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The Objectives of International Punishment

Denis Abels¹

1. Introduction

International criminal justice is an ambitious undertaking. This is due to high expectations on the part of different stakeholders. The international criminal tribunals are generally expected to serve such ‘grand’ goals as promoting or maintaining peace and security, historiography, upholding and advancing the rule of law, fostering or contributing to reconciliation and giving a voice to victims of mass atrocity. The sentencing judges of international criminal tribunals and courts have added to those objectives the classic aims of punishment, *i.e.*, retribution and prevention (the latter through deterrence, incapacitation and, to a much lesser extent, rehabilitation), which they appear to import from the domestic context.

The aim of this chapter is to lay the basis for an inquiry into the objectives of the *enforcement* of international punishment. Prison law is an area that is already characterized by having many, sometimes competing, objectives: resocialisation or rehabilitation, normalisation and a rights-based approach may clash with security, order and safety considerations. This chapter addresses the issue of whether the objectives of international criminal justice should also play a direct role in the tribunals’ penal regimes. In light of the fact that some scholars have pushed for it to play a greater role in the tribunals’ penal regimes, the focus will be on the objective of reconciliation.

In the same way that it is often assumed that the objectives of international criminal *procedure* can only be fully understood by linking them to the goals of international criminal justice² and that the latter provide a basis for analysing the efficiency of the trial process, it is often assumed that the objectives of international enforcement and the objectives of international criminal justice (and those of its different components, including the sentencing stage), are ontologically connected and must be aligned. This way of ‘systemic’ thinking presumes that the different components (establishment and “legislation”, sentencing and execution) of international criminal justice are subject to the same objectives that govern international criminal justice as a whole. It also presumes that the different components of international criminal justice are hierarchically connected on the basis of sequence: since

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² J.D. Ohlin, *A Meta-Theory of international Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. Int’l L. Foreign Aff., 2009, p. 77-120, at 83.

sentencing precedes and ultimately constitutes the justifying basis for acts of enforcement, objectives of enforcement must be aligned to the objectives of sentencing.

Swart has stated that, '[w]here tensions between the means and ends of international criminal justice are revealed, the question arises of how to solve them. Different options may then present themselves: adjusting the means to the ends, adjusting the ends to the means, or a combination of both'.³ However, this line of thinking is ultimately based on the idea that the courts' effectiveness can be assessed on the basis of the achievement of some pre-set objectives.⁴ If reconciliation is one of the ultimate objectives of international criminal justice, while the penal regimes are based on retribution and directed towards normalization and, perhaps, rehabilitation, does this imply that the latter require adaptation?

The identification of the objectives of enforcement requires, in the first place, that the aforementioned *systemic* assumptions be verified or falsified, which is the purpose of this chapter. It is necessary to ascertain whether the objectives governing international criminal justice as a whole and the objectives of sentencing should govern international enforcement. In other words, it needs to be ascertained whether, and if so, to what extent a systemic approach to the identification of objectives of international punishment is appropriate. After all, it may be argued that such socio-political goals,⁵ which have been proclaimed at the macro level, should only govern the enforcement of sentences at the micro level, *i.e.*, in respect of each convicted person, to a limited extent.⁶ Only after this question has been answered can one start identifying such objectives, which is beyond the scope of this chapter. The purpose of this chapter, it should be recalled, is to lay the basis for an inquiry into such objectives. In doing so, I will argue for a modest approach towards applying socio-political goals to the tribunals' penal regimes.

A final (though by no means insignificant) point that needs to be raised here concerns the nature of the 'objectives' referred to in this chapter.

The objectives of international criminal justice as set by either the tribunals' mandate givers or internal constituencies on the macro level can be regarded as the tribunals' *official*

³ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

⁴ There are countless other factors which may have an impact on (the perceptive of) effectiveness. Shany identifies such factors as judgment compliance, usage rates, impact on state conduct. Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 227. See also Vasiliev, who defines effectiveness as 'the interplay and tension between the considerations related to the goals of the tribunals and those relating to *efficiency*'; S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 163.

⁵ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 163.

⁶ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 101.

objectives.⁷ They may to some extent be compared to the principles of international criminal law in the sense that both are often vaguely defined and open-ended (i.e. they can never be completely concretized).⁸ Unlike legal principles, these socio-political objectives may conflict inter-se,⁹ which may necessitate designating a hierarchy among them or fixing their relative weight in order to render them operative.¹⁰ These official objectives are also the tribunals' *ultimate* ends, as opposed to objectives that are 'strategic or intermediate in nature' and may therefore more easily be altered.¹¹ The official objectives must, according to Shany, be distinguished from *operative* objectives into which the formal objectives may be translated over time in the tribunals' discharge of functions and which 'reflect the specific policies that the organization actually prioritizes'.¹² According to him, '[t]he general nature of some abstract goals renders them imprecise and leaves considerable interpretive discretion as to translating such goals into concrete judicial policies and operative or intermediate judicial goals'.¹³

⁷ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 231.

⁸ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 231.

⁹ C. Stahn, *Between 'Faith' and 'Facts': By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 259; M. Damaška, *What is the Point of International Criminal Justice*, 83 *Chicago-Kent Law Review*, 2008, p. 329-365, at 331-334. Damaška points for example to the possible tension between stopping an ongoing conflict and bringing perpetrators to justice, between individualizing criminal responsibility and historiography or between respecting the accused's procedural rights and giving a voice to victims. For an opposing view, see S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 204. The comparison to legal principles ends here, in relation to this characteristic. Principles, being the law's core values, cannot clash and may not be compromised, balanced or weighed against one another. Rather, they demand full respect in all situations to which they are relevant and must be adhered to without exception. Since principles provide for the law's justification and rationale, making exceptions to their applicability would erode the decision's or rule's (which is based on a particular principle) constitutional basis. See Sergey Vasiliev, 'General Rules and Principles of International Criminal Procedure: Definition, Legal Nature, and Identification', in: G. Sluiter and S. Vasiliev (eds.), *International Criminal Procedure – Towards a Coherent Body of Law*, Cameron May/CMP Publishing Ltd, 2009, p. 53. I do not see how that applies to the tribunals' ultimate objectives.

¹⁰ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 233. M. Damaška, *What is the Point of International Criminal Justice*, 83 *Chicago-Kent Law Review*, 2008, p. 329-365, at 339.

¹¹ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 232.

¹² Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 231.

¹³ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 233.

2. The objectives of international criminal justice and international sentencing

As stated above, the question that this chapter seeks to answer is whether from this wide array of ‘ultimate’ and sentencing objectives any conclusions may be drawn as to the shape that the *enforcement* of sentences in international criminal justice must take. Mulgrew appears to answer this question in the affirmative where she argues that ‘[i]n addition to an individualistic rehabilitation focus, international sentences of imprisonment should also be applied in a manner that achieves the wider goals of the international criminal justice system and meets the expectations of the stakeholders of the international penal process’.¹⁴ Goals such as reconciliation and the maintenance of peace should, according to her, be actively pursued by the tribunals in their penal regimes. She rightly points to the ICC’s release criteria, which take into account reconciliatory attempts undertaken by convicted persons towards victims, and argues that this logically demands a similar focus during the enforcement of sentences. Other scholars have argued that the tribunals’ ultimate objectives are simply too ambitious and that some of them should either be scaled down or even abandoned.¹⁵

The objectives of international criminal justice can be found in their Statutes’ preambles, resolutions, other official documents and the tribunals’ case law. Various scholars have identified the following as ‘idiosyncratic goals’ of international criminal justice: ‘reprobation and stigmatization of the offender by the international community’,¹⁶ ‘the reassurance that the international legal system is implemented and enforced’,¹⁷ ‘providing satisfaction to the victims’,¹⁸ ‘to put an end to conflict and to prevent its reoccurrence’,¹⁹ ‘to change a culture of impunity’,²⁰ ‘to contribute to the restoration and maintenance of (international) peace and

¹⁴ R. Mulgrew, *Towards the Development of the International Penal System*, Cambridge: Cambridge University Press 2013, p. 215. See, in a similar vein but not specifically with respect to the enforcement phase, J. Sarkin, *Enhancing the legitimacy, status, and role of the international criminal court globally by using transitional justice and restorative justice strategies*, 6 *Interdisc. J. Hum. Rts. L.*, 2011-2012, p. 83-101. He even argues (at p. 86) that ‘[i]f prevention were to become a central objective and steps were taken to operationalize it, the ICC could have a dramatic effect on the frequency of massive human rights abuses’.

¹⁵ M. Damaška, *What is the point of international criminal justice?*, *Chi.-Kent L. Rev.* 83, 2008, p. 329-365.

¹⁶ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

¹⁷ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

¹⁸ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

¹⁹ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

²⁰ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

security’,²¹ ‘to re-establish the rule of law’,²² ‘to provide an accurate historical record of events that make it more difficult for offenders and others to negate history’²³ and ‘to promote a process of reconciliation in the region where international crimes have been committed’.²⁴ Some of these objectives are clearly irrelevant to the enforcement phase, such as creating a historical record, which seems to be more appropriately applied to the trial phase (insofar as this is possible and/or desirable).²⁵ Similarly, the goal of ‘norm strengthening’ is arguably better served in the context of sentencing.

As noted by Stahn, the selection and application of the socio-political goals is not uncontroversial. Some authors have expressed ‘doubts about whether extra-judicial motives could be part of the legitimate or primary goals of criminal justice’, while ‘[o]thers concede that domestic criminal-law goals may require adjustment in an international context and that there might be modest space for broader ‘transformative’ goals, even as secondary goals’.²⁶ Ohlin takes a more conservative view: ‘[t]hose who are protective of the sanctity and autonomy of the judicial process are sceptical that participants in the trial process should – in any way – be guided by the global aims of peace and security’.²⁷ Nevertheless, in his view this is not a cause for concern, since the criminal trial operates at different levels: the level of institutional design – at which it may operate to restore peace and security- and the ‘internal level of adjudication’ (*i.e.* the micro level), where it ‘operates autonomously to determine individual culpability. Advocates for the autonomy of the criminal law may be correct when

²¹ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

²² B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100; C.J.M. Safferling, *Can Criminal Prosecution be the Answer to massive Human Rights Violations?*, *German Law Journal* 5, 2004, p. 1469-1488, at 1475. See, in particular, Ohlin, who pleads for a rule of law –based understanding of international criminal procedure, wherein ‘international criminal procedure is also valued for its intrinsic, not instrumental, functions’, *i.e.* vindicating the rule of law. J.D. Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 *UCLA J. Int’l L. Foreign Aff.*, 2009, p. 77-120.

²³ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100.

²⁴ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 100. See, also, M. Damaška, *What is the Point of International Criminal Justice*, 83 *Chicago-Kent Law Review*, 2008, p. 329-365, at 331. See also the list provided by Ohlin: J.D. Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 *UCLA J. Int’l L. Foreign Aff.*, 2009, p. 77-120, at 85-90; S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 164-171.

²⁵ M. Damaška, *What is the Point of International Criminal Justice*, 83 *Chicago-Kent Law Review*, 2008, p. 329-365, at 339, note 15.

²⁶ C. Stahn, *Between ‘Faith’ and ‘Facts’: By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 259.

²⁷ J.D. Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 *UCLA J. Int’l L. Foreign Aff.*, 2009, p. 77-120, at 90.

they insist that considerations of the former should not infect the operations of the latter'.²⁸ The same argument is made in this chapter in relation to the phase of enforcement. The international sentencing objectives can be found in the tribunals' case law and are largely based on the classic domestic aims of punishment, *i.e.*, retribution and prevention (general and special deterrence, incapacitation, rehabilitation). Retribution is regarded as the primary aim of sentencing,²⁹ and must, according to the tribunals, be understood as public reprobation and stigmatization by the international community.³⁰ Punishment expresses the international community's condemnation of criminal act and perpetrator.³¹ In *Aleksovski*, the Appeals Chamber stated that retribution is *not* to be understood as fulfilling a desire for revenge but as 'duly expressing the outrage of the international community at these crimes' and that sentences rendered by the International Tribunal 'should make plain the condemnation of the international community of the behavior in question and show that 'the international community was not ready to tolerate serious violations of international humanitarian law and human rights.''³² Similarly, Nuremberg Prosecutor Robert H. Jackson argued that '[t]he satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied case.'³³

In *Stakić* the Appeals Chamber held that purposes other than retribution and deterrence, such as rehabilitation, should be taken into account but not accorded undue weight.³⁴ At the same time, however, most 'sentencers' are of the view that deterrence should not be accorded too

²⁸ J.D. Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. Int'l L. Foreign Aff., 2009, p. 77-120, at 90.

²⁹ Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 Journal of International Criminal Justice, Oxford University Press, 2003, p. 69. See D. van Zyl Smit, *Punishment and Human Rights in International Criminal Justice*, 2 Human Rights Law Review 1, 2002, p. 10 and the case law cited there: ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, par. 182; ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, T. Ch., 16 November 1998, par. 1225; ICTY, Judgement, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch., 14 January 2000, par. 852.

³⁰ ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 29 July 2004, par. 678.

³¹ ICTY, Sentencing Judgement, *Prosecutor v. Jokić*, Case No. IT-01-42/1-S, T. Ch. I, 18 March 2004, par. 31,32. T Ch; ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 29 July 2004, par. 678 ICTY, Judgement on Sentencing Appeal, *Prosecutor v. Bralo*, Case No. IT-95-17-A, A. Ch., 2 April 2007, par. 81; ICTY, Judgement, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&IT-96-23/1-A, A. Ch., 12 June 2002, par. 385.

³² ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000 par. 185; see also ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1075 stating that 'retribution should not be misunderstood as a way of expressing revenge or vengeance'.

³³ William A. Schabas, *supra*, footnote 66, p. 500.

³⁴ ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-A, A. Ch., 22 March 2006, par.402, citing ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 806.

much weight.³⁵ The idea that the gravity of punishment to be imposed on a concrete person should not be dictated by the aim of deterring others from committing similar crimes in the future, which is affirmed in the tribunals' case law,³⁶ can be traced back to the Kantian notion that persons must be treated as ends in themselves, rather than means to achieve certain ends. Deterrence further suffers from the serious deficit that it has not been proven to actually work.³⁷ The premise on which deterrence is based, *i.e.*, an individual weighing the pros and cons before committing a crime, is often inaccurate or simply untrue.³⁸ This certainly seems to be the case in the contexts of mass atrocity crimes where, in Safferling's words, perpetrators are 'overcast with ideology, fanaticism or religious fundamentalism, and who conceive themselves to be over and above the law anyhow' and system criminality, which is characterized by a state or state-like entity facilitating or encouraging such acts.³⁹ Vasiliev states that '[a]s known from domestic contexts, the faith in the general preventive power of criminal law is speculative and largely untested in empirical terms, as opposed to the existing enquiries into special deterrence and recidivism'.⁴⁰

Where reference *has* been made to deterrence as a sentencing rationale, the tribunals' judges have acknowledged that the general deterrent effect is merely 'assumed', and formulated a rather limited working definition of general deterrence: 'with regard to general deterrence, imposing a punishment serves to strengthen the legal order in which the type of conduct involved is defined as criminal and to reassure society of the effectiveness of its penal provisions.'⁴¹ It has been held that, although 'in adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby *detering future violations* and contributing to the re-establishment of

³⁵ ICTY, Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, A. Ch., 24 March 2000, par. 185; ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 801-803; ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1078; ICTY, Judgement on Sentencing Appeal, *Prosecutor v. Nikolić*, Case No. IT-94-2-A, A. Ch., 4 February 2005, par. 46.

³⁶ ICTY, *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, T. Ch., 27 September 2006, par. 1137. Cited by Swart in B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 103.

³⁷ C.J.M. Safferling, *Can Criminal Prosecution be the Answer to massive Human Rights Violations?*, *German Law Journal* 5, 2004, p. 1469-1488, at 1483.

³⁸ M. Damaška, *What is the point of international criminal justice?*, *Chi.-Kent L. Rev.* 83, 2008, p. 329-365, at 344.

³⁹ C.J.M. Safferling, *Can Criminal Prosecution be the Answer to massive Human Rights Violations?*, *German Law Journal* 5, 2004, p. 1469-1488, at 1484.

⁴⁰ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 176.

⁴¹ ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, A. Ch., 29 July 2004, par. 678.

peace and security in the region’,⁴² ‘the Trial Chamber’s duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.’⁴³

Rehabilitation (in sentencing, not as an enforcement rationale) has been defined by the ICTY Appeals Chamber as ‘reintegrating the guilty accused into society’.⁴⁴ Some accused have argued on appeal that the Trial Chamber had erred in not taking into consideration rehabilitation as a sentencing purpose in their case.⁴⁵ However, in *Čelebići* the Appeals Chamber held that rehabilitation usually has a role to play ‘when younger, or less educated, members of society are found guilty of offences. It therefore becomes necessary to re-integrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this respect’.⁴⁶ The Appeals Chamber pointed to the serious nature of the crimes dealt with by the International Tribunal, thereby arguing that these cases were not comparable to national criminal cases and held that, therefore, rehabilitation cannot ‘play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal’ and ‘cannot be given undue weight.’⁴⁷ The question is, of course, what the scope is of the latter remark. In this regard the tribunals have on the one hand reiterated that retribution and deterrence must be considered the main

⁴² ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 800, citing with emphasis par. 72 of the ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, A. Ch., 2 October 1995. It should be noticed that deterrence is used here in its role as general justifying aim for the establishment of the ICTY, not in answering the question of how severe to punish in a concrete case.

⁴³ ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 717; ICTY, Judgement on Sentencing Appeal, *Prosecutor v. Nikolić*, Case No. IT-94-2-A, A. Ch., 4 February 2005, par. 46.

⁴⁴ ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 805; ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1079.

⁴⁵ See, for example, ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 804.

⁴⁶ *Id.*, par. 805 citing Trial Judgement, par. 1233.

⁴⁷ ICTY, Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, A. Ch., 20 February 2001, par. 806; ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1079. ICTY, Judgement on Sentencing Appeal, *Prosecutor v. Deronjić*, Case No. IT-02-61-A, A. Ch., 20 July 2005, par. 136. See in this regard also ICTY, Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-A, A. Ch., 22 March 2006, par. 371 in which the Appellant argued that the Trial Chamber erred in refusing to hear the evidence of an expert criminologist or psychiatrist which would have been relevant to sentencing as it related to his propensity to commit crimes. The Appellant had claimed that such evidence was essential to his case and would have led to a lesser sentence. The Appeals Chamber held that a Trial Chamber has the discretion to determine which experts it wants to hear depending on the circumstances of the case before it. It was stated in *Blaškić* that in light of the gravity of many of the crimes, the weight of rehabilitative considerations may be limited in some cases, see ICTY, Judgement, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, T. Ch., 3 March 2000, par. 782.

purposes in international sentencing⁴⁸ while on the other expressing their ‘support for rehabilitative programs in which the accused may participate while serving his sentence’,⁴⁹ thereby acknowledging the distinction between sentencing rationales and objectives of enforcement.

As correctly observed by Swart, the tribunals have the tendency to equate the idiosyncratic objectives of international criminal justice with the aforementioned sentencing objectives imported from the domestic context. In *Nikolić*, for example, it was held that the aim of the Chamber was to come as close as possible to justice for both victims and their relatives and the accused, with justice being ‘of paramount importance for the restoration and maintenance of peace.’⁵⁰ Retribution is equated with public reprobation, norm strengthening and stigmatization, and is seen as acknowledgement of the harm done to victims, while the different modes of prevention are considered to strengthen the legal order.⁵¹ More convincing is the argument adduced by Vasiliev, that it is dangerous to transpose the socio-political goals to the sentencing phase, since ‘[i]nordinate attention to institutional objectives when determining an individual sentence may result in a failure to hand down the sentence faithfully reflecting the person’s level of culpability, gravity, nature and circumstances of the crime, and the relevant individual circumstances’.⁵² The tribunals’ line of reasoning does not constitute an argument for explicitly aligning the tribunals’ penal regimes to the ultimate goals, since it suggests that sentencing objectives and objectives of punishment originating in the domestic context are perfectly capable of achieving the idiosyncratic socio-political goals. The next paragraph discusses whether there is any need for such alignment in the first place.

⁴⁸ ICTY, Judgement, *Prosecutor v. Furundžija*, Case No., IT-95-17/1-A, A. Ch., 21 July 2000, par. 291; ICTY, Judgement on Sentencing Appeal, *Prosecutor v. Deronjić*, Case No. IT-02-61-A, A. Ch., 20 July 2005, par. 136. See also ICTY, Judgement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 17 December 2004, par. 1079 in which it was stated that ‘[i]t would violate the principle of proportionality and endanger the pursuit of other sentencing purposes if rehabilitative considerations were given undue prominence in the sentencing process’.

⁴⁹ ICTY, Judgement, *Prosecutor v. Furundžija*, Case No., IT-95-17/1-A, A. Ch., 21 July 2000, par. 291. See also ICTY, Sentencing Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, T. Ch., 5 March 1998, par. 16 and ICTY, Judgement, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, T. Ch., 14 January 2000, par. 849.

⁵⁰ ICTY, Sentencing Judgement, *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, T. Ch. I, 2 December 2003, par. 4. The Appeals Chamber endorsed this view, see ICTY, Judgement on Sentencing Appeal, *Prosecutor v. Bralo*, Case No. IT-95-17-A, A. Ch., 2 April 2007, par. 82, footnote 350.

⁵¹ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 104.

⁵² S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 169.

3. The need for alignment of the objectives of international enforcement with those of international criminal justice and international sentencing

3.1.A systemic approach towards international criminal justice?

The (interrelated) questions that are central to this paragraph are whether the objectives that are said to govern international criminal justice as a whole must govern all its distinct components and whether the objectives directing a certain stage must also be taken into account in the subsequent stage. It may appear that, in order for international criminal justice to be (at least potentially) effective and credible, both questions must be answered in the affirmative. As Wright puts it: ‘if criminal justice is to fulfil its function of crime control, then a transformation must occur which will create a rational, well-integrated system in which a common set of goals can be pursued through a compatible set of strategies and techniques’.⁵³ This line of thinking is largely built on the premise that all the different parts or stages of international criminal justice should be governed in a systemic manner, by the same teleological principles. However, many scholars have questioned whether criminal justice can be understood in this way. Some even doubt whether, in light of ‘the lack of integration among institutions and the within-institution differences that exist (...) across different locales’, there is such a thing as a criminal justice *system*.⁵⁴ According to Duffee, for example, ‘[i]n fact, applying the word “system” to criminal justice agencies and processes may be itself a good example of wishful thinking’.⁵⁵ He observes that ‘any particular criminal justice system is rarely an integrated and coordinated system with all its separate agencies operating toward the same goals’.⁵⁶ However, often the term ‘system’ is used in a purely descriptive manner, without any substantive reference.⁵⁷ It is likely that when legal scholars refer to the ‘criminal justice system’ they are using the term in this way; they simply wish to refer to the various agents and institutions involved in criminal justice as a collective entity. In this regard,

⁵³ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 209.

⁵⁴ T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 203. See also L. Harold DeWolf, *Criminal Justice as Defense and Restoration of Community: Our “Non-System” of Criminal Justice*, *Cumb. L. Rev.* 7, 1976-1977, p. 393-412.

⁵⁵ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 3.

⁵⁶ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 102.

⁵⁷ T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 203.

Duffee observes that the notion of the criminal justice *system* has political and popular origins and is not a scientific term.⁵⁸

‘Systems’ theory is difficult to define due to the wide variety of ways in which the term ‘system’ is used.⁵⁹ Nonetheless, a common and essential element appears to be ‘the interaction of different units toward a common goal’.⁶⁰ As such, the depiction of criminal justice as a system necessarily means that the different branches of criminal justice are seen as interrelated and as striving towards (a) common goal(s). It is precisely this argument that constitutes the most often heard critique with regards to criminal justice.⁶¹ Duffee states that ‘police, judicial, and penal agencies – even those operating in the same locality under the same law – often have such contradictory objectives, and such independent sets of constraints, that it becomes very hard to imagine that the primary determinates of criminal justice agency action are the actions and needs of other criminal justice agencies’.⁶² Some have characterized the components of criminal justice ‘as being non cooperative and even hostile toward one another’.⁶³ Scholars who disagree with this characterization have come up with common goals such as ‘justice’ and ‘efficiency’.⁶⁴

‘System’ may also assume the meaning, as listed in the Oxford Dictionary, of ‘a set of things working together as parts of a mechanism or an interconnecting network’. An example would be the digestive system, or organ systems. The emphasis here is placed not so much on the teleological as well on the organic or operational aspect: the functioning of the whole depends on the cooperation of the parts. Criminal justice may perhaps be analyzed and characterized in this way and on that basis be identified as a system. The focus then is on the contributions of the various stages and agents of criminal justice to the system’s eventual output (a successful product is something else than the pursuit of common goals). The fact that it is quite likely for police, prosecution, judiciary and corrections to pursue different goals in handling concrete

⁵⁸ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 2.

⁵⁹ T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 203, 204.

⁶⁰ T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 204.

⁶¹ T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 205; K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 210.

⁶² D.E. Duffee, *Explaining criminal justice*, Second Edition, Waveland Illinois: Prospect Heights 1990: quote borrowed from in T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 205.

⁶³ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 210.

⁶⁴ T.J. Bernard, E.A. Paoline III and P. Pare, *General systems theory and criminal justice*, *Journal Of Criminal Justice* 33, 2005, p. 203-211, at 205.

cases does not mean that they are not contributing to the output of criminal justice. The output of the distinct components and stages may differ, while each ‘output’ may consist of both qualitative (normative) and quantitative elements. For example, the successful product of the trial stage may be a reliable finding of fact and guilt. The successful product of the sentencing stage may be the punishment of persons found guilty of committing an offence. And the successful product of the enforcement stage may be the execution of a sentence in such a way as to prepare the convicted person as well as possible for a crime-free life in society. The qualitative and quantitative elements cannot be completely separated in a criminal justice system governed by the rule of law in a democratic society, which aims at punishing only the truly guilty. However, the output of the system as a whole, the “system’s” successful product, is more difficult to define, especially because successful products may leave the system at different stages. As argued by Vasiliev, ‘the institutes of punishment and sentencing do not exhaust the systemic goal to the exclusion of the other important objective (acquitting the innocent). It is misguided to reduce the enterprise of criminal justice to a single outcome or act, even though it is a distinctive feature of the system’.⁶⁵ Such an *organic* system of criminal justice then, is a very loose, fragmentary complex and its output may perhaps only be defined as ‘delivering justice’, which may mean different things to different peoples (whereby such differentiation may be amplified in the international context).⁶⁶ Such an organically understood system says very little about the effect of general justifying aims⁶⁷ or of objectives governing the sentencing stage or the execution stage. It certainly does not prescribe that the same objectives must govern all of the different components; it would only do so if this was the only means to secure the system’s output. The normative elements of the output of enforcement may include the successful reintegration into society and the mitigation of the damaging effects of imprisonment. Such an output would necessarily have consequences for the sentencing stage, in the sense that it would preclude sentencers from imposing harsh sentences which are not based on respect for the autonomy of the accused. And it works the other way as well. Applying retribution to the sentencing stage calls for the respectful treatment of prisoners. This is not so much based on the *jus tallionis*, ‘an eye for an eye’ understanding of retribution, but more on the contemporary ‘just deserts’ understanding of retribution, which lies at the heart of the tribunals’ sentencing practice. To censure a person

⁶⁵ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 168.

⁶⁶ Vasiliev formulates international criminal justice’s overarching goal as ‘ensuring accountability and closing the impunity gap for international crimes by delivering justice to the accused, victims and society’. S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 168.

⁶⁷ H.L.A. Hart. *Punishment and Responsibility. Essays in the philosophy of law*, Second Edition, Oxford: Oxford University Press 2008.

means that she is being treated as an autonomous being who can be held responsible, someone who is believed to be able to alter her ways. It would be difficult to see how this could be combined with harsh, disrespectful punishment at the enforcement stage.

Another point is that a systemic approach to retooling an organization in order to maximize or alter outputs is best used in organizations that have no specific interest in the kind of operations they employ to reach such outputs, and where operations are ‘very real, tangible, limited endeavors designed to accomplish specific goals’.⁶⁸ The international criminal justice apparatus, however, does have such interests: international penitentiary operations are to a large extent dictated by human rights standards and penal principles and it may be slightly far-fetched to characterize penal regimes as effective tangible short-term goal-directed operations. According to Wright, striving for a monolithic system to overcome fragmentation in criminal justice must be considered as rather unfortunate, perhaps even naïve. He argues that the conflict of goals within criminal justice is actually desirable.⁶⁹ He distinguishes between simple and complex systems, stating that ‘[i]n a simple system, goals can be specified, tasks to accomplish those goals can be undertaken, and progress can be monitored so that the system is self-regulating. These activities are possible because the internal and external environments of the system are relatively stable’.⁷⁰ It is this type of monolithic, non-fragmentary system that proponents of the idea of a criminal justice as a system usually have in mind, while criminal justice, *if* it can be regarded as a system at all, may only be devised as a complex system. A complex system does ‘not exist in stable environments, but rather finds itself in a complex and rapidly changing, or turbulent environment which produces unpredictable changes within the system itself’.⁷¹ This, according to Wright, ‘precludes rational, long-range and macro-planned change. Because the environment is turbulent, and thus drastically and dynamically affecting the system, it is simply impossible to identify and specify a set of goals and to bring about some change to remodel the system’.⁷² He considers the variety of goals, spread over the various components of criminal justice, as something positive, since it enables the institutes to represent and protect different societal interests and

⁶⁸ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 100.

⁶⁹ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 210.

⁷⁰ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 211.

⁷¹ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 211.

⁷² K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 211.

needs.⁷³ Fragmentation and lack of integration within criminal justice are, according to that view, desirable. Wright even states that ‘[i]f it is assumed that the political culture and public interests vary from area to area, then the seemingly fragmented system of justice may serve to fulfill those diverse interests’.⁷⁴ With respect to international criminal justice, this latter remark may constitute an argument for enforcement as close as possible to the former conflict region, or for establishing an international prison with regional prison facilities, as advocated by Penrose.⁷⁵ Apart from variations among different areas, Wright acknowledges that ‘different interests can be represented by the fragmentation and inconsistencies *within* a single component’.⁷⁶ Or as Damaška phrases it, ‘[r]econciliation and genuine social solidarity do not require locating an elusive consensus but, rather, finding a way to live with the absence of consensus. In seeking to make differences manageable, or perhaps to find a key to a symphonic consonance, the didactic role of courts, properly understood, should be not to propagate any particular moral view, but to use trials as a “theater for the clash of ideas”’.⁷⁷ Distinct interests may thus be served on the different levels of international criminal justice.

3.2. The relative autonomy of the objectives directing the enforcement stage

In his work *Punishment and Responsibility*, Hart argued that in order to arrive at a morally acceptable account of punishment, one must acknowledge that the question as to the justification of punishment requires consideration on different levels and involves different questions. According to him, ‘in our inherited ways of talking about punishment there is some persistent drive towards an over-simplification of multiple issues which require separate consideration (...) What is needed is the realization that different principles (each of which may in a sense be called a ‘justification’) are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may

⁷³ See also M. Klamberg, *What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime*, *Nordic Journal of International Law* 79, 2010, p. 279-302, at 280, 285.

⁷⁴ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 213.

⁷⁵ For the latter, see M.M. Penrose, *Spandau Revisited: The Question of Detention for International War Crimes*, *New York Law School Journal of Human Rights* 16, 1999-2000, p. 553-591, at 585.

⁷⁶ K.N. Wright, *The desirability of goal conflict within the criminal justice system*, in: *Journal of Criminal Justice* 9, 1981, p. 209-218, at 213. Emphasis added.

⁷⁷ M. Damaška, *What is the Point of International Criminal Justice*, 83 *Chicago-Kent Law Review*, 2008, p. 329-365, at 346.

punishment be applied? How severely may we punish?’⁷⁸ According to this view, the general justifying aims, the rationales and objectives as provided by the mandate givers of international criminal justice do not necessarily explain or prescribe certain practices in concrete cases in its different components and stages.

Back in 1975, Jonkers argued that for a proper understanding of penal purposes, a distinction must be made between the levels of legislation, application (by which he meant sentencing) and execution.⁷⁹ According to him, however, these levels are not strictly separated. The level of execution refers to that of application, which, in turn, refers to that of legislation. The “lower” level should always take into account the aims governing the “higher” level(s). Nonetheless, Jonkers recognized that, when enforcing a sentence, besides the task of deprivation of liberty which is prescribed by the level of application, the executioner also has a task independent from the foregoing stages. Since execution may take many forms, he argues, there are policy choices to make.⁸⁰

Although the notion that a distinction must be made between the different stages or levels of the criminal justice process when examining the objectives of punishment remains highly relevant, it is questionable whether Jonkers’ theory can still provide us with the answer to the question with which this chapter is concerned, *i.e.*, whether the enforcement stage should take into account the objectives governing the stages of sentencing and legislation (or establishment of the international criminal tribunals). Jonkers’ theory dates from a time when certain contemporary penal notions were not yet widely accepted, *i.e.*, the notions that ‘men are sent to prison as punishment, not for punishment’,⁸¹ or ‘*Freiheitsstrafe soll eine “Beschränkung der Freiheit, nichts anderes” sein*’⁸² and that ‘sentenced persons retain their fundamental rights’. The acceptance of those ideas enhances the autonomy of the enforcement stage in relation to the other components of criminal justice.

Indeed, it has been argued that the execution phase does not so much look back at the sentencing phase, or at the acts and purposes of the legislature, but is rather forward looking, thereby assuming a character that is in important respects different from the earlier stages of

⁷⁸ H.L.A. Hart. *Punishment and Responsibility. Essays in the philosophy of law*, Second Edition, Oxford: Oxford University Press 2008, p. 3.

⁷⁹ W.H.A. Jonkers, ‘De strafrechtelijke straf: inhoud, grondslag, doeleinden’, in: Y. Buruma (ed.), *100 Jaar Strafrecht. Klassieke teksten van de twintigste eeuw*, Amsterdam: Amsterdam University Press 1999, p. 163-176.

⁸⁰ .H.A. Jonkers, ‘De strafrechtelijke straf: inhoud, grondslag, doeleinden’, in: Y. Buruma (ed.), *100 Jaar Strafrecht. Klassieke teksten van de twintigste eeuw*, Amsterdam: Amsterdam University Press 1999, p. 163-176, at 174.

⁸¹ A. Paterson, as cited in F.W. Bleichrodt and P.C. Vegter, *Sanctierecht*, Deventer: Kluwer 2013, p. 93.

⁸² J. Feest & W. Lesting, *StVollzG Kommentar zum Strafvollzugsgesetz (AK-StVollzG)*, Köln: Carl Heymanns Verlag 2012, p. 18.

the criminal process. Van Zyl Smit and Snacken argue that a ‘relative autonomy’ exists between the principles and purposes that guide sentencing judges and those that govern the enforcement stage. Aims that may govern sentencing, like retribution or prevention, are mainly translated into the duration of the sentence imposed and into the mode of punishment (deprivation of liberty, community service, fines etc.). Such aims do not necessarily tell the executioner *how* she should enforce the sentence imposed. For this reason they speak of the relative autonomy of prison law.⁸³ This relative autonomy essentially means that the execution stage has its own goals, largely independent from aims directing the other components. The judicial verdict does not permit for any other infringements on the rights of convicted persons apart from the deprivation of liberty. Feest and Lesting, writing about German penal law, argue in this regard that ‘*[i]m Vollzug der Freiheitsstrafe treten an die Stelle der Strafzwecke die Aufgaben des Vollzuges*’ and ‘*[n]ach der zutreffenden herrschenden Meinung ist daher die Berücksichtigung der Strafzwecke wie Schuldausgleich, Schuldschwere, Sühne, Generalprävention oder Verteidigung der Rechtsordnung im Strafvollzug nicht zulässig*’.⁸⁴ Other than the separation of powers doctrine,⁸⁵ there may be other reasons for recognizing that the enforcement stage is largely governed by its own rationales. According to van Zyl Smit and Snacken, the relative autonomy is primarily caused by ‘differences in time and purpose’.⁸⁶ They argue that, at the moment of sentencing, the judge, at that singular moment, ‘publicly expresses the censure of a particular offence with due regard to the responsibility and guilt of the offender’.⁸⁷ This sentencing moment is essentially backward looking. Of course, the judge may take into account the accused person’s future when determining the mode and duration of the sentence, but the main focus is on the crime and the guilt of the accused.⁸⁸ The enforcement stage, however, does not consist of one single moment, but consists of a longer period of time during which the convicted person is deprived of his liberty. And since most of these persons will someday

⁸³ D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 76.

⁸⁴ J. Feest & W. Lesting, *StVollzG Kommentar zum Strafvollzugsgesetz (AK-StVollzG)*, Köln: Carl Heymanns Verlag 2012, p. 18-19.

⁸⁵ D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 77.

⁸⁶ D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 79.

⁸⁷ D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 79.

⁸⁸ D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 79.

return to society, the prison regime must necessarily be directed to the future, to a life after release (that is, a crime-free life).⁸⁹

The aforementioned notion that ‘sentenced persons retain their fundamental rights’ gained more and more acceptance from the sixties onwards. It found expression in Article 10, Paragraph 1 of the ICCPR, which demands that prisoners be treated with respect for the dignity inherent to their person. As argued by Van Zyl Smit, since respect for human dignity is the cornerstone, the essence of all human rights,⁹⁰ Article 10, Paragraph 1, allows for a holistic interpretation of the applicability of human rights in the prison context. Respect for human dignity of imprisoned persons implies that all their fundamental rights must be respected.⁹¹ Although this may seem self-evident nowadays, it wasn’t until the third quarter of the twentieth century. Up until 1975, the European Court of Human Rights (ECtHR), for example, made use of the inherent limitations doctrine. According to that doctrine, deprivation of liberty automatically allows for infringements of other rights. In *Golder*, the Court rejected the inherent limitations doctrine and assessed the impugned domestic restrictions on the right to correspondence against the limitations clause of Article 8(2).⁹² Since then, the Court has repeatedly affirmed that confined persons “‘continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty’”.⁹³ This view has not only been promulgated by the ECtHR, but also by the Human Rights Committee (HRC) and the Inter-American Court of Human Rights (I-ACtHR) and other human rights supervisory bodies.⁹⁴ In the case of *Fongum Gorji-Dinka v. Cameroon*, for instance, the HRC stated that ‘persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they

⁸⁹ D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy*, Oxford: Oxford University Press 2009, p. 79.

⁹⁰ As held by the ICTY Trial Chamber in *Furundžija*, ‘[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law’. ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, T. Ch., 10 December 1998, par. 183.

⁹¹ D. van Zyl Smit, *International Imprisonment*, *International Criminal Law Quarterly* 54, 2005, p. 357-386, at p. 362; D. van Zyl Smit, *Punishment and Human Rights in International Criminal Justice*, 2 *Human Rights Law Review* 1, 2002, p. 1-17, at 5.

⁹² ECtHR, *Golder v. the United Kingdom*, judgment of 21 February 1975, Application No. 4451/70.

⁹³ See, e.g., ECtHR, *Ciorap v. Moldova*, judgment of 19 June 2007, Application No. 12066/02, par. 107; ECtHR, *Hirst v. the United Kingdom (No. 2)*, judgment of 6 October 2005, Application No. 74025/01, par. 69.

⁹⁴ See Rule 2 of the European Prison Rules, Article 1 of the Kampala Declaration on Prison Conditions in Africa, Principle 5 of the U.N. Basic Principles for the Treatment of Prisoners, and I-ACtHR, *López-Álvarez v. Honduras*, judgment of 1 February 2006, par. 104.

must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners (1957)⁹⁵.

Another ground for acknowledging the relative autonomy of the stage of enforcement lies in the fact that international human rights standards prescribe that the primary aim of penitentiary systems is to rehabilitate the prisoner. Rehabilitation may play a limited role at the legislative and sentencing stages. At the legislative stage it instructs the legislature to create sanctioning norms that enable the judges to take into account the accused's future, including a life after release. At the sentencing stage, it instructs the judges to individualize punishment (although this is also demanded by retribution) when determining the mode and the duration of punishment and to take into account the perpetrator's chances of successful reintegration. At the enforcement stage, however, rehabilitation may be regarded as the primary human-rights based principle, interacting with such policy rationales as maintaining order and security inside the institution.

The relative autonomy of the objectives governing the enforcement stage is augmented in the international criminal justice context as a result of the jurisdictional fragmentation that characterizes the international enforcement of sentences. *International* sentences are executed in *domestic* prisons under domestic prison regimes. The penal regimes of these enforcement states must conform to human rights minimum standards, but such regimes do not have a particular international character (as they were developed with the domestic context in mind) and, therefore, do not provide enforcement with a specific, international quality. As such, objectives of international criminal justice and international sentencing, at least in theory, find expression in the duration (and perhaps in the future if the ICC decides to actually impose fines, the form) of the punishment, but not in the modalities of the enforcement regimes.

In conclusion, the relative autonomy of the objectives governing the enforcement stage from those that direct other components or criminal justice as a whole must be acknowledged. International criminal justice is not a simple system in which goals can be easily specified and accomplished. The aims of sentencing largely find expression in the mode and duration of the

⁹⁵ HRC, *Fongum Gorji-Dinka v. Cameroon*, Communication 1134/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (2005), views of 17 March 2005, par. 5.2. See, in a similar vein, HRC, *Salem Saad Ali Bashasha v. The Libyan Arab Jamahiriya*, Communication No. 1776/2008, U.N. Doc. CCPR/C/100/D/1776/2008, views of 2 November 2010, par. 7.7; HRC, *Munguwambuto Kabwe Peter Mwamba v. Zambia*, Communication 1520/2006, U.N. Doc. CCPR/C/98/D/1520/2006, views of 10 March 2010, par. 6.4; HRC, *Abdelhamid Benhadj v. Algeria*, Communication No. 1173/2003, U.N. Doc. CCPR/C/90/D/1173/2003, views of 20 July 2007, par. 8.5; HRC, *Bradley McCallum v. South Africa*, Communication 1818/2008, CCPR/C/100/D/1818/2008, views of 2 November 2010, par. 6.8; HRC, *Sid Ahmed Aber v. Algeria*, Communication 1439/2005, U.N. Doc. CCPR/C/90/D/1439/2005, views of 16 August 2007, par. 7.7; HRC, *Abdelhakim Wanis El Abani (El Ouerfeli) v. The Libyan Arab Jamahiriya*, Communication 1640/2007, U.N. Doc. CCPR/C/99/D/1640/2007, views of 14 September 2010, par. 7.7.

punishment imposed. The retributive foundation of the imposed punishment (as argued by Jonkers, the foundational principle of punishment is retribution, in the (limited) sense that the evil (all punishment can be regarded as additive evil) imposed by the sentencing authority finds its basis in and looks back at the crime and guilt of the offender)⁹⁶ finds expression in the deprivation of liberty. This deprivation of liberty necessarily has consequences for other rights and means that the convicted person is cut off from wider society (at least to the extent permitted by human rights law and as far as reconcilable with the objective of normalization and resocialisation). The latter aspect may resonate with Erich Fromm's theory that the leitmotiv in human suffering is man being conscious of himself being separated from other men, *i.e.*, of his essential isolation, which creates a lifelong longing, or endeavour to transcend or dissolve that isolation.⁹⁷ It may be precisely this dissociative aspect, which is inherent to imprisonment, that largely echoes the retributive objective.⁹⁸ Any *additional* harm or discomfort neither finds a basis or justification in the sentencing judgment, nor in the general aims of criminal justice.

3.3. Causality and other major weaknesses of alignment theories

Another serious problem with aligning the objectives of the enforcement stage with those of international criminal justice and the sentencing stage lies in the fact that it is extremely difficult, if not impossible, to establish any causal links between the courts' internal operations and the achievement of their ultimate, socio-political objectives at the domestic or regional level.⁹⁹ Vasiliev states, for example, that '[t]he grounds underpinning most of the claims about the peace-making and reconciliatory effects of the tribunals-distinct from arguments based in morality-remain contentious'.¹⁰⁰ According to him, the problem lies 'in the over-deterministic link' that is being drawn between the functions of criminal procedure and the socio-political goals.¹⁰¹ In a similar vein, Stahn argues with regards to international

⁹⁶ W.H.A. Jonkers, 'De strafrechtelijke straf: inhoud, grondslag, doeleinden', in: Y. Buruma (ed.), *100 Jaar Strafrecht. Klassieke teksten van de twintigste eeuw*, Amsterdam: Amsterdam University Press 1999, p. 163-176, at 166-167

⁹⁷ E. Fromm, *Liefhebben. Een kunst, een kunde*, Utrecht: Bijleveld 2010, p. 20-21; E. Fromm, *Een kwestie van hebben of zijn. Naar een nieuwe levensoriëntatie in de consumptiemaatschappij*, Utrecht: Bijleveld 2014, p. 149.

⁹⁸ Compare, in this volume, S. Snacken and N. Kiefer, p. 31.

⁹⁹ As stated by Shany, 'even if one finds broad support for the proposition that certain effects are indeed desirable, delineating the causal relationship between judicial performance and state conduct may remain difficult'. Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 228.

¹⁰⁰ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 177.

¹⁰¹ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 187.

criminal justice as a whole that ‘there remains a fundamental tension between ‘faith’ (i.e., belief in the value and worthiness of the project) and ‘facts’ (i.e., actual and demonstrable record)’.¹⁰² Stahn is right where he argues that a lack of facts does not necessarily undermine a faith based approach. I am not arguing that in the absence of a clear causal connection between penal regimes and the achievement of socio-political goals, no reconciliatory efforts should be made at all. As Stahn argues, the limitations of factual assessments must be acknowledged and ‘one of the most important virtues of international criminal justice may actually lie in the fact that it upholds normative values and idealism’.¹⁰³ He argues that ‘a proper evaluation requires factual *and* normative judgement that is partly grounded in moral argument’.¹⁰⁴

Nevertheless, knowing that it is unclear ‘what actually works’ in penology warrants caution when implementing changes to penal regimes, especially where such changes may have consequences for the convicted persons’ autonomy, respect for which, as we have seen above, is mandatory in light of the retributive foundation of international punishment.

The problems with causality are at least threefold. First, the content of the ultimate objectives is imprecise. As was stated in this chapter’s introduction, the ultimate ends are often vaguely formulated and open-ended, which may give ‘rise to conflicting interpretations of their meaning’.¹⁰⁵ Such a lack of clarity may also be the result of opposing political views during the identification and drafting of the objectives and may be due to the complexities of the situation that gave rise to the tribunals’ establishment.¹⁰⁶ The definition of the different objectives’ content may largely depend on the viewpoint of the different stakeholders.¹⁰⁷

Second, as held by Shany, the ‘public goods that they generate, such as justice, peace and legal certainty, are hard to quantify (by contrast, private organizations typically generate quantifiable profits or losses’.¹⁰⁸ Stahn is keen to remind us that the assessment of the

¹⁰² C. Stahn, *Between ‘Faith’ and ‘Facts’: By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 254.

¹⁰³ C. Stahn, *Between ‘Faith’ and ‘Facts’: By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 257.

¹⁰⁴ . Stahn, *Between ‘Faith’ and ‘Facts’: By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 260.

¹⁰⁵ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int’l L.*, 2012, p. 225-270, at 233.

¹⁰⁶ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int’l L.*, 2012, p. 225-270, at 233-234.

¹⁰⁷ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 171.

¹⁰⁸ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int’l L.*, 2012, p. 225-270, at 239. As argued by Stahn, ‘it is evident that not all goals of international criminal justice can be fully quantified or translated into concrete indicators and measurable outcomes’. C. Stahn, *Between ‘Faith’ and ‘Facts’: By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 264.

achievement of socio-political objectives largely comes down to a normative assessment.¹⁰⁹ In this regard, it is important to reflect on the point raised by Swart that a distinction must be made between the different levels of the tribunals' operations: the macro and the micro level.¹¹⁰ Whether the tribunals achieve the objectives of international criminal justice at the macro level depends on the views of the different stakeholders – victims, international organizations, mandate providers, the general public, states. Because of this multiplicity of stakeholders, such views may easily vary.¹¹¹ They are largely based on confidence and trust and will depend on such considerations as whether suspects can be apprehended, whether perpetrators of international crimes are held accountable and, more generally, on the perception of the tribunals' effectiveness.

Third, the achievements of international courts are to an important extent dependent on their *external* environment.¹¹² Shany argues that 'since measuring effects may fail to capture the actual organizational features or dynamics leading to those effects, such measures may provide a limited understanding of those aspects of international courts in need of reform'.¹¹³ Vasiliev adds to the aforementioned problems relating to causality the point that 'the socio-political goals of international criminal justice are so remote from and neutral to the mechanics of the legal process that it strains imagination to try to draw a direct link. The objectives of restoring peace and reaffirming international law norms are under-determinative when it comes to defining procedural arrangements. This is where the major weakness of the theories asserting a direct interaction between the legal process and institutional goals comes to the surface. The problem is that they collapse the two dimensions of criminal justice: the micro-level perspective focusing on the individual cases and consequences of specific proceedings, on the one hand, and the political macro-dimension of the longer term and broad social consequences of the life of the tribunal, on the other hand'.¹¹⁴ He concludes that 'empirically or even theoretically there is neither an evident link nor necessarily alignment between the micro- and macro-outcomes of the judicial process'.¹¹⁵ He stresses that the relationship

¹⁰⁹ C. Stahn, *Between 'Faith' and 'Facts': By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 265.

¹¹⁰ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 101.

¹¹¹ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at p. 240.

¹¹² Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at 239.

¹¹³ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at 228.

¹¹⁴ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 188.

¹¹⁵ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 189.

between processes and goals is complex. The same is argued here in respect of enforcement. Altering penal regimes in order for them to contribute to some lofty political goals, on the basis of mere feasibility, *i.e.*, without any empirical proof or detailed theory which indicates how exactly such adapted regimes would contribute to the formidable political objectives and the likelihood that there would be any such effect, is a highly speculative undertaking that may waste resources and put a strain on the convicted persons' autonomy resulting in bitterness and resentment. Instead, penal regimes should be governed by goals prescribed by international minimum standards, as dictated by the tribunals' own legal frameworks and human rights norms, and which have proven prevent as much harm as possible to the persons subjected to such regimes. One might start thinking about aligning penal regimes with ultimate goals only if this can be combined with full respect for and implementation of international penal standards. But achieving the ultimate goals should be considered no more than a 'desired side effect'.¹¹⁶

According to Shany¹¹⁷ and Duffee, systemic analysis in criminal legal research tends to neglect the relationships that criminal justice has with the environmental context and other subsystems when making judgments 'about how the "criminal justice system" can be more effective in serving "the community"'.¹¹⁸ Duffee warns that bringing about changes to existing criminal justice apparatus requires i) clear conceptions of the existing structure, ii) 'accuracy or some demonstrable feasibility about the nature of the future system' and iii) 'a reasonable connection between the two through planned guidance, control, or intervention'.¹¹⁹ It may also be that a plurality of strategies is needed to bring about the desired changes.¹²⁰ According to Duffee, 'the application of such normative analysis to criminal justice is premature, if not totally inappropriate. The system of criminal law and its administration is not a project, nor is it an event that occurs within an organization. Criminal justice is not constructed upon a narrow set of goals nor is it built to specifications established to increase the probability of particular outcome or set of outcomes. Evaluating criminal justice against a set of goals to be accomplished and using empirical indicators to demonstrate outcomes fall

¹¹⁶ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 190.

¹¹⁷ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at 239.

¹¹⁸ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 6.

¹¹⁹ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 78.

¹²⁰ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 78.

short or wide of said goals is often merely an analytical exercise, valuable perhaps in establishing academic careers or in advancing a philosophy of punishment'.¹²¹

In the absence of clear conceptions, there are no real solid arguments for revising the tribunals' penal regimes in order for them to be better able to contribute to, for example, reconciliation or restoring peace.

The only argument one *can* adduce in favour of building in reconciliatory mechanisms in the tribunals' operations is that of feasibility: tribunals that lack any programs specifically aimed at outreach are, in the words of Shany, 'unlikely to facilitate the changes in public opinion necessary to realize [their] reconciliation mandate'.¹²² However, this argument is not very convincing. Although it may sound logical with regards to outreach programs, it appears a little far-fetched to argue that the same is also true for tribunals whose penal regimes do not contain any reconciliatory programs. It may be more plausible to argue that reconciliation may be one of the macro-level, longer-term contributions of international criminal justice to a certain region or society, even if reconciliatory programs are not part of penal regimes, but where enforcement finds its basis in the classic (domestic) objectives of punishment. As Sarkin argues in respect of transitional and victim-oriented restorative justice objectives, '[t]he retributive justice component certainly serves these needs as it seeks accountability for those responsible for past human rights violations through criminal trials'.¹²³ Swart arrives at a similar conclusion on the basis of an analysis of the tribunals' interpretation of domestic sentencing objectives where he states that in the tribunals' case law 'reconciliation also seems to be a potential effect of punishment rather than a goal that is pursued in its own right'.¹²⁴ Achieving this reconciliatory objective may be a matter of time.¹²⁵ Perhaps it is still too early to draw conclusions as to the reconciliatory impact of retributive post-conflict justice as delivered by the tribunals; after all, it took years before Germany could accept the legitimacy of (post)Nuremberg war crimes trials and before such trials could generate positive, reconciliatory effect.

¹²¹ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 100.

¹²² Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at 239.

¹²³ J. Sarkin, *Enhancing the legitimacy, status, and role of the international criminal court globally by using transitional justice and restorative justice strategies*, 6 *Interdisc. J. Hum. Rts. L.*, 2011-2012, p. 83-101, at p. 89.

¹²⁴ B. Swart, *Damaška and the Faces of international Criminal Justice*, *Journal of International Criminal Justice* 6, 2008, p. 87-114, at p. 104.

¹²⁵ See in a similar vein but with regards to the trial proceedings S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 192.

Duffee also raises the point that the environment in which criminal justice operates does not allow it to work effectively towards deterrence or other penal goals because the public it serves is too differentiated, holding too many different viewpoints and not being equally able to express or define its desires and needs. He says that '[i]nstead, criminal justice operations, based upon the faulty assumption that integration exists, can actually increase the divisions among various groups and limit the chances of deriving mutually acceptable standards of how persons should act toward each other'.¹²⁶ This argument seems to apply *a fortiori* to the international context, where a single court located in the Hague tries to deliver justice in respect to multiple former conflict regions and victim communities in other parts of the world. And as to the risk that criminal justice operations may increase divisions among community groups, Duffee explains - with great relevance to system criminality and mass atrocity - that fostering the appearance that criminal justice aspires to achieving certain goals may provide 'explanations of social deviance that center upon individual malfunctioning or individual ill will, rather than upon structural antecedents to conflict', whereby attention is diverted 'from the social system to scapegoated "sinners"'.¹²⁷ Stahn warns against attributing too great a role to reconciliation in international criminal justice. Besides the fact that any effect of the tribunals' operations on reconciliation is difficult to measure, he explains that such operations may lead to even deeper divisions and that arguing for a greater role for reconciliation is based on the wrong premise: reconciliation would presuppose that 'each group has a willingness to inquire into the extent to which it bears collective responsibility through the actions of its members and, in particular, its leadership', while there 'is no guarantee that such a process will indeed effectively take place'.¹²⁸

Furthermore, as was stated in the introduction, the lack of a hierarchy between the tribunals' ultimate ends makes it difficult, if not impossible, to realise them, since they may conflict inter-se. Where tensions arise, it is not clear which objective must be accorded prominence. Damaška searched for one leading objective in international criminal justice but had to conclude that there was no such primary objective.¹²⁹ As a consequence, the socio-political objectives hardly provide any guidance as to enforcement on the micro level. The only objectives that must be directly pursued by the tribunals on the micro level are those dictated

¹²⁶ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 102.

¹²⁷ D.E. Duffee, *Explaining Criminal Justice. Community Theory and Criminal Justice Reform*, Cambridge: Oelgeschlager, Gunn & Hain, Publishers Inc. 1980, p. 115.

¹²⁸ C. Stahn, *Between 'Faith' and 'Facts': By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 278.

¹²⁹ M. Damaška, *What is the point of international criminal justice?*, *Chi.-Kent L. Rev.* 83, 2008, p. 329-365.

by contemporary penal standards and human rights law. So if there is any clarity as to the proper objectives of international punishment, then it is to be primarily found in the human rights standards that are applicable to the tribunals' penal regimes.

Besides a lack of hierarchy, another difficulty is that the mandates themselves, and therefore also objectives, or their weight may vary per tribunal and may alter over time.¹³⁰ This may lead to ambiguity of objectives.¹³¹

The question that must be answered is whether it is appropriate to use individual cases of punishment in order to achieve the broader socio-political objectives where this would entail what may be regarded as more paternalistic penal regimes, *i.e.*, regimes in which respect for the autonomy of the convicted person is not the primary concern. Such regimes may, for example, oblige convicted persons to participate in reconciliatory programs in order for them to, *inter alia*, become eligible for early release programs and furloughs. As indicated by Damaška, 'retributive and restorative forms of justice do not mix very well'.¹³² He argues that there are other, superior mechanisms to work towards reconciliation than via criminal proceedings. The same can be argued with regard to international enforcement. Vasiliev argues that '[s]ubmitting considerations of fair retribution and individualized punishment to utilitarian objectives means nothing else than using an individual defendant as a mere object for achieving the desired socio-political results, whereas under retribution the dignity of an individual must always be upheld in the act of punishment. The view of punishment as a means to an end conflicts with the categorical imperative which underlies retributive penal accounts'.¹³³

¹³⁰ M. Klamberg, *What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime*, *Nordic Journal of international law* 79, 2010, p. 279-302, at 285; C. Stahn, *Between 'Faith' and 'Facts': By What Standards Should we Assess International Criminal Justice?*, *Leiden Journal of International Law* 25, 2012, p. 251-282, at 260; S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 172.

¹³¹ Y. Shany, *Assessing the effectiveness of international courts: a goal-based approach*, 106, *Am. J. Int'l L.*, 2012, p. 225-270, at 234.

¹³² M. Damaška, *What is the point of international criminal justice?*, *Chi.-Kent L. Rev.* 83, 2008, p. 329-365, 343.

¹³³ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 170.

4. Conclusion

The international criminal justice “system” as it stands today clearly suffers from a systemic deficiency due to being spread over a myriad of jurisdictions: sentences, which must be enforced in accordance with international standards are being executed in a (potentially) large number of States that apply their own domestic penitentiary legislation. While it may already be difficult to argue that domestic criminal justice operates in a systemic way towards specified goals, one may safely say that there is no such thing as an integrated international criminal justice system. It is decentralized, fragmented and pursues inconsistent goals.¹³⁴

Although the idea that ‘[p]enological goals should be based on the social objectives of the criminal justice system and penal processes should promote the development of both its subjects and the society it serves’¹³⁵ is a commendable one, I agree with scholars like Damaška and Vasiliev where they call for a ‘modest’ or ‘moderate’ approach towards pursuing macro level objectives in international criminal justice.¹³⁶ In this chapter, such a modest approach is advocated with respect to the pursuit of socio-political objectives in international punishment. Vasiliev admits that socio-political pursuits cannot but have some impact on international criminal proceedings, but that does not mean that achieving such objectives should be seen as the main function of proceedings; if it would, it could – according to him- no longer be considered a criminal trial.¹³⁷ As stated in the introduction where I compared the tribunals’ ultimate objectives to legal principles, the socio-political goals do not generate direct effect on the content of penal regimes in an all-or-nothing fashion. They can to some extent be compared to principles. They function as tools of reflection and critique and can lead to ‘no more than a partial realization’.¹³⁸ They are being applied in and as part of a particular legal context by professional practitioners who are positioned in the sociological roles they fulfill.¹³⁹ They are applied more indirectly and, when applied, do not

¹³⁴ Compare T.J. Bernard and R.S. Engel, *Conceptualizing Criminal Justice Theory*, 1 *Justice Quarterly* 18, 2001, p. 1-30, at p. 3.

¹³⁵ R. Mulgrew, *Towards the Development of the International Penal System*, Cambridge: Cambridge University Press 2013, p. 215.

¹³⁶ M. Damaška, *What is the point of international criminal justice?*, *Chi.-Kent L. Rev.* 83, 2008, p. 329-365, at 343.

¹³⁷ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 183.

¹³⁸ See, in more detail, chapter 4 of D. Abels, *Prisoners of the International Community: The Legal Position of Persons Detained by International Criminal Tribunals*, The Hague: T.M.C. Asser Press 2012. A.A.G. Peters, *Het rechtskarakter van het strafrecht*, Deventer: Kluwer 1972, p. 14.

¹³⁹ R. Foqué and A.C. 't Hart, ‘Grondslagen ter discussie’, in: G.C.G.J. van Roermund, M.S. Groenhuijsen, W.J. Witteveen (eds.), *Symposium strafrecht. Vervolg van een grondslagendebat*, Arnhem, Gouda Quint b.v. 1993, p.

lead to concrete results.¹⁴⁰ From the relatively high level of abstraction on which they operate, they merely offer ‘peremptory guidance’ to practitioners in their interpretational activities and decision making. Their high degree of abstraction, inconclusiveness (their application does not lead to concrete results) and open-endedness (they can never be fully concretised) enable principles to be relevant in different situations and contexts and still “apply” fully. As said, the same may be said of the tribunals’ socio-political objectives.

In light of both the difficulties inherent in identifying any causal link between the tribunals’ operations at the enforcement stage and the achievement of their socio-political objectives, and the risks that the implementation of socio-political objectives in the enforcement stage may entail for the autonomy of convicted persons, it would be wise to stick to Vasiliev’s approach. According to him, the tribunals’ officials should not actively try to promote the ultimate objectives, but should only ensure that their penal regimes are not inconsistent with or undermine those objectives.¹⁴¹

In seeking for a more effective pursuit of socio-political objectives, in striving for an integrated international penal system and in seeking ways to revise the current penal regimes, we should firstly ask ourselves whether such a system is conceivable at all and, if so, whether such aims ought to be aspired to in the enforcement phase. Outreach programs and the trial phase may be more apt to roll out victim oriented restorative and reconciliatory strategies than the execution phase. International punishment must not be overloaded with expectations and aims which can more safely and fruitfully be aspired to by other components of international criminal justice, or by other, non-legal mechanisms and activities,¹⁴² such as economic support to the former conflict region¹⁴³ and transitional justice programs. It should be recalled here that punishment is but one answer to international crimes (and, arguably, a very limited one at that).

Another way of seeing things, as argued by Ohlin, is that instead of considering international procedure as instrumental, *i.e.*, as being directed towards achieving the socio-political goals provided by mandate-givers, one may conceive it as constituting ‘an end in itself’ where it

393. As held by these scholars, ‘[t]he interpreter himself stands as theoretician with his experience and observation in the midst of reality, which he interprets observantly and experiencing. To be able to do just that, he nevertheless needs an eccentric position, but the eccentric aspect of that position is symbolic in nature’.

¹⁴⁰ P. Scholten, ‘Rechtsbeginselen’, in: *Mededeelingen der Nederlandsche Akademie van Wetenschappen, Afdeeling Letterkunde Deel 80, Serie B, No. 6, Tweede Druk*, Amsterdam: N.V. Noord-Hollandsche Uitgevers Maatschappij 1941, p. 270.

¹⁴¹ S. Vasiliev, *International Criminal Trials. A Normative Theory* (diss.), 2014, p. 195-196.

¹⁴² M. Damaška, *What is the point of international criminal justice?*, *Chi.-Kent L. Rev.* 83, 2008, p. 329-365.

¹⁴³ C.J.M. Safferling, *Can Criminal Prosecution be the Answer to massive Human Rights Violations?*, *German Law Journal* 5, 2004, p. 1469-1488, at p. 1487.

vindicates the rule of law in situations which oftentimes ‘involve the systematic breakdown of the Rule of Law’.¹⁴⁴ In other words, international criminal procedure is more than its social functions, it has an intrinsic moral value. Although Ohlin’s argument is specifically directed at the trial stage, the same may to a certain extent be said for enforcement. In the enforcement context the rule of law is also vindicated in relation to a situation where it was absent, where wrongdoers were not being held accountable, but where they and their actions were being facilitated by and approved of by a state or system’s infrastructure. In such a state or system, the penitentiary is not governed by the rule of law; prisoners are nor protected by the minimum standards of decency that characterize imprisonment in a civilized society. International penology, with its high levels of protection and respect for international penal principles and standards, is the antithesis to such a state of terror where fear and total dependency reign. Let that be the real worth of international punishment: showing the former conflict region and the convicted persons how societies that respect the rule of law treat their most unpopular and vulnerable members.

¹⁴⁴ J.D. Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 *UCLA J. Int’l L. Foreign Aff.*, 2009, p. 77-120.