What are the Objectives of International Criminal Procedure?
- Reflections on the Fragmentation of a Legal Regime

Mark Klamberg
Doctoral Candidate
Stockholm University, Faculty of Law
mark.klamberg@juridicum.su.se

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Mark Klamberg
Doctoral candidate in international law, Stockholm University, Sweden

Abstract
International criminal courts pursue several objectives including retribution, deterrence, creating a historical record and giving a voice to the victims while the rights of the accused are protected. A problem is that these objectives pull in different directions creating tensions and fragmentation in the procedural system. Numerous legal issues, referred to as ‘hard cases’, entail a choice where the Judge has to make a choice between two or several objectives. In the interest of legal certainty solutions should ultimately controlled by the law and not by the discretion of the Judge. This article examines whether it is possible to identify a universally acceptable hierarchy of objectives. It is argued that the relevant objectives which determine the outcome of a hard case vary depending on the procedural stage and in each procedural stage there is a structural bias towards one or several objectives. Considering that law exists as a response to several social needs, it appears as unattainable to identify a universal and fixed hierarchy of objectives.

Keywords
Fragmentation, International Criminal Procedure, International Criminal Law, Methods of Interpretation

1 Preliminary Remarks

International criminal courts and tribunals all represent procedural hybrids with tensions between adversarial and inquisitorial influences. Any effort to establish a universal code of procedural law governing international trials is met with great difficulties. Part of the explanation is that the specific international criminal procedures, as all other branches of law, are subject to competing goals, functions or interests, in this article described as objectives. The aim of this article is to examine tensions between objectives in international criminal procedure and suggest an approach that may guide courts in their adjudication of hard cases. A hard case concerns a concrete legal issue and is at hand when it is uncertain whether it should be subsumed by a legal rule.1 (p. 279)

I will examine which appraisals of objectives can be made to arrive to certain solutions and whether a method of general applicability is available. Are the objectives the same for various procedural matters? Does the balance between different objectives differ between various procedural matters? Is it possible to justify different solutions with reference to one or several objectives? In other words, can we find a universally acceptable hierarchy of objectives? The aspiration is to outline a web of various objectives, reflected in legislation, case law and offer the practitioner a useful perspective when confronted with a procedural matter.

2 Theory of Interests

Knowingly or not, all lawyers act under a legal theory which determines their assumptions about concepts, reasonable argumentation and the legal sources. On the surface the applicable law in international criminal procedure consists of individual rules. If we take a closer look we find that the rules form a part of a system and that they are interrelated with each other, all in order to serve overlapping objectives to be found at a deeper level of the law. The means of selecting and making objectives operational through rules are not random. The particular systems of international criminal procedure have been shaped and been subject to change through an interaction of ideologies, cultures and policies, hereafter referred to as models. Even though models are exposed to the risks of polarization, simplification and distortion, they give a context and help us to analyse the relationship between objectives, rules and various procedural stages.

Thus, I will examine: i) the theory of interests, and how interests contribute to the fragmentation of legal regimes in international law; ii) the differentiated functional approach which concerns how objectives are recognized by rules and made operational; and iii) the context in the form of competing procedural models.

It is assumed that international criminal procedure, like other law, exists as a response to social needs. These social needs may be expressed in other words, for example interest, value, goal, object, purpose, objective, end, wants, demand and desire. I will use the term ‘objective’ and initially build my approach on the theory of interests. Closely related to this theory is the teleological method of interpretation. The idea is to identify and protect certain ‘objectives’. An ‘objective’ may be defined as a “demand or desire which human beings, either individually or through or associations or in relations, seek to satisfy”. Law is an expression of competing objectives. These objectives may be legally protected by attributing to them the status of legal rights. The aim is to choose the most efficient solution, one which ensures the satisfaction of the maximum of interests with minimal friction and waste of resources. This line of thinking has been carried forward by Rudolf von Jhering and Roscoe Pound. The emphasis on interests was an assault of what was perceived as legal formalism and traditionalism, namely conceptual jurisprudence (Begriffsjurisprudenz).

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6 Wacks, *supra* note 1, at pp. 200-201
10 Wacks, *supra* note 1, at pp. 199-200; Peterson, Claes, ‘The Concept of Legal Dogmatics in Epistemology and Ontology’, *Archiv für Rechts-und Sozialphilosophie, ARSP. Beiheft*, vol 104, 2003, at pp. 119-125, at p. 119; In international law some appear to argue that by applying neutral rules it is possible to determine the ‘correct legal view’. Judges Fitzmaurice and Spender wrote in South West Africa Cases: “We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social, humanitarian and other, which underlie this case; but these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from Our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view”, 21 December 1962 South West Africa Cases, Joint Dissenting Opinion of Sir Percy Spender and Sir
Pound applied his approach to international law as well, which involved a criticism of 19th century naturalism and positivism.\textsuperscript{11} Elements from Pound’s theory were incorporated in the policy-approach of Myres McDougal,\textsuperscript{12} and later his student, Judge Rosalyn Higgins, \textsuperscript{13} former president of the International Court of Justice.\textsuperscript{13} In that sense international law is no different from domestic law; both concern the pursuit of certain objectives. The International Law Commission (ILC) has described the fragmentation of international law and explained this phenomenon by the existence of differences between the objectives or values recognized in geographically or functionally defined legal regimes.\textsuperscript{14} The policy-approach is vulnerable because it tends to ignore questions about the validity or content of law. Even more serious criticism concerns the subjectivism of the policy-approach in its discussion of goal values.\textsuperscript{15} Mindful of these weaknesses, I will only focus on objectives that are recognized by the law.\textsuperscript{16} I claim that it is possible to stay clear of formalism as well as the extreme version of the policy-approach. I will attempt to portray the law as something more than its formal rules but still strong in normative force. Rules cannot foresee every courtroom situation. They should be a framework, not a straitjacket.\textsuperscript{17} Law cannot be reduced to either rules or objectives, it is both.\textsuperscript{18} Some claim that no theory in international law can determine outcome and that jurisprudence should focus on critique.\textsuperscript{19} In contrast, I argue that international law, whereof international criminal procedure is a part, prefers some outcomes to other outcomes.\textsuperscript{20} The theory of interests is not presented as an omnipotent and universal solution; it has both strengths and weaknesses. It recognizes the tensions in international criminal procedure and provides a fairly concrete approach to hard cases. At the same time it is admitted that it is difficult to establish the relevant objectives.\textsuperscript{21} As R.W.M. Dias

Gerald Fitzmaurice, 1962, at p. 151. This has been criticized by Judge Higgins who argues that “[r]eference to ‘the correct legal view’ or ‘rules’ can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. Because I believe there is no avoiding the essential relationship between law and policy, I also believe that it is desirable that the policy factors are dealt with systematically and openly”, Higgins, Rosalyn, Problems and Process: International Law and How We Use, Oxford University Press, Oxford, 1994, at p. 5.

\textsuperscript{11} Pound, Roscoe, ‘Philosophical Theory and International Law’ Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium, vol 1, 1923, at pp. 71-90; see also Koskenniemi, supra note 4, at p. 201.


\textsuperscript{15} Koskenniemi, supra note 4, at pp. 205-206

\textsuperscript{16} Pound, supra note 7, volume III, at p. 22; this approach is explained in section 3 ‘The Approach: Identifying and Making Objectives Operational’


\textsuperscript{19} Koskenniemi, supra note 4, at p. 62; Wrange, supra note 2, at pp. 55-56; Higgins, supra note 10, at p. 9

\textsuperscript{20} Koskenniemi, supra note 4, at pp. 606-607.

\textsuperscript{21} Wacks, supra note 1, at pp. 201-202; Aleksander Peczenik lists the main criticisms against Per-Olof Ekelöf, Peczenik, Aleksander, Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation, Fritzes, Stockholm, 1995, at pp. 369-377. I agree with Peczenik’s conclusion that teleological interpretation is one of many interpretative methods and it should not have a monopoly position.
puts it, “each situation has (p. 282) a pattern of its own, and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are measured.”22 The appropriate standards by which to measure the justice of a particular rule or a set of rules are those already upheld by the system to which those rules belong.23

Should we make other considerations concerning international criminal procedure? Is there any room for purposive considerations? The principle of legality, closely connected to the rule of law, in international criminal law indicates that one should favour formalism in order to guarantee legal certainty. The principle of legality is articulated through the maxims *nullum crimen sine lege* and *nulla poena sine lege* which both purport to define the scope of criminalized and penalized behavior, i.e. substantial criminal law. Does the principle of legality and requirements on formalism also apply to procedural matters? The existence of fair trial requirements stemming from human rights provides a strong argument in favor of a formalistic approach. Are not human rights absolute and thus immune to purposive considerations? Still, formalism may not always provide an answer when rules are in conflict with each other or the law is silent. We also have to admit that i) there is at least some indeterminacy in human rights-language, ii) human rights often come with exceptions, and iii) different human rights may come in conflict.24

3 The Approach: Identifying and Making Objectives Operational

To understand a rule the judge has to see which objectives gave rise to it and how they were adjusted by the rule. The rule’s interpretation and application should seek to ensure those objectives, which the law-maker preferred.25

In order to make objectives operational I suggest that the following steps are taken: 1) an inventory of the objectives which press for recognition is prepared; 2) identify whether and to what extent any or all of the objectives are recognized by the applicable law; and 3) weigh and balance competing objectives.26 (p. 283)

3.1 Inventory of Objectives Pressing for Recognition in International Criminal Procedure

What are the objectives that press for recognition in relation to international criminal procedure? Depending on the perspective and level of abstraction the relevant objectives of a legal system may differ. In the field of international criminal law, a brief survey of the perspective of legal scholars specialized in procedure shows that their focus is either on crime control through prosecution,27 human rights,28 or both.29 The references to protection and promotion of human rights may appear

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25 Dias, supra note 22, at p. 595 on the Tübingen School.
26 This approach is an adaptation of what Roscoe Pound suggests. Pound, supra note 7, volume III, at p. 22; see also Dias, supra note 22, at p. 596.
27 Safferling, Christoph J.M., *Towards an International Criminal Procedure*, Oxford University Press, 2001, at p. 46; See also the perspective of the judges in Prosecutor v. Dusko Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 18
28 Zappalà, Salvatore, *Human Rights in International Criminal Proceeding*, Oxford University Press, Oxford 2003, at p. 1; Safferling, supra note 27, at pp. 45-46: “[T]he objective of international criminal law … is seen as lying in the protection of legal goods. These goods find their expression in particular in human rights law. Criminal law therefore serves mainly to enforce the order that derives from human rights … The main rationale for international criminal law is therefore the protection and promotion of human rights in the global society.”
ambiguous, because it can relate both to crime control vis-à-vis human rights violations and the defendant’s right to a fair trial as a human right. For the sake of clarity, I will distinguish between the objectives of crime control and fair trial rather than making references to the protection and promotion of human rights. Furthermore, a closer scrutiny suggests that fellow scholars have identified additional objectives, although they are not always expressed as a purpose, objective or goal, namely expeditious proceedings, state sovereignty, truth-seeking, victims’ participation and witnesses and victims protection. Mirjan (p. 284) Damaška has reached a similar conclusion on the aims of international criminal proceedings. This may provide a background to the main questions of this article, namely whether there is a structural bias towards a certain objective and if it is possible to focus on a single objective. Depending on the procedural stage the aforementioned objectives may be either concurrent or competing vis-à-vis each other. It should also be stressed that the mentioned objectives should not be seen as a universal and eternal list. Objectives may change, for example as a result of law-making, and their significance vary depending on the procedural stage. The relation between the objectives may also be described in terms of ‘win-win’ situations or ‘trade-offs’. It is the obligation of the judge to balance the objectives. The following sections will describe how the abovementioned objectives are rooted in the positive law.

3.1.1 Crime Control

The objective of crime control in international criminal law is at least twofold, to do justice by punishing the perpetrator and to deter both the perpetrator and the general public from further crimes. The retributive and deterrent approaches have a long history in criminal law, going back to theorists.

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30 Safferling, *supra* note 27, at pp. 45-46, see quote in footnote 28.
31 Zappalà, *supra* note 28, at pp. 6 and 27; Safferling, *supra* note 27, at pp. 46-48
32 In his analysis of the American criminal process Herbert L. Packer pits the crime control model against the due process model, Packer, Herbert L., ‘Two Models of the Criminal Process’, *University of Pennsylvania Law Review*, vol 113, 1, 1964, at pp. 1-68. At the same time as Packer describes his article as an attempt of clarification, he admits that these values are “too various to be pinned down” and his use of two models in a sense leads to polarization and distortion, at p. 6. I agree with those writers that suggest that Packer’s two models are not procedural models because they do not offer a coherent vision of how to structure the criminal process, Damaška, Mirjan R., ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study’ *University of Pennsylvania Law Review*, vol 121, 1972-1973, 506-589, at p. 576 and Arenella, Peter, ‘Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies’, *Georgetown Law Journal*, vol 72, 2, 1983, 185-248, at p. 211
35 Safferling, *supra* note 27, at p. 45
36 May and Wierda, *supra* note 33, at p. 12
39 Dias, *supra* note 22, at p. 603; see also Wacks, *supra* note 1, at pp. 180-181; Damaška, *supra* note 38, at p. 331
41 May and Wierda, *supra* note 33, at p. 179, Koskenniemi, *supra* note 4, at p. 48
42 Tadić, *supra* note 27, para. 18
such as Immanuel Kant and Jeremy Bentham. Crime control is also recognized as an objective in the preambular and opening articles of the statutory frameworks.

The objective of crime control, tend to deemphasize the adversarial aspect of the criminal procedure. It puts a premium on the speed and efficiency with which the process operates to punish those defendants who have committed the crime. With an emphasis on crime control, the probably innocent are screened out early in the criminal process. The probably guilty are passed quickly through the remaining stages of the process. The objective of crime control require according to Herbert L. Packer “that primary attention be paid to the efficiency of with (p. 285) which the criminal process operates to screen suspects, determine guilt, and secure appropriate treatment of convicted persons convicted of crime”. Packer also states that “[t]he pure Crime Control Model finds unacceptable the presumption of innocence… For this model the presumption of guilt assures the dominant goal of repressing crimes crime through highly summary processes.” The pure model of crime control cannot tolerate rules which exclude illegally obtained evidence from the criminal process. To simplify, crime control is often associated with the inquisitorial model of civil law countries. However, if one examines actual practice prior, during and after trial, USA is as good as any other country when it comes to emphasizing the objective of crime control in criminal procedure.

3.1.2 Fair Trial

The notion fair trial is closely connected to and intertwined with the Anglo-American concept of ‘due process of law’. It aims to protect and enforce the individual’s right to a fair trial and have been subject to a great deal of international law-making. While the objective of crime control tends to deemphasize the adversarial aspect of the criminal procedure, the objective of fair trial tends to make it central. While the crime control model is reliant on “the ability of investigative and prosecutorial officers”, the due process model insists in Herbert L. Packers words on “formal, adjudicative, adversary, fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him.”

Considering that it is mentioned in all of the statutory frameworks, fair trial is clearly a recognized objective in international criminal procedure. The objective of a fair trial may be attained by attributing upon the parties, primarily the defence, a set of rights. The key provisions on the right to a fair trial in human rights instruments are very similar. The right to a fair trial is a set of distinct (p.
rights which: “taken together, make up a single right not specifically defined”. A first general distinction is made between two aspects of the right: the judicial procedure (fair hearing) on the one hand; and the organization of the judiciary (independent and impartial tribunal) on the other. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) on fair trial has served as a model both for later human rights provisions and fair trial guarantees in international criminal procedure. Even though the statutes of the International Military Tribunal in Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) preceded the ICCPR, they both contain fair trial guarantees falling short, but still similar to present day norms. On this basis, I argue that the right to a fair trial in international criminal procedure is binding, as a customary norm, with a fairly well defined content. The ad hoc tribunals have taken the practice of national courts and regional human rights courts as a baseline. The fact that human rights law is binding does not mean that international criminal courts and tribunals are tied down to a specific solution. Instead human rights law mainly provides ‘negative procedural rules’ where broadly phrased principles are routinely used to disqualify certain rules of criminal procedure and evidence.

Mindful of the difficulties to straightforward define a fair trial standard, it is submitted that the following, distinct customary rights or principles indicate that a hearing is fair. Some even argue that several or all of these rights are jus cogens norms in international criminal procedure. (p. 287)

1. The presumption of innocence;
2. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
3. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
4. To be tried without undue delay;
5. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case

amended by Protocol No. 11, article 6; American Convention on Human Rights adopted 22 November 1969, article 8; compare with African Charter on Human and Peoples' Rights, article 7

53 Golder v. the United Kingdom, 4451/70, 21 February 1975, at 9, para. 28
54 Lehtimaja and Pellonpää, supra note 48, at p. 223
55 Report of the Secretary-General pursuant to paragraph 2 of security Council Resolution 808 (1993), UN Doc S/25704, 1993, para. 106; see also Zappalà supra note 28, 47f.
57 Prosecutor v. Zejnil Delalić et al. (Čelebići), Case No. IT-96-21, ICTY Trial Chamber, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", 28 April 1997, para. 27: [D]ecisions on the provisions of the International Covenant on Civil and Political Rights … and the European Convention on Human Rights … have been found to be authoritative and applicable; see also Cogan, supra note 34, at pp. 116-117.
59 Cogan, supra note 34, at p. 116
60 Knoops, supra note 29, at pp. 24-89; Cassese, supra note 56, at pp. 389-405
61 ICCPR, article 14(2); ECHR, article 6(2); AmCHR, article 8(2); ACHPR, article 7(1)(b); ICTYST., article 21(3); ICTRS., article 20(3); ICCSt., article 66(1) and 67(1)(i)
62 ICCPR, article 14(3)(a); ECHR, article 6(3)(a); AmCHR, article 8(2)(b); IMT Charter, article 16(a); IMTFE Charter, article 9(a); ICTYST., article 21(4)(a); ICTRS., article 20(4)(a); ICCSt., article 67(1)(a)
63 ICCPR, article 14(3)(b); ECHR, article 6(3)(b); AmCHR, article 8(2)(c) and (d); ICTYST., article 21(4)(b); ICTRS., article 20(4)(b); ICCSt., article 67(1)(b)
64 ICCPR, article 14(3)(c); ECHR, article 6(1); AmCHR, article 8(1); ACHPR, article 7(1)(d); ICTYST., article 21(4)(c); ICTRS., article 20(4)(c); ICCSt., article 67(1)(c)
where the interests of justice so require, and without payment by him or her in any such case if he does not have sufficient means to pay for it;  
6. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;  
7. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;  
8. Not to be compelled to testify against himself or herself or to confess guilt and to remain silent.

It is evident that the international norms reflect the adversarial model. Even though the principle of equality of arms is not explicitly expressed in any of the human right treaties it is clear from case law that the principle falls within the right to a fair hearing. The equality of arms principle “obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”

3.1.3 Expeditious Proceedings

Expeditious proceedings were recognized as objectives already in the IMT and IMTFE Statutes, which has been repeated in the statutes of the ad hoc tribunals and the International Criminal Court (ICC). The notion expeditious proceedings is related to the rights to be tried without undue delay and to a hearing within a reasonable time. However, expeditious proceedings is more than a right of the accused. It is also a guarantee for the victims and a question of procedural economy, i.e.

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65 ICCPR, article 14(3)(d); ECHR, article 6(3)(c); AmCHR, article 8(2)(d) and (e); ACHPR, article 7(1)(c); IMT Charter, article 16(b) and (d); IMTFE Charter, article 9(c) and (d); ICTYSt., article 21(4)(d); ICTRSt., article 20(4)(d); ICCSt., article 67(1)(d)

66 ICCPR, article 14(3)(e); ECHR, article 6(3)(d); AmCHR, article 8(2)(f); IMT Charter, article 16(e); IMTFE Charter, article 9(d); ICTYSt., article 21(4)(e); ICTRSt., article 20(4)(e); ICCSt., article 67(1)(e)

67 ICCPR, article 14(3)(f); ECHR, article 6(3)(e); AmCHR, article 8(2)(a); IMT Charter, article 16(c); IMTFE Charter, article 9(b); ICTYSt., article 21(4)(f); ICTRSt., article 20(4)(f); ICCSt., article 67(1)(f)

68 ICCPR, article 14(3)(g); AmCHR, article 8(2)(g); ICTYSt., article 21(4)(g); ICTRSt., article 20(4)(g); ICCSt., article 67(1)(g).

69 May and Wierda, supra note 33, at pp. xv-xvi.


71 Prosecutor v. Dusko Tadić, ICTY Appeals Chamber, Judgment 15 July 1999, para. 48; see also the Aleksovski case where the Appeals Chamber explained, citing Dombo Beheer B.V. v. The Netherlands, ECourtHR, 14448/88, Judgment, 27 October 1993, para. 33; Prosecutor v. Aleksovski, Case IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 24; see also Kaufman v. Belgium, ECourtHR, 10938/84, Decision, 9 December 1986, at 115

72 IMT Charter, article 1 and article 18(a)-(b); IMTFE Charter, article 1 and article 12(a)-(b)

73 ICTYSt., article 20(1); ICTRSt., article 19(1); ICCSt., article 64(2)

74 ICCPR, article 14(3)(c); ICTYSt., article 21(4)(c); ICTRSt., article 20(4)(c); ICCSt., article 67(1)(c); ECHR, article 6(1); AmCHR, article 8(1); ACHPR, article 7(1)(d); see also Terrier, Frank Powers of the Trial Chamber, Cassese, Antonio, Gaeta, Paola & Jones, John R.W.D (Eds.), The Rome Statute of the International Criminal Court, 1259-1276, Oxford University Press, Oxford 2002, at p. 1264; Lahieu, Hafida, The Right of the Accused to an Expeditious Trial, May, Richard, Tolbert, David, Hocking, John, Roberts, Ken, Jia, Bing Bing, Mundis, Daryl & Oosthuizen, Gabriel (Eds.), Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald, 197-213, Kluwer Law International, The Hague, 2001, at p. 199
sound administration of the court’s resources. The European Commission on Human Rights considered that at least three kinds of difficulties can delay criminal proceedings, the complexity of the case, the conduct of the accused and the conduct of the relevant authorities. (p. 289)

3.1.4 Truth

One merit of bringing alleged culprits of gross atrocities and international crimes before a court is that an accurate historical record may be established. Is truth-finding an explicit objective that the Judge should actively pursue when dealing with procedural issues? With an adversarial approach the Judge is the ‘finder of justice’ between the parties and not a ‘truth-finder’. Thus, in the adversarial setting of the IMT and the IMTFE, the Judges and the Prosecutor had no active truth-finding role. The concept of broad judicial powers to intervene in the proceedings is more normal for the inquisitorial process which is ‘judge-driven’ and where both the judge and prosecutor have the role of the ‘truth-finder’. The ad hoc tribunals follow the adversarial logic, with judicial intervention at a later stage and with no obligation for the Prosecutor to search for exculpatory evidence. In contrast, it is evident that the judges of the ICC, including the prosecutor, have an additional duty to actively clarify as much as possible the historical facts of a case.

3.1.5 Victims’ Participation

The interests and objectives of victims are several, including participation in the proceedings and protection. For the sake of clarity these are discussed as two separate objectives.

At a first glance one may assume there is symmetry between the victims’ interest of participation and the Prosecutor’s objectives, if the perpetrator is convicted the victim’s claims, aspirations on reparations and retribution are more likely to be satisfied. In reality, their objectives may diverge. The Prosecutor may in the interests of crime control and procedural economy choose, possibly as a consequence of plea-bargaining, to charge the defendant for the crimes where evidence is easily available and forego prosecution of crimes where evidence is less reliable. The Prosecutor may during the trial choose to focus on evidence that relate to the guilt of the accused, but not necessarily the damages, losses or injuries suffered by the victim which is of importance to the question of reparations.

In international criminal procedure, the concept of a victim as party with formal locus standi is a novelty with the ICC. Before, at the historical tribunals and the ad hoc tribunals the victims had a marginal position in that they could only be heard as witnesses and not participate as a party. This was a result of the fact that their procedural frameworks were mainly derived from common law systems.

77 Cassese, supra note 56, at pp. 5-6; Cryer et al., supra note 43, at p. 350
79 Zappalà, supra note 28, at pp. 41-42
80 ICCSt., articles 54(1)(a) and 69(3); see also Behrens, Hans-Jörg & Piragoff, Donald, Article 69 - Evidence, Trüfferer, Otto (Ed.), Commentary on the Rome Statute of the International Criminal Court, 889-916, Nomos Verlagsgesellschaft, Baden-Baden, 1999, at p. 903, para. 41
82 ICCSt., article 68(3); see also reference to partie civil in Judge Blattman’s dissenting opinion, Prosecutor v. Thomas Lubanga Dyilo, TC I, Decision on victim’s participation, 18 January 2008, at 58, para. 26, footnote 13; Zappalà, supra note 28, at p. 225
At the ICC the victim may be admitted to submit briefs, attend the hearings and examine or cross-examine witnesses. However, the legal institution typical of civil law countries, namely the ‘constitution de partie civil’ (application to join criminal proceedings as a civil petitioner), has not been fully upheld, not even before the ICC.84

3.1.6 Protection of Victims and Witnesses

It is decisive for the success of international criminal proceedings that victims and witnesses are encouraged to come forward and testify. Those coming to the proceedings should be provided with protection to minimize risks for their security, avoid incursions on their dignity and reduction of trauma associated with giving evidence. However, protective measures concerning victims and witnesses are frequently in conflict with, if not diametrically opposed to, the right and interests of the accused for a fair trial.85

The historical tribunals had no specific provisions on the protection of victims and witnesses whereas the ad hoc tribunals are under an obligation to provide protection of victims and witnesses.86 The concerns at the ad hoc tribunals for protection of victims and witnesses and the need to strike a balance with the objective of a fair trial served as a precedent for the Rome Statute of the International Criminal Court (The Rome Statute),87 which incorporates similar provisions.88 (p. 291)

3.1.7 State Sovereignty

In international criminal proceedings states may become stakeholders both in regard to their territorial sovereignty and national security interests.89 State sovereignty represents the basic constitutional doctrine in international law. As states are equal and have legal personality, sovereignty is a major interest in relation to other states and organizations established by states, including courts. The principal corollaries of state sovereignty include: 1) a jurisdiction, prima facie exclusive, over its territory and the population living there; and 2) a duty of non-intervention in the area of exclusive jurisdiction of other states. The UN Charter is based on the principles of sovereign equality of states and non-intervention in matters essentially within the domestic jurisdiction of any state.90 However, the principle of state sovereignty is in a continuing state of tension with the interest of effective protection against human rights violations.91

The mere existence of international criminal courts may be seen as a challenge to state sovereignty, illustrated by the primacy of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Tribunal for Rwanda (ICTR) over national courts.92 This does not mean that state sovereignty is irrelevant vis-à-vis international criminal courts. On the contrary, the ICC’s jurisdiction is based on the principle of complementarity, which means that national jurisdiction in principle has priority unless a situation is referred to the Court by the UN Security Council or if the competent state

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84 Cassese, supra note 56, at p. 387
86 ICTYS., article 22; ICTRS., article 21; ICTY Rules of Procedure and Evidence as amended 4 November 2008 and ICTR Rules of Procedure and Evidence, rules 69 and 75
87 ICCSt.
88 ibid, article 68(1); see also article 54(1)(b)
89 Cryer et al., supra note 43, at p. 363
90 Charter of the United Nations, 1 UNTS XVI, 145, article 2(1) and (7)
92 ICTYS., article 9(2); ICTRS., article 8(2)
“is unwilling or unable genuinely to carry out the investigation or prosecution”. Furthermore, the statutory frameworks of international courts have explicit restrictions on the powers of the Court, its organs and the parties vis-à-vis states, often with reference to national security interests of States. National security is closely related to the concept of vital interest of States, which is protected by customary international law as it is recognized as the *domain réservé* of States. *(p. 292)*

### 3.2 Recognition by the Applicable Law

In order to take the second step, namely to identify whether and to what extent any or all of the objectives are recognized by the applicable law, we have to consider the following. The applicable law has to be identified. In systems of municipal law this is a lesser problem. One may distinguish between formal and material sources of law. The former refers to the constitutional law-making machinery and involve legal procedures for creation of rules of general application that is legally binding for the addresses. The material sources of law provide evidence of the existence of rules, which, when proved, have the status of legally binding rules of general application. Both formal and material sources of law in a domestic system are expressions of complementary or competing objectives. In contrast, there is no constitutional machinery for the creation of rules in international law. As a consequence it is difficult to maintain the distinction between formal and material sources. Article 38 of the ICJ Statute is generally regarded as complete statement of the sources of international law. Yet, there is an ongoing debate over the hierarchy and nature of the applicable law. Mindful of these difficulties, it is still held that the individual sources such as a treaty or a custom express complementary or competing objectives. The recognized objectives may either be manifest or implicit in the statutory framework. The explicit manifestation of objectives can be described in terms such as interests, goals, values or purpose in the preparatory works, preamble or treaty provisions. Furthermore, manifest objectives, and more importantly implicit objectives, of a rule may be derived from the expected result of the application of the statutory framework in ordinary cases. The section above lists several objectives pressing for recognition in international criminal procedure as well as indicating how these objectives are recognized by the applicable law.

### 3.3 Weighing and Balancing Competing Objectives

The third step concerns weighing and balancing of competing objectives. Potential conflicts of objectives may be resolved by the law-maker as well as by a judge. *(p. 293)* The utilitarian approach...
would be to give a value to each objective, compare them on the same plane and secure the most objectives with the least sacrifice of other objectives.\textsuperscript{100} Along the same argument that we previously used concerning the principle of legality we must reject a pure utilitarian approach because i) it is unrealistic that objectives can be put on the same plane and be given an objective, numerical value,\textsuperscript{101} and ii) in certain situations some objectives, for example on fair trial, may be absolute and cannot be sacrificed in order to secure a greater good.\textsuperscript{102} A more moderate utilitarian approach recognizes that there are trade-offs between objectives and that some objectives in certain situations are absolute.

Already at the adoption of a statute or a set of statutes, regardless of the level of detail, the law-maker has made a choice of relevant objectives and balanced the objectives. A law-maker can not regulate all cases. Thus, in an ideal state the law-maker concentrates his/her attention on ordinary cases which fall in the core of the rule.\textsuperscript{103} It appears as that this strategy of legislation is adopted in many existing legal systems. Hard cases are created by ambiguity, inconsistency or incompleteness in the statutory framework of the law.\textsuperscript{104}

Considering that the judge must make a ruling, it is suggested that in hard cases a judge must find a balance between competing objectives.\textsuperscript{105} The judge should neither resort to reasoning in terms of natural law nor to his or her own personal values. The judge should adhere to clear statutory provisions in order to guarantee legal certainty.\textsuperscript{106} The judge should attempt in a hard case to identify the objectives in the positive law, by studying the expected result of the application of the statutory framework in ordinary cases.\textsuperscript{107} When the judge has identified the recognized objectives, he or she should solve the hard case according to the context and system given by the positive law. The judge can identify the balance of objectives both through the systematic construction of the statute, the context set by it and other statutes together. The judge must distinguish between 1) the objectives expressed by a specific provision in a statute; 2) the objectives prevalent in relation to a procedural stage; and 3) the objectives of the legal regime.\textsuperscript{108} For example, even if a specific provision is an expression of the objective of crime control, the judge cannot ignore other provisions which protect the (p. 294) objective of a fair trial. Pre-Trial Chamber I adopts a similar approach in \textit{Situation in the Democratic Republic of the Congo}.

The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.\textsuperscript{109}

\textsuperscript{100} Pound, \textit{supra} note 5, at pp. 42-45; Pound, \textit{supra} note 7, volume III, part 4, at pp. 328-334; see also Lauterpacht, \textit{supra} note 18, at p. 123
\textsuperscript{101} Pound, \textit{supra} note 5, at pp. 46-47; Koskenniemi, \textit{supra} note 24, at p. 37; Damaška, \textit{supra} note 38, at p. 344; Dias, \textit{supra} note 22, at p. 602
\textsuperscript{102} Koskenniemi, \textit{supra} note 4, at p. 52
\textsuperscript{103} Ekelöf, \textit{supra} note 98, at pp. 80 and 83; Boman, Per Olof Ekelöf and Robert, \textit{Rättegång I}, 7, Norstedts Juridik, Stockholm, 1990, at pp. 82-83
\textsuperscript{105} Koskenniemi, \textit{supra} note 4, at p. 48
\textsuperscript{106} Ekelöf and Boman, \textit{supra} note 103, at pp. 78-79; Lindblom, \textit{supra} note 40, at p. 419
\textsuperscript{107} Ekelöf, \textit{supra} note 98, at p. 84. See also Lehrberg, \textit{supra} note 98, at p. 65.
\textsuperscript{109} \textit{Situation in the Democratic Republic of the Congo}, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 33
I suggest that the criminal procedure has to be deconstructed in procedural stages, keeping in mind that they still form a unity.\textsuperscript{110} Such procedural stages may include collection of evidence, arrest proceedings, proceedings prior to confirmation of the charges and presentation of evidence. A procedural stage is not defined on the basis of its formal designation, but rather on which real and potential situations it aims to solve.\textsuperscript{111} A procedural stage may reflect several and overlapping objectives.

Furthermore, when comparing sets of rules in separate procedural systems that include similar procedural stages, it is not necessary that the stages express identical objectives.\textsuperscript{112} On the contrary, similarities and differences in objectives may exist i) between various procedural stages within a procedural system on one hand, and ii) between similar procedural stages belonging to separate procedural systems on the other.

The balance between objectives is not the same during collection of evidence as it is during presentation of evidence at trial and later during deliberation. The key assumption is that there is a structural bias for a certain objective in relation to a given procedural stage.\textsuperscript{113} If the statutory provisions are unclear the judge should seek to fulfill the objectives prevalent in relation to the procedural stage. The weighing of objectives is nothing mechanistic, it is rather contextual.\textsuperscript{114} The balance between objectives does not necessarily have to be static in a statute or set of statutes, it can vary depending on the procedural stage at hand and by time.\textsuperscript{115} The method outlined in this article, the differentiated functional approach, may be summarized and defined as follows. The relevant objectives which may determine the outcome of a hard case vary depending on the procedural stage and in each procedural stage there is a structural bias towards one or several objectives. If we at the same time give due regard to context, such an approach will not prevent us from seeing the general picture.\textsuperscript{116}

4 Interpretation

I will now examine whether the suggested differentiated functional approach is in accordance with the rules of interpretation in international law. In general, three steps are involved in the adjudication of a case. First, from the recognized sources of law the relevant specific legal rules have to be identified. Already here some sources are sorted out which may have an impact on the result. There are often various plausible alternative rules that can be argued for.\textsuperscript{117} Second, the legal rules identified are often of an abstract nature and have to be interpreted before they can be applied to a concrete legal matter. Different methods of interpretation may establish different meanings of one and the same

\textsuperscript{110} Koskenniemi, supra note 4, at p. 555
\textsuperscript{112} Bogdan, Michael, \textit{Komparativ rättsskanskap}, Norstedts Juridik, Stockholm, 1996, at p. 64
\textsuperscript{113} Koskenniemi, supra note 4, at pp. 607 and 610
\textsuperscript{114} Higgins, supra note 10, at p. 8; Klami, supra note 3, at p. 215
\textsuperscript{115} Koskenniemi, supra note 4, at p. 591
\textsuperscript{116} Per Henrik Lindblom uses the notions ‘differentiated functional approach’ (differentierat funktionstänkande), ‘polyfunctional criminal procedure’ (polyfunktionell straffprocess) and ‘deconstructed functional guidance’ (dekonstruerad funktionsstyrning), Lindblom, Per Henrik, ‘Tvekamp eller inkvisition?’, \textit{Svensk Juristtidskrift}, 1999, 617-655, at pp. 627 and 633; Edelstam, Henrik and Ekelöf, Per Olof, \textit{Rättegång I}, 8, Norstedts Juridik, Stockholm, 2002, at pp. 30-31; Lindblom, \textit{supra} note 40, at pp. 418-420. Lindblom was in turn inspired by a paper written by an undergraduate student: Aule, Ellen, \textit{Straffprocessens funktioner}, 1998 (Uppsala universitet); compare with Koskenniemi, supra note 4, at p. 556
\textsuperscript{117} Higgins, supra note 10, at p. 267; Hart, supra note 97, at p. 12; Pound, supra note 5, at p. 48; Jennings, R Y, ‘What is international law and how do we tell when we see it?’, \textit{Schweizerisches Jahrbuch für internationales Recht}, vol 37, 1981, 59-88, at pp. 59-60
rule. Sometimes, even one and the same method of interpretation leads to contradictory results. Finally, the legal rules found and interpreted are applied to the case.118

Article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention)119 concerns interpretation and it is primarily a compromise between text, its context and telos.120 The ILC has stated the provision is formulated on the basis, that “the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international (p. 296) law, together with authentic interpretations by the parties, [are] the primary criteria for interpreting a treaty.”121 Article 32 of the Vienna Convention provides a supplementary means of interpretation, including preparatory works,122 which is not an autonomous method of interpretation, but only an aid in interpretation governed by the principles contained in article 31.123 The rules of interpretation articulated in the Vienna Convention have customary nature.124

Different approaches to treaty interpretation are not necessarily exclusive of another and they can be compounded. However, each approach tends to hold its primacy on one particular method of interpretation. They present different means on how to solve hard cases and are capable of leading to diverging results.125 The choice of the precise method of interpretation may be biased and it can be argued that interpretation is “to some extent an art, not an exact science”.126 Martti Koskenniemi holds that “[t]he law is how it is interpreted”.127 Hersch Lauterpacht goes even further and argues that rules of interpretation “are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means.”128 I agree with Judge Rosalyn Higgins in the following:

The corpus of international law is frequently made up of norms that, taken in isolation, appear to pull in different directions … It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another is to be preferred in the particular case. 129 (p. 297)

Thus, as the choice of method is partly subjective, the only conceivable remedy is to proceed in a transparent way. The alternative of not using any method is the subjective considerations of the judge

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119 Vienna Convention on the law Treaties, 1155 UNTS 331, 1969, article 31
122 Vienna Convention on the Law of Treaties, article 32
123 Yrbk. ILC (1966) vol. II, at p. 223; see also at pp. 220 and 223; Territorial Dispute (Libyan Arab Jamahiriya/Chad), ICJ, Judgment 3 February 1994, at 22, para. 41
124 Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment 27 December 2002; see also Case concerning Kasikili/Sedudu Island (Botswana/Namibia), Judgment 13 December 1999, para. 18; Klabbers, supra note 120, at pp. 271-272; Aust, supra note 120, at p. 232
126 Yrbk. ILC (1966) vol. II, at p. 218, para. 4; see also Aust, supra note 120, at p. 230; Klabbers, supra note 120, at p. 5
and his/her total discretion which ultimately is to the disadvantage of legal certainty. As already stated, the theory of interests favors the teleological method of interpretation. When the text is insufficient, the differentiated functional approach relies on context and telos. It conforms well to the rules of interpretation in international law.

I suggest a teleological method that attempts to free itself from preparatory works. However, it should steer clear of radicalism in the sense of unrestricted judicial legislation. It should in a transparent way remain loyal to the general object and purpose of international criminal procedure, identified in statutes and thereto attached instruments. The assumption is that the object and purpose, i.e. the relevant objectives can be identified in the applicable law, including statutory framework, treaties and custom. This means that the solution to hard cases is ultimately controlled by the law and not by the discretion of the judge. It is conceivable that a judge may be confronted by a rule which covered by several overlapping competing objectives. In such situations the judge has to identify the recognized objectives and weigh them against one another. At this purposive level, consistency within the relevant procedural stage is desirable. Some would argue that this would be an introduction of a subjective element. However, it must be emphasized that it is not on his or her own opinion the judge should base his or her evaluation. The judge may only derive the objectives from the positive law and the balancing of objectives has to be made in transparent way.

Considering that a substantial part of the statutory framework in international criminal procedure may be found in other sources than treaties, the following remark is warranted. The rules on treaty interpretation are clearly applicable to the Rome Statute, considering that it is a treaty. Even though the statutes of ICTY and ICTR are resolutions from the UN Security Council and as such are sui generis legal instruments and not treaties, Article 31 of the Vienna Convention is applicable to matters of interpretation. In Tadić the Trial Chamber stated that “[a]lthough the Statute of the International Tribunal is a sui generis instrument, and not a treaty, in interpreting its provisions […] the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant". This was affirmed by the Appeals Chamber in the Kanyabashi case where it found that the Vienna Convention is applicable by analogy. The same rules of interpretation appear to apply to the procedural framework of the ICC as a whole, including the rules of procedure and evidence which are not treaties.

5 Applying the Approach

Having introduced the differentiated functional approach, the following examples will illustrate how this approach may help us to understand the relevance of objectives and how they are balanced differently during the progress of the proceedings. I will use cases, concerning two procedural areas where the law in some regards is silent or at least ambiguous: victims’ participation and disclosure. The first example will support my approach and the second will challenge it.

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130 Koskenniemi, supra note 4, at p. 24
131 ibid, at pp. 41-56.
133 Pound, supra note 7, volume III, part 4, at p. 22; Koskenniemi, supra note 132, at pp. 66-67
134 Ekelöf, supra note 98, at pp. 87-88; see also Lehrberg, supra note 98, at pp. 66 and 71; see also Higgins, supra note 10, at p. 5
135 Tadić, Trial Chamber decision 10 August 1995, para. 18
136 Prosecutor v. Kanyabashi, ICTR-96-15, Appeals Chamber decision (Joint and Separate Opinion of Judge McDonald and Judge Vohrah), 3 June 1999, para. 15; see also Prosecutor v. Zejin Delalić et al. (Čelebići), Case No. IT-96-21, ICTY Trial Chamber, Trial Judgment, 16 November 1998, paras. 161 and 163
137 Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Final System of Disclosure and the Establishment of a Timetable, 15 May 2006, Annex I, para 1; see also Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, PTC I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, para. 8
Where the personal interests of the victims are affected, the Court shall in accordance with article 68(3) of the Rome Statute, permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate. Rule 85 provides that ‘victims’ mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Does this mean that any victim in a situation investigated by the Prosecutor can participate in the proceedings? This is an example where the ordinary text of statutory framework is silent. However, this does not mean that the judges have unfettered discretion. They still have consider the purpose of article 68(3), rule 85 and in what context, i.e. procedural stage, the participation is sought. Consider the situation when the Prosecutor has concluded his or her preliminary examination and is in the process of submitting a request for authorization of an investigation, pursuant to article 15(3). The aforementioned paragraph also provides that victims may make representations to the Pre-Trial Chamber. At this early stage no charges have been confirmed and there is an uncertainty concerning the exact scope of any forthcoming trial proceedings. Thus the notion ‘victims’ can be interpreted fairly broad with reference to (p. 299) objectives such as truth. The same argument applies to article 19(3) which concerns challenges to the jurisdiction of the Court or the admissibility of a case. At this procedural stage victims may submit observations to the Court. Should the same broad interpretation of ‘victims’ apply at the trial stage or should such participation be restricted? In Lubanga, the Trial Chamber based it assessment on the literal meaning of rule 85 when it stated that the provision “does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I”. The criteria for participation was instead whether there was a link between the victim’s personal interests and evidence considered or issues arising during the trial. Judge Blattman dissented with the majority on this issue. In appeal the Prosecutor argued that the Trial Chamber’s decision conflated the general interests of victims in relation to participation, in particular, “an interest in verifying particular facts and establishing the truth”. This could not be used as the sole or main basis of participation. The Appeals Chamber acknowledged that rule 85 does not have the effect of restricting the participation of victims to the crimes charged, but emphasized that the provision “must be read in context and in accordance with its object and purpose.” The Appeals Chamber stated that “whilst the ordinary meaning of rule 85 does not per se, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges.” The Appeals Chamber also specified that the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged, and that the in application for participation in the trial, only victims of these crimes will be able to demonstrate that the trial, as such, affects their personal interests. The Appeals Chamber’s reasoning and decision to reverse the finding of the Trial Chamber squares well with the approach suggested in this article.

Turning to the second example concerning disclosure I will compare several cases. In Lubanga the Pre-Trial Chamber recognized several objectives relevant for disclosure, including expeditious proceedings, confidentiality of information, victims’ participation, protection of victims and witnesses. However, some objectives were explicitly regarded as less relevant at that stage of the proceedings. (p. 300) This may be exemplified when the Pre-Trial Chamber found it contrary to the role of the Pre-Trial Chamber to file in the record of the case and present at the confirmation hearing

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139 Prosecutor v. Thomas Lubanga Dyilo, supra note 82, para. 93
140 ibid, para. 95
141 Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, Appeals Chamber, 11 July 2008, para. 43
142 ibid, paras. 53-54
143 ibid, paras. 58
144 ibid, para. 62
145 Prosecutor v. Thomas Lubanga Dyilo, decision 15 May 2006, supra note 137, at 16, para. 6
potentially exculpatory and other materials disclosed by the Prosecution before the hearing, if neither party intends to rely on those materials at that hearing. The Pre-Trial Chamber based its decision, inter alia, on teleological and contextual interpretation when it downplayed the objective of truth at stage of the confirmation hearing. This approach was followed in Katanga and Chui, and Abu Garda. In Bemba on the other hand the Pre-Trial Chamber increased the scope of communication to the Pre-Trial Chamber in order to make truth the principal objective. It emphasized “that the search for truth is the principal goal of the Court as a whole.” Thus, the decisive factor was whether the interest of truth should be emphasized or downplayed during disclosure. This is an example where the teleological approach can lead to two different solutions. Does this mean that the suggested method is useless? There is no such thing as an omnipotent method. However, a method used in a transparent way defeats the alternative of not using any method relying solely on discretion of the judge.

6 Reflections on the Fragmentation of a Legal Regime

The aim has been to outline a web of various objectives, reflected in legislation and case law. Mirjan Damaška has made an attempt to explore whether an overarching goal of international criminal courts can be identified, so that existing tensions among the remaining objectives can be better managed. His conclusion is that no single goal can be found around which other objectives can be rigorously organized. I would argue that on a macro level it may be possible to establish an overarching goal, for example to end impunity or to establish the truth, regardless of the procedural model. The end result is the same but the (p. 301) means and difference differ. Differences in means and methods may create an uneven balance of the objectives when procedural stages are compared. The end result may be the same in the sense that both ‘justice’ and ‘truth’ is accomplished, but this is done at different stages of the proceedings. At the micro level the relevant objectives and balance between them may vary. For example, in an inquisitorial system the Prosecutor may help to discover the truth by collecting evidence on the behalf of all parties. In an adversarial system the truth is uncovered at a later stage, when the evidence is presented before the judge. From a normative standpoint, the adversarial system has its advantages, but it can only work effectively if there is a certain ‘equality of arms’. This may be the case during trial, but is more questionable prior to trial. As a consequence, I find the mixed approach appropriate where inquisitorial elements are prevailing at the pre-trial investigation stage while the trial phase is structured in an adversarial setting. To conclude, I submit that the pursuit of idiosyncratic goals of international criminal procedure, for example creating an historic record, should primarily be relegated to the macro level and the judges should refrain from automatically pursuing them in all procedural matters. (p. 302)

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146 ibid, annex 1, paras. 54-56
147 Prosecutor v. Katanga and Chui, PTC I, Transcript, 14 December 2007, at 4 lines 14-22 making references to Lubanga, decision 15 May 2006, supra note 137, Prosecutor v. Thomas Lubanga Dyilo, PTC I, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, 19 May 2006 and Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006
150 Damaška, Mirjan, supra note 38, at pp. 330-339
152 Swart, supra note 151, at p. 118