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Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol36/iss2/5
The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals

Mirjan Damaška†

I.

International criminal tribunals find themselves in a rather unenviable position. Their major task is to put an end to the impunity of individuals who are most responsible for horrendous crimes that threaten the well-being of the international community.¹ Producing convictions is thus high on their list of priorities. Incongruously, however, they lack indigenous enforcement powers, depending totally on outside help—primarily of states—for such basic requirements as securing custody of defendants, or obtaining evidence. But since crimes within their jurisdiction are often committed through political structures, support for their operation is not always forthcoming: governments can be hostile to their activity. Moreover, even if the needed cooperation is assured, trying international crimes remains a very difficult enterprise: the complexity of problems involved in processing them has few parallels with the prosecution of ordinary crimes by national criminal courts. Mass victimization and systemic perpetration that characterize international criminality are only part of the reason. Another is that international criminal tribunals aspire to achieve goals that exceed or complicate those of national criminal law enforcement, such as their ambition to establish a broader historical record of crime-producing events, or to contribute to peace and security.²

Despite all the difficulties inherent in bringing culprits to justice, international criminal tribunals profess their devotion to fair procedure and declare their readiness to abide by its exacting

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² For the cornucopia of goals set for the International Criminal Tribunal for former Yugoslavia, see Minna Schrag, Lessons Learned from the ICTY Experience, 2 J. INT’L CRIM. JUST. 427, 428 (2004).
standards. Is it not likely, however, that the heavy burden of their demanding tasks—coupled with their frustrating indigenous weakness—places these standards under greater stress than is the case in the environment of domestic criminal prosecutions? Imagine the prosecution of a high governmental official for an egregious international crime which has produced mass victimization: several thousands of crime victims clamor for justice and expect to receive satisfaction from the accused official’s conviction. But his government refuses to cooperate with the tribunal and is unwilling to surrender some incriminating documents. Fearing for his life, a credible prosecution witness refuses to testify unless permitted to do so anonymously.

Some reliable items of incriminating evidence have been obtained during an improperly executed premises search, or by an electronic intercept whose manner of acquisition cannot be revealed because of promises given to the government whose secret service obtained the information. Although the untainted evidence available in the case is strong enough to make the defendant’s guilt quite likely, it fails to meet the standard of proof beyond a reasonable doubt. Does this far from fanciful scenario not suggest that it is harder for international than for domestic criminal judges to reject anonymous testimony, or to exclude the fruits of technically illegal searches? Does it not suggest that international judges might be more tempted than their national counterparts to depart sub silentio from the postulated standard of proof sufficiency? Generally speaking, could the rigid observance of fair procedure not compromise the ability of international criminal tribunals to put an end to the impunity of prominent human rights violators?

The pages that follow are devoted to reflections on this sensitive issue that is often shrouded in a fog of vaporous pieties.

II.

In order to set the stage for considering the situation in international criminal courts, we must first glance at the ethical-legal principle of fairness in national legal systems where it first appeared. The idea of fairness is usually associated with English legal and political developments, and traced back to the thirteenth century Magna Carta. It would be wrong to believe, however, that the thought of compromising crime control for the sake of other
values—including the defendant’s dignity—was entirely absent even from the continental procedure of the ancien régime, despite its residence in the doghouse of legal history. Yet despite sporadic and largely ineffective measures prompted by what we might classify as humanistic values, it was only in the liberal ideological climate of the late eighteenth and nineteenth centuries that legal provisions appeared capable of seriously complicating the realization of governmental punitive impulses. In America, such provisions were interpreted as concretizations of the constitutionally enshrined due process idea, and in England were seen mainly as manifestations of “natural justice.” Continental Europe, on the other hand, lacked an organizing principle of this scope until the mid-twentieth century, when, under the influence of the Anglo-American legal vernacular, the principle of fair procedure made its appearance in the law. The principle rapidly established itself in legal discourse and court practice.

Although the demands of fairness were originally conceived solely as protection of the defendant against abuses of governmental power, a measure of uncertainty about the reach of

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3 Rudiments of due process concerns in this procedure were thought to be required by natural law. On the important citatio-defensio demands of natural law, see G. Gorla, *Iura Naturalia sunt Immutabilia*, in *Diritto e Potere nella Storia Europea: Atti in Onore di Bruno Paradisi* 629, 639 (Leo S. Olschki ed., 1982). Rudiments of these concerns can be found even among its rules on the permissible use of coercive measures to extract evidence from defendants. For example, one of the greatest authorities of the inquisitorial process in the seventeenth century, the German Benedict Carpzov, insisted that the defendant’s dignity (dignitas rei) is an important reason for the exemption from torture. See Benedict Carpzov, *Practica Nova Imperialis Saxoniae Rerum Criminalium*, pars III, qu. 118, no. 65 (Wurst, Frankfurt 1677). Similar concerns were expressed as early as the thirteenth century. For Spain, see the Siete Partidas of Alfonso X of Castile and Leon, Partida VII, titulo 30, ley 2, in 1 *Codigos Antiguos de España* (Marcelo Martinez Alcubilla ed., Madrid Administración 1885). Of course, dignity was not a universal human attribute. It was believed to be limited to persons of high social standing, so that only very small steps were taken on men’s fitful ascent out of the subhuman.

4 Instrumental in its rapid spread and acceptance was Article 6 of the 1950 European Convention for the Protection of Human Rights, and the interpretation of this Article in the decisions of the European Court of Human Rights. Scholarly interest in the principle is also a relative newcomer on the Continent. In Germany, for instance, the first monograph dealing with fair procedure appeared only in 1981. See the references in Dorothée Rzepka, *Zur Fairness in Deutschen Strafverfahren* 244 (2000). The French literature on the “procès équitable” is also of relatively recent vintage. See, e.g., the literature cited in Loïc Cadiet et al., *Théorie Générale du Procès* 93-96 (2010).
its demands was introduced by the more recent rise of the victims’ rights movement. In its wake, some authorities took the position that not only the defendant but also victims and witnesses—perhaps even the prosecutor—can raise fairness claims. This position implied, of course, that the resolution of fairness issues requires balancing the defendant’s interests against those of other procedural participants. But even where this position on the scope of the principle prevailed, his interests were accorded the greatest weight in the resulting “mediating discourse”: the rights of victims were not treated as equally strong, capable of generating equally strong demands. It may thus safely be said that in national justice systems, procedural fairness in criminal procedure tends to be understood first and foremost as fairness toward the defendant.

This is easy to understand, considering how hard it would be for these systems to abandon their special concern for the defendant’s interests—a pro-defendant bias. It is most clearly reflected in the many entailments of the presumption of innocence, especially in the generally accepted maxim that it is better to acquit a large number of guilty people than to convict a single innocent. Even if evidence points to a high probability of a defendant’s guilt but fails to prove it beyond a reasonable doubt, he is entitled to an outright acquittal. Inevitably, then, acquittals cover a large epistemic terrain, stretching from ascertained innocence to a great likelihood of guilt. The systematic tilt in defendant’s favor can also be detected in the treatment of reliable but illegally obtained evidence. If incriminating in nature, it tends to be rejected (even if necessary to a successful prosecution); if exculpatory, it tends to be admitted. But the fact that the ghost of the innocent man convicted hovers over criminal justice is not the only reason for favoring the criminal defendant. Consider, for example, that the defendant is permitted to withdraw from the interrogation process, although he happens to be a precious informational source. Desirous to protect his autonomy and privacy, the justice systems accord him the right to remain silent, and even prohibit the fact-finders from drawing unfavorable inferences from his exercise of the right. Because continental

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5 See infra note 19.
European countries do not let him testify under oath as a witness, and refuse to criminalize his detected false testimony, some commentators go so far as to maintain that he has the right to lie.\textsuperscript{7} Remember also that he has the right to confront witnesses, even if confrontation might expose witnesses to a more serious danger than the danger the defendant faces in the event of conviction. The approach whose bias of interest focuses on him survives even the finality of judgments. Thus, if new evidence comes to light justifying the reopening of a case, it may be used if it is exculpatory in nature, but seldom, if ever, when it is incriminating. Many more examples of such \textit{favores defensionis} could easily be given.

Now, it is a banal observation that a tension exists between the criminal justice system’s bias in favor of the defendant and its desire to repress crime and punish criminals. Other things remaining equal, the greater the emphasis placed on the need to repress crime, the more rules favoring the defendant are seen as obstacles frustrating the realization of justice.\textsuperscript{8} Conversely, the more the impulse to punish the guilty weakens, the easier it becomes for the operators of the justice system to observe rules aimed at safeguarding the defendant’s interests. What, we should then ask, can be said about the punitive impulse of contemporary national justice systems in the West? In regard to more recent responses to terrorism and organized crime, the punitive impulse is strong, justifying liberal concerns that its intensity generates tensions with rules favoring the defendant. But in the area of ordinary crime—the staple of national criminal law enforcement—symptoms of a weakening \textit{libido puniendi} can be discerned.\textsuperscript{9} The accuracy of factual determinations is no longer a high priority, although accuracy is necessary to determine the punitive response postulated by substantive law. Outcomes agreed to by officials

\textsuperscript{7} See Mirjan R. Damas\'ka, The Faces of Justice and State Authority 130 (1968). In continental legal systems, this right is sometimes thought to be a constitutive part of procedural fairness. See, e.g., Mohammed Ayat, \textit{Le silence prend la parole: la perc\'ee du droit de se taire en droit international penal}, Revue de Droit International et de Droit Compar\'e 237 (2001) (Belg.). See also Rzepka, \textit{supra} note 4, at 394.

\textsuperscript{8} Herbert Packer has famously likened his Due Process model to an “obstacle course.” Herbert L. Packer, The Limits of Criminal Sanction 163 (1968).

\textsuperscript{9} They might persist, barring contamination by attitudes formed in the wars on organized crime and terrorism.
and defendants proliferate, criminal punishment can be “bargained down” and even replaced by non-criminal sanctions and measures. At least on the European continent, this development is reflected in legal scholarship. The quest for “substantive truth”—until recently extolled as the most important organizing principle of criminal procedure—is downgraded in importance, and its high place is increasingly accorded to “fairness” whose central concern is solicitude toward the interests of the defendant. As philosophers would say, procedural justice is gaining at the expense of its substantive antipode. The road to the destination seems to be becoming more important than the increasingly uncertain destination itself.

III.

What we have just said provides an easy access to the first of several reasons why the demands of fairness come under greater stresses and strains in international criminal tribunals than in national criminal courts. Since the jurisdiction of the former is reserved for some of the most horrendous crimes imaginable, and since these tribunals are specifically charged with ending the impunity of the most responsible perpetrators of these crimes, it seems inevitable that the perceived need of international tribunals to obtain conviction exceeds that of their national counterparts in cases that typically come before them. And since international tribunals face far greater difficulties than national courts in securing custody of defendants and obtaining evidence they need, it is also quite natural that some domestically developed standards of fair procedure should be experienced in the international context as unusually high and frustrating barriers to conviction.

If these domestic standards are experienced as obstructing, this does not mean, of course, that international judges will disregard them. It would be wrong—even insolent—to assume that they react to barriers to conviction in the way in which continental judges of the inquisitorial process reacted when confronting crimes which their culture found horrifying, or very difficult to prove. Following the then popular maxim “no crime should remain unpunished” or *ne crimina remaneant impunita*, they felt

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10 For the widely influential German scholarship, see CLAUS ROXIN, *STRAFVERFAHRENSRECHT: EIN STUDIENBUCH* 69 (Eduard Kern ed., 24th ed. 1995).
justified to greatly relax—and sometimes openly transgress—normal procedural arrangements. But even if international criminal judges are not prepared to follow this ancient régime’s example and bend demanding standards of fair procedure for the sake of obtaining convictions, the fact remains that it is often quite difficult for them—both morally and politically—to observe these standards. The refusal to hear an important witness if his identity is not revealed to the defendant, or the exclusion of some types of reliable but improperly obtained evidence, is much more troubling in international than in a typical domestic context—especially if the ruling could lead to the acquittal of a person responsible for masterminding a mass atrocity. And since proof sufficiency is in its practical application less likely to be a fixed entity than a sliding point along a continuum, it may well be that in cases of such egregious crimes, international criminal judges might sometimes be actually less scrupulous in applying the beyond a reasonable doubts standard then they would be in regard to less serious criminality in the domestic context.

IV.

Another reason why some fair procedure standards come under increased stress in international criminal courts emanates from their inclination to delve into the surrounding context of crime in

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11. A testimonial of this attitude is the seventeenth century’s statement of the famous Benedict Carpzov: “it is notorious that in the prosecution of most atrocious crimes it is permissible to disregard the laws because of their enormity” (notissimum est quod in delictis atrocissimis propter criminis enormitatem iura transgredi liceat). Carpzov, supra note 3, pars III, qu. 102, no. 67. On the development of this doctrine from a text of Pope Innocent IV (1242-1254), see Mathias Schmöckel, Humanität und Staatsraison 276-80 (2000).


13. A declaration of strict adherence to the standard can be found in ICTY’s trial judgment Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T, no. 11 (Sept. 27, 2007). But an empirical study of the Rwanda Tribunal’s judgments leaves one with doubts about the reach of this attitude. See N. A. Combs, Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials, 14 UCLA J. INT’L L. & FOREIGN AFF. 235, 264 (2009).
order to produce a reliable historical record of crime producing
events. This stress is scarcely surprising, considering that an
important source of provisions limiting factual inquiries in
criminal procedure is the concern for the defendant’s autonomy,
privacy and dignity. Thus, to use an eloquent example, while the
solicitude for these humanistic values has induced some countries
to ban the evidentiary use of his diary as unfair,\textsuperscript{14} diary entries of
indicted military or political leaders can obviously be highly
valuable material for judicial historiography. Or, to use another
example, if a defendant were acquitted on the ground of a
reasonable doubt as to his guilt, international criminal judges
might sometimes be prevented from realizing their ambition to
make a record of the underlying atrocity—an atrocity which could
have been sufficiently proven to them in their role as historians.
This is not difficult to understand. While judgments of conviction
are supposed to accurately determine the factual predicates of
liability, judgments of acquittal are not expected to do the same for
factual predicates of innocence: as already noted, they encompass
a wide range of possible states of the world, from clear innocence
and scant evidence of guilt to its substantial probability. And as
juridical and historical pursuits do not use the same cognitive
lenses, the indiscriminate nature of acquittals is alien to
historians.\textsuperscript{15} In sum, then, when the desire of international
criminal judges to portray an atrocity is strong, at least some
standards of fair procedure can appear to them as a frustrating
obstacle.

But the greatest stress on considerations of fairness toward the

\textsuperscript{14} For the case-law of German courts, see ROXIN, supra note 10, at 168-69.

\textsuperscript{15} To increase the truth-value of acquittals, at least one more type of judgment
would have to be tucked in between conviction and acquittal. See Mirjan R. Damaška,
Truth in Adjudication, supra note 6. Continental courts of the ancien régime followed
this logic and used such intermediate judgments. French judges went farthest in this
direction. See BERNARD SCHNAPPER, VOIES NOUVELLES EN HISTOIRE DU DROIT: LA
JUSTICE, LA FAMILLE, LA REPRESSION PENALE 69, 87 (1991). A judgment of this type
(assoluzione per insufficienza delle prove) survived in Italy until 1987, and a jury verdict
of this genre persists to this day in Scotland. While compelling arguments can be made
for intermediate judgments on grounds of epistemic clarity, they are all difficult to
reconcile with the presumption of innocence: the normative force of the presumption
requires judges to close their eyes to actual probabilities of guilt.
defendant comes from the ennobling ambition of international criminal tribunals—and especially the permanent International Criminal Court—to place justice for victims at the heart of their mission. The stress arises because the desire to safeguard the interests of the defendant and the desire to protect those of the victims generate conflicting demands. If contemporary criminal procedure is to remain tilted in favor of the defendant, can it at the same time also favor victims? Can it serve two masters, so to speak?

The tensions produced by the conflicting demands deserve a closer look. Consider that the more recent demand for participatory right of victims has arisen in national criminal justice systems against the background of situations in which crimes involve a single victim, or only a handful of them. But international tribunals can easily be driven to cope with the need to accommodate the demands of thousands, possibly hundreds of thousands of victims. And even if only their representatives are entitled to procedural action, the length of proceedings is inevitably increased—especially if victim representatives take their role seriously, and do not hesitate to challenge procedural strategies of other procedural participants. Obviously, then, the defendant’s right to speedy trial can be negatively affected. This result acquires special poignancy if he is languishing in preliminary detention—as he usually does in international criminal proceedings. A related tension has its spring in the fact that he is faced not only by lawyers from the prosecutor’s office but also by victim representatives. Even if the latter are not formally accorded the status of parties, the balance of forces between the procedural contestants is nevertheless affected: the defendant could easily begin to harbor the feeling that he is engaged in agonistic confrontation with more than one procedural adversary. The equality of arms may in this situation become problematic.

Prominent among tensions with defendant’s interests is the one created by the atmosphere of revulsion and anger generated by the succession of emotional horror stories recounted by agitated victims. The possible defense versions of events mitigating or excluding responsibility can in this atmosphere easily be obscured by burning sympathies for the plight of the victims, and judges could be driven to attribute to the defendant a larger role in the incriminated calamities than he actually played. Even the danger
of scapegoating him should not be ruled out.  

Less visible but important for our purposes is the tension between the presumption of innocence, on the one hand, and the early recognition of victimhood by international criminal courts, on the other.  

The tension arises because the presumption—provided that it is taken seriously—requires more than that the defendant be assumed innocent until proven guilty: it also demands that the crime not be taken for granted before the end of proceedings. This is because the defendant can deny not only his guilt, but also the commission of crime with which he is charged: until the prosecutor has satisfied his burden of proof, both crime and guilt do not exist in the eye of the law. In fact, the conceptual acrobatics necessary to resolve this tension are an incisive illustration of the difficulty of mediating between the interests of victims and the defendant without weakening the traditional liberal tenets of criminal procedure. It will be said that this difficulty arises in many national criminal courts as well. Small wonder, since some demands of the victims' rights movement clash with liberal procedural arrangements focused on the need to avoid condemning innocents.  

Good things are not always compatible. It should be stressed, however, that the difficulties in handling tensions between the interests of victims and defendants are weaker in national criminal courts than in international criminal justice: typical cases they process are not crimes resulting in mass victimization, and national courts do not place as much weight as international criminal tribunals on the vindication of victims' interests.

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17 This is especially the case in the International Criminal Court, whose judges are authorized to let victims express their "views" and "concerns" at any procedural moment they find appropriate. See Rome Statute, supra note 1, art. 68, ¶ 3. Observe also that victims are admitted to the proceedings of this Court by a preliminary finding that a crime was committed against them. See Mirjan R. Đamaška, The International Criminal Court between Aspiration and Reality, 14 UCLA J. INT’L L. & FOREIGN AFF. 14, 25-26 (2009).

Although the strain between the interests of victims and defendants is usually observed from the defendant's perspective, it can also come into view from the victims' vantage point. To use again a previous example, victims of international crimes have little sympathy for the exclusion of illegally obtained but reliable evidence. If the illegality is not attributable to them, the exclusion of evidence seems from their standpoint inapposite—most obviously if the remaining untainted evidence is insufficient for conviction. Aside from the absence of closure, why should they be exposed to the risk of repeated victimization by the actually guilty who could return to their midst? Again, while this problem appears in contemporary national criminal courts as well, in international criminal justice it is much more serious because of the enormity of international crimes and the multiplicity of victims they cause.

VI.

Given that the distinctive situation of international criminal tribunals places the standards of fair procedure under greater stress than in national systems, the question then becomes whether something should be done about it. As previously alluded, some authorities have suggested that the unusual difficulties faced by international tribunals justify that architects of international criminal procedure, in determining demands of fairness, focus not only on the interests of the defendant, but also the interests of victims, witnesses and prosecutors. On this view, then, balancing these diverging interests inheres in the notion of a fair trial. Others who have pondered on the issue argue that fairness should be concerned solely with the proper behavior of public authorities toward those who are subject to criminal prosecutions. This, they claim, was the original understanding of American due process, as well as of fairness as it appeared in national justice systems of

19 See Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 27 and 55 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995). The preference for a balancing approach was also expressed by the German Supreme Court of General Jurisdiction. See Bundesgerichtshof [BGHSt] [Federal Court of Justice], February 20, 1996, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN, 42, 49 (Ger.). For the sympathetic treatment of this view in German scholarship, see ROXIN, supra note 10, at 223.
continental European countries. Including interests of other procedural participants in the fairness equation, they maintain, would take too much of a toll on liberal aspects of criminal procedure, threatened so recently by overbearing authoritarian governments.\textsuperscript{20} Therefore, it would be inappropriate, or at least questionable, for international criminal tribunals to relax domestically developed standards of fairness.

Before remarking on this difference of opinion, let us digress and examine two related questions capable of placing the importance of the disagreement in better perspective. One question concerns the possibility of reducing the stress on fairness toward to the defendant, and the other relates to the importance international criminal justice should attribute to it.

As suggested at the outset here, international criminal tribunals aspire to pursue so many goals that even national law enforcement systems, with their far stronger institutional support and greater enforcement powers, could buckle under the weight of a comparable agenda. Might it not be desirable, then, to disencumber international criminal judges of the burden of some of the tasks they have assumed? It appears, in fact, that some of their goals are good candidates for being downplayed, or even abandoned, since more suitable mechanisms for their realization exist, or could be created by the community of nations. Probing into contextual issues transcending concerns with specific crimes could be entrusted, for example, to truth commissions, or similar institutions better equipped to deal with the quicksand of history. These institutions could also provide more opportunity than criminal procedure for victims to vent their grievances. It is true that their exalted position in international criminal tribunals is now celebrated on ideological grounds as a remarkable achievement, but the pragmatic wisdom of this apotheosis is far from clear. Leave to one side the just-discussed tensions this attention generates with the defendant’s interests. Other grounds exist for skepticism about the wisdom of this emphasis. Consider, for example, that only a few individuals in the likely mass of persons aggrieved by international crimes can derive meaningful relief from rights to participate in criminal proceedings. The much

\textsuperscript{20} See, e.g., Guénaél Mettraux, \textit{Foreword}, 8 J. INT’L CRIM. JUST. 75, 76 (2010); Zappala, \textit{supra} note 18, at 149; RZEPKA, \textit{supra} note 4, at 320.
larger number of those who do not obtain such relief can easily be harmed again by disappointed expectations of being able to express their grievances at the trial and obtaining satisfaction in proceedings. Far more effective to satisfy victims’ interests, and much broader in scope, are sweeping victim compensation schemes and other forms of restorative justice that could be established apart from overburdened and inherently weak international tribunals. All in all, it appears that the pressures on fairness toward the defendant would be lessened if international criminal justice were more modest in its ambitions. But these pressures would nevertheless remain stronger than in national jurisdictions, because of the magnitude and complexities of international crime and the absence of enforcement powers in international criminal tribunals.

What adds to the frustrating power of these pressures is the great importance of procedural fairness to international criminal justice. To realize why this is the case, we must look again at the objectives of international criminal tribunals. Among them, deterrence is usually attributed the greatest weight. This choice is not without tonic irony, however, because it implies that an objective is treated as most important whose attainment depends entirely on the benevolence of outside actors. Does it make sense for the powerless to embrace an objective as being of prime importance to him although its realization requires the credible threat or regular exercise of power? Is his choice not a recipe for disappointment? Since international criminal tribunals are intrinsically almost impotent, it thus would seems more appropriate for them to rely on suasion rather than on threats. They should aspire first and foremost to be moral teachers, and accord pride of place to the socio-pedagogic function that is so often mentioned among the goals of international criminal justice. What does this function entail? It entails attempting to strengthen the sense of accountability for human rights violations through the exposure and stigmatization in criminal judgments of the basic inhumanity of those who are most responsible for mass atrocities. Recognition of their basic inhumanity leads to the spreading of empathy, and the spreading of empathy is joined by many fine

21 For a fuller argument along these lines, see Mirjan R. Damška, What is the Point of International Criminal Justice?, 83 CHI.-KEN Y. L. REV. 329, 340-43 (2008).
threads with the spreading of human rights. What we must observe at this point, however, is the connection between the socio-pedagogic function so understood and the importance of fairness to international criminal justice. If international judges are to be successful in delivering their moral messages, they must be trusted by their audiences as legitimate authority and be perceived by them as fair.22

In the end, then, fairness is of great importance to international criminal tribunals because it is the \textit{sine qua non} for the successful cultivation of a goal which is, or should be, at the heart of their vocation.

\textbf{VII.}

We can now return to the differences of opinion about fairness demands in international criminal justice. Should the special difficulties facing international criminal tribunals justify adopting a \textit{sui generis} notion of fairness, whose range of applicability would not be limited to the defendants but extend to other procedural participants as well? There is no doubt that procedural participants, other than the defendant, can claim that their interests have been disregarded without just cause. In a sense, then, they too could raise the issue of being treated unfairly. But this is not the concept of fairness which the architects of international criminal tribunals had in mind in proclaiming the duty of these tribunals to abide by the standards of fair procedure. When the International Criminal Court for Former Yugoslavia was being established, for example, the U.N. Secretary General declared that it was “axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”23 The unspoken assumption that only the rights of the defendant fit under the umbrella of fairness when it is invoked in criminal procedure is clearly expressed in international human rights documents: in speaking of the rights to “fair trial” they all enumerate only rights

22 Id. at 345-47.

belonging to persons charged with criminal offenses. There is no hint in these documents that these rights could be “balanced away” by recognizing the interests of other procedural protagonists. But this narrow scope of fairness follows also from the didactic function of international criminal tribunals. Victimized communities don’t need condemnatory judgments to provoke revulsion to international crimes in their midst. It is communities sympathetic to the defendant that need to be stirred toward this sentiment: they should be the target of moral messages. And unless the carriers of these messages are perceived as being fair to the defendant, messages are likely to fall on deaf ears.

But if the standards of fairness in international criminal justice relate solely to defendants, this does not mean that they cannot be fashioned in ways that depart from those accepted by national criminal courts. Nor does it mean that these departures cannot be motivated, *inter alia*, by concern for the special position of victims, or even the special difficulties faced by prosecutors in the environment of international criminal justice. Much as national standards of fairness are fashioned with an eye to domestic procedural ecology, fairness in the fledgling international criminal tribunals may legitimately be molded against the background of their specific environment. It is an illusion to believe that the decision of what is fair in the administration of criminal law is made in monastic isolation from the animating need of justice systems to combat crime. Attempts at such a splendid detachment are extremely rare even in liberal countries where individual values are regarded as paramount and limitations of official power are greatly pronounced. If procedural law goes too far in inhibiting the need to control crime, history teaches us that its provisions tend to be disregarded, or, in an alternative scenario, to be supplemented with vague substantive law doctrines capable of

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24 See, *e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171. Note, parenthetically, that the very expression “fair trial” reveals the Anglo-American provenience of the idea of fairness. Continental European lawyers would speak of *fair procedure* rather than of a *fair trial*. And they also have no exact translation of the adjective “fair” in their languages. So the French decided to use the term “procès équitable,” although it misses some connotations of “fairness,” while the Germans simply adopted the English term “fair.”
satisfying the repressed need. 25 In short, some departures by international criminal tribunals from domestic standards of fairness can be justified, given their sui generis goals, the complexity and the atrocity of crimes they process, and the innate weaknesses of these tribunals. And while it is true that only the defendant has the right to fair trial, the determination of what this right entails does not exclude consideration of the needs generated by the distinctive environment of international criminal justice, including consideration of the interest of other procedural participants affected by this environment.

What are we to make, then, of the previously mentioned concern that some domestically guaranteed rights of the defendant might unduly be limited if special problems of international criminal tribunals were taken into account? 26 For starters, it is important to realize that attention to these special problems does not require departures from the basic demands on fair trials as they are enumerated in principal human rights instruments. 27 In describing the ingredients of fair trial, all of them use broad terms that leave room for fine-grained adaptations of these ingredients to the varying circumstances in which domestic and international

25 A mild symptom of international criminal tribunals’ tendency to bypass evidentiary difficulties by using broad doctrines of substantive criminal law was the adoption by ad hoc tribunals for former Yugoslavia and Rwanda of a variant of command responsibility doctrine. Since proof of a commander’s knowledge about the criminal intentions of his underlings turned difficult, his negligent disregard to acquire this knowledge was made sufficient for criminal responsibility. See Damaška, supra note 21, at 350, 353.

26 On this concern, see, e.g., Sara Stapleton, Note, Ensuring a Fair Trial in the International Criminal Court, 31 N.Y.U. J. INT’L L. & POL. 535, 580-608 (1999). In an insightful article, Frédéric Mégret seems to share this concern, although his views on the matter are not entirely clear. Although he expresses the belief that the invocation of special difficulties faced by international courts represents a serious threat to the idea of fair trial, he also says that some rights of the defendant may for good reasons be limited “to account [for] the imperatives of [international] criminal justice.” Mégret, supra note 18, at 60. And he also writes that the “due process” for international criminal courts should be approached as a matter of “re-interrogating the tradition of due process in light of the particular exigencies of international criminal justice.” Id. at 76.

The competing visions of fairness

Courts operate. As is amply illustrated by the "margin of appreciation" left to member states of the Council of Europe by the European Court of Human Rights, a wide range of more or less liberal procedural arrangements is compatible—even in the context of domestic administration of justice—with fair trial standards. This then holds a fortiori for international criminal procedure which need not necessarily echo the decisions of the Strasbourg Court.

The problem with departures by international criminal tribunals from domestic fair trial arrangements is therefore not whether they are in principle permissible, but whether they go beyond minimal requirements of internationally recognized fair trial demands. Determining this lower limit of the permissible range of fair arrangements in international criminal justice thus assumes great importance. If the ability of international criminal tribunals to punish the worst human rights abusers required that this lower limit be exceeded, this would rightly provoke a deep malaise, not only in the circle of human rights activists, but also beyond. The continued existence of international criminal tribunals would come under a cloud.

VIII.

While the importance of minimal fairness in international criminal justice may thus be clear, identifying its requirements is a difficult task, bound to provoke serious disagreements. There is hardly anything that can be said on the subject without extensive argumentation. Before closing, then, no more can be offered here than a small sample of procedural arrangements that might be considered fair enough, although they fall below the demands of most generous extrapolations from basic human rights found in international instruments and national jurisdictions. And since little can be said on this theme as if securely clothed in certainty, the remarks that follow should not be taken as more than tentative suggestions and provisional markers.

The first example concerns the issue of defendant's self-representation. As is well known, countries in the Anglo-American and continental European legal tradition take different approaches toward this issue. While the former recognize self-representation as a right, the latter typically insist on mandatory representation in the prosecution of serious crime. Drafted under
Anglo-American influence, several international human rights documents also treat self-representation as a defendant’s right, and so do the founding documents of most international criminal tribunals. Yet the right to self-representation is never absolute: not only can it be forfeited, but it is seldom exercised without some sort of legal assistance in support of the hypothesis of innocence. What attitude should international justice take toward this right? It cannot be denied, of course, because denial would run afoul of the just-mentioned human rights instruments. Two reasons can be advanced, however, that militate in favor of relaxing the existing criteria for its forfeiture. One reason is the tension between self-representation and another fair trial demand, effective defense: given the complexity of processing international crimes, defendants cannot be expected to successfully mount their own cases without professional help. The other reason is linked to the didactic mission of international criminal justice. The pro se defense, especially one by a charismatic defendant, can turn the trial into a stage for the promotion of causes harmful to human rights, so that the intended educational effect of international criminal trials could easily be lost. It will be said, in opposition, that the resulting ease in imposing counsel on the unwilling defendant amounts to obtrusive paternalism. But while this is powerful criticism in liberal ideology, it is not a decisive or self-sealing argument for the demiurges of international criminal justice: they must be responsive to great ideological and cultural diversity. The conflict with liberal conceptions of human autonomy—as distinct from complete insensitivity to its claims—is therefore not a sufficient reason to banish a procedural arrangement from the array of those that can be regarded as minimally fair. If Anglo-American political and legal culture were not so influential in the drafting of human rights documents, even the outright denial of self-representation in the processing of serious crime could hardly be treated as fundamentally unfair.

28 For details, see J. TEMMINCK TUINSTRA, DEFENCE COUNSEL IN INTERNATIONAL CRIMINAL LAW 249-59 (2009).

29 Tensions which can arise among constitutive elements of fair trials cannot be sketched out here. The bare bones of an argument on this subject would inevitably become bones of contention because, for lack of space, they could not be clothed with the flesh of sufficiently extensive discussion.

30 Observe that in judicially directed trials it is easier for the courts to deny self-
Another illustration of arrangements that could pass muster as minimally fair relates to the limits of the defendant’s right to confront and cross-examine witnesses. In determining these limits one of the thorniest issues is that of anonymous witnesses. It is beyond dispute that the defendant’s capacity to challenge the testimony of witnesses against him is greatly restricted if he is unfamiliar with their identity. But it is equally clear that cases arise in which important and potentially trustworthy witnesses refuse to testify, unless assured that their identity is not disclosed to the defendant. In glancing at national systems of criminal justice, it is interesting to note that few of them reject anonymous witness testimony out of hand. Most of them allow the use of anonymous testimony as a means of last resort in some circumstances, provided that anonymity is the only available measure to protect the witness. For countries belonging to the Council of Europe, the Strasbourg Court approved this flexible attitude, refusing to hold that the use of anonymous testimony violates the defendant’s human rights in all circumstances. What should be the approach of international criminal tribunals toward this sensitive issue? One must bear in mind that the need for anonymous testimony arises not only more frequently in international than in national criminal law enforcement, but that the rejection of this testimony is also much more troubling in the international environment. Not only because of the magnitude of crimes in the jurisdiction of international criminal tribunals and the resulting strong punitive demands, but also because of the greater ease of hatching witness intimidation schemes in the representation rights without creating the impression of trying to muzzle the defendant: since he is entrusted with fewer means to influence the course of procedural action than in party orchestrated trials, less is taken away from him than in systems where he can organize his own case.

31 Some American jurisdictions may be exceptional in this regard. For a comparative survey, see Stefan Trechsel, Human Rights in Criminal Proceedings 318-20 (2005).

32 But the Court has held that anonymous testimony always violates this right if it constitutes “the sole or decisive” evidence against him. For an insightful discussion of the Court’s case law, see Károly Bárd, Fairness in Criminal Procedure 234-48 (2008). Surprisingly, the English Court of Appeals has recently disregarded this law by ruling that trials could be fair even where anonymous testimony is the “sole of decisive” evidence implicating the defendant. See In R v. Mayers, [2008] EWCA Crim. 2989, at ¶ 23, [2009] 1 WLR 1915 at ¶ 23.
international arena, and the greater difficulty of international prosecutors to obtain alternative evidence. Considering, now, that anonymous testimony is per se not regarded as incompatible with domestic conceptions of fair trials – even by human rights forums – it becomes difficult to argue that international criminal tribunals should take a stricter position on this matter. What remains as a difficult and sensitive problem, however, is to properly determine the specific conditions that must be met in order to admit anonymous witnesses. Should, for example, one of these conditions be serious personal danger to the witness himself, or could serious personal danger to people close to him also qualify? Equally difficult is to devise appropriate measures to compensate for the reduced ability of the defense to test their testimony. One measure to contemplate in this regard would be to let the tribunal entrust an ad hoc procedural participant with the inquiry into the background, possible motive for bias, and potential cognitive weaknesses of anonymous witnesses.

The treatment of credible but illegally obtained evidence is yet another sensitive subject in considering minimal fairness of international criminal justice. To place the subject in proper perspective, it is useful again to begin by looking at national systems of criminal procedure. Some are very strict, demanding that improperly obtained evidence be automatically rejected, no matter how important and reliable it might be, and also that whatever derives from this tainted source be excluded from trials. But the great majority of national criminal procedures do

33 The need to use anonymous testimony was invoked already in the first case tried by the International Criminal Tribunal for the Former Yugoslavia. The issue led to a split court decision. See Prosecutor v. Tadic, ICTY Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses (August 10, 1995).


35 For the tendency to exaggerate the likelihood that illegally obtained evidence is also unreliable, see infra note 40.

36 An example of this strict legal regime on the European Continent can be found in Greece, especially with regard to evidence obtained in violation of personal privacy. See Dimitrios Giannoulopoulos, The Exclusion of Improperly Obtained Evidence in Greece, 11 Int’l J. Evidence & Proof 181-210 (2007). Whether Greek (and some other) courts always follow this approach in processing most serious crimes would be worth exploring.
not go so far: they authorize judges to weigh the seriousness of the crime on trial against the seriousness of the right violated in acquiring evidence. Since the European Human Rights Convention contains no provision on the subject, the Strasbourg Court left it to the states to decide how to treat the issue, leaving them again a sizable "margin of appreciation."

The attitude of international criminal courts on this subject is still evolving, but an idea of how this genre of evidence is presently treated may be gained from the case law of the Yugoslav War Crimes Tribunal. If judges find that an item of evidence was obtained by prosecutors or investigators of the Tribunal through oppressive interrogation techniques, or in breach of some other rule regarding proper interrogation, they tend to reject that item automatically. But whether this strict attitude is attributable solely to perceptions of unfairness is not clear: the belief that evidence obtained in this manner is unreliable also seems instrumental. On the other hand, evidence obtained through illegal intercepts, secret monitoring, or illegal searches and seizures, tends to be admitted without much visible agonizing about possible interference with privacy values. Several reasons explain this contrasting approach. It is not only that this type of spuriously acquired evidence—provided it is authentic—tends to

37 For a sample of decisions in countries following this approach, see Stephen C. Thaman, Comparative Criminal Procedure 105-18 (2002); see also Gerson Träg & Jörg Habetha, Beweisverwertung trotz rechswidriger Beweisgewinnung, 28 Neue Zeitschrift für Strafrecht 481-92 (2008).

38 But if the wrongfully acquired evidentiary material was used in deciding a case, the Court views this circumstance as one of the indicia suggesting that criminal proceedings "as a whole" were unfair. See, e.g., Schenk v. Switzerland, 140 Eur. Ct. H.R. (ser. A) at 40 (1988).


40 This is not necessarily true, however; oppressive interrogations can yield accurate information. Many of those who argue differently do so in a well-meaning attempt to psychologically condition criminal law enforcement officials. The latter are thought more amenable to arguments concerning prevention of factual error than they are to arguments extolling the primacy of the individual, human dignity and similar humanistic values.

be reliable and often conclusive. It is also true that this type of evidence is usually obtained by governmental agencies pursuing goals independent of international criminal prosecutions. Starved as they are for evidence, international criminal tribunals find it difficult to reject the fruits of these activities if their wrongful character cannot be attributed to their own officials. If they reject these fruits, could this not be interpreted as a rebuke to governments on whose good will for cooperation they vitally depend? And if rejection were the adopted policy, then governments implicated in international crimes and pressured to cooperate with international justice might be tempted to stage improper acquisition of evidence in order to prevent its employment against their leaders.

Adopting a variant of the flexible approach to reliable but illegally obtained evidence thus seems the right way to go for international criminal tribunals. It is difficult to criticize it as unfair to defendants, given again that it is considered fair enough in environments where the need for evidence is much less pronounced and where paradigmatic crimes are typically of much lesser gravity. But the flexible approach also accords with the perceptions of fairness in broad swaths of the tribunals’ constituency. The idea that the criminal defendant has a fairness-based claim to the automatic rejection of all illegally obtained evidence does not agree with ordinary perception of justice. Ordinary people tend to believe that such evidence should be used, at least in prosecutions of serious crime, and that the appropriate reaction to the wrongful manner of acquisition is to punish those responsible for it. Even if a few exclusionary rules of this genre encounter a measure of sympathy, stretching them to their full logical potential is not likely to be met with approval. On the contrary, the results of such a logical expansion are likely to be dismissed as misbegotten subtleties, engendered by a single-minded focus of the legal mind on isolated aspects of criminal justice. If international criminal tribunals are to fulfill their didactic mission, they should avoid the perception of cloistered isolation from the intuitions of ordinary people. In the end, then, it seems best for international criminal judges to take recourse to the rejection of reliable but illegal evidence only in those cases where the manner of its acquisition is truly outrageous. Limited in this way, the loss of evidence would have a good chance to be
understood and accepted even in the prosecution of genocidal saturnalia, where the impulse to condemn and punish is at its apogee.

Similar analysis could be undertaken for a variety of other procedural arrangements. Yet, we shall not continue on this path here. What we have said so far should suffice to support the view that ideas on what is fair to the criminal defendant are not fixed, or independent from the environment in which criminal courts operate and from the objectives they seek to attain. Requirements of fairness developed against the background of domestic criminal law enforcement should therefore not unreflectively be projected into the arena of international criminal justice. All of which is not to say that there are no limits to the adaptation of fairness demands to specific contexts. In all the permutations to which these demands can be subjected, an elusive core minimum, or kernel, cannot be disregarded without compromising the hard-won achievements of civilization. The reputation of international criminal justice depends on respecting this kernel and leaving it intact. Sporadic acquittals of the probably guilty that may result from this respect should not be regarded as a failure. In order to preserve their moral muscle, international criminal tribunals must maintain a degree of suspense in regard to the final outcome. If the perception were to spread that they stack the deck against the defendant, or that their proceedings are programmed to lead to convictions, their legitimacy in the eyes of their audiences would be doomed.

42 Most controversial is the search for minimal requirements of the privilege against self-incrimination. Note that the Strasbourg Court has ruled that even the defendant's right to silence is not without some qualifications. See John Murray v. The United Kingdom, 1 Eur. Ct. H.R. at 48-53 (1996).