International criminal trials: A normative theory

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CHAPTER 5.

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1. **INTRODUCTION**

The previous Chapter has addressed the theoretical and comparative law questions raised by the notion of the trial phase within criminal proceedings. It provided an overview of the main ‘archetypes’ of a criminal trial familiar from the domestic context and drew a distinction between the procedural functions of trial and its ‘communicative’ aspects. This Chapter applies these insights to the phenomenon of the international criminal trial. It examines what functions may be assigned to trials held before international and hybrid criminal tribunals, and which of its outcomes are rather incidental or ‘communicative’ side-effects.

The institutions of international criminal justice are traditionally attributed audaciously ambitious mandates, such as assisting the restoration and maintenance of peace, promoting national reconciliation, compiling a credible historical record, offering redress to victims of international crimes, and so on. This explains why some of the peculiarities of international criminal trials—of procedural form and content, as well as their supposed expressive role—are often deemed to mirror or track the socio-political goals which in fact belong to the institutions rather than the procedure itself.\(^1\) This Chapter seeks to ascertain whether the specific missions driving those institutions endow trials with any *sui generis* functions and/or didactic effects, as well as how the regular functions attributed to trials (e.g. ‘establishing the truth’) may be altered as a result of that, if at all. It is then necessary to define where the limits to such reformulation lie. Arguably, drawing a principled line of distinction here would prevent international trials from sliding into ‘show trials’ – a risk which is elevated in the international criminal law context. This risk is due to the magnitude and political dimension of most of the tribunals’ cases, the more than significant temptation for, or pressure on, the actors to transcend their established and strictly professional roles in pursuit of the socio-political goals, and the—already noted—tendency to mistake the institutional objectives for the goals of the process.

Chapter 3 considered whether there is—or should be—a direct interaction between the goals and functions of the international criminal process on the one hand, and the broader rationales and goals of international criminal justice on the other. The deterministic link between the two has been rejected as a matter of principle, subject to a recognition that from a normative perspective, procedures may not be structured or operate in ways fundamentally undermining the broader goals of the enterprise. Although the specific circumstances and aspirations of international criminal courts are not necessarily procedure-determinative, they may provide a general ideological background, or a set of constraints in respect of procedural law and practice. As such, they may to a certain extent shape the process, especially in relation to discretionary matters that remain within the purview of the actors at trial. Taking these methodological positions on the interplay between the goals and procedure further, this Chapter looks into what the proper functions of the trial phase in international criminal procedure are or should be, and the extent to which they can be informed and controlled by the tribunals’ special goals and circumstances.

The following section applies the distinction between the *functions* and *communicative effects* of trials, proposed in Chapter 3, to international criminal justice. It revisits the tensions between the legalist and law-and-society views on what a criminal trial ought to aim at, and be capable of achieving. Section 3 focuses on what is proposed as the key procedural function of the trial phase in international criminal procedure, ‘truth-finding’. That section examines how

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\(^1\) F. Kafka, *The Trial* (1925).

\(^2\) Chapter 3.
Chapter 5: Functions of International Criminal Trials

this function emerges from the procedural law of various international criminal tribunals, and how it is performed in that context. The meaning and scope of the truth to be established through a trial is an important question, given this function’s overlap or parallelism with the institutional objective of historical truth-finding. Then, section 4 turns to the communicative effects and didactic potential of the trial process. After examining the notions of ‘show’ and political trials, the Chapter turns to the risks that lurk in an excessive and improper emphasis on the expressive and didactic aspects of trials. The criminal process, being essentially a social ritual, has certain objective communicative effects. But putting the process at the service of didactic and communicative mandate is conceptually flawed, and result only of the confusion between the proper functions and mere effects of proceedings. More importantly, it is pernicious as it undermines the idea of international criminal trials as truly liberal justice exercises. The distinction from a show trial is essential to maintain: otherwise an international criminal trial will be vulnerable to the charge that it is not a genuine forensic fact-finding and legal inquiry, but a show staged to publicize a verdict known in advance.

2. PROCEDURAL FUNCTIONS V. COMMUNICATIVE ASPECTS: THE LEGALIST AND LAW-AND-SOCIETY PERSPECTIVES

As with the issue of goals, the question of the functions of international criminal trials is a site of clashes between what can be referred to as the ‘legalist’ and ‘law-and-society’ views. It is worth revisiting these schematically here in order to establish whether they present useful analytical vantage points from which the trial phase before the tribunals can be explored.

Chapter 3 showed that some scholars who adopt the legalist position, maintain that international trials should be no less and no more than criminal trials in the proper sense. Their functions are essentially the same as those of ordinary domestic trials – the retributive justice process is not an appropriate instrument for achieving societal closure, reconciliation and other similar goals. The presence of ‘ulterior motives’ and functions going beyond the establishment of the truth in an individual case (with view to determination of the guilt or innocence of the accused on the actual charges) would make the process susceptible to the critique that international trials—whether specific proceedings or generally—are by nature sham or show trials. Liberal critics and people distrustful of the integrity and authority of international criminal courts—among whom one is likely to find the accused persons and members of their community—may, like Kafka’s Josef K., refuse to recognize those trials as legal events in a true sense.

Such assessments are more likely in international criminal trials than in case of ordinary domestic trials because the foundations and the legitimacy of holding these, as well as the decision-making authority of the court, often come to be challenged. This is due to the political and historical dimensions of cases, the extraordinary subject matter, and the highly contested context in which they are conducted. International trials deal mostly with the responsibility of political and military leaders for the gravest offences committed in times of armed conflict and controversial historical periods. The injection of politics into the trial proceedings seems unavoidable, whether through the presentation of evidence and pleadings by the parties or, more controversially, as considerations affecting the views of the judges and their deliberation. The ‘liberal legalism’ critique may target international criminal trials on account of their being driven by utilitarian concerns of promoting institutional missions, however noble – history-writing, peace and reconciliation, or construction of collective memory and so on.3 The critique to the

3 See R.A. Wilson, Writing History in International Criminal Trials (Cambridge: Cambridge University Press, 2011) 9 (‘in the doctrine of liberal legalism, law’s minimal regard for history and sociopolitical context is a cardinal virtue’).
effect that the trial is insufficiently ‘legalist’ evinces a presumption that it must necessarily be such.

The ‘law-and-society’ critique has a diametrically opposed angle of attack. It complains that the purported legalist character of the trials unjustifiably downgrades their nature and curtails their potential positive effects on a broader—potentially global—scale, resulting in ‘lost opportunities’ for societal transformation. It is argued that the goals of reconciling, reconstructing, pacifying, satisfying victims, and building a collective memory should be factored in as more or less central functions of the court. If international prosecutions are to be undertaken at all, professionals charged with running and participating in such trials ought to be aware of this impressive potential of legal proceedings and seek to realize it. We cannot afford missing the unique opportunity to transform a ‘target society’ and help its recovery from a tragic past through judicial process cannot be afforded, or otherwise international criminal justice would fail its fundamental mission.

Obviously, adopting one perspective or the other will result in differing conceptions of procedural functions served by international criminal trials. The operative goals the proceedings endeavour to achieve will be prioritized and balanced differently. Rejecting one perspective entails disqualifying also its derivative ‘functions’, or at least restricting the appropriateness of pursuing these through the trial process. However, despite the somewhat troubled and polemic relationship between the legalist and legal-sociological positions, it may be possible to identify some shared ground and combine their elements into a single framework. In line with the positions taken in Chapter 4 with regard to criminal trials generally, one can adopt the ‘liberal legalism view’ in identifying the functions of the trial phase. At the same time, one can also acknowledge that the proceedings objectively do—and legitimately may—exert certain communicative effects on those in the courtroom and beyond, in this sense operating as a communicative tool. In order to be reconcilable with the legalist view though, such recognition should uphold the distinction between the ‘functions’ of the process and its incidental outcomes.

Under the legalist approach, the functions accomplished by the trial process are the outcomes envisaged in procedural law of specific procedural activities – e.g. presentation of evidence, questioning of witnesses, deliberations, and so on. The functions that are proper to trial effectively distinguish that phase from other stages of the process, such as investigations, pre-trial (trial preparation) and appeals. As opposed to preparatory steps in the lead up to trial (initial and/or further appearances, a plea of guilty or not guilty, disclosure, submission of the materials to the Chamber or a pre-trial Judge) and appellate review, the crucial function of trial remains the establishment of the truth in an individual case against an accused. The trial chamber is to conduct an inquiry into the truth of the facts alleged in the charges and make legal findings on the basis of the evidentiary record in the case. The overarching function of truth-finding enables the court to achieve the systemic goal of criminal justice: to tell the guilty from the innocent and to apply the appropriate sanction to those found guilty. It is achieved, among other ways, through examining the evidence on the contested facts and evaluating it against the relevant standards of proof; determining the legal qualification to be applied to the facts proven; deciding upon the guilt or innocence; and deciding on the legal consequences of the verdict, in particular the appropriate sentence in case of conviction.

The establishment of the truth can also be seen as an overarching objective of the criminal process, i.e. as a function served also by phases other than trial. The investigative stage contributes to the accomplishment of that goal through the accretion of evidence, and the identification, apprehension, and advancing charges against suspects. It provides a basis for a trial and makes it possible. The judicial pre-trial phase enables all actors to get trial-ready and, in this sense, indirectly contributes to the orderliness and efficiency of the fact-finding exercise at trial. Similarly, the appeal stage—apart from correcting errors of law in the trial judgment—is meant, to a certain extent provided by the standard of review, to verify and modify factual findings from trial. In the tribunals, a more rigorous standard of review is used than in ‘de novo trials’ on cassation in some civil law jurisdictions. Whilst the pre-trial and post-trial stages
render important contributions to establishing the truth, those contributions are secondary and indirect (i.e. preparatory or corrective). Arguably, it is the trial phase that accomplishes the goal of truth-finding first-hand and directly.4

The second, ‘law-and-society’ type of accounts tend, to approach the phenomenon of a criminal trial not (solely) as an enterprise whose purposes are exhausted by the implementation of formal rules of procedure and evidence. As was argued earlier, the attribution to international criminal process of goals that are not proper goals of procedure is the least convincing aspect of these positions.5 However, some other elements may be valuable. One of them is their keener attention to the communicative purposes of legal process in the context of the society. This view embraces the nature of a trial as a manifold social reality rather than a lifeless protocol or algorithm followed per books. If one looks closer into the way in which the trials (both national and international) are structured, and how, where, and by whom they are conducted, one notices that the process unfolds through courtroom rituals, interactions, and exchanges. These external manifestations (should) have a specific point or be geared to communicate certain messages across the courtroom and possibly beyond. In addition to what any given procedural step or activity is directly meant to achieve, its external aspects may exert didactic effects of their own (next to, and different from, the didactics of whatever is being pleaded or adjudicated upon). Thereby, the process in itself may play an expressive role and engage the trial participants, public gallery, and observers.

Indeed, international legal proceedings are objectified through recognizable and deliberately conceived corporeal features, including the courtroom interior, attributes, and elements of decorum such as formal legal etiquette and language.6 Unless the procedural form and the setting of an international trial are mere automatic and arbitrary extensions of the national court rituals, there must be a reason why international criminal trials look as they do. The trial process ‘in action’ and the view of the ‘wheels of justice’ rolling affect public perceptions. If it is apt to produce strong effects on the procedural players and the audience, such effects are better to be known and managed than neglected. For the posterity, the ‘atmospherics’ of a trial may become nearly as important as the content.7 The impressions on the receiving end will be decisive in forming the public judgement of the trial as orderly and fair or otherwise. Hardly any court is pleased if the prevalent assessment of how the trial is being (or has been) run are negative.

It is in this sense—a sense not incompatible with the legalist conception—that the trial process can be deemed to possess an inherent expressive value and a didactic potential. The process is organized in a way that enables the court to transmit certain messages to the participants and observers, and to endow them with a shared experience of involvement. As the communication unfolds between the actors in the courtroom and extends into the outside world, the process acquires a penumbral function as a communicative platform and a form of outreach.8

4 See e.g. Decision, Prosecutor v. Blagojević et al., Case No. IT-02-60-AR73, AC, ICTY, 8 April 2003 (‘Blagojević et al. appeal decision’), para. 22 (‘A Trial Chamber … is in nature both a trier of fact and an arbiter of questions of law. Authorised by the Statute and the Rules to make factual findings on the basis of evidence presented by the parties, the Trial Chamber relies on the factual findings to determine the guilt or innocence of the accused. In that sense, the factual findings, subject to appeal and review, are parts of the truth proved beyond reasonable doubt.’) (Footnote omitted).
5 Chapter 3.
6 For a discussion of courtroom arrangements and ritual in the national criminal trials, see Chapter 4.
7 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) 16 (‘The setting of a trial is designed to send strong messages and images about guilt and morality that leave an imprint on collective memories. … The legal form and procedural legality provide morally powerful instruments for assigning criminal liability to individuals and responsibility to states.’).
8 ‘In a sense everything that an institution of this kind does can be seen as a form of outreach. The way it investigates and engages with potential witnesses…, the announcements that courts make…, the conduct in the courtroom is outreach, [as well as the judgments.’ See interview with Refik Hodžić, cited in F. Mégre, ‘The Legacy...
These expressive effects of the trial process are quite distinct from the functions of establishing the truth and distinguishing between the guilty and the innocent, and they are largely overlooked by the legalist accounts.

It can thus be argued that the examination of international trials through a socio-legal lens is a promising line of inquiry. For example, expressivist accounts drawing upon Durkheim’s concept of social rituals describe trial and punishment as rituals by which the community activates its values and defines its own ‘self’. The cohesiveness, if not the existence, of the ‘international community’ is something with which such accounts will necessarily struggle. Be it as it may, the ritual of an international trial can be viewed as a process through which that proverbial community defines itself. The extraordinary gravity of international crimes is bound to shock the public conscience and is attended by universal calls for justice to ‘be done, and [be] seen to be done’. The attention by the international public to an average international criminal trial is more far-reaching than, or at comparable to, high-profile cases of exceptional importance processed by national courts.

The ‘theatrics’ of international trials—which encompasses their communicative, corporeal, and spatial-temporal aspects—make an interesting sociological case study. International trials can thus be viewed as a communicative process through which the defendant is called to account as a moral and responsible agent; they are rational inquiries that make it possible to reach a verdict justifiable to both the accused and the community at large. The scenario, not unusual in international criminal trials, whereby the defendant defies the political terms on which he is ‘called to account’ is a serious challenge to the viability of ‘communicative’ theories and points to the need for reassessing their relevance in this context.

The purpose here is neither to test the validity of these hypotheses in the international trial context, nor to pursue the legal-sociological lines of inquiry. It is sufficient to be aware of the potential and limitations of both legalist and socio-legal visions. The potential of the latter perspective is, in particular, in acknowledging the communicative aspects the trial process, over and above expressivism that is traditionally associated with the application of substantive criminal law and especially in relation to criminal punishment. As for the dispute between the legalist and law-and-society positions, the recognition of the communicative role and effects of procedure is not irreconcilable with the view that trials must be limited to establishing the truth about the charges and to the determination of the guilt or innocence of the individual accused. As long as such ‘centripetal’ effects do not become the principal motive behind the operation of justice, there is no conflict. The proper procedural functions ought to remain a primary concern on the mind of trial participants, being the yardsticks for determining whether the procedural system operates as it should. Being integral to the trial process, the sociological or communicative effects are incorporated in the way the trial is conducted. But they are incidental to the logic of the process itself. These effects are not susceptible to the court’s fail-proof calculation, and the perceptions that are being formed about the court and the process on the receiving end cannot be controlled.


10 These aspects deserve a separate study in legal psychology and anthropology. This Chapter has a more legal and normative twist and does not aim to fill this gap, save for occasional and limited remarks (see text to infra n 484 et seq.).

11 R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986) 144; A. Duff et al., *The Trial on Trial. Vol. 3: Towards A Normative Theory of the Criminal Trial* (Oxford: Hart, 2008) 3 (‘a communicative process that calls the defendant to answer, and through which he can challenge the accusations of wrongdoing made against him, including the norms in the light of which those accusations are made. The trial is a communicative forum which involves mutual relations of responsibility between the participants.’).
Chapter 5: Functions of International Criminal Trials

The following sections will examine the primary procedural function (truth-finding) of international criminal trials and address the ‘penumbral’ communicative effects of the trial process. As part of that inquiry, the Chapter will address the following question: (i) what do socio-political goals, such as establishing a historical record, reconciliation, and redress for the victims, entail for the principles, methods, and scope of truth-finding by international criminal tribunals? and (ii) how is the trial’s expressive or communicative potential to be realized whilst at the same time enabling the tribunals to stay immune to the risk and perception of a ‘show trial’ being performed on the accused, as opposed to the genuine administration of justice?

3. PROCEDURAL FUNCTION OF INTERNATIONAL TRIALS: TRUTH-FINDING REVISITED

3.1 Formal commitment to truth

Under the legalist view, the procedural functions that international criminal trials serve, or are supposed to serve, are not too different from those of trials conducted in the national context. The primary function of international trials, which is apparently deemed not in need of a special normative justification by most scholars of international criminal procedure, is the establishment of the truth.\(^{12}\) The question is whether they can remain exactly the same, given that the institutional mandates of the tribunals might redefine the ways in which such functions are interpreted and exercised. If the premise is correct, international criminal trials—being criminal trials in the first place and in this regard similar to domestic criminal proceedings—are or should be aimed at establishing the truth of the alleged facts and deciding upon the guilt or innocence of the accused with respect to the charges against him or her. Ensuring the accuracy of the factual bases enables the court to arrive at a correct legal qualification of the conduct in issue and to determine an appropriate sentence if applicable.

Truth-finding, i.e. the quest for a ‘legal’ or procedural truth, rather than an absolute objective truth, is the basic goal of the trial process before international criminal courts.\(^{13}\) It is also seen as an important precondition for the acceptance of the proceedings and a yardstick of the legitimacy of the entire enterprise.\(^{14}\) The priority of truth-finding is not plainly recognized as a primary procedural task in the positive law of all international criminal tribunals. But it is often presumed to be inherent in the adjudicative mandates of those courts and is inferable from their legal frameworks. Among other ways, the formal commitment of international and hybrid criminal courts to establishing the truth finds expression in the prescribed powers and competences of trial judges and the courtroom rituals concerning the treatment of the sources of evidence.

\(^{12}\) See e.g. C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (The Hague: T.M.C. Asser Press, 2010) 8-9 (adopting ‘an impact on the truth-seeking function’ as a criterion in selecting the procedural issues to be covered in the study, without further explanation of reasons); N. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) 4 (implying that ‘determining who did what to whom during a mass atrocity’ is an elementary function of international criminal trials and devoting her study to the tribunals’ asserted incapacity to properly discharge it).

\(^{13}\) Chapter 4.

\(^{14}\) S. Kirsch, ‘Finding the Truth at International Criminal Tribunals’, in T. Kruessmann (ed.), *ICTY: Towards a Fair Trial?* (Graz: Neuer Wissenschaftlichter Verlag, 2009) 47 (although the search for the (historical) truth cannot be the main goal of international criminal justice, ‘truth is of critical importance’ to its legitimacy: ‘A criminal proceeding that is not based on the search for correspondence with reality will lose acceptance rather quickly.’); Combs, *Fact-Finding without Facts* (n 12), at 6-7 (concluding, on the basis of a thorough empirical research, that at least at some tribunals ‘international criminal trials purport a fact-finding competence that they do not possess.’).
3.1.1 ICTY, ICTR, and SCSL

The Statutes of the ICTY, ICTR, and SCSL do not use terms such as ‘truth-finding’ or ‘establishment of the truth’, in contrast to ‘fairness’ and ‘expeditiousness’, which are integral components of the vocabulary of the trial procedure. This feature has been noted as striking by several scholars. However, the current versions of their Rules do recognize the ‘ascertainment of the truth’ as a principle which underlies the Trial Chamber’s control over the mode and order of interrogating witnesses and presenting evidence at trial, along with the need to avoid a needless consumption of time. This renders the establishment of the truth the overarching goal of the trial process. The Milošević Trial Chamber referred to this controlling power of the judges as ‘no more than a recognition of the purpose of any criminal trial’. Similarly, the court’s function of establishing the truth is reflected in the text of a solemn declaration witness are to make; the possibility for a child to testify without a solemn declaration if the Chamber is satisfied that she is sufficiently mature to report the facts and understands the ‘duty to tell the truth’; and the Chamber’s power to warn a witness of the duty to tell the truth and the consequences of a failure to do so.

Due to the essentially party-driven logic of the proceedings at the ICTY, ICTR, and SCSL, the judges at those tribunals do not hold an ex officio duty to make sure that the evidentiary basis for the judgment is exhaustive. They would normally establish facts on the aggregate strength of the proof adduced by the parties in order to prove or to disprove the charges contained in the indictment. However, their toolkit does include powers that can be employed to search for the truth more actively. Most notably, judges are authorized: (i) to ask witnesses any questions at any time of the examination; (ii) to allow enquiry into the additional matters in cross-examination; (iii) to order either party to produce additional evidence or to call witnesses proprio motu and order their attendance; and (iv) to exercise their functions at a place other than the seat of the Tribunals (which implies the power to conduct on-site visits).

The degree to which judges have been willing to have recourse to these fact-finding powers has varied by tribunal, case, and individual Chamber. Variations have been shaped by the composition of the trial bench and individual preferences of its members. Subject to these variations, the logic of the procedural system embodied in their Rules of Procedure and Evidence informs notions about the proper configuration of professional roles of the trial participants. In a party-driven process, the parties are responsible for formulating and presenting

15 Arts 20(1) and 21(2) ICTY Statute; Arts 19(1) and 20(2) ICTR Statute; Art. 17 SCSL Statute.
17 Rule 90(F) ICTY, ICTR, and SCSL RPE.
20 Rule 90(A) ICTY and ICTR RPE; Rule 90(B) SCSL RPE.
21 Rule 90(B) ICTY and ICTR RPE; Rule 90(C) SCSL RPE.
22 Rule 91(A) ICTY, ICTR, and SCSL RPE.
23 Rule 85(B) ICTY, ICTR, and SCSL RPE (‘a Judge may at any stage put any question to the witness’).
24 Rules 90(H)(iii) ICTY RPE and 90(G)(iii) ICTR RPE.
25 Rule 98 ICTY and ICTR RPE.
26 Rule 4 ICTY, ICTR, and SCSL RPE.
their cases, for deciding what witnesses to put on the stand, and what questions to pose and when. This sets constraints on the willingness of the judges to invoke the above-mentioned powers and affects the manner in which they exercise them. This is due, first, to the judges’ relatively limited advance knowledge of the parties’ cases and, second, to the need for them to preserve the image of passive umpires throughout the trial. An extensive judicial examination of witnesses, especially where it is ‘ill-timed’, goes beyond mere requests for clarification, and interferes with the case strategy a party has in mind, will be perceived as problematic in courts generally following the adversarial scheme of trial where the parties take the lead in presenting and probing evidence.\(^{27}\) The ICTY’s record features examples of situations in which the judicial approach to questioning witnesses, led to serious frustration for both parties. Particularly combined with unfortunate remarks from the bench, which were meant to justify the approach but in fact indicated the purport and/or result of such questioning, this resulted in extensive and almost academic and avoidable courtroom debate on the proper truth-seeking role of judges in the proceedings.\(^{28}\)

Differently, a judge’s questions which merely seek to clarify the matter and do not disturb the tightly-knit line of counsel’s examination are normally regarded as fully legitimate and necessary, as they are in both common law and civil law systems.\(^{29}\) The ad hoc tribunals’ judges who were surveyed on this issue reported that they did not feel constrained to pose questions to witnesses whenever they believed that clarifications might help them to comprehend the testimony or when the parties did not manage to get an answer from a witness.\(^{30}\)

\(^{27}\) D.D. Ntanda Nsereko, ‘Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia’, (1995) 5 (2-3) Criminal Law Forum 507, at 538-9 (giving an early recommendation to the ICTY judges not to interpret Rule 85 (B) as ‘a license … to descend pell-mell into the arena of criminal trial combat and conduct unrestrained’, but rather to leave the questioning to the parties and intervening only so as to resolve ambiguities and clarify certain points overlooked by the counsel); P.M. Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court’, (2001) 5 Washington University Journal of Law and Policy 87, at 90 (such questioning [by the judges] may throw off the rhythm of the prosecution’s or the defense’s case presented in an adversarial mode, casting the judge in the role of an uninvited guest at the party.’); M. Fairlie, ‘The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit’, (2004) 4 International Criminal Law Review 234, at 276 (arguing that these powers are incompatible with the judicial impartiality as defined in the adversarial system).

\(^{28}\) For the most striking, but far from the only, example, see Transcript, Prosecutor v. Prlić et al., Case No. IT-04-74-T, TC III, ICTY, 15 March 2007, at 15826-39 et seq. (see at 15831, Presiding Judge: ‘my feeling is, and I’ve already said, that in 90 per cent of the cases, 95 per cent of the cases, most of those questions are in favour of your clients.’) and, in the same case, Transcript, 19 March 2007, at 15842 et seq. See also, in the same case, Order to Clarify an Oral Observation, TC III, 15 March 2007.

\(^{29}\) Blagojević et al. appeal decision (n 4), para. 23 (‘If Blagojević’s argument were that by allowing the judge to ask questions of the fitness, the Rules allow the judge to help the Prosecution discharge its burden of proof, it would be plainly wrong. The questions asked by the judge are asked in order to clarify for the court, as opposed to the parties, certain questions of evidence, and the answers may be to the advantage of the accused. In both common and civil law systems, a judge can ask witnesses questions, proprio motu.’).

\(^{30}\) See e.g. Interview with Judge Emile Francis Short of the ICTR, ICTR-PJ/05, Arusha, 23 May 2008, at 10 (‘We put questions during and after the examination and cross-examination of witnesses … primarily to make sure that we get material information which we think the parties have neglected or omitted to elicit. We also occasionally intervene to ensure that the Court’s time is not being wasted.’); Interview with Judge Sergei Alekseevich Egorov of the ICTR, ICTR-PJ/06, Arusha, 20 May 2008, at 9 (‘We have always been asking when there was something we would like to clarify. As regards the timing of questions, this is not regulated. I have asked questions … at any stage – examination-in-chief, cross-examination. … When the prosecution leads its witness and examines her in-chief, they frequently forget certain qualifying questions, because for them as a party this may be unnecessary. They simply forget the temporal/spatial factor. … Therefore, I have always been trying to qualify what time and place we are talking about, which is otherwise very easy to lose sight of in the course of a lengthy examination with many rounds of questions and answers.’); Interview with an ICTR Judge, ICTR-AJ/08, Arusha, 16 May 2008, at 9 (‘I will ask questions whenever there is an area not fully covered by both parties based on the indictment. Also, I may propose some clarification questions. During the heated exercise between both parties, sometimes they lose critical points, or there is conflicting evidence from a witness. At that time, Judges have a duty to clarify or ask more questions.’); Interview with Judge Asoka Nilah de Silva, ICTR-PJ/03, Arusha, 2 June 2008, at 8 (‘Sometimes we do not get involved because if we ask too many questions, the Defence thinks we are supporting the Prosecutor, or the
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Insofar as the judge’s questioning does not amount to a takeover of the examination from the relevant party and does not lead to uninformed self-incrimination, this line of conduct is deemed appropriate and not objected to by counsel.\(^3^1\)

With regard to the judicial power to order parties to present additional evidence and to call evidence \textit{proprio motu}, the general principle has been that the Trial Chamber holds discretion in invoking this fact-finding competence, depending on the circumstances of the case. A stronger interpretation espoused by some Trial Chambers has been that the judges “may be obliged \textit{proprio motu} to summon witnesses and order their attendance in court in order to address any outstanding questions regarding criminal responsibility of the Accused emanating from the presentation of evidence by the parties”.\(^3^2\) This statement implies the imposition on the ICTY Trial Chambers of an \textit{ex officio} truth-finding duty.

In practice, the Rule 98 power has not been used particularly often. Both the prosecution and the defence have normally ensured that the bench is furnished with all relevant evidence that can possibly be identified that tends to prove their respective cases.\(^3^3\) Moreover, as noted, the willingness of judges to have recourse to this fact-finding tool has been watered down by the preoccupation that the accused might end up disadvantaged if the Chamber evidence was not in his favour and that the image of an unbiased bench would therefore be undermined.\(^3^4\) From this perspective, as Judge Schomburg observed, Rule 98 is ‘misleading’, because ‘if the defense has decided to remain silent, the Chamber has no power to order the defense to present additional evidence.’\(^3^5\)

\(^3^1\) Interview with Defence Counsel Ben Gumpert, ICTR, ICTR-PD/09, 22 May 2008, at 15 (‘Judges manifesting a clear bias in favour of one side or the other by persistent questioning of a particular nature, then that is obviously undesirable. … But if the purpose of the questions is to move things along and get things done quickly, get the evidence out clearly, very good.’); Interview with a member of the ICTR OTP, ICTR-AP/08, 20 May 2008, at 11 (‘it comes more from the civil law judges where, after the witness has finished testifying, you see the judge has a piece of paper and a long list of questions. It is useful, helpful. Common law judges tend to be more laidback and they just allow the witness to testify and it is for the other party to cross-examine the witness.’); Interview with Christine Graham of the ICTR OTP, ICTR-OP/03, Arusha, 28 May 2008, at 14 (‘Some [judges] do it there and then, and they just take over your examination, even if you do not want to do it that way. You have to live with it. Others wait. There are different styles.’).


\(^3^3\) Interview with Judge Short of the ICTR (n 30), at 8 (‘that it does not happen is probably due to the fact that both the Prosecution and the Defence do make sure that all the material witnesses are called. The biggest problem we have is trying to limit the number of witnesses that the parties wish to call without denying them the right to put their case across.’); Interview with Judge Egorov of the ICTR (n 30), at 9 (‘I agree with you that it is rare. The reason is that the parties usually present sufficient evidence. Furthermore, if they notice that the Court is interested in something, they will probably take steps to obtain it unless it is impossible.’); Interview with an ICTR Judge, ICTR-AJ/08 (n 30), at 7 (‘The reason why the bench does not exercise its \textit{proprio motu} power in an active manner is that the bench wants to listen to both sides first. The accused sometimes accuses the bench of being biased. In my case, there are lots of accusations to the bench from the Defence. This sometimes gave us an uncomfortable feeling.’).

\(^3^4\) Interview with Judge Egorov of the ICTR (n 30), at 10 (‘We rely on what has been gathered by the parties. And there is a sort of misgiving that if we request an additional material from the Prosecution, we would thereby manifest ourselves as judges concerned with a more prosecutorial direction of investigation. If we do the same vis-à-vis the defence, the prosecution might object as a matter of professional jealousy that we support the defence.’); Interview with Judge Erik Møse of the ICTR, ICTR-PJ-04, Arusha, 20 May 2008, at 9 (‘There may be a dilemma between requesting additional evidence to ascertain the truth, on the one hand, and creating a risk of the bench being accused of assisting one of the parties. … It should also be borne in mind that at the time of the request it is unknown whether the additional evidence, if found, will assist one or the other party. … In a nutshell, Rule 98 is useful but should be applied in a way that avoids any perception of bias. After all, the point of departure in this adversarial system is that the parties have the main responsibility to produce the evidence.’).

\(^3^5\) W. Schomburg, ‘Truth-Finding in the International Courtroom: The \textit{Ad Hoc} Tribunals for the Former Yugoslavia and Rwanda’, lecture delivered at the International Alumni Conference 2008, Faculty of Law, Utrecht University, 29 March 2008, available at
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The utility of the Rule 98 power is also reduced by the practical reason of the limited familiarity of the judges with the details of the case. Since they do not have access to the full dossier of the materials assembled by the parties through their investigations, the judges will more likely than not be unaware of the existence of the evidence that could be probative and relevant. That said, Rule 98 has not remained a dead letter, and ICTY and ICTR judges have occasionally resorted to the fact-finding power to call important witnesses that have not called by either of the parties. At least some of the ICTR judges who participated in the survey have confirmed that they or their colleagues would not hesitate to call material evidence that would otherwise not have been made available by the parties.

Before the ad hoc tribunals, judicial fact-finding powers are generally of a subsidiary and gap-filling character. The bulk of the mission of uncovering and presenting the different versions of facts rests with the parties. As zealous advocates in an adversarial context, they remain responsible for submitting all the relevant and probative evidence that promotes their respective cases. Importantly, in their advocacy, the parties operate under a strict duty to abide by the rules of professional ethics. One of its main principles is that they may not deliberately misinform the court or engage in other practices that undermine the truth-finding potential of the proceedings. These are the indicia of ‘the new breed of “softly” adversarial systems’ whereby the judge generally remains aloof from the presentation of evidence, but he has a subsidiary right to ask questions and even to call evidence sua sponte.

It may be subject to debate whether the party-driven process as the method for establishing the truth is optimal in view of the purposes and circumstances of international criminal proceedings. However, it is not seriously in question that the trial process at the ICTY, ICTR, and SCSL, which is structured per adversarial script, aims at the determination of the truth on the charges and the underlying factual allegations under the applicable standard of proof beyond reasonable doubt.

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36 The pre-trial delivery of case materials to the Trial Chamber (ICTR) or the pre-trial Judge (ICTY) by the parties, which includes pre-trial briefs and lists of witnesses and exhibits, is not necessarily sufficient to enable the judges to make informed guesses about the other possible evidence that could be heard. Furthermore, the purpose of the procedure is the opposite: to reduce the scope of the case and evidence presented at a trial in advance. See further Chapter 8.

37 Interview with Judge Emile Short of the ICTR (n 30), at 8 (‘if Judges saw the need to call an important witness to resolve a crucial issue in a case, I have no doubt they would make such an order. For example, if the resolution of an important issue that touches on the guilt or innocence of the accused could be resolved by calling a handwriting expert, I am sure the Chambers would invoke Rule 98’).

38 See infra 4.3.

39 Blagojević et al. appeal decision (n 4), para. 21 (‘The pre-trial Judge was correctly concerned with the duty of the Chamber to discover the truth but only from the evidence as presented to the Chamber.’). See also Transcript,
3.1.2 ICC

At the ICC, establishment of the truth permeates the procedural edifice and is embedded in the way in which trial actors are to carry out their obligations. First and foremost, it guides the investigative work of the Prosecutor who is placed under a duty to ‘investigate incriminating and exonerating circumstances equally’. Like at the ad hoc tribunals, the requirement of truthfulness applies to witnesses. The link between witness evidence and the search of truth is also reflected in the ICC Rules – for example, ICC Rules 66(1) and (2) (on solemn undertaking) and 67 (the conditions in which the audio or video-link testimony is given must be conducive to the giving of truthful and open testimony). The duty of witnesses to testify truthfully is strengthened by the provision which makes it an offence against the administration of justice to give false testimony.

Defence counsel before the ICC are bound by the duties to act honourably, to maintain the integrity of evidence and to refrain from knowingly misrepresenting facts or otherwise damaging truth-finding. Among conduct proscribed as offences against administration of justice are also ‘presenting evidence that the party knows is false or forged’ and ‘corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence’.

The configuration of the truth-finding competence of the Trial Chamber is of utmost relevance in this context. The ICC Trial Chambers have a duty to establish the truth and are endowed with powers enabling them to do so. Article 64(6) of the ICC Statute stipulates that

In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: … (b) require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; … (d) order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

In addition, Article 69(3) provides that the Trial Chamber ‘shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth’. Some commentators submit that this imposes an obligation on the Trial Chamber to actively search for the truth. However, a broader scholarly consensus has emerged that the named provisions fall short of establishing a judicial obligation but provide for an ex officio power to extend the factual inquiry to areas unexplored by the parties. This means that while

Prosecutor v. Blagojević et al., Case No. IT-02-60-PT, TC II, ICTY, 19 July 2002, at 6 (‘Please understand that the general concept of this Tribunal, and here, it is the necessity to come as close as possible to the truth.’).

Art. 54(1)(a) ICC Statute (‘The Prosecutor shall … [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.’).

Art. 69(1) ICC Statute (‘Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.’).

Art. 70(1)(a) ICC Statute.

Conduct of Professional Conduct for counsel, Resolution ICC-ASP/4/Res. 1, 3rd plenary meeting, ASP, 2 December 2005: Arts 6, 24(3) (‘Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.’); 25(1) (‘Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.’); and 31 (on misconduct).

Art. 70(1)(b)-(c) ICC Statute.

Tochilovsky, ‘Legal Systems’ (n 16), at 631.

the ICC trial judges are not under a legal obligation to ensure *proprto motu* the broadest possible evidentiary base for their decision and to guarantee that it encompasses all potentially relevant evidence, they are entitled to strive to do so.\(^{51}\)

The latter view finds support in the drafting history of Articles 64(6)(d) and 69(3) of the Statute.\(^{52}\) In particular, during the August 1997 session of the Preparatory Committee, the precursor of Article 69(3), then Art. 44 of the ILC Draft, included a reference to the Court’s ‘authority and duty to call all evidence that it considers necessary for the determination of the truth’. This reference was abandoned in December 1997 as too strong but a noteworthy comment was added to the surviving text: ‘This provision is meant to indicate that the relevant evidence cannot be determined by the parties alone, but has also to be determined by the Court’s evaluation of the necessary depth of investigation and determination of the facts. This is ... basically a civil law concept, but delegations should bear in mind the additional historical dimension and truth-finding mission of the Court.’\(^{53}\) Thus, although the respective articles provide a legal basis for a potentially stronger role of the Chamber in ascertaining the truth, nominally they do not go further than the judicial competence provided under Rule 98 of the ICTY and ICTR Rules.\(^{54}\) Arguably, the ICC judges’ powers have an even more limited reach, given the lack of the power to subpoena witnesses.\(^{55}\)

Similarly, like at the antecedent courts, the power of the Chamber to question a witness before or after the questioning by other trial participants is formulated as an authorization, and not as a duty to raise all questions that the judges believe to be material.\(^{56}\) Thus, as a matter of law, the scope and nature of judicial questioning at the ICC is comparable to the examination of witnesses by ICTY and ICTR judges. Finally, another relevant provision relevant to the format of the ICC judges’ truth-finding mandate is Regulation 43. It prescribes that, along with the need to preserve fairness and avoid delays, the efficient ‘determination of the truth’ is a key consideration that the Presiding Judge (in consultation with the other members of the bench) takes into account when determining the mode and order of questioning of witnesses and presentation of evidence.\(^{57}\) In the absence of a judicial duty at the ICC to search for the truth by adopting a proactive approach towards the examination of evidence, the presentation of evidence, like investigations, remains a prerogative of the parties. While the Trial Chamber is not precluded from resorting to its positive discretion under Articles 64(6)(d) and 69(3), the full take-over of fact-finding by judges is unlikely. Structurally, it is the parties who take the lead in investigations and are primarily responsible for investigating and submitting evidence to the Court – this is not a dossier system.

It has been argued that the need to supervise compliance with the unprecedented prosecutorial duty under Article 54(1)(a) to conduct investigations impartially would prod the

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\(^{54}\) Noting similarity between Art. 64(6)(d) and ICTY Rule 98, see Bitti, ‘Article 64’ (n 50), at 1213.

\(^{55}\) See further G. Sluiter, ‘“I Beg You, Please Come Testify” – The Problematic Absence of Subpoena Powers at the ICC’, (2009) 12 New Criminal Law Review 590. Observing that the lack of a power of the Chamber to summon witnesses is unlikely to amount to material difference, given the power to order the production of evidence from the parties, see Piragoff, ‘Article 69’ (n 52), at 1304.

\(^{56}\) Rule 140(2)(c) ICC RPE. Cf. Rule 85(B) ICTY, ICTR, and SCSL RPE.

\(^{57}\) Regulation 43 ICC Regulations of the Court.
judges to adopt a more active truth-finding role. In Lubanga, the Trial Chamber gave a clear signal that it takes its role as a guardian of fairness under Article 64(2) of the Statute seriously when it assumed a supervisory task over the investigative methods of the Prosecutor. The Chamber imposed a stay of proceedings, as the prosecutor was unable to disclose to the accused and to the bench potentially exculpatory materials obtained pursuant to the confidentiality agreements with anonymous information-providers (including at the UN), concluded under Article 54(3)(e), not to disclose evidence. The problem was that the OTP used such agreements routinely in order to obtain evidence, instead of resorting to them under exceptional circumstances only and in order to collect springboard information for generating new evidence. Given that under their terms the OTP was not authorized to divulge the materials even to the judges, the prosecution prevented the Chamber from exercising its statutory duty to ensure a fair trial, to provide for disclosure before trial, and to remove doubt as to whether the material is exculpatory. Whilst the Chamber’s primary concern was about the possibility of oversight, its fact-finding powers under Articles 64(6)(d) and 69(3) were arguably also indirectly threatened by the prosecutorial practice of procuring evidence via the Article 54(3)(e) route. The Chamber could neither order the production of additional evidence from the information provider nor require her appearance as a witness. Thus, even though the decision reflects in the first place the Chamber’s preoccupation with its supervisory function, it is equally about the Chamber’s ability to effectively exercise its fact-finding prerogatives. The stay of proceedings was lifted as the obstacles that engendered it had fallen away: the information-providers gave consent for disclosure of the evidence to the judges, and the Prosecution provided the Chamber access to the materials in unredacted form with a view to verifying whether they must be disclosed to the accused as exculpatory.

Similarly, the Mbarushimana Pre-Trial Chamber expressed its concern about, and deprecated in strong terms, the investigative methods employed by some OTP investigators, which it deemed it ‘utterly inappropriate’ in light of the duty under Article 54(1)(a). In particular, the PTC criticized those investigators for being attached to certain theories and assumptions to such an extent as to consider it possible to put leading questions or to demonstrate ‘resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations’. A consequence of such flawed investigative techniques is reduction of the probative value of evidence, and it is telling that the charges were not confirmed in that case.

59 Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1401, TC I, ICC, 13 June 2008, para. 94.
60 Ibid., paras 71-2.
61 Ibid., para. 92(iii). See Arts 64(2), 64(3)(c), and 67(2) ICC Statute. The AC subsequently affirmed that TC must be given access to any material in possession or control of the Prosecutor obtained under Art. 54(3)(e), to enable it to decide whether it is subject to disclosure pursuant to Art. 67(2) ICC Statute. See Judgement on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials…’, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, para. 3.
62 Rule 81(2) ICC RPE.
65 Ibid.
66 Ibid., at 149.
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The degree of activism of the ICC Chambers in the exercise of fact-finding powers, the Prosecutor’s compliance with the duty of impartial investigation, and the rigorousness of the judicial supervision over the same, are some of the key parameters through which the ICC’s prioritization of its truth-finding tasks becomes apparent. But from a formal perspective of law, it is certainly correct to consider the objective of establishing the truth as a ‘plain commitment’ of the ICC procedure and its trial process in particular.67

3.1.3 Hybrid and other courts

At this juncture, it is worth turning to a number of hybrid criminal tribunals with a view to assessing the extent to which the search for the truth is embedded in their procedure, as well as the configuration of that mandate in light of the expected stronger influence of local procedural traditions.

At the SPSC in East Timor, for example, the Transitional Rules of Criminal Procedure envisaged the obligation of the Public Prosecutor ‘to direct criminal investigations in order to establish the truth of the facts under investigation’. For that purpose the investigations must be extended over incriminating and exonerating circumstances equally – the formula that is familiar from the model set by the ICC Statute.68 Like elsewhere, the truthfulness of testimony is a fundamental principle underlying the testimonial process, as reflected in provisions governing solemn undertaking, the obligation of witnesses to tell the truth, and the sanctions for failure to do so.69 Section 36.7 authorized the Presiding Judge to exercise control over the mode and order of questioning of witnesses, inter alia, in order to, ‘make the presentation of evidence effective for the ascertainment of the truth and ‘avoid needless consumption of time’.

The configuration and reach of the truth-finding function of the ECCC deserves special consideration. Due to the embedment of the ECCC within the legal system of Cambodia, which draws heavily upon the Continental legal tradition, its procedural law more explicitly adheres to the conception of ‘procedural truth’ that is supposed to approximate as much as possible the material or objective truth. The ECCC regime is permeated by concern with accurate and efficient fact-finding. This transpires especially from the way the powers of trial judges are formulated. As in other jurisdictions surveyed, the formal commitment to the truth flows clearly from the witnesses’ legal duty to tell the truth, the ritual of taking the oath to that effect, and the powers of the Co-Investigating Judges and the Trial Chamber to remind a witness of that duty and the consequences of failing to respect it.70 At the judicial investigation stage and by analogy with the ICC Prosecutor’s truth-seeking mandate, the investigative action by the OCIJ remains at all times subordinate to the goal of ‘ascertaining the truth’, which is interpreted as the requirement of impartial collection of evidence, whether inculpatory or exculpatory.71 Subject to the guarantees against self-incrimination (Rule 28), the CIJs may question any person as a witness if they consider that to be conducive to ‘ascertaining the truth’.72

As concerns the substantive hearing, the Internal Rules require that it must be conducive to the goal of truth-finding: proceedings that do not serve to promote it and unnecessarily delay

67 Eser, ‘The “Adversarial” Procedure’ (n 16), at 210 and 225.
68 Section 7.2. TRCP (emphasis added).
69 Sections 35.6, 36.2 and 49.3 TRCP.
70 Rule 24(1) ECCC IR (‘Before being interviewed by the Co-Investigating Judges or testifying before the Chambers, witnesses shall take an oath or affirmation in accordance with their religion or beliefs to state the truth’); Rules 35(2) and 36(1) ECCC IR (‘The Co-Investigating Judges or the Chambers may, on their own initiative or at the request of a party, remind a witness of their duty to tell the truth and the consequences that may result from failure to do so.’).
71 Rule 55(5) ECCC IR (‘In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory.’).
72 Rule 60(1) ECCC IR.
the trial may be excluded by the Presiding Judge, in consultation with other members of the bench.\textsuperscript{73} Importantly, the ECCC Trial Chamber is endowed with further reaching \textit{ex officio} fact-finding powers and role at proof-taking than its ICC counterparts: (i) the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth, acting either \textit{proprio motu} or at the request of a party,\textsuperscript{74} and (ii) the Chamber may at any time order additional investigations if necessary.\textsuperscript{75} Furthermore, it is a striking feature of the judicial competence of the ECCC trial judges that they are not only entitled to question the accused and ask any questions that are conducive to ascertaining the truth, but they are also under an obligation to ask ‘all pertinent questions, whether these would tend to prove or disprove the guilt of the Accused’.\textsuperscript{76} As will be discussed in more detail subsequently, these aspects are a corollary of the fact that ECCC judges are to take a lead in the process of structuring the evidence presentation, during which the single case, the ‘case of the truth’, rather than two cases, is presented.\textsuperscript{77} Thus, it is the judges and not the parties who determine the organization of proof-taking, what witnesses to call and the order of their appearance, and commence and conduct the bulk of questioning or hearing of the accused, witnesses, experts and civil parties.\textsuperscript{78}

It can be inferred from this that the ECCC procedural framework vests in the judges a duty to actively and \textit{proprio motu} search for the truth, which is rather unique in international criminal law. In this respect, the ECCC regime clearly reflects the approach adopted in some inquisitorial jurisdictions. For instance, in Germany judges are also incumbent of an obligation to establish facts \textit{ex officio} (\textit{Amtsaufklärungspflicht}).\textsuperscript{79} Subject to ubiquitous and recognized extrinsic limitations on the reach of truth-finding,\textsuperscript{80} the pursuit of the truth at the ECCC embodies the aspiration of establishing the ‘objective truth’ to the extent possible. Notably, the ECCC Rules acknowledge no compromises to the quest for the truth such as negotiated settlements between the parties. They merely prescribe that the Chamber ‘give the same consideration to confessions as to other forms of evidence’.\textsuperscript{81}

While the STL Statute makes no explicit mention of the truth-finding function, the founding UNSC Resolution 1757(2007) provides that in establishing the Tribunal, the UNSC is guided by the willingness ‘to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and … to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations’.\textsuperscript{82} This effectively renders the search for the truth, as it can be attained through criminal proceedings, an aspect of the broader mission of the institution. Furthermore, this truth-finding mandate surfaces in a variety of Rules which set out the functions and competences of procedural actors. Rule 55(C) provides that in performing his or her functions, the Prosecutor shall assist the Tribunal in establishing the truth. Rule 92 authorizes the Pre-Trial Judge to exceptionally gather important pieces of evidence, inculpatory or exculpatory, that the parties or participating victims have been unable to collect, where this would be in the interest of justice, the impartial establishment of truth, and a fair and expeditious trial. Drawing upon the model of

\begin{itemize}
\item \textsuperscript{73} Rule 85(1) ECCC IR.
\item \textsuperscript{74} Rule 87(4) ECCC IR (‘During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth.’).
\item \textsuperscript{75} Rule 93 ECCC IR.
\item \textsuperscript{76} Rule 90(1) ECCC IR.
\item \textsuperscript{77} Chapter 10.
\item \textsuperscript{78} Rules 80bis(2), 91(1) and (2), 91bis ECCC IR.
\item \textsuperscript{79} Art. 244(2) Code of Criminal Procedure (Germany, \textit{Strafprozeßordnung, StPO}). See Kirsch, ‘The Trial Proceedings before the ICC’ (n 50), at 278; Schuon, \textit{International Criminal Procedure} (n 12), at 42.
\item \textsuperscript{80} E.g. Rule 87(7) ECCC IR (‘Any communications between the Accused and their lawyers are privileged and shall not be admissible as evidence.’).
\item \textsuperscript{81} Rule 87(5) ECCC IR.
\end{itemize}
ICTY Rule 90(F)(i), the STL Rules authorize the Trial Chamber, upon objections raised by a party, to exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth and avoid needless consumption of time and resources. Along with other relevant provisions that are all but new to students of international criminal procedure, these rules leave no doubt that the STL process, including its trial component, is guided by the goal of truth-finding and that establishing the truth is the immediate function of all principal procedural activities undertaken during the trial phase.

This perfunctory overview of key provisions obtaining in main procedural models of international criminal procedure highlights that the establishment of truth amounts to the principal proper function of such proceedings generally and the trial process in particular. The competences of the judges, prosecutors and the defence, the applicable deontological standards, and expectations towards the contributions to the proceedings by other actors, most importantly witnesses, are formulated in such a way as to facilitate the tribunals’ exercise of that function.

The following paragraphs will deal with the questions of how the ‘truth’ that is traditionally pursued through criminal proceedings can be redefined in the context of international criminal law given its specialized objectives. It remains to be seen what scope of truth can appropriately be sought to be established by international criminal courts without attracting the inappropriate risk of turning the process into a ‘show trial’ or a quasi-legal exercises in didacticism or national identity-building. Second, what kind of truth—that approximating the common-law concept of a competition between the narrowly defined and self-interested truths forged by the parties, the civil law concept of ‘objective truth’ discovered by an active and supposedly neutral adjudicator, or perhaps none of those—appears to sit better with the broad mandate of international criminal justice.

3.2 Scope of truth in trials

3.2.1 Dimensions of truth

There is a widely accepted notion that ‘truth’ acquires a broader dimension in international criminal law given its special objectives and that as such it may go beyond the ‘forensic’ truth that is normally ascertained in criminal proceedings. This raises the questions of what scope of material truth can be sought to be established via the device of an international criminal trial and how far the traditional forensic mission can be reconfigured or adjusted to enable international courts to promote the lofty objectives of compiling a historical record and building a collective memory of atrocities. The notion of legal or procedural truth may well transcend its pragmatic boundaries associated with the determination of guilt when linked to the ‘historiographical’ function of international criminal justice. On the macro-level, ‘truth’ is the cornerstone of the socio-political mission of international criminal justice and a prerequisite for achieving at least some of its recognized objectives. When combined appropriately (and paradoxically) with timely forgetting and letting go of the past, the historical truth operates as a foundation for lasting peace and genuine reconciliation between the conflicting sides. It is also a necessary

83 Rule 150(G) STL RPE.
84 See e.g. STL Rules 150(A)-(B) (the text of the solemn declaration; the possibility for a child to testify without a solemn declaration if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts and understands the duty to tell the truth), 152(A) (warning to a witness of the duty to tell the truth and of the consequences of a failure to do).
86 On the benefits of collective amnesia, see e.g. Karstedt, ‘The Nuremberg Tribunal and German Society’ (n 7), at 15 (‘Collective amnesia allows victims as well as perpetrators and all those whose past does not easily fit into either of these categories to forge new identities, to leave the past behind and reshape their memories, thus making reconciliation and immediate peace-building an easier task.’).
component of redressing victims who hold the right to truth about their victimization and the supporting structure of the accurate and balanced historical record of the conflict and gross violations of human rights.

The variables of truth, justice, reconciliation, and peace are closely linked and parts of the same dialectical equation of post-conflict justice. The interplay between them may be expressed in terms of interdependence or mutual exclusion, depending on the specific circumstances and needs of a post-conflict society. There is no ideal and one-size-fits-all formula relating these unknowns; the universal validity of different combinations and models that obtain success in some settings is far from certain. It falls beyond this inquiry to explore the underpinnings of popular claims such as: ‘There is no peace without justice and no justice without truth’. Suffice it to recognize that their correctness is generally presumed and intimated as a moral or philosophical matter. The same goes for the common belief that a broad ‘truth’ supports of most of the special objectives of international justice. A stable and sustainable peace is only viable, the argument goes, if it rests on the complete and undistorted truth having been uncovered about the causes and the course of the conflict. This helps prevent revisionism, denial, and revival of old national, ethnic, or religious animosities that might lead to the recurrence of violence. The satisfaction of victims and national reconciliation are attainable through forgiveness and healing, for which the revelation of the truth is a first step and sine qua non. Equally, assembling an accurate historical record of the atrocities equally is impossible without establishing what allegations of crimes are truthful and which, on the contrary, are false and undertaken to justify own crimes by putting a tu quoque defence.

Disharmony between the narrow forensic and more ample post-conflict dimensions of the ‘truth’ becomes apparent as soon as one takes a look at what international criminal trials are supposed (and able) to achieve given their normative priorities and limited resources. The procedural truth is established, under the standard of beyond reasonable doubt, within the contours of specific allegations and criminal charges against a given individual in order to resolve issues of his or her individual guilt and, where appropriate, sentence. This meaning of ‘truth’ is molded by the objective of establishing individual criminal responsibility that may not be easily reconciled with objectives of restoring peace, promoting reconciliation, and compiling a historical record if these are seen as immediate goal or tasks. One beaten example is that the threat of a criminal prosecution may galvanize the political and military leaders into continuing hostilities until they definitively prevail or become defeated in the war. The gap between the

88 Naqvi, ‘The Right to the Truth in International Law’ (n 85), at 247.
89 Question of the impunity of perpetrators of human rights violations (civil and political), revised final report prepared by Mr. Joint to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev. 1, 2 October 1997, Annex 1, Principle 1 (‘Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts [the perpetration of heinous crimes] in the future.’).
90 Statement by the Representative of the US (Madeleine Albright) to the Security Council, Provisional Verbatim Record of the 48th Sess., 3217th Meeting, New-York, 25 May 1993, UN Doc. S/PV.3217, at 12 (‘Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only truth that can cleanse the ethnic and religious hatreds and begin the healing process’); M. Koskenniemi, ‘Between Impunity and Show Trials’, (2002) 6 Max Plank Yearbook of United Nations Law 1, at 4 (‘only when the injustice to which a person has been subjected has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored.’).
legal truth and the macro-dimensional ‘truth’ is visible where a policy decision is made only to resort to a truth and reconciliation mechanism and to grant immunity from prosecution or amnesty in exchange for the truthful information about the crimes. In such cases, the broader ‘truth’ is constructed without pursuing a procedural truth in specific criminal cases and to the deliberate exclusion of the former. This raises the questions of how truth-finding through international criminal procedure relates to other forms of searching for the truth in a post-conflict settings and to what extent it is appropriate to pursue the broader truth through trials.

### 3.2.2 Competing truths and the role of trials

International criminal proceedings invariably deal with factual allegations arising from complex and contested political and social phenomena such as armed conflicts and regime transitions. The outstanding magnitudes of the broader events that constitute a background to the commission of international crimes inevitably give rise to plural, often clashing, interpretations. The greater the historical significance of those background processes, the greater the divergence in the reasonable assessments thereof by historians, political analysts, civil society and politicians. All the more is it difficult for judges sitting in a criminal trial to find their way between or around the conflicting versions of facts, let alone try to hand down an authoritative version that reconciles the differences and is acceptable to all. This difficulty stands in contrast to the utmost urgency and desirability of bringing the conflict to close, definitively bridging social divisions, and removing the persisting obstacles to peace.

With those ends in mind, states often outlaw the discredited ideologies and criminalize denial of historical facts and revisionism in an attempt to fix certain truths as properly established and not subject to debate among reasonable members of society. For example, the Federal Republic of Germany adopted a law in 1985 that prohibited ‘lying about Auschwitz’, with a view to honouring the memory of Holocaust victims and legitimizing the government by distancing it from the Nazi past. Another example is Rwanda’s Organic Law of 2003, which prescribes a sentence of 10 to 20 years of imprisonment for ‘any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence’.

Such legislative measures are normally preceded by an institutionalized form of fact-finding, be it a truth and reconciliation commission, commission of inquiry, or national or international criminal proceedings.

Thus, international criminal justice does not hold a monopoly over the tasks of the maintenance of peace, reconciliation, and historiography, but shares them with a host of formal and informal responses, the latter including journalism, art, forms of commemoration such as museums and memorials etc. When finding facts relating to the controversial historical events, international judges face strong competition from other judicial and non-judicial factual accounts and narratives –competition unknown to national courts in ordinary cases. Save for proceedings in exceptional—high-profile and political—cases, national criminal benches normally have little

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*Criminal Justice* (Oxford: Oxford University Press, 2008) at 178 (‘If they expect to be prosecuted once the conflict ends, or after they abdicate, the leaders are likely to hold tenaciously to the reins of power and continue fighting’).

92 Naqvi, ‘The Right to the Truth in International Law’ (n 85), at 246 (‘The desire for truth may even be used to justify non-prosecution of certain alleged offenders in “amnesty-for-truth” or “use immunity” situations’).


94 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 12 (‘The wider the context in which individual guilt has to be understood, and the more such understanding defers to the contingencies of historical interpretation, the more evident the limits of criminal procedure for reaching the “truth”.’).


opportunity to engage with history. They deal mostly with less controversial episodes of limited historical importance and have a lesser capacity to develop or refute historical narratives.98

Furthermore, when adjudicating on international crimes, ordinary national courts occasionally—and controversially, as has been seen—serve as transitional justice mechanisms addressing the broader issues of collective memory and national identity through the prism of individual responsibility.99 In transitional political contexts and in the adjudication of crimes committed during conflict and political turmoil, the emerging collective identity of a given society may come to be significantly challenged by a divisive past. When dealing with such cases, national courts normally take the historic-ideological discourse predominant in the relevant society for granted and try to settle legal issues without reopening the predominant political and moral framework. This largely dovetails into the governments’ preference for selective representation of history corroborating their legitimacy and political stability.100 Although the questions of contested history come to the fore in any event, this judicial approach tends to make trials less tumultuous and to spare the society from the trauma of having to pause upon and revisit the inconvenient aspects of its history and present. The findings reached thus will be rooted in the locally entrenched and officially endorsed perceptions of the events and be less subject to external critical scrutiny. While it helps the official narratives prevail over alternative and marginalized accounts, it possibly does so at the cost of arriving at a consensual and inclusive truth with a broader appeal.

International justice efforts may be more credible and successful than unilateral endeavors by successor regimes and victors towards enforcing accountability in post-conflict settings. Because of their distance from national institutions and politics, international tribunals are believed to possess a greater ability and preparedness to challenge nationalist myths and to generate more objective historical evidence.101 Judge Bert Röling observed in this respect:

It is certainly incorrect to maintain that this kind of post-war trial serves only to provide the victor with the possibility of proving his war propaganda. But the influence of cultivated feeling upon opinion is strong. Inevitably, on occasion, reality is strained. The more nations such an international court of justice represents the smaller the risk thereof is; for distortion or camouflage of history is then more limited because certain distortions or disguises are mutually begrudged.102

In a post bellum landscape, there is often an urgent need to set the record straight promptly. The cacophony of voices speaking to divergent interpretations of the contested past may be seen as counterproductive, inhibiting positive social change and in need of harmonization, orchestration or filtering. The pronunciation of an official version of what exactly happened, and how, in order to break the silence or to quiet the raging debates becomes all the more important for the society to be able to move forward.

The production of truth with a legal imprint is certainly one way of arriving at an official narrative. The judicial fact-finding by international criminal courts helps to sort out the competing accounts and promulgates a version of facts that may be accepted as authoritative. According to Van den Wyngaert, for victims of international crimes, it makes a crucial difference who the ‘narrator’ is: ‘if their history is narrated by the journalists and historians only, 99 Wilson, Writing History (n 3), at 18.
98 See Chapter 3.
100 Wilson, Writing History (n 3), at 33-34 (‘Exposing a postconflict state’s misdeeds and moral failings too openly risks undermining its already-shaky legitimacy and authority. Openly challenging the ethnic and nationalist mythology underlying a conflict is anathema to many successor regimes. …[H]istory becomes politicized as governments pressure courts to selectively filter the past and construct a new official account that corresponds with a heroic vision of the nation. Governments, especially those emerging from a recent civil war or authoritarian rule, have a clear interest in controlling representations of the past so as to manufacture legitimacy in the present.’).

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it will never have the same cogency as when resulting from a judicial proceedings … [A] judicial proceeding helps to turn the victim’s story into the official narrative of the post-conflict society.’

Although courts may rely in part on the same materials as historians and journalists, they are believed to generate a ‘supreme truth’ with a strong claim for recognition as ‘official’.

There are several reasons why judicial products tend to be seen as the most credible accounts of historically controversial events. First, judgments are based on evidence the credibility and reliability of which has normally been rigorously probed by counsel and judges in a public and fair proceeding. Denying the 1995 massacre in Srebrenica had been easier, despite numerous journalist reports and historical accounts, before than after the relevant ICTY judgements were handed down. The formal expression such an authoritative account takes—a reasoned judgment in writing issued upon months of deliberation by a court of law on the basis of an evidentiary record probed in the fire and water of adversary process—is important in itself and predetermines its significant weight. This is certainly true for the final (appeal) judgments and non-appealed trial judgments (which are rather an oddity in international criminal practice). The question arises to what extent, and under which circumstances, the interim decisions (such as a judgment on the motion of acquittal in the mid-way stage of trial issued under ICTY Rule 98bis or the ICC PTC decision confirming the charges) may pretend to come anything close to an official judicial narrative of the truth. This acquires particular relevance in cases where the final judgment is not reached due to the death of the accused.

Second, it is believed that the value of international criminal adjudication in establishing the historical record outweighs that of the variety of alternative responses because the accused gets a fair and reasonable opportunity to confront and challenge the witnesses and the sources of documentary evidence against him in a public hearing as well as a comparable opportunity to present his or her own evidence to refute the accusations. Insofar as the accounts presented in court tend to clash and weaken one another, the dialectics of the courtroom discourse is conducive to the emergence of a didactically less powerful and less Manichean but certainly more credible and balanced narrative of events. The confluence and mutual reinforcement of several narratives of historical events that works to expand the scope of the truth arrived at as a result of the trial is an occasional rather than regular advantage of the courtroom interaction. One

103 Van den Wyngaert, ‘International Criminal Courts as Fact (and Truth) Finders’ (n 93), at 64. Supportive of the idea of trials as instruments for creating an ‘official history’, see L. Douglas, ‘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) 198 (‘the sense of fixedness—the closure of trial—describes one of the most profound attractions of the trial as a response to a traumatic history’).

104 Karstedt, ‘The Nuremberg Tribunal and German Society’ (n 7), at 16 (‘Legal truths as uncovered by legal procedures render a specific credibility that other procedures cannot muster.’).


107 M. Ignatieff, ‘Articles of Faith’, in Index on Censorship (September/October 1996), reprinted in (1997) 294 Harper’s Magazine 15 (‘great virtue of legal proceedings … [is] that their evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial.’).

108 Discussing this issue in connection with the Milošević trial, see Naqvi, ‘The Right to the Truth in International Law’ (n 85), at 246-7.

episode from the Dragan Nikolić trial tends to attest to the added truth-seeking value of the trial dynamic. When asked by a witness whether or not the accused could provide information about her sons, who she last saw at Sušica camp and who had been missing since, Nikolić chose to comply with the request after having consulted his counsel. However, such trial interactions are exceptional against the more usual confrontational mode adopted in the formal setting of criminal proceedings.

Criminal trials confine and dissect the episodes of large-scale social and political processes and put the alleged facts under a microscopic focus, thereby attempting to ‘establish incredible events by credible evidence’. The judicial version of the truth dominates, or at least is expected to dominate, over other accounts of the facts being adjudicated, inasmuch as it bears an imprimatur of a formal authority. More importantly, it is bound to dominate because the methods by which such truth is brought about have a strong association with the principles that guarantee integrity and impartiality of the fact-finding process. The court’s truth may effectively counter revisionist claims by making it impossible to exploit the lack of credible information regarding the micro-episodes of the conflict for denying atrocities on a macro-level. This limited focus enables trials to protect a fragile plant of steady reconciliation and peace from the poisonous ivy of ‘new untruthful legends’. A powerful antidote against fabrications, legal truths pronounced through judgments may prevent deceitful propaganda from getting a strong hold in the yet disoriented communities devastated by conflict. While the truth-finding performed by international judges in individual cases is but a minor segment in the process of establishing the grand historical truth, its contribution to that process is essential. Although the sufficiency and adequacy of legal proceedings as a historiographical tool is a contested issue, the res judicata that are the ‘basis of controversial historical events’ in itself amounts to solid ‘material for historiography’. In this sense, the tribunals—to a greater extent than regular national courts—are seen as instruments of history. As discussed previously, this also finds reflection in the

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111 ‘Report to the President by Mr. Justice Jackson’, 6 June 1945, in Report of Robert H. Jackson, US Representative to the International Conference on Military Trials, London 1945 (Washington, DC: US Government Printing Office, 1949) 48. See also Sentencing Judgement, Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, TC II ter, ICTY, 5 March 1998, para. 21 (‘The International Tribunal, in addition to its mandate to investigate, prosecute and punish …, 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.’).
112 ‘Report to the President by Mr. Justice Jackson’ (n 111), at 438 (the Nuremberg trial documented the truth relating to the crimes committed by the Nazi regime ‘with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.’). See also Address of the President of the ICTY Antonio Cassese to the General Assembly of the United Nations, 4 November 1997, UN Doc. A/52/PV.44, at 2 (defining the ICTY’s mission as that of establishing ‘an historical record of what occurred during the conflict, thereby preventing historical revisionism’; Remarks of Gabrielle Kirk MacDonald to the Georgetown and George Washington International Law Societies, 2nd Annual International Law Conference, 7 February 1998 (‘We have begun the task of creating a historical record. In the Judgement that followed the conclusion of our first trial, over which I presided, we established as a judicial fact what happened in a corner of north-eastern Bosnia in 1992, findings that no amount of revisionism or amnesia can erase.’).
113 Eser, ‘The “Adversarial” Procedure’ (n 16), at 226.
114 Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 196 (noting that historians ‘remain indebted to law’s power as a fact-finding tool’); Van den Wyngaert, ‘International Criminal Courts as Fact (and Truth) Finders’ (n 93), at 63 (disagreeing with the view that ‘international criminal courts have, as far as truth finding process is concerned, little to add to the “truth” as it is revealed by journalists or historians’). For more critical views, see K. Turković, ‘The Value of the ICTY as a Historiographical Tool’, in T. Krueßmann (ed.), ICTY: Towards a Fair Trial? (Graz: Neuer Wissenschaftlichter Verlag, 2009) 44 (the eventual historiographic value of the ICTY proceedings will be reduced due to the secrecy of many of its materials); Kirsch, ‘Finding the Truth’ (n 13), at 47 (on the critique that the ad hoc tribunals’ and especially the ICTR’s is a biased historical record).
115 Van den Wyngaert, ‘International Criminal Courts as Fact (and Truth) Finders’ (n 93), at 64; Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 29-30 (observing that the ICTY proceedings are
positioning of the possible contribution to the historical record among the core missions of international criminal justice institutions.116

3.2.3 Historical truth v. trial truth

The second part of the question about the scope of truth to be discovered through criminal proceedings relates to risks posed by a failure to contain the historical inquiry within the proper bounds of the trial as a legalist procedural enterprise. Extending a historical quest or didactic exercise too far, and turning it from an incidental by-product of the trial proceedings into a proper function of procedure, may vitiate the liberal nature of trials, even if the message meant to be conveyed purports to be liberal.117 As noted in Chapter 3, this extension might stem from a well-meaning attempt to increase the institutional efficiency of the tribunals or from the confusion between their institutional goals and functions of the process.

The relationship between the exercises of establishing a legal truth and searching for a historical truth are per se not antithetical, because historical facts are potentially legally relevant and as such will be sought to be proven by the parties at trial.118 But drawing the line between the appropriate and inappropriate approach to historical truth-finding by international criminal courts is not a straightforward task. Due to the special nature of international crimes and, in particular, the need to prove the contextual (chapeau) elements of crime definitions, a fact-finding inquiry pursued in an individual criminal case is apt to contribute to the establishment of the ‘truth’ in a broader historical context.119 However, it is another matter to argue that the trial process should be an endeavour calculated to write history and therefore that the structure and conduct of trial should accommodate that goal directly. Why not endow international criminal judges with a ‘historiographical function’? They already deal ex officio with the events contextual to the alleged individual criminal conduct and responsibility; they may be well placed to make findings as to broader historical facts. Transcending the boundaries of an individual case and its obsession about the individualization of guilt might create a momentous opportunity for the court to bring out and certify an ‘official’ historical truth. The judges could also be expected to seize the occasion to authoritatively settle any controversies that surround the official truth and weaken its intended didactic and political messages. From this viewpoint, a trial can serve as a shortcut to social reconstruction and an effort to establish a historical record by way of legal proceedings as a salutiferous surgical intervention meant to cure the society’s ailments. Along these lines, a number of scholars have spoken in favour of recognizing the so-called ‘historical function’ or goal of international criminal trials.120

The objection to that line of reasoning is the risk of compromising the principal functions—liberal international trials are to serve that lurk in an endeavour by international judges and prosecutors to try on historians’ hat and to pursue a historiographic mission through criminal proceedings.121 The extent to which this could detract from the principal tasks of the tribunals—

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116 Chapter 3.
117 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 35.
118 R.A. Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’, (2005) 27 Human Rights Quarterly 908, at 922 (the pursuit of justice and the history-writing are not inherently irreconcilable); id., Writing History (n 3), at 69-70.
119 Petrig, ‘Negotiated Justice’ (n 105), at 13.
121 Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 41 (noting ‘a high risk that the fate of the accused will be seen as unimportant or at least less important compared to the accomplishment of nonjudicial goals, didactical, historical and other.’); J. Iontcheva Turner, ‘Defense Perspectives on Law and Politics in
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There exist good reasons why modesty on the part of the bench is warranted. These include practical reasons such as the lack of training in the historiographical method of research and the non-specialist knowledge of the history of the region and the conflict – which also conveys a guarantee of impartiality. These limitations—or advantages, depending on how one looks at them—are likely to impair the judges in an independent expert evaluation of competing historical accounts. They would have to rely on history experts proposed by the parties and have indeed done so on a regular basis. The problem comes where the expert accounts are diametrically opposed on a certain issue. The judges would have to either choose between them, without the benefit of a clear and authoritative reference point, or navigate between them towards a compromise. Their ‘history’ (as history in general) would not amount to a definitive settlement of differences; worse still, the quality of the history courts can deliver on their own is likely to be mediocre by the proper standards of that discipline. It is doubtful whether reaching a credible and adequately reasoned decision on controversial historical issues is at all feasible in criminal proceedings.

There are more fundamental reasons for that than the courts’ limited capacities or budgetary constraints. As noted by numerous authors, beyond evident similarities, historical

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122 See e.g. Eser, ‘The “Adversarial” Procedure’ (n 16), at 226 (‘judges are not historians’); Schomburg, ‘Truth-Finding’ (n 35), at 4. For similar waivers in the jurisprudence, see Sentencing Judgement, Prosecutor v. Deronjić, Case No. IT-02-61-S, TC II, ICTY, 30 March 2004 (‘Deronjić trial sentencing judgment’), para. 135 (‘it should be recalled that this Tribunal is not the final arbiter of historical facts. That is for historians. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done, within the ambit of the Indictment presented by the Prosecutor.’); Krstić trial judgment (n 106), para. 2 (‘The Trial Chamber leaves it to historians and social psychologists to plumb the depths of this episode of the Balkan conflict and to probe the deep-seated causes. The task at hand is a more modest one: to find, from evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstić, was criminally responsible…’); Judgement on Sentencing Appeal, Prosecutor v. Babić, Case No. IT-03-72-A, AC, ICTY, 18 July 2005, para. 17 (‘the right of an accused under Article 23 of the Statute to a reasoned opinion . . . does not oblige a Trial Chamber to make a finding, as suggested by the Appellant, for the “historical record”.’).
123 P. Wald, ‘Tyrants on Trial: Keeping Order in the Courtroom’, Report, Open Society Justice Initiative, September 2009, at 58 (‘The relative ignorance of judges from afar as to the centuries-old history of the particular conflict they are hearing about is apt to diminish their ability to rule confidently on the boundaries of what the leader wants to declaim about.’).
124 For detailed treatment of the use (and misuse) by the parties of historical expert evidence, see Wilson, Writing History (n 3), chapters 5-7 (ICTY and ICTR) and 8 (ICC).
125 Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 39; Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 25 (‘The engagement of a court with “truth” and “memory” is thus always an engagement with political antagonism, and nowhere more so than in dealing with events of wide-ranging international and moral significance. Historians disagree on the interpretation of such events. So it is no surprise that judges may find it difficult to deal with them.’).
126 On similarity of methods and aims of historical and legal inquiries, see Wilson, Writing History (n 3), at 7-8 (careful weighing of evidence, vetting and ranking of sources, reliance on eyewitness accounts and corroborating documentary evidence, and the organization of individual facts into a coherent narrative).
truth-finding and fact-finding through criminal process are vastly different in their purposes, methods, and objects of inquiry.\textsuperscript{127} The historical truth is non-exclusive and pluralist, as it tolerates different interpretations, alternative readings, and a free dialogue; it is adjustable and flexible over time.\textsuperscript{128} Historiography enjoys freedom in electing the topics it seeks to focus on and perspectives which are to be employed; it can afford extending over countless number of facts, varying in the level of detail and profundity of inquiry. It might center at the individual conduct just as at the macro-dimension of broad historical processes, by treating socio-political controversies as essential to micro-truth and by locating ‘individual agency within a wider context, thus diffusing guilt throughout the social fabric’.\textsuperscript{129}

By contrast, criminal process seeks to promptly and exclusively settle issues of individual guilt and frame them into a formal decision that possesses certain finality.\textsuperscript{130} With reference to the limited capacity of judges to ‘make a historical record’, Mirjan Damaška puts eruditely thus:

\begin{quote}
they must act under time constraints and make stable decisions upon which action is taken—the res upon which they focus must become judicata without undue delay. Historians, on the other hand, are not subject to the constraints of promptness and finality—they need not rush to a decision and can afford to follow the slow breathing of history. Whenever Clio, their elusive mistress, reveals a new veil to fold into, they are free to modify their findings. Res judicata in the historians’ domain is nothing less than an absurdity—history cannot be arrested by ukase.\textsuperscript{131}
\end{quote}

Trial judgments are subject to formal review under limited conditions and in strict accordance with the applicable procedure and standards for appeals or revision. Some scholars argue that legal decisions can also be revised ‘through a complex process of renegotiation’, whereby subsequent legal proceedings (including civil process) effectively re-try the events in question.\textsuperscript{132} In the sphere of international criminal adjudication, such ‘renegotiation’ is often impossible given that there is normally no overlap between the temporal, personal and substantive jurisdiction of various international courts, even though they might cross-refer to the findings of each other when dealing with the same or related historical events. The renegotiation across several cases arising from one situation and adjudicated by the same international court (for example, a situation under investigation by the ICC, or the conflict in the former Yugoslavia dealt with by the ICTY) also appears unlikely. A specific version of the historical truth produced by the same tribunal stems from its jurisdictional constraints and institutional or political factors related to its establishment and operation. Moreover, the jurisprudential concern with the consistency of outcomes is intertwined with the preoccupation about the consistency of the historical narrative produced: the failure by the ICTR to prosecute RPF crimes serves as an illustration. However, the renegotiation of history through court rulings may be less difficult or impossible in the conversation between the national and international courts: thus, the Eichmann

\textsuperscript{127} Outlining the ‘incompatibility theory’, see \textit{ibid.}, at 7. See further \textit{id.}, ‘Judging History’ (n 118), at 912-3 and 917-8; Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 196-200; Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 37-9 and 42.
\textsuperscript{128} Wilson, \textit{Writing History} (n 3), at 7 (‘Law’s epistemology is positivist and realist, demanding definite and verifiable evidence typically produced through scientific forensic methods. History, however, is more pluralistic and interpretative in both its methods and conclusions. Courts often endorse one version above all others, whereas historians may integrate the elements of competing accounts.’).
\textsuperscript{129} Wilson, ‘Judging History’ (n 118), at 913; \textit{id.}, \textit{Writing History} (n 124), at 7 (‘Historians situate individual acts in the societal and cultural contexts as a matter of course, whereas courts are concerned with context only insofar as it impinges on questions of guilt or innocence.’).
\textsuperscript{130} Wilson, \textit{Writing History} (n 3), at 2 (citing a 2006 interview with D. Saxon: ‘The purpose of the criminal trial is to get at the truth about the crimes and produce a fair and reasoned judgment about the guilt or innocence of the accused and get some finality … so that victims can get closure. Historians can reinterpret, but we only get one chance.’).
\textsuperscript{132} Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 198-9.
trial in Jerusalem (1961) as well as the *Majdanek* trials (1946-48) and *Auschwitz* trials (1963-65) in Germany, are often viewed as a rectification of the Nuremberg IMT’s omission of victims’ justice and the Holocaust. In this sense, criminal law may yield a lesser degree of historical finality than it tends to assume.

In terms of the ‘scope of truth’, the traditional focus of criminal process on individuals may not do justice to the collective dimension of the large-scale processes which enter the history books. The course of history is not susceptible to full control by individuals, however powerful. The individual may play a key role in triggering and fuelling mass processes and historical events, but it is uncertain if such a role is *sine qua non* as those are often ‘over-determined’ and unfold independently from or clearly despite individual will. Thus, an exclusive focus on individual culpability is by definition an oversimplified and inadequate reflection of the reality of mass atrocity. A more satisfactory explanation can only emerge from closer attention being paid to collective and institutional dimensions of international crimes. For example, according to Susanne Karstedt, the individualization of responsibility of Nuremberg defendants in fact served to vicariously atone the German population for it downplayed the degree of responsibility of business and society for standing by or actively aiding the Nazi crimes. The focus on individual guilt at the ICTY—at any other criminal tribunal—is akin to an alibi for popular mentalities and social structures responsible for creating conditions in which crimes became normal. Catching the collective dimension of international criminality in the concepts of individual culpability central to retributive paradigm of justice remains the main challenge in international criminal law. There, the problematic choice is between the resort to expansive liability doctrines such as JCE and leadership responsibility, which may not be fully consistent with the principle of individual attribution, on the one hand, and impunity for civil and military leaders who do not directly perpetrate atrocities, on the other hand.

Legal truth is born under time pressure and spawns from incomplete and piecemeal evidence. By definition, it presents a simplified and inaccurate account of facts that cannot seriously pretend to be as comprehensive, inclusive and dynamic as historical accounts. Put differently, trials can only be ‘a discursive beginning and not an end to the history emerging’.

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133 Karstedt, ‘The Nuremberg Tribunal and German Society’ (n 7), at 17, 31 (noting that the presence of victims was a decisive difference between the Nuremberg trial and the *Auschwitz* trial). For a historian’s criticism of Nuremberg for treating the Holocaust merely ‘as a by-product of a monolithic German-Nazi conspiracy for European domination through war’, see D. Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001) 12.


135 See e.g. Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 13 (the events which constitute a historical background to international crimes ‘exceed the intentions or action of particular individuals and can ne grasped only by attention to structural causes, such as economic or functional necessities or a broad institutional logic through which the actions by individuals create social effects.’).

136 Karstedt, ‘The Nuremberg Tribunal and German Society’ (n 7), at 25 (‘with the IMT the victorious Allies provided the Germans with the opportunity to take vicarious revenge on the Nazi leadership’) and 31 (‘not surprising that business and industry leaders were mostly opposed to the Auschwitz Trial, since for the first time it revealed the full extent of the involvement of industry and business in the genocide of the Jews.’). See also Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 14 (focus of criminal trials on individuals ‘serve[s] as an alibi for the population at large to relieve itself from responsibility’).

137 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 13-15; Damaška, ‘What is the Point’ (n 131), at 333 (‘Dispassionate historical research may someday reveal that even ethnic cleansing [in Yugoslavia] enjoyed widespread popular support for a while.’).

138 Joyce, ‘The Historical Function of International Criminal Trials’ (n 120), at 465. See also Wilson, ‘Judging History’ (n 118), at 914 (contrasting law to history in that the former ‘often ends up reducing complex histories to a defective legal template for social reality, thereby producing distorted or even incorrect versions of history’); Minow, *Between Vengeance and Forgiveness* (n 87), at 47.
Facts as multitudinous and complex as those brought into the spotlight in international criminal trials require detached treatment. Criminal litigation is, however, a profoundly interest-ridden activity in which neutrality is unattainable and the framing of ‘historical truth’ is inherently subjective.\textsuperscript{139} The polarized historical accounts emerging from adversarial trials and are probed through cross-examination do not make conclusive and ready-made history.\textsuperscript{140} In order to become such, posterior detached analyses of the evidence and any other relevant information that has remained unexamined by the court would be needed.

The handicaps of law as a generator of a credible ‘history’ are exacerbated by the limitations stemming from the definite temporal, personal, subject-matter, and territorial jurisdiction over the criminal conduct which the courts is allowed to address.\textsuperscript{141} Further, international criminal justice is notoriously selective of the situations within its jurisdiction. The rigid parameters of legal relevance, which demand anchorage of a factual narrative told at criminal trials to the actual charges against the individual accused, are a poor match to the thematic freedom typical for historical inquiries.\textsuperscript{142} Thus, issues that are indisputably significant for historians—e.g. the question of who brought down the plane carrying the Rwandan President Habyarimana and the President of Burundi Ntaryamira, the event which sparked the genocide in Rwanda—may be deemed as legally irrelevant by a respective court.\textsuperscript{143}

The requirement that trial and judgment be strictly confined to the current charges and evidence presented at trial, finds explicit reflection in the procedural law of most international and internationalized criminal jurisdictions. Thus, both the IMT and IMTFE were bound to ‘confine the Trial strictly to an expeditious hearing of the cases raised by the charges’ and to ‘take strict measures to prevent any action which will cause reasonable delay, and rule out irrelevant issues and statements of any kind whatsoever’.\textsuperscript{144} The lasting relevance of the rule is confirmed by its inclusion, without any significant alterations, in Article 21(1) of the STL Statute.\textsuperscript{145} The ICTY, ICTR, and SCSL Trial Chambers may impose a sentence only where they find the accused guilty on one or more of the charges (ICTY) or counts (ICTR and SCSL) contained in the indictment.\textsuperscript{146} Further, Article 74(2) of the ICC Statute limits the scope of trial judgment strictly to the facts falling within the confirmed charges (as amended) and the

\textsuperscript{139} Minow, *Between Vengeance and Forgiveness* (n 87), at 47 (‘If the goal to be served is establishing consensus and memorializing controversial, complex events, trials are not ideal.’); Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 193 (noting that trials successful as instruments of shaping collective memory, demonstrate a ‘relaxed fidelity to the historical record’); Kirsch, ‘Finding the Truth’ (n 13), at 47.

\textsuperscript{140} See also Wilson, *Writing History* (n 3), at 169.


\textsuperscript{142} Schomburg, ‘Truth-Finding’ (n 35), at 4-5 (‘\textit{in concreteo}, the charges automatically limit the scope of truth to be found in the findings of a judgment. Where there is no charge, where there is no alleged crime, we cannot deal with the underpinning facts.’); Gaynor, ‘Uneasy Partners’ (n 141), at 1264 (on legal irrelevance of incidents of ‘unquestionable historical importance’, including ‘legitimate combat not involving crimes, peace negotiations, preparations for North Atlantic Treaty Organization (NATO) military intervention, efforts to ensure humanitarian relief’, as well as information adduced as \textit{tu quoque} defence); Damaška, ‘What is the Point’ (n 131), at 336 (‘judges cannot sufficiently disentangle themselves from the webs of legal relevancy. Even when its limits are considerably enlarged, as they are by the definition of international crimes, matters important to a full historical account still remain legally irrelevant.’)

\textsuperscript{143} Decision on Casimir Bizimungu’s Requests for Disclosure of the Bruguière Report and the Cooperation of France, *Prosecutor v. C. Bizimungu et al.*, Case No. ICTR-99-45-T, TC II, ICTR, 25 September 2006, paras 20-1 (‘Arguments related solely to the historical record, as opposed to the specific charges against the Accused, are beyond the scope of this trial.’).

\textsuperscript{144} Art. 18(a) and (b) IMT Charter; Art. 12(a) and (b) IMTFE Charter.

\textsuperscript{145} Art. 21(1) STL Statute (‘The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal and review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.’).

\textsuperscript{146} Rule 87(C) ICTY, ICTR, and SCSL RPE.
Chapter 5: Functions of International Criminal Trials

The evidentiary basis to the evidence submitted and discussed at the trial.\(^{147}\) Rigid rules apply to the amendment of charges: (i) before the confirmation hearing, the Prosecutor may amend or withdraw the charges freely; (ii) after the charges have been confirmed and before the trial has begun, they may be amended with permission of the PTC and after notice to the accused; an addition of new charges or substitution for more serious charges requires another confirmation to be held on those charges; (iii) after the commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.\(^{148}\) Finally, the ECCC Rules embody the principle that the judgment shall be limited to the facts set out in the indictment and only be passed on the person of the Accused; the Chamber’s decisions ‘shall be based only on evidence that has been put before the Chamber and subjected to examination’.\(^{149}\)

In criminal trials, therefore, there is an inextricable nexus between the facts and evidence under review, and of the resulting ‘truth’, and the formal charges, including the modes of liability charged. The scope of charges is (and should by necessity be) reasonably narrow in international criminal prosecutions. There is little chance that legal truth emerging from a handful of trials conducted by international tribunals, even in sum with cases processed by national courts, will amount to a comprehensive history. In international criminal justice, a degree of randomness and political expediency in choosing situations of human rights violations to address and specific cases within those situations is inevitable.\(^{150}\) Next to resource constraints, selectivity as a matter of institutional policy and prosecutorial discretion inheres in the mandates of the tribunals, in particular their subsidiary or complementary relationship with national jurisdictions and the expected focus on the most senior leaders suspected of being most responsible for the crimes.\(^{151}\) The charges are further subject to culling by the Judges who have increasingly taken upon themselves the task of ensuring that the completion of cases is feasible within a reasonable time.\(^{152}\)

While historiography can afford to be comprehensive and aim to provide a panoramic view of the past, the legal truth discovered through international criminal proceedings is a dotted line, or an uncompleted puzzle. International criminal proceedings do not purport to uncover the truth relating to all equivalent incidents and equally situated accused. Their ‘crime control’ capacity is more limited than that of domestic courts with regard to ordinary crimes. Numerous incidents and allegations of crimes that in principle deserve judicial attention will end up uninvestigated, not taken up by the prosecution as fitting into its theory of the case, dropped for lack of strong evidence as casting little chance for conviction, traded off at plea bargaining, or ordered to be abandoned by the judges themselves.\(^{153}\)

\(^{147}\) Art. 74(2) ICC Statute (‘The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.’).

\(^{148}\) Art. 61(4) and (9) ICC Statute. See e.g. Decision on the withdrawal of charges against Mr Muthaura, *Prosecutor v. Muthaura and Kenyatta, Situation in Kenya*, ICC-01/09-02/11-696, TC V, ICC, 18 March 2013 (granting permission to the OTP to withdraw charges against Muthaura before the start of trial).

\(^{149}\) See e.g. UNSC Res. 1534 (2004), 26 March 2004, para. 5.

\(^{150}\) In detail on judicial powers in limiting parties’ cases, see Chapter 8.

\(^{151}\) Rule 73(D)-(E) ICTY RPE authorizes the Trial Chamber: (i) to invite the Prosecutor ‘to reduce the number of counts charged in the indictment’ and ‘fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor’; (ii) after receiving the complete file of the prosecution case and having heard the parties, ‘to direct the Prosecutor to select the counts in the indictment on which to proceed’.
The effect of ‘undercharging’ on the potential of criminal proceedings to contribute to the establishment of the truth is demonstrated by the ICC OTP’s insistence on the theory of the Lubanga case as the ‘case about child soldiers’. This prosecutorial choice has been challenged on the ground that in addition to enlisting and conscripting children into armed forces and using them to participate in the hostilities, the charges of murder, torture and sexual offences should have also been brought. Several victim participants in the Situation in the DRC unsuccessfully attempted to acquire documents regarding the prosecutor’s decision to temporarily suspend further investigations in relation to the other potential charges against the accused.\footnote{Decision on the requests of the Legal Representative for victims VPRS 1 to VPRS 6 regarding “Prosecutor’s information on further investigation”, Situation in the DRC, ICC-01/04-399, PTC I, ICC, 26 September 2007.} Notably, the prosecution did not seek to add new charges or to substitute more serious charges pursuant to Article 61(9), even though those other categories of offences were mentioned in its opening and closing statements and the questions concerning rape and sexual enslavement came up during the trial.\footnote{Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, para. 629 (‘Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step.’).} The issue of undercharging arose squarely when, after the close of the prosecution case, the participating victims applied for the modification of legal characterization of facts described in the charges to ‘sexual slavery’,\footnote{Arts 7(1)(g) or 8(2)(b)(xxii) ICC Statute.} and ‘inhuman and/or cruel treatment’.\footnote{Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, para. 629 (‘Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step.’).} The Trial Chamber majority decided that the charges may be subject to requalification, but the decision was reversed on appeal on the ground that Regulation 55(2)-(3) may not be used to exceed the facts and circumstances encompassed by the confirmed or amended charges.\footnote{Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court, Prosecutor v. Lubanga, Situation in the DRC, ICC-01/04-01/06-2842, TC I, ICC, 14 March 2012, para. 629 (‘Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step.’).}

This example illustrates that while the consequences of the myopia of the international criminal justice method may be unfortunate from a historical, didactic and victim-justice perspectives, they can be acceptable from the viewpoint of litigants who perform their professional roles and serve distinct interests, which do not necessarily include certifying legally the ‘complete truth’. As opposed to historical inquiries, law produces a truth that is bound to be fragmented, piecemeal, and at times incoherent.\footnote{Amann, ‘Assessing International Criminal Adjudication’ (n 109), at 178-9 (‘In fact, what emerges out of international criminal proceedings is likely to be a constructed, fragmentary truth. ... This form of selectivity renders the record made in an international criminal trial incomplete.’).} The tribunals have had to live with a conscience that even findings on the same facts emerging from related cases will vary and be inconsistent.\footnote{Judgement, Prosecutor v. Stakić, Case No. IT-97-24-T, TC II, ICTY, 31 July 2003 (‘Stakić trial judgment’), para. 20 (‘The unfortunate but obvious fact that, for various reasons, this Tribunal has never had and never will have the opportunity to hear all the persons allegedly most responsible in one procedure creates additional problems. The Trial Chamber is aware that the possibility of divergences from, or even contradictions with, findings in other cases cannot be excluded because they are based on different evidence tendered and admitted.’).} In that case, the historical truth-finding within the dimension of a single judicial institution is akin to an incoherent picture such as would result from an attempt to piece together the unfitting mosaic tiles.

This might concern cases in which a defendant is not convicted for crimes committed through an alleged joint criminal enterprise (JCE), whereas in the previous cases of other defendants dealing with the same crime-base he or she is consistency named as a key member of

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\footnote{Decision on the requests of the Legal Representative for victims VPRS 1 to VPRS 6 regarding “Prosecutor’s information on further investigation”, Situation in the DRC, ICC-01/04-399, PTC I, ICC, 26 September 2007.}

\footnote{Amann, ‘Assessing International Criminal Adjudication’ (n 109), at 178-9 (‘In fact, what emerges out of international criminal proceedings is likely to be a constructed, fragmentary truth. ... This form of selectivity renders the record made in an international criminal trial incomplete.’).}

\footnote{Judgement, Prosecutor v. Stakić, Case No. IT-97-24-T, TC II, ICTY, 31 July 2003 (‘Stakić trial judgment’), para. 20 (‘The unfortunate but obvious fact that, for various reasons, this Tribunal has never had and never will have the opportunity to hear all the persons allegedly most responsible in one procedure creates additional problems. The Trial Chamber is aware that the possibility of divergences from, or even contradictions with, findings in other cases cannot be excluded because they are based on different evidence tendered and admitted.’).}
that JCE. In such scenarios, the factual findings on the role of specific individuals emerging from different judgments do not interlock, which understandably gives rise to a concern that the tribunals are poor historiographers. Drumbl argues in that regard that ‘the emergence of multiple juridical truths does not bode well for the clarity and finality promised by the criminal law. This fragmentation clouds the historical record as generated by the judicial process.’ The inconsistent factual findings would have been a grave problem if the judicial proceedings had indeed served a historical function. But from a liberal legalism perspective, such incongruent ‘historical record’ is justified by the focus in each trial on the acts and conduct of individual accused and follows from the diverging scope and nature of evidence adduced in each case, whereby the factual findings entered specifically in respect of an individual in his or her own trial should become the predominant ‘judicial truth’. In this sense, Drumbl’s proposals for the extra-evidentiary harmonization of factual findings by different Trial Chambers or by the Appeals Chamber seem objectionable, as that would curtail the autonomous decision-making on the basis of evidentiary record in each case that is essential to the operation of liberal criminal justice.’

Thus, the quality of historical truth emanating from judicial proceedings raises legitimate doubts as to the suitability of courts as mechanisms for creating a complete and accurate historical record. Judicial process can contribute to that objective by thoroughly establishing micro-facts that would form part of the future ‘official’ narrative of the conflict and the crimes. But it should not pursue the impossible task, for which it is not equipped, of handing down such history as an immediate output because such history is a result of broader acceptance and not a unilateral judicial exercise.

B. Are trials appropriate conduits of historical truth? Legal v. historical facts

It has been noted earlier that legal parameters associated with procedural inquiries, such as jurisdiction, discretion, and relevance to charges, delimit the scope of micro-facts that will come under ‘legal truth’ to be discovered through trials. As criminal law is inherently selective in its reach, its coverage of crime incidents from among historical facts of equivalent magnitude is more limited than historical inquiry in some respects and more extensive in others. Legal truth and historical truth are not identical: they may simply focus on different facts. There are also visible differences between ‘legal facts’ concern to a law inquiry, and ‘historical facts’ of concern to historiography with regard to the degree of generality or specificity of such facts. For instance, fact-finding in the context of a criminal process will normally take a microscopic focus and be more attentive to the forensic details on the commission of crimes and circumstances surrounding them. While hugely important for establishing individual responsibility and

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162 Ibid., at 29-31 (discussing the problem of inconsistent factual findings in a series of the ICTR cases regarding the Nyange church massacre—Ndahimana, Seromba, and Kanyarukiga—with respect to the role Ndahimana played in the JCE and the details regarding his actual conduct).
163 Ibid., at 31.
164 Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 34 and 40. Ibid., at 37 (‘In such a process of transforming historical events into legally cognizable data, historical events are not only simplified, but often distorted. Obviously, trials do not seek to reflect events as they have occurred in reality and thus their ability to represent historical events is limited.’).
165 C. Stahn, ‘Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice’, (2012) 25 Leiden Journal of International Law 251, at 273 (‘it would go a step too far to equate judicial fact-finding with accurate historiography, or even a broader ‘truth-finding’ procedure aimed at societal reconciliation. The acceptance and internalization of facts are processes that are shaped by other factors, such as media, inter-ethnic contact, or local politics.’).
166 See also Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 12 (‘legal and historical truth are far from identical.’)
circumstances that might mitigate or aggravate an individual sentence, the same details \textit{per se} may present little historical importance.

The line of distinction between legal and historical facts may become blurred as regards the coverage of macro-dimensional background events, such as the nature and existence of armed conflicts, certain state policies, and the broader context of criminality. While being ‘historical facts’ in a proper sense, they also wield legal relevance in international criminal law, and this is where the two types of inquiry, despite their different objectives and methods, are confluent and interweave with one another. In this light, it is necessary to consider how generalized the facts may be whilst still remain properly ‘legal facts’ that can be certified by a court \textit{qua} ‘legal truth’ in international criminal proceedings? This is essentially the question of where one draws the boundaries in employing judicial fact-finding for ascertaining the ‘truth’ regarding the historical macro-facts which extend far beyond an individual criminal case.

The ‘chapeau elements’ of international crime definitions presuppose that individual acts are committed in a certain context and with \textit{mens rea} associated with or inferable from such context. These are the existence of an armed conflict and ‘a plan or policy or … a large-scale commission’ – for war crimes\textsuperscript{167} a widespread or systematic attack directed against civilian population, with knowledge of the attack – for the crimes against humanity\textsuperscript{168} and an assault against a targeted national, ethnical, racial or religious group driven by a \textit{dolus specialis} to destroy the group in whole or in part – for genocide\textsuperscript{169} Hence, it is unavoidable that parties and the court will at some point direct their legal inquiries to the broader historical context of the microscopic crime episodes, as a consequence of their effort to meet the legal requirements of the crime definitions\textsuperscript{170}

However, such inquiries will be justified and appropriate beyond question only if and to the extent that they are strictly relevant to the alleged facts encompassed by the charges. It is tempting for both parties and judges as fact-finders in international criminal trials to ‘seize the opportunity’ by expanding the legal inquiry beyond strict relevance to individual charges, be it in order to better comprehend the causes and implications of the conflict or for the sake of a historical record. High-profile trials tend to be viewed by some observers (and even by some insiders) as momentous occasions for bringing to light and passing authoritative judgement on broadly formulated facts of historical significance\textsuperscript{171} This may be particularly so for the prosecutors who, whether out of partisan advocacy interest in securing a conviction or out of a desire to ‘make history’, are prone to magnify the historical role and culpability of the accused as evil geniuses with sufficient power and capacity to orchestrate the atrocities and thus primarily responsible for large-scale tragedy and societal collapse\textsuperscript{172} This approach converts trials into an extension of historical research. However, the experience of conducting complex international criminal proceedings has clearly demonstrated that rhetoric trespassing the

\textsuperscript{167} Art. 8(1) ICC Statute.
\textsuperscript{168} Art. 7(1) ICC Statute.
\textsuperscript{169} Art. 6 ICC Statute.
\textsuperscript{170} Wilson, ‘Judging History’ (n 118), at 918 and 940-1 (proving a genocide requires ‘a novel combination of forensic evidence and historical narrative’ and ‘impels a court to consider evidence that encompasses a broader context and a longer duration than in most conventional criminal cases’); Wilson, \textit{Writing History} (n 3), at 19-22 (citing H. Retzlaff-Uertz of the ICTY: ‘we have to prove a widespread and systematic attack upon a civilian population, so we have to explain the whole context of a crime, what was happening around it and how the crime was part of the plan.’).
\textsuperscript{171} Wald, ‘The International Criminal Tribunal for the Former Yugoslavia Comes of Age’ (n 27), at 117 (critically observing that earlier ICTY judgements contain long passages that focus on the causes and precursors of the 1991 outbreak of hostilities in the former Yugoslavia, because the ICTY ‘was urged to make detailed findings about the social and political etiology of events leading up to the atrocities’); Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 42, n53 (observing that \textit{Tadić} trial judgment devoted 73 chapters to the historical context, including 14 chapters on the remote history of Bosnia and Herzegovina).
\textsuperscript{172} As Carla del Ponte stated in the opening statement delivered on behalf of the prosecution, ‘I recognise that this trial will make history, and we would do well to approach our task in the light of history.’ See Transcript, \textit{Prosecutor v. S. Milošević}, Case No. IT-02-54-T, TC III, ICTY, 12 February 2002, at 8.
boundaries of legal reason and relevance into the realm of historical interpretations in pursuit of the ‘complete truth’ is not sustainable, and is rather damaging vis-à-vis the immediate functions of criminal proceedings. On the deficiency of overblown indictments which pursue historical truth: see G. Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007) 112-3, 128, and 298 (‘The prosecution’s zealous quest for joinder, justified largely by extra-legal concerns relating to victim representation and other political and historical interests, set the scene for an unmanageable trial.’).

173 Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 41 (‘when trials are expected to generate historical consciousness there is a great danger that they will be turned into a “stage” for advancing the parties’ views of the political nature, which are often diametrically opposed.’) and 43 (admonishing that the tribunals’ efforts to collect historical evidence could politicize the courtroom and turn the trial into a spectacle).


175 ibid., para. 22.


177 See *Karemera et al.* judicial notice appeal decision (n 175), para. 35 (‘The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a “fact of common knowledge”.’).

178 ibid.
whomever else, through fair and public criminal proceedings. The purpose of establishing the ICTR was exactly to fill this gap by testing, supplementing and, through specific factual allegations, authoritatively replacing claims contained in secondary non-judicial sources with credible findings arrived at in accordance with applicable criminal procedure. Arguably, the fact of genocide itself should not have been excluded from the matters reasonably in dispute in the ICTR, and only the ICTR, – both directly as a crime allegedly committed by the accused and indirectly as the socio-political background to individual crimes.

It was a bold move, and arguably overly so, for the judges to enter as an undisputable historical fact this specific genocide in the way they did. Putting to one side its direct relevance for the ICTR proceedings, it would have been a different matter if other historical genocides (the Holocaust and the Armenian genocide) had been noticed as notorious facts. Arguably, the ascertainment of the Rwandan genocide as a historical truth is not up to the same judges who are seized by criminal cases in which it is a core legal fact to be established. Making such a finding must be left to historians, analysts, politicians and general public who would read and interpret the Tribunal’s judgments and reach their historical conclusion on that basis and on the basis of other available material. The judicial notice of the genocide as a fact of common knowledge seems to reflect the facility with which policy-makers, historians, social scholars, and laymen term complex social processes and historical events, more than it does strict adherence to legal vocabulary and discourse one might expect of a court. Supplanting of legal findings by historical conclusions is an illegitimate extension of a judicial mandate and an appropriation of historians’ functions. As noted by Koskenniemi who commented thus on the taking of judicial notice of 271 historical facts in Galić:

A Court cannot avoid taking judicial notice of a certain number of background facts. But the moment it does this, it will seem to be conducting a political trial to the extent that what those facts are, and how they should be understood, is part of the conflict that is being adjudicated. The tribunal ... is here between the difficult choice of accepting some facts as commonly known (and integrating the controversies concerning the adequacy of what is “commonly known”) and constructing facts out of what the procedural techniques ...happen to bring forward. Here the line between justice, history, and manipulation tends to become all but invisible. 180

Considerations of efficiency may warrant taking shortcuts in the evidentiary process and avoiding adjudicating on facts that have earlier been decided in other criminal proceedings. That route is self-referential, and it would not have been as problematic to take judicial notice of the Rwandan genocide as an ‘adjudicated fact’ in the sense of Rule 94(B), i.e. subject to the right of the parties to be heard. 181 But taking judicial notice under Rule 94(A) is inappropriately self-serving: it facilitates the prosecutorial job as well as the Tribunal’s own adjudicative task at the cost of the accused’s entitlement to respond to the accusations with evidence. Turning a contested legal determination to be made at trial into a fact of common knowledge creates insurmountable prejudice for the defence by undermining the presumption of innocence and alleviating the burden of proof incumbent on the Prosecution. Furthermore, as the decision vacates the defence strategy of denying the occurrence of the genocide as a nationwide campaign, it raises the issue of unequal treatment of ICTR defendants in a chronological perspective because the accused in earlier trials were not confronted with the absence of a possibility to challenge the genocidal campaign. 182 Earlier in the lifespan of the Tribunal, when the genocide had not ‘matured’ into a ‘fact of common knowledge’, it would still be possible for them to advance such a defence. Another absurd implication of the decision is that all ICTR Chambers are now not only empowered but also obliged to take a judicial notice of the genocide as a fact of common knowledge: in contrast with the Rule 94(B) avenue, the Rule 94(A) notice is not contestable and shall be taken by the Chamber.

180 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 33-34.
181 Preferring this option, see Jørgensen, ‘Genocide as a Fact of Common Knowledge’ (n 177), at 895.
182 Art. 20(1) ICTR Statute (‘All persons shall be equal before the International Tribunal for Rwanda.’).
This quandary demonstrates that the confusion between ‘historical’ and ‘legal’ facts in international criminal proceedings may lead to judges appropriating, rather awkwardly, the truth-finding competences that should rather belong to historians and social scientists.\(^{183}\) The failure to draw an accurate distinction between the trial truth and the historical truth is apt to prejudice the accused’s right to a fair and expeditious trial, to politicize the process, and compromise the legitimacy of the judicial forum. In what resembles historical research but is in fact quasi-historiography at best, the judges may legitimately extend the forensic inquiry to historical facts, but only insofar as and to the extent that this is relevant to the charges. Beyond that, the combination of the two functions in the context of research into historical context is unnecessary and would be problematic in light of the need to guarantee due process. Even if motivated by good intentions of clarifying controversial history and generating a credible record, judicial ‘history-writing’ may inadvertently harm the properly procedural objectives that must enjoy priority in the conduct of trials.\(^{184}\) The establishment of the truth must therefore be thought of as a means to an end (the verdict) rather than a proper end of a trial.\(^{185}\) Indeed, Richard Wilson has found that the parties include historical and contextual evidence not because they ‘are committed to the pursuit of historical commentary as an end in itself’ but because ‘they believe that it helps them succeed in making their legal case’.\(^{186}\)

Besides the risks for due process, the mistaken conferral on international criminal procedure of a ‘historical function’, and the persistent focus on it by key trial players will imperil rather than promote the lofty institutional objectives set before the tribunals.\(^{187}\) Instead of bringing about peace and reconciliation, it is apt to smuggle political controversy into the sanctum of a courtroom. Political and historical discourse by the procedural participants that inappropriately manipulates and utilizes history complicates the acceptance of the trial outcomes and boomerangs back into society. There, it could entrench the feelings of collective guilt and resentment, strengthen divisions, and postpone the prospects of the emergence of a consensual version of truth and of reconciliation. Given their different focus and unfitting tools, there is a high risk that judges will write ‘bad history’.\(^{188}\) The risk is that of constructing a white-and-black and simplistic narrative of one side being the guilty side as opposed to the other. Similarly, discourse about ‘cyclical’ and ‘natural’ mass atrocities will tend to disempower and stigmatize rather than reconstruct the relevant communities, or even work as a self-fulfilling prophecy. Finally, the narratives that are not necessarily wrong didactically might still be unconvincing to the receiving societies and appear to have been concocted hastily and handed down unilaterally by the judicial body.

To be clear, international criminal trials do facilitate the emergence of a credible and comprehensive historical record by amassing the significant volumes of otherwise unavailable

\(^{183}\) In a similar vein, see Wilson, *Writing History* (n 3), at 17 (‘the writing of a far-reaching history is more adequately achieved elsewhere, and chiefly by historians, social scientists, and others who may, of course, draw on the extensive information and documentation revealed in international trials.’).

\(^{184}\) *Ibid.* (‘the principal function of international courts is determining individual criminal responsibility… [T]he introduction of historical and social context is not invariably a “good thing” in a trial; this depends on the quality and credibility of the evidence and whether it has any meaningful bearing on the charges.’).

\(^{185}\) J. Galbraith, ‘The Pace of International Justice’, (2009) 79 *Michigan Journal of International Law* 79, at 89 (‘the establishment of a historical record is a means rather than an end of international criminal law. It is a means of helping to determine guilt or innocence: by figuring out what has happened, a tribunal can identify who is responsible.’). Cf. Stahn, ‘Between “Faith” and “Facts”’ (n 165), at 271 (noting this as a controversy).

\(^{186}\) Wilson, *Writing History* (n 3), at 20.

\(^{187}\) Chapter 3.

\(^{188}\) Joyce, ‘The Historical Function of International Criminal Trials’ (n 120), at 464; Damaška, ‘What is the Point’ (n 131), at 336 (‘Seen through the prism of a historian, then, judicial portrayals of the background of international criminality inevitably appear fragmentary, foreshortened, and locked in an arbitrary time frame.’); Wilson, *Writing History* (n 3), at 17 (‘international tribunals can get the history of a country badly wrong when trying genocide cases as a result of their quest for certainty and fixity in defining ethnic groups.’).
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evidence. But this is only a by-product and possible long-term outcome of such trials, which should however remain criminal trials in the proper sense, rather than historical symposia.

The judges ought to exercise utmost caution and refrain from adopting one-sided narratives and terming historical events beyond what is strictly necessary for the purpose of rendering verdicts on the charges in the case pending before them. The essentially historical ‘truth’ may turn into an indiscriminate political weapon and manipulation tool when it obtains a legal imprint from a historian in a judge’s robe. The ‘hypertrophied’ legal fact which guises itself as a historical truth is authoritative and sustainable neither under legal principles nor tenets of the history discipline:

The paths of judge and historian, which run side by side for a certain distance, eventually and inevitable diverge. If one attempts to reduce the role of the historian to that of a judge, one simplifies and impoverishes historiographical knowledge; but if one attempts to reduce the role of the judge to that of a historian, one contaminate—and irreparably so—the administration of justice. … In comparison with the errors of historians, however, the errors of judges have more immediate and more serious consequences. They can lead to the conviction of innocent people.

Thus, history ought not to be prodded by the haste of criminal proceedings. To resort to a metaphor of a rider and a horse, the legal process is not there to saddle and spur history into a gallop so as to shorten its own journey; on the contrary, its modest task is to drag the cart of history forward.

3.3 What kind of truth?

‘No peace without justice and no justice without truth’, remains a popular adage in the discipline of international criminal law. But it does not clarify what kind of ‘truth’ is meant as the precondition for achieving justice. Earlier, some differences between the conceptions of ‘truth’ that prevail in the main models of national criminal proceedings were highlighted. The normative view on the appropriate configuration of ‘procedural’ truth for international criminal tribunals predetermines what fact-finding arrangements are deemed ideal, and is in turn itself defined by them. In this sense, given the differences between international criminal jurisdictions, the concept of ‘truth’ as the object of fact-finding inquiry in international criminal justice may be not exactly the same for each and every court, so long as their procedural arrangements differ.

Hence, the ‘procedural truth’ does not exist as a single distinct phenomenon or as a notion uniformly understood in ICL. Comparative analyses of procedure in the relevant jurisdictions from the perspective of their ability to establish the truth may reveal a common denominator, and perhaps a synthetic definition of ‘truth’ in international criminal procedure. A systematic account of the nuts and bolts of the trial system in the tribunals, undertaken elsewhere, could serve as a descriptive basis for such a definition. The following observations are limited to the normative questions whether, generally, it is possible to identify a conception of ‘truth’ in international criminal procedure that is the ‘best fit’ in light of the goals of

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189 Wilson, Writing History (n 3), at 18 (‘Even if courts produce unsatisfying history, they may provide a body of evidence that is invaluable for historians, and so in that sense, their impact as producers of history lasts long after the trials are completed.’).

190 R. May and M. Wierda, International Criminal Evidence (Ardsley, NY: Transnational, 2002) 13-14; id., ‘Evidence before the ICTY’, in R. May et al. (eds), Essays on the ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald (The Hague: Kluwer, 2001) 253 (‘any such result can only be a by-product of the trials where the emphasis must necessarily be in determining whether the Prosecution has established the guilt of the accused beyond reasonable doubt.’); Ohlin, ‘Goals of International Criminal Justice’ (n 120), at 62 (‘At heart, procedures created for the trial process are designed primarily to adjudicate individual conduct, determine individual culpability, and to prescribe individual punishment. The international trial is not a colloquium for historians.’).


192 Chapter 4.

193 Chapters 8-11. See also supra 3.1.
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international criminal justice and, if so, what that conception entails. In other words, do the objectives of restoring peace, reconciliation, redress of the harm suffered by the victims, constructing a historical record, among others, make a specific understanding of ‘truth’ more appropriate? Do (or should) the tribunals adopt the concept of ‘truth’ reminiscent of the ‘outcome of a fair contest’ familiar from an adversarial model, or are those objectives better served by the inquisitorial-style like commitment to the ‘material truth’ (materielle Wahrheit)?

Like in other modern systems of criminal justice, the quest for truth through international criminal procedure is subject to both practical and legal constraints. In international criminal proceedings, such constraints are even more considerable than normally in the national settings. Next to the scarcity of resources and capacities (funding, time, staff) that plagues the enterprise of international justice and investigations in particular, there are further practical barriers to truth-finding. These include inordinate difficulties with collection of evidence, ensuring appearance of suspects and witnesses due to faltering state cooperation, and unavailability of witnesses able or willing to testify. Furthermore, notorious linguistic and cultural barriers as well as translation problems attend the processes of investigating the crimes and examining and evaluating evidence. These cannot but adversely influence the accuracy of fact-finding. Differences between the judges, advocates, and witnesses complicate the balanced assessment of witnesses’ credibility and crediting weight to their evidence. The reduced accuracy of eyewitness recollections of the events of a traumatic past may further be diluted by distortions resulting from a long passage of time after the events. Original recollections may be overlain by the information obtained by witnesses from their social contacts within the community and with persons who have personal or second-hand knowledge about those events. Retention and retrieval of recollections can also be shaped, even if inadvertently, by witness preparation practice taking place before trial, as well as the methods of examination used at trial.

Next to the selectivity of charges, there may be normative (rather than merely practical) obstacles to striving to establish the material and absolute ‘truth’ through international criminal trials. These are for example fair trial rights (e.g. the presumption of innocence and the privilege against self-incrimination) and privileges, e.g. lawyer-client privileged communications and ICRC testimony privilege. In relation to the privileges, the interest of establishing the ‘material truth’ does not prevail over the more general ‘interests of justice’. Fact-finding inquiry is constrained by the existence of fundamental rights not to disclose certain information as a way to promote other important societal goals, or because it is not evident that the interests of justice would be promoted by the admission. In fact, because the privileged material is generally inadmissible, the balancing exercise does not even take place. If the ‘material’ and ‘absolute’ truth can at all be established through a criminal process, the idea of doing so in international

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195 Cryer, ‘Witnesses before International Criminal Tribunals’ (n 194), at 1-2.
196 Turković, ‘The Value of the ICTY as a Historiographical Tool’ (n 114), at 35.
198 See in particular Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness, Prosecutor v. Simić et al., Case No. IT-95-9-T, TC III, ICTY, 27 July 1999, para. 73 (‘the right to non-disclosure of information relating to the ICRC’s activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate.’).
199 Ibid., para. 76. Cf. in the same case: Separate Opinion of Judge David Hunt on Prosecutor’s Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 32 (opining that ICRC non-disclosure principle should not foreclose the balancing of interests at stake in each case).
criminal proceedings is utopian. The tribunal judges admitted, both in the decisions and in their extra-judicial writings, that this is not what they can reasonably be expected to achieve.

The question is therefore whether the international criminal courts should be concerned, as a normative preference, with ascertaining legal truth that is as accurate and close to ‘material truth’ as possible, and undertake special efforts to that end? Or would compliance with the formal script of fair contest in principle suffice and serve as a sufficient guarantee for attaining the sought-after procedural truth, like in an adversarial model? The formal commitment to truth as such does not answer that question and will remain an empty shell until a more specific normative content is given to the notion of ‘truth’ in the context of international trials.

The judicial views on the kind of truth sought by the ICTY, ICTR, and other courts have been expressed but in a handful of cases. The objective value to those pronouncements is difficult to measure, given that these obiter dicta reflect personal views by individual judges rather than the institutional interpretation of the notion of ‘truth’. Many—especially continental lawyers—will answer the first question affirmatively. However, such preferences are intuitive and mirror conceptions prevailing in their legal culture. Thus, a closer look should be taken at the criticisms of certain procedural arrangements in the international criminal tribunals in light of their ability to contribute to truth-finding or to derail it. Those criticisms lay bare explicit or presumed preferences for either an ‘inquisitorial’-like or ‘adversarial’-like concept of truth in international criminal proceedings. Furthermore, the two variants of ‘truth’ ought to be contextualized in the broader institutional goals of international criminal justice in order to say which one of them is more fitting in this set of considerations.

3.3.1 Comparative outlook: ‘Contest’ v. ‘material’ truth

While fairness is a normative core of international criminal procedure, the ‘contest’ aspects championed by the adversarial model do not necessarily belong to its cornerstone values. International criminal trials may be especially difficult to reduce to a contest between the equally placed actors in order to ‘solve a dispute’ between them. There are arguably no other actors as unequal as the international community and an individual accused; conceiving of an international crime as a ‘dispute’ between them is an artificial and counterintuitive construct. Despite the adversarial script of the process, such an analogy is not a fitting concept in light of the situations addressed by the tribunals, the character of authority exercised by the organs of peace and security such as the UNSC, and the place of the tribunals in the system. Their trials are (or ought to be) about fair and accurate adjudication in the implementation of lofty policies of restoring peace, promoting reconciliation and providing victims with redress. Some

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200 Stakić trial judgment (n 160), para. 21 (‘The Trial Chamber has endeavoured to come as close as possible to the truth. However, the Chamber is aware that no absolute truth exists.’); Annex, Guidelines on the Standards Governing the Admission of Evidence, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-PT, TC I, Section A, ICTY, 23 April 2003, para. 1 (on trial as ‘an often complex journey in search for the truth in relation to the alleged individual criminal responsibility’, and bearing in mind that “the truth” can never be fully satisfied’); Delić guidelines (n 32), para. 35. See also Schomburg, ‘Truth-Finding’ (n 35), at 4 (‘the purpose of an International Criminal Tribunal is limited because there is no absolute truth and everybody is entitled to and de facto has his or her own truth. We are not historians, but we have to approach those objectives as closely as possible.’).

201 Transcript, Prosecutor v. Blagojević et al., Case No. IT-02-60-PT, TC II, ICTY, 19 July 2002, at 6 (‘Please understand that general concept of this Tribunal, and here, is the necessity to come as close as possible to the truth.’).

202 Exceptionally, see a strong view along these lines expressed by a US comparative law scholar, who is critical of the ability of adversarial process to establish the truth: W. Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals’, (2006) 4(1) International Commentary on Evidence 1, at 1 (taking it as a ‘starting point’ that trials of horrendous crimes ‘must seek to provide an accurate account of the crimes that took place and the defendant’s role in those crimes. In short, it has to be a search for the truth.’).

203 Chapter 2.

scholars and practitioners of both civil law and common law backgrounds submit that the procedural philosophy of common law, when applied to international criminal justice, is not apt to lend satisfactory results in terms of truth-finding, insofar as it narrows ‘forensic truth’ to ‘virtual truth’. It is to be emphasized that the empirical evidence of the truth-finding advantages of an inquisitorial-model trial system in ICL is lacking. The critique against the adversarial system as a method of adjudicating international crimes targets the same elements identified as carrying a truth-defeating potential in national criminal justice context.

205 It is to be emphasized that the empirical evidence of the truth-finding advantages of an inquisitorial-model trial system in ICL is lacking. The critique against the adversarial system as a method of adjudicating international crimes targets the same elements identified as carrying a truth-defeating potential in national criminal justice context.

206 Lord Justice Bonomy of the ICTY designated cross-examination as a possible disadvantage of the adversarial process in relation to the ICL system:

Adversarial cross-examination can be counterproductive. It is not the best way of getting at the truth where detailed exploration and analysis of documentary evidence is required. The selection of passages by examiner and witness out of the context may distort the overall effect of the document. This is particularly so where aggressive cross-examination is directed at a witness who is unfamiliar with the common law culture and resents being accused of giving misleading evidence.

207 This critique might make one skeptical about the veracity of the classical notion that cross-examination ‘is beyond any doubt the greatest legal engine ever invented for the discovery of truth’ in relation to international criminal trials.

The party-driven system at the ICTY and ICTR has been deemed problematic from the perspective of effective truth-finding because it entrusts the mission of teasing out the truth to the parties who are primarily concerned with winning the case rather than establishing the legal truth that approximates the material truth. Thereby, a risk is created that material witnesses would not be heard if calling them may be inconsistent with partisan interests. At the same time, the judges who are responsible for determining facts and handing down a reasoned verdict are expected to remain passive throughout trial. This is a supposed way for them to preserve the appearance of even-handedness, to avoid challenges to their impartiality and, indeed, the only role they could perform given the virtual lack of investigative functions and limited pre-trial access to the parties’ evidence.

208 The leading role of parties in the presentation of evidence puts fetters on the pro-active participation of judges at trial by extensively questioning the witnesses and calling additional evidence. Although Rule 90(F) authorizes judges to exercise greater...
control over the mode of witness interrogation at trial, with a view to making it more efficient for the ‘ascertainment of the truth’, it does not empower them to take lead in the factual inquiry and to be in charge of fact-finding. The adherence to this essentially adversarial approach to the judicial role in fact-finding raises the question of the extent to which its extension to international criminal trials is justified. Unlike in jury trials at common law where the jurors are the actual fact-finders at trials who hand down render unreasoned verdicts are to be shielded from prejudicial information and judge’s overbearing, international trials are conducted by professional judges who are responsible for finding facts and for issuing reasoned judgments at the end.

In a similar vein, proposals have been made for reassessing the roles of trial participants in order to equip the process better for the truth-finding function. For example, it is often argued that, in line with Article 54(1) of the ICC Statute, the role of the Prosecutor should be that of a judicial officer tasked with the impartial search for the truth rather than that of a partisan actor in an adversarial contest. A prominent objection voiced to that reflects the traditional mistrust of the idea of an impartial investigation. The external pressures on the prosecution to secure a conviction are recognizably higher in case of international crimes which are widely regarded as most heinous. This invites a consideration of the possible ways of removing the improper incentives to prevail in an ‘evidentiary combat’ that may be disconnected from the aspiration to arrive at ‘all the truth and nothing but the truth’. Besides, it has been noted in relation to the ad hoc tribunals that the reduced role of represented accused in an adversarial trial setting may also be a factor that is not always conducive to the truth-finding. This point reflects the frustration of civil-law trained judges deprived of direct contact with the accused for the most part of the trial, except for the time of his or her testimony.

TC for refusing to assume a more active role in directing the focus of the inquiry because of its being ‘inextricably shackled to adversarial notions’). Cf. M. Fairlie, ‘Revised Pre-Trial Procedure before the ICTY from a Continental/Common Law Perspective’, in G. Sluiter and S. Vasiliev (eds), International Criminal Procedure: Towards a Coherent Body of Law (London: Cameron May, 2009) 319 (‘In the absence of access to … evidence, the ICTY judges would not possess the tools necessary to make their ability to be active at trial an efficient and productive affair.’) and 320 (considering it unfair for the Dokmanović TC to have taken a more active approach by steering the prosecution’s questioning into the area it had considered most important).

Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 207), at 355 (‘The judges’ objective should be to secure greater judicial control.’).

Heinsch, ‘How to Achieve Fair and Expeditious Trial Proceedings before the ICC’ (n 58), at 485 (‘the ICC OTP still is behaving much more like an actor in a typical adversarial proceeding’); Groome, ‘Re-Evaluating the Theoretical Basis’ (n 204), at 797-8 (‘Methods must be developed that insulate international prosecutors from the temptations of partiality, the seduction of prominent convictions and craft a role different from the traditional role of a prosecutor as adversary.’); Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials’ (n 202), at 2 (‘There should be a single, neutral investigation that is as full and complete as possible, and the investigators should be obligated to pursue all relevant evidence, whether it favours the prosecution or the defence’).

For a typical critical remark from a common-law position, see G. Robertson, ‘General Editor’s Introduction to Essays on Fairness and Evidence in War Criminal Trials’, (2006) 4(1) International Commentary on Evidence 1, at 5 (‘show me a “neutral” investigator in an inquisitorial system and I will show you a pie – in the sky. The investigating magistrate inevitably takes on the mantle of a prosecutor, and it is his report that incriminates the defendant, after a secret procedure from which has counsel has been excluded.’).

M. Wladimiroff, ‘Defending Individuals Accused of Genocide’, (2007-8) 40 Case Western Reserve Journal of International Law 271, at 274 (‘The eagerness of the media, politicians, and some nongovernmental organizations to achieve convictions, not merely fair proceedings, puts pressure on international trials. … This is the reason why international prosecutors may well be inclined to play a creative trial game in order to secure conviction, rather than assisting the court in finding the truth.’).

Schonburg, ‘Truth-Finding’ (n 35), at 12-3 (observing that the placement of the accused at the end of the courtroom makes it difficult for judges to follow his body language and demeanour, including the avoidance of the eye-contact with witnesses, which is otherwise ‘of utmost importance in finding the truth’); Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials’ (n 202), at 4 (who recommends to allow the submission of the accused to questioning by both investigators and trial judges who would credit weight to his or her answers or failures to answer).
The material implication of a party-driven system in the tribunals is the possibility for the parties to avoid a full presentation in case of negotiated settlements on the charges and sentence resulting from plea bargaining. Plea bargaining epitomizes the parties’ autonomy over the dispute and the ‘arbiter’ status of the judges in that regard, which is why it is often regarded as an element potentially undermining the truth-finding mission of international criminal tribunals. This particularly concerns the practice of charge bargaining: out of efficiency considerations the prosecutor may drop certain charges in exchange for the accused’s plea of guilty in relation to the other—usually less significant—charge(s). There is a general agreement that this practice is in principle undesirable in international criminal prosecutions because it tends to undermine international justice, which must not be traded off for speed and efficiency. This notion was initially endorsed by the ICTY judges when adopting the rules. But the increased caseload and the obvious pragmatic benefits of disposing of full trials in order to clear the docket soon compelled its acceptance in practice and in the Rules. The relationship of plea-bargained outcomes with truth-finding is more complex as the former enable the prosecution to obtain insider information about the crimes that would otherwise be unavailable, which in fact promotes truth-seeking. Charge-bargaining has, however, remained controversial due to the perception that the accountability for crimes of extraordinary gravity is antithetical to the idea of securing a prompt conviction on a lesser charge while more serious charges have been confirmed in the presence of evidence casting the ‘reasonable grounds to believe’ that the respective crimes have taken place. Given the link with the issue of fundamental goals of international criminal justice, this issue will be returned to shortly.

The criticisms of some aspects of the party-driven process are often joined with calls to broaden the role of the judges in the fact-finding process. The measures proposed include the enhanced pre-trial access to evidence and contact with the accused during the hearing, increased judicial participation in witness questioning, and judicial control over the scope of truth-finding at trial. Argument has been made in favour of making it obligatory for the judges to take truth-

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218 M.P. Scharf, ‘Trading Justice for Efficiency: Plea-Bargaining and International Tribunals’, (2004) 2(4) JICJ 1070, at 1080 (‘If practical utility is the only valid justification, it may not be sufficient to warrant the international adoption of this practice.’); M. Damaška, ‘Negotiated Justice in International Criminal Courts’, (2004) 2 JICJ 1018, at 1035 (‘arguments supporting bargained justice, other than those of practical utility, have a much lesser force in the international than in the domestic arena.’); M. Bohlander, ‘Plea Bargaining before the ICTY’, in R. May et al. (eds), Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald (The Hague: Kluwer Law International, 2001) 163 (‘If the international community is serious about international criminal prosecution..., then is must be prepared to fund this enterprise accordingly in order to be able to afford full public trials and at the same time to avoid overloaded dockets.’); Petrig, ‘Negotiated Justice’ (n 105), at 29-30.

219 First Annual Report of the ICTY, UN Doc. A/49/342, 29 August 1994, para. 74; Statement by the President Made at a Briefing to Members of Diplomatic Missions, IT/29, ICTY, 11 February 1994 (regarding immunities in return for testimony: ‘this tribunal is not a municipal court but one that is charged with trying persons accused of the gravest possible of all crimes. … After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be’.

220 Rule 62ter of the ICTY RPE; Rule 62bis of the ICTR RPE. In more detail, see Chapter 6.

221 Schomburg, ‘Truth-Finding’ (n 35), at 12; Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials’ (n 202), at 5 (‘some of the mechanisms for achieving efficiency in domestic trial systems, such as plea bargaining or negotiated sentences, cannot be used for such crime’). Some scholars argued that this also violates the customary obligation under international law to prosecute international crimes that is binding on both the Prosecutor of the tribunal with jurisdiction and states. The argument is tenuous given that the relevance of such a customary obligation—addressed to states—to tribunals is not self-evident, and international prosecution function is governed by the principle of opportunity rather than legality. Cf. Scharf, ‘Trading Justice for Efficiency’ (n 218), at 1075; Petrig, ‘Negotiated Justice’ (n 105), at 17-21.

222 Schomburg, ‘Truth-Finding’ (n 35), at 12 and 224-25; Heinsch, ‘How to Achieve Fair and Expeditious Trial Proceedings before the ICC’ (n 58), at 481, 487-8; Bohlander, ‘Evidence before the International Criminal Court’ (n 51), at 553; Groome, ‘Re-Evaluating the Theoretical Basis’ (n 204), at 321.
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finding initiatives and employ the means available to them in order to extend inquiries beyond the evidence furnished by the parties, where they deem it to be conducive the effective ascertainment of the truth. Thus, an *ex officio* power of the ICC judges under Articles 64(6)(b) and 69(3) ought to be applied as a binding obligation to seek the truth *proprio motu*. *224*

The measures towards expanding the judicial control over the process that have actually been taken are primarily motivated by the need to increase efficiency and to reduce the length of international criminal trials rather than to enhance truth-seeking. *225* The two interests are aligned to a certain extent because efficiency of proof-taking eventually facilitates fact-finding, while inefficient questioning obfuscates it and decreases the ability of the court to ascertain facts. Thus, an implicit reason for giving the judges a more pro-active role is to equip them for ‘a comprehensive ascertainment of truth in the area of international criminal justice’ as ‘a precondition of—equally genuine and literally true—justice’. *226* This view is not exclusive to the commentators with a civil law background. *227*

The recurring and prevalent critiques of the present trial arrangements in the *ad hoc* tribunals and the recommendations for reform make it apparent what concept of truth may be not the most fitting in international criminal procedure. There is a common sense of mistrust towards the idea that an adequate and satisfactory ‘truth’ can emerge automatically and without additional judicial effort from a party-driven process, even if it is conducted fairly and in full accordance with the adversarial script. According to the commentators, the normative meaning of ‘legal truth’ in international trials should not be limited to the adversarial vision of ‘truth’ as a natural outcome of the clash of party narratives in the context of jury trials. Their arguments point to the need to re-conceptualize the ‘procedural truth’ appropriate for international criminal proceedings by shifting its content towards the notion of ‘material truth’ familiar to the procedural doctrine in continental systems.

However, the exact contours of that notion in the novel context of international criminal procedure and its possible implications for the optimal trial arrangements remain underexplored. While a departure from the ‘adversarial’ concept of legal truth is advocated, the ultimate destination is not fully clear and it is uncertain that the alternative is a guaranteed solution to fact-finding problems of the tribunals. As noted, there is as yet limited empirical proof that such a reformed concept of truth would fare better. Finally, most critiques overviewed above recognizably stem either from the civil law commentators’ adherence to the tenets of their procedural tradition or from the disillusionment of common law scholars and practitioners with

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797. But cf. Fairlie, ‘The Marriage of Common and Continental Law at the ICTY’ (n 27), at 276; id., ‘Revised Pre-Trial Procedure’ (n 212), at 320-21 (considering pre-trial access to evidence by the judges problematic).
224. See text accompanying n 51 and Kirsch, ‘The Trial Proceedings before the ICC’ (n 50), at 292.
225. Assessment and Report of Judge Fausto Pocar, President of the ICTY, provided to the Security Council Pursuant to Paragraph 6 of Council Resolution 1534 (2004), Annex 1, UN Doc. S/2006/353, 31 May 2006, para. 30 (citing the conclusion of the Working Group on Speeding Up Trials chaired by Judge Bonomy that ‘the presentation of a party’s case at trial should be increasingly in the hands of the Judges and … the trial should not be primarily a party driven process.’); Bonomy, ‘The Reality of Conducting an International Criminal Trial’ (n 207), at 349-50 (‘It is a simple fact of life that adversarial proceedings can tend to lack focus and can lead to lengthy, unproductive and largely irrelevant exchanges between examiner and witness. … In the absence of judicial control …, it is plain that the conduct of war crimes trials in classical adversarial form results, and inevitably will result, in the proceedings in some cases lasting for several years.’).
226. Eser, ‘The “Adversarial” Procedure’ (n 16), at 224-5; Kress, ‘The Procedural Law of the International Criminal Court in Outline’ (n 50), at 612 (expecting that the duty of the ICC judges to give a reasoned judgement as per Article 74(5) of the ICC Statute will create for them ‘a strong incentive … to play a more active role in the search for the truth’).
227. Groome, ‘Re-Evaluating the Theoretical Basis’ (n 204), at 797 (‘international trial procedure must abandon its reliance on the adversarial process to yield the truth and develop its own methodology to uncover the truth in a process that fairly strikes the balance between the rights of the defendant, the victim and the international community’); Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials’ (n 202), at 2 (advocating the adoption of civil-law trial tradition for international criminal trials as placing ‘a much higher value on truth’).
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the forensic capacity of the trial arrangements at common law and the flawed concept of truth they may reflect.

None of those per se amount to sufficient grounds for uncritically adopting a ‘material truth’ paradigm in international criminal procedure. Taken on their own, the essentially comparative-law based considerations lack in explanatory detail as to the content of ‘truth’ they deem optimal, as opposed to the notions they reject, and wield little normative power as the basis to conclusively argue in favour of the ‘material truth’ concept. It is to be recalled that comparative law is a poor normative criterion for the evaluation and reform of international criminal procedure.\textsuperscript{228} Instead of adopting any ready-made concepts of ‘truth’ from the national context, the tribunals are expected to define their own in light of their purposes and procedural setting. There has been little effort on their part to do so in their jurisprudence (and with reason, since conceptual discussions rather belong to scholarly domain). Therefore, the contours of the concept of truth the tribunals apply remain unclear and vary given differences between the various jurisdictions in part of procedural arrangements and approaches.

3.3.2 Truth and institutional goals: The case of plea bargaining

As suggested above, the goals of international criminal justice may provide a better vantage point from which the concept of truth employed in international criminal procedure and the organization of trial can be assessed. While a full discussion falls beyond the scope of this section, the earlier mentioned issue of consensual outcomes would merits special attention in this context. It is perhaps the best demonstration of tensions between the different interests at stake in international criminal procedure which shape the interpretations of ‘procedural truth’ as a phenomenon and normative aspiration in this context. Guilty pleas often emanate from agreements between the prosecutor and the accused regarding the scope of the procedural truth to be submitted to the judges in lieu of the entirety of evidence that could be presented and discussed in a contested trial. This practice allows the trial truth to be framed by the parties more subjectively than if it were to be ascertained by the judges on the basis of their detailed knowledge of evidence adduced during a contested trial. But as noted, the relationship between guilty pleas and truth-finding is not straightforward.

On the one hand, a guilty plea consists of an acknowledgement and acceptance by the accused of the responsibility for the incriminating acts whereby he or she often indicates willingness to cooperate with the prosecution in relation to investigations. Insofar as guilty pleas may be accompanied by the expressions of remorse and by invaluable additional information in his case or related cases, they are believed to enhance the truth-finding and to protect against denial and revisionism.\textsuperscript{229} The accused that pleads guilty facilitates the work of the prosecution and assists it in the investigation of the cases of other—often high-ranking—accused. This is

\textsuperscript{228} Chapter 1.

\textsuperscript{229} Sentencing Judgement, \textit{Prosecutor v. Sikirica et al.}, Case No. IT-95-8-S, TC, ICTY, 13 November 2001, para. 149 (‘notwithstanding the timing of the guilty plea, a benefit accrues to the Trial Chamber, because a guilty plea contributes directly to one of the fundamental objectives of the International Tribunal: namely, its truth-finding function’); Sentencing Judgement, \textit{Prosecutor v. Todorović}, Case No. IT-95-9/1-S, TC, ICTY, 31 July 2001 (‘\textit{Todorović} trial sentencing judgment’), para. 81 (‘A guilty plea is always important for the purpose of establishing the truth in relation to a crime’); Sentencing Judgement, \textit{Prosecutor v. M. Nikolić}, Case No. IT-02-60/1-S, TC I, Section A, ICTY, 2 December 2003 (‘\textit{M. Nikolić} trial sentencing judgment’), para. 70; \textit{Deronjić} trial sentencing judgment (n 122), paras 3 and 241 (‘Miroslav Deronjić’s guilty plea and his readiness to testify in other trials assists the Tribunal in its search for the truth and prevents historical revisionism.’) and 260. For a positive assessment of the truth-generating capacity of plea bargaining, see M. Harmon, ‘Plea Bargaining: The Uninvited Guest at the ICTY’, in J. Doria \textit{et al.} (eds), \textit{The Legal Regime of the International Criminal Court: Essays in Honour of Igor Pavlovich Blischenko} (Leiden/Boston: Brill, 2009) 179 (pointing out that along with the body of evidence produced in \textit{Krstić} and \textit{Blagojević} and \textit{Jokić}, the three guilty pleas in \textit{Erdemović}, \textit{Obrenović}, and \textit{Momir Nikolić} leave no room for denial of Srebrenica).
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especially so where he or she agrees to supply insider’s evidence,\textsuperscript{230} including the data that
enables inquiries in the previously undiscovered areas.\textsuperscript{231} As noted by various Trial Chambers,
guilty pleas and bargaining promote institutional efficiency and allow saving scarce tribunal
budget and time.\textsuperscript{232} However, remarkable are the judicial attempts to shroud the ‘resource
economy’ benefits of guilty pleas in the ‘broader mandate’ discourse, by insisting that the
efficiency is a corollary or incidental by-product of guilty pleas and not the primary reason for
promoting them.\textsuperscript{233}

It is difficult to overestimate the importance of efficiency and judicial economy
considerations, given the ultimate complexity and costliness of international trials.\textsuperscript{234} The
resources saved on uncontested trials can be used to pursue other cases and to expand the ambit
of accountability. This enables the establishment of a more comprehensive truth and ensuring a
wider—even if not deeper—coverage of events.\textsuperscript{235} Guilty pleas enrich the emerging ‘historical
record’ by casting an important perspective of the accused on the controversial and obscure
events surrounding the commission of crimes.\textsuperscript{236} Furthermore, guilty pleas are recognized to be
important tools in promoting peace and reconciliation.\textsuperscript{237} By admitting incriminating facts, the
accused arguably paves the way towards forgiveness and heeling of the victims of crimes
which might have eventually broader social spin-off effects assisting in reconciling the
communities. The acknowledgement of responsibility relieves the victims from having to appear
before the tribunal and spares them from the ordeal of having to recount traumatic
experiences.\textsuperscript{238} It also diminishes their exposure to safety risks and, where they are satisfied with
the outcome, ensures them a sooner closure in terms of obtaining a conviction and sentence than
after a full-blown contested trial.\textsuperscript{239} This benefit proves very significant where the holding a trial
would require a repeated attendance of the witnesses who have earlier testified in related cases.
The ‘witness fatigue’ has been reported to result in reluctance to undertake travel to a distant
tribunal in order to give evidence.\textsuperscript{240} Moreover, statements of remorse often accompany pleas
of guilty. If perceived as genuine and truthful rather than contrived to avoid a higher sentence, their
potential restorative and reconciliatory effects on the communities of survivors and perpetrators

\textsuperscript{230} M. Nikoli\’ć trial sentencing judgment (n 229), para. 71. See Harmon, ‘Plea Bargaining’ (n 229), at 168-9
(considering ‘positive and constructive’ the impact of guilty pleas and bargaining on the ICTY Prosecutor’s ability
‘to identify fruitful new investigative leads, obtain important evidence not otherwise available to the Prosecutor’s
office, and develop and present at trials credible testimonial evidence from insider/co-perpetrator witnesses at trial.’).

\textsuperscript{231} Deronjić trial sentencing judgment (n 122), para. 135; D. Nikolić trial sentencing judgment (n 110), para. 122.

\textsuperscript{232} Sentencing Judgement, \textit{Prosecutor v. Plavšić}, Case No. IT-00-39&40/1-S, TC, ICTY, 27 February 2003
(‘\textit{Plavšić trial sentencing judgment’), para. 73.

\textsuperscript{233} E.g. M. Nikolić trial sentencing judgment (n 229), para. 67. Finding this explanation improbable, see Petrig,
‘Negotiated Justice’ (n 105), at 29-30.

\textsuperscript{234} See Chapter 3.

671 (‘Even if the documentation accompanying plea agreement lacks the details of a full trial record, the efficiency
of the plea agreement process results in a greater number of completed cases and, therefore, more additions to the
historical record. Plea agreements can therefore make up in breadth what they may lack in depth.’).

\textsuperscript{236} \textit{Ibid.}

\textsuperscript{237} Sentencing Judgement, \textit{Prosecutor v. Obrenović}, Case No. IT-02-60/2-S, TC I, Section A, ICTY, 10 December
2003 (‘\textit{Obrenović trial sentencing judgment’), para. 111 (‘Dragan Obrenović’ s guilty plea is indeed significant and
can contribute to fulfilling the Tribunal’s mandate of restoring peace and promoting reconciliation.’); Deronjić trial
sentencing judgment (n 122), para. 236.

\textsuperscript{238} D. Nikolić trial sentencing judgment (n 110), paras. 121; \textit{Plavšić trial sentencing judgment} (n 232), paras. 66 and
68; Sentencing Judgement, \textit{Prosecutor v. Bralo}, Case No. IT-95-17-S, TC, ICTY, 7 December 2005, para. 64;
Deronjić trial sentencing judgment (n 122), paras 134 and 241; Todorović trial sentencing judgment (n 229), para.
80.

\textsuperscript{239} Petrig, ‘Negotiated Justice’ (n 105), at 22.

\textsuperscript{240} Harmon, ‘Plea Bargaining’ (n 229), at 175.
are deemed to be higher than those of judicial findings of guilt or innocence.\textsuperscript{241} Such statements may thus in themselves provide ‘some form of closure’.\textsuperscript{242}

On the other hand, the proclaimed benefits of guilty pleas in terms of their promotion of the broader goals come into question for the lack of empirical proof.\textsuperscript{243} Besides, while the goals of truth-finding and historical record generally are deemed to be helped by the oral and transparent adversarial truth-finding processes, the certification by the court of a guilty plea may in certain conditions be at tension with the supposed quest for the truth and reconciliation.\textsuperscript{244} This is particularly the case where a plea is entered successfully in the wake of charge bargaining between the parties whereby the prosecution promises to drop certain factual allegations and/or relevant charges against the accused person in exchange for a plea of guilty to other, less serious charges in the indictment.\textsuperscript{245} The ICTY Trial Chambers and individual judges regard as particularly problematic the charge-bargaining practice attended by withdrawal of factual allegations where the surviving charges do not reflect the totality or gravity of the criminal conduct that transpires from the alleged facts and the available evidence.\textsuperscript{246} Because it is rather the gravity of crime than the label which matters for sentencing and given the Chamber’s broad discretion in sentencing matters, the Chambers may have been less concerned about the label of a charge serving as the ground for conviction. However, even if the factual basis remains largely unaffected and the incriminating facts are still subsumed by the surviving charges, downplaying the legal qualifications of the conduct may be problematic: the qualification which fails to mirror the level of culpability and the true gravity of the criminal conduct in question deprives victims of full justice and might entrench denial.\textsuperscript{247} For example, the withdrawal of a charge as symbolic and stigmatizing as ‘genocide’ has not been uncommon at the ICTY and exposed the prosecution and the charge-bargaining practice to criticism.\textsuperscript{248}

\begin{thebibliography}{99}
\bibitem{241} D. Nikolić trial sentencing judgment (n 110), paras. 246-52; M. Nikolić trial sentencing judgment (n 229), para. 63, para. 72 (‘an admission of guilt from a person perceived as “the enemy” may serve as an opening for dialogue and reconciliation between different groups.’). See also N.B.H. Jørgensen, ‘The Genocide Acquittal in the Sikirica Case before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea’, (2002) 15 \textit{Leiden Journal of International Law} 389, at 406 (‘An acknowledgement of guilt is arguably more significant for reconciliation than a finding of guilt.’); J.N. Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’, (2009) 20(2) \textit{European Journal of International Law} 415, at 426 (arguing that ‘the truth cannot have a positive [reconciliatory] effect unless it is acknowledged.’).
\bibitem{242} \textit{Obrenović} trial sentencing judgment (n 237), para. 111.
\bibitem{243} \textit{Obrenović} trial sentencing judgment (n 237), para. 111.
\bibitem{244} Clark, ‘Plea Bargaining at the ICTY’ (n 241), at 421 (rebuking as unsubstantiated the claims that plea-bargaining facilitates truth-finding and reconciliation).
\bibitem{245} See also J.D. Jackson and S.J. Summers, \textit{The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions} (Cambridge: Cambridge University Press, 2012) 116 (‘wider goals … might seem to argue for the more transparent and oral models of truth-finding associated with adversarial procedure, although the scope that this mode of procedure lends to bargained outcomes between prosecution and defence can serve as much to exclude as to include the interests of victims and others which need to be accommodated if reconciliation is to be achieved.’).
\bibitem{246} M. Nikolić trial sentencing judgement (n 229), para. 63 (‘In cases where factual allegations are withdrawn, the public record established by that case might be incomplete or at least open to question, as the public will not know whether the allegations were withdrawn because of insufficient evidence or because they were simply a “bargaining chip” in the negotiation process’).
\bibitem{247} M. Nikolić trial sentencing judgement (n 229), paras 62, 65 and 78 (finding it ‘significant that the Prosecution did not seek to withdraw any of the factual allegations outlining … criminal conduct’ and satisfying itself that the accused’s ‘criminal conduct is reflected in the charge of persecutions’, while deferring to the discretion of the OTP as to whether the accused harboured specific intent required for genocide). See also Dissenting Opinion of Judge Schomburg, Deronjić trial sentencing judgment (n 122), paras 4 and 10 (disagreeing with the sentence on the ground that the indictments ‘arbitrarily present the facts, selected from the context of a larger criminal plan and, for unknown reasons, limited to one day and to [one] village … only’).
\bibitem{248} Scharf, ‘Trading Justice for Efficiency’ (n 218), at 1080; Petrig, ‘Negotiated Justice’ (n 105), at 15-6 and 20; Clark, ‘Plea Bargaining at the ICTY’ (n 241), at 428.
\end{thebibliography}
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The effects of this practice on the truth-finding are rather adverse. The evidence related to the dropped charges may never enter into the public domain: ‘neither the public nor the judges themselves come closer to know the truth beyond of what is accepted in the plea agreement’, which ‘might create an unfortunate gap in the public and historical record of the concrete case’.249 As opposed to lengthy judgments, the factual basis annexed to the plea agreements undersigned by the parties is normally a few pages long and cannot fill in the gap in the historical record of the single case of the accused and much less that of the entire conflict.250 Consequently, the judicially accepted truth runs a serious risk of being incomplete and deficient251 even when measured against the potential of plea bargaining to generate new and otherwise unavailable evidence. In any event, in certain circumstances of a given case, the failure to tell the ‘whole truth’ may effectively equate to telling a lie, and from this perspective bargaining it is cogent to argue that bargaining is apt to distort the historical record.252 A full public trial in which all or nearly all of the available evidence is presented and contested by the parties, better serves the objective of establishing a complete and detailed evidentiary record.253 This is also corroborated by the ad hoc tribunals’ jurisprudence which regards judgments resting on guilty pleas as inappropriate sources of facts which may be judicially noticed as ‘adjudicated facts’ (Rule 94(B)) because they are not preceded by a thorough judicial examination.254

Moreover, the withdrawal of charges and/or factual allegations as a result of plea bargaining engenders a negative public perception, particularly among the accused’s and victims’ communities. These effects could undermine the reconciliatory mission pursued by international criminal courts on an institutional level.255 The reasons for dropping a charge may vary from the prosecution’s wish to secure an efficient disposal of the case to the recognized insufficiency of the evidence to prove the relevant charge ‘beyond reasonable doubt’.256 Those reasons will remain unknown to anyone save for the prosecution itself.257 An impression can easily arise that the abandoned counts have served as a ‘bargaining chip’ in the negotiation process, that the interests of victims have been traded off for prosecutorial convenience and judicial economy, and that the accused pleads guilty only for give-and-take motives.258 Condoning such deals is arguably inconsistent with the tribunals’ goals of administering justice for crimes of utmost gravity.259 The judges would also be seen as implicated in the bargain

249 D. Nikolić trial sentencing judgment (n 110), para. 122.
250 Scharf, ‘Trading Justice for Efficiency’ (n 218), at 1080; Petrig, ‘Negotiated Justice’ (n 105), at 16.
251 Clark, ‘Plea Bargaining at the ICTY’ (n 241), at 424 and 428.
253 M. Nikolić trial sentencing judgment (n 229), para. 61.
254 Decision on the Prosecutor’s Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos ICTR-96-10-T and ICTR-96-17, TC I, ICTR, 22 November 2001, para. 26 (‘The Chamber is of the view that this reference to previous findings of the ICTR does not include judgments based on guilty pleas, or admissions voluntarily made by an accused during the proceedings. Such instances, which do not call for the same scrutiny of facts by a Chamber as in a trial situation where the Prosecutor has the usual burden of proof, are not proper sources of judicial notice.’). This aspect is noted in J. Iontcheva Turner and T. Weigend, ‘Negotiated Justice’, in G. Sluiter et al. (eds), International Criminal Procedure: Principles and Rules (Oxford: Oxford University Press, 2013) 1383
255 Bohlander, ‘Plea Bargaining before the ICTY’ (n 218), at 161-2 (‘Especially the victims of the crimes or their relatives, or whole segments of a country’s population will not understand the fact that their tormentors escape public scrutiny and may hide behind an agreement with the very institution that is supposed to ensure that justice is being done to the victims’); Clark, ‘Plea Bargaining at the ICTY’ (n 241), at 423.
256 Harmon, ‘Plea Bargaining’ (n 229), at 163-4, n2.
257 M. Nikolić trial sentencing judgment (n 229), para. 65.
258 ‘It may be thought that an accused is confessing only because of the principle “do ut des” (give and take)’: Deronjić trial sentencing judgment (n 122), para. 135.
259 M. Nikolić trial sentencing judgment (n 229), para. 65 (‘Once a charge of genocide has been confirmed, it should not simply be bargained away. If the Prosecutor make[s] a plea agreement such that the totality of an individual’s
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because by validating the guilty plea they would sanction the reduction of the charges that had previously been confirmed based on the evidence meeting the threshold of a *prima facie* case.\(^{260}\) Plea bargains might also undermine the systemic principle of the equal treatment of the accused, for the Prosecutor is more likely to be willing to offer a generous plea agreement to the accused who can return useful cooperation. This mostly comes down to those who have been higher up in the hierarchy and are alleged to have participated in a joint criminal enterprise for the commission of most serious crimes.\(^{261}\)

The perception is thus likely to arise that neither the charges on which the accused is convicted nor the sentence reflect the totality and intensity of his or her criminal conduct. True or false, it could damage the reconciliation process, as victims inevitably feel outraged by the fact that the charges have been dropped and the sentence reduced.\(^{262}\) The public repentance of the accused is bound to be mistrusted as self-interested and insincere, and nothing more than a result of cunning risk-calculation.\(^{263}\) This has occurred indeed when the ICTY authorized the dropping of the charges of genocide and crimes against humanity against one of the members of the Presidency of the Republika Srpska, Biljana Plavšić, in exchange for her plea of guilty to persecution as a crime against humanity, and sentenced her to eleven years of imprisonment.\(^{264}\) Mrs. Plavšić’s subsequent statements publicized in the media as well as her refusal to cooperate with the prosecution in the *Štakić* and *Milošević* cases, where she could have provided useful information, raised *ex post facto* doubts about the sincerity of remorse she had expressed in her guilty plea.\(^{265}\) In addition, such expedient settlements between the parties tend to foster nationalist sentiments in the accused’s community as they give food to anecdotes that a plea of guilty has been made only to obtain certain charging or sentencing benefits and, therefore, that the admissions of facts are solely motivated by the expectations of leniency. Thus, reportedly, some Bosnian Serbs cynically saw Plavšić’s plea as ‘an act of treachery and betrayal in return for generous benefits’.\(^{266}\) Needless to say, this tends to feed revisionism and to obstruct the process of coming to terms with the past atrocities.

Finally, there is also a notion that the opportunity to give evidence has the effect of empowering victims and that the cathartic experience of testifying may provide them with some form of closure.\(^{267}\) If accepted, this claim corroborates the view that negotiated justice may actually be at odds with restoration and redress for the victims as well as with the prospects of forgiveness and reconciliation in the society. This is because the victims are thereby deprived of their ‘day in court’, often the only forum where they can effectively be heard, without even providing them with an opportunity to express themselves on the merits of the diversionary

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\(^{260}\) E.g. Art. 19(1) ICTY RPE; Rule 47(E) ICTY RPE.

\(^{261}\) M. Nikolić trial sentencing judgment (n 229), para. 66.


\(^{263}\) Petrig, ‘Negotiated Justice’ (n 105), at 16; Clark, ‘Plea Bargaining at the ICTY’ (n 241), at 432.


\(^{265}\) Harmon, ‘Plea Bargaining’ (n 229), at 180, n65. In 2009, after having served two-thirds of her sentence, Plavšić was granted early release, considering good behaviour, advanced age, and a poor state of health. See also Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, *Prosecutor v. Plavšić*, Case No. IT-00-39 & 40/I-ES, President, ICTY, 14 September 2009, para. 12 (weighing Plavšić’s testimony in *Kraišnik* in favour of her request for commutation of sentence, notwithstanding the OTP report that the accused ‘has not been overtly helpful or anxious to cooperate’ with it and refused to give testimony in *Milošević*).

\(^{266}\) Scharf, ‘Trading Justice for Efficiency’ (n 218), at 1080.

\(^{267}\) Bohlander, ‘Plea Bargaining before the ICTY’ (n 218), at 162.
While some victim-witnesses may be called at the sentencing hearing held in the aftermath of a valid guilty plea to testify to the effects of the crime and other relevant circumstances, this has not been a regular practice and is probably unfit to replace the full-fledged trial inquiry. On the balance of arguments in favour and against the ‘negotiated’ truth, the Nikolić Trial Chamber has unequivocally expressed its preference for its opposite: ‘Convictions entered by the trial chamber must accurately reflect the actual conduct and crime committed and must not simply reflect the agreement of the parties as to what would be a suitable settlement of the matter.’ The present regime at the ICTY, ICTR, and SCSL authorizes judges to reject a guilty plea and to proceed to a full trial instead, among others, if a guilty plea is not based on ‘sufficient facts for the crime and accused’s participation in it’. Thus, the Trial Chamber will still consider the plea valid where the facts and available evidence would support a more serious charge. Like at common law, a guilty plea certified by the Chamber is more than merely a piece of evidence: it has a legal consequence of predetermining conviction and supplants the needs to establish the guilt of the accused through an evidentiary process.

That said, the Trial Chambers are still able to exercise significant control over the disposal of cases through plea agreements. Should the proposed charges fail to reflect the totality of the criminal activity as may be reflected on the available evidence, the judges may put to the notice of the parties their concern as regards the factual basis of the agreement and use the leverage of discretion to refuse leave to amend indictment as requested by the OTP, in which case the plea agreement will not stand. Consequently, while the scope of forensic truth in the ad hoc tribunals’ frameworks may be variable by agreement by the parties, it is subject to judicial oversight, indirect and limited as it is. The scope of such review varies by the bench and extends only as far as the familiarity of judges with the prosecution evidence goes.

This discussion reflects the idea, which has already been identified in the foregoing section, that in international criminal law, ‘a negotiated historical record that is generally accepted’ must preferably yield to ‘an accurate one, where one might have to bite the bullet of a harsh judgement’. Where the utmost truth-finding accuracy is called for, the system elevating compromise above other decision-making methods is ill-suited. It is important to recall that the pressures and inducements to acknowledge responsibility which accompany plea bargaining engender the risk of convicting a person who is innocent or at least not as guilty as the initial charges may suggest, because he or she is more likely to receive and be tempted to receive a ‘generous offer’ from the prosecution. Such risks are certainly no lower in international criminal justice than in the national contexts, given the gravity of the charges and imminently severe penalties in case of conviction. One should also consider the factors such as the extreme legal complexity of the offenses and heads of liability, relative vagueness of indictments in international criminal law (as compared to charging practices at civil law), the scarcity of precedent, and unpredictability of the sentencing outcomes as a consequence of the judges’ broad discretion. These are all factors which make a truly informed choice—one of the prerequisites for a valid guilty plea—very difficult for a defendant, even if he or she is advised.

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268 Petrig, ‘Negotiated Justice’ (n 105), at 22-3.
269 M. Nikolić trial sentencing judgement (n 229), para. 62.
270 Ibid., para. 65.
271 Rule 62bis(iv) ICTY RPE; Rule 62(B)(iv) ICTR RPE and Rule 62(A)(iv) SCSL RPE. Cf. Art. 65(4) ICC Statute, authorizing the Trial Chamber ‘in the interests of justice’ to request the Prosecution to present additional evidence or to order that the trial be continued under the ordinary trial procedures.
272 Harmon, ‘Plea Bargaining’ (n 229), at 169.
273 Rule 62ter(B) ICTY RPE; Rule 62bis(B) ICTR RPE. See further Rule 50(A) ICTY, ICTR and SCSL RPE.
274 Petrig, ‘Negotiated Justice’ (n 105), at 15.
275 Damaška, ‘Negotiated Justice in International Criminal Courts’ (n 218), at 1032.
277 Petrig, ‘Negotiated Justice’ (n 105), at 23-4.
by a qualified counsel.278 The same factors call for utmost vigilance on the part of the Chamber when accepting a guilty plea, given the grave consequences of an error.

The limited example of negotiated justice in the international context demonstrates that the ‘postmodern’ interpretation of ‘truth’ as a compromise,279 i.e. a statement of facts agreeable to the participants recognized by the procedural regime (with victims being excluded at the ad hoc tribunals), is rather at odds with the broad objectives of international criminal justice. There are cogent reasons why the system should tilt more decisively towards the objective approach to forensic truth. This would ensure that the procedural philosophy underlying its actual practices is not counterproductive and subversive in relation to those goals.280 As opposed to the ‘subjective’ truth variable and negotiable by the parties, the idea of ‘procedural truth’ situated as close as possible to an accurate reconstruction of micro-facts of objective reality is more fitting, subject to unavoidable and inordinate fact-finding impediments the tribunals are facing. If the tribunals can be deemed at all to adhere to a single average concept of ‘truth’ despite their highly diversified and dynamic practice, their concept of ‘truth’ is neither ‘adversarial’ nor yet quite ‘inquisitorial’. As it oscillates between the two variants, the preference for ‘material truth’ is clearly discernible in the tribunals’ discourse but it is an aspiration that is clearly unattainable under the current procedural setup and fact-finding competences. The sui generis variant of truth would be a more fitting descriptor of the kind of ‘procedural truth’ the tribunals espouse, although its actual meaning and implications remain to be evaluated on an issue-by-issue basis.

With regard to negotiated justice, the interest of ‘truth’ arguably requires that fetters be set on this practice with view to preserving the fact-finding potential of international trials. Judges should exercise a greater control and act with utmost caution whenever granting leave to amend an indictment where the motion possibly results from charge-bargaining between the parties.281 Agreements whereby the prosecutor commits to dropping the alleged series of facts, incidents, and crime sites are normatively undesirable in ICL in case the amended indictment ceases to reflect the prima facie totality and gravity of the criminal conduct of the accused.282 The trials should be about finding the truth whose distance from ‘material’ truth may not be the result of subjective manipulations of facts by the parties, as opposed to objective impediments such the availability and quality of evidence. The prosecutor, acting in his capacity of an officer of justice, should in principle be able to present evidence on all chosen incidents underlying the charges, subject to relevant judicial orders for case-management.283 He ought not to trade this opportunity off for the efficiency benefits expected from a guilty plea that covers a more circumscribed factual terrain.284 Put differently, the parties should not be allowed to freely redefine the scope of facts to be established out of considerations extraneous to the truth-seeking objective, without judges exercising the necessary oversight. Some judges have answered to the question of ‘what kind of truth?’ by resounding ‘truth, meaning the entire truth and nothing but

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279 Naqvi, ‘The Right to Truth in International Law’ (n 85), at 272.
280 Postulating this as a baseline on the interrelation between the institutional goals and procedures, see Chapter 3.
281 See also Deronjić trial sentencing judgment (n 122), para. 135.
282 M. Nikolić trial sentencing judgment (n 229), para. 78 (even though the TC granted the request to drop the charge of genocide, it ‘found it significant that the Prosecution did not seek to withdraw any of the factual allegations outlining … criminal conduct. The Trial Chamber therefore found that the totality of Momir Nikolić’s criminal conduct is reflected in the charge of persecutions, a crime against humanity.’). See also Schuon, International Criminal Procedure (n 12), at 253 (‘Bargaining that involves the dropping of facts should only be permitted in cases in which the facts dropped by bargaining and the newly-obtained additional information (which enables further criminal prosecution in that respect) demonstrate a certain proportionality.’).
283 See e.g. Rule 73bis(D) ICTY RPE.
284 Dissenting opinion of Judge Schomburg, Deronjić trial sentencing judgement (n 122), paras 6-9. In Judge Schomburg’s view, the accused did not receive an adequate sentence because of the Prosecutor’s undercharging: ‘the Judges have to determine a sentence based on a clinically clean compilation of selected facts by the Prosecution’ (para. 9), despite the expectation that there should be ‘no arbitrary selection of persons to be indicted and no arbitrary selection of charges or facts in case of an indictment’ (para. 10).
the truth.' While few would disagree with that, it must be recalled that the ‘entire truth’ in the international trial context is by definition selective and myopic in its ambit, being at best an endeavour to establish objective facts in respect of a narrow range of comparable incidents and not concerned as much about the exact legal labeling of the crimes. The truth-finding competence of the tribunals should not be diluted further by the subjectivity of the parties remolding the scope of the ‘procedural truth’ by negotiation as they go along.

4. COMMUNICATIVE ASPECT OF TRIAL PROCESS

4.1 Trial as didacticism

Next to the primary task as a mechanism of factual inquiry into the alleged crimes, international criminal proceedings exert certain inadvertent as well as calculated effects on a wide range of actors among both the trial participants and the public at large. The trials have a communicative and social aspect to them that is autonomous from their direct procedural functions. Being a communicative and interactive process unfolding in the courtroom, the trial process produces effects that spill over onto wider audiences and conveys messages meant by the participants to be heard on the receiving end. Like national criminal trials and arguably even to a greater extent, international criminal trials objectify procedural law through distinct corporeal and communicative features. These externalities of the process enable the court to transmit such messages more effectively, whether their intended meaning is about the power-relation in court, the fairness and integrity of its process, concern about and respect for the crime victims, or reprobation of the crimes in question.

The organization and structure of trial hearings can be assumed to have a rational character, unless one is prepared to argue that the tribunals’ trial system is merely coincidental – which is apt to be contradicted by even limited trial observation and reading of transcripts. The courtroom scenery, the placement of the participants during the hearing, the ritual followed and patterns of interaction, formalized language and professional etiquette all are the ‘outward’ features that are not random. Those embody functional symbolism in the sense that they are meant to serve both to facilitate the discharge of primary functions and to be a communicative tool. On the one hand, these manifestations of trial process have ‘introvert’ effects that reinforce the legalist functions of procedure by preserving the court decorum and enhancing procedural effectiveness in terms of the fact-finding task.

The judicial rituals, the professional tone and language of communication between the trial participants are supposed to mark the role and status of various participants, orient them in the workings of the process, and to instill respect to the forum where it comes to be challenged or defied (most notably, by those in the dock). On the one hand, those aspects effectively complement or even replace the social relationship conventions with specialized courtroom hierarchies, which is especially remarkable in the trials of (former) high-ranking state officials accused of international crimes. These hierarchies effectively reshape the regular and established patterns and dynamics of social interaction. One aim is to preclude the manipulation by the participants with the entrenched hierarchies, which are less relevant than their procedural status in the trial context, inasmuch those may be damaging to the primary fact-finding mission of the court proceedings. On the other hand, the courtroom interaction is equally outward-looking. It is through the implementation of procedural norms that the process generates extrovert effects that are addressed to broader audiences and communities. One archetypal image in ICL is that of

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285 Ibid., para. 6 (‘there is no peace without justice; there is no justice without truth, meaning the entire truth and nothing but the truth.’)
286 T. Kelsall, ‘Politics, Anti-Politics, International Justice: Language and Power in the Special Court for Sierra Leone’, (2006) 32 Review of Legal Studies 587, at 598. On the basis of his observations of the SCSL’s CDF trial, Kelsall notes that during cross-examination, one of the CDF co-defendants, Sam Hinga Norman, addressed the witness by diminutive Mende term ‘Kotoba’ so as to remind him implicitly of his junior social status. He thereby attempted to ‘insert local social hierarchies into the courtroom’ and was stopped by the judges.
a former dictator, incumbent head of state, or a powerful military leader in the dock, which is meant to transmit the ‘rule of law’ and ‘no impunity’ message.\(^{287}\) Other numerous—less momentous but no less important—messages emanating from trial hearings are procedural fairness, credibility, and legitimacy of the institution, which are transmitted not only for ‘internal consumption’ but also for the public observing trials, major stakeholders, and constituencies in whose name trials is held.

Analogously with, and to the degree exceeding that of, other legal proceedings taking place in the aftermath of mass atrocity, international criminal trials are believed to possess a great potential of ‘norm expressivism’ as a capacity to educate the broader public on the international law prescriptions, to shape moral-legal discourse, and to influence the norm development.\(^{288}\) They are also deemed to contribute to building a collective memory,\(^{289}\) although, as noted, this is a bone of contention between the proponents of legalist and law-and-society views. The recognition of a ‘didactic’ or ‘pedagogical’ function as an important goal of international criminal justice,\(^{290}\) may suggest that it is not only the final judgment and sentence but also the very processes of examining the bases for those decisions and arriving at the factual and legal findings do in fact—or should—carry a distinct expressive potential.\(^{291}\)

International criminal trials deal with the most heinous crimes committed on a large scale in highly contested socio-political contexts engaging the responsibility of civil and military leaders. They invariably attract a wide public interest and often enter in the limelight of the media, even if only for a limited period of time or in relation to major milestones or elements that ‘sensational’ enough to make it to the front pages.\(^{292}\) The deeply shocking nature, or the ‘sick charm’, of mass atrocity crimes turns international trials into unique occasions for generating educative and ethical narratives of an unprecedented power and for sending them across to large audiences. This communicative aspect of trials is geared to exert a rather immediate impact on the collective conscience, memory, and view of history.\(^{293}\) Mark Osiel eloquently described the tremendous societal significance and far-reaching effects of trials as follows:

By highlighting official brutality and public complicity, these trials often make people willing to reassess their foundational beliefs and constitutive commitments, as few events in political life can

\(^{287}\) *Ibid.*, at 601–2 (referring to it as a sort of ‘ideological manipulation, in which the criminal nature of erstwhile political acts is drip-fed into the minds of the general population.’).

\(^{288}\) Chapter 3. See Stahn, ‘Between “Faith” and “Facts” ’ (n 165), at 279-80 (the tribunals’ ‘strength and virtue may lie in their ability to ‘send messages’, shape debates and discourse, and influence the generation and perception of norms. … They are, most of all, entities that frame controversies and issues, highlight the value of norms, or send signals.’)

\(^{289}\) Osiel, *Mass Atrocity* (n 95), at 2 (‘Insofar as they succeed in concentrating public attention and stimulating reflection, such proceedings indelibly influence collective memory of the events they judge.’); Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 192.

\(^{290}\) Damaška, ‘What Is the Point’ (n 131), at 347 et seq.; Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 3. See further Chapter 3.


\(^{292}\) In the ‘age of entertainment’, the broad public’s attention to international criminal justice is intermittent, despite the proliferation of specialized information sources. See M. Simons, ‘International Criminal Tribunals and the Media’, (2009) 7 JICJ 83, at 86. The exception is the domestic media from the countries concerned, however their coverage is selective and far from daily: M. Klarin, ‘The Impact of the ICTY Trials on the Public Opinion in the Former Yugoslavia’, (2009) 7 JICJ 89, at 94-5 (noting that the foreign Serbian and Croatian media are interested in ‘their’ accused and not ‘their’ victims); Wald, *Tyrrants on Trial* (n 123), at 47 (‘The media’s focus in these trials has been predominantly on the accused and his antics rather than on the evidence of his crimes or on victims’ testimony.’). See also A. Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes against Humanity* (New York: Columbia University Press, 1992) 66 (‘In the age of entertainment, “news” has usurped the place of historicity; moments no longer follow one another according to a reasoned and recountable order; they succeed each one another like meals in an unending circle.’).

do. In the lives of individuals, these trials thus often become, at the very least, an occasion for personal stock-taking ... [and] moments of transformative opportunity in the lives of individuals and societies, a potential not lost upon the litigants themselves.294

Understandably, the profound impact the trials are bound to produce increases the temptation to ‘rent’ the courtroom out as the humanity’s classroom or a construction site for ‘rebuilding politics’.295 On the latter point, the political didactics are served through the designation of certain political acts as criminal and banishing them from the domain of legitimate politics, which is implicitly channelled through the legal process. As noted by Kelsall, the ‘discursive regime’ of international criminal justice ‘de-politicizes’ political acts and actors by relegating them to the rank of criminal:

[T]he historical and political context in which facts occurred is not of ‘materiality’ to the case. The effect of this narrow aperture is to cast the facts in a particular light, depoliticising certain modes of action by calling them criminal, motivated, where motivations are spoken of, by pure greed, and providing a point of leverage for the penal apparatus.296

In this light, it may be deemed apposite to gear the substantive contents of litigation as well as the technical side of the proceedings to the professed pedagogical role of international criminal justice – hence, drawing the link between the ends and means of international criminal justice which, as a normative point, has been decisively rejected in the previous Chapter.297

The proponents of a didactic role of international criminal trials have argued in favour of enabling the courts which deal with mass atrocity to produce a more theatrically powerful and spectator-friendly narrative in order to secure it stronger ‘extrovert’ educative effects. These scholars go as far as to argue that ‘To maximize their pedagogic impact, such trials should be unabashedly designed as monumental spectacles’ and recommending the professional players to engage in a ‘self-conscious dramaturgy’ or at least familiarize themselves with the ‘accepted genres of storytelling’.298 In practical terms, this would entail, among others, the need to curtail the dull minutae and technical niceties that constitute the core of litigation and adjudication exercises. Instead, the parties and the court would be expected to develop and put to the fore those aspects of the ‘story’ that are capable of instantly capturing the public’s attention and effectively teaching its members in political history or moral philosophy.

It is worth recalling that such accounts lie in one end of the wide spectre of views on the proper interplay between different layers of teleology in international criminal justice.299 More specifically, these can be characterized as ‘unilingual’ law-and-society accounts that demand a direct translation of institutional goals into the respective functions of procedure. Conversely, in her critique of the Eichmann trial, Hannah Arendt admonished that an overly emphasis on the impact of the emerging trial narrative upon outside audiences as a means of teaching historical and moral lessons is inappropriate, for it detracts from the legalist functions of delivering fair justice. Adjudication of egregious crimes committed in highly politicized and deeply contested historical settings is a fortiori susceptible to the risk of political manipulation of both history and process, thereby diminishing the didactic impact in the long run. As argued earlier, where the

294 Osiel, Mass Atrocity (n 95), at 2.
295 A. Garapon, ‘Three Challenges for International Criminal Justice’, (2004) 2 JICJ 716, at 716 (the purpose of international criminal justice is ‘to rebuild politics’).
296 See also Kelsall, ‘Politics, Anti-Politics, International Justice’ (n 286), at 589 and 601.
297 Chapter 3.
298 See M. Osiel, ‘In Defense of Liberal Show Trials – Nuremberg and Beyond’, in G. Mettraux (ed.), Perspectives on the Nuremberg Trial (Oxford: Oxford University Press, 2007) 705, 712, and 715. Ibid., at 709 (‘If the law is to influence collective memory, it must tell stories that are engaging and compelling, stories that linger in the mind because they are responsive to the public’s central concerns.’). See also id., Mass Atrocity (n 95), at 3 (arguing that trial participants should concern themselves with the “poetics” of storytelling” and use “the law of evidence, procedure, and professional responsibility to recast the courtroom drama in terms of the “theatre of ideas””).
299 Chapter 3.
trial is hijacked to pursue goals other than the proper functions of establishing the ‘truth’ concerning forensic facts and legal grounds for individual criminal responsibility, it is bound to degenerate into a ‘show trial’. Arendt’s problem with the prosecutor’s rhetoric and invocation of victims in the *Eichmann* trial was that it meant to make true the Prime Minister’s intention to stage such a trial.\(^{300}\)

As has been stated, this author does not reject the link between the pursuit of broader socio-political goals and the procedural means employed by the tribunals, and the possible need for minimal alignment between them. But Arendt’s concerns are shared to a large extent because, if smuggled into the criminal process under the guise of its proper functions, professed ‘didactic’ and ‘historical’ goals of international criminal justice come in tension with the legalist functions of trial process. The greatest risk of ‘unilingual’ accounts on the interplay between systemic goals and procedural functions is that of using *faux amis* in the translation of the goals into the notions about the ‘optimal’ procedural arrangements. In unrestrained and calculated pursuit of broader institutional mandate, the auxiliary communicative effects and aspects of the process will soon become hypertrophied to the detriment of the primary goals of forensic truth-finding and procedural fairness. It is contrary to the liberal justice ideals that militate against using individuals as scapegoats and instruments for achieving noble utilitarian objectives, to single the accused out to serve the others as a didactic material, however valuable.

The notorious selectivity of international prosecutions already creates a fertile ground for perceptions of vicarious liability when one of the many potentially culpable is brought into dock.\(^{301}\) Those are not necessarily fully justified insofar as individuals are incriminated unlawful conduct personally attributable to them, and in this sense the guilt sought to be conferred is not displaced on but concentrated in those person.\(^{302}\) However, the ‘condensation’ of guilt on an individual accused may still prove problematic from the perspective of personal liability, where the contextual elements beyond his will and control and not properly attributable to him, come to have an indirect bearing on his degree of culpability. That is, where he or she comes to be targeted as the living embodiment of evil that made possible and drove behind the collective violence that has led to the charges. This danger was pinpointed by defence counsel in the first ICTY trial:

> the danger seems evident that the case is viewed as a symbol of everything that happened in the area, and that Duško Tadić has been portrayed as the prototype of a war criminal. It requires little argument to show that this has a disproportionate effect on the evidence in the case and it may influence the judgement of that evidence.\(^{303}\)

International tribunals often deal with deposed politicians and high-ranking state officials, thereby indirectly handing down judgments on state policies of orchestrating, facilitating and condoning the commission of such crimes. By definition, therefore, such trials

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\(^{301}\) Amann, ‘Assessing International Criminal Adjudication of Human Rights Atrocities’ (n 109), at 179 (‘Selectivity, and randomness, also engender a separate problem: the risk of slippage into unfair show trials. Only a small number of individuals ever will face trial before an international criminal tribunal. Those defendants inevitably come to stand in the shoes of many others who escape criminal process. … There is obvious danger in using individual human beings to represent the wrongs done by others. Such scapegoating invites unfairness to the person on trial.’); Minow, *Between Vengeance and Forgiveness* (n 87), at 42 (‘the inability of the trial process to proceed against all or even many such foot soldiers risks making those trials that do proceed seem arbitrary and grossly incomplete’).

\(^{302}\) See Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 200 (observing that a ‘scapegoat’ is someone innocent ‘ saddled with undeserved guilt’, but guilt is not ‘displaced’ upon but ‘condensed’ in an actual perpetrator; the inescapable selectivity denotes the nature of trial as a symbolic act).

\(^{303}\) Transcript, *Prosecutor v. Tadić*, Case No. IT-94-1-T, TC, ICTY, 7 May 1996, at 56-7. See also G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Penguin, 2000) 309-10 (arguing that as a low-level perpetrator Tadić took on ‘a symbolic capacity, a scapegoat almost, for the community of which he was part’ and ‘[h]is punishment is less than an example of individual responsibility than collective guilt.’).
are impregnated with the risk of politicization. As noted by Scott Veitch in relation to political dissident trials, the questions of who is being tried and what is being tried are inseparable.\(^\text{304}\) How far the trial participants can go in maximizing the educative and moralizing aspects of the trial raises the question of distinction, if any, between international criminal trials, on the one hand, and ‘show’ and ‘political’ trials, on the other hand.

### 4.2 Between show and political trials

The notion of ‘show trials’ has been used previously in this book and those uses leave no doubt that liberal criminal justice accounts look at such quasi-legal proceedings negatively.\(^\text{305}\) The terms shared widely both by lawyers, political scientists, and laymen, ‘show trial’, ‘sham trial’, and ‘political trial’ originate in the political discourse rather than in the legal vocabulary.\(^\text{306}\) As political-historical phenomena, these trials have been explored comprehensively elsewhere.\(^\text{307}\) In the present context, it is worthwhile to briefly overview the predominant understandings of these categories before moving to the issue of their ostensible kinship with international criminal trials.

#### 4.2.1 Disentangling notions and quasi-notions

To begin with the former notions, ‘sham’ or ‘show’ trials are historically associated with the quasi-level proceedings staged by dictatorial regimes. The prime examples are the Stalinist purge ‘Moscow Center’ trials (1936-1938) of Grigory Zinoviev, Lev Kamenev, and Nikolai Bukharin on the allegations of conspiring to murder Sergei Kirov as well as their ‘cousin’ proceedings before the Nazi People’s Court.\(^\text{308}\) In a more abstract sense, show trials are defined by a number of interrelated features. First, these are tailored procedural arrangements which effectively preordain the outcome of trial, i.e. increase the chance of conviction.\(^\text{309}\) The

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\(^\text{305}\) Chapter 3.


\(^\text{308}\) L.L. Fuller, ‘Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory’, (1949) 47 *Michigan Law Review* 1157, at 1161-2 (‘sham legal proceedings, repeatedly used in the USSR and other communist countries … designed to dramatize specific political campaigns and/or eliminate prominent individuals.’). As for the Nazi *Volkgerichtshof* established in 1934, its ‘heyday’ (measuring by the number of death sentences) is firmly associated with the name of its ‘Judge-President’ Ronald Freisler (1942-5), who was reportedly not without pride been compared to Andrei Vyshinsky by Hitler himself. See further H.W. Koch, *In the Name of the Volk: Political Justice in Hitler’s Germany* (London: I.B.Touris & Co., 1997); W. Malley, ‘The Atmospherics of the Nuremberg Trial’, in D.A. Blumenthal and T.L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Leiden/Boston: Martinus Nijhoff, 2008) 3-4 (‘horrendous parodies of courts and legal processes’).

conviction-oriented proceedings are a more usual scenario in a historical retrospective, although staging sham trials meant to shield the accused from responsibility by acquitting him cannot be ruled out. At any rate, the essential trait of a show trial is the little to no chance of a court decision other than that projected by the trial’s ‘puppet-masters’. Secondly, a show trial is mainly conducted with a view to influence the public rather than to genuinely dispose of an individual case and to provide justice to the defendant. The legal event is thereby effectively turned into a sheer ‘show’ and ‘theatrical production’. The process is not set in motion in order to establish the actual guilt or innocence of the accused in relation to the charges, but to facilitate certain policy objectives pursued by the trial’s architects through publicly arriving at a pre-programmed outcome. A broad range of objectives, equally inappropriate if transposed onto the legal proceedings, include flexing political muscles, avenging for dissent, eliminating political enemies, inspire terror and obedience in the population and the like. Teaching them lessons in politics, morality and history is undoubtedly a possible aspect of such objectives. The content of the ‘didactic’ message does not matter as much because the trial is qualified as ‘show’ once its purpose shifts from proper criminal adjudication to socio-political goals, however meritorious.

These essential features entail a number of typical aspects of legal and institutional setting that attend a show trial and ensure its unhindered course. Those may include: (i) a purely reactive and ad hoc nature of proceedings and their ‘divorce’ from regular adjudication; (ii) prosecutorial focus on persons whose names do not come up naturally on the basis of the available evidence. Candidates for prosecution are carefully selected based on political expediency. As a result of a defeat in a war or a political struggle, defendants are essentially targeted because they find themselves ‘on the wrong side of the history’, with their otherwise lawful political decisions becoming declassified into criminal, and (iii) a heavy reliance on the concepts of conspiracy, membership of criminal organization and the like, which makes it easier to catch political foes in a legal dragnet. At least some of these institutional and legal aspects may strike one as bearing resemblance to the operations of international criminal tribunals, although the above-mentioned defining characteristics of ‘show trials’ would be missing.

Under the traditional interpretation, the term ‘show trial’ bears a strong pejorative connotation and denotes the kind of activity that is both morally condemnable and legally distasteful, from the liberal positions. The principal moral objection to a show trial is that it transforms an accused individual from a subject of rights into a mere theatrical object and accessory of a staged, essentially punitive performance. To liberal lawyers, show trials and

contain an element of risk – namely the risk that the accused is freed. If this aspect is missing, what we have is a show trial: a symbolic process that merely ratifies a conclusion already reached by other considerations.’.

For example, this is a situation caught by Art. 17(2)(a) ICC Statute. A trial of civil servants or military personnel held with a sole purpose of acquitting may be a way for the government to refute allegations of human rights abuses by political opponents or by other states and to reaffirm the legitimacy and authority of the regime in the eyes of the own population or international actors.

Peterson, ‘Unpacking Show Trials’ (n 307), at 260 and 262; M.S. Ball, ‘The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater’, (1975) 28 Stanley Law Review 81, at 85 (‘The correct objection to show trials, produced for commercial or political reasons, is an objection not to theater per se but to the misappropriation of one type of theater with its own purpose—trials—for some other type with different, sometimes dishonourable, purposes.’).


J. Smith, ‘The ICC: A Forum for Show Trials?’, (2002-3) 9 Auckland University Law Review 1298, at 1300 (‘The concept of a “show trial” in the Stalinist vein, where a few pre-selected people are symbolically scapegoated, is clearly an anathema to the traditional western concept of the rule of law’); Peterson, ‘Unpacking Show Trials’ (n 307), at 262.

Simpson, ‘Objective Responsibility’ (n 312), at 8 (‘show trials are stark demonstrations of the disposability of human beings in the name of political projects. People are treated as means in “the inexpiable struggle” that constitutes politics. … The defendants in show trials are simply individuals who get in the way of large-scale political transformation.’).
Chapter 5: Functions of International Criminal Trials

their attributes—e.g., the brutal *ad hominem* prosecutorial style *à la* Vyshinsky—are especially repulsive and ridicule the fundamental legal principles. Those are not legal proceedings in a true sense but travesty of justice and charade amounting of anything but sound presentation and analysis of evidence and genuine deliberation by independent and impartial decision-makers. The judgment is not an end in itself, but merely a disposable checkpoint *en route* to the desired objective or social effects those who orchestrate the ‘show’ have in mind. The process may be thinly clad in the pretence of ‘legality’, but this is a decorative *façade* meant to deceive the public about the actual motives behind the proceedings, or rather to terrorize it by not trying too hard to conceal them. Under the occasional veil of due process, the dubious measures are taken, pursuant to inappropriately expansive interpretation of the law in force or in flagrant violation thereof, in order to preclude the risk of acquittal and to ensure that the show proceeds as planned. The executive pressure on the court by way of tampering with its composition and the outright blackmail and torture applied to the ‘accused’ behind the scenes in order to extort absurd incriminatory statements against himself or other targeted or random individuals, are all but extraordinary. The notions of fair trial and rights of the accused are effectively disregarded and expansive interpretations of crime definitions and liability doctrines is are adopted to obtain the necessary outcome. Procedural rights are violated by silencing the defendant, disallowing him to call and question witnesses, depriving him of the right to appeal, manipulating evidentiary rules, and ensuring that openness and public access is selective.

The non-pejorative, less conventional use of the term refers to proceedings that, despite the element of ‘show’, are socially desirable and defensible. This is due to the special needs of transitional contexts in which such proceedings are undertaken and due to the morally approvable nature of the ‘lessons’ taught by the courts. This argument commonly applies to the trials held in post-conflict situations in which a country seeks to effect a political transition from an oppressive regime to a new legitimate government, to come to terms with atrocious crimes, and to divorce the national identity from the troubled past. It would use the criminal justice mechanisms for reinserting the rule of law, liberal, and democratic values and for demonstrating to the victims and the public that justice is being done.

Mark Osiel contends, for instance, that ‘liberal show trials’ are trials ‘undertaken for pedagogical purposes—such as the transformation of a society’s collective memory’ and ‘not inherently misguided or morally indefensible’, insofar as their core message is essentially liberal. According to Osiel, those trials ‘are ones self-consciously designed to show the merits of liberal morality and to do so in ways consistent with its very requirements’; however, he is aware—and seems to accept—that the liberal principles may be compromised to a certain extent (‘the risk of sacrificing the defendants’ rights on the altar of social solidarity’). Other scholars have similarly distinguished between ‘show trials’ in a pejorative sense and ‘exemplary trials’ that are laudable phenomena earmarked by the supreme quality of their normative message.

Along the same lines, Lawrence Douglas positively regards the Nuremberg and subsequent post-
World War II Holocaust trials held nationally as laudable ‘show trials’ – unique instruments of historical instruction, story-telling, and ‘dramas of didactic legality’.

The evident weakness of these accounts is that the ‘liberal’ content of lessons taught through a criminal trial in itself does not render ‘liberal’ the way of teaching it. The character of the message does not justify the fact that any lesson is being taught at all, instead of ensuring that the proper functions of a criminal process are first and foremost served. The very idea of staging trials ‘for the show’, even where it is a ‘good show’, is paternalistic and antithetical to the essence of ‘liberalism’. Hence, such trials aim at force-feeding liberal ideas in illiberal ways, which is a self-defeating undertaking whose credibility (along with any of the emerging messages) is bound to be challenged. The liberal ideals are compromised whenever a ‘consequentialist’ attitude is adopted in treating individuals, be it in relation to process or punishment. The shift of the attention from the accused to the audiences at large is unavoidable if the trial participants are primarily concerned about the extrovert effects of the proceedings. Since the two defining features of show trials (reduced risk of acquittal and external focus) are interrelated, this paves the way for the political manipulation of the outcome.

Firstly, there is a high risk that the regular judicial ways of proceeding with the case will be adjusted and the ordinary course of justice derailed in order to make sure to convey the ‘right’ didactic message. For instance, Osiel believes that regular, i.e. non-show, trials are too much concerned with technical detail and fail to present a compelling and comprehensible picture of broader social and historical issues underlying the charges. Hence, the omission of that detail would make trials more ‘audience-friendly’ and useful tools for the society to come to terms with the past. Since Osiel is aware that the open recognition of ‘the influence of power and self-interest upon how a story is being told undermines its persuasiveness, its asserted claim to represent impartial truth’, he seems to favour the secretive approach that would allow the puppet-masters to camouflage the threads by which control is exercised over the course of a ‘liberal show trial’. The idea may be understandable from a theatrical production perspective: spectators should not be able to pierce the curtain and observe what takes place behind the scenes of a ‘performance’. But it is totally unacceptable in light of principled and true liberalism and democratic values in the organization of judicial authority: this encourages non-transparency, arbitrariness and lack of accountability in the trial system.

Second, because of the link between focus on external audiences and the preference for specific outcomes, most measures taken in the procedural domain that pursue the purpose of securing the proceedings a certain effect on the public, will necessarily affect the structural bias in terms of case disposition. As a result, a failure of the prosecution and, by implication, of the court to secure a conviction would automatically be seen as a ‘didactic’ catastrophe – and, to continue this logic, a bankruptcy of the liberal idea as such. At the very least, it would be lamented as a ‘missed opportunity’ to teach an invaluable lesson.

320 L. Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust (New Haven: Yale University Press, 2001) 2 (‘orchestrations orchestrations designed to show the world the facts of astonishing crimes and to demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense.’).
322 Peterson, ‘Unpacking Show Trials’ (n 307), at 263.
323 See Osiel, Mass Atrocity (n 95), at 61, 95-102.
324 Ibid., at 245.
325 For a critique of the Osiel theory from liberal positions, see Peterson, ‘Unpacking Show Trials’ (n 307), at 263, 266-8 (‘any hope for holding a “liberal show trial” runs into the problem that changes made to enhance or control the effect of a trial on its larger audience often increase the likelihood of conviction.’).
326 See Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 202 (who seems to bear with this perception); Wladimiroff, ‘Defending Individuals Accused of Genocide’ (n 216), at 274.
327 See an example of such reasoning in P. Heberer, ‘Justice in Austrian Courts? The Case of Josef W. and Austria’s Difficult Relationship with Its Past’, 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) 239 (stating as regards the acquittal by an Austrian Court of a gas van driver and member of Einsatzkommando 8: ‘the
outcome would bring the trial system under the pressure to reduce or nullify the chances of an acquittal by tinkering with the rules on the presentation of evidence and its tendentious evaluation. The proponents of 'liberal show trials' do recognize the importance of procedural protections. But this rather appears as either a lip-service or a self-contradiction since show trials are by definition irreconcilable with an idea of a fair trial. The problem is that due process safeguards 'render outcomes quirky and far from a foregone conclusion'. Hence, they have to be dispensed with if the goal is to effectively 'educate' rather than genuinely engage in fact-finding, analysis of evidence, and the determination of individual criminal responsibility.

Thus, the notion that the ‘show’ aspects of trial may be reconciled with fairness is preposterous. Accepting it _arguendo_, the problem still remains that hijacking criminal proceedings for the didactic purposes is overtly illiberal and negates the categorical imperative. To treat a defendant as an instruction material rather than as an aim _in se_ is nothing else than ‘spreading a liberal message by illiberal means’. However, the ends do not justify the means. The notions of ‘liberalism’ and ‘fairness’ are not relative but absolute: thus, a certain practice cannot be ‘partially fair’ or ‘somewhat liberal’, these epithets only work in a yes or no fashion. Therefore, the notion of ‘liberal show trial’ is an oxymoron and _contradictio in terminis_. Trials can be either ‘show’ or ‘fair’ (‘liberal’, ‘morally defensible’ under uncompromised liberalism); they cannot be both. A ‘show trial’ has nothing to do with the process of establishing a ‘legal truth’, which it surrogates with a prefabricated and politically dictated construct. So long as this deprives a criminal trial of its primary function, truth-finding, it effectively divests it of its very nature. ‘Liberal show trials’ are not even ‘trials’ in the true sense.

At this point, it is worth turning shortly to the notion of ‘political trials’, which is often used interchangeably with that of ‘show trial’ but is not synonymous to it. The former is a generic term that encompasses, but is not exhausted by, show trials. While normally all show trials are political, not all political trials are show. ‘Political’ denotes the presence of the elements of political discourse and considerations, which may be relevant or not to the legal issues in the case. A typical understanding of political trials is the employment of legal procedure for undermining one’s political opponents. The political nature of trials may follow from the nature of a defendant. Having a politician in the dock will likely render the trial ‘political’ but it would not _per se _vitiate its nature, provided that the trial is still undertaken as a proper inquiry into criminal responsibility. Some political trials, however, are malignant without being ‘show’. The case in point is the secret ‘troika trials’ of the Great Terror conducted in 1937-38 by repressive Bolshevik kangaroo courts which applied extrajudicial punishment (normally death sentence) to ‘anti-Soviet elements’.

To the extent that a show trial can focus on non-political acts, the two notions correlate not as general and special but as partially overlapping categories. Indeed, non-political show trials...
are a rare species, for the most of such trials are instruments for playing politics. Taken broadly, political trials are trials involving political elements or motivated by the politics as the set of activities whose aim is to enable one to obtain or retain the political power. The gist of a political trial is an endeavour to execute politics through criminal law and thereby to sanction political acts qua crimes. Again, it is not a conviction or an acquittal that is at stake in a political trial for both the accused and the state as much as the righteousness of their competing political ideologies and, in cases where political aspects are combined with the ‘show’ elements, the expected impact of the political propaganda on the public. For example, the government’s goal could be to intimidate and dissuade sympathizers of the defendant’s political movement through discrediting and outlawing it as plainly criminal. But the defendant’s aim is the opposite: it is to defy the very terms of a criminal law discourse and to reinsert the political interpretations and justifications for his conduct into what is supposed to be an ordinary trial. This enables him to use the proceedings for the purpose of propaganda and in order to generate public sympathy for the political cause promoted.

Similarly to ‘show trials’, the predominant use of the term ‘political trials’ is disparaging, although the assessments of specific proceedings potentially within this category may vary depending on their purpose and degree to which the political elements are allowed to take over the legal essence of the trial. Unnecessary and unacceptable in liberal democracies, political trials in broad sense may be beneficial and justifiable in transitional settings, especially where the alternative is granting amnesty to deposed political leaders. The controversy noted in the context of ‘show trials’ overshadows this issue. The difficulty of absolutely separating legal process from politics in certain cases is not a reason good enough to discontinue efforts aimed at insulating justice from politics. For instance, drawing upon Judith Shklar’s analysis, Osiel argues that the Nuremberg trial was and should be ‘defended as a political trial, unabashedly so’.

However, it is hereby argued that the IMT trial must rather be defended insofar as it was ‘legalist’ and criticized for the extent to which it was ‘political’. The political aspects of the Tribunal, like of any other court, carry the greatest share of blame for blemishes on its legacy: its credibility and didactic power in the long-term perspective would have been higher if it had been fully apolitical.

From a liberal standpoint, a ‘political trial’ is less objectionable than a ‘show trial’ if it is not divested of its primarily legalist nature which requires at least that the defendant be provided with a due process and the verdict not be prejudged. Where these lines are crossed, criminal law becomes subject to expansive interpretation and retroactive or selective application and the

333 Van Roermund, ‘The Political Trial and Reconciliation’ (n 307), at 175. Van Roermund postulates, however, that ‘political trial’ is oxymoronic: ‘As consistency requires that the procedure of the trial be in accordance with the constitutive basis of the legal order itself, it cannot allow political powers to play a decisive role in courtroom proceedings’ (ibid., at 175-76).

334 Kirchheimer, Political Justice (n 307), at 47 (defining ‘political trials’ as the trials whereby ‘governments and private groups have tried to enlist the support of the courts for upholding or shifting the balance of political power’ and thus ‘the political issues are brought before the courts’); Posner, ‘Political Trials in Domestic and International Law’ (n 307), at 76 (‘A political trial is a trial whose disposition … depends on an evaluation of the defendant’s political attitudes and activities. In the typical political trial, a person is tried for engaging in political opposition or violating a law against political dissent, or for violating a broad and generally applicable law that is not usually enforced’).

335 S.E. Barkan, ‘Political Trials and the Pro Se Defendant in the Adversary System’, (1976-7) 24 Social Problems 324, at 324. See also Veitch, Judgement and Calling to Account (n 304), at 165 (‘The “criminal” person and the politically-motivated “moral” person remain distinct. The gap between the two (from the perspective of the accused) cannot be bridged: that is precisely the point of their motivation to break the law.’).

336 E.g. Shklar, Legalism (n 307), at 145 (drawing a distinction between condemnable political trials and those that ‘may actually serve liberal ends, when they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system’); Posner, ‘Political Trials in Domestic and International Law’ (n 307), at 78; Barkan, ‘Political Trials’ (n 335), at 333-34 (generally approving of political trials and stating that ‘political trials more than nearly approach the combat model of trial procedure that is the ideal of the adversary system of criminal justice.’).

337 Osiel, ‘In Defense of Liberal Show Trials’ (n 298), at 706.
process is bent in order to obtain the desired result of sanctioning political deviance.\footnote{338} A political trial then degrades into a show trial, and the distinction between them vanishes.

4.2.2. International trials as ‘show trials’

The nature and manifestations of trials held before international and hybrid criminal courts raise the question of distinction from ‘political’ and ‘show’ trials. Generally equating them or dismissing the specific case proceedings as political or show irrespective of whether they meet the definitions would be justified. Thus, Posner has claimed that the Nuremberg and Tokyo proceedings and trials before the ICTY and ICTR ‘have all been political trials, although burnished with legalisms’, since ‘the defendants were charged with legal violations but prosecuted because they were political enemies of the states that operate the tribunals.’\footnote{339} He went as far as to predict that the ICC trials ‘will continue to be political, rather than legal, institutions’, because of the US opposition to the ICC.

International criminal trials are apt to raise the suspicion of being political and have traditionally been criticized as such. Most of them involve political actors—former and incumbent civil and military leaders—whose political motives and activities may be legally relevant and subject to examination at trial and may affect the determination of their responsibility. This is also the reason why tribunal trials can easily be politicized by either party unless the court tightly controls the lines of witness questioning and directions which trial litigation takes. However, it is unwarranted to indiscriminately label the trials which involve political aspects as ‘political’, such that they are held ultimately to punish the accused for his political views and to remove him from the political scene through foreclosing acquittal. Substantiation is necessary to validate such claims with regard to any specific case. As a normative premise, international trials are legalist by nature: they focus on the individual conduct in violation of substantive ICL norms and are concerned with political motives, ideology, and implications of his conduct only to the extent relevant in light of crime definitions, modes of liability, and mitigating and aggravating circumstances. The political component is not present or not exploited by the parties in every international criminal case.\footnote{340}

The distinction from ‘show trials’ is not straightforward either. Actually, there are quite many—dangerously many—similarities.\footnote{341} The ‘disproportionately common’ use of the term in relation to international criminal tribunals is explained by a widespread perception in some quarters that verdicts are preordained.\footnote{342} The supposed preoccupation of the participants with the effects of trials on the broader audiences watching the trial and their immersion ‘in matters of great political moment’ is conducive to keeping these impressions alive.\footnote{343} Consider the skeptical remark by Arendt who characterized the presumption of innocence in the \textit{Eichmann} case as ‘an obvious fiction’.\footnote{344} The gravity of the alleged crimes and the intense public longing for justice may have produced, to an unbearable extent, a ‘presumption of guilt’ of the accused such as Slobodan Milošević or Radovan Karadžić.\footnote{345} In the public perception, incriminating facts may appear too notorious and the guilt of the defendants too obvious to require proof
Evidence. The trials undertaken as endeavours to verify ‘uncontestable’ facts may appear to have been staged to serve as a conduit to the inevitable punishment.\(^{346}\) While in Nuremberg defendant Hess famously characterized the trial as a successor to the Moscow trials, the ICTY and ICTR accused and defence counsel warned about the danger of slipping into a ‘show trial’ or declared the proceedings to be ‘political’ rather than ‘legal’.\(^{347}\) According to one study, the majority of defence counsel at the ICTY and—which less so—at the ICTR regard trials as legal (i.e. genuinely contested on the facts and the law) rather than show or political.\(^{348}\) While the views of defence counsel as to whether trials are genuine or show are important indicators, their nature should arguably be measured by more objective parameters as it is uncertain whose perceptions would matter most. In any event, the critiques of trials as being ‘show’ should not be taken lightly, not least because such perceptions reverberate in target communities which, as noted, often have little trust of international judicial bodies dealing with their situation.\(^{349}\)

Another distinct ground for the ‘show trial’ critique of international criminal trials has been advanced by Nancy Combs. As a result of a solid analysis of the trial record in a cross-section of ICTR, SCSL, and SPSC cases, Combs found that these tribunals had claimed the fact-finding competence which they do not actually possess.\(^{350}\) At least in some of the cases, the tribunals enter convictions on the evidence that is utterly deficient, contradictory and falls below the ‘beyond reasonable proof’ standard. At the same time, the courts manipulate the factual narrative in the judgments as they downplay or gloss over the testimonial flaws by attributing them to innocent causes.\(^{351}\) Therefore, Combs argues that the tribunals arrive at their verdicts otherwise than on the strength of the evidence examined during the trials, which essentially renders them a dispensable ‘show’.\(^{352}\)

Given the importance of the accurate fact-finding as the true function of trial, this critique is obviously of an extremely serious nature. If it occurs that in any specific case reliance

\(^{346}\) Simpson, ‘Objective Responsibility’ (n 316), at 1-2; Turner, ‘Defence Perspectives’ (n 121), at 536 (on ‘political’ v. ‘legal’ models of international criminal trials).

\(^{347}\) Transcript, Prosecutor v. S. Milošević, Case No. IT-02-54-T, TC, ICTY, 14 February 2002, at 284 (labelling his trial as a ‘political trial … that has nothing to do with law whatsoever’) and 15 September 2004, at 32876-8 (on two occasions citing potential defence witnesses that have allegedly refused to appear before the ICTY because of the trial’s amounting to a ‘Stalinist show trial’ and ‘no more than a political show trial’); 21 October 2004, at 37-8, 43 and 53 (arguing before the Appeals Chamber that the decision to assign defence counsel was politically motivated and that the trial is political). See also Transcript, Prosecutor v. Lukić and Lukić, Case No. IT-98-32/1-T, TC III, ICTY, 9 December 2008, at 3797 (referring to a show trial) and 3784 (waiving ‘professional responsibility’ for ‘such a circus’); in the same case, Milan Lukić Final Trial Brief and Submissions, 13 May 2009, para. 609 (‘These abridged political trials [referring to the trials before ICTY] do little to reconcile the parties to the conflict and actually enflame and rekindle the antagonistic beliefs of the parties, particularly where concerns for due process are sacrificed for political expediency in obtaining convictions at all costs.’). Despite the presumption underlying the study to the effect that the views of the defence counsel affect the nature of international trials as being either ‘adjudicative’ or ‘show’, the questions remain whether the trial’s being one or another should not be measured by objective rather than subjective parameters and, in case the latter is true, whose perceptions really matter.

\(^{348}\) Turner, ‘Defence Perspectives’ (n 121), at 531 et seq.

\(^{349}\) Chapter 3. See also Klarin, ‘The Impact of the ICTY Trials’ (n 292), at 92. The public mistrust towards the ICTY in the former Yugoslavia is documented: e.g. according to the 2002 South Eastern Europe Public Agenda Survey of the International Institute for Democracy and Electoral Assistance (IDEA), trust ratings of the Tribunal in 2002 were as low as 7.6% in Serbia, 3.6% in Republika Srpska, 21% in Croatia, and 24% in Montenegro.

\(^{350}\) Combs, Fact-Finding without Facts (n 12), at 176 (‘international criminal proceedings are vulnerable to the label “show trial” not only for the position and negative reasons that other scholars have invoked but because they purport a fact-finding competence that they do not in fact possess. …And therein lies the show, for although international criminal trials appear on the surface to be Western-style trials, they in fact constitute a much less reliable fact-finding mechanism.’). See also ibid., at 189.

\(^{351}\) Ibid., at 174-75, 179-83.

\(^{352}\) Ibid., at 172 (‘the testimonial deficiencies plaguing the international tribunals impair their fact-finding competence to such a degree as to render international criminal proceedings a form of show trial.’). See also ibid., at 272 (‘trials purport to center themselves around testimony that in many cases plays only a supporting role in the … decision to convict or acquit the defendant. …[T]he stated justifications for many international criminal convictions markedly diverge from their actual ones.’).
Chapter 5: Functions of International Criminal Trials

is on anything but evidence properly presented and challenged at trial for convicting or acquitting someone, the legalist nature of the tribunals and their credibility are fundamentally undermined.\(^{353}\) Even so, however, the label of ‘show trial’ may be not the most fitting one, unless the proceedings are initiated and conducted in such a way as to inexorably lead to the only possible outcome and unless the court makes a genuine effort to ascertain the truth. It is another matter that the tribunals ultimately fail to establish the truth and conceal that failure \textit{ex post facto} by espousing a cavalier attitude towards testimonial deficiencies in the decisions, resulting in high rate of convictions. This approach provides one with good grounds to consider international trials as poor epistemic mechanisms. But the term ‘show trials’, employed in a usual sense, would require a higher threshold of deliberate manipulation and dispensability of the process as a way of arriving at the verdict.

However, there are several respects in which international criminal trials resemble show and political trials in a classic sense. Consider only the extensive reliance on (vicarious) liability theories which aim at reaching senior leader (joint criminal enterprise, command responsibility) and de-politicization of erstwhile ‘political’ acts. The unfairness and theatrics as the core aspects of the ‘show trial’ liberal critique of international criminal trials are associated with tensions between earlier mentioned ambition of the courts to teach lessons in history and politics, on the one hand, and the primary needs and limitations of the criminal process, on the other. The ability of the courts to formulate and spread clear moral messages based on the didactic material emerging from controversial history is preconditioned by their adopting of a simplistic black-and-white interpretation of that material.\(^ {354}\) As Arendt put it, it is a ‘show trial [that] needs even more urgently than an ordinary trial a limited and well-defined outline of what was done and how it was done’.\(^ {355}\)

On the one hand, there is an idealistic notion that international courts it is easier to remain insulated from the national interests and politics, as opposed to domestic courts that unavoidably become conduits of executive policies where judicial independence and impartiality are wavering.\(^ {356}\) On the other hand, although the anchorage to local interests is missing, international judicial bodies may still bolster ‘the constituted order and all the political and material conditions that it presupposes and promotes’.\(^ {357}\) The victorious powers and strong actors on the international scene take upon themselves to speak for the ‘international community’ when creating international criminal tribunals and providing for the terms of their operation. The political realities in which they do so implicitly affect the underlying notions and starting positions for the respective trials.\(^ {358}\) Along these lines and drawing upon Finkielkraut’s concept of ‘vain memory’, which signifies the way for the outsiders to ‘admire [their] own moral sensibilities and capacity for quick compassion’, Koskenniemi observes that international trials

\(^{353}\) \textit{Ibid.}, at 186 (‘proceedings … are conducted in a way that creates the illusion that they are routinely capable of reaching reliable factual conclusions on the basis of evidence presented to them, when in fact, they are not. The Trial Chambers are adrift, and they are adrift in a way that calls into question the very foundation of the international criminal justice project.’).

\(^{354}\) Garapon, ‘Three Challenges for International Criminal Justice’ (n 295), at 725 (alerting the courts to the risk of ‘moralizing over-simplification of the complexity of reality’ and ‘falling into Manichean approaches’).

\(^{355}\) Arendt, \textit{Eichmann in Jerusalem} (n 300), at 9.

\(^{356}\) E.g. Wilson, ‘Judging History’ (n 118), at 921-2 (the tribunals’ ‘bureaucracy is not beholden to a specific nation-state’ and ‘not as easily subordinated to national political interests as domestic criminal justice systems’, which enables them to produce an impartial historical narrative) and 940 (‘international character of the ICTY … liberated it from nationalist mythologies’).

\(^{357}\) Veitch, ‘Judgement and Calling to Account’ (n 304), at 166 (‘the court necessarily carries with it the commitment to the overall social ordering within which its constitutional authority is granted. This is the political condition of the court, and the trial, within which their claims to impartiality or objectivity are always to be situated.’).

\(^{358}\) M. Scharf, ‘The International Trial of Slobodan Milošević: Real Justice or Realpolitik’, (2002) 8 \textit{ILSA Journal of International and Comparative Law} 389, at 400 (‘only starry-eyed idealists could ever have imagined that power politics would play no part in the timing and targeting of the Tribunal’s indictments’).
pursue the purpose of ‘the construction of an “international community” out of the tragedies of others’ and its common memory as a narrative ‘from Nuremberg to The Hague’.  

Viewed from that perspective, the jurisdictional positions on which the enterprise of international criminal adjudication rests will be seen as ‘conveniently underwriting [the] views and post-conflict preferences’ of the powerful international actors. Not a single tribunal is immune to the critique that it in fact promotes the political agendas of its major donors. The hackneyed examples are the victorious Allied Powers’ ownership of the Nuremberg Tribunal and the American dominance over the Tokyo proceedings, which precluded the adjudication of their own violations of international humanitarian law during World War II. The ICTY has owed its success to new moderate political elites in the former Yugoslav states with the distinct interest of winning over from the old communist-nationalist nomenclature and, even more importantly, to the support of the NATO, hence being regarded locally as its extension.

Likewise, the ICTR’s impartiality was seen as tainted as a result of its failure to address the crimes allegedly committed by the Rwandan Patriotic Front (RPF) who remained in power in Rwanda ever since the end of genocide and enjoyed support of powerful international allies. The ICTR’s indulgence towards RPF has also been explained by the successful manipulation by the Rwandan government of the feeling of guilt of the Western countries for the failure by the UNSC and the international community to intervene in a timely fashion so as to prevent and halt the genocide. At the SCSL, the CDF trial was politically controversial because one the defendants, Sam Hinga Norman, had enjoyed popularity as a national hero among many Sierra Leoneans and his leadership of Kamajors had been a key factor in bringing President Akhmad Tejan Kabbah back into power. His removal from the political scene and conviction may have been beneficial to the President as a way to neutralize a powerful contender. Finally, the establishment and the ‘tailor-made’ jurisdiction of the STL have been seen as favouring a specific version of history favourable to the Tribunal’s donors. However, it goes without saying that the legal process must treat all competing versions of history as potentially correct.

In that regard, the adversarial model of trial procedure employed by most of the courts provides the parties with a suitable platform and devices for challenging the interpretations of history that they see as having been advanced by their political opponents or presumed as truthful by the respective tribunal. Besides attempting to use the adversarial system for their political benefit and to broadcast propaganda back home, some accused have attempted to expose and counteract what they saw as preconceived notions about the ambivalent history by offering an alternative to the mainstream (prosecution) story. They considered that ‘the best defence is attack’ and led a political *tu quoque* defence by criticizing the supposed double standards at work in the proceedings against them. Such strategy is meant to undermine the legitimacy and credibility of the prosecution by bringing up incidents embarrassing to the adversary sponsors of the tribunal, despite the possible legal irrelevance, and to present the predictable refusal of the court to follow down that path to the outside audiences as a

359 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 34. See also Finkielkraut, *Remembering in Vain* (n 292).
360 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 9; Smith, ‘The ICC: A Forum for Show Trials?’ (n 313), at 1303 (the partiality of international trials relates to the ideological preferences and political expediency of prosecuting ideological enemies, rather than ideological friends’); Minow, *Between Vengeance and Forgiveness* (n 87), at 40.
364 Regarding the STL, see Elberling, ‘The Next Step in History-Writing’ (n 361), at 531 et seq.
365 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 7.
366 Wald, *Tyrants on Trial* (n 123), at 12.
confirmation of the structural bias. As an ‘objection that cannot be heard,’ 367 this version of the story, which is likely to be silenced as immaterial, would take a life of its own and to be cited in support of claims of unfairness, selectivity, and victor’s justice. 368

There are numerous examples of how history can not only narrated but also muted in the judgments of international criminal courts. As noted, the Nuremberg Tribunal did not pronounce on the responsibility with regard to the ‘forgotten’ episodes imputable to the Allied Powers, among which were the Soviet occupation of Poland under the 1939 Ribbentrop-Molotov pact, the flattening of Dresden by the American and British air forces, and the Katyn massacre of Polish officers which had in fact been committed by the Soviet NKVD. 369 On the latter incident, the evidence to that effect was adduced by the defense which resulted in a withdrawal of the charges against the defendants and did not lead to prosecution of those allegedly responsible. Similarly, the Tokyo Tribunal’s turning a blind eye to the A-bombing by the US of Hiroshima and Nagasaki (causing 70,000 immediate casualties) dramatically reduced its legitimacy and impact, especially in Japan. 370 The subsequent trials held before US military courts are attended by comparably negative perceptions. 372

The modern tribunals have, too, been subject to allegations of bias. In relation to the ICTY, for example, controversy has revolved around the 1999 aerial bombings by NATO of civilian objects in Serbia. The Prosecutor decided not to open investigation into this episode pursuant to a recommendation by an expert committee specifically appointed within her Office to review the NATO campaign, although the attacks resulted in damage to civilian infrastructure and civilian casualties, possibly amounting to IHL violations. 374 The conclusions of report have been challenged as being based on less than a thorough preliminary inquiry and

367 E. Christodoulis, ‘The Objection that Cannot be Heard’, in A. Duff et al. (eds), The Trial on Trial, Volume 1: Truth and Due Process (Oxford: Hart Publishing, 2004) 179-202 (defining such objection as ‘not merely one that is side-lined in official discourse; rather … the very possibility of raising it, in the courtroom, is structurally removed.’).

369 T. Taylor, The Anatomy of the Nuremberg Trials (Boston: Little, Brown and Co., 1992) 555 (characterizing the IMT’s evasion of the issue of the secret protocol to the 1939 USSR-Germany non-aggression pact and the refusal by the British to provide the Defendant Raeder with documents concerning their plans on Norway prior to its occupation by Germany as ‘engaging in half-truths, if there are such things’). For the fairness sake, it must be noted that the Nuremberg Tribunal at least refrained from convicting some defendants (Raeder and Doenitz) of unlawful submarine warfare in which the Americans and the British had also engaged: ibid., at 592-93.

370 Exceptionally, Judge Pal’s dissenting opinion asserted the criminal character of the atomic bombing and compared the decision to use of the atomic bomb to ‘the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war’. See N. Boister and R. Cryer, The Tokyo International Military Tribunal: A Reappraisal (Oxford: Oxford University Press, 2008) 203-4 and 242 (criticizing Judge Pal’s ‘naturalist’ tu quoque reasoning as legally irrelevant and morally unconvincing).

371 I. Buruma, The Wages of Guilt: Memories of War in Germany and Japan (London: Phoenix, 2002) 166 (‘instead of helping the Japanese to understand the past, the trial left them with an attitude of cynicism and resentment. This is what revisionists mean when they talk about the Tokyo Trial View of History. And they are right, even if their conclusions are not.’); Ô. Yasuaki, ‘Japanese War Guilt and Postwar Responsibilities in Japan’, (2002) 20 Berkeley Journal of International Law 600, at 604 (‘The unfair composition of the tribunal, the neglect of the violation of the Japan-Soviet Neutrality Pact by the Soviet Union, the atomic bombings by the U.S. … strengthened the perception that the trials were victors’ justice.’). For a view that the IMTPE did not completely fail to produce educative effects on the Japanese population, see Boister and Cryer, The Tokyo International Military Tribunal (n 370), at 316-22.

372 Buruma, The Wages of Guilt (n 371), at 165 (citing Yoshimoto Takaaki who in 1986 commented on the Yamashita trial thus: ‘From our point of view as contemporaries and witnesses, the trial was partly plotted from the very start. It was an absurd ritual before slaughtering the sacrificial lamb’).

373 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, PR/P.I.S./510-e (‘ICTY OTP Report’), para. 90 (recommending not to open the investigation because ‘either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.’).

374 For a list of key incidents, see ibid., para. 9. The statistics on casualties among civilians compiled by the FRY Ministry of Foreign Affairs was ‘approximately 495 civilians killed and 820 civilians wounded in documented instances’ and it remained uncontested in the committee’s final report. See ibid., paras 53 and 90.
the demonstrated reluctance on the part of the OTP to acquire full information from the NATO officials.\textsuperscript{375} According to the commentators, the failure to properly investigate the alleged violations and, if appropriate, to prosecute those responsible was ‘unexplainable’ and damaged the institution’s credibility.\textsuperscript{376} In Serbia, the episode may have only provided more room to cynicism, given the pre-existing hostility towards the ICTY.

As previously noted, the ICTR OTP has been faulted for the non-prosecution of the senior members of the Tutsi-led RPF, in spite of the evidence implicating their members concerning the systematic and widespread commission of war crimes and crimes against humanity.\textsuperscript{377} The ‘special investigations’ into the alleged RPF crimes were ongoing at least from 1999,\textsuperscript{378} but did not lead to indictments issued by the ICTR.\textsuperscript{379} Instead, the Rwandan authorities were allowed to deal with a case regarding the Kabygai murder of fifteen clergymen and civilians committed by RPF soldiers, which lead to acquittals of two commanding officers and convictions of two subordinates who received low sentences (five years’ imprisonment on appeal).\textsuperscript{380} Nonetheless, the ICTR’s failure to address the crimes allegedly committed by both sides to the conflict is widely seen as undermining the perceptions of legitimacy of the Tribunal

\textsuperscript{375} Ibid., para. 90 (the Committee ‘has tended to assume that the NATO and NATO countries’ press statements are generally reliable and that explanations have been honestly given. The committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents. The committee has not spoken to those involved in directing or carrying out the bombing campaign.’).


\textsuperscript{377} According to the UNHCR estimate, the death toll as result of RPF atrocities ran to 25,000-40,000 civilians; see Human Rights Watch, ‘Law and Reality: Progress in Judicial Reform in Rwanda’, Report, July 2008, at 89. Other estimates are approximately 100,000 civilians: see L. Reydam, ‘The ICTR Ten Years on: Back to Nuremberg Paradigm?’, (2005) 3 JICJ 977, at 982, citing G. Prunier, \textit{The Rwanda Crisis: History of a Genocide}, 2nd ed. (New York: Columbia University Press, 1999). See also A. Des Forges, ‘Leave None to Tell the Story: Genocide in Rwanda’, Human Rights Watch, March 1999, at 734-35 (‘These killings were wide-spread, systematic and involved large numbers of participants and victims. They were too many and too much alike to have been unconnected crimes executed by individual soldiers or low-ranking officers. Given the disciplined nature of the RPF forces and the extent of communication up and down the hierarchy, commanders of this army must have known of and at least tolerated these practices.’).

\textsuperscript{378} F. Reyntjens, ‘Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors’, <http://africanewsanalysis.blogspot.nl/2009/07/prosecutorial-policies-in-ictr-ensuring.html> (last accessed on 22 April 2013). Reyntjens reports that by April 2003 the ‘special investigation’ team of the ICTR OTP has garnered overwhelming evidence of 15 to 20 massacres allegedly perpetrated by the RPF, sufficient to start prosecutions in respect of at least four cases relating to Butare, Byumba, Giti, and Gakurazo municipalities.

\textsuperscript{379} In June 2009, the ICTR Prosecutor reported to the Security Council that the ‘work’ regarding the allegations of the RPF crimes had been ‘ongoing’ but his Office had had no indictments ready at that stage: UNSCOR, 6134\textsuperscript{th} Meeting, UN Security Council, UN Doc. S/PV.6134, 4 June 2009, at 33. See Letter by Hassan Jallow, Chief Prosecutor of the ICTR, to Mr. Kenneth Roth, Executive Director of the Human Rights Watch, OTP/2009/P/084, 22 June 2009, < http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response_0.pdf> (responding to the ‘victor’s justice’ argument: ‘The ICRT [sic] has understandably focused for many years in the genocide as this is the main crime base of its mandate.’). See also Interview with an ICTR OTP member, ICTR-AP-08, Arusha, 20 May 2008, at 14 (‘The door is not yet closed on that, we are still investigating these cases. Understandably, the focus of our work has been on the genocide, which was the major crime base. But the investigations have been going on into the allegations against the RPF and we recognize this is our responsibility and periodically we tell the Security Council where we are.’).

\textsuperscript{380} L. Waldorf, ‘“A Mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the Rwanda Tribunal’, (2011) 33 \textit{Fordham International Law Journal} 1221, at 1245-58; Wilson, \textit{Writing History} (n 3), at 45.
and portraying a distorted picture of Rwanda’s troubled history.\textsuperscript{381} This is corroborated by the data obtained by this author during interviews with the ICTR defence counsel,\textsuperscript{382} judges, and even some members of the OTP.\textsuperscript{383} The history of the genocide emerging from the ICTR supports, rather than refutes, the official version adopted by the Rwandan government, namely that the RPF stopped the genocide and that any crimes in revenge committed by its rogue members were merely isolated instances.\textsuperscript{384} By effectively legitimizing the political status quo in Rwanda, the ICTR prosecutorial policy has rendered the Tribunal vulnerable to the ‘victor’s justice’ critique and endangered its mandate of fighting impunity, assisting in reconciliation, and redressing victims of all crimes, whoever committed them.\textsuperscript{385}

\textsuperscript{381} Turner, ‘Defence Perspectives’ (n 121), at 578-9 and 593 (reporting perceptions of defence counsel); Reydams, ‘The ICTR Ten Years On’ (n 377), at 980 (fearing that ‘the ICTR would transform a long history of symmetrical barbarism, which stretches back as far as 1959, into a truncated history of asymmetrical conduct.’).

\textsuperscript{382} Interview with Defence Counsel Ben Gumpert, ICTR, ICTR-PD/09, 22 May 2008, at 20-1 (‘It is an absolute scandal. It is an absolute failure of the Tribunal to fulfil half of its mandate. It has lead to enormous ill feelings within Rwanda and other neighboring countries. It has lead to suspicion that what justice the Tribunal has done, is not real justice, that the Tribunal itself is biased. On the other hand, it has been a recognition of the political realities. ... The problem is that this is not a truly independent tribunal.’); Interview with Defence Counsel Peter Robinson, ICTR, ICTR-PD/10, Arusha, 22 May 2008, at 15 (‘If you go to Rwanda, nobody appreciates this Tribunal. They see it as a huge waste of money for very little results. ... People in exile see it as a victors’ court, just prosecuting one side. So I think it has done a terrible job for reconciliation. It has set it back in fact. ... I would really like to see the Tribunal as something I could be proud of. I am very much disappointed in the legacy the Tribunal is going to leave.’); Interview with Defence Counsel Christopher Black, ICTR, ICTR-PD/08, Arusha, 22 May 2008, at 15 (‘As far as the stated purposes on paper, establishing justice and reconciliation in Rwanda, it is a complete failure. This is creating more division in Rwanda because what they are saying about these prisoners is false. The Hutu majority population in Rwanda have been persecuted, their leaders have been persecuted. That creates nothing but tension and hatred and more division.’); Interview with Defence Counsel Beth Lyons, ICTR, ICTR-PD/02, Arusha, 29 May 2008, at 1-2 (‘it [ICTR] cannot fulfil its mandate because it is only prosecuting one side of the struggle. ... [T]here is a failure to prosecute the RPF despite the plethora of evidence. ... The OTP here operates as a political body; it does not operate as an independent prosecutor.’); Interview with Defence Counsel Chief Charles A. Taku, ICTR, ICTR-OD/07, Arusha, 23 May 2008, at 5-6 (‘the reason why ... they accept a mandate without prosecuting the RPF can only be political. Namely, there is a risk of sanctions from some of the superpowers that probably support the political agenda of the RPF in the Great Lakes region. The problem remains that if the Tribunal is going to end with a very poor legacy, the mandate might have failed, because no justice is seen to be done to the many Hutus and also Tutsi victims of the RPF crimes in Rwanda.’).

\textsuperscript{383} Interview with an ICTR OTP member, ICTR-AP-01, Arusha, 3 June 2008, at 2 (‘The fact that the ICTR has not brought charges against the RPF shows that it has been under political pressure and that it has been responding to political pressure. The greatest stain on the reputation of the ICTR will be if it shuts down without any prosecution of any RPF member for crimes during the year of 1994, which are included within the jurisdiction of the court.’); Interview with Judge Inés Mónica Weinberg de Roca of the ICTR, ICTR-PJ/07, Arusha, 19 May 2008, at 13(‘I think that is absolutely a total failure of reconciliation, and this is probably because we have heard only one-side justice.’). But cf. Interview with an ICTR OTP member, ICTR-AP-08 (n 379), at 14-15 (‘People say that if we do not prosecute RPF, it would be a failure of the ICTR. It would be like victors’ justice. I do not necessarily agree with that sort of perception. What is happening here is not justice being administered by victors. This is justice being administered by the international community. ... Another question is whether it would be more appropriate to prosecute RPF cases here or in Rwanda itself. ... If you deal with them here, you still have the problem of reconciliation in Rwanda. The perception in Rwanda is still that the RPF have not been dealt with in their country.’). For a criticism of this view, see Waldorf, “A Mere Pretense of Justice” (n 380), at 1261 (‘As a criterion for prosecutorial discretion, national reconciliation is very problematic because it means the prosecutor is engaged in highly speculative and political predictions about what will heal Rwandan society—something well beyond his competence.’).

\textsuperscript{384} Wilson, Writing History (n 3), at 48 (referring to Rwanda’s ‘hegemonic mythology that represents the RPF as noble liberators who led the way to an ethnic reconciliation without reprisals’).

\textsuperscript{385} Ibid., at 31 (‘the ICTR’s lack of prosecutions against the ruling RPF make accusations of bias very hard to dispute’) and 46 (‘the historical record produced by the ICTR is a partial one, as it ha rendered an account of the crimes of just one side in the conflict, the losers.’); Reydams, ‘The ICTR Ten Years On’ (n 377), at 978 and 988; Waldorf, “A Mere Pretense of Justice” (n 380), at 1272-76; Reyntjens, ‘Prosecutorial Policies in the ICTR’ (n 378), at 3 (the effects of the ICTR prosecutorial strategy were that ‘the regime in Kigali was given a sense of impunity’, ‘frustration, resentment and even hatred’ in the Rwandan society, as well as ‘major structural violence’ in the region).
Chapter 5: Functions of International Criminal Trials

The way in which the ICC was established, its jurisdiction and trigger mechanisms were meant to enhance the ICC’s perceived impartiality and divorcing from politics, but this has not precluded the critique along these lines from recurring. The prevailing practice of self-referrals, resulting in the ICC’s predominant focus on cases arising from the African continent and on rebel (or deposed) leaders as opposed to incumbent governments, accounts for this. Otherwise, where the situation has been referred to the ICC by the UNSC (e.g. Darfur) or where the Prosecutor has decided to open a proprio motu investigation (Kenya), the Court has come to be seen as a tool of neocolonialism and moral imperialism. The issuance of an arrest warrant against the sitting head of state of Sudan has led the African Union member states to express a ‘deep concern’. It is indeed ironic that the P5 members of the UNSC who are not parties to the ICC Statute (US, Russia, and China) are unopposed to using its good offices for applying the law to weaker opponents and those with tainted international credentials, while themselves staying immune to the ICC’s action, legally and practically.

The examples surveyed illustrate that depending on what side commits the crimes, the misconduct can be labeled as ‘crimes’ proper or indulgently as ‘errors of judgement’. In the latter case, the available evidence that international crimes may have been committed is downplayed or shoved under the carpet and the question of responsibility of the adversary that has an upper hand is muted. As Smith put it, ‘[e]very war crimes trial serves to implicitly legitimize other conduct that has not been subjected to judicial sanction’. The availability of justifications for non-action and the expediency of such omissions in any specific scenario fall beyond this Chapter. The revealed incoherence in the international criminal practice does not automatically lead to the conclusion that the international justice system is inherently corrupt and submitted to political manipulation. Rather, the point is that this remains a major out-of-box challenge to international criminal trials and the reason why the critique of those trials often adopts the form of ‘show trial’ discourse. Especially a failure to prosecute and judicially examine the ‘tu quoque crimes’ which fall within the tribunal’s jurisdiction is apt to cast a shadow on its legitimacy. The judicial legacy is bound to be detracted by resounding claims of selectivity, structural bias, and the lack of reciprocity in achieving accountability between the powerful and the weak, the victors and the vanquished. The detrimental effects of the perceived one-sidedness in the pursuit of international justice are such that even a slight appearance of an ideological bias is apt to be amplified by skeptics and take the life of its own. Resonating with the public opinion in the target communities, such perceptions will fall on the fertile soil of incredulity and harden the opponents on the opposite side of an ‘ideological barricade’.

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388 E.g. ICTY OTP Report (n 376), para. 90 (using euphemistic language: ‘mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate.’). See also K. Jaspers, ‘The Significance of the Nuremberg Trials for Germany and the World’, (1946) 22 Notre Dame Lawyer 150, at 156 (‘The pseudo-justice of the court, according to this objection, shows itself finally in the fact that the acts declared criminal are judged by the court only when they have been committed by the vanquished nations. These same acts committed by sovereign or victorious nations are passed over in silence and are not even discussed, let alone punished.’).
390 Garapon, ‘Three Challenges for International Criminal Justice’ (n 295), at 717-9 (on the ‘lack of reciprocity’ as the major tension between international criminal justice and cosmopolitanism); Smith, ‘The ICC: A Forum for Show Trials?’ (n 313), at 1301-3.
391 Klarin, ‘The Impact of the ICTY Trials’ (n 292), at 96 (‘the negative image of the ICTY has been shaped by the tendency of domestic audiences to regard the ICTY and its actions, especially those of the Prosecutor, as supremely political and deserving a reaction … which is predominantly ethical or moral, but decidedly not legal.’).
4.2.3 Making and curbing a political show: Ideological defence and its limits

A. Political dissent in and beyond courtroom

In complex disputes balancing on the verge between the politics and the law, ideology and history become key frames of reference. The legal evaluation of both the historical and political contexts and the blameworthiness of individual acts may be strongly informed by the interpretive framework one adopts. A one-dimensional frame entails one-dimensional answers that will perpetually be contested. The risk to the integrity of the proceedings lurks in underpinning the trial by an essentially political discourse because if the court conceives of itself as an actor of international politics, its ability to make independent choices would largely be predetermined by the chosen framework. Often the tribunals’ authority and legitimacy are conditional upon whether they would manage to clearly dissociate themselves from any politics at all.

The difficulty of processing the cases of ‘ideological’ accused such as Slobodan Milošević is that they resist the interpretations of a historical and political context by the adversaries who facilitated their downfall back home, arrest, and trial. Such accused are likely to challenge the nature of the tribunal as a court of law and to content that the motives underlying the prosecution are political. During trial, they will lead a counter-discourse and invoke justifications for the allegedly criminal conduct in the historical and political context as a way to oppose the depoliticization of what in their view is political conduct. From that point of view, the trial is challenged as a ‘show trial’ because it could only be imposed on the defendant in the wake of a military or political defeat. As Koskenniemi puts it,

To accept the terms in which the trial is conducted—what deeds are singled out, who is being accused—is to already accept one interpretation of the context among those between which the political struggle has been waged. This is … a situation in which to accept a method or criterion of settlement is already to have accepted the position of one’s adversary. … If individual criminality always presumes some context, and it is the context which is at dispute, then it is necessary for an accused such as Milosevic to attack the context that his adversaries offer to him. … And because the context is part of the political dispute, the trial of Milosevic can only, from the latter’s perspective, be a show trial participation in which will mean the admission of Western victory.

Thus, from their perspective, the trial is a continuation of the political struggle by (quasi-)legal means rather than a genuine and impartial inquiry into the grounds of criminal responsibility. To the political accused, the Eichmann-style connivance and obedience in lending cooperation to the prosecution is not an option as it signifies the legitimization of the process, its (preordained)

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392 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 13. See Wilson, Writing History (n 3), at 79 (while ‘[h]istory … becomes a prism through which the courts view and apprehend the alleged crimes’, noting that ‘[i]t is important not to overstate the role that historical evidence can play in transforming judges’ perceptions of alleged crimes, as historical and political context occupy the lowest rung of causality and determinacy.’).
393 I. Delpla, ‘In the Midst of Injustice: The ICTY from the Perspective of some Victim Associations’, in M. Valenta and S.P. Ramet (eds), The Bosnian Diaspora: Integration in Transnational Communities (Aldershot: Ashgate, 2007) 226 (‘The ICTY is evaluated against the background of a deeply rooted rejection of international politics, which it leaves unchanged. Its credibility depends on whether or not it succeeds in distinguishing itself from such politics.’).
394 See also Elberling, The Defendant (n 293), at 218 (describing ‘problem defendants’ as ‘defendants going beyond the usual defendant role in the trial in order to challenge the historiographic project and/or the legitimacy of the court trying them.’).
395 Wald, Tyrants on Trial (n 123), at 10.
397 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 16-18, 26.
398 Robertson, ‘General Editor’s Introduction’ (n 215), at 2.
outcome and therewith the historically unjust political reality. Therefore, the ‘dissident’ or ‘ideological’ accused attack the court’s authority for its association with the asymmetry and injustice of the international power structure and defy the court’s right to conduct moral ‘tutorship’ through legal process.

The ‘dissident’ defence tactics range from resorting to regular procedural means to openly deviant conduct and antics. The political accused typically try to exhaust remedies offered by the trial system, for example, by attempting to challenge the jurisdiction of the tribunal and to disqualify judges for the lack of impartiality and religious or national bias, even if only to show that such challenges are bound to be rejected. At some point, their conduct crosses a line to more deviant forms of political action in the courtroom, including boycotts of hearings and rejection of courtroom conventions, ritual and language that are part of the decorum, in symbolic protest. The international criminal practice has seen a full spectrum ranging from neglectful language to ‘uncivilized’ behaviour such as blackmailing, hunger strikes, and verbal assaults on procedural actors, including witnesses, prosecution attorneys, and judges. Thus, Slobodan Milošević developed a routine of addressing Presiding Judge May as ‘Mr. May’ rather than ‘Your Honour’. The exceptional hunger strike incident pertains to the dubious credit of Vojislav Šešelj who began refusing to take food in November 2006 while protesting against the assignment by the Trial Chamber of a standby counsel and limitations on family visits. Arguably, this eccentric act was not without dividends, insofar as the Appeals Chamber soon reinstated full self-representation in concession to the defendant’s ultimatum. Another popular form of protest has been boycotts of trial hearings combined with an instruction to the counsel to abstain from interventions on their client’s behalf. The boycotts of trials emerged as a distinct pattern before the SCSL: in 2004-2005 all six accused in both CDF and RUF trials refused to appear in court hearings on numerous occasions and under various pretexts. Earlier at the ICTR, the accused Barayagwiza decided to stay away from the court and instructed lawyers to

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399 Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 203 (‘Eichmann contributed to making his trial a success. Through his submissive behaviour, Eichmann curiously helped to legitimate the court that sentenced him to death.’). In a certain ironic sense, this made him an ‘ideal defendant’.

400 Veitch, ‘Judgement and Calling to Account’ (n 304), at 157 and 171; Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 203.

401 The notorious example is the Serb nationalist politician Vojislav Šešelj who moved for disqualification of Judge Schomburg on the ground of his NATO-country (German) nationality and Judges Mumba and Agius as ‘ardent and zealous Catholics’. Šešelj alleged that the judges therefore possess ‘certain personal characteristics which completely preclude them from being impartial’. The motion was dismissed as frivolous and abuse of process.

402 Wald, Tyrants on Trial (n 292), at 19. On disruptive techniques (including the presentation of repetitious evidence and objections, disrespectful treatment of judges and prosecutors, turning backs to the judges, fistfights etc), see ibid., at 12. These forms of behavior are not uncommon in ‘political dissident’ trials in the national context. In the US ‘Chicago Eight’ trial of Vietnam War protesters, defendants demonstratively failed to rise when the judge entered or left the courtroom, called him by first name, refused to wear formal attire, and shouted during the hearings. See Barkan, ‘Political Trials and the Pro Se Defendant in the Adversary System’ (n 335), at 626.

403 E.g. Transcript, Prosecutor v. S. Milošević, Case No. IT-02-54-T, TC III, ICTY, 31 March 2003, at 18150-1, 18250, 18255-6; 4 December 2003, at 30096.

404 Decision on Appeal against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, Prosecutor v. Šešelj, Case No. IT-03-67-AR73-4, AC, ICTY, 8 December 2006. For critical comments characterizing the appellate decision to be a capitulation to Šešelj’s blackmail, see G. Sluiter, ‘Compromising the Authority of International Criminal Justice: How Vojislav Šešelj Runs His Trial’, (2007) 5(2) JICJ 529; A. Zahar, ‘Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal’, (2008) 19 Criminal Law Forum 241, at 241-4; Elberling, The Defendant (n 293), at 228-29.

405 On the boycott of RUF defendant Gbao and the order to the counsel to continue representing him, Elberling, The Defendant (n 293), at 218-19.
withdraw, on the ground of the ICTR’s ‘dependency’ upon the ‘dictatorial anti-hutu regime in Kigali’.

The decision to shift from generally unproductive negationist tactics to that of ‘playing by the rules’ at a certain stage in the proceedings may be brought about by the wish of the accused to use his trial as a ‘truth-seeking moment’. The disbelief that the genuine participation in the trial would obtain him an acquittal does not preclude an endeavour to place the counter-narrative on the record for history. This dissenting version of a historical truth will be thrown against the prosecution’s truth as a contender for the far more ‘impartial’ and ‘fair’ judgment of history than a contemporary verdict of a politicized court. To that end, the accused will first and foremost be addressing the public gallery, the mass media, and the audiences back home in an attempt to turn the ‘court of public opinion’ in his favour. By using the trial as a platform for self-aggrandizement and for presenting himself as a martyr who is being sacrificed for a political cause, the accused will hope to win the war having lost the battle. Thus, his conviction and punishment would merely confirm the court’s lack of impartiality and, paradoxically, would amount to a strategic victory over the accusers. The verdict of guilty dovetails into the conspiracy theory of political bias and the non-legal justifications for the political conduct placed on the record might weaken the historical and normative power of any legal condemnation.

Besides regular input to the proceedings, the ‘political’ accused seek access to alternative means of public communication than trial, in order to counteract the demonization of their personae in the media and publicize their version of (historical) truth from detention facility. However, the courts are often reluctant to authorize such direct contact insofar as it may interfere with the conduct of the proceedings and their broader mandates. Thus, the requests for access to the SCSL detainees outside of the courtroom by both the internal press office and external mass media were routinely declined in accordance with the detention rules. The grounds for that were that such communications ‘could prejudice or otherwise affect the outcome of the proceedings’ or ‘could disturb the maintenance of the security and good order in the Detention facility’. Furthermore, shortly before the commencement of trials, the some of the CDF and RUF defendants (Norman and Gbao) sought an opportunity to publicly appear and testify before the Truth and Reconciliation Commission, with sessions to be televised and broadcast throughout Sierra Leone. While Gbao’s request was refused, Norman’s application was granted on appeal allowing him to provide his account only in writing or in a private session.

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407 Wald, Tyrants on Trial (n 123), at 47-8; Kelsall, ‘Politics, Anti-Politics, International Justice’ (n 286, at 597 (by delivering his opening statement, Sam Hinga Norman ‘hoped to be tried in the court of public opinion’).
408 Wald, Tyrants on Trial (n 123), at 10 and 37 (‘Leader trials frequently revolve around bigger than life personalities who … are less interested in evading conviction than in challenging the legitimacy of those international entities that assert jurisdiction to judge them, and in pleading their justifications for what they did to homeland audiences.’) See also Veitch, ‘Judgement and Calling to Account’ (n 304), at 157.
410 See Elberling, The Defendant (n 293), at 208 (who believes that this aspect shows that ‘international courts worried about the “theatrical aspect” of the historiographical debate contained in a trial.’).
411 S. January, ‘Tribunal Verité: Documenting Transitional Justice in Sierra Leone’, (2009) 3 International Journal of Transitional Justice 207, at 215 (critical of this media policy on the ground that the ‘right to privacy, in effect, was a right to be dehumanized’).
412 Elberling, The Defendant (n 293), at 186-87. See Rule 42(B), Rules Governing the Detention of Persons Awaiting Trial or Appeal before the SCSL or Otherwise Detained on the Authority of the SCSL, 7 March 2003, last amended on 14 May 2005.
413 See e.g. Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone and Chief Sam Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC’s Request to Hold a Public Hearing with Chief Sam Hinga Norman JP, Prosecutor v. Norman, Case
testimony eventually did not materialize as the conditions imposed effectively made the TRC an unattractive forum for him to air their versions of the history of the conflict. Elberling suggests that this demonstrates the unwillingness of the SCSL to allow the TRC steal its thunder by receiving and publicizing the testimony of its high-profile accused on the eve of trial.415

Similarly, at the ICTY, several defendants have sought permission for direct contacts with the press, but without considerable success so long as this was deemed potentially to interfere with the administration of justice and to undermine the tribunal’s mandate. At some point, the scope of permissible communication of the detainees with the press became a matter of contention in Karadžić. The ICTY Registry had refused Mr. Karadžić direct contact with the journalist in a face-to-face interview, which decision was partly reversed by ICTY Vice-President pursuant to Rule 64bis(C) of the Rules of Detention, authorizing remote contact.416 Remarkably, the Registrar’s initial argument for denying any media contact was that ‘that the Tribunal’s facilities should not be used as a political platform’. This echoes the argument that surfaced in a series of the ICTY Registry decisions prohibiting Šešelj and Milošević to communicate with the press during and after the December 2003 parliamentary election campaign and the July 2004 presidential campaign in Serbia, on the ground that their participation therein and in the post-election activities was likely ‘to frustrate the Tribunal’s mandate’.417 Insofar as the evident aim of those decisions was to remove the accused from the political life, the detention regime effectively became a tool for directly serving the supposed socio-political objectives. This strikes one as inappropriate, given that the procedure and pre-trial restrictions of liberty should not be used as penal means of political ‘incapacitation’.

### B. Political defence and self-representation

Much like for deposed English king Charles I who refused to be represented at his trial on the charge of ‘tyranny’ in 1649,418 the reason for high-profile political accused such as Milošević, Šešelj, and Karadžić (ICTY) or Šešelj and Milošević (SCSL) in choosing to represent themselves is their wish to be in control over the delivery of the counter-narrative to the public. The history of war crimes trials across the board has seen counsel with specialization in conducting a political defence on behalf of their clients with relative success, in terms of media attention if not in terms of acquittals. One such figure is Ramsey Clark, the former US Attorney General under President Lyndon Johnson and a vocal civil-rights and anti-war activist, who has represented some of the most politically controversial defendants in the national as well as international criminal proceedings by advancing ideological defence.419 The other example is a well-known

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415 For a discussion, see Elberling, *The Defendant* (n 293), at 187-8, 208 (‘a TRC hearing of the defendants would have endangered the Special Court’s position with regard to both the establishment of historic facts and the “theatrical” aspect of the proceedings.’). See also *ibid.*, at 213-4 (‘A likely reason for refusing the audiences concerned the fear that the defendants would use their hearings before the TRC to challenge the prevailing view on the history of the conflict.’).

416 Decision on Radovan Karadžić’s Request for Reversal of Denial of Contact with Journalist, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Vice-President, ICTY, 12 February 2009, paras 4, 8, 13-5; in the same case, Decision on Request for Reversal of Limitations of Contact with Journalist, 21 April 2009 (refusing to lift restrictions on the press contact imposed pursuant to the former decision).


418 Robertson, ‘General Editor’s Introduction’ (n 215), at 1.

419 Next to serving as a defence counsel of Saddam Hussein in the Iraqi High Court, Clark defended Elizaphan Mtukudizi (ICTR) and advised Slobodan Milošević in his defence before the ICTY. See L.T. Brown, Jr., ‘Representing Saddam Hussein: The Importance of Being Ramsey Clark’, (2007) 42 *Georgia Law Review* 47.
French lawyer Jacques Vergès. After having promised a ‘trial of rupture’ in advance of the *Barbie* trial, Vergès effectively turned the trial on charges of crimes against humanity into an attack on the hypocrisy of the French government who had been implicated in a comparable conduct in the course of Algerian anti-colonial war (1954-62). It should be noted that this peculiar defence style has been appreciated by very few and there is too little of ‘law’ in this chaotic strategy, which rather appears the lack of any strategy at all. The more recent attempt by Vergès, already as an international co-lawyer at the ECCC, to defy the authority of the court was less rewarding and earned him a reprimand for obstructive conduct under Rule 38 of Internal Rules. This time, it appears as though Me. Vergès’ ‘Third World’ rhetoric transmogrified into non-legal arguments alleging the corruption and political manipulation of the ECCC and the senior age of the accused.

But the cases in which defence counsel chooses to conduct a primarily political defence are relatively exceptional in international criminal proceedings. Firstly, ‘dissident defendants’ are reluctant to leave the task of communicating their interpretations of history to anyone else and likely to mistrust lawyers provided by the court. Unless counsel shares the client’s worldview, which is not very likely, the dissident accused prefers to remain in charge of his political defence and to be able to convey their counter-narrative without a go-between. Secondly and more importantly, defence counsel are professional lawyers who in the majority opt for a non-political and legal discourse when interacting with the court and the prosecution, irrespective of what their personal view may be and rather in line with what they consider to be in the best procedural interest of their clients. Even where an attorney supports a client’s cause, he remains bound by professional obligation of candour towards the court and, in case of misconduct, runs the risk of sanctions, including the ejection from the courtroom, communication to the national bar, and striking from the list of eligible counsel.

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420 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 29-30. Wilson defines ‘defense de rupture’ as ‘a legal strategy that seeks to undermine the prosecution case by repetition of nonsensical, irrelevant, and spurious arguments with the aim of sowing confusion, uncertainty, and doubt.’ Wilson, *Writing History* (n 3), at 11 n31.

421 See further G. Binder, ‘Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie’, (1989) 98 *Yale Law Journal* 1321, at 1355-72 (arguing that the Vergès defense of equating Nazism and colonialism was incoherent); Finkielkraut, *Remembering in Vain* (n 292), at 31-3 and 65-6 (critical of ‘collusion’ between Vergès and a ‘Nazi torturer’ Barbie in manipulating the Third World rhetoric as defiance of Nuremberg).

422 Warning to International Co-Lawyer, Khieu Samphan, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15), PTC, ECCC, 19 May 2009, para. 25-31 (reprimanding Jacques Vergès, among others, for failing to make a meaningful submission in addition to that of the National Co-Lawyers at a hearing, despite that it was rescheduled specifically to enable Vergès to attend). In addition, Vergès addressed abusive remarks to the judges: ‘it is not for me to be more concerned about your honour than you yourselves are. If you consider that corruption should not be discussed, I am not going to force the discussion on you. I shall be silent because I understand your caution in this regard and I think that the presumption of innocence that you sometimes deny the accused may be of some benefit to you. … I shall be silent also because a member of the Government of the country that hosts you stated that you were oppressed only by money, thus confirming the charge—be it grounded or not—of corruption, which blights the tribunal. Lastly … it is not seemly … to fire at hearses and those who are about to die.’ (Ibid., para. 11).

423 Wald, *Tyrants on Trial* (n 123), at 37; N. Combs, ‘Legitimating International Criminal Justice: The Importance of Process Control’, (2011-12) 33 *Michigan Journal of International Law* 321, at 375-76 (‘the most trustworthy counsel in the eyes of an ICTY defendant may well be the one who rejects the very assumptions on which international criminal justice project is founded. …[M]any ICTY defendants desire a lawyer who can and will refocus the lens from the narrow charges in the indictment to the broader, more morally ambiguous context surrounding those charges.’).

424 Wald, *Tyrants on Trial* (n 123), at 29 (‘Most defense lawyers have careers to pursue when the instant trial is over and are not so rooted as their clients in the outcome of any single trial.’); Turner, ‘Defence Perspectives’ (n 121), at 573-75 and 583 (most counsel surveyed would not pursue a political line of argument and would advise their clients against it); Combs, ‘Legitimating International Criminal Justice’ (n 423), at 375 (noting, in respect of the challenges to the legitimacy of the court and judicial impartiality, that ‘these alternative goals and tactics are ones that many defense counsel are unwilling to advance’). See e.g. Wladimiroff, ‘Defending Individuals Accused of Genocide’ (n 216), at 280 (‘the trial should not be a forum for dispensing political views.’).

425 Rule 46 ICTY, ICTR, and SCSL RPE.
Consequently, counsel are not able to run a political defence with the same degree of procedural impunity as a pro se defendant.\textsuperscript{426}

To international tribunals, the cases of self-representing accused embarking on a political-legal defence are a notorious source of trouble and serious test of judicial integrity and professionalism. These ‘problem’ defendants may be difficult for judges to manage in the courtroom, certainly more so than professional counsel.\textsuperscript{427} The inappropriate maneuvers in conducting the defence must be curbed without creating an impression of limiting the defence rights. Thus, such high-profile trials thus inevitably become ‘battles of wills’.\textsuperscript{428} As noted, the fact that the accused are not subject to the code of professional ethics for counsel, unlike lawyers, play into the hands of the defendants.\textsuperscript{429} Either inadvertently or as a part of defence strategy, a pro se defence presents a risk of impeding the regular course of the criminal process via digressions into matters irrelevant to the charges, political grandstanding, and other ways of wasting of court time. It might also take the extreme forms of obstructionist behavior, e.g., bullying witnesses, disclosing confidential information in a public hearing, or insulting judges and prosecution counsel.

The challenge of effectively containing political and obstructionist defence while preserving fairness has not yet been met in an exemplary fashion in international criminal trials.\textsuperscript{430} The judicial reactions to disruptive and unruly defendants have included warnings, tight control over the defence cross-examination and interventions, cutting the defendant’s interventions short and turning off the microphone, declaring recess or moving into closed sessions, the imposition of duty counsel or standby counsel, and the contempt of court proceedings. In extreme cases in order to preserve decorum, the judges may use the power to expel a culprit from the courtroom,\textsuperscript{431} including the accused that persists in a disruptive conduct.\textsuperscript{432} Those powers have indeed been exercised where that was deemed necessary.\textsuperscript{433}

However, those powers are no universal panacea because in tailoring their procedural responses to defendant’s misconduct, the judges walk on the fringe between the treatment that is bound to be perceived as overly harsh and overly lenient.\textsuperscript{434} Allowing the political defence to

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\item \textsuperscript{426} On this reasons for the preference by ‘political’ accused to act pro se, see also Barkan, ‘Political Trials and the Pro Se Defendant in the Adversary System’ (n 335), at 328-34 (naming the wish to avoid shackling to procedural rules; the perception that the defendants are in a better position than attorneys to explain their ideology; mistrust of lawyers, especially if they are court-appointed; and escaping alienation at their own trial). On the special role of defence counsel in promoting ideological cause of their clients, see V. Denti, ‘Public Lawyers, Political Trials and the Neutrality of the Legal Profession’, (1981) 16 Israel Law Review 20, at 25-6 (the political trials are characterized ‘not only [by] an ideological solidarity of lawyers with defendants, but even the use of the trial as a means of spreading the political ideas of the defendants’, where the outcome of the trial being irrelevant for both the defendants and counsel).
\item \textsuperscript{427} Elberling, The Defendant (n 293), at 206 (‘it is less stressful for judges to deal with counsel, who have a similar professional background and who usually are more cooperative and courteous than the defendant.’)
\item \textsuperscript{428} Wald, Tyrants on Trial (n 123), at 31 and 59. On these challenges in the conduct of the Milošević trial, see Boas, The Milošević Trial (n 173), at 131 and 145.
\item \textsuperscript{429} Lamenting this fact, see Wald, Tyrants on Trial (n 123), at 38.
\item \textsuperscript{430} Boas, The Milošević Trial (n 173), at 9-10 (arguing that modern international criminal proceedings are not suited to effectively deal with ‘intelligent and manipulative accused’ who do not recognize the court’s legitimacy); Wald, Tyrants on Trial (n 123), at 31, 38, and 53 (reporting a description of self-representation by the ICTY Registry staff member as a ‘nightmare’ of the system). On poor handling by the ICTY of the self-representation issue, see sources in n 404.
\item \textsuperscript{431} Rule 80(A) ICTY, ICTR and SCSL RPE; Art. 71 ICC Statute.
\item \textsuperscript{432} Rule 80(B) ICTY, ICTR, and SCSL RPE; Art. 63(B) ICC Statute. The removal of a disruptive accused may be effected only upon a warning and in exceptional circumstances. Rule 80(B) SCSL RPE and Art. 63(B) ICC Statute require making it possible for the accused to follow the proceedings by video link.
\item \textsuperscript{434} Wald, ‘Tyrants on Trial’ (n 123), at 27-8. See also C. del Ponte (with C. Sudetic), Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity (New York: Other Press, 2008) 141 (criticizing the Milošević Trial Chamber for the ‘lack of resolve’ to disallow self-representation).
\end{itemize}
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unfold unrestrained leads to the perception that the legal proceedings are turned into a mockery and a show trial run by the accused. At the same time, any measure intended to return the ‘political trial’ back on the legalist track by curbing the party’s autonomy in presenting the case entails the watering down of the adversarial character of proceedings and might appear as an unscrupulous attempt to silence the accused and to suppress his legitimate defence. The decision to impose a counsel on Milošević against his will due to his health condition was perceived in that vein. At the same time, the legal headache associated with self-representation led numerous commentators to suggest that it be limited or disallowed in certain circumstances in line with the civil-law practice. However, in reining recalcitrant pro se defendants, the international judges remain inhibited by the need to avoid a perception that they do so in order to silence the accused and to suppress his defence as a result of pre-judgement on their part. At the same time, the overly liberal approach whereby the judges are seen as having ‘bent over backwards to keep the defendants participating in the proceedings’ is bound to attract a blame for the politicization of international trials. As the golden mean is yet to be discovered, the inconsistent and seemingly arbitrary approaches to regulating self-representation remain a principal source of the legitimacy challenges and the ‘show trial’ critique in politically charged international criminal proceedings. But, as the next section means to illustrate, this not the only source.

C. Political prosecution

Where the political and historic context is introduced into the proceedings by a party as a matter relevant to the determination of individual criminal responsibility, the court ought not to treat it as anything else but a partisan version of truth. Where the court allows this line of argument to be pursed, it may not proceed on the presumption of its accuracy and validity. It should rather deem it as a legitimate subject of dispute, inquiry, and competition. Where the prosecution leads evidence on the historical and political background as a part of its case, the accused must be given a symmetric opportunity to counter it by providing his account of the contested history

437 E.g. M.P. Scharf, ‘Self-Representation versus Assignment of Defence Counsel before the International Criminal Tribunals’, (2006) 4 JICJ 31; Robertson, ‘General Editor’s Introduction’ (n 215), at 3 (‘uncooperative defendants who refuse to recognise the court or who disrupt it by their self-defence tactics cannot be allowed to hijack their own trial. Fairness in such cases has its limits – or rather, must be balanced by fairness to the victims, … and by the imperative of upholding the rule of law.’); Pizzi, ‘Overcoming Logistical and Structural Barriers to Fair Trials’ (n 214), at 3 (citing the complexity of the law and the need to avoid a political defence as reasons to abrogate self-representation); Wald, Tyrants on Trial (n 123), at 62 (arguing that the standards for granting and annulling self-representation must recognize the relativity of the defendant’s preferences); Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 207), at 355-56; Groom, ‘Re-Evaluating the Theoretical Basis’ (n 204), at 794; Heinsch, ‘How to Achieve Fair and Expeditious Trial Proceedings before the ICC’ (n 58), at 493-94.
438 Wald, Tyrants on Trial (n 123), at 12 (‘the court cannot ignore the damage to its own image if it appears to act arbitrarily to silence an unruly defendant from having his day in court regardless of the merits of his argument.’); Barkan, ‘Political Trials and the Pro Se Defendant in the Adversary System’ (n 335), at 331.
439 Wald, Tyrants on Trial (n 123), at 35; Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 202-3 (‘Courts can, of course, muzzle disruptive defendants, but it is hardly surprising that judges have on the whole proved reluctant to do so in high-profile perpetrator cases … [in] struggling to demonstrate legitimacy by bending over backwards to accommodate even the most tendentious displays by the defence’).
440 See also Osiel, Mass Atrocity (n 95), at 52 (‘It is … wrong to endow anyone’s story about a collective event with authoritative status, for the same reason that it is wrong to endow political power with moral legitimacy: the worst abuses of power are always committed by those most convinced of the moral superiority of their cause, their civilization, or their theory of history.’).
context. This is a corollary of the right on the accused to be presumed innocent and the right to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Otherwise, the proceedings slip into a ‘show trial’ mode where dissident voices are muted because they weaken the intended didactic messages.\footnote{Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 18 (‘A trial that “automatically” vindicates the position of the Prosecutor is a show trial in the precise Stalinist sense of that expression. … To avoid looking like Vyshinsky, the judges not only must allow Milosevic to speak, but take what he says seriously. They will have to accept being directed by Milosevic into the context within which he will construct his defence in terms of patriotic anti-imperialism’). See also Veitch, ‘Judgement and Calling to Account’ (n 304), at 157 (‘trials involving a dimension of political dissidence require an acknowledgement of the importance of the accused’s political self-understanding’).}

A pro se political defence does not need to take the extreme forms outlined above to remain problematic. The controversy resides in an inclination of the ‘dissident’ accused to polemize with the ideological framework the prosecution seeks the court to adopt and thereby to challenge its monopoly to historical or ethical truth.\footnote{Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 202.} Hence, the problem starts with the choices made by the prosecution as a party with the burden of proof that is to present its case first because it is namely the prosecution that sets the tone of the entire trial. By contrast, certain proponents of ‘didactic trials’ defend them ‘as an affair of the prosecution’, while at the same time regarding the ‘didactic trials of the defence’ as a ‘far more problematic destabilising affair’.\footnote{Ibid.} This approach strikes one as asymmetrical and potentially unfair because the notion of a ‘didactic trial’ is inherently problematic one irrespective of what party initiates a shift in that direction.

Ideology-ridden discourse may be appropriate for a history seminar or a parliamentary session but not for a courtroom because it politicizes justice and pushes the judges out of the domain covered by their primary mandate and expertise. The usual solution for the judges is to sift the issues of ‘macro-political scene’ out as immaterial.\footnote{Kelsall, ‘Politics, Anti-Politics, International Justice’ (n 286), at 601.} But the effective control over the evidence and submissions walking a thin line between the law and politics and their balanced treatment in the judgments will often be practically difficult to ensure.\footnote{Wilson, Writing History (n 3), at 18 (‘many international tribunal judgments steer a careful course between legal minimalism on the one hand and nationalist dramaturgy on the other hand’).} The familiarity of judges with the historical background and broad context tends be more limited than the knowledge of the parties. This may impair them in challenging and suppressing the lines of questioning or arguments irrelevant to the charges.\footnote{Ibid., at 223 (noting that the ability of judges to follow the expert evidence and ask probing questions varies and proposing the institution of a training programme in methods and theories of history and social sciences).} Ensuring the consistency and equity in the application of the trial management powers to both parties, actually and in appearance, presents particular challenges. Thus, in the Milošević trial,

\begin{quote}

it was not easy for Judges to cut him off when he wandered into waters of the irrelevant, because allowance had to be made for his insufficient grasp of legal relevancy. And even within the bounds of greatly expanded relevancy, it was hard to rein him in, because he was often more familiar with background issues than were the other procedural participants.\footnote{Damaška, ‘Assignment of Counsel and Perceptions of Fairness’ (n 436), at 4.}
\end{quote}

Although the political nature of some defendants cannot be helped, it bears emphasizing, based on the Milošević experience, that the prosecution’s theory in itself poses greatest risks of politicization of international criminal trials. Hence it is the prosecution that must be cautious not to open a gate for the political defence in the first place. One should recall in this connection the grandiose ‘Greater Serbia’ plot attributed to Slobodan Milošević, which served as an
ideological premise for joining the Bosnia, Croatia, and Kosovo indictments. Underpinned by a sweeping prosecution theory, the megalomaniac indictment covering countless crime incidents which allegedly took place in a vast geographic area over a significant time period in the course of several armed conflicts, all encompassed by several joint criminal enterprises involving different individuals, verged dangerously on political. The nature and scope of the indictment complicate the highly demanding task of containing litigation on the ‘chapeau elements’ of the crimes by expanding the boundaries of legal relevance within which the pro se accused could justifiably fare.

The results of this unfortunate approach are well-known: the Milošević case acquired a monstrous dimension and could not be consummated due to the passing away of the accused. This precedent stands as a signpost warning about the risks of gargantuan indictments in international criminal law. The post-Milošević practice has shown a consistent judicial effort to ensure that the prosecution’s charging activity is kept within the reasonable limits. For instance, when the prosecution argued in Stanišić and Simatović that reducing the scope of the indictment under Rule 73bis(D) would ‘risk the creation of an inaccurate historical record’, given the ‘loss of the Slobodan Milošević Judgement’, it was reminded by the pre-trial Judge that ‘the Tribunal was established to administer justice, and not create a historical record’.

When faced with a political prosecution, the judges find themselves in something of a deadlock situation or a paradox. Where the prosecution is permitted to proceed with its case on the basis of a political theory and to lead a disguised political prosecution in proving the

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449 Boas, The Milošević Trial (n 173), at 112 (accepting that political motives appear to have guided the prosecution in charging Milošević so broadly); O-G. Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, (2007) 5(2) JICJ 360, at 373 (critical of the ‘persistent resistance of the Prosecutor and her senior staff to the idea of trying’ Milošević on the three indictments consecutively as a ‘hunting expedition’).

450 Damaška, ‘Assignment of Counsel and Perceptions of Fairness’, (n 436), at 3 (the objective of compiling a historical record ‘greatly expanded the range of relevant courtroom inquiries: many issues … of a complex political nature, were injected into the trial and became the subject-matter of proof’); Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 207), at 350 (‘Prosecution’s excursions into the historical and political background of the conflict being explored open the door for the self-represented accused, such as Slobodan Milošević, to explore these essentially peripheral matters at length’); 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>, at 77 (reporting the view that the Milošević prosecution ‘erred in framing their case in ways that … opened the door to politicization’, and that ‘[t]his mistake … provided a platform for Milošević to have endless arguments, often with the Prosecution losing’ them). Cf. A. Whiting, ‘In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered’, (2009) 50(2) Harvard International Law Journal 323, at 358 and 360 (arguing that, although ‘broad cases can become unmanageable … and can get sidetracked into historical and tangential detours’, the straitjacket charges in Lubanga could have in fact contributed to delays, because the prosecution deprived itself of fallback options and any legal hurdle potentially jeopardized the outcome of the entire case).

451 Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 207), at 358 (‘Should a similar situation arise in the future, careful thought should be given to whether joining such massive indictments together may make a trial unwieldy, bearing in mind the adversarial process to be followed, and may delay judgement unduly in a long leadership case involving an elderly accused.’); Boas, The Milošević Trial (n 173), at 90-2, 110 and 121 (commenting critically on the ‘Greater Serbia’ aspect of the prosecution case as the one that was badly articulated and long remained unclear to everyone involved in the process); G. Higgins, ‘The Impact of the Size, Scope, and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY’, (2009) 7(2) Northwestern Journal of International Human Rights 239, at 240 (‘The size and scope of the sixty-six count indictment spanning a ten year period of war has raised legitimate questions about the propriety and fairness of such mega-trials.’).

452 Decision pursuant to Rule 73 bis(D), Prosecutor v. Stanišić and Simatović, Case No. IT-03-69-PT, TC III, ICTY, 4 February 2008, para. 21. On the Rule 73bis(D) powers of judges, see Chapter 8.

453 Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 25 and 35 (‘This is the paradox: to convey an unambiguous historical “truth” to its audience, the trial will have to silence the accused. But in such case, it ends up as a show trial.’).
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charges, it would be fundamentally unfair to refuse the accused the counter the accusations by conducting a similar type of discourse. If historiographical and didactic trials are to be accepted at all in international criminal law and where the historical evidence is allowed in, this can clearly not remain an exclusive prerogative of the prosecution, lest the history emerging from the trials would be slanted and not credible.\footnote{See also Wilson, \textit{Writing History} (n 3), at 219-20.} Otherwise, such trials should be dismissed as inherently biased and asymmetrical, i.e. as ‘show trials’ in the true sense.

The need to avoid the Scylla of a ‘show trial’ by allowing a dissident accused to speak out freely pushes the court further towards the Charybdis of a ‘political trial’. Since none of the avenues presents a safe course in international criminal trials, the Gordian knot can be cut by limiting the prosecution’s ambition to pursue an essentially political prosecution. This empowers the court to apply a symmetrical approach to the defence case where necessary.\footnote{But see Bonomy, ‘The Reality of Conducting a War Crimes Trial’ (n 207), at 353 (adopting a symmetrical approach of excluding ‘undue reference to historical background and political context’).} This also spares it the embarrassment and legitimacy costs associated with the differential treatment of the parties, and the imagery of a ‘show’ and ‘political’ trial that hangs like a dark cloud over the conduct of complex international criminal proceedings. However, given the nature of those cases, this is easier done than said. The next section will address the question of whether there is a safe route out of this impasse by revisiting the normative limits on the communicative aspect of international criminal trials.

4.3 Liberalism as unostentatious didacticism

4.3.1 Fetters on didacticism: ‘Due process’ message

The solution to the dilemma of preserving a liberal nature of international criminal trials while enabling them to exert didactic effects arguably lies in setting stringent limits on the extent to which the so-called ‘communicative’ aspects (or incidental outward side-effects) of the trial process can be embraced. In other words, it is essential to define the acceptable form and reach of the ‘communicative’ messages to be generated by and during the proceedings.

It is submitted that, as a matter of principle, the expected sociological and political effects of the trial process must be limited to facilitating the orderly and effective operation of the process and to remain strictly subordinate to the proper function (truth-finding) performed within the applicable procedural framework.\footnote{Section 3.} The didactic messages communicated in the course of proceedings—both introvert and extrovert, i.e. reaching the wider audiences, must be not extend beyond those that are functional to the process of hearing a criminal case. For example, communicative effects produced by the established trial rituals which help to orient the trial participants and the observers in the workings of the criminal process and are meant to uphold and underline the fairness of the proceedings, are not in tension with the primary mandate of international criminal courts and, therefore, not objectionable.

International criminal trials are in principle conducted via public and oral hearings and, as such, they are observed by the general public, albeit ‘with periodic spasms of interest amid long stretches of indifference’.\footnote{Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 204.} The ‘inward-looking’ and functional messages generated by trial proceedings will by definition have an extrovert dimension, and the courts are certainly keenly aware of that when they strive jealously to protect the decorum of the proceedings. It is only through making it true and by demonstrating that international justice is taking its proper course and that the accused is being served a fair trial that international criminal tribunals can justify their legitimacy, counteract claims of bias, and serve as role models.\footnote{See Chapter 2.} The professional style of the judges in managing the trial and in addressing the participants, and particularly that of the
presiding judge, are essential to creating the atmospherics of impartial and independent justice.459

The extrovert or outward-looking messages to that effect are not improper per se as they are not utilitarian and go to the core of the ‘expressivist’ role of the tribunals with regard to procedural standards.460 According to a popular maxim, justice must not only be ‘done’ but also ‘seen to be done’.461 But ‘doing justice’ comes first, lest there would be nothing of it to be shown.462 The function of truth-finding in accordance with the principles of fairness must of course remain the cornerstone of the proceedings, instead of being reduced to a communicative message that serves to assure the public and affirms the tribunal’s credibility. The legitimacy of a trial forum as a perception is crucial for attaining the broader goals of international criminal justice, but the legitimacy as an objective fact, immeasurable as it may be, remains a core requirement. The extrovert manifestations of the ‘fairness’ message are not a primary concern for the judges whose obligation is to guarantee a fair rather than a ‘fairish’ trial.463

However, the spreading of didactic (political or historical) messages should not be deemed as an appropriate ‘communicative function’ of the trial process. In their procedural activities and decisions, the court and the prosecution are strongly advised to eschew these ambitions in order to avoid the unsavory labels of political and show trials. This can only be attained if they resist the temptation to adopt grandiloquent and tendentious rhetoric in the pleadings, jurisprudence, and statements made within and outside the courtroom.464 Their engagement with historiography should be strictly pragmatic and limited to the establishment of the truth in each case and the determination of issues that are clearly relevant to ascertaining the individual criminal responsibility; the higher ambitions are in all circumstances inappropriate when pursued directly by means of criminal process. Where a prosecution case rests on a specific version of history or political context that is contested, special care must be taken to ensure that the presumptions of the prosecution are not simply ‘internalized’ by the judges and that the defendant is not precluded from challenging the validity of those ideological premises.465 Value judgements about the righteousness of the defendant’s motives and political causes should neither affect the

459 On the role of Lord Justice Lawrence, the IMT President, see Malley, ‘The Atmospherics of the Nuremberg Trial’ (n 308), at 6 (‘he managed from the bench to create an impression of remorseless impartiality on the part of the Tribunal which quickly allayed the fears of the defence counsel that they were simply part of a farcical procedure in which there would be no opportunity properly to test the evidence that would be brought against their clients. Lord Justice Lawrence was imperturbable: unmovable once he came to the conclusion that justice required that the Trial be handled in a particular way … and by virtue of sheer character a huge contributor to one key atmosphere of the Trial, namely an atmosphere of impartial justice.’). By contrast, the IMTFE President Justice William Webb, due to his notoriously dictatorial and arrogant style in treating colleagues on the bench and procedural participants, may have contributed to the perceptions of the Tribunal proceedings as unfair. For recollections, see e.g. B.V.A. Röling with A. Cassese, The Tokyo Trial and Beyond: Reflections of a Peacemaker (Oxford: Polity Press, 1993) 30.

460 In a similar vein, see Ohlin, ‘A Meta-Theory of International Criminal Procedure’ (n 291).

461 R. v. Sussex Justices, Ex party McCarthy (Lord Hewart CJ) (1923) 1 King’s Bench 256, at 259 (‘Justice must not only be done, but should manifestly and undoubtedly be seen to be done.’).

462 Smith, ‘The ICC: A Forum for Show Trials?’ (n 313), at 1310 (‘much of the criticism aimed at war crimes trials … addressed [the problem that] they were pedagogical spectacles that aimed to appear fair and just, yet if the rule of law is to be respected, it must be the actual presence of justice, rather than the mere appearance of it, that is important.’).

463 In a similar vein, F. Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’, (2009) 14 UCLA Journal of International Law & Foreign Affairs 36, at 76 (‘The slightly abstract aim of show-casing the “best version” of a fair trial has, in practice, taken second place to a robust exercise of arbitrating between different goals: securing rights of the accused and victim, fairness and expediency, universal justice, and local legitimacy.’).

464 Buruma, The Wages of Guilt (n 372), at 142 (‘Just as belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics…. But good politics don’t necessarily serve the truth.’); Simons, ‘International Criminal Tribunals and the Media’ (n 292), at 87-8.

465 Wald, Tyrants on Trial (n 123), at 24 (especially in leadership trials the judges must appear ‘independent and free from political influences’).
degree of blameworthiness beyond what is caught by the relevant crime definitions, nor inappropriately result in a differential treatment such as imposing a harsher (or more lenient) penalty by virtue of being considered an aggravating or mitigating circumstance.

This is a normative position that does not preclude one from recognizing the difficulty of achieving this in a highly charged environment of international criminal prosecutions.\textsuperscript{466} To provide one example, the CDF trial sentencing judgment characterized the defendants’ ‘just cause’ as a mitigating circumstance, i.e. the fact that the CDF/Kamajors operated ‘in defending a cause that is palpably just and defendable, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards the restoration of the ousted democratically elected Government of President Kabbah’.\textsuperscript{467} In reversing this holding, the Appeals Chamber stated that ‘Allowing mitigation for a convicted person’s political motives, even where they are considered by the Chamber to be meritorious, undermines the purposes of sentencing rather than promotes them. In effect, it provides implicit legitimacy to conduct that unequivocally violates the law.’\textsuperscript{468}

It is a judicial responsibility to vigilantly guard the process from any attempt to hijack it as an educative tool and a pulpit for teaching lessons in political history, and it goes without saying that the judges ought to refrain from doing that themselves. The duty to control the parties in that regard should apply equally to the defence and the prosecution cases.\textsuperscript{469} Should the prosecution choose to introduce the political context and motives of the defendant as part of the case, it must be for sufficiently compelling reasons, namely a nexus to the charges. Otherwise it is advised to scale the historiographical ambition down: unless they are caught by criminal law, the essentially political acts and motives ought to be left in the political domain rather than artificially de-politicized and re-interpreted to fit in the criminal law framework. The political discourse led by the prosecution in support of the charges is a provocation of a symmetrical response by a defendant. Hence, Judge Patricia Wald recommends that indictments ‘use historical and ideological references with care and parsimony to avoid politicizing the trial and justifying defendants [sic] forays into history and national politics to make their case.’\textsuperscript{470}

The court that has shown patience towards the political nature of prosecution will be faced with a problematic choice between, on the one hand, allowing such a reaction by the defence and, on the other hand, silencing the accused and taking the blame for an unfair, show trial.

Therefore, the claim that it is right for the prosecutors and judges ‘to shape collective memory of horrible events in ways that can be both successful as public spectacle and consistent with liberal legality’ and to pay ‘closer attention to the “poetics” of legal storytelling’ are not

\textsuperscript{466} Koskenniemi, ‘Between Impunity and Show Trials’ (n 90), at 25 (‘no matter how much judges may seek to proceed in good faith towards their judgements, the context of the trial cannot—unlike the history seminar—be presumed to manifest good faith on everybody’s part. This is not a disinterested enquiry by a group of external observers but part of history that it seeks to interpret. Much is at stake for the protagonist—that is the nature of the trial—and no truth can remain sacred within it.’).

\textsuperscript{467} Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, TC I, SCSL, 9 October 2007, para. 86. See also Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, Judgement, Prosecutor v. Fofana and Kondewa, TC I, SCSL, 2 August 2007, paras 65-97, 104 et seq. (opining that the principle of ‘necessity’ and the CDF action for the preservation of the state of Sierra Leone precluded the conviction of Fofana and Kondewa).

\textsuperscript{468} Judgment, Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-A, AC, SCSL, 28 May 2008, paras 521-35 and especially paras 530-31. See also Partially Dissenting Opinion of Honourable Justice George Gelaga King, paras 28-29, 91-93 (considering the fact the CDF fought for the restoration of democracy to be relevant to whether their attacks had been directed against the civilian population and as a mitigating factor in determining the sentence).

\textsuperscript{469} Cf. Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 202 (depicting the ‘horrors’ of the defence side’s ‘hijacking history’ and turning trial into a ‘revisionist, even negationist, spectacle’, whilst approving of the ‘didactic’ spectacles staged by the prosecution).

\textsuperscript{470} Wald, Tyrants on Trial (n 123), at 60.
sustainable.\footnote{Osiel, Mass Atrocity (n 95), at 2 and 3.} It is misconceived to employ criminal proceedings as dramaturgical events for broadcasting liberal (and for that purpose, any other) messages. As noted, the conspicuous anti-liberalism of such unprincipled use of process detracts from those messages’ intended liberal content. Due process and rule of law are the only lessons international trials can be expected to teach unostentatiously, unless the purpose is to teach by providing bad examples. Numerous examples of such kind illustrate sufficiently well that the focus on other ‘lessons’ diminishes the potential didactic value of outcomes and longer-term effects of trials.\footnote{See also Minow, Between Vengeance and Forgiveness (n 87), at 47 (‘the theatrical devices and orchestration required [to memorialize controversial, complex events] threaten the norms of law that are a crucial part of the lesson’). Minow’s views are sometimes presented as defensive of instrumentalist use of criminal trials. See e.g. Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 195.} Nowadays nobody seriously regards the televised trials of Nicolae Ceauşescu and Saddam Hussein—both intended as didactic spectacles with the execution being a final act—as exemplary instances of justice.

The fallacy of ‘liberal show trials’ is the thinly veiled inconsistency between the noble ends and the dubious means employed for achieving them. It compromises rather than reaffirms the norms and values such trials are supposed to promote, however laudable and morally justifiable – ‘democracy’, ‘rule of law’, ‘liberalism’, and ‘fight against impunity’. The international criminal tribunals have grown into a regular element of an international legal order.\footnote{On the ‘aura of normalcy’, see Chapter 1.} Hence their trials may no longer be seen as ‘by their very terms anomalous, unusual legal events’\footnote{Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 192 and 203.} requiring ‘orchestration’ in some conspiratorial sense, over and above institutional guarantees of independence, due process, and effective management. It is high time to start looking at international criminal trials as rather routine instances of administration of international criminal justice subject to the same requirements of legality and credibility as those applicable to domestic trials. The fact that it may well be a high-minded, naïve or, using Douglas’s expression, ‘silly’ demand, does not invalidate it as a normative aspiration.\footnote{\textit{Ibid.}, at 195.} The main and, if it is to succeed, the only objective of international criminal process is to deliver fair justice to the accused, to the victims and to the community, however manifold that term. It is detrimental to that objective to make it compete with didactic or other utilitarian goals that pertain to the institutions as a whole rather than to criminal proceedings as such.\footnote{Chapter 3.}

Thus, the intuitive popular perceptions that acquitting a person might possibly be guilty or terminating of proceedings on procedural defects would amount to a didactic failure, must not stand in the way of doing what rule of law requires. This position has been adopted by the ICC Trial Chamber when it imposed a stay of proceedings in \textit{Lubanga} due to the Prosecutor’s failure to fulfil its obligations to disclose the potentially exculpatory evidence obtained under Article 54(3)(e) confidentiality agreements. As one can imagine, the implications of halting the proceedings in the ICC’s first case, with a prospect of releasing the accused the charges against whom have earlier been confirmed, would be no less than a ‘didactic catastrophe’. This would raise serious questions about the ICC being seen as a viable and operative institution, especially in the victim community and among the sponsors. The Trial Chamber revealed its keen awareness of such consequences when it noted that stay had been imposed with a ‘great reluctance’.

The trial judges made a principled and courageous decision and accepted responsibility for it: 	extit{fiat iustitia, et pereat mundus.}

\footnote{ICC-01/04-01/06-1401 (n 59), para. 95 (‘Although the Chamber has no doubt that this stay of proceedings is necessary, it has nonetheless imposed it with great reluctance, not least because it means the Court will not make a decision on issues which are of significance to the international community, the peoples of Democratic Republic of the Congo, the victims and the accused himself. … The judicial process is seriously undermined if a court is prevented from reaching a verdict on the charges brought against an individual. … The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice.’).}
This does not imply that the products of the proper operation of international criminal proceedings—trial practices, jurisprudence, evidentiary record, eloquent pleadings and submissions of the parties, moving witness testimony, and climactic moments of the proceedings—should not subsequently become a valuable didactic material. On the contrary, the question of what can be done with that material to enhance the sociological impact on the relevant communities of the messages emanating from the work of international criminal tribunals is highly relevant in light of the special goals of international criminal justice. But it bears emphasizing from the outset that the answers to those questions lie beyond the realm of procedural law.

4.3.2 Enhancing didacticism by other means: Outreach, venue, space

Strengthening the impact and ensuring the long-lasting legacy of the tribunals in the society are institutional, outreach and external communications tasks which are appropriately implemented outside of the framework of procedure, i.e. in the way that does not impair or affect the conduct of the proceedings. The courts’ administrative structures may do so by among others by engaging with the (local) press more actively and regularly so as to attract the media coverage of the important highlights of the proceedings and thus to contribute to forming a public opinion about the tribunal’s operations. Reporting the progress made in specific cases and generally in implementing the institutional mandate, providing firsthand information on the jurisprudential developments, and their balanced and legally accurate interpretation in a manner that would secure the tribunal a stronger hold on the target communities are important areas of work. Those public relations (rather than legal and procedural) tasks should be discharged by the courts’ outreach programmes. The importance of setting such programmes up in a timely fashion and the need to run them effectively cannot be emphasized enough, as follows from the negative experience of the ad hoc tribunals whose outreach efforts were an afterthought and started late in their lifetime, as noted in Chapter 3.

The advocates of ‘didactic spectacles’ suggest that it is for the judges and prosecutors themselves to mould the content and form of their didactic messages. However, it is rather the joint task of the tribunal’s outreach and the mass media to build a bridge between the judicial action and the target community and to operate as a public relations ‘extension of the courtroom’. Unlike lawyers, they are professionally up to the task of translating the routine of lengthy and technical proceedings into accessible and mind-captivating narratives without dull and unnecessary digressions into legal pedantry. Needless to say, this must be done within the proper limits such that the outreach accurately conveys the purposes of and steps in the courts work and does not misinterpret the meaning of judicial decisions, much less amounts to a political propaganda, oversimplified didacticism, or sensationalism.

478 Chapter 3.
479 Wald, Tyrants on Trial (n 123), at 47-9 and 62 (recommending the adoption of the media strategy and the appointment of the spokesperson in advance of trial).
481 See Simons, ‘International Criminal Tribunals and the Media’ (n 292), at 85, who describes the usual job of international justice reporters thus: ‘During the lengthy, often technical court proceedings, print media search for pithy quotes and revealing testimony and documents. Television cameras search for movement on the stage and, better still, a good confrontation. … [M]ost of us need to find stories about people rather than abstractions. We look for an event or an incident that allows us to build a narrative. What we cannot do is dwell on the fine legal points, so dear to many jurists.’
482 January, ‘Tribunal Verité’ (n 412), at 212 and 224.
Another promising measure of an institutional kind consists in bringing the proceedings closer to the target population through establishing the court in the country concerned (ECCC and STL) or by way of conducting trial hearings in the territorial state. This might help the tribunal yield more profound and direct societal effects by its very presence and without adjusting the way in which the proceedings are conducted. Holding at least some of the hearings in the country or in the region where the crimes have been committed enables the members of the relevant community to attend the hearings and to benefit more immediately from the view of the ‘international justice in action’.

Within a related category fall the organizational measures towards improving the spatial arrangements in international criminal trials with a view to enhancing their didactic impact. Needless to say, any proposed reforms in this respect must be carefully examined in light of fairness to the accused and security considerations for witnesses and other participants. Lawrence Douglas has made interesting remarks on the ‘organization of space’ and ‘spectatorship’ in criminal trials. He compared the courtroom setup of the Eichmann trial to those of the ICTY, not to the latter’s benefit in his view. In the Eichmann trial, the public gallery was not separated from the courtroom by the bulletproof glass, unlike the accused’s booth, which made the attending members of the public an organic part of the proceedings and enabled a direct communication between the court and spectators. By contrast, the public gallery at the ICTY (as well as the ICTR, SCSL, ICC, ECCC and STL) is separated from the participants by a sound-isolating glass (thus the court itself is put in the ‘glass booth’). The oral pleadings may be heard over headphones only and the courtroom action can also be followed on the monitors.

Douglas believes that the isolation of the court from the public creates a feeling ‘akin to watching an elaborate psychology experiment through one way glass: the spectator cannot suppress the feeling that he or she is entirely invisible to the Tribunal’ (this in fact is not the case) and that such ‘spatial displacement must … undercut the didactic value of the trial … in terms of contemporaneous reception.’ Firstly, it must be said that the concerns seemed overstated. If it is to be accepted that attending a trial in a courtroom secures a stronger effect of involvement as compared to following it remotely, then, if anything, it is rather the physical remoteness of the proceedings from the target audiences in the affected communities that limits the didactic effect of international trials most. While people in the former Yugoslavia, Sierra Leone and elsewhere can still observe (some of) the hearings on TV broadcast, internet live stream or otherwise, the majority of the population cannot visit the tribunals for the purpose of trial observation.

Second, it is doubtful whether the ‘organic’ participation of the public in the sense Douglas means it (‘expressions of grief, disbelief, anger, horror’, ‘gasps, snickers, whispers and occasional violent outbursts’) in the proceedings is appropriate in the conduct of criminal proceedings. The risk of disruption is too high. For example, upon delivery of an opening statement by a CDF accused before the SCSL, Sam Hinga Norman, in which he challenged the legitimacy of the Court, his supporters present in the public gallery were exultant. To reinstate the order, the Presiding Judge interrupted the plaudit and issued a formal warning to the

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483 Interestingly, the ICC Trial Chamber President’s plan for the Lubanga trial was to start it in an aircraft hangar on a MONUC base in the DRC, but it did not materialize: A. Fulford, ‘Reflections of a Trial Judge’, (2011) 22 Criminal Law Forum 215, at 216-7.
484 Douglas, ‘Perpetrator Proceedings and Didactic Trials’ (n 103), at 204.
485 Ibid.
486 See, however, Finkielkraut, Remembering in Vain (n 292), at 70-1. He considers it ‘doubly absurd to want to televise judicial proceedings in order to educate people’, because when broadcasted, the proceedings get reduced from a real-time educative event to an entertainment product for consumption).
487 The SCSL’s press office has developed the practice of screening of video documentaries that summarize proceedings for screening in the provinces of Sierra Leone and conducting Q&A sessions: January, ‘Tribunal Verité’ (n 412), at 211.
Justice must be seen to be done, but not contemporaneously affected by those who see it being done. More importantly, even where the ‘spatial displacement’ may undermine the didacticism of the process, the concerns of safety of witnesses, accused persons, and other participants that warrant the isolation of the public gallery will undoubtedly outweigh the expected ‘didactic’ benefits.

It is clear that placing a court in a ‘glass booth’ will neither make the audience disappear altogether, nor lessen its demand for moral messages or entertaining show from the court. The public demand for a courtroom drama will not meet the offer fully, even if at the cost of abating the popular curiosity towards international criminal trials. But it should not be deemed problematic, at least from a liberal legalist perspective. Admittedly, law is a bore when administered in an orderly fashion. It is true that this places the courts into a disadvantageous position in the eyes of the public and press when faced with the disruptive Vergès-type defence by the parties. But such tactics need to be placed under right control, and there is per se nothing unusual or inappropriate about the courts producing monotonous stories. As observed by novelist Rebecca West, who covered the Nuremberg proceedings for The New Yorker:

The trial was then in its eleventh month, and the courtroom was a citadel of boredom. Every person within its walk was in the grip of extreme tedium. This is not to say that the work in hand was being performed languidly. An iron discipline met the tedium head on and did not yield an inch to it. … But this was boredom on a huge historical scale. A machine was running down, a great machine, by which mankind, in spite of its infirmity of purpose and its frequent desire for death, has defended its life.

The international and domestic criminal trials of the posterity undoubtedly match the same description. Due to their greater length may well outdo the ‘boredom’ of the Nuremberg proceedings. In relation to the Klaus Barbie trial, Finkielkraut recounts that thirty-nine closing speeches by the lawyers for the civil parties ‘talked the audience into a stupor’ – ‘[r]ather than satisfying the appetite for the new, they rehashed, ad nauseam, the same tired formulas’. No surprise, Douglas has described the ICTY trials as ‘painstakingly slow and boring’. It is a telling fact that Court TV stopped broadcasting the ICTY proceedings already after the first few months into the Tadić trial. It is natural that the public and the media become mind-numbed quite soon and lose interest towards what is happening in the courtroom after (if not already

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488 Transcript, Prosecutor v. Norman et al., Case No. SCSL-04-14-T, TC I, SCSL, 15 June 2004, at 5 (‘let me warn the gallery, please. This is not a political forum, it’s not a political arena, and if anybody is caught behaving as if he were in a political arena, he will be called upon to withdraw from this courtroom. Please, you are here to follow the proceedings which are judicial proceedings. We are not here in politics.’); Kelsall, ‘Politics, Anti-Politics, International Justice’ (n 286), at 597.

489 Wilson, Writing History (n 3), at 11 (‘Criminal trials can seem overly complex, excessively technical, and obsessed with minor procedural details. After the first flush of press interest, trials for mass crimes soon lose their appear and are ignored by the public, who feel alienated by the morass of courtroom rules and regulations.’).

490 For discussion of how procedure necessary to ensure a fair trial produces ‘mind-numbingly monotonous stories’: Osiek, Mass Atrocity (n 95)), at 84-94.

491 Cf. Wilson, Writing History (n 3), at 11 (‘Law’s tiresome proceduralism is unfortunate not only in terms of its impact on the historical value of a trial; it can also expose criminal courts to unscrupulous defense lawyers who mount a “rupture defense” that undercuts the legitimacy of the court in the eyes of the media and public.’); 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 563 (‘As anyone who has watched some of the ICTY proceedings can tell you, trials are often long, boring, complex, and highly technical processes – so it is easy for politicians and other interested parties to distort the facts as they are presented.’)


493 Finkielkraut, Remembering in Vain (n 292), at 63 and 65


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during the opening statements. But in many senses the legalist obsession about procedural niceties, anti-climactic routine of the trial, and the non-sensationalism are both counterindications of, and antidotes against, show trials.

Given the already excessive external pressures on international criminal tribunals, the vacuum-sealing of the process of adjudication and distancing of the participants from the court of the current or expected public opinion appears desirable. As long as the tribunal’s public relations arm—press office and outreach programme—is functioning as it should, the procedural actors should concentrate on their primary work of trial advocacy and adjudication and in principle not be distracted by, or flirt with, the public reactions. When they do engage in forming the public opinion outside of the courtroom, they are advised to do not so by means of process and to carefully dose input. Thus, they ought to refrain from grand posture of the makers of history, from providing simplistic and slanted historiographic and political perspectives on the trials and their outcomes.

Their role would be to explain how the court and process work, what limited ambitions legalist trials pursue and, where possible, to rectify inaccurate and distorted perceptions in that regard, which are uncommon in media reporting of international criminal proceedings. The public and the ‘international society’ at large will appreciate this dosed engagement by international criminal justice professionals, just as they understand that it is essential that criminal justice be delivered impartially and at a safe distance from volatile and not always balanced ‘judgment’ of public opinion and press. There is obviously more to be gained from a detached and fair criminal adjudication system than from the one that is oversensitive to external and arbitrary impulses. The thin line between a ‘trial enjoying large publicity’ and a ‘show trial’ should not be crossed, despite all difficulty of abstracting one’s mind from the fact of being watched by large audiences.

4.3.3 Calling to account?

Finally, with the external audiences being put on hold, what is the appropriate tone by key procedural figures towards the accused person? Since the process generally should not be exploited to educate in political history, this holds for the treatment of the defendant as well. To use Anthony Duff’s theory of ‘calling to account’, the international trials can be conceptualized as such, but calling the accused to account should proceed under legal terms. It should not invite, challenge, or force him to accept the political or moral accountability for imputed conduct. The ‘political’ accused in international criminal trials tend to attack the core moral evaluations and political premises of the prosecutor’s ‘didactic’ case; by challenging the trial forum’s legitimacy they seek to question the very terms on which they are being ‘called to account’. The essentially non-legal nature of those terms would preclude the unnecessary and counterproductive politicization of the trials.

The complex subjects of politics and history that enter into the domain of international criminal trials seldom lend themselves to unambiguous and uncontestable truths, and educating on them can only be accomplished in a form of multilateral, transparent, and open dialogue. Therein lies the major obstacle to the supposed didactic and historiographic functions of trials and the ‘calling to account’ theory in the context of international criminal law. The use of trial as

496 Klarin, ‘The Impact of the ICTY Trials’ (n 292), at 94 (noting that the media interest towards the first ICTY trial of Tadić waned after the first 2-3 days).
497 See also Saxon, ‘Exporting Justice’ (n 491), at 563 (‘because these trials, in the interest of fairness, are often so complex and technical, they are the opposite of “Show Trials”’).
498 Simons, ‘International Criminal Tribunals and the Media’ (n 292), at 85.
499 Sadat Wexler, ‘Reflections on the Trial of Vichy Collaborator Paul Touvier’ (n 306), at 217 (in response to the claim that ‘the public’s perception of trial is more important than the issues under consideration’, pointing out that ‘society at large clearly benefits from a criminal justice system that retains its impartiality and distance from public opinion’).
500 See n 11.
a two-way ‘communicative process’ to justify to the accused why his conduct is criminal (and not political) and deserves a criminal sanction over and above any political response is bound to effectively turn the courtroom into a debate chamber. This embroils the process into polemics for which the courtroom is clearly not a suitable forum.\(^{501}\)

The communicative theories of trial arguably fail to catch the complexities of international criminal trials. This is most visible in relation to those of them which are contested, as opposed to cases disposed of through guilty pleas, and where the political dimensions of international criminal justice come to the fore, for example, due to the prosecutorial case strategy. Along similar lines, Veitch has provided a perceptive critique of the ‘calling to account’ theory in the context of certain political trials.\(^{502}\) If the trial is not an ‘institutional charade’ but a genuine communicative forum aimed to secure ‘repentant understanding’ by the accused of his punishment, the court would be obliged to engage in a dialogue with the accused in order to evaluate the truth of his (political) convictions. But due to the unavoidable immersion into the political realm, such dialogue would hardly qualify as a trial in a true sense. Since the conditions on which the accused are ‘called to account’ are non-negotiable, the ‘communicative’ value of trial is limited. For Veitch, ‘the trial is at the pinnacle—real and symbolic—of the constituted political and material order’ and ‘the parasitic nature of the trial on the constituted order and its material underpinnings’ is in that ‘it upholds and promotes that order, but is powerless to address its injustices’.\(^{503}\)

Therefore, if any educative messages are to be produced in international criminal trials and any historical and moral lessons to be taught through them, these should be incidental and positive side-effects and by-products of the process and outcomes rather than calculated and premeditated outputs of the efforts undertaken for that end by judges, prosecutors, and defence counsel.\(^{504}\) The tenets of liberal international criminal justice admit only unostentatious, indirect and long-term didacticism. As Milner Ball eloquently put it,

> Insofar as it is made a platform for moralizing or a forum for educating, a trial is not a trial. Trials may indeed have an educative effect, but they have this effect when, instead of deliberately undertaking to teach, they treat the parties as individuals.\(^{505}\)

Hence, it is only by constraining the ideological, historiographic, and pedagogical aspirations that the international criminal trials will remain criminal trials in the true sense. At least the necessity for them to remain such is out of question.\(^{506}\)

### 5. CONCLUSION

The present Chapter has endeavoured to clarify what functions the trial process before international criminal tribunals can properly serve and how the external manifestations and communicative aspects of the process may correlate with the primary functions. The Chapter built upon the normative position concerning the optimal correlation between the goals of international criminal justice and the ends of procedure presented justified in Chapter 3. In turn, it took the inquiry into the question of what international criminal trials should be expected to

\(^{501}\) Wald, *Tyrrants on Trial* (n 123), at 10.

\(^{502}\) Veitch, ‘Judgement and Calling to Account’ (n 304), at 165-70.

\(^{503}\) *Ibid.*, at 170-1.

\(^{504}\) Smith, ‘The ICC: A Forum for Show Trials?’ (n 313), at 1324 (‘while [pedagogic] functions will likely always be by-products of a criminal trial, they cannot be its primary purpose. If the aim is something other than justice, justice is unlikely to result.’)


\(^{506}\) Smith, ‘The ICC: A Forum for Show Trials?’ (n 313), at 1312 (‘A war crimes trial should be left to remain a proper trial.’).
deliver as a direct output further. It did so by delineating the scope and kind of ‘truth’ to be established in individual cases and distinguished between the appropriate and improper uses of didacticism and historiography in international criminal procedure.

From the context of domestic political trials, the question of the functions of criminal courts operating on contested political foundations and against contested historical background emerges as an inherently complex one. Its complexity grows exponentially in relation to international criminal tribunals landmarked by their common institutional emphasis on the socio-political objectives such as peace-building, reconciliation, creating a historical record, and norm-expressivism. This goal setting results in almost intuitive perceptions that the success or failure of trials can appropriately be measured by the immediate contribution they offer for the achievement of the lofty political objectives. But international criminal justice enthusiasts and legal sociology scholars ought not to be overly optimistic about the actual potential of international criminal trials, through a series of climactic acts and courtroom dramas, to accomplish the broader goals behind the project. A recognition is warranted of the supreme importance of leaving the courts do their primary job of establishing the truth in each case and determining the guilt or innocence of the individual accused. The course of international criminal justice should be left undisturbed and the unique opportunities for generating master history narratives and undertaking exercises and experiments in political and moral didactics on a wide scale should be left for more appropriate contexts. In a multidisciplinary debate on the functions of international criminal courts and proceedings, the legal and social sciences perspectives on the subject will likely differ and even clash. As this Chapter argues, these positions are not necessarily irreconcilable if the proponents of the law-and-society view are prepared to concede that the only primary ‘function’ of the trial process, in the strict sense, is the search for the truth. A recognition is warranted of the supreme importance of leaving the courts do their primary job of establishing the truth in each case and determining the guilt or innocence of the individual accused. The course of international criminal justice should be left undisturbed and the unique opportunities for generating master history narratives and undertaking exercises and experiments in political and moral didactics on a wide scale should be left for more appropriate contexts. In a multidisciplinary debate on the functions of international criminal courts and proceedings, the legal and social sciences perspectives on the subject will likely differ and even clash. As this Chapter argues, these positions are not necessarily irreconcilable if the proponents of the law-and-society view are prepared to concede that the only primary ‘function’ of the trial process, in the strict sense, is the search for the truth. A recognition is warranted of the supreme importance of leaving the courts do their primary job of establishing the truth in each case and determining the guilt or innocence of the individual accused. The course of international criminal justice should be left undisturbed and the unique opportunities for generating master history narratives and undertaking exercises and experiments in political and moral didactics on a wide scale should be left for more appropriate contexts. In a multidisciplinary debate on the functions of international criminal courts and proceedings, the legal and social sciences perspectives on the subject will likely differ and even clash. As this Chapter argues, these positions are not necessarily irreconcilable if the proponents of the law-and-society view are prepared to concede that the only primary ‘function’ of the trial process, in the strict sense, is the search for the truth.

While, as Chapter 2 posits, there is a link between the institutional goals and procedural functions, the trial process should not be overstretched to a degree supposed to enable the court to directly promote the grand objectives pursued by establishing international criminal tribunals. This would bring the proper function of trials—truth-finding in accordance with the principle of a fair trial—into jeopardy. In this sense, Arendt’s normative critique of the Eichmann trial and her position on the insurmountable importance of delivering genuine justice in each individual case, irrespective of its potential broader impact and historical significance, remain valid, and they do so a fortiori in the context of international criminal trials. By solely discharging their proper functions and by doing no more and no less than that, international trials courts contribute their maximum share to the high-minded institutional goals. Tina Rosenberg wrote in this regard that trials must not have an ambition of rendering ultimate historical justice, but only a modest justice ‘bit by bit’.\(^{507}\) Clinging to this position is not inconsistent with recognizing a subtle link between the truth-finding function of criminal trials and the socio-political objectives of international justice.

The institutional objectives may exert an indirect normative influence on the meaning and scope of the functions of trial process, in the sense that the latter may be in need of reconfiguring and re-contextualization. However, this Chapter argues that the degree to which the regular functions of trial procedure may require modification should not be overestimated. This has been demonstrated on the examples of the primary and conventional function of trials—the establishment of truth in the determination of the guilt or innocence and, where appropriate, sentence—as well as an extra-legal ‘function’ which refers to the communicative aspects of the process of adjudication. The procedural truth-finding is the basic and essential

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\(^{507}\) T. Rosenberg, *The Haunted Land: Facing Europe’s Ghosts After Communism* (New York: Vintage Books, 1996) 351 (‘Trials that seek to do justice on a grand scale risk doing injustice on a small scale; their goal must not be Justice but justice bit by bit by bit. Trials, in the end, are ill suited to deal with subtleties of facing the past.’).
function of the trial process, which goes as a red thread through a plethora of procedural provisions applied by international and hybrid criminal jurisdictions.

The truth-finding as a procedural function tends to be interpreted expansively in the sense that trial procedures should arguably be made more suitable for assisting the court to write history of contested historical and political contexts as social environments in which international crimes tend to be committed. However, such interpretations do not sufficiently take into account the fundamental differences between the purposes, rationales, methods, and limitations of historiography, on the one hand, and criminal law on the other. That they are also self-defeating and normatively unsustainable follows unequivocally from the critical legal studies and liberal-legalist objections against using criminal trials as instruments of political education, didacticism, and history-writing.\(^{508}\) One realist objection is that while the courts can make an invaluable contribution to the process of amassing historical evidence concerning the causes of the conflict and violence, the inherent and indispensable limitations of criminal process make it a meager and utterly unfitting vehicle for producing a scientifically solid and politically uncontroversial account of contested history. Nor are the courts proper venues for authoritatively solving disputes between several competing interpretations of history as may be presented by the parties. Convincing judgements on the complex and ambivalent historical events that would enjoy universal acceptance and authority can hardly emerge from trials that have been conducted fairly and without undue delay. As Osiel has recognized, ‘law is likely to discredit itself when it presumes to impose any answer to an interpretive question over which reasonable historians differ’.\(^{509}\)

The second, normative objection to the pursuit of historical truth through criminal process is that attempts to that effect inexorably lead to travesty of justice vis-à-vis the accused person, raising the dangerous spectre of show and political trials. Some proponents of the ‘historical function’ of international criminal trials acknowledge the rational and unobjectionable nature of the limitations of the legal process that warrants modesty in this regard, lest the justice would be sacrificed on the altar of politics.\(^{510}\) Indeed, the goal of compiling a historical record to which the tribunals are supposed to make an important yet perhaps not decisive contribution, may affect the normative preferences with regard to the meaning and scope of forensic or legal ‘truth’ sought to be established in international criminal trials and, therewith, the fact-finding arrangements in international criminal procedure.

Speaking in terms of the conceptions of ‘legal truth’ espoused by major national procedural traditions, the notion of ‘truth’ as found in the modern ‘inquisitorial’ tradition of criminal justice would arguably be a closer analogy than the procedural truth of the ‘adversarial contest’ type demarcated by the contours and contents that are negotiable by the parties to a large extent. However, one should consider the systemic nature of some fact-finding impediments in international criminal proceedings, the limited formal powers and capacities of international courts in relation to the ascertainment of the truth and their procedural setup in terms of the role of the parties and the court, and procedural value-based limitations on the extent to which the legal truth can legitimately be pursued in international criminal trials. These factors preclude a conclusion that an international trial ‘truth’ can ever pretend to approximate to the ‘inquisitorial’ ideal of ‘material truth’. Still, the truth that aspires to reach that unattainable objective and does so to the extent possible, rather the truth that the parties are free to renegotiate as they deem fit given the procedural expediency and other utilitarian considerations, sits better with the structural needs of international justice. The goals of fighting impunity, creating a credible historical record, and providing redress for the victims may be deemed to favour the ‘legal truth’ that is as accurate and objectively framed as possible, although manifold constraints on that aspiration must readily be recognized in international criminal justice.

\(^{508}\) Wilson, ‘Judging History’ (n 118), at 909.

\(^{509}\) Osiel, Mass Atrocities (n 95), at 119.

\(^{510}\) Joyce, ‘The Historical Function of International Criminal Trials’ (n 120), at 462-63.
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The subject tackled in the second part of the Chapter is the extent to which the communicative effects and external (corporeal, spatial) manifestations of trial process should be a conduit of the institutional objectives of international criminal justice. Some authors cling to the view that ‘sociological’ or ‘communicative’ functions of trial process are directly informed by didacticism and expressivism engrafted in the project international criminal justice. The Chapter objects to this view because moulding the way in which the trials are conducted to the supposed ‘best model’ for the court’s interaction with wider audiences is precarious. The pedagogical or dramaturgical tasks are erroneously ascribed to international criminal courts when it comes to the conduct of the proceedings and decision-making. The normative position defended in the foregoing is that the influence of socio-political goals on communicative aspects of international criminal trials must be circumscribed.

The procedural expressivism must remain subordinate and limited to facilitating the trial’s primary functions of truth-finding and due process. The ‘due process’ message is admissible to the extent that it is—like the light emitted by the source of heat—an inadvertent by-product of actual substantive fairness. The didactic tasks extending beyond that should not be served by the process itself and ought to be entrusted to the court’s specialized outreach units and be promoted by organizational and institutional measures such as conducting court hearings in the country where the crimes have been committed. Otherwise, international trials effectively become ‘show trials’ or start conveying a distinct impression to that effect. Because appearances do matter in the administration of criminal justice, in either case the prospect that the tribunals will have a positive social and political impact in a longer term will be fatally undercut.

It may be true that international criminal trials carry a unique potential for exerting profound but occasional pedagogical effects on the worldwide audience. But this is a heavy burden as the trial participants should as a matter of principle resist assuming these noble tasks in order to preserve the integrity of the legal process. The public which monitors the operations of international criminal tribunals may expect them to hand down accessible and authoritative lessons in moral philosophy, politics, and history. The affected communities are likely to hope for a master narrative of their contested history that can be convenient in constructing a new national identity and achieving reconciliation in the aftermath of conflict and mass atrocities. But international criminal justice professionals ought to be prepared to disappoint these expectations in the short term and continue working towards the future by building a credible legacy of fair and expeditious proceedings and high-quality jurisprudence that would help promote the far-reaching institutional objectives in the long run. The vision of the court embroiling itself into historiography, political moralization, and didactic dramaturgy might please the public. But this is a pernicious route to the pitfall of show and political trials which should be averted to safeguard the project’s legitimacy.

The substantive norm expressivism through procedure as a way of elucidating the ‘correct’ interpretations of history and the desirable trajectories of the essentially political conduct, will in most cases lead to the politicization of trial and undermine its primary goals and the more remote institutional objectives. The courts should not undertake to make any political points or to teach historical lessons in the criminal proceedings. Such exercises are to be left to historians, scholars, and the general public who will draw their conclusions on the basis of judgments, evidentiary record, the due process performance, and the legacy of the tribunals in the target regions. Any effort to control or manipulate the ‘judgement of history’ by the court itself pushes away the prospect that such judgement would be a favourable one.