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Yvonne McDermott, *Fairness in International Criminal Trials*, Oxford, Oxford University Press, 2016, 256pp., ISBN 9780198739814, £70.00.

The prosecution of international crimes and the end of impunity are core goals of international criminal justice. However, they must be balanced with the rights of the accused and the necessity to have procedural safeguards in international criminal trials. Without such guarantees, the prosecution of heinous international crimes would lose its legitimacy, and the credibility of international criminal tribunals would be undermined. In this context, fairness is the criterion used to distinguish ‘victors’ justice’ from impartial criminal proceedings; to mark the boundary between an unlawful prosecution of international crimes, and the fight against impunity following the highest procedural safeguards. The peculiar nature of international criminal proceedings imposes the respect for higher standards of fairness than in national criminal jurisdictions. Indeed, international criminal courts need to do justice in a complex social, legal, and political context, avoiding ‘show trials’ and guaranteeing that the accused are fully protected in their rights, despite being charged with serious crimes. In this sense, international criminal tribunals can develop standards that trespass the borders of international criminal justice, becoming a ‘model’ for national jurisdictions.

In recent years, several authors have analysed the right to a fair trial in international criminal proceedings.¹ From these studies emerges a broad understanding of fairness, whereby different theories and approaches are proposed. One might argue that there is no room for further research on the topic and that the abundant existing literature precludes additional original arguments. However, a closer look to the scholarship shows that the discussion on the subject has been quite ‘chaotic’: much has been written, but a clear and comprehensive research on the topic has been missing. *Fairness in International Criminal Trials* brings order to this ‘chaos’, with an admirable and insightful analysis. The book seeks to achieve two purposes: (i) to describe the phenomenon of ‘fairness’ in international criminal justice; and (ii) to advance an innovative and authoritative interpretation of the topic for present and future international criminal trials. To this end, the author does not limit her research to a descriptive analysis of ‘fairness’, but she looks at the practice of international criminal tribunals and at their interpretation of the concept.

Fairness in International Criminal Trials is a fascinating study of the right to a fair trial in international criminal proceedings, both from a theoretical and an impact-based perspective. Through the analysis of fairness in international criminal procedure, the author gives an insightful account of the right to a fair trial and of its corollaries. This analysis is conducted looking at the law and practice of five international criminal tribunals, i.e. the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the International Criminal Court, and the Special Tribunal for Lebanon. The author describes ‘fairness’ as a general category that includes a plurality of rights for the accused, and she indicates the relevant practice of international criminal tribunals in applying these rights. The overarching argument of the

¹ For instance, see F. Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’, (2009) 14(1) *UCLA Journal of International Law and Foreign Affairs* 37; M. Damaska, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’, (2011) 36(2) *North Carolina Journal of International Law and Commercial Regulation* 365; M. Damaska, ‘Reflections on Fairness in International Criminal Justice’, (2012) 10(3) *JICJ* 611; A. Sarvarian et al (eds.), *Procedural Fairness in International Courts* (BIICL 2015).

book is that fairness is a necessary element of international criminal trials and a paramount goal of international criminal justice. It must be guaranteed at the highest level, and a ‘just fair enough’ (p. 125) justice is not sufficient. In this regard, two main points are considered: (i) what ‘fairness’ in international criminal justice means and what its features are; and (ii) what standards of fairness are necessary for international criminal trials.

In the book, McDermott first discusses the nature of international criminal procedure and clarifies the ‘lens’ she has adopted in assessing fairness in international criminal trials (Chapter 1). The author scrutinizes the different theories developed for the classification of international criminal procedure, and she underlines the limits of such positions, preferring an approach that avoids ‘domestic legal constructs’ (p. 10). McDermott qualifies international criminal procedure as a *sui generis* system, where the right to a fair trial plays a pivotal role. In this sense, international criminal procedure cannot be identified with one domestic criminal justice model, but it includes rules and principles that derive from various legal traditions. McDermott’s approach convinces in promoting the view of international criminal procedure as a specific area of international criminal justice, with its own scope and rationale.

Then, the author turns to the specific analysis of the right to a fair trial in international criminal proceedings (Chapters 2 and 3). McDermott argues for a ‘unique construct of fairness’ (p. 31), in the sense of determining a general category of fairness under which other related principles and rights are included. This argument is very persuasive and it correctly reflects the interpretation given by international and regional human rights bodies, such as the European Court of Human Rights.² Starting from this idea, the author dissects the right to a fair trial, focusing on its different corollary rights in the practice of five international criminal tribunals. McDermott describes in detail sixteen aspects of fairness strictly linked to the procedural safeguards that must be present in international criminal proceedings. From this study emerges that there have been positive advancements in applying the right to a fair trial by international criminal tribunals, but some issues remain relating to the consistency among the courts in their practice. By means of thought-provoking reasoning, the author depicts a system in which the right to a fair trial is widely applied by international criminal courts, but not always in the same way and at the same level.

In a very engaging part of the book, the author discusses the relationship between actors of international criminal proceedings (other than the accused) and the right to a fair trial (Chapter 4). McDermott takes into account the contribution of these subjects in achieving the highest standards of fairness and asks whether the right to a fair trial is owned only by the accused, or also by other actors, such as the prosecutor and the victims. The analysis focuses on the ‘stakeholders’ of the right to a fair trial and imposes some reflections on how international criminal procedure should balance the various actors’ rights at trial. This is the most controversial part of the book, and the most appealing. McDermott affirms that the right to a fair trial should be recognised principally to the accused, with a choice in favour of the defendant, when his/her rights and interests clash with those of the other parties of the proceeding. The attempts of the author to justify this ‘radical’ approach to fairness are not convincing for at least three reasons. First, the study fails to engage with the discussion about the qualification of many accused in international criminal proceedings as powerful subjects,

² See, for instance, the analysis done in ECtHR, *Guidance on Article 6: Right to a Fair Trial (Criminal Limb)* (Council of Europe 2014).

with the economic and political means to undermine the work of the tribunals that judge them. Allowing them to be preferred in the exercise of the right to a fair trial would increase their possibilities to weaken the proceeding. Second, limiting the right to a fair trial of the victims or the Prosecutor would violate the principle of equality of arms between the parties and it would create an unbalanced relationship between them. Indeed, the accused would be treated more favourably, prevailing on the other parties. Third, the right to a fair trial is certainly a fundamental guarantee for the accused, but, first and foremost, it is a pivotal element for international criminal proceedings in their entirety. Excluding some actors from its exercise would be contrary to its purpose, i.e. the conduct of a fair and impartial trial.

In another significant part of the book, the author engages with the standards of fairness required before international criminal tribunals (Chapter 5). Here McDermott poses the quite provocative question whether it would be sufficient to have justice done ‘fairly enough’, or instead fairness should be conceived as the ‘highest’ possible. In addressing this fundamental question, she conducts an excellent research of the goals of international criminal procedure and of the pros and cons of standard setting. The author attentively examines the two sides of fairness and its standards, avoiding a mere descriptive list of attributes. Her inference that only the highest standards of fairness are acceptable can be shared for two reasons. The highest standards are the sole that permit the judges to avoid abuses in the conduct of international criminal proceedings. Moreover, the highest standards help to avoid heavy criticisms on the works of international criminal tribunals; especially in light of the deep political pressure that international criminal justice faces nowadays.

A third significant part of the book focuses on the interplay between domestic and international jurisdictions in relation to the right to a fair trial (Chapter 6). The analysis exposes the leading role of international criminal tribunals in promoting and protecting the rights of the accused and the fairness of criminal proceedings. International jurisdictions become ‘models’ for domestic criminal justice systems, and, in a certain sense, their ‘watch dogs’. The author addresses three specific aspects of the relationship between international and domestic courts on fair trial matters. First, referring to the ICTY and ICTR rules and jurisprudence, the author considers the ‘guarding’ function of Rule 11*bis* of the Rules of Procedure and Evidence of the ICTY and ICTR. McDermott argues that this provision permits the ad hoc tribunals to check the respect of fairness at the national level. Second, the author discusses the ‘due process thesis’ (p. 156) in relation to the principle of complementarity. According to this thesis, the states need to guarantee certain standards of due process during a criminal proceeding and when they are unwilling or unable to do so, the case must be referred to an international criminal tribunal. In this regard, through a detailed examination of the elements of complementarity, McDermott agrees with the idea that a case can be brought before international criminal courts when domestic courts do not apply the same ‘high standards’ for the protection of the accused’s rights as at international level. Finally, McDermott interestingly outlines the link between the manner in which criminal proceedings are conducted at the national level and the possible derogation of the *ne bis in idem* principle, with pressure put by international criminal tribunals on domestic judges. Indeed, when a domestic court does not respect the right to a fair trial, the case can be brought before an international court and the accused is tried for the second time. Overall, the author presents three insightful arguments on the influence of the ‘international’ over the ‘national’ in criminal justice. She advances an original point of view on the matter, showing how

international criminal tribunals should persuade domestic courts to embrace their same high standards of fairness.

McDermott's concluding recommendation for a consistent approach by international criminal tribunals to the right to a fair trial is certainly of value. Indeed, in order to guarantee effectively fairness in international criminal proceedings and the protection of the accused's rights, a certain level of homogeneity in the interpretation and application of procedural rights is required. As correctly indicated by the author, despite the broad fragmentation of international criminal procedure, international criminal courts should avoid questionable practices and support the highest standards of fairness. This is due to the fact that, when prosecuting international crimes, they represent at the same time a 'model' for international criminal justice and for national jurisdictions.

If any criticisms can be made of McDermott's work, these relate to its structure, rather than to its content, since the arguments proposed are not always clearly presented. In particular, not all parts of the book have a clear layout (e.g. Chapter 6, Conclusion) and sometimes it is difficult to follow the flow of the arguments. This problem affects the clarity of the work, causing a lack of structural homogeneity. Moreover, the chapters are not always well balanced: some are too long (e.g. Chapter 3), whereas others would have benefited from a broader analysis (e.g. Chapter 5 and 6).

Despite these structural issues, McDermott has made a detailed examination of fairness in international criminal trials, advancing insightful and innovative ideas on its theoretical and practical aspects. The author addresses the issues surrounding the right to a fair trial, both pointing out the challenges faced by international criminal tribunals and critically analysing the future prospects of the standards of fairness. Moreover, McDermott enriches the existing literature on the topic, advancing some controversial interpretations of the right to a fair trial and of how it should be guaranteed in international criminal proceedings. Even if the arguments presented are sometimes debatable, they undoubtedly show the strength and originality of McDermott's contribution to the study of international criminal procedure. Indeed, studying and researching this field of law requires a cutting-edge approach that provokes a debate and helps our critical thinking.

Fairness in International Criminal Trials is an essential reading for students of international criminal law as well as practitioners before international criminal tribunals. With an excellent balance between general analysis and a more technical study, this book speaks to the specialists of the field, and to all those who seek to understand how international criminal justice works, what the limits of this system are, and how the judges of international criminal tribunals can guarantee the prosecution of heinous crimes maintaining the highest standards of fairness.

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