

Book Review Essay: *Fairness and Rights in International Criminal Procedure* by Sophie Rigney (Edinburgh University Press 2022) and *Punishing Atrocities through a Fair Trial* (Cambridge University Press 2017) by Jonathan Hafetz

## 1. Introduction

International criminal law has many imposed and self-proclaimed goals and aspirations: determining accountability, ending impunity, justice for victims, promoting the rule of law, establishing truth and the historical record, peace, and reconciliation.<sup>1</sup> At the heart of these goals is accountability for international crimes through a fair trial. The concept of fairness, which underscores a fair trial is not easily identified, defined or applied and so runs the risk of being understood differently between cases and tribunals.

Fairness is a constant concern among international criminal law scholars. This is in part because 'fairness' can apply to so many things within the criminal justice system, for example: procedural fairness; fairness in case selection, investigation and prosecution; respect for defence fair trial rights; fairness for victims; and even wider principles of fairness. In addition to the numerous topics to which the idea of fairness can be applied, these areas may have competing interests and so the application of fairness to one area create tension with or prevent another area's ability to have fairness. Furthermore, it is unclear how much fairness is required for legitimacy and just trial outcomes.<sup>2</sup> Is a sort of minimum overall fairness across areas required or should fairness to the defence be the most important with little concern to other areas where fairness might be relevant? Complicating matters further, the exact relationship between fairness and justice is unclear. Fairness can be seen as an equivalent to justice, a separate but related concept, or a right that attaches to individuals.<sup>3</sup> Despite these uncertainties and potential contradictions, fairness is undoubtably important: it is necessary for the legitimacy of both international criminal courts and their outcomes.

Two recent additions to this ongoing debate are Sophie Rigney's *Fairness and Rights in International Criminal Procedure* (Edinburgh University Press 2022) and Jonathan Hafetz's *Punishing Atrocities through a Fair Trial* (Cambridge University Press 2017). Both of these excellent books take a thorough look at fairness in international criminal law and are significant contributions to the debate. This book essay will examine these books set in the context of the general ongoing discussions about fairness. First, there will be a discussion of the method each book uses and how these books are examples of the methodological divergence within the field. Next, each of the books' conception of

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<sup>1</sup> UNSC Res. 808 (22 February 1992), 2; UNSC Res. 827 (25 May 1993), 1; UNSC Res. 955 (8 November 1994), 1; Rome Statute of the International Criminal Court (17 July 1998) Preamble, art 54(2), art 68(1); Resolution 1315; GA resolution 57/228 A/RES/57/228 (27 February 2003). For further discussion of the goals and their development see Caleb H Wheeler, *Fairness and the Goals of International Criminal Trials* (Routledge 2023).

<sup>2</sup> Yvonne McDermott, *Fairness in International Criminal Trials* (OUP, 2016); Sergej Vasiliev, *International Criminal Trials: A Normative Framework* (PhD Thesis, University of Amsterdam, 2014).

<sup>3</sup> Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (OUP, 2003); Frédéric Mégret, 'Beyond "Fairness": Understanding the Determinants of International Criminal Procedure' (2009) 14 *UCLA JILFA* 37.

fairness will be explored as well as the common ground and departures between them. Finally, it will be noted how each of these books look to the future of international criminal law and fairness.

## 2. The methodology and structure

There is an interesting methodological divide when discussing rights or procedure within international criminal law. A historical and doctrinal tracing of topics chronologically through the various tribunals from Nuremberg to the present or within one tribunal is a traditional method of research and discussion.<sup>4</sup> However, the significant increase of trial activity since the 1990s through to the present time has allowed other scholars to take a more critical approach by examining how the courts and other issues intersect and interact.<sup>5</sup> The two books discussed in this essay are examples of these approaches.

Hafetz employs the traditional approach. This book examines fairness set within the historical context of international criminal law, starting with the Nuremberg Trials and moving through time to the International Criminal Court. By examining the rules, statutes, and decisions of the tribunals through time, the book observes how fairness has developed and is incorporated within the trials. This allows for the discovery of what Hafetz sees as the central tension between fairness and accountability.

The book starts by arguing that Nuremberg was important for the establishment of fairness as a legitimizing force within international criminal trials. Therefore, fairness is one of Nuremberg's main legacies within international criminal law today. Discussing all of the post-World War II international criminal law developments, Hafetz argues that Nuremberg set the stage for procedural fairness and is thus seen as a legitimate court. By contrast, the International Military Tribunal for the Far East (Tokyo Trial) did not uphold fair procedure in the same way and is seen as both less fair and less legitimate. That is, 'Nuremberg's main contribution is in establishing the principle that due process must be maintained in bringing perpetrators of the severest crimes to justice. Nuremberg thus not only created a lasting precedent for addressing mass atrocity through an international criminal trial, but also reinforced the notion that the trial's ultimate success hinged on its fairness and integrity.'<sup>6</sup> From this starting point, the book examines fairness at the later tribunals. Chapter 2 focuses on the 1990s revival of international criminal law with an examination of the ad hoc tribunals. Most noticeably, during this time accused's rights were already expanded within human rights. Thus, procedural fairness through rights of the accused were much more present in these tribunals. Logically, Chapter 3 discusses fairness at the International Criminal Court. Here, because of the ongoing development of fair trial rights as human rights, the author

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<sup>4</sup> For example: Mark Berger, 'The Right to Silence in the Hague International Criminal Courts' 47 (20) University of San Francisco Law Review 1 (2012).

<sup>5</sup> For example: Pádraig McAuliffe and Christine Schwöbel-Patel, 'Disciplinary Matchmaking: Critics of International Criminal Law Meet Critics of Liberal Peacebuilding' (2018) 16(5) *JICJ* 985; Barrie Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) 32 *LJIL* 851; Sara Kendall, 'Commodifying Global Justice: Economics of Accountability at the International Criminal Court' (2015) 13 *JICJ* 113.

<sup>6</sup> Jonathan Hafetz, *Punishing Atrocities through a Fair Trial* (Cambridge University Press 2017) 14.

is able to focus on discrete areas where fairness continues to be an issue in international trials. The chapter focuses on disclosure, the reliance on written documents rather than oral testimony, and case management tools. It also highlights the idea that the International Criminal Court's multiple goals are competing which creates a risk of undermining the accused's fair trial rights.

After surveying the historical development of fairness in international criminal law, the book takes a more holistic view of fairness in international trials by looking at issues that cross jurisdictions. Chapter 4 examines how fairness can and is developing within the decentralized system of international criminal law. The number of courts and tribunals and an increasing number of international crimes being dealt with in domestic courts allows for a greater risk of deviation from due process requirements. Further, it posits that the International Criminal Court 'could more effectively use the Rome Statute's complementarity framework to advance fair trial safeguards at the national level.'<sup>7</sup> This would perhaps create greater consistency in fairness and fair trial protections across jurisdictions. Chapter 5 explores the fairness issues that can arise in case selection within the international criminal law context. This chapter proposes that during investigation and case selection more emphasis should be placed on the principle that no person is above the law. Finally, as an examination of ongoing and future issues, Chapter 6 examines whether terrorism should be treated as an international crime with a specific focus on the fairness issues involved.

A critical approach is taken in Rigney's book. The goal of this book is to see how fairness, rights and procedure interact.<sup>8</sup> To do that both a factual and normative approach are taken to argue that a divide has developed between fairness and rights and that this gap should be rectified.<sup>9</sup> Part of what makes the book so compelling and differentiates it from other fairness discussions is that it is partly informed through Rigney's own experience working at the International Criminal Tribunal for the former Yugoslavia. Rather than surveying all tribunals, the book focuses on the Yugoslavia Tribunal and the International Criminal Court and specifically on the international criminal law decisions from the years 2008-2018. It also incorporates interviews with judges, prosecutors and defence lawyers from these courts in order to provide a practical context and real examples. This is a marked departure from the historical approach and allows for a contemporary examination of the issues surrounding fairness combined with a sense of urgency for correcting the areas in which change is necessary. Rather than examining how far fairness has come, this book takes a normative approach; investigating the current state of fairness within international criminal law and how it could improve in the future.

By using this method, Rigney's book takes a more thematic approach throughout with each chapter arguing the need for recalibration and change. While the book is wholly coherent, it could be roughly divided into two parts. Chapters 1-3 focus on the interaction of fairness, rights and procedure at the conceptual level. These chapters set

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<sup>7</sup> Ibid 4.

<sup>8</sup> Sophie Rigney, *Fairness and Rights in International Criminal Procedure* (Edinburgh Press 2022) 6.

<sup>9</sup> Ibid 11.

up the argument about what fairness is and how it interacts with the goals of trial and rights of the accused. The second half of the book explores the relationships between fairness, rights and procedure at the level of procedural decision making. Chapters 4-6 examine these interactions through an investigation of decisions surrounding particular themes.

The introduction sets the stage by stating what the book's goals are and how it will achieve them. Chapter 2 discusses the aims and procedure within international criminal law, arguing that there are three different levels of analysis: 'the system of law, its institutions of courts and tribunals, and the trial processes.'<sup>10</sup> Rigney argues that by analysing the aims of international criminal law against these three levels, clarity can be achieved in understanding how the law and its multiple, and at times conflicting, aims interact. The chapter argues that there should be a recalibration of the importance of the various aims so that the determination of guilt is the main goal of international criminal trials with rights and procedural fairness being of central importance for achieving this goal. Chapter 3 focuses on what Rigney terms the 'conceptual incoherence of fairness'. Here the book argues that the overall understanding and use of fairness within international criminal trials is incoherent because there are conflicts within the discipline about who should benefit from fairness and how to ensure fairness in a third system of law which is hybrid between the inquisitorial and accusatorial systems. This, Rigney argues, causes and contributes to the disconnect between the accused's rights and fairness which is introduced in Chapter 2.

Part 2, which is comprised of Chapters 4-6, examines how fairness and rights of the accused interact along particular procedural themes: Chapter 4 focuses on evidence disclosure; Chapter 5 the use of adjudicated facts; and Chapter 6 protection of witnesses. In discussing the decisions on each theme significant attention is paid to how fairness was considered in making these decisions. Through this, Rigney argues that chambers have difficulty reconciling the requirement of fairness with the implementation of each of these three legal concepts. This is because, in each of these areas, the chambers say they are protecting the trial's fairness while at the same time they are in fact challenging and preventing full protection of the accused's rights. This highlights the lacuna between fairness and rights of the accused. The conclusion draws the book together arguing that there is a gap between fairness, rights of the accused and procedure which should be closed. To not close this gap means that fairness risks being a conceptual ideal stripped of real meaning that can be invoked for any argument, even those which demonstrably undermine the accused's fair trial rights.

Together these books are an example of the divide within the academic discussion about international criminal law. While they take two different approaches, it is interesting that structurally, they are relatively similar. Each book starts by developing the concept of fairness and then applies it to particular areas of concern. While Hafetz takes a historical route and Rigney's is thematic, when read together, they provide a comprehensive view of fairness. Through Hafetz's traditional approach the development of fairness, and how the field got to this point, can be seen. Through Rigney's critical

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<sup>10</sup> Ibid 20.

approach there is a closer look at the current state of fairness and its relationship to rights and procedure.

### 3. What is fairness?

The many parties, participants, and interested persons to international criminal trials can offer up a multitude of perspectives on fairness. What is considered 'fair' and a different definitions of fairness may arise depending on whether defendants, victims, prosecutors, the international community, or any combination of these groups are considered. However, the general discussion within international criminal law is focused on fairness to defendants, with other interested people considered secondly. This is mostly because defendants are always party to the proceedings, while victims may participate at the International Criminal Court but not in other courts and tribunals, and other groups are not directly involved in the trial process.<sup>11</sup> Further, the accused person's right to fair trial is specifically accounted for in the international courts' statutes and various human rights treaties but is not extended to other persons or groups.<sup>12</sup> Continuing the scholarship along these lines, both Rigney and Hafetz centre the defendant as the focus of fairness, however they see fairness in two different ways.

Rigney argues that fairness 'is the overriding requirement of international criminal trials.'<sup>13</sup> The accused's procedural rights are important for demonstrating fairness and operationalizing it but, for Rigney, fairness and the rights of the accused are separate concepts. That is, fairness contains the rights of the accused and more. However, the book notes that what else fairness contains is unclear.

For Rigney, the relationship between fairness and procedural rights is the main tension regarding fairness. Fairness and defence rights and procedure are closely aligned, which is demonstrated through case analysis throughout the book.<sup>14</sup> However, the examination of defence rights and fairness shows not only the close operational relationship but also the divergence that has occurred between procedural rights and fairness.<sup>15</sup> Importantly, Rigney finds that while procedure and fairness are discussed together in court decisions, the courts frequently make decisions using the language of fairness while undermining the accused's rights. This means that fairness has been working on a normative theoretical level, but not on the practical level.<sup>16</sup> The result is a growing gap between fairness and rights, which Rigney argues, should be closed in order to ensure the protection of the rights and restore meaning to fairness.

Hafetz on the other hand, finds a much closer relationship between the defendant's rights and fairness. For him, fairness is due process and the resulting procedural safeguards. This book takes a broad view of the procedural safeguards for the defence

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<sup>11</sup> ICC Rome Statute art 68.

<sup>12</sup> For example: ICC Rome Statute art 67; ICTY Statute art 21; ICTR Statute art 20; UNDHR art 10; ECHR art 6.

<sup>13</sup> Rigney (n 8) 1.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid 2.

<sup>16</sup> Ibid 200.

including 'the expansive modes of criminal responsibility and the selection of situations and cases for investigation and prosecution.'<sup>17</sup> This takes procedure further than trial, expanding procedure, and by extension fairness, to pretrial and even pre-situation considerations.

The tension identified in this book is between fairness and international criminal law's goal of criminal accountability. He argues that a fair trial is required for legitimacy of the courts and the outcome of trial. However, fairness is also seen as an impediment to holding someone accountable, that is, convicting someone of the crimes. He notes that there is tremendous pressure to hold someone responsible for the crimes charged in international criminal trials because of the expectation of victims, the cost and difficulty of obtaining evidence, and the crimes' gravity. These factors create a desire to convict an alleged perpetrator even if it means not strictly providing due process guarantees and safeguards to the accused. However, this would not only increase the possibility of miscarriages of justice but would also undermine the court's legitimacy.

While these books define fairness differently, they both argue that the defence's fair trial rights are essential to fairness. Read together they describe the full extent of the problem of fairness not being sufficiently linked with fair trial rights. Rigney highlights that without a meaningful understanding of fairness by the courts procedural rights could be completely undermined. If actualized, this suggests that ultimately Hafetz's concern that disregarding fairness results in a lack of legitimacy in courts and their outcomes would become reality.

#### 4. The future of fairness

Both books examine how fairness may be applied to future international criminal law scenarios. Hafetz discusses this through an analysis of terrorism as a possible future international crime. Rigney argues that if the international criminal law project is to be taken seriously in the future, then a rethinking of the system and its relationship to fairness is necessary.

Hafetz's examination of whether terrorism could be elevated to an international crime is grounded in the ongoing controversies within the field. While it is generally considered transnational there is an increasingly international approach to counterterrorism measures, which implies that perhaps terrorism could be treated as an international, rather than transnational, crime.<sup>18</sup> He argues that while doing so would highlight terrorism's gravity it would pose many difficult challenges particularly in the realm of fairness. In particular, the lack of agreed upon definition of terrorism with the precision required for criminal law, the evidentiary issues, and the selection of cases that supports powerful governments over nonstate actors would all undermine the fairness within the resulting trial. Following Hafetz's argument would mean that an international court dealing with terrorism would have serious legitimacy issues if these fairness issues were not solved.

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<sup>17</sup> Hafetz (n6) 2.

<sup>18</sup> Ibid 168.

Rigney concludes that fairness and rights must be tightly bound so that both fairness and defence rights have real meaning and in practice.<sup>19</sup> With that in mind she argues that the future of international criminal law should see the goal of determining accountability as the main focus of trials. This requires a reevaluation and ranking of the goals of trial and a commitment to not using fairness arguments to undermine defence rights. Doing so would have the advantage of solving many of the problems and tensions between fairness and other aspects of the courts. It would make the roles of those involved in the trial process clearer and the process of trial more straightforward. Moving beyond the fairness issue, or perhaps thinking beyond trial itself, Rigney calls for a rethink about international criminal law and whether it is the appropriate solution to the problems that it tries to solve. She posits that the future of fairness scholarship might go beyond the critical approach to questioning whether international criminal law is beneficial and even a reimagining of the systems that deal with mass crimes with structural fairness in mind.

## 5. Conclusion

Although rigorously discussing the same right, these books are quite different. They take different methods, discuss different definitions of fairness, and generally have different perspectives on international criminal law. However, each engage with and provide a valuable contribution to understanding the challenges and applications of fairness. When read together they show both how far the field has come in its discussion of fairness and where it is headed in the future. Hafetz's doctrinal approach is traditional however, it contributes a much-needed update of the legal developments and demonstrates how the structure of fairness created within the law could be used to help create future international crimes. Rigney's more normative and critical approach is rooted in practice which allows us to think about not only the state of the law as it is, but what a meaningful understanding and application of fairness could and should be.

While there are many goals of international criminal trials, accountability through a fair trial must be at the heart. Trial and its requirement of fairness is one of the main areas in which there is a clear demonstration that fighting human rights violations (mass crimes) with other human rights violations (violations of fair trial rights) should be prevented. If international criminal justice is a machine which marches toward accountability, then fairness is a bit of resistance that helps ensure the right outcome while preventing those in power from punishing arbitrarily. However, for that necessary resistance to work, fairness must be understood, defined, and respected. The tensions, highlighted by these authors, between fairness and other aspects of international criminal trials highlight how fairness is important but underappreciated, and at times misunderstood, within the field. By defining fairness and examining these tensions these books contribute to strengthening international justice. The insistence on fairness in international criminal law helps ensure the safety of convictions and the legitimacy of the courts and system as a whole.

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<sup>19</sup> Rigney (n8) 197-205.