the UNSC imposed the Completion Strategy on the ICTY and stating that it was the ICTY that 'proposed this course of action, and it did so in a creative and courageous way.');

<sup>287</sup> Report on the Operation of the ICTY, submitted by Judge Claude Jorda, on behalf of the judges of the Tribunal, UN Doc. A/55/382-S/2000/865, 12 May 2000 (suggesting that, subject to availability of *ad hoc* judges, the entire current and future case-load could be disposed of in the first instance by 2007 rather than by 2016). The report led to the adoption of UNSC Res. 1329 (2000), 5 December 2000 (n 283).

to process the increased docket within a reasonable time.<sup>288</sup> The subsequent updates confirmed the commitment to complete trials within the agreed terms.<sup>289</sup>

In 2003, the Completion Strategy took precise contours and was formally adopted by the Security Council. In a key Resolution 1503 (2003), the UNSC endorsed ‘in strongest terms’ the earlier approved three-phase timeline for the completion of all investigations, first-instance trials and appeals.<sup>290</sup> In reaction to a proposal for a similar course of action by the ICTR, the Completion Strategy was extended also to that Tribunal.<sup>291</sup> The timeframe for the completion of the procedural activities were affirmed by the UNSC one year later.<sup>292</sup> Importantly, the UNSC established target dates and did not demand the absolute compliance with the schedule at any expense, and certainly not compromises on fairness or impunity for senior-level accused.<sup>293</sup> The 2004 Resolution further called upon the tribunals to ensure that indictments focus on the ‘most senior leaders suspected of being most responsible for crimes’; the cases of other indictees were to be referred to the national authorities.<sup>294</sup> Thus at least since 2003, the tribunals operated in a straitjacket of the shrinking timeline for wrapping up investigations, trials, and appeals. While the first ‘deadline’ was met, the completion dates for trials and appeals had to be postponed due to the late arrival of remaining key accused.<sup>295</sup>

The adoption of the Completion Strategy was attended by recognition of the significant progress made by both tribunals in carrying out their mandates. The fact that their operations came at a very high expense for states was the main unstated motive for it.<sup>296</sup> Whether or not the ICTY and ICTR were deemed *effective* institutions, it was their perceived *cost-inefficiency* that

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<sup>288</sup> See Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002, annexed to Letter dated 10 June 2002 from the President of the ICTY addressed to the Security Council, UN Doc. S/2002/678, 19 June 2002; Statement made by the President of the Security Council, UN Doc. S/PRST/2002/2123, July 2002. See also Ninth Annual Report of the ICTY (n 57), para. 6.

<sup>289</sup> On subsequent developments and the shifting timeline for the completion of the mandates, see Raab, ‘Evaluating the ICTY and Its Completion Strategy’ (n 275), at 84-88.

<sup>290</sup> UNSC Res. 1503 (2003), 28 August 2003, para. 7 (‘Calls on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010’) and UNSC Res. 1534 (2004), 26 March 2004, preambular para. 5 (‘calling on them [ICTY and ICTR to ensure effective and efficient use of their budgets, with accountability’) and para. 3.

<sup>291</sup> *Ibid.*; Completion Strategy of the International Criminal Tribunal for Rwanda, Annex, Agenda item 133, UNSCOR, 58<sup>th</sup> sess., UNGAOR, UN Doc. A/58/269 (2003), at 34; see also Eighth Annual Report of the ICTR, UN Doc. A/57/163-S/2002/733, 11 July 2003, paras 21-23. The revised ICTR Completion Strategy was presented in October 2003: Completion Strategy of the International Criminal Tribunal for Rwanda, Enclosure, Letter dated 29 September 2003 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, UN Doc. S/2003/946 (2003), 6 October 2003, at 5.

<sup>292</sup> UNSC Res. 1534 (2004), 26 March 2004, preambular para. 5; Statement by the President of the Security Council, UN Doc. S/PRST/2004/28, 4 August 2004 (‘The Council strongly encourages the Tribunals to undertake every effort to ensure that they remain on track to meet the target dates of the Completion Strategies.’).

<sup>293</sup> UNSC Res. 1534 (2004), 26 March 2004, paras 1-2 (affirming the need to apprehend and to surrender Mladić, Karadžić, Gotovina, and Kabuga); UNSCOR, 4999<sup>th</sup> meeting, UNSC, UN Doc. S/PV/4999, 29 June 2004, at 22-23, 27 (statements of France, the UK, and the US). See Pocar, ‘Completion or Continuation Strategy?’ (n 80), at 657-58; Johnson, ‘Closing an International Criminal Tribunal’ (n 285), at 159; Mundis, ‘Completing the Mandates’ (n 285), at 614.

<sup>294</sup> UNSC Res. 1534 (2004), 26 March 2004, paras 4 and 5 (‘Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503(2003)’).

<sup>295</sup> UNSC Res. 1966 (2010), 22 December 2010, para. 3 (‘Requests the ICTY and the ICTR to take all possible measures to expeditiously complete all their remaining work as provided by this resolution no later than 31 December 2014’).

<sup>296</sup> Raab, ‘Evaluating the ICTY and its Completion Strategy’ (n 275), at 84 (‘It was reasonable to question the value for money derived from a war-crimes tribunal, absorbing a large amount of UN resources disproportionate to its geographical focus’); Wippman, ‘The Costs of International Justice’ (n 15), at 862 (‘cost concerns played a major role in the adoption of the ICTY’s “completion strategy”’).

predetermined the decision to close them down.<sup>297</sup> This demonstrates that the two perspectives—effectiveness and efficiency—are quite distinct in practical terms. The tribunals’ performance was scrutinized ever since not only by the UN General Assembly on a yearly basis, but also biannually by the UNSC to which the presidents and prosecutors of both tribunals reported the progress in the implementation of the Completion Strategy.<sup>298</sup> Besides the related issues of capacity-building and legacy, this review procedure essentially focuses on efficiency.<sup>299</sup> The regularity of this second-track reporting indicates the urgency of the timely progress in the implementation of the Strategy and evinces the strong wish of the Council to keep a hand on the pulse of the tribunals at this decisive stage.

The impact of these developments on the nature and setup of the ICTY and ICTR procedure cannot be overstated. A plethora of rules have been adopted and amended to enable them to conduct the proceedings quicker and to facilitate the transfer of cases to domestic authorities.<sup>300</sup> In order to expedite the docket, *ad litem* judges were allowed to adjudicate on pre-trial matters.<sup>301</sup> In response to the UNSC demands, the tribunals have increasingly made use of Rule 11*bis* by referring less than high-ranking cases to domestic courts as a way to thin out the dockets.<sup>302</sup> The ICTY has transferred at least ten cases to the War Crimes Chamber of the State Court of Bosnia and Herzegovina, two to Croatia, and one to Serbia.<sup>303</sup> But it took the ICTR longer to authorize a referral to Rwanda,<sup>304</sup> and the first referrals were made to the countries where the accused had been arrested.<sup>305</sup> In addition, the

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<sup>297</sup> Shany, ‘Assessing the Effectiveness’ (n 2), at 21 n60 (‘The operation of a court may be terminated because it is perceived as effective but lacking in cost-effectiveness or efficiency.’); Stahn, ‘Between “Faith” and “Facts”’ (n 2), at 265 n79; Raab, ‘Evaluating the ICTY and its Completion Strategy’ (n 275), at 95-96 (reporting ‘steadily increasing resentment amongst UN Members about paying such a large item on the UN budget, which funds a tribunal with a focus confined to one particular conflict’).

<sup>298</sup> UNSC Res. 1534 (2004), 26 March 2004, para. 6.

<sup>299</sup> See completion strategy reports of the ICTY and ICTR (2004—present): e.g. Assessments and report of Judge Theodor Meron, President of the ICTY, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and 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; Assessment and report of Judge Theodor Meron, President of the ICTY, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 23 May 2012 to 16 November 2012 and Report of Serge Brammertz, Prosecutor of the ICTY, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), UN Doc. S/2012/847, 19 November 2012.

<sup>300</sup> Rule 11*bis* ICTY RPE (adopted on 12 November 1997) was amended on 10 June 2004 to enable the referral of indictment not only to a state in whose territory the crime was committed but also to the authorities of a state in which the accused was arrested or having jurisdiction and being willing and adequately prepared to accept a case, at all times subject to assurances that a fair trial will be provided and no death penalty imposed or carried out.

<sup>301</sup> UNSC Res. 1481 (2003), 19 May 2003; Tenth Annual Report of the ICTY, UN Doc. A/58/297-S/2003/829, 20 August 2003, paras 10 and 34 (‘The most important internal reform during the reporting period was the removal of the ban on ad litem judges adjudicating in pre-trial matters. ... This reform enables ad litem judges to make more efficient use of their time and to enhance their already important contribution to the work of the Tribunal, thus helping the Tribunal to bring cases to completion more expeditiously.’)

<sup>302</sup> See further O. Bekou, ‘Rule 11 bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence’, (2009) 33 *Fordham International Law Journal* 723; Møse, ‘The ICTR’s Completion Strategy’ (n 285), at 673.

<sup>303</sup> Pocar, ‘Completion or Continuation Strategy?’ (n 80), at 660.

<sup>304</sup> Decision on Prosecutor’s Request for Referral to the Republic of Rwanda, *Prosecutor v. Uwinkindi*, Case No. ICTR-2001-75-R11bis, Referral Chamber, ICTR, 28 June 2011 (granting the motion); Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, *Prosecutor v. Sikubwabo*, Case No. ICTR-95-1D-R11bis, Referral Chamber, ICTR, 26 March 2012 (granting the motion). Cf. e.g. Decision on the Prosecutor’s request for Referral to the Republic of Rwanda, *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Referral Chamber, ICTR, 6 June 2008 and Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Referral Chamber, ICTR, 28 May 2008 (denying the motion).

<sup>305</sup> E.g. Decision on the Prosecutor’s Request for the Referral of Wenceslas Munyeshyaka’s Indictment to France, *Prosecutor v. Munyeshyaka*, Case No. ICTR-2005-87-I, Referral Chamber, ICTR, 20 November 2007. The first referral requested to states other than Rwanda was complicated by the lack of jurisdiction over the crimes charged: see e.g.

investigative materials and case files in non-indicted cases were also forwarded to national authorities for further handling.<sup>306</sup>

Further, the ICTY (but not the ICTR) instituted the Bureau for a judicial review of new indictments based on whether they concentrate on ‘most senior leaders’.<sup>307</sup> The adoption of the Rule was objected to by the Prosecutor, but to no avail.<sup>308</sup> Confirming the tendency that started with the 1999 expert review process, the other important measure was activating the judges in the pre-trial and trial process as a way to enable them to effectively counteract the dilatory tactics that parties tend to adopt in an undiluted adversarial process. This resulted in the growth of the managerial powers of the judges, while the parties were increasingly expected to embrace the new role of judges as ‘active arbiters’ and the more consensus-oriented process.<sup>309</sup> Those reforms effectively served to strengthen the Trial Chamber’s grip on the volume of the evidence to be presented by each party and to encourage judges to actively employ their powers for cutting back the number of witnesses and the time for the presentation of the cases, by fixing the number of crime sites or incidents encompassed by the charges and even by suggesting that some charges should be dropped.<sup>310</sup> Given that the latter competence was deemed to interfere with the Prosecution’s power to formulate a case, it has proved particularly controversial and led to significant litigation.

Generally, the measures aimed at expediting the trial process and motivated by the requirements of the Completion Strategy are in line with the accused’s interest protected by the right to be tried without undue delay. Thus, the ICTY and ICTR have tended to emphasize the need for expedition with reference to the protection of the rights of the accused. For example, in *Prlić et al.* ICTY Appeals Chamber Trial Chamber held that

time and resource constraints exist in all judicial institutions and that a legitimate concern in this trial, which involves six accused, is to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, which is recognized as a fundamental right of due process under international human rights law.<sup>311</sup>

Notably, in a decision in the same case, the Trial Chamber reduced the time allotted to the Prosecution for its presentation and made an incidental and ill-considered remark to the effect that UNSC Resolution 1503 (imposing the Completion Strategy) ‘governed this trial’.<sup>312</sup> The challenge of this approach on appeal as an abuse of discretion was rejected because

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Decision on Rule 11bis Appeal, *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-AR11bis, AC, ICTR, 30 August 2006 and, in the same case, Decision on Prosecutor’s Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Pursuant to Rule 11bis (F) & (G), TC, 17 August 2007.

<sup>306</sup> By 2008, the ICTR Prosecutor transferred 35 case files to Rwanda and 1 to Belgium: see Møse, ‘The ICTR’s Completion Strategy’ (n 285), at 672.

<sup>307</sup> Rule 28(A) ICTY RPE (adopted on 6 April 2004, in the implementation of UNSC Res. 1534 (2004)). The Rule provides for the review of new indictments by the Bureau, composed of the President, Vice-President, and Presidents of the three TCs, and in particular whether the alleged level of responsibility of the proposed indictees is sufficient. See Assessments and report of Judge Theodor Meron, UN Doc. S/2004/420 (n 299), paras 32-33.

<sup>308</sup> Assessment of Carla Del Ponte (n 299), para. 13 (‘Recently the Judges of this Tribunal took action, which in my view was contrary to the Statute and unnecessary in light of the independence given to me under the Statute of the Tribunal, to amend Rule 28 of the Tribunal’s Rules of Procedure and Evidence.’).

<sup>309</sup> See further Chapter 8.

<sup>310</sup> See Rules 65ter, 73bis, 73ter ICTY RPE; Rules 73bis and 73ter ICTR RPE. See further Chapter 8.

<sup>311</sup> Decision on Joint Defence Interlocutory Appeal against the Trial Chamber’s Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel’s Request for Leave to File an *Amicus Curiae* Brief, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.2, AC, ICTY, 4 July 2006, at 4.

<sup>312</sup> Decision on Adoption of New Measures to Bring the Trial to an End Within a Reasonable Time, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, TC III, ICTY, 13 November 2006, para. 16 (‘there is a good reason to recall Resolution 1503 (2003) of the United Nations Security Council, which governs this trial and states that “all activities at first instance’ should be completed by the end of 2008. The Chamber is aware of the necessity to ensure that a trial is

### Chapter 3: Measuring Effectiveness: Teleology and Efficiency

The Trial Chamber did not state that because the Completion Strategy is reflected in a Security Council resolution, it is therefore bound to its deadlines in the management of this trial. Rather, it merely considered the Completion Strategy as one factor to be weighed in the Impugned Decision while correctly stressing that it would not allow the “considerations of economy” to “violate the right of the Parties to a fair trial.”<sup>313</sup>

However, the two categories of interest in the expeditious proceedings—expedition qua fairness and expedition qua a corollary of the Completion Strategy—are distinct and might diverge in relation to certain matters. The Completion Strategy may also work to the detriment of the rights of the accused and its drive for expedition should therefore be moderated. Thus, ‘efficiency’ should not be collapsed together with the right of the accused to an expeditious trial, which comes into consideration under the rubric of ‘fairness’.

The Tribunals have tried hard to preclude the impression that the considerations flowing from the Completion Strategy prevailed over the fundamental interests of a fair trial. That impression may have been difficult to debunk where judicial discretion was exercised in such a way as to prioritize expedition over the interpretations of the rights of the accused previously established by the court. For example, the subterranean impact of the Completion Strategy on the ICTY process was severely criticized by some judges who believed that it has been implemented to the detriment of fairness. Notably, in the *Milošević* appeal concerning the admissibility of written statements in lieu of examination-in-chief, Judge Hunt made an unusually strong statement:

The international community has entrusted the Tribunal with the task of trying persons charged with serious violations of international humanitarian law. It expects the Tribunal to do so in accordance with those rights of the accused to which reference is made in the previous paragraph. If the Tribunal is not given sufficient time and money to do so by the international community, then it should not attempt to try those persons in a way which does not accord with those rights. In my opinion, it is improper to take the Completion Strategy into account in departing from interpretations which had earlier been accepted by the Appeals Chamber where this is at the expense of those rights. ... This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused will leave a spreading stain on this Tribunal’s reputation.<sup>314</sup>

In response to Judge Hunt’s sentiment, Judge Shahabuddeen disagreed that the Completion Strategy had had any impact on the Chamber’s decision:

As every lawyer appreciates – and many a non-lawyer too – it would not be correct for the Appeals Chamber to give priority to the Completion Strategy of the Security Council over the rights of the accused; so to do would indeed “leave a spreading stain on the Tribunal’s reputation”, as Judge Hunt has correctly observed. It is therefore not surprising that that Strategy has not been mentioned in the decision of the Appeals Chamber: it has not been mentioned because it has nothing to do with the matter. The decision is based on the reasoning which it sets out. That reasoning may be microscopically examined, but it leaves no room for a judicial finding that a plainly inadmissible factor has been taken into account.<sup>315</sup>

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expeditious and does not consume, unduly, too much in the way of international time and resources. It stresses, however, that the considerations of economy should never violate the right of the Parties to a fair trial.’).

<sup>313</sup> Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.4, AC, ICTY, 6 February 2007, para. 23.

<sup>314</sup> Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR73.4, AC, ICTY, 21 October 2003, paras 21-22.

<sup>315</sup> 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, *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR73.4, AC, ICTY, 31 October 2003, para. 21.



Without taking sides in the debate, this judicial exchange indicates serious tensions between the normative prescriptions flowing respectively from the requirement of *fairness* and from that of *efficiency*. Clearly, all conflicts between them in procedural matters must be resolved in favour of the former normative demand which informs the process most directly. The mainstream discourse at the Security Council, at the tribunals, and in scholarship has firmly rejected the legitimacy of compromising fairness to promote cost-effectiveness.<sup>316</sup> So do also the dissenters who have criticized the adverse effects of what they see as a pursuit of the Completion Strategy at the expense of fairness and other principles (e.g. prosecutorial independence).<sup>317</sup> ‘Efficiency’ ought never to displace or compromise the fundamental duty of fairness which is a permanent mandatory *modus operandi*. Being a normative criterion that is autonomous from the parameter of ‘fairness’, it remains at all times subordinate to it.

As a normative parameter, ‘efficiency’ is an important background consideration for the tribunals. It endows them with a broader picture and a strategic view of their own situation.<sup>318</sup> The institutions can thus identify realistic ways for achieving their mandates with the resources available and devise creative solutions for that end. This helps the tribunals to guide themselves by realism and pragmatism while drifting towards the project’s idealistic objectives. The experience of the *ad hoc* tribunals shows that the importance of expedition has grown tremendously over time and that the Completion Strategy has completely overshadowed or reconfigured the institutional goals. This means that there is no clear and absolute hierarchy between *efficiency* and *effectiveness*: the respective considerations can be ordered depending on the current priorities which in turn are determined by the institutional context and circumstances and the exact period in the lifetime of each individual institution. Like with the special goals of international criminal justice, efficiency informs the procedural practice by requiring adjustments within the reasonable boundaries of discretion and the current procedural framework. Occasionally, it can also trigger reforms where the need for expedition cannot be sufficiently met through the exercise of discretionary powers, the reinterpretation of procedural rules, and shifts in the practice.

While being clearly distinct from the qualitative perspectives of *fairness* and *effectiveness*, *efficiency* is an important part of a multi-dimensional framework for the critical evaluation of international criminal justice and, in particular, of its process.<sup>319</sup> But, like competing perspectives, it is not a self-sufficient normative and epistemic benchmark.

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<sup>316</sup> See e.g. UNSC, 4999<sup>th</sup> meeting, UN Doc. S/PV/4999, 29 June 2004, at 8 (ICTY President Meron: ‘A rigid and mechanistic pursuit of the completion strategy should be avoided, as it would lead to the espousal of trials that fall short of the guarantees of international human rights of which the United Nations is—and should be—protective and proud.’); Pocar, ‘Completion or Continuation Strategy?’ (n 80), at 658 (‘speed cannot be procured at the price of sacrificing the requirements of due process.’) and 662 (‘the Tribunal’s legacy will be about much more than the efficiency of its administration and the expeditiousness of it [sic] proceedings.’); Johnson, ‘Closing an International Criminal Tribunal’ (n 285), at 161.

<sup>317</sup> See e.g. Mundis, ‘Judicial Effects’ (n 285), at 147-48; Turner, ‘Defense Perspectives’ (n 39), at 590; M.G. Karnavas, ‘The ICTY Legacy: A Defense Counsel’s Perspective’, (2011) 3 *Goettingen Journal of International Law* 1053, at 1056 (complaining of ‘the constant tinkering with the rules of procedure for the sake of promoting efficiency and expeditiousness while eroding the fundamental rights of the Accused.’).

<sup>318</sup> Pocar, ‘Completion or Continuation Strategy?’ (n 80), at 656 (‘an international tribunal’s actions must be guided not just by routine matters—with the attendant risk of being bogged down in details and daily routine—but also must strive to always keep a view to the broader picture of where the institution comes from and, especially, of where it intends to go.’).

<sup>319</sup> See also Raab, ‘Evaluating the ICTY and its Completion Strategy’ (n 275), at 97 (the ICTY ‘will be assessed, on one measure, by the number of convictions. There will inevitably be a quantitative as well as a qualitative element to the legacy of the ICTY.’).

## 6. CONCLUSION

This Chapter set out the parameter of ‘effectiveness’ as a framework to be adopted for the normative evaluation of international criminal proceedings. The two components of that framework—the special goals and efficiency of international criminal justice—have been addressed in detail. The Chapter overviewed the specialized goals set before the international criminal tribunals and explained the position the author adopts on the asserted normative link between those objectives and the procedural arrangements. It also sketched the ‘efficiency’ perspective, which counterbalances the aspiration-driven side of ‘effectiveness’, and justified its suitability as an autonomous evaluative criterion. This clarifies why the goals of international criminal justice and operational efficiency are the yardsticks fit for the assessment of the tribunals’ procedure.

The teleological debate on international criminal procedure has been obscured by the mix-up between the diverse inventories of goals, functions, and rationales, whereas those should rather be associated with distinct concepts and phenomena – international criminal justice, punishment and sentence, and procedure. The scholars who have tackled the question of ‘objectives’ have recognized the need for a principled distinction only in passing. These disclaimers notwithstanding, the more usual approach has been to neglect the crucial nuances, which has rendered the debate somewhat scholastic and distant from the realities of war crime trials. In other words, the ‘theorems’ on the interaction between the institutional goals and the procedural forms have mostly been constructed on the shaky basis of the knowingly mistaken ‘axioms’.

The Chapter has engaged with some conceptual flaws that surface in the literature. In particular, it has addressed the terminological confusion through defining the concepts such as ‘goals’, ‘rationales’, and ‘functions’ and through drawing distinctions between the different levels of teleology in international criminal justice. It was argued that the normative relevance of the purposes of punishment, sentencing rationales and of the ‘ordinary’ goals of international justice system as determinants for the procedure is limited. The ‘special goals’ of international criminal justice warrant consideration in this context, insofar as they indirectly inform the processes employed by the tribunals. Such goals in particular hinge upon the expected contributions by the tribunals to the maintenance of peace, reconciliation, providing redress to the victims, and affirming the rule of law undermined by the crimes. The values underlying those goals have occasionally had an impact on the procedural law of the tribunals and on how it has been interpreted and applied in practice. This perspective set the stage for the examination of the nature of a link between the institutional objectives and procedures before international criminal tribunals.

That nexus is indirect and defies the overly deterministic approach which has sometimes been espoused in the scholarship. The procedural arrangements do not and should not necessarily respond to the preferences flowing from the institutional goals. Nor can they always do so, given the rift between the micro-dimension and the macro-dimension of adjudication. The transposition of ultimate objectives of the enterprise of international criminal prosecutions onto the goal-setting in the procedural domain will often be impossible and undesirable. Even where it seems otherwise, this mostly comes down to rough analogies and assumptions about the ability of specific criminal proceedings to immediately promote the special goals. The forensic fact-finding may indirectly and in a long run facilitate the compilation of a historical record of atrocities and thereby assist in reconciliation, but it cannot *per se* be driven by those aspirations if it is to preserve integrity and to remain efficient. One is advised not to fall into the trap of lumping together the institutional objectives and the functions of procedure. Much less should one expect or demand from the courts to be concerned with the former while implementing the latter. The limited societal impact of the tribunal proceedings is to be embraced for the sake of safeguarding procedural fairness. Failing that, the longer-term prospect of attaining the lofty socio-political goals would be undermined.

The more attention the trial participants, especially judges and prosecutors, pay to the ‘broader’ goals in their routine business of litigating and deciding cases, the more damage they do to those objectives. The greater is the risk that the procedural system will be moulded for the

promotion of ultimate goals rather than for heeding jealously to its primary objectives and functions of fairness and fact-finding. The principles of liberal criminal justice are in danger where the right to a fair trial and fairness as an overarching principle compete with utilitarian considerations of 'seizing the opportunity' to teach lessons in history and politics, to promote reconciliation, or to set the historical record straight. Turning a criminal trial into the pursuit of social reconstruction vitiates its legalist nature and unavoidably raises a spectre of a show trial. It also places an additional strain on the scarce resources of the court and is bound to detract from efficiency and to add to delays. This subverts rather than vindicates the institutional objectives, for example, by fuelling the victims' frustrations with overly slow and unwieldy judicial process.<sup>320</sup> Therefore, the best way of achieving such objectives in the long-term perspective is to put them to one side in the routine operation of criminal procedure. Whenever possible, resort shall be made to transitional justice mechanisms which are better apt to directly promote didacticism, historical truth-finding, and reconciliation.

At the same time, the tribunal architects and legislators should not ignore the objectives of international criminal justice when devising and reforming the procedural system. For the tribunal judges and other staff, the mission statements should continue to serve as ideological premises rather than as operative goals. The reasonable alignment between the goals and the procedural arrangements must be ensured to the extent possible – in the narrow sense that the practice ought not to be antithetical to the ultimate objectives of the tribunals. The modes of adjudication may not be allowed to conflict with the entire enterprise's professed ideology. Where this is the case, the practice and methods of adjudication putting off rather than approximating the ultimate objectives should be adjusted to the extent possible within the governing legal framework; or more ambitious reforms should be undertaken to ensure that the reality of trials does not fundamentally contradict the values the tribunal proclaims to vindicate at a macro-level. The goal that is being paid mere lip service upon closer look and given up on in actual practice should be disavowed as an empty promise because the consistency between the 'means' and 'ends' in a broad sense is a precondition for preserving the credibility of the international criminal justice. But this is as far as the 'moderate approach' goes in recognizing the link between the institutional objectives and the procedural form.

Since the Chapter takes issue with an over-deterministic view on the relationship between the goals of establishing the tribunals and the procedural means, it therefore challenges the reductionist accounts which advocate the need for drawing priorities and establishing a ranking between the tribunals' special objectives and, possibly, selecting a so-called 'paramount' goal. According to some scholars, those measures would optimize the process and attune it to the special needs of international criminal justice. This brings to surface the ostensible problem of the 'overabundance' of goals as a supposed source of weaknesses of the tribunals – weaknesses which rather reside in the domain more practical than the lofty aspirations. Manipulations with the tribunals' objectives meant to square the ideological dimension of the tribunals' work into the circle of the procedural system are impracticable because it would be impossible to draw an abstract hierarchy of goals. It is furthermore undesirable: it is bound to reduce the uses of international criminal justice by international decision-makers and will weaken its potentially important role in post-conflict societies.

It remains to clarify how the parameter of 'effectiveness', i.e. its limbs of 'goals of international justice' and 'efficiency', will be used for the evaluation of trial arrangements in the descriptive and analytical chapters.<sup>321</sup> More specifically, what does the proposed approach entail for the normative force of those sub-parameters vis-à-vis the procedural arrangements and for their authority to tell the procedural features that are desirable from those that are not?

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<sup>320</sup> See e.g. Clark, 'The Impact Question' (n 4), at 68.

<sup>321</sup> Chapters 8-11 contain, next to the analytical subsections reviewing the relevant components of trial process through the prism of 'fairness' (see further Chapter 2), also two separate subsections dealing respectively with the teleological and efficiency-related aspects.

To begin with the first perspective (teleology), the rejection of goal-determinism of procedure entails that the ‘consistency’ with the goals should not be a precondition for the survival and normative acceptance of any given procedural norm or practice. This is different from the result demanded by a finding of incompatibility with considerations stemming from examining the process through the prism of ‘fairness’. The tenuous link between the goals and the process limits the weight of the normative considerations flowing from the former. On many issues, the goals will be inconclusive as regards the preferred procedural arrangements and the alleged inconsistencies false. The moderate account holds that such findings will only be justified in those rare case cases in which a given procedural feature (or the lack thereof) systematically fails to promote and *a fortiori* openly conflicts with the values whose protection is proclaimed to be an institutional goal. In that event, a corrective intervention by legislator and specific procedural reforms should be considered. But one should be cautious not to vouch for the far-reaching changes or a fundamental overhaul of the system with reference to a relatively weak, inconclusive, and variable normative yardstick. At least, any proposals to that effect should preferably be bolstered or not contradicted by considerations flowing from the analysis of the procedure through the lens of fairness and, possibly, efficiency.

The degree to which the normative guidance of the ‘goals’ perspective may be compelling as regards the procedural arrangements, is further reduced by the fact that the different objectives of international criminal justice may be seen to pull in opposite directions. It can also be anticipated that the same objective will give rise to diametrically opposed arguments as to whether a given procedure is good or unacceptable and, if not, how it is to be reformed. This is largely a value-driven choice, and much depends on individual preferences which may be formed through other implicit lines of reasoning. The special goals cannot be ranked in abstract or assigned a relative weight of a permanent value qua factors carving the procedural form into a certain mold. Depending on the specific procedural feature, some goals would be more relevant than others, and their aggregate normative effect on the process, if any, would be determined by the outcome of balancing the values that they seek to vindicate.

Thus, if an argumentative advantage—limited as it were—is to be attached to any specific objectives over the other, it should not be mechanistic but situation-sensitive and issue-specific. Since the goals of international criminal justice do not directly affect or shape the proceedings, there is not much point in prioritizing among them. The clever theoretical maneuver of turning one objective into a super-goal meant to avoid this obstacle cannot solve the problem of effectiveness. It is rather bound to exacerbate it. A deliberate disregard and dropping of the other objectives pursued in the establishment of international criminal justice institutions for the fear of failure would reduce the potential and value of international criminal justice as a tool of post-conflict settlement. As noted, if recognized as valid, this argument will simply dissuade decision-makers in the UNSC and elsewhere from resorting to it. Unnecessarily so, since the excruciating fear of failing some grandiose objectives is as unjustified as the expectation that the processes of international criminal justice are actually supposed to have a direct societal impact, for example, by reconciling and pacifying the divided communities. International criminal justice is a faith-based, normative and, some would say religious, project to a large extent. At some point, the long-term value of its specific outcomes should just be assumed, provided that the system properly discharges its primary functions of establishing facts and determining individual criminal responsibility. The tribunals, which are charged with the task of ensuring that criminal justice is administered fairly and efficiently, should treat it as a mandatory precondition for accomplishing their long-term missions.

Finally, the parameter of operational efficiency emphasizes the importance of the rational organization of the institutions and processes in view of the limited resources, budgets, and time line allocated to the tribunals for executing their substantive mandates. The considerations of cost-effectiveness and resource saving may shape the procedural arrangements in a more immediate way than the institutional goals. The aspiration to streamline the proceedings and to expedite the docket

can fairly easily be translated into the measures towards reforming the court organization and procedure. While this is evidenced especially by the procedural reforms at the *ad hoc* tribunals in the aftermath of the Completion Strategy, ‘efficiency’ constitutes a valuable external evaluative framework for any international criminal justice institution, including the permanent ICC and hybrid forms of justice.

The parameters of efficiency and of goals do not necessarily generate diametrically opposed arguments. But in cases where the institutional goals are deemed to exert a direct influence on the structure and features of criminal proceedings, there may be a tension. This is exemplified by the translation of the victim-redress goal into the allowance of active victim participation and reparation scheme at the ICC. The latter shift has been performed despite the compelling considerations of institutional *efficiency* which unambiguously militate against such a radical expansion of victims’ procedural rights. Similarly, the concerns about efficiency moderate the grand quests for the comprehensive historical truth through legal process. However, there is no clearcut hierarchy between the two aspects of effectiveness. Again, depending on a specific issue and on the tribunal in issue, the need to reform the procedure for it to better fit the goal may outweigh the efficiency concerns, and vice versa. That said, ‘efficiency’ is no competitor by normative force to the demands stemming from the parameter of ‘fairness’.<sup>322</sup> A procedure is not necessarily to be stricken out if it is deemed inefficient but can be justified by an institutional goal of which it is an indirect translation, or if it maximizes efficiency but does not appear to be in line with a certain institutional goal. Appearances are not necessarily sufficient bases for unseating the established procedural philosophy. However, no procedure is normatively tolerable if it does not stand the test of ‘fairness’. As the previous Chapter anticipated, this parameter still retains a clear and permanent ‘argumentative advantage’ in relation to any other normative consideration.

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<sup>322</sup> E.g. Partially dissenting opinion of Judge Pocar, Judgement, *Prosecutor v. Mrkšić and Šlišančanin*, Case No. IT/95/13-1/A, AC, ICTY, 5 May 2009, para. 10 (‘concerns about efficiency in the administration of justice can never be implemented to the detriment of human rights standards.’).