

## Pluralism in International Criminal Procedure

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### I. Introduction

Over the last two decades, international criminal procedure has become a recognized body of law, with textbooks, treatises, and law review articles discussing its rules and principles and theorizing its goals and methods.<sup>1</sup> The term refers to the procedures used at the international criminal courts and tribunals created to address some of the most serious offenses, such as genocide, crimes against humanity, and war crimes. Some of these courts are fully international, like the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the permanent International Criminal Court (ICC). Others are “hybrid courts,” featuring a mix of domestic and international personnel, laws, and practices and including the Special Court for Sierra Leone (SCSL), the East Timor Special Panels for Serious Crimes, the Bosnia and Herzegovina War Crimes Chamber, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL). More hybrid courts are being created and proposed today, even as the appetite for international institutions appears on the decline.<sup>2</sup>

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<sup>1</sup> See, e.g., Kai Ambos, *Treatise on International Criminal Law: Volume III, International Criminal Procedure* (2016); *International Criminal Law Practitioner Library: Volume III, International Criminal Procedure* (Gideon Boas et al. eds., 2011); Karim Khan et al., *Archbold International Criminal Courts: Practice, Procedure, and Evidence* (2014); *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Linda Carter & Fausto Pocar eds. 2013); Christoph Safferling, *International Criminal Procedure* (2012); Christine Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (2010); *International Criminal Procedure: Principles and Rules* (Göran Sluiter et al. eds. 2013); *International Criminal Procedure: Towards a Coherent Body of Law* (Goran Sluiter & Sergey Vasiliev eds. 2009); Frédéric Mégret, *Beyond Fairness: Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. Int'l L. & Foreign Aff. 37 (2009); Mirjan Damaška, *Reflections on Fairness in International Criminal Justice*, 10 J. Int'l Crim. Just. 611 (2012); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 Colum. J. Transnat'l L. 635 (2007); Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. Int'l L. & Foreign Aff. 77 (2009); Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. Armed Conflict L. 45 (1998).

<sup>2</sup> See, e.g., Agreement between the Government of the Republic of Senegal and the African Union on the creation of the Extraordinary African Chambers in the Senegalese Courts (in French) (creating the Extraordinary African Chambers to try international crimes committed in Chad from 7 June 1982 to 1 December 1990); Agreement between the United Nations and the State of Guatemala to Establish the International Commission against Impunity in Guatemala (establishing a special prosecutor's office within the Guatemalan justice system to prosecute human rights violations by security forces); Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, Ethiopia, August 17, 2015, ch. V (proposing a Hybrid Court for South Sudan); Patryk I. Labuda, *The Road Ahead — Building Momentum for Justice in the Central African Republic*, <https://justiceinconflict.org/2017/06/07/the-road-ahead-building-momentum-for-justice-in-the-central-african-republic%E2%80%A8/> (discussing Special Criminal Court for CAR).

Even as international criminal courts have proliferated and international criminal procedure has attained recognition as an independent corpus of law, foundational questions about the field remain. Can the diverse procedures used by these institutions be treated as part of a single, coherent system? Is international criminal procedure a blend of domestic traditions or a *sui generis* body of law, reflecting the special goals and needs of international criminal trials? What goals does it pursue, and how does it balance competing objectives?

Part II of the Chapter traces the development of modern international criminal procedure, first at the ad hoc tribunals for the former Yugoslavia and Rwanda and then at hybrid courts and the International Criminal Court.<sup>3</sup> Part III discusses the ambitious and at times conflicting goals that international criminal procedure is said to pursue. These include goals commonly associated with domestic trials—providing a fair trial, establishing the truth, and enforcing the criminal law effectively. But some commentators believe that international courts—and by extension, the process these courts rely upon—also pursue broader, political goals, such as promoting the rule of law, fostering peace and reconciliation, creating a historical record as a means to educate future generations, and providing a sense of closure for injured individuals and communities. The international community has failed to agree on a clear ranking of these various objectives, however, and debates persist about which goal should take precedence when different goals are in tension. As Part IV documents, the disagreement about priorities helps explain much of the diversity we see in international criminal procedures, both across different courts and within the same court.

Accordingly, international criminal procedure is currently not a coherent legal system, but is rather best described as the product of a decentralized “network” or “community” of courts.<sup>4</sup> Part V argues that the international legal community should embrace the pluralist character of international criminal procedure and learn from the dialogue and the “labs of experimentation” that it encourages. The diversity of procedures can help international criminal courts arrive at solutions that address more effectively the unique political, practical, and forensic challenges of dispensing international criminal justice. Over time, the circulation of information and personnel around the different international criminal courts and tribunals can help spread procedural practices from one court to the next and bring some level of coherence to the enterprise.<sup>5</sup> But at least in the foreseeable future, such piecemeal efforts to bring greater uniformity to international criminal procedure are likely to run up against the desires of the creators of different international courts to establish and maintain court-specific procedural frameworks that reflect the political priorities and legal traditions of the populations affected.

While pluralism across courts may be both inevitable and in many ways desirable, procedural pluralism within the same court raises legitimate concerns about notice, predictability, and equal treatment. Part V therefore argues that international criminal courts must respond to these concerns and that they can do so through clearer rules and appellate jurisprudence that promotes procedural coherence. Predictability and equal

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<sup>3</sup> Although the International Military Tribunals for Nuremberg and the Far East (Tokyo) can be seen as the first examples of courts using “international criminal procedure,” the procedural rules used at the tribunals were not as fully developed as modern rules and are therefore not examined here.

<sup>4</sup> Elies van Sliedregt & Sergey Vasiliev, *Pluralism: A New Framework for International Criminal Justice*, in *Pluralism in International Criminal Law* 3, 13 (Elies van Sliedregt & Sergey Vasiliev eds. 2014); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 *Mich. J. Int'l L.* 1, 3 (2002).

<sup>5</sup> Burke-White, *supra* note 4, at 4; Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 *Oregon Rev. Int'l L.* 361 (2008).

treatment within the same legal institution are critical elements of the rule of law and of fair trials and indispensable to the legitimacy of the international criminal justice system.

## II. Development of International Criminal Procedure

In the aftermath of atrocities committed during ethnic conflicts in the former Yugoslavia and Rwanda in the 1990s, the UN Security Council established the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) to address international crimes arising out of these conflicts. The tribunals had jurisdiction over genocide, crimes against humanity, and war crimes. They were the first international courts since the post-World War II Nuremberg and Tokyo Tribunals to address such crimes.

The procedural law that the tribunals applied included their founding statutes, their rules of procedure and evidence, and standard international law sources such as treaties and custom. Because international criminal law and procedure were not well developed when the ICTY and ICTR began their work, the tribunals had to fashion and interpret rules of procedure with reference to domestic laws and practices. Both common-law and civil-law countries' traditions influenced the development of criminal procedure at the tribunals. At the outset, the common-law, or adversarial, approach predominated,<sup>6</sup> but over time, tribunal procedure became more inquisitorial, as part of an effort to expedite proceedings.<sup>7</sup>

Soon after the ICTY and ICTR began their proceedings, in 1998, state delegations from around the world negotiated and signed the Rome Treaty establishing the International Criminal Court (ICC). Like the ICTY and ICTR before it, the ICC adjudicates some of the most serious international crimes, including war crimes, crimes against humanity, and genocide (and possibly in the near future, the crime of aggression). On matters of procedure, the ICC applies its own statute and rules of procedure and evidence, as well as treaties and "principles and rules of international law."<sup>8</sup> It must interpret the norms drawn from these sources of law in a manner "consistent with internationally recognized human rights."<sup>9</sup>

Reflecting the greater diversity of their drafters, ICC procedural rules are more closely aligned with the inquisitorial approach than were those of the ad hoc tribunals. ICC judges have the authority to exercise significant control over the proceedings by directing the presentation of evidence<sup>10</sup> and overseeing charging decisions of prosecutors.<sup>11</sup> Victims

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<sup>6</sup> Daryl A. Mundis, *From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence*, 14 *Leiden J. Int'l L.* 367, 368 (2001).

<sup>7</sup> See, e.g., Kai Ambos, *International Criminal Procedure: 'Adversarial', 'Inquisitorial' or Mixed?*, 3 *Int'l Crim. L. Rev.* 1, 18–19 (2003); Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 *J. Int'l Crim. Just.* 603, 612 (2003). Other commentators have argued that rather than becoming more inquisitorial, the ICTY became more "managerial," changing its procedures to promote efficiency rather than to facilitate a more thorough objective inquiry into the facts. See, e.g., Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 *Am. J. Comp. L.* 835, 835–36 (2004).

<sup>8</sup> Rome Statute art. 21(1). The Regulations of the Court, adopted by ICC judges, are a subsidiary source of procedural law. ICC Regulations of the Court Reg. 1.

<sup>9</sup> Rome Statute art. 21(3).

<sup>10</sup> *Id.* art. 69(3) (providing that judges can request the submission of evidence that they consider "necessary for the determination of the truth."); *id.* art. 64(8)(b) (authorizing judges to "give directions for the conduct of the proceedings").

<sup>11</sup> See, e.g., *id.* art. 61 (providing for an adversarial hearing on the basis of which the "Pre-Trial Chamber shall . . . determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged"); *id.* art. 56 (3) (giving Pre-Trial Chambers the authority to take special

can also actively participate in the proceedings in their own capacity, from pretrial to appeal.<sup>12</sup> Furthermore, ICC prosecutors have obligations to not only disclose, but also collect exonerating as well as incriminating evidence.<sup>13</sup> These and other related features bring ICC procedure closer in line with the inquisitorial model.

When it comes to hybrid tribunals, procedure is influenced in part by the ICTY, ICTR, and ICC models and in part by the legal system within which a hybrid tribunal is located. The Special Court for Sierra Leone heavily borrowed from ICTR rules and remained largely adversarial, consistent with the modern legal tradition of Sierra Leone.<sup>14</sup> By contrast, the procedures of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) have more inquisitorial features, such as investigative judges (ECCC), victim participation (ECCC and STL), and trials in absentia (STL).<sup>15</sup> Once again, this reflected the intention of the drafters to make the procedures of these tribunals consistent with the procedures of the country where the crimes were committed and whose population was the target audience of the tribunals.<sup>16</sup>

### III. Guiding Values and Objectives

International criminal procedure follows a number of goals that are similar to those of domestic criminal procedure—establishing the truth, enforcing criminal laws effectively, and ensuring fairness in the process. But just as different domestic courts place different weights on each of these values, so do different international criminal courts. Furthermore, international criminal courts may pursue additional, more ambitious goals, such as establishing a historical record about the crimes, promoting peace and reconciliation, and modeling respect for human rights. These more ambitious goals may at times conflict with the narrower, adjudicative goals of the process, and courts differ in how they resolve the tension.

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investigative measures in certain limited circumstances, even if the prosecutor has not sought such measures, “but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defense at trial”); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” ¶¶ 77, 93 (Dec. 8, 2009) (noting that judges can, after giving notice to the parties, change the legal characterization of the facts, although the Trial Chamber may not exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber).

<sup>12</sup> See *infra* Part IV.B.

<sup>13</sup> Rome Statute art. 54(1)(a).

<sup>14</sup> Antonio Cassese, Report on the Special Court for Sierra Leone 21 (2006), at <http://www.rscsl.org/Documents/Cassese%20Report.pdf>.

<sup>15</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, 10 August 2001, with inclusion of Amendments as promulgated on 27 October 2004 art. 23 [hereinafter ECCC Statute]; Extraordinary Chambers in the Courts of Cambodia, Internal Rules Rev. 9 R. 23 (2015); Statute of the Special Tribunal of Lebanon arts. 17, 22 [hereinafter STL Statute]; Special Tribunal of Lebanon Rules of Procedure and Evidence, Rev. 9, R. 86, 87 (2017).

<sup>16</sup> See, e.g., STL Statute art. 28(2) (noting that in drafting STL rules, STL judges should “be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.”). See generally Nancy Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 Yale J. Int’l L. 1, 17-18 (2016) (discussing the different substantive and procedural laws and different mandates of the main international and hybrid tribunals).

## 1. Truthseeking

The duty to seek the truth is a primary goal of the process at all international criminal courts, as it is for domestic courts.<sup>17</sup> Dedication to truthseeking means at the very least that international courts should use investigative and trial procedures that produce reliable evidence.<sup>18</sup> Some courts and commentators have gone beyond the focus on reliability, however, and have interpreted the duty to seek the truth to mean also that courts must contribute to the establishment of an accurate historical record about the underlying conflict.<sup>19</sup>

This broad interpretation of the court's duty to seek the truth has been controversial. Trials are not well-suited for producing reliable history, given judges' lack of historical training, the parties' disincentives to produce an objective record, and the limitations imposed by formal evidentiary rules.<sup>20</sup> In addition, the focus on producing a complete historical record may conflict with the court's primary task of determining individual culpability.<sup>21</sup> An approach aimed at building an historical record may focus on issues such as mass complicity and foreign involvement, but this may prejudice the court's decision with respect to the specific charges leveled against the defendant.<sup>22</sup> It may also interfere with the defendant's right to be tried without undue delay.<sup>23</sup>

Even when courts adopt the narrower conception of truthseeking, they confront a host of practical challenges unique to the international level. The first such challenge is the heavy dependence of international criminal courts on the cooperation of national authorities in investigating crimes and apprehending suspects. National authorities are frequently unwilling or unable to provide such cooperation, and in some cases, may deliberately interfere with the investigations.<sup>24</sup>

Another major hindrance is the difficulty of ensuring the safety of witnesses, particularly when international prosecutors are investigating crimes in areas of continued conflict or instability.<sup>25</sup> Security concerns may also extend to the investigators themselves, whether they work for the prosecution or the defense. More so than domestic courts,

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<sup>17</sup> See, e.g., Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12 A, Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute," ¶ 256 (Feb. 27, 2015) ("The establishment of the truth is one of the principal objectives of the Statute, to which the Trial Chamber must actively contribute.").

<sup>18</sup> Richard L. Lippke, *Fundamental Values of Criminal Procedure*, in this volume.

<sup>19</sup> See, e.g., Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgement, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 Vand. J. Transnat'l L. 405, 472-75 (2012).

<sup>20</sup> Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 Chi. Kent. L. Rev. 329, 333, 337-38 (2008).

<sup>21</sup> Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. Pa. L. Rev. 463, 524 (1995); Damaška, *supra* note 20, at 333, 337-38.

<sup>22</sup> *Developments in the Law – The Promises of International Prosecution*, 114 Harv. L. Rev. 1957, 1973 (2001); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Calif. L. Rev. 75, 95 (2005).

<sup>23</sup> Jenia I. Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 Va. J. Int'l L. 529, 541 (2008).

<sup>24</sup> E.g., Nancy Combs, *Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions*, 75 Wash. & Lee L. Rev. \*21, \*38-39 (forthcoming 2018).

<sup>25</sup> *Id.* at \*17-18.

international criminal courts must further contend with national security and other confidentiality concerns with respect to sources they rely upon. This affects the ability of prosecutors to present evidence and comply with their disclosure obligations to the defense.

More broadly, the ability of international criminal courts to uncover the truth is hampered by language and cultural barriers for the factfinders, who come from various countries, typically different from the countries in which the crimes occurred. The long time lapse between the commission of the crimes and the international prosecutions presents additional evidentiary challenges for international courts, as memories fade, witnesses disappear or die, and evidence is destroyed.<sup>26</sup> Furthermore, mass atrocities frequently occur in developing nations, and investigators in these countries have traditionally been less able to rely on “audio, video, or cellular evidence” or even on written records.<sup>27</sup> As a result, international criminal proceedings have had to rely heavily on eyewitness testimony, which is frequently unreliable in the context of ordinary domestic crimes, but is even more so in the context of mass atrocities, where the events witnessed are traumatic and occurred in the distant past.<sup>28</sup> Scholars have documented widespread inconsistencies in testimony at various international criminal courts.<sup>29</sup>

Finally, the massive evidentiary base of international crimes adds to the difficulty of determining individual responsibility. The crimes alleged are often widespread and committed with the assistance of complex organizations or state organs. Disentangling responsibility in the relevant political or military hierarchies is a daunting task for international courts. Just the trial of Slobodan Milošević, for example, which ended prematurely because of the defendant’s death, involved 466 days of hearings, 295 witnesses, 5,000 exhibits, and a transcript of over 49,000 pages.<sup>30</sup> The enormity of the evidentiary base complicates charging, disclosure, and evidence presentation choices, and calls on the prosecution to make compromises in the process, such as relying on overly expansive modes of liability and on insider witnesses who may not be fully credible.<sup>31</sup>

Because of the massive evidentiary challenges facing international prosecutors, the search for truth can seem too costly. Accordingly, like certain of their domestic counterparts, international tribunals have occasionally restrained their truthseeking ambitions for the sake of efficiency.<sup>32</sup> At other times, international criminal courts have subordinated truthseeking to attain other important goals, such as the protection of individual rights.<sup>33</sup> In

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<sup>26</sup> *Id.* at \*19-20.

<sup>27</sup> *Id.* at \*8-9. As cell phones become more ubiquitous throughout the world, however, digital evidence is likely to become more commonly available even in international prosecutions. See, e.g., Alex Whiting, *The ICC’s New Libya Case: Extraterritorial Evidence for an Extraterritorial Court*, *Just Security Blog*, Aug. 23, 2017, at <https://www.justsecurity.org/44383/iccs-libya-case-extraterritorial-evidence-extraterritorial-court>.

<sup>28</sup> Combs, *supra* note 24, at \*11-12, \*30.

<sup>29</sup> Nancy Amoury Combs, *Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials*, 14 *UCLA J. Int’l L. Foreign Aff.* 235 (2009); Alexander Zahar, *The Problem of False Testimony at the International Criminal Tribunal for Rwanda*, in 25 *Annotated Leading Cases of International Criminal Tribunals: International Criminal Tribunal for Rwanda 2006-2007*, at 509 (André Klip & Göran Sluiter eds., 2010).

<sup>30</sup> Damaška, *supra* note 20, at 341.

<sup>31</sup> Combs, *supra* note 24, at \*27.

<sup>32</sup> See, e.g., Jenia Iontcheva Turner, *Plea Bargaining and International Criminal Justice*, 48 *McGeorge L. Rev.* 219 (2017).

<sup>33</sup> Courts have done so, for example, when they have excluded relevant and reliable evidence to remedy violations of individual rights. See, e.g., *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on the Prosecutor’s Bar Table Motions, ¶¶ 57, 60, 62–63 (Dec. 17, 2010).

short, while truthseeking remains a primary goal of international criminal process, it frequently must be balanced against competing goals such as effectiveness, efficiency, and the protection of human rights.

## **2. Ensuring the Effective and Expeditious Enforcement of International Criminal Law**

International criminal courts seek the truth not only for its own sake, but also to advance their broader goal of repressing international crime. As the preamble to the Rome Statute affirms, the international community has an essential interest that “the most serious crimes of concern to the international community as a whole must not go unpunished” and that effective prosecution at the national and international level would “put an end to impunity for the perpetrators of these crimes and thus ... contribute to the prevention of such crimes.”<sup>34</sup> To accomplish this goal, international criminal procedure must effectively and efficiently “screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.”<sup>35</sup>

In addition to helping secure the enforcement of international criminal law, efficient procedure is regarded as an important goal of its own. Expeditiousness is a component of the accused’s right to a fair trial that guards against an unreasonably long detention of innocent individuals and minimizes the anxiety and social and economic burdens on defendants facing public accusation.<sup>36</sup> Expeditiousness is also beneficial to victims, witnesses, and the relevant national and international communities:

It ensures [victims] of receiving justice and of going on through a healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence. Unreasonable delay in commencing or finalizing a trial may also diminish public interest and public support for, and cooperation with the Court.<sup>37</sup>

As discussed in the previous section, enormous practical challenges hinder the ability of international prosecutors to investigate crimes effectively and expeditiously and of judges to adjudicate them. In a world of unlimited resources, international criminal courts might be able to make up for many of the evidentiary difficulties by hiring more investigators, prosecutors, translators, and paying more for witness protection. Yet this is far from the reality of international court operations. Instead of steady financial support, international courts typically encounter pressure to cut costs. Investigators, prosecutors, defense attorneys, and judges end up having to handle exceedingly complex cases faced simultaneously with serious practical challenges and with insufficient funding.

Furthermore, political support is also not always forthcoming for international trials, even in situations where the international community, through the UN Security Council, establishes these courts or refers situations to them. As a result, when national authorities

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<sup>34</sup> Rome Statute pmb.

<sup>35</sup> Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 9 (1964).

<sup>36</sup> *Cf. Barker v. Wingo*, 407 U.S. 514, 526–27 (1972).

<sup>37</sup> *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings,” ¶ 46 (July 12, 2010).

balk at arrest warrants and cooperation requests, international criminal courts generally remain powerless to respond effectively.<sup>38</sup>

In short, even as truthseeking, effectiveness, and efficiency remain central goals of the international criminal process, courts have had to contend with serious practical and political challenges in pursuing those goals. Courts have responded in part by adapting their procedures to meet these challenges. For example, the ICTY and ICTR introduced a host of managerial reforms to expedite proceedings—limiting indictments, relying more heavily on written evidence and plea bargaining, and restricting interlocutory appeals. The ICC has also recently begun experimenting with measures aimed at expediting the process, including greater judicial control over investigative and charging decisions<sup>39</sup> and over disclosure and evidence presentation.<sup>40</sup> These reforms show how practical difficulties are pushing the criminal process to adapt and rebalance international courts' commitments to, on the one hand, defense rights and truthseeking, and on the other, efficiency.

### 3. Respecting Human Rights and the Right to a Fair Trial

International criminal courts do not simply focus on adjudicating crimes efficiently—they aim to do so while respecting human rights and due process.<sup>41</sup> Even as international courts vary in their procedural orientations—more inquisitorial or more adversarial—they are universally committed to following international standards of due process and human rights. The Rome Statute for the ICC is explicit about this commitment and provides that “the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”<sup>42</sup> The STL Statute likewise requires that rules of procedure be guided by, *inter alia*, “reference materials reflecting the highest standards of international criminal procedure.”<sup>43</sup> Even though not all international criminal courts have an express statutory requirement to observe human rights, they all have provisions guaranteeing the right to a fair trial and other fundamental defense rights, and judicial

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<sup>38</sup> See, e.g., Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶ 138 (July 6, 2017).

<sup>39</sup> See, e.g., Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of the Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges,” ¶ 44 (May 30, 2012) (encouraging prosecutors to have investigations largely completed before the confirmation of charges hearing).

<sup>40</sup> See, e.g., Statement by Judge Sang-Hyun Song, President of the ICC, Remarks to the Assembly of States Parties 9th Session, Dec. 6, 2010, at 3, at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP9/Statements/ICC-ASP9-statements-SangHyunSong-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-statements-SangHyunSong-ENG.pdf) (noting that the requirement of in-depth analysis charts of the evidence by the prosecution has enhanced the efficiency of the proceedings); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision on the Disclosure of Evidence by the Defence, ¶¶ 9–10 (Dec. 5, 2008) (requiring the prosecution to submit an in-depth analysis chart); Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision Establishing a Disclosure System and a Calendar for Disclosure (Jan. 24, 2012) (setting a disclosure timeline); see also Megan Fairlie, *The Abiding Problem of Witness Statements in International Criminal Trials*, 50 N.Y.U. J. Int'l L. & Pol. \*44-45 (forthcoming 2018) (noting several recent directions by Chambers to prosecutors to rely more heavily on witness statements rather than oral testimony).

<sup>41</sup> Mégret, *supra* note 1, at 49.

<sup>42</sup> Rome Statute art. 21(3).

<sup>43</sup> STL Statute art. 28(2).



decisions have repeatedly emphasized the courts' commitment to respecting human rights.<sup>44</sup> This shared commitment promotes coherence in international criminal procedure.

Yet human rights principles relating to fair criminal trials remain quite vague in many respects and allow for multiple interpretations.<sup>45</sup> For example, while the principle of fair trial has been interpreted to require that evidence favorable to the defendant be disclosed to him before trial, human rights law does not regulate critical details, such as the timing and scope of disclosure. Nor does human rights law specify how courts are to resolve conflicts between the right to exculpatory evidence and the international community's interests in effective investigations, witness protection, and the protection of national security information. Unsurprisingly, in this area and many others, international criminal tribunals have found that human rights can support a range of procedures, affirming that human rights "provide a mere skeleton of what is required."<sup>46</sup>

In addition to being vague and open-ended, human rights law is ambivalent in its demands on the criminal process because it attempts to mediate between defendants' rights and victims' rights. Victims' rights are seen as an inextricable component of human rights law, which in turn is a key component of international criminal law and procedure.<sup>47</sup> Because international crimes are typically state-sponsored, under international law, victims have the right to a remedy for the breach of their fundamental human rights by state agents. The right to a remedy has been used by some to argue for reinterpreting the notion of a fair trial in international criminal proceedings to include victims and not just defendants.<sup>48</sup> Restorative justice advocates have argued further that giving victims a voice in the criminal process should be an independent objective of international courts as a means of promoting peace and reconciliation in conflict-torn areas.<sup>49</sup>

The dual commitment to procedural fairness and victims' rights is reflected in the statutes and rules of procedure of international criminal courts. Provisions on fair trial expressly reference the interests of victims alongside the rights of the accused; even though the latter are supposed to be prioritized, the need to consider the interests of victims reflects

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<sup>44</sup> *E.g.*, Statute of the International Tribunal for the Prosecution for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 20(1), May 25, 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda art. 19(1), Nov. 8, 1994, U.N. Doc. S/RES/955; Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgement, ¶ 242 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

<sup>45</sup> *See, e.g.*, Mégret, *supra* note 1, at 53-55.

<sup>46</sup> Warbrick, *supra* note 1, at 50; *see also* Mégret, *supra* note 1, at 58.

<sup>47</sup> *See, e.g.*, Mégret, *supra* note 1, at 57.

<sup>48</sup> *Id.*

<sup>49</sup> *See, e.g.*, Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, at lxiv (2001) (noting that the ICC has been transformed into a "court administering restorative justice" that would provide reparations to victims and give victims the opportunity to participate in the proceedings); Gilbert Bitti & Hakan Friman, *Participation of Victims in the Proceedings*, in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 456, 457 (Roy S. Lee ed., 2001) (linking victim participation to the restorative justice aims of the court); Tom Dannenbaum, *The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims*, 28 *Wis. Int'l L.J.* 234, 238 (2010) (noting that victim detachment from international criminal proceedings at the ICTR is seen by some as undermining that court's efforts to bring lasting peace and reconciliation to the region); *see also* Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, *Law & Contemp. Probs.*, 2013, at 235, 239-41 (noting that some NGOs have made the link between victim-oriented justice and peace).

a level of ambivalence in international criminal procedure.<sup>50</sup> Some opinions have gone beyond an emphasis on victims' rights and have suggested that prosecutors, too, can claim a right to a fair trial.<sup>51</sup> And as Section IV.B describes in greater detail, courts such as the ICC and ECCC give victims extensive participation rights in the proceedings.

An emphasis on victims' rights at trial, while commendable in many ways, has raised concerns about its effects on defendants' right to a fair trial. Does the commitment to victims' rights—particularly when accompanied by direct victim participation in the proceedings, put pressure on judges to lower standards of proof?<sup>52</sup> Does “[t]he idea that an acquittal could be justified on grounds of procedural impropriety, even if serious, become[] well-nigh preposterous?”<sup>53</sup> However each international court resolves the tension between victims' rights and the rights of the accused, what is clear is that human rights law leaves a broad margin of discretion in this regard.

#### 4. Promoting the Rule of Law

Beyond respecting human rights in their own proceedings, international criminal courts are often expected to serve as procedural models for domestic justice systems. Under this view, international courts ought to spread to national justice systems a “human rights culture.”<sup>54</sup> They must lead by example and set the highest standards for the fairness of trials.<sup>55</sup> Some scholars have argued that it is the central mission of international criminal courts to exemplify respect for the rule of law to countries where international crimes have occurred, which are frequently struggling to reestablish the rule of law after the end of violent conflicts or authoritarian regimes.<sup>56</sup>

Yet the ability and desirability for international criminal courts to model a commitment to highest norms of procedural fairness remains debatable. Recognizing the serious political and practical challenges facing the ICC, some have argued that it is sufficient for the ICC to be “fair enough” rather than attempting to set the highest standards of fairness.<sup>57</sup> International courts lack the state machinery that helps domestic courts effectively enforce criminal law. In this environment, adding procedural requirements that are overly demanding may entirely thwart international prosecutions and undermine the broader commitment to provide justice and accountability for international crimes. Rather than providing a pristine model of fair trial, international criminal procedure may compel us to “re-interrogat[e] the tradition of due process in light of the particular exigencies of international criminal justice.”<sup>58</sup>

### IV. Pluralism in International Criminal Procedure: Two Examples

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<sup>50</sup> See, e.g., Rome Statute art. 64(2) (requiring judges to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”).

<sup>51</sup> Yvonne McDermott, *Fairness in International Criminal Law* 109-16 (2016).

<sup>52</sup> Damaška, *supra* note 20, at 334.

<sup>53</sup> *Id.* at 334; see also Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 *Leiden J. Int'l L.* 925, 930-31 (2008).

<sup>54</sup> Damaška, *supra* note 1, at 614.

<sup>55</sup> McDermott, *supra* note 51; Ohlin, *supra* note 1, at 82–83, 103.

<sup>56</sup> *Id.*

<sup>57</sup> Mégret, *supra* note 1, at 60; Warbrick, *supra* note 1, at 54; Damaška, *supra* note 1, at 615.

<sup>58</sup> Mégret, *supra* note 1, at 76.

As the brief discussion above highlighted, international criminal procedure pursues multiple, and at times competing, goals. Disagreement persists both on how best to align procedures with these goals and how to balance the different objectives when they come into conflict with one another.<sup>59</sup> Even if consensus about the ranking of the several goals could be accomplished, opinions would continue to vary on the best means of accomplishing the same goals.

Dissension about the goals and methods of international criminal trials has led to inconsistent rules and case law on procedural matters. This section discusses two examples of procedures that have received divergent interpretation and implementation within and across international criminal courts, at least in part because of disagreement among judges—or the drafters of the procedures—about the ranking of different objectives or the best means of accomplishing these objectives.

## 1. Judicial Management of the Proceedings

The involvement of judges in managing international criminal proceedings has varied significantly, both across and within different courts. Some of the variation can be attributed to the diverse legal backgrounds of the individual judges—judges from the adversarial tradition have tended to act consistently with the tradition of the passive referee while those from the inquisitorial tradition have been more likely to play a proactive role.<sup>60</sup> At the ICTY and ICTR, judges' legal education and experience influenced the style of judicial management of the proceedings and decision-making on a host of procedural matters:

Judges coming from civil law countries tend[ed] to be more active during the testimonial process and [we]re more willing to pose questions to witnesses than their common law colleagues [we]re. Similarly, there [wa]s variance in the ICTY judges' exercise of their case-management duties in the pre-trial process and degrees of judicial activity in streamlining cases before they [went] to trial. 'Procedural pluralism' [wa]s not limited to specific areas but extend[ed] virtually to all essential procedural or evidentiary matters, including questioning of witnesses, admission of documents, treatment of hearsay, setting and enforcing time limits for the presentation of cases, and admission of expert evidence proposed by the parties.<sup>61</sup>

Variation with respect to judicial management of the proceedings has also occurred across courts, as a function of different formal rules reflecting different priorities. The following Sections discuss examples of both inter-court and intra-court variation on this question.

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<sup>59</sup> As Mirjan Damaška has argued:

Managing tensions among the goals, and dealing with the courts' limitations in attaining some of them, would be greatly facilitated if a set of priorities existed based on an understanding of the relative weights of competing goals. Acceptable terms of trade-offs among the contenders could then be identified, and greater coherence established in decision making. Procedural means also could be designed to facilitate the realization of what is agreed upon as most important to the mission of international criminal courts. Yet no clear set of priorities has emerged so far from the operation of international criminal courts.

Damaška, *supra* note 20, at 339.

<sup>60</sup> Van Sliedregt & Vasiliev, *supra* note 4, at 27.

<sup>61</sup> *Id.* at 27-28.

*a. Inter-Court Variation*

At the ICTY and ICTR, the rules initially assigned a relatively passive role to the judges—the parties were in charge of investigating and presenting the evidence, and prosecutors had significant charging discretion. But as the tribunals came under pressure to expedite proceedings, the heavily party-driven framework was faulted for producing lengthy and overly complex and costly trials. To address these problems, the judges amended the rules to provide themselves with greater managerial powers, to encourage guilty pleas, to limit interlocutory appeals, and to allow more extensive reliance on written evidence. This change reflected a new emphasis on efficiency and a somewhat lesser concern for establishing a detailed historical record;<sup>62</sup> according to some, it also reflected a lesser concern for ensuring the highest standards of procedural fairness.<sup>63</sup>

A somewhat different model of judicial authority has emerged at the ICC. As a compromise between delegates from inquisitorial and adversarial traditions, the rules give judges significant authority to shape the proceedings. Judges can hold status conferences to set filing schedules, discuss questions about disclosure, regulate the evidence to be presented, direct the manner in which the evidence is presented, and set time limits on arguments.<sup>64</sup> Although the rules do not require it, some chambers have also demanded that parties disclose evidence directly to the court in order to enable judges to establish the truth.<sup>65</sup> Reflecting inquisitorial influences, judges can also change the legal characterization of the facts (i.e., amend the charges pursued by the prosecutor) and reject admissions of guilt if the “interests of justice” require a fuller airing of the facts.<sup>66</sup> At the pretrial stage, judges must approve any decision of the prosecutor to open an investigation on her own initiative,<sup>67</sup> and they conduct probing confirmation of charges hearings to test the sufficiency of the evidence supporting the prosecutor’s charges.<sup>68</sup> In certain defined situations early in the investigations, pretrial judges may also independently take measures to preserve evidence that they consider “essential for the defense at trial,” even if the prosecutor disagrees that such measures are necessary.<sup>69</sup> In all these ways, ICC judges exercise broad oversight of prosecutorial actions, in many ways more significantly than did judges at the ICTY and ICTR.<sup>70</sup>

It is too early to know what the effects of judicial managerialism at the ICC have been. A recent survey of defense attorneys found that such “managerialism” has generally not infringed on defense rights and has in fact at times helped the defense by reining in the

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<sup>62</sup> Langer, *supra* note 7, at 836.

<sup>63</sup> Prosecutor v. Milosevic, Case No. IT-02-54-AR73.4, Dissenting Opinion of Judge Hunt, ¶¶ 20–22 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 21, 2003); Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, 28 Fordham Int’l L.J. 1566, 1589 (2005).

<sup>64</sup> ICC Rules of Procedure and Evidence R. 121; ICC Regulations of the Court 2004, ICC-BD/01-01-04, reg 54.

<sup>65</sup> Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties, ¶¶ 8–25 (July 31, 2008).

<sup>66</sup> ICC Regulations of the Court 2004, ICC-BD/01-01-04, reg 54; Rome Statute art. 65(4).

<sup>67</sup> Rome Statute art. 15(3)

<sup>68</sup> *Id.* art. 61.

<sup>69</sup> *Id.* art. 56(3).

<sup>70</sup> Hanna Kuczynska, *The Accusation Model Before the International Criminal Court: Study of Convergence of Criminal Justice Systems* 123-25 (2015).

prosecution in its investigative, disclosure, and charging decisions.<sup>71</sup> But as the ICC comes under increasing pressure to do more with fewer resources, what began as a more inquisitorial system may morph into the heavily managerial style of judging that prevailed in the later days of the ICTY. Instead of promoting deeper inquiry into the facts, managerial judging may be used to expedite the proceedings at the expense of procedural fairness and the search for truth.<sup>72</sup>

The ECCC has so far been the most inquisitorial of international criminal courts when it comes to the question of judicial authority. In addition to entrusting the investigation to investigative judges, the ECCC rules assign a very active role to judges at trial.<sup>73</sup> Critically, ECCC rules enable judges to perform that role more effectively by providing them with the dossier compiled by the investigative judges at the pretrial stage.<sup>74</sup> As Vasiliev explains, at the ECCC:

There are no distinct partisan cases but a single ‘case of the truth’, which comprises the evidence amassed in the dossier and supplemented by any proof proposed by the parties and admitted by the court. . . . The examination at trial is dominated and tightly controlled by the Trial Chamber, with parties playing second fiddle. Questions may only be posed to the accused, witnesses, experts, and civil parties with the permission of the President.<sup>75</sup>

Despite rules entrusting judges with broad authority to streamline proceedings, the ECCC process has remained remarkably slow. The languid pace cannot be attributed to the procedural setup, however, as a number of financial, institutional, political, and case-specific factors combined to delay the proceedings; it is quite likely that the proceedings would have been even slower under a more adversarial process.<sup>76</sup> And whatever effects ECCC procedural rules may have had on the pace of the proceedings, they have arguably succeeded in advancing other central goals of the court: to uncover the truth through detailed and impartial judge-led investigations and evidence presentation and to engage victims in the process as part of a broader effort at promoting national reconciliation.<sup>77</sup>

#### *b. Intra-Court Variation*

ICC chambers have repeatedly taken different approaches to the role of the judge in overseeing prosecutorial charging decisions, managing the proceedings, and regulating the evidence to be admitted. For example, initially, ICC Trial Chambers decided that they would, contrary to case law and practice at the ICTY and ICTR, ban the party-led

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<sup>71</sup> Jenia Iontcheva Turner, *Defense Perspectives on Fairness and Efficiency at the International Criminal Court*, in *Oxford Handbook on International Criminal Law* (Kevin Jon Heller et al. eds.) (forthcoming 2018), at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940483](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940483).

<sup>72</sup> Knoops, *supra* note 63; Natacha Fauveau-Ivanovic, *Quelle réalité pour les droits de la défense au sein de la Cour pénale internationale?* 5 *Revue des droits de l'homme* 2, 7 (2014).

<sup>73</sup> Jessica Peake, *A Spectrum of International Criminal Procedure: Shifting Patterns of Power Distribution in International Criminal Courts and Tribunals*, 26 *Pace Int'l L. Rev.* 182, 224-25, 226-30 (2014).

<sup>74</sup> *Id.* at 230-31.

<sup>75</sup> Sergey Vasiliev, *The Trial Process at the ECCC: The Rise and Fall of the Inquisitorial Paradigm in International Criminal Law*, in *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* 389, 396 (Simon Meisenberg & Ignaz Stegmiller eds. 2016).

<sup>76</sup> *See id.* at 423, 430-31.

<sup>77</sup> *See id.* at 428, 430; Jeudy Oeung, *Expectations, Challenges and Opportunities of the ECCC*, in *The Extraordinary Chambers in the Courts of Cambodia: Assessing Their Contribution to International Criminal Law* 103, 107-12 (Simon Meisenberg & Ignaz Stegmiller eds. 2016).

preparation of witnesses for testimony.<sup>78</sup> The new approach reflected not any significant difference in the formal rules at the tribunals and the ICC,<sup>79</sup> but rather two distinct procedural orientations. At the ICC, where a more inquisitorial approach prevails, witnesses were seen as “belonging” to the court, not to either party; accordingly, their preparation by a party to the proceedings was seen as inappropriate.<sup>80</sup> Along the same lines, ICC judges believed that preparation may distort witnesses’ testimony, whereas an unprepared witness is more likely to be spontaneous and authentic.<sup>81</sup> Ultimately, the ICC’s approach was grounded in a more inquisitorial approach to judicial authority, which rests on the belief that to establish the truth, judges must gather and examine evidence independently and not rely exclusively on the parties for this task.

More recently, however, two ICC chambers have charted a new path and have permitted the parties to prepare their witnesses.<sup>82</sup> They have reasoned that witness preparation helps expedite the process, without undermining the search for truth, as judges can adequately assess the credibility of witnesses even if those witnesses have been thoroughly prepared by one of the parties. Particularly in cases of great complexity, spanning a broad time period and involving numerous exhibits, the chambers concluded that “witness preparation will enable the calling party to engage with the witness in order to define the most effective way to discover the truth during trial.”<sup>83</sup> A different weighing of the values at stake, as well as a different view of the relationship between witness preparation and truthseeking, led to a new approach within the same court.

Witness preparation is not the only area where ICC chambers have taken diverging approaches to managing the proceedings. Similar divergence can be found in judicial decisions on disclosure requirements,<sup>84</sup> the standard of proof for confirming charges,<sup>85</sup>

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<sup>78</sup> Prosecutor v. Gombo, Case No. ICC- 01/05-01/08, Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 34 (Nov. 18, 2010); Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on a Number of Procedural Issues Raised by the Registry, ¶ 18 (May 14, 2009); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used To Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 57 (Nov. 30, 2007) [hereinafter *Lubanga Trial Chamber I Decision on Witness Preparation*].

<sup>79</sup> See, e.g., John D. Jackson & Yassin M. Brunger, *Witness Preparation in the ICC*, 13 J. Int’l Crim. Just. 601, 604 (2015).

<sup>80</sup> See *Lubanga Trial Chamber I Decision on Witness Preparation*, ¶ 34; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶ 36 (Nov. 8, 2006) (noting the inquisitorial approach on this issue and ultimately agreeing with it).

<sup>81</sup> *Lubanga Trial Chamber I Decision on Witness Preparation*, ¶¶ 51–52.

<sup>82</sup> Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on Witness Preparation, ¶¶ 52–54 (Jan. 2, 2013) [hereinafter *Muthaura Decision on Witness Preparation*]; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on Witness Preparation, ¶ 16 (June 16, 2015) [hereinafter *Ntaganda Decision on Witness Preparation*].

<sup>83</sup> *Ntaganda Decision on Witness Preparation*, ¶ 18; *Muthaura Decision on Witness Preparation*, ¶ 35 (“A witness who testifies in an incomplete, confused and ill-structured way because of a lack of preparation is of limited assistance to the Chamber’s truth finding function.”).

<sup>84</sup> Some Chambers have held that prosecutors must disclose “the bulk” of exculpatory evidence before confirmation, while others have required that “the totality” of exculpatory evidence be disclosed before the confirmation of charges hearing. Compare Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, ¶¶ 124–133, (May 15, 2006), with Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ¶ 6 (Apr. 6, 2011).

<sup>85</sup> See, e.g., Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 37–39 (Jan. 29, 2007) (requiring “compelling” evidence and “concrete and tangible proof”); Triestino Mariniello, *Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure*, 13 J. Int’l Crim.

limitations on cumulative charges,<sup>86</sup> and requirements for prosecutors to complete investigations before the confirmation hearing.<sup>87</sup> This has led to concerns among some defense attorneys about their ability to represent clients effectively, in light of the unpredictability in the court's procedures.<sup>88</sup>

## 2. Victim Participation

International criminal courts have also taken contrasting approaches to the involvement of victims in the proceedings. While courts influenced by the adversarial tradition have largely relegated victims to the role of witnesses, the ICC and the ECCC, reflecting inquisitorial orientations, have incorporated robust victim participation in their procedures. The move toward more extensive victim participation has also been supported by advocates of restorative justice. They have argued that allowing victims to tell their stories helps provide closure and promote healing and reconciliation and should therefore be a priority objective of international criminal courts.<sup>89</sup> Critics of extensive victim participation, on the other hand, have argued that it is too costly and that it endangers the defendant's right to a fair trial. As with judicial management of the proceedings, we find both inter-court and intra-court variation in the approaches to victim participation.

### a. Inter-Court Variation

Reflecting the influences of certain key continental European traditions, as well as restorative justice concerns, the Rome Statute of the ICC allows victims to participate in the proceedings as such at all stages, from pretrial to appeals.<sup>90</sup> Victims are entitled to legal representatives to represent their views adequately. The victims' legal representatives can question witnesses, review and file briefs and motions, and present evidence. The ICC proceedings also include a reparations stage, where victims can participate with a view to

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Just. 579, 580, 589, 595-96 (2015); Ignaz Stegmiller, *Confirmation of Charges*, in *The Law and Practice of the International Criminal Court* 897 (Carsten Stahn ed., 2015).

<sup>86</sup> Kuczynska, *supra* note 70, at 135-36 (discussing inconsistent approaches to cumulative charging at the ICC).

<sup>87</sup> On the requirement that the prosecution be "trial ready" at confirmation see, for example, Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges," ¶ 44 (May 30, 2012); see also Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute," ¶ 9 (Jan. 29, 2013); Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ¶ 25 (June 3, 2013).

<sup>88</sup> Turner, *supra* note 71, at \*22 n.144.

<sup>89</sup> E.g., Sigall Horovitz, *The Role of Victims*, in *International Criminal Procedure* 166, 174-75 (Linda Carter & Fausto Pocar eds., 2013); Dannenbaum, *supra* note 49, at 238-41; Jenia Iontcheva Turner, *Decision on Civil Party Participation in Provisional Detention Appeals, Case No. 002/19-09-2007-Eccc/ocij (PTC01), Extraordinary Chambers in the Courts of Cambodia*, 103 Am. J. Int'l L. 116, 120-21 (2009); see also Kendall & Nouwen, *supra* note 49, at 239-41.

<sup>90</sup> Rome Statute art. 68(3) ("Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.").

receiving reparations for the injuries they have suffered as a result of the defendant's conduct.<sup>91</sup>

The ECCC includes a similarly comprehensive scheme of victim participation as part of which victims, through their legal representatives, can take part at all major stages of the proceedings and are designated as "civil parties." The ECCC procedure is expressly modeled on domestic Cambodian law on "civil parties," which in turn is patterned on French criminal procedure. Under this model, victims can become parties to criminal cases and participate actively at the pretrial and trial stage by examining evidence, requesting investigative action, and making written submissions. The victim participation scheme is in important respects broader than that of the ICC because it does not require victims to make a special showing that their personal interest is affected before taking part in a specific stage of the proceeding.<sup>92</sup>

While the victim participation schemes at the ICC and ECCC have been hailed by many as the fulfillment of the human rights ideal of providing closure and fuller reparation to victims, they have also been increasingly criticized for their expense, impracticability, and burden on defense rights.<sup>93</sup> The victims' application process at the ICC has been particularly cumbersome, and the participation at both pretrial and trial stages has significantly delayed the proceedings and imposed logistical and financial burdens on the court and on the parties. Victim participation has also been criticized for pitting the defense against multiple accusers and requiring under-resourced defense counsel to expend time reviewing victim applications and responding to victim submissions.<sup>94</sup> At this point, critiques of victim participation are so widespread that, as one commentator concluded, "alarmed accounts outweigh by far the more positive and hopeful ones."<sup>95</sup>

Whether anticipating some of the difficulties with extensive victim participation or simply following the adversarial blueprint on this issue, the first modern international tribunals, the ICTY, ICTR, and SCSL, took a more limited view of victim participation. Victims participated as witnesses for the prosecution and could present statements to the court at sentencing. This approach was criticized for failing to consider victims' concerns and to promote national reconciliation, but it was consistent with the adversarial tradition and helped advance efficiency and protect defense interests.

Whatever one's views on the advantages and disadvantages of the different approaches, the experimentation with a range of victim participation schemes across different courts provides a useful reference point for the ICC and for fledgling hybrid courts as they decide how to design—or reform—rules on victim involvement.

#### *b. Intra-Court Variation*

Judicial decisions within the same court have also offered diverging interpretations of the scope and mechanics of victim participation. At the ICC, chambers have experimented

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<sup>91</sup> Rome Statute art. 75.

<sup>92</sup> *E.g.*, Co-Prosecutors v. Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ (PTC01), Decision on Civil Party Participation in Provisional Detention Appeals, ¶ 49 (March 20, 2008).

<sup>93</sup> Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case W. Res. J. Int'l L. 475, 481 (2011); Sergey Vasiliev, *Victim Participation Revisited—What the ICC Is Learning About Itself*, in *The Law and Practice of the International Criminal Court* 1133, 1138-43 (Carsten Stahn ed. 2015).

<sup>94</sup> Van den Wyngaert, *supra* note 93, at 488, 493; Vasiliev, *supra* note 93, at 1172.

<sup>95</sup> Vasiliev, *supra* note 93, at 1139.



with different approaches to victim applications and the mode of victim participation at trial, which has “reinforced ... cross-chamber pluralism.”<sup>96</sup>

On the question of victim applications to participate in the proceedings, for example, some chambers have encouraged or required a collective or partly collective approach to application while others have favored a more individualized process, allowing victims to express their distinct harms and interests more fully.<sup>97</sup> Likewise, judicial decisions have differed on whether relatives of deceased victims can apply to participate in the proceedings. Some chambers have read the term “natural persons” in Rule 85(a) narrowly to exclude deceased persons. Others have looked to international human rights law, which takes a broader view of the group of people entitled to compensation for human rights abuses, and have interpreted the term “natural persons” to mean that, if a victim has died as a result of a crime charged at the ICC, then his or her family members have the right to participate in the criminal proceedings before the ICC.<sup>98</sup>

Chambers have also disagreed on the scope of victim involvement at trial. While uniformly allowing victims to present and challenge evidence,<sup>99</sup> some ICC chambers have also permitted oral submissions by the victims themselves as a way of permitting the presentation of the victims’ “views and concerns” to the court.<sup>100</sup>

This intra-court pluralism on victim participation can be attributed in large part to the novelty of the ICC victim participation regime and the ambiguity of the governing law.<sup>101</sup> But another reason why chambers have split on these issues is that conflicting values underlie the different sides of victim participation debates. On the one hand, the sheer numbers of victim applicants, combined with a complex, individualized application process and a broad pretrial and trial participation scheme have significantly strained the capacity of the ICC. The unwieldy victim participation practice has also raised questions about the burdens on the defense to respond to victim applications and victim interventions during trial and pretrial. Concerns about efficiency and about the defendant’s right to a fair trial therefore weigh in favor of restricting victim participation. On the other hand, a more individualized victim application process and more extensive victim involvement at trial are consistent with the emphasis on victims’ rights and restorative justice, which motivated the drafting of the Rome Statute provisions on victim participation. This explains why, even as the ICC moves away from a full-blown emphasis on restorative justice and becomes more pragmatic in its approach to victim participation,<sup>102</sup> intra-court divergence on the issue persists, leading to incoherence and unpredictability in ICC procedural law.

## V. The Promise and Challenge of Pluralism in International Criminal Procedure

As the overview in Part IV shows, while some may have hoped that the creation of a permanent international criminal court would bring coherence to the field, this has not

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<sup>96</sup> *Id.* at 1153.

<sup>97</sup> *See id.* at 1153-59.

<sup>98</sup> Héctor Olásolo & Alejandro Kiss, *The Role of Victims in Criminal Proceedings Before the International Criminal Court*, 81 Int’l Rev. Penal L. 125, 128-30 (2016).

<sup>99</sup> Vasiliev, *supra* note 93, at 1169, 1173-74.

<sup>100</sup> *Id.* at 1168.

<sup>101</sup> *See* Rome Statute arts. 68(3), 69(3); ICC Rules of Procedure and Evidence R. 85, 89, 91(3).

<sup>102</sup> Vasiliev, *supra* note 93, at 1196.

occurred. Pluralism of procedural approaches persists both within and across international criminal courts, and the creation of new hybrid courts to pursue international criminal justice is only likely to expand procedural diversity.<sup>103</sup>

This diversity of procedural approaches might be regarded as an example of the broader phenomenon of fragmentation of law within international institutions. But the use of the term fragmentation seems inapt in this context. As van Sliedregt and Vasiliev observe, international criminal procedure did not begin as a coherent system of law that slowly disintegrated over time, as a result of inconsistent interpretations of the same rules.<sup>104</sup> Rather, international criminal procedure has been built up incrementally in self-contained legal regimes at the several international courts.<sup>105</sup> These courts are governed by independent statutes and rules of procedure and pursue different mandates. Their procedures are intentionally designed to develop on separate tracks, and there is no overarching legal instrument on procedure that binds all of them. As discussed earlier, human rights law provides only the bare bones of common principles for international criminal procedure.

One might still expect to see convergence in international criminal procedure over time, if the courts aimed to accomplish similar objectives, or if, as one scholar puts it, “the central project of international criminal courts [were] to build a normative community.”<sup>106</sup> Yet an underlying agreement on the goals of international criminal process does not appear to be forthcoming. The international community continues to pursue multiple goals and to disagree on the ranking of different goals. They also turn to a range of procedures to accomplish the same goals, as debates about the superiority of adversarial versus inquisitorial procedures continue. Neither the states creating international courts, nor the judges on the courts, appear to be trying to build common procedural norms across international criminal institutions.

If pluralism in international criminal procedure is here to stay, is this a cause for concern? To answer this question, we must distinguish between procedural diversity within the same court and diversity across courts. Lack of coherent procedural approaches is more problematic in the former than in the latter. In fact, variance of approaches across courts is beneficial for international criminal procedure, for two principal reasons.

First, diversity allows international courts to calibrate their procedures to reflect the priorities of their primary local or regional audiences. While the international community remains an important audience for all courts adjudicating international crimes, at least ad hoc and hybrid courts created to address crimes on a particular territory primarily aim to address the national and regional communities most directly affected by the courts’ work.<sup>107</sup> Indeed, this is expressly recognized by the courts’ founding documents. The ICTY aimed (among else) to advance peace and reconciliation in the former Yugoslavia, the ICTR in Rwanda, the ECCC in Cambodia, and so forth. Adjusting the procedural approach of each court to match the priorities of the primary target audience could help strengthen the court’s local political legitimacy and therefore its ability to accomplish its goals.

Likewise, procedures can be adjusted somewhat to address specific practical challenges that each war crimes court is likely to encounter with respect to the cases it

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<sup>103</sup> Beth van Schaack, *The Building Blocks of Hybrid Justice*, 44 *Denv. J. Int’l L. & Pol’y* 101, 104 (2016).

<sup>104</sup> Van Sliedregt & Vasiliev, *supra* note 4, at 16.

<sup>105</sup> *Id.*

<sup>106</sup> Margaret deGuzman, *Harsh Justice for International Crimes*, 39 *Yale J. Int’l L.* 1, 27 (2016).

<sup>107</sup> *See, e.g.*, Combs, *supra* note 16, at 21, 27-28.

adjudicates. For example, if a court is likely to operate in a setting of ongoing conflict or an environment of broad witness intimidation, it may be particularly important for that court to provide for a range of witness protection measures.<sup>108</sup> Such a court may be more open to arguments in favor of video testimony or greater reliance on documentary evidence.<sup>109</sup> It may also be more open to arguments for trials in absentia, particularly if such procedures are available in the domestic legal regime of the relevant national jurisdiction.<sup>110</sup>

Second, even if one posited that over time, international criminal courts should work toward developing a coherent system of international criminal procedure, permitting the flourishing of diverse procedural approaches may still be beneficial. Different courts can serve as “labs of experimentation” for procedural rules in international criminal cases. As Anthony Colangelo has argued in the context of international law more broadly, “fragmentation may be a necessary and important growing pain that attends the international legal system’s maturation.”<sup>111</sup> Even if international criminal courts begin with different procedural aims and rules, over time, as judges cite to decisions from other international courts and as international criminal law professionals move from one court to the next, procedures might incrementally evolve toward a shared understanding of “best practices.”<sup>112</sup>

At the same time, a legal regime that encourages the flourishing of diverse procedural approaches to identical issues invites the criticism that it undermines certainty, notice, and equality of treatment. This critique is less poignant when different courts, bound by their own independent legal instruments, develop contrasting criminal procedures. As long as all courts abide by the minimal threshold set by international human rights law (within the broad margin of appreciation that they receive under that body of law), inconsistent procedural approaches appear legitimate and, as noted earlier, even beneficial.

But when inconsistent approaches occur within the same court, which is supposed to follow the same statute and rules of procedure, concerns about predictability and equal treatment are well-grounded. In the examples discussed in Part IV, we see variation not just from one court to the next, but also within the same court.

Some scholars have argued that intra-court pluralism is legitimate when a court’s governing statute and rules contain open-ended provisions that permit the testing of different evidentiary and procedural approaches. In this view, as long as such procedural experimentation is “properly managed and procedural uncertainty is minimized by consultations and detailed guidance handed down by the Chamber,” it can be beneficial.<sup>113</sup> It could help the court tailor its process “to [its] epistemic needs . . . , as well as to forensic challenges posed by the situation on the ground and the nature of witnesses.”<sup>114</sup>

While some procedural experimentation may be necessary as part of the “growing pains” of a new international criminal court and the need to adjust to unexpected practical challenges, it is important for each court to work towards a coherent interpretation of its own rules. Basic notions of justice and fairness require that, within the same jurisdiction,

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<sup>108</sup> See, e.g., Rules of Procedure and Evidence Before the Kosovo Specialist Chambers R. 80.

<sup>109</sup> See *id.* R. 80, 100.

<sup>110</sup> STL Statute art. 22. See generally IBA International Criminal Court and International Criminal Law Programme, Report on the “Experts’ Roundtable on Trials in Absentia in International Criminal Justice” (2016).

<sup>111</sup> Anthony J. Colangelo, *A Systems Theory of Fragmentation and Harmonization*, 49 N.Y.U. J. Int’l L. & Pol. 1, 7 (2016).

<sup>112</sup> See Baylis, *supra* note 5, at 377-82; Combs, *supra* note 16, at 20.

<sup>113</sup> Van Sliedregt & Vasiliev, *supra* note 4, at 29.

<sup>114</sup> *Id.*

like cases be treated alike and that the parties have a reasonable expectation of which rules would apply to their case.<sup>115</sup> This is particularly important in criminal cases, where notice about the applicable law is a bedrock principle and where the right to a fair trial encompasses the right to “adequate time and facilities for the preparation of the defence.”<sup>116</sup> Procedural inconsistency hampers the ability of the parties to predict the rules that the court will follow and to prepare and present their case accordingly. Not surprisingly, in a recent survey of ICC defense attorneys, several respondents identified procedural consistency as one of top three procedural reforms they would encourage the court to adopt.<sup>117</sup>

To reduce unwelcome procedural unpredictability, commentators have encouraged international criminal judges to adopt practice manuals and have called on appeals chambers to harmonize the law on key procedural issues.<sup>118</sup> Appeals chambers have a critical role to play in this regard, as they can quickly remedy inconsistent procedural decisions among lower chambers by issuing an authoritative interpretation of the relevant rules and statutory provisions.<sup>119</sup> To do so, ICC judges must become more open to interlocutory appeals, which allow for a speedy correction of procedural mistakes even if the mistakes may not prejudice the outcome of the case.

Currently, for an interlocutory appeal to reach the Appeals Chamber at the ICC, the lower chamber whose decision is being challenged must grant leave to appeal to the moving party.<sup>120</sup> The rules on interlocutory appeals are similar at other international criminal courts, although the ICTY and ICTR have interpreted these rules in a permissive fashion that encourages review of interlocutory matters.<sup>121</sup> At the ICC, interlocutory appeals have been granted quite rarely, leaving many procedural conflicts unresolved for long periods of time.<sup>122</sup> To promote procedural coherence, it would help to relax somewhat the standards for leave to file an interlocutory appeal and to place the decision of whether to accept an interlocutory appeal with the Appeals Chamber itself, rather than with the chamber whose

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<sup>115</sup> Colangelo, *supra* note 111, at 23.

<sup>116</sup> Rome Statute art. 67 (1)(b).

<sup>117</sup> Turner, *supra* note 71, at \*32.

<sup>118</sup> *Id.* at \*32-33; Guénaél Mettraux et al., Expert Initiative Report on Promoting Effectiveness at the International Criminal Court 34, 209-10 (2014).

<sup>119</sup> See International Bar Association, *Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress* 21 (2011).

<sup>120</sup> Rome Statute art. 82(1)(d) (providing that a party may appeal a “decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”).

<sup>121</sup> ICTY Rules of Procedure and Evidence R. 72, 73; ICTR Rules of Procedure and Evidence R. 72, 73; SCSL Rules of Procedure and Evidence R. 72; ECCC Internal Rules R. 74, 75; War Crimes Research Office, *Interlocutory Appellate Review of Early Decisions by the International Criminal Court* 53-61 (2008).

<sup>122</sup> A recent study found that out of 458 issues on which the defense sought leave to appeal, chambers granted leave for only 51 issues, yielding an average grant rate of 11.13%. Out of 90 issues for which the prosecution requested leave to appeal, Chambers granted leave on 34 issues, yielding an average grant rate of 37.78%. Turner, *supra* note 71, at \*26-27; see also War Crimes Research Office, *Expediting Proceedings at the International Criminal Court* 12 (2011) (“although the Appeals Chamber regularly takes multiple months to rule on an interlocutory appeal, the resulting judgment is often brief and provides little guidance to the parties and lower chambers of the Court”).

decision is being impugned.<sup>123</sup> Even where revising the rules of interlocutory appeals may be difficult to accomplish—as procedural amendments are at the ICC—pre-trial and trial chambers can easily relax the way they interpret the standards for interlocutory appeals (perhaps at the direction of a practice manual). Such steps would help advance procedural coherence and equal treatment of the parties in international criminal courts.

## VI. Conclusion

International criminal procedure is likely to remain a pluralist enterprise for the foreseeable future, as the international community continues to disagree on the values and goals that the process should pursue and the means that can best accomplish these goals. While experimentation with different procedures at different courts can be useful and informative, such experimentation should be discouraged within the same court, even if the court's rules permit it. Procedural coherence is a basic element of the rule of law and is a minimum requirement for a fair and legitimate international criminal process. For that reason, lower chambers within the same court should attempt to promote coherence by adopting practice manuals to guide judges and the parties, and rules on interlocutory appeals should be amended to allow appeals chambers to resolve procedural variation in lower chamber rulings more quickly and effectively.

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<sup>123</sup> This was the original framework for interlocutory appeals at the ad hoc tribunals, and it was seen as critical to establishing guiding case law on procedural matters at these tribunals. War Crimes Research Office, *supra* note 121, at 47-49.

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