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International criminal trials: A normative theory

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SUMMARY

This book examines the nature and organization of international criminal trials, as they were/are conducted in nine international or hybrid criminal tribunals (IMT, IMTFE, ICTY, ICTR, SCSL, ICC, SPSC, ECCC, and STL) constituting the international criminal justice system. By approaching the international criminal trial as a distinct object of theoretical and legal (procedural) inquiry, the book systematically describes, compares, and appraises the arrangements for the conduct of trial adopted in those jurisdictions. It tracks the evolution of the legal regimes and practice relating to the trial stage in international criminal procedure and exposes the reasons for the tribunals to adopt similar or diverging approaches on the same issues. The study also points out the causes of problems faced in ensuring fair and expeditious proceedings and identifies the possible solutions. On the basis of a critical evaluation of the tribunals' law and experience in line with the agreed methodology, the book seeks to define the 'face' of modern and future international criminal trials. It attains this task by proffering a coherent 'normative theory' which might guide legislators and judges when it comes to structuring the trial process in international and hybrid criminal tribunals. Thus, the study pursues four interrelated objectives: (i) developing a *methodology* for the critical (normative) assessment of the law and practice of trial process and international criminal procedure generally; (ii) *conceptualizing* an international criminal trial as a socio-legal event and a formal procedural phase with specific functions in international criminal proceedings; (iii) systematic *description* and methodical *analysis*, comparison, and evaluation of trial procedure and practice in the relevant courts and tribunals; and (iv) offering a 'normative theory' of international criminal trials, being a harmonious set of normative positions and recommendations for the organization of the trial process formulated as an elaborate and coherent model. The study is divided into two volumes (Volume I: 'Nature' and Volume II: 'Organization') and further sub-divided into four parts corresponding to the research objectives.

Volume I opens with Part I, entitled 'A Theory for Trials: Methodological Framework'. It contains three chapters whose purpose is to formulate the research objectives and to develop the methodological framework that explains and justifies the use of the parameters for the evaluation of the trial procedure and practice. **Chapter 1** contains an extended introduction to the study. It gives the *tour d'horizon* of the current state of the international criminal law project and of the related scholarly discipline. The present stage of international criminal justice scholarship is characterized as 'methodological'. Given its post-critical and reconstructive agenda, the present study aims to contribute to that wave of scholarship and its approach is to be seen in this light. The Chapter provides an overview of the origins and development of international criminal procedure as a pendulum swing from the state-made law to judge-made law paradigm and back. With hindsight, it disputes the accuracy of the narrative that views international criminal procedure as an unprivileged body of disparate rules deprived of the attention of primary legislators and bereft of a discernible 'identity'. Although the legislative processes that have brought international criminal procedure into existence in some tribunals have not been flawless or unobjectionable, this body of law and practice is past the stage when ontological anxieties could be taken seriously. Given the structure of international legal authority and the delegation of legislative powers in this field, the perceived 'fragmentation' of international criminal procedure, its (largely) judge-made character, the lack of anchorage to the traditional international law sources do not undermine its legitimacy and do not detract from its normative 'identity'. The problem is rather that international criminal procedure juggles plural identities, with limited ways of ordering them. There is no overarching and coherent theory to understand and harness the identity-based, cultural, and institutional

pluralism and to facilitate informed choices on key procedural matters, including the organization of the trial process. The Chapter sets out the parameters and limitations of the 'normative theory' offered and flags difficulties that any effort to construct it is bound to face. In order to clarify this research agenda, the further sections set out the study's objectives and justify its subject-matter scope. The latter is limited to the tribunals mentioned, to the trial (as opposed to other stages), and to the 'nature' and 'organization' (sequential) aspects of trials. The Chapter then clarifies the 'meta-theoretical' hypotheses serving as the study's working approach; namely, that 'fairness' and 'effectiveness' are appropriate parameters for the evaluation of the law and practice of international criminal tribunals while comparative criminal procedure is not a serviceable normative prism. Finally, the structure and methodology are set out, including the function of the empirical component (semi-structured personal interviews with the practitioners concerning their professional perspectives on international criminal procedure and practice).

Chapter 2 constructs the first pillar of the methodological framework. It considers whether and why 'fairness' may serve as a legitimate normative parameter for evaluating the law and practice of international criminal procedure, what it means in the tribunals' context, and how this parameter is to be employed. 'Fairness' is embedded into the DNA of international criminal procedure and is its normative backbone. The fair trial requirements have powerful effects on international criminal adjudication not only as a result of their incorporation into the tribunals' law. They are also binding on the tribunals as part of general international human rights law codified in the treaties and conventions and contained in other sources that the tribunals are to consult. Given the difficulties of ascertaining the content of formally binding human rights norms from unwritten international law sources, the methodological role of human rights law as a mandatory framework for the interpretation and application of law (e.g. Art. 21(3) of ICC Statute) is arguably more important than its source-based impact. Being both the binding law and the framework for law-interpretation and application, human rights law essentially holds the status of *lex superior* in international criminal procedure. But the binding effect of legal norms says little about the authority of the interpretations of those norms by other courts and monitoring bodies. The Chapter addresses the 'contextualization' debates and clarifies what import the authoritative interpretations of human rights norms by other (judicial) bodies should have in international criminal adjudication. The tribunals not only may but also are under a duty to 're-interpret' human rights standards within their own legal, institutional, and operational contexts. This is a corollary of their adjudicative autonomy, status as courts of law, and the obligation to ensure genuine fairness, i.e. fairness in a specific context of case and legal-institutional environment. The tribunals are well advised to consult the jurisprudence of regional human rights courts and UN monitoring bodies. This is because the legal reasoning therein is highly likely to be substantively relevant and only to the extent that it will be persuasive for the tribunals, as opposed to any binding effect or informal hierarchy between courts. The tribunals may rely on such other jurisprudence for qualitative and rationale-based guidance, but should not uncritically take over quantitative parameters and legal tests as if such case law had been a source of mandatory 'minimum standards'. Whenever adopting, adjusting, or rejecting the *ratio decidendi* from the foreign jurisprudence, the tribunals must properly distinguish cases and provide adequate reasoning for their legal conclusions, as a matter of judicial accountability and integrity. When appraising trial procedure in light of 'fairness', review should focus not on whether the tribunals have correctly identified and followed the foreign legal tests. The metric is rather whether they have ensured the adequate level of fairness and human rights protection in their own context, which can only be demonstrated through properly reasoned decisions. Therefore, their deviation from (as well as reliance on) the rationale-based guidance drawn from human rights case law must be painstakingly substantiated.

Chapter 3 presents the second pillar of the normative framework, the parameter of ‘effectiveness’, as comprising essentially two perspectives: special goals of international criminal justice and (resource) efficiency. The former expresses the broader aspirations of the enterprise whilst the latter counterbalances it by the consideration of what is reasonably possible to achieve given the practical realities and limited resources. The Chapter seeks to introduce the order into the disarray of non-equivalent teleological categories, which have been used interchangeably in the discourse despite the fact that they must be associated with distinct phenomena and concepts. A distinction must be maintained between the socio-political goals pursued when establishing the tribunals, the aims of punishment and sentencing rationales, and the goals and functions of procedure. These diverse goals and functions belong to the different tiers of the project’s teleology; their normative influence on the structures and operation of the criminal process is not the same. The special (institutional) goals of the tribunals (promoting peace, reconciliation, redress for the victims, historiography, and reaffirming the rule of law) may indirectly inform the procedural law-making and practice. While inaccurate analogies are sometimes drawn between the goals and functions of criminal process and macro-objectives of the tribunals, it is misconceived and counterproductive to expect or demand that criminal proceedings directly promote those objectives. Such goal-setting in criminal process leads to a competition with the own priorities of procedure (fairness and truth-finding function). It creates tensions with the purported liberal character of international criminal justice and, ultimately, damages to the same macro-objectives. Turning a criminal trial into a pursuit of social reconstruction vitiates its legalist nature and raises a spectre of a show trial; the best way for the tribunals to contribute to that grand objective in the long-term perspective is to put it aside in the administration of criminal justice. The socio-political goals are not readily subject to translation into the procedural language and may in most scenarios be served by a variety of procedural solutions. Therefore, the nexus between macro-objectives and procedural arrangements is generally tenuous and not strictly deterministic. By contrast, the link between the ‘efficiency’ parameter and the procedural form is more conspicuous: the considerations of cost-effectiveness and resource-saving can directly inform the court organization and procedure and call for reforms (and this has occurred in actual practice). That said, the institutional goals, as ideological premises rather than operative goals, cannot be ignored altogether when devising and reforming the tribunals’ procedural systems. The Chapter advocates a ‘moderate approach’ under which the necessary alignment between institutional ‘ends’ and procedural ‘means’ must be guaranteed. Procedures and practices may not be sustainable if they are in overt conflict with the ultimate objectives of the project. Given its rejection of goal-determinism in respect of procedure, the Chapter deems irrelevant the ‘reductionist’ account (defended by Mirjan Damaška) proposing the need for a ranking between the tribunals’ objectives and selecting a ‘paramount’ goal. As the parameter for the procedure-evaluation, ‘effectiveness’ has a weaker normative traction than the ‘fairness’ perspective. A finding that a procedure or practice is ‘ineffective’ in light of the ultimate goals is not *per se* fatal, but it can be problematic in case of a proven value conflict or a systematic failure. Since any (limited) argumentative advantage claimed by ‘effectiveness’ is situation-specific, caution is in order when using this indeterminate yardstick for criticizing specific arrangements or advocating procedural reforms. This concludes Part I and sets the stage for the analysis of international criminal trials as a distinct object of socio-legal and procedural inquiry in Part II), as well as for the evaluation of trial arrangements in light of ‘fairness’ and ‘effectiveness in Part III.

Part II ‘Phenomenology of the Trial Phase: Conceptual Approaches’ contains the conceptual body of the study, which is predicated on the idea that the term ‘trial phase’ is a procedural translation of the broader, not exclusively legal, notion of an ‘international criminal trial’. The Part consists of three chapters (4-6), which approach (international)

criminal trials as the event from a socio-legal angle and as the phase of the process from a procedural angle.

Chapter 4 employs the insights into domestic criminal trials to construct a conceptual apparatus for the examination of international criminal trials. The trial is seen both as a complex socio-legal phenomenon and as its procedural embodiment. The theoretical perspectives on trial include: (i) the legalist ‘functions’ of the trial phase, as distinct from (ii) broader social effects of trials; and (iii) the role and place of the trial phase in the context of (international) criminal proceedings. The limitations of the comparative law discourse do not rule out the continued epistemic value of its established categories in relation to domestic procedural forms. The Chapter employs this dual comparative and conceptual approach in exposing the main aspects of the nature and organization of criminal trials in national contexts. From a legalist perspective, truth-finding, i.e. the establishment of material facts in the case as the basis for the decision, is the primary and elementary function of what is known as ‘criminal trial’. The differences between procedural traditions and individual jurisdictions in this regard hinge on diverging philosophical understandings of the concept of ‘truth’, rather than on their different prioritization of ‘truth’ or their superior or inferior ability to establish it. The Chapter uses law-and-society lenses and Durkheim’s notion of social rituals to address the ritualistic features of the trial process and to explain why trials look differently across jurisdictions and cultures. The ‘corporeal’ and cognizable elements, including courtroom layout, etiquette, and language, enable the court and the parties to effectively communicate in the course of trial, which facilitates the smooth conduct of the proceedings and the realization of procedural functions (e.g. the establishment of the truth). The in-court communication also has outbound effects, which endows the trial process with an autonomous expressive value. From a legalist perspective, the expressivism of the process should neither be of concern to, nor subject to control by, the court or participants. While incidental messages of fairness and authority of the court reaching the outside world are not illegitimate, the abuse of communicative potential of the process presages the risk of ‘show trials’. The final section, on the role of trial, considers the claim made in criminal justice literature that the criminal trial is under a ‘normative attack’ in national contexts. In the ‘adversarial’ and ‘inquisitorial’ systems, the trial phase occupies different niches in the administration of justice. The ‘one-day-in-court’ approach to adjudication (and finality of jury verdicts) in the former type of systems means the centrality of trial, even though the prevailing resort to negotiated settlements reduces its statistical importance. In the ‘inquisitorial’ systems, the finality of trial decisions is qualified by an extensive appellate review. The bulk of official fact-finding took place in the pre-trial stage whereby the results of official inquest were taken over by trial adjudicator. Therefore, the trial was traditionally not the prime phase of the process or the truth-finding locus of the process. This started to change as the principles of orality and immediacy shifted truth-finding to the trial stage. This increased the complexity and contested character of trials and, therefore, led to a greater resort to consensual settlements, even if unauthorized by law. Even if a significant proportion of cases are not processed through contested trials across the board, the position of trial as the ‘face of criminal justice’ is not in decline. The statistically lower use of contested trials does not directly detract from their continued normative relevance in domestic criminal justice.

The threads of this discussion are taken up in **Chapter 5**. It uses the themes of procedural functions and communicative effects to expose the nature of international criminal trials and to build upon the ideas developed in Chapter 3 regarding the relationship between the goals and procedure. Given that the tribunals are attributed ambitious socio-political goals, the question is whether this should result in the conferral on the trial process of any additional functions, or whether the functions acquire a macro-dimension. In order for international criminal trials to remain a liberal justice enterprise,

they must be restricted to the function of establishing the truth and deciding on the guilt or innocence of the defendant. It is possible to identify a goal-based preference for the interpretation of ‘truth’ as approximating the idea of ‘material’ truth rather than that of a ‘negotiable’ truth in international criminal law. However, the Chapter’s survey of regulations relevant for defining the nature and scope of ‘truth’ sought in international criminal trials and, in particular, of the fact-finding competences of judges, shows that the ‘material’ truth ideal is not sustainable. This suggests that the tribunals have to operate under a *sui generis* concept, which remains institution-specific and undefined in the systemic context. The Chapter advocates strongly the importance of leaving the tribunals to do their primary job of criminal adjudication, within the strict parameters of legal relevance, and refraining from the pursuit of grand objectives of historical narration, social reconstruction, reconciliation, and so on. This position is not irreconcilable with the recognition that the conduct of international criminal trials does exert strong effects beyond the courtroom and that the process is capable of communicating impactful messages to outside audiences. In Durkheimian sense, an international criminal trial is a ritual by which international community seeks to define itself. Admittedly, the institutional objectives of the tribunals (e.g. ‘historiography’) can indirectly influence the nature and scope of the traditional functions of the process (e.g. ‘truth-finding’). But the degree to which such functions may legitimately be subject to re-interpretation in international criminal trials is limited, among others, by the nature and methods of judicial inquiry, the parameters of legal relevance, and the imperative need to preserve the liberal legalist nature of adjudication. The latter includes not allowing international criminal trials to slide into the realm of show trials. Based on a principled distinction between (liberal) international criminal trials and the ominous phenomena such as show and political trials, the Chapter dispels as oxymoronic the idea of ‘didactic’ and ‘liberal’ show trials defended by Mark Osiel and Lawrence Douglas. Adjusting ways in which trials are conducted to enhance their supposed pedagogical and dramaturgical effects on the audience is a precarious approach of attempting to spread liberal messages by illiberal means. The calculated substantive norm expressivism *through* procedure politicizes the trial and turns it into a show, thereby betraying both its primary functions and the remote institutional objectives. Judicial efforts to control or manipulate the ‘judgement of history’ eliminate the prospect that such a judgement would be a favourable one toward the court itself.

Chapter 6 turns to the position of ‘trial’ in the chronology of international criminal proceedings. Depending on the specific context of discussion, the ‘trial’ means either the trial stage or the contested trial (distinct from abridged trials in the wake of a consensual settlement). The Chapter unpacks the claim that ‘trials’ are under a ‘normative attack’ in the context of international criminal justice. To that end, it inquires whether it is correct to view the trial as the true culmination of international criminal proceedings, i.e. as the stage at which the bulk of truth-finding and core decision-making take place. By analogy with domestic settings, its ‘centrality’ comes in question, among others, in connection with two visible tendencies in international criminal procedure: (i) the growing sophistication of pre-trial process; and (ii) the increased resort to negotiated justice in some jurisdictions in the past (e.g. ICTY and ICTR). Based on a historical and comparative overview focusing on these themes, the Chapter concludes that the normative predominance of the trial as the ‘prime stage’ in international criminal procedure has not come to be substantially challenged. The sophistication and multi-functionality of pre-trial proceedings, which dramatically increased during the lifetime of the *ad hoc* tribunals, was attended by the growth of the managerial involvement of judges in the preparation of trial. The adoption of the managerial judging model did not entail granting judges investigative competences or broad access to evidence in the pre-trial phase. Hence, the model does not (is not supposed to) take away from the fact-finding and adjudicative prerogatives of the trial court. In the ICC, a normative threat to the trial prerogatives can be discerned in the procedural device

of the confirmation of charges and related practice. This is particularly so where the Pre-Trial Chambers appear to duplicate core functions of trial by conducting an in-depth analysis of evidence or by applying an elevated standard of proof. However, such approach contravenes the Statute and does not detract from the notion that the trial, and not confirmation, is the truth-finding locus of the proceedings. As for the effects of consensual and negotiated justice (guilty pleas and plea agreements; admissions of guilt), the institution was nominally capable of disturbing the significance of contested trials in the ICTY and ICTR, where a valid guilty plea should lead to conviction. But neither statistical nor normative prevalence of trials was undermined by the practice of guilty plea due what appears to be the judicial and prosecutorial discomfort with negotiated outcomes in this category of cases. This finding attests to the continued viability of full contested trials in international criminal law.

Volume II starts with Part III ('Anatomy of the Trial Phase: Descriptive and Analytical Framework'), which comprises five chapters (7-11). The objective is to provide a methodical description and critical analysis of the procedural arrangements falling within the trial phase in nine jurisdictions. While Chapter 7 formally defines the trial phase, Chapters 8 to 11 are dealing with its distinct components and, in relation to each of them, provide a detailed treatment of the law, practice, and jurisprudence. The exposition of the status in international criminal procedure is preceded by a synthetic discussion of principal domestic approaches for background purposes and followed by an analysis of law and practice in light of the evaluative criteria.

Chapter 7 adopts a formalist approach toward demarcating the trial stage in international criminal proceedings and identifies its sub-units on the basis of legal texts. This serves as a roadmap for the subsequent in-depth discussion of trial procedure, as the findings relating delimitation and phasing justify the coverage of the segments of the trial stage in Part III. The legal instruments of the tribunals do not define the milestones of procedural chronology with sufficient clarity. Nor are they uniform in demarcating the trial stage in the proceedings and in defining the internal structure of that stage. In the ICTY, ICTR, SCSL, and STL, the line of distinction between pre-trial and trial process is not strictly drawn. The stage-allocation of the preliminary proceedings before the Trial Chamber (initial and further appearances and trial preparation activities) presents problems due to the coincidence of the authority for the trial preparation and adjudication in the trial court. The statutes allocate these activities under 'trial proceedings', while the Rules denominate them as 'pre-trial'. In other courts (ICC, SPSC, and ECCC), the institutional separation between the pre-trial and trial judicial authorities enables a stricter demarcation, whereby trial-preparation activities are properly part of the trial stage. Based on the status in all jurisdictions surveyed, the Chapter proposes a terminological distinction between the 'trial proceedings' and the 'trial', as the subset of core trial activities subsumed within the former interval. 'Trial' is defined as the central stage of 'trial proceedings' during which the case is heard on the merits, including non-evidentiary submissions on the merits and evidentiary presentations by the parties and participants. 'Trial' in a strict sense includes opening statements, presentation of evidence, and closing arguments/statements; in addition, the trial process at the ECCC and ICC features the formal stage for preliminary issues (referred to respectively as the 'initial hearing' and the 'commencement of trial'). Next to 'trial' *stricto sensu*, 'trial proceedings' in a broad sense encompass measures taken by the court and the parties in the lead up to, and in the preparation for, trial and essential post-trial activities (deliberations and judgment). In light of these distinctions, Part III covers the trial-preparation phase, which is inherently linked with the conduct of 'trial' in all jurisdictions, and the proceedings falling within the 'trial' proper. Finally, the Chapter uses examples from the ICC practice to demonstrate the practical importance of drawing clearer distinctions between the different sub-phases of trial proceedings. The legal instruments define the scope of rights and duties of the parties and competences of the

court with reference to specific milestones. The lack of clarity and regulatory consistency on these technical matters has undermined procedural certainty and resulted in litigation that could best be avoided.

Chapter 8 contains a detailed examination and analysis of the law and practice of the tribunals relating to the proceedings taking place prior to the commencement of ‘trial’. Its analytical focus is on the activities aimed at trial-preparation, including the diverse conferences held in the pre-trial stage, pre-trial filing obligations on the parties, and managerial competences of the trial court. The Chapter looks closely at the path-breaking experience of the *ad hoc* tribunals where the judges’ managerial role prior to trial was expanded significantly with view to enabling them to set limits to the volume of the case to be tried. It also gives an overview of the analogous procedures at other courts and tribunals. Admittedly, the tribunals’ performance in this respect can give rise to varied assessments. Solid empirical data offered by Langer and Doherty suggest that the ICTY managerial reforms failed. However, the Chapter does not exclude that the managerial model is still a promising and valuable approach in ensuring the more efficient trial process, provided that it is implemented in a confident, consistent, and balanced fashion. ‘Managerial judging’ does mark a departure from the ‘pure’ adversarial philosophy. But when properly applied, it does not raise ‘fairness’-based objections. It is not in a clear conflict with international human rights law and relevant interpretations provided in the human rights jurisprudence. The consideration of the special goals of the tribunals and *a fortiori* operational ‘efficiency’ do generally not militate against granting judges moderating powers in relation to the case at trial, although serious goal-related tensions have arisen in practice. For example, the judicial powers aimed to counteract the prosecutorial tendency to ‘overcharge’ by qualifying the charging prerogatives of the prosecutor (ICTY Rule 73bis(D) and (E)) proved highly contentious. The OTP regarded them to be unprincipled concessions to the considerations of judicial economy and the Completion Strategy incongruent with the objectives of international criminal justice. On the balance of arguments, an overt conflict with the goals that would warrant curbing these powers under the ‘moderate approach’ (Chapter 3) cannot be identified. The resistance to the model and institutional tensions between the managerial court and the parties may have been caused by circumstances that are not bound to be reproduced in other contexts. These include the piecemeal process of the reforms, the novelty of the managerial approach (deviating from the original paradigm), the parties’ resistance, and the judges’ own skepticism about the new powers leading to uneven insistence on full and timely compliance. Finally, the Chapter offers recommendations that could help address these problems. Such would be the measures aimed at fixing the half-hearted legislative solutions, removing the causes of attitudinal ambivalence towards managerial judging among the practitioners, and proposing how the model is to be configured in a more balanced way so that institutional controversies and side litigation can be minimized or avoided.

Chapter 9 provides an overview of the legal standards and practice in the area of opening statements. This moment marks the commencement of the hearing of the case on the merits in all jurisdictions surveyed. The discussion focuses on the sequencing of the opening stage, actors competent to deliver the statements, their expected content, and the scope of the judicial powers to moderate the content and length. The analysis of the law and practice against the normative framework does not reveal fundamental concerns, although some of the regulations and practices call for optimization. Subject to the recognition of weak determinism of institutional goals in respect of procedure, the Chapter recommends allowing the accused an opportunity to make a personal statement, whether at the start or at the later stage in trial and independently of the defence’s opening statement. This helps the smooth conduct of trial, enhances the perceived legitimacy of the process, and removes the artificial barriers between the accused and the court. The opportunity to

make a personal statement of extra-testimonial character is provided in ICTY Rule 84*bis* (which was given an expansive interpretation by some Chambers) and, in different forms, at the ICC, ECCC, and STL. This procedure is to be endorsed, but only provided that the fair trial rights, including the right against self-incrimination, are observed and that the statement is delivered subject to judicial control. The Chambers hold adequate powers to curb the risk of abuse that might render this device inimical to the institutional goals. From the ‘efficiency’ perspective, opening statements constitute a valuable means for the judges to acquire an early insight into the party’s case, given the massive volume of evidence normally presented in international criminal trials. The professional character of the bench speaks against the overt use of statements for trial advocacy and invite their more pragmatic application. The expectations regarding the time-saving effects of the ICTY Rule 84*bis* procedure have remained unfulfilled, but the address may provide the court with potentially useful insights into the personal perspectives of the accused on the issues raised by the charges. The Chapter welcomes the multivariate STL model, whereby several avenues are available to the defendant for providing the court with the relevant information. This includes the possibility for the court to ask the defendant specific questions at any stage (with the probative value of any statements or answers to be decided upon) and for the accused to precede the statement or answers by a solemn declaration. Finally, the Chapter advocates a flexible approach under which the defence should be allowed to elect the timing of its opening statement (after the prosecution statement or before the opening of the defence case). Where the victims are allowed the evidence on the guilt or innocence to be led on their behalf, it is procedurally inconsistent to deny them an opportunity to make an opening statement through a legal representative, provided that it is relevant and delivered under control of the Chamber.

Chapter 10 turns to the evidentiary stage of (contested) international trials. It provides a systematic overview of the law and jurisprudence relating to the sequencing and modes of presenting evidence and the modalities of questioning witnesses. There are numerous differences in the regulation of the structure of case presentation among the institutions of international criminal justice. The Chapter discusses at length the essentially two-case approach (ICTY, ICTR, and SCSL), the one-case (thematic) approach (ECCC), the indeterminate approach (ICC), and the three-case approach (STL). The (gross) order of evidence-presentation (the sequence of evidentiary blocks per party/participant or per other organizing principle) and rules governing the (fine) order and modes of questioning witnesses are model-specific. In the courts adopting other than one-case approach, the common law modes of questioning (examination-in-chief; cross-examination; and re-examination) have been adopted. Except for the judicial questioning (subject to the principle of judicial impartiality alone) and the questioning by victims’ legal representatives (subject to the default and reversible preference for the neutral mode of posing questions), the principles based on common law have been used by extension to govern the character and scope of questioning. This illustrates the tribunals’ pragmatic use of domestic rules as ‘building blocks’ of their own procedure, in a direct sense. The normative evaluation does not warrant a strong preference in favour of either the ‘adversarial’ or ‘inquisitorial’ scheme for the presentation of evidence. Human rights law is inconclusive on the questions of the order of the presenting evidence in a criminal trial and appropriate modes of examining witnesses. Some scholars have identified tensions between the special goals of international criminal justice and procedural efficiency, on the one hand, and the ‘adversarial’ model adopted in most international and hybrid criminal courts, on the other hand. However, the conclusions that the ‘adversarial’ trial format is *per se* incompatible with the unique nature and goals of international criminal justice and that the conceivable alternatives would have been more appropriate is not warranted. The choice of the structure and modes of proof-taking in international criminal law should not proceed from the notion that any specific domestic approach is inherently more fitting in

light of the socio-political objectives or that it by definition can ensure a more expeditious and streamlined process in this context. Finally, the Chapter recommends reformulating the judicial competence to pose questions to witnesses as a positive obligation to ask witnesses any question deemed necessary for the establishment of the truth. This would strengthen the truth-finding mandate of the trial judges and subject the judicial questioning to more transparent and clearer principles.

The last Chapter of Part III, **Chapter 11**, covers the closing stage of international criminal trials. This stage includes oral closing arguments/statements by the parties and participants and the filing of final briefs before the court retires for deliberations on the trial judgment. Closing arguments and final trial briefs are deemed important advocacy tools and functional elements of the process. They enable the parties to effectively argue their case in a structured and in-depth debate on evidence, which can assist the court in deliberations. The Chapter compares the law and practice of the tribunals on the following issues: actors competent to make oral and written closing submissions; the order of oral statements, including rebuttal and rejoinder arguments; and the content and length of the arguments and briefs, including the interplay between the two, as well as the scope and forms of judicial supervision. Based on the comparative overview and normative evaluation of the procedural frameworks and practice, the Chapter offers the following recommendations. Subject to the requisite judicial control to prevent abusive interventions and uninformed self-incrimination, the opportunity of the last word should generally be granted to defendants, not least because this enables them to make useful clarifications and address final matters. The ICC practice of judges posing specific questions on matters arising from the parties' final trial briefs and closing arguments during the closing hearing is to be welcomed, as it enhances the practical value of the submissions. The provision of rebuttal and rejoinder arguments is desirable as they ensure a more structured, transparent, and conclusive debate on the evidence and assists the decision-making. Where victims participate in case presentation, including the delivery of closing arguments, there is no evident reason to deny them a rebuttal (cf. approach reflected in the STL RPE). Finally, final trial briefs are an indispensable element of procedure at the closing stage. Although the obligation to prepare detailed submissions in advance of oral arguments increases the workload on the counsel, those briefs are invaluable *aides-mémoire* assisting the judges in deliberations and drafting of a judgment. The ICTY and ICTR rule to the effect that parties shall—rather than may—address sentencing matters in their closing arguments is problematic and should not be reproduced. More generally, the stages of guilt-determination and sentencing in the tribunals with the two-case approach to presentation of evidence at trial should be separate so as to enable the parties to make tailored sentencing submissions in case of conviction.

Part IV 'Faces of Trials: From Present to the Future' consists of one concluding chapter. **Chapter 12** executes the principal goal of the study and formulates the 'normative theory' for international criminal trials by pulling together the threads of the normative analyses in the preceding chapters. It starts by reappraising the methodological framework formulated in Part I, hinging on the perspectives of 'fairness', 'special goals of international criminal justice', and 'efficiency' and excluding (domestic) comparative criminal procedure. The Chapter revisits the validity of that framework with hindsight of the performance of the normative criteria in the evaluation of trial arrangements in international criminal procedure (Part III) and in light of the actual uses of comparative law data by the tribunals. Thus, the Chapter engages with the question of which of the perspectives has had the strongest normative pull in respect of international criminal procedure. The discussion confirms the hypotheses formulated at the outset of the study about: (i) the unsuitability of comparative law as a normative parameter; (ii) the normatively powerful but indeterminate effects of human rights law in international criminal procedure; and (iii) the abstract and tenuous impact of the teleology of

Summary

international criminal justice on its procedural forms. The Chapter concludes that it is the third prong in the normative framework—‘efficiency’—whose impact on the formation and evolution of international criminal procedure has been decisive and defining, also in terms of the emerging shape and format of international criminal trials. Despite not being nearly as prominent as other oft-used perspectives, it amounts to the normative *éminence grise*—a powerful determinant and gap-filler—in international criminal procedure. The ‘efficiency’ considerations have predetermined the development of international criminal procedure ‘from familiar to pragmatic’ and its emancipation from the domestic reference points. This perspective, underappreciated in the international criminal law discourse, emphasizes flexibility and pragmatism and, therewith, the need for pluralism on the systemic level. These material insights inform the author’s choices on a range of matters made for the purpose of articulating the ‘normative theory’. The remaining sections of the Chapter summarize the positions taken and findings made in the previous parts with regard to the nature and organization of international criminal trials. The ‘normative theory’ builds on the foundation of juryless trials and no default preference for one-case or multiple-case approach to investigations, which, it is argued, should remain a situation-specific choice. The ‘normative theory’ asserts the indispensability of a robust and firm pre-trial case-management. But the efficiency gains of ‘managerial judging’ should neither be overestimated nor sought to be maximized at all costs, given that the defence may not be forced to cooperate fully with the managerial court. Further, the ‘normative theory’ accepts the need for the non-evidentiary segments of trial process (opening statements and closing arguments) and links them primarily to the pragmatic rationales of assisting the comprehension of evidence rather to trial advocacy. In respect of the presentation of evidence, the theory is premised the proven need for flexible, pragmatic, and pluralist approaches. It cannot ignore and dismiss what it calls the ‘postmodern suspense’ in procedure: the continuing fundamental uncertainty as to which of the trial models is epistemologically and normatively preferable for international criminal tribunals. Accordingly, the theory advocates the need for a variable model of presentation whereby none of the procedural options should be excluded for any given jurisdiction. The courts should be allowed, to the extent possible, to tailor the order of presentation and modes of questioning to the epistemic needs and challenges posed by the relevant context, rather than operate on the basis of rigid legislative choices made on unpronounced and uncertain grounds. Importantly, the operation of the ‘variable’ model must be subject to the absolute requirement of procedural certainty for the parties and participants. Pluralism and variability are in themselves not incompatible with procedural certainty: the latter can be ensured, among others, through inclusive consultations on the applicable trial procedure such as those taking place in the ICC. Further, the theory recommends a bifurcate approach to the structure of trial. The tribunals are advised to allow the parties make sentencing submissions and to hold separate deliberations on the sentence, when and if the defendant has been found guilty. Next to that, the Chapter argues that international criminal judges should combine—and carefully balance—the roles of active case-managers and truth-seekers; it also advocates granting the defendant enhanced procedural opportunities to actively participate in his or her own trial, subject to all required safeguards and checks. The book concludes with observations on the feasibility of a coherent hybrid trial culture in that context. The Chapter regards this prospect with skepticism. Instead of investing in the grand project of a coherent culture, the legal-cultural pluralism of international criminal procedure should be embraced and the advantages it offers enlisted. This could be the way to enhance the fairness and effectiveness of international criminal justice in the diverse forensic contexts in which it intervenes.