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International criminal trials: A normative theory

Vasiliev, S.

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CHAPTER 2.**FAIRNESS AND ITS METRIC IN INTERNATIONAL CRIMINAL PROCEDURE: DRAWING FROM HUMAN RIGHTS LAW**

1. Introduction	89
2. ‘Fairness’ as external framework: Drawing from human rights law	90
2.1. Duality of human rights law and its questions	90
2.2. Human rights law as binding law	96
2.2.1. From the nature of obligation...	96
2.2.2. ... to sources of law	99
2.2.3. Human rights law as applicable law	104
2.2.3.1. Treaty law	104
2.2.3.2. General international law	105
A. Question of applicability, again	105
B. Custom	108
C. General principles of law	114
D. Moving beyond sources	116
2.2.3.3. Precedents of other courts and monitoring bodies	116
2.2.4. Law or policy, and does it matter?	124
2.3. Human rights as a methodological framework: Place in the normative hierarchy	129
2.3.1. <i>Ad hoc</i> tribunals	129
2.3.2. ICC	132
2.3.3. Other courts	136
3. Metric of ‘Fairness’: Contextualization and its Limitations	138
3.1. The need and duty to contextualize	138
3.2. ‘Fairest’ or ‘fair enough’?	145
3.3. What is ‘enough’? Setting the limits	150
4. Conclusion	155

1. INTRODUCTION

This Chapter outlines the first aspect of the methodological framework relied upon in the discussion of the trial process before international and hybrid criminal jurisdictions. It tackles the questions of whether and why ‘fairness’ is a suitable parameter for evaluating international criminal justice and its procedural law, and how it is to be used. The aim is neither to provide a detailed overview of the requirements of fairness in international criminal proceedings and specific components of the right to a fair trial or other rights,¹ nor to look into how those standards correlate with analogous requirements obtaining in domestic jurisdictions, as policed by regional human rights courts

¹ For useful overviews and analyses, see S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003); W. Schomburg, ‘The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights’, (2009) 8 *Northwestern Journal of International Human Rights* 1.

(ECtHR and IACtHR) and treaty monitoring bodies (HRC).² Many other works have dealt with these topics at length.

The contours of the ‘fairness’ perspective on international criminal procedure will be examined as a normative phenomenon, as a set of binding legal standards and factors impacting on international criminal practice, rather than from a sociological viewpoint concerned with anyone’s perceptions of the process as fair or unfair.³ The main question—the grounds for, and the extent of, the applicability of human rights to the tribunals—is addressed from a conceptual angle. This focus aims at highlighting the methodological positions adopted in the following appraisal of the trial proceedings.⁴ With this constraint in mind, the empirical basis for this Chapter is limited to a few cases demonstrating the points made. A comprehensive treatment of the human rights practice of the tribunals would deserve a focused study on its own.

International human rights law (IHRL), as the ‘external’ framework of fairness and a yardstick for review of the performance of international tribunals, shapes their internal practices in several ways. The normative effects of IHRL in the tribunals’ legal environments, the legal grounds for this impact, and specific paths of legal and policy reasoning employed by the courts when drawing upon the notions of IHRL (and when departing from them) are questions which warrant a closer look. What value do the IHRL norms and precedents have in the application of statutes and rules of procedure and evidence? What type of procedural outcomes attracts the finding of inconsistency with that law, and what are the consequences? Finally, it is claimed that tribunals are to be accorded a certain ‘margin of appreciation’ in applying the IHRL provisions within their specific context.⁵ If that is so, what are the boundaries of the normatively acceptable contextual interpretation and application of human rights law? The answers to these queries would assist in establishing how the evaluative criterion of ‘fairness’ is to be applied and what weight is to be assigned to IHRL and the related jurisprudence in the domain of international criminal courts.

2. ‘FAIRNESS’ AS EXTERNAL FRAMEWORK: DRAWING FROM HUMAN RIGHTS LAW

2.1. Duality of human rights law and its questions

The genealogical and philosophical anchorage of international criminal law to IHRL and related complexities, have been discussed elsewhere and do not need to be paused upon.⁶ Suffice it to recall

² See further E. Møse, ‘Impact of Human Rights Conventions on the Two Ad Hoc Tribunals’, in M. Bergsmo (ed.), *Human rights and Criminal Justice for the Down-trodden: Essays in Honour of Asbjørn Eide* (Leiden/Boston: Martinus Nijhoff, 2003) 185-204; S. Trechsel, ‘Rights in Criminal Proceedings under the ECHR and the ICTY Statute—A Precarious Comparison’, in B. Swart *et al.* (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 158 *et seq.*; R. Pati, ‘Fair Trial Standards under Human Rights Treaty Law and the ICTY: A Process of Cross-Fertilization?’, in T. Kruesmann (ed.), *ICTY: Towards a Fair Trial?* (Graz: Neuer Wissenschaftlicher Verlag, 2008) 147-84; V. Dimitrijević and M. Milanović, ‘Human Rights Before International Criminal Courts’, in J. Grimheden and R. Ring (eds), *Human Rights Law: From Dissemination to Application. Essays in Honour of Göran Melander* (Leiden: Brill, 2006) 149-68.

³ Discussing the gap between the ‘action’ and ‘perception’ of fairness, see C. Stahn, ‘Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice’, (2012) 25 *Leiden Journal of International Law* 251, at 270.

⁴ See Chapters 8-11, which elaborate more on the components of international trial procedure in light of the requirements of human rights law.

⁵ M. Damaška, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’, (2011) 36 *North Carolina International Law and Comparative Regulation* 365; *id.*, ‘Reflections on Fairness in International Criminal Justice’, (2012) 10 *JICJ* 611.

⁶ See further Møse, ‘Impact of Human Rights Conventions’ (n 2), at 180-82; F. Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’, (2011) 9 *JICJ* 577, at 578-79, 593-94; P. Pinto Soares, ‘Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism’, (2012) 23 *Criminal Law Forum* 161, at 171-72.

the metaphor by Judge Christine van den Wyngaert, who distinguished between the ‘shield’ and ‘sword’ functions of human rights law in the operation of criminal justice.⁷ The substantive ICL is seen as its law-enforcing extension. Insofar as international criminal tribunals were established to put an end to impunity for gross violations of human rights law, they give expression to its repressive impulse and are its ‘sword’. Since they complement and give teeth to the international machinery for the protection of human rights in a broad sense,⁸ they have even been dubbed as ‘human rights courts’.⁹ But in exercising their repressive mandate, the tribunals must abide by the standards of fairness and stay clear from violating rights themselves, thus giving the deserving effect to the ‘shield’ function of human rights law, which protects individuals from abuse of state (or any public) power.

It is neither this ‘duality’ of hypostases of human rights law that looms in criminal justice generally, nor tensions between its protective and repressive roles that are visible in the divide between substantive and procedural criminal law that is of primary concern here.¹⁰ Instead, premium lies on the ‘shield’ function that is central to international criminal procedure. Through this prism, ‘duality’ will rather denote pluralism as the co-existence and interplay of several regimes of human rights protection before the tribunals.

The function of the tribunals as forums of criminal adjudication points unmistakably to their true institutional nature. The international community, acting through its ostensible embodiment (UN) in creating and endorsing those courts, initially enjoyed a significant credit of trust in relation to the way it organized and ran international justice project.¹¹ With its magnanimity not being under question, the (disingenuous) view prevailed that its institutions and procedures are unlikely to result in violations of human rights of persons over whom the tribunals’ jurisdiction extends.¹² But it is now well accepted—and confirmed by experience—that violations of human rights are not the prerogative of states and that international organizations, tribunals and courts included, can also find themselves in an unenviable position of rights violators.¹³ Such a risk is intrinsic to the undertaking of criminal justice, and the tribunals have already lost a lion’s share of initial capital in this regard. The most common and scathing critique of the tribunals’ performance relates to the

⁷ C. van den Wyngaert, ‘Human Rights between Sword and Shield’, Lecture at the Award Ceremony Prize, Human Rights League, Antwerp, December 2006. See Tulkens, ‘The Paradoxical Relationship’ (n 6), at 579.

⁸ E.g. L. Gradoni, ‘International Criminal Courts and Tribunals: Bound by Human Rights Norms ... or Tied Down?’, (2006) 19 *Leiden Journal of International Law* 847, at 847; G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), at 40-1; S. Stapleton, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation’, (1999) 31 *New York University Journal of International Law and Politics* 535, at 535.

⁹ W.A. Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’, (1997) 7 *Duke Journal of Comparative and International Law* 461, at 516.

¹⁰ On tensions between international law and criminal method and sources in the domain of ICL, see B. Perrin, ‘Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials’, (2007-8) 39(2) *Ottawa Law Review* 367, at 379 *et seq.*

¹¹ See e.g. F. Mégret, ‘Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure’, (2009) 14 *UCLA Journal of International Law & Foreign Affairs* 36, at 72 (reporting the widespread, self-indulgent view that ‘international community can do no wrong’).

¹² As non-state actors (including the UN and other international and regional organizations, transnational corporations, armed groups, and quasi-state entities acquiring more powers and played an increasing role in global governance, their potential to commit human-rights abuses came to meet with growing recognition. See F. Mégret and F. Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’, (2003) 25 *Human Rights Quarterly* 314-342 (the transformation of the UN’s mission brought about a role shift from ‘benevolent promoter’ to the potential violator of IHRL and bearer of the obligation to protect human rights in its operations); A. Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situation’, (2006) 88(863) *International Review of the Red Cross* 491.

¹³ Among others, see G. Sluiter, ‘International Criminal Proceedings and the Protection of Human Rights’, (2003) 37 *New England Law Review* 935, at 935.

provision to be tried without undue delay.¹⁴ Beyond the right to a fair trial and the minimum guarantees,¹⁵ the rights at stake include the right to liberty and security in person¹⁶ and rights not as central to the administration of criminal justice, e.g. the right to privacy¹⁷ and the freedom of expression.¹⁸

The lofty ideal of a liberal criminal justice system that is so vital to the project of international criminal justice is facing unique and extraordinary challenges in the operational and institutional realities of the tribunals.¹⁹ Unlike most states, they are not availed of a 'safety cushion' of external human rights supervisory mechanisms. Apart from incidental, exceptional, and superficial review of their fairness and independence by human rights courts,²⁰ the tribunals remain insulated from external judicial oversight.²¹ The necessity and indeed the possibility of submitting them to human rights supervision generally or at present may be debated.²² Regardless, this isolation places the tribunals on a slippery slope and should be a reason for them to exercise utmost caution in regard of their human rights practice.²³ Worse still, they operate checked neither by strong constitutional structures and political culture which are bulwarks of hard-won due process safeguards in domestic jurisdictions, nor by a longstanding tradition of administering justice probed in the water and fire of reforms over centuries.²⁴ These circumstances confirm the existing

¹⁴ D. Tolbert and F. Gaynor, 'International Tribunals and the Right to a Speedy Trial: Problems and Possible Remedies', (2009) 27 *Law in Context* 33; Schomburg, 'The Role of International Criminal Tribunals' (n 1), at 14.

¹⁵ Art. 14 ICCPR; Art. 6 ECHR; Art. 8 ACHR; Art. 7 ACHPR.

¹⁶ Art. 9 ICCPR; Art. 5 ECHR; Art. 7 ACHR; Art. 6 ACHPR. For several examples from practice, see n 33.

¹⁷ Art. 17 ICCPR; Art. 8 ECHR; Art. 11 ACHR.

¹⁸ For example, the tribunals' subpoena to a war correspondent might inhibit the work of this category of journalists and limit the right of the public to receive information, which is the component of the freedom of expression. Orders to a newspaper (or to the parties) to refrain from divulging the names of protected witnesses also impinge upon that freedom. See e.g. Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36, TC II, ICTY, 7 June 2002, reversed on appeal: Decision on Interlocutory Appeal, Case No. IT-99-36-AR73.9, AC, ICTY, 11 December 2002 ('*Brđanin and Talić* appeal decision'); Decision on Prosecution Motion for an Order for Publication of Newspaper Advertisement and an Order for Service of Documents, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13a-PT, TC II, ICTY, 19 December 1997.

¹⁹ Dimitrijević and Milanović, 'Human Rights' (n 2), at 149.

²⁰ See *Naletilić v. Croatia*, Decision as to the admissibility, Application No. 51891/99, ECtHR, 4 May 2000 ('an international court ..., in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence.');

Milošević v. the Netherlands, Decision as to the admissibility, Application No. 77631/01, ECtHR, 19 March 2002 (dismissed as inadmissible for the failure to exhaust domestic remedies); *Blagojević v. the Netherlands*, Decision as to the admissibility, Application No. 49032/07, ECtHR, 9 June 2009, para. 46 ('an international tribunal established by the Security Council of the United Nations, an international organisation founded on the principle of respect for fundamental human rights and that moreover the basic legal provisions governing that tribunal's organisation and procedure are purposely designed to provide those indicted before it with all appropriate guarantees.')

and *Galić v. The Netherlands*, Decision as to the admissibility, Application No. 22617/07, ECtHR, 9 June 2009, para. 46. The latter two applications were dismissed for the lack of *ratione personae* jurisdiction). See also *Djokaba Lambi Longa v. The Netherlands*, Decision as to the admissibility, Application No. 33917/12, ECtHR, 9 October 2012, para. 71.

²¹ Along the same lines, see Mégret, 'Beyond "Fairness"' (n 11), at 52.

²² Judgement, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, TC II, ICTY, 14 January 2000 ('*Kupreškić et al.* trial judgement'), para. 540 (referring to the lack of a hierarchical judicial system in the international community); Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, AC ICTY, 2 October 1995 ('*Tadić* jurisdictional appeal decision'), para. 11 ('International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power can be centralized or vested in one of them but not the other.')

See also Zappalà, *Human Rights* (n 1), at 13-14 (suggesting that tribunals 'cannot be subjected to the supervision of organs belonging to a different system. Among international judicial bodies there cannot be such vertical relationships.')

²³ Dimitrijević and Milanović, 'Human Rights' (n 2), at 167.

²⁴ G. Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations', (2007) 20 *Leiden Journal of International Law* 613, at 618 (the *ad hoc* tribunals 'cannot rely on a long tradition of delivering justice and upholding the rule of law').

suspicion that the tribunals are at least as prone to abuse as the tightly policed domestic justice systems, and that absent external surveillance over any violations occurring before the tribunals stand a lower chance to be adequately addressed. The tribunals solely depend upon internal safeguards for disclosing and remedying any violations, and this is where the faith in their liberalism may transgress liberalism's own boundaries.

The usual starting point in discussions about the position and authority of IHRL has been the recognition that it leads a 'double life' in the legal regime of the tribunals.²⁵ On the one hand, most—but not all—human rights protections enshrined in international treaties and other sources of IHRL enter into the legal space of the tribunals by virtue of their express codification in the statutes, rules of procedure and evidence, and other internal instruments.²⁶ The imprint of Article 14 of the ICCPR and Article 6 of the ECHR on the language of those provisions is self-evident.²⁷ Those standards were internalized as *lex specialis* of the tribunals and, as integral elements of their constituent documents, their binding character is not an issue.

On the other hand, IHRL as a corpus of *lex generalis* continues to operate 'outside' of the legal regimes of the tribunals, both as a specialized branch of international law codified in universal and regional human rights treaties (and soft law instruments) and as a part of general international law. This authoritative and elaborate regime is 'external' in the sense of being contained in sources other than the tribunals' statutes and rules. The duality of human rights law raises questions from the viewpoint of tribunals as law-apppliers. Its dissimilation into distinct layers of varying density, mode of application, and even content creates uncertainties as to the nature of relationship between the 'internal' and 'external' frameworks and, more specifically, the import of the 'external' regime on the procedural practice of the tribunals. Indeed, the fact that two regimes are not necessarily identical in purport and detail evinces fragmentation of human rights law relevant to the work of the tribunal.

Its first indication is that the tribunals' internal regimes are not as comprehensive in scope as those prescribed for states under most IHRL instruments. Presumably, the categories of human rights were selected for codification in statutes and rules of the tribunals based on their apparent relevance to criminal justice (e.g. fair trial). But some rights of evident or potential pertinence were omitted from the statutory catalogues.²⁸ Several examples may demonstrate this point. The right to liberty and security of person, the right to compensation for unlawful detention and unjust conviction, the right to an independent and impartial tribunal established by law, and the right to review by a higher court are missing from the inventories of rights laid down in the ICTY, ICTR, and SCSL Statutes.²⁹ The lack of mention of the latter two rights in the Statutes' catalogue does not amount to a gap because they are effectively guaranteed in other provisions. The right to an independent and impartial tribunal is couched as a set of institutional guarantees and obligations on the judges, from which it is perfectly inferable.³⁰ The same holds for the right to appeal, which

²⁵ E.g. Gradoni, 'International Criminal Court and Tribunals' (n 8), at 484 ('In a sense, human rights law may be said to exist both within the system – the rights enshrined in the Statutes of the ad hoc Tribunal and the ICC – and outside it, in regional and universal human rights instruments, customary law, and general principles of law.').

²⁶ Arts 18(3) and 21 ICTY Statute; Arts 17(3) and 20 ICTR Statute; Art. 17 SCSL Statute; Rule 42 ICTY, ICTR, and SCSL RPE; Art. 55 and 67 ICC Statute; Section 6 TRCP; Arts 15-16 STL Statute.

²⁷ The origin of the ICTY Statute's provisions in Art. 14 ICCPR is recognized, among others, in *Tadić* jurisdictional appeal decision (n 22), para. 42.

²⁸ See also M. Fedorova and G. Sluiter, 'Human Rights as *Minimum* Standards in International Criminal Proceedings', (2009) 3 *Human Rights & International Legal Discourse* 9, at 19.

²⁹ Art. 21 ICTY Statute; Art. 20 ICTR Statute; and Art. 19 SCSL Statute. On the right to liberty and security in person: Art. 9(1) ICCPR; on the right to compensation for unlawful detention and unjust conviction, and the general right to remedy: see respectively Arts 9(5), 14(6) and 2(3) ICCPR; Art. (5) ECHR; Art. 3 Protocol 7, ECHR; on right to review: Art. 14(5) ICCPR, cf. Art. 2 Protocol 7, ECtHR. At the drafting of the Statutes, the chapeau of Art. 14 ICCPR was cut back, resulting in the disappearance of the right to an independent and impartial tribunal', while the rights to appeal and to liberty, contained respectively in Art. 14(5) and 9 ICCPR, did not make it to the statutory catalogues.

³⁰ At the ICTY, the right to be tried by an independent and impartial tribunal is effectively guaranteed by provisions containing in requirements of independence (Art. 12(1) ICTY Statute), high moral character, impartiality and integrity

accrues to its bearers despite not having been denominated as a *right*, by virtue of provisions on the courts' structure and competences of the respective Chambers.³¹

However, one notices that some rights were 'forgotten' and more tellingly exemplify said duality. The right to compensation for unlawful arrest and detention and for unjust conviction as well as the general right to an effective remedy for human rights violations, provided for under the ICCPR, were not envisaged in the statutes and cannot be induced from the existing provisions. In order to ensure protection, judges sought to cover the gaps through exercise of discretion and invocation of inherent powers.³² The ICTR jurisprudence affirmed the right to an effective remedy not only in cases of unlawful arrest and detention, but also where other human rights were violated, including the right to be informed promptly of the nature of charges, to be brought promptly before a judge, and the right to legal assistance.³³ But in respect of the right to liberty, including the principle that the accused person should not be detained as a rule (*in dubio pro libertate*),³⁴ the *ad hoc* tribunals' human rights regimes have remained substantively under-protective both in law and in practice.³⁵ The root cause is that states are only in limited instances prepared to facilitating provisional release and to guarantee the return of the defendant while tribunals possess neither their own territory nor police force. Combined with the extraordinarily yet habitually lengthy pre-trial detention, this gap is disturbing from an uncompromising human-rights perspective that is less indulgent about the special circumstances of those institutions.³⁶ These examples serve to confirm that the catalogues of due process rights, such as provided in Article 21 of the ICTY Statute and Article 20 of the ICTR Statute, were neither meant to be exhaustive nor were treated by the courts as such.³⁷ Instead, the 'implied' or outright 'external' standards have regularly been relied upon, to

(Art. 13 ICTY Statute), and nomination and election procedures (Arts 13*bis* and 13*ter* ICTY Statute). See e.g. Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, AC, ICTY, 21 July 2000 ('*Furundžija* appeal judgment'), para. 177. Cf. Zappalà, *Human Rights* (n 1), at 103 ('In the ICC and in the system of the *ad hoc* Tribunals, the requisite independence is not established as a right of the accused. It is more an attribution that must characterize the judges.').

³¹ Art. 25(1) ICTY Statute; Art. 24(1) of the ICTR Statute. Cf. Art. 81(1)(b) ICC Statute ('The convicted person ... may make an appeal').

³² On inherent powers in this domain, see Decision on Appropriate Remedy, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, TC III, ICTR, 31 January 2007 ('*Rwamakuba* remedy trial decision'), paras 45-49, 58.

³³ Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, AC, ICTR, 3 November 1999 ('*Barayagwiza I* appeal decision'), paras 88-90; Decision (Prosecutor's Request for Review or Reconsideration), *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, AC, ICTR, 31 March 2000 ('*Barayagwiza II* appeal decision'), paras 74-75 (affirming the right to an effective remedy for unlawful arrest and detention); Judgement, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, AC, ICTR, 23 May 2005 ('*Kajelijeli* appeal judgment'), paras 255 and 322 (affirming the right to an effective remedy where the right to counsel and the right to be brought promptly before a judge are violated); Decision, *Prosecutor v. Semanza*, Case No. ICTR-97-20, TC, ICTR, 31 May 2000, paras 125, 127; *Rwamakuba* remedy trial decision (n 32), paras 16-31, 40-49 (in the exercise of inherent powers, granting a remedy in a form of a financial compensation and order to the Registrar to provide the acquitted person with an apology for the violation of the right to legal representation, but refusing a remedy for the miscarriage of justice caused by a wrongful accusation and lengthy criminal proceedings followed by an acquittal).

³⁴ Art. 9(3) ICCPR ('it shall not be the general rule that persons awaiting trial shall be detained in custody').

³⁵ Cf. Art. 20(2) ICTY Statute and Art. 19(2) ICTR Statute ('A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody.');

Rule 65 ICTY and ICTR RPE (whose para. (B) for long time featured the criterion of 'exceptional circumstances' as the precondition for release).

³⁶ There is an enormous body of jurisprudence on this matter and a comparable body of (critical) commentary: see e.g. Zappalà, *Human Rights* (n 1), at 95; Trechsel, 'Rights in Criminal Proceedings' (n 2), at 165-66; Schomburg, 'The Role of International Criminal Tribunals' (n 1), at 8-11; Dimitrijević and Milanović, 'Human Rights' (n 2), at 160-62. For an exceptional example of a less critical view, see G. McIntyre, 'Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', (2003) 16 *Leiden Journal of International Law* 269, at 271 (claiming that the ICTY's practice on provisional release has 'for the most part been accepted by the international community as just decisions.')

³⁷ Gradoni, 'International Criminal Courts and Tribunals' (n 8), at 853, 859 (noting that even in the absence of these articles, 'internationally recognized human rights would have been fully applicable within the system of the *ad hoc*

the extent possible, to fill lacunae in the human rights protection under the courts' statutes, even though it may be argued that such reliance should have extended further to ensure adequate protection.

The legal frameworks of other courts (e.g. ICC) are not necessarily characterized by the same uncertainties or gaps. The 'internal' human rights regime of the ICC, as outlined in its Statute, Rules and any subordinate instruments, is more complete and progressive, in that it provides explicitly for the rights omitted from the ICTY and ICTR instruments, most notably the right to a compensation for unlawful detention and unjust conviction.³⁸ The internal human rights framework is even more gapless in case of some internationalized courts. As will be discussed below, the formal position of human rights law before the SPSC and ECCC is different, insofar as human rights treaties are incorporated into their legal regimes in full.³⁹ Since this renders the treaty provisions directly applicable, duality of human rights regime is not an issue. This underlines a degree of divergence between the different sub-regimes of human rights protection within various international criminal tribunals, over and above the effect of 'diffraction' of international human rights law in each tribunal's jurisdiction.

The second aspect of duality lurks in the fact that IHRL includes, next to human rights treaties and conventions, the authoritative interpretations of those texts in the jurisprudence of the courts and monitoring bodies mandates to oversee state compliance. Made in the context of individual cases arising from domestic jurisdictions, those interpretations imbue the provisions of conventions with specific content that is to a large degree contextual and fact-dependent. The unique purport and contours of this review framework bears special note. Human rights courts such as the ECHR are subsidiary mechanisms by nature: they carry out supervisory functions in relation to domestic proceedings and in doing so necessarily accord a 'margin of appreciation' to states in regard of a variety of nuances of judicial organization and process. This is different for international criminal tribunals, which decide substantive issues on the merits and, except at the appellate level, are not super-structures but full-fledged systems doing the gritty justice work such as the disposition of cases at the first instance.⁴⁰ The direct relevance of human rights jurisprudence in the supervision of national governments, which is addressed and tailored to states, to international criminal courts is not self-evident.

Thus, 'external' and 'internal' human rights regimes of the tribunals are distinct not only in view of enforcement through different institutional frameworks but potentially also in terms of their actual content and resulting scope of protection. As a result, there may be inconsistencies and tensions between the two regimes, in which case the underlying standards would compete for application. The implications of said duality thus go beyond conceptual: when faced with a perceived inconsistency, the tribunals would have to decide how to resolve it, be it through harmonizing interpretation or by way of setting one of the regimes aside. This choice of substantial normative significance because the treatment by the tribunals of human rights law sources and authorities, including case law of other courts and bodies, is widely perceived as a key factor

Tribunals' and that 'the catalogue of rights appearing in the Statutes of the ad hoc Tribunals was not conceived as an exhaustive list').

³⁸ Art. 85(1) and (2) ICC Statute. See also Art. 85(3) ICC Statute ('"In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.')

Cf. *Rwamakuba* remedy trial decision (n 32), paras 21 and 31 (ICTR finding that the ICC provision goes beyond customary standard of protection).

³⁹ See *infra* section 2.2.1.

⁴⁰ On different functions of the ECHR and ICTY, see Trechsel, 'Rights in Criminal Proceedings' (n 2), at 156-57. See also J. Jackson, 'Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries', in J.D. Jackson *et al.* (eds), *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaška* (Oxford and Portland: Hart Publishing, 2008) 225.

impacting on the legitimacy of international criminal justice as a whole.⁴¹ Indeed, courts from the IMT to STL have conceptualized their own legality as institutions and the legitimacy of their proceedings in terms of compliance with the international rule of law, which in turn was interpreted principally as the duty to fully respect some objective and external—that is, in addition to their own—international standards of fair trial.⁴²

The important questions of normative hierarchies, methodology of law practice, and legitimacy are raised by the relationship between the two human rights regimes. In uncovering the implications of duality, one should turn to the formal status the ‘external’ framework enjoys within the system of sources applied by the tribunals. In addition, rules of references contained in the tribunals’ primary instruments (statutes, rules of procedure and evidence etc.) which allude to external standards need to be examined, for they clarify terms on which recourse to the external framework is to be had by the judges. The following sections address whether human rights law and precedents form part of the law binding on the tribunals *stricto sensu* and how it may enter the internal regime through the ‘backdoor’ of interpretation.

2.2. Human rights law as binding law

2.2.1. From the nature of obligation...

With an exception of some hybrid courts, the question of whether human rights law constitutes the law binding on the tribunals is not squarely addressed in the tribunals’ statutes and rules, and no straightforward position on that emerges from preparatory works. The ICTY and ICTR Statutes do not specify the use the tribunals should make of human rights treaties such as the ICCPR, ECHR, IACHR and related jurisprudence. But an oft-quoted paragraph in the Report of the Secretary-General on the ICTY Statute, approved in its entirety by the UN Security Council,⁴³ states that:

It is *axiomatic* that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights.⁴⁴

This language may be interpreted to reflect the Secretary-General’s conception that the reasons for extending the internationally recognized standards on fair trial to international criminal proceedings are so obvious that they do not need to be spelt out. However, while the statement could hardly have been more strongly worded, it is in fact enigmatic and says little as to the basis and scope of the ICTY’s obligation to ‘fully respect internationally recognized standards’. It also shrouds the

⁴¹ E.g. G. McIntyre, ‘Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY’, in G. Boas and W. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Brill, 2003) 194.

⁴² E.g. *Tadić* jurisdictional appeal decision (n 22), paras 45-46 (‘For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.’); Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadić*, Case No. IT-94-1-T, TC, ICTY, 10 August 1995 (‘*Tadić* protective measures decision’), para. 25 (‘ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings’); Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, *In the matter El Sayed*, Case No. CH/AC/2011/01, AC, STL, 19 July 2011, para. 35 (‘Overarching the work of this Tribunal is the principle of the rule of law. At base the rule of law entails the recognition of essential human rights and just procedures for their enforcement. Other critical elements include fair trial guarantees and the dignity of the individual vis-à-vis the state.’ Footnotes omitted.).

⁴³ UNSC Resolution 827 (1993), 25 May 1993, operative para. 1.

⁴⁴ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704 (‘UNSG Report on the ICTY Statute’), para. 106 (emphasis added).

content of the ‘internationally recognized standards’ in obscurity.⁴⁵ The words ‘in particular’ invite one to speculate about the status of human rights protections set out in other articles of ICCPR (e.g., Article 9) and in other instruments (e.g. ECHR and IACHR) and about their relation to those provided in Article 14 of the ICCPR. Under one interpretation, reference to Article 14 ICCPR is made in order to provide an example, in which case, it is neither meant to enjoy priority over other articles of the ICCPR and in other human rights treaties reflect ‘internationally recognized standards’, nor to exclude the relevance of the latter. Lastly, the statement allows opposing interpretations as to whether the decisions of human rights monitoring courts and bodies are subsumed in ‘internationally recognized standards’.⁴⁶

In the absence of a more thorough and principled explanation, it is unsurprising that scholars have disagreed on whether the tribunals are *bound*, in a legal sense, by IHRL (because it forms an integral part of their applicable law), or whether they comply with it as a result of a *policy* decision to affirm the validity of the ‘external’ human rights framework to them.⁴⁷ According to one side to the debate, the choice of the wording unequivocally reflects the view that there exist undisputable *legal* reasons to extend fair trial protections to the proceedings before the international criminal forum.⁴⁸ But one should not be overly assumptive in this regard because the opposite can equally be argued on the same scarce hypothetical grounds.

Thus, the fact that the Secretary-General neither explicitly indicated the nature of the tribunals’ commitment to respect internationally recognized human rights, nor provided specific legal bases, instead resorting to a rhetoric utterance, might point to the more immediate grounding of the statement in policy considerations (turning law upon UNSC’s approval of the Report). If the tribunals had been meant to respect internationally recognized standards on fair trial as a matter of obligations under general international law, this would presumably have been stated, even if implicitly. By comparison, the Report does contain a passage to that effect with regard to substantive criminal law.⁴⁹

It should be observed that the ‘axiomatic’ rhetoric in the Report, in view of its endorsement by the UNSC, is sufficiently prescriptive to operate as a legal norm that governs the interpretation and application of the law by the ICTY (or as an interpretative device). It is a clear expression of the legislative will which ascertains and reaffirms—that is, does not necessarily *create*—said duty. Essentially, this normative shortcut makes it unnecessary for the ICTY to establish the original foundation of that obligation in daily adjudication.⁵⁰ This justificatory link neither negates nor rules out the antecedent binding nature of international human rights law vis-à-vis the tribunal. Instead, as a practical matter, it replaces the need for the judges to substantiate why international standards

⁴⁵ C. Warbrick, ‘International Criminal Courts and Fair Trial’, (1998) 3(1) *Journal of Conflict and Security Law* 45, at 46; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 20.

⁴⁶ *Tadić* protective measures decision (n 42), para. 19. See further *infra* 2.2.3.3.

⁴⁷ See e.g. Zappalà, *Human Rights* (n 1), at 5 (‘With regard to the extension of due process principles to international criminal trials, ... although there was no one specific rule imposing on States the obligation to extend human rights safeguards to the international level, there were (and are), nonetheless, several good reasons to support this extension.’) and 7 (‘this is more a *policy* issue than a legal question. And the policy choice has been made in favour of an extension to international criminal proceedings of international human rights provisions on due process.’) *Contra* Gradoni (n 8), at 848-49; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 22.

⁴⁸ Gradoni, ‘International Criminal Courts and Tribunals’ (n 8), at 852 (‘Whereas the term “axiomatic” admittedly leaves undetermined the Secretary-General’s position with regard to the source from which human rights standards derive their binding character, nonetheless it makes it crystal clear that the issues was not one of voluntary adherence inspired by sound policy considerations. The language used in the Report should be understood as implying that human rights norms are binding on the ICTY qua customary international law or general principles of law’).

⁴⁹ UNSG Report on the ICTY Statute (n 44), paras 33-35.

⁵⁰ Along these lines, see Separate Opinion of Judge Shahabuddeen, *Brdanin and Talić* appeal decision (n 18), para. 5 (‘The law which the Tribunal is authorised to apply could be the subject of much discussion. For the purposes of this case, the inquiry need not go beyond an implied grant of power by the Security Council. When the Security Council vested judicial power in the Tribunal, that power included power (with a corresponding duty) to act fairly, as a judicial body would, towards all who had business before the Chambers.’).

have a legal force in matters before them by the imperative guideline to proceed on the assumption of their relevance and applicability. By placing the Tribunal under the duty to take it for granted ('must respect'), the text of the Report as approved by the UNSC Resolution restores the 'missing link' of incumbency of IHRL on the Tribunal.⁵¹ While there is nothing wrong with this approach, its method is arguably clearly of a policy (legislative) rather than of a strictly legalist and source-driven nature as was suggested.⁵²

Indeed, this may explain why the ICTY judges have taken the Secretary-General's statement as an unequivocal normative guidance for the interpretation and application of human rights law instruments. Whenever they deemed it appropriate to provide justification for the resort to the ICCPR and HRC decisions, this was mostly done by way of referring to the above-cited passage.⁵³ The fact that the Chambers did not refer back to that statement all the time as the ground for them to be bound by general international law might also serve as indirect evidence of internalization of the normative axiom that was placed at the heart of their procedural practice. Notably, the axiom was formulated in respect of the ICTY alone but it also had powerful spill-over effects vis-à-vis other institutions. The ICTR has accepted the 'binding nature of "generally accepted norms of human rights"',⁵⁴ with occasional reference to the Secretary-General's position,⁵⁵ despite the absence of the analogous statement in the Secretary-General's Report on its own Statute.⁵⁶ Moreover, the Appeals Chamber has unequivocally held that the Report establishes the ICTR's *sources of law*.⁵⁷ More recently, the STL President too adopted the 'axiomatic' language to justify the extension of the right to justice to the persons who are not participants in any pending proceedings before that Tribunal.⁵⁸ Thus, it would appear that the compliance with internationally recognized human rights operates as an ideological setup and overarching framework for the tribunals' operations, which cannot readily be squared into the formalist legal source-based approach.

Accordingly, it can be argued that the tribunals sourced the authority to fill gaps in their internal human rights regime by having recourse to IHRL by virtue of the primary legislator's

⁵¹ For the more recent and limited acknowledgement, see L. Gradoni, 'The Human Rights Dimension', in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 83 (noting, in relation to the right to appeal under Art. 14 ICCPR, that 'the source of obligation, at least in this case, lies not only in custom but also in the Security Council's act.').

⁵² See e.g. n 48.

⁵³ See *inter alia* Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), *Prosecutor v. Blaškić*, Case No. IT-95-14-T, TC, ICTY, 4 April 1997, para. 12; *Furundžija* appeal judgment (n 30), para. 177 n239; Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, *Prosecutor v. Milošević*, Case No. IT-02-54, TC, ICTY, 4 April 2003 ('*Milošević* trial decision on assignment of counsel'), para. 37.

⁵⁴ Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay, *Prosecutor v. C. Bizimungu et al.*, Case No. ICTR-99-50-T, TC II, ICTR, 29 May 2007 ('*C. Bizimungu et al.* undue delay decision of 29 May 2007'), para. 20 ('the Chamber fully accepts the binding nature of "generally accepted norms of human rights" on the Tribunal'); Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, *Prosecutor v. Mugiraneza*, Case No. ICTR-99-50-T, TC II, ICTR, 23 June 2010 ('*C. Bizimungu et al.* undue delay decision of 23 June 2010'), para. 9.

⁵⁵ See also *Rwamakuba* remedy trial decision (n 32), para. 45 (the Chamber's 'power to provide an accused or former accused with an effective remedy for violations of human rights arises out of the combined effect of the Tribunal's inherent powers and its obligation to respect generally accepted international human rights norms') and 49 (referring to the Secretary-General's report on the ICTY Statute).

⁵⁶ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995 ('UNSG Report on the ICTR Statute'). See also Sluiter, 'International Criminal Proceedings' (n 13), at 936 n5 (arguing that the UNSG's comment is applicable to the ICTR as well given the 'practically identical language' of Art. 20 ICTR Statute).

⁵⁷ *Barayagwiza I* appeal decision (n 33), para. 40 ('The Report of the U.N. Secretary-General establishes the sources of law for the Tribunal').

⁵⁸ Order assigning Matter to Pre-Trial Judge, *In the matter of El Sayed*, Case No. CH/PRES/2010/01, President, STL, 15 April 2010 ('*El Sayed* order'), para. 35 ('Whether or not it is held that the international general norm on the right to justice has been elevated to the rank of *jus cogens* ..., it is axiomatic that an international court such as the STL may not derogate from or fail to comply with such a general norm.').

volition to the effect that they must be able do so in order to ensure full respect for fair trial standards. Although the practical implications are not necessarily different, this is distinct from grounding it in the primordial authority of a ‘proto-obligation’ incumbent on them by general international law. Under this view, it may be right that the statutory catalogues of rights are not meant to be exhaustive, but are complemented by the corpus of international *lege generali*, for which reason the due process codifications in the statutes and rules were not indispensable for the tribunals to be bound by them.⁵⁹ But the legal authority for resort to ‘external’ sources of general international law may be not what is often presumed. Unless one identifies more fundamental legal grounds for the tribunals to be bound by general international law of human rights, the ‘extension’ of the duty to apply those standards may have been not as ‘axiomatic’ and self-evident without an explicit clarification (or implied demand) by the legislator. While a possible argument along these lines will be offered later,⁶⁰ the current positions on this issue occasionally feature a degree of inconsistency. On the one hand, the direct applicability of ‘external’ human rights standards in the tribunal proceedings is asserted, but, on the other hand, an act of ‘incorporation’ is deemed necessary for those standards to be applicable internally.⁶¹

Regardless of the nature of the primary legal obligation, the ascertainment of the position of human rights law (and jurisprudence) in the jurisdictional sphere of the tribunals, and the legal or policy nature of their commitment, should continue by looking closely into the system of sources of law the tribunals are supposed to apply and the position of IHRL norms within those sources.

2.2.2. ... to sources of law

The ICTY and ICTR are not provided express guidance by the statutes as regards the sources of law they are called upon to consult. This is regrettable but also understandable given the haste with which the statutes were drafted. With regard to substantive law matters, such as crime definitions, the Secretary-General’s Report held that the ICTY must operate within the bounds of customary law, while the Report on the ICTR Statute took a more expansive approach towards defining the subject-matter jurisdiction.⁶² As regards procedure, the judges were left to their own devices, except for the ‘axiomatic’ duty discussed above. The tribunals unavoidably turned to the issue of the sources of applicable law in their jurisprudence. In *Kupreškić et al.*, the ICTY Trial Chamber found that:

Indisputably, the ICTY is an international court, ... (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia. Thus, the normative *corpus* to be applied by the Tribunal *principaliter*, i.e. to decide upon the principal issues submitted to it, is international law.⁶³

This implies the applicability of international law before the Tribunal, as an aspect of its nature as an international court. This position has enjoyed support in the literature.⁶⁴ In relation to the duty to apply international law to the ‘principal issues’, it leaves uncertain whether the Tribunal should do so in relation to procedural matters, which might perhaps be regarded as not ‘principal’. Assuming

⁵⁹ Gradoni, ‘International Criminal Courts and Tribunals’ (n 8), at 853; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 22.

⁶⁰ *Infra* 2.2.4.

⁶¹ See e.g. Gradoni, ‘The Human Rights Dimension’ (n 51), at 75 and 82.

⁶² UNSG Report on the ICTY Statute (n 44), para. 34; but cf. UNSG Report on the ICTR Statute (n 56), para. 12.

⁶³ *Kupreškić et al.* trial judgement (n 22), para. 539.

⁶⁴ A. Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks’, in M. Bergsmo (ed.), *Human Rights for the Downtrodden: Essays in Honour of Asbjørn Eide* (Leiden/Boston: Martinus Nijhoff, 2003) 19. It must be noted though that Judge Cassese was the presiding judge of the trial bench in that case. Cf. Møse, ‘Impact of Human Rights Conventions’ (n 2), at 183-84 (evinced a more restrictive view and mentioning only primary codified sources).

that this distinction was not intended, the interpretation may be relevant to the domain of procedure as well.

In identifying sources of applicable law, ICTY judges naturally resorted to categories listed in Article 38 of the ICJ Statute,⁶⁵ thereby assuming their applicability and relevance to the work of the court.⁶⁶ It was accepted that this Article is declaratory of a custom and is therefore binding on the Tribunal.⁶⁷ There is a substantial authority supporting the view that this provision is indeed a manifestation of a customary rule. However, the reasoning employed by the ICTY and scholars on this instance arguably amounts to a logical leap and at a certain point becomes circular. Firstly, it merely assumes the link between the international nature of the court and the law it is to apply, although one should not rule out the possibility that international courts may also be called upon to apply national law. Second, proceeding from the vantage point of the assumption, the court essentially considered itself bound by a provision that establishes custom as a source of law on the basis of the customary nature of that provision, without there being, to use Herbert L.A. Hart's term, a rule of recognition validating its duty to be so bound as a matter of law.⁶⁸ Third, this reasoning overlooks the fact that the exact content of the customary norm of which Article 38 of the ICJ Statute is declaratory and its relevance to courts other than the ICJ is in fact rather unclear. It lists the categories of sources that the ICJ 'shall apply' when 'decid[ing] in accordance with international law such disputes as are submitted to it'. Is this rule, tailored to the needs of the world court adjudicating disputes between states and solving issues in advisory proceedings, unreservedly and as a whole applicable to international criminal tribunals?⁶⁹ Some commentators, including the present author, are questioning this unqualified and facile extension, not least because it is refuted by the tribunals' actual practice, as opposed to the justificatory discourse they employ.⁷⁰

In asserting the all too obvious applicability of general international law to the tribunals, reference is often made to the ICJ's 1980 Advisory Opinion.⁷¹ The ICJ held that international

⁶⁵ Article 38(1) of the ICJ Statute: 'The Court, whose function is to decide [disputes] in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

⁶⁶ *Kupreškić et al.* trial judgement (n 22), para. 591 ('It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible lacunae must be filled by having recourse to that body of law.'). See e.g. Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, AC, ICTY, 7 October 1997 ('*Erdemović* appeal judgment'), para. 40; Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, TC II, ICTY, 10 December 1998 ('*Furundžija* trial judgement'), para. 177; Separate Opinion of Judge Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, *Prosecutor v. Simić*, Case No. IT-IT-95-9, TC III, ICTY, 27 July 1999, para. 20 ('It may be accepted that the Tribunal is bound by customary international law, as is the United Nations itself.')

⁶⁷ *Kupreškić et al.* trial judgement (n 22), para. 540; Declaration of Judge Patrick Robinson, *Furundžija* appeal judgment (n 30), paras 273 and 281 n10.

⁶⁸ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994) 94.

⁶⁹ For example, Art. 38(1)(a) ICJ Statute refers to conventions 'establishing rules expressly recognized by the contesting states', which is telling in terms of the legal context in which this provision is to be applied and the type of disputes in resolving which it is to assist the ICJ.

⁷⁰ See also F. Mégret, 'The Sources of International Criminal Procedure' (L. Gradoni *et al.*, 'General Framework'), in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 68 ('although the idea that international criminal law is a branch of international law is often repeated like a mantra, it is misleading to suggest that the sources of international criminal law are entirely aligned with those of general international law.');

Perrin, 'Searching for Law' (n 10), at 369 (interrogating 'the conventional wisdom that public international law doctrines applicable to disputes between states can be readily transposed to the international criminal prosecution of individuals' and arguing that adjudication and gap-filling by the tribunals has not been source-based but discretion-based).

⁷¹ E.g. Gradoni, 'International Criminal Courts and Tribunals' (n 8), at 851 (suggesting that the opinion 'could perhaps be cited conclusively'); *id.*, 'The Human Rights Dimension' (n 51), at 81; Sluiter, 'International Criminal Proceedings' (n 13), at 937; Fedorova and Sluiter, 'Human Rights' (n 28), at 20.

organizations ‘are subjects of international law and, as such, are bound by any obligation *incumbent upon them under general rules of international law*, under their constitutions or under agreements to which they are parties’.⁷² The position which puts the full weight of the tribunals’ duty to apply IHL standards onto this foundation is open to challenges.⁷³ For one, this *dictum*—whose authority is, again, limited to a specific case before the ICJ⁷⁴—qualifies the applicability of general international law to international organizations, by limiting it to obligations *incumbent upon them* under that law.⁷⁵ It is uncertain, however, what obligations in relation to the choice of applicable law—or in any other relevant aspect for that matter (including, as will be seen, human rights standards)—are bestowed upon international organizations, and international criminal courts in particular, by sources other than their constitutions and agreements to which they are parties.⁷⁶

Even if one accepts that the customary norm on sources holds for international criminal tribunals, are states precluded from departing from it, and may they not have done so, when creating those courts? For one, the state practice of creating such courts, as demonstrated by the ICC Statute, seems to confirm that adjustments to that norm are indispensable. Transposing it in an unadulterated form to the regimes of other international judicial organs may be difficult if not impossible. One unavoidable modification relates to the duty for the tribunals to consult their primary legal texts (e.g. Statutes and Rules) before any other sources, but in judicial practice, the adjustments have gone even further. As noted elsewhere, the ICTY has not always been faithful to the letter of the ‘customary norm’ and improvised its ‘sources’, in a visible endeavour to get a grip over legal categories that it saw as promising sources of conclusive guidance regarding the matters at stake. The problem is that those categories neither make part of Article 38 list nor can be deemed as sources (formal aspects) of law at all: some of them clearly denote specific kinds of norms (substantive aspects) of law.⁷⁷ Despite these uncertainties, however, it has generally been assumed that Article 38 of the ICJ Statute envisages the system of sources to be employed by the ICTY and ICTR whenever their primary instruments (Statutes and Rules) provide no answers. Under this approach, the sources include treaties, custom, and general principles of law, while judicial decisions and the teachings of publicists serve as ‘subsidiary means for the determination of rules of law’.

From among *international* criminal courts, only the ICC is availed of a provision specifying sources.⁷⁸ The ICC treaty-based system of sources is *lex specialis* which departs in several

⁷² *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, Advisory Opinion, ICJ, 20 December 1980, ICJ Reports 1980, para. 37 (at 89-90) (emphasis added). See also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ, 11 April 1949, ICJ Reports 1949, at 179 (an international organization is ‘a subject of international law and capable of possessing international rights and duties.’)

⁷³ The author has benefitted greatly from discussions with Krit Zeegers concerning these issues.

⁷⁴ Art. 59 ICJ Statute (‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’)

⁷⁵ Arts 4 and 8 Draft Articles on International Responsibility of International Organizations (2011), which define ‘international organization’ as ‘an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality’, provide that conduct attributable to an international organization amounts to its internationally wrongful act when it ‘constitutes a breach of an international obligation of *that organization*’, regardless of that obligation’s ‘origin and character’. See *Report of the International Law Commission*, Sixty-Third Session, GAOR 66th session, Supplement No. 10 (A/66/10), para. 87.

⁷⁶ See also Acquaviva, ‘Human Rights Violations’ (n 24), at 618.

⁷⁷ *Furundžija* trial judgement (n 66), para. 177 (distinguishing ‘general principles of international criminal law’, ‘general principles of international law’, and ‘principles of criminal law’ as autonomous sources); *Kupreškić et al.* trial judgement (n 22), para. 591 (‘(ii) general principles of international criminal law, or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice’). For a critical comment, see S. Vasiliev, ‘General Rules and Principles: Definition, Legal Nature, and Identification’, in G. Sluiter and S. Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May, 2009) 62, 72-74.

⁷⁸ Art. 21(1) ICC Statute (‘The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of

important respects from Article 38 of the ICJ Statute and the underlying custom.⁷⁹ The design of Article 21(1) evinces the attempt to adapt the traditional international law sources to the unique needs of an international criminal jurisdiction.⁸⁰ It is at least as true that some of the language modifications rather seem to be explained by the need to secure consensus of diplomatic delegations taking part in the Rome Conference.⁸¹

The relevance of the ICJ Statute's system of sources to hybrid courts is less removed: they are not *international* and not necessarily bound by the customary provision. The SCSL, SPSC, and ECCC either are availed of specific provisions regarding the applicable sources, or adopted a specific norm to that effect. For instance, in 2004, the SCSL judges enacted a unique Rule 72*bis* entitled 'General Provisions on the applicable law', bearing a striking resemblance to Article 21(1) of the ICC Statute.⁸² Some terminology has been adjusted (for example, the term 'international customary law' is not eschewed as in the ICC Statute) and a special place is given to *lex loci* for the purpose of determining the general principles of law, which is meant to underline the SCSL's proximity to the domestic legal order.⁸³ The decision of the SCSL judges to adopt this rule, and to do so rather early into the SCSL's activities, evinces the wish to resolve uncertainty that the *ad hoc* tribunals have had to deal with. But the legislative solution of adopting a provision of such fundamental nature as part of the Rules (and including it, bizarrely enough, in the section concerning the proceedings before the Trial Chamber), is not the most fortunate. Is it appropriate for the judges, who only have power to 'legislate' on procedure, to adopt a provision on the applicable law *in abstracto*, as opposed to merely identifying the relevant principles and rules *within* such law? If its purpose is to envisage a general system of sources for all matters, including substantive law, the rule is arguably *ultra vires*.⁸⁴ Otherwise, the rule should be deemed to be limited to outlining the sources regarding procedural matters.

Before the Special Panels in Dili, a section of the UNTAET Regulation 2000/15 which set out applicable law envisaged the duty to apply two categories of sources: (a) the law of East Timor as promulgated in Sections 2 and 3 of the UNTAET Regulation 1999/1 and any subsequent UNTAET law; and (b) 'where appropriate, applicable treaties and recognised principles and norms

international law...; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world ... provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.' Rule 72*bis* of the SCSL RPE is modeled on Article 21(1) of the ICC Statute and employs the almost identical language.

⁷⁹ See further S. Vasiliev, 'Proofing the Ban on "Witness Proofing: Did the ICC Get It Right?"', (2009) 20 *Criminal Law Forum* 193, at 210-14; R. Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources', (2009) 12 *New Criminal Law Review* 390, at 393-94.

⁸⁰ See e.g. M. McAuliffe deGuzman, 'Article 21', in Triffterer (eds), *The Commentary on the Rome Statute 702-703* (Article 21 'modifies the approach taken in the ICJ Statute to fit the context of international *criminal* law' and is 'the first codification of the sources of international *criminal* law'); Perrin, 'Searching for Law' (n 10), at 393, 395 (characterizing it as 'a split ...from the dominance of public international law in international criminal law' and 'from strict adherence to Article 38 of the ICJ Statute'). Cf. Akande, 'Sources of International Criminal Law' (n 103), at 43 (stating that Art. 21(1) merely repeats the Art 38(1) ICJ Statute sources, 'though not in precisely the same way').

⁸¹ DeGuzman, 'Article 21' (n 80), at 702-703.

⁸² The rule was adopted on 29 May 2004 at the Fifth Plenary Meeting; no explanation of its rationale was provided. See Second Annual Report of the President of the Special Court for Sierra Leone for the period 1 January 2004 - 17 January 2005, at 14.

⁸³ Rule 72*bis* SCSL RPE ('The applicable laws of the Special Court include: (i) The Statute, the Agreement, and the Rules; (ii) where appropriate, other applicable treaties and the provisions and rules of international customary law; (iii) general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of the Republic of Sierra Leone, provided that those are not inconsistent with the Statute, the Agreement, and with international customary law and internationally recognized norms and standards.')

⁸⁴ Art. 14(1) SCSL Statute (limiting the applicability of Rules of Procedure and Evidence to 'the conduct of the legal proceedings before the Special Court'). Moreover, it sits uncomfortably with Arts 5 and 6(5) SCSL Statute, for it gives no place at all to the domestic law incorporated in the SCSL regime referred to therein (Prevention of Cruelty to Children Act, 1926 (Cap. 31) and Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861).

of international law, including the established principles of the international law of armed conflict'.⁸⁵ The category (a) entailed the direct incorporation into the 'law of East Timor', and therewith into the SPSC legal regime, of the standards contained in key international human rights treaties (including the explicitly mentioned UDHR, ICCPR, and the UN Convention against Torture).⁸⁶ These standards formed an integral part of the applicable law, next to relevant UNTAET Regulations⁸⁷ and the pre-existing (Indonesian) law that remained applicable until repealed and insofar as it did not conflict with the incorporated international human rights standards, the UNTAET mandate under UNSC Resolution 1272(1999), and any UNTAET legislation.⁸⁸

By contrast, the ECCC governing framework does not envisage a system of sources. But, similarly to the SPSC regime, the ECCC Agreement and ECCC Law explicitly refer to Articles 14 and 15 of the ICCPR, thereby transposing the underlying standards into the legal regime of the ECCC.⁸⁹ Presumably, the respective protections have been incorporated into the Internal Rules, which are meant to 'consolidate' the applicable Cambodian procedural law for the ECCC proceedings and, among others, to ensure its consistency with 'international standards'.⁹⁰ Thus, in relation to the protection of human rights in procedural matters, the ECCC framework, like that of the SPSC, presents no duality of regimes. This is a consequence of Cambodia's being a party to the ICCPR and the ECCC's embedment into the municipal judicial system.

Finally, the STL legal framework leaves a window for reliance on sources other than Lebanese law, including those mentioned in the customary provision regarding sources of international law, but it does it differently than by way of incorporation. The Statute provides that applicable criminal law is Lebanese law, subject to its provisions, whereas the procedure is governed by the Rules to be adopted by the judges who shall draw guidance from the Lebanese Code of Criminal Procedure and 'other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial'.⁹¹ With respect to substantive law, the STL has interpreted these provisions as disallowing it to directly apply treaties and customary law, but enabling it to use them for interpretation and application of Lebanese law.⁹² Given that the STL RPE are meant to operate as an exhaustive procedural regime, albeit the one that is influenced by guidance under Lebanese law and 'other reference materials', the question of potentially competing human rights regimes does not arise in the STL context.

Two observations follow from this overview of the tribunals' law governing sources. Firstly, the various jurisdictions covered in this study differ in this regard both *inter se* and in relation to the traditional system of sources reflected in the ICJ Statute and the underlying customary norm. The

⁸⁵ Section 3 UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Offences, UNTAET/REG/2000/15, 6 June 2000.

⁸⁶ Section 2 UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, 27 November 1999 ('In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in [the seven IHRL instruments listed, including the UDHR and the ICCPR and its Protocols]').

⁸⁷ See e.g. Section 3 TRCP.

⁸⁸ Section 3.1 UNTAET Regulation 1999/1 (n 86). Section 3.2 repealed a number of particularly notorious and repressive Indonesian laws.

⁸⁹ Art. 12 ECCC Agreement ('The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party.'). Art. 13 ECCC Agreement ('The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.'). See also Arts 33 new, 35 new ECCC Law.

⁹⁰ ECCC IR, Preamble.

⁹¹ Arts 2 and 28 STL Statute.

⁹² Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case STL-11-01, AC, STL, 16 February 2011, para. 39 ('As an international court, we may depart from the application and interpretation of national law by national courts under certain conditions: when such interpretation or application appears to be unreasonable, or may result in a manifest injustice, or is not consonant with international principles and rules binding upon Lebanon.'). See also *ibid.*, para. 62.

state of affairs in this area is characterized by fragmentation. Next to a specialized system of sources that may be emerging in international criminal law, departing from the traditional system, each of the courts employs a sub-system that is further subject to variations flowing from diverging definitions of the categories of sources and the specifics of each tribunal's legal context (including the role reserved for national law). The relationship between the two types of systems remains uncertain. Second, some of the hybrid courts, due to their being neither international courts nor international organizations, are clearly not bound by the customary norm on the sources of law. Instead, they are directly placed under a duty to observe the treaty-based human rights law obligations as a proper part of their *internal* legal frameworks, next to any obligations incumbent on the state of whose judicial systems they constitute a part. This, of course, does not rule out their recourse to 'external' human rights standards for the interpretation of 'internal' law. In light of these observations, the discussion of the relation of human rights law and jurisprudence as an 'external framework' to formal sources of applicable law of the tribunals will cover jurisdictions to which it is most relevant – ICTY, ICTR, SCSL, and ICC.

2.2.3. Human rights law as applicable law

2.2.3.1. Treaty law

In accordance with the tribunals' constituent documents and/or—subject to the previously noted uncertainties—customary rules, international treaties and conventions constitute one category of the 'external' sources of law to be consulted by them whenever the primary sources are to no avail.⁹³ Do international—universal and regional—human rights declarations, covenants and treaties fall within the category of 'applicable' and to what extent is their application by international criminal courts 'appropriate'?

Following the established logic, international criminal tribunals—as international organizations—are only bound by the treaties to which they are parties.⁹⁴ While the possibility for them to accede to human rights treaties cannot be ruled out if one considers the developments in the EU context,⁹⁵ the policy debates on it are not so advanced as to make it a realistic prospect in the nearest future, however desirable. The ICTY, ICTR, SCSL, and the ICC are not parties to the ICCPR, ECHR, ACHR, and the ACHPR and therefore are not bound by standards provided therein *qua* treaty law: these instruments are not applicable to and by these courts *stricto sensu*.⁹⁶ The same or analogous standards underlying the treaties may still be binding on account of their being doubled in other sources, such as custom or general principles of law, subject to their applicability to the tribunals. It is furthermore well established that treaties may provide evidence of the existing

⁹³ Art. 21(1)(b) ICC Statute ('In the second place, where appropriate, *applicable treaties* and the principles and rules of international law'); Rule 72bis(ii) SCSL RPE ('where appropriate, *other applicable treaties* and the provisions and rules of international customary law'). See also Art. 38(1) ICJ Statute ('international conventions, whether general or particular, establishing rules expressly recognized by the contesting states').

⁹⁴ *Interpretation of the Agreement of 25 March 1951* (n 72), para. 37.

⁹⁵ For instance, the fourteenth Protocol to the ECtHR, which is yet to enter in force, allows the EU to accede to the Convention. See Art. 17(2) Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, CETS No. 194, 13 May 2004 and Art. 6(2) Consolidated Version of the Treaty on European Union, OJ C 83/19 ('The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'). Gradoni, 'International Criminal Courts and Tribunals' (n 8), at 850.

⁹⁶ E.g. Separate Opinion of Judge Shahabuddeen, Judgement, *Prosecutor v. Galić*, Case No. IT-98-29-A, AC, ICTY, 30 November 2006, para. 25 ('internationally recognised human rights instruments were made by states for states. The Tribunal is not a state and is not party to those instruments. There is no way, for example, by which the Tribunal can become a party to the Optional Protocol to the International Covenant on Civil and Political Rights'). See also Gradoni, 'International Criminal Courts and Tribunals' (n 8), at 850; Fedorova and Sluiter, 'Human Rights' (n 28), at 28-29; Akande, 'Sources of International Criminal Law' (n 103), at 49.

customary rules, save for cases in which they derogate from custom.⁹⁷ This leads to the question of whether and to what extent the tribunals are bound by customary IHRL, which will be dealt with soon.

In any event, human rights conventions as such are not ‘applicable’ before international criminal courts in the same sense as treaties that are binding on states who ratified or acceded to them.⁹⁸ In addition, the clause ‘where appropriate’ in Article 21(1)(b) of the ICC Statute and Rule 72bis(ii) SCSL RPE entails, in accordance with the principle of effective interpretation, that the *appropriateness* of application of ‘applicable’ treaties is an autonomous requirement. While the clause may give rise to different interpretations, the more plausible one invites the courts to satisfy themselves of substantive relevance of the standards of the ‘applicable’ conventions to the matters at hand. Thus, the normative utility of the conventions is submitted to the discretion of the court in determining when and what parts of those conventions are to be applied on the ground of their relevance, as opposed to a wholesale transposition of respective legal standards. This stands to reason, as human rights conventions were designed with states in mind and have states as their addressees. This affects the purport and scope of the standards, the envisaged level of protection, and institutional infrastructure for ensuring compliance. Put simply, some of their provisions are literally irrelevant for the tribunals.⁹⁹ The jurisprudence of *ad hoc* tribunals contains statements to the same effect.¹⁰⁰

2.2.3.2. General international law

A. Question of applicability, again

The direct applicability of IHRL *qua* treaty law can be ruled out in international criminal proceedings, as generally confirmed by the jurisprudence of the courts.¹⁰¹ Given the unavailability of this—most uncontroversial—basis of international law obligations, the tribunals are naturally tempted to reach out for the alternative, more promising sources of guidance on human rights. The question still remains whether they are bound, as (subsidiary organs of) international organizations, by ‘general international law’ of human rights contained custom and general principles of law. It is submitted that the answer to that question is in the positive, but the devil is in the detail.

⁹⁷ R. Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, (1965-66) 41 *British Yearbook of International Law* 275.

⁹⁸ Cf. deGuzman, ‘Article 21’ (n 80), at 705-706 (who interprets the term ‘applicable treaties’ broadly as including all *relevant* treaties, e.g. VCLT and ICCPR, and noting that the distinction is of little practical effect). For a narrower interpretation, see A. Pellet, ‘Applicable Law’, in Cassese/Gaeta/Jones (eds), *The Rome Statute* 1068 (arguing that the ICCPR is inapplicable because it is addressed to states parties and not to international criminal jurisdictions).

⁹⁹ For example, provisions concerning derogations and limitations (e.g. Art. 4 ICCPR and Art. 15 ECHR) and those regarding supervisory mechanisms are addressed to states and cannot be (directly) to applicable to the tribunals: C. DeFrancia, ‘Due Process in International Criminal Courts: Why Procedure Matters’, (2001) 87 *Virginia Law Review* 1381, at 1394 (international criminal courts cannot avail themselves of the ICCPR’s public emergency exception); Sluiter, ‘International Criminal Proceedings’ (n 13), at 938 (‘These conditions ... concern the application of human rights within national societies and may not fit easily into the application of human rights by international criminal tribunals.’) and 940.

¹⁰⁰ See e.g. Separate Opinion of Judge Shahabuddeen, Judgement, *Prosecutor v. Galić*, Case No. IT-98-29-A, AC, ICTY, 30 November 2006, para. 19 (‘It is good jurisprudence that particular provisions of internationally recognised human rights standards do not apply to the Tribunal lock, stock and barrel ... What applies is the substance of the standards – or goals – set by the provisions of those instruments, not the provisions themselves.’)

¹⁰¹ But cf. *Décision faisant suite à la requête du procureur aux fins de disjonction, de jonction d’instances et de modification de l’acte d’accusation*, Cases Nos ICTR-95-1-T, ICTR-96-10-T, ICTR-96-17-T, TC, 27 March 1997 (‘*prévu* par l’article 14 du Pacte international relatif aux droits civils et politiques ... et *rappelé* par l’article 20 du Statut du Tribunal’), cited in Gradoni, ‘International Criminal Courts and Tribunals’ (n 8), at 853.

Commentators have often made positive assumptions to that effect (presumably on the strength of the ‘axiomatic’ argument),¹⁰² while other scholars have taken the debate further by adducing some legal grounds to substantiate that position. For instance, it was opined that the tribunals must apply international law sources because international criminal law forms part of international law.¹⁰³ This appears to be a utilitarian and commonsensical explanation rather than a normative and source-based one, and it does not elucidate why the tribunals are bound to apply general international law in the first place. Another argument advanced is that this is a consequence of their international legal personality, and this proposition may have had a stronger traction. Nonetheless, one cannot fail noticing that the authorities, which are presented as unreservedly supporting of this argument and cited from one work to another, in fact use a rather cautious language which does no less than betray uncertainty in this regard.¹⁰⁴

Indeed, caution is not excessive given that the bases for, and the scope of, the applicability of (state-oriented) general international law to international organizations and to their uniquely special genus such as criminal courts, are not self-evident. For the reasons already stated in the context of the discussion concerning the authority of the customary norm underlying Article 38 of the ICJ Statute,¹⁰⁵ reference to the ICJ’s Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 does not really advance the assertions of a clear cut and aprioristic binding effect of general international law on the tribunals.¹⁰⁶ The ICJ *dictum* merely states that international organizations are bound by obligations *incumbent* on them, *inter alia*, by general rules of international law. Hence their being bound by a totality of conceivable obligations under such rules, whether or not incumbent on them, cannot be read into it without expanding—and thus distorting—its intended meaning. The argument claiming the binding effect of such human rights norms on the tribunals with reference to their being subjects of international law, should mark not the end of the debate on those rules’ imperative character but the beginning of a discussion on what rules are meant and on their exact content.

Because the *a priori* legal grounds are uncertain, the applicability of human rights protections *qua* ‘general international law’ to non-state actors, including tribunals, is hardly self-evident, except perhaps to human rights *jus-naturalists* among international lawyers. As argued above, grounding it in the explicit—or inferred, as appropriate—will of the international legislators

¹⁰² E.g. Werle, *Principles of International Criminal Law* (n 8), at 52; Warbrick, ‘International Criminal Courts and Fair Trial’ (n 45), at 47.

¹⁰³ D. Akande, ‘Sources of International Criminal Law’, in A. Cassese (ed.), *The Oxford Companion on International Criminal Justice* (Oxford: Oxford University Press, 2009) 43 (‘Since ICL is part of international law, international criminal tribunals will be called upon to apply the sources of general international law.’). See also Declaration of Judge Patrick Robinson, *Furundžija* appeal judgment (n 30), para. 273 (‘the Tribunal would, in any event, be obliged to apply customary international law, since under Article 1 of the Statute, it is empowered to prosecute persons for serious violations of international humanitarian law, an integral component of which is customary international law.’).

¹⁰⁴ A. Reinsch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’, in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 46 (‘The *underlying tenor* of recent developments *appears to be* that international organizations, as a result of their international legal personality, are *considered to be* bound by general international law, including any human rights norms, that can be viewed as customary law or as general principles of law. *Still, there seems to be enough uncertainty in this area to leave room for voluntary guidelines.*’); K. Wellens, *Remedies Against International Organisations* (2002) I (‘As subjects of international law, international organizations ... are subject to rules and norms of customary international law *to the extent required by their functional powers* and they have to observe the general principles of law’). Emphases are added to underline the qualified character of the statement. Cf. Gradoni, ‘International Criminal Courts and Tribunals’ (n 8), at 851 (who adopts a more assertive position, citing Reinsch in support but omitting the last sentence from the citation).

¹⁰⁵ See *supra* 2.2.2.

¹⁰⁶ Cf. sources in n 71. For the most recent restatement, see Gradoni, ‘The Human Rights Dimension’ (n 51), at 81 (who corroborates the same references by the argument that the applicability of custom to international organizations is in line with the binding and non-consensual effects of custom on new states, which arguably is a flawed analogy given the differences between the two categories of subjects of international law).

makes for a more credible and effective argument.¹⁰⁷ The IHRL standards, to the extent that they are part of customary law and general principles of law, indeed *are* binding upon the tribunals, with the primary basis for that being, for practical purposes, the written and verifiable expression of the legislative intent.¹⁰⁸ In relation to the binding character of customary rules, such intent is overt in Article 21(1)(b) of the ICC Statute and Rule 72*bis*(ii) of the SCSL RPE.¹⁰⁹ The latter expressly refers to ‘international customary law’, while the former uses the terminology ‘principles and rules of international law’, which seems to denote nothing else but custom.¹¹⁰ The same holds for the binding effects of ‘general principles of law’, the subsidiary source to be resorted to by the courts as an *ultima ratio* tool for gap-filling in avoidance of non-findings (*non liquet*).¹¹¹ In case of the ICTY and, by analogy, of the ICTR, the intent to bind the courts by internationally recognized human rights presumably *qua* custom has been inferred from the Secretary-General’s Report.¹¹² This approach generally conforms with the explanation for resort to custom the tribunals have employed themselves.¹¹³

Beyond reference to the ICCPR, the contours of the legal corpus thus rendered applicable have emerged as unclear.¹¹⁴ The uncertainty as to what human rights standards apply *qua* customary law and general principles of law is a general one – it lurks in the unwritten and nebulous character of those sources. Even though the tribunals can be relieved from inquiring into the fundamental grounds for them to be bound by general international law of human rights and may interpret their primary legislation in its context, they have struggled with the vexed question of norm-identification. Ascertaining the content of non-codified norms is bound to consume considerable judicial resources. As is widely known, the established methodology for identifying custom requires uniform and consistent state practice (*usus*, or material element) combined with the *opinio juris*, being the acceptance of a rule by states as binding law (subjective element).¹¹⁵ In turn, a general principle of law presupposes the finding of a fundamental legal tenet shared by legal

¹⁰⁷ See also A. D’Amato, ‘Human Rights as Part of Customary International Law: A Plea for Change of Paradigms’, (1996) 25 *Georgia Journal of International and Comparative Law* 47, at 98 (‘the only logical and empirically validating position to take on the source of human rights norms is that they derive from provisions in treaties.’)

¹⁰⁸ Cf. Mégret, ‘Beyond “Fairness”’ (n 11), at 52 (‘international human rights law has no formal status before international criminal tribunals.’)

¹⁰⁹ Art. 21(1)(b) ICC Statute (‘In the second place, where appropriate, ... the principles and rules of international law’); Rule 72*bis*(ii) SCSL RPE (‘where appropriate, other applicable treaties and the provisions and rules of international customary law’). See also Art. 38(1)(b) ICJ Statute (‘international custom, as evidence of a general practice accepted as law’).

¹¹⁰ Reportedly, drafters in Rome avoided the term ‘custom’ due to influence of criminal lawyers concerned with the need to protect the principle of legality. For a critical view, see Pellet, ‘Applicable Law’ (n 98), at 1057, 1071 and for a different interpretation, deGuzman, ‘Article 21’ (n 80), at 707, who suggests that ‘principles ... of international law’ in fact means ‘principles that neither derived from national laws nor part of customary international law’ and that the concept of custom was eschewed as ‘too imprecise for the purposes of international *criminal* law’. It bears noting that its current alternative may be even more so.

¹¹¹ See Art. 21(1)(c) ICC Statute; Rule 72*bis*(iii) SCSL RPE; Art. 38(1) ICJ Statute; Joint and Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* appeal judgment (n 66), para. 57. See A. Cassese, ‘The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations’, in S. Yee and W. Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (New York: Routledge, 2001) 52; Akande, ‘Sources of International Criminal Law’ (n 103), at 51.

¹¹² See n 59.

¹¹³ *Rwamakuba* remedy trial decision (n 32), para. 22 and n33 (implying the existing obligation of the Tribunal to apply the ground of compensation ‘as a rule established under customary international law’ and referring, next to the ICTR previous jurisprudence, to UN Secretary-General reports on the ICTY and ICTR Statutes).

¹¹⁴ See *supra* 2.2.1.

¹¹⁵ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment, ICJ, 20 February 1969, ICJ Reports 1969, paras 74-77; *Continental Shelf Case (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ, 3 June 1985, ICJ Reports 1985, para. 27; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, 8 July 1996, ICJ Reports 1996, para. 64.

systems across different traditions that would be consistent with, and adaptable to, the international law order.

Both methodologies, in their orthodox versions, rest on the need to engage in a global-scale and cumbersome comparative research of the practice of states in their mutual transactions and internal law-making and adjudicative practices. One should consider the exigent and complex character of the method, against the backdrop of: (i) the scarcity of international custom governing the conduct of criminal proceedings in general;¹¹⁶ and (ii) the contradictory, inconsistent and at times overtly illegitimate practice of states in the field of human rights, as one of the constitutive elements of customary law-making.¹¹⁷ Hence it is understandable why international criminal tribunals have rarely been up to said research task and preferred to approach law-identification more practically. From the traditional, inductive approach to custom that places premium on state practice, the ICJ itself gradually came to gravitate towards a ‘modernist’ and deductive approach, consisting in the prioritization of *opinio juris* over *usus* and consideration of any deviating state practice as breaches of pre-existing rules rather than as a recognition of a new rule.¹¹⁸

The tribunals have not shunned the similar avenue when identifying applicable human rights standards.¹¹⁹ On a more fundamental level, the relevance of state practice to determining the detailed content of international criminal procedure is rather remote, and any act of transposition would tend to amount either to a rough analogy or to a tortuous interpretation.¹²⁰ That rubric of practice primarily encompasses the treatment by states of individuals within their jurisdiction, rather than practice concerning the protection of human rights in the framework of the courts states they jointly create. Where human rights obligations do not require interaction and are not running between states, should domestic practice matter at all for the purpose of establishing custom binding upon the tribunals?¹²¹ It would thus seem that the tribunals are themselves creating the relevant custom through their practice, where sanctioned by and not objected to, by states and/or not qualified by negative *opinio juris*, because their proceedings, with some stretch, might be deemed to represent ‘state practice’ in the new domain of international criminal procedure.

B. Custom

For the reasons stated above, the tribunals have generally refrained from conducting comprehensive and rigorous inquiries into the domestic law and practice when discovering customary norms.¹²²

¹¹⁶ Mégret, ‘The Sources of International Criminal Procedure’ (n 70), at 71 (noting a secondary role of custom as a source of the law of criminal procedure).

¹¹⁷ See further B. Simma and P. Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’, (1988-89) 12 *Australian Yearbook of International Law* 82, at 90 (who discuss the inconsistency between *usus* and *opinio juris* as one root cause of what they call an ‘identity crisis of customary law’).

¹¹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Judgment, ICJ, 27 June 2008, ICJ Report 1986, paras 97-98, 186 and 218; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ, 14 February 2002, ICJ Reports 2002, paras 52-55. See further Simma and Alston, ‘The Sources of Human Rights Law’ (n 117), at 88-89 and 96.

¹¹⁹ See e.g. *El Sayed* order (n 58), para. 30.

¹²⁰ As one SCSL staff member put it, ‘where international law was only dealing with states and self-representation was not even an issue 15-20 years ago, we suddenly have very specific customary international law rules dealing with specific details of the criminal procedure. It sounds strange to me.’ See Interview with SCSL Legal Officer, SCSL-AO/02, The Hague, 16 December 2009, at 6.

¹²¹ For a similar line of thought, expressed but not adopted, see Simma and Alston, ‘The Sources of Human Rights Law’ (n 117), at 100 (‘the existence *vel non* of a rule of international customary law not requiring interaction, and not really running between States, can only be ascertained by finding expressions of a respective international *opinio juris*. Thus, as a matter of logic, such an *opinio juris* would remain the only relevant element; domestic practice would simply not matter anymore.’)

¹²² The critique of the insufficient rigorousness of the tribunals’ research and reasoning in this regard is widespread. To cite a few examples: J. Powderly, ‘Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos’, in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 26-32 (concluding that the *ad hoc* tribunals’ methodology for the identification of custom has been ‘inconsistent,

This is equally descriptive of their efforts in ascertaining custom regarding human rights protection in the domain of procedure. In that process, they mostly contented themselves with consulting multilateral agreements, conventions and instruments drawn up by international organizations, as ‘surrogates’ of the constitutive elements of custom, and gave little attention to the examination of actual state practice. For instance, the *Rwamakuba* Trial Chamber based its conclusion that ‘there is insufficient evidence of State practice or of the recognition by States of this practice as law to establish that customary international law provides for compensation to an acquitted person in circumstances involving a grave and manifest miscarriage of justice’ on the basis of a limited survey that covered the ICTY and ICC Statutes, the ICC *travaux préparatoires*, the TRCP, and, as an afterthought, legislation in eight domestic jurisdictions that did in fact exemplify said practice.¹²³

Typically, the tribunals had resort to this custom-identification shortcut, which is also an auxiliary method employed in international law for determining customary rules, based on notion that treaties may be ‘declaratory’ of, and/or generate, customary rules.¹²⁴ This method is neither uncontroversial nor flawless. For an unbiased researcher, it may be impossible to tell a treaty provision that is ‘evidence’ of an existing custom from that which is *lex specialis* and a state-sanctioned derogation from it, against the ‘unsatisfactory patchwork quilt of obligations’¹²⁵ states hold under international treaties. One may not know where the treaty manifests custom unless it is already known what the customary rule is, in which case there would have been no reason to look for the ‘evidence’ thereof in the treaty law in the first place.¹²⁶ Nonetheless, the tribunals have often chosen the convenient route of falling back on the texts of human rights treaties such as the ICCPR and ECHR when establishing or confirming the contents of ‘general international law’ of human rights.¹²⁷ Effectively, the method has been a ‘front door’ through which the conventions paraded into the legal orders of the tribunals.

Under this approach, the tendency has been to attribute a greater weight to the ICCPR over the ECHR on qualitative grounds. The former instrument has often been held to ‘contain’ or ‘reflect’ customary law and was therefore regarded as a source that the tribunals were under a duty to directly apply. Thus, the ICTY referred to Article 14 of the ICCPR as ‘an imperative norm of international law to which the Tribunal must adhere’.¹²⁸ In justification, some judges alluded to the UN Secretary-General’s Report that explicitly mentioned ICCPR or referred to the fact that it was adopted by the UN General Assembly.¹²⁹ Moreover, in a string of decisions, the Appeals Chamber held that the ICCPR forms an integral part of general international law and reflects, and that it was

flawed, and potentially cast a significant pall over the legitimacy of the law ‘produced’ by the Tribunals’); Perrin, ‘Searching for Law’ (n 10), at 381-82. Cf. Declaration of Judge Patrick Robinson, *Furundžija* appeal judgment (n 30), para. 281 (‘A global search, in the sense of an examination of the practice of every state, has never been a requirement in seeking to ascertain international custom, because what one is looking for is a sufficiently widespread practice of states accompanied by *opinio juris*.’)

¹²³ *Rwamakuba* trial decision on remedy (n 32), paras 22-30.

¹²⁴ E.g. A. D’Amato, ‘Human Rights as Norms of Customary International Law’, in *id.*, *International Law: Prospect and Process* (Irvington: Transnational, 1987) 123-147. It is accepted that treaty provisions may pass into customary law over time. See also *id.*, ‘Human Rights as Norms of Customary International Law’ (n 124), at 142 (‘treaty law today is clearly the major repository of rules that we regard as the rules of customary international law of human rights.’)

¹²⁵ Simma and Alston, ‘The Sources of Human Rights Law’ (n 117), at 82.

¹²⁶ D’Amato, ‘Human Rights as Part of Customary International Law’ (n 107), at 96.

¹²⁷ E.g. *Rwamakuba* remedy trial decision (n 32), para. 40.

¹²⁸ Appeal Judgement on Allegations of contempt Against Prior Counsel, Milan Vujin, *Prosecutor v. Tadić*, Case No. IT-94-1-A-AR77, AC, ICTR, 27 February 2001 (‘*Vujin* appeal judgment’), para. 3.

¹²⁹ Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, Decision on Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, AC, ICTY, 11 May 2007 (‘*Krajišnik* Schomburg dissent’), para. 12.

applicable by the ICTR as such.¹³⁰ By contrast, regional conventions (ECHR, IACHR, and ACHPR), along with precedents issued by the respective human rights commissions and courts, has been taken for ‘evidence’ of customary law and aids in the law-identification – but not sources of binding law subject to application.¹³¹

It bears noting that the approach has not been uniform across the tribunals and benches. As opposed to the previously cited examples, the ICTY at times merely sought (further) guidance from both Article 14 of the ICCPR and Article 6 of the ECHR, falling short of ranking them qualitatively by source labels.¹³² Sometimes judges treated the standards under the ECHR (and sometimes under both the ECHR and the ICCPR without distinction) as binding law on the ground that the accused must be granted at least the same level of protection as he would have enjoyed if he had been charged in the territory of the former Yugoslavia, in the interest of equal treatment.¹³³ The reliance on the text of either convention has not always been justified as an effort to distil and apply a customary norm and may have involved a degree of selectivity. The preference of one treaty over the other may be akin to some scholars’ argument that the generally accepted human rights standards to be applied by the court ought to be that of the ECHR and not of the ICCPR.¹³⁴ The validity of this suggested approach of ‘regionalization’ of the human rights regime of the tribunals seems to be driven by practical arguments of convenience rather than by a strict source-based or any other normatively justifiable approach.

In view of the earlier noted limitations of the treaty-based method of customary law identification, the tribunals have faced serious difficulties when using it. The exceptions are their efforts aimed at confirming the most general principles of IHRL, which may indeed be not so difficult to establish since all human rights treaties are univocal in affirming them. There can be no doubt, for example, that the principle of fair trial is a customary requirement; the courts have been confident to make this—rather superfluous—finding.¹³⁵ But establishing the existence and contents

¹³⁰ *Barayagwiza I* appeal decision (n 33), para. 40 (‘The [ICCPR] is part of general international law and is applied on that basis.’); *Kajelijeli* appeal judgment (n 33), para. 209 (referring to ‘customary international law as reflected *inter alia* in the [ICCPR]’ as one source of law for the ICTR).

¹³¹ E.g. *Barayagwiza I* appeal decision (n 33), para. 40 (‘Regional human rights treaties, such as the [ECHR and the IACHR], and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal’s applicable law. Thus they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.’) *Kajelijeli* appeal judgment (n 33), para. 209.

¹³² Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, AC, ICTY, 15 July 1999 (‘*Tadić* appeal judgment’), at 321; *Milošević* trial decision on assignment of counsel (n 53), para. 37.

¹³³ *Krajišnik* Schomburg dissent (n 129), para. 12 (‘as an accused would enjoy the guarantees of some of these agreements, such as the [ECHR], had he been charged with crimes on the territory of the former Yugoslavia, it is an obligation of the Tribunal to fully respect the rights as granted under this convention as well.’); Decision on Provisional Release, *Prosecutor v. Mrđa*, Case No. IT-02-59-PT, TC, ICTY, 15 April 2002 (‘*Mrđa* provisional release decision’), paras 25-27.

¹³⁴ For instance, Judge Trechsel justified his (research) preference for the ECHR over the ICCPR by the ‘European dimension’ of the ICTY (territorial jurisdiction, membership of the respective countries in the CoE, the European majority of judges), the significant volume of relevant ECtHR’s case law, and the Court’s proper judicial nature (as compared to the HRC). See Trechsel, ‘Rights in Criminal Proceedings’ (n 2), at 149-50. See Schomburg, ‘The Role of International Criminal Tribunals’ (n 1), at 2 n3 (considering the ACHR ‘less directly relevant’ to his analysis, given that ‘the jurisprudence of the International Tribunals relates to situations in Europe and Africa). See also Sluiter, ‘International Criminal Proceedings’ (n 13), at 940, n20 (the ECHR reflects customary international law, because ‘this Convention dates from 1950 and served as a model for the ICCPR’).

¹³⁵ Judgement, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, AC, ICTY, 24 March 2000 (‘*Aleksovski* appeal judgment’), para. 104 (‘The right to a fair trial is, of course, a requirement of customary international law.’). See also Separate Opinion of Judge Georgios M. Pikis, Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur”’, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-424, AC, ICC, 12 September 2006, para. 3 (‘the right to a fair trial has been proclaimed as a legal norm and its incorporation in international instruments denotes comprehensive assent to its emergence as a principle of customary international law.’).

of customary law that governs the detail of fair trial, even on a treaty-law basis, has posed significant challenges, in terms of both certainty of findings and the research efforts spent.¹³⁶

For one thing, human rights treaties allow states to make declarations and reservations when ratifying them,¹³⁷ next to resorting to derogations from their provisions on ‘derogable’ rights, including the right to a fair trial and the right to liberty.¹³⁸ Such provisions are not directly relevant for the tribunals: they have no nation of their own the threats to which could be averted by derogations.¹³⁹ Similarly, being no parties to the conventions, the tribunals are not competent to file reservations to such treaties. But it may appear too obvious that, because the tribunals are not parties, those avenues are not available to them in justifying departure from the treaty standards.¹⁴⁰ The point is rather that depending on the relevant state practice, the availability of those avenues to states indicates that the minimum standard of protection required under customary international law in certain limited circumstances is lower than what those provisions establish by default.¹⁴¹ The existence of the respective clauses in the human rights treaties and the derivative state practice obfuscates the mandatory minimum scope of protection under general international law.

For another thing, the ECHR and ICCPR regimes provide for discrepant standards, which raises the question of which regime should be taken as duly reflecting custom. The grounds for ranking between the instruments emerging from the tribunals’ jurisprudence, as shown, are not crystal clear. In the absence of a hierarchical or even informal relationship between the enforcement systems, the internal fragmentation of IHRL cannot easily be overcome. This affects if not its normative effect but certainly its pragmatic value as guidance on which tribunals can draw in solving specific issues before them.

¹³⁶ Sluiter, ‘International Criminal Proceedings’ (n 13), at 938 (‘when confronted with questions as to the exact scope of application of human rights law, resort to customary international law and general principles of law may be a highly complicated and time and energy consuming matter for the Tribunals’); Pellet, ‘Applicable Law’ (n 98), at 1080.

¹³⁷ Arts 2(d) and 19 VCLT (defining a ‘reservation’ as a ‘unilateral statement, however phrased or names, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application that State’ and generally disallowing reservations that are ‘incompatible with the object and purpose of a treaty’ or do not amount to a kind of a reservation permitted by the treaty).

¹³⁸ Art. 15 ECHR (‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.’); Art. 4(1) ICCPR (‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination...’); Art. 27(1) ACHR (‘In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.’). For some rights (but not for the right to a fair trial and the right to liberty), the ICCPR authorizes reasonable limitations in normal times, as provided by law and as necessary in democratic society: Arts 12(3), 19(3), 21, 22(2), 25 ICCPR.

¹³⁹ Sluiter, ‘International Criminal Proceedings’ (n 13), at 938; Mégret, “‘Beyond Fairness’” (n 11), at 58 n69 (‘It is difficult to imagine how the “international community,” which is substantially more removed from any given emergency than states, could claim the benefit of such clauses’).

¹⁴⁰ Fedorova and Sluiter, ‘Human Rights’ (n 28), at 31.

¹⁴¹ DeFrancia, ‘Due Process’ (n 99), at 1396 (‘To the extent that certain due process norms may be derogable under international law, the strength of these protections in an international system of adjudication remain an open question.’); Mégret, “‘Beyond Fairness’” (n 11), at 57-58 (noting the ‘typical elasticity’ of human rights and its potential effects relevant for the tribunals). For reasoning along these lines, see *Tadić* protective measures decision (n 42), para. 61 (‘The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance *par excellence*. It is for this kind of situation that most major international human rights instruments allow some derogation from recognized procedural guarantees. ... The fact that some derogation is allowed in cases of national emergency shows that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification.’)

One vivid example of a collision—rather than conflict—between the ICCPR and ECHR regimes has been a recurring issue before the *ad hoc* tribunals. It relates to the right to appeal a new or more serious conviction or a higher sentence handed down by the Appeals Chamber (*reformatio in pejus*) in reversing or modifying a trial judgment. Article 14(5) of the ICCPR guarantees ‘everyone convicted of a crime’ ‘the right to his conviction and sentence being reviewed by a higher tribunal according to law’, thereby ruling out the possibility of a new conviction on appeal insofar as its consequence amounts to a denial of the right to appeal. The HRC has repeatedly held the (non-appealable) convictions entered for the first time on appeal to be a violation of the right.¹⁴² However, Article 2 of the Protocol 7 to the ECHR legitimizes some restrictions to this right, including situations in which the first-instance proceedings take place before the highest tribunal or follow the successful prosecutorial appeal of acquittal.¹⁴³ In addition, several (mostly West-European) states made reservations to Article 14(5) of the ICCPR to the effect that the impossibility of appealing a conviction entered by the highest court or following the acquittal should not be considered a denial of the right to appeal.¹⁴⁴

Faced with this inconsistency, the ICTY and ICTR have had to decide which provision must be given priority. The practice has varied: in a number of cases the Appeals Chamber chose not to remedy the trial court’s error itself by reversing an acquittal, by entering a more serious conviction, or by increasing the sentence – instead, it either remitted the case to the Trial Chamber for determination or simply declared that the error had been committed without remedying it to the detriment of the defendant.¹⁴⁵ In other cases, the Appeals Chamber preferred to substitute a conviction for acquittal and to aggravate a conviction or sentence.¹⁴⁶ The latter approach has been controversial and has been persistently objected to by a dissenting member of the Chamber.¹⁴⁷ In his opinions appended to *Rutaganda*, *Semanza*, *Galić*, and, more recently, *Mrkšić and Šivančanin* appeal judgements, Judge Pocar argued that the Appeals Chamber may not itself remedy an error of the trial court by entering new or more serious convictions or increasing the sentence on appeal, as this effectively deprives the convicted person of the right to appeal. In support of the assertion that

¹⁴² See among others *Bernardino Gomariz Valera v. Spain*, Views, Communication no. 1095/2002, HRC, 22 July 2005, para. 7.1 (‘Although a person acquitted at first instance may be convicted on appeal by the higher court, this circumstance alone cannot impair the defendant’s right to review of his conviction and sentence by a higher court.’); *Francisco Juan Larrañaga v. The Philippines*, Views, Communication no. 1421/2005, HRC, 24 July 2006, para. 7.8; *Salgar de Montego v. Colombia*, Views, Communication no. 64/1979, HRC, 24 March 1982, para. 3.2; *Jesús Terrón v. Spain*, Views, Communication no. 1073/2002, HRC, 26 August 2005, para. 7.4; *Aliboeva v. Tajikistan*, Views, Communication no. 985/2001, HRC, 16 November 2005, para. 6.5; *Khalilova v. Tajikistan*, Views, Communication no. 973/2001, HRC, 13 April 2004, para. 7.5; and *Saidova v. Tajikistan*, Views, Communication no. 964/2001, HRC, 20 August 2004, para. 6.5; *Gelazauskas v. Lithuania*, Views, Communication No. 836/1998, HRC, 17 March 2003, para. 7.2; *Finali v. Italy*, Views, Communication No. 75/1980, 31 March 1983, HRC, para. 12.

¹⁴³ Art. 2(2) Protocol 7, ECHR (‘This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.’) Protocol 7 has to date been ratified or acceded to by 41 states.

¹⁴⁴ Out of over 150 ratificants, around 10 states (Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg, Norway, Republic of Korea, and Trinidad and Tobago) deposited respective declarations/reservations.

¹⁴⁵ *Tadić* appeal judgment (n 132), paras. 171, 235-237 and 327 and, in the same case, Order Remitting Sentencing to a Trial Chamber, 10 September 1999, at 3 (reversing acquittals on several charges, but remitting the sentencing matter to the Trial Chamber); Judgement, *Prosecutor v. Krstić*, Case No. IT-98-33-A, AC, ICTY, 19 April 2004, paras 219-229 and at 87 (holding that the Trial Chamber ‘incorrectly disallowed convictions’, without entry of new convictions and sentencing); Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, AC, ICTY, 20 February 2001 (‘*Delalić et al.* appeal judgment’), para. 711 (remitting the matter of sentencing); *Vujin* appeal judgment (n 128), at 3.

¹⁴⁶ *Aleksovski* appeal judgment (n 135), para. 191 and at 79 (increasing the sentence); Judgement, *Rutaganda v. Prosecutor*, ICTR-96-3-A, AC, ICTR, 26 May 2003 (‘*Rutaganda* appeal judgement’), para. 584; Judgement, *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, AC, ICTR, 20 May 2005, paras. 364, 371 and 389; Judgement, *Prosecutor v. Galić*, Case No. IT-98-29-A, AC, ICTY, 30 November 2006 (‘*Galić* appeal judgement’), para. 456 and Disposition; Judgement, *Prosecutor v. Mrkšić and Šivančanin*, Case No. IT-95-13/1-A, AC, ICTY, 5 May 2009 (‘*Mrkšić and Šivančanin* appeal judgment’), paras 103, 419 and Disposition.

¹⁴⁷ See (partially) dissenting opinions of Judge Pocar appended to *Rutaganda* appeal judgment, *Semanza* appeal judgment, *Galić* appeal judgment, and *Mrkšić and Šivančanin* appeal judgment (n 146).

Article 25 of the ICTY Statute and Article 24 of the ICTR Statute should be given interpretation that accords with Article 14(5) of the ICCPR, Judge Pocar pointed, among others, to the surrounding circumstances such as the unanimous adoption of the ICCPR by the UN General Assembly, and the explicit reference to Article 14 in the Secretary-General's Report in the context of the right to appeal.¹⁴⁸ In his view, the Appeals Chamber was bound to guarantee the right to appeal a conviction in all circumstances, even where it convicts and sentences at first instance. Instead of substituting a conviction for an acquittal, or aggravating the sentence, the Chamber should have resorted to an alternative solution that would ensure the effective protection of the right, most notably remission of the case to the Trial Chamber.¹⁴⁹

Notably, Judge Pocar did deliberately not base his position on the argument that Article 14(5) of the ICCPR, rather than Article 2 of the Protocol 7, represents customary international law. Instead, he argued that the ICCPR has a binding effect on the tribunals, regardless of its status as customary law.¹⁵⁰ While he did not challenge the fact that the ICCPR is inapplicable *qua* treaty,¹⁵¹ he did not clarify under which other limb of the customary list of sources he proposed to apply the ICCPR. It is quite telling that Judge Pocar's argument is not anchored to the doctrine of sources, and the answer to that query is not forthcoming. Be it as it may, the preoccupation with the question of whether Article 14 of the ICCPR provision, rather than its Protocol 7 counterpart, reflects custom is still apparent in this debate. The dialogue between the judges has been couched in terms of which of the provisions represents a 'universal principle',¹⁵² or enjoys a more universal formal adherence by states (for example, how many states entered reservations relating to the ICCPR provision, how many have ratified Protocol 7, and what that means for the legal authority of those instruments vis-à-vis the tribunals).¹⁵³ These terms underlie the ongoing quest for a source-based justification. For instance, echoing the *Tadić* dictum to the effect that the right to a fair trial is not without qualification,¹⁵⁴ Judge Shahabuddeen argued that although the ICTY, not being a state party, is not in a position to make a reservation to the ICCPR, the applicability of its principles to the ICTY should be 'on the basis that the Tribunal is given a benefit equivalent to the opportunity possessed by states to make reservations', which means that 'the provisions of the ICCPR have to be construed with modifications which take account of the special circumstances of the Tribunal.'¹⁵⁵

¹⁴⁸ E.g. Dissenting Opinion of Judge Pocar, *Rutaganda* appeal judgement (n 146), referring to the UNSG Report on the ICTY Statute (n 44), para. 116 ('The Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.');

Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šlišančanin* appeal judgment (n 146), para. 3.

¹⁴⁹ E.g. Dissenting Opinion of Judge Pocar, *Rutaganda* appeal judgment (n 146), at 2 and 4; Partially Dissenting Opinion of Judge Pocar, *Semanza* appeal judgment (n 146), paras 1 and 4; Dissenting Opinion of Judge Pocar, *Galić* appeal judgment (n 146), paras 2-3; Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šlišančanin* appeal judgment (n 146), paras 1-2, 9. Another alternative, employed once in the context of contempt proceedings, was the review of the first appeal judgment by a differently constituted Appeals Chamber: *Vujin* appeal judgment (n 128). But this option was deemed objectionable given that such panel is not a 'higher tribunal': see Separate Opinion of Judge Wald Dissenting from the Finding of Jurisdiction, *Vujin* appeal judgment (n 147), at 1-2; Separate Opinion of Judge Shahabuddeen, *Rutaganda* appeal judgment (n 146), paras 32-36 and Separate Opinion of Judge Shahabuddeen, *Galić* appeal judgment (n 146), para. 10.

¹⁵⁰ Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šlišančanin* appeal judgment (n 146), paras 7-8.

¹⁵¹ *Ibid.*, para. 8

¹⁵² E.g. Separate Opinion of Judge Wald Dissenting From the Finding of Jurisdiction, *Vujin* appeal judgment (n 147), at 4 ('I am unable to conclude that there yet exists a universal principle that a right of appeal must be afforded even when a conviction first arises in the highest tribunal, as is the case here.')

¹⁵³ Separate Opinion of Judge Shahabuddeen, *Rutaganda* appeal judgment (n 146), paras 14-21, 24-27. Cf. Dissenting Opinion of Judge Pocar, *Rutaganda* appeal judgment (n 146), at 2; Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šlišančanin* appeal judgment (n 146), paras 6-7.

¹⁵⁴ *Supra* n 141.

¹⁵⁵ Separate Opinion of Judge Shahabuddeen, *Rutaganda* appeal judgment (n 146), para. 21. Cf. a response to this position in Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šlišančanin* appeal judgement (n 146), paras 8-9.

As the judges invariably come back to the dialectics of formal sources and normativity, the issue at hand is indeed the identification of custom.¹⁵⁶

While the source-oriented discourse continues to inform the judicial dialogue, its feature that is important to discern is that it by no means exhausts it. In arguing the prevalence of one instrument over the other, the judges have gradually drifted away from source-driven rhetoric and turned to arguments which speak more directly to their interpretative discretion.¹⁵⁷ Thus, the ranking between the ICCPR and the ECHR based on the mechanistic criteria such as their universal v. regional character, degree of acceptance (number of declarations or reservations), and recency (*lex posterior* or *lex prior*), does not amount to an acceptable or effective methodology for establishing custom.¹⁵⁸ It is another question that some of their interpretative methods are more attractive than others. For instance, a provision-specific determination of the applicable norm among discrepant standards that results in opting for the one that better serves the goal of the protecting a right in question (*in dubio pro reo*) has been expressly favoured by Judge Pocar.¹⁵⁹ Indeed, this notion is emerging as imperative in procedural matters and has received recognition as ‘hard law’ of international criminal procedure.¹⁶⁰ Even though ‘procedural legality’ as the right of the defendant to non-retroactive and foreseeable procedural arrangements provides for in *lex scripta* is not as entrenched as legality in substantive criminal law, the extension of the principle *favor rei* to procedure is in line with the ideal of liberal criminal justice.¹⁶¹ However, as Rule 3 STL RPE makes clear, this principle reflects an interpretation-oriented preference, rather than a strictly source-driven method of establishing the applicable law. This overt substitution of discourses demonstrates the limitations of the source-based approach in respect of procedural decision-making of the tribunals – the issue to be returned to shortly.

C. General principles of law

Before the discussion on the ability of the tribunals to locate the applicable IHRL standards in the sources of general international law can be concluded, a brief observation is warranted on the remaining traditional source. Whenever the primary instruments, applicable treaties and custom are of no avail, the tribunals may turn to general principles of law in accordance with their statutes or the customary provision.¹⁶² The observations concerning intractability of custom as a source of IHRL are presumed to apply to this source as well.¹⁶³ This conclusion is agreeable, although the

¹⁵⁶ *Vujin* appeal judgment (n 128), at 3 (‘Article 14 of the International Covenant reflects *an imperative norm of international law to which the Tribunal must adhere.*’ Emphasis added); Separate Opinion of Judge Shahabuddeen, *Rutaganda* appeal judgment (n 146), para. 37; Separate Opinion of Judge Shahabuddeen, *Galic* appeal judgment (n 146), para. 26 (considering reservations states made in relation to the ICCPR as ‘state practice’).

¹⁵⁷ E.g. Separate Opinion of Judge Shahabuddeen, *Rutaganda* appeal judgment (n 146), para. 11 (‘the question is not as to the applicability of the ICCPR but as to its meaning, or more particularly what is the extent of the right of appeal to which it refers.’)

¹⁵⁸ See e.g. n 134. The universal acceptance of certain provisions of the ICCPR can be qualified by declarations entered by states, while certain provisions of the regime under ECHR are chronologically *lex posterior*, as they were introduced by the Protocols more recent than the ICCPR.

¹⁵⁹ Dissenting Opinion of Judge Pocar, *Rutaganda* appeal judgment (n 146), at 3 (‘it should be evident that, where the rights of the accused are concerned, in case of doubt as to whether a particular right exists, such a doubt must operate in favor of the accused.’); Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šljivančanin* appeal judgment (n 146), para. 7 (‘One of the key principles in the international protection of human rights is that when there are diverging international standards, the highest should prevail.’)

¹⁶⁰ Rule 3(B) STL RPE; Rule 21 ECCC IR. See further *infra* 2.3.3.

¹⁶¹ Mégret, ‘The Sources of International Criminal Procedure’ (n 70), at 70 (‘a liberal approach to international criminal justice suggests that in case of doubt the interpretation of criminal procedure most protective of the rights of the accused should be favoured.’); *id.*, ‘Beyond “Fairness”’ (n 11), at 50 (‘Even where the lowest common denominator rule would otherwise favor the incorporation of only those rules common to both systems, the concern for international human rights suggests the most “protective” rule should prevail.’).

¹⁶² Art. 21(1)(c) ICC Statute; Rule 72*bis* (iii) SCSL RPE; Art. 38(1)(c) ICJ Statute.

¹⁶³ Fedorova and Sluiter, ‘Human Rights’ (n 28), at 27; Sluiter, ‘International Criminal Proceedings’ (n 13), at 938.

different nature of general principles as a source results in special difficulties for the law-identification process, including an elevated risk of selectivity.

Essentially, general principles of law are the standards common to a broad range of jurisdictions across legal traditions that are transferrable to the international context.¹⁶⁴ Drawing a representative sample of positions from principal legal systems generally suffices as the methodology for their identification of such principles. But tribunals have tended to interpret the standard even more liberally and contented themselves with surveying the law and jurisprudence of jurisdictions *accessible to them*,¹⁶⁵ or worse still, pulled such principles out of their sleeve.¹⁶⁶ This approach can be criticized as opportunistic and less than earnest as to the real value of orthodox source-based methodologies in defining the outcome.¹⁶⁷ As ‘basic principles or ‘common denominators’, the underlying standards will normally be of a highly abstract character and not helpfully determinative of specific requirements of human rights protection – the examples are the principles of human dignity, equality before the law, etc.¹⁶⁸ Such principles will have to be detailed and further (imaginatively) re-interpreted before they can be meaningfully used for solving a procedural issue at hand. Moreover, as regards procedural matters, the differences within and across the main procedural traditions, unequal status of human rights commitments in individual jurisdictions, and sheer diversity of procedural arrangements are bound to complicate norm-identification.¹⁶⁹ Where tribunals have resorted to this source in regard of procedural matters, their most usual finding has been the absence of general principles.¹⁷⁰

¹⁶⁴ Judgement, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T& IT-96-23/1-T, TC, ICTY, 22 February 2001 (‘*Kunarac et al.* trial judgment’), para. 439 (‘The value of these sources is that they may disclose “general concepts and legal institutions” which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.’); *Furundžija* trial judgement (n 66), para. 178 (‘general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share.’)

¹⁶⁵ See Joint and Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemović* appeal judgment (n 111), para. 57 (‘a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of [the ICTY].’); *Kunarac et al.* trial judgment (n 164), para. 439 (‘In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles, or ... “common denominators”, in those legal systems which embody the principles which must be adopted in the international context.’)

¹⁶⁶ E.g. *Tadić* jurisdictional appeal decision (n 22), para. 42 (finding the principle that a tribunal must be established by law to be a general principle of law, with no references whatsoever).

¹⁶⁷ For critical views, see Perrin, ‘Searching for Law’ (n 10), at 373-75; Mégret, ‘The Sources of International Criminal Procedure’ (n 70), at 72 (‘“general principles” are only loosely invoked as such and ... the tribunals often opportunistically determine their content to further ground procedural solutions which they reached through other (and not necessarily less legitimate means.’).

¹⁶⁸ E.g. *Furundžija* trial judgment (n 66), para. 183 (identifying a ‘general principle of respect for human dignity’). See Akande, ‘Sources of International Criminal Law’ (n 103), at 53 (who argues that this is not a proper legal principle but an underlying value). See also Mégret, ‘The Sources of International Criminal Procedure’ (n 70), at 72 (‘international criminal tribunals may be tempted to reach for some meta-procedural principle that is common to both traditions despite their concrete differences, but this is likely to be so general as to not be particularly useful.’)

¹⁶⁹ For recognition to that effect, see Separate Opinion of Judge Hunt (n 66), para. 24 (‘It is not easy to discover general principles of law in relation to this issue [ICRC staff’s testimonial immunity] which are recognized by the domestic laws of (all) civilised nations. This is because most civil law systems have detailed statutory provisions in relation to evidence which is the subject of claims of confidentiality, whereas most common law systems leave it to the courts to determine where the balance lies between competing public interests.’). See also Cassese, ‘The Contribution of the ICTY to the Ascertainment of General Principles of Law’ (n 111), at 54; Mégret, ‘The Sources of International Criminal Procedure’ (n 70), at 71-72 (considering it ‘difficult to identify general principles without doing violence to one system or engaging in an illegitimate majoritarian or hegemonic exercise’).

¹⁷⁰ E.g. Opinion and Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-T, TC II, ICTY, 7 May 1997, paras 256, 537-9 (finding no principle underlying the doctrine of *unus testis, nullus testis*, i.e. requiring that a single witness’s testimony be corroborated); Decision on the Practices of Witness Familiarisation and Witness Proofing, *Prosecutor v. Lubanga*,

Thus, general principles of law can rather be used as an *ultima ratio* tool for filling lacunae and for obtaining a normative direction for judicial reasoning, as opposed to a ready-made panacea for regulatory gaps. The unclear scope of comparative inquiries required for establishing a general principle, attended by a leeway in picking and choosing jurisdictions, crowned by the notion that the candidate standards should be transposable to the context of international criminal proceedings are the aspects which maximize the importance of judicial discretion.¹⁷¹

D. Moving beyond sources

The foregoing confirms the idea that a conservative source-based approach to establishing the requirements of IHRL that can be deemed to make part of general international law has proved to be a deficient methodology for the tribunals. They sought to supplement and surmount it by interpretive techniques that were more capable of leading to intuitively correct outcomes. Indeed, the tribunals have consulted—and rightly so—the general international law sources when establishing the human rights obligations incumbent on them. But besides being an arduous task, the source orthodoxy has not been apt to provide them with conclusive guidance on all issues.¹⁷² This circumstance does not reduce the normative validity of prescriptions deriving from general international law of human rights, but it may limit its functional and practical value as clear and foreseeable law that can readily be applied to resolve the matter in issue.¹⁷³ This supports the view that IHRL is largely under-determinative when it comes to fleshing out the normative detail of international criminal proceedings.¹⁷⁴ However, as will be discussed, internationally recognized standards of human rights play a considerably more powerful role in the process of interpretation and application of the tribunals' law.¹⁷⁵ Mostly, such standards are effectively employed by the judges as rational levers and value-based supports in justifying the exercise of their discretion.¹⁷⁶

2.2.3.3. *Precedents of other courts and monitoring bodies*

The question important to consider against the backdrop of sources is the role and authority accorded by the tribunals to legal findings contained in the decisions of other international courts (ECtHR and IACtHR) and quasi-judicial bodies (ECommHR, IACommHR and HRC), which are competent to interpret and apply the provisions of IHRL treaties, as well as to any domestic decisions. Precedents form an integral part of the body of IHRL because they give effect to treaty provisions and may be the evidence of custom. However, for the purpose of establishing their authority vis-à-vis international criminal courts, the essential meta-judicial distinction must be upheld between the sources of law *stricto sensu* and (judicial) decisions. It is sometimes overlooked that the latter are the results of the interpretation and application of law in the circumstances of individual cases and within specific adjudicative frameworks.

Situation in the DRC, ICC-01/04-01/06-679, PTC I, ICC, 8 November 2006 ('Lubanga pre-trial witness proofing decision'), para. 42; Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Prosecutor v. Lubanga*, *Situation in the DRC*, ICC-01/04-01/06-1049, TC I, ICC, 30 November 2007 ('Lubanga trial witness proofing decision'), para. 41.

¹⁷¹ Pointing to the broad scope of judicial discretion engraved in Article 21(1)(c) ICC Statute, see e.g. Pellet, 'Applicable Law' (n 98), at 1073-75; deGuzman, 'Article 21' (n 80), at 710; Perrin, 'Searching for Law' (n 10), at 399.

¹⁷² For a similar conclusion, see Perrin, 'Searching for Law' (n 10), at 403 ('international criminal tribunals historically could not simply rely upon the general sources of public international law in resolving difficult cases.').

¹⁷³ Mégret, "'Beyond Fairness'" (n 11), at 52 ('this ambiguity [as to the exact status of human rights law] arguably limits the role human rights law might have, in contrast to its status in legal systems, where it clearly forms part of super-legality to which all the procedure should conform.').

¹⁷⁴ Warbrick, 'International Criminal Courts and Fair Trial' (n 45), at 50 ('a mere skeleton of what is required'); Mégret, "'Beyond Fairness'" (n 11), at 51.

¹⁷⁵ See *infra* 2.3.

¹⁷⁶ Similarly, see Perrin, 'Searching for the Law' (n 10), at 382.

Under the common law doctrine of *stare decisis*, precedents are regarded as proper sources of law subject to application by (lower) courts on that very basis. Presumably due to this fact, the distinction between ‘sources’ and ‘subsidiary means’ is sometimes blurred or deemed immaterial. The pure doctrine of binding precedent as known from common law formally has no place before international (criminal) courts and in public international law generally.¹⁷⁷ Thus, it would be incorrect to lump decisions of other courts together with the sources that the tribunals are called upon to apply. This follows from the provisions on sources of international (criminal) law. In accordance with Article 38(1)(d) of the ICJ Statute, judicial decisions, next to ‘the teachings of the most highly qualified publicists of the various nations’, is a ‘subsidiary means for the determination of rules of law’. The notion that decisions are no proper source of law is endorsed by the language of Article 21(2) of the ICC Statute and Rule 72*bis* of the SCSL RPE, which do not mention judicial precedents among the sources those courts ‘shall apply’.¹⁷⁸ Article 20(3) of the SCSL Statute prescribes that the SCSL judges be *guided* by the decisions of the ICTY/ICTR Appeals Chamber and, in the interpretation of Sierra Leonean law, by the decisions of the Supreme Court of Sierra Leone. This falls short of requiring the SCSL to follow that jurisprudence as directly applicable or binding.¹⁷⁹ Article 21(2) of the ICC Statute merely states that ‘The Court may apply principles and rules of law as interpreted in its previous decisions’. It thus entitles—but not obliges—the Court to have recourse to its previous interpretations and is silent as to whether the Court may or should consider any other jurisprudence.

In regard of the ICTY and ICTR, whose Statutes do not address the status of jurisprudence, some judges¹⁸⁰ and commentators¹⁸¹ alike have suggested that the Secretary-General had intended the HRC jurisprudence to make the ‘lock, stock and barrel’ of the body of human rights law. Likewise, some have argued the same as regards the ECtHR jurisprudence.¹⁸² The expansive interpretation of human rights *law* as necessarily including the relevant *case law* has no basis and would not be warranted. It must be recalled that the Secretary-General’s statement refers to ‘standards’ and not interpretations thereof; moreover, human rights precedents are nowhere close to being mentioned as a source of ‘internationally recognized standards’.¹⁸³

From early on, the ICTY Trial Chambers upheld the principle that adjudication must proceed on the strength of law, not of cases (*non exemplis, sed legibus iudicandum est*). The *Kupreškić et al.* Chamber adhered to the notion that, subject to the binding effects of the *ratio decidendi* of the Appeals Chamber, precedents are no sources of law, but ‘subsidiary means’ that can be taken at

¹⁷⁷ Cf. Akande, ‘Sources of International Criminal Law’ (n 103), at 53 (who notes that judicial precedents play ‘a deceptively important role’ in ICL, which is agreeable, and states without qualification that the *ad hoc* tribunals apply *stare decisis*). The tribunals should rather be deemed to apply its watered-down version.

¹⁷⁸ Art. 21(1) ICC Statute; Rule 72*bis* SCSL RPE.

¹⁷⁹ Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, AC, SCSL, 11 September 2006, para. 13 (‘This body of case law is persuasive, but it is not directly applicable or binding. ... Useful guidance may be gleaned from the experience of the other international criminal tribunals, but this Special Court is not bound by their decisions. This Appeals Chamber will, however, follow relevant jurisprudence where it is appropriate to do so.’)

¹⁸⁰ E.g. Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šivančanin* appeal judgment (n 146), para. 3 (‘no reasons exist to permit the International Tribunal to subtract itself from applying the principles enshrined in the ICCPR, in accordance with the meaning given to them by the Human Rights Committee ... that is, the very body entrusted to interpret the ICCPR for the overall purpose of monitoring its application and implementation.’)

¹⁸¹ McIntyre, ‘Equality of Arms’ (n 36), at 269; Sluiter, ‘International Criminal Proceedings’ (n 13), at 938 (‘human rights treaty law, including decisions to supervisory bodies’) and 940 (‘Full application of the ICCPR should include the views of the Human Rights Committee, as authoritative interpretations of the provisions in that instrument.’)

¹⁸² J. Nicholls, ‘Evidence: Hearsay and Anonymous Witnesses’, in R. Haveman *et al.* (eds), *Supranational Criminal Law: A System Sui Generis* (Antwerp: Intersentia, 2003), at 287 (‘it is difficult to find reasons why the international norms embodied in the European Court’s jurisprudence should not guide, and to an extent bind, the decisions of the ICTY’).

¹⁸³ UNSG Report on the ICTY Statute (n 44), para. 106.

best as a persuasive evidence of the existing (international customary) rules, i.e. *opinio juris*.¹⁸⁴ The further ranking was made between international and national jurisprudence, whereby greater caution was deemed necessary whenever relying on domestic case law.¹⁸⁵ The main principle that has governed resort to precedents is their relevance, i.e. sufficient relation of decisions used for interpretation to the law which is being interpreted. Where the court is satisfied of relevance, it is appropriate to apply *ratio decidendi* developed by the other court by analogy.¹⁸⁶

The logic departing from a classical *stare decisis* doctrine was broadly endorsed by the *Aleksovski* Appeals Chamber which confirmed that *ratio decidendi* of its decisions is binding vis-à-vis Trial Chambers and that it should follow the rationale of its own decisions, absent cogent reasons for departure.¹⁸⁷ More specifically with regard to the jurisprudence of regional human rights courts and treaty-based bodies, the position the ICTY adopted in one of the earliest decisions was more antagonistic and for that reason became subject to extensive (critical) commentary.¹⁸⁸ In *Tadić*, the Trial Chamber's majority granted prosecution witnesses full anonymity and, in doing so, not only rejected the binding nature of the interpretations of human rights standards by other courts and bodies, but also held that those were of 'limited relevance' in its own context:

The interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statutes and Rules of the International Tribunal as those bodies interpret their provisions in the context of their framework, which do not contain the same considerations. ... The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies is evident in the different circumstances in which the provisions apply. ... [T]he International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.¹⁸⁹

On these grounds, the ICTY chose to depart from the ECtHR's principle that 'all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument', and that the identities of witnesses should normally be disclosed to enable the accused 'to demonstrate that [witness] is prejudiced, hostile or unreliable' and 'to test the [witness] reliability or cast doubt on his credibility'.¹⁹⁰

It bears noting that the Trial Chamber's majority was ill-advised to draw a parallel with military tribunals. In a sense, it betrays the Nuremberg Tribunal's legacy: despite its name, a

¹⁸⁴ *Kupreškić et al.* trial judgement (n 22), para 540-41 ('precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law' and 'judicial decisions may prove to be of invaluable importance for the determination of existing law').

¹⁸⁵ *Ibid.*, para. 542 ('International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.')

¹⁸⁶ Analogy can be defined as a 'methodological process by which a given norm or set of norms extends its application to facts or fields not directly comprised in its scope and with which it shares a specific relationship' in connection with the same protected values or goods. See Pinto Soares, 'Tangling Human Rights', (n 6), at 181.

¹⁸⁷ *Aleksovski* appeal judgment (n 135), paras 107-111 and 113.

¹⁸⁸ See among others C.M. Chinkin, 'Due Process and Witness Anonymity', (1997) 91(1) *American Journal of International Law* 75-79; M. Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', (1996) 90(2) *American Journal of International Law* 80-85; *id.*, 'Witness Anonymity Is Inconsistent with Due Process', (1997) 91(1) *American Journal of International Law* 80-83; N. Affolder, 'Tadić, the Anonymous Witness and the Sources of International Procedural Law', (1998) 19 *Michigan Journal of International Law* 448.

¹⁸⁹ *Tadić* protective measures decision (n 42), paras 27-28. But see, in the same case, Separate opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

¹⁹⁰ *Ibid.*, para. 28. See *Kostovski v. The Netherlands*, Judgment, Application no. 11454/85, ECtHR, 20 November 1989, ECHR series A, Vol. 166, 23 May 1989, paras 41-42.

palpable effort was undertaken by the IMT architects to surpass the reduced standards of justice in military commissions. The statement was apt to become a ‘red cloth’—or rather a helpful aid—for the Tribunal’s opponents and those looking for arguments to apply lax standards of rights protection in other contexts, making the court liable to a justifiable criticism.¹⁹¹ In the context of the decision, the claim was no more than bad rhetoric immaterial to the Chamber’s reasoning. It could have well been omitted *en route* to the same conclusion, given that the ECtHR case law does *not* rule out the granting of full anonymity to witnesses and the subsequent use of their evidence, but merely attaches conditions to such use, namely that it may not serve as the sole basis to convict.¹⁹² Albeit extraordinary, anonymous witness testimony does not have to be fully excluded in international criminal procedure context, subject to appropriate guarantees (e.g. that it cannot serve as the sole or decisive basis for the conviction).¹⁹³

The protective measure of total anonymity, just as the dubious comparison used to justify it, have remained an isolated instance in the ICTY practice.¹⁹⁴ Apparently, the judges came to feel uncomfortable about the *Tadić* declaration and that line of thought was replaced soon enough with a pointedly deferential attitude.¹⁹⁵ As widely noted, the case law of other courts and bodies has since been taken more seriously and accorded greater value, absent specific reasons for distinguishing between the cases in issue.¹⁹⁶ However, the shift in rhetoric never went as far as to recognize the binding nature or direct applicability of human rights jurisprudence. On the contrary, the ICTY and ICTR continued to adhere to the position that it is not binding upon them as of its own accord.¹⁹⁷ They recognized that it may nevertheless be relevant and operate as a ‘persuasive authority’ in interpreting the relevant human rights law norms.¹⁹⁸ The following statement by the ICTR Trial Chamber concerning the alleged violation of the right to be tried without undue delay is illustrative of the point:

while the jurisprudence of these authorities [HRC and ECtHR] may have a persuasive effect on a Trial Chamber, the Tribunal’s own statutory instruments and jurisprudence remain its primary sources of law. Therefore, the Chamber considers that it should have recourse to such authorities only to the extent that the Tribunal’s statutory instruments and jurisprudence are deficient. Therefore, the Chamber’s Decision will

¹⁹¹ See e.g. W.A. Schabas, ‘Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights’, (2011) 9 *JICJ* 609, at 625.

¹⁹² *Kostovski v. The Netherlands* (n 190), para. 44 (‘The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction ... is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6’).

¹⁹³ See e.g. Rules 93 and 159 STL RPE.

¹⁹⁴ Decision on the Application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses, *Prosecutor v. Tadić*, Case No. IT-94-14-PT, 5 November 1996, para. 24 (‘the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.’); Decision on Motion by Prosecution on Protective Measures, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, TC II, ICTY, 3 July 2000, para. 20 (‘the rights of the accused are made the first consideration, and the need to protect victims and witnesses a secondary one.’)

¹⁹⁵ E.g. Decision on the Motions by the Prosecutor for Protective Measures for the Prosecution Witnesses Pseudonymed “B” through “M”, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC, ICTY, 28 April 1997, para. 27 (‘decisions on the provisions of the ICCPR and the ECHR have been found to be authoritative and applicable’).

¹⁹⁶ Sluiter, ‘International Criminal Proceedings’ (n 13), at 938; Gradoni, ‘The Human Rights Dimension’ (n 51), at 91; Schabas, ‘Synergy or Fragmentation?’ (n 191), at 625.

¹⁹⁷ *Delalić et al.* appeal judgment (n 145), para. 24 (‘Although the Appeals Chamber will necessarily take into consideration decisions of other international courts, it may, after careful consideration, come to a different conclusion.’ This statement concerns the ICJ case law but it is representative of general attitude towards the authority of the jurisprudence other international courts); *Barayagwiza I* appeal decision (n 33), para. 40. But cf. *ibid.*, para. 67 (‘length of time that the Appellant was detained in Cameroon at the behest of the Tribunal without being indicted *violates* ... established human rights jurisprudence governing detention of suspects’, emphasis added).

¹⁹⁸ Separate Opinion of Judge Shahabuddeen, *Galić* appeal judgment (n 146), para. 18 (‘[HRC] decisions are interesting, but are not determinative of the present case. They need to be qualified to accommodate the characteristics of an international criminal tribunal as distinguished from the national judicial bodies to which they applied.’)

Chapter 2: Fairness and its Metric in International Criminal Procedure

focus on the jurisprudence which is binding upon it, rather than that of the Human Rights Committee, in determining whether the delay in this case—if any—is undue.¹⁹⁹

This statement reflects a baseline for the judges' resort to the external jurisprudence, which is also confirmed by a relatively uniform response obtained in the course of the personal interviews with the staff of the Chambers of both the ICTR²⁰⁰ and SCSL.²⁰¹

In its emerging jurisprudence, the STL has affirmed a similar position.²⁰² In turn, the ICC has from early on rejected the status of the *ad hoc* tribunals' jurisprudence as a source of applicable law, in accordance with Article 21.²⁰³ But it has regularly cited and relied upon the case law of human rights courts bodies, including the IACtHR and ECtHR.²⁰⁴ The reasons for this deference

¹⁹⁹ *C. Bizimungu et al.* undue delay decision of 23 June 2010 (n 54), para. 10 and, in the same case, *C. Bizimungu et al.* undue delay decision of 29 May 2007 (n 54), para. 20.

²⁰⁰ Interview with an ICTR Judge, ICTR-AJ/09, Arusha, 16 May 2008, at 3 ('I would not consider a decision of the European Court of Human Rights to be binding. Except to the extent to which it evidences what is customary international law.');

Interview with Judge Emile Francis Short of the ICTR, ICTR-PJ/05, Arusha, 23 May 2008, at 2 ('They [ECtHR and HRC decisions] are not binding. They are of a persuasive nature.');

Interview with Judge Møse of the ICTR, ICTR-PJ-04, Arusha, 20 May 2008, at 3-4 ('it is common ground that a supervisory body under one convention is not bound by the interpretation of another organ set up under a different instrument. This said, I consider them very authoritative. I would only use the word "binding" in relation to precedents by the ICTR and ICTY Appeals Chamber.');

Interview with Judge Sergei Alekseevich Egorov of the ICTR, ICTR-PJ/06, Arusha, 20 May 2008, at 3 ('As far as the value and legal force of precedential law is concerned, I would not say the jurisprudence of, for example, the European Court is of a strictly binding character. ... Indeed, with regard to some of the questions we deal with, we may not challenge the authority of what is accepted in this Court. But on what ground can we consider their jurisprudence as binding? – Perhaps only on the moral ground that the European Court has a great value.');

Interview with Judge Inés Mónica Weinberg de Roca of the ICTR, ICTR-PJ/07, Arusha, 19 May 2008, at 2 ('we are not bound by the jurisprudence of the regional courts, but we do not ignore it. ... [I]t is definitely not a set of binding precedents.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/10, Arusha, 19 May 2008, at 3 ('"Binding effect" is a technical concept. ... But, definitely, decisions of other courts are not binding. You need a hierarchy to be binding to begin with, and there is no such hierarchy. It can only be persuasive.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/05, Arusha, 3 June 2008, at 3 ('it would not be considered binding necessarily. To the extent that it reflects customary international law and that it is relevant to a decision, I guess it would be considered binding. But it is not something that is often looked to in my experience.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/08, Arusha, 16 May 2008, at 5 ('I would not necessarily refer to it as binding applicable law. It is like looking to another jurisdiction to get some guidance. They have dealt with a problem that we are now dealing with.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/01, Arusha, 5 June 2008, at 3.

²⁰¹ Interview with SCSL Judge, SCSL-AJ/01, The Hague, 16 December 2008, at 5; Interview with SCSL Legal Officer, SCSL-AO/02 (n 120), at 5 ('the Special Court is not bound by the [human rights] jurisprudence as a legal matter ... because [it is] not part of those conventions.');

Interview with SCSL Legal Officer, SCSL-AO/01, The Hague, 4 February 2010, at 4 ('we do look to that but at the end of the day it is more persuasive than binding.').

²⁰² *El Sayed* order (n 58), para. 26 ('the case law of the international human rights courts mentioned above [the ECtHR and IACHR], although such courts do not have jurisdiction over Lebanon or the STL, is extremely important for two reasons. First, it spells out notions and legal consequences of provisions that are to a large extent similar to those of the ICCPR, a treaty that is binding on Lebanon and cannot but act as a set of crucial legal standards for the STL as well. Second, the case law in question has contributed and is contributing to the evolution of international customary rule on the right of access to justice and, by the same token, can be regarded as evidence of the contents of that customary rule.')

²⁰³ Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, *Prosecutor v. Kony et al.*, ICC-02/04-01/05-60, PTC II, ICC, 28 October 2005, para. 19; *Lubanga* trial witness proofing decision (n 170), para. 44 ('this precedent [of the *ad hoc* tribunals] is in no sense binding on the Trial Chamber at this Court. ... [T]he Chamber does not consider the procedural rules and jurisprudence of the *ad hoc* Tribunals to be automatically applicable to the ICC without detailed analysis.')

²⁰⁴ See e.g. Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v. Harun and Al-Rahman*, ICC-02/05-01/07-1, PTC I, ICC, 27 April 2007, para. 28; Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial State of the Case, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-474, PTC I, ICC, 13 May 2008, para. 32 n39; Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article

have not always emerged clearly in the ICC's case law. Human rights jurisprudence originating from different contexts is regarded as equally relevant, without special deference being accorded to the HRC views on individual communications or to the jurisprudence of regional human rights courts. Again, this may be taken to indicate their potentially persuasive but equally non-binding force.²⁰⁵ It is accorded greater weight that decisions of domestic courts in the field of human rights.²⁰⁶

While the influence of human rights case law on the procedural practice of the tribunals has been very significant, their usage of it has not been consistent.²⁰⁷ Some found it to be opportunistic and being driven by the pragmatic interest of 'functional adaptation', rather than by a sense of following a persuasive authority.²⁰⁸ The similar modes of usage of human rights jurisprudence by the tribunals have been to confirm conclusions reached by other means of legal reasoning and to reinforce the interpretations of their own Statutes and Rules.²⁰⁹ These modalities unmistakably emerge as prominent from the personal interviews with the ICTR and SCSL judges and their staff.²¹⁰

This non-rigorous, or 'wild approach'—the label which denotes a cognitive dissonance one may experience when trying to make sense of the tribunals' treatment of case law of other courts in light of the traditional theory of sources—is explained by nothing else than a significant discretion judges wield in interpreting the applicable human rights law.²¹¹ The problem is that the tribunals are not always aware of, or at least explicit about, the grounds on which they resort to human rights

54(3)(e) agreements and the application of stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", *Prosecutor v. Lubanga*, ICC-01/04-01/06-1486, AC, ICC, 21 October 2008, paras 47-48; Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", *Prosecutor v. Katanga*, ICC-01/04-01/07-475, AC, ICC, 13 May 2008, para. 57; Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08-323, AC, ICC, 16 December 2008, paras 28-33.

²⁰⁵ Gradoni, 'The Human Rights Dimension' (n 51), at 89-90 (with further references).

²⁰⁶ Interview with Judge Møse (n 200), at 3 ('I would rather refer to a Strasbourg case under ECHR Article 6 about impartiality than a decision from the House of Lords in the UK, even though it may have been ground-breaking when it was rendered. ... [I]t is preferable to develop a common international denominator, drawing on the ICCPR and the ECHR case law.')

²⁰⁷ Cassese, 'The Influence of the European Court' (n 64), at 21-4 and 50 (criticizing the *ad hoc* tribunals' 'wild approach' of using case law of other international and national tribunals 'not in order to establish the existence of a rule of customary international law or general principles of law, but rather directly to resolve the legal problem before them.'). On the substantial impact of human rights jurisprudence, see *ibid.*, at 25-26 and 49; Møse, 'Impact of Human Rights Conventions' (n 2), at 207-8; T. Meron, 'Human Rights Standards in the Jurisprudence of International Criminal Courts and Tribunals', Speech delivered on 25 January 2013 at the Opening of the Judicial Year, European Court of Human Rights, Strasbourg, France, <http://www.echr.coe.int/NR/rdonlyres/1CF8F53B-AB43-4671-BC63-A1E708DFCC74/0/20130125_Discours_Theodor_Meron_Audience_solennelle_2013_EN.pdf>, at 7 (recognizing 'the leading authority and invaluable guidance of this Court's extensive jurisprudence addressing fair-trial guarantees.')

²⁰⁸ Mégret, "'Beyond Fairness'" (n 11), at 52 ('the tribunals' use of international human rights precedents is a little opportunistic and haphazard, determined less by a sense of obligation than by functional adaptation. "Precedents" are in fact used loosely as evidence of how certain courts have dealt with problems that the tribunals are facing, rather than as authoritative.')

²⁰⁹ See Cassese, 'The Influence of the European Court' (n 64), at 21-22, 38-43

²¹⁰ E.g. Interview with Judge Egorov (n 200), at 3 ('the pragmatic approach prevails. If we are looking for the support of our position or, on the contrary, the counterarguments of legal nature and find them in that jurisprudence, we do use it.');

Interview with SCSL Judge, SCSL-AJ-02, The Hague, 9 December 2008, at 3 ('They provide useful guidance and sometimes we can use them to strengthen our argument. In most cases, there is enough case law without going out to the European court or whatever. There is enough jurisprudence within the tribunals, the *ad hoc* tribunals, to help us to support the decisions we take. Sometimes, if we really want to make a point or where there is a good decision in the European court that we think is completely on the point that we are dealing with, yes we can quote it. Not that we are bound by it, but that we are persuaded by it.')

²¹¹ See also Mégret, "'Beyond Fairness'" (n 11), at 52 ('The fact that tribunals proclaim their intention to abide by the standards of due process, but affirm that they are not formally bound by the most authoritative sources of due process as a human right, in short, suggests significant room for maneuver.')

jurisprudence.²¹² Often when dealing with procedural matters or in justification of the validity of their procedural law and regulations, they refer to human rights jurisprudence, but provide explanation neither of the reasons for using it nor of its authority.²¹³

Another striking aspect is that whenever consulting and using such jurisprudence, the tribunals in fact engage with their own ‘interpretations of interpretations’ of human rights standards by other courts and other organs. As the above-cited example from *Tadić* as well as other instances may show,²¹⁴ the courts’ reasoning is sometimes based on their incomplete knowledge or flawed understanding of the other jurisprudence. The tribunals’ restatement or summaries of normative positions of other courts and their declarations as to whether they decide to adhere to or deviate from the standards as interpreted by other organs should therefore be taken with a grain of salt. Their treatment of issues may in fact deviate from the general human rights practice when they assure of their compliance with it and, vice versa, the tribunals’ own practice may in fact be quite in line with the other courts’ rationales despite incredulous attitude.

Be that as it may, where the tribunals refer to human rights jurisprudence, they jealously preserve their autonomy from other judicial forums.²¹⁵ As one interviewed staff member put it, this is a matter of judicial independence.²¹⁶ Indeed, it is difficult to see how this could have been otherwise without the tribunals divesting their status as judicial bodies. The process of interpretation of law is integral to its implementation and is bound to be fact-specific, i.e. to be conducted in the context of the case and the judicial setting within which it is applied. Interpretations of human rights standards by other courts mandated to enforce them arguably may not (and cannot) be taken by the tribunals on their face value and to be directly applied to the case before them. Instead, the rationale offered by another court can be taken as ‘persuasive’ if the question before the tribunal is the content of the respective human rights treaty provision. Still, it is a discretionary matter for the court to confer on them such degree of authority, subject to any rules concerning the interpretation of law. Where interpretations of human rights law norms are cast in relation to a situation factually similar to that before the court, they might helpfully orient the tribunals in the interpretation of their own human rights law regime. However, in solving issues pending before them, it is a responsibility of the judges to operate as independent, impartial, and autonomous decision-makers and to ‘strike the balance’ anew as appropriate in every individual case.²¹⁷

²¹² Interview with SCSL Legal Officer, SCSL-AO-02 (n 201), at 5 (‘there is no discussion in any of decisions or judgements of the Special Court why they are actually guided by them or what the rationale is, why they can use their jurisprudence.’)

²¹³ E.g. Decision on Joint Defence Motion for Leave to Recall Witness TF1-023, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, TC II, SCSL, 25 October 2005, para. 23; Decision on Brama-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara, *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-AR73, AC, SCSL, 8 December 2005, para. 89 (‘The SCSL Regulations are also fully consistent with the jurisprudence of the [ECtHR], in particular its decision in the *Mayzit v. Russia* Case’).

²¹⁴ See also *Tadić* appeal judgment (n 132), para. 51 (misinterpreting the principle of equality of arms as used by the ECtHR to the effect that its reliance on the argument of the unavailability of state cooperation amounts to a ‘more liberal’ interpretation of the principle). See Fedorova and Sluiter, ‘Human Rights’ (n 28), at 50.

²¹⁵ S. Negri, ‘Equality of Arms – Guiding Light or Empty Shell?’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007) 24 (‘tribunals “necessarily take into consideration other decisions of international courts” while firmly claiming their position of absolute autonomy in relation to the others.’).

²¹⁶ Interview with Legal Officer, ICTR Chambers, ICTR-AO/07, ICTR, Arusha, 2 June 2008, at 2 (‘The Tribunal is independent, it is not bound by any other court. It cannot be. But, certainly, decisions by the European Court of Human Rights have influenced, and have been taken into consideration. ... And, obviously, they are independent Judges, who are not bound by any other thing than their conscience. There are connections between the tribunals, between the courts, between the jurisprudence, but the tribunals are independent, and they need to be independent.’).

²¹⁷ See also Gradoni, ‘International Criminal Courts and Tribunals’ (n 8), at 855 (‘international criminal courts and tribunals are obviously not bound to strike the balance of interpretation as single human rights courts or bodies, or even all of them, do. Needless to say, the applicability of general international law does not prevent international criminal

The balancing technique serves to accommodate, to the extent reasonable and possible, all legitimate interests at stake in a criminal trial; the questions regarding the scope of the rights protection appropriate to be granted should be decided from a clean slate. The application of human rights standards should be more than a quasi-deliberation that barely scratches the surface and parrots the reasoning and arguments imported from another case decided by another judicial body. International criminal courts are neither mere heralds, nor enforcement arms of human rights courts and monitoring bodies which are to abide by other organs' (quasi-)judicial authority. The mission of the tribunals is to adjudicate their cases on merits and according to their governing principles and methodologies, not to disseminate the other courts' interpretations of human rights standards or help the expansion of their rationales into contexts other than those for which they were tailor-made. The deliberative and methodological autonomy of international criminal courts is ultimately a question of the preservation of the identity and survival of international criminal law as a distinct body of law.²¹⁸

Handing down first-hand interpretations of human rights standards produced in result of autonomous reasoning is a core adjudicative function which cannot be waived by any court. Uncritical reliance on the rationales of other courts would be tantamount to an abdication of this responsibility and make the court vulnerable to challenges based on the alleged violations of fair trial, namely the right to an impartial and independent tribunal and the right to a reasoned opinion. The latter entails, at least, that the court genuinely deliberates and engages in the objectified process of factual and legal reasoning. The tribunals must be—and indeed have been—keenly aware of the differences between their legal and institutional circumstances and the context to which the human rights jurisprudence relates.

The different mandates and operational frameworks of international judicial bodies necessitate the contextual application of human rights law; not all legal positions adopted by courts in the application of human rights should necessarily be shared. In addressing the violations of the obligations of states under the respective Conventions, the ECtHR, IACtHR, and the HRC operate within the confines of their framework and for their unique purposes. This is seen *inter alia* from the provision of a wide margin of appreciation to states, the nature of their obligations as binding as to the result,²¹⁹ the recognition of interpretive declarations or reservations as well as derogations and limitations, and the treatment of convention provisions as only minimum standards which catch practice falling below the bar.²²⁰ These courts and bodies engage in their own casuistry and are guided by legal policy considerations which are extraneous to international criminal tribunals and which should not necessarily be allowed to shape the outcome of cases pending before them.²²¹

International criminal tribunals are reserved onto themselves in the sense that rationales offered by other adjudicative and quasi-judicial bodies are essentially utilized for the interpretation and application of their own 'internal' law.²²² In this light, it is not inaccurate to say that every

jurisdictions from developing, through interpretation and taking account of their specific situation and exigencies, their own human rights judicial policy.)

²¹⁸ See e.g. Pinto Soares, 'Tangling Human Rights' (n 186), at 191.

²¹⁹ Mégret, "'Beyond Fairness'" (n 11), at 53 ('Fundamental intuitions about the need or right to a fair trial await concretization in actual forms.')

²²⁰ Warbrick, 'International Criminal Courts and Fair Trial' (n 45), at 51 ('Many of the international standards are really standards of review of national decisions rather than rules of decisions themselves and, at best, they create minimum levels of protection rather than normal or optimum ones. ... [T]he human rights standards in the main create obligations of result for states—to secure a fair trial for the defendant, rather than to secure it in any particular way.')

²²¹ This is of course not meant to ignore or diminish the general normative ambition behind the ECtHR adjudication: see e.g. *Ireland v. UK*, Application No. 5310/71, ECtHR, 18 January 1979, para. 154 ('The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.')

²²² E.g. *C. Bizimungu et al.* undue delay decision of 29 May 2007 (n 54), para. 20 ('the fundamental guarantees afforded to the Accused are derived firstly from the Tribunal's statutory instruments – in particular Articles 19 and 20 of the Statute.')

solution the tribunals eventually employ when addressing human rights issues originates within the system itself, as opposed to being drawn from ‘external sources’.²²³ Such is the nature of judicial process as opposed to, say, mere executive competence and law-enforcement. That said, it is true that the tribunals are not self-contained, let alone ‘vacuum-sealed’, institutions – and it is an illusion if they seem to be such.²²⁴ On the contrary, as will be discussed later, they must be alert to jurisprudential developments in the domain of human rights and should make them an integral part of deliberation.²²⁵ By engaging in an informal and non-hierarchical dialogue with other judicial forums and by exchanging rationales with judges of other courts and decision-making bodies, international criminal judges benefit from, and potentially contribute to, the *ius commune* of IHRL.²²⁶

To sum up, the value of human rights jurisprudence in the domain of international criminal courts and tribunals is that it may serve a persuasive but not binding authority. The other courts’ *ratio decidendi* may be applied by the tribunals to their cases by analogy when interpreting and applying the law, to the extent that such rationales are relevant and compatible with the tribunals’ own legal framework.

2.2.4. Law or policy, and does it matter?

The foregoing discussion shows that the issue of what primary legal bases exist for international criminal tribunals to be bound by IHRL and, in particular, its norms forming a part of general international law is not straightforward, but the tribunals are bound by such law, not least because of the explicit manifestation of legislators’ will to that effect. The question remains whether the decision to extend the applicability of IHRL to tribunals was rooted in policy or ensued as a matter of law in the sense that no policy decision had to be made for the tribunals still to be bound by IHRL. On its face, this is theoretical: does it really matter what the origin of the obligation (law or policy) is if the tribunals consider themselves bound by generally accepted human rights norms? Nonetheless it could have practical importance in establishing extent to which the tribunals may deviate from, or re-interpret, the IHRL standards in their institutional and legal contexts. Should the courts be under a primordial legal obligation to comply with international human rights law, the room for manoeuvre would be considerably more restricted. This may be relevant for defining the metric of fairness in international criminal proceedings vis-à-vis the human rights standards valid within domestic jurisdictions as overseen by human rights courts and treaty bodies.

It is possible to identify a series of arguments supporting the existence of primordial *legal* grounds for the binding nature of international human rights law as part of general international

²²³ Zappalà, *Human Rights* (n 1), at 14 (‘In the international legal order each subsystem tends to be self-contained and to operate as a “monad”.’) Cf. Gradoni, ‘International Criminal Court and Tribunals’ (n 8), at 856.

²²⁴ Gradoni, ‘International Criminal Court and Tribunals’ (n 8), at 848 (rejecting the idea that tribunals operate ‘as a self-contained system, which should be assessed predominantly, if not exclusively, according to its own parameters.’); Fedorova and Sluiter, ‘Human Rights’ (n 28), at 20; P.M. Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law, (2008) 1 *European Journal of Legal Studies* 1, available at <<http://www.ejls.eu/1/4UK.pdf>>, at 4 (‘the illusion that each sub-system is independent from the general normative framework constituted by the international legal order.’)

²²⁵ Gradoni, ‘International Criminal Court and Tribunals’ (n 8), at 855 (‘the dialogue with other human rights courts and bodies must be kept alive for international courts and tribunals to live up to their claim to be models of fairness.’).

²²⁶ The ICTY jurisprudence has occasionally been relied upon by the ICJ (in part of factual findings) and by regional human rights courts (mostly concerning definitions of crime of torture, rape and crimes against humanity). See e.g. Pati, ‘Fair Trial Standards’ (n 2), at 180-82, 184 (with further references); Schabas, ‘Synergy or Fragmentation?’ (n 191), at 612. But it cannot be ruled out that their procedural legacy will be relevant to, and influence, other international courts’ decisions. and in particular *Baena Ricardo et al. Case (270 Workers v. Panama)*, Judgment, IACtHR, 28 November 2003, IACtHR (Ser. C) No. 104 (2003), paras 55(f), (l) and 69 (relying on the ICTY’s interpretations of *compétence de la compétence*).

law, other than references to the tribunals' status as subjects of international law. They go beyond the assertion that tribunals are bound by IHRL by virtue of their possessing a legal personality as such and rather focus on the competences and obligations of parental entities as organic limiters of the tribunals' legal subjectivity and competences. Although this is not a source-based but rather competence-based claim, it has incidentally been acknowledged the tribunals and appears persuasive.

The cornerstone notion here is that states and international organizations may not evade their obligations under international law by creating entities not duty-bound to fully respect the same obligations. A parent body may neither delegate more powers to the new entity than it itself possesses, nor exempt it from the respective obligations (*nemo plus iuris ad alium transferre potest quam ipse habet*).²²⁷ The UN is committed to promoting and encouraging respect for human rights and fundamental freedoms,²²⁸ and that commitment has been argued to be 'firmly established in customary law'.²²⁹ The tribunals established as a part of or under the aegis of the UN must comply with and further said commitment.²³⁰ This implies a general obligation to abstain from actions that could undermine it and to promote it to the extent possible and relevant to the tribunals' operations. Indeed, the Charter's text in itself is inconclusive as to what individual rights and freedoms are subsumed under the UN's proclaimed purposes and principles.²³¹ It could reasonably be argued that the ICCPR, as the UN-made instrument, is more relevant when determining the duties incumbent on the organization itself, meaning its primary organs (e.g. UNSC) and its subsidiary organs (ICTY and ICTR).²³²

It follows that whenever the UNSC acting under Chapter VII of the UN Charter institutes a tribunal as a subsidiary organ, such an organ is created automatically bound by the duties of the parent organization to respect the internationally recognized human rights. It would have been

²²⁷ Acquaviva, 'Human Rights Violations' (n 24), at 614 ('It would be absurd at this point in the development of international relations to suggest that states can shield their own breaches of human rights by creating international organizations which would be immune from such obligations.');

C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', (1999) 281 *RCADI*, at 129-130 (the EU 'Member States may withhold rights of active participation in international life, but they cannot thereby shield their creation from becoming liable towards other subjects of international law on account of its activities.');

Gradoni, 'International Criminal Courts and Tribunals' (n 8), at 871 (UNSC 'cannot effectively exempt its subsidiary organs from observing generally recognized human rights, just as it cannot release the United Nations from its international obligations.');

id., 'The Human Rights Dimension' (n 51), at 84 ('while states and some international organizations may legitimately establish criminal courts, they have no power to strip individuals of their rights under international law.')

²²⁸ Arts 1(3) and 55 UN Charter (providing for functions of the UN: (i) '[t]o achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' and (ii) to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion').

²²⁹ Simma and Alston, 'The Sources of Human Rights Law' (n 117), at 98.

²³⁰ E.g. *Rwamakuba* remedy trial decision (n 32), para. 48 ('the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights. This result is in keeping with the United Nations' stated purposes as well as its internal practices. According to its constitutional instrument, one of the purposes of the United Nations is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all.' Footnotes omitted.)

²³¹ See Sluiter, 'International Criminal Proceedings' (n 13), at 937.

²³² E.g. Dissenting Opinion of Judge Pocar, *Rutaganda* appeal judgement (n 146), at 2 ('the ICCPR is not only a treaty between States which have ratified it, but, like other human rights treaties, also a document that was adopted – unanimously – as a resolution by the General Assembly. As such, it also expresses the view of the General Assembly as to the principles enshrined therein. It would therefore have to be assumed that the Security Council, as a UN body, would act in compliance with that declaration of principles of the General Assembly.');

Dissenting Opinion of Judge Pocar, *Galić* appeal judgement (n 146), para. 8 ('The International Tribunal is an organ of the United Nations, the General Assembly of which unanimously approved the ICCPR. As a direct expression of the very same international organization which instigated and unanimously endorsed the ICCPR, the International Tribunal is not entitled to avoid the application of the principles enshrined therein.');

Dissenting Opinion of Judge Pocar, *Semanza* appeal judgment (n 146), para. 1, n2.

illogical if the duty of the UN had not been extended to—or, depending on one’s view, imposed on—its courts.²³³ Legal personality is delegated to international organizations by states as primary subjects of international law, and any obligations under general international law borne by them are non-consensual. Such duties are in-built limitations on the tribunals’ powers and mandate, rather than result from their being bound by standards of which they are no addressees. Violations of internationally recognized human rights when carrying out the tribunals’ functions fall beyond their delegated competence as secondary subjects. The competence sponsors may not have intended the tribunals to interpret and apply human rights norms in a way that would be tantamount to a violation of their own obligations under IHRL.²³⁴ This line of claims has resurfaced in the tribunal case law. For example, it was a core *ratio decidendi* relied upon by the ICTR in *Rwamakuba* when it asserted an inherent power to apply the ‘external’ human rights regime to cover the gap concerning the right to an effective remedy not guaranteed under the primary instruments.²³⁵

The same considerations concern courts that states establish by a multilateral treaty (e.g. ICC).²³⁶ As recognized by the ECtHR, states may not violate their obligations incumbent on them under IHRL through international organizations,²³⁷ and must ensure that those organizations ensure ‘at least equivalent’ standards of protection.²³⁸ The validity of this position has been embraced by the tribunals.²³⁹ The combined effect of these considerations is relevant for *hybrid* tribunals established by states in partnership and with the participation of the UN pursuant to bilateral agreements (SCSL and ECCC), or which form part of the UN Transitional Administrations (SPSC and ‘Regulation 64’ panels in Kosovo). For one thing, states are supposed to operate in line with their commitments and to respect obligations deriving from the IHRL treaties and customary law whenever establishing an internationalized court. Given the UN’s own commitment to promote the observance of human rights, the applicability thereof within hybrid courts’ regimes may not depend on the status and implementation of human rights treaties and customary law in the respective

²³³ *Mrda* provisional release decision (n 133), para. 25 (‘As a Tribunal of the United Nations, the Tribunal is committed to the standards of the ICCPR, and the inhabitants of Member States of the United Nations enjoy the fundamental freedoms within the framework of a United Nations court.’) Along these lines, see Zappalà, *Human Rights* (n 1), at 5; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 21.

²³⁴ *Krajišnik* Schomburg dissent (n 129), para. 12 (‘It can easily be assumed that the Security Council felt obliged to respect the rights as guaranteed under the Covenant when establishing the ICTY as a measure under Chapter VII of the U.N. Charter.’); *Rwamakuba* remedy trial decision (n 32), para. 59 (‘the Security Council cannot have intended that the Tribunal would be in breach of generally accepted international human rights norms and as such must have accorded it the powers necessary to comply with such norms and thus carry out its functions as a judicial body.’).

²³⁵ See *Rwamakuba* remedy trial decision (n 32), paras 48 and 59.

²³⁶ Warbrick, ‘International Criminal Courts and Fair Trial’ (n 45), at 47.

²³⁷ *Waite and Kennedy v. Germany*, Judgment, Application No. 26083/94, Grand Chamber, ECtHR, 18 February 1999, para. 67 (‘The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences ..., there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.’); *Beer and Regan v. Germany*, Judgment, Applications no. 28934/95, Grand Chamber, ECtHR, 18 February 1999, para. 57; *Matthews v. UK*, Judgment, Application No. 24833/94, Grand Chamber, ECtHR, 21 January 1999, para. 32 (‘The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer.’).

²³⁸ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland*, Judgment, Application No. 45036/98, Grand Chamber, ECtHR, 30 June 2005, para. 155 (‘State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.’)

²³⁹ *Rwamakuba* remedy trial decision (n 32), para. 48 (‘As the Member States of the United Nations are bound to respect their international human rights obligations when prosecuting international crimes within their domestic national legal systems, they cannot establish an International Criminal Tribunal which would not be bound to respect the same human rights obligations.’ Footnote omitted.)

national system.²⁴⁰ The UN involvement in the creation and running of these institutions is contingent upon ensuring their conformity with IHRL, as manifested through the explicit affirmation of the binding effect of treaty-based standards on these courts.²⁴¹ Thus, the competence-based limitations on the international subjectivity of international criminal courts and tribunals may be viewed as primordial yet indirect legal basis for the tribunals' being bound by general international law of human rights. While the competence-delegation doctrine will certainly have its adversaries, this justification at any rate appears a better alternative to claiming that those bodies are automatically and directly bound by the obligations stemming from general international law.

Furthermore, independent of any *legal* reasons, there are strong *policy* arguments for asserting that the tribunals must respect internationally recognized human rights. Those grounds have been dealt with at length elsewhere, and their treatment here does not need to be elaborate. The following points merely seek to demonstrate that even if there had been no legal bases for the tribunals to be bound by IHRL, there are sufficiently imperative reasons that mandate their strict adherence to that human rights law in their operations.

First of all, their compliance with IHRL and, in particular, full respect for the right to a fair trial, is the universally accepted measurement of the tribunals' legitimacy and the precondition for their continued support.²⁴² The tribunals have accepted this as their primary commitment from the outset and thus fully internalized this yardstick.²⁴³ A failure to deliver on the promise will result in complete insolvency of those institutions and of the grand project they represent. The consequences of losing support and legitimacy will immediately be felt. States, international organizations and other actors (e.g. NGOs and organs involved in fact-finding of gross human rights violations) on whose good will the tribunals depend, might be urged to discontinue or to downsize cooperation, cease hosting the tribunals, and cut funding if their proceedings fail to satisfy human rights standards.²⁴⁴

Second, the missions of grafting the rule of law and building capacity in post-conflict situations would be undermined if the tribunals had not accorded defendants with the full range of due process guarantees or if they had set the bar too low.²⁴⁵ Their didactic objective can only be achieved if the proceedings are fair and perceived as such by the constituencies, which requires from the tribunals to uphold an impeccable due process record.²⁴⁶ Inconsistency between the professed ends (the promotion of human rights) and the means employed (the process deficient from the human rights perspective) would be paradoxical and undermine the value of international criminal trials in the eyes of stakeholders – the international community, the societies of victims

²⁴⁰ See e.g. Decision on Prosecution Request for Leave to Amend the Indictment, Case No. SCSL-04-16-PT, TC, 6 May 2004, at 30 ('the protection of the rights of suspects and accused persons is not only often more clearly spelt out and entrenched in the statutes of those tribunals, but is also, in addition, reinforced by other international conventions and instruments that are conspicuously absent in municipal legislations').

²⁴¹ See nn 86 and 89. See also Sections 2-3 UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo, 25 July 1999.

²⁴² McIntyre, 'Equality of Arms' (n 36), at 270; Dimitrijević and Milanović, 'Human Rights' (n 2), at 150; L.S. Sunga, 'Full Respect for the Rights of Suspect, Accused and Convict: From Nuremberg and Tokyo to the ICC', in M. Henzelin and R. Roth (eds), *Le droit pénal à l'épreuve de l'internationalisation* (Bruxelles: Bruylant, 2002) 218; Sluiter, 'International Criminal Proceedings' (n 13), at 935 ('In the long run, the support for and confidence in forms of international criminal adjudication ... will depend on whether or not the tribunals can live up to this expectation [respect for human rights]').

²⁴³ See e.g. n 42.

²⁴⁴ As for host states, the ECtHR has held, however, that it is 'not axiomatic that a criminal trial must engage the responsibility under public international law of the State on whose territory it is held'. *Lambi Longa v. The Netherlands* (n 20), para. 70.

²⁴⁵ On the rule-of-law value of procedure, see J.D. Ohlin, 'A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', (2009) 14 *UCLA J Int'l L & Foreign Affairs* 77, at 82-83, 103.

²⁴⁶ Warbrick, 'International Criminal Courts and Fair Trial' (n 45), at 49.

and offenders, the procedural participants, and the defendant.²⁴⁷ Their judgments, whether or not just on the merits, would unlikely to meet with acceptance, and the broader mandate of contributing to peace and reconciliation, would suffer a deadly blow as a result.²⁴⁸

Third, there is a strong expectation that the tribunals will serve as ‘models of enlightened justice’²⁴⁹ or ‘universal models of criminal justice’,²⁵⁰ which national courts should aspire to replicate when dealing with cases involving international and perhaps other crimes.²⁵¹ If so, they should be able to lead by example and set their bar no lower than the domestic standards.²⁵² Ideally, the global ‘role-model’ mission should be exercised by the tribunals not only vis-à-vis states whose performance in safeguarding human rights barely meets the admissible minimum, but also with regard to others. This raises questions—which will be turned to in due course—of how high the standard should be set, and whether the re-interpretation of human rights by the tribunals in their own context is at odds with their ‘role-model’ function.²⁵³

The tribunals are seen as models also by other institutions of international criminal justice.²⁵⁴ Each court should be mindful of the fact that its procedural practices speak to posterity and that they will be scrutinized and, if appropriate, relied upon as precedents by the successors in the family of international and hybrid courts. The tribunals are of course keenly aware of the importance of constructing a sound procedural legacy. As early as in 1995, the *Tadić* Trial Chamber stated prophetically that compliance with the internationally recognized standards of fair trial is important in order ‘to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future’ (while ultimately opting for a less ambitious approach).²⁵⁵ Similarly, the importance of upholding the highest standards of human rights has been emphasized by judges in individual opinions.²⁵⁶ Unprincipled compromises are bad legacy and unlikely to make it to ‘reference materials’ which other courts are to consult when adopting their rules.²⁵⁷ Obviously,

²⁴⁷ R.D. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, (2007) 43 *Stanford Journal of International Law* 39, at 42 (‘It would be ironic and counterproductive were ICL trials to undermine some international human rights standards in an effort to vindicate others.’); Dimitrijević and Milanović, ‘Human Rights’ (n 2), at 149.

²⁴⁸ E.g. McIntyre, ‘Equality of Arms’ (n 36), at 270 and 319.

²⁴⁹ Schabas, ‘Sentencing by International Tribunals’ (n 9), at 516 (‘the ad hoc tribunals should be aware that they are mandated to provide a model of enlightened justice. Judges around the world, sitting in the most mundane criminal cases, will be influenced by their approaches to criminal law. Wrong or even confusing signals from The Hague and Arusha may set human rights back decades, within the context of criminal justice.’).

²⁵⁰ A. Swart, ‘Commentary’, in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 1994-1999, Vol. II* (Antwerp: Intersentia, 2001), at 201.

²⁵¹ In a similar vein, see J.D. Ohlin, ‘Goals of International Criminal Justice and International Criminal Procedure’, in G. Sluiter *et al.* (eds), *International Criminal Procedure: Principles and Rules* (Oxford: Oxford University Press, 2013) 66 (on the ‘robust standard-setting role [of international criminal procedure] for domestic legal systems.’).

²⁵² E.g. Y. McDermott, ‘Rights in Reverse: A Critical Analysis of Some Interpretations of Fair Trial Rights under International Criminal Law’, in W. Schabas *et al.* (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Aldershot: Ashgate, 2013) (‘international criminal procedure has enormous potential to lead by example, in setting the highest possible standards for the fair conduct of proceedings domestically.’).

²⁵³ See *infra* 3.

²⁵⁴ A. Cassese, ‘Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights’, (1997) *European Human Rights Law Review* 329, at 330 (‘setting ... an exemplary standard for future international criminal trials.’); Sluiter, ‘International Criminal Proceedings’ (n 13), at 935 (referring to the ICTY and ICTR as ‘models for international criminal justice’).

²⁵⁵ *Tadić* protective measures decision (n 42), para. 25.

²⁵⁶ E.g. Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šljivančanin* appeal judgment (n 146), para. 11 (‘the International Tribunal and the ICTR ... stand as examples of best practice for the prosecution of international crimes. These bodies do so at a time of great importance in the history of international criminal law, as evident through the development of the International Criminal Court, currently engaging in its first prosecutions, and the establishment of ad hoc and mixed tribunals such as the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia. Accordingly, it is incumbent on the International Tribunal and the ICTR to apply the highest standard of human rights.’)

²⁵⁷ E.g. Art. 28(2) STL Statute.

no court looks forward to its precedents being used as signposts and examples of how international criminal proceedings should *not* be conducted.

2.3. Human rights as a methodological framework: Place in the normative hierarchy

As observed earlier, IHRL enters into the adjudicative practice of the tribunals as a set of interpretative principles or techniques. This is distinguishable from the status as applicable law – and it is recognized as such in the constituent documents of the more recent courts such as the ICC and STL.²⁵⁸ This subtle entry of human rights into the tribunals' regimes complements the formal status of IHRL and is arguably more consequential.²⁵⁹ This reflects the idea that the source-based discourse has a lesser explanatory power when it comes to the evolution of procedural law and practice. In the tribunals, this has been more about the judicial effort of devising fair and workable solutions through the interpretation and reliance on the standards selected based on their relevance and persuasiveness rather than based on their origin in certain sources.²⁶⁰ Essentially, it allows the tribunal judges to overcome the difficulties of establishing the content of human rights law as customary law or general principles of law. Furthermore, as rules that determine the validity of the outcomes of the interpretation of law, human rights standards acquire a new quality characterized by prevalent normative force in relation to other norms. It is therefore convenient to consider the function of human rights standards as a methodological framework for the interpretation and application of law and those standards overriding normative effects jointly.

2.3.1. *Ad hoc* tribunals

In the context of *ad hoc* tribunals, the methodological function of IHRL was not made explicit in their cursory legal texts, which are silent about the principles governing judicial interpretation and application of law. Although the tribunals admitted that their Statutes are no treaties, in interpreting them, judges deemed it appropriate to rely on the rules concerning treaty interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT).²⁶¹ According to its methodology, which is of customary origin,²⁶² interpretation must be 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.²⁶³

The use of the VCLT rules for interpretation of the statutes has sometimes been marred by a narrow understanding of the 'object and purpose' as being equal to the punitive objective of the

²⁵⁸ Art. 21(3) ICC Statute; Rule 3(A) STL RPE.

²⁵⁹ See also Simma and Alston, 'The Sources of Human Rights Law' (n 117), at 100 ('the authoritative interpretation approach appears to rest on somewhat more solid legal foundations than the customary law approach.')

²⁶⁰ In a similar vein, see Mégret, 'The Sources of International Criminal Procedure' (n 70), at 73 ('It is thus quite hard to find arguments about the content of international criminal procedure before international tribunals that are based solely or even principally on the authority of sources, as opposed to how particular rules stand up to informed scrutiny about their inherent and contextual justice. The exercise of thinking about the right procedure has often been less source- than it has been goal-driven.')

²⁶¹ *Tadić* protective measures decision (n 42), para. 18 ('Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant.');

Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeal Chamber Decision, *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, AC, ICTR, 3 June 1999, para. 15. Over time, the ICTY shifted from applying the VCLT principles by analogy to regarding the Statute rather as a treaty: e.g. Decision on Preliminary Motions, *Prosecutor v. Milošević*, Case No. IT-99-37-PT, TC III, ICTY, 8 November 2001, para. 47 ('The Statute of the International Tribunal is interpreted as a treaty'). For a critical comment, see Powderly, 'Judicial Interpretation' (n 122), at 34.

²⁶² *Polish Postal Service in Danzig*, Advisory Opinion, 16 May 1925, PCIJ, Series B, No. 11, at 39; *Competence of the Assembly Regarding Admission to the United Nations*, Advisory Opinion, ICJ, 3 March 1950, ICJ Reports 1950, at 8.

²⁶³ Arts 31-33 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

Tribunal ('to prosecute and punish').²⁶⁴ This approach is misguided: undoubtedly, ensuring full respect for the rights of the accused is equally prominent as the *telos* of the Statutes.²⁶⁵ The fight against impunity does not exhaust the 'object and purpose' of the Statute, which furthermore should not be equated with one—and not exclusive—institutional objective. This interpretative bias has occasionally resulted in the prioritization of 'humanitarian protection' anchored to the 'rights' of victims and of the international community over the 'fair trial protection' benefitting defendants which demands a restrictive interpretation of criminal laws.²⁶⁶ Thus, the tribunals have interpreted the statutes based on a selective use of some human rights law desiderata to the effect of expanding the scope of criminalization in contravention of other vital principles of human rights that are more directly relevant to the determination of the issue: the principle of legality and *favor rei*.²⁶⁷ This brings to surface a serious and almost schizophrenic tension between the interpretive doctrines that international criminal law draws from international law, on the one hand, and criminal law, on the other.²⁶⁸ As such, the fact that the VCLT interpretative methodology is employed next to criminal law interpretative techniques is not as problematic as the one-sided and deficient usage of the VCLT principles, which neglects the criminal law nature of the statutes, and the visible anarchy of competing interpretative techniques.

When interpreting the statutory procedural provisions, judges have generally relied on the VCLT principles; more dubiously from a formalist perspective, the same have occasionally been applied to the RPE.²⁶⁹ Given that judges are the ones adopting them, the submission of the Rules to the methodology devised for establishing the original intent of a drafter of the text other than the one who interprets it, is indeed a window-dressing. But the VCLT framework was not the only interpretative methodology used for procedural law. One also finds instances of resort to the principles of interpretation drawn from IHRL, such as that of 'effective interpretation' (*effet utile*) of rights, to the effect that rights should be practical and effective, rather than theoretical and illusory.²⁷⁰ Even more importantly, it has been shown above that the tribunals developed the practice of employing the standards of human rights conventions and jurisprudence as a guiding framework for the interpretation of due process provisions of the statutes and rules.

²⁶⁴ *Tadić* protective measures decision (n 42), para. 18 ('to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace'); *Tadić* jurisdictional appeal decision (n 22), para. 78 ('the Security Council's object in enacting the Statute—to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects—suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.');

²⁶⁵ Joint and Separate Opinion of Judge McDonald and Judge Vohrah (n 261), para. 16. See also Interlocutory Decision on the Joint Challenge to Jurisdiction, *Prosecutor v. Halilović*, Case No. IT-01-47-A, AC, ICTY, 27 November 2002, para. 25 ('The lack of a clear basis in international law for the present prosecution cannot be side-stepped by drawing upon the object and purpose of IHL, in general, and the Statute of the ICTY. ... The protection of humanity and preservation of world order as the overriding aims of IHL cannot serve as basis to criminalise behaviour beyond the existing law. There would be no limit on the scope of IHL if the only guiding criterion was whether the prosecution was broadly in the interests of the spirit of IHL. Where the rights of the accused in a criminal trial are concerned, utmost respect for legality, for certainty and foreseeability of the law are required.')

²⁶⁶ For critical analyses, see D. Robinson, 'The Identity Crisis of International Criminal Law', (2008) 21 *Leiden Journal of International Law* 925, at 926 *et seq.*; Pinto Soares, 'Tangling Human Rights' (n 6), at 167-68.

²⁶⁷ See e.g. Art. 22 ICC Statute.

²⁶⁸ Akande, 'Sources of International Criminal Law' (n 103), at 44-45; Mégret, 'The Sources of International Criminal Procedure' (n 70), at 70.

²⁶⁹ Powderly, 'Judicial Interpretation' (n 122), at 40.

²⁷⁰ E.g. Decision on appeal regarding the admission into evidence of seven affidavits and one formal statement, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.6, AC, ICTY, 18 September 2000, para. 23. See *Goodwin v. UK*, Judgment, Application No. 28957/95, ECtHR, 11 July 2002, para. 74 ('It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.');

Waite and Kennedy v. Germany (n 237), para. 67 ('the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.')

Typical justifications of the latter approach are that the statutory provisions are based on the blueprints of convention provisions, are similar in purport, and should not be read in isolation.²⁷¹ Besides emphasizing the value of human rights principles as interpretative aids, jurisprudence reflects the view that the interpretation of the statutes should be such as to comply with those principles.²⁷² As noted, in the *Rwamakuba* case, this took the form of inferring from the primary texts a remedy not foreseen in the Statute explicitly – the financial compensation to be paid out to the acquitted person for the violation of his fair trial rights.²⁷³ If one is inclined to view it as devising a new remedy, this may effectively amount to the use of ‘external’ human rights standards for gap-filling.

It bears noting that the fact that human rights standards form a part of the interpretive framework does not automatically elevate them to the position of absolute normative superiority in respect of alternative interpretations of applicable law arrived at under other principles of the same framework. Nor does it *per se* entail that such standards mandate setting aside the written norms contained in statutes and rules where their interpretation in conformity with human rights law is impossible, as suggested by some scholars.²⁷⁴ The jurisprudence of the *ad hoc* tribunals provides scarce empirical basis to corroborate this claim, however desirable the situation it describes as actual can be. Beyond employing the ‘external’ human rights standards for gap-filling function, the tribunals have not really taken their reverence for human rights so far as to express preparedness to overtly misapply their primary law, rather than to re-interpret it in the way that would allow addressing the legal collision at stake.²⁷⁵ Thus, even though the position is arguable, it has not (yet) put to test in those tribunals.²⁷⁶ It is therefore more justified to observe that in its capacity of an interpretive tool, the IHRL standards did not emerge clearly as quasi-constitutional and superior provisions located on the apex of the normative hierarchy before the *ad hoc* tribunals, nor did they wholly displace the established international law methods of interpretation. As a result of the somewhat chaotic pluralism of their law-interpretation methodologies, the tribunals’ discourse has

²⁷¹ E.g. *Mrda* provisional release decision (n 133), para. 28 (‘Rule 65 must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.’); *Krajišnik* Schomburg dissent (n 129), para. 12 (‘From the outset it must be considered that Article 21(4) of the Statute is a reflection of the relevant provisions contained in various global and regional human rights conventions and therefore cannot be viewed in isolation.’); Decision on the Confidential Joint Defence Motion to Declare Null and Void Testimony-in-Chief of Witness TF1-023, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, TC II, SCSL, 25 May 2005, para. 21 (‘the Trial Chamber may look at the application and interpretations of international treaties and conventions by other International Courts. The Trial Chamber is entitled to consider the jurisprudence of other jurisdictions, a practice commonly adopted by the International Criminal Tribunals. We note the similarity of the provisions of Article 17 of the Statute to Article 6 of the [ECHR]. We draw a contrast to Article 17 (2) of the Statute and Article 6 (1) of the ECHR both providing for a “fair and public hearing”. Article 17 (2) of the Statute is “subject to measures ordered by the Special Court for the protection of victims and witnesses” and Article 6 (1) of the ECHR empowers a Court to exclude the press and public for reasons enumerated therein.’)

²⁷² E.g. Partially Dissenting Opinion of Judge Pocar, *Galić* appeal judgment (n 146), para. 2 (‘Thus, the modalities of the Appeals Chamber’s intervention under Article 25(2) of the Statute of the International Tribunal to correct errors committed by a Trial Chamber must be interpreted so as to comply with the fundamental human rights principle that any conviction and or sentence must be capable of review by a higher tribunal according to law.’).

²⁷³ See nn 32-33.

²⁷⁴ Gradoni, ‘International Criminal Courts and Tribunals’ (n 8), at 870-71 (‘the *ad hoc* Tribunals are arguably required to set aside provisions of the Statute and hierarchically inferior norms, such as those contained in the Rules of Procedure and Evidence, if these turn out to be inconsistent with generally recognized human rights.’); *id.*, ‘The Human Rights Dimension’ (n 51), at 93; Akande, ‘Sources of International Criminal Law’ (n 103), at 45-46.

²⁷⁵ It could be argued that the ICTY had been ‘ready to set aside the whole Statute upon finding the resolution incompatible with the UN Charter or human rights law’ in *Tadić* jurisdictional appeal decision (n 22). Gradoni, ‘The Human Rights Dimension’ (n 51), at 85. While it must be assumed that the ICTY was indeed prepared to do so, the hypothetical and unspecific nature of this example may limit its value, insofar one has to speculate about the reasoning the ICTY would adopt in upholding the appeal. Without formally setting the Statute aside as a whole, it could have well grounded the appropriate remedy (including, in the extreme case, the misapplication of some norms in the Statute) directly in the statutory provisions (e.g. those establishing safeguards of judicial independence). The conflict-solving potential of the interpretative methods should not be underestimated.

²⁷⁶ Akande, ‘Sources of International Criminal Law’ (n 103), at 45.

occasionally (and mostly only for rhetorical purposes) revolved around the principles relative to normative hierarchies that are more established in international law, in particular the *jus cogens* doctrine.²⁷⁷

2.3.2. ICC

For the first time, the function of human rights standards as a guiding method for the interpretation and application of law has been formalized in Article 21(1) of the ICC Statute, which requires that the application and interpretation of law pursuant to Article 21 be consistent with internationally recognized human rights and without any adverse distinction on discriminatory motives.²⁷⁸ According to the view deriving from the position that has just been questioned, the provision purports to crystallize an interpretative technique that has been used with relative regularity by the *ad hoc* tribunals.²⁷⁹ However, considering the heterogeneous and inconsistent approaches of the previous tribunals to using human rights standards as lenses for the interpretation and application of law, it is rather correct to regard this codified provision as a novelty in international criminal law. As will be shown, this norm lacks a parallel in the previous practice because it unequivocally elevates internationally recognized human rights to the status of superior norms and makes their function as the obligatory and prime interpretive devices formal. Indirect evidence of its novelty is supplied by the fact that it was hotly contested during the Rome negotiations and has become subject of extensive body of specialized commentary since.²⁸⁰ It is indeed one of the Statute's most fascinating and mind-boggling provisions, which has retained the intrigue despite the generous scholarly attention.

Scholars have varied in their assessments of the Article's potential importance in the ICC regime, its purport, and the intended as well as actual normative effects. Notwithstanding the initial skepticism as to whether the provision is apt to have a real impact, the now predominant view recognizes its significant potential in shaping the practice before the ICC, even though its more ambitious use arguably remains to be seen in the future.²⁸¹ Likewise, while some observers welcomed it as a powerful vehicle for maximizing and developing the human rights protection within the ICC system,²⁸² others expressed misgivings about its vagueness which they saw as

²⁷⁷ Decision on Immunity from Jurisdiction, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-1, AC, SCSL, 31 May 2004, para. 43 ('The Special Court cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law.')

²⁷⁸ Art. 21(3) ICC Statute ('the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.')

²⁷⁹ Gradoni, 'The Human Rights Dimension' (n 51), at 74-75, 94 ('Article 21(3) tersely conveys the purport of the practice generally followed by international criminal courts and tribunals. ... the 'ICC formula' ... has the crucial advantage of giving in a few words the gist of current practices.')

²⁸⁰ DeGuzman, 'Applicable Law' (n 80), at 711-12 (most controversy revolved around the choice of grounds of discrimination). See among others R. Young, "'Internationally Recognized Human Rights' before the International Criminal Court", (2011) 60 *International & Comparative Law Quarterly* 189; D. Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute', (2010) 10 *International Criminal Law Review* 43; G. Hafner and C. Binder, 'The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed', (2004) 9 *Austrian Review of International and European Law* 163.

²⁸¹ DeGuzman, 'Article 21' (n 80), at 712 ('one of the more important provisions in the Rome Statute'); Young, "'Internationally Recognized Human Rights'" (n 280), at 189 ('tremendous potential as a tool for evolution and innovation') and 207; Perrin, 'Searching for Law' (n 10), at 398; Fedorova and Sluiter, 'Human Rights' (n 28), at 25; G. Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Brill, 2009) 464 ('the potential of Article 21 (3) is enormous, especially from a defence perspective.'). Cf. Pellet, 'Applicable Law' (n 98), at 1082.

²⁸² E.g. Sluiter, 'Human Rights Protection' (n 281), at 464.

allowing judges to misapply the applicable rules whenever they deemed fit.²⁸³ Indeed, the content of ‘internationally recognized human rights’ is unclear and potentially very broad.²⁸⁴ But this hardly places the ICC at a greater disadvantage than the *ad hoc* tribunals, which had a comparable trouble of deciphering the UN Secretary-General’s allusion to ‘internationally recognized standards’. It was expected that the interpretation by the ICC would not be formalist. Indeed, the Court has not limited human rights falling under consideration in Article 21(3) to universal as opposed to regional standards, nor to standards that have the status of *jus cogens*.²⁸⁵ Instead, it has drawn them from all sources available, including soft-law human rights instruments and those containing law not directly applicable or binding upon it. As pertinently noted by Gradoni, the provision embodies, ‘through its relative vagueness, the decentralized structure of authority of human rights law and jurisprudence’ in the current international legal order.²⁸⁶

Most uncertainties on Article 21(3) concern its normative effects and the appropriate usage in practice.²⁸⁷ On the one hand, commentators have suggested that it envisages IHRL as a source of fully and directly applicable law, over and above sources listed in Article 21(1).²⁸⁸ Others adhere to the position that, as opposed to making them a proper source, it turns the respective standards into a ‘master framework’ for the interpretation and application of all sources of law (a ‘rule of general consistency’, or a ‘general rule of interpretation’).²⁸⁹ The distinction is not merely academic but has serious practical consequences. Had Article 21(3) been meant to turn IHRL into a distinct source for the ICC, that corpus would have been assigned a place and rank among the sources specified in Article 21(1). Instead, it has been allowed to soar, in terms of its normative force, above all applicable norms regardless of their origin in any of the ICC sources, with the crucial obligation on the court to use it ceaselessly in the review of the possible outcomes of its interpretations and application of the entirety of the ICC law. Otherwise, it would have to be consulted, as any other source, only once in the process of executing the sequence envisaged in Article 21(1). That would

²⁸³ Akande, ‘Sources of International Criminal Law’ (n 103), at 47 (‘a worrying degree of vagueness which gives unduly indeterminate powers to the Court.’); Perrin, ‘Searching for Law’ (n 10), at 398 (Art. 21(3) ‘can allow the judges of the ICC to effectively rewrite international criminal law with a the stroke of a pen’); Pellet, ‘Applicable Law’ (n 98), at 1081.

²⁸⁴ Perrin, ‘Searching for Law’ (n 10), at 398 at 398 (‘the concept and scope of human rights norms that may be employed to interpret and develop law at the ICC is potentially vast.’); Young, “‘Internationally Recognized Human Rights’” (n 280), at 189, 193.

²⁸⁵ Young, “‘Internationally Recognized Human Rights’” (n 280), at 205-206 (with further references to the ICC case law); G. Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff Publishers, 2009) 301; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 25. Cf. Separate Opinion of Judge Georghios M. Pikis, Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la defense en réponse au mémoire d’appel du Procureur”’, *Prosecutor v. Lubanga*, ICC-01/04-01/06-424, AC, ICC, 12 September 2006, para. 3 (‘Internationally recognized [human rights] may be regarded those human rights acknowledged by customary international law and international treaties and conventions.’)

²⁸⁶ Gradoni, ‘The Human Rights Dimension of International Criminal Procedure’ (n 51), at 75.

²⁸⁷ E.g. Sluiter, ‘Human Rights Protection’ (n 281), at 465-66. For an overview of early positions, see Vasiliev, ‘Proofing the Ban’ (n 79), at 214-19.

²⁸⁸ Sluiter, ‘Human Rights Protection’ (n 281), at 462 (‘The provision ... posits the view that “internationally recognized human rights” are applicable fully, and thus need not be re-interpreted in light of the unique mandate and context of the ICC.’) But Sluiter also considers the provision as a vehicle of ‘consistency-review in light of international human rights standards’. Cf. Bitti, ‘Article 21’ (n 285), at 293-94 (who uses, but does not explain, the distinction between material and formal sources of law, and regards the standards envisaged in Art. 21(3) a material source). See also *ibid.*, at 300 and 304 (where ‘internationally recognized human rights’ are referred to simply as a source of law).

²⁸⁹ P. Saland, ‘International Criminal Law Principles’, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer, 1998) 214; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) 385; Young, “‘Internationally Recognized Human Rights’” (n 280), at 189 (‘special rule of interpretation’), 191 (‘method of recourse to extraneous international law’), 198 (‘a mandatory rule which affects the identification and use of all sources of law under the Statute.’); Fedorova and Sluiter, ‘Human Rights’ (n 28), at 24.

signify a dramatic downgrade in the hierarchy as compared to the real position of the Article 21(3) standards.

However, this interpretation is inconsistent with the ordinary meaning of the text of Article 21(3) Statute. The more agreeable view is that the respective standards referred permeate and reign over the totality of the Court's adjudication, and that they are not reducible to a mere step in the statutory algorithm of consulting sources. As a provision directing the interpretation and application of law, Article 21(3) sets out the normative hierarchy, while Article 21(1) only denotes the order in which various sources ought to be consulted by the Court.²⁹⁰ Put differently, it reflects a substantive norm-based, rather than source-based, hierarchy, which is interposed with the algorithm of resort to the Article 21(1) sources.²⁹¹ Thus, Article 21(3) has the effect of elevating the relevant human rights standards to the quasi-constitutional status of 'super-legality' as a supreme element of the normative hierarchy in the ICC regime.²⁹² The superiority of internationally recognized human rights entails that any legal norm, irrespective of its source, should be given a meaning that is reconcilable with said standards, failing which the norm may not be applied.²⁹³ The provisions of the ICC Statute itself present no exceptions in this respect. The scope of the interpretative settlement of any collisions includes the possibility of devising remedies that are not expressly envisaged in the Statute but are nevertheless inferable from it.²⁹⁴ The status of human rights law as *lex superior* is thus a corollary of its function as a *primary* device for avoiding and solving normative conflicts.

The uncertainties start getting resolved as the ICC jurisprudence is consolidating. In practice, Article 21(3) is cited regularly by the Court, although in terms of its reach, the provision has been employed rather sparingly.²⁹⁵ The Court's interpretation of the provision thus far refutes the conception that Article 21 purports to make internationally recognized human rights into an distinct formal source of law. Mostly, the provision has been seen as a mandatory framework for the interpretation and application of law that may override any norm irreconcilable and inconsistent with human rights standards. For example, the Pre-Trial Chambers have typically affixed to it the label of a 'general principle of interpretation'.²⁹⁶ Additionally, the Appeals Chamber emphasized

²⁹⁰ There is thus no contradiction between the normative hierarchy as established by Art. 21(3) and the ostensible 'hierarchy of sources' (which, as argued elsewhere, is not a hierarchy in a proper sense but a mere algorithm of law-identification). See Pellet, 'Applicable Law' (n 98), at 1077 ('It is necessary, therefore, to study the hierarchy of sources defined by the Statute separately from that of the norms to which it refers in Article 21(3), which seems to create a sort of international "super-legality" in favour of international human rights law in general'); Vasiliev, 'General Rules and Principles' (n 77), at 71-72, 76-78. Cf. Hafner and Binder, 'The Interpretation of Article 21 (3) ICC Statute' (n 280), at 164.

²⁹¹ The norms of the Statute do not 'prevail' over sources listed in Art. 21(1)(b) ICC Statute. (Cf. Akande, 'Sources of International Criminal Law' (n 103), at 45). Rather, the statutory norms are to be consulted 'in the first place' and, where they are insufficiently clear or deficient in any respect, they shall be complemented by, or clarified in light of, 'principles and rules of international law', which does not mean normative prevalence.

²⁹² Pellet, 'Applicable Law' (n 98), at 1079-81 ('certain rules are given ... an intrinsic superiority stemming not from their source, but their subject-matter. ... [T]hese "internationally recognized human rights" take precedence over all other applicable rules.'). Perrin, 'Searching for Law' (n 10), at 398 ('Article 21 has taken the unprecedented step of raising all such norms to the level of quasi-constitutional status'); Sheppard, 'The International Criminal Court' (n 280), at 46; Gradoni, 'The Human Rights Dimension of International Criminal Procedure' (n 51), at 84. *Contra* Hafner and Binder, 'The Interpretation of Article 21 (3) ICC Statute' (n 280), at 175.

²⁹³ Akande, 'Sources of International Criminal Law' (n 103), at 47.

²⁹⁴ Bitti, 'Article 21' (n 285), at 304.

²⁹⁵ See e.g. Young, "'Internationally Recognized Human Rights'" (n 280), at 206 (the use of Art. 21(3) has been 'understated' and rarely decisive).

²⁹⁶ Annex 1, Decision on the Final System of Disclosure and the Establishment of the Timetable, *Prosecutor v. Lubanga*, ICC-01/04-01/06-102, PTC I, ICC, 15 May 2006, para. 3; *Lubanga* pre-trial witness proofing decision (n 170), para. 10; Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui, *Prosecutor v. Katanga and Prosecutor v. Ngudjolo*, ICC-01/04-01/07-257 and ICC-01/04-01/07-307, PTC I, ICC, 10 March 2008, at 7; Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pretrial detention of Germain

the importance of not only *interpreting* but also *applying* the ICC law in accordance with the internationally recognized human rights.²⁹⁷ As is well-known, the interpretation and application of legal norms are two distinct steps, but the border between them is evasive: every act of application is underlain by the preceding step of interpretation.²⁹⁸ Article 21(3) expressly mentions both steps, and it thus mandates that any norm conflicting with ‘internationally recognized human rights’ be set aside if the conflict cannot be solved through interpretation.²⁹⁹ Clearly against the early predictions to the contrary,³⁰⁰ the Trial Chamber has already once found itself not in a position to apply a provision of the Statute because, in the circumstances of the case, the outcome would have been inconsistent with the Article 21(3) standards.³⁰¹

Interestingly, the Appeal Chamber has also been prepared to source certain implied powers and remedies from Article 21(3).³⁰² There are several possible interpretations of what this may mean in terms of the purport and function of Article 21(3). The provision may be deemed to have an overt ‘generative’ (gap-filling) function,³⁰³ a power-conferring function,³⁰⁴ or to enable the Court to deduce—rather than generate—remedies that are already implicit in its applicable law and follow from it as a matter of course.³⁰⁵ Indeed, there are nuances to each of these views, in particular on whether or not Article 21(3) can serve to fill lacunae in a complete absence of directly and even

Katanga, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-330, PTC I, ICC, 18 March 2008, at 6; ICC-01/04-01/07-474 (n 204), para. 78.

²⁹⁷ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, AC, ICC, 14 December 2006, paras 36-37 (‘article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. ... Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.’); Judgment on the Prosecutor’s Application of Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the DRC*, ICC-01/04-168, AC, ICC, 13 July 2006, para. 11.

²⁹⁸ N. MacCormick, ‘Argumentation and Interpretation in Law’ (1995) 9 *Argumentation* 467, at 470 (‘the norm posed in an authoritative source of law has to be understood before it can be applied. Accordingly, in a wide sense of the term ‘interpretation’, every application of an authority reason requires some act of interpretation, since one has to form an understanding of what the authoritative text requires in order to apply it, and any act of apprehension of meaning can be said to involve interpretation.’). See also Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, AC, STL, 16 February 2011, para. 19 (‘Interpretation is an operation that always proves necessary when applying a legal rule. One must always start with a statute’s language. But that must be read within the statute’s legal and factual contexts. Indeed, the old maxim *in claris non fit interpretatio* (when a text is clear there is no need for interpretation) is in truth fallacious’).

²⁹⁹ See also Bitti, ‘Article 21’ (n 285), at 303 and 304 (‘the application of the [sources listed in Art.21] will always have to produce a result compatible with internationally recognized human rights’ but not taking it that far); Gradoni, ‘The Human Rights Dimension’ (n 51), at 83, 93 (interpreting Art. 21(3) ICC Statute as the granting the power to set aside but not to invalidate the relevant norm).

³⁰⁰ Cf. Hafner and Binder ‘The Interpretation of Article 21 (3) ICC Statute’ (n 280), at 173-74.

³⁰¹ Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute), *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-3003-tENG, TC I, ICC, 9 June 2011, para. 73 (‘As matters stand, the Chamber is unable to apply article 93(7) of the Statute in conditions which are consistent with internationally recognised human rights, as required by article 21(3) of the Statute. If the witnesses were to be returned to the DRC immediately, it would become impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to effective remedy.’).

³⁰² ICC-01/04-01/06-1486 (n 204), para. 77 (‘Neither the Rome Statute nor the Rules of Procedure and Evidence provides for a “stay of proceedings” before the Court.’), referring to ICC-01/04-01/06-772 (n 297), para. 37 (linking the power to stop the trial with ‘the interpretation of article 21(3) of the Statute, its compass and ambit.’).

³⁰³ Sheppard, ‘The International Criminal Court’ (n 280), at 61-62 (arguing that the position cited exemplifies the ‘generative power’ of Art. 21(3) ICC Statute).

³⁰⁴ Gradoni, ‘The Human Rights Dimension’ (n 51), at 93-94 (interpreting the same decision and several others as attributing a ‘power-conferring’ function to Art. 21(3) ICC Statute).

³⁰⁵ Vasiliev, ‘Proofing the Ban’ (n 79), at 218-19.

remotely relevant norms (which is highly unlikely). But they all appear to broadly concur as to the ultimate practical effects of that provision.³⁰⁶

Finally, a strong emphasis on the Article 21(3) regime should not be understood that it is an exclusive methodology for the interpretation of law in use at the ICC. Like its predecessors, the ICC has often employed the VCLT principles in interpreting its Statute, justifiably treating them as subordinate to the Article 21(3) principles. In other words, the validity of the results of the interpretation through the VCLT prism must at all times be tested against Article 21(3).³⁰⁷ In addition, and incidentally, the Court deemed it useful—like the *ad hoc* tribunals—to rely on the principle of effective interpretation of human rights treaties to accord the relevant rights a practical and effective, rather than theoretical and illusory manner.³⁰⁸ Article 21(3) is sufficiently broadly formulated to allow for incorporation of interpretive strategies that fall within the ‘internationally recognized human rights’.³⁰⁹

2.3.3. Other courts

Even if for the sake of comparison alone, it is apposite to look into the existence of the function of IHRL as an interpretative device in some of the hybrid tribunals where, as noted, the formal status of IHRL as binding is sometimes introduced through plain incorporation (e.g. in the ECCC). This circumstance of course does not prevent the drafters from according human rights with a special methodological role. This is a positive development which may point to an irreversible legislative tendency in international criminal procedure.

The ECCC IR contain a rule on the interpretation of all law, save for the Agreement, which is analogous to Article 21(3) of the ICC Statute, yet quite distinguishable from it.³¹⁰ The ECCC interpretative toolkit is essentially defined by an obligation to safeguard (and by implication to balance) the interests—that is, not ‘rights’—of suspected, charged, and accused persons *and* those of victims. While this obviously covers ‘interests’ protected *qua* fair trial rights,³¹¹ the language is drafted in the way that excludes the interpretation that ‘rights’ are directly subject to balancing. In contrast with the ICC provision, the interest-based review is complemented by the duty to treat the values of legal certainty and transparency as additional interpretative prisms.

Similarly, Rule 3(A) of the STL RPE continues the trend established by Article 21(3) of the ICC Statute and also assigns human rights standards the function of a framework for the interpretation of law.³¹² But its ‘order of precedence’ seems to turn the consistency-review in light

³⁰⁶ E.g. Sheppard, ‘The International Criminal Court’ (n 280), at 61-62.

³⁰⁷ ICC-01/04-01/06-102 (n 296), annex, paras 1-3; ICC-01/04-01/07-307 (n 296), at 7; Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, *Prosecutor v. Lubanga, Situation in the DRC*, ICC-01/04-01/06-108, PTC I, ICC, 19 May 2006, para. 7; ICC-01/04-168 (n 297), para. 33; ICC-01/04-01/06-102; Judgement on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-522, AC, ICC, 27 May 2008, para. 38; ICC-01/04-01/07-330 (n 296), at 7 and 9; ICC-01/04-01/07-475 (n 204), para. 57; ICC-01/04-01/06-1486 (n 204), para. 46.

³⁰⁸ Decision on “Mr Mathieu Ngudjolo’s Complaint under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-RoR217-02/08-8, Presidency, ICC, 10 March 2009, para. 31.

³⁰⁹ In this sense, see Young, “‘Internationally Recognized Human Rights’” (n 280), at 205 (‘Such practice is consistent with the views ... that the ordinary meaning of article 21(3) does not demand an unduly formal understanding.’)

³¹⁰ Rule 21 ECCC IR (‘The ECCC Law, Internal Rules, Practice Directions and Administrative regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of the proceedings.’)

³¹¹ Gradoni, ‘The Human Rights Dimension’ (n 51), at 79.

³¹² Rule 3(A) STL RPE (‘The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.’)

of ‘international standards on human rights’ into a subsidiary interpretive aid to be used where the issue cannot be solved through rule-interpretation ‘in the spirit of the Statute’ and in accordance with the VCLT rules of interpretation. In theory, this might generate different dynamics in the practice of interpretation of procedural rules by the STL as compared to that under Article 21(3), inasmuch as the explicit terms of the order of precedence preclude resort to the item listed next where the previous one provides a conclusive interpretation. Like with the *ad hoc* tribunals, the extension of the customary rule on interpretation of treaties by analogy to judge-made STL RPE and, furthermore, giving this step the pride of place over the seemingly more relevant human-rights ground, is open to criticism.

But any criticism is apt to be moderate: the material differences in the outcome are unlikely to ensue from this ranking of principles in practice. Firstly, the STL are adopted by judges who shall be guided, next to the Lebanese Code of Criminal Procedure, by ‘other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial’.³¹³ To some extent, this pre-empts the risk that the interpretation of the RPE in light of the VCLT principles, awkward as it may be, would lead to a result incoherent with human rights standards. Second, ‘international standards on human rights’ undoubtedly come into play as an aspect of the process of interpreting the rules ‘in a manner consonant with the spirit of the Statute’ and in light of its ‘object and purpose’. It can be recalled that the ICC has at times resorted to the VCLT rules before submitting the hypothetical outcome to the Article 21(3) review. This is not necessarily problematic and is arguably the optimal approach for it gives human rights the ‘last word’. Third, and most importantly, Rule 3(B) codifies the *in dubio pro reo* formula as an overarching tenet that governs the resolution of interpretative collisions in procedural matters.³¹⁴ Therefore, Rule 3 in fact does not contradict the general trend of recognizing the normative prevalence of the ‘external’ human rights regime as a methodological framework and interpretative device.³¹⁵

This overview highlights that, without prejudice to the nuances of approach each of the tribunals takes whenever interpreting and applying the law, internationally recognized human rights have come to occupy a prominent place among interpretive devices, as is visible in particular in the ICC and more recent tribunals. It is in their special quality of a framework for the interpretation and application of law that these human rights standards exert the most far-reaching normative effects on the procedural practice of the tribunals. This methodological function ensures that the relevant standards operate as *lex superior* regardless of their provenance in a specific category of sources (e.g. custom) and regardless of their nature as *jus cogens*, heretofore the only established hierarchical element in the loosely structured normative field of international law.³¹⁶ The superiority of human rights in international criminal proceedings flows from the ‘pervasiveness of their interpretive role’.³¹⁷ Much like a magnetic field that impacts on the trajectory of charged particles in its reach, the human rights standards operate as a normative force that promotes certain outcomes while diverting the others: essentially, it amounts to a comprehensive ideology which attunes the mindset and value perspectives of decision-makers in relation to all issues and logical steps in the application of law.

³¹³ See Art. 28(2) STL Statute; Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011 (n 42), para. 30. On Art. 28(2) STL Statute as ‘a conduit for “human-rights-proof” procedural norms to flow through the Tribunal’s legal system’, see Gradoni, ‘The Human Rights Dimension’ (n 51), at 77.

³¹⁴ Rule 3(B) STL RPE (‘Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.’)

³¹⁵ For the same conclusion, see Gradoni, ‘The Human Rights Dimension’ (n 51), at 78.

³¹⁶ E.g. also *El Sayed* order (n 58), para. 35. Pellet, ‘Applicable Law’ (n 98), at 1077. See also Gradoni, ‘The Human Rights Dimension’ (n 51), at 80 and 83-85.

³¹⁷ Gradoni, ‘The Human Rights Dimension’ (n 51), at 75.

3. METRIC OF 'FAIRNESS': CONTEXTUALIZATION AND ITS LIMITATIONS

3.1. The need and duty to contextualize

As has been discussed above, international criminal tribunals are formally bound by the 'external' IHRL standards, but the latter arguably have the greatest import on procedural practice *qua* means for the interpretation and application of the tribunals' internal law. This 'master framework' sets the tone for the construction and implementation of all procedural norms irrespective of a source of origin, while in case of an insurmountable conflict with internationally recognized human rights, any internal norms must be put aside. The contours of the interpretative guidance are often established by the tribunals with reference to the potentially persuasive yet non-binding judicial rationales set out in the human rights jurisprudence. Both the choice of rationales and the semantics of their translation into the tribunal's normative language are discretionary matters. The functional relevance of those foreign rationales and the appropriateness of analogy are crucial factors in the exercise of that discretion. The analogy is only appropriate if the norm whose application is extended to another context serves to protect there the same value as in the original context.

The key point is that the human rights practice of the tribunals by definition is—and should be—the process of contextualization. It can be defined as the transposition of the normative propositions identified as relevant and valid in human rights law (and most notably interpretations of relevant courts and bodies) into the unique legal and institutional context of the tribunals, subject to necessary and appropriate modifications. The uniqueness of the tribunal context implies features that make it different from domestic systems, including the unavailability of police force and the ultimate dependence on states for a variety of matters, which range from effecting arrests to making provisional release possible to enforcing sentences.³¹⁸ The need to consider the peculiarity of the international legal context and special goals and challenges the tribunals are facing as a starting point for the re-interpretation of applicable human rights standards has emerged in the literature as uncontroversial.³¹⁹ Notably, the importance of the context and the need for contextual assessment is

³¹⁸ E.g. Decision on Motion for Provisional Release filed by the Accused Esad Landžo, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC, ICTY, 16 January 1997, para. 26. For detailed discussion, Separate and Dissenting Opinion of Judge Cassese, Judgement, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, AC, ICTY, 7 October 1997 ('*Erdemović* Cassese dissent'), para. 5.

³¹⁹ McIntyre, 'Defining Human Rights' (n 41), at 194 ('if it [is] accepted that human rights are principles that can only have meaning in the context the Tribunal is entitled ... to develop its own set of human rights standards in light of its context'); Cassese, 'The Influence of the European Court' (n 64), at 26-30 and 49 (noting, with approval, that the ICTY judges have been fully aware of the specificity of the court as a limit on the extent to which domestic legal principles are transposable to the international sphere); Møse, 'Impact of Human Rights Conventions' (n 2), at 208 (the *ad hoc* tribunals 'have adapted human rights law to the specific circumstances of the Tribunals and even deviated from it, for instance because international tribunals are in a different situation than national courts.');

Dimitrijević and Milanović, 'Human Rights' (n 2), at 150 ('distinct features of international criminal proceedings make it impossible to simply transpose to them the human rights standards developed in the context of domestic criminal justice.');

Pati, 'Fair Trial Standards' (n 2), at 184; G. Boas and T.L.H. McCormack, 'Learning the Lessons of the Milošević Trial', (2006) 9 *Yearbook of International Humanitarian Law* 65, at 70-71 ('The interpretation of these rights in the context of international criminal law may differ from their origin and interpretation within the international human rights law regime. The application of these rights in the *sui generis* system of international criminal law is necessarily contextual, but this does not dilute their significance');

DeFrancia, 'Due Process' (n 99), at 1394 ('Domestic and international norms of due process can undergo substantial transformations when incorporated into a new legal system.');

J. D. Jackson and S.J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) 132 ('the tribunals should not necessarily be criticised for giving their own independent interpretation to internationally recognized human rights standards');

C. Deprez, 'Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors', (2012) 12 *International Criminal Law Review* 721, at 723 ('the extent of applicability of human rights law cannot be precisely described unless the specific nature ... of international criminal justice in general is taken into consideration.').

not objectionable *per se* – not even to commentators who assert direct effects of ‘external’ human rights norms within the tribunal regimes.³²⁰ Under the proviso that weighing contextual factors must be principled and thorough, this line of reasoning is agreeable and methodological arguments can be provided in its support.

International human rights standards create obligations as to result, while the states as their addressees enjoy a ‘margin of appreciation’ in the framework of review of their human rights practices by regional courts and treaty-monitoring bodies. There is no reason why the nature of human rights as ends-oriented obligations should fundamentally change in the context of international courts and tribunals. On the contrary, as the ECtHR has held, the equivalent standard of protection required from international organizations does not mean identical.³²¹ The specific detail of the obligations remains to be fleshed out by the courts themselves, and it is unfortunate that in doing so they enjoy a greater leeway than most states given the total absence of external oversight.³²²

In order to establish the content of human rights norms subject to application, the tribunal judges have to tailor the ‘external’ human rights standards and their interpretations to the circumstances of each case, which cannot be divorced from the broader jurisdictional and institutional context. The IHRL standards were designed with states in mind, and the practice of human rights courts and monitoring bodies is shaped by the unique purposes, dynamics and constraints of human-rights review they carry out as subsidiary instances. But international criminal courts conduct criminal trials first-hand as any ordinary court would. In using human rights jurisprudence, the tribunals thus cannot do otherwise than to satisfy themselves of the relevance of all legal rationales in the human rights jurisprudence and to re-interpret them as appropriate before applying them.³²³ This is inherent in their nature as courts: they are called upon to interpret law autonomously when solving cases. The contextual interpretation of human rights is feared because it ‘conceals a significant risk of stretching their limits and resulting in a reduction of individual protection’.³²⁴ This argument could be interpreted, and perhaps wrongly so, as neglecting the fact that the same risk may reside in a *failure to properly contextualize* the interpretation and application of human rights.³²⁵

Admittedly, any references by the tribunals to special subject-matter jurisdiction, inordinate practical hurdles, and the lack of enforcement capacity as supposed grounds that warrant the

³²⁰ E.g. n 217 (Gradoni); Fedorova and Sluiter, ‘Human Rights’ (n 28), at 30, 33, 51 (‘a reorientation concerning human rights in light of the particular context of international criminal proceedings is not without merit, because it cannot be denied that the concrete cases differ significantly from the types of situation submitted to the ECtHR.’).

³²¹ *Bosphorus Airways v. Ireland* (n 238), para. 155 (‘By “equivalent” [standards] the Court means “comparable”; any requirement that the organisation’s protection be “identical” could run counter to the interest of international cooperation pursued’).

³²² Cf. *ibid.* (‘any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.’).

³²³ Warbrick, ‘International Criminal Courts and Fair Trials’ (n 45), at 51 (‘it might be asked whether human rights standards, directed as they are to national trial processes, have any real relevance to an international process because the international court will have to operate in a much sparser legal environment and in much different factual circumstances than a domestic court.’); Jackson and Summers, *The Internationalisation of Criminal Evidence* (n 319), at 132 (‘the tribunals are not only legally entitled to depart from the jurisprudence of the international rights bodies, but ... the context in which the tribunals operate and the purposes of the tribunal may positively require them to develop different standards.’); Jackson, ‘Transnational Faces of Justice’ (n 40), at 243 (‘The types of consideration relevant to these human rights bodies may not be appropriate for international tribunals The context in which the tribunals operate and the purposes of the tribunal *may positively require* them to develop different standards.’ *Emphasis added.*)

³²⁴ Fedorova and Sluiter, ‘Human Rights’ (n 28), at 46-47 (who offer—but do not define—an alternative term ‘re-orientation’). See also Sluiter, ‘The Human Rights Protection’ (n 281), at 461 (‘the harmful tendency that this so-called re-interpretation of the human rights corpus in light of the unique character and circumstances of international criminal tribunals practically by definition results in reduced protection, and always favours the interests of prosecution and/or victims over those of the accused.’).

³²⁵ McIntyre, ‘Defining Human Rights’ (n 41), at 238 (noting that a claim of adherence to human rights jurisprudence where the tribunals’ frameworks are markedly different ‘discredits the legitimate interpretation of human rights.’)

adoption of a non-ambitious approach to human rights protection, must be treated with utmost caution. They may be occasioned by unprincipled considerations such as the falsely perceived interests of expediency and by the insufficient attention to the rights of defendants. Far from all of the aspirations and practical challenges should influence the due level of fundamental rights protection, and some clearly favour elevating the threshold of protection. For instance, it is recognized that the gravity of crimes may not legitimately serve as a justification for longer periods of detention on remand.³²⁶ But it may be accorded a normative weight in another area of rights protection, and with an opposite effect. Give that the nature of charges entails the increased public pressure and a risk of passionate prosecutions (and convictions), it *ipso facto* requires the ever more stringent protection of the presumption of innocence and other guarantees reinforcing it, including the right to assistance by counsel and the right to an adequate time and facilities in the preparation of the defence. What is deemed as the special context will actually invite the application of higher standards than those found *in foro domestico*.

Returning to the importance of contextualization, it bears emphasizing that where the tribunals fail the ‘adjustment’ part of IHRL application, the implementation of its protections is bound not to be meaningful but a lip service and mere appearance of fairness: fairishness. Procedural (and possibly, substantive) injustice ensues unless a good-faith effort is undertaken to accord the accused and other subjects as appropriate the full scope of protection they are entitled to in accordance with the legal framework and in the relevant context. Without possibly leading to the reduction in the substantive protection of rights, the contextualization is not just a practical necessity but a normative one because it goes to the heart of a duty of the court to safeguard genuine fairness in each case as an overarching objective.³²⁷

In practice, the tribunals have been keenly aware of the specifics of their legal framework and institutional context and referred to them to justify occasional departures from the interpretations of human rights by other courts and bodies. This is a mandatory and standard substantive desideratum (rather than an interpretative method)³²⁸ in the process of the application of law and, as such, it influenced the outcomes in a wide range of matters.³²⁹ In re-interpreting human rights standards in their context, like any other courts, the tribunals balance all legitimate interests involved.³³⁰ Thus, the judges necessarily enter in the uncharted waters and, in striking the balance, sail between the Scylla of overreaching re-interpretation and the Charybdis of insufficient

³²⁶ E.g. Decision on Ramush Haradinaj’s Motion for Provisional Release, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, TC, ICTY, 6 June 2005, para. 24 (‘the expectation of a lengthy sentence cannot be held against an accused *in abstracto*’).

³²⁷ Jackson, ‘Transnational Faces of Justice’ (n 40), at 243 (‘The importance of the context, however, should not necessarily lead international tribunals to seek to reduce the protections that have been accorded to accused persons within the existing human rights regimes’).

³²⁸ Cf. Fedorova and Sluiter, ‘Human Rights’ (n 28), at 30.

³²⁹ To cite the examples from the ICC case law alone: e.g. Decision on the Final System of Disclosure and the Establishment of the Timetable (n 296), paras 3-4 (pointing to ‘the need to safeguard the uniqueness of the criminal procedure of the [ICC]’ as the ‘one of the primary considerations in contextual interpretation of the relevant provisions’, to be met by ‘addressing possible tensions among those provisions so as to ensure consistency, and full expression to the meaning of each’); Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release” (n 204), para. 33 (‘jurisprudence of the ECtHR illustrates that the right to disclosure in these circumstances is not unqualified. The nature and time of such disclosure must take into account the context in which the Court operates. The right to disclosure in these circumstances must be assessed by reference to the need, *inter alia*, to ensure that victims and witnesses are appropriately protected . . . The Court has jurisdiction over genocide, crimes against humanity and war crimes; the gravity of the crimes is such that the protection of victims and witnesses is a paramount consideration. An additional consideration is the need to safeguard ongoing investigations.’).

³³⁰ See also Gradoni, ‘The Human Rights Dimension’ (n 51), at 91 (‘the authority of human rights jurisdictions is unhesitatingly recognized with the proviso that the validity of their decisions is case-relative and that there is space for reconsideration and rebalancing of reasons in the light of the circumstances of the case. Like human rights jurisdictions, the tribunals regularly employ the technique of weighing and balancing conflicting reasons and interests.’ Footnotes omitted.).

contextualization, either of which is synonymous to unfairness. A few examples from practice discussed below—by no means amounting to a comprehensive treatment—testify to the challenges posed by this task.³³¹

As discussed previously, the ICTY tackled the question of contextual interpretation from very early on. In *Tadić*, the unique character of the Tribunal’s legal framework—namely, its ‘affirmative obligation’ to provide protection to witnesses and victims that is absent from the ICCPR and ECHR—was cited as a ground to deviate from human rights case law which neither favours, nor completely rules out, witness anonymity.³³² The mandate and duty to protect victims and witnesses and to pay due regard to their fundamental interests is the element in the human rights equation that distinguishes the tribunals from the convention-based regimes. The concern about the safety and psychological well-being of vulnerable participants is clearly a legally recognizable interest that must be factored into the assessment of the appropriate scope of the rights of the accused. By contrast, the traditional focus of the ECHR and the ICCPR regimes in the criminal procedure context has been on the fair trial rights, and the aspect of victims’ rights is not nearly as developed.³³³

While this aspect of reasoning thus may evince a faithful attempt to take into account the peculiarity of the ICTY’s legal context, the same decision manifests a less rigorous—too far-reaching—effort of contextualization with regard to another matter: the possibility of derogating from fair trial rights in case of national emergency. The ICTY drew a dubious and self-serving analogy with its own situation in order to justify its use of what it saw as a reduced standard of individual protection. Arguably, an earnest effort at a contextual application of human rights standards within its jurisdiction would have led the Chamber to decide against the relevance of that analogy and to eschew this line of reasoning.³³⁴

The ICTY’s interpretation of the principle of equality of arms, which developed incrementally over a series of cases, is another example of (insufficient) contextualization that is controversial at best. In *Tadić*, one of the majority judges opined that the application of the principle ‘should be inclined in favour of the Defence acquiring parity with the Prosecution ... to preclude any injustice against the accused’, while the dissenting judge held that the principle only envisages the right of the defence to call and to examine witnesses under the same but no more favourable conditions, referring to the unavailability of state cooperation as a factor that is equally

³³¹ An example of (inadequate) contextualization not discussed here is the early problem of vague indictments which arguably fall short of genuine adherence to the applicable human rights standards. For a discussion, see W. Jordash and J. Coughlan, ‘The Right to Be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy’, in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) 287.

³³² *Tadić* protective measures decision (n 42), paras 27 and 70 (‘some guidance as to what standards should be employed to ensure a fair trial can be ascertained both from the case law of the European Court of Human Rights and from domestic law. ... [H]owever, ... these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognizing its mandate to protect victims and witnesses.’).

³³³ Victims’ rights as a rubric of ‘hard law’ of IHRL are still in the embryonic stage of development. The jurisprudence has recognized the right of victims to effective and official (criminal) investigation as the best way for states to protect certain fundamental substantive rights protected by the conventions. See e.g. on the right to life (Art. 2 ECHR): *Kiliç v. Turkey*, Judgment, Application No. 22492/93, ECtHR, 28 March 2000, para. 62; the right not to be subjected to torture (Art. 3 ECHR) and/or the right to private life (Art. 8 ECHR): *M.C. v. Bulgaria*, Judgment, Application No. 39272/98, ECtHR, 4 December 2003, para. 153 (‘obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution’); *X and Y v. the Netherlands*, Judgment, Application No. 8978/80, ECtHR, 26 March 1985, para. 27 (‘Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.’). Extending Art. 6(1) ECHR to cover civil-party action, see *Perez v. France*, Judgment, Application no. 47287/99, ECtHR, 12 February 2004, para. 71. In detail, see Tulkens, ‘The Paradoxical Relationship’ (n 6), at 584-87.

³³⁴ The language used (‘[g]uidance as to which other factors are relevant when balancing all interests’) indicates that its observation about the derogable nature of the right to a fair trial was not a mere *obiter dictum*. See *Tadić* protective measures decision (n 42), para. 70.

disadvantageous to both parties.³³⁵ On its face, the interpretation of the equality of arms that requires equal procedural conditions, next to the absolute parameter of ‘reasonable’ opportunity for presenting one’s case, comports better with the position taken by Strasbourg organs.³³⁶

The dissenting judge’s position was soon affirmed in relation to the same procedural matter by another Trial Chamber,³³⁷ which reinforced the principle by requiring ‘complete equality’ between the parties.³³⁸ Later in *Tadić* the Appeals Chamber ruled that ‘under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts ...[to the effect] that the Prosecution and the Defence must be equal before the Chamber.’³³⁹ The notion of the ‘more liberal interpretation’—not to the benefit of the defendant—got entrenched in the jurisprudence.³⁴⁰ In later cases, the ICTY drifted even further away in that direction. It re-interpreted equality of arms as ‘a principle of basic proportionality, rather than a strict principle of mathematical equality’ that ‘generally governs the relationship between the time and witnesses allocated to the two sides’.³⁴¹

The evolution of interpretations as set out here represents a pendulum swing from an initial pole of the contextual approach that exclusively favours the defence, to the central position of ‘complete equality’, to the yet another extreme that legitimized not only the substantive inequality of means but also the procedural inequality. The latter interpretation, diametrically opposed to the starting premise underlying the principle, essentially turns a blind eye to the predominance of the prosecution. In light of the perpetual systemic inequality between the parties in terms of resources and access to evidence, this re-interpretation reaches too far. Even if constructed and justified with reference to the ECtHR case law, it makes one party in fact ‘more equal’ than the other and arguably distorts the spirit of equality of arms, particularly in the context of international criminal justice. According to a detailed critical analysis of the earlier manifestations of this problem, the Tribunal has relied upon the human rights jurisprudence in giving the principle an inadmissibly formal and narrow interpretation that excluded systemic procedural inequality from the situations potentially caught by it.³⁴² Therefore, as has been argued by one commentator, the ICTY’s

³³⁵ Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, Case No. IT-94-1-T, TC, ICTY, 27 November 1996. Cf., in the same case, Separate and Dissenting Opinion of Judge McDonald on Prosecution Motion for Production of Defence Witness Statements, paras 31-32 (‘The International Tribunal must rely on the co-operation of State authorities Most importantly, two of the entities of the former Yugoslavia have refused to fully co-operate with the International Tribunal. ... Thus, the Prosecutor of the International Tribunal does not have all of the advantages of a State, making *Jaspers [v. Belgium]* less persuasive. For these reasons, the international norms as contained in the ICCPR and the ECHR would not be violated by an order for the disclosure of the relevant portions of prior statements of witnesses called by the defence.’)

³³⁶ *Dombo Beheer BV v. Netherlands*, Judgment, Application No. 14448/88, ECtHR, 27 October 1993, para. 33 (‘“equality of arms” implies that each party must be afforded a reasonable opportunity to present his case ... under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.’); *Kaufman v. Belgium*, Decision as to Admissibility, Application No. 10938/84, ECommHR, 9 December 1986 (‘everyone who is a party to such [civil and criminal] proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent.’)

³³⁷ Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, *Prosecutor v. Delalić et al.*, Case No. 96-21-T, TC II *quater*, ICTY, 4 February 1998, para. 45 and 49.

³³⁸ Decision on the Motion of Joint Request of the Accused Persons Regarding the Presentation of Evidence, *Prosecutor v. Delalić et al.*, Case No. 96-21-T, TC II *quater*, ICTY, 12 June 1998, para. 33.

³³⁹ *Tadić* appeal judgment (n 132), paras 51-52.

³⁴⁰ Decision on the Application by Mario Cerkez for Extension of Time to File his Respondent’s Brief, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, AC, ICTY, 11 September 2002, para. 7 (‘The principle of equality of arms has been given a liberal interpretation in its application to the Tribunal’s procedures, in recognition of the peculiar difficulties under which both parties have to operate in this Tribunal.’)

³⁴¹ Interlocutory Decision on Length of Defence Case, *Prosecutor v. Orić*, Case No. IT-03-68-AR73, AC, ICTY, 20 July, 20 July 2005, para. 7; Judgement, *Prosecutor v. Stakić*, Case No. IT-97-24-A, AC, ICTY, 22 March 2006, para. 149.

³⁴² McIntyre, ‘Equality of Arms’ (n 36), at 272 (‘if the full ambit of the principle of equality of arms is to be respected and criminal proceedings at the Tribunal are to be fair proceedings, then the principle should be interpreted in a much broader way than as actual procedural equality’). See also Fedorova and Sluiter, ‘Human Rights’ (n 28), at 51.

purported adherence to the interpretation of the principle in human rights jurisprudence is the source of ‘actual injustice and the appearance of it’.³⁴³ Here, the criticism is thus that the Tribunal did not ‘contextualize’ the interpretations of other courts enough in its unique circumstances. This curtailed the level of protection due to the accused in light of handicaps under which the defence labours on a daily basis and effectively emasculated the principle of equality of arms.³⁴⁴

It is of note that the search for arguments to justify such a treatment of the principle led the ICTY into another kind of conceptual incoherence. The trump argument used to cover up the twisted interpretation of equality of arms, whether one considers it insufficiently or excessively contextual, has been to put to the fore the ostensible legal entitlement of the prosecutor to protections flowing from this principle and fair trial generally. In *Aleksovski*, the ICTY Appeals Chamber held that:

This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does not affect the fundamental protections given by the general law or Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.³⁴⁵

The notion that the prosecutor and not only the defendant, benefits from fair trial rights in a legal sense is replicated in a mass of judicial opinions sufficient to petrify it into a dogma.³⁴⁶ It has mostly served as a rhetorical device for levelling the field between the two parties one way only – that is not to enhance the protections of the defendants but to justify the increased procedural opportunities for the prosecutor.³⁴⁷

As was argued elsewhere, this notion builds upon the controversial premise that the prosecutor represents the interests of the international community, which are narrowly understood as subsuming (and exhausting) the interests of victims but excluding the interests of the accused.³⁴⁸ In the examples cited, the prosecutor’s right to a fair trial is based on a fallacious segregation and antinomy between the interests of the community and those of the defendant.³⁴⁹ It is important that

³⁴³ McIntyre, ‘Equality of Arms’ (n 36), at 319. For another analysis along similar lines, see Jackson and Summers, *The Internationalisation of Criminal Evidence* (n 319), at 133-36.

³⁴⁴ See also M.G. Karnavas, ‘Gathering Evidence in International Criminal Trials—The View of a Defence Lawyer’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Procedures and Institutions* (London: Cameron May, 2007) 92 (referring to the principle as ‘a melodious yet vacuous slogan a consoling though ineffectual mantra’).

³⁴⁵ Decision on Prosecutor’s Appeal on Admissibility of Evidence, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, AC, ICTY, 16 February 1999 (‘*Aleksovski* admissibility appeal decision’), para. 25. Cf. *Tadić* protective measures decision (n 42), para. 55 (‘A fair trial means not only *fair treatment* to the defendant but also *to the prosecution and witnesses.*’)

³⁴⁶ Decision on Motion for Prosecution Access to Defence Documents, *Prosecutor v. Halilović*, Case No. IT-01-48-T, TC I Section A, ICTY, 9 May 2005, para. 8; Decision on Severance of André Rwamakuba and Amendments to the Indictment, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, TC III, ICTR, 7 December 2004, para. 26 (‘The right to a fair trial applies both to the Defence and the Prosecution’); Separate Opinion of Judge David Hunt on Prosecutor’s Motion for a Ruling Concerning the Testimony of a Witness, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, TC III, ICTY, 27 July 1999, paras 17 and 25.

³⁴⁷ See further S. Vasiliev, ‘Trial’, in L. Reydamas *et al.* (eds), *International Prosecutors* (Oxford: Oxford University Press, 2012) 735-37; McDermott, ‘Rights in Reverse’ (n 252) (‘The excruciating irony of this unfounded extension is that it often has a detrimental effect on the rights of the accused, whom the enumerated rights were intended to protect in the first place.’)

³⁴⁸ Vasiliev, ‘Trial’ (n 347), at 735-37.

³⁴⁹ For a more cautious language, cf. Separate Opinion of Judge Shahabuddeen, *Rutaganda* appeal judgment (n 146), para. 10 (‘The prosecution side embraces the interests of the international community. Certainly, *the interests of the international community comprehend the necessity to ensure that the defence has a fair trial.* But justice is also due to

the interests of the community are not legally recognized in the context of procedure, as opposed to those of its ‘opponent’. The Chamber thus proceeds on a counterintuitive and sterile vision of the proceedings as an adversarial combat between the two equally-footed opponents blessed with identical procedural rights, whereas it is difficult to imagine actors more different in quality, procedural status, and capacity than an accused individual and the glorified ‘international community’. Such equality is neither achievable, nor really endorsed by the tenet of fairness.³⁵⁰

From a legal perspective, the extension of the *right* to a fair trial to anyone else but the defendant goes against the letter of the Statute which guarantees it only to the accused.³⁵¹ It is true that the court is under a general duty to ensure ‘full respect’ for the rights of the accused, including guaranteeing a fair and expeditious trial, and it is legitimate for it to also pay ‘due regard’ to other legitimate interests at stake (e.g. those of witnesses and victims), in the circumstances of the case.³⁵² However, this must be done in strict conformity with the Statute which draws priorities between competing interests.³⁵³ Without an interpretative stretch, the mandatory parameters of fairness, as outlined specifically in relation to the accused person, are not applicable or even relevant to the prosecutor as bases for a rights claim. Where procedural interests are unjustifiably elevated to the rank of enforceable rights, it becomes all too easy to balance the rights of the accused away or, put differently, to ‘contextualize’ them out.

An alternative argument would have been that actors other than the defendant—the prosecutor, witnesses and victims—hold no fair trial rights of their own but nonetheless are to be treated equitably by the court as a matter of its proper obligation to guarantee a fair conduct of the proceedings. The other participants thus incidentally benefit from ‘fairness’ as the intrinsic quality of the proceedings guaranteed by law to the defendant.³⁵⁴ This means, paradoxically to some extent, that the defendant is not receiving a fair trial where the other party—the prosecution—is substantially disadvantaged in the presentation of its case to the benefit of the defence. Arguably, this conception finds support in the ICC Statute, which, despite enhancing the procedural rights of victims to a degree previously unseen in international criminal procedure let alone in general human rights law, still subordinates them to the need to protect the rights of the accused.³⁵⁵ The ICC’s jurisprudence accordingly holds that while the requirement of fairness encompasses respect for the own procedural rights of the prosecutor and victims and fundamental human rights of ‘persons at

the international community. If the Trial Chamber’s assessment of facts is patently erroneous, there could be a miscarriage of justice to that community.’).

³⁵⁰ See also D. Groome, ‘Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials’, (2006) 25 *Penn State International Law Review* 793, at 796 (‘Can we ever reduce a contest between the international community and an individual defendant to a fair contest on the same terms envisaged by the early architects of the adversarial system?’); STL Rules of Procedure and Evidence (as of 12 April 2012) – Explanatory Memorandum by the STL’s President, para. 3 (‘prosecution and punishment of international crimes is not a business of two contestants; it is premised upon a public interest in justice and implicates the whole international community (otherwise why should the UN intervene and establish international or mixed tribunals?’)).

³⁵¹ See Arts 21 ICTY Statute; Art. 20 ICTR Statute; Art. 18 SCSL Statute.

³⁵² Art. 20(1) ICTY Statute. See also Decision on Adoption of New Measures to Bring the Trial to an End within a Reasonable Time, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, TC III, ICTY, 13 November 2006, para. 14 (rejecting the accused’s waiver of the right to an expeditious trial on the ground that ‘the Accused are not the only ones to have the right to an expeditious trial and, consequently, cannot renounce it’); Decision on Prosecution’s Request for Certification of Rule 73bis Issue for Appeal, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, TC III, ICTY, 30 August 2006, para. 10 (‘Although use of the word “fairness” in the context of a criminal trial might commonly refer to fairness for an accused, the Prosecution undoubtedly is entitled to a fair opportunity to present its case. The Statute of the Tribunal . . . does not provide that only an accused is entitled to be treated equitably.’)

³⁵³ See e.g. Dissenting Opinion of Judge Patrick Robinson, Decision on Prosecution Motion for the Admission of Transcripts in lieu of Viva Voce Testimony Pursuant to 92bis(d) – Foča Transcripts, *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, TC, ICTY, 30 June 2003, para. 24 (‘measures to protect victims and witnesses must not compromise the rights of the accused’).

³⁵⁴ Vasiliev, ‘Trial’ (n 347), at 735-36.

³⁵⁵ Art. 68(3) ICC Statute (‘. . . in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’).

risk on account of the activities of the Court’, the right to a fair trial in a strict sense only applies to a defendant.³⁵⁶

Pulling the threads together, in their reading of equality of arms as a part of the right to a fair trial, the *ad hoc* tribunals have basically de-emphasized its core purpose, that is to provide the defendant as a weaker party with a reasonable opportunity to present her case under the conditions that do not put her at a substantial disadvantage vis-à-vis the more resourced prosecutor. The grounds for this interpretational somersault are far from impeccable, and in a mutated form, the principle served to promote the purpose opposite to the original. It legitimized a situation which would have likely been qualified as flagrant and systemic inequality had it been judged in a way more detached from institutional predilections. The re-interpretation of equality of arms extending the fair trial entitlements to the prosecutor, with reference to ‘peculiar circumstances under which both parties have to operate in this Tribunal’,³⁵⁷ is not based on a *bona fide* and out-of-box analysis of the normative meaning of the principle in the Tribunal’s context.

Nominal equality is not the same as genuine procedural justice. Where the contextual interpretation results in an inadequate level of individual protection, it reaches too far and calls for corrective action taking the form of judicial remedies and systemic measures. Ironically, the *Haradinaj et al.* appeal judgment was rectified by the Appeals Chamber *ex post facto*, in order to substitute the reference to ‘the Trial Chamber’s duty to safeguard the fairness of the proceedings’ for the notion of the prosecutor’s ‘right to a fair trial’ used in the original text.³⁵⁸ However belated, the attempt to get the terminology right is welcome, but this cosmetic change will not undo unfairness that may have resulted from the application of the prosecutor’s ‘right to a fair trial’ to the detriment of defendants all along.

3.2. ‘Fairest’ or ‘fair enough’?

It was shown above why the idea that the human rights standards should be interpreted and applied contextually by the tribunals is not as blasphemous as it may sound at first. On the contrary, it is what the courts are supposed to do in their discovery of the holy grail of fairness in the circumstances of the case assessed in its context. Inherent in any process of translation is the danger of distorting the intended meaning of the human rights principles. The uncertainty here is that it is seldom apparent what amounts to a legitimate interpretation and what is rather a distortion. The question is what considerations should guide the tribunals in their re-interpretation of human rights. Should they be guided by an absolute approach and devise their own metric of fairness, or is it more

³⁵⁶ See e.g. Decision on the Prosecution’s Applications for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the DRC*, ICC-01/04-135-tEN, PTC I, ICC, 31 March 2006, para. 38 (‘fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)’); Decision on Prosecutor’s Applications for Leave to Appeal Dated the 15th day of March 2006, *Prosecutor v. Kony et al.*, ICC-02/04-01/05-90-US-Exp, PTC II, ICC, 10 July 2006, para 24 (‘the right to a fair trial applies first and foremost to a defendant or to the defence. However, . . . “the general component” of fairness should be preserved to the benefit of all participants in the proceedings, including the Prosecutor’); Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06 . . . , *Situation in Uganda*, ICC-02/04-112, PTC II, ICC, 19 December 2007, para. 27 (‘It is commonly understood that the right to a fair trial in criminal proceedings mainly ensues to the benefit of the defendant or the defence. Yet, fairness also extends to other parties in proceedings such as the Prosecution.’); ICC-01/04-01/07-475 (n 204), paras 56, 58 (‘the withholding of certain information from the Defence may be necessary so as to preserve the fundamental rights of an individual put at risk by the activities of the International Criminal Court.’).

³⁵⁷ See n 340.

³⁵⁸ Cf. Judgement, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, AC, ICTY, 19 July 2010, para. 46 (critical of the undue prioritization by the Trial Chamber of ‘logistical considerations over the Prosecution’s right to a fair trial’) and, in the same case, Corrigendum to Judgement of 19 July 2010, 23 July 2010, replacing the relevant text of that paragraph with a reference to ‘the Trial Chamber’s duty to safeguard the fairness of the proceedings’).

appropriate for them to adopt a relativist approach that draws upon the parameters developed in other contexts? If so, what level of human rights protection vis-à-vis external reference points may be mandatory or desirable for them to maintain, if at all?

Two schools of thought seem to have emerged concerning this issue. On the one hand, the tribunals have been expected or pleaded to adopt the ‘highest standards’ of fairness.³⁵⁹ The proposition borders at a cliché and its superlative language is unclear: do the ‘highest standards’ refer to the ‘highest conceivable’, ‘highest possible’ in the circumstances, or to the standards that are ‘higher’ in relation to other (domestic) systems? The comparative degree is intrinsic in the superlative: defining the ‘highest’ level of protection is only possible once it is established that it is ‘higher’ than references. This strand in fact implies that international tribunals should strive to accord the accused with due process protections that are *no lower* than in any domestic system.³⁶⁰ A variety of arguments are advanced to bolster it, including the nature of crimes, as giving rise to stronger biases against the alleged offenders and consequently posing an elevated need for protection,³⁶¹ the serious nature of prosecutions,³⁶² and the aspiration of the tribunals to serve as role-models for national and international courts alike.³⁶³

On the other hand, the (liberal) realists have pleaded for a less ambitious metric and the emancipation of the tribunals from the normative pull of the parameters of fairness which originated in unrelated contexts. These courts should be relieved of the onerous—and sometimes unbearable—burden of meeting the ‘highest standards’ of justice and instead content themselves with delivering justice that is ‘fair enough’ in the circumstances.³⁶⁴ Mégret argued that the tribunals ‘should not feel obliged to “shoot themselves in the foot” by too rigidly adhering to principles developed from application in other contexts.’³⁶⁵ Similarly, Damaška recognizes the ‘seductive attractiveness of the idealist view’ but clings to the realist position which tolerates the ‘abandonment, or relaxation, of some cherished domestic procedural arrangements’; he also warns that ‘if the *id* of criminal justice is submitted to an overly strong *super ego*, neurotic symptoms are likely to develop.’³⁶⁶

The ‘realists’ emphasize the importance of taking the specific context in which the tribunals operate seriously.³⁶⁷ The gravity of crimes, complexity of prosecutions and trials, nuances of procedural regimes of the tribunals, and the special nature and goals of international criminal justice, they say, justify and necessitate the deviations from the established interpretations of liberal

³⁵⁹ E.g. Warbrick, ‘International Criminal Courts and Fair Trials’ (n 45), at 49; Dimitrijević and Milanović, ‘Human Rights’ (n 2), at 167-68.

³⁶⁰ E.g. DeFrancia, ‘Due Process’ (n 99), at 1384 (‘in the context of an international system of adjudication, due process protections should be no weaker than those found in any domestic jurisdiction. The establishment of a higher standard for due process protections in an international system will assist these courts in avoiding challenges to the integrity of their trial processes.’).

³⁶¹ See e.g. G.J. Simpson, ‘War Crimes: A Critical Introduction’, in T.L.H. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997) 15 (‘in an area of law so thoroughly politicised, culturally freighted and passionately punitive as war crimes there is a need for even greater protections for the accused.’)

³⁶² Partially Dissenting Opinion of Judge Pocar, *Mrkšić and Šljivančanin* appeal judgment (n 146), para. 5 (‘Pursuant to the ICCPR and its interpretation by the HRC, over 150 States are held to this standard. It would be unjustifiable for the International Tribunal to adopt a lower standard of human rights, particularly given the serious nature of the prosecutions.’).

³⁶³ See *supra* nn 249-250.

³⁶⁴ E.g. Warbrick, ‘International Criminal Courts and Fair Trials’ (n 45), at 54 (‘the trial should have been “fair enough” rather than aspiring to an exemplary or superior level of “fairest of all”’); M. Cherif Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’, (2001) 5 *Journal of Law and Policy* 35, at 49 (‘[i]nternational justice, like national justice, can never be held to the standards of perfection. Our expectations should not be to seek the best, for it is frequently the enemy of the good.’); Damaška, ‘Reflections on Fairness’ (n 5), at 619 (‘departures of international criminal justice from certain extrapolations of “fair trial” rights found in domestic criminal proceedings need not necessarily lessen its legitimacy.’)

³⁶⁵ Mégret, ‘Beyond “Fairness”’ (n 11), at 67.

³⁶⁶ Damaška, ‘Reflections on Fairness’ (n 5), at 612, 614.

³⁶⁷ E.g. *ibid.*, at 613-14.

safeguards.³⁶⁸ The thrust of arguments for watering down the superlative ambitions of the tribunals in relation to the scope of human rights protection relates to the already mentioned extraordinary practical hurdles, including dependence on cooperation of states and other actors who may be unwilling to provide it, the unavailability of own law-enforcement arms and territory, and insufficient capacities.

What unites the variants of realist accounts is the recognition that the operational context may have a reductive effect on the scope of rights protection. This does not amount to an unqualified plea to indiscriminately treat all such factors and circumstances as normatively acceptable and legitimate. The ‘realist’ camp is variegated and features diverse, at times conflicting, views and perspectives. Disagreements concern the circumstances which can warrant diminished protection and the extent to which this may be allowed.³⁶⁹ The normative relevance of practical hurdles as a factor in the contextual application of human rights to the detriment of the accused are vigorously questioned, and rightly so.³⁷⁰ It bears emphasizing that the validity of arguments based on the recognition of the special goals and circumstances of international criminal justice as sufficient reasons for reducing the scope of individual protection is by definition suspect and should be vigorously probed in relation to each individual case.³⁷¹ In several domains of practice, the arguments for ‘contextualization’ referring to the uniqueness of the tribunals’ challenges tended to lackadaisically be accepted instead of a rigorous and comprehensive assessment of the consequences for fairness, thus falling short of an adequate contextualization and putting courts on a slippery slope.³⁷² But the baseline, which is perfectly acceptable, is the call for the tribunals (and the critics of their performance) to pay adequate attention to the circumstances that inform the applicable parameters of fairness and to approach the task of weighing them in a principled way whenever establishing the proper scope of protection. The fact that the contextualization-oriented arguments have often been compromised by the lip-service treatment falling short of proper contextualization, should not be taken to fundamentally vitiate the contextualization thesis as such.

The tribunals’ own treatment of external comparators of fairness oscillates between the two conceptual positions and sends out contradictory signals along the same lines that divide scholars. In some cases, they expressed the view that human rights standards concerning the rights of suspects and accused enshrined in the conventions such as the ICCPR and ECHR are only ‘minimum rights’,³⁷³ suggesting thus they must strive for the greater level of protection and never

³⁶⁸ *Ibid.*, at 613.

³⁶⁹ E.g. S. Siebert, ‘The Pull of Criminal Law and the Push of Human Rights: Challenges in the International Criminal Process’, (2003) 11 *Irish Student Law Review* 29, at 32 (‘the qualitative differences of such crimes ... may ... require procedures that deviate from the norms and standards endorsed in national legal systems. ... For instance, the question of what constitutes a speedy trial and how long an accused can be detained without trial before the accused’s rights are violated is subject to a determination that must take into account the particularities of the international criminal process.’). Cf. Deprez, ‘Extent of Applicability’ (n 319), at 736-37 (rejecting gravity as a factor that can be relied upon to justify a reduced level of due process protection).

³⁷⁰ Mégret, ‘Beyond “Fairness”’ (n 11), at 60 (‘The fact that the “international community” faces “difficult and complex circumstances” cannot be in and of itself a reason to unduly limit certain rights that are otherwise guaranteed, or the international community would clearly be showing a bad example.’)

³⁷¹ See also Jordash and Coughlan, ‘The Right to Be Informed of the Nature and Cause of the Charges’ (n 331), at 310 (‘The continual reliance on the catch-all claim of “uniqueness” of international proceedings must be put to test in each individual case.’).

³⁷² Critical of the judicial acceptance of prosecutorial justifications for the insufficiently specific indictments in the early ICTY practice, see *ibid.*, at 290-92, in particular at 290 (‘a preconceived assumption of the scale of the crimes, and the associated assumption that the prosecution has a nigh-on impossible task to perform, was always likely to encourage loose drafting, less particularization, and less rigorous scrutiny of indictments, both at the time of confirmation and during the trial.’).

³⁷³ *Barayagwiza I* appeal decision (n 33), para. 79 (‘suspects held at the behest of the Tribunal ... are entitled, at a bare minimum, to the protections afforded under these international instruments’); Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Prosecutor v. D. Nikolić*, Case No. IT-94-2-PT, TC, ICTY, 9 October 2002, para. 110 (‘these norms [Arts 5-6 ECHR; Art. 14 ICCPR] only provide for the absolute minimum standards applicable.’).

fall below the bar. But in great many other cases, as noted, the tribunals held that the aspiration to apply more liberal standards than afforded under IHRL is not justified because it will result in the deprivation of other rights of the accused or his co-accused (e.g. the right to be tried without undue delay), or in the ‘balancing away’ of legitimate interests of other participants which fit within the concept of ‘fairness’.³⁷⁴ Thus, the former position views ‘minimum standards’ as demanding a further effort to enhance the protections, whereas the latter one sees them as ‘maximum’ standards. No ready-made middleground position reconciling the two strands is to be found in the jurisprudence.

A closer look at the actual practice reveals that the tribunals have mostly been content to operate on the basis of the ‘fair enough’ threshold and have fully embraced the dialectics of rights-balancing.³⁷⁵ The cases of ‘over-protection’, in which the tribunals deliberately opted for the level of fair trial protections that was, in their view, higher than that applicable domestically and accepted as sufficient by the ECtHR, have been relatively rare. Furthermore, despite the seemingly laudable ambition of raising the bar of ‘fairness’, such initiatives mostly meet with lukewarm reactions at best or even criticism instead of praise.

To begin with one of the less problematic examples, in *Delalić et al.* the ICTY excluded statements the defendant had given to the Austrian police while being unassisted by defence counsel. It did so under Rule 95, i.e. as evidence ‘obtained by methods which cast substantial doubt on its reliability’ or antithetical to or damaging the integrity of its proceedings, on the ground that it violated the right to a fair hearing.³⁷⁶ This is a more exacting standard than that used in some civil law jurisdictions which had allowed the invocation of this right *by suspects* only later into the proceedings without censure by the ECtHR. The decision to opt for a higher standard would not have been problematic had it not been based on a contested argument that guarantees granted to suspects in the ICTY proceedings under Rule 42 are strictly required by Article 14(3) of the ICCPR and Article 6(3)(c) of the ECHR. This raises the question whether the Chamber’s balancing exercise of the interests at stake was not slanted by the application of a standard which (wrongly) conceived of the continental practice not disapproved by the ECtHR as violative of the Convention.³⁷⁷

Another example of ‘over-protection’ is provided by the ICTY’s troubled record regarding the right to self-representation, which is unnecessary to recount here.³⁷⁸ It has been argued that the Tribunal has gone too far in accommodating personal wishes of defendants to represent themselves, and that its unnecessarily ‘liberal’ approach is in fact not mandated by IHRL.³⁷⁹ The ECtHR does not regard the right under Article 6(3)(c) as absolute and has accepted a number of limitations, including the possibility of appointing counsel against the wishes of the accused in the interests of justice, e.g. in order to avoid delays or to ensure the effective participation of the accused in the trial.³⁸⁰ It was also argued that the disjunction ‘or’ in the expression ‘to defend himself in person or

³⁷⁴ *Aleksovski* admissibility appeal decision (n 345), para. 25 (‘it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.’); Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled “Decision on application for interim release” (n 204), para. 33.

³⁷⁵ For examples, see Acquaviva, ‘Human Rights Violations’ (n 24), at 620.

³⁷⁶ Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, TC II *quater*, 2 September 1997, paras 43-44.

³⁷⁷ However, the TC did cite in support some ECtHR decisions recognizing the right to counsel throughout the proceedings: Cassese, ‘The Influence of the European Court’ (n 64), at 40-41.

³⁷⁸ See e.g. A. Zahar, ‘Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal’, (2008) 19 *Criminal Law Forum* 241, at 243 *et seq.*; N.H.B. Jørgensen, ‘The Right of the Accused to Self-Representation before International Criminal Tribunals’, (2004) 98 *American Journal of International Law* 711; Schomburg, ‘The Role of International Criminal Tribunals’ (n 1), at 16-21.

³⁷⁹ See Trechsel, ‘Rights in Criminal Proceedings’ (n 2), at 183-86; Schomburg, ‘The Role of International Criminal Tribunals’ (n 1), at 16 (who terms it as ‘the right to pretend to defend oneself’).

³⁸⁰ *Croissant v. Germany*, Judgment, Application no. 13611/88, ECtHR, 25 September 1992, paras 28, 30 and 32; *Lagerblom v. Sweden*, Application No. 26891/95, 14 January 2003, paras 51, 54.

through legal assistance of his own choosing' in Article 14(3)(d) of the ICCPR should not be interpreted, in a tribunal context, to confer an unqualified freedom on the defendant to choose between the two options.³⁸¹ The ICTY's seemingly more 'liberal' practice may sit well with the conception of the right to defend himself in person as an autonomous and minimum right that should attract a higher standard of protection. But in fact, the critique points that it has the opposite effect. Arguably, it strikes the wrong balance between the individual autonomy and the interests of justice, thereby undermining the integrity of the proceedings and creating, rather than averting, the risk of unfairness towards the accused.³⁸²

One does not need to subscribe to the foregoing assessments in full to agree that at least some 'superlative' due process aspirations in the context of international criminal procedure can be deemed controversial and unsustainable. Other than don-quixotic maximalism, the application of the 'highest' human rights standards by the tribunals, such as aiming at the 'over-protection' of defendants by domestic standards, has little justification. The idealist striving for perfection in such situations has tenuous, if any, rational grounding, especially against the growing recognition of a need for a more sober and balanced approach. Even more importantly, superlative aspirations prove to be anti-thetical to the procedural fairness and shortsighted in two main respects.

Firstly, granting the accused a level of protection that is too generous, over and above sufficient and necessary, might have detrimental effects on the enjoyment of other rights. The 'over-protection' in one area might bring about 'under-protection' in the other. Given that the extent to which some rights may be exercised is subject to the need to guarantee other fundamental rights, hardly any rights are unlimited in scope. The expectation of the 'highest standard' in respect of all rights is unreasonable and a recipe for failure.³⁸³ The different fair trial rights presuppose the delicate balancing exercise to be performed on them to minimize any tensions. The overly lax approach to allowing the accused to represent himself in the proceedings or to granting postponements to enable him to prepare for trial might undermine his own right to be tried without undue delay. In a similar vein, the right to cross-examine witnesses is not boundless but subject to limitations recognized in Rules and in jurisprudence.³⁸⁴

Second, the 'liberal' approach of allocating over-the-top protections to one participant, e.g. the accused, is bound to trample on the legitimate interests of other actors which should form part of the paradigm of fairness. As noted, the tribunals commonly extend the applicability and methodological effects of human rights not only to benefit the suspects and accused but also other procedural participants and persons outside of the courtroom, whose legitimate interests are at stake.³⁸⁵ This rights-pluralist philosophy is a defining aspect of their human rights regimes. It should be emphasized though that the concept of fairness is centered on the accused as a matter of their legal entitlements, and this focus ought to continue in international criminal justice if it is to remain a liberal system of justice.³⁸⁶ But, as noted, fairness is nonetheless not an exclusive privilege

³⁸¹ E.g. Schomburg, 'The Role of International Criminal Tribunals' (n 1), at 17.

³⁸² Trechsel, 'Rights in Criminal Proceedings' (n 2), at 188 ('In the field of human rights, sheer quantitative criteria are only of a relative relevance. The best solution is achieved by careful balancing. In my view, by accommodating the wishes of the accused to such a large extent the ICTY does not further the interests of justice and of a fair trial in an optimal way.');

Schomburg, 'The Role of International Criminal Tribunals' (n 1), at 15 ('a major obstacle to guaranteeing expeditious proceedings');

Damaška, 'Reflections on Fairness' (n 5), at 619.

³⁸³ Møse, 'Impact of Human Rights Conventions' (n 2), at 208 (noting that human rights instruments do not afford 'unlimited guarantees');

Gradoni, 'The Human Rights Dimension' (n 51), at 86.

³⁸⁴ See e.g. Rules 90(F) and 92bis ICTY RPE. See Decision on Appeal against the Trial Chamber's Decision on the Evidence of witness Milan Babić, *Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, AC, ICTY, 14 September 2006, para. 12.

³⁸⁵ Gradoni, 'The Human Rights Dimension' (n 51), at 75, 86. See e.g. n 374.

³⁸⁶ Damaška, 'Reflections on Fairness' (n 5), at 615 (arguing that 'the traditional liberal tilt in favour of defendants' interests should continue in international criminal procedure.');

M. Caianiello, 'First Decisions on the Admission of Evidence at ICC Trials', (2011) 9 *JICJ* 385, at 387 ('in any criminal process, the main focus is the freedom and destiny of the accused, endangered by the action of the prosecutor. As such, the aim of justice is inextricably linked with observing safeguards for the accused.').

of the accused; it is also an overarching duty on the court in relation to the conduct of the proceedings. It overlaps with, but is not exhausted by, the right to a fair trial. Other participants must be accorded all rights and protections that accrue to them by law – and only those rights and protections, in order to avoid a tilt in the other, illiberal, direction.

It is too easy to demand the highest standards *in abstracto*, but legal rules do not operate independently of material realities. The ability for the court to ‘reach the sky’ in the exacting context of actual proceedings is qualified by the need to juggle a plethora of valid considerations and pressing interests that pull in opposing directions. The exclusive focus on the rights of the accused and the idealist longing for standards that exceed the ‘fair enough’ mark ousts other legitimate interests from the equation and undermines fairness. Although the fair trial rights of the accused must never be ‘balanced away’, a careful and comprehensive balancing of all circumstances and interests by the court lies at the heart of the task of defining the parameters of fairness in each case. Benevolent pleas for the highest conceivable standards are divorced from practice and insensitive to the true demands of justice exactly because they defy the need for such balancing. While ‘fair enough’ seems to be the right answer, the final question remains of what this standard entails in specific terms and what parameters guide and limit the tribunals in their re-interpretation of human rights.

3.3. What is ‘enough’? Setting the limits

In light of the foregoing, the practical need and duty for the tribunals to interpret and apply the relevant human rights standards contextually is not objectionable. Those in the ‘realist’ camp highlight why this may result in the relaxation of the standards of rights protection, but eschew the question of what are the lower limits in that process. The recognition of the question in itself indicates, however, that contextualization, according to them, may not be a boundless exercise.³⁸⁷

The discourse about procedural practice of the tribunals evinces, not without reason, serious concerns about the risks the contextualization entails for the actual level of individual protection, which is understandable in view of the tarnished reputation of the ‘uniqueness’ arguments.³⁸⁸ The normative limits to that exercise are sought in the concept of human rights as ‘minimum standards by their legal-institutional nature’ which is underpinned by a variety of moral philosophy accounts.³⁸⁹ The lower threshold in the mandatory level of protection is typically drawn from the only authoritative ‘external’ source of empirical experience available – the ‘common law’ of human rights as developed by treaty monitoring bodies and regional human rights courts. Under this paradigm, the suggested way of applying the yardsticks set out in that case law is that the contextual interpretation and application of IHRL by the tribunals may be allowed to lead to the higher level of protection but may not fall below the minimum established in the context of review of domestic procedural arrangements.³⁹⁰

³⁸⁷ Damaška, ‘Reflections on Fairness’ (n 5), at 618; Mégret, ‘Beyond “Fairness”’ (n 11), at 60.

³⁸⁸ Sluiter, ‘Human Rights Protection’ (n 281), at 461; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 51 (‘there is indeed a significant risk that this reorientation [of human rights standards in light of the tribunals’ context] may be selective in a manner that tends to reduce protection rather than –as might be expected in such complex cases – enhance it.’); Sheppard, ‘The International Criminal Court’ (n 280), at 70-71.

³⁸⁹ Sluiter, ‘The Human Rights Protection’ (n 281), at 461; Fedorova and Sluiter, ‘Human Rights’ (n 28), at 17.

³⁹⁰ Fedorova and Sluiter, ‘Human Rights’ (n 28), at 24-25, 34 (‘contextual interpretation of the ICT’s provisions in light of their object and purpose should not be used in effect to diminish the minimum protection of individuals offered by internationally recognised human rights.’); G. Sluiter, ‘Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law’, (2010) 8(3) *Northwestern Journal of International Human Rights* 248, at 268 (‘international criminal tribunals must take human rights seriously. This implies that the law and case law of international human rights courts must be followed. Any deviation must be exceptional and based on convincing arguments. Furthermore, such deviation cannot, by definition, result in less protection.’) Cf. Gradoni, ‘The Human Rights Dimension’ (n 51), at 92 (speaking of ‘minimum standards’ in the reverse, and more straightforward situation: the impermissibility of invoking an external standard that is lower than the higher minimum spelt out in the tribunals’ statutes or RPE).

The approach of taking standards applied by other courts and monitoring bodies as a ‘minimum’ is rooted in the universalist position according to which fundamental rights accrue to individuals irrespective of who the providers or enforcers of those rights are and regardless of the context in which those rights are invoked.³⁹¹ That position is taken a step further to argue that there might exist certain universally valid and objective quantifiable parameters underlying the broadly formulated principles that should apply in any legal order and extra-contextually, and emanating from the inherent quality of human dignity or otherwise. Whether or not this belief is to be shared as a legal (rather than moral) matter, one cannot fail noticing that there is a contradiction between recognizing the authority of the tribunals to apply external human rights norms contextually in principle, on the one hand, and the insistence on taking normative positions that find expression in the jurisprudence of human rights courts and treaty bodies as containing ‘minimum standards’ binding upon them. This tension is not unknown to the proponents of the ‘minimum standard’ approach who seek the way out by ultimately acceding to the need for ‘re-orientation’ and by formulating a lower limit to it in non-quantifiable terms, such as the demand for a thorough analysis and rigorous reasoning.³⁹² This is a more promising and constructive approach, which has a discernible shared ground with that taken by the proponents of ‘contextual’ interpretation.³⁹³

Indeed, the understanding of human rights standards as ‘minimum’ by nature does not mean that, in order to do justice to that nature, any quantifiable limits from another context are to be treated as mandatory in the context of the tribunal. The distinctness of their operational and legal environment as well as their *judicial* character, as discussed above, militate against the uncritical transposition of any quantitative minimums set by other courts and bodies whenever determining the breaking point at which a given practice degrades into a rights violation. Instead, the tribunals are supposed to re-define their own minimum level of protection below which they cannot afford going. The nature of a standard as minimum does not entail that its quantifiable or measurable parameter must or even can be identical in different legal-institutional settings. It may have to be reset and re-defined anew, or, using late Judge Cassese’s words, given ‘a new lease of life’,³⁹⁴ in order to operate effectively as a lower threshold. Indeed, this seems exactly what the judges see themselves doing.³⁹⁵

In this light, the method of contrasting degrees of individual protection accorded by the tribunals and *in foro domestico* in binary judgmental terms such as ‘higher’ and ‘lower’, or ‘under-protection’ and ‘over-protection’, is potentially misleading. The frameworks within which the human rights courts conduct supervisory tasks and the regimes of international criminal tribunals in which they adjudicate international crime cases are too different for meaningful two-dimensional comparisons.³⁹⁶ There may be simply no apposite *tertium comparationis* other than one’s intuitions

³⁹¹ The tribunals have occasionally espoused this position: *Mrđa* provisional release decision (n 133), para. 27 (‘no distinction can be drawn between persons facing criminal procedures in their home country or on an international level. Additionally, a distinction cannot be drawn between the inhabitants of States on the territory of the former Yugoslavia, regardless of whether they are Member States of the Council of Europe.’).

³⁹² See e.g. Fedorova and Sluiter, ‘Human Rights’ (n 28), at 51, 56, who demand from the Chambers the ‘profound analysis’ of the ‘core and universal value’ of the right, structural and contextual differences between the cases before the tribunal and before the other court, and the interpretation of right consistent with its core which does not entail the reduction of protection.

³⁹³ E.g. McIntyre, ‘Defining Human Rights’ (n 41), at 238 (pointing to the need for persuasive reasoning by the tribunals when adopting interpretations of human rights adopted in other contexts).

³⁹⁴ *Erdemović* Cassese dissent (n 318), para. 6 (‘the interpreter must first determine whether these notions or terms are given a totally autonomous significance in the international context, i.e., whether, once transposed onto the international level, they have acquired a new lease of life, absolutely independent of their original meaning.’)

³⁹⁵ Schomburg, ‘The Role of International Criminal Tribunals’ (n 1), at 28 (‘by adopting all the detailed facets of fair trial rights, the Tribunals have not only enhanced their own legitimacy but also *set a minimum standard with which any legitimate international criminal court must comply.*’ Emphasis added.)

³⁹⁶ In a similar vein, see Cassese, ‘The Influence of the European Court’ (n 64), at 22 (underlining that ‘international tribunals belong to a *totally distinct legal system from that of national courts*, a legal sphere with its own rules, time-frame and institutions’).

about what the *equivalent* standards of fairness and justice require in each context. It may be too tempting to succumb to deceptive analogies and to lose sight of nuances that tilt the scale of fairness differently in the context of international criminal proceedings. The assumption to the effect that international and national judicial environments form parts of the same continuum is fraught with the risk of overlooking the material differences which (should) attract normative consequences. As noted, the nominally ‘over-protective’ procedure adopted by the tribunals will in many cases be ‘under-protective’ in fact, when judged against the adjudicative context as a whole. One should be cautious about direct translation of ‘minimum’ standards formulated by human rights courts into the tribunals’ normative language. Clearly, a more viable approach is to search for the closest analogues and equivalents of established legal tests that, upon due modification, would be determinative of the minimum threshold of protection in international criminal proceedings.³⁹⁷

The degree and nature of the ‘due modification’ then is a key question. The lower limits that harness the contextual interpretation could be identified through a sequence of analytical steps, which are schematically portrayed in the following. The point of departure should always be the (legal) analysis and interpretation of the given right in the context of the tribunals’ own legal framework. The core values and interests the right is meant to safeguard should be discerned, without necessarily assuming that those interests and values are fully identical with those in the domestic context. The correlation with other legally recognizable interests at stake that require protection should be examined in order to determine the relative level of the protection (balancing) of derived rights. The *second* step is the comprehensive (factual) analysis of the situation contextual to the rights claim before the tribunal, including the traits of the operational environment and any practical hurdles facing the participants. The distinction should be made between the circumstances that ought to be accorded weight when devising legal tests and deciding on alleged violations, and those that do not attract such weight. This is a matter of judicial discretion the exercise of which should be thoroughly explained in the decision. As the *third* step, the tribunal should establish and pronounce the applicable legal test. At that point, they must be fully aware of the nuances of the legal and institutional framework of other courts and quasi-judicial organs as the background against which they adjudicate cases. The external jurisprudence should be analyzed from the perspective of whether and to what extent the normative positions stated therein are relevant and can serve as a valid and useful analogy in arriving at the tribunal’s own legal finding.

The exercise should thus amount to drawing a strictly rationale-based, qualitative guidance from any human rights case law, and not a simple reception of the positions developed by human rights courts and supervisory bodies. Any legal tests so identified and transposed should undergo a careful review and adjustment that ensure the adequate and equivalent level of protection. As the experience shows, adherence to mere ‘minimum’ level of protections, determined per human rights law, does not necessarily guarantee adequate protection.³⁹⁸ In its own context, a tribunal may or may not find it justified to accord weight to certain circumstances that are held relevant by other courts, and its own test should accommodate all additional factors unique to the context, and omit those that are irrelevant. Only then can one be satisfied that the court has interpreted human rights standards contextually in a *bona fide* manner.

The proper role of the human rights case law in that analysis is clear: The tribunals are strongly expected to consult such jurisprudence, to engage with the reasoning contained therein, and to carefully justify both eventual acceptance of it and their departure from it. No legal finding based on a summary dismissal of the relevance of human rights jurisprudence or generally according it with limited relevance, similar to the one encountered in the early ICTY practice, can be credible. There is—and must be—a presumption of the relevance of human rights jurisprudence for the purpose of the tribunals’ definition of their parameters of fairness. This is largely a question

³⁹⁷ *Ibid.*, at 25 (the ECtHR’s case law is not ‘transposable, as such, to international criminal courts’).

³⁹⁸ See e.g. Jordash and Coughlan, ‘The Right to Be Informed of the Nature and Cause of the Charges’ (n 331), at 291.

of the specialization of courts and of mutual recognition of each other's expertise and experience, not any sort of formal hierarchy.

Human rights courts and treaty bodies are specifically granted (quasi-)judicial authority to interpret and apply treaties that serve as blueprints for fair trial provisions of the tribunals. The relevance is reinforced by the fact that like international tribunals, the ECtHR has to determine the relationship between human rights principles and the traditions of civil law and common law.³⁹⁹ Their jurisprudence is by definition persuasive and relevant for the purpose of the adjudication by the tribunals.⁴⁰⁰ From the perspective of the tribunals, the degree of persuasiveness is informed by the recognition of the special expertise of those courts, subject to the case-by-case assessment of the quality of their reasoning.⁴⁰¹ Given the subject-matter specialization of courts, according their interpretations of IHRL a reasonable credit of trust is warranted, just as would be those other courts' reliance on the tribunals' interpretations of international criminal law doctrines. A discourse aimed at judicial insulation and immunity vis-à-vis other courts' reasoning is unacceptable – it is not a civilized mode of conducting judicial dialogues within the community of courts which adjudicate across different subject-matters and legal orders.

That said, the relevance and adjudicative autonomy remain important caveats: human rights jurisprudence is not a well-spring of ready-made answers tailored to issues arising before the tribunals. Deference to that case law should not extend so far as to reach the other extreme of treating the external tests and methodologies, much less those other courts' specific findings and outcomes, as law.⁴⁰² Those can only be used as construction material and points of departure in the decision-making process. Whenever the tribunals err on the side of deference, they are liable to critique for not having engaged in a meaningful analysis that is *sine qua non* in the enforcement of fundamental rights.

The genuine fairness and justice are contextually defined. The casuistic approach by the tribunals is bound to result in the diversification of the human rights law at large and to be attended by the increasingly self-referential tone as they proceed along their route of delineating and fleshing out their tailored human rights regime.⁴⁰³ The same conclusion transpires clearly from the positions adopted by practitioners in the course of personal interviews, most of whom concurred as to the order in which jurisprudence is to be consulted.⁴⁰⁴ The tribunals must adjudicate autonomously and

³⁹⁹ Meron, 'Human Rights Standards' (n 207), at 8.

⁴⁰⁰ *Ibid.*; Gradoni, 'The Human Rights Dimension' (n 51), at 85-86, 90, 92 (considering that normative propositions derived from the case law of human rights jurisdictions are 'surely relevant, even though they do not necessarily state human rights norms binding upon the tribunals, and that the tribunals 'cannot avoid taking the decisions of the latter into account'); M. Caianiello, 'First Decisions on the Admission of Evidence at ICC Trials', (2011) 9 *JICJ* 385, at 399 ('undoubted authoritative').

⁴⁰¹ Interview with Judge Asoka Nihal de Silva, ICTR-PJ/03, Arusha, 2 June 2008, at 3 ('We are not bound by their decisions. Sometimes, they have persuasive authority. So, we consider them. We consider them because they are reasoned decisions.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/10 (n 200), at 3 ('The authority of judgments and decisions of the other courts will have persuasive effect, they will guide other Judges who have not had a lot of time dealing with all sorts of issues. There is a matter of expertise that recommends looking at those authorities. But they can never be binding. They can have great weight depending on a number of factors – correct reasoning, for example.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/08 (n 200), at 4 ('So it [Strasbourg jurisprudence] certainly plays a role. But it is something that is not necessarily followed. Obviously if the European or Inter-American Court's ruling is a well-reasoned, persuasive opinion, it would be put in the same category as any other decision to consider.');

Interview with SCSL Judge, SCSL-AJ-01 (n 201), at 5 ('the first place I look is our own Appeals Chamber and at our own decisions, because consistency is very important. Others are not binding on us, but they are persuasive if reasoned and in accordance with the law and our Rules.')

⁴⁰² In a similar vein, see Sheppard, 'The International Criminal Court' (n 280), at 54 (observing that while the ICC may be entitled to adopt the reasoning of the human right courts it deems compelling, it should explain the bases for that adoption).

⁴⁰³ On this tendency, see Cassese, 'The Influence of the European Court' (n 64), at 52 ('the need for references to the decisions of the European Court will gradually lessen').

⁴⁰⁴ Interview with ICTR Judge, ICTR-AJ/09 (n 200), at 3 ('We are still coming across questions which have not been answered previously at an international criminal court level. When one is addressing a question of that nature, when we

on the strength of the comprehensive appraisal of all relevant facts and legal arguments. While the merits of coordination of different courts on human rights issues have been emphasized,⁴⁰⁵ such coordination should never come at the cost of quality of reasoning and true (contextual) justice. The respect for differences does not detract from the inter-curial dialogue and is intrinsic in horizontal, rather than vertical, communication between them. As long as the judges of various courts consider each other's rationales but feel free to take distinct paths in the reasoning *en route* to a configuration of fairness workable in their contexts, the cross-fertilization between courts will be enriching and strengthening the normative foundations of IHRL and international law generally.⁴⁰⁶

To conclude, what does this mean for the determination of the bottom-line level of protection before the tribunals, as compared to that endorsed by human rights jurisprudence? The conclusion, which might appear as uncomfortably agnostic, is that the juxtaposition is a flawed methodology. Whether the tribunals are allowed to accord beneficiaries of fundamental rights with a lower level of protection than human rights courts is simply a wrong question without a possibility of a right answer, insofar as it assumes the validity of the comparison. Instead, it should rather be about reimagining the standards and identifying the right analogues and equivalents. As with most aspects of adjudication by courts, the compliance by the tribunals with their human rights obligations is ultimately the matter of supplying proper reasoning for their acceptance of, and deviation from, foreign legal tests and minimum thresholds and the full consideration of all relevant circumstances of the case and of the institutions, whether or not they are unique to the tribunals.

The deliberative autonomy cuts both ways. In certain situations, the minimum level of protection ascribed to particular rights and interests, when taken in isolation from the other interwoven and competing rights and the context, may appear to be 'lower' than in domestic jurisdictions. But appearances may be deceptive: the tribunal's own 'minimum' standard, when established via genuine analysis, may in fact strike the right balance of fairness in the individual circumstances of the case. For the tribunals, such readjustments will likely be attended by scholarly critique and policy costs in terms of legitimacy and credibility. In order to minimize them, it is vital that the judges take the pains of scrupulously justifying any departures from the established interpretations of human rights by a solid analysis of their law and legitimate context-related considerations. Both the claims of uniqueness of the tribunals' context and those of their

do not have precedent from our courts, and even when we have direct precedent from our courts, it is still a general technique of legal learning to make comparisons with other court systems to decide those issues.');

Interview with ICTR Judge, ICTR-AJ/02, Arusha, 2 June 2008, at 5 ('the influence of the European Court is much weaker than the influence of the jurisprudence of the ICTY and our Appeals Chamber.');

Interview with Judge Short (n 200), at 3 ('most Chambers rely on jurisprudence of the ad hoc Tribunals and only refer to international human rights law where the ad hoc Tribunals' jurisprudence is deficient.');

Interview with Judge Egorov (n 200), at 3 ('Most often we have recourse to the case-law of our Appeals Chamber first and we do refer to the experiences of our colleagues in the ICTY and in the other Trial Chambers. ... Finally, and as a matter of course, we use any other existing jurisprudence');

Interview with ICTR Judge, ICTR-AJ/08, Arusha, 16 May 2008 ('my primary focus is on our decisions and the ICTY decisions. When further review or study is required, I consider further case law issued by human rights institutions or scholars, but this is a source of guidance.'). See also Interview with Legal Officer, ICTR Chambers, ICTR-AO/03, Arusha, 4 June 2008, at 3 ('the influence of this human rights jurisprudence from Europe or say Africa, is non-existent in the practical work. I think the decisions are becoming ... more and more self-referential. So it is actually a tightly woven jurisprudential net. The farther that we can go is to draw from ICTY jurisprudence, but I have not really seen anything from the European Court of Human Rights, and I see that as a problem.');

Interview with SCSL Legal Officer, SCSL-AO/01 (n 201), at 4 ('Unfortunately, I also think that it [human rights case law] has not been relied on as much as it could.')

⁴⁰⁵ See e.g. A.A. Cançado Trindade, 'The Merits of Coordination of International Courts on Human Rights', (2004) 2 *JICJ* 309, at 312; Cassese, 'The Influence of the European Court' (n 64), at 51-52.

⁴⁰⁶ Interview with Legal Officer, ICTR Chambers, ICTR-AO-09, 30 May 2008, at 3-4 ('Il faut laisser au droit international, au système international son originalité, qui est ce système décentralisé qui fonctionne plutôt bien. De façon décentralisée, on a une approche consistante qui donne plus de poids à une norme internationale. ... Je suis d'accord qu'il y a un risque de fragmentation, de conflits entre les jurisprudences. Mais je pense qu'il faut laisser le temps au temps et les choses se développeront, de façon à conduire à un système plus harmonisé.'). See also Schabas, 'Synergy or Fragmentation?' (n 191), at 632; Meron, 'Human Rights Standards' (n 207), at 14 (speaking of the work of both international criminal justice and the ECtHR as 'knitting together a web of rights.').

comparability with domestic settings must be vigorously and comprehensively analyzed. This is a fundamental aspect of the right to a reasoned opinion. In the absence of external supervision, the tribunals should aim at building up a self-standing, comprehensive, and exemplary human rights regime for international criminal proceedings, stocked with all necessary normative paraphernalia that make it such. As an obligation of result, the detailed requirements of a fair trial are informed by idiosyncrasies of international criminal justice. There is no way around the fact that the tribunals must reinvent the wheel of fairness that fits their own tracks. It would have been odd if the tribunals had endeavoured to follow in the tracks laid by other courts and if their performance had been pinned down, as a matter of law *stricto sensu*, to the same metric of fairness as applied to domestic jurisdictions.

4. CONCLUSION

In addressing the meaning and implications of ‘fairness’ as an evaluative parameter, this Chapter has attempted to answer several methodological queries concerning the status and functions of IHRL before the tribunals. While IHRL is in many senses a progenitor and a muse of the international criminal justice project, it is also genetically embedded into the project’s DNA and constitutes the backbone of its procedure. Its normative effects on the procedure are plural and interrelated. It is both formally binding law and a methodological framework for the interpretation and application of law. As was shown, this combination secures it the status of *lex superior* in the legal realm of the tribunals, which has been fully internalized as the overarching ideology of the project.⁴⁰⁷

No less importantly, international criminal procedure has an inherent and distinct communicative value in that it demonstrates the orderly administration of justice and an exercise in the rule of law in the post-conflict settings where it was previously negated by mass criminality, impunity and state connivance or involvement.⁴⁰⁸ In this sense, fairness is the core indispensable content of any didactic message international criminal proceedings could convey to the tribunals’ constituents, and a precondition for such proceedings being taken seriously as a source of best practices or model standards.

The formal status as binding law is characterized by complexities stemming from the duality of human rights standards within the tribunals’ legal regime, which are incorporated into their internal law and form a part of general international law. These complexities are visible whenever the tribunals seek to draw from IHRL in order to deal with gaps in their internal regimes but it offers diverging solutions. The question of primordial grounds for extending the ‘external’ human rights regime to the tribunals has been controversial among scholars, and it is argued here that those are to be found in the delimited scope of their legal personality, rather than in a direct binding effect of the pre-tribunal era’s general international law of human rights. The query is to a large extent academic, because the legislative will to extend the applicability of human rights to the tribunals, their own recognition of such binding nature, and imperative policy reasons for adherence, constitute sufficient reasons to take the applicability of IHRL to the tribunals for granted.

The exact implications of the binding effect of ‘external’ standards drawn from customary law and general principles of law are, however, not easy to appreciate. Their unwritten nature complicates the task of identifying prescriptions at the level of precise and conclusive rules, as opposed to general and abstract principles. Even more importantly, the utility of those sources is

⁴⁰⁷ See Gradoni, ‘The Human Rights Dimension’ (n 51), at 85 (‘the *lex superior* status of human rights obligations inheres in the very idea of international criminal justice.’); M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International Criminal Tribunals’, (2001) 50 *International and Comparative Law Quarterly* 26, at 50 (‘The ideology governing international criminal tribunals is that which identifies “fair trial”. The “rights-based” language elaborating on “fairness” is consistent and compatible with the political origins of the tribunals’).

⁴⁰⁸ Ohlin, ‘Goals’ (n 251), at 67; *id.*, ‘A Meta-Theory’ (n 245).

circumscribed in view of the difficulty of establishing the content of said norms as being in a proper sense applicable to international courts, as opposed to states. Under a modest guise of a faithful application of the human rights provisions in their internal law as interpreted in light of IHRL, international criminal tribunals have had to break a totally new ground. They fashioned and cultivated the human rights law tailored for international criminal proceedings as an emerging rubric of general IHRL. It may well be that this is where their major legacy lies.

This new species of IHRL has grown incrementally and is driven by the ambition and the practical need to create a comprehensive and self-sufficient human rights regime. Its degree of density is perfectly comparable to domestic regimes, as it is equipped by all necessary normative utensils – legal tests, review mechanisms to disclose violations, and remedies to address them. Much like at the domestic level, the tribunals have had to embrace a more comprehensive rights-pluralist rather than a limited accused-centered paradigm of fairness typical for subsidiary systems of human-rights supervision. Whereas the core of IHRL in the criminal law context remains accused-oriented, the tribunals recognize the procedural status and ‘rights’ of other persons whose interests should be factored in the equation of fairness, thereby complementing the IHRL paradigm.⁴⁰⁹ The right to a fair trial as a legal right is the exclusive privilege of the accused, but the treatment of this issue by the tribunals has not been principled and conceptually thought-through. Be it as it may, this underlines the *sui generis* nature of their human rights regime vis-à-vis the regime under the respective human rights conventions. The importance of the emerging human rights law for the international criminal justice system is evident from the fact that the tribunals tend to (self-referentially) rely on each other’s human rights precedents as most relevant. Presumably, this ‘common law’ of human rights in international criminal justice will be of value for domestic courts dealing with international crime cases and seeking to optimize their procedural practices.

Arguably the greatest potency of IHRL in international criminal practice lurks in that law’s function as a methodological framework for the interpretation and application of the law. In this quality, IHRL proves to exert, indirectly and less formally, powerful effects on the adjudication. This in a certain sense ideological function overshadows the formalist source-based approach in fleshing out the nuances of the human rights regime before the tribunals. Not quite as mainstream at the *ad hoc* tribunals, which have frequently given priority to other ideological motives and interpretative means, the function of IHRL as a source of guidance, has now been codified in the Statutes and Rules of the more recent additions to the family of international criminal courts, including the ICC, ECCC, and STL. Although Article 21(3) of the ICC Statute is subject to varying interpretations and the practice is developing, it is certainly the flagman of this tendency. The framework function does not rule out resort to other interpretative methods, but it suffices to elevate IHRL to the kind of *Grundnormen* of supreme normative force in international criminal procedure. This is a primary reason why ‘fairness’, in the broader sense of ‘external’ human rights law, can appositely be used for the critical evaluation of the tribunals’ procedural practices.

The status of IHRL as *lex superior* is ensured thus, rather than by virtue of its location in the sources of law directly applicable to the tribunals. But how is compliance to be ensured in the absence of any external supervision? The system is left to its own devices in this respect, and compliance in that context is largely a matter of judicial self-discipline, wisdom, integrity, and the profound sense of justice – the elements that only to a limited extent depend on regulation. International criminal judges should police themselves in the interpretation and application of human rights law, and their managing to do so is the only real bulwark of the system’s legitimacy. This is akin to a mental exercise of submitting their hypothetical decisions, before they are objectified, to the jurisdiction of an imaginary human rights court and reflecting on what such a

⁴⁰⁹ M. Findlay, ‘Synthesis in Trial Procedures? The Experience of International Criminal Tribunals’, (2001) 50 *International and Comparative Law Quarterly* 26, at 47 (observing, in relation to ECHR, ‘[t]here is little in this version of fair trial which relates to participants beyond the accused (such as victims, witnesses, the prosecutor or the judge), despite the assumption that it is for the courts and the community to oversee these essential procedural components.’).

court would hold when faced with a challenge alleging a human rights violation. Would that court still be able to find the proceedings fair, in their context, and, in case of departure from established interpretations of IHRL, would it be able to agree with the justification?

This does not imply that this is sufficient and should not be complemented by systemic solutions and institutional guarantees. One solution could be submitting the tribunals to the jurisdiction of a human rights supervisory body or court, be it through the extension of jurisdiction of extant institutions or by creating a new institutional layer.⁴¹⁰ The personnel at the ICTR Chambers, when asked about this proposal, were divided, but most interviewees deemed this measure unnecessary and/or unfeasible,⁴¹¹ with only a handful being slightly more enthusiastic.⁴¹² In any event, the baseline is that self-policing by the tribunals in human rights matters remains tremendously important and a formal obligation of courts, as exemplified by Article 21(3) of the ICC Statute.

Distinct from the question of sources, the case law of the human rights courts and monitoring bodies serve the tribunals as a persuasive authority to be consulted whenever the tribunals interpret their legal framework. Such jurisprudence is not a controlling authority on all issues; much less is it binding in a legal sense. The recognition of this status of human rights jurisprudence leads us to the final set of findings relating to the contextual interpretation and application of human rights and, in particular, the lower thresholds that should be ensured. This Chapter's approach towards defining the metric of 'fairness' for international criminal trials is based on the position that the interpretation and application of IHRL by the tribunals in light of their unique legal, institutional and operational context continues to be a practical need and their fundamental duty. This is an outgrowth of their decision-making autonomy and the obligation to ensure true—contextual—fairness in the individual circumstances of a case. Any failures to re-interpret the applicable human rights standards make for an equally appropriate target for censure as a 'liberal approach' overly indulgent about the special circumstances of the tribunals in letting go of the essential guarantees.

The fair administration of criminal justice is the delicate act of balancing, and prioritizing between, the competing interests at stake. Abstract demands to provide the highest standards of procedural justice conceivable, or standards higher than those found in any given domestic jurisdiction are ingenuous rhetoric with little practical meaning. Of course, ideally the tribunals must strive to ensure the highest level of protection of the fundamental rights of the defendants and

⁴¹⁰ See e.g. Sluiter, 'Atrocity Crimes Litigation' (n 391), at 268 ('it is worth seriously exploring the possibility of external supervision of international criminal tribunals for their compliance with human rights law. For any justice system, including the international criminal justice system, however perfect it may be, external checks, with the necessary distance, are vital.');

Fedorova and Sluiter, 'Human Rights' (n 28), at 56.

⁴¹¹ E.g. Interview with ICTR Legal Officer, ICTR-AO/07 (n 216), at 2 ('the very concept of having a Tribunal and an Appeals chamber, and then another organization on the top of it, I do not think that that is the right thing to do.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO-02, 5 June 2008, at 7 ('I think you are putting another administrative level onto these proceedings that are already unduly burdened by administrations. I would hope that, instead of this proposal, what you would have from the outset of the setting up of any kind of international court is a continuing legal education which is obligatory.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/01 (n 200), at 3-4 ('that would just be creating an additional layer of adjudication, and I do not think that it is necessary. I think that the Judges who come to this Court are of the highest qualification and experience and integrity. ... I think that there are adequate safeguards built into the system, rather than having another supra-national authority or court that will supervise the activities of the Tribunal. And I think it would detract from the independence of the Judges here, because the Judges here are not appointed by any national authority.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/09 (n 406), at 3 ('Pourquoi voulez-vous une cour suprême des droits de l'homme au niveau international? Je n'y crois pas, personnellement. Je ne pense pas que ça soit nécessaire dans l'état actuel, dans la mesure où le système fonctionne.').

⁴¹² Interview with Legal Officer, ICTR Chambers, ICTR-AO/03 (n 404), at 3 ('Definitely. ... [Y]ou want for there to be a court to actually supervise the conduct of this Tribunal.');

Interview with Legal Officer, ICTR Chambers, ICTR-AO/05 (n 200), at 4 ('It is an interesting question. I guess I would have no problem with it. It might get little unwieldy, just slow things down even more. ... I think it might be a good idea. Some of the Judges would be a bit temperamental about it.').

any rights of the other parties, participants, and affected persons. But in a real-world international courtroom this can only be an overarching aim, not an operational objective. The ambition to deliver justice that is 'fair enough' is already a highly challenging undertaking.

Thus, in responding to what is 'enough' in 'fair enough', the Chapter rejects the idea of the tribunals' using the interpretations of human rights courts and monitoring bodies as the mandatory 'minimum' standards, in line with the foregoing plea for the need to preserve the tribunal's decisional autonomy. Instead, it suggests that the tribunals should rely on such jurisprudence for qualitative and rationale-based guidance. Its legal tests are subject to scrutiny and readjustment as is necessary. Foreign normative propositions should be translated into the terms organic to the unique (or not so unique) circumstances. The tribunals are to consider and weigh anew additional factors that affect the scope of protection, while excluding desiderata that may be well-established, say, in the ECtHR jurisprudence or HRC's views, but do not attract the same value in the tribunals' own environment. The obligation to accord full respect to fundamental human rights requires the tribunals to painstakingly distinguish their cases from those decided by human rights courts.

Therefore, their jurisprudence is not to be taken as laying down the 'minimum' standards binding upon the tribunals. The latter must devise their own quantifiable parameters of protection and tailored legal tests for catching violations by reimagining the foreign tests. As the only masters of their own human rights regimes, the tribunals forge their tools and aids for doing justice, and not mere lip service, to the obligations. Their accountability as courts ultimately lies in the rigorousness of legal analyses and reasoning. The importance of that judicial virtue multiplies where the tribunals tread on the murky terrain of contextual interpretations toward the downgraded protection. It is in line with this framework that human rights jurisprudence is to be used when appraising trial procedure arrangements in international criminal tribunals. The review must focus not on whether the tribunals simply follow the foreign legal tests as normative dogmas on human rights issues, but whether they ensure the adequate level of fairness in their context and justify their reliance on, or deviation from, the rationale-based guidance obtained from human rights case law.