‘Too High’, ‘Too Low’, or ‘Just Fair Enough’?

Finding Legitimacy Through the Accused’s Right to a Fair Trial

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Abstract

That an accused receives a fair trial is essential to the legitimacy of international criminal courts and tribunals. However, how best to interpret the right to a fair trial in order to maximize the legitimacy of international criminal courts and tribunals’ decision-making? Some argue that international criminal courts and tribunals should aspire to the highest standards of fairness and should aim to set an example for domestic courts in this regard. Others argue that the unique context within which international criminal courts and tribunals operate allows them, at times, to interpret the right to a fair trial in a way which falls below minimum international human rights standards. This article examines both of these positions and finds both to be problematic. Rather, the article argues that international criminal courts and tribunals should aim for a middle path, the ‘fair enough’ standard, when interpreting the right to a fair trial. In situations where a different standard than that found within international human rights law is applied, international criminal courts and tribunals should expend greater effort in being open and clear as to why this is so, and should take care in communicating this to their audience, including victims and the accused. By doing so, the legitimacy of their decision making will be enhanced.

1. Introduction

Once upon a time, a little girl called Goldilocks was walking in the woods, when she came across a cosy looking cottage. She pushed open the door to find that the cottage was empty, but standing on the table were three bowls of porridge, and Goldilocks was hungry. She tasted the porridge in the biggest bowl, but it was too cold; she tried the porridge in the medium bowl, but it was too hot; then she had a mouthful of porridge from the smallest bowl, which was just right, so she gobbled it all up. We all understand the idea that this part of the story conveys: the concept of something being not too one thing or another, but ‘just right’, the so-called ‘goldilocks effect’. Parallels can be drawn between the children’s story and a different tale being played out in the field of international criminal law, concerning the interpretation by international criminal courts and tribunals of an accused’s right to a fair trial.

The right to a fair trial is an integral part of international criminal law and is enshrined within the foundation documents of the different international criminal courts and tribunals.

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That an accused receives a fair trial is inherent to the legitimacy of international criminal courts and tribunals. While a fair trial may not be sufficient in itself to legitimize an international criminal court, an unfair trial would undermine its legitimacy.[1] This raises the question of how international criminal courts and tribunals should interpret the accused's right to a fair trial in order to maximize the legitimacy of their decision-making? Should international criminal courts and tribunals aim to interpret the right to a fair trial in the strongest or 'highest' way possible, or might it negatively impact the legitimacy of an international criminal court if the right to a fair trial is interpreted too strongly? Alternatively, does the unique context of international courts and tribunals allow these institutions to interpret certain human rights in a way that falls short of minimum international human rights standards, or would such a 'too low' approach damage their legitimacy? Or, rather would the legitimacy of international criminal courts and tribunals be best served by following Goldilocks' example of aiming for a standard that is not 'too high' or 'too low', but 'just right' by being fair enough?[2]

This article begins by discussing the concept of legitimacy and the right of the accused to a fair trial. Thereafter, it considers the arguments underpinning the three possible positions: Firstly, that the right to a fair trial should be interpreted as strongly as possible (the 'too high' standard); secondly, that the uniqueness of international courts and tribunals allows them to adopt weaker human rights standards than those set by international human rights law on occasion (the 'too low' standard); and thirdly, that the best way for international criminal courts and tribunals to reach a legitimate decision in relation to fair trial rights is to aim for an interpretation that is 'fair enough' or 'just right'.

2. Legitimacy and the Right of the Accused to a Fair Trial

International criminal courts and tribunals are unique institutions in that they are courts, criminal courts and international criminal courts.[3] As courts, they uphold and apply the law in a different way to other types of institutions, and their decisions have potentially far-reaching consequences that can extend beyond the immediate parties to the case. As criminal courts, as opposed to other forms of dispute settlement, they are concerned with determining individual

[1] A. Kiyani, 'The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Court', 8 *African Journal of Legal Studies* (2015) 1, at 27.
[2] M. Damaška, 'Reflections on Fairness in International Criminal Justice', 10 *Journal of International Criminal Justice* (*JICJ*) (2012) 611, at 616.
[3] S. Aambø Langvatn and T. Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals', in N. Hayashi and C. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2017) 41, at 46-47.

guilt, ensuring the accused receives a fair trial and determining the appropriate punishment. That they are international criminal courts adds an extra dimension, in that they are concerned with extreme acts of societal violence, often perpetrated on a massive scale and often resulting in political change. This unique nature of international criminal courts and tribunals, coupled with their relative newness on the international stage, means that they operate under constant anxiety as to their legitimacy.[4] They must work continually to build legitimacy and evidence its existence to the international community.[5]

Before proceeding further, it is necessary to reflect upon what is meant by the term 'legitimacy'. In literature, a key distinction is made between the normative legitimacy of an institution, which concerns whether it has a 'right to rule';[6] and its sociological legitimacy, namely whether the institution is perceived or believed to be legitimate. These two perspectives of legitimacy are not completely distinct from each other and can overlap to some degree.[7] The fairness of international criminal proceedings can impact upon both the normative and the sociological legitimacy of an international criminal court, and both will be touched upon in this article.

International criminal courts and tribunals build their legitimacy at different stages, beginning with how the court is established (source legitimacy), to how it operates once it is underway (process legitimacy), to the wider effects that it produces (outcome legitimacy).[8] Fairness is a key element in enhancing the process legitimacy of international criminal courts and tribunals. Indeed, some scholars argue that the fairness of an international criminal court has one of the most significant impacts upon its legitimacy.[9] David Luban, for example, states

[4] For example, see F. Mégret, 'The Anxieties of International Criminal Justice', 29 *Leiden Journal of International Law* (*LJIL*) (2016) 197, at 205-206.
[5] See Langvatn and Squatrito, *supra* note 3, at 51-52; J. Nicholson, 'Learning Lessons through the Prism of Legitimacy: What Future for International Criminal Courts and Tribunals?' in A. Kent et al., *The Future of International Courts* (Routledge, 2019) 162.
[6] A. Buchanan and R.O. Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Affairs* (2006) 405, at 405.
[7] Langvatn and Squatrito, *supra* note 3, at 43-44.
[8] *Ibid.*, at 51-52; Nicholson, *supra* note 5.
[9] International criminal courts and tribunals have themselves recognized that ensuring fair trials promotes their legitimacy. It follows that, in *Šešelj*, the ICTY noted that the right to a fair trial 'is not only a fundamental right of the Accused, but also a fundamental interest of the Tribunal related to its own legitimacy'. Decision on

that the legitimacy of international criminal courts and tribunals does not arise from the 'shaky political authority' that creates them, but rather, '[t]ribunals bootstrap themselves into legitimacy by the quality of the justice they deliver; their rightness depends on their fairness'.[10]

That fairness is a key factor affecting a court's legitimacy is not unique to international criminal law. This concept applies to every court whether civil or criminal, domestic or international. However, the peculiarity of international criminal courts and tribunals lends an additional piquancy to the notion. Unlike domestic criminal courts, such institutions are newcomers to the criminal justice system, and must accordingly work harder to build their 'legitimacy capital'[11] and persuade their constituencies of their effectiveness.[12] Research shows that, with respect to a court's sociological legitimacy, an individual's perception of the fairness of an institution's procedures is key to their showing deference to the court's decisions. For example, Tom Tyler explains that 'if people view or personally experience the authorities as making decisions fairly, they increasingly view them as legitimate. Over time, this legitimacy shapes deference, which becomes increasingly independent of the favourability of policies and decisions'.[13] Thus, if international criminal courts and tribunals can convince their constituencies, including both the accused and the victims of the alleged crimes, of their fairness, their sociological legitimacy will increase.

Prosecutor's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, *Šešelj* (IT-93-676-PT), Trial Chamber, 9 May 2003, § 21.

[10] David Luban is referring to the normative legitimacy. D. Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2012) 569, at 579.

[11] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions', in N. Grossman et al. (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018) 354, at 360.

[12] *Ibid.*, at 361-363. As Guido Acquaviva explains, the ICTY and ICTR 'by their very nature cannot rely on a long tradition of delivering justice and upholding the rule of law. Thus, in order to appear, and ultimately act, as legitimate bodies, it is essential to their mission that they strictly respect the rights of the accused'. G. Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations', 20 *LJIL* (2007) 613, at 618.

[13] T.R. Tyler, 'Social Justice: Outcome and Procedure', 35 *International Journal of Psychology* (2000) 117, at 120.

Observing fair processes also allows international criminal courts and tribunals to achieve other, wider goals. For example, an important goal is that of deterrence. Mirjan Damaška argues that international criminal courts and tribunals are intrinsically almost impotent, in that they must rely on the cooperation of states to carry out their functions successfully and they must achieve deterrence via the carrot rather than the stick. It is critical that judges of international criminal courts and tribunals spread a moral message that the commission of serious human rights violations is wrong and those responsible must be held accountable. In order to successfully accomplish this goal, these judges must be trusted by their audiences as a legitimate authority and must be perceived by them as fair. Thus, Damaška argues, fairness 'is the *sine qua non* for the successful cultivation of a goal which is, or should be, at the heart of their vocation'.[14]

Fairness is a broad concept, invoking overarching, expansive principles such as equality, impartiality and consistency.[15] It can apply to different parties within a criminal case, including the accused, victims and the prosecution. This article is concerned with a particular notion of fairness, namely the right to a fair trial as it pertains to the accused.[16] The right to a fair trial is a fundamental human right that is contained in several international human rights treaties.[17] The relevant human rights are regarded as minimum standards, which may not be breached.[18] In international criminal law, the accused's right to a fair trial applies by way of a two-tiered system. Firstly, some rights are explicitly contained within the statutes of the different courts.[19] Secondly, during judicial decision-making, courts draw upon international human rights law that exists outside their statutory regime, including regional and universal human rights

[14] M. Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals', 36 *North Carolina Journal of International and Commercial Law* (2011) 365, at 378 and 377. In addition, Judge Christine Van den Wyngaert held that: 'In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential … to scrupulously observe the fairness of the proceedings.' Minority Opinion of Judge Christine Van den Wyngaert, Judgment, *Katanga* (ICC-01/04-01/07-3436-AnxI), Trial Chamber, 7 March 2014, § 311 (hereinafter 'Minority Opinion of Judge Christine Van den Wyngaert').

[15] Y. McDermott, *Fairness in International Criminal Tribunals* (Oxford University Press, 2017), at 31.

[16] On whether victims and the prosecutor have a right to a fair trial, see *ibid.*, at 109-123.

[17] For example, Arts 14(1) and 26 International Covenant on Civil and Political Rights, Art. 6 European Convention on Human Rights.

[18] Masha Fedorova and Göran Sluiter state that: '[H]uman rights norms as laid down in international agreements are minimum standards to be applied within different legal and social contexts and every interpretation of these norms should be guided by this minimum nature'. M. Fedorova and G. Sluiter, 'Human Rights as Minimum Standards in International Criminal Proceedings', 3 *Human Rights and International Legal Discourse* (2009) 9, at 17-18. Also see Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Nikolić* (IT-94-2-PT), 9 October 2002, Trial Chamber, § 110.

[19] See Art. 21 ICTYSt., Art. 20 ICTRSt., Art. 17 SCSLSt., Art. 67 ICCSt.

instruments, customary law and general principles of law.[20] When interpreting the right to a fair trial, international criminal courts and tribunals have displayed reluctance to rely on jurisprudence from human rights bodies,[21] and there has been debate as to the precise extent to which these institutions are bound by human rights norms.[22] Commentators have pointed to a lack of clarity and consistency[23] in the interpretation and application by international criminal courts and tribunals of international human rights norms.[24] As there is a vital connection between the fairness of an international criminal court and its legitimacy, how should such a court interpret the accused's right to a fair trial?

3. 'Too High'?

One of the reasons advanced for the argument that international criminal courts and tribunals should strive to set the highest standards when interpreting the right of the accused to a fair trial is that these institutions amount to more than just the sum of their trials.[25] While international criminal courts and tribunals endeavour to achieve the goals of domestic criminal courts, including retribution, deterrence and rehabilitation, a number of other, broader goals are laid at their door.[26] Among these is the aim to promote the rule of law and set standards for domestic courts to follow, both within the societies in which international courts are involved and also for other jurisdictions.[27]

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[20] L. Gradoni, 'International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?' 19 *LJIL* (2006) 847, at 848.

[21] Famously, for example, the ICTY found in the *Tadić* Protective Measures Decision, that 'the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal'. Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Tadić* (ICTY IT-94-1-T), Trial Chamber, 10 August 1995, § 27. For an analysis of the approach taken by the ICC, see A. Jones, 'Insights into an Emerging Relationship: Use of Human Rights Jurisprudence at the International Criminal Court', 16 *Human Rights Law Review* (2016) 701.

[22] Fedorova and Sluiter, *supra* note 18.

[23] Frédérick Mégret, for example, argues that 'the tribunals' use of international human rights precedents is a little opportunistic and haphazard'. See F. Mégret, 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure', 24 *UCLA Journal of International Foreign Affairs* (2009) 37, at 52.

[24] For example, see Fedorova and Sluiter, *supra* note 18.

[25] Carsten Stahn submits that: 'It does injustice to international courts to judge effectiveness merely by a number of visible and quantitative outcomes, such as the number of cases or decisions that they render … . Some of the most important effects … are actually largely independent of the record of cases.' C. Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' 25 *LJIL* (2012) 251, at 264.

[26] See for example, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, UN Doc. S/2004.616, 23 August 2004, § 38.

[27] For a discussion concerning whether international criminal bodies are successful in this regard, see G. Dancy and F. Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions', 111 *American Journal of International Law* (2017) 689.

The view that international criminal courts and tribunals should adhere to the highest standards of fairness has been expressed by the courts themselves; by court officials; by members of civil society and by academics.[28] Both of the ad hoc tribunals have stated in their decisions that they aspire to set the 'highest standards of justice'[29] and serve as a 'model of fairness'[30] for other jurisdictions to follow. While the Statute of the Special Tribunal for Lebanon provides that when its judges adopt Rules of Procedure and Evidence for the tribunal, they shall be guided by reference materials 'reflecting the highest standards of international criminal procedure with a view to ensuring a fair and expeditious trial'.[31] Court officials have made statements to similar effect. For example, when assuming the Presidency of the International Criminal Tribunal for the former Yugoslavia (ICTY) for the second time, Judge Theodor Meron stated that he would work to ensure that the proceedings of the court would be concluded in a timely fashion 'while upholding the highest standards of fairness'.[32] Judge and Second Vice-President of the International Criminal Court (ICC), Hans-Peter Kaul has also spoken of his court as observing the 'highest standards of fairness and due process'.[33]

Human rights organizations, such as Human Rights Watch[34] and Amnesty International,[35] too have advocated that international criminal courts and tribunals should aim to achieve the highest standards of fairness. Furthermore, in an Expert Roundtable on fair trial and complementarity at the ICC held by the International Bar Association, panellists

[28] For a discussion of sources, see McDermott, *supra* note 15, at 131-133.
[29] Decision on the objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum, Blaškić* (IT-95-14-T), Trial Chamber, 18 July 1997, § 61.
[30] Separate Opinion of Judge Pavel Dolenc, Judgment, *Ntagerura et al.* (ICTR-99-46-T), Trial Chamber, 25 February 2004, § 5. See also, McDermott, *supra* note 15, at 131-133, for a discussion of other references to the highest level of standard setting.
[31] Art. 28(2) STLSt.
[32] ICTY Press Release, 'Statement of President Theodor Meron', 17 November 2011, available online at http://www.icty.org/en/press/statement-president-tribunal-%E2%80%93-judge-theodor-meron (visited 15 May 2019). See also the comments made by President Meron concerning the Mechanism for International Criminal Tribunals where he again referred to 'highest standards of fairness'. ICTY Press Release, 'President Meron Discusses Mechanism as a New Model of International Justice', 20 September 2016, available online at http://www.unmict.org/en/news/president-meron-discusses-mechanism-new-model-international-justice (visited 15 May 2019).
[33] Human Rights and the International Criminal Court, address by Dr. Jur. h.c. Hans-Peter Kaul, 21 January 2011, available online at https://www.icc-cpi.int/NR/rdonlyres/2C496E38-8E14-4ECD-9CC9-5E0D2A0B3FA2/282947/FINAL_Speech_Panel1_HumanRightsandtheInternational.pdf (visited 15 May 2019). Also see remarks by Antonio Cassese arguing for high standard setting concerning the broader issue of the conditions of detention for detainees at the Special Court for Sierra Leone. A. Cassese, *Report on the Special Court for Sierra Leone*, 12 December 2006, § 214.
[34] For example, see Remarks of Kenneth Roth, Human Rights Watch, Assembly of State Parties, 9 September 2002, available online at http://pantheon.hrw.org/legacy/campaigns/icc/docs/ken-icc0909.htm (visited 15 May 2019).
[35] Amnesty International, *States Must Strengthen, Not Abandon, Only Route to Justice for Millions of Victims*, 15 November 2016, available online at https://www.amnesty.org/en/latest/news/2016/11/icc-states-must-not-abandon-only-route-to-justice-for-millions-of-victims/ (visited 15 May 2019).

emphasised the importance of the ICC's position as a standard setting institution that should uphold the 'highest standards' of fairness.[36]

In scholarship too there have been pleas for international criminal courts and tribunals to set the highest standards of fairness when interpreting the accused's right to a fair trial. McDermott argues strongly in favour of this. One of the reasons she suggests for the standard setting function of international criminal courts and tribunals is to strengthen the legitimacy of these institutions, both in terms of their external audience, in that anything less than perfect standards can be pounced upon by detractors of the tribunal; and in terms of their internal 'audience', in that defendants will be more likely to defer to the authority of the tribunal if they perceive the procedure to be fair.[37]

At first glance, from a legitimacy perspective, it might appear to be a sensible proposition that international criminal courts and tribunals should aim for a high standard of fairness concerning the rights of the accused. If it is accepted that international criminal courts and tribunals have a standard setting function for domestic courts, then it seems logical that the standards should be set as high as possible. However, there are problems with this approach. What are the human rights standards that international criminal courts and tribunals should be measured against?[38] The extent to which international criminal courts and tribunals are bound by international human rights law remains unresolved. Rules laid down in international human rights instruments are not directly binding, as international criminal courts and tribunals are not party to these instruments. While there is consensus that international criminal courts and tribunals are bound by 'internationally recognized human rights',[39] there is uncertainty how this is to be interpreted in practice.[40]

If the bar is taken as being that of the standards set in international human rights instruments, which were drafted with a domestic context in mind, then to what extent should the particular circumstances within which international criminal courts and tribunals operate matter? As will be discussed in more detail below, there is merit to the argument that an

[36] International Bar Association, *Report on Fair Trials and Complementarity: An Experts' Roundtable Discussion Addressing Practice, Challenges and Future Perspectives*, 19 September 2017, at 15-16.
[37] McDermott, *supra* note 15, at 140-141. Also see C. Warbrick, 'International Criminal Courts and Fair Trial', 3 *Journal of Armed Conflict Law* (1998) 45, at 49.
[38] S. Vasiliev, 'Fairness and its Metric in International Criminal Procedure' (2013), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253177 (visited 15 May 2019).
[39] For example, see Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, *Lubanga* (ICC-01/04-01/06-722), Appeals Chamber, 14 December 2006, § 37.
[40] Fedorova and Sluiter, *supra* note 18.

international criminal court operate within a particular context that affects how human rights protections should be interpreted by them. International criminal courts and tribunals must overcome many challenges which domestic courts either do not face, or face to a lesser degree, for example lack of state cooperation; difficulties in obtaining evidence and access to victims and witnesses. This means that the interpretation of particular human rights norms by these institutions will not necessarily be the same as their interpretation in the context of domestic courts. Comparing the application of human rights at domestic and international levels is not necessarily comparing like with like, meaning that an ambition that international criminal courts and tribunals should set the 'highest standards of fairness' for domestic courts to follow may be rendered relatively meaningless.

On the other hand, the measure for the 'highest standards of fairness' could be other international criminal courts and tribunals. However, this raises the question of how comparable the different courts are in this respect. Each international criminal court is a unique, standalone institution operating within a particular context and is bound by the terms of its Statute as to the sources it may refer to.[41] The operating conditions of the courts are markedly different: for example, the Extraordinary Chambers in the Courts of Cambodia and the Kosovo Specialist Chambers have the advantage of a greater degree of state cooperation than the ICC, meaning that the right to a trial without undue delay may be interpreted differently at the ICC.

Another question is whether international criminal courts and tribunals are suitable institutions for setting human rights standards in the first place. International criminal courts and tribunals have an erratic record when it comes to referring to case law from human rights institutions. They have been criticized for among other things: using false analogies when relying on jurisprudence from human rights institutions;[42] applying legal tests inaccurately; and generally relying on case laws from these institutions inconsistently.[43] As international criminal courts and tribunals are not always a reliable source of guidance on human rights matters, they do not necessarily provide a good role model for national jurisdictions to follow.[44]

A further difficulty with the 'highest standards' ambition, is that it begs the question of whether it applies in relation to each element of the accused's right to a fair trial, or to the

[41] For example, Art. 21(1) ICCSt.
[42] S. Vasiliev, 'Cross-fertilisation under the Looking Glass: Transjudicial Grammar and the Reception of Strasbourg Jurisprudence by International Criminal Tribunals', Grotius Centre Working Paper (2017), at 12-14.
[43] *Ibid.*, at 14-18.
[44] *Ibid.*, at 27.

fairness of the trial as a whole.[45] An example of this is the right to self-representation. The right of the accused to represent themselves at trial is contained in human rights treaties and within the statutes of several international criminal courts and tribunals.[46] In the context of domestic criminal courts, the right to self-representation has not been found to be absolute. The European Court of Human Rights (ECtHR), for example, has held that although national courts must take into account the defendant's wishes when appointing defence counsel, these wishes may be overridden when there are 'relevant and sufficient grounds for holding that it is necessary in the interests of justice.'[47] The ICTY in particular has struggled with defining the right, and has undergone several changes of tack, including from finding it to be an absolute right facilitated by an *amicus curiae*, to being facilitated by standby counsel, to an 'absolute right to defend oneself'[48] with the assistance of counsel.[49] From a legitimacy perspective, that the ICTY opted towards overprotecting the right of the accused to represent themselves is understandable. As Combs explains, initially, the ICTY was 'weak and vulnerable; defendants viewed it with hostility, and outside observers viewed it with scepticism'.[50] The court had to afford defendants autonomy over their selection of, and whether to eschew, counsel in order to bolster perceptions that it was fair, both among the defendants themselves, and among the court's audiences. As the years passed, and the tribunal's legitimacy and credibility increased and its confidence grew, it was able to reduce the defendant's control over these processes.[51] However, there were costs in prioritising one particular right of the accused, the right to self-representation, over other of their rights: the ICTY has been criticised for trying too hard to accommodate the wishes of the defendant at the expense of the interests of justice. For example, Schomburg argues that 'The overly doctrinal approach to permitting self-representation must yield to the fundamental right to a fair, public and expeditious trial.'[52] Pursuing a policy of setting a high standard of

[45] 'It is not good enough that most of the trial has been fair. All of it must be fair'. Minority Opinion of Judge Christine Van den Wynaert, § 311.
[46] For example see Art. 24(3)(d) International Covenant on Civil and Political Rights, Art. 21(4)(d) ICTYSt., Art. 20(4)(d) ICTRSt., Art. 17(4)(d) SCSLSt., Art. 67(1)(d) ICCSt.
[47] See *Croissant v. Germany,* ECtHR, Appl. No. 13611/88, 25 September 1992, § 29. Also see *Lagerblom v. Sweden,* ECtHR, Appl. No. 26891/95, 14 January 2003, § 54; *Mayzit v. Russia*, ECtHR, Appl. No. 63378/00, 20 January 2005, § 66.
[48] W. Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights', 8 *Northwestern Journal of International Human Rights* (2009) 1, at 16.
[49] See *ibid.,* at 16-21. See also N.A. Combs, 'Legitimizing International Criminal Justice: The Importance of Process Control', Faculty Publications (2012), at 347-357.
[50] Combs, *ibid.,* at 377.
[51] *Ibid.,* at 377-380.
[52] Schomburg, *supra* note 48, at 21. Also see N.H.B. Jørgensen, 'The Right of the Accused to Self-representation Before International Criminal Tribunals', 98 *The American Journal of International Law* (2004) 711. Also see Vasiliev who states that 'it strikes the wrong balance between the individual autonomy and the interests of justice, thereby undermining the integrity of the proceedings and creating, rather than averting, the risk of unfairness towards the accused'. Vasiliev, *supra* note 38, at Section 3.2.

interpretation concerning one element of the accused's right to a fair trial can cause a decrease in the overall fairness of the trial for the accused and of the fairness of the trial as a whole.

To summarize, while on the face of it, it may seem that the ambition of aiming for the highest standards of fairness concerning the interpretation of the right to a fair trial is desirable, the reality is more complex. It is not necessarily clear what human rights standards international criminal courts and tribunals are being measured against. Furthermore, an interpretation of a particular fair trial right over others can be 'too strong' or 'too high' and can damage the legitimacy of the court's decisions as a result. Indeed, the push to aim for the highest standards is perhaps reflective of the over-optimism that has surrounded international criminal courts and tribunals in the past, placing unrealistic goals on these courts, when perhaps a greater degree of modesty as to what they can achieve may be more conducive to increasing their legitimacy.[53]

4. 'Too Low'?

The second perspective flows from the proposition that international criminal courts and tribunals operate within a markedly different context to national courts. This context should be taken into account when interpreting human rights protection. Indeed, it may justify an international criminal court in applying standards that fall below the minimum standards set by international human rights instruments.[54]

There are several reasons behind the argument that international criminal courts and tribunals are unique institutions.[55] First, crimes falling within the ambit of international criminal courts and tribunals are, generally speaking,[56] of a more serious character than domestic crimes.[57] Second, international criminal proceedings tend to be more complex than those within a domestic context. International criminal courts and tribunals are often required to investigate

[53] Nicholson, *supra* note 5, at 177.
[54] For example, see A. Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks', in M. Bergsmø (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in honour of Asbjørn Eide* (Martinus Nijhoff Publishers, 2003) 19, at 22, 26; M. Damaška, 'Should National and International Justice be Subjected to the Same Evaluative Framework?' in G. Sluiter et al. (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013) 1418, at 1418.
[55] J. Geneuss, 'Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law', 84 *Nordic Journal of International Law* (2015) 404, at 412.
[56] Domestic courts may also, at times, adjudicate over crimes which are arguably comparably serious. See C. Deprez, 'The Gravity of International Crimes as a Challenge to the (Full) Protection of Human Rights before International Criminal Tribunals? A Strasbourg Perspective', 86 *Nordic Journal of International Law* (2017) 499, at 506.
[57] For example, Preamble ICCSt. holds that the crimes that fall within its jurisdiction are 'unimaginable atrocities that deeply shock the conscience of humanity'. Warbrick states that 'the very seriousness of the charges means that only limited analogies may be made with domestic processes at large'. Warbrick, *supra* note 37, at 53.

potential crimes in situations of ongoing conflict and must gather evidence and access victims and witnesses in difficult environments. The sheer amount of evidence, coupled with the wide geographical and temporal scales that are involved, may cause additional challenges that domestic courts do not face. Third, unlike domestic courts, international criminal courts and tribunals have no police service on which they can rely. They are dependent on state cooperation in order to fulfil their functions- to carry out investigations, collect evidence and apprehend suspects. Finally, as has been touched on already, international criminal courts and tribunals have wider goals than the traditional goals of domestic courts. These include bringing to justice those responsible for serious violations of human rights and international humanitarian law, putting an end to such violations and preventing recurrence, securing justice and dignity for victims, establishing a record of events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.[58]

Although a contextual interpretation of international human rights law does not necessarily mean that the human rights of the accused will be affected in a negative sense, in practice this tends to be the result. Carsten Stahn, for example, observes that 'one notices the harmful tendency that this so-called re-interpretation of the human rights corpus in light of the unique character and circumstances of international criminal tribunals practically by definition results in reduced protection, and always favours the interests of the prosecution and/or victims over those of the accused'.[59]

When examining the jurisprudence of international criminal courts and tribunals it is not difficult to identify examples where lower standards of protection have been applied than those found in international human rights law. For instance, concerning pre-trial detention — connected to the right to be presumed innocent and the right to liberty —[60] individuals accused of international crimes at the ad hoc tribunals can be detained for years before the trial begins. Originally, the rules of procedure and evidence at the ad hoc tribunals allowed for provisional release only in 'exceptional circumstances'.[61] This threshold to qualify for release was substantial and few applications were granted. The rules for both tribunals were later amended

[58] See *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, UN Doc. S/2004.616, 23 August 2004, at 38.
[59] G. Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) 459, at 461. Also see Geneuss, *supra* note 55, at 410.
[60] Art. 14(2) International Covenant on Civil and Political Rights, Art. 6(2) European Convention on Human Rights, Art. 8(2) American Convention on Human Rights, Art. 7(2) African Charter on Human and Peoples' Rights.
[61] Rule 65(B) ICTY RPE, Rule 65(B) ICTR RPE.

to allow for provisional release in certain circumstances.[62] However, even under the more lenient rules, there continued to be a number of crucial differences between the approach to the right to liberty at the ad hoc tribunals and international human rights law.[63] For example, the burden was on the accused to raise the issue of release, whereas under human rights law it is the prosecutor who would request that the accused be remanded in custody.[64] Furthermore, the accused had to prove that they would not pose a flight risk or obstruct proceedings in the event that their motion was successful; whereas under human rights law the opposite is true. These represent important deviations from international human rights law and operate to the detriment of the accused.

Admittedly, the situation concerning pre-trial detention at the ad hoc tribunals improved over the years as the tribunals grew in confidence and experience. This growth in experience is perhaps reflected in the ICC Statute, where the pre-trial detention process is notably different from that of the ad hoc tribunals. In order to justify arrest and provisional detention, there must be the persistence of a reasonable suspicion, and thus, the burden of proof is on the authorities to prove the need for interim detention. Furthermore, the ICC Statute imposes an obligation upon the Pre-Trial Chamber to release the accused in the event that his or her continued detention is not necessary to ensure appearance at trial, to ensure the accused does not obstruct or endanger the investigation or to prevent the accused from continuing the commission of a crime with which he or she is charged.[65] This corresponds to the reasons for justifying detention found in international human rights law. At the ICC, the burden of proof is on the prosecutor to show that continued detention is required. However, concerns have been raised as to how the ICC interprets the right in practice. For example, that the court's assessments as to whether a trial or period of detention has been unduly prolonged do not correspond to how reasonable lengths of detention have been applied in international human rights law.[66] In addition, the ICC has required state guarantees as a precondition for granting provisional release. Thus, in practice, the ICC has applied lower standards of human rights protection than under international human rights law.

[62] If proven that the accused would re-appear for trial and would not pose a danger to witnesses and victims while on release, see Rule 65(B) ICTY RPE.
[63] K. Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualisation* (T.M.C. Asser Press, 2016), at 241-244.
[64] For example, see Decision on Mr. Perišić's Motion for Provisional Release, *Perišić* (IT-04-81-T), Trial Chamber, 31 March 2010, § 12.
[65] Arts 61(2) and 58(1) ICCSt.
[66] Zeegers, *supra* note 63, at 279-283.

A second example where international criminal courts and tribunals have applied a lower standard of human rights protection concerns the right to trial without undue delay.[67] These institutions are notorious for the length of time that their proceedings take. Moreover, such courts have been very reluctant to make a finding that the right to trial without undue delay has been violated and that prejudice to the accused has occurred.[68] International criminal courts and tribunals, in particular, the ad hoc tribunals, have tended to rely on the complexity of the cases before them as a reason to justify the lengthy proceedings when determining whether undue delay has occurred.[69] Pursuant to human rights law, while the complexity of the case is a valid factor to be taken into account when assessing whether undue delay has occurred, it is not the only one.[70] International criminal courts and tribunals have been criticized for over-relying upon the complexity of their proceedings as a justification for finding that undue delay has not occurred.[71] Furthermore, international criminal courts and tribunals have introduced other factors when determining undue delay that are generally not found within the case law of human right courts. These factors include the requirement that prejudice be established,[72] and having regard to the gravity of the crimes charged.[73] As Krit Zeegers notes, relying on the gravity of the charges suggests that individuals who are charged with more serious crimes are entitled to a lesser degree of human rights protection than other accused.[74]

A third instance of a lower standard protection in international criminal law concerns the right of a former defendant to compensation following an acquittal.[75] The statutes of the ICC and the Special Tribunal for Lebanon are the only instruments containing provisions

[67] For example, Art. 21(4)(c) ICTYSt., Art. 20(4)(c) ICTRSt., Art. 67(1)(c) ICCSt.
[68] For example, see Decision on Oral Request of the Accused for Abuse of Process, *Šešelj* (IT-03-73-T), Trial Chamber, 10 February 2010, § 30 (hereinafter 'Decision on Abuse of Process, *Šešelj*'). For exceptions, see Judgment, *Gatete* (ICTR-00-61-A), Appeals Chamber, 9 October 2012, § 44 (hereinafter '*Gatete* Appeal Judgment'); Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, § 397.
[69] For example, see *Gatete* Appeal Judgment, §§ 24-29.
[70] Other factors to be taken account are whether any delays can be attributed to the conduct of the defendant or the conduct of the authorities and whether prejudice was suffered by the accused. For example, see *Idalov v. Russia*, ECtHR Appl. No. 5826/03, 22 May 2012, § 186; *Sizov v. Russia*, ECtHR, Appl. No. 58104/08, 25 July 2012, § 59.
[71] Zeegers, *supra* note 63, at 349. McDermott states that: 'The complexity of international criminal trials alone should not itself serve as sufficient justification for judicial derogations from the right to a speedy trial.' McDermott, *supra* note 15, at 55.
[72] Decision on defence motion for prompt scheduling of appeal hearing, *Halilović* (ICTY, IT-01-48-A), Appeals Chamber, 27 October 2006, § 17; Judgment, *Nahimana et al.* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, § 1074; Judgment, *Bagosora et al.* (ICTR-98-41-T), Trial Chamber, 18 December 2008, § 75, *Gatete* Appeal Judgment, §§ 30-31.
[73] For example, with respect to the ICTY, see Decision on Abuse of Process, *Šešelj*, § 30. Also see Zeegers, *supra* note 63, at 329-332.
[74] Zeegers, *supra* note 63, at 349.
[75] Arts 9(5) and 14(5) International Covenant on Civil and Political Rights, Art. 5(5) European Convention on Human Rights, Art. 3 Protocol No. 7, Convention for the Protection of Human Rights and Fundamental Freedoms.

entitling a person to compensation who has been the victim of an unlawful arrest or detention or who has been convicted and subsequently acquitted following a miscarriage of justice.[76] To date, the ICC has yet to grant a request for compensation under Article 85 of the ICC Statute.[77] The ICTY denied requests for compensation on the basis that neither its Statute nor its RPE contained a specific provision on the matter.[78] In contrast, the International Criminal Tribunal for Rwanda (ICTR) held that it had the inherent power to grant an appropriate remedy to redress any violation of the rights of an accused. This power may include, depending on the circumstances, financial compensation.[79] However, in practice, the ICTR has taken a strict approach as to whether compensation should be awarded, and indeed has only awarded it in one case.[80] This lack of access to compensation following grave violations of the human rights of the accused has led to criticism that 'the presumption of guilt is alive and well in international justice'.[81]

The above analysis — concerning the right to liberty, the right to a trial without undue delay and the right to compensation — provides a sample of occasions where the standards of human rights applied by international criminal courts and tribunals have arguably fallen below those in international human rights law. Decisions of an international criminal court that ostensibly apply lower standards of human rights protection have the potential to negatively impact upon their legitimacy.[82] Accused persons who form the impression that their human rights are not being respected will be less likely to respect the decisions of the tribunal Moreover, badly reasoned decisions may lead to wider criticism from other observers of the court, including victims. However, there are conceivably good grounds for having a 'lower' bar concerning a particular fair trial standard at an international criminal court than might apply in international human rights law. There are different constraints and practicalities in trying cases

[76] Art. 85 ICCSt., Rule 170(D) STL RPE.
[77] See Decision on the 'Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome', *Ngudjolo Chui* (ICC-01/04-02/12), Trial Chamber, 16 December 2015. At the time of writing, the decision in the *Bemba* case is pending.
[78] *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. A/57/379-S/2002/985, 4 September 2002, § 28.
[79] Decision on Appropriate Remedy, *Rwamakuba* (ICTR-98-44C-T), Trial Chamber, 31 January 2007, § 66. Also see Judgment, *Kajelijeli* (ICTR-98-44A-A), Appeals Chamber, 23 May 2005, § 322; Decision, *Barayagwiza* (ICTR-97-19-AR72), Appeals Chamber, 3 November 1999, § 75.
[80] In *Rwamakuba*, the defendant was awarded 2,000 US dollars for having been denied a lawyer for the following his arrest. Also see Decision on Appeal against Decision on Appropriate Remedy, *Rwamakuba* (ICTR-98-44C-A), Appeals Chamber, 13 September 2007.
[81] B.S. Lyons, 'Litigating for Compensation for the Acquitted', *IntLawGrrls*, 21 November 2015, available online at https://ilg2.org/2015/11/21/litigating-compensation-for-the-acquitted/ (visited 15 May 2019).
[82] For an example, see *ibid*.

before an international criminal court than before a domestic one. The interpretation of human rights by international criminal courts and tribunals to take account of the specific context of international criminal justice is not problematic in and of itself. This leads back to the story of Goldilocks.

5. 'Just Right'?

There are several things which international criminal courts and tribunals can do in order to achieve the elusive Goldilocks standard and issue a decision which achieves a balance of 'just right' or 'fair enough' when interpreting an accused's right to a fair trial. First, it should be accepted that a contextual interpretation of human rights within international criminal law does not detract from the legitimacy of an international criminal court. [83] International criminal courts and tribunals are distinct from domestic courts in many important ways and accordingly, how they interpret and implement human rights standards could be different. For instance, they face different constraints to domestic systems, both concerning the nature of the crimes which are prosecuted before them and the practicalities that are involved in prosecuting such cases. That human rights should be adapted to fit particular contexts is no great surprise. This happens constantly within international human rights law, notably the margin of appreciation principle applied by the ECtHR. Although international criminal courts and tribunals do on occasion taken time to explain why a contextualized interpretation is warranted, they should be more consistently bolder and clearer in doing so.[84]

Indeed, the key to ensuring that the decisions handed down by an international criminal court concerning the interpretation of the right to a fair trial do not negatively impact the legitimacy of the institution is through solid legal reasoning and communication. Previously, the use of case law from human rights courts by these institutions has been selective and inconsistent.[85] When departing from human rights law standards, international criminal courts and tribunals have not always sufficiently acknowledged this or provided justification.[86] Instead, international criminal courts and tribunals should provide a considered overview of the relevant jurisprudence from international human rights law and produce a reasoned decision

[83] Mégret, for example, argues that 'international criminal courts should not feel obliged to "shoot themselves in the foot" by too rigidly adhering to principles developed for application in other contexts'. See Mégret, *supra* note 24, at 67. Also see Damaška, *supra* note 2, at 619.
[84] For example, see Judgment, *Nahimana et al.* (ICTR-99-52-A), Appeals Chamber, 28 November 2007, § 1076.
[85] Zeegers, *supra* note 63, at 336.
[86] *Ibid.*, at 349.

explaining why a different approach is warranted within the context of both international criminal law and the court itself.[87]

Crucially, international criminal court and tribunals must effectively communicate and explain their reasoning to their audience.[88] This is particularly important concerning outreach to victims. Victims need to be informed in a clear and understandable way as to why and how a particular decision has been taken. This would allow victims to evaluate for themselves whether the processes are fair and would greatly add to the sociological legitimacy of the court.

Although the context of international criminal law may be taken into account when interpreting fair trial rights, it cannot be in a manner that falls below minimum human rights standards.[89] However, these minimum standards may not necessarily reflect those applied in international human rights law. Instead, the minimum standards forming the benchmark for measurement should arise within the context of international criminal law or, potentially, where justified, within the context of a particular an international criminal court. Again, however, this has to be explained and justified within the judgment and must be communicated to the court's audience.

International criminal courts and tribunals should carry out a balancing exercise when interpreting fair trial rights in two respects. First, they should balance the different elements of the accused's right to a fair trial to ensure that favouring one right does not lead to under protection concerning other rights. Thus, for example, as was discussed above, an international criminal court needs to ensure that a strong interpretation of the right to self-representation does not impact the accused's right to a trial without undue delay.[90]

In addition, a balancing exercise should take place between the right of the accused to a fair trial and the right of other participants to a fair trial. Whether other actors, including the prosecutor, victims and witnesses, have a 'right' to a fair trial is somewhat controversial. A number of courts have found that the prosecutor has a 'right' to a fair trial,[91] whereas others have focused more on whether there is an equality of arms between the prosecution and the

[87] An example is the *Butare* case, where the Appeals Chamber took time to examine in detail the allegation of the accused that the trial, one of the lengthiest in history, violated their right to a trial without undue delay. See Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, §§ 348-380.
[88] Zeegers, *supra* note 63, at 349.
[89] Sluiter, *supra* note 59, at 461; Deprez, *supra* note 56, at 508.
[90] For an example of an international criminal court acknowledging the need for such a balance, see Judgment, *Karadžić* (MICT-13-55-A), Appeals Chamber, 20 March 2019, § 90.
[91] Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, *Ayyash et al.* (STL-11-01/T/TC), Trial Chamber, 3 April 2015, § 47.

defence.[92] There has been increasing recognition of the need to recognise the rights of victims and witnesses in international criminal proceedings.[93] However, ultimately when carrying out this balancing act, it is the accused who should feature foremost, as it is they who must endure the consequences of a criminal process that is carried out unfairly. As Damaška writes: 'The ghost of innocent men convicted must continue to hover over international criminal justice just as it hovers over domestic criminal law enforcement. It is for good reasons that in enumerating "fair trial" rights, international human rights documents mention only rights belonging to persons charged with criminal offences.'[94]

6. Conclusion

International criminal courts and tribunals can learn a lesson from Goldilocks when interpreting the right of the accused to a fair trial. While on the face of it, it might seem desirable for international criminal courts and tribunals to aim to set the highest standards concerning the fair trial rights of the accused, from a legitimacy perspective this may not be the best thing to do. The aspiration follows a general tendency within the field of international criminal law towards over-expectation and over-optimism as to what an international criminal court can achieve. Aiming for the 'highest standards' is an opaque and ultimately unrealistic ambition that needlessly raises the expectations of the audience, including the expectations of the accused and victims. While ensuring that the accused receives a fair trial should lie at the heart of any international criminal proceedings, there is also a need for an injection of realism and modesty as to what this means in practice. More reflection is needed upon what setting the 'highest standards' of fairness means. Direct comparisons with how international human rights norms are applied in domestic situations is the wrong standard for comparison with international criminal courts and tribunals. That there be a top down approach from international courts and tribunals to domestic courts concerning many elements of the right to a fair trial may not be

[92] See G. McIntyre, 'Equality of Arms: Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia', 16 *LJIL* (2003) 269. McDermott is highly critical of this position. She argues that: 'The crude balancing act that pits the Prosecutor's "rights" against the accused's right to a fair trial is neglectful of every court's fundamental role in protecting the rights of the defendants deprived of their liberty and facing trial before it. In allowing those rights to be "balanced" against the interests of the prosecution, which is already in a privileged position deriving from its role as an organ of the court, these decisions effectively create an imbalance to the detriment of the accused.' McDermott, *supra* note 15, at 116.

[93] Under Art. 68(3) ICCSt., victims are permitted to participate 'in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. The Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia also provide for some victim participation. For example, see A. Pues, 'A Victim's Right to a Fair Trial at the International Criminal Court? Reflections on Article 68(3) of the Rome Statute', 13 *JICJ* (2015) 951.

[94] Damaška, *supra* note 2, at 615. See Minority Opinion of Judge Christine Van den Wynaert, § 311.

possible or indeed desirable. A better metric for comparing human rights standards might be to compare one international criminal court against standards set by other international criminal courts and tribunals or indeed the standards that apply within a specific court. By doing so, the aim to set the highest standard may become more meaningful and achievable. Aiming 'too high' does not aid the legitimacy of a court.

At the same time, international criminal courts and tribunals must not over rely on their unique context to justify or excuse an undue lowering of human rights norms. The minimum standard of human rights within international criminal law can be different to that within international human rights law. However, in this case, international criminal courts and tribunals should be careful in explaining precisely why this so. In order to be legitimate, decisions which result in a lower level of protection for the accused should be carefully reasoned and meticulously explain why the interpretation is justified following a full evaluation of the facts and the law. Furthermore, this reasoning must be effectively communicated through outreach initiatives.

The key to international criminal courts and tribunals issuing legitimate decisions is through legal reasoning, taking full account of international human rights standards, and being open and clear about the reasons why they do not apply within a particular case- whether due to the context the court operates in, or the need to balance a particular fair trial right with other valid considerations. By doing so, international criminal courts and tribunals can issue a decision that is 'just right'.