Introduction

*Editors**

1. BACKGROUND TO AND PURPOSE OF THE STUDY

1.1 INTERNATIONAL CRIMINAL JUSTICE: THE *STATUS QUO* AND FUTURE OUTLOOK

Recent years have been marked by a rapid proliferation of international and mixed criminal justice institutions and by the growing reliance on these mechanisms for preventing and responding to major humanitarian crises through the enforcement of individual responsibility for core international crimes. As the end of the Cold War defused the political tensions in a deeply divided bipolar world, a plethora of courts and tribunals were set up in a breathtakingly short period of time (1993–2007) to deal with mass atrocities committed in the course of conflict. Notably, these included the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes in Dili District Court, East Timor (SPSC), the International Criminal Court (ICC), and, more recently, the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL).

Not only did these courts complement the landscape of existing international institutions, but they also pushed the horizons of the international legal order forward. More

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than anything, they have become the true symbols of the international community's aspiration to end impunity for international crimes and to strengthen the rule of law in conflict and transitional settings. The functional system of international criminal law, which could only be dreamt of by futurist legal scholars some twenty years ago, is now 'a living and vital reality', just as the institutions which comprise it.[1] The international criminal justice phenomenon has firmly occupied its niche in the system of legal responses to the core international crimes, whoever commits them. Moreover, it has emerged as a powerful leverage in reshaping the interplay between law, power, and politics in both the international arena and domestic settings and has become impossible to ignore in the world of *realpolitik*. The tribunals—some more than others—are in the vanguard of the progressive development of international law, and their seminal, albeit not always impeccable or uncontroversial, jurisprudential legacy will take many years to fully appreciate and digest, for adjudicators, policy-makers, and scholars alike.

Having reached its climactic point, the age of proliferation is now giving way to an era of recession or, at least, to a slowdown of the institution-building efforts in this domain. The expansive development of international criminal law is transforming into a more latent qualitative growth characterized by an introspective search for identity, reappraisal of fundamental terms and underlying philosophies, the continued—more careful and refined—experimentation with the hybrid forms of justice, and a more symbiotic and non-paternalistic engagement with national jurisdictions. The veteran institutions such as the UN ad hoc Tribunals and the SCSL are winding down their adjudicative activities in the near future. The essential tasks of the ICTY and ICTR will continue to be carried on by the respective branches of the International Residual Mechanism for International Criminal Tribunals (MICT).[2]

This point in the modern history of international criminal adjudication presents a unique opportunity for drawing lessons from the experience gained thus far. Successes and missteps of the outgoing courts and the interim results attained by the institutions which started their operations more recently, including the permanent ICC, provide a rich source of didactic material. More than ever, a systematic examination and critical reflection on the legacy of the tribunals is required in order to define the goals and agenda for the forthcoming period. It is important that any such stocktaking exercise be carried out without unfair critique or celebratory rhetoric, the time for which is long gone.

The ability of the international criminal justice institutions to meet their objectives and to carry out their increasingly important role within the nascent global constitutional order depends on their ability to tackle effectively the numerous challenges intrinsic in their work. Struggling with the need to dispose of complex and voluminous cases despite dramatically limited resources and powers, the international criminal courts strive to render equitable and properly reasoned verdicts on the basis of solid evidence and as a result of trials that meet the highest standards of fairness and due process. They are expected to do so without spilling the credit of legitimacy vested in them by their diverse stakeholders and constituencies, ranging from the individual accused and victims to the international community at large. The quality of the procedural law and the efficiency of the institutional structure in which that law is to be interpreted, litigated, and applied have ranked among the most pressing issues in international criminal justice.

[1] A. Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2(2) *JICJ* 585, 585.

[2] UNSC Res. 1966 (2010), 22 December 2010, para. 1 (establishing the Residual mechanism with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY) respectively).

1.2 THE QUESTION OF AN INTERNATIONAL CRIMINAL PROCEDURE: A BRANCH OF LAW AND A DISCIPLINE

Unlike substantive international criminal law, which has been the focus of attention for states and legal scholars since at least Nuremberg and Tokyo, its procedural counterpart has for a long time been largely ignored.[3] As a result, its recognition as a specialized branch of international law has been—and still is—far from self-evident.[4] Both post-World War II international military tribunals applied the specially devised Rules of Procedure and took numerous decisions disposing of procedural matters, as their trial record reveals. However, the practice and jurisprudential legacy of the IMT and IMTFE in that domain have remained dramatically under-examined.[5] The process was an afterthought and the nascent debate thereon was overshadowed by the tectonic shift from impunity towards individual accountability for international crimes that the historical tribunals induced and by their contributions to the clarification and development of substantive international criminal law. Thus, the issue of international criminal procedure becoming a separate field of law and study was not on the radar before the formative years of the ICTY and ICTR.

Despite the Nuremberg and Tokyo precedents, the very existence of the 'law of international criminal procedure' was questioned by international law academics. As the distinguished legal scholar Professor Georg Schwarzenberger put it:

> The Law of International Criminal Procedure, as with International Criminal Law in any substantive sense, does not exist in the international customary law of unorganized international society. On this lowest level of international integration, international law rests on a primitive metalegal quasi-order which neither has nor requires the more sophisticated distinction between civil and criminal law nor, in the absence of judicial organs, rules of civil or criminal procedure. In partly organized international society, States are free to create between themselves any rules of procedural or substantive criminal law they care to adopt.[6]

Importantly, he did not regard the Nuremberg and Tokyo proceedings as valid precedents which could attest to the existence of international criminal procedure, since the Charters (and, presumably, also the Rules) 'were international only in the formal sense that several cobelligerents did jointly what each could have done singly under the laws and customs of war: the exercise of its extraordinary jurisdiction against persons accused of being war criminals.'[7] Consequently, he reasoned:

[3] See further S. Vasiliev and G. Sluiter, 'Editors' Preface', in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: CMP Publishing, 2009) 3–4.

[4] E.g. K. Ambos and S. Bock, 'Procedural Regimes', in L. Reydams et al. (eds), *International Prosecutors* (Oxford: Oxford University Press) 540 ('a uniform international criminal procedure does not exist. Rather, each tribunal has developed its own, more or less unique, procedural code'). See further G. Boas et al., *International Criminal Law Practitioner Library, Vol. III: International Criminal Procedure* (Cambridge: Cambridge University Press, 2011) 1; N. Combs, 'Legitimizing International Criminal Justice: The Importance of Process Control' (2011–12) 33 *Michigan Journal of International Law* 321, 321–2.

[5] There are relatively few sources dealing principally or in detail with the procedural law and practice of the historical international criminal tribunals: see e.g. D.A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account, Vols I and II.* (Lanham: University Press of America, 1999); H. Laternser, 'Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders' (1986–87) 9 *Wittier Law Review* 557–80; E.J. Wallach, 'The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?' (1999) 37 *Columbia Journal of Transnational Law* 851; Boister/Cryer, *The Tokyo International Military Tribunal.*

[6] G. Schwarzenberger, 'Province of International Judicial Law' (1983) 1 *Notre Dame International Law Journal* 21, 25 (footnotes omitted).

[7] Schwarzenberger (n 6).

> Subject to insignificant consensual exceptions, International Criminal Procedure as the adjective law of an International Criminal Law in any substantive sense remains in the limbo *of lex ferenda*. To escape from there requires stronger *de facto* and *de jure* order than confederate unions are able to provide. Yet, like other propositions *de lege ferenda*, those in the fields of International Criminal Law and Procedure can be turned to constructive uses. They can be made to stimulate further reflection on the minimal international orders postulated, if only by implication, in such blueprints.[8]

This rather conservative position was neither consensual nor necessarily representative at the time. For example, a little less than a decade earlier, another prominent scholar, Professor Quincy Wright, expressed a more sanguine view on the relevance and prospects of an international criminal procedure. From an endeavour to define that branch of law, he went as far as to propose the adoption of a comprehensive code containing procedural provisions, among others:

> A comprehensive international criminal code should include provisions to assure fair indictment and fair trial of those indicted. The following are generally accepted procedures in international criminal codes: indictment process, assurance of the accused's presence in court, perhaps involving extradition, the right to *habeas corpus* and bail, the assurance of a speedy trial and avoidance of long preventive detention, the right to counsel, the prohibition of *ex post facto* laws, the securing of witnesses and of evidence by letters rogatory if necessary, and assurances against double jeopardy.[9]

Professor Wright's argument was undoubtedly of a *de lege ferenda* nature. His reference to the 'desirability of a generally accepted international criminal code' and analysis of the difficulties of establishing 'courts with international criminal jurisdiction' and the permanent ICC are clear indications to that effect.[10] But unlike Schwarzenberger, Wright did consider the Nuremberg proceedings as a precedent falling within the realm of 'international criminal procedure'. As the 'usual' fair trial guarantees incorporated in both the Charter and the judge-adopted Rules made the Charter's procedural regime 'an example of fairness',[11] those guarantees implicitly were to be taken as the core elements of the definition and identity of international criminal procedure.

The picture of the underdeveloped international society with a low degree of integration sketched by Professor Schwarzenberger at the time barely reflects the present realities.[12] In the meantime, that very society has gone a long way to acquiring a greater moral and legal cohesion. The intensive institution-building in international criminal justice in the last two decades has rendered obsolete the claim that 'consensual exceptions' are 'insignificant'. The existence of multiple sets of procedural rules across various international judicial fora is in itself an ontological argument corroborating the existence of international criminal procedure. Nowadays, states hardly have a *carte blanche* when creating 'between themselves any rules of procedural or substantive criminal law they care to adopt', but, as far as the procedure is concerned, are bound by treaty and customary law to respect internationally recognized human rights.

[8] Schwarzenberger (n 6) 25–6.
[9] Q. Wright, 'The Scope of International Criminal Law: A Conceptual Framework' (1974–75) 15 *Virginia Journal of International Law* 561, 572.
[10] Wright (n 9) 573.
[11] Wright (n 9) 573.
[12] See S. Vasiliev, 'General Rules and Principles of International Criminal Procedure: Definition, Legal Nature and Identification', in Sluiter and Vasiliev (n 3) 21; Boas et al. (n 4) 4.

As previously noted, it is with the advent of the second-generation international criminal tribunals (ICTY and ICTR) that the importance of procedural law and practice, as the means to ensure that international criminal justice can be administered and dispensed properly, has increasingly gained recognition. In the words of Judge O-Gon Kwon, it became clear that without the sturdy 'rails of international criminal procedure', the 'train of international criminal law' would get nowhere.[13] The question of what procedures are most suitable to be applied by international criminal courts has gradually occupied a central place in the tribunal discourse. It became the focal point of the legislative effort spearheaded by the international judges who in most tribunals were charged with adopting and amending the Rules of Procedure and Evidence.

In academia, what can be called an obsession with procedure has brought about an explosion in monographs on the procedural law of the tribunals more generally, as well as numerous journal symposia and myriad articles devoted to more specific topics.[14] The discernible trend of theorization and sophistication of the scholarly debates on the nature of that law further attests to the emergence and consolidation of international criminal procedure as an independent academic discipline.[15]

However, as noted earlier, the question of whether international criminal procedure indeed exists as a distinct branch of (international) law is less self-evident. This is not due to the lack of relevant legal standards, but rather due to their multiplicity and the seeming incoherence across the various jurisdictional frameworks. The latter may point to the absence of a fundamental theoretical basis to underpin that body of law. For those who are prepared to admit its existence, this fact alone offers little comfort if international criminal procedure were to remain largely incoherent and deficient in view of loopholes, disconnection from vital interests and needs of the constituencies and stakeholders, or the lack of sense of direction.[16]

Indeed, in his earlier-mentioned article, Professor Schwarzenberger stated that any 'new branch of Law' presupposes 'the existence of a sufficient number of significant legal rules and principles which give identity and cohesion to a branch of law'.[17] The first, quantitative parameter can rather easily be met by international criminal procedure by virtue of the numerous 'legal rules and principles' which exist as a matter of positive law. But the qualitative prongs of that definition may certainly give rise to insecurity. For example, it is unclear to what extent those numerous rules and principles are 'significant', whether some are to a greater extent than the others, and how that is to be measured. Even more importantly, the question arises as to whether divergent procedural standards developed and applied in various international and hybrid criminal courts are cemented by a unique identity and a substantial degree of cohesion.

The procedural law-making effort—which accompanied the frantic institution-building in the domain of international criminal adjudication and further evolution and

[13] See Postscripts to this volume: O-G. Kwon, 'The Procedural Challenges Faced by International Criminal Tribunals and the Value of Codification', para. 2.

[14] See among the most recent book titles C. Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012); Boas et al. (n 4); C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (The Hague: T.M.C. Asser Press, 2010).

[15] See further M. Langer, 'Trends and Tensions in International Criminal Procedure: A Symposium' (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 1, 2 (noting that 'in the last fifteen years, international criminal procedure has flourished as a discipline') and 13 (referring to the trend of 'the conceptualization of international criminal procedure as a theoretical and practical field that is independent and qualitatively different from domestic criminal procedure').

[16] Presenting a sceptical account, see G. Sluiter, 'The Effects of the Law of International Criminal Procedure on Domestic Proceedings Concerning International Crimes' in Sluiter and Vasiliev (n 3) 460.

[17] Schwarzenberger (n 6) 21.

transformations of that law within the 'self-contained' legal-institutional regimes—unfolded in an extemporary and uncoordinated, piecemeal fashion.[18] It has been noted that traditionally the task of developing the Rules of Procedure and Evidence was entrusted to the judges (possibly with the participation of other organs) of each individual tribunal, with the notable exception of the ICC, whose Rules were developed 'extramurally' by state delegations to the Preparatory Commission. This could not but result in a significant diversification and fragmentation of the procedural regimes across multiple institutional frameworks. There has not, therefore, been one central authority to develop and enact the procedural law for international criminal tribunals in general or for each of them individually.

Consequently, no explicit uniform theory and design for the organization of international criminal proceedings could have emerged to serve as a universal model to guide judge-legislators and negotiators. The different institutional structures defined by the architects of the courts and the slightly varying goals affected the initial choices made for each individual court and resulted in somewhat discrepant trajectories of development of their procedural law. There has certainly been a legislative and jurisprudential cross-fertilization between the various tribunals and a great deal of learning from the experience of the predecessor courts which had to deal with similar procedural situations. The procedures adopted by some courts served in a more direct sense as a blueprint for the others.[19]

This accounts for a degree of similarity between them and makes it possible to speak, in the broadest of terms, of the existence of a number of 'models' of international criminal procedure. For example, one could identify the historical IMT/IMTFE model, the ICTY/ICTR/SCSL model, and the ICC model as 'principal models', and a few more *sui generis* models embodied in the process of the hybrid courts (SPSC and ECCC) and courts of an international character (STL). In relation to certain aspects, those *sui generis* models may bear resemblance to some of the principal models (SPSC and ICC; STL and ICTY). But, in fact, they are independent units of equal worth and amounting to unique *mélanges* of inspirations drawn from the 'original' international criminal procedure and the procedure borrowed from elsewhere, most importantly from the legal culture prevalent in their 'target' domestic jurisdictions.

While some convergence has taken place as a result of the ceaseless amendment of Rules, any initial similarities between the individual tribunals' procedural frameworks may have also been significantly diluted due to the parallel and selective nature of the amendment process at various courts. For example, ICTY procedure differs in many respects from that of the ICTR, and the same holds for the SCSL's approach, although those three tribunals might conditionally be placed under the same 'model' of international criminal procedure. The differences between any of those three models and the 'derivative' STL model are even more significant, as are those between the ICC procedure and the UNTAET Transitional Rules of Criminal Procedure which applied before the Special Panels in East Timor.

This begs the following question: how is one to make sense of this diversity? Does it point to a low degree of coherence of the law of international criminal procedure and are any overlaps and differences between the several disparate procedural frameworks merely accidental and arbitrary? Or should diversity be taken as attesting to the congenital complexity

[18] On the idea of fragmentation and self-contained 'sub-regimes' in international criminal procedure, see Vasiliev (n 12) 21–3.

[19] See e.g. Art. 14(1) SCSL Statute ('The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.').

(and perhaps deficiency) of that law, without it being a disproof of 'cohesion' and entitlement to be ranked among other, more established branches of (international) law?

In the former case, international criminal procedure might well be regarded as a discipline, or a method which allows for the comparison of the procedural arrangements at different tribunals.[20] But in the latter case, it could also be deemed as more than a mere 'method': a body of law as a (relatively) coherent corpus of legal provisions underpinned by a normative core of fundamental procedural norms and allowing for some variation as far as the niceties of the regulatory regime are concerned. Arguably, the absolute uniformity that could theoretically be reached by having a fully converged set of procedures, from the more general principles down to the most specific and technical rules, to be applied in all international courts without exception, is not attainable. There appears to be little prospect of achieving uniformity as long as international criminal law is enforced through multiple jurisdictional fora, each reinforced by its own procedural rule-making authority. Furthermore, it would be presumptuous to assert that uniformity is or should be a proper goal or value in itself, without identifying any concrete and practical benefits for the system of international criminal justice or its specific elements. Moreover, it may well be that the various international criminal tribunals will be in a better position to dispense substantive and procedural justice in the best manner possible within their respective legal-cultural contexts and through tailored institutional frameworks if a reasonable variation in procedures is allowed and pluralism embraced. If so, the cornerstone questions must be what degree of procedural pluralism in international criminal jurisdictions is tolerable, necessary, or even desirable and what standards may or may not legitimately be subject to fragmentation. This brings us to the issue of objectives of the present book.

1.3 THE PROJECT'S OBJECTIVES

The present volume is the result of collaboration by a collective of authors, all of whom have been involved, academically or professionally, with the ever-expanding universe of international criminal justice institutions. The question of whether international criminal procedure has indeed matured into a coherent branch of law has been the *leitmotif* of this study. The issue is whether this body of law constitutes a unitary corpus of legal rules and a cohesive normative whole distinct from the several divergent self-contained procedural regimes, the relevance of which is limited to individual tribunals.[21]

Over and above the academic preoccupation with the state of development of international criminal procedure, the rationales for this study lie in the practical domain. This goes to both the internal, or systemic effects of that law that might ameliorate the international tribunals' own procedural practice (consistency, predictability, and efficiency) and its external authority, in terms of the possible effects on domestic and hybrid criminal procedure.[22] In their quest for the highest standards of international procedural

[20] See further Schwarzenberger (n 6) 24 (observing that 'Comparative Procedural Law like Comparative Law is not a branch of law but a method.'). For the uses of 'international criminal procedure' in this comparative sense, see Langer (n 15) 15 (referring to 'comparative international criminal procedure'); Sluiter (n 16) 459 (referring to the study of international criminal procedure as a 'comparative exercise' in educational purposes).

[21] Proposing a research agenda, see Vasiliev (n 12) 20–7 and Sluiter (n 16) 459 (on the objective of 'verifying whether a well-structured and logical body of law exists, offering a fundamental basis for fair and effective trials'). See further Boas et al. (n 4) 8–10.

[22] On the possible effects on the national criminal process, see G. Sluiter, 'The Law of International Criminal Procedure and Domestic War Crime Trials' (2006) *International Criminal Law Review* 605–35. See further Vasiliev (n 12) 24–7 (discussing the systemic benefits of clear, precise, and certain standards of international criminal procedure and their potent role as a model for hybrid courts).

justice and best practices in dealing with cases involving international crimes, national criminal justice systems have increasingly turned, and may be expected to continue doing so in the future, to the experiences of international criminal courts.[23]

A clear and foreseeable corpus of standards of international criminal procedure which has proved to be a workable, fair, and efficient system would be more keenly received by those states that wish to enact domestic procedural reforms and who are looking for sources of guidance and inspiration for that purpose. Further, the hybrid forms of justice which may be established in the future would also clearly benefit from such a normative corpus, as attested by the remarkable perceptiveness of the ECCC and STL with regard to the international procedural standards.[24] At the same time, the question arises of whether conclusive guidance could be drawn from international criminal procedure in its present-day state: on many essential issues it may appear unprincipled and too disjointed to be of any use to 'external consumers'.

The conveners and participants of the Project of the International Expert Framework on International Criminal Procedure (IEF) sought to establish, through a systematic examination of the field, the respects in which international criminal procedure is more fragmented and in which it is less so. Finding an explanation for the diversity might help to tackle the perceived problem of a disparate and incoherent state of procedural law in the domain of international crimes adjudication. In an endeavour to ascertain the degree of coherence of that body of law, the authors looked into which standards and practices adopted by international criminal tribunals constitute its immutable core,[25] as a matter of legal obligation and/or procedural expediency shared by most or all international and hybrid criminal jurisdictions, and which rules are variable.

The hypothesis at the heart of the Project and its starting point is that despite the many significant differences, a number of shared fundamental standards of international criminal procedure—referred to as 'principles' and 'general rules'[26]—are nevertheless likely to exist and can be identified through the application of a certain methodology or algorithm.[27] The group's aspiration was to distil a set of legal principles and rules constituting the normative core of international criminal procedure. Moreover, the idea was to cast that set in the form of 'an "autonomous" written text . . . that merits analysis on its own terms, quite apart from its application to contingent circumstances', as an abstraction from the highly volatile and variable facts of specific cases.[28]

Some provisional ideas and hypotheses as to what standards could be denominated as the core of international criminal procedure were aired during the debates preceding the Project and at its early stages. But to the extent that they had been drawn from hunches and personal preferences or prejudices, rather than from 'scientific' data obtained through resort to the agreed methodology, they had to be discarded and had no bearing on the conclusions.

[23] For a tentative study, see Sluiter (n 22). It is worth noting that a fully-fledged inquiry into the dynamics of the demand in national legal systems for guidance which could possibly be matched by a respective offer from international criminal tribunals is yet to be undertaken. The same holds for the question of the actual, as opposed to possible or likely, effects of international criminal procedure on the national criminal process, be it in respect of core crime cases or generally.

[24] Vasiliev (n 12) 25–7.

[25] See e.g. Sluiter (n 22) 606 and 634 (querying 'to what degree a *corpus iuris* of international criminal procedure has in fact developed' and 'which are the essential rules of international criminal procedure and to what extent do they have an autonomous status').

[26] For definitions, see section 2.2.

[27] See section 2.5.

[28] M. Damaška, 'On Circumstances Favoring Codification' (1983) 52 *Revista Juridica de la Universidad de Puerto Rico* 355, 357–8 (shrewdly noting, however, that 'where legal thinking is interwoven with the contextual and the situational, the "law" without application hardly deserves to be termed law: it resembles unperformed music').

This volume attempts to make sense of what may appear as the 'normative jungle' to anyone who, when observing the diversity of international criminal procedure and the occasional interlacement of the law and practice in different courts, is led to suspect that the commonalities among the tribunals are as coincidental and arbitrary as any divergences between their procedures. Ultimately, it aims at ascertaining whether that branch of law is a legal reality rather than a product of the imaginations of like-minded scholars. Centred on the task of compiling a set of 'principles' and 'general rules', the study executes the programme for the research proposed previously.[29] The study endeavours to deliver a comprehensive, critical and forward-looking reflection on the nature and the present state of the law of international criminal procedure. It does so by pursuing several interrelated and sequential objectives:

(a) *Descriptive*: providing a restatement of the law of international criminal procedure as it exists *de lege lata* and as it is applied in and across international and hybrid criminal courts. The (nearly) comprehensive nature of the undertaking is apparent not only from the coverage of the topics, but also from the endeavour to examine the law and practice of all international and hybrid criminal tribunals applying, fully or in part, the law of international criminal procedure. The volume thus aims to offer a structured, systematic, and nearly complete overview of the field, including both the statutory law and jurisprudence. As a first step, therefore, it takes stock of the procedural standards and practices adopted and developed by the historical and contemporary international and hybrid criminal courts and tribunals;

(b) *Comparative/synthetic*: comparing the procedural law and related practice in different international criminal jurisdictions, providing an analysis of the reasons for and implications of any similarities and differences, and identifying problems or gaps in the law or inadequacies of its interpretation and application in the specific tribunals. This aspect of the study allows common trends and mainstream approaches as well as notable deviations within international criminal procedure to be discerned;

(c) *Evaluative*: subjecting any commonalities between and idiosyncrasies of specific procedural regimes to a critical evaluation against an agreed set of criteria. Such framework is formed by (i) human rights law; (ii) comparative criminal procedure; (iii) goals of international criminal justice; and (iv) coherence, expediency, and practical considerations. The set of uniform benchmarks for the assessment of the law and practice of the tribunals is what allowed the making of reasoned and verifiable—rather than arbitrary and opinionated—judgements as to whether any commonly shared or deviating procedural standards are justifiable and admissible. Where that is the case, the relevant standards may be deemed to constitute part of the normative 'nucleus' of international criminal procedure;

(d) *Analytical*: within the entirety of the law and practice of all the courts and tribunals under examination, identifying and formulating those standards, which for present purposes can be referred to as 'principles' and 'general rules', if any. The existence of these standards in any of the areas of the law of international criminal procedure may neither merely be assumed nor authoritatively proposed in the absence of sufficient corroborative data. A conclusion that no 'principles' or 'general rules' can

[29] Vasiliev (n 12) 19, 91 ('It is both necessary and feasible to undertake a systematic review of the law and practice of international criminal procedure, results of which can find expression in a private codification of the general rules and principles of the LICP.... [D]rawing a *sui generis* instrument entitled "General Rules and Principles" appears a preferable mode of systematisation.').

be established, but only several divergent rules or sets of rules which have no apparent common denominator, is also an important and valuable finding;

(e) *Normative*: on the basis of the comparative overview and painstaking evaluation of the law and jurisprudence, pointing to the best practices from among those available across numerous international jurisdictions and offering recommendations *de lege ferenda* that may help to address any inconsistencies and legal gaps and defects in the practice of international and mixed criminal tribunals. The recommendations for improved international criminal procedure are advanced to give expression to the Project's normative aspiration and to initiate or contribute to a further discussion on how to inject more fairness into international criminal proceedings or further streamline them. It has deliberately not been our objective to revolutionize the current approaches of the various courts. Rather, the idea was to provide a set of motivated and constructive, yet restrained, proposals meant to cover lacunae or to refine practice. This forward-looking angle of the study highlights issues on which a greater cross-jurisdictional convergence of international criminal procedure may be required or expected in the future. For that purpose, the conceptual and practical normality of pluralism and the possible desirability of a reasonable divergence between the procedural laws at various courts have been accepted, unless specific and compelling considerations call for increasing uniformity.

Thus, the study is meant to be descriptive, comparative, analytical, and normative at the same time. The multiplicity of its objectives and their interweaving necessitated the adoption of an agreed methodology to be followed faithfully in respect of all matters falling under examination.

The methodology includes the uniform use of terms, the common understanding of the objectives, the resort to the same assessment criteria in the evaluative parts of the study, and the algorithm under which the comparative and analytical parts of the exercise must be carried out. The editors and the authors have been keenly aware of the fact that the choice of methodology may affect the outcome. For example, the selection of, and ranking among, the criteria by which to evaluate the fairness and efficiency of international criminal procedure will necessarily inform the specific findings eventually entered.

Since the purpose and ambit of this Project, as well as the substantive conclusions presented in this book, would be impossible to appreciate and verify otherwise, the main aspects of the IEF methodology are explained later in more detail. In elaborating the methodology the group was guided by their collective knowledge and fundamental reflections on the field that preceded the core IEF research. In the early stages of the Project, separate inquiry was conducted into, and debates held on, the methodology for the purpose of defining and adjusting the general directions on the basis of the participants' feedback.

Only the main highlights of those methodology-related considerations and discussions will be presented in the following sections. Given that this is done only for explanatory purposes, some issues will be given undeservedly short shrift. This Introduction does not reproduce the entirety of the research that underpinned the group's approach; the methodology of international criminal procedure deserves a book on its own. The issues which, as a matter of necessity in light of the Project's goals, invite a more fundamental reflection are set out elsewhere in this volume.[30]

[30] See Chapter 1, which provides research groundwork relevant to the determination of the Project's methodology.

In addition to the methodological clarifications, the following outlines the approach taken by the research group towards the division of the vast terrain of international criminal procedure into the subject-matter areas and the selection of topics, the terms on which the (collective) conclusions were reached and can be attributed; the coverage of international criminal jurisdictions; and the temporal period for which the developments in the law and jurisprudence are covered.

1.4 LIMITATIONS

More importantly than stating what this book is, it must be made clear from the outset what it is not. Ambitious as it may appear,[31] the study is subject to several limitations.

First, the principles and (general) rules of international criminal procedure, which are the principal object of this research, are believed to reflect the current status of the law, as opposed to a progressive interpretation thereof or a prediction of what the core of international criminal procedure must or is likely to be in the future. The *de lege ferenda* considerations are rather advanced as a part of the research group's recommendations. Both the conclusions and the recommendations ought to be read in the context of the study as a whole and with attention to the group's methods.

Secondly, while the study provides a rather extensive inventory of 'principles' and 'general rules' of international criminal procedure, it is not our purpose to offer a fully-fledged codification of that law, i.e. an autonomous *system* of principles and rules of international criminal procedure.[32] The ambition is rather to systematize that law by providing a comprehensive survey and restatement. Indeed, the 'principles' identified by the Project, in accordance with the agreed definition, may (and as is argued, should) be the essential elements and pillars of any *system* of international criminal procedure, if it is meant to be fair and viable. Under the interpretation adopted by the Project, principles have, in themselves, a strong cohesive effect that binds the disparate procedures across the various jurisdictions together into one coherent system. By contrast, 'general rules' merely reflect the prevalent procedural solutions within the international criminal justice system at the present stage of its development and *in se* are not conclusive indicators of any strong and principled normative preference. The 'mainstream solutions' are attended and qualified by alternatives which are deemed permissible and may even be normatively desirable in the circumstances of an individual tribunal.

Thus, whereas in respect of the principles, the Project may well approximate a private 'codification', in relation to general rules and *a fortiori* specific rules it represents an incomplete 'systematization' or a 'collection'. In that sense, it resembles a 'technocratic code' in which the rules of a rather specific and detailed nature reflect the status in some, but not necessarily all, jurisdictions.[33] The Project is generally not concerned with procedural technicalities and petty regulations, the systemic importance of which may be limited, as opposed to their potentially high practical value in the respective jurisdictions. However, where no principles serving as common denominators, but only several options

[31] On the difficulty of determining the 'core' and 'firmly established' rules and principles of the law of international criminal procedure, see among others Sluiter (n 16) 460; Sluiter (n 22) 606.

[32] See Damaška (n 28) 355 (defining 'codes' as 'those written works that embrace a system of principles and rules applicable to a given area of law' and 'essentially directive'). Footnotes omitted.

[33] See Damaška (n 28) note 1 (in this sense, distinguishing between 'legal texts that are *collections*, rather than a system of provisions', those that set out '*guidelines*, i.e., factors that should be taken into account in making a decision' as well as '"technocratic" codes that set out instructions as to how consequences of alternative courses of action should be evaluated, so that certain posited goals can best be realized… [and] contain formulae for "instrumental calculations"').

amounting to irreconcilable approaches are deemed to exist, the 'general rules' that apply in relevant tribunals but not in the others and the more technical norms underlying those rules have been indicated. These reflect the consequences of the alternative courses of legislative effort at a more specific level.

As a result, the conclusions presented in this work cannot readily be relied upon in their entirety by a newly established international or hybrid criminal jurisdiction, as if they constituted a self-sufficient code of procedure. Further choices would have to be made between the options available in order to complete and concretize the procedural edifice. Over and above offering an inventory of norms governing international criminal practice and providing a research basis in support of the standards identified, the task of elaborating a Code would require an even more comprehensive, volitional, and centralized (or even authoritarian) effort.[34] This Project is, however, primarily academic and consensual, which in itself precluded the feasibility of making unilateral and definite choices for one or the other procedural model, let alone misrepresenting them as the actual law in force. This is a matter of difference between a restatement of law and a legislative effort.

Any real codification is only valuable when it is as complete as possible in relation to the situations it specifically or implicitly covers.[35] But as will be noted, exhaustiveness has not been the primary goal of the Project.[36] The 'principles' and 'general rules' identified by the Expert Framework are not all-inclusive in the sense that they do not comprise every possible and necessary principle or rule that a procedural regime must be availed of if it is expected to function effectively. In other words, the IEF general rules and principles do not provide a self-sufficient normative regime but are limited to its essential building blocks. The numerous difficult choices will have to be made by any future Code architects.

It would take legislative vigour, creativity, and discretion—and many more years of research and debates—to be able to adopt pronounced positions as a group on various contested issues of procedure. It is potentially even more difficult to ensure that the choices for some of the procedural options and avenues rather than others are made in a holistic and coordinated manner. Only then will the result amount to an autonomous and functional normative system. In order to be workable, the various arrangements and solutions embodied in the Code must go together well, and be carefully balanced against one another. This would help to prevent any apparent or more subtle conceptual incoherence that would be a recipe for normative bankruptcy in practice. In the same way that a set of notes drawn erratically from incompatible scales cannot make a pretty tune, a neatly performed, yet cacophonous mix of internally discordant 'highest standards of procedure' and 'best practices' is unlikely to result in a coherent and workable procedural system capable of ensuring fair and efficient proceedings.

Lastly, as noted, most recommendations presented at the end of each chapter of this book are deliberately of a limited and modest nature. Even so, the members of the expert

[34] Damaška (n 28) 359–60 (on autocratic power as a political circumstance favouring codification). Over and above the 'dictatorship' of the IEF methodology, which might well go beyond the standards usual for our discipline in part of the authors' autonomy to determine their research methods, the idea of recreating such a 'favourable' circumstance appeared as unseemly as those political regimes that may be most successful at 'codification'. The Project was not steered in the way that would enable one to arrive at the desired conclusions on the specific issues at the cost of academic honesty or authorial freedom.

[35] See Damaška (n 28) 355 ('codes are essentially directive: the interaction of their principles and rules is expected to describe the solution to most problems that can arise within the area they regulate, at least in the sense of providing starting points for analysis and argument. This inspiration to inclusiveness results in a relatively high level of abstraction; rather than trying to provide in detail for every foreseeable situation, such codes tend, by marking out lines of inquiry, to suggest contours of the solution. And practical application calls for further elaboration, on concretisation of their provisions').

[36] See section 2.3.

group were not tasked with modelling a procedural regime that would incorporate all of the recommendations made and ensure the greatest operational success possible. Again, any procedural reforms, particularly those amounting to an overhaul of any given system, must be the result of the careful analytical exercise of checking the internal coherence of a resulting model. A legislator must make sure that all of the proposed elements in the system serve their intended functions and work seamlessly in conjunction with one another. This effort should also be strongly tailored to the specific features and needs of a receiving legal context. Conducting such an exercise fell beyond the IEF's mandate. Therefore, codification of international criminal procedure was left to specialized initiatives which might be taken in the future in accordance with suitable methodology. In our view, it will already be good enough if the present study could serve as a point of departure for any such initiative and a first step towards a more comprehensive codification effort.

2. APPROACH AND METHODOLOGY

2.1 DEFINING INTERNATIONAL CRIMINAL PROCEDURE AND COVERAGE OF JURISDICTIONS

'International criminal procedure' is a term that will be used more than abundantly throughout this volume. In addition, this notion helps to draw the external contours of the Project. The breadth of the definition determines which of the international (or hybrid) criminal courts and tribunals should be examined. For this purpose, international criminal procedure can be defined as the specialized body of international law that governs the conduct of criminal proceedings, including matters of both procedure and evidence, in the context of the international legal order. International criminal procedure has as its principal objective, and indeed its most usual function, the effective and fair enforcement of substantive international criminal law by international and hybrid criminal tribunals. In this sense, international criminal procedure can be seen as being adjectival to substantive international criminal law.

But international criminal procedure is merely an instrument which, in principle, could (albeit not necessarily should) be applied to enforce any set of substantive penal provisions: it has no intrinsic limitations that per se cancel or prevent its validity outside its traditional habitat. Thus, the nature of international criminal procedure being 'adjectival' to substantive international criminal law means something else than 'inseparable'. As a body of law distinct from the specific procedural systems (tribunals) in which it is applied, it is a derivative of, and yet fully autonomous from, international criminal law. Its potential relevance is not limited to international crimes within the jurisdictions of international criminal tribunals and may well extend beyond the enforcement of responsibility for those crimes.[37] Just as violin is better suited to playing the high-pitched notes and a cello the lower ones, international criminal procedure is an instrument that was designed by its creators to implement *international* criminal law rather than to enforce any other (penal) norms. But if need be and with some adaptation, it could also be used to serve other purposes.

[37] E.g. in the ad hoc Tribunals, the standards of international criminal procedure do apply in the prosecutions and trials in connection with contempt of court. Similarly, the hybrid tribunals with jurisdiction over domestic offences (e.g. SPSC, SCSL, ECCC, and STL) apply their regular rules of procedure and evidence which embody international criminal procedure entirely or predominantly. The formulation of the charge per se has no bearing on the determination of the applicable procedural law.

Thus, the first and crucial parameter of the definition is the origin of the procedural standards in international law, including treaties, resolutions of international organizations and their organs or other instruments, customary international law, and general principles of law. The second element (the link to substantive ICL or core crimes and international or hybrid criminal courts) is simply a distinctive or descriptive, but not a defining, feature. It does serve as an almost fail-proof indicator, but it is hardly an integral part of the definition.

It is true that the law of international criminal procedure has been developed for operation within international and hybrid criminal tribunals. Therefore, these bodies' procedural regimes are the first place to search for norms of international criminal procedure. But nothing prevents the creation of an international—and especially a hybrid—court that would rely exclusively or principally on *domestic* laws of criminal procedure, despite comprising international elements in other respects (e.g. international judges and staff; international criminal law being directly applicable substantive law).

The domestic developments in the realm of international crime prosecutions and experiments with hybrid justice corroborate this point. For example, the Iraqi High Tribunal and the War Crimes Chamber in the State Court of Bosnia and Herzegovina did not apply international criminal procedure, despite applying international criminal law and employing international judges, respectively.[38] At the same time, hybrid criminal courts which are firmly embedded in the national judicial system could still apply an essentially *international* criminal procedure.[39]

The function of an 'adjectival law' to substantive international criminal law is also a highly distinctive feature of international criminal procedure, but not its *sine qua non* trait. As noted, international criminal procedure principally serves as a mechanism for the enforcement of substantive international criminal law and its provisions concerning 'core' offences such as crimes of aggression, genocide, crimes against humanity, torture, war crimes, and other related crimes within the tribunals' jurisdiction. But the scope of crimes to be adjudicated upon by international and hybrid courts may be expanded as new crimes are added to their material jurisdiction. This circumstance alone would not per se strip the applicable procedure of its international nature. International criminal procedure may indeed be used to prosecute and adjudicate offences under domestic law—as is the case with some of the hybrid tribunals—without this depriving the relevant procedure of its 'international' character.[40] In a similar vein, domestic judicial systems increasingly deal with core crimes, which does not automatically turn the applicable criminal procedure into an *international* one.

It is thus worth distinguishing conceptually between (i) international criminal procedure as a legal toolbox of methods and practices for dispensing of criminal cases, (ii) the traditional object of proceedings (international crimes), and (iii) fora in which the relevant methods and practices are employed (international tribunals). Drawing an indissoluble link between the three elements may prove misleading.

[38] Art. 1(2) Law of The Iraqi Higher Criminal Court, Law No. (10) 2005, Al-Waqa'I Al-Iraqiya [Official Gazette of the Republic Iraq], 18 October 2005; Rules of Procedure and Evidence of the Iraqi Special Tribunal, annexed to Law of The Iraqi Higher Criminal Court, Law No. (10) 2005, Al-Waqa'I Al-Iraqiya [Official Gazette of the Republic Iraq], 18 October 2005. On War Crimes Chamber, see n 59.

[39] See further H. Friman, 'Procedural Law of Internationalized Criminal Courts', in C. Romano et al. (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004) 317–58.

[40] See e.g. Art. 5 SCSL Statute; Sections 8–9 UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000; Art. 9 ECCC Agreement and Art. 3 new ECCC Law; Art. 2 STL Statute.

This approach to defining international criminal procedure enables one to draw up a list of jurisdictions that are relevant in the light of this study's objectives and will therefore be covered in the following chapters:

- *IMT and IMTFE*: While the 'international' nature of the IMT procedure has been touched upon previously, it bears noting that the Nuremberg and Tokyo Tribunals' Rules of Procedure were drawn up by the respective Tribunals in accordance with their Charters,[41] which in turn were adopted under international authority and directly under international law.[42] The IMT and IMTFE procedural arrangements pre-dated the human rights movement, that has had an enormous and irreversible impact on the progressive development of domestic criminal procedure worldwide and shaped the process in the more recent international tribunals. But this fact does not detract from the properly 'international' character of the procedural model they embody. The subsequent trials of war criminals were conducted by the occupying powers (the US, the UK, the USSR, and France) under the authority of the international Allied Control Council and pursuant to Control Council Law No. 10 in which substantive international criminal law was applied. However, the proceedings before the respective military tribunals in the occupation zones and elsewhere were subject to national laws. Therefore, the occupation tribunals' procedural practices say little as to the contents and status of international criminal procedure. In this light, other than to occasionally demonstrate the national approaches to procedure in war crimes cases, the procedure employed in the US, British, French, and Soviet military tribunals in the wake of World War II will generally not be examined in the descriptive parts of this study.
- *ICTY, ICTR, and SCSL*: The origins in international law of the ICTY, ICTR, and SCSL procedure, developed by the respective Tribunals' judges in accordance with the Statutes,[43] can be traced back to the legislative authority of the UNSC acting under Chapter VII of the UN Charter (in case of the ad hoc Tribunals) and the SCSL Agreement between the UN and Sierra Leone, respectively. The SCSL judges were authorized under the Statute to amend or supplement the RPE and in doing so, 'to be guided as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone'.[44] Nevertheless, the direct import of the domestic law and jurisprudence on the SCSL procedure has been marginal, particularly as compared to the influence exerted by the ICTY and ICTR. It thus does not cast doubt on the 'international' character of the SCSL procedure.
- *ICC*: The pertinence of the ICC Statute as a treaty adopted as a result of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC (Rome Conference), the ICC Rules of Procedure and Evidence, adopted by the Assembly of the States Parties, and the Regulations of the Court, adopted by the ICC judges,[45] to

[41] Art. 13 IMT Charter; Art. 7 IMTFE Charter.

[42] See Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945. The IMTFE Charter was adopted in the form of a special proclamation of Douglas MacArthur, Supreme Commander for the Allied Powers, in accordance with Cairo Declaration, 1 December 1943, the Declaration of Potsdam, 26 July 1945, the Instrument of Surrender, 2 September 1945, and Moscow Conference Agreement, 26 December 1945. See Special Proclamation: Establishment of an International Military Tribunal for the Far East (annex 4), 19 January 1946, TIAS No. 1589, at 3 and IMTFE Judgment, Chapter I.

[43] Art. 15 ICTY Statute; Art. 14 ICTR Statute; Art. 14 SCSL Statute.

[44] Art. 14(2) SCSL Statute.

[45] See respectively Arts 51(1) and 52(1) ICC Statute.

the category of international legal instruments need not be dwelled upon. The possible *ultima ratio* resort by the ICC to the 'national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'[46] for the purpose of deriving general principles of law does not alter the 'international' nature of its criminal procedure. Any procedural standards transposed from national laws that may be drawn as a result of the inductive process under Article 21(1)(c) would possess the quality of international law standards and fall within the category of 'international criminal procedure'.

- *SPSC*: Before being repealed by the adoption of the Criminal Procedure Code by the sovereign Timor Leste's government,[47] the Transitional Rules of Criminal Procedure were applied by the hybrid Special Panels for Serious Crimes in Dili District Court in East Timor and all other East Timorese courts in the period from September 2000 to May 2005.[48] The TRCP were promulgated by the UN Transitional Administration in East Timor with a view to replacing the Indonesian Code of Criminal Procedure. The latter was to remain applicable to the extent that it did not conflict with 'internationally recognized standards' and any UNTAET law.[49] Essentially, as a matter of law, the SPSC process was rather comprehensively regulated by the detailed Transitional Rules, which reflected a unique model of international criminal procedure bearing resemblance to the ICC procedural model in some, but far from all, aspects. Additionally, the TRCP regime was opened up to the import of 'internationally recognized principles' on issues not covered by the Regulation.[50] From a legal perspective, this could have had the effect of further reducing the relevance of the Indonesian criminal procedure. In practice, for unprincipled reasons, the TRCP were not always faithfully followed or applied and the Indonesian criminal procedure was haphazardly relied upon instead. This calls for special caution when treating the SPSC case law as a manifestation and reflection of the status of international criminal procedure. Using the Panels' jurisprudence as a 'means for the determination' of the rules of international criminal procedure must be preceded by the assessment of whether they actually relied upon the applicable UNTAET law rather than Indonesian (or Portuguese) procedural practices. But the criminal procedure model devised by the UNTAET for the post-conflict East Timor should be examined in this study as one of international criminal procedure's numerous, albeit less familiar, 'faces'.
- *ECCC*: Although the ECCC Agreement established that the procedure 'shall be in accordance with Cambodian law', it authorized the ECCC to seek guidance in 'procedural rules established at the international level' where 'Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards'.[51] In a significant and comprehensive effort to 'consolidate' the applicable law, the ECCC judicial officers promulgated and have regularly amended the ECCC Internal Rules.[52]

[46] Art. 21(1)(c) ICC Statute.
[47] Art. 2(1) Code of Criminal Procedure (Timor Leste).
[48] UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure, 25 September 2000, as amended by UNTAET Regulation 2001/25, 14 September 2001.
[49] Sections 2–3 UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, 27 November 1999; Section 3 TRCP.
[50] Section 54.5 TRCP.
[51] Art. 12 ECCC Agreement. See further Arts 20, 23, 33 ECCC Law.
[52] See Preamble, ECCC IR ('the purpose of…[the IR] is to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and

The Rules envisage a unique hybrid model visibly inspired by the Cambodian criminal procedure rooted in the French tradition, but at the same time drawing to a significant degree on international standards. The authority to enact a self-standing instrument to govern the proceedings before the Chambers is not explicitly vested in the ECCC by the constituent documents. Such a creative 'consolidation' may therefore be problematic, at least with respect to issues that are satisfactorily covered by the Cambodian procedural law in force.[53] Be that as it may, to the extent that the IR serve to distil and manifest the 'procedural rules established at the international level', the ECCC Rules and their interpretations by the judges through case law may well form part of international criminal procedure for our purpose. There is an important caveat: the elements of the ECCC procedure as reflected in the IR or crystallized through practice that are clear extensions of Cambodian domestic criminal procedure, may not be taken to reflect the 'law of international criminal procedure', unless they can also be traced back to international standards.

- *STL*: The terms on which the STL Rules of Procedure and Evidence were adopted and amended by the STL judges,[54] point to the obvious relevance of this jurisdiction for the purpose of this study—their authority stems from international law.[55] This is despite the STL's unique—among other international tribunals—subject-matter jurisdiction (terrorism), which, as noted previously, is not directly relevant for defining a given criminal procedure as 'international'. In adopting the STL Rules of Procedure and Evidence in accordance with the Statute, the STL judges were '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'.[56] As the STL President has observed:

> …'other reference materials' clearly refers to the Rules of Procedure and Evidence of other international criminal tribunals and courts such as the ICC, the ICTY and the ICTR, and of mixed tribunals such as the Special Court for Sierra Leone (SCSL), the Timor Leste Special Panels and the Extraordinary Chambers in the Courts of Cambodia. Hence, when drafting the Rules, the Judges took into account the RPE of those tribunals and courts and the LCCP. They also carefully considered the emerging procedural practice of these other courts and tribunals, and the lessons learned from their experience in conducting international criminal proceedings.[57]

Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards'). The first version of ECCC IR was adopted on 12 June 2007 and subsequently amended eight times (last amendment Rev. 8, 12 August 2011).

[53] Code of Criminal Procedure (Cambodia), 7 June 2007. See further G. Sluiter, 'Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers' (2006) 4 *JICJ* 14, 320; G. Acquaviva, 'New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers' (2008) 6 *JICJ* 129, 132–3 (concluding that 'it would seem that the drafters consider the IR a consolidation of the procedural law applicable in ECCC proceedings—presumably excluding, therefore, direct applicability of other, not consolidated, provisions').

[54] Art. 28(1) STL Statute; STL RPE were adopted on 20 March 2009 and amended four times since (last amendment dated 18 February 2012) (STL/BD/2009/01/Rev. 4).

[55] UNSC Res. 1757 (2007) (the UNSC, acting under Chapter VII of the UN Charter, bringing into force the provisions of the STL Agreement and the annexed STL Statute).

[56] Art. 28(2) STL Statute.

[57] RPE (as of 25 November 2010)—Explanatory Memorandum by the Tribunal's President, STL, para. 1.

The STL procedural model also amounts to a novel hybrid regime in which the import of the 'highest standards of international criminal procedure' is clearly distinguishable, along with any influence of the non-adversarial domestic Lebanese criminal procedure.[58] Therefore, the procedural law and the emerging practice of that Tribunal is subject to inclusion in this study's comparative survey, although the usual caution must be exercised in order not to mistake the purely domestic elements for the standards referred to in Article 28(2) of the STL Statute.

The procedural law applied in other mixed criminal tribunals with jurisdiction over 'core' crimes that have existed to date, among which the War Crimes Chamber in the State Court of Bosnia and Herzegovina and the Kosovo 'Regulation 64 Panels' set up under the United Nations Interim Administration Mission in Kosovo (UNMIK), are not covered by the Project. The explanation for this is that, as in the case of trials held by the post-World War II military tribunals set up by each of the Allied powers, the procedure before them is domestic rather than international, in the sense of not being directly provided for under international law.[59]

Finally, the Residual Mechanism of the International Criminal Tribunals is directly relevant to this study, for reasons similar to those indicated for the ICTY and ICTR.[60] However, its procedural law and (as yet non-existent) procedural practice could not be covered for a practical reason: the MICT Rules of Procedure and Evidence were adopted only after the bulk of the IEF research was completed and when this book was already at an advanced stage of the editing process.[61] The Mechanism should, however, be included in any future comprehensive, comparative inquiry into international criminal procedure.

2.2 PRINCIPAL OBJECT: PRINCIPLES AND GENERAL RULES

Having reached a certain level of maturity, any discourse on whether a particular corpus of legal standards—operating within one jurisdictional regime or drawn from several of them—united by a common object of regulation amounts to a 'branch of law' should address the question of its basic meta-juridical components: 'principles' and 'rules' and their function in the system.

The debate on international criminal procedure has neither escaped, nor sought to evade, this question. On the contrary, it has long employed these categories to flesh out the core of that body of law, reflecting on its advantages and gaps, and ultimately to try to fathom its prospects for the future from its uncertain present. The late Professor Antonio Cassese believed that several 'general principles governing international trials' could be drawn both from the constituent charters and statutes of the tribunals, their RPE, case law, and the general principles of law relating to the criminal process.[62] By contrast, in his view, no 'international general rules on international criminal proceedings' existed at that time,

[58] Explanatory Memorandum (n 57) paras 3–4.

[59] See Code of Criminal Procedure (Bosnia and Herzegovina); UNMIK Regulation No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK/REG/2000/64, 15 December 2000.

[60] See UNSC Res. 1966 (2010), 22 December 2010 (the UNSC establishing MICT under Chapter VII) and Art. 13(1) MICT Statute (authorizing judges to adopt and amend MICT RPE).

[61] See MICT RPE (MICT/1, 8 June 2012) and Corrigendum (Mict/1/Corr.1, 17 August 2012).

[62] A. Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008) 378 (identifying several principles which give rise to the basic human rights of the defendants and reflect fundamental standards on human rights laid down in treaties and general principles of law: the independence and impartiality of the judiciary, the presumption of innocence, the requirement of fair and expeditious trial, and the prohibition of *in absentia* trials save for exceptional situations and under strict conditions).

due to the diversified regulation of those proceedings through multiple and divergent sets of Rules of Procedure and Evidence.

At the time, this discussion was not continued in an incidental inquiry meant to define the notions of 'principles' and 'rules'. Nor did it address whether a finding of a 'general rule' required the universal adherence by all existing international criminal jurisdictions, and what implications the alleged lack of 'general rules', but not principles, entailed for the qualities of international criminal procedure as a whole.

Countless studies, conceptual strands, and schools of thought on the meaning and normative function of (general) 'principles' and 'rules' have emerged in other legal disciplines, including legal theory and specialized fields of study such as criminal law, civil law, administrative law, etc. and more recently, international law. Until some years ago, no attempt had been made to define 'principles' and 'rules' of international criminal procedure, to analyse these notions from several perspectives specifically in that context, or to try to draw a line between them.

The publication that was the precursor to the Project endeavoured to fill this gap and to apply the notions of 'principles' and 'rules' to the domain of procedure. It linked the question of international criminal procedure as a body of law to the systemic coherence and to the function of the basic normative components, outlined the possible interpretations of the said notions from the international-law and legal-theory perspectives, and proposed some definitions and a schematic algorithm for standard-identification.[63]

The notions of 'principles' and 'rules' have since been adopted in other research in the sphere of international criminal procedure.[64] This may attest to their relevance and affirms that insights which can be obtained through an import of legal theory can prove highly valuable in the context of international criminal procedure and international law in general.

The entitlement of an array of legal norms regulating a certain sector of social relations to being considered a branch of law on an equal footing with other well-established bodies of law can be linked to the existence of principles and rules and their potential to form a coherent normative system.[65] The question arises of what 'coherence' means for a system which—despite some intrinsic and extrinsic need for unity—is spread over multiple rather insulated legal regimes.

It is suggested that coherence would require that the plethora of legal norms which constitute the *acquis* of international criminal procedure amount to a proper system:

> . . . a hierarchically structured variety of norms ranging from more general constitutive principles and commonly shared rules to subordinate and more specific norms—the latter being mere variables and thus more probably subject to fragmentation between the international criminal jurisdictions applying them.[66]

Thus, like a strong trunk which gives a tree its force and enables it to spawn the—more short-lived—branches and leaves, the standards of international criminal procedure are engaged in an orderly relationship, from the 'top' of its '*Grundnormen*' on which the

[63] Vasiliev (n 12) 19–91. [64] E.g. Boas et al. (n 4) 11. [65] See text to n 17.

[66] Vasiliev (n 12) 24 (citing Neil MacCormick who defined coherence, in a similar sense, as a situation in which 'the multitudinous rules of a developed legal system should "make sense" together. Sets of rules may be such that they are all consistent with some more general norm, and may therefore be regarded as more specific or "concrete" manifestations of it. If that more general norm is . . . sound and sensible, or just and desirable, norm for the guidance of affairs, then . . . [one] may properly treat that norm as a "principle" which both explains and justifies all or any of the more specific rules in question'). See N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) 152.

authority and legitimacy of the entire enterprise rests, down to the 'bottom' of more technical rules governing routine matters.

As long as its elements serve their regulatory functions properly without giving rise to collisions between the norms of the same rank, let alone between superior and inferior norms, the normative system runs smoothly. It can be relied upon to deal effectively with legal controversies including 'hard cases'. It will have adequate internal resources to tackle any gaps and inconsistencies revealed in practice and offer sufficient means (rules of interpretation, normative hierarchies, etc.) for remedying them.[67]

Much ink has been spilt by legal theorists and international judges and scholars on the distinction between 'principles' and 'rules'. In international law, the distinction has mostly been drawn within the parameters of generality and fundamental nature. For example, the International Court of Justice explained that while 'the association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, . . . the use of the term "principles" may be justified because of their more general and more fundamental character'.[68]

Pointing to a more qualitative basis for the distinction than this being a matter of degree alone, Sir Gerald Fitzmaurice provided a representative account:

> By a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or provides the reason for it. A rule answers the question 'what': a principle in effect answers the question 'why'. In the event of any dispute as to what the correct rule is, the solution will often depend on what principle is regarded as underlying the rule.[69]

Particularly in the context of the legal theory, a complex and elaborate debate on the nature of, and relationship between, 'principles' and 'rules' has been going on for many years. Various prominent thinkers and legal philosophers contributed to that debate more or less directly, including but not limited to Jeremy Bentham, Hans Kelsen, Roscoe Pound, Herbert L.A. Hart, Ronald Dworkin, Joseph Raz, and Robert Alexy. Some authors denied the rationale for the distinction, whilst others upheld it. Further divisions have arisen as to whether that distinction is weak, being merely of a quantitative character, or strong, being of a qualitative nature.

In this regard, reference is traditionally made to the fundamental and influential debate between Hart and Dworkin, the proponents of the 'weak' and 'strong' positions respectively, and between other scholars who have taken sides in that debate and occasionally reinterpreted its parameters or complemented it with their own modified accounts.[70]

It was not the purpose of this Project to dive into the meta-juridical intricacies of the definitions and the distinction between principles and rules. Nor was it the intention of the research group to contribute directly to the established scholarly debate, and much less to break new ground. The topic undoubtedly deserves a separate study which could not be afforded as part of the Project because it fell beyond the group's mandate and would have distracted it from its primary tasks. Therefore, the members of the Project readily acknowledge the existence of a range of divergent theoretical positions on this subject, but

[67] The crucial conflict-solving role of 'general principles' has been recognized by Prof. Cassese: see Cassese (n 62) 379. On the positive systemic effects of principles and general rules, see further Vasiliev (n 12) 24–5.

[68] *Canada v. USA (Gulf of Maine)*, Judgment of 12 October 1984, ICJ Reports (1984) 288 and 290.

[69] G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957-II) 92 *Recueil des Cours de l'Académie de Droit International de la Haye* 1, 7, cited in Vasiliev (n 12) 42–3 (with further references to international scholars).

[70] For a brief overview, see Vasiliev (n 12) 42–8.

the content of the relevant debates, important and enriching as they are, had to be 'factored out'.

However, in view of the goal of identifying 'principles' and 'general rules' of international criminal procedure, it would be plainly impossible to execute the core of the present research without having defined the notions of 'principles' and 'rules' and without having agreed at least on the working definitions which would serve as the starting points in this exercise. Consequently, it was decided that the research group should proceed collectively and individually on the basis of uniform definitions of those notions and the unitary understanding of the phenomena underlying them, as proposed in the precursor study. Having been developed for purposes similar to those pursued by this Project, the proposed concepts of 'principles' and 'rules' are more accurately described as a middle-ground account, or a theoretical alternative to those developed by the sides to the Hart-Dworkin debate.[71]

The individual members of the working groups may have held different visions of what 'principles' and 'rules' mean as legal categories and not all of them necessarily agree with all aspects of the definitions ultimately adopted. But they were requested by the management committee to take the proposed definitions and interpretations for granted and to proceed with their substantive research into specific subjects of international criminal procedure on that basis. The uniform adherence to those interpretations was among matters specially addressed during: (i) the internal review within each Working Group; (ii) the review by the management committee in several rounds of comments on both interim and final drafts submitted; and (iii) the comprehensive review conducted by the editorial board when preparing this publication.

The following working—and shortened for the simplicity's sake[72]—definitions of 'principles' and 'rules' of international criminal procedure have been relied upon in Chapters 2 to 11:

Principles are general, highly abstract, and inconclusive legal prescriptions which are (or must be) shared by all individual tribunals due to their fundamental and mandatory nature (i.e. not subject to fragmentation in the macro-dimension of international criminal justice).[73]

Rules are more specific legal prescriptions which give conclusive guidance, accord with and give effect to the principles, and are not so fundamental and mandatory as to require uniform adherence (i.e. potentially subject to legitimate and admissible divergence in the macro-dimension of international criminal justice).[74]

[71] For an exposé, see Vasiliev (n 12) 48–53. See general definitions in Vasiliev (n 12) 51 ('principles [can] be defined as fundamental and absolute provisions permeating the legal system . . . , formulated at such an abstract level where they cannot be detracted from by any exceptions, qualifications or reservations. Generality and intolerance to exceptions appear distinctive and inherent features of a principle. By contrast, rules are always accompanied by explicit or implicit exceptions, restrictions of scope, or conditions for applications. While [a] narrow formulation of a rule including all conceivable exceptions approximates it to the 'all-or-nothing' regime of validity, it simultaneously deprives them of the quality of abstraction typical of principles').

[72] See Vasiliev (n 12) 90–1 ('The general rules and principles of the law of international criminal procedure are a special category of norms intrinsic to that branch of international law constituting the basis of its normative hierarchy. The general principles of the LICP are an analogue, by their legal nature and force, to the "fundamental" or "constitutional" principles of international law that has emerged specifically in the framework of the LICP; as highly abstract, non-conclusive but absolute provisions, they are not subject to fragmentation. The general rules are the relative provisions of more specific and conclusive nature that detail the realisation of the general principles in an institutional setting of a particular international or internationalised criminal tribunal. Thus, these are subject to (acceptable) fragmentation. The normative system of the LICP in its macro-dimension is thus based on non-binding rules and binding principles.').

[73] For a detailed explanation, see Vasiliev (n 12) 53–6.

[74] Vasiliev (n 12) 56–62.

Importantly, not least in order to ensure feasibility, the Project endeavoured to uphold a reasonable degree of abstraction. Among the 'rules' of international criminal procedure, it has in particular sought to identify '*general* rules' rather than any legal rules, in particular those of a highly specific and technical nature that are situated at the bottom of the normative hierarchy. While 'generality' is a matter of degree of abstraction (as both principles and underlying rules may be formulated in a more or less abstract manner), it is another related aspect is the extent of acceptance that the relevant standard obtains across various international courts and tribunals and across the procedural models.[75]

The adjective 'general' is not used to qualify the notion of 'principles', insofar as the Project is concerned with all standards that fall within this category. Furthermore, this qualifier has been dropped in order to prevent possible confusion between the principles of international criminal procedure as legal standards of a special nature which pertain to that body of law, on the one hand, and 'general principles of law' as one of the traditional sources of international law envisaged in Article 38(1)(c) of the ICJ Statute, on the other.[76] The phenomena that the two concepts signify may intersect: the principles of international criminal procedure may derive authority from general principles of law recognized across various domestic jurisdictions. But the two are still separate and correlate with one another as substantive aspects of law relate to its formal aspects (sources).[77]

Although the proposed interpretations of 'principles' and 'rules' have fulfilled their pragmatic purpose in this Project, their vitality beyond the present framework remains to be seen and is not necessarily advocated here. The reader's agreement with denominating the identified standards either way is likely to be coloured by his or her own views on the meaning of those basic legal concepts.

2.3 MAPPING THE FIELD AND DIVISION INTO WORKING GROUPS

This study attempts to provide a comprehensive overview of the field and to cover as many substantive topics as was feasible within the limited time and with the number of experts on board. The endeavour of dividing international criminal procedure into several relatively even subject-matter areas was undertaken early on in the process.[78] The exercise of drawing a chart of international criminal procedure and distributing the topics into respective categories essentially resembled the logic of a codification process or at least of its start-up phase.[79]

The idea was that each of the subject-matter areas identified would be assigned to a specific working group of experts tasked with completing a report on it. In order to

[75] Suggesting that in the macro-dimension of international criminal justice, there is a link between the two aspects of generality ('vertical' as the degree of abstraction of a legal standard and 'horizontal' as the scope of its validity across various international and hybrid criminal jurisdictions applying international criminal procedure), see Vasiliev (n 12) 53–4 and 61 ('The regularity is that the degree of abstraction of a legal norm is proportional to its legal force and the scope of its validity, thus being inversely proportional to the degree of its fragmentation.').

[76] See in addition Art. 21(1)(c) ICC Statute.

[77] Comparing and drawing a distinction between the concepts such as 'general principles of law' '(general) principles of international law' and '(general) principles of international criminal procedure', see Vasiliev (n 12) 31–40.

[78] The division was agreed on during the first coordination meeting held in The Hague in September 2008 attended by four of the present editors and by Prof. Claus Kress. The division remained unchanged throughout the process, although the contents of each chapter as initially envisaged were subject to change during the implementation of the Project. Some topics were shifted from one subject-area to the other.

[79] Damaška (n 28) 357 ('To begin with, a synthetic understanding of the law is required: the legal landscape must be made surveyable and must be neatly chambered into relatively independent units. Furthermore, it is necessary to develop a sufficiently clear idea of potential problems that may arise within the unit of law to be regulated.').

facilitate coordination and collective work on the drafts, a possibility for the individual members to sit on several working groups was envisaged. This measure helped to identify any emerging gaps and overlaps and to make early decisions regarding the optimal way of addressing them.

The main challenge of this exercise was the inherent difficulty of compartmentalizing the interdependent cogs and wheels of the procedural mechanism into several relatively insulated conceptual boxes. In this case, it was exacerbated by the existence of several mechanisms each vested with its own procedural regime and giving rise to different issues. The important decisions also had to be made in order to define what perspectives were to be employed for the purpose of delimiting the subject-matter areas and selecting the focal points deserving a separate working group of their own to tackle them.

From the outset, it was agreed that, due to the special nature of the exercise, the usual taxonomy and structure of (international) criminal procedure that can be found in criminal procedure textbooks, Rules of Procedure and Evidence of tribunals, and domestic criminal procedure statutes did not necessarily have to be followed. The preference was expressed for dealing separately with: (i) the important cross-cutting issues (e.g. 'charges', 'law of evidence', 'deliberations and judicial decision-making', 'defence issues'); (ii) distinct topics of a systemic nature (e.g. 'guilty pleas and plea bargaining'); and (iii) newly emergent themes in international criminal procedure, the omission of which would have been inexcusable (e.g. 'victim issues'). The dual purpose of ensuring a logical and structured exposition of the material in the book and bringing some of the essential cross-cutting and novel themes into focus predetermined the adoption of both *chronological (stage-related)* and *thematic* perspectives.

The first, chronological, perspective would approach the course of international criminal justice as a temporally logical sequence of procedural events. It mandated the systematic and consequential examination of proceedings from inception to completion. Generally under this perspective, matters that do not pertain to criminal procedure proper but are essentially administrative or penitentiary matters would be excluded. The second, thematic, perspective allows the examination of specific topics of relevance to several or even all stages of the criminal process. Such topics also tend to give rise to systemic issues in relation to which purely procedural matters may be difficult to discuss in isolation from any institutional matters.

As a result, while for some subject-matter areas the primary emphasis was placed on the procedural chronology, for the others specific topics were designated regardless of their pertinence to procedural stages. But it would be artificial and unnecessary to keep the two perspectives completely separate, given the purpose of examining issues meaningfully and comprehensively. Therefore, most working groups have in fact tackled their subjects from a combined chronological-thematic angle.

This hybrid perspective is reflected in how the subjects were demarcated and framed for the working groups. Subject to the management committee's approval, some groups subsequently adjusted their focus in order to be able to cover the adjacent areas which risked remaining unattended. In its coverage of issues, the adopted classificatory structure, as revised, functioned as a perimeter delimiting the areas in which each working group was authorized to venture.[80]

[80] See Damaška (n 28) 358 ('integration [of rules subject to codification] into a system puts a premium on a classificatory scheme that does not depend on analogic use of relatively concrete data').

Thus, the ten following segments of international criminal procedure were identified:

(i) the initiation of investigation and selection of cases;

(ii) the conduct of investigation, including the issues raised by the application of coercive measures and effecting arrest and surrender to the international tribunals, and remedies for procedural violations;

(iii) the charging document (indictment) and charges, along with the, at times, trans-stadial procedures for bringing, confirming, amending, withdrawing, deciding on the charges and related topics of *ne bis in idem*, *res judicata*, *lis pendens*, and *jura novit curia*;

(iv) the trial stage, including the chronological progression of trial proceedings and factors affecting that chronology; cross-cutting and residual issues concerning the role and legal status at trial of some procedural actors not examined by other working groups (namely, judges and witnesses);

(v) appeals, revision, reconsideration, and other avenues for a court to review the previous decisions of its various organs;

(vi) the law of evidence, including issues of admissibility of various types of evidence, disclosure of, or access to, evidence by the parties, matters not requiring proof, and the standards of proof at different procedural stages;

(vii) deliberation, dissent, and judgment, including the procedural aspects of judicial decision-making, deliberation, and judgment-drafting in the tribunals (both interlocutory decisions, final pre-trial decisions, and trial and appellate judgments);

(viii) defence issues, including the (trans-stadial) issues of representation by counsel, self-representation, and other forms of legal assistance; vetting of counsel's qualifications and effective representation; the structural organization of the defence, remuneration of counsel; matters of legal aid; and professional regulation and discipline of counsel;

(ix) victims' role and status in the proceedings, including participation, protection, reparations, and special assistance for victims, with protection of victims in their capacity as witnesses being covered under (iv);

(x) negotiated justice, including the parameters and implications of the validity of guilty pleas and admissions of guilt.

In addition, a special working group on conceptual issues ('general framework') of international criminal procedure was assigned (xi). It was requested to handle the important intrinsic and extrinsic factors which shape that body of law and related practice and predetermine its objectives, methods of regulation, and the parameters of legitimacy. The 'general framework' group was charged with the important methodological task of supporting the research group as a whole. It provided the broader theoretical basis for the systemic exploration of the field, including justifications for the choice of evaluative parameters as part of the methodology to be applied by the members of all other working groups.[81]

Envisaging a separate study group on conceptual issues appeared necessary given that no inquiry into international criminal procedure can do without consideration of its background, idiosyncrasies, aspirations, and limitations. The knowledge of special needs and circumstances of the tribunals which flow from the distinctive traits of their legal,

[81] See section 2.4.

institutional, and operational contexts must inform any critical examination of their procedure. Otherwise, the inquiry would lend itself to misbalanced and unfair assessments. Thus, a few subjects were defined as crucial: the influence of 'adversarial' and 'non-adversarial' procedures and historic legal traditions on the nature of international criminal procedure; special goals of international criminal justice and procedure; the role of human rights law in the practice of the courts; sources of the law of international criminal procedure; the tribunals' dependence on the cooperation of states and other entities; and the possible impact of jurisdictional arrangements between international and hybrid tribunals and domestic jurisdictions on the procedure. As these overarching matters are relevant to the IEF research as a whole, the detailed treatment thereof by the 'framework' group was meant to alleviate the other working groups' burden. They would be relieved of the need to revisit the special features and character of the international criminal tribunals, to discuss the 'nuts and bolts', and to justify their routine resort to certain concepts and methods (e.g. fairness and efficiency, comparative models, goals of international criminal justice, etc.).

With these considerations in mind, the following eleven working groups were envisaged:

(1) General framework
(2) Initiation of Investigations and Selection of Cases
(3) Investigation, Coercive measures, Arrest, and Surrender
(4) Charges
(5) Trial Process
(6) Appeals, Reviews, and Reconsideration
(7) Law of Evidence
(8) Deliberation, Dissent, Judgment
(9) Defence Issues
(10) Victim Issues
(11) Negotiated Justice.

As noted previously, this way of mapping the field does not necessarily follow the usual taxonomy. As with any other similar effort to translate the scattered procedural norms and practices into a handful of evasive categories, it is unavoidably selective. One drawback of this division of topics is that the reader will not readily locate some of the habitual procedural topics (such as the rights of suspects and accused) in the table of contents: there was no special working group to deal with these important issues. However, if the reader has the patience to peruse the respective chapters in which this material is presented in significant detail, this inconvenience may easily be remedied.[82]

At the same time, the division into the aforementioned topics offers the advantage of addressing all of the important issues in (international) criminal procedure. In addition, it provides original syntheses on the hitherto under-examined topics (e.g. the development of charges throughout the proceedings or the nature and course of judicial deliberations and preparation and delivery of judicial decisions) and the composite topics (e.g. defence issues and victim issues).

Furthermore, the dynamics of the research were such that, as the expert group progressed in its research and drafting, the tendency was for it to fill in the gaps revealed in the

[82] The issue of defendants' rights is a red thread going through the entire study, as each chapter contains analyses of the relevant human rights norms and their treatment by the tribunals. Some of the chapters deal with the rights of suspects, accused, and convicted and acquitted persons in particular detail: see e.g. Chapters 3, 5, 6, and 9.

areas closely related to their respective topics. Thus, the coverage has grown to become (nearly) comprehensive. The themes which fell 'in the cracks' between the working groups were included in the Project along the way. For some of them, research has been finalized but does not make part of the present publication due to space constraints.[83]

All working groups approached their respective topics as primarily procedural subjects. But the infrastructure and institutional frameworks are occasionally addressed where they bear upon procedure and where the same cannot be explained without looking into the more 'down-to-earth' matters.[84] In addition, the legal policy issues may be more relevant for some subject-matter areas (e.g. selection of cases and plea negotiations) than for the others and are thus more prominent in the respective chapters.

Any inevitable overlaps resulting from the combination of the different perspectives and approaches—whether within the same working group or between the working groups—were remedied through coordination, membership of some experts in several working groups, and extensive review by the management committee and the group as a whole.

2.4 CHOICE AND USE OF THE EVALUATIVE FRAMEWORK

The choice of the criteria to be used for the assessment of the 'soundness' (fairness, effectiveness, systemic coherence, or other similar qualities of virtue and adequacy) of the standards of international criminal procedure is a fundamental question which consumed much thinking and debate in the early stages of the Project.[85]

The choice of an evaluative framework should not be arbitrary. Otherwise the outcome of any assessment performed in accordance with it would be deprived of credibility and impact. Conclusions on whether any given commonly shared (or diverging) standard of international criminal procedure amounts to a legitimate and desirable norm-practice within the system will largely depend on the evaluative framework one employs.

The important debate on what standards can most appropriately serve as a metric of the success of international criminal justice in general is still at the fledgling stage.[86] It was not the Project's purpose to fill in any conceptual lacunae and to give definitive answers to this question before the core of the research could be embarked upon. It was decided to proceed on the basis of four main criteria that are widely used in the academic literature on criminal procedure with a view to assessing its adequacy: (i) human rights law; (ii) comparative criminal procedure; (iii) goals of international criminal justice; and (iv) coherence, expediency, and practical considerations.

As observed previously, the working group on conceptual issues ('general framework') was among others tasked with examining the relevance of some of those evaluative criteria in international criminal procedure and outlining the basic parameters and contours of the Project's normative framework. The sections justifying the use and setting out the first three parameters have been drafted, circulated, and commented on within the IEF and now

[83] Thus, a section on pre-trial management, exploring conferences, powers of a pre-trial judge, and other tools of expediting trial proceedings, was prepared by this author for inclusion in Chapter 5 (available on file). But it was withdrawn in the end, due to the already more than considerable length of that chapter.

[84] The examples are the topics of the organization of victim participation; judicial review of administrative decisions (dealt with under 'appeals, review, and reconsideration'); and the institutional framing, remuneration for counsel, structural equality between the defence and the prosecution (dealt with under 'defence issues').

[85] Most debates on the methodology took place during the first and second expert meetings, held in Amsterdam in January and June 2009.

[86] E.g. C. Stahn, 'Between Faith and Facts: By What Standards Should We Assess International Criminal Justice?' (2012) 25(2) *Leiden Journal of International Law* 251–82.

form part of Chapter 1.[87] The working group's accounts were relied upon by the rest of the group when conducting research into their specific subjects. Such reliance deliberately did not take the form of using those accounts as a source of mandatory interpretations of the specific parameters along with any underlying reasoning and conclusions. Rather, working groups 2 to 11 mostly used that material as general guidance, methodological data, and a background for their research.[88] Providing an informative and effective overview of the special features of the tribunals' legal and institutional contexts and the stimulation of the discussion on the conceptual issues were the main projected contributions of the 'general framework' group.

A wealth of substantive considerations adduced to corroborate the group's use of the chosen evaluative parameters is presented in Chapter 1 and need not be rehearsed here. Rather, the rest of this section will synthesize the reasons for the choices made, identify some of the challenges, problems, and limitations in this regard, and explain the approaches taken by the research group in applying the evaluative framework elaborated for the Project:

- *Human rights law*: In respect of the procedural side of international criminal justice, it is clear that the human rights law amounts to the most established and reliable *external* evaluative framework of criminal procedure, over and above being an integral part of the tribunals' (internal) applicable law. The overwhelming number of publications on international criminal tribunals and their proceedings, including those devoted to specific topics of procedural law, have taken human rights law as a primary yardstick.[89] The Project upholds this approach, reasons for which are set out in full elsewhere in this volume and need not be reproduced here.[90]

  That said, the question of the fundamental (legal) bases for this choice and the implications of the human-rights evaluative framework as applied to international criminal proceedings are still far from settled.[91] In this light, the proposed way of using the 'human rights law' parameter has been the one that has led to invalidation, for the purpose of the exercise aimed at establishing general rules and principles, of any procedural standard or practice conflicting with prescriptions deriving from it. Any such conflict would possibly have to be dealt with as a part of recommendations.
- *Comparative criminal procedure*: Similarly, the second parameter for assessing international criminal proceedings is a widely recognized metric in our discipline. International criminal justice scholars have often resorted to this heuristic method and no doubt will continue doing so in the future.[92] The reason for that is that international

[87] Chapter 1, sections 5 ('The Human Rights Dimension of International Criminal Procedure' by L. Gradoni), 2 ('Comparative Models and the Enduring Relevance of the Accusatorial-Inquisitorial Dichotomy' by S. Zappalà), and 3 ('Goals of International Criminal Justice and International Criminal Procedure' by J.D. Ohlin).

[88] Thus, the interplay between Chapter 1 and all other chapters in the book is not such that the considerations and conclusions of working group 1 would have to be accepted and followed by the members of all other working groups without qualification (be it in part of the interpretation of the 'goals of international criminal justice' or the descriptions of the comparative models). Authors retained full autonomy to develop independent reasoning and conclusions in relation to substantive issues, subject to the need to comply with the methodology.

[89] See e.g. S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003).

[90] Chapter 1, section 5.

[91] See e.g. the contribution by M. Damaška, in Postscripts of the present volume. See further L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms . . . or Tied Down?' (2006) 19(3) *Leiden Journal of International Law* 847–73.

[92] To mention just a few titles: Schuon (n 14); J.D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) 108–48; A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC' in Cassese/Gaeta/Jones (eds), *The Rome Statute*

criminal tribunals do not have a historically predetermined and coherent legal-cultural tradition to fall back on. They have therefore had to use the elements of domestic procedural practice and conceptual approaches underlying major legal traditions as construction material when building their procedural edifice.[93]

The relevance of this parameter in the IEF research and the terms on which it was to be employed emerged as a controversial issue during the methodological debates. In particular, the question was whether it can provide us with conclusive guidance and a sense of direction. Can it really be relied upon to distinguish between procedural norms and practices that are 'good' and those that are not? Nevertheless, it was generally agreed that the criterion has an undisputable explanatory power in respect of the provenance of various elements of the tribunals' procedural systems and the interaction between those elements.

It was therefore decided to retain 'comparative criminal procedure' among the assessment criteria—without expecting that it would, in itself, result in strong value judgements on any of the contested issues. Indeed, an unpronounced hope was that it would rather not. International criminal justice has traditionally served as an arena for a clash between the 'common law' and 'civil law' visions. This dialogue has not always been conducted in constructive terms which could promote the better understanding of the practical problems faced by the tribunals and the identification of optimal and tailored solutions. The efficiency concerns have sometimes been overshadowed by bare claims of superiority and an almost ideological competition which tended to obscure the debate and to make the 'sides' thereto deaf to the more principled consideration of special needs and circumstances of the courts. Crediting either of the comparative models with a greater intrinsic value would be inapposite in the context of what is supposed to be a neutral and critical evaluation of procedure. Thus it was best avoided.

With this in mind, the members of the IEF group have generally strived, as part of the comparative analysis and in relation to the procedural issues at hand, to discern divergent positions existing in domestic jurisdictions representative of the main legal traditions. In doing so, they have extensively resorted to comparative models. Subject to some variation across the individual chapters and sections, the study generally eschews comprehensive and detailed expositions of the nuances of law in the national jurisdictions. Catching all of the subtle differences between individual countries and reflecting on all recent developments would require a study on its own. Therefore, the comparative parts of the study mostly paint the status of domestic law in a broad brush, relying in many instances on secondary materials, i.e. comparative scholarship, from jurisdictions which can be deemed reasonably representative.[94]

This may be understandable given the constraints on the research. International criminal tribunals regularly examine national criminal law and procedure for the purpose of distilling norms of customary law and general principles of law in order to flesh out the legal bases for holding individuals criminally responsible. The focus of the IEF Project has been on other matters. Comparative criminal procedure is used for the more limited (and certainly less responsible) purpose of establishing whether certain procedures adopted by the tribunals 'make sense', how it is that they ended up

1439 *et seq.*; K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2003) 3 *International Criminal Law Review* 1.

[93] In detail, see Chapter 1, section 2.

[94] Due to the international composition of the Expert Framework, a significant amount of primary comparative data from various jurisdictions was easily accessible within the group itself. The members have strived to make the best possible use of the expertise available in-house.

being components of international criminal procedure, and their primordial, as opposed to current, rationales.

While 'comparative *international* criminal procedure' is at the heart of the present exercise, this study does not compete with the enormous body of excellent scholarship in *comparative* criminal procedure. Besides, as noted, international criminal tribunals sometimes—though unfortunately not always—examine in admirable detail the commonalities and points of divergence between criminal procedures in domestic jurisdictions for their own purposes. This fact has called for caution and modesty when attaching far-reaching normative consequences to preferences that may have emerged from the evaluation of the tribunals' law and practice from a comparative perspective. The opposite approach would be equivalent to using double standards—an embarrassing irony of applying a rigorous yardstick to evaluate the tribunals' performance while being unfussy and complacent about our own research methods.

- *Goals of international criminal justice*: The possibility of using this parameter as an analytical aid in assessing the adequacy of procedural standards did not stir as much controversy during the methodological discussions. Teleological considerations have often been used in the scholarship on international criminal law as a framework for the evaluation of a variety of its aspects, including procedure.[95] Admittedly, this parameter is a multifaceted one and far from straightforward. This is due in part to the abundance—or over-abundance—of the goals of international criminal justice which give rise to considerations pulling in different directions.[96]

  As with other substantive issues in the application of the methodology, it was left to the authors to decide which of the many goals of international criminal justice have a stronger influence on the specific procedural issue at hand. Authors have therefore reflected on what systemic implications the interplay between the various goals has on the determination of given procedural standards as consistent or inconsistent with this parameter.
- *Coherence, expediency, and practical considerations*: The fourth parameter is an umbrella for general notions such as sensibility, internal logic, efficiency and pragmatism, and consistency with other elements of the procedural system. While the criterion affords researchers some leeway, it principally focuses on the practical (timing, budgetary) implications of procedural practice, thus complementing the other normative perspectives.

  It is not unusual to assess international criminal proceedings from an overt practical and 'efficiency' angle: judicial economy, streamlined and efficient trials (separately from the right to be tried without undue delay), completion strategy, and resource-saving. This parameter was not designated as a separate segment for the 'framework group' to tackle in their exploration of the normative criteria—the general and common-sense nature of the underlying notions militated against providing a separate conceptual exposé thereon as a part of this publication.[97]

[95] See among others the relatively recent but already oft-cited contributions by Prof. Damaška on the topic: M. Damaška, 'Problematic Features of International Criminal Procedure', in A. Cassese (ed.), *The Oxford Companion to International Criminal* Justice (Oxford: Oxford University Press, 2009) 175–86; M. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83(1) *Chicago-Kent Law Review* 329. See further B. Swart, 'International Criminal Justice and Models of the Judicial Process', in Sluiter and Vasiliev (n 3) 93–118.

[96] See Swart (n 95), and Chapter 1, section 3.

[97] Some considerations provided in Chapter 1, sections 6 ('Cooperation from States and Other Entities' by A. Reisinger-Coracini) and 7 ('Jurisdictional Arrangements and International Criminal Procedure' by S.M.H. Nouwen and D. Lewis) are relevant in this context because they imbue the notions of 'efficiency', 'systemic coherence', 'expediency', and 'practical considerations' with a concrete meaning. They examine, among others, the

Although the parameters of 'efficiency' often remain unpronounced,[98] the concept is routinely relied upon in the criminal procedure scholarship to issue value judgements in respect of procedural rules and practices. As criteria for the assessment of the adequacy of a procedural system, the underlying notions can prove particularly useful and instructive when the other elements of the evaluative framework are inconclusive or neutral with respect to a certain issue. As the following chapters will show, on many issues regarding the organization of the process, human rights law provides no direct guidance or prescriptions, while comparative criminal procedure is a 'supermarket' of options which may broadly be relied on to support nearly any solution embodied in the international procedural models.

The fourth parameter thus has been used as a subsidiary or *ultima ratio* assessment criterion. Due to its relatively low normative force, the vectors of reasoning drawn by it are not likely to have a persuasive power sufficient to reverse the stronger countervailing considerations flowing from other parameters. This assessment is strictly contextual and cannot be made *in abstracto*. By contrast, the human rights law as the primary criterion that bears the greatest normative force will always prevail where it is not inconclusive and neutral but gives rise to a discernible position on the relevant matter.[99]

Finally, it bears noting that in applying this multilayered evaluative framework as a whole, the authors were given significant leeway in the interpretation of the four agreed normative parameters and their interrelation against the backdrop of specific issues of procedure. The predominance and invincibility of the 'human rights law' parameter (in the sense that a finding of inconsistency therewith entered in relation to a certain procedural standard automatically cancels the validity of the same in the equation) is rather exceptional. Subject to this consideration, the principle of 'free evaluation' applied. The authors used discretion whenever weighing the criteria against one another, assessing their import on the evaluative process, and when ultimately forming their conclusions as to whether any given standard amounts to a 'principle' or a 'rule', if at all.

2.5 STANDARD-IDENTIFICATION ALGORITHM

In light of the complexity and issue-specific character of the analytical process geared towards the identification of 'principles' and 'general rules', the algorithm will be outlined in an abstract and schematic fashion. The idea is to explain the general terms rather than to reproduce or anticipate the elements of reasoning in relation to specific issues. It is neither necessary nor possible to ensure that the same sequence of steps is or has been followed at all times and in respect of all matters. The approaches may differ among individual authors and working groups, as there may be several conceivable ways to execute each of the steps of

objective structural and jurisdictional limitations the tribunals have to struggle with in their operations. These limitations necessarily have to be considered when determining whether a certain legal standard is adequate, suitable, expedient, pragmatic, and coherent in the overall context of the system.

[98] For a remarkable and recent exception, see Y. Shany, 'Assessing the Effectiveness of International Courts: Can the Unquantifiable Be Quantified?', Hebrew University International Law Research Paper No. 03-10, 1 September 2010, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669954> (last accessed 30 August 2012). See also M. Heikkilä, 'The Balanced Scorecard of International Criminal Tribunals', in C. Ryngaert (ed.), *The Effectiveness of International Criminal Justice* (Antwerp: Intersentia, 2009) 27–54.

[99] In detail, see Chapter 1, section 5.

the algorithm. But in accordance with the objectives of the research,[100] the general sequence is inflexible and comprises three main steps, to be taken in relation to *each of the issues* under examination:

(1) **description/analysis/comparison** of the relevant law and practice (statutory texts as well other sources of law where available; and jurisprudence) of all jurisdictions covered. The smaller steps to be executed include discerning the applicable legal standards as a result of abstraction and induction from the sources; logical ordering and systematization of both general and more specific standards identified (very specific and technical rules formulated with a low degree of abstraction do not need to be registered);[101] identifying standards shared by all or some jurisdictions covered (respectively, *potential* principles and general rules) and those which occur exceptionally or in a small number of jurisdictions; establishing the likely reasons for commonality and divergence; recording any particular problems associated with the rules (or their application) in the relevant tribunal's context;

(2) **evaluation** of the universally, commonly shared, and stand-alone standards from the four perspectives. The possibility of qualifying the shared standards as principles or general rules of international criminal procedure depends on whether those standards are of such nature and authority as to withstand the rigorous and multi-layered test under the agreed parameters. In case of a conflict or inconsistency between the relevant evaluative parameters and the procedural standards at hand, one is to decide whether an impugned rule holds or gets invalidated. The foregoing considerations on weighing the evaluative parameters apply at this juncture (the prescriptions deriving from the 'human rights law' parameter defeat any conflicting rule; any opposing considerations deriving from the application of other parameters are to be weighed to discretion). When the standard is dismissed, it loses its normative value and eligibility for being considered along with other—valid—standards for the purpose of identifying principles and general rules.

(3) **Identification** of 'principles' and 'general rules' from among standards that have not been found to be (seriously) problematic from any of the perspectives and defeated. At this point, authors were required to establish whether each of the standards (*potential* principle or general rule) complied with the definitions.[102] Principles are mandatory and fundamental standards of a high level of abstraction and have universal validity across all of the jurisdictions covered. Normally, when there is even one jurisdiction which permissibly and irreconcilably deviates from the otherwise prevalent practice, the identification of a principle would be impossible.[103] As more specific standards that are possibly subject to legitimate fragmentation across the relevant tribunals, general rules may be more difficult to establish because the

[100] See section 1.3.

[101] Although this is not a codification exercise in a proper sense, methodology is comparable: see Damaška (n 28) 358 ('The raw material of codification must be logically digested: simplified rules, for the sake of which many particulars were disregarded, must be expressed in proper (relatively invariant) language and integrated into a coherent system. The development of a proper language requires a move from an arithmetic to an algebra of the law.').

[102] See section 2.2.

[103] However, an inquiry must then be conducted into whether that particular tribunal—especially if it is a hybrid criminal court—on this particular issue follows and applies international criminal procedure *stricto sensu* rather than domestic law (see section 2.1). If it is not the case and if the deviation by a 'stray tribunal' is explained by its adherence to *national* criminal procedure, the otherwise uniformly shared procedural standard may still hold as a principle.

(nearly) even split between the groups of jurisdictions with consolidated regulatory standpoints will complicate the identification of a prevailing position reflecting a general rule on this issue. Thus, unless a normative prevalence of one of the consolidated positions can be established at the author's discretion, no finding of a general rule can be entered.[104] Within the consolidated positions which give rise to general rules, more specific and divergent rules can exist on a lower level of abstraction. The prevalent rules among those may be classified as context-specific rules. For all purposes, the weight of the procedural standards is not determined solely on the basis of which tribunal or court they originate from.

Finally, two remarks should be made to respond to the specific questions that have arisen at different stages of the Project, including the Final Conference. First, within the Project, all models of international criminal procedure are considered equally valuable—to the extent that one is assured that they channel the application of international criminal procedure as opposed to domestic law on an issue at hand. As noted previously, the latter might well be the case for hybrid courts (e.g. SPSC, ECCC, or STL). Clearly, some procedural models will be more influential and durable. But for the purpose of identifying general rules and principles, it should not matter, for example, whether the respective court is permanent or ad hoc.

Secondly, the tribunal's own finding that a certain principle or rule amounts to a 'general rule' or a 'principle' of international criminal procedure may be a relevant factor (not least because jurisprudence is a subsidiary means for the determination of rules of law). But in no way can it be considered decisive in the identification of those standards in the framework of this Project. This scenario is largely hypothetical because the respective terminology has not yet firmly entered in the domain of jurisprudence. It is more likely that the reference to such standards in fact implies the more traditional category of 'general principles of law', which is a totally different concept.[105]

2.6 CONCLUSIONS AND RECOMMENDATIONS: ATTRIBUTION AND AUTHORITY

When covering the vast area of criminal procedure, individual authors from different legal-cultural backgrounds and professional tracks will more likely than not have diverging visions on most of the issues related to the organization of criminal process. However, without its being a collective endeavour, this study would never have been completed—it would have taken one researcher or just a handful of them many more years to accomplish the same volume of research and analytical work.

The present book results from the close cooperation within the working groups and the Expert Framework as a whole. The Project's expert meetings served as important fora for holding detailed discussions on the drafts and conclusions of each individual working group and for providing critical feedback thereon by way of the inter-group review. Occasionally, those members who commented on the other groups' drafts provided further support by research or information. However, each working group retained the final say on the approach towards presenting the material and conclusions, subject to the need to operate within the uniform methodology.

In the working groups, the cooperation has been even closer and took forms of co-writing sections of the chapter, providing comments on each other's drafts, including any

[104] The 'normative prevalence' should be measured not only by quantitative criteria (the prevalence in number of tribunals following a certain consolidated position), but also by qualitative ones (which may include drawing additional considerations from the evaluation stage).

[105] On the distinction, see text to n 76.

follow-up assistance with research, and extensive consensus-oriented discussions on the conclusions set out in sections C. Whenever a principled disagreement rendered a unanimous decision impossible, the authors were of course allowed to state their findings and conclusions in the sections assigned to them individually, subject to the methodological review by the management committee.

In addition, any IEF member was authorized to file a motivated 'dissenting opinion' in which he or she could dissociate him- or herself from any of the findings reached within the Project. Such opinions would be subject to publication in the present volume—but, for better or worse, no such 'opinions' were received. This circumstance, considered jointly with the fact that all IEF members have had numerous opportunities to comment on the drafts, to express their disagreement, and to settle any differences, indicates that the consensus-driven and collegiate decision-making within the working groups and the Framework as a whole has worked as expected.

Therefore, the output of the IEF research in the form in which it is being published does not raise objections within the Framework. However, in terms of the authority of the 'general rules' and 'principles' and the support for 'recommendations', it would be going too far to assert—as some of us may have hoped in the early stages of the Project—that every IEF member would unconditionally agree with and subscribe to all of the conclusions presented in this volume.

In some working groups, each individual member has adopted the group's output (chapter) in its entirety, and the individual authorship in respect of specific sections is not indicated. In such cases, the attribution of authorship is collective with respect to the chapter as a whole. In other chapters, sections were completed individually and are attributed accordingly. The findings presented in the individually attributed sections may have been endorsed by all members of the respective working group. However, for the purpose of complying with the terms of clearance and prior approval of publications by the employers of some of our contributors, the views expressed in sections naming an individual author may only be attributed to that author.

3. STRUCTURE AND SCOPE OF THE BOOK

3.1 STANDARD CHAPTER LAYOUT

It will not have escaped the reader's notice that each chapter dealing with the subject-matter areas (i) to (x)[106] is distinguished by a painstaking effort to uniformly follow the IEF methodology on substance as well as in form. The premium placed on the research methodology has predetermined the standard chapter or section layout which was mandatory for the researchers to follow. The layout is a direct translation of the Project's objectives and the standard-identification algorithm as outlined earlier.[107] Following it enables a uniform and structured presentation of the primary research and the analytical and evaluative components of the study in which both the commonly shared and deviating standards of international criminal procedure are subjected to a critical assessment under the agreed parameters.

In the context of this study, the standard layout of the chapters is not an end in itself but it has a dual function. First, it has served as a test of self-discipline for the researchers as it invited them to address all jurisdictions that must be covered, to examine the tribunals' law and practice against the agreed benchmarks, and to set out the conclusions thereon in

[106] See section 2.3. [107] See sections 1.3 and 2.5.

the form of 'principles' and 'general rules' as well as recommendations, if any. It reflects the fact that the authors have conducted their research and analysis in accordance with the IEF methodology. It should be emphasized again that the need to operate within a 'methodological straitjacket' did not diminish the freedom of the individual authors and the working groups to develop their own reasoning and to formulate substantive findings in the way they deemed fit.

Secondly, the standard layout enables the reader to verify the research basis and the reasoning that led authors to their conclusions. In particular, rather than being forced to take their findings at face value, the reader is able to review whether the issues have been tracked consistently for all jurisdictions; whether all of the jurisdictions have been considered as they should as part of determining whether the legal standards are universally or commonly shared, or exceptional; what considerations that followed from the normative assessment were given weight; and whether the proposed language of the principles and rules is corroborated by the primary research. Put differently, the standard layout makes the group's reasoning and findings transparent and verifiable rather than arcane. It also allows the restatement of law *de lege lata* to be kept apart from any considerations *de lege ferenda*.

Accordingly, in relation to every topic chosen or, where the topics are too extensive and composite, in relation to every issue, all chapters of the volume (except for Chapter 1 which provides a general framework for the study) necessarily comply with the following layout:

A. Law and Practice of International Criminal Procedure
   i. IMT and IMTFE
   ii. ICTY, ICTR, and SCSL
   iii. ICC
   iv. SPSC
   v. ECCC
   vi. STL
   vii. Synthesis
B. Evaluation
   i. Human Rights Law
   ii. Comparative Criminal Procedure
   iii. Goals of International Criminal Justice
   iv. Coherence, Expediency, and Practical Considerations
   v. Synthesis
C. General Rules and Principles of International Criminal Procedure
   i. Principles
   ii. General Rules
D. Recommendations

This layout gives effect to the various aspects of the methodology, as outlined previously, including the meaning and scope of international criminal procedure and the respective selection of jurisdictions to be covered, the normative evaluation of the law and practice of the courts in the light of the agreed parameters; the standard-identification algorithm; and the expected ambition and character of recommendations.

Sections A are exclusively reserved for the examination of the procedural law of each of the previously-mentioned jurisdictions which have been determined as generally applying international criminal procedure.[108] For the sake of convenience and to enable one to track

[108] See section 2.1.

the historical development of the procedural regulation on the same issues from IMT and IMTFE to the most recent STL, the relevant jurisdictions are dealt with in a chronological order per timeline of their establishment. The exception is made for tribunals belonging, with all due caveats, to the same procedural model. These are normally grouped together with a view to facilitating the comparative exercise. Minor—and rare—departures from the standard layout have occasionally been allowed upon the authors' request. Those have been justified, for example, by their preference to discuss the law and practice of the SCSL in a separate subsection, where these might present certain distinctive features.

Sections A end with a brief comparative exposition of the law and practice of all the courts and tribunals ('Synthesis'). It serves to contrast the various procedural regimes against one another and to locate standards which are universally followed, those which amount to common and prevailing trends on account of being shared by a certain number of tribunals within or across the procedural models, and those which are exceptional rather than general, being limited to one particular jurisdiction or a group of jurisdictions. Because sections A and their syntheses are primarily descriptive and comparative, no common trends or shared standards identified can at this stage be considered 'principles' or 'general rules', as opposed to 'possible' or 'potential' principles or rules. The omission of the evaluative part would have amounted to a shortcut in the standard-identification algorithm and invalidate conclusions in sections C and D.

Sections B are reserved for the critical evaluation of the findings obtained from the foregoing inquiry into the law and practice of the courts, along with any shared features and oddities, in the light of the agreed criteria. As noted earlier, there is no obvious hierarchy among the evaluative parameters, which can inform the deliberation in different ways and at times pull it in opposing directions. Any finding of non-conformity of a rule or practice with human rights law shall cancel the normative value thereof and oust it from among the options admissible for the purpose of identifying general rules and principles.

Syntheses in sections B usually serve to weigh the different considerations as to the admissibility or desirability of the relevant shared norms or exceptions—which arise from the earlier evaluation of the law and practice—against one another. Syntheses B might already provide an indication as to which procedural standards are deemed to have satisfied the definitions of 'principles' and 'general rules'. In principle, the discussion of all four evaluative parameters is required. But exceptionally, where the authors are satisfied that their import on the topic in issue is marginal and does not affect the conclusions, limited allowance is made for omitting the respective analysis. An explicit statement that the relevant parameter cast no additional observations would normally be needed, in order for the reader to appreciate any implications the omission may have had for the conclusions.

Sections C invariably contain subheadings 'Principles' and 'General Rules', in this sequence, which reflects the normative hierarchy between the relevant standards and the fact that 'general rules' are derivatives of more fundamental principles. Each standard or set of standards identified is followed by a specification of the provisions in the tribunals' texts and/or jurisprudence—whether referred to generically or indicating specific decisions—and other materials which have been directly relied upon in arriving at the finding.

In respect of 'general rules', the abbreviation 'cf.' that precedes the legal provision or case law cited indicates that the same represents a material divergence in the regulation and/or language which may have consequences for the uniformity of the law. This points to a degree of permissible fragmentation whereby general rules are still discernible or to an even split between the procedural models.

Generally, sections C are limited to formulating the standards and citing the relevant authorities in support. But especially where the painstaking comparison and contrasting of

the divergent rules and practices followed by their probing in the fire and water of the normative parameters does not point to the existence of any 'principles' or 'general rules', the authors occasionally provide a narrative explanation of the uncertain status of the law on the relevant matter.

Finally, sections D within each chapter or section may contain recommendations with a view to gap-filling, ironing out inconsistencies in the regulatory approach and/or in practice, and otherwise ameliorating the current procedural regime. The authors were not constrained in the way such recommendations were to be formulated. But it is generally expected that those would follow up on the preceding descriptive accounts and normative analyses of the law and practice. Secondly, as noted, recommendations are to be as concrete and constructive as possible and to propose solutions that could help to remedy the particularly grotesque gaps and inadequacies.

3.2 STRUCTURE OF THE BOOK

Each working group's report was prepared as a separate chapter of the present volume. Its structure essentially follows the order of numbering of the working groups.[109] Each working group's mandate was adumbrated earlier and the contents of the 11 chapters need not be summarized here: there is little to add to a detailed foreword of Judge Weinberg de Roca in which she effectively sums up the central matters addressed in each chapter.

Suffice it to say that no general conclusion for the book was envisaged by the editors. All of the chapters already contain concrete and condensed findings in the form of 'general rules and principles' and 'recommendations'. As these stand on their own, reproducing or synthesizing them is neither necessary nor useful. It is hoped that the working groups' conclusions provide a fairly clear idea about the actual state of unity and fragmentation in the law of international criminal procedure at present.

The debate on the quality and coherence of that law, on the advantages and risks of legal pluralism in this domain, and on the need for greater consolidation than this Project could deliver will certainly continue. The real conclusion of this study can only be written in the years to come. At the point of releasing it as a contribution to the said debate, to which the Project itself owes multiple debts, we believe that it is best to leave things open.

Instead of a conclusion, the volume comprises postscripts by two distinguished scholars of (international) criminal law and procedure, Professor Mirjan Damaška (Yale University) and Judge O-Gon Kwon (ICTY). The postscripts were submitted to the IEF group as keynote addresses at the Final Conference of the Project in October 2011 at which the initial document containing 'general rules and principles' was inaugurated and discussed. Both contributions engage with fundamental issues at the heart of the Project and fit seamlessly as afterwords in this volume.

Judge Kwon's afterword addresses the value of the harmonization and possible codification of international criminal procedure as ways to augment its normative force and its ability to respond effectively to the novel challenges arising on a daily basis in the context of international criminal trials. Judge Kwon welcomes such an initiative and proposes that it should proceed on the recognition of the unique challenges facing international criminal tribunals and the need to identify workable and pragmatic solutions.

The keynote speech by Professor Damaška is entitled 'Should National and International Criminal Justice Be Subjected to the Same Evaluative Framework?' Professor Damaška

[109] See section 2.3.

deconstructs the conceptual premises of the human-rights approach to international criminal proceedings, which played an important methodological role in the IEF context. In addition to making some concrete suggestions on how the current procedure can further be improved, his paper is a realist plea to reset the parameters of fairness in international criminal trials for them to fit the specific context and circumstances of the tribunals.

3.3 PERIOD COVERED

In the three years of the Project's lifespan, the IEF researchers have had to try to cage an enormous and rapidly moving beast. Keeping up with the ever-expanding and highly volatile field in which new tribunals had to be added to the list of jurisdictions mandatory for consideration, with the constantly changing procedural laws of international criminal tribunals, and with their ever-growing body of jurisprudence, posed separate challenges given the nature of the Project.[110]

The group endeavoured to incorporate the new material and all important developments in the law, jurisprudence, and scholarship in the body of the research. As those needed to be brought into the equation of the standard-identification algorithm, the updates were in many cases consequential for the ascertainment and formulation of the general rules and principles.

The bulk of the research presented in this volume was concluded before the Project's Final Conference in October 2011. All chapters were then revised in the light of the substantive feedback received at the Conference and brought up to date to cover the important developments up to 14 March 2012 (the date on which the ICC issued its first judgment). That date is therefore to be taken as a general cut-off date for the research, unless indicated otherwise in the individual chapters. Many of the contributors have been generous enough to keep updating their material in part to include the landmark developments until the very final stages of preparing this publication. As a result, the reader will occasionally come across references to court decisions falling within the period from March to August 2012.

Unless otherwise provided, the versions of Rules of Procedure and Evidence and other similar instruments of the jurisdictions covered as indicated on the Table of Frequently Cited Authorities have been consulted. Although the researchers have been alert to the emerging trends, we realize that the value of this study as a comparative survey of the law and practice and as a reference source may be reduced by fresh developments already in the near future. But we seek comfort in the hope that the core of the research and the conceptual grounds of this study will prove to be more enduring contributions to the discipline.

[110] E.g. during the substantive research phase of the Project (January 2009–March 2012), the ICTY RPE were amended four times, the ICTR RPE once, the SCSL RPE twice (the last amendment falling outside the period covered and dated 31 May 2012), the ECCC IR six times (last amended on 12 August 2011). The STL formally commenced its operations in the meantime (1 March 2009), adopted its RPE (20 March 2009), and subsequently amended them four times (last amendment from 8 February 2012).