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ABSTRACT

The world community expects international criminal trials to accomplish more than their domestic law counterparts. International criminal trials are meant to further both judicial and political trial goals despite the potential conflict between these trial purposes and the accused's fair trial rights. First, this article discusses what makes a trial legal or political and where along this spectrum international criminal trials should fall. Next, this article assesses each of the purposes underlying international criminal trials, contextualises them as legal or political, and analyses whether each should be relied on as a justification for trying a suspect in an international or internationalised criminal court or tribunal. Third, the article scrutinises the way in which the different trial goals interact and discusses the impact each political goal has on the legal purpose of trial. The article concludes that incorporating political goals into international criminal trials is necessary to fulfill the mandates of each international criminal law institution. Trial courts must balance the legal and political goals to ensure that the trial meets its aims but that when a political goal comes into conflict with the legal goal of trial, it is latter that must take precedence as it is the factor most concerned with ensuring that the trial is fair. Prioritising fairness is the only way to guarantee the continued legitimacy of international and internationalised criminal courts and tribunals.

Keywords: International Criminal Law, International Human Rights Law, Purposes of Trial, Political Involvement in Trial, Right to A Fair Trial

Article

I INTRODUCTION

There has been a proliferation of international criminal courts and tribunals since 1993. Despite this apparent demand for greater international adjudication of certain types of crimes, it has been pointed out that the question, ‘what are tribunals here for?’ has largely been left unanswered by the international legal community.¹ Although the United Nations Security Council, the Secretary-General and their own foundational statutes have set a number of goals for the different international and internationalised criminal courts and tribunals to achieve, it remains an open question whether they actually being accomplished. This naturally leads to two related questions: first, whether international criminal justice institutions are accomplishing the goals set for them; and second, whether these international criminal justice institutions are capable of achieving their stated purposes.

Answering these questions requires the identification of the method through which an international or internationalised criminal court or tribunal accomplishes its goals. At their root, such institutions are criminal courts. Criminal courts are designed as venues in which the criminal process is applied against an individual accused of committing a crime falling under the jurisdiction of the court. The culmination of the criminal process is a contested criminal trial and the purposes of the institution conducting the trial are realised through holding a trial.² This leads to an additional question; can international criminal trials achieve the overarching goals set for international criminal justice institutions?

This article will discuss the different purposes assigned to international and internationalised criminal courts and tribunals and examine whether criminal trials are capable of fulfilling those purposes. It will contend with the complicated problem that many of the different purposes are not necessarily compatible and that a balance must be found between these disparate factors. It will identify the importance of the right to a fair trial and use it as its guiding principle when weighing the different purposes against one another. It will conclude that fairness must be the overarching principle because without fairness international and internationalised criminal courts and

¹ C. Stahn, ‘Editorial: Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice?’; (2012) 25(2) *Leiden Journal of International Law* 251, 253.

² R.A. Duff, ‘Fairness in Criminal Proceedings: Concluding Thoughts and Further Questions’, in J. Jackson and S. Summers (eds), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (Oxford: Hart, 2018), 305.

tribunals lack legitimacy and without legitimacy they lack effectiveness. Therefore, those purposes that emphasise fairness will likely be dominant because without them the other purposes are rendered largely meaningless.

II DIFFERENTIATING A LEGAL TRIAL FROM A POLITICAL TRIAL

International criminal trials exist on a spectrum; on one end is the purely legal trial, limited in scope to a determination of the guilt or innocence of the accused based on the evidence as assessed following the application of the accused's fair trial rights.³ At the other end is a purely political trial, or 'show trial', in which all those involved assume the guilt of the accused in advance of trial.⁴ Show trials are largely held to silence the political opponents of the group conducting the trial.⁵ There is nothing inherently wrong with a trial that prioritizes political goals over legal goals so long as such a trial is conducted fairly.⁶ Unfortunately, politically motivated trials have a tendency to put pressure on notions of fairness, which creates a danger of threatening the legitimacy of the trial as a whole.⁷

Because international criminal trials combine both legal and political aims they exist somewhere along that spectrum. What is important to consider is where on that spectrum international criminal trials should fall to still be considered legitimate. The dividing line between a principally legal trial and a principally political trial should be whether the guilt is determined through the application of fair procedures.⁸ Once the political goals become so prominent as to make the trial unfair it ceases being a legal trial and becomes predominantly political.⁹ The right to a fair trial is a requirement of international law and a court that allows other interests to predominate over fair trial goals loses its legitimacy as it fails to comply with that basic standard.¹⁰

This raises the question: how fair must an international criminal trial be to comply with the right to a fair trial? Antonio Cassese believed that trials 'defend and

³ E.A. Posner, 'Political Trials in Domestic and International Law', (2005) 55 *Duke Law Journal* 75, 82.

⁴ J.I. Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials'; (2008) 48 *Virginia Journal of International Law* 529, 533-4; see also K. Campbell, 'The Making of Global Legal Culture and International Criminal Law', (2013) 26 *Leiden Journal of International Law* 155, 164.

⁵ *Ibid.*

⁶ D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 575.

⁷ *Ibid.*

⁸ S. Ford, 'Fairness and Politics at the ICTY: Evidence from the Indictments'; (2013) 39 *North Carolina Journal of International Law and Commercial Regulations* 45, 57.

⁹ *Ibid.*

¹⁰ *Ibid* at 57-8.

protect human rights...by fully applying the international human rights standards relating to the accused, victims and witnesses and setting thereby an exemplary standard for future international criminal trials.’¹¹ Although speaking specifically in the context of the Yugoslavia Tribunal, Cassese demonstrates a preference for trials falling towards the legal end of the spectrum. This is exhibited by his emphasis in favour of a strict application of the rights of the trial participants as a way of creating template for future courts and tribunals. Colin Warbrick expressly rejected Cassese’s position in asserting that trials need only be ‘fair enough’ to all of the participants ‘rather than aspiring to an exemplary or superior level of ‘fairest of all’’.¹² This position demonstrates a more political approach to trial and its purposes through the implication that fair trial rights should not be rigidly applied. Instead, the focus is on ensuring that trial end in the correct result rather than on guaranteeing the fair trial rights of the participants. This view is meant to minimise the importance of ensuring that trial is fair; instead it allows room for the political trial goals to play a greater role by making fairness to the parties a less pressing concern.

In her seminal work on fairness in international criminal trials, Yvonne McDermott effectively endorses Cassese’s position while tacitly rejecting Warbrick’s approach to fairness. McDermott argues that international criminal trials must aim to protect ‘the highest standards of fairness’, which she defines as ‘full respect for the rights of the accused as established by international human rights standards and repeated in the statutes of the tribunals’.¹³ Respect for the accused must also be ‘consistent with principles of fairness’ including neutrality, equality, and consistency.¹⁴ Fairness is important because a proceeding that is perceived as fair will positively impact perceptions about whether the trial is legitimate.¹⁵ Judge Christine van den Wyngaert also drew the connection between fairness and legitimacy in her minority opinion to the *Katanga* judgment. She reasoned that a court’s authority to pass judgment on an individual is directly related to the fairness of the proceedings.¹⁶

¹¹ A. Cassese, ‘The International Criminal Tribunal for the Former Yugoslavia and Human Rights’; (1997)(4) *European Human Rights Law Review* 329, 329.

¹² C. Warbrick, ‘International Criminal Courts and Fair Trial’; (1998) 3 *Journal of Armed Conflict Law* 45, 54.

¹³ Y. McDermott, *Fairness in International Criminal Trials* (Oxford: Oxford University Press, 2016), 34, 147.

¹⁴ *Ibid* at 34.

¹⁵ *Ibid* at 23-4.

¹⁶ *Prosecutor v Katanga* (Minority Opinion of Judge Christine Van den Wyngaert) No ICC-01/04-01/07, T Ch (7 March 2014), para. 311.

The success or failure of an international or internationalised criminal court or tribunal, i.e. its legitimacy, is determined by whether its proceedings are ‘fair and just.’¹⁷

Mirjan Damaška offers a somewhat different perspective. He cautions that if demands for fairness are perceived as being too high, those in charge of applying fair trial rules will find ways to work around those demands.¹⁸ This view recognizes that the political purposes of international criminal trials do exist, and that those responsible for conducting international criminal trials will make sure that those goals are given proper attention during trial, even if doing so could diminish the overall fairness of proceedings. That being said, one must heed Jenia Turner’s warning that ‘[t]he further a trial strays from its focus on the adjudicative function, the more likely it is to disregard the defendant’s rights in pursuit of non-legal purposes.’¹⁹

Cassese’s position is relatively non-controversial as it is easy to defend the proposition that the participants in a trial should all have full and equal access to existing human rights standards. However, the flaw in his argument is that it proposes an often unattainable standard. Cassese does not suggest any approach to how human rights norms should be applied when the interests of different parties come into conflict. All of the international criminal courts and tribunals have encountered situations in which the rights of the accused have clashed with the rights of the victims or witnesses. In some cases, the Statute or the Rules of Procedure and Evidence creates a ranking order of how the rights are to be applied. For example, the victims’ right to participate at the International Criminal Court is limited by the Statute to the extent that such participation cannot be prejudicial or inconsistent with the accused’s fair trial rights.²⁰ Unfortunately, in many instances no such normative mandate exists. In the absence of such an obligation, international and internationalised criminal courts and tribunals must make a choice. Either they must prioritise guaranteeing the fairness of one participant over the other or they must pursue a form of proceeding designed to balance the different interests of all of the parties. Unfortunately, neither of these solutions comports with Cassese’s desire to fully apply human rights standards of all of the parties. The first option benefits the

¹⁷ Ibid at para 310.

¹⁸ M. Damaška, ‘Reflections on Fairness in International Criminal Justice’; (2012) 10 *Journal of International Criminal Justice* 611, 614.

¹⁹ Turner (n. 4 above), 533-4, 537.

²⁰ Article 68(3) ICCS.

interests of one party to the detriment of others while the second seeks to proportionally diminish the interests of all of the parties. In either case, something less than full human rights protection is employed.

Warbrick's response to Cassese does not really offer a solution to this problem. Warbrick explains that his 'fair enough' standard is met when a court 'can secure the proper conviction of the guilty without doing too much violence in the meantime to the rights of the defendants.'²¹ His focus is entirely on what he understands the goal of the court to be, to convict guilty defendants, and whether the court can achieve its goals without infringing too much on the accused's right to a fair trial. This is the wrong approach. By understanding criminal trials in this way, Warbrick is suggesting that there exists an acceptable limit within which courts can put other interests ahead of the accused's fair trial rights so long as doing so correctly results in the conviction of a guilty accused. However, the application of this approach could result in obscuring the accused's fair trial rights entirely. Whatever the correct balance between fairness and expedience may be, it is clear that fairness must be a paramount concern. Once a trial allows fairness to take a backseat to other goals it is no longer a legal proceeding and becomes a politically motivated trial seeking to achieve goals other than the legal conviction of the accused. That is impermissible in international criminal law as there are basic minimum standards, found in the International Covenant on Civil and Political Rights and the Statutes of every international criminal court and tribunal, below which the courts and tribunals may not depart. Rigorous respect for those standards must be preserved for international criminal law to maintain its credibility.²²

McDermott and van den Wyngaert disagree with both Cassese and Warbrick and advocate in favour of providing the accused with the utmost fairness. McDermott supports her position with two claims. First, anything less than 'scrupulous fairness' would run counter to the presumption of innocence and act as a form of punishment before judgment is reached.²³ Second, choosing to provide those people standing accused at international criminal justice institutions with the fullest respect for their

²¹ Warbrick (n. 12 above), 62.

²² W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford: Oxford University Press, 2016), 1017; A. Reisinger-Coracini, 'Cooperation from States and Other Entities: General Framework of International Criminal Procedure', in G. Sluiter, H. Friman, S. Linton, S. Vasiliev and S. Zappalà (eds.), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013), 115.

²³ McDermott (n. 13 above), 146.

fundamental human rights, regardless of what they may be accused of, reveals a society that values the rights of the individual over the ‘vengeful and retributivist’ demands of the collective.²⁴ Van den Wyngaert takes an even more practical approach. From her perspective, it is only the accused whose liberty and property is at risk, meaning that he or she has the most to lose if the trial is unfair.²⁵ This view is somewhat reductive, as it undervalues the sense of justice that victims can experience following a conviction, but it reflects an important underlying sentiment. The accused must not be convicted pursuant to a compromised procedure as it can impact the legitimacy of international criminal law as a whole.

David Luban advances another reason for why fairness and legitimacy are inextricably linked in international criminal trials. He suggests that because international and internationalised criminal courts and tribunals are the product of political agreements they lack the inherent authority found in domestic legal systems that operate as a component of the government.²⁶ Because of this lack of inherent authority, international justice organisations must ‘build their legitimacy from the bottom up’, which is accomplished by the quality of justice they deliver.²⁷ Justice of sufficient quality to confer such legitimacy is derived from the fairness of the overall proceedings and the procedures applied.²⁸ This relationship between fairness and legitimacy means that international and internationalised criminal courts and tribunals must prioritise fairness if they wish to accomplish any of their legal or political goals.

That being said, Damaska’s concerns must be heeded and courts and tribunals should make every effort to avoid the overly rigid application of fair trial rights while continuing to maintain rigorous respect for those rights. If the fair trial rights of the accused are seen as being too inflexible, and particularly if they are viewed as a hindrance to justice, it becomes more likely that they will be limited or avoided. This is exemplified through various rule changes at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court. In the first instance, the accused’s right to ‘examine, or have examined’ the witnesses against them is secured in both the International Criminal Tribunal for the former Yugoslavia’s Statute and

²⁴ Ibid.

²⁵ *Prosecutor v Katanga* (n. 16 above), para. 311.

²⁶ Luban (n. 6 above), 579, 588.

²⁷ Ibid.

²⁸ Ibid.

the International Covenant on Civil and Political Rights.²⁹ However, due to concerns about the length of trials, the International Criminal Tribunal for the former Yugoslavia changed its rules so as to introduce limits on the accused's ability to examine some of the witnesses testifying against him or her. Despite this, the Tribunal saw fit to somewhat abrogate this fair trial right in favour of other considerations. The International Criminal Court also reduced the fair trial rights of the accused so as to promote other considerations when in 2013, the Assembly of States Parties incorporated Rules 134 *bis*, 134 *ter* and Rule 134 *quater* into the International Criminal Court's Rules of Procedure and Evidence.³⁰ These rules allow trial to continue in the accused's absence, a procedure that was previously thought to be incompatible with the accused's right to be present at trial and the Rome Statute.³¹ In both cases, the institutions involved identified areas in which the right to a fair trial clashed with other goals it wished to achieve. Rather than acquiesce to a strict interpretation of fairness, they made changes to the rules that may have slightly diminished the accused's right to a fair trial while enhancing other purposes of trial.

It is appropriate for courts to find a balance between ensuring that the trial is fair and achieving the other goals trial is meant to accomplish. Warbrick insinuates this, but his proposed understanding of the requisite balance is over reliant on maintaining the court's ability to render a guilty verdict thus creating the potential for abuse. The sort of questions about the fairness of trial that this approach raises can lead to concerns that court or tribunal's verdicts are unsafe. Those concerns can, in turn, threaten the legitimacy of the court or tribunal as a whole and make it impossible to accomplish any of the goals trials are meant to achieve. Instead, the balance must accentuate the accused's fair trial rights so as to avoid any substantive suggestion that a trial was unfair and preserve the credibility of international criminal justice.

III THE DIFFERENT PURPOSES OF TRIAL

It becomes increasingly more difficult to maintain the appropriate balance between the fair trial rights of the accused and the decision-making function of the court as courts attempt to incorporate more political goals into their decision-making process. The core purpose of trial is to bring the accused to justice in a fair and impartial proceeding, but international criminal trials are also meant to serve other,

²⁹ See Article 21(4)(e) ICTYS; Article 14(3)(e) ICCPR.

³⁰ Rule 134 *bis*, Rule 134 *ter* and Rule 134 *quater* ICC RPE.

³¹ C.H. Wheeler, *The Right to be Present at Trial in International Criminal Law* (Leiden: Brill, 2018), 104; *see also* Article 63 and Article 67 ICCS.

politically motivated purposes, as evidenced by the political goals expressed during the creation of international courts and tribunals.³² In many instances those political goals serve a purpose other than the fair adjudication of the accused. This causes the legal and political goals of trial to come into conflict with one another creating a tension about the continued fairness of trial. This sort of disagreement is expected as different trial goals serve different purposes. However, it is necessary for the process to remain fair, and therefore fundamentally legal, even while simultaneously serving recognised political purposes.

There are a number of different sources that identify the goals international criminal trials are meant to achieve. In a 2004 report, former United Nations Secretary-General, Kofi Annan formally set out the United Nations' objectives when establishing international and internationalised criminal courts and tribunals. Those stated goals are:

[B]ringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.³³

The aims identified by the Secretary-General were, for the most part, not new, but reflected those ambitions already described in the foundational documents of the existing international and internationalised criminal courts and tribunals. Future statutes would reiterate these goals while emphasizing those most important to their own work.

The United Nations' Security Council made clear when it established the International Criminal Tribunal for the former Yugoslavia that it did so with three goals in mind: first, to stop the violations of international humanitarian law being committed in the former Yugoslavia, including mass killings and ethnic cleansing; second, to 'bring to justice' the individuals perpetrating those crimes; and third, to restore and maintain peace in the region.³⁴ The Security Council echoed these goals when it established the International Criminal Tribunal for Rwanda by particularly

³² J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights: Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006), 262.

³³ *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (24 August 2004), para. 38.

³⁴ UNSC Res. 808 (22 February 1993), 2; UNSC Res. 827 (25 May 1993), 1.

highlighting the importance of ending the commission of international crimes in Rwanda, bringing the perpetrators of those crimes to justice and contributing to national reconciliation and the restoration and maintenance of peace.³⁵ The primary distinction between the identified goals of the two *ad hoc* tribunals is that the resolution establishing the International Criminal Tribunal for Rwanda specifically identified the importance of promoting national reconciliation while the resolution establishing the International Criminal Tribunal for the former Yugoslavia did not mention it. Despite this textual difference, Antonio Cassese, the first president of the International Criminal Tribunal for the former Yugoslavia, later explained that the achievement of national reconciliation is implicit in the trial goals of the Yugoslavia Tribunal.³⁶

In addition to trying to accomplish goals similar to those of the *ad hoc* Tribunals, the Rome Statute of the International Criminal Court also attempts to protect the victim-oriented interests identified by Secretary-General Annan. The Preamble to the Rome Statute refers to the fact that millions of people have been the victims of crimes that ‘deeply shock the conscience of humanity’ and then reinforces the important role the Court plays in punishing the perpetrators of those crimes.³⁷ By including reference to victims in the Preamble, the drafters of the Statute intended to emphasize the prominent place victims’ interests occupy in the International Criminal Court’s system. The Court’s interest in securing justice and dignity for victims is further reinforced in Article 54(2), which compels the prosecutor to consider the interests and personal circumstances of the victims and witnesses when investigating and prosecuting crimes within the Court’s jurisdiction, and Article 68(1), which obligates the Court to take measures to protect ‘the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’³⁸

The Security Council set out somewhat different goals in its resolution authorising the formation of the Special Tribunal for Lebanon. In addition to expressing the specific desire to bring to justice those responsible for assassinating former Lebanese Prime Minister Rafik Hariri, which the Security Council classified

³⁵ UNSC Res. 995 (8 November 1994), 1.

³⁶ *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, UN Doc. S/1994/1007 (29 August 1994), para. 13.

³⁷ Preamble ICCS.

³⁸ Article 54(2) ICCS.

as a threat to international peace and security, it also stressed that the Tribunal would assist Lebanon ‘in the search for the truth’ about the incident.³⁹ By identifying the search for truth as part of the function of the Lebanon Tribunal, the Security Council implicitly suggested that a court is an adequate forum for determining the truth about a given situation. Interestingly, the Lebanon Tribunal’s Statute does not mention the search for truth as part of the Lebanon Tribunal’s mission, but rather, focuses entirely on the legal purposes of trial.

Taken together, six major trial goals can be identified from the former Secretary-General’s statement and the Statutes of the various international and internationalised criminal courts and tribunals. They are: 1) determining the individual accountability of the accused; 2) establishing the truth about the incident at issue; 3) fostering reconciliation in the affected region; 4) achieving long-term peace; 5) providing the victims with a sense of justice; and 6) promoting the rule of law. Some, but not all of these goals have expressly legal underpinnings while others are designed to achieve more political aims. Although these goals are presented as individual topics, it is necessary to appreciate the connection between them and to understand that they are somewhat interdependent. There is no formal hierarchy amongst the different trial goals, however the court or tribunal conducting the trial may emphasize some goals over others in order to comply with its individual mandate.⁴⁰

3.1 The Goals of International Criminal Trials

3.1.1 Determining the Individual Accountability of the Accused

Accountability is a term that has come to be used broadly and is seen as both an end result of trial as well as a means for facilitating a multitude of other trial goals.⁴¹ Accountability efforts have been credited with encouraging: reconciliation, deterrence, recognition of victimisation, reparations, truth, peace, representative

³⁹ UNSC Res. 1757 (30 May 2007), 2.

⁴⁰ M. Damaška, ‘Part A Major Problems of International Criminal Justice, IV International Criminal Trials, Problematic Features of International Criminal Procedure’, in A. Cassese (ed.), *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, Oxford, 2009), 179.

⁴¹ A. Matwijkiw and B. Matwijkiw, ‘A Modern Perspective on International Criminal Law: Accountability as a Meta-Right’, in L.N. Sadat and M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers 2008), 42; C. Fournet, ‘Mass Atrocity: Theories and Concepts of Accountability - On The Schizophrenia of Accountability’, in R. Henham and M. Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (London: Routledge, 2011), 27.

democracy, lustration and the cessation of ongoing conflict.⁴² Some of these goals can be achieved outside of the traditional boundaries of the courtroom and accountability processes in international criminal law are now thought to include truth and reconciliation commissions, the memorialisation of victims and ‘other guarantees of non-repetition.’⁴³

Despite the numerous responsibilities assigned to accountability, and the increasing number of ways in which accountability can be realised, international criminal trials are most concerned with establishing legal accountability.⁴⁴ Legal accountability, in the context of international criminal law, is the only purely legal trial goal and it means holding individuals responsible for violations of any crimes proscribed by the applicable statute.⁴⁵ An essential component of accountability is that only those accused against whom the relevant charges are proved should be subject to conviction and punishment.⁴⁶ It is accomplished through an assessment of the evidence against the accused that results in a determination as to his or her guilt or innocence based on that evidence and imposing an appropriate punishment all while providing the accused with due process.⁴⁷ Legal accountability has been described as the natural counterpoint to impunity and the absence of legal accountability is considered immoral, damaging to victims’ interests, in violation of international legal norms and leading to the recurrence of atrocity crimes.⁴⁸

Although accountability is primarily concerned with assessing the guilt or innocence of the accused, that determination cannot be made in a vacuum. It is essential that before anyone can be held responsible for his or her actions, he or she must have access to a fair trial. The right to a fair trial is considered a central feature of the rule of law, a part of customary international law and has been called a core

⁴² Ibid; see also M.C. Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’; (1996) 59 *Law and Contemporary Problems* 9, 23; O.N.T. Thoms, J. Ron and R. Paris, ‘State-Level Effects of Transitional Justice: What Do We Know?’; (2010) 4 *International Journal of Transitional Justice* 329, 333.

⁴³ Fournet (n. 41 above), 27.

⁴⁴ Ibid at 28.

⁴⁵ S. Ratner, J.S. Abrams and J.L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (3rd edn., Oxford: Oxford University Press, 2009), 3, 10.

⁴⁶ *Prosecutor v Bemba* (Concurring Separate Opinion of Judge Eboe-Osuji) No. ICC-01/05-01/08, A Ch (14 June 2018), para. 28.

⁴⁷ Turner (n. 4 above), 533-4; J.D. Ohlin, ‘A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law’; (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 77, 92.

⁴⁸ *Prosecutor v Bemba* (n. 46 above), para. 26; Bassiouni (n. 42 above), 19; Fournet (n. 41 above), 28; N.J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’; (1996) 59(4) *Law & Contemporary Problems* 127, 129.

human right.⁴⁹ It is expressed as ‘a right to procedural safeguards to prevent an unjust conviction’ the purpose of which is to achieve ‘the proper administration of justice.’⁵⁰ Fair trials are achieved by providing a set of rights to the participants, particularly the defendant.⁵¹ These rights are detailed in a number of international conventions and treaties, as well as the foundational documents and rules of procedure and evidence of every international and internationalised criminal court and tribunal.

The right to a fair trial encompasses a number of legal safeguards, which if not observed, will call into question the validity of the trial as a whole. It is in this way that the right to a fair trial is linked to accountability. The basic goal of legal accountability in international criminal law is to properly apportion blame for the commission of atrocity crimes. That can only be accomplished if the court is given accurate information about the crimes alleged and the actions of those individuals involved in the commission of those crimes. If the information under consideration by the court is in some way suspect it could lead to an incorrect result. That, in turn, would mean the goal of legal accountability has not been fulfilled.

Punishment of the accused can also play a key part in accountability, although the extent of the role it plays is subject to debate. The importance of punishment to accountability is largely dependent on how different international and internationalised criminal courts and tribunals prioritise the interests of the distinctive groups international criminal law is intended to serve. Two groups were identified during Kofi Annan’s speech opening the Rome Conference. In it he urged the delegates to develop a Statute for the International Criminal Court in which ‘the overriding interest must be that of the victims, and of the international community as a whole.’⁵² By identifying these two groups separately the Secretary-General signalled

⁴⁹ D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994), 396; P.L. Robinson, ‘The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY’; (2009) 3 *Berkeley Journal of Law International Law Publicist* 1, 11; M.C. Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International and Procedural Protections and Equivalent Protections in National Constitutions’; (1993) 3 *Duke Journal of Comparative & International Law* 235, 292; M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge’s Recollection* (Oxford: Oxford University Press, 2012), 161-2; citing *Prosecutor v. Aleksovski* (Judgement) IT-95-14/1-A, A Ch (24 March 2000) § 104; *Prosecutor v Simić, et al.* (Judgement) IT-95-9-T, T Ch II (17 October 2003), para. 678.

⁵⁰ Campbell, (n. 4 above), 167; *General Comment 13, Article 14: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 1.

⁵¹ M. Klamborg, ‘What are the Objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime’; (2010) 79 *Nordic Journal of International Law* 279, 286.

⁵² *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference*

that they each have distinct interests in international criminal justice. While these interests often intersect, the two groups diverge on the subject of the necessity of punishment.⁵³

The International Criminal Court's emphasis on victims suggests that it will pursue punishment from a victim-oriented perspective. It is believed that victims are primarily concerned with the immediate redress of the wrongs committed against them, including the apportionment of guilt and resulting punishment. This has been expressed as an entitlement to 'full justice', which includes the trial of the alleged perpetrator and 'adequate punishment' of the accused if found guilty.⁵⁴ This view is supported by the belief that punishment is an essential component of delivering justice to the victims.⁵⁵ However, it is not universally accepted that victims necessarily link accountability and punishment. William Schabas writes that the victims' interest in justice 'may be better satisfied by society's condemnation of anti-social behavior than by the actual punishment of offenders' and that in international criminal law the declaration of the accused's guilt is 'far more important' than the actual punishment of the perpetrators.⁵⁶ In his view, the victims of international crimes desire the identification and stigmatisation of the perpetrator and a pronouncement by society that the offender's behaviour was wrong and anti-social.⁵⁷

Conversely, the goals identified by the Security Council when it established the *ad hoc* Tribunals more closely align with the interests of society as a whole. This suggests it will approach punishment with those purposes in mind. The international community as a whole is thought to be interested in trials that will produce more long-term and expressive benefits than those sought by the victims. These are often thought to include the deterrence of future atrocity crimes, the public vindication of human

Must be that of Victims and World Community as a Whole, Doc. No. SG/SM/6597 L/2871 (15 June 1998).

⁵³ S.K. Ivković and J. Hagan, 'The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived (In)Justice'; (2006) 40(2) *Law & Society Review* 369, 373.

⁵⁴ R.J. Goldstone, 'Foreword', in M. Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), ix.

⁵⁵ Bassiouni, 'Searching for Peace' (n. 42 above), 26-7; Ratner et al. (n. 45 above), 175; J. Rabkin, 'Global Criminal Justice: An Idea Whose Time has Passed'; (2005) 38 *Cornell International Law Journal* 753, 775; L.E. Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation'; (2002) 24 *Human Rights Quarterly* 573, 589; M.A. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: *Hamdan*, the Geneva Conventions, and International Criminal Law'; (2007) 35 *George Washington Law Review* 1165, 1182-3.

⁵⁶ W.A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach'; (1997) 7(2) *Duke Journal of Comparative and International Law* 461, 500, 516.

⁵⁷ *Ibid.*

rights norms and the promotion of long-term and stable peace.⁵⁸ The Special Tribunal for Lebanon's Statute primarily highlights the judicial purposes of trial by declaring it was established 'to try all those who are found responsible' for committing the crime resulting in the death of Rafik Hariri and others.⁵⁹ This statement of purpose seems largely focused on establishing the guilt or innocence of the accused and is less concerned with punishment. That being said, the Statute does make clear that punishment will result from conviction.⁶⁰

Determining accountability is the purely legal purpose of international criminal trials. Accountability demands an evaluation of the guilt or innocence of the accused based on relevant evidence during a fair trial. Punishment can also be a part of accountability, however the importance of punishment to accountability is largely dependent on whose interests the trial court is best trying to serve. While establishing accountability is undoubtedly important in any criminal legal context, it is unlikely that an international criminal trial will ever be entirely motivated by solely legal considerations. As has been made clear by the United Nations and the foundational statutes of the various international and internationalised criminal courts and tribunals, there are other goals that must be accomplished alongside the legal purposes of trial. The challenge confronting trial courts is how to balance the legal and political goals of trial so as to produce a result that is both fair and just.

3.1.2 Establishing the Truth

Establishing the truth has been identified as 'the cornerstone of the rule of law' and various international and internationalised criminal courts and tribunals have consistently identified the important role truth-finding plays in their missions.⁶¹ The truth established by a court or tribunal is believed to serve multiple purposes including: identifying an objective record of events; undermining denials about the existence of human rights violations; supplying therapeutic benefits to the accused; and the traditional legal function of creating a factual basis upon which the fact-finder can determine the guilt or innocence of the accused.⁶² This makes the search for truth

⁵⁸ P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?'; (2001) 95(7) *The American Journal of International Law* 7, 10.

⁵⁹ Preamble STLS.

⁶⁰ *Ibid* at Article 23.

⁶¹ UN Security Council, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Security Council Meeting, UN Doc S/PV.3217 (25 May 1993), 12.

⁶² G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., Oxford: Oxford University Press, 2014), 38; D. Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and

an overarching goal enabling the fulfilment of other trial purposes, particularly reconciliation and achieving peace.⁶³

It is unclear what amount of truth must be introduced during trial is to satisfy this goal. The United Nations High Commissioner for Human Rights indicated in 2006 that victims have a ‘right to truth’ entitling them to learn: ‘the full and complete truth’ about relevant events and the circumstances in which they occurred; the identities of the participants; and the reasons for the occurrence of the events.⁶⁴ Despite the emphasis the High Commissioner placed on ascertaining the ‘full and complete truth’, international and internationalised criminal courts and tribunals rarely establish, or attempt to establish, the full and complete truth about a situation, irrespective of the accused’s presence during trial.

There are a myriad of reasons why international criminal justice institutions are disinclined to attempt to establish the full and complete truth about a situation or conflict. One of the most prominent is the need to limit the evidence introduced during trial to information that is relevant to the accused and the charges alleged against him or her.⁶⁵ Allowing the introduction of evidence outside of the scope of the charges is unfair to the accused as it exposes the fact-finder to irrelevant and potentially prejudicial facts and could result in the entry of a verdict based on improper evidence.⁶⁶ As a result, little or no evidence will be introduced at trial relating to issues that do not directly relate to the charges brought against the accused or to aspects of the prosecution’s case that are uncontested.⁶⁷ The requirement that evidence be relevant can also lead to the omission from the record of facts relating to the actions of individuals or organisations not on trial, or facts that are considered too remote in time or place to have a bearing on the proceedings.⁶⁸ This results in the historical record being viewed through the filter of legal rules and procedure rather than being the product of a neutral presentation of the facts.⁶⁹ This omission of

Emotional Effects of Post-Conflict Justice’; (2009) 31 *Human Rights Quarterly* 592, 593.

⁶³ Bassiouni, ‘Searching for Peace’ (n. 42 above), 24.

⁶⁴ *Promotion and Protection of Human Rights: Study on the Right to Truth: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/2006/91 (8 February 2006), § 59.

⁶⁵ E. Haslam, ‘Victim Participation at the International Criminal Court: A Triumph of Hope over Experience’, in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court*, (Oxford: Hart Publishing, 2004), 328-29.

⁶⁶ Ohlin (n. 47 above), 95.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ L. Douglas, *The Memory of Judgment* (London: Yale University Press, 2001), 75.

evidence can often be unsatisfactory for victims as it can mean that evidence relevant to their victimisation might go unaddressed during trial.

The willingness of international and internationalised criminal courts and tribunals to permit the accused to enter a guilty plea also demonstrates a penchant for conducting trials that will not result in the establishment of the full and complete truth. Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia expressed its concern about this in *Prosecutor v Momir Nikolić*. In particular, the Trial Chamber worried that a guilty plea necessarily prevented the development of a full and complete record of the facts.⁷⁰ The Trial Chamber was particularly troubled by plea agreements reached under Rule 62 *ter*, which permit the accused to enter a guilty plea only as to certain agreed upon facts.⁷¹ It felt that under these circumstances ‘[n]either the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement’ potentially creating ‘an unfortunate gap in the public and historical record of the concrete case’.⁷² The International Criminal Court’s Statute attempts to address this concern by allowing for the presentation of evidence following a guilty plea, including witness testimony, ‘in the interests of justice’ and ‘in particular, the interests of the victims’.⁷³ Whether this flexibility to allow the introduction of additional evidence following a guilty plea will contribute to a fuller factual record remains to be seen as the procedure has only been used once, and in that instance evidence was only presented for two days.⁷⁴

Identifying the truth about a situation is acknowledged as one of the most important political purposes of trial. When done properly it can lead to the conviction or acquittal of the accused and promote reconciliation and peace in conflict-affected communities. Unfortunately, trials are an imperfect forum for establishing the truth. This is partly due to the legal goals of trial and the need to avoid prejudicing the accused. Truth presented during trial must necessarily be limited to evidence bearing on the guilt or innocence of the accused with regard to the charges that have been brought by the prosecution. This excludes wide swathes of information about an

⁷⁰ *Prosecutor v Momir Nikolić* (Sentencing Judgement) No. IT-02-60/1-S, T Ch (2 December 2003), para. 61.

⁷¹ *Prosecutor v Dragan Nikolić* (Sentencing Judgement) No. IT-94-2-S, T Ch (18 December 2003), para. 12; *see also* Rule 62 *ter* ICTY RPE.

⁷² *Ibid.*

⁷³ Article 65(4) ICCS.

⁷⁴ *Prosecutor v Ahmed al Faqi al Mahdi* (Judgment and Sentence) No. ICC-01/12-01/15, T Ch (27 September 2016), para. 7.

incident or situation that may be objectively true but is not relevant to the case at bar. Limiting the exploration of truth in this way creates a gap between the actual truth and the truth presented at trial. This gap prevents the victims from ever learning the ‘full and complete truth’ to which they are entitled as a matter of right and which may be necessary for them to experience a sense that justice has been accomplished. This suggests that while determining the truth may be the most important trial goal because of the role it plays in facilitating the other legal and political goals, it cannot serve as the sole justification for trial independent of those other purposes.

3.1.3 *Fostering Reconciliation*

The important connection between truth and reconciliation was highlighted by the General Assembly of the United Nations when it declared that 2009 was to be the ‘International Year of Reconciliation’.⁷⁵ In its declaration, the General Assembly described truth as an indispensable element of ‘reconciliation and lasting peace.’⁷⁶ Unfortunately, reconciliation, and the conditions necessary to achieve it, defies easy definition. This challenge is highlighted by the following questions:

Is it peace, the end of violence; is it contented individuals and families; is it communities where it is safe to walk the streets, to shop, to go to the mosque or church or synagogue, where women do not fear rape and where men and women feel no pressure to take up arms; is it economic opportunity, education for the children and dignity in old age?⁷⁷

Commentators concede that safety and security are critical components of reconciliation, but also question the meaning of those terms within the context of a post-conflict society.⁷⁸ Some have focused on the attitudes of the people on different sides of the conflict, and particularly on whether there is tolerance and acceptance of people from different communities and whether they are ‘getting along’.⁷⁹ Others described reconciliation as ‘the repair and restoration of relationships’ by ‘discovering ways and means to build trust so that the parties might be able to live cooperatively

⁷⁵ UNGA Res. 61/17, UN Doc. A/RES/61/17 (20 November 2006), 1.

⁷⁶ Ibid.

⁷⁷ H.M. Weinstein, ‘Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief’; (2011) 5 *International Journal of Transitional Justice* 1, 3-4.

⁷⁸ Ibid.

⁷⁹ J. Meernik and J.R. Guerrero, ‘Can International Criminal Justice Advance Ethnic Reconciliation? The ICTY and Ethnic Relations in Bosnia-Herzegovina’; (2014) 14(3) *Southeast European and Black Sea Studies* 383, 389.

with one another.⁸⁰ What these attempted definitions illustrate is that reconciliation can be approached from a number of different directions making it difficult to identify one single, over-arching definition.

The situation in the former Yugoslavia raises serious doubts as to whether international criminal prosecutions can produce the sort of reconciliation sought by the international community.⁸¹ When the International Criminal Tribunal for the former Yugoslavia was founded, Antonio Cassese expressed optimism about the role the Tribunal would play in facilitating reconciliation amongst the parties to the then on-going conflict. Cassese believed that fair trials conducted by an independent and impartial tribunal would promote reconciliation, and be conducive to the establishment of ‘healthy and cooperative relations’, thus contributing to the peaceful resolution of the conflict.⁸² In Cassese’s view, fair trials, and the resulting convictions of those found to be responsible, would alleviate unresolved hatred and resentment diminishing the likelihood of renewed violence and the commission of new crimes.⁸³

Qualitative research suggests that Cassese’s confidence in the effect trials would have on reconciliation has not been borne out in practice. Janine Natalya Clark found that in Bosnia and Herzegovina ‘[e]xtremely high levels’ of mistrust remained amongst members of the different factions, that there was little contact between different ethnic groups, the contact that did exist was mostly restricted to business transactions and that different groups had very different understandings about how and why certain events occurred during the war.⁸⁴ These findings led her to conclude that the Yugoslavia Tribunal’s judicial process had not resulted in reconciliation.⁸⁵ Clark attributes this lack of reconciliation between the parties to the perception, particularly amongst Croats and Serbs, that the Yugoslavia Tribunal is biased against them.⁸⁶ What this suggests, and what Cassese may not have recognized, is that fair trials conducted by an objective tribunal cannot, by themselves, lead to reconciliation. Perhaps more important than the trials actually being fair is that they are seen as being

⁸⁰ J. N. Clark, ‘The Limits of Retributive Justice’; (2009) 7(3) *Journal of International Criminal Justice* 463, 482; C.C. Joyner, ‘Reconciliation as Conflict Resolution’; (2010) 8 *New Zealand Journal of Public International Law* 39, 40.

⁸¹ E. Stover and H.M. Weinstein, ‘Conclusion: A Common Objective, a Universe of Alternatives’, in E. Stover and H.M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, (Cambridge: Cambridge University Press, 2004), 323.

⁸² Annual Report of the ICTY (n. 36 above), paras. 15-7.

⁸³ *Ibid* at para. 15-6.

⁸⁴ Clark (n. 80 above), 482-3.

⁸⁵ *Ibid* at 483.

⁸⁶ *Ibid*.

fair by members of the affected communities.

The International Criminal Tribunal for the former Yugoslavia's failure to create an objectively understood history about the war is believed to play a significant part in the perception that it is biased.⁸⁷ Establishing the objective truth about a conflict can support reconciliation by establishing indisputable facts that cannot be manipulated or denied.⁸⁸ Unfortunately, the different ethnic groups in the countries that make up the former Yugoslavia have largely rejected the narrative created by the Tribunal and alternative narratives have sprung up in their place.⁸⁹ This is exacerbated by discrete ethnic groups within each country developing their own understandings about the war that often conflict with national and international accounts.⁹⁰ This has resulted in development of a huge number of histories that often conflict with one another on a basic level. The proliferation of such a multitude of different histories, many of which conflict with one another on a very basic level, makes it almost impossible to foster reconciliation as the people involved lack a common starting point from which to begin understanding one another. This disagreement about what happened during the war has also raised questions about the International Criminal Tribunal for the former Yugoslavia's validity, particularly when it reached decisions that did not easily harmonise with a particular group's understanding of events.

It is probably impossible for an international criminal justice institution to develop a common history that is acceptable enough to all parties involved so that it might facilitate reconciliation. To do so would require everyone involved to accept that each group's version of events is equally valid even if their accounts are contradictory. This does not require consensus about the facts, but it does mean that the different interested parties would have to find a way to accept the reality that other sides believe a version of events that differs from their own.⁹¹ Producing an account that can be accepted by all sides can only be accomplished when the international or internationalised criminal court or tribunal adjudicating the matter is deemed

⁸⁷ E.K. Lovall and J.E. Vutrano, 'Seeking Truth in the Balkans: Analyzing Whether the International Criminal Tribunal for the former Yugoslavia has Contributed to Peace, Reconciliation, Justice or Truth in the Region and the Tribunal's Enduring Legacy'; (2015) 5 *Law Journal for Social Justice* 252, 306.

⁸⁸ P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal'; (1998) 20 *Human Rights Quarterly* 737, 741-2; Fletcher and Weinstein (n. 55 above), 587; Meernik and Guerrero (n. 79 above), 403.

⁸⁹ J. Subotic, 'Truth, Justice, and Reconciliation on the Ground: Normative Divergence in the Western Balkans'; (2015) 18(3) *Journal of International Relations and Development* 361, 371, 373.

⁹⁰ *Ibid.*

⁹¹ Damaška (n. 18 above), 346; Akhavan, *Justice in The Hague* (n. 88 above), 741-2.

legitimate. However, it could also require the introduction of evidence that goes beyond what is necessary to establish the guilt or innocence of the accused.

Unfortunately, this approach would be at odds with the legal goal of determining the accountability of the accused. Relevant facts cannot be omitted or distorted in an attempt to fulfil the goals of reconciliation. Nor can facts be included that do not bear on the guilt or innocence of the accused. The accused's right to a fair trial cannot accommodate a truth-telling process designed to develop an acceptable narrative meant to foster reconciliation. The trial court must find a balance between permitting the presentation of sufficient evidence to create an acceptable narrative that will promote reconciliation while also ensuring that the evidence is relevant to the crimes alleged. When a conflict arises it must be resolved in favour of admitting only relevant evidence, although courts should take a liberal approach to how it interprets what evidence is relevant. Such a system is most likely to ensure that the trial is both fair and also fulfilling the goal of reconciliation.

3.1.4 Achieving Peace

As with reconciliation, peace is also a frequently used word that resists easy definition.⁹² Johann Galtung suggested that the modern concept of peace could be separated into two different types, which he described as 'negative peace' and positive peace'.⁹³ 'Negative peace' is defined as 'the absence of organized collective violence', and positive peace is 'all other good things in the world community, particularly cooperation and integration between human groups.'⁹⁴ Charles Webel further developed Galtung's theory by introducing the ideas of a 'Strong, or Durable, Peace' and a 'Weak, or Fragile Peace.'⁹⁵ Strong, or durable, peace exists when there is 'relatively robust justice, equity, and liberty, and relatively little violence and misery at the social level'.⁹⁶ Conversely, peace can be described as weak or fragile when there is an absence of war, but also 'pervasive injustice, inequity

⁹² A. de Zayas, 'Peace', in W.A. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016), 96.

⁹³ J. Galtung, *Theories of Peace: A Synthetic Approach to Peace Thinking*, Oslo, International Peace Research Institute, 1967, available online at https://www.transcend.org/files/Galtung_Book_unpub_Theories_of_Peace_-_A_Synthetic_Approach_to_Peace_Thinking_1967.pdf (last visited 2 October 2018), 12.

⁹⁴ *Ibid.*

⁹⁵ C. Webel, 'Introduction: Toward a Philosophy and Metapsychology of Peace', in C. Webel and J. Galtung (eds.), *Handbook of Peace and Conflict Studies* (Abingdon (UK): Routledge, 2007), 11.

⁹⁶ *Ibid.*

and personal discord and dissatisfaction.⁹⁷

The United Nations linked the ideas of reconciliation and peace in a 2006 General Assembly Resolution.⁹⁸ This should come as no real surprise as Galtung's definition of 'positive peace', particularly the concept of 'cooperation and integration between human groups', is essentially describing the result of successful reconciliation, although in an environment that goes beyond the post-conflict context. To the extent that one purpose of reconciliation is to build cooperative and integrated relationships between different groups, it logically follows that such reconciliation will result in a peace defined along the same terms. This relationship between reconciliation and peace suggests that the problems precluding reconciliation would also inhibit peace.

By describing the type of peace it would like to achieve as 'lasting', the United Nations is indicating that it hopes to achieve positive peace, or strong, or durable peace, when establishing international courts and tribunals.⁹⁹ It could be argued that positive peace is the overriding political goal of international criminal trials, particularly those that involve conflict and post-conflict societies. Truth is seen as being essential to creating a lasting peace as it can establish an objective account of past conflicts and reveal and validate the experiences of different groups within an affected area.¹⁰⁰ Reconciliation enables the achievement of peace by creating an environment in which respect and trust is extended to all involved groups. That atmosphere of trust and respect also helps foster a sense of justice and restores and protects the dignity of the victims. Victims of past crimes that feel as if they have access to justice and dignity are less likely to retaliate or seek violent retribution and are, therefore, less likely to threaten peace. The rule of law, particularly to the extent that it applies equally to all people, contributes to peace as it removes arbitrariness from the legal system.¹⁰¹ All of these political goals come together to create the conditions to facilitate and maintain a lasting peace exemplified by mutual cooperation, justice and respect.

⁹⁷ Ibid.

⁹⁸ UNGA Res. 61/17, UN Doc. A/RES/61/17 (20 November 2006), 1.

⁹⁹ Werle and Jessberger (n. 62 above), 33-4.

¹⁰⁰ D. Tolbert, 'Truth is the First Step Towards Peace', 24 March 2016, International Center for Transitional Justice, available online at <https://www.ictj.org/news/truth-first-step-peace> (last visited 2 October 2018).

¹⁰¹ R.H. Fallon, "'The Rule of Law' as a Concept in International Discourse"; (1997) 97 *Columbia Law Review* 1, 7; see also Stromseth et al. (n. 32 above), 69-70, 250.

There are some indications that the legal goal of trial can conflict with attempts to achieve and maintain peace. The International Criminal Court's Office of the Prosecutor made clear in a policy paper issued in 2007 that the interests of justice do not 'embrace all issues of peace and security' and that while the office would work to respect the mandate of groups working for peace, it would also independently pursue its own goals.¹⁰² This statement indicates that the Prosecutor will not allow ongoing peace negotiations interrupt the investigation and prosecution of crimes falling under the Rome Statute. This approach has been interpreted as an attempt to keep the legal duties of the prosecutor free from influence by political considerations, but may have the practical effect of inhibiting the peaceful resolution of ongoing conflicts.¹⁰³

The situation involving Joseph Kony in Uganda exemplifies that conclusion. Kony willingly entered the Lord's Resistance Army into peace negotiations following his indictment by the International Criminal Court although he refused to personally participate in the talks out of a fear that he would be arrested and transferred to the Court for prosecution.¹⁰⁴ The Lord's Resistance Army's demand that the arrest warrants issued against Kony and other members of the organisation be withdrawn before they would formalize a peace agreement became a significant stumbling block during the negotiations.¹⁰⁵ No compromise could be reached about this issue and many commentators believe that the existence of the arrest warrants, and the Court's insistence that those allegedly responsible for committing crimes in Uganda be held accountable for those crimes, was the 'most critical impediment' to a peace agreement.¹⁰⁶ As a result, the Court's overly formalistic approach to fulfilling the judicial goal of trial prevented a peace agreement from being concluded. Kony remains at large and the Lord's Resistance Army continued to commit atrocities after the breakdown of peace negotiations.

There is also no clear sign that the legal process facilitates peace. It has been

¹⁰² Policy Paper on the Interests of Justice, Office of the Prosecutor, International Criminal Court, 2007, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-policy-int-just> (last visited on 2 October 2018).

¹⁰³ K.A. Rodman, 'Why the ICC should Operate Within Peace Processes'; (2012) 26(1) *Ethics & International Affairs* 59, 59.

¹⁰⁴ M. Happold, 'The International Criminal Court and the Lord's Resistance Army'; (2007) 8 *Melbourne Journal of International Law* 159, 180.

¹⁰⁵ I.K. Souaré, 'The International Criminal Court and African Conflicts: The Case of Uganda'; (2009) 36(121) *Review of African Political Economy* 369, 374.

¹⁰⁶ K. Armstrong, 'Justice without Peace? International Justice and Conflict Resolution in Northern Uganda'; (2014) 45(3) *Development and Change* 589, 594.

suggested that the deterrent effect of imposing criminal liability for certain types of crimes will encourage peace.¹⁰⁷ This argument operates on the assumption that perpetrators of atrocity crimes rationally weigh the consequences of their actions before committing criminal acts. There is not much support for that assumption and, to the extent that perpetrators do consider the consequences, they largely focus on the likelihood they will be detained, whether they will be prosecuted and the possible severity of punishment if convicted.¹⁰⁸ Additionally, choices made under normal circumstances become inverted during ethnic or military conflicts. Decisions are more often made to indulge the violent inclinations that have become commonplace in that particular society.¹⁰⁹ It is doubtful that such a deterrent sufficient to lead to a lasting peace will have any real effect on the actors operating under such circumstances.

One way in which international criminal trials may help to generate peace is by incapacitating certain actors through prosecution and incarceration. This sort of incapacitation can remove those individuals acting as driving forces to violence and signal to others that credible legal measures might be imposed against them if they were to incite further violence.¹¹⁰ Returning to Joseph Kony and the Lord's Resistance Army, it is reasonable to surmise that if the International Criminal Court had been able to execute its arrest warrant against Joseph Kony it probably would have led to peace in Uganda. Kony is the founder and leader of the Lord's Resistance Army, a group described as 'rigidly hierarchical', and his name is often used synonymously with the movement that he leads.¹¹¹ Kony's personal willingness to enter into a peace agreement was thought to be the key to an enduring deal being reached, and because of that the Ugandan government sought a deal directly with him.¹¹² The importance placed on Kony's personal involvement in negotiating an accord suggests that he possessed the power to ensure that the Lord's Resistance Army would continue to commit acts of violence if a peace deal could not be reached. Therefore, it logically follows that peace would have been the likely result if Kony

¹⁰⁷ Ohlin (n. 47 above), 89.

¹⁰⁸ Akhavan, 'Beyond Impunity' (n. 58 above), 12; *see also* J. Ku and J. Nzalibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?'; (2006) 84(4) *Washington University Law Review* 777, 792.

¹⁰⁹ Akhavan, 'Beyond Impunity' (n. 58 above), 11-2; M. Reisman, 'Legal Responses to Genocide and Other Massive Violations of Human Rights'; (1996) 59(4) *Journal of Law & Contemporary Problems* 75, 77-8;

¹¹⁰ Akhavan, 'Beyond Impunity' (n. 58 above), 12.

¹¹¹ J.R. Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda' (2009) 10 *Human Rights Review* 55, 57, 60.

¹¹² *Ibid* at 60.

had been arrested and removed from Uganda pursuant to the International Criminal Court's arrest warrant.

Peace can be split into two different types with one considered more favorable than the other. While the international community welcomes the absence of violence described as 'negative peace', it is most concerned with encouraging positive forms of peace that foster cooperation, social justice and equality amongst disparate groups. Whether international criminal trials can bring about positive peace is debatable. The example of Uganda suggests that a legal process conducted without adequate respect for a parallel peace process can prevent the conclusion of peace accords that might result in more positive forms of peace. In contrast, international criminal trials can contribute to peace to the extent that they can incapacitate those individuals most responsible for instigating violence in conflict-afflicted regions. Removing them from the scene, and demonstrating the illegality of their actions, can lead to the cessation of violence. However, this may not lead to the sort of peaceful solution sought by the international community.

3.1.5 Justice for the Victims

Delivering justice to the victims of atrocity crimes has become one of the most important functions of international and internationalised criminal courts and tribunals and it is considered a defining purpose of the International Criminal Court.¹¹³ In 2011, the prosecutors of all of the existing international criminal courts and tribunals released a joint statement underlining the importance of effectively and expeditiously completing their missions 'on behalf of the victims in the affected communities'.¹¹⁴ Further, officials from all of the international criminal law institutions have stated that supplying the victims of atrocity crimes with justice is an important goal of international criminal trials.¹¹⁵ While recognizing the importance of victims in

¹¹³ L. E. Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court', in C. de Vos, S. Kendall and C. Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (Cambridge: Cambridge University Press, 2015), 302.

¹¹⁴ *Joint Statement, Sixth Colloquium of International Prosecutors*, 15 May 2011, available online at www.rscsl.org/Documents/Press/OTP/Colloquium_Joint_Statement.pdf last visited on 14 August 2018.

¹¹⁵ Cassese (n. 11 above), 331; *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must be that of Victims and World Community as a Whole*, UN Doc. SG/SM/6597 L/2871, 15 June 1998; *ICC Prosecutor visits Egypt and Saudi Arabia*, ICC Doc. ICC-CPI-20080509-MA13, 9 May 2008, *Statement by the Prosecutor of the International Criminal Court Mrs Fatou Bensouda*, 22 October 2012, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otpstatement221012>, last visited on 14 August 2018; *ICC launches commemorations for 17 July – International Criminal Justice Day*, ICC Doc. ICC-CPI-20120706-PR822, 6 July 2012; *Sixteenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law*

international criminal trials, none of the international criminal law institutions substantively address what justice for the victims means in this context. Commentators have attempted to fill this gap by suggesting that the right to an effective remedy designed to eliminate the effect of the harm suffered by the victims as a result of the commission of the crime constitutes justice for the victims.¹¹⁶ While many different things might contribute to forming an adequate remedy, there are three primary components that must almost always be present. They are: developing a truthful record of events; establishing accountability for the crimes committed; and providing the victims with reparations.¹¹⁷

The first two of these issues have been dealt with more generally above and their part in delivering justice to victims further underscores how intertwined the different goals of trial can be. With regard to reparations, the United Nations General Assembly asserted in 2005 that victims of gross violations of international human rights law or international humanitarian law have a right to reparations.¹¹⁸ Reparations are meant to be proportional to the harm done and can be grouped into five categories: Restitution, Compensation, Rehabilitation, Satisfaction and Guarantees of Non-Repetition.¹¹⁹ National governments are responsible for reparations for crimes that can be attributed to the state and individuals must provide reparations when found liable by a competent court.¹²⁰ Prior to the General Assembly's decision to acknowledge the victims' right to reparations, victims were dependent on the individual rules applied at the international or internationalised criminal court or tribunal at which the matter pertaining to their victimisation was being adjudicated. In

Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. S/2011/472, 29 July 2011, at § 89; *Opening Speech by the Plenary's President Judge Kong Srim, During the 8th Plenary of the Extraordinary Chambers of the Courts of Cambodia (ECCC) on 13th September 2010*, 13 September 2010, available online at www.eccc.gov.kh/en/documents/public-affair/opening-speech-plenary39s-president-judge-kong-srim-during-8th-plenary-extra, last visited on 14 August 2018, at 3; *Second Annual Report of the President of the Special Court for Sierra Leone*, 2005, available online at www.rscsl.org/Documents/AnRpt2.pdf, last visited on 14 August 2018, at 3; *First Annual Report of the Special Tribunal for Lebanon*, 2010, available online at <https://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/226-Annual-Report-2009-2010>, last visited on 14 August 2018, at paras. 166, 246.

¹¹⁶ L. Moffett, *Justice for Victims Before the International Criminal Court*, (Abingdon (UK): Routledge 2014), 30-1; citing D. Shelton, *Remedies in International Human Rights Law* (2nd edn., Oxford: Oxford University Press, 2005), 7, 35-6.

¹¹⁷ Moffett (n. 116), 33-4.

¹¹⁸ UNGA Res 60/147, UN Doc. A/RES/60/147, 16 December 2005, at para. 1 and Principle 11 of the Annex.

¹¹⁹ *Ibid* at Principles 15, 19-23.

¹²⁰ *Ibid* at Principle 15.

general these rules allowed for very limited forms of reparations, and monetary damages were often excluded entirely.¹²¹

Numerous studies demonstrate that people affected by atrocity crimes believe that atrocity crime victims should be entitled to reparations in recognition of the harm they have suffered. Ugandan and Kenyan victim participants involved in cases adjudicated at the International Criminal Court identified the prospect of receiving reparations as their primary motivation for becoming involved in the prosecutions.¹²² Similarly, victim participants in the Democratic Republic of Congo and Côte d'Ivoire placed reparations amongst the reasons they chose to participate, and also made clear that they expected reparations when trial concluded, although they did not identify reparations as their main purpose for cooperating with the Court.¹²³ Other groups have also emphasized the important role reparations play in achieving a personal sense of justice. 97% of interviewees in the Central African Republic, not all of whom identified themselves as victims, thought that providing the victims with reparations is an important aspect of delivering justice.¹²⁴ Further, a study done in Iraq found that most respondents felt that it was necessary to provide reparations to the victims in the form of rehabilitation and compensation to allow the country to move on from the brutality of Saddam Hussein's regime.¹²⁵

International criminal law has typically only provided the victims with a rather limited right to reparations. The Statutes of the *ad hoc* Tribunals and the Special Court for Sierra Leone authorise reparations only in the form of restitution of property and proceeds obtained by the accused through his or her criminal conduct.¹²⁶ The Extraordinary Chambers in the Courts of Cambodia limit reparations to 'collective and moral' reparations and explicitly exclude monetary awards.¹²⁷ The Statute of the Special Tribunal for Lebanon does not directly provide the victims with a right to reparations. Instead, it sets out the procedure it will follow to assist victims

¹²¹ Article 24(3) ICTYS; Article 23(3) ICTRS; Article 19(3) SCSLS; Article 25 STLS; Article 38 ECCC Law.

¹²² Human Rights Center, *The Victims' Court?: A Study of 622 Victim Participants at the International Criminal Court* (Berkeley: UC Berkeley School of Law, 2015), 36, 58.

¹²³ *Ibid* at 46, 68.

¹²⁴ P. Vinck and P. Pham, *Building Peace Seeking Justice: A Population-Based Survey on Attitudes About Accountability and Social Reconstruction in the Central African Republic* (Berkeley: UC Berkeley School of Law, 2010), 3, 29, 35.

¹²⁵ Human Rights Center, *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction* (Berkeley: UC Berkeley School of Law, 2004), 40.

¹²⁶ Article 24(3) ICTYS; Article 23(3) ICTRS; Article 19(3) SCSLS.

¹²⁷ Rule 23 *quinquies*(1) ECCC IR.

receiving reparations from courts of national jurisdictions.¹²⁸ The International Criminal Court's Statute goes further than many other international criminal justice institutions by permitting victims to seek reparations in the form of restitution, compensation and rehabilitation.¹²⁹ Despite this more expansive approach to reparations, the International Criminal Court has imposed limits on which victims are eligible for reparations. At the International Criminal Court, a victim is generally defined as a person that fits each of the following four criteria: 1) they are a natural or legal person; 2) who has suffered harm; 3) caused by the commission of a crime falling within the jurisdiction of the International Criminal Court; and 4) a causal nexus exists between the harm suffered and the crime.¹³⁰ For the purposes of determining reparations a condition attaches to the third criterion to be applied when deciding if an individual qualifies as a victim. For a victim to be eligible for reparations, the accused must have been convicted of the crime that was the proximate cause of the harm suffered by the victim.¹³¹ As a result, the interests of victims of atrocity crimes are divided at the reparations stage of proceedings between those who suffered harm as a result of a crime for which the accused was convicted and those who did not. Therefore, the extent to which reparations can contribute to the victims of atrocity crimes experiencing a sense of justice will largely depend on whether the individual victim is eligible for reparations.

Reparations are likely to be an important part of justice for those victims authorised to receive them. Because reparations are only recoverable following a conviction, the trial and its outcome occupies a place of preeminent importance to those victims primarily motivated by reparations. Further, victims falling into that category may also be less interested in the application of fair trial standards, particularly if a compromised procedure proves more likely to lead to a conviction. That being said, an unfair process may negatively affect the court's ability to achieve

¹²⁸ Article 24 STLS.

¹²⁹ Article 75 ICCS.

¹³⁰ *Prosecutor v Katanga* (Order for Reparations Pursuant to Article 75 of the Statute) ICC-01/04-01/07, T Ch II (24 March 2017), § 36; *citing Prosecutor v Lubanga* (Judgment on the Appeals of the Prosecutor and the Defence Against Trial Chamber I's Decision on Victim Participation of 18 January 2008) ICC-01/04-01/06, A Ch (11 July 2008), paras. 61-65.

¹³¹ *Ibid* at para. 37; *see also Prosecutor v Lubanga* (Annex to Judgment on the Appeals Against the "Decision Establishing the Principles and Procedures to be Applied to Reparations" of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2) No. ICC-01/04-01/06, A Ch (3 March 2015), para. 59; *Prosecutor v Ruto et al.* (Public Redacted Version of Decision on Defence Applications for Judgments of Acquittal: Reasons of Judge Fremr) No. ICC-01/09-01/11, T Ch (6 April 2016), para. 149.

the other victim-oriented goals of accountability and establishing a truthful record of events. As justice for victims is seen as being a multifaceted goal made up of all three elements, it would be dangerous to compromise the overall fairness of the proceedings so as to better achieve only one aspect of justice.

3.1.6 Promoting the Rule of Law

International criminal trials are also thought to further the political goal of enhancing the rule of law. The rule of law is seen as serving three purposes: protecting people from arbitrary abuses of power; allowing people to make decisions with knowledge of the legal consequences of their actions; and to protecting people from arbitrary exercises of power by public authorities.¹³² Secretary-General Ban Ki-Moon accentuated the importance of the rule of law when he described it as being at ‘the heart’ of the work done by the United Nations due to its intrinsic link to peace and justice.¹³³ The Secretary-General was tacitly indicating in this statement that the rule of law might act as the bridge between the political and judicial purposes of trial by connecting peace and justice through the rule of law. This connection is further borne out by the functions assigned to the rule of law. This approach recognizes that justice is a fundamental part of positive peace and that justice can only be achieved through the proper application of the rule of law. The rule of law allows the State to perform the purely legal function of adjudicating and enforcing those laws effective in its territory, while also accomplishing more political tasks including guaranteeing the separation of powers between different branches of government and guaranteeing fairness in how laws are applied.¹³⁴

International criminal trials can play an important role in developing or re-establishing the rule of law in national jurisdictions. These trials are seen as an expression of the moral authority as it applies to all of humanity and reinforces the notion that compliance with the basic legal standards expressed therein is part of being a member of the international community.¹³⁵ When trials at international and internationalised criminal courts and tribunals are conducted in accordance with rule of law norms it provides an example for the relevant national governments that

¹³² Fallon (n. 101 above), 7; *see also* Stromseth et al. (n. 32 above), 69-70, 250.

¹³³ *Provisional Verbatim Record of the Seven Thousand One Hundred Thirteenth Meeting of the United Nations Security Council*, U.N. Doc. S/PV.7113 (19 February 2014), 2.

¹³⁴ B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press 2002), 52-3.

¹³⁵ L. Vinjamuri, ‘Deterrence, Democracy and the Pursuit of International Justice’; (2010) 24(2) *Ethics & International Affairs* 191, 196-7.

atrocities are morally repugnant and it reinforces the importance of requiring fairness in the operation of the domestic legal system.¹³⁶ International criminal trials also raise public awareness about the existence of human rights laws and demonstrate that those laws were violated. The resulting enhanced visibility of human rights laws and their violation tends to increase the legitimacy of those laws, which in turn further strengthens the rule of law.¹³⁷ Taken to the logical extreme, international criminal trials can lead to habitual lawfulness and the belief that committing atrocities is not a logical alternative to peaceful, multi-ethnic co-existence.¹³⁸ When people trust that legal institutions will deliver prompt and fair dispute resolution it leads to greater peace and reconciliation because it creates the atmosphere of fairness necessary for quarreling groups to find common ground.¹³⁹ International criminal trials cannot establish or re-establish the rule of law on their own following the commission of atrocities. Instead, multiple participants are required to strengthen the standing of the rule of law. International criminal trials are meant to be expressive, both in an effort to encourage the growth of the rule of law in regions afflicted by conflict, but also to demonstrate the legitimacy of the trial itself in an effort to facilitate acceptance of the outcome.¹⁴⁰

The evidence is inconclusive as to whether international criminal trials have had the desired effect on rebuilding or enhancing the rule of law. A study done on the impact that international criminal trials had on the rule of law in Rwanda and the former Yugoslavia found that because the *ad hoc* Tribunals suffered from a lack of legitimacy within the affected States neither Tribunal had the impact sought on developing the rule of law.¹⁴¹ The International Criminal Court also does not appear to have had much success in instilling victim participants with a sense that there has been any progress in strengthening the domestic rule of law. Studies conducted in Uganda and Kenya found that there was still widespread distrust for domestic legal institutions in both countries due to perceptions about political interference and corruption and the involvement of the International Criminal Court has done nothing

¹³⁶ Thoms et al. (n. 42 above), 333; E. Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court'; (2006) 44 *Columbia Journal of Transnational Law* 801, 828.

¹³⁷ Ohlin (n. 47 above), 88.

¹³⁸ Akhavan, 'Justice in The Hague' (n. 88 above), 749.

¹³⁹ 7113th Security Council Meeting (n. 133 above) 2.

¹⁴⁰ Vinjamuri (n. 135 above), 196-7.

¹⁴¹ Stromseth et al. (n. 32 above), 264.

to change that belief.¹⁴² In fact, interviewees in both countries believe that the more likely outcome is that the respective domestic governments will have a corrupting influence on the International Criminal Court resulting in an overall diminishment of the rule of law internationally.¹⁴³

Research about the influence the Special Court for Sierra Leone had on the rule of law in Sierra Leone and Liberia produced more mixed findings. Most people in both countries believed that the Special Court for Sierra Leone had caused an overall enhancement of the rule of law, with more than 80% of the people surveyed attributing that improvement to the work of the Special Court.¹⁴⁴ However, despite the perception that the Special Court for Sierra Leone had played a positive role on the rule of law, the researchers did not find that influence to be reflected in changes to domestic legislation in either country and they also felt there had been minimal improvement in the performance of law enforcement and the judiciary.¹⁴⁵

Two relevant conclusions can be drawn from the results of these studies. First, it would appear that individuals from conflict stricken countries believe that the weak domestic approach to the rule of law is entrenched to such an extent that it will outweigh the efforts made by international criminal trials to improve the rule of law. In some cases the lack of domestic support for the rule of law is seen as being so strong that it will ultimately corrupt international criminal law institutions. This belief suggests that those surveyed do not have much confidence in the legitimacy of the international criminal justice institutions if they believe that local actors can so easily taint them. This leads to the second conclusion, that an international or internationalised criminal court or tribunal cannot have any effect on improving the domestic rule of law if the court or tribunal is not seen as legitimate. These conclusions accentuate how important it is that the people from the communities impacted by atrocity crimes perceive international criminal trials as legitimate. Without legitimacy, international criminal trials are unlikely to play a role in cultivating the rule of law.

¹⁴² Human Rights Center, *The Victims' Court* (n. 122 above), 134, 56.

¹⁴³ *Ibid* at 34, 53.

¹⁴⁴ L.A.A. Smith and S. Meli, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone in Sierra Leone and Liberia* (No Peace Without Justice, 2012), Annex 10 and Annex 33.

¹⁴⁵ *Ibid* at 36.

IV CONCLUSION

Generally, international criminal courts and tribunals were established to hold accountable those individuals alleged to have violated human rights and humanitarian law. In addition to that legal goal, international courts and tribunals have also been charged with accomplishing certain political goals, particularly determining the truth, facilitating reconciliation between different groups, establishing lasting peace, delivering justice to victims and supporting the rule of law. The interaction between the different political purposes of trial demonstrate that although each issue is identified separately by the United Nations and the different international courts and tribunals, they all work together to form a cohesive whole. Because of the interconnectedness of the goals it is difficult to create a genuine hierarchy amongst them. These political goals also operate in conjunction with the legal goal and often the latter is expected to help achieve the former.

There is nothing inherently wrong with combining legal and political trial goals during international criminal trials. International criminal trials were designed to fulfill a number of different purposes, both legal and political. However, certain tensions arise when a court or tribunal tries to fulfill multiple goals simultaneously. The evidence needed to ascertain the truth about a given situation may not align with the evidence required to convict the accused of the crimes alleged. Reconciliation can be impeded if the evidence is viewed as biased or different groups feel its members are being disproportionately subject to prosecution. Peace may not be achieved if international courts and tribunals insist on fulfilling their mandates by investigating and indicting individuals involved in the peace process. Victims may not feel as if they have received justice if they are not able to fully tell their stories but such a full telling may not comport with the fair trial rights of the accused. Holding trials operates as a representation of the rule of law but may have no real impact on enhancing the rule of law.

Although it is unfortunate that the legal goal of trial may prevent the political goals from being accomplished, it is a necessary part of the legal system. While there is no formal hierarchy amongst the different trial goals, an informal order must be maintained with accountability ranking ahead of the others. That is because the right to a fair trial, as a fundamental human right, must predominate in the legal context. Allowing the introduction of evidence that has no bearing on the case at bar, tailoring

investigations and prosecutions to counter a perceived bias or failing to prosecute potentially culpable individuals to further external political efforts, do not comport with the mission of international and internationalised criminal courts and tribunals or basic human rights standards. International criminal trials will lose their legitimacy if the political trial goals are allowed to predominate over the legal, and the trials themselves will become little more than show trials. That loss of legitimacy will, in turn, undermine any political benefits that might be derived from holding international criminal trials rendering them meaningless.