FAIRNESS AND THE GOALS OF INTERNATIONAL CRIMINAL TRIALS

FINDING A BALANCE

Caleb H Wheeler
Fairness and the Goals of International Criminal Trials

This book presents a ground-breaking, interdisciplinary study into the various goals assigned to international criminal trials. It starts from the proposition that no hierarchy exists amongst the different goals meaning that trials should strive to achieve all of them in equal measure. This is made difficult by the fact that not all of these goals are compatible and the fulfilment of one may lead to others going unmet. Therefore, a balance must be found if the goals of trial are to be achieved at all. The book posits that fairness should serve as the guiding principle when weighing the different trial goals against one another. It is argued that without fairness international and internationalised criminal courts and tribunals lack legitimacy and without legitimacy they lack effectiveness. The book concludes that international criminal trials must adopt procedures that emphasise fairness to all of the parties and trial participants if they wish to accomplish any of the goals set for them. Each chapter is devoted to identifying and explaining a different trial goal, providing analysis of how that particular goal functions in conjunction with the other goals, and discussing the ways in which a fairness-oriented trial model will help achieve those goals. The book provides a dynamic understanding of the different trial goals and the importance of fairness in the trial process by drawing on research from a variety of different legal disciplines while also incorporating scholarship rooted in criminology, political theory, international relations, and psychology. The book will be essential reading for researchers, academics and professionals working in the areas of International Criminal Law, Public International Law and Transitional Justice.

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### List of Acronyms

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<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>AUC</td>
<td>Autodefensas Unidas de Colombia</td>
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<td>CNDP/M23</td>
<td>National Congress for the Defense of the People/Movement of 23 March</td>
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<td>ELN</td>
<td>Ejército de Liberación Nacional</td>
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<td>FARC-EP</td>
<td>Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo</td>
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<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICTY</td>
<td>International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>IR</td>
<td>Internal Rules</td>
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<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>PNU</td>
<td>Party of National Unity</td>
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<td>PTSD</td>
<td>Post-Traumatic Stress Disorder</td>
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<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>STL</td>
<td>Special Tribunal for Lebanon</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNTAET</td>
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1 Introduction

This book was inspired by a question posed by Professor Carsten Stahn when he asked, ‘What are tribunals here for?’ My initial, and somewhat glib answer was ‘to hold trials’. International criminal justice institutions are, at their core, criminal courts, and the raison d'être of a criminal court is to try people accused of committing crimes. Trials represent the culminating event in most criminal justice processes. They are the point at which the law is applied to the facts to determine whether an accused is guilty of the crimes alleged. It is during trial that the prosecution presents the case against the accused to the finder of fact. Trials then afford the accused with the opportunity to answer the allegations against them and to make alternative arguments to those advanced by the prosecution. The fact-finder must then take all of this information and decide whether the evidence presented is sufficient to support a finding that the accused committed the crime or crimes alleged against them. A criminal justice institution that has reached that point would seem to have fulfilled its function and satisfactorily demonstrated the reason for its existence.

My response to Professor Stahn’s question is inadequate, however, when considered in the larger context of the purposes of international criminal law. While domestic legal systems are geared towards the lone goal of determining whether the accused can be held criminally responsible for the crimes alleged, the focus of international criminal trials is not so narrowly limited. Therefore, it became necessary to push the inquiry further and consider what goals international criminal justice institutions are trying to accomplish by holding trials.

International criminal trials are being asked to change the world. Created to hold individuals accountable for certain types of atrocity crimes – genocide, crimes against humanity, war crimes and the crime of aggression – they have also been assigned a number of other far-reaching purposes. These include: developing the history of and establishing the truth about a situation in which atrocity crimes were committed; achieving peace; fostering reconciliation; promoting the rule of


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law; and providing the victims of atrocity crimes with a sense of justice. These goals extend far beyond what is needed to establish legal accountability. They are broad, and at times they can come into conflict with one another. Asking trials to accomplish so many different goals naturally leads to the question: Is it possible for international criminal trials to achieve all of the goals set out for them?

This book will answer that question. It starts with the proposition that because no hierarchy has been established amongst these goals, international criminal trials should attempt to achieve all of them in equal measure. However, it is clear that tension exists between some of these goals and that prioritising the fulfilment of one could lead to others going unmet. Therefore, a balance must be found if the goals of trial are to be achieved at all. The book posits that fairness should serve as the guiding principle when weighing the different trial goals against one another. Without fairness, international and internationalised criminal courts and tribunals lack legitimacy and without legitimacy they lack effectiveness and acceptance. The book concludes that fairness should drive every trial decision made during proceedings at an international criminal justice institution to maximise the likelihood that all of the goals of trial will be accomplished.

This book conducts a critical examination of all six of the purposes of international criminal trials. Each chapter will be devoted to identifying and explaining a different goal and providing an analysis of how that particular goal functions in conjunction with the other goals. By looking at each goal individually, and then analysing it in relation to the others, this book provides a dynamic understanding of what international criminal trials are meant to achieve. It does this by taking a broad, interdisciplinary approach to the research. While the book is primarily based in international criminal law, it also considers a variety of other academic perspectives including: international human rights law, international humanitarian law, transitional justice, criminology, psychology, political theory and international relations.

Most of the trial goals are initially approached through a consideration of the primary source material, particularly: international and regional human rights treaties and conventions, statutes of the different international and internationalised criminal courts, United Nations General Assembly and Security Council resolutions, other law-making instruments including rules of procedure and evidence, and case law. The statutes, rules and case law of the post-World War II International Military Tribunals, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia all receive attention. These particular institutions have made the most significant contribution towards understanding the motivations underlying international criminal trials.

A 2004 report by the Secretary-General of the United Nations on transitional justice in conflict and post-conflict situations served as a starting point for identifying the goals of international criminal trials discussed in this book. The report
contained a number of objectives that the United Nations hoped the establishment of international criminal justice institutions would accomplish. They are:

[B]ringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.3

These goals largely reflected the purposes set out in the foundational documents of the international criminal justice institutions then in existence. The International Criminal Tribunal for the former Yugoslavia was established with three goals in mind: stopping the then ongoing violations of international humanitarian law being committed in the former Yugoslavia; bringing to justice the individuals perpetrating those crimes; and restoring and maintaining peace in the region.4 The International Criminal Tribunal for Rwanda was created by the UN Security Council on a similar basis, while also identifying the need for the Tribunal to contribute to reconciliation within Rwanda.5 The International Criminal Court was designed to accomplish many of the same things as the ad hoc Tribunals, while also specifically recognising the need to deliver justice to the victims of atrocity crimes.6 The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia were also charged with achieving similar goals to those set for their predecessors.7 The Special Tribunal for Lebanon was founded on the basis of the need for accountability, particularly to the extent that the assassination of the Rafik Hariri constituted a threat to international peace and security, and also to assist Lebanon ‘in the search for the truth’ about the incident.8 Taken together, these different sources indicate that international criminal trials are meant to accomplish six goals during trial. They are:

1 determining the individual accountability of the accused;
2 promoting the rule of law;
3 establishing the truth about the incident at issue;
4 achieving long-term peace;
5 fostering reconciliation in the affected region; and
6 providing the victims with a sense of justice.

Recent qualitative research done at the International Criminal Court was also used to identify the goals of international criminal trials discussed in this book. In 2020,

4 UNSC Res. 808 (22 February 1993), 2; UNSC Res. 827 (25 May 1993), 1.
5 UNSC Res. 955 (8 November 1994), 1.
7 Resolution, 1315; GA resolution 57/228 A/RES/57/228 (27 February 2003)
8 Ibid.
Samaria Muhammad, Barbara Holá and Anja Dirkzwager surveyed individuals working in different capacities at the International Criminal Court about what they felt were the purposes of trials.\(^9\) The respondents identified a myriad of goals, including: fighting impunity; prosecuting the people responsible for committing atrocity crimes; providing justice to the victims; rule of law concepts like capacity building and supplementing the work of domestic jurisdictions; conducting fair and impartial trials; and contributing to peace and stability.\(^10\) These goals mostly overlap with those previously identified in the Secretary-General’s report and the foundational documents of the different international criminal courts and tribunals.

The one main omission from the list of trial goals discussed in this book is the oft-cited desire to end impunity. Ending impunity is not discussed because it is an aspirational goal that cannot be achieved within the context of a particular trial. Further, it is also not a goal that can be accomplished in isolation from the other goals of trial. Rather, international criminal trials can only play a role in ending impunity if they are successful in achieving the six identified goals. Therefore, it should not be considered a goal of trial, but rather an outcome resulting from the successful realisation of the six stated trial goals.

Identifying the goals of international criminal trials is only the first step. Each goal is exceedingly ambitious and has its own requirements about how it can be accomplished.\(^11\) In some cases the different ways the goals can be fulfilled may conflict with one another.\(^12\) Additionally, not all of the goals of international criminal trials are easily achieved during an international criminal trial.\(^13\) These challenges make it tempting to dismiss those goals that are difficult or in conflict and to instead focus on the ones that trials are best equipped to satisfy. However, the lack of a hierarchy amongst the different trial goals means that they are all equally important and must each be given the same effect.\(^14\) As a result, some fulcrum is needed to allow for the balancing of these different requirements if there is to be any hope that international criminal trials will achieve all of the different goals set for them. This book proposes that fairness fills that role. Fairness has been chosen for this task because of the indispensable role it plays in


\(^10\) Ibid 132.


\(^12\) van der Merwe, Baxter and Chapman (n 11) 3.


producing reliable and truthful trial outcomes. It is believed that trials producing reliable and truthful outcomes are best positioned to achieve all of their stated aims. What this book intends to find out is whether fairness can adequately serve that purpose and whether the various goals of international criminal trials can be simultaneously achieved.

2 The Role Fairness Plays in Legal Accountability

Accountability is the goal most commonly associated with international criminal trials. It is a term that is used broadly to describe any process whereby responsibility is apportioned for criminal acts.¹ Common types of accountability mechanisms include trials, truth and reconciliation commissions, the memorialisation of victims, commissions of inquiry and other ‘guarantees of non-repetition’.² In the criminal law context, accountability is pursued through a good faith investigation into the alleged actions of a suspect that, should the investigation so warrant, results in the suspect being prosecuted for those actions at trial.³ This form of accountability, often called legal accountability, is accomplished when a nexus is established during trial between the factual guilt and the legal guilt of the accused resulting in a guilty verdict.⁴ This conclusion is reached on the basis of the fact-finder’s assessment of the evidence presented against the accused.⁵ Legal accountability does not mean that every person charged with a crime must be convicted.⁶ Legal accountability, when properly realised, requires the acquittal of an accused when the applicable rules so dictate.⁷ Further, not all criminal

² Fournet (n 1) 27.
³ Prosecutor v Bemba (Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III’s ‘Judgment Pursuant to Article 74 of the Statute: Concurring Separate Opinion of Judge Eboe-Osuji) No ICC-01/05–01/08, App Ch (8 June 2018) [27].
⁶ Judge Eboe-Osuji Separate Opinion (n 3) [28].
⁷ Ibid.

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convictions produce accountability; it only results when the person who actually committed the crimes alleged is found to be responsible for them.8

There are several important issues to address when considering how accountability can be established during international criminal trials. The first is procedural and includes a consideration of the role fairness plays in accountability. Whether a trial accomplishes accountability is often dependent on the procedure used when conducting the trial. Trial courts that make arbitrary or capricious decisions are more likely to reach a judgment decided on an improper basis. For this reason, international criminal trials should place fairness at the centre of the process. A process focused on procedural fairness for all of the parties is more likely to result in a just outcome because it guarantees that safeguards are in place to ensure that the accused will not be convicted or acquitted on an impermissible basis. This leads to the second issue under review in this chapter, relating to how a fairness-focused trial process can create positive perceptions about the legitimacy of the international criminal justice institution holding the trial. International criminal courts and tribunals lack the legitimacy that domestic courts derive from being established by the government. Demonstrating that trials are fair to all parties can be a good way of building the legitimacy needed to have the decisions of the court or tribunal respected.

Having discussed the importance of fairness in the trial process, the chapter will then contemplate what outcome is needed for different interested parties to conclude that the trial has properly held the accused accountable for their actions. Within that context, it contends with the role punishment plays in accountability and particularly how different interested groups view the necessity of punishment. It concludes that fairness and appropriate punishment should be prioritised to maximise accountability, which in turn will increase the legitimacy of the trials and the institutions holding them. Greater legitimacy will bring greater acceptance of international criminal judgments, which will help to facilitate the other goals of international criminal trials.

The Importance of Fairness when Determining Accountability

Fairness, in the context of a criminal trial, should be understood as the principle that trials must be conducted in a way that ensures that justice is properly administered. This can be accomplished by guaranteeing that the trial participants have access to rights that, when given full effect, will result in the proceeding ending in a just outcome.9 Doubt is cast on the validity of the trial as a whole when these rights are not properly observed. An unfair trial can increase the possibility that someone other than the actual perpetrator of the crimes alleged is being held

8 Prosecutor v Bemba (Separate Opinion Judge Christine van den Wyngaert and Judge Howard Morrison) No ICC-01/05–01/08, App Ch (8 June 2018) [78].
responsible for them. As a result, an unfair process is more likely to fail to meet the requirements of accountability.

The connection between fairness and accountability raises the question of how fair a trial must be to ensure that it is meeting the accountability goal. Put differently, does it require the trial court to strictly protect the rights of the parties or can a lesser standard of fairness suffice to ensure that the right person is held accountable? Several arguments have been advanced in favour of the need for full compliance. Antonio Cassese asserted that the purpose of trials is to ‘defend and protect human rights’. With that as a starting point it would appear axiomatic that trials must fully comply with all relevant human rights standards. If the very purpose of international criminal trials is to protect human rights, what legitimate purpose could they serve if they fail to protect the rights of the parties? The appropriate answer to human rights abuses cannot possibly be the infringement of the human rights of others. This would do nothing more than create an endless cycle of violations rendering the trials for these abuses meaningless.

Cassese also suggested that international criminal trials must strive for a high standard of fairness so as to create an example for future trials. He was speaking in the particular context of the International Criminal Tribunal for the former Yugoslavia when he made this observation, and his views were based on the fact that as the first modern international criminal justice institution it had a responsibility to act as a model for those that came after it. This illustrative function of international criminal trials is also one that has application in the domestic sphere, and can particularly impact rule of law building efforts in post-conflict and transitional states. As will be discussed in greater detail in subsequent chapters, when international criminal justice institutions exhibit a firm commitment to human rights it can demonstrate to states the importance of those concepts, which in turn can help strengthen the rule of law in those states. Further, it can also illustrate the central importance of human rights in society and reinforce the notion the criminal process should not be misused to gratify the ‘vengeful and retributivist’ demands of the collective.

The ways in which international criminal courts and tribunals came into being also should encourage them to prioritise fairness during trials. These organisations are the product of political agreements, and as such, they lack the inherent legitimacy of domestic courts that operate as a part of the national government. This means that international criminal justice institutions must construct their own legitimacy, which is best achieved by delivering a high quality of justice.

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11 Ibid.
12 Yvonne McDermott, Fairness in International Criminal Trials (OUP 2016) 146.
14 Ibid.
Conducting fair trials is a key part of this as it demonstrates that the court will make its decisions fairly, without bias or favour. Judge Christine van den Wyngaert reinforced the importance of this idea in her minority opinion to the Katanga Judgment delivered at the International Criminal Court. In it, she asserts that a court’s legal and moral authority to pass judgment on an accused, i.e. its ability to legitimately exercise its judicial function, is dependent on whether the trial has been fair in its entirety. For her, whether a trial has been fair largely hinges on whether it was fair to the accused. Yvonne McDermott extends this point by suggesting that anything less than ‘scrupulous fairness’ to the accused not only diminishes the legitimacy of the trial and undermines the goal of accountability, it also violates the presumption of innocence and acts as a form of pre-determination punishment. When viewed in this way, a trial that fails to fully adhere to the accused’s right to a fair trial is a human rights violation.

It is not universally accepted that international criminal trials need to provide the accused with the highest possible standard of fairness. Colin Warbrick unambiguously rejects the highest standard approach by asserting that trials need only be ‘fair enough’ to all of the participants ‘rather than aspiring to an exemplary or superior level of “fairest of all”’. He argues that few of the rights that make up the accused’s right to a fair trial are absolute, and to understand them as such would create an impossible standard to meet. Instead, trial courts should ensure that the trial results in the correct outcome – i.e. one that produces accountability – without impermissibly infringing on the fair trial rights of the accused.

Approaching fairness in this way could alleviate one of the main concerns victims of atrocity crimes have about international criminal trials. Victims have often expressed the opinion that trials are overly concerned with protecting the rights of the accused, which they have understood as an indication of bias against their own interests. This has led many of them to become disillusioned with international criminal justice, undermining its ability to accomplish any of its goals. Therefore, if international criminal trials take a more balanced approach to protecting the rights of all parties it could inspire more victims to work cooperatively with international criminal justice institutions.

15 Ibid.
16 Prosecutor v Katanga (Minority Opinion of Judge Christine Van den Wyngaert) No ICC-01/04-01/07, T Ch II (7 March 2014) [311].
17 Ibid.
18 Yvonne McDermott, Fairness in International Criminal Trials (OUP 2016) 146.
20 Ibid.
21 Ibid.
Trial fairness cannot be the exclusive domain of the accused if international criminal law institutions wish to accomplish the goals set out for them. Victims of atrocity crimes also have certain rights that must be respected by the trial court for trial to be considered fair that must be balanced against the rights of the accused.\(^23\) This is most evident in the Rome Statute of the International Criminal Court, which contains a provision granting victims the right to directly participate in trial proceedings.\(^24\) The right to participate is considered one of the major innovations of the International Criminal Court, and one that exceeds what is allowed in most domestic jurisdictions.\(^25\) The existence of the victims’ right to participate does not mean that victims are entitled to the same level of fairness as the accused. In fact, when the rights of the accused and the victims come into conflict, Article 68(3) of the Rome Statute makes clear that the victims may not participate in a way that is ‘prejudicial to or inconsistent with’ the rights of the accused.\(^26\)

Other parts of the Rome Statute support the conclusion that fairness to the accused must be the overriding concern of a trial court. Article 64(2) mandates that Trial Chambers at the International Criminal Court have a responsibility to ensure that ‘trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’.\(^27\) Similar obligations can be found in the Statutes for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.\(^28\) There is an obvious semantic difference between the trial court’s duty to give full respect for the rights of the accused and its responsibility to give due regard to the protection of victims. This instruction has been interpreted to mean that the interests of the accused are paramount to those of the victims, and that they must take precedence when the two are in conflict.\(^29\)


\(^{26}\) Anni Pues, ‘A Victim’s Right to a Fair Trial at the International Criminal Court: Reflections on Article 68(3)’ (2015) 13 JICJ 951, 958; *see also* Rome Statute (n 24) Art 68(3).

\(^{27}\) Rome Statute (n 24) Art 64(2).


Van den Wyngaert suggests this is because during trial the accused is the only participant risking their liberty and property, meaning that they have the most to lose if the trial is unfair.  

This view is somewhat reductive, to the extent that it undervalues the loss victims have already experienced and the sense of justice they can experience following a conviction. Despite this, the victim’s interest in trial fairness is still generally considered subsidiary to that of the accused and it must give way when it is thought to threaten the accused’s fair trial rights.

Fairness also dictates that the Prosecution is given a fair chance to present their case in order to prove the guilt of the accused. In aid of this, the Prosecution can introduce any evidence relevant to the crimes alleged, limited only to the extent that evidence thought to be unreliable or unfairly prejudicial can be excluded. The issue of fairness to the prosecution was raised by the International Criminal Tribunal for the former Yugoslavia’s prosecutor in the Haradinaj et al. case. There, the prosecutor claimed that the Trial Chamber violated their right to a fair trial by failing to allow them to exhaust all reasonable steps in securing the testimony of two witnesses. This was due, in part to the expiration of a pre-determined amount of time afforded to the prosecution to present its case. The Appeals Chamber determined that the Trial Chamber’s decision to prioritise procedural concerns over ensuring the introduction of all of the prosecution’s evidence was an error that undermined the fairness of the proceedings resulting in a miscarriage of justice. Interestingly, the original judgment refers to the prosecutor’s right to a fair trial, a reference that was later removed from the judgment and replaced by a more general statement about the fairness of the proceedings.

Accountability is dependent on a belief that the trial resulted in the right person being convicted for the crimes they committed. Without fairness, trials will struggle to achieve adequate accountability. An unfair trial process calls into question whether the right outcome was reached as it makes it more likely that the case has been decided on a flawed basis. Therefore, fairness must be prioritised to better

30 Prosecutor v Katanga (Minority Opinion of Judge Christine Van den Wyngaert) No ICC-01/04–01/07, T Ch (7 March 2014) [311].
31 Situation in Uganda (Decision on Prosecutor’s Applications for Leave to Appeal Dated the 15th Day of May 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006) No ICC-02/04–01/05, PT Ch (10 July 2006) [24].
33 Prosecutor v Haradinaj et al. (Judgement) No IT-04–84-A, A Ch (19 July 2010) [14].
34 Ibid [28].
35 Ibid [49].
36 Prosecutor v Haradinaj et al. (Corrigendum to Judgement of 19 July 2010) No IT-04–84-A, A Ch (23 July 2010) [2].