A Quiet Transformation? Efficiency Building in the "Fall" of International Criminal Justice

Annika Jones

Abstract

In recent years, international criminal justice mechanisms have come under increasing pressure to improve their efficiency, i.e. to reduce costs and increase their speed of operation. Drawing from semi-structured interviews with staff and stakeholders in proceedings at the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia, this article argues that pressure for efficiency and related reform is supporting 'quiet transformation' in the balance between conflicting goals that underpin the international criminal justice process; in particular, between the pursuit of accountability, on the one hand, and demand for fairness and victim satisfaction, on the other. It highlights the need for greater engagement with the underlying policy issues that efficiency building raises and for ongoing, sustained empirical research into the impact of efficiency building on the ability of international criminal courts and tribunals to realise their goals.

Keywords: Efficiency, Fairness, Victim Satisfaction, International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, Extraordinary Chambers in the Courts of Cambodia.

1. Introduction

Following a wave of institution building from the 1990s onwards, widespread optimism about the future of international criminal justice has given way to disappointment and disillusionment. After the rise of international criminal justice, inability to meet the high expectations that have been placed on international criminal tribunals has led to its, perhaps inevitable, fall.[1] An often-cited criticism of international criminal tribunals is the low number of cases that they have completed, particularly in light of their high costs of operation. The number of individuals involved in the atrocities in the former Yugoslavia and Rwanda dwarfs the number that were indicted by the costly *ad hoc* international criminal tribunals (*ad hoc* tribunals; ICTY, ICTR) that were established to address them.[2] In its first 20 years of operation, the International Criminal Court (ICC) has completed just a handful of cases.[3] Internationalised criminal courts and tribunals,[4] such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), have similarly overseen small caseloads.

Dissatisfaction with the productivity of international(ised) criminal tribunals has prompted the institutions to take numerous measures to increase their efficiency, i.e. to increase the speed and reduce the cost of their operation.[5] Efficiency concerns have

[1] P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', 11 *Journal of International Criminal Justice* (2013) 527.
[2] The ICTY indicted 161 individuals, the ICTR indicted 93 individuals. *See* http://www.icty.org/en/cases/key-figures-cases and http://unictr.unmict.org/en/tribunal respectively.
[3] For current cases *see* https://www.icc-cpi.int/.
[4] The term 'internationalised criminal courts and tribunals' is used here to refer to mechanisms that have international and domestic elements in terms of applicable law or personnel.
[5] The concept of efficiency has been defined elsewhere as the maximisation of Court activities, distinct from the cost of the Court's operation. *See* B. Kotecha, 'The ICC's Office of the Prosecutor and the Limits of Performance Indicators', 15 *Journal of International Criminal Justice* (2017) 543, at 546-7.

underpinned the completion strategies that were designed to bring the *ad hoc* tribunals and the ECCC to a close.[6] The ICC has recently embraced the pursuit of efficiency as a key policy objective.[7] In 2015, the former President of the ICC committed herself to 'deploy all [her] efforts to contribute to the sustainability of the Court by seeking to enhance its efficiency and effectiveness', describing this as her 'top priority for the three years ahead'. [8]

Efficiency-related reform has significance for one of the current challenges facing international criminal courts and tribunals: how to balance their competing demands and related tensions between the goals that underpin their operation. In particular, the pursuit of speedier proceedings plays into tensions between the pursuit of accountability, on the one hand, and demand for fairness and victim satisfaction, on the other. By playing into the balance between these goals, efficiency building has the potential to affect the standards of fairness that international criminal justice institutions uphold and the function(s) that they perform.

Tensions between efficiency building and the goals of fairness and victim satisfaction are commonly referred to in policy debates. There has, however, been very little

[6] On the relationship between efficiency and the completion strategy of the ICTY, *see* ICTY, *Letter dated 29 November 2017 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council* (UN Doc. S/2017/1001) (ICTY Final Completion Strategy Report), para. 4. On the relationship between the completion strategy and the expeditiousness of proceedings at the ECCC, *see* Extraordinary Chambers in the Courts of Cambodia (ECCC), *Completion Plan, Revision 16,* 31 March 2018, https://www.eccc.gov.kh/sites/default/files/ECCC%20Completion%20Plan-%20Revision%2016_0.pdf (accessed 7 December 2018) (ECCC Completion Plan, Revision 16).

[7] *See, for example,* ICC, *Strategic Plan 2013-17 (Interim Update)*, 24 July 2015, https://www.icc-cpi.int/iccdocs/registry/Strategic_Plan_2013-2017__update_Jul_2015.pdf (accessed 7 December 2018); ICC Office of the Prosecutor, *Strategic Plan 2016-18*, 6 July 2015, https://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf (accessed 7 December 2018).

[8] Judge Silvia Fernández de Gurmendi, President of the International Criminal Court, *Remarks to the 25th Diplomatic Briefing*, 26 March 2015, https://www.icc-cpi.int/iccdocs/db/25DB-Pres-Eng.pdf (accessed 7 December 2018). *See also* ICC, *Statement by the ICC President at the Opening of the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court: Presentation of the Court's Annual Report*, 18 November 2015, https://www.icc-cpi.int/Pages/item.aspx?name=presidency-statement-ASP-2015 (accessed 7 December 2018).

research into how and to what extent they have been affected by the drive for efficiency in practice. Research that has been conducted has focused on specific procedural changes at particular institutions and, consequently, can only provide a partial and institution-specific account.[9] Greater understanding of the relationship between efficiency building and the goals of international criminal justice is needed to inform the establishment and reform of international criminal justice institutions and to understand more accurately the role that such institutions can play alongside other responses to international crimes, allowing the expectations of victims and other stakeholders in the international criminal justice process to be managed more effectively.

The purpose of this article is to deepen understanding of how the pursuit of efficiency is affecting the ability of international criminal justice institutions to realise their goals. While a plethora of goals have been attributed to international criminal justice institutions,[10] the article focuses on the goals of accountability, fairness and victim satisfaction in light of their close connection with efficiency building in international criminal proceedings and their prominence in relevant policy debates. The article addresses three institutions: the ICC, the ICTY and the ECCC. The ICC is an important focal point in light of its current efficiency drive, as well as the Court's permanence and potential to provide a model or point of reference for other international(ised) and domestic mechanisms. The ICTY has been included as an immediate predecessor to the ICC, which has been subjected to considerable pressure to increase its speed of operation and experienced significant procedural reform to this end. The ECCC, an internationalised rather than a purely international

[9] Existing research has focused primarily on the impact of certain procedural changes on the fairness of proceedings at the *ad hoc* tribunals. *See, for example,* sources referred to in footnotes 88-90.
[10] *See generally* M. Damaska, 'What is the Point of International Criminal Justice', 83 *Chicago-Kent Law Review* (2008) 329.

mechanism, has been included because of its provision for victim participation and reparations, which makes it a useful comparator to the ICC. The article does not seek to provide an exhaustive account of the *extent* of the impact of efficiency building on accountability, fairness and victim satisfaction at these institutions. Rather, the aim is to expose the *manner* in which rebalancing between goals is taking place amid pressure for efficiency and to highlight the implications of the findings.

The article draws from a series of 24 in-depth semi-structured interviews that were undertaken with staff and stakeholders at the ICC, the ICTY and the ECCC from 2016-2017. The majority of the interviews were conducted in person near to or at the relevant institutions; a small number were carried out by telephone. Opportunity sampling and snowball sampling were used to select the interviewees. The interviews were semi-structured, allowing the interviewees to influence their direction and focus. Each interview lasted from 40-60 minutes and addressed a schedule of topics, which were revealed to the interviewees in advance. The interviews were used to get an insider view of the impact of efficiency building on the goals of the institutions concerned from a number of different perspectives. Participants included judges, prosecutors, defence counsel, victim representatives and representatives of States and NGOs working at or in relation to the three institutions.

In light of the interview data, it is argued that demand for efficiency is raising tensions between the pursuit of accountability, on the one hand, and the pursuit of fairness and victim satisfaction, on the other, in relation to a range of issues within and beyond the courtroom. As a result of the piecemeal manner in which tensions are being resolved, a growing culture of efficiency in international criminal proceedings and ambiguity as to the meaning and scope of the concepts of fairness and victim

satisfaction at the international level, any transformation that does take place in the balance between conflicting goals is likely to take place 'quietly'. Quietness is problematic insofar as it allows changes in the function of international criminal justice mechanisms to evade scrutiny and, where warranted, resistance. It is also undesirable insofar as it fails to prompt deep consideration of the policy issues at stake and the identification of best practice amongst institutions. Quietness must, therefore, be remedied, or at least mitigated, by further sustained empirical research into the relationship between efficiency building and the goals of international criminal justice institutions and deeper engagement with the relevant policy issues.

The remainder of the article proceeds in five sections. Section 2 tracks the rise of efficiency as a policy objective in international criminal justice. Section 3 addresses the relationship between the pursuit of efficiency and the goals of international criminal justice, showing how efficiency building has an inherent relationship with accountability and can conflict with fairness and victim satisfaction. Drawing from the interview data, Section 4 looks at the impact of efficiency building on the practice of international criminal justice mechanisms and the realisation of their goals. Section 5 explains why efficiency building supports 'quiet transformation' in the relative weight that is given to accountability, fairness and victim satisfaction in international criminal proceedings. Section 6 puts forward recommendations for tackling the 'quietness'.

2. Growing Demand for Efficiency in the Pursuit of International Criminal Justice

Efficiency, in the sense of expeditious proceedings, has long been recognised as a vital attribute of the international criminal justice process. The charters of the post-Second World War International Military Tribunals for Nuremberg and the Far East (IMTs) required the tribunals to 'confine the Trial to an expeditious hearing of the issues raised by the charges' and to 'take strict measures to prevent any action which will cause unreasonable delay'.[11] Similarly, the statutes of the *ad hoc* tribunals and the ICC place an obligation on their respective trial chambers to ensure that trials are expeditious.[12] They also recognise expeditiousness as a right of the accused in the form of the right to be tried without undue delay.[13]

Despite longstanding recognition of the importance of expeditiousness in international criminal proceedings, it was fairly recently, in the late 1990s, that demand for a speedier, more cost effective international criminal justice process grew. The triggers were the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda.[14] The tribunals faced a variety of challenges, which had implications for their speed of operation. As the first international criminal tribunals to have been established after the IMTs, and the first to be established under the UN Security

[11] Charter for the International Military Tribunal for Nuremberg (Nuremberg Charter), Art. 18(a) and (b). Charter for the International Military Tribunal for the Far East (IMTFE Charter), Art. 12(a) and (b). Art. 19 of the Nuremberg Charter goes on to provide that 'The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure…' A similar provision can be found in IMTFE Charter Art. 13(a).
[12] ICTY Statute, Art. 20(1). ICTR Statute, Art. 19(1). Rome Statute, Art. 64(2).
[13] ICTY Statute, Art. 21(4)(c). ICTR Statute, Art. 20(4)(c). Rome Statute, Art. 67(1)(c).
[14] D. Raab, 'Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals', 3 *Journal of International Criminal Justice* (2005) 82, at 84. M. Langer, 'The Rise of Managerial Judging in International Criminal Law' 53 *American Journal of Comparative Law* (2005) 835, at 869-70.

Council's Chapter VII powers, the institutions were tasked with applying an underdeveloped body of international criminal law and dealt with an array of legal questions that had not yet been addressed at the international level. Both tribunals were located away from the relevant crime scenes and faced difficulties in securing State cooperation, which was critical for, amongst other things, the transfer of the accused and the appearance of witnesses.[15] Added to these challenges is the inherent complexity of international crimes, which tend to be fact-rich and require proof of elements that go beyond ordinary domestic crimes.[16] The speed of operation of the tribunals soon began to raise concerns amongst the UN Member States that were responsible for funding them.[17] Long periods of pre-trial detention for those that had been transferred to the tribunals also raised concerns about compliance with the rights of the accused.[18]

Attempts to increase the pace of proceedings at the *ad hoc* tribunals began in their early years of operation. From 1998, measures were taken with a view to reducing the length of proceedings at the ICTY.[19] A wave of procedural reform followed, some of which had the effect of increasing the role of the judge in steering the trial process.[20]

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[15] ICTY Final Completion Strategy Report, *supra* note 6, para. 49. Human Rights Watch, *Letter to Security Council Members: Action Urged Regarding Non-Cooperation with ICTR and ICTY*, 25 October 2002, https://www.hrw.org/news/2002/10/25/action-urged-regarding-non-cooperation-ictr-and-icty (accessed 7 December 2018).

[16] Ford has justified the speed of operation of the ICTY on the basis of the complexity of the crimes that it was addressing, in comparison to domestic and internationalised criminal justice mechanisms. *See* S. Ford, 'Complexity and Efficiency at International Criminal Courts', 29 *Emory International Law Review* (2014) 1.

[17] D. Wippman, 'The Costs of International Justice', 100 *American Journal of International Law* (2006) 861, at 861-62. Raab, *supra* note 14, at 96. R. Zacklin, 'The Failings of *Ad Hoc* International Tribunals', 2 *Journal of International Criminal Justice* (2004) 541, at 543.

[18] Raab, *ibid.*, at 84. D. J. Rearick, 'Innocent Until Alleged Guilty: Provisional Release at the ICTR', 44 *Harvard Journal of International Law* (2003) 577, at 578.

[19] D. A. Mundis, 'From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence', 14(2) *Leiden Journal of International Law* (2001) 367, at 368. For an overview of measures taken to improve case management at the ICTY *see* ICTY Final Completion Strategy Report, *supra* note 6, paras. 67-81.

[20] On the evolving role of the trial judge, *see* T. Meron, 'Procedural Evolution at the ICTY', 2 *Journal of International Criminal Justice* (2004) 520, at 523. J. Jackson, 'Finding the Best Epistemic Fit for

Pre-trial conferences were introduced where judges could call upon the Prosecutor to shorten the estimated length of the examination-in-chief for witnesses, determine the number of witnesses the Prosecutor may call and the time available to the Prosecutor for the presentation of evidence.[21] Judges were also permitted to invite the Prosecutor to reduce the number of counts charged in the indictment.[22] The tribunal's approach to evidence also evolved, including a move away from its initial focus on oral evidence to allow more evidence in written form,[23] as well as greater reliance on previously adjudicated facts, reducing the need for live evidence.[24] A further trend was the introduction of what Wald has referred to as 'a concerted policy of encouraging guilty pleas' in exchange for dropping or reducing certain charges.[25]

The procedural changes referred to above were implemented alongside the completion strategies that brought the *ad hoc* tribunals to a close.[26] In addition to focusing the work of the tribunals on persons bearing the highest responsibility for crimes committed in each situation and envisaging the transfer of cases to national jurisdictions, the completion strategies encouraged efforts to ensure the speedy

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International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy', 7 *Journal of International Criminal Justice* (2009) 16, at 30-31. Mundis, *ibid.*, at 368.

[21] *See* ICTY Rules of Procedure and Evidence, Rule 73*bis* (B)-(C).

[22] *See* ICTY Rules of Procedure and Evidence, Rule 73*bis* (D).

[23] Key provisions included ICTY Rules of Procedure and Evidence, Rule 89(F) and Rule 92*bis*. For discussion, *see* Jackson, *supra* note 20, at 29-30. S. Kay, 'The Move from Oral Evidence to Written Evidence: "The Law is Always Too Short and Too Tight for Growing Humankind"', 2 *Journal of International Criminal Justice* (2004) 495, at 495-96.

[24] Kay, *ibid.*, at 496.

[25] P. M. Wald, 'ICTY Judicial Proceedings: An Appraisal from Within', 2 *Journal of International Criminal Justice* (2004) 466, at 471.

[26] For the completion strategies, *see* ICTY, *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991* (UN Doc. S/2002/985), 14 August 2002; ICTR, *Letter Dated 29 September 2003 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General* (UN Doc. S/2003/946), 6 October 2003, Annex. *See also* UN Security Council Resolution 1503, S/RES/1503, 28 August 2003 and UN Security Council Resolution 1534, S/RES/1534, 26 March 2004. An overview of the origins and development of the completion strategy is given in ICTY Final Completion Strategy Report, *supra* note 6, paras. 29-47.

completion of the remainder of the tribunals' work.[27] In 2003, UN Security Council Resolution 1503 called on the tribunals to 'take all possible measures' to complete proceedings at various stages within certain timescales.[28]

Amid the developments outlined above, the Rome Statute was adopted in 1998, providing the legal basis for the establishment of a permanent International Criminal Court, which came into operation in 2002.[29] The early years of the ICC's operation were not marked by significant concern for efficiency, despite its increasing prominence in the work of the *ad hoc* tribunals. In its early days, the ICC was greeted with optimism by its supporters, many of whom had been surprised by the willingness of States to establish a permanent court with prospective jurisdiction over the commission of international crimes.[30]

It was as the ICC's caseload began to grow that initial optimism about the establishment of the permanent Court gave way to concerns about the Court's efficiency.[31] The ICC's early cases moved slowly, the first, *Lubanga*, taking six years from the transfer of the accused to the Trial Chamber's final verdict, despite its focus on a narrow range of charges.[32] Following the global financial crisis in 2008, the ICC came to operate in a climate of greater financial restraint, leading to resistance

[27] *Ibid*.
[28] Security Council Resolution 1503, S/RES/1503, 28 August 2003.
[29] Rome Statute of the International Criminal Court (1998) 2187 UNTS 90 (Rome Statute).
[30] For issues overcome during the negotiation process, *see* P. Kirsch and J. T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93(1) *American Journal of International Law* (1999) 2.
[31] Zacklin, *supra* note 17, at 542. A. Fulford, 'The Reflections of a Trial Judge', 22 *Criminal Law Forum* (2011) 215, at 217-19.
[32] *Prosecutor* v. *Thomas Lubanga Dyilo*, concerned the conscription, enlistment and use of child soldiers as war crimes under Art. 8 of the Rome Statute. *See Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06-2842, Trial Chamber I, 'Judgment Pursuant to Article 74 of the Statute', 5 April 2012.

amongst some State Parties to the Rome Statute to increase the Court's budget.[33] From 2010, efficiency became a prominent discussion point in meetings of the ICC's Assembly of States Parties (ASP). In December 2010, the ASP adopted a resolution establishing a Study Group on Governance (SGG) to 'conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court'.[34]

As with the *ad hoc* tribunals, growing concern for efficiency at the ICC led to reform. However, whereas the judges of the *ad hoc* tribunals could amend their Rules of Procedure and Evidence, the ICC's Rules of Procedure and Evidence (ICC's RPE) can only be amended by States, operating through the ASP.[35] In light of the time consuming and resource intensive nature of this process, few amendments to the ICC's RPE have been made.[36] Examples include the adoption of Rule 132*bis*, which allows for the designation of a Single Judge for the preparation of the trial, and amendment of Rule 68, which addresses the admission of prior recorded testimony.

Instead, the Court has focused on implementing practice changes within its existing legal framework. Reports of the Office of the Prosecutor highlight numerous changes

[33] FIDH, 'The ICC, 2002-2012: 10 Years, 10 Recommendations for an Efficient and Independent International Criminal Court', 15 June 2012, https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/States-should-not-hinder-ICC-s-12423 (accessed 7 December 2018).

[34] ICC Assembly of States Parties Resolution, *Establishment of a Study Group on Governance, adopted at the 5th plenary meeting, on 10 December 2010, by consensus* (ICC-ASP/9/Res.2). For the latest report of the Study Group, *see* ICC ASP, *Report of the Bureau on the Study Group on Governance, ICC-ASP/16/19*, 22 November 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-19-ENG.pdf (accessed 7 December 2018).

[35] In 'urgent cases', judges are permitted to 'draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties'. *See* Rome Statute, Art. 51(3). For discussion of the control of States over the ICC's legal framework, *see* H. Abtahi and S. Charania, 'Expediting the ICC Criminal Process: Striking the Right Balance between the ICC and States Parties', 18 *International Criminal Law Review* (2018) 383, at 391-410.

[36] For amendments to the ICC Rules of Procedure and Evidence, see https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx. *See also* Abtahi and Charania, *ibid*.

that have been taken to improve processes and develop best practices.[37] The Registrar has overseen a complete reorganisation of the Registry under its ReVision project,[38] and amendments have been made to the Regulations of the Registry.[39] The Court's Chambers have produced a Chambers Practice Manual, with the aim of increasing efficiency and consistency of practice.[40] The Regulations of the Court have also been under development by the ICC's judges since 2003.[41] Amendments to the Regulations in 2017 were expressed as being underpinned by an intention to 'expedite and streamline the Court's proceedings on appeal through a number of procedural innovations, in keeping with the Court's commitment to enhance its efficiency at all stages of the judicial process'.[42]

Court-wide measures have also been taken, including efforts to identify overlap, inefficiency or duplication of work between different Court organs,[43] and the recent drive to develop performance indicators to measure the Court's operation.[44] While the *ad hoc* tribunals have come to a close, efficiency building at the ICC is ongoing. The Court's most recent proposed programme budget includes as an objective for the

[37] ICC Office of the Prosecutor, *Strategic Plan 2016-2018*, Annex 2, 16 November 2016, https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf (accessed 7 December 2018). For an overview of developments within the Office of the Prosecutor, *see also* S. S. Shaomanesh, 'Institution Building: Perspective from within the Office of the Prosecutor of the International Criminal Court', 18 *International Criminal Law Review* (2018) 489.
[38] *See* ICC, *Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court*, August 2016, https://www.icc-cpi.int/itemsDocuments/ICC-Registry-CR.pdf (accessed 7 December 2018).
[39] For discussion see Abtahi and Charania, *supra* note 35, 416-17.
[40] ICC, *Chambers Practice Manual (2016)*, https://www.icc-cpi.int/iccdocs/other/Chambers_practice_manual--FEBRUARY_2016.pdf (accessed 7 December 2018).
[41] For discussion *see* Abtahi and Charania, *supra* note 35, 411-15.
[42] ICC Press Release, *ICC Judges Amend the Regulations of the Court*, 20 July 2017 (ICC-CPI-20170720-PR1326).
[43] ICC, *Proposed Programme Budget for 2017 of the International Criminal Court*, 17 August 2016 (ICC-ASP/15/10), paras. 56-59.
[44] ICC, *Second Court's Report on the Development of Performance Indicators for the International Criminal Court*, 11 November 2016, https://www.icc-cpi.int/itemsDocuments/ICC-Second-Court_report-on-indicators.pdf (accessed 7 December 2018) (Second Report on Performance Indicators).

Court's Chambers: '[t]o continue to reduce the length of proceedings by implementing the numerous reforms undertaken in recent years'.[45]

Demand for efficiency is not unique to criminal tribunals of a purely international nature. Internationalised criminal courts and tribunals have also come under pressure to increase their speed of operation. A prime example is the ECCC, where the speed of proceedings has been a prominent concern in light of the age and health of the accused.[46] From its early stages of operation, the ECCC has faced criticism of high costs and slow proceedings.[47] Against the background of these pressures, the Court has undergone numerous reforms to increase its speed and cost effectiveness.[48] These include the adoption of Rule 66*bis* of the Internal Rules, which allows the Co-Investigating Judges to reduce the scope of a judicial investigation '[i]n order to ensure a fair, meaningful and expeditious judicial process',[49] use of Rule 89*quarter* to reduce the scope of a trial by excluding certain facts set out in the indictment,[50] measures to increase the investigative capacity of the Office of the Co-Investigating Judge,[51] and the adoption of a demanding court schedule with limited time for the

[45] ICC, *Proposed Programme Budget for 2018 of the International Criminal Court*, 11 September 2017 (ICC-ASP/16/10), para. 152.
[46] Open Society Justice Initiative, *Performance and Perception: The Impact of the Extraordinary Chambers in the Courts of Cambodia (2016)*, https://www.opensocietyfoundations.org/sites/default/files/performance-perception-eccc-20160211.pdf (accessed 7 December 2018) (OSJI Performance and Perception Report), p.16.
[47] C. Sperfeldt, 'From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia', 11 *Journal of International Criminal Justice* (2013) 1111, at 1113. *See also* K. Gibson and D. Rudy, 'A New Model of International Criminal Procedure? The Progress of the Duch Trial at the ECCC', 7 *Journal of International Criminal Justice* (2009) 1005, at 1006.
[48] For an overview of these measures, *see* completion plan reports, available at https://www.eccc.gov.kh/en/about-eccc/finances. At the Sixth Plenary Meeting of the ECCC, the Court adopted a number of proposals to amend its Internal Rules, which 'streamlined proceedings in relation to a number of matters, including witness protection and rules of evidence, as well as adopting or formalizing measures designed to promote more expeditious proceedings'. *See* https://www.eccc.gov.kh/en/articles/sixth-eccc-plenary-session-concludes (accessed 7 December 2018).
[49] This provision has been used in cases 003 and 004. *See* ECCC Completion Plan, Revision 16, *supra* note 6, para. 14.
[50] *Ibid.*
[51] *Ibid.*

appearance of witnesses, experts and civil parties.[52] As with the ICTY and the ICC, efficiency-based reform at the ECCC has come in the form of practice changes as well as changes to the Court's legal framework.[53]

3. Efficiency and the Goals of International Criminal Justice

Pressure for efficiency and efficiency-based reform have implications for the ability of international criminal tribunals to realise their underlying goals. Three goals that have the potential to be heavily affected by the pursuit of efficiency are accountability, fairness and victim satisfaction.

The pursuit of speedier proceedings has a natural affinity with the pursuit of accountability for the commission of international crimes, which is frequently cited as one of the primary goals of the international criminal justice process.[54] Accountability can be seen as an overarching objective in that it provides a means of achieving other goals, such as deterrence, retribution, incapacitation, restoration and peace building. The drive for efficiency in international criminal proceedings supports accountability insofar as it results in speedier proceedings and allows a larger number of perpetrators to be held to account. This is significant in light of the large numbers of individuals

[52] Interview 023.
[53] For examples of both, *see* ECCC Completion Plan, Revision 16, *supra* note 6, paras. 14 and 15. *See* also Interview 023, indicating that much of the change at the ECCC has been within the existing rules.
[54] The ICC's website, for example, states that accountability is an aim of the Court ('The Court is participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again'). *See* https://www.icc-cpi.int/about.

that are typically involved in the commission of international crimes and the limited capacity of international criminal justice institutions.

Of course, efficiency building measures will not necessarily be successful in speeding up criminal proceedings and bringing greater numbers of perpetrators to trial. The underlying objectives of speed and accountability are, however, consistent. Where measures to increase the speed of the international criminal justice process are successful, they will inevitably contribute to the pursuit of accountability for international crimes in the form of higher numbers of completed cases, involving a wider range of perpetrators. In this respect, the pursuit of efficiency and accountability are inherently aligned. Pursuit of speed can be seen *as* pursuit of accountability. Accountability is understood here in a narrow sense, referring only to the ability of international criminal justice institutions to complete cases in a timely manner and not any other aspect or quality of the proceedings, such as its ability to respond to broader interests of victims and affected communities.

Demand for speedier proceedings has a more fractious relationship with the pursuit of other goals of the international criminal justice process, including fairness and victim satisfaction. Fairness is well established as a vital characteristic of the international criminal justice process, and one that is closely tied to its legitimacy.[55] The pursuit of accountability against large numbers of perpetrators loses meaning if the process is perceived as unfair and, consequently, seen to lack legitimacy and credibility. The right to fair trial, which encapsulates various elements and pertains to the accused,[56]

[55] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Public Law Research Paper No 1154117* (2008), at 13-15. *See* also Y. McDermott, *Fairness in International Criminal Trials* (OUP, 2016), pp.22-25.
[56] McDermott, *ibid.*, p.32. For the argument that fair trial rights should be understood as attaching to the accused alone, to be balanced with the interests of other actors at trial, *see* McDermott, *ibid.*, p.177.

has been incorporated into the statutes of all modern international criminal courts and tribunals.[57]

The relationship between efficiency building and fairness is two-pronged. On the one hand, expeditious proceedings are in the interests of the accused and integral to the right to be tried without undue delay.[58] On the other hand, attempts to increase the speed of the proceedings can have a negative impact on compliance with elements of the right to fair trial, for example by restricting the ability of the defence to prepare and present their case. The dual relationship between speedy proceedings and fairness is frequently acknowledged in policy debates and documents on the efficiency of international criminal justice.[59]

As with fairness, the pursuit of victim satisfaction can be in conflict with demand for speedy proceedings. Tensions between efficiency and victim satisfaction are significant in light of attempts from the late 1990s onwards to bring victims closer to the heart of the international criminal justice process. Critical to this move was the adoption of the Rome Statute of the ICC, which, departing from the statutes of the *ad hoc* tribunals, allowed victims to participate in proceedings in their own right (rather than solely as witnesses) and made provision for victim reparations.[60] The Rome

[57] *See, for example,* ICTY Statute, Art. 20. ICTR Statute, Art. 20. Rome Statute, Arts. 64(2) and 67. Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (ECCC Agreement), Arts. 12 and 13; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, as amended, Arts. 24 (new), 33 (new), 34 (new) and 35 (new). ECCC Internal Rules, Rules 21, 79, 81, 84, 85, 87 and 90.
[58] P. L. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia', 11(3) *European Journal of International Law* (2000) 569.
[59] *See, for example,* ICC, *Report of the Court on the Development of Performance Indicators for the International Criminal Court*, 12 November 2015, https://www.icc-cpi.int/itemsdocuments/court_report-development_of_performance_indicators-eng.pdf (accessed 7 December 2018), para. 15 (First Report on Performance Indicators). The report recognises that 'the speed of a trial needs to be balanced by fairness – proceedings can only be as fast as the parties' rights (and in particular those of the accused) allow'.
[60] Rome Statute, Arts. 68 and 75.

Statute also supports victim involvement in the Court's proceedings through extensive provision for victim protection.[61] In light of these provisions, the Rome Statute was initially lauded as 'a progressive step in international criminal law'.[62] The ECCC similarly makes provision for victim participation and reparation and has been considered forward looking in this respect.[63] While victim satisfaction is a concept that is much broader than – and arguably does not necessitate – victim participation in criminal proceedings, developments at the ICC and ECCC reflect an understanding that victim participation is a key contributor to victim satisfaction in international criminal trials.

Expeditiousness serves the interests of victims by helping courts to oversee a larger number of cases in a shorter time frame and to hold a wider range of perpetrators to account; i.e. by enhancing accountability.[64] The pursuit of victim satisfaction can, however, have a detrimental impact on expeditiousness, for example by permitting large numbers of victims to participate in proceedings and requiring charges to be representative of different forms of harm.[65] Turner has highlighted the potential for a broad interpretation of victims' rights to '"overwhelm" a court and impair its ability to adequately fulfil its mandate'.[66] Similarly, ICC Judge and former ICTY Judge Christine van den Wyngaert has written that '[i]f victims' participation slows down

[61] Rome Statute, Art. 68.
[62] S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2013) 235, at 238.
[63] ECCC Internal Rule 23.
[64] On the relationship between accountability and victim satisfaction, *see* OSJI Performance and Perception Report, *supra* note 46, p.80.
[65] E. Hoven, 'Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers I the Courts of Cambodia', 12 *Journal of International Criminal Justice* (2014) 81, at 85-6. Frisso refers to 'the inherent conflict between initiatives aimed at speeding up proceedings and the desire to allow the victim's voice to be heard in the proceedings'. *See* G. M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims', 3 *Goettingen Journal of International Law* (2011) 1093, at 1096.
[66] Hoven, *ibid.*, at 85-6, citing J. I. Turner, 'Decision on Civil Party Participation in Provisional Detention Appeals', 103 *American Journal of International Law* (2009) 116, at 118.

proceedings, fewer trials can be held' and that '[s]een from that perspective, victims' participation may be in conflict with the basic purpose of the ICC, which is to fight impunity'.[67] The pursuit of efficiency thus calls into question the extent to which and how institutions can and should provide for victim satisfaction and, in doing so, balance demand for a high number of completed cases against the 'richness' of each case in terms of the harms addressed and the number of victims that are able to participate in the proceedings.

4. Efficiency Building and the Goals of International Criminal Justice in Practice: The ICTY, ICC and ECCC

It follows from the above that there is at least a theoretical tension between the pursuit of efficiency (and with it accountability), on the one hand, and demand for fairness and victim satisfaction, on the other. While the tension is frequently acknowledged in policy debates, there has been little research into the relationship between these conflicting demands in practice. This section draws from interview data to provide a deeper understanding as to how efficiency building is affecting the ability of international criminal justice mechanisms to achieve these goals.

4.1. Speed of Proceedings and Accountability

[67] C. van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law* (2011) 476, at 495.

There are indications that the measures that have been taken to promote efficiency in international criminal proceedings have contributed to the speed of proceedings and, in doing so, have contributed to the pursuit of accountability for international crimes and the realisation of goals that flow from the speedy completion of cases.

When reflecting on the speed of operation of the tribunals, the most positive comments in the interviews related to the ECCC. Stakeholders in the ECCC's proceedings indicated that, at least in terms of trial proceedings, the Court was operating at considerable speed and that there was little room to increase the pace of proceedings further. One interviewee described the rigorous nature of the trial schedule in Case 002/2, whereby the Court would sit in every possible hearing day, requiring the parties to be 'in Court essentially all of the time'.[68]

Conversely, the overall picture created by interviewees commenting on the ICC was that the Court had a long way to go in increasing its speed of operation. There was a sense of frustration amongst some interviewees at the obstacles that stood in the way.[69] These included agreement on the nature and purpose of the pre-trial process, inconsistency in the priority given to efficiency amongst Court staff and reluctance to think creatively about possible changes to procedure.[70] Interviews with ICC staff and stakeholders did, however, indicate a feeling that proceedings were moving more quickly than they had been as a result of growing demand for efficiency.[71] Specific attention was drawn to the pace of pre-trial proceedings in the *Ongwen* and *Al Mahdi* cases, which, some interviewees highlighted, had progressed in a more expeditious

[68] Interview 023. The interviewee explained that the hearing days had been based on an assessment of the health of the defendants, which resulted in four hearing days per week.
[69] *See, for example,* Interview 012.
[70] *Ibid*.
[71] *See, for example,* Interview 011: 'people are just trying to do things faster, they are just literally trying to turn round the paperwork faster by self-imposed deadlines … we are now producing appellate results probably twice as fast as our predecessors'.

manner than previous cases.[72] This was, in part, attributed to the establishment of the Chambers Practice Manual, which had set a template for pre-trial proceedings and helped to establish common approaches to evidence.[73] Attention was also drawn to the streamlined approach that had been taken to proceedings for offences against the administration of justice.[74] The most recent proposed programme budget for the ICC reinforces the general view expressed in the interviews, noting 'the significant reduction in the average time between the hearing on the confirmation of charges and the beginning of trial, as well as a decrease in the amount of Court time required for each witness to be heard'.[75]

Opinions about the impact of efficiency building on the pursuit of accountability at the ICTY were more mixed and reference was made to measures designed to increase efficiency that had, in practice, had a detrimental impact on the speed of the tribunal's operation.[76] Such measures included reliance on previously adjudicated fact and witness statements in the tribunal's proceedings, which, in the view of one interviewee, simply allowed more evidence to be introduced into the record and prolonged the proceedings.[77] The comments in the same interview aligned with the findings of Langer and Doherty's study, that procedural reforms that were designed to shorten proceedings at the ICTY 'had the opposite effect: they lengthened both the pre-trial and trial phases'.[78]

[72] Interviews 010, 012 and 018.
[73] Interview 010.
[74] Interview 018.
[75] ICC, *Proposed Programme Budget for 2018 of the International Criminal Court*, 11 September 2017 (ICC-ASP/16/10), para. 157.
[76] Interview 001.
[77] *Ibid.*
[78] M. Langer and J. W. Doherty, 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms', 36 *Yale Journal of International Law* (2011) 241, at 243.

Despite a generally positive view of the speed of the ECCC's trial proceedings, some of the ECCC's efficiency building measures were also considered to have had a negative impact on efficiency. Reference was made, for example, to the counterproductive effect of the demanding trial schedule, which had resulted in defence counsel having to 'write lengthy motions seeking to recall [a] witness' when the original testimony had to be rushed.[79] The decision to sever proceedings in Case 002 was also seen by some as detrimental to the ECCC's speed of operation because of the procedural issues that it had raised.[80] The identification of measures that have had a counterproductive effect on accountability at the ECCC and ICTY is relevant for the policy debates referred to below.[81]

4.2. Fairness

The dual relationship between efficiency building and fairness, referred to in Section 3, was emphasised in interviews with staff and stakeholders in proceedings across the three institutions. Many noted that although expeditiousness was essential to fairness,[82] demand for speed and fairness could conflict.[83] The interviews revealed efficiency building measures that raised points of conflict between accountability and fairness, as well as views on the extent to which the pursuit of efficiency had prompted a change in the balance between these goals.

The greatest concerns about the detrimental impact of efficiency building on the fairness of proceedings were raised in relation to the ICTY. In interviews with ICTY staff, reference was made to the fair trial implications of reliance on written evidence

[79] Interview 023.
[80] Interviews 008 and 023.
[81] *See* Section 6.
[82] Interviews 011, 012, 015, 016, 017. 020, 021, 023. These participants included defence counsel.
[83] Interviews 002, 010, 011, 013, 014, 017, 023. This is also reflected in the Second Report on Performance Indicators, *supra* note 44, para. 22.

and judicial notice of previously adjudicated fact.[84] Interview participants also mentioned the potential for the joining of charges,[85] as well as time limits and page limits for court documents,[86] to have a detrimental impact on the operation of the defence and the rights of the accused. Attention was drawn not only to rule changes but the way in which they had been implemented.[87] The interview data reinforces concerns that have been raised about the fairness implications of specific procedural reforms in academic literature. Much has been written about the tensions raised between efficiency and fairness in the context of the tribunal's increased reliance on written evidence,[88] use of previously adjudicated fact,[89] and plea-bargaining.[90] Nonetheless, the majority of interviewees felt that efficiency and fairness had been balanced effectively at the ICTY and that the pursuit of efficiency had not led to infringements of the rights of the accused.[91] Only one interviewee believed that the fairness of the ICTY's proceedings had been negatively affected by the pursuit of greater speed and cost-effectiveness.[92]

Concerns about the impact of efficiency building on compliance with fair trial standards were also raised in relation to the ECCC. One of the key concerns raised in relation to the ECCC, as with the ICTY, was the impact of time limits on court proceedings.[93] The trial schedule was considered by one participant to make it

[84] Interviews 001 and 011.
[85] Interview 021.
[86] Interview 001.
[87] For example, their use by the Parties to 'dump documents or statements into the record'. See *ibid*.
[88] *See, for example,* Kay, *supra* note 23, at 495-96. Wald, *supra* note 25, at 473. S. Bourgon, 'Procedural Problems Hindering Expeditious and Fair Justice', 2 *Journal of International Criminal Justice* (2004) 526, at 532.
[89] Kay, *ibid.*, at 501.
[90] J. I. Turner, 'Plea Bargaining and International Criminal Justice', 48(2) *The University of the Pacific Law Review* (2017) 219.
[91] *See, for example,* Interviews 011, 018 and 019.
[92] Interview 001.
[93] Interviews 002, 006 and 008.

difficult for defence counsel to prepare adequately for every witness.[94] Another interviewee referred to the tension between efficiency and fairness in relation to the time permitted to the defence for the evaluation of evidence.[95] Overall, three interview participants considered or implied that efficiency building measures had had a negative impact on the fairness of proceedings.[96] One concluded:

> [The accused] has a right to a trial without undue delay, that's true. But on the other hand you have the right to a fair trial and, to be honest, I think it would be the view of all defence teams that that right is being eroded because of the current efficiency measures. In particular, it's very difficult now for him to have adequate time and facilities to prepare his defence.[97]

Interviews with ICC staff indicated a number of reform measures that have raised tensions with the fairness of the Court's proceedings, some of which mirror those that have emerged in the practice of the ICTY and ECCC. They included the ICC's increasing reliance on written evidence,[98] the ability of the defence to cross-examine and effectively present the defence case,[99] use of Rule 68 of the ICC RPE regarding statements in lieu of oral evidence where the witnesses cannot be cross-examined,[100] and shortening of confirmation of charges decisions.[101] Tensions were also raised by the Registry's planned reform of the Office of Public Counsel for Defence (OPCD),

[94] Interview 023.
[95] Interview 002.
[96] Interviews 002, 008, 023.
[97] Interview 023.
[98] Interviews 010 and 13.
[99] Interview 019.
[100] Interview 010.
[101] Interview 018.

which was resisted and ultimately stalled.[102] Despite highlighting various points of tension, none of the interviewees that commented on the ICC considered efficiency building measures to have had a negative impact on the fairness of the Court's proceedings to date. One interviewee did, however, consider it to be too early to comment on this point.[103]

4.3. Victim Satisfaction

As with fairness, the dual relationship between efficiency building and victim satisfaction was reflected in interviews with staff and stakeholders from the ICTY, the ICC and the ECCC.[104] Some participants from the ICC were keen to emphasise the importance of efficiency for the Court's ability to provide victim satisfaction.[105] Again, the interview data revealed areas of tension and views on the extent to which victim satisfaction had been negatively affected by the drive for efficiency to date.

In relation to the ICC, interviewees cited a number of measures as being in tension with the pursuit of victim satisfaction, many of which related to victim participation in the Court's proceedings. The points of tension included increasing reliance on written statements rather than oral testimony,[106] time limits for victim applications to participate before the start of the trial process,[107] and increasing emphasis on representation through the Office of Public Counsel for Victims (OPCV), rather than

[102] Interviews 014 and 021.
[103] Interview 019.
[104] Interviews 018 and 012.
[105] Interviews 012 and 018.
[106] Interview 009: **'**[Y]ou can try to reduce a lengthy and unnecessarily difficult process for the victim herself, examination in chief, by resorting to the prior statements as much as you can, but at the end of the day the victim must have an opportunity to tell their story'.
[107] Interview 024. Carayon and O'Donohue have raised concerns about the implementation of the approach in the Chambers Practice Manual, in particular the practice of the Victims Participation and Reparations Section (VPRS) in the Ongwen case of 'experiment[ing] with limiting its assistance to one person per household, excluding many victims' in order to meet the deadline for applications. *See* G. Carayon and J. O'Donohue, 'The International Criminal Court's Strategies in Relation to Victims', 15 *Journal of International Criminal Justice* (2017) 567, at 579.

through independent representatives.[108] A final concern went to the Registry's planned, but stalled, reform of the OPCV.[109] Overall, only one participant interviewed in relation to the ICC believed that pursuit of efficiency had had a negative impact on victim satisfaction.[110] One interviewee considered it to be too early to comment on this point.[111]

The main concern raised by interviewees in relation to the ECCC related, again, to the scope for victim participation in the Court's proceedings. Interviewees highlighted the negative impact of the demanding trial schedule in Case 002/02, in particular, on the number of victims that were able to participate and the time allocated to each victim to describe related events and their impact.[112] Tension between the number of victims affected by the crimes, the rights of the accused and the need to carry out proceedings in a timely manner in light of the age and health of the accused has also been acknowledged in NGO commentary.[113] Reference was also made in the interviews to the tension raised at the ECCC between victim satisfaction and the introduction of discretion for co-investigating judges to reduce the scope of a judicial investigation

[108] Interview 009: '[W]e seem to be moving towards a system whereby the Office for Public Counsel for Victims, based in The Hague, appears to almost have a monopoly over victim representation at trials, which I think is wrong… I think that the idea behind victim representation is that in a way you have the local communities affected represented in the court, and that is certainly served in a much different way when you have lawyers that are closer to the communities appearing here'. *See also* L. Walleyn, 'Victims' Participation in ICC Proceedings', 16 *International Criminal Law Review* (2016) 995, at 1007-8.

[109] Interview 014. *See* Draft Basic Outline of Proposals to Establish Defence and Victims Offices in the Registry. For discussion, *see* Walleyn, *ibid.*, at 1014. D. Suprun, 'Legal Representation of Victims before the ICC: Developments, Challenges and Perspectives', 6 *International Criminal Law Review* (2016) 972, at 989.

[110] Interview 009.

[111] Interview 024.

[112] Interviews 023 and 005.

[113] OSJI Performance and Perception Report, *supra* note 46, p.44, recognising that despite the generally positive contribution of victim participation to victim satisfaction at the ECCC, '[t]he testimony the civil parties were able to provide at trial was constrained by time and subject matter'. On the evolution of victim participation at the ECCC, *see further* D. S. Sokol, 'Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia', 10(1) *Washington University Global Studies Law Review* (2011) 167.

under Rule 66*bis* of the ECCC's Internal Rules.[114] Overall, one interviewee considered the pursuit of efficiency to have had a negative impact on victim engagement with the Court, reflecting that victim engagement as a testifying witness 'must be quite a dissatisfying experience', largely as a result of the pace of trial proceedings and the time allowed for victim testimony.[115]

Notwithstanding the more limited role of victims in proceedings at the ICTY,[116] efficiency building measures were acknowledged in the interviews to have raised tensions with the tribunal's ability to ensure victim satisfaction. As was the case in relation to the ICC, a prominent concern went to the ICTY's increasing reliance on written evidence rather than oral testimony under Rules 89(F) and 92*bis* of the ICTY Rules of Procedure and Evidence (ICTY RPE).[117] One interviewee stressed that the ICTY had gone much further than the ICC in its use of witness statements, with the effect that they: 'effectively replac[ed] the testimony in chief of crime based witnesses for written statements' with the effect that 'the first direct question the victim got was an aggressive question from the defence in cross-examination'.[118] Another interview participant raised concerns about the use of rule 92*ter* ICTY RPE, which allowed written witness statements to be admitted prior to cross-examination. It was argued that: 'the victims don't get a chance to tell their story under this format, they are just asked a few questions… and they turn it over to the defence to be cross-

[114] Interview 006.
[115] Interview 023.
[116] Victims can only participate as witnesses and the definition of victim is narrow including only direct victims. *See* Frisso, *supra* note 65, at 1101.
[117] *Ibid*. Frisso also discusses Rule 73*bis,* regulating the number of witnesses the Prosecution could call and the time available to the prosecution for presenting evidence. On the impact of the tribunal's reliance on written evidence on victim satisfaction, *see also* M. Dembour & E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 15(1) *European Journal of International Law* (2004) 151, at 159, cited by Frisso.
[118] Interview 009.

examined and then they are immediately challenged'.[119] The interview data supports references in academic literature to the negative implications of the ICTY's completion strategy for the tribunal's ability to engage with victim communities.[120] The potential for guilty pleas to exclude the interests of victims and affected communities, which has been discussed in academic literature,[121] was not mentioned in the interviews.

Ultimately, only one interviewee concluded that victim satisfaction had been negatively affected by the pursuit of efficiency at the ICTY.[122] The majority of interviewees did not consider efficiency building to have had a detrimental effect on the tribunal's contribution to victim satisfaction.[123]

5. The Risk of Quiet Transformation

The practice of the ICC, the ICTY and the ECCC indicates that the pursuit of efficiency is playing into tensions between the goals of international criminal tribunals, in particular by supporting the pursuit of speedy proceedings in a manner that can conflict with demand for fairness and victim satisfaction. While the interview

[119] Interview 001.
[120] Frisso, *supra* note 65, at 1101-1108.
[121] Jackson, *supra* note 20, at 22. For discussion of the implications of guilty pleas for reconciliation, *see* M. B. Harmon and Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes', 5 *Journal of International Criminal Justice* (2007) 683, at 702-3. S. Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms', 45 *Vanderbilt Journal of Transnational Law* (2012) 405, at 473-74. Turner, *supra* note 90, at 220-21.
[122] Interview 001.
[123] *See, for example,* Interviews 011, 018 and 019.

data gathered in this study cannot provide an exhaustive account of the extent of the impact of efficiency building on the ability of the institutions to realise their goals, given the limited number of interview participants, it does allow conclusions to be drawn about the way in which (re)balancing between goals is taking place. It indicates that where transformation in the balance between goals occurs, this is likely to happen 'quietly', for three reasons:

5.1. Tensions Arising in Different Contexts and Incremental Re-Balancing of Goals

The first is the range of contexts in which conflicts between competing goals are being raised within international criminal tribunals, which leads to tensions being resolved in a piecemeal manner. The interviews highlighted the diverse circumstances in which tensions were being raised and resolved, within and beyond the courtroom, in relation to different points of criminal procedure and institutional organisation. Tensions are raised not only by the introduction of procedural rules but also by how they are implemented.[124] Where tensions arise in the courtroom, there is also the potential that judges working in different chambers will approach them inconsistently.

The number of situations in which the goals of international criminal justice are coming into conflict with one another means that there are numerous opportunities to defend fairness and victim satisfaction against the pressure for efficiency. It does, however, also create the potential for the balance between these goals to change incrementally through the cumulative effect of multiple institutional, legal and practice changes taken at different levels and at different points in time. This, in turn, makes it more difficult to determine the overall impact of efficiency building on fairness and victim satisfaction. It creates a risk that the accumulation of measures

[124] *See* Section 4.2 above.

taken without an overarching view of their collective impact will gradually chip away at the ability of international courts and tribunals to ensure high levels of fairness and victim satisfaction, without attracting the attention that it warrants.

5.2. An Emerging Culture of Efficiency

Added to the above is the impact of a general consciousness or awareness of the need for efficiency that has become ingrained into the operation of international criminal tribunals. Interviews across the ICC, ICTY and ECCC indicated the extent to which concerns about efficiency had permeated the international criminal justice process and were being 'felt' by its participants and stakeholders. Reference was made not only to numerous institutional, legal and practice changes, many of which have been referred to above, but also to a more general awareness of the need to increase efficiency in the everyday activities of the institutions,[125] or the development of a 'culture' of efficiency.[126]

Interviewees described the demand for efficiency and efficiency-related reform as having emanated from within as well as and beyond the institutions.[127] While pressure from external stakeholders and funders of the institutions was noted, reference was also made to an internal drive for efficiency, rooted either in frustration at the length of proceedings or a sense of professional pride.[128] The interviews indicate that concern for efficiency has been internalised by at least some key figures in the international criminal justice process at the ICTY, the ICC and the ECCC. The development of a culture of efficiency is significant insofar as it contributes to the

[125] *See, for example,* Interviews 002, 005, 015.
[126] Interview 023.
[127] *See, for example*, Interviews 005 and 006.
[128] *See, for example*, Interview 023.

(conscious or unconscious) willingness to prioritise efficiency – and, with it, accountability – over other goals, including fairness and victim satisfaction.

5.3. Ambiguity as to the Scope of Fairness and Victim Satisfaction at the International Level

The third factor that contributes to the 'quietness' of the re-balancing between goals is the lack of clear boundaries to the concepts of fairness and victim satisfaction at the international level. Again, this makes it difficult to identify the extent to which realisation of these goals is being, or has been, undermined.

5.2.1. Fairness

A striking conclusion from the interviews was the lack of a clear point of reference when determining what fairness requires in the context of international criminal proceedings. When contemplating the impact of measures designed to increase the speed of proceedings on the rights of the accused, some interview participants made reference to practice in other international or domestic legal systems to justify the approaches that had been taken in the institutions they were associated with.[129] Others highlighted the lack of a point of reference in determining what fairness requires.[130]

The lack of an obvious point of reference has been highlighted in the literature on international criminal procedure and the concept of fairness at the international level.[131] Standards developed for domestic proceedings are of questionable relevance given the peculiarities and challenges of international criminal proceedings, such as

[129] Interviews 010 and 011.
[130] Interviews 010 and 017.
[131] *See generally* F. Mégret, 'Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 37. McDermott, *supra* note 55.

their distance from the crime scenes being addressed and their reliance on State cooperation. Domestic understandings of fairness are also problematic insofar as they are specific to particular legal systems. What may be seen as fair in the context of one system may not be viewed as fair in another.[132] Reference to international human rights law is also problematic. While international criminal tribunals have frequently referred to human rights jurisprudence in determining aspects of criminal procedure, and reference to this body of law has a foundation in the applicable law of the ICC,[133] the direction that it provides is limited. Mégret has highlighted that the human rights framework is 'too broad and under-determinative of the "right" procedure' to provide useful guidance.[134]

The overall standard to aspire to in international criminal proceedings is also disputed. At times, international criminal tribunals have asserted the need for a flexible standard.[135] Academic literature has advanced conflicting views on this point. In response to the argument that international criminal trials should merely aspire to be 'fair enough', McDermott has argued that international criminal tribunals should seek to uphold the highest standards of fairness.[136] In this study, the importance of

[132] See reference to the different approaches to fairness in different legal cultures in D. M. Groome, 'Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials', 25 *Penn State International Law Review* (2007) 791, at 793-94.
[133] Rome Statute, Art. 21. For discussion, *see* A. Jones, 'Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court', 16(4) *Human Rights Law Review* (2016) 701.
[134] Mégret, *supra* note 131, at 42.
[135] Mégret, *ibid.*, 39 ('as the ICTY put it, "the International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence"'). *See also* McDermott, *supra* note 55, p.36 ('In *Nikolić*, for example, the "Chamber observe[d] that these norms only provide form the absolute minimum standards applicable" which the Court could go beyond in ensuring due process… Judge Shahabuddeen, in a dissenting opinion in *Milosević*, stated that "the fairness of the trial need not require perfection in every detail. The essential question is whether an accused has had a fair chance of dealing with the allegations against him"').
[136] McDermott, *ibid.*, Chapter 5. For the argument that international procedure should be 'fair enough', *see* M. R. Damaška, 'Reflections on Fairness in International Criminal Justice', 10 *Journal of International Criminal Justice* (2012) 611, 616 (cited in McDermott). *See also* M. Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals', 36(2) *North Carolina Journal of International Law & Commercial Regulation* (2011) 365, 381; C. Warbrick,

adopting a 'gold star standard' in relation to the right to fair trial was highlighted by one interviewee from the ECCC as particularly important at the Court in light of its aim to influence and build capacity at the domestic level.[137]

The lack of a clear point of reference or overarching standard creates the risk that *any* procedural measures may be considered fair in the international criminal context. This point has been highlighted in relation to specific points of international criminal procedure. Writing about the admission of written statements and the rights of the accused, Jackson has argued that '[s]ince the rules leave considerable discretion to the courts to decide in each particular case whether to require witnesses who have made written statements to appear for cross-examination… it is hard to make the argument that the rules act unfairly upon the accused'.[138] In the present study, one interviewee noted that 'people might argue that… any time limit or page limit is potentially prejudicial'. [139] This may explain why the majority of participants that were interviewed ultimately concluded that the rights of the accused had been upheld.

In light of the above, it is possible that contemplation of adherence to the rights of the accused is reduced to what is reasonable in the context of an international criminal trial. The problem with reference to reasonableness is that it is context specific and subject to other prevailing demands, such as the interests of victims or rising concern for expeditiousness and increased productivity. As pressure for efficiency increases, the boundaries of fairness in international criminal proceedings may not be strong enough to resist deterioration.

'International Criminal Courts and Fair Trial', 3 *Journal of Armed Conflict Law* (1998) 45, at 54, cited in Mégret *supra* note 131, at 60.

[137] Interview 023.

[138] Jackson, *supra* note 20, at 30-31.

[139] Interview 011.

5.2.2. Victim Satisfaction

The concept of victim satisfaction also remains underdeveloped at the international level, perhaps even more so than the concept of fairness given the relatively recent emphasis on the centrality of victims to international criminal proceedings and paucity of jurisprudence on various victim-related issues. It is significant that pressure to increase the speed of the ICC's proceedings is taking place at a time when the Court's approach to victim participation and reparation are evolving and where there is uncertainty as to how the Court's aspirations in relation to victim satisfaction are to be achieved.[140]

Uncertainty as to the demands of victim satisfaction in international criminal trials was reflected in the interviews in this study. One interviewee referred to current ambiguity over what is meant by references within the ICC to meaningful victim participation or reparations.[141] Complex issues arise at several levels: identifying relevant victim communities, establishing their needs and wishes, and determining how they can be accommodated by international criminal justice institutions alongside pursuit of other goals, such as expeditiousness and respect for the rights of the accused. The interviews highlighted the existence of conflicting views of those within international criminal tribunals as to how central victim satisfaction can or should be to the international criminal justice process and what this would mean in practice, particularly in relation to victim participation. The lack of consensus on this issue makes it difficult to manage the expectations of victims, which was also

[140] Carayon and O'Donohue, *supra* note 107, at 578.
[141] Interview 024.

acknowledged in the interviews to be an important pre-requisite to victim satisfaction.[142]

Questions as to the Court's ability to ensure or promote victim satisfaction turned in one interview to discussion of compromise between the expectations of victims and what is possible, or reasonable, in the context of an international criminal trial.[143] Again, the lack of a clear point of reference or developed understanding of victim satisfaction at the international level makes the interests of victims difficult to protect when they come into conflict with demands for efficiency and allows for gradual deterioration of the concept of victim satisfaction over time.

5.2.3. Is Quietness Problematic?

Together, the ambiguous scope of the concepts of fairness and victim satisfaction, a growing culture of efficiency and the range of contexts in which competing goals are coming into conflict with one another contribute to the quietness of any re-balancing that is given to the goals of fairness and victim satisfaction vis-à-vis accountability. Such quietness is problematic insofar as it enables transformation in the functioning and overall function of international criminal justice institutions to take place without appropriate levels of scrutiny, debate and, where relevant, resistance. It increases the risk that significant changes as a result of cumulative developments are unchallenged and perhaps even under-appreciated. It also means that important policy questions highlighted above, such as the fairness standards to be applied in international criminal proceedings and the approach to victim satisfaction, have the potential to be overlooked as discrete institutional or procedural issues are addressed in isolation.

[142] Interview 007.
[143] Interview 011: '[T]here has to be a happy compromise found somewhere between the expectations of victims and the realities, and that's a terribly difficult equation to work through'.

6. Tackling the Quietness

It is beyond the scope of this article to engage in debate as to where standards of fairness and victim satisfaction in international criminal proceedings should lie and what they require in practice. The aim is, rather, to highlight the risk that transformation in the relative weight that is given to conflicting goals may happen incrementally, gradually and perhaps unconsciously over time. The quietness needs to be addressed to ensure that the balance that is struck is principled, given the importance of the interests at stake. Two measures are needed to address the potential for quiet transformation in the balance between competing goals.

The first is greater engagement with the policy issues that are raised by pressure for efficiency. The interview data referred to above highlights some areas where tensions have been raised, which can provide a point of focus for policy debate. The data also highlights the significant scope that exists for the sharing of best practice, given that tensions have arisen in similar areas within different international criminal justice mechanisms. An accumulation of best practice may help to show how tensions between accountability, fairness and victim satisfaction can be decreased or avoided altogether,[144] and to identify measures that could be taken to boost accountability without having a negative impact on other goals. It may also highlight measures that

[144] The interviews highlighted measures that could be taken to meet conflicting demands, such as keeping to strict trial deadlines while providing necessary resources to meet them, and the use of frequent status conferences to facilitate planning with the involvement of the parties. *See* Interview 023.

are not worth pursuing because of their limited or detrimental effect on efficiency, particularly where they have negative implications for fairness and victim satisfaction.[145] While recourse to best practice should not obscure the quest for original approaches to the reconciliation of conflicting goals, it may offer a useful point of reference in the development of international criminal procedure.

In addition to discussion of specific points of practice, there is need for richer debate about the broader issue of how fairness and victim satisfaction should be – and can be – realised at the international level, and what standards are being aspired to. There is need for greater consensus as to whether or not international criminal courts and tribunals are aspiring for the highest standards of fairness, or 'a relatively more expeditious justice – one imbued with a sense of urgency'.[146] If the reputation of international criminal justice does, as Damaška suggests, depend on keeping a 'core minimum' of fair trial demands intact,[147] it is necessary to establish what the minimum is and how this translates into specific elements of criminal procedure. A key question that arises in relation to victim satisfaction is the heavy reliance on victim participation as a route to victim satisfaction that is reflected in the practice of the ICC and the ECCC. Broader consensus on these issues is necessary in order to provide coherence in the case law and to manage expectations of both participants in the international criminal justice process and its observers.

The resolution of such debates will be an ongoing challenge for international criminal justice. What must be avoided is the casting aside of these discussions because of the quiet manner in which re-adjustment of the tensions between conflicting goals is

[145] *See* the counterproductive measures referred to in Section 4.1 above.
[146] Mégret, *supra* note 131, at 62.
[147] M. Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals', *supra* note 136, at 387.

currently taking place. The issue, at present, is that the debate around these issues is lacking, leaving important policy questions to be resolved in a piecemeal and unconscious manner.

Tackling the quietness also requires further, sustained empirical research into the impact of efficiency building on the goals of international criminal justice mechanisms. Understanding of past and current practice is a pre-requisite to informed policy debate, which has, to date, had a weak empirical basis. The interview data presented above has shown some areas where further empirical research could focus. It has also highlighted the importance of research into the collective impact of various measures taken over time, given the potential for changes in the balance between goals to take place through the culmination of various measures taken at different levels in any one institution. A birds-eye view of the cumulative impact of various procedural, institutional and legal changes would provide a firmer and more principled foundation for the resolution of discrete issues within or beyond the courtroom.

7. Conclusion

Pressure for more speedy justice is playing into tensions underlying the operation of international criminal courts and tribunals, with implications for the balance that is struck between their competing goals. There is potential for an era of un-met

expectations and a climate of financial restraint to quietly reshape the function of international criminal justice institutions, including the ICC, and the role that they can play in responding to international crimes. This article has highlighted the manner in which efficiency is playing into tensions between competing goals and the risk that rebalancing will take place quietly through incremental resolution of tensions by different actors in various contexts. It has also drawn attention to the potential for quiet transformation in the balance of conflicting goals to occur without sufficient engagement with the underlying policy issues at stake.

In response to these issues, two recommendations have been made. Firstly, there is need for more rigorous policy debate within and in relation to the institutions concerned as to the implications of efficiency building. This must take place on two levels: (i) greater certainty as to the nature and scope of the concepts of fairness and victim satisfaction at the international level and (ii) how this translates into specific points of procedure. The need for greater policy debate around the conflict between goals should not be taken to imply that the balance between conflicting goals should be taken out of the hands of judges, who are likely to be best placed to resolve tensions on a case-by-case basis. The purpose of the debate is to inform the decisions that are being made on the balance between goals, which are often rightfully resolved in the courtroom in response to the particular circumstances that have arisen and the needs of the affected stakeholders.

In order for policy debates to be informed, they must be underpinned by a deeper understanding of developments in practice. The second recommendation is, therefore, for continued empirical research. Greater understanding of the relationship between efficiency building and the goals of international criminal justice is essential for an

accurate picture of the impact of efficiency building to emerge, to understand the balance that is being struck between competing goals and to allow for the identification of best practice. Together, the combination of empirical research and policy debate will help to ensure that international criminal justice rises from its "fall" with greater consciousness as to its function and standards, and without unnecessary deterioration of the core values on which it is based.