The Objectives of the International Criminal Justice System

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1 Introduction

It has been said that all law exists to meet societal needs.[1] It follows that identifying these needs is important. As Lindholm observes, it is not possible to manufacture a machine without knowing what it will be used for.[2] These societal needs can be expressed using different words - such as values, functions, aims, purposes, objectives, and justifications. The term objective is used in this text. The following will show what objectives can be identified in relation to the international criminal justice system. In this context the international criminal justice system refers to both international criminal law and international criminal procedure.

An inventory suggests that the objectives of international criminal law and international criminal procedure are: a) retribution, b) deterrence, c) incapacitation, d) efficiency e) fair trial guarantees, f) reconciliation, g) truth-seeking (either in the individual case or more broadly, to write the history of a conflict), h) expeditious proceedings, (i) the interests and needs of victims (protection, reparation, etc.), (j) state sovereignty, and (k) norm harmony between different legal systems.[3] This list is already quite long, but it is not exhaustive. Some of these objectives are recognizable from the objectives of punishment and criminal proceedings regarding "ordinary" domestic crimes, while some have been added. Perceiving punishment and criminal trials as a means to seeking the truth or a way to achieve reconciliation is related to what one might call the distinctiveness of international criminal law. International crimes represent a special type of criminality and crime committed in the special context of exceptional atrocities. They are often committed in a systematic and widespread way and in extreme situations: states involved in armed conflict, ethnic or religious strife, political unrest, revolutions or other fundamental changes in society.[4] The trials are often part of a larger societal transition from one government to another, from conflict to peace, from dictatorship to democracy.[5] A brief review of these objectives follows, focusing on those objectives that are specific to international criminal law and international criminal procedure.

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1 Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument*, New York: Cambridge University Press, 2005, p. 24.

2 Lindblom, Per Henrik, *Progressiv process: Spridda uppsatser om domstolsprocessen och samhällsutvecklingen*, Uppsala: Iustus, 2000, p. 198.

3 Klamberg, Mark, *Evidence in International Criminal Procedure: Confronting Legal Gaps and the Reconstruction of Disputed Events*, Stockholm: Stockholms universitet, 2012, p. 49; Cryer, Robert, Friman, Håkan, Wilmshurst, Elizabeth, & Robinson, Darryl, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, p. 29.

4 Luban, David, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law" in Besson, S. & Tasioulas, J. (eds.), *The Philosophy of International Law*, Oxford: Oxford University Press, 2010, p. 574.

5 Nowadays, legal measures in such transitional contexts are often referred to as Transitional Justice.

2 Objectives of International Criminal Law

Retribution is one of the oldest criminal law theories and continues to influence national as well as international criminal law. According to the retribution theory, punishment is perceived as an expression of ethical demands for justice. An individual deserves to be punished if he or she has committed a criminal act.[6] In *Aleksovski*, the International Criminal Tribunal for the former Yugoslavia (ICTY) states that the punishment is intended to make plain the condemnation of the conduct in question.[7] An important part of the retribution theory is that the punishment should be proportional to the seriousness of the crime, as the ICTY also pointed out in *Kordić* and *Čerkez*.[8]

Like retribution, *deterrence* is another traditional criminal law theory, which is also found in international criminal law. The preamble[9] to the Rome Statute of the International Criminal Court (Rome Statute) states that "[T]he States Parties to this Statute […] [are] Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[10] The conclusion can be drawn from this statement that the main objective of the International Criminal Court (ICC) is to combat impunity and prevent new crime. Such a view of the objective of criminal justice measures is also expressed in other sources of international law regarding serious human rights violations.[11] The former UN Commission on Human Rights has repeatedly emphasised the importance of putting an end to impunity in order to prevent violations of international human rights, in the long run.[12] Deterrence is also

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6 Duff, Antony & Garland, David, "An Introduction: Thinking About Punishment", in Duff, A. & Garland, D. (ed.), *A Reader on Punishment*, Oxford: Oxford University Press, 1994, p. 6-8; Lacey, Nicola, *State Punishment:Political Principles and Community Values*, London: Routledge, 1988, p. 16-27.

7 *Prosecutor v. Aleksovski*, (Case No. IT-95-14/1-A), ICTY A. Ch., Judgment, 24 March 2000, para. 185.

8 *Prosecutor v. Kordić och Čerkez*, (Case No. IT-95-14/2), ICTY A. Ch., 17 December 2004, para. 1075.

9 Traditionally, the considerations that have allowed states to agree on a particular instrument - its underlying aim and purpose - appear in a preamble to the international treaty.

10 Preamble to the Rome Statute of the International Criminal Court, para. 5.

11 Nowak, Manfred, "Torture and Enforced Disappearance" in Krause, C. & Scheinin, M. (eds.), *International Protection of Human Rights: A Textbook*, p. 153-188, 2nd ed., Åbo: Åbo Akademi University, Institute for Human Rights, 2012, p. 165; Roht-Arriaza, Naomi, "Punishment, Redress, and Pardon: Theoretical and Psychological Approaches", in Roht-Arriaza, N (ed.), *Impunity and Human Rights in International Law and Practice*, p. 13-23, Oxford: Oxford University Press, 1995, p. 14.

12 See for example Commission on Human Rights, Res. 2004/72, Impunity, 21 April 2004, E/CN.4/RES/2004/72, p. 51 f, para. 1. There are a number of resolutions from the UN General Assembly addressing impunity, see inventory in Roht-Arriaza, Naomi, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, California Law Review 1990, vol. 78, no. 2, 449-513, especially p. 498-500; Seibert-Fohr, Anja, *Prosecuting Serious Human Rights Violations*, Oxford; Oxford University Press, 2009, p. 266.

mentioned in the case-law of the ICC .[13] In *Katanga*, for example, reference is made to the preamble to the Rome Statute mentioned above that the punishment should act as a deterrent.[14] Thus, there is an explicit ambition that the ICC should deter these serious crimes. Unfortunately, it is difficult to prove empirically that international criminal trials do in fact deter new crime but some studies indicate that international criminal trials have a deterrent effect.[15] These studies have focused on general deterrence as opposed to specific deterrence.

Related to the objective of deterrence is the idea that criminal law is there to communicate to the perpetrator, the victim, and the community that a wrongful and criminal act has been committed.[16] The ICTY expresses this as the educational function of judgments, in that they demonstrate that international humanitarian law must be obeyed and that the punishments seek to internalize these rules and their underlying morality in the general public.[17]

Deterrence and retribution are also usually seen as reasons for the *effective* implementation of criminal law. Effective implementation has been described, for example, by Packer as *crime control* and is also found in international criminal law.[18] Simply put, it can be described as the objective to convict as many as possible for the crimes they commit. According to Packer, however, it is equally important to guarantee a fair trial for the accused.[19]

Admittedly, while the principles of rule of law and *fair trial guarantees* are not referred to in the preamble to the Rome Statute, they have had a great impact on it, for example in the form of the principle of legality (Article 22) and the fair trial guarantees for the accused.[20] This has been the case even in the statutes of the other, temporary, criminal tribunals and courts.[21] Luban discusses the

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13 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC T. Ch. III, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para. 10.

14 *Prosecutor v. Germain Katanga*, ICC T. Ch. II, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, para. 37-38.

15 Kim, Hun Joon and Sikkink, Kathryn, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, International Studies Quarterly, 2010, vol. 54, 939–963. Such an effect has also been shown in relation to the ICC by Mullins, CW & Rothe, D, *The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment*, International Criminal Law Review, 2010, vol. 10, no. 5, 771-786. Other authors question the method and transferability of Sikkink and Kim's results, see Cronin-Furman, K, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, The International Journal of Transitional Justice, 2013, vol. 7, 434–454; Tallgren, I, *The Sensibility and Sense of International Criminal Law*, European Journal of International Law, 2002, vol. 13, no. 3, 561-595, p. 594.

16 Duff & Garland, 1994, p. 8; Duff, Antony, "Authority and Responsibility in International Criminal Law", in Besson & Tasioulas, 2010, p. 589-604.

17 *Kordić och Čerkez*, ICTY A. Ch., 17 December 2004, para. 1080-1.

18 Packer, Herbert, *Two Models of the Criminal Process*, University of Pennsylvania Law Review, 1964, vol. 113, 1-68, especially p. 9–13; Safferling, Christoph, *Towards an International Criminal Procedure*, Oxford: Oxford University Press, 2001, p. 46.

19 Packer, Herbert, *The Limits of the Criminal Sanction*, Redwood City: Stanford University Press, 1968.

20 For example in Articles 55, 61, 66 and 67.

21 Klamberg, 2012, p. 53.

importance of the legitimacy of international criminal proceedings and that it is based on respect for principles such as fair trial, equality before the law, the objective application of human rights, and acquittal for lack of evidence.[22]

As noted, one objective of international criminal law, as highlighted in the literature and practice, is its importance for *peace and reconciliation*.[23] This is exemplified by the trial of Biljana Plavšić, Vice-President of Republika Srpska during 1992. Plavšić turned herself in to the ICTY and confessed to crimes against humanity. She expressed her remorse and that she wanted to convey some kind of comfort to the innocent victims – Muslims, Croats and Serbs – for the war in Bosnia and Herzegovina.[24] When she was later convicted, the judgment stated that the "[a]cknowledgment and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation."[25]

This is an objective of international criminal law and procedure, which is broader than the traditional ones. Sometimes this is discussed using the term 'no peace without justice', which encapsulates an assumption that criminal accountability leads to an end to armed conflicts. Such an effect is, of course, difficult to prove empirically, but there are indications that prosecution has contributed to reconciliation in Latin America, for example.[26] Research also highlights that peace and reconciliation require more than criminal accountability. Clark's study of Bosnia-Herzegovina, Croatia and Kosovo, and the importance that the ICTY has had on reconciliation in these states, shows that it is not realistic to believe that a court alone can create reconciliation in conflict-torn states.[27] Clark stresses the importance of complementing the work of the courts with other legal measures and mechanisms.[28]

A few words should be said of the international criminal justice system as a tool for *truth-seeking*. The idea in this regard is that the evidence and documentation that a trial entails may constitute accurate documentation - the

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22 Luban, 2010; Packer, 1968.

23 See, e.g. Cassese, A, *Reflections on International Criminal Justice*, Modern Law Review, 1998, vol. 61 no. 1, 1-10, especially p. 6; *Prosecutor v. Momir Nikolić*, (Case No. IT-02-60/2-S), ICTY T. Ch., Sentencing Judgment, 12 December 2003, para. 60; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC T. Ch. VIII, Judgment and Sentence, 27 September 2016, para. 67.

24 *Prosecutor v. Plavšić*, (Case No. IT-00-39&40/1-S), ICTY T. Ch. III, Sentencing Judgment, 27 February 2003, para. 19.

25 *Plavšić*, ICTY T. Ch. III, 27 February 2003, para. 80.

26 See e.g. Ohlin, J, "Peace, Security and Prosecutorial Discretion", in Stahn, C & Sluiter G (ed.), *The Emerging Practice of the International Criminal Court*, 185-208, Leiden: Martinus Nijhoff Publishers, 2009, p. 203-5. The question is how far these conclusions can be taken, given how easy it is to find examples where states have moved on after a violent past without prosecuting the abuses, which is the situation in most European states, see Tallgren, 2002, p. 592.

27 Clark, Janine Natalya, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia*, London and New York: Routledge, 2014.

28 Clark, 2014.

truth - of a historical event such as mass abuse. The judgments often contain lengthy accounts of the background to conflicts. However, there are critics of the idea of truth-seeking who argue that courts are not the best suited vehicle for writing history. After all, the main task of the courts is to examine the possible criminal liability of an individual defendant. Trials are typically limited to certain events, which may contradict the idea that the judgments would provide a complete description of history.[29]

The next objective is *expeditious proceedings*, i.e. the use of the court's resources in an efficient manner, which is expressed in the statutes of international courts and tribunals.[30] The issue of expeditious proceedings is linked to the defendant's right to a trial within a reasonable time but can also be seen as being in the interest of the victims. The European Commission on Human Rights has discussed what factors are relevant in relation to the right to a trial within a reasonable time.[31] These factors are the complexity of the procedure, the actions of the accused,[32] and the actions of relevant institutions.[33] In the case of international criminal trials, the complexity and scope of the proceedings may warrant a fairly lengthy investigation and trial.

The preamble to the Rome Statute mentions in the second paragraph that states which are parties to the Statute are "[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." Since the Nuremberg trials, victims of crime have gained ground in discussions about crime and punishment. This has led to ideas that justice requires more than just punishing the perpetrators.[34] Nowadays, *victims' interests and needs* are part of many criminal law and criminal procedural theories, both in terms of 'ordinary' domestic crimes and international crimes. These modern criminal justice theories have developed into more comprehensive and general theories of

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29 Koskenniemi, Martti, *Between Impunity and Show Trials*, in Max Planck Yearbook of United Nations Law, 2002, vol. 6, 1-35.

30 Statute of ICTY, Article 20(1): "The Trial Chambers shall ensure that a trial is . . . expeditious"; Statute of ICTR, Article 19(1): "The Trial Chambers shall ensure that a trial is . . . expeditious"; ECCC Law, Article 33 new: "The Extraordinary Chambers of the trial court shall ensure that trials are . . . expeditious"; Rome Statute, Article 64(2): "The Trial Chamber shall ensure that a trial is . . . expeditious".

31 *Huber v. Austria*, (Application No. 4517/70), ECommHR, Report adopted 8 February 1973, para. 83.

32 Such as deliberate obstruction and failure to cooperate during the investigation; Ibid., para. 109.

33 The manner in which judicial authorities and courts deal with proceedings may cause undue delay; Ibid., para. 85 f.

34 de Brouwer, Anne-Marie & Groenhuijsen, Mark, "The Role of Victims in International Criminal Proceedings", in Vasiliev, S & Sluiter, G (ed.), *International Criminal Procedure: Towards a Coherent Body of Law*, 149-204, London, Cameron May, 2009, p. 151; Bottigliero, I, *Redress for Victims of Crimes under International Law*, Boston: Martinus Nijhoff, 2004; Dwertmann, Eva, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Leiden: Martinus Nijhoff, 2010, p. 32; Jorda, Claude & de Hemptinne, Jérôme, "The Status and Role of the Victim", in Cassese, A, Gaeta, P & Jones, J R.W.D. (ed.), *The Rome Statute of the International Criminal Court – A Commentary*, vol. 2, Oxford: Oxford University Press, 2002, pp. 1387-1419.

criminal justice not solely focused on theories of punishment. These theories have also had an impact in law. From being regarded only as witnesses, as in the Nuremberg trials, victims today have a stronger position in international courts and tribunals, which is perhaps most clearly expressed in the Rome Statute, where victims are granted the right to participation, protection and reparation.[35]

An interest or objective that asserts itself in all international law is *state sovereignty*. State sovereignty is one of the most fundamental principles of international law and means, among other things, that states are equal and independent in relation to each other, but also in relation to international organisations. However, there are limits to state sovereignty, visible not least in the field of human rights. State sovereignty may be limited in relation to the jurisdiction of international courts[36] but with regard to the ICC, state sovereignty remains a strongly upheld principle. According to the principle of complementarity, the Court may only exercise jurisdiction if states are unwilling or unable to examine the offences themselves. This means that states have primary jurisdiction.[37]

The final objective to be mentioned is that international criminal law can contribute to the *norm harmony* between different legal systems. It can be argued that the Rome Statute contributes to the harmonisation of national legal systems. The Rome Statute does not in itself constitute an obligation on states to criminalise and prosecute the crimes under the Statute nationally, but many of the states that are party to it have nevertheless chosen to harmonise their domestic legislation in accordance with its principles.[38]

3 Concluding Comments

This overview shows that the traditional objectives of ordinary domestic criminal law and procedure are expressed in the sources of international criminal law and international criminal procedure. In addition, international criminal law and international criminal procedure includes broader objectives established later, such as justice for victims, reconciliation, and truth-seeking. The international criminal justice system, therefore, includes not only objectives that are part of national criminal law but also envisages other objectives that correspond to the specific nature of international crimes.

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35 Articles 68 and 75 of the Rome Statute.

36 One example is the ICTY.

37 See Article 17 of the Rome Statute.

38 Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005, p. 167-84.

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