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## Theorizing International Criminal Procedure Review Essay: Christoph Safferling's International Criminal Procedure

Sujith Xavier

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**THEORIZING INTERNATIONAL CRIMINAL PROCEDURE REVIEW ESSAY: CHRISTOPH SAFFERLING'S *INTERNATIONAL CRIMINAL PROCEDURE* (OXFORD UNIVERSITY PRESS, 2012)**

SUJITH XAVIER\*

**I. PROFESSOR CHRISTOPH SAFFERLING'S *INTERNATIONAL CRIMINAL PROCEDURE* (OXFORD UNIVERSITY PRESS, 2012)** is one of the first scholarly attempts to set out in detail the applicable procedure before the International Criminal Court (ICC). Since the early 1990s, there has been a surge in scholarly interventions on international criminal law. The creation of *ad hoc* international criminal tribunals, the ICC, and other international hybrid institutions has expanded the literature to examine the contours of the substantive legal aspects of international criminal law. As these institutions matured, a new field began to form and push the existing and nascent doctrinal boundaries between public international law (including international human rights and international humanitarian law) and instrumental conceptions of international law.

More recently, case law and the practice of international tribunals have resulted in numerous critical insights concerned with the political nature of international prosecution and international criminal law generally. There is an overall tendency however to focus on the substantive legal aspects of international criminal law, given the latency of the field. The scholarly interventions therefore have focused on filling the existing gaps in the substantive aspects of the law. For example, with the recent inclusion of the crime of aggression to the Rome Statute, some of the current interventions examine the contours of the newly created crime and the surrounding

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\* LL.B., LL.M., PhD; Assistant Professor and Director, Transnational Law and Justice Network, University of Windsor Faculty of Law. I am grateful to Mazen Masri, Hengameh Saberi and Peer Zumbansen for their insightful comments. All errors are mine.

doctrinal analysis. International criminal procedure, even though central to the field's operation, is often given a short and cursory overview in the leading textbooks and scholarly interventions.<sup>1</sup>

The underdevelopment of the scholarly interventions of international criminal procedure is possibly attributable to the embryonic nature of international criminal law, the desire by the international community to 'end impunity' and thus develop the substantive areas of law amongst other reasons.

In contemporary international criminal law literature, there are very few expositions of international criminal procedural law and Safferling's text is a welcome addition to this miniscule library. It is a meaningful and engaging analysis of international criminal procedure (ICP). There are, of course, other monographs that attempt to provide an analysis of ICP. For example, *Archbold: International Criminal Courts: Practice, Procedure and Evidence*, by Dixon and Khan, is a practitioners guide to ICP.<sup>2</sup> *An Introduction to International Criminal Law and Procedure* by Robert Cryer *et al* is another recent but superficial attempt to grapple with procedural criminal law.<sup>3</sup> In this regard, Safferling is amongst a handful of researchers that have focused on ICP in the recent years.<sup>4</sup>

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<sup>1</sup>. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsey: Transnational Press, 2004); Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008); Robert Cryer *et al.* *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010); William Schabas, *The International Criminal Court A Commentary on the Rome Statute* (Oxford University Press, 2010); Alexander Zahar & Goran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford, UK: Oxford University Press, 2009); Michael Bolander ed, *International criminal justice: a critical analysis of institutions and procedures* (London: Cameron May, 2007)[*international criminal justice*]; Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005); Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

<sup>2</sup>. Rodney Dixon & Karim Khan, *Archbold, International Criminal Courts: Practice, Procedure and Evidence* (London: Sweet & Maxwell, 2009).

<sup>3</sup>. Robert Cryer, Håkan Friman *et al.*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press 2010).

<sup>4</sup>. Göran Sluiter & Sergey Vasiliev, *International Criminal Procedure: Towards a Coherent Body of Law* (UK: Cameron May, 2009); See for example Goran Sluiter, *et al.*, *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013).

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Safferling has made numerous substantive contributions to our understanding of ICP over the years.<sup>5</sup> In this recent monograph, Safferling introduces the audience (academic, students and practitioners<sup>6</sup>) to the procedural law of the ICC and draws from other international criminal institutions. He suggests that the controversy surrounding international criminal procedural law has yet to be settled.<sup>7</sup> By creating the two *ad hoc* tribunals, the United Nations Security Council allowed the judges of both tribunals to draft and amend their respective rules of evidence and procedure. The Rules of Evidence and Procedure of the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for former Yugoslavia (ICTY) were amended on numerous occasions, precipitating arguments that the judges were over utilizing their quasi-legislative powers.<sup>8</sup> The drafters of the ICC Rome Statute steered away from comparable practice. Rather, the Rome Statute requires that the Assembly of State Parties of the ICC adopt the Rules of Evidence and Procedure (REP) on a 2/3 majority.<sup>9</sup>

In what follows, I will provide a synopsis of the different chapters, highlighting important contributions. Then this review essay will hone in on two issues from the different chapters. It will first interrogate international criminal procedure's conceptualization of the rights of the accused. Then Safferling's new ICP method in dealing with the challenging "mixture of criminal law and public international law will be examined.<sup>10</sup> It will be argued that there is an absence of focus on the rights of the accused as a central tenet within the aims and purpose of the international criminal justice regime. Second, the proposed method or "procedural theory" in ICP is heavily reliant on existing rules of interpretation in international law. Simultaneously, while adopting such a method

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<sup>5</sup>. Christoph J. M. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2012).

<sup>6</sup>. Safferling, *supra* note 5 at 3.

<sup>7</sup>. Safferling, *supra* note 5.

<sup>8</sup>. Megan A Fairlie, "Rulemaking from the Bench: A Place for Minimalism at the ICTY" (2003-2004) 39 *Texas International Law Journal* 257.

<sup>9</sup>. *Rome Statute of the International Criminal Court*, 1998, 37 ILM 999, arts 1, 112, 34 & 51.

<sup>10</sup>. Safferling, *supra* note 5 at 109.

might be useful, there is however a tendency to solely focus on legal formalism. In this regard, the focus on existing rules of interpretation does not allow for interdisciplinary insights that have emerged over the years to influence emerging international criminal procedure.

## II. OUTLINE OF THE BOOK

Safferling engages with and contributes to the current debates on international criminal procedure. He suggests “a new and more systematic way of thinking about procedural matters”.<sup>11</sup> On the first page, Safferling states that the monograph is about international criminal procedure. In his analysis, the ICC’s Statute, Rules of Evidence and Procedure and the Regulations of the different organs (Regulations of the Court; Regulations of the Office of the Prosecutor; & Regulations of the Registry) are situated within the context of other international criminal institutions. One does not grasp the real task of this text until the third chapter in which a procedural theory of international criminal procedure is set out, forming the backdrop to the remaining seven chapters on specific procedural provisions within the ICC. The first three chapters “demonstrate the set of frictions” that is caused by the inherent nature of international criminal procedure.

Safferling’s International Criminal Procedure is composed of three main sections with the aim of introducing ICP to the lay students, practitioners and scholars working on issues related international criminal justice and international criminal procedure. The first and final sections of this text are facile to comprehend and have a readable and easy to follow structure. The second section, setting out the different procedural mechanisms, however is lengthy and justifiably complicated. All three sections provide detailed understanding of the different principles and

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<sup>11</sup>. Safferling, *supra* note 5 at 2.

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provisions applicable within ICP and ultimately, this text is a must read for those interested in the procedure of the ICC and procedural law applicable in international criminal justice.

In the first section, the historical context and key principles of ICP are explored and then, the analysis turns to Safferling's functional-normative theory of international criminal procedure. Ultimately the central motivation is to articulate a "methodological framework for the development of the ICC procedural system".<sup>12</sup> Chapter 1 leads the reader through the history of international criminal institutions, starting with the International Military Tribunal at Nuremberg and International Military Tribunal for the Far East. It culminates in a succinct and clear analysis of the different institutions with a detailed account of how they were created and identifies their respective flaws. In the end, Safferling is able to tease out some of the most technical misunderstandings between practitioners from common law and civil law traditions. Within the two *ad hoc* tribunals, a lengthy and arduous debate unfolded concerning the Rules of Evidence and Procedure. Judges and scholars quarreled about whether these rules should take on or have incorporated principles from common law or civil law.<sup>13</sup>

Chapter 2 discusses the special circumstances of ICP by describing its aims, purposes and competence. With reference to the competence, the chapter details the jurisdiction of the two *ad hoc* tribunals and the ICC. The ICC has a complicated jurisdictional structure as set out by the Statute (jurisdiction over international crimes and jurisdiction is applicable only for events that occurred once the Statute entered into force in 2002). Safferling offers a clear road map of the different trigger mechanisms through which the ICC's jurisdiction can be invoked. In this regard,

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<sup>12</sup>. Safferling, *supra* note 5 at 4.

<sup>13</sup>. Gabrielle Kirk McDonald, "Trial Procedures and Practices" in Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds, *Substantive and Procedural Aspects of International Criminal Law; The Experience of International and National Courts* (Hague/London/Boston: Kluwer Law International, 2000); Fausto Pocar, "Common and civil law traditions in the ICTY criminal procedure : does oil blend with water?" in Janet Walker & Oscar Chase, *Common Law, Civil Law and the Future of Categories* (LexisNexis, 2010).

however, Safferling could have further elaborated on the politics of ICC trigger mechanisms. In particular, the recent attempts by the Palestinian Authority (Occupied Palestinian Territories) to use the *proprio motu* powers of the ICC Prosecutor.<sup>14</sup> Whether in this chapter or in chapter 6, the procedural aspects of *proprio motu* powers and its respective politics should have been included to highlight the political nature of international criminal prosecutions. Studying the ICC trigger mechanisms through a political lens would allow students, practitioners and scholars to understand the political compromises involved in selecting and prosecuting individuals responsible for international crimes.

In the final section, there is an excellent, if perhaps somewhat extensive discussion of complementarity, which constitutes a crucial doctrine specific to the ICC. The complementarity requirement of the Statute necessitates that the ICC can only avail itself of a ‘situation’ in instances where the State Party is unable or unwilling to prosecute those responsible for the crimes listed in the Statute. In Chapter 3, Safferling discusses the theoretical basis for the international criminal system. In Chapter 4, the different participants in ICP are set out. These include the President of the Court, the Chambers, the Office of the Prosecutor, the Accused and Defence, the victims, and the Registry that handles the day-to-day function of the Court.

In section two, Safferling jumps into the tricky details of ICP. The following five chapters review the procedural steps before the ICC vis-à-vis the investigatory stage, pre-trial and trial phrase, and finally the appeal and revision stage of the adjudicatory process. In Chapter 5, there is an in-depth examination of jurisdiction and admissibility. In Chapter 6, the discussion turns to the

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<sup>14</sup>. See for example UCLA Human Rights and International Criminal Law Online Forum, Invited Experts on Gaza Question (2010), <http://uclalawforum.com/gaza>; Special Symposium Issue UCLA Journal of International Law and Foreign Affairs, (2009) 14 University California Los Angeles Journal of International Law & Foreign Affairs; Michael Kearney & John Reynolds, “Palestine & the Politics of International Criminal Justice” in William Schabas et al eds, *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (England/ USA : Ashgate, 2013)

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investigative stage (pre-trial inquiry<sup>15</sup>) before the ICC. This stage is defined as the period between the discovery of the crime (as set out in the Statute) and the formulation of the charges and indictment by the Office of the Prosecutor. Statute and the Rules of Evidence and Procedure establish numerous different procedural requirements at this juncture. Chapter 7 tackles the pre-trial phase where the proceedings are confirmed and Chapter 8 examines trial proceedings. The trial is the central and most important part of the process set up within ICP and certain fundamental principles such as a fair hearing must be adhered to at all times. This chapter describes the different procedural steps and the law of evidence that is utilized before the ICC. The final and concluding Chapter of this section takes up the appeal and revision process. The right to appeal is established by the Rome Statute and, more interestingly, if a new fact arises, then the parties can ask for a review of the verdict. The revision process is intended to allow the accused and the prosecutor the opportunity to bring new factual claims on an already decided matter. From the perspective of the accused, the Statute affords robust protection through the revision provisions.

The last section of Safferling's treatise tackles issues stemming from misconduct by those involved in the proceedings, whether the defense counsel or the spokesperson to the Court. The Contempt of Court proceedings have a long history within the *ad hoc* tribunals and the ICC Statute provides "explicit regulations for cases where a party tampers with evidence, disobeys its orders, or disrupts a trial".<sup>16</sup>

### III. THE ROLE OF THE ACCUSED IN ICP AND DEVELOPING AN ICP METHOD

Even though ICP is a seminal contribution to the field of international criminal law, there are numerous omissions. In what follows, two such omissions will be laid bare. The first relates to the

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<sup>15</sup>. Safferling, *supra* note 5 at 216.

<sup>16</sup>. Safferling, *supra* note 5 at 560.

role of the accused. Irrelevant of scholars or practitioners affiliation to common law or civil law, the rights of the accused is a central tenet that is fiercely guarded in any regime. Even through the Rome Statute affords similar protection, the rights of the accused are not part of the central animating aims and purposes of international criminal procedure. The second omission, whilst it may not be characterized as a direct criticism, relates to the new methodology that Safferling proposes for international criminal procedure. The proposed method or procedural theory does allow for the incorporation of interdisciplinary insights, which ultimately affect the manner in which these institutions function. Safferling's method draws heavily from the existing public international law rules of interpretation as set out in the *Vienna Convention on the Laws of Treaties*. Nonetheless, there is no room to incorporate different perspectives that can incorporate critical perspectives from other disciplines such as, for example, history or politics.

#### IV. THE ROLE OF THE ACCUSED

In the second chapter of ICP, Safferling tackles the aims and purposes of international criminal procedure. There is an effort, although superficial, to connect the importance of procedural law to substantive aspects of international criminal law. The central argument in this analysis indicates that substantive law comes into existence through procedural law and thus “[I]t would be wrong to presume that procedural law is detached from the goals of substantive law”.<sup>17</sup> The animating aims and purposes are: retribution<sup>18</sup>; deterrence<sup>19</sup>; “positive-preventive aspects” (summarized as prevention of further conflict)<sup>20</sup>; justice for victims<sup>21</sup>; and international legal order<sup>22</sup>.

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<sup>17</sup>. Safferling, *supra* note 5 at 64.

<sup>18</sup>. Safferling, *supra* note 5 at 65-66.

<sup>19</sup>. Safferling, *supra* note 5 at 66-67.

<sup>20</sup>. Safferling, *supra* note 5 at 68-69.

<sup>21</sup>. Safferling, *supra* note 5 at 69-70.

<sup>22</sup>. Safferling, *supra* note 5 at 70-74.

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Safferling then turns to the aims and purpose of the international criminal procedure. In this instance, the articulated purpose is general, and includes all of the tribunals and special courts. In turn, the purpose of ICP is not specific to the ICC. A distinction between primary and secondary procedural aims is suggested. The primary aims of criminal procedure ultimately endeavors to buttress substantive aims and purposes, to “reveal the truth, and at the end of the trial a decision must state whether or not the accused has indeed committed the crime”.<sup>23</sup> The subsequent “guilt of the offender needs to be translated into a just sentence in the case of conviction”.<sup>24</sup> The primary objective of ICP is therefore to place the perpetrator at the center of the adjudicatory process and to determine whether his/her conduct amounts to a breach defined by substantive aspects of international criminal law as set by the respective statutes and customary international law. There are six indirect aims of international criminal procedure, which relate to the preventive aims of substantive international criminal law and “by staging a trial at the international level”.<sup>25</sup> These are: to assist in healing the social conflict between the perpetrator, the society and victims; to stabilize the relationship between the conflicting parties; deterrence; to establish the rule of law; to give voice to the victims; and finally the creation of an official record.<sup>26</sup> There is thus a stark absence of a discussion of the rights of the accused vis-à-vis the procedural aims and substantive aims.

The customary nature of the right to a fair trial (which includes the rights of the accused) is still up for debate.<sup>27</sup> Academic writing on the question of applicable human rights standards

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<sup>23</sup>. Safferling, *supra* note 5 at 74-75

<sup>24</sup>. Safferling, *supra* note 5 at 74-75.

<sup>25</sup>. Safferling, *supra* note 5 at 75-77.

<sup>26</sup>. Safferling, *supra* note 5 at 75-77.

<sup>27</sup>. Judge Patrick Robinson, “The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY” (2009) (Fall) 3 *Publicist Berkeley Journal of International Law*.

within the ICC is generally sparse.<sup>28</sup> The judges of the two *ad hoc* tribunals have oscillated between adopting an expansive and restrictive approach to incorporating international human rights standards.<sup>29</sup> The previously set out debates in terms of whether international criminal institutions and other international courts are self-contained regimes has spawned numerous splintered and fractured analyses of applicable law.<sup>30</sup> Some scholars invoke a domestic understanding of constitutional law and argue that, within the international space, there are certain fundamental norms that permeate the system.<sup>31</sup> The subject of these norms is arguably contested, but some scholars point to the applicability of general international human rights standards as one of the most important constitutional norms available within the international area.<sup>32</sup> In other words, the constitutional nature of international human rights law therefore requires that all actors be subject to its standards, including international organizations.

From a comparative criminal law perspective, the fundamental rights guarantees afforded to the accused are a central tenet of national codifications of criminal procedure. For example, constitutional provisions of the *Canadian Charter of Rights and Freedoms* have been interpreted

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<sup>28</sup>. *Rome Statute of the International Criminal Court*, *supra* note 9, art 21; Daniel Sheppard, “The International Criminal Court and “Internationally Recognized Human Rights”: Understanding Article 21(3) of the Rome Statute” (2010) 10 *International Criminal Law Review* 43.

<sup>29</sup>. *The Prosecutor v. Delalic.*, IT-96-21-T of 25 September 1996; *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003, [Separate Opinion of Judge Shahabuddeen, para 8]; *See Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003 [Dissenting Opinion of Judge Pocar at 3].

<sup>30</sup>. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 Feb. 2001.

<sup>31</sup>. Jan Klabbers, “Setting the Scene” in Jan Klabbers, Anne Peters and Geir Ulfstein eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) 14-15; Anne Peters & Klaus Armingeon “Introduction-Global Constitutionalism from an Interdisciplinary Perspective” (2009) 16:2 *Indiana Journal of Global Legal Studies*; Jeffrey L. Dunoff, & Joel P. Trachtman, “A Functional Approach to International Constitutionalization” in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, International Law, and Global Governance* (Cambridge/New York: Cambridge University Press, 2009) 30.

<sup>32</sup>. Stephen Gardbaum, “Human Rights as International Constitutional Rights” (2008) 19:4 *European Journal of International Law* 749; Brado Fassbender, “The UN Charter as Framework Constitution of the International Community” (2006) (1) *Select Proceedings of the European Society of International Law* 377-82; Douglas M. Johnston, “World Constitutionalism in the Theory of International Law” in Ronald St. John Macdonald & Douglas M. Johnston eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) 19.

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by the Canadian courts are prohibiting any erosion of the rights of the accused.<sup>33</sup> In the United States, the Supreme Court and the Constitution are protective of the rights of the accused.<sup>34</sup> Similarly, the European Court of Human Rights has developed expansive jurisprudence protecting the rights of the accused in criminal matters.<sup>35</sup> Meanwhile, there is a long tradition of affording fundamental rights protection in international human rights law.<sup>36</sup> More importantly, Article 21(3) of the Rome Statute necessitates that the Court conduct itself consistently with international human rights norms.<sup>37</sup> Whilst the jurisprudence and academic writing is quite limited on this matter, contrasted with domestic counterpart<sup>38</sup>, the ICC Appeals Chamber judgment in *Dyilo* offers some insights: “[A]rticle 21(3) of the Statute makes the interpretation as well as the law applicable under the Statute subject to internationally recognized human rights”.<sup>39</sup>

A central criticism against the international criminal regime is associated with trial fairness. Safferling identifies trial fairness as one of the main problems of the two International Military Tribunals.<sup>40</sup> Trial fairness, as articulated in Justice Pal’s powerful dissent from the International Military Tribunal for the Far East jurisprudence, has precipitated a long list of progenies in our contemporary understanding of international criminal justice.<sup>41</sup> The Rome Statute, similar to all of

<sup>33</sup>. See for example *R. v. Grant*, [2009] 2 S.C.R. 223; David Paciocco & Lee Stuesser, *The Law of Evidence* (6<sup>th</sup> edn) (Irwin Law, 2011) 352-402.

<sup>34</sup>. SG Thompson, “Judicial Gatekeeping of Police-Generated Witness Testimony” (2011) University of Houston Law Center No. 2011-A-8; Caleb Mason, “Jay-Z’s 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps” (2012) 56:567 St. Louis University Law Journal.

<sup>35</sup>. See for example *Jalloh v Germany* (2006) (Appl. No. 54810/00, 11 July 2006); *Funke v France* (1993) (Appl. No. 10828/84, 25 February 1993); *Saunders v United Kingdom* (1996) (Appl. No. 19187/91, 17 December 1996); *Khan v United Kingdom* (2000) (Appl. No. 35394/97, 12 May 2000).

<sup>36</sup>. *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171; *Universal Declaration of Human Rights*. GA Res. 217 (III), UNGAOR, 3<sup>rd</sup> Sess., Supp. No. 13, UN Doc. A/810 (1948).

<sup>37</sup>. *Rome Statute of the International Criminal Court*, *supra* note 9.

<sup>38</sup>. Daniel Sheppard, *supra* note 28 at 43-71.

<sup>39</sup>. *The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06 (OA4).

<sup>40</sup>. Safferling, *supra* note 5 at 15.

<sup>41</sup>. Elizabeth Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial” (1991) 23 New York University Journal of International Law & Politics 373; Richard J. Wilson, “A History of Defence Counsel in International Criminal and War Crimes Tribunals” in Michael Bohlander *et al* eds, *Defence in International Criminal Proceedings; Cases, Materials and Commentary* (Ardsley, New York: Transnational

the other international criminal institutions, embeds the rights of the accused.<sup>42</sup> Article 21 (3)'s requirement is that the Court, including the different organs, must incorporate and have space for the rights of the accused, a heavily guarded right within the bounds of international human rights law. The fundamental guarantees afforded to the accused therefore embody a central organizing feature of how the international criminal regime is conceptualized.

Consequently, Safferling's omission of the protection of the rights of the accused as a central pillar of the developing international criminal procedural law is disappointing. This is particularly difficult in light of the criticisms leveled against the first instances of international criminal justice as examples of victors' justice<sup>43</sup> or concerns that international criminal institutions have a pro conviction bias that undermines the credibility of the metered out judgments.<sup>44</sup> More contemporary examples of these criticisms have emerged under the moniker of Third World Approaches to International Law which seek to connect the historical foundations of international law to present existing inequities embedded within the structure of international law.<sup>45</sup>

The absence of the accused within the aims and purpose of the international criminal procedural law may not have been intentional, given the pro conviction nature of the existing international criminal justice regime as demonstrated by empirical evidence emerging from the

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Publishers, Inc., 2006); See generally Michael Bolander eds, *International criminal justice supra* note 1; Wayne Jordash, "The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice" (2009) *Leiden J I L* 22.

<sup>42</sup>. *Rome Statute of the International Criminal Court, supra* note 9, art 67.

<sup>43</sup>. Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964); Samuel Moyn, "Judith Shklar on the Philosophy of International Criminal Law", (2014) *International Criminal Law Review* 14:4/5 717-37.

<sup>44</sup>. See for example Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

<sup>45</sup>. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004)[*Imperialism*]; Makau Mutua, "What is Twail?" (2000) *American Society of International Law, Proceedings of the 94th Annual Meeting* 31; Antony Anghie, "What is TWAIL: Comment"[*Twail*] (2000) 94 *American Society of International Law* 39; Obiora C. Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2010) 10 *International Community Law Review* 37.

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ground.<sup>46</sup> The exclusion of the accused nonetheless is not a sustainable model if international criminal procedural law is to be successful and thus it must become part and parcel of the international criminal procedural regime.

### V. A NEW METHOD FOR ICP?

Safferling's third chapter, titled "A Methodology for International Criminal Procedure", confronts the challenges that have plagued international criminal institutions: how to grapple with procedure when the respective statutes and official documents are silent? The quasi-legislative nature of the Rules of Evidence and Procedure (REP) of the two *ad hoc* tribunals precipitated the drafters of the ICC to close the democratic gap in how the REP is amended.<sup>47</sup> Safferling commences this chapter by identifying the troublesome nature of how rules of evidence and procedure have developed within two *ad hoc* tribunals. Importantly, he points to the absence of legal sources to locate the development of procedural law. He says: "[...] judges largely relied on identifying customary international law as methodological tool to deal with debated issues."<sup>48</sup> Such a methodology, without relying on identifiable sources, in Safferling's view does not go well together. As a response, Safferling identifies these unorthodox legal methods utilized by the judges and their experts within the context of the international criminal institutions as necessitating a concise theoretical framework.<sup>49</sup> The production of "procedural theories and the develop[ment] of reliable parameters which would be applicable to all international trials" is Safferling's ultimate goal.<sup>50</sup>

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<sup>46</sup>. Combs, *supra*, note 44.

<sup>47</sup>. Megan A. Fairlie, "Rulemaking from the Bench: A Place for Minimalism at the ICTY" (2003-2004) 39 *Tex Int'l L J* 257.

<sup>48</sup>. Safferling, *supra* note 5 at 110.

<sup>49</sup>. Safferling, *supra* note 5 at 109-112.

<sup>50</sup>. Safferling, *supra* note 5 at 111.

The ICC Statute, unlike the other two *ad hoc* international criminal institutions, contains specific provisions, which address the sources of international criminal law. These provisions, Safferling argues creates the impetus for the development of a methodological framework.<sup>51</sup> Article 21 of the Rome Statute produces a hierarchy between the Statute, the REP and Elements of Crimes of the ICC, international treaties and general principles of law derived from national jurisdictions. By combining the legal method utilized by public international lawyers (as extrapolated from the *Vienna Convention on the Laws of Treaties*<sup>52</sup>) and the provisions from the ICC Statute (and interpretative framework set out by the ICC Judges in *Bashir*<sup>53</sup>), Safferling offers up a framework with four methodological pillars “on which a theory of international criminal procedure could be based”.<sup>54</sup> The normative methodological approach suggested is open textured and there is an emphasis on the idea of dialogue that the judges must undertake in hard cases. The basic parameters of the procedural methodology are based on autonomous interpretation; functional interpretation; normative interpretation; and comparative interpretation.

Drawing from the methodological leanings of the European Court of Human Rights, the autonomous interpretation suggests that each international institution must establish its own legitimacy and thus there is a strong desire to ignore the normativity of the different national approaches from civil and common law traditions. Focus is on “what not to do” and not to give a “term the same meaning as in the national law”.<sup>55</sup> The emphasis is on the meaning of the Statute. This approach necessitates a functional analysis. Under the rubric of functional approach warrants that the norm is situated within the context in which it operates, including the purpose of

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<sup>51</sup>. *Rome Statute of the International Criminal Court*, *supra* note 9, art 21.

<sup>52</sup>. Adopted on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, 331.

<sup>53</sup>. *Case The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

<sup>54</sup>. Safferling, *supra* note 5 at 121.

<sup>55</sup>. *Ibid* at 122.

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international criminal procedure.<sup>56</sup> It must then take account of the various interests of the different participants. The interpretation of the sources of law must comply with international human rights standards<sup>57</sup> and the normative approach includes these ideals within the procedural methods. The comparative approach is characterized through two questions: how does international criminal procedure relate to national criminal procedure and how does international criminal procedure fit into the wider context of public international law?<sup>58</sup>

In sum, these four methodological frames, analogous to those found within public international law, will guide the development of international criminal procedure. These four frames are especially useful as they relate to important questions such as how to interpret procedural provisions within the different organizing texts of the International Criminal Court. Whilst the adoption of similar method is welcomed and will undoubtedly serve as a beneficial tool, Safferling nonetheless *does not* push the boundaries far enough.

As early as beginning of the 20<sup>th</sup> century, American legal theorists have undertaken a systematic decentering law's formalism. In the early 1900's, American realist sought to replace formalism with "a pragmatic attitude toward law generally" and they believed that law "was made, not found".<sup>59</sup> Scholars were therefore attuned to how judicial decisions were created, reflecting on the socio-political context of these decisions, as opposed to accepting that judicial decisions were the "outcome of reasoning from a finite set of determinate principles".<sup>60</sup> To better understand how

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<sup>56</sup>. Safferling identifies these as: ending impunity; identify the perpetrators and ascertain their guilt; the guilt to be translated into a sentence; assist in healing the social conflict between the perpetrator and society (which includes the victim); deterrence; stabilizing the rule of law amongst the people and peoples; official record; & victims can tell their story; Safferling, *supra* note 5 at 123.

<sup>57</sup>. *Rome Statute of the International Criminal Court*, *supra* note 9, art 21 (3).

<sup>58</sup>. Safferling, *supra* note 5 at 126.

<sup>59</sup>. See generally Oliver Wendel Holmes, "The Path of the Law" (1897) 10 Harvard Law Review 457; Joseph Singer, "Legal realism Now" (1998) 76:2 California Law Review 465 at 474.

<sup>60</sup>. Debra Livingstone, "Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship" (1981) 95 Harvard Law Review 1669 at 1670.

law functions in the real world, legal realists sought to combine law with social science and subsequently viewed law as a social science.

Leaning on the legal realists, critical legal scholars dethroned law's formalism in the 1970's by first postulating that law originates from societal norms and thus it need not have positivistic requirements. Moreover, they argued that formality of law may exist on the surface, but societal norms will nonetheless dictate how these legal rules are obeyed.<sup>61</sup> Building on these intuitions, the Critical Study of the Law movement re-enacted the critical exercise started out by Holmes and his contemporaries within a global context. The movement has thus far spawned different theoretical arguments that are critical of law's association to existing power structures. For example, *Third World Approaches to International*<sup>62</sup> suggests that insights from history<sup>63</sup> and political economy<sup>64</sup> have particular effects on how international law functions. Moreover interdisciplinary scholars too have started to identify potential pitfalls of relying solely on legal analysis to measure success of international criminal institutions and other international institutions<sup>65</sup>.

From the perspective of this trajectory, we have to inquire further as to how Safferling's functional and comparative approaches can allow for a concrete dialogue with existing claims, for example, about the failure of international criminal justice. It appears Safferling utilizes legal

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<sup>61</sup>. Sally Falk Moore, "Law and Social Change: the semi-autonomous field as an appropriate subject of study", (1973) 7 *Law & Society Review* 719; David Trubek and Marc Galanter, "'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States'" (1974) *Wisconsin Law Review* 1062; Marc Galanter "Farther along" (1999) 33 (4) *Law & Society Review* 1113 at 1116; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, (1981) 19 *Journal of Legal Pluralism* 1; J. Griffiths, "What is Legal Pluralism" (1986) 24 *Journal of Legal Pluralism*

<sup>62</sup>. Makau Mutua, *supra* note 45; Antony Anghie, *Twail supra* note 45; Obiora C. Okafor, *supra* note 45.

<sup>63</sup>. Antony Anghie, *Imperialism supra* note 45.

<sup>64</sup>. Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

<sup>65</sup>. Galit A. Sarfaty, "Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights" in Kamari Clarke & Mark Goodale eds, *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge University Press, 2009).

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methods to calibrate current international criminal procedure and fuel further discussions within our epistemic community. But, by focusing on the institutional and social functionality (functional approach<sup>66</sup>) and requiring a comparative element (both in terms of national jurisdictions and within the wider context of public international law), there might in the end remain too little room, if any, to facilitate the inclusion of interdisciplinary insights into the international criminal procedural law. Safferling alludes to the need to have a dialogue, yet he closes the legal loop from possible contributions by historians<sup>67</sup>, political scientists<sup>68</sup>, anthropologists<sup>69</sup> and other interdisciplinary scholars to international criminal procedure. Some examples may shed more light on this thesis and illustrate the central argument.

The colonial history of Rwanda is an outlier within the jurisprudence of the ICTR. The Chambers make brief references to the colonization and fluidity of Rwandan ethnic communities.<sup>70</sup> Yet the construction of the Hutu and Tutsi identities are sharply predicated on the colonial history of Rwanda and is rather much more complicated than as depicted by the Trial Chamber.<sup>71</sup> More recently, studies have offered up richer accounts of international criminal justice. Ethnographic evidence from the Sierra Leone Special Court demonstrates a conflict between local goals and international objectives, suggesting that international expectations and local aspirations are often incommensurable.<sup>72</sup> Empirical evidence, on the one hand, has displayed the existence of a pro-conviction bias amongst the judges of the international criminal institutions by reviewing faulty

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<sup>66</sup>. See for example summary of the aims and purposes of criminal procedure, Safferling, *supra* note 5 at 123.

<sup>67</sup>. Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton, NJ: Princeton University Press, 2001).

<sup>68</sup>. Maximo Langer and Joseph W. Doherty, "Managerial Judging Goes International but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms" (2011) 36 *Yale Journal of International Law*.

<sup>69</sup>. Clarke, Kamari Maxine. *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009); Combs, *supra*, note 44.

<sup>70</sup>. *Prosecutor v. Akayesu*, (1998), Case No. ICTR-96-4-T at para. 78 to 86.

<sup>71</sup>. Mahmood Mamdani, *supra* note 67.

<sup>72</sup>. Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, 2009).

witness testimony from three international criminal institutions.<sup>73</sup> On the other hand, recent data reveals that the amendments to the REP of ICTY do not result in expeditious proceedings. On the contrary, the proceedings take longer as there are more procedural steps that have been added by the recent amendments.<sup>74</sup>

These insights *must* become part of the method of international criminal procedural law if the goal is to create robust procedural theories, establish reliable parameters and move away from past practices.<sup>75</sup> If the “door is left ajar to social and political influences”<sup>76</sup>, Safferling as well as other scholars belabouring this field now, have to further explore the means by which interdisciplinary insights can migrate into the development of international criminal procedure.

## VI. CONCLUSION

Christoph Safferling’s *International Criminal Procedure* is an excellent analysis of the applicable procedure before the International Criminal Court. The text undoubtedly is required reading for anyone interested in the procedural law of the ICC. In the forgoing discussion, Safferling’s contribution to the field of international criminal law was situated with a brief summary of the divergent components. Finally, two criticisms were raised as absent from Safferling’s understanding of international criminal procedure. First, it was argued that there is an absence of focus on the rights of the accused as an intricate part of the aims and purpose of the international criminal justice regime. Second, the proposed method for hard international criminal procedural cases is heavily reliant on existing formal doctrines of public international law. Adopting such a method runs the risk of perhaps paying too little regard to the interdisciplinary insights that have

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<sup>73</sup>. Combs, *supra*, note 44.

<sup>74</sup>. Maximo Langer & Joseph W. Doherty, *supra* note 68.

<sup>75</sup>. Safferling, *supra* note 5 at 123.

<sup>76</sup>. *Ibid* at 127.

emerged over the years and that will likely inform the transnational legal methodological discourse in an increasing manner.