Introduction

From: The Right to a Fair Trial in International Law
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1. Purpose of This Book

The right to a fair trial is at the heart of human rights protection because ‘without this one right, all others are at risk’. An unfair trial can be devastating to an individual defendant—removing their liberty, destroying their reputation, even taking away their life. But unfair trials are also damaging to entire societies as they are used to undermine democracy and oppress minorities. Between 2008 and 2018, 24 states experienced some form of autocratisation, affecting one-third of the world’s population. In many such states, judges conspire with, or are co-opted by, powerful leaders so that political opponents and critics are silenced through the courts. Journalists are tried on vague and spurious charges, which suppresses public debate. And flawed prosecutions are used as a tool to discriminate against minorities and other vulnerable groups.

To take one example, in the Maldives, former President Mohamed Nasheed, the country’s first democratically elected leader, was imprisoned following a politically motivated trial. He was not the only person targeted—at one point every leader of an opposition party was either in prison or barred from running in upcoming elections because of a previous conviction. President Nasheed’s conviction on trumped-up terrorism charges was based on vague laws and his trial was seriously flawed. Among other violations, two of the three judges presiding over his case acted as witnesses for the prosecution and severely curtailed his rights to adequate facilities for the preparation of his defence. The trial also enabled authorities to disqualify him from running for public office given his conviction for a serious crime.

President Nasheed’s case illustrates the dangerous co-opting of courts to undermine democracy, but it also demonstrates the potential power of international human rights bodies to expose and remedy violations. His trial and detention were found to be in violation of international law by the Human Rights Committee and the Working Group on Arbitrary Detention. On 26 November 2018, the Supreme Court of the Maldives overturned his sentence, saying that he had been charged wrongfully and the case against him should never have gone to trial. At the time of writing, he has re-entered political life as the Speaker of the Parliament of the Maldives.

Outside the context of politicised prosecutions, a survey of conviction rates around the world highlights the systemic problem of unfair trials. In a properly functioning criminal justice system with strong defence rights, a substantial proportion of trials would be expected to result in an acquittal. However, conviction rates around the world are alarmingly high. In China more than 99.9 per cent of defendants are convicted. In Israel the rate is 99.7 per cent. In Russia and the Ukraine, the conviction rate is 99.3 and 99.8 per cent respectively. Japan has a conviction rate of 99 per cent. In the United States, the conviction rate at the federal level has remained above 90 per cent since 2001. And in England and Wales, the conviction rate is over 80 per cent. In many systems the vast majority of defendants never even go to trial. In systems as diverse as Georgia, Israel, and China, more than 80 per cent of charges are settled through the use of guilty pleas in return for promises of a shorter sentence or non-imposition of the death penalty. In other states, a low conviction rate for certain types of defendants is a red flag: for instance, in India, the general conviction rate of 40–50 per cent drops to 6 per cent in cases involving defendants who are politicians. The lack of protection for witnesses and victims in criminal proceedings in India has also moved its own Supreme Court to label the system ‘pathetic’.

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Despite the importance of the right to a fair trial, most leading human rights textbooks do not include a chapter on it or engage in detailed analysis. Existing academic studies on the right to a fair trial tend to focus on only one or two sources, leaving the definition of an international standard unclear. Counsel in domestic courts may therefore tend not to cite an international standard for a fair trial, but instead to focus on national case law or regional treaties. Further, remedies for fair trial violations have not been subject to detailed examination by scholars or practitioners. The purpose of this book is to be both universal and practical. We want to make the law on the right to a fair trial accessible to counsel and meaningful to victims in courtrooms all over the world. We want to make it more difficult for trials to be used by state authorities to suppress dissent or to oppress minorities. We want to bring to life the commitment made by over 170 states that have ratified the International Covenant on Civil and Political Rights.

To this end, this book seeks to explain, in granular detail, what Article 14 of the ICCPR means, by setting out how this Article compares to the equivalent provisions in regional human rights treaties and how all these provisions have been applied by international bodies including United Nations committees, regional human rights courts and commissions, and international criminal courts. We hope that this book will be translated and cited by lawyers and judges so that individuals can benefit from the fact that their state has ratified the ICCPR, defendants can enjoy increased protections in national courts, and other participants in the trial process, and the general public can have increased confidence in the judicial system. Fair trial guarantees are also relevant to those on trial at international courts, and the book deals extensively with their jurisprudence.

Although this book focuses on the right to a fair trial in criminal proceedings, we recognise that both domestic and international bodies are required to assess compliance with fair trial standards in many other scenarios. National courts conduct an assessment of foreign states’ compliance with fair trial standards in the context of claims of forum non conveniens, recognition of judgments and awards, immigration and asylum reviews, and extradition requests. The International Criminal Court must assess fair trial standards, not only in determining the rights of defendants brought before the Court, but also in deciding whether a national court is able to bring a suspect ‘to justice’ under the doctrine of ‘complementarity’. Denial of a fair trial is even a crime that can be charged by the ICC. Fair trial standards are also assessed by the European Union and national governments in evaluating the imposition of sanctions or the revocation of trade and aid. In some domestic systems, intelligence-sharing and counter-terrorism cooperation with other states may be denied or limited if such assistance may contribute to an unfair trial or the denial of justice. And consular assistance obligations may be triggered by a finding that a national faces an unfair trial overseas.

The International Court of Justice, the principal judicial organ of the United Nations, has considered ‘the right to a fair hearing’ in the context of employment disputes involving UN staff members. The UN Security Council has made the sharing (p. 5) of evidence in international accountability mechanisms dependent on its ‘eventual use in fair and independent criminal proceedings, consistent with applicable international law’. And international arbitral tribunals must consider the right to a fair trial in connection with claims of ‘denial of justice’ in investment disputes.

This book intends to define what a fair trial means under international law because international standards provide the minimum protections that states have undertaken to protect. The quality of human rights protection in a state ‘cannot be measured by their enforcement in favour of essentially non-contentious issues ... (but) by the degree to which the social outcasts and marginalised people of [a] society are able to enjoy such benefits and in this respect the ultimate testing ground is criminal law’. Many states are failing
this test, and it is our hope that this book will help efforts in courtrooms around the world to hold them to account.

2. Sources and Components of the Right to a Fair Trial

2.1 Sources of the right to a fair trial in international law

The right to a fair trial is one of the most fundamental components of human rights. Article 14 of the ICCPR is the starting point and organising principle of the right to a fair trial, but the scope and content of the right is not always easy to discern given the multitude of international law sources that define it.

Most academic commentary on the right to a fair trial is divided by source, focusing on the ICCPR, the European Convention on Human Rights, or the case law of the ICC. But for academics and practitioners alike, it is essential to understand how the approach in one system compares to the approach in other systems. The scope of the right to an 'independent and impartial tribunal', for example, may be addressed by jurisprudence of the Human Rights Committee and the Working Group on Arbitrary Detention, pronouncements of the UN Special Rapporteur on the Independence of Judges and Lawyers, or judgments of the European, Inter-American, or African Courts. The situation of a defendant may also implicate other instruments. If he is a foreign national detained overseas, the Vienna Convention on Consular Relations, which provides for the right to consular notification and assistance, may be relevant. And if he is arrested during an armed conflict, the fair trial provisions of the Geneva Conventions may apply. If a defendant is arrested in a state that has not ratified the relevant treaties, such as the ICCPR, he will need to know which protections have crystallised into customary international law that binds all states.

For each component fair trial right, we have examined sources including the international human rights bodies in the UN system; the UN special procedures; international courts and tribunals of general jurisdiction and those with jurisdiction over international crimes; regional courts and commissions; and soft law developed by the UN, regional bodies, NGOs, or groups such as the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights developed by experts and adopted by the UN Economic and Social Council. The case law of national jurisdictions is occasionally referred to for leading cases cited by international courts or innovative decisions that may represent best practice.

Understanding the right to a fair trial may require reference not only to its interpretation by courts, treaty bodies, rapporteurs, experts, and scholars, but also to the preparatory work of the treaty (travaux préparatoires) and the circumstances of its conclusion. The travaux are a supplementary means of interpretation, used to confirm the meaning resulting from the application of principles of treaty interpretation or to determine the meaning when the interpretation ‘leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable’. For this reason, each chapter contains a detailed analysis of the relevant treaty provisions of the ICCPR, including the travaux.

(p. 7) 2.2 Right to a fair trial in international treaties

The right to a fair trial was recognised in the Universal Declaration of Human Rights in 1948 and has been included in all international and regional human rights instruments concluded since then. Of these, the ICCPR of 1966 is the leading instrument. It is one of the most widely ratified human rights treaties, with 173 States Parties drawn from every region of the world, and a permanent specialised body—the Human Rights Committee—that supervises compliance with its terms.
The ICCPR’s fair trial provision, Article 14, has served as the model for regional treaties in Europe, the Americas, Africa, and the Arab region as well as the non-binding declaration adopted by the Association of Southeast Asian Nations. The scope and expression of the right to a fair trial varies in the regional treaties, with some component rights receiving higher protection and others receiving less protection or being omitted altogether. But Article 14 of the ICCPR is the nucleus of international protection and has also provided the foundation for the rights of the defendant in the statutes of the international criminal courts.

International instruments and treaty bodies, as well as the existing scholarship, identify different lists of the rights that make up the right to a fair trial. In this book, we have identified 13 component rights based on the terms of Article 14 of the ICCPR. The book is structured according to these component rights. Article 14(1) provides for the right to equality before courts and tribunals, a fair and public hearing by a competent, independent and impartial tribunal, and a public judgment subject to narrow exceptions. Article 14(2) refers to the presumption of innocence and Article 14(3)(a)–(g) sets out the minimum guarantees. Additional chapters address the rights to appeal and to remedies in Article 14(5) and (6) respectively. And another chapter covers the protection codified in Article 14(7) against double jeopardy. Finally, the requirement in Article 14(4) that the procedure in trials of juveniles must ‘take account of their age and the desirability of promoting their rehabilitation’ is addressed throughout the chapters when relevant. Similarly, the right to ‘fairness’ articulated in Article 14(1), and the related right to ‘equality of arms’, is addressed in chapters on the right to examine witnesses, the right to defence, and the right to equality. The chapters on equality, the presumption of innocence, the right to prepare a defence, and the right to silence also consider situations involving trials that are technically or procedurally fair but underpinned by a persecutory motive or result from entrapment.

2.3 Right to a fair trial: exhaustive list or an expanding ‘bundle of rights’?

A key issue in defining the right to a fair trial is whether the right is set out exhaustively in Article 14 of the ICCPR, or whether the ‘bundle of rights’ contained in this treaty provision, and its regional equivalents, can be expanded upon by reference to other rights, international instruments, and customary international law. Further, some issues that are not explicitly referred to in Article 14 are also relevant to a fair trial, such as the fairness of the prosecutor.

The question of whether Article 14 is exhaustive was squarely faced by the International Court of Justice in the Jadhav case between India and Pakistan following the trial of Mr Jadhav, an Indian national who had been sentenced to death by a military court in Pakistan. India had argued that Pakistan had breached Mr Jadhav’s rights to consular access and protection under Article 36 of the Vienna Convention on Consular Relations, which also breached his rights under Article 14 of the ICCPR because denial of consular access affected his right to a fair trial. India had based its claim primarily on the jurisprudence of the Inter-American Court of Human Rights, which has held that consular rights form part of the ‘due process’ guarantees under the ICCPR. The ICJ responded that its jurisdiction in the case did ‘not extend to the determination of breaches of international law obligations other than those under the Vienna Convention’. But it considered the ‘principles of a fair trial [to be] of cardinal importance in any review and reconsideration’ of Mr Jadhav’s conviction and sentence by the Pakistani courts to ensure ‘full weight is given to the effect of the violation’ of his (p. 9) consular rights. And two judges found that the rights to consular access and protection were inextricably tied to the right to a fair trial.
In particular, Judge Robinson found that the rights to consular access and protection should be added to the minimum guarantees under Article 14 of the ICCPR. In his view, Article 14 did not foreclose the addition of other rights, and the rights to consular access and protection are ‘as much human rights as any of the seven rights in Article 14(3) of the [ICCPR]’. He stated that

the ‘bundle of rights’ in Article 14(3) ‘is not an exhaustive list of those rights; it comprises “minimum guarantees” to which “everyone” is entitled “in full equality”’. Accordingly, ‘other rights may be added to the list, provided they share the essential characteristics of the seven rights in the bundle, that is, they are rights designed to ensure that an individual has the right to a fair hearing guaranteed by Article 14 (1) of the Covenant’.

The concept of Article 14 as a ‘bundle of rights’ that may be expanded upon is supported by the practice of interpreting and applying the Article alongside other rights in the ICCPR, especially Article 9 (the right to liberty), Article 15 (the right against retroactive application of criminal laws or penalties), Article 7 (prohibition on torture and other inhuman or degrading treatment), and Articles 2 and 26 (freedom from discrimination). The interaction of the rights to fair trial and to non-discrimination has, for instance, led the Human Rights Committee to criticise acquittals as well as prosecutions, in states where so-called ‘honour crimes’ committed against women ‘remain unpunished’. The requirement in Article 9(2) that ‘anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him’ is inextricably linked to fair trial rights as it applies to a defendant before they are charged. The two rights, read together, represent an escalating scale of protection. For instance Article 9 requires that upon arrest, a defendant is informed of the ‘reasons for his arrest’. But once authorities issue a criminal charge, Article 14(3)(a) requires a person to be informed of the charge ‘promptly and in detail in a language which he understands’. Article 14 is more precise because it is enough for an arrested person to be aware of the reasons for the arrest under Article 9(2), whereas he must (p. 10) always be formally charged to satisfy Article 14(3)(a). Article 9 serves as a precursor to Article 14, and actions that violate the former may also violate the latter. Similarly, delays in bringing a defendant to trial or lengthy pre-trial detention may breach both provisions. Ultimately, if violations of the right to detention are sufficiently egregious, they may compromise the very ability to ever hold a fair trial.

A related point is that what constitutes a fair trial ‘cannot be the subject of a single unvarying rule’ but depends on the circumstances of the case. International human rights bodies will evaluate the overall fairness of the proceedings. The violation of a specific component may be ‘so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings’. In that situation, it is for the domestic court in the first place to assess whether the procedural defect has been remedied in the course of proceedings. The cumulative effect of procedural defects may violate the right to a fair trial even if each defect, taken alone, would not have rendered proceedings unfair.

**2.4 Right to a fair trial in international criminal courts**

Various international criminal courts have been created through treaties or by the UN Security Council to hold trials of defendants accused of international crimes such as genocide, crimes against humanity, and war crimes. These courts interpret and apply the right to a fair trial primarily by reference to their statutes and rules, but their constitutive instruments and rules of procedure are stated to be in compliance with the right to a fair
trial in international human rights law. Their practice is therefore informative as an application of this right.

During the drafting of the ICTY Statute, the report of the UN Secretary-General stated that it was 'axiomatic that the [ICTY] must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings’ including ‘in particular, [those] contained in Article 14 of the International Covenant on Civil and Political Rights’.67 The ICTY’s statute ‘reflects’ these standards on fair trials and its jurisprudence confirms that ‘it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.’69 The SCSL Appeals Chamber similarly stated that its proceedings ‘must be in tune with international human rights instruments’70 and the first STL President also considered it ‘axiomatic’ that international tribunals ‘may not derogate from or fail to comply' with international general norms when referring to the right to justice.71 The ICC Statute expressly provides that ‘[t]he application and interpretation of law ... must be consistent with internationally recognized human rights.’72

At the same time, the application of human rights law by the international criminal courts is in a different context to domestic criminal courts and without any supervision by treaty bodies. The courts may grant higher protections than under international human rights law or seek to justify a departure from principles that apply to national courts because of their distinct mandate, including the gravity and large scale of the crimes within their jurisdiction, the interest of the international community in prosecuting such crimes, their reliance on state cooperation, and the complexity of their proceedings.74

The denial of a fair trial has itself occasionally been prosecuted as a crime against humanity and a war crime.75 The first prosecutions were before national courts and military commissions of Allied Countries after World War II.76 And in its first judgment, (p. 12) the Extraordinary Chambers in the Court of Cambodia convicted a defendant of the grave breach of the Geneva Conventions of ‘wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial’.77 At the ICC, the prosecutor has alleged that armed groups in Mali have committed the war crime of the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.78 The Pre-Trial Chamber has confirmed such charges against a defendant.79

2.5 Right to a fair trial in national courts

A counsel advising a defendant on his fair trial rights not only has to take into account the standards under international law as set out in the relevant treaties, but also how these standards may be applied in the domestic legal system.

Domestic criminal trials may operate very differently. For instance, in civil-law countries, investigators often have an obligation to collect exculpatory as well as incriminating material,80 the pre-trial questioning of witnesses can be more extensive,81 in absentia trials are more common,82 and defendants are less likely to have the ability to represent themselves.83 But international standards on fair trials operate across all systems, regardless of the legal tradition.

Counsel wanting to invoke the right to a fair trial in international law by reference to the ICCPR or other international instruments will, however, have to consider how the treaty obligations of the state in which the trial takes place are incorporated into domestic law (in dualist systems) and whether the obligations prevail over inconsistent domestic law (in both monist and dualist systems).84 If counsel is relying on a customary aspect of the right to a fair trial before an international body, they should take into account that this body may be reluctant to apply a customary norm (p. 13) against a state that has not affirmatively consented to it in a treaty. But an international criminal court and a domestic court in a
monist system may be more open to applying a customary norm directly, even when it conflicts with domestic law to the contrary.85

3. Right to a Fair Trial in Customary International Law

The right to a fair trial is a fundamental human right, but there has been little analysis of the degree to which the right, and its various components, have achieved the status of customary international law. In our view, there is strong evidence that the right as a whole, as well as most of the 13 component rights set out in Article 14 of the ICCPR, have achieved customary status.

The customary status of the component rights to a fair trial has practical implications because customary rules are binding on all states, regardless of whether they are parties to a treaty.86 For example, the Working Group initially invoked the ICCPR in all cases ‘even where the state in question had not ratified the ICCPR’ on the basis that nearly all of the provisions of the ICCPR had achieved customary international law status.87 In response to strong objections from governments, in particular Cuba, in 1996 the UN Commission on Human Rights requested that the Working Group apply the ICCPR only to states parties to the ICCPR.88 The Working Group’s opinions now indicate whether the state is a party to the ICCPR, but it still does invoke the ICCPR in cases involving non-party states; the Working Group also relies on the Universal Declaration of Human Rights.89

(p. 14) 3.1 Right to a fair trial is a rule of customary international law

The customary status of the right to a fair trial as a whole is supported by widespread and representative state practice and ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’, also known as opinio juris.90 Although this is not set out in the ICCPR,91 nor clearly recognised by the Human Rights Committee,92 the following factors support the right’s customary status: treaty practice, the law applicable in armed conflicts, its non-derogable nature, suggestions that it is a peremptory norm of general international law (jus cogens), and the practice on reservations. There is also separate evidence that most, if not all, of the components of the right to a fair trial have themselves reached the status of customary law.93

The adoption of the right to a fair trial in treaties is strong evidence that these rights have achieved the status of customary international law on the basis that it constitutes extensive state practice as well as evidence of opinio juris.94 The right appears in all the major human rights instruments concluded by the UN as well as regional organisations, ‘numerous military manuals’,95 and features in the statutes of all international criminal courts.96 Even states not party to the ICCPR have codified fair trial rights in their domestic legislation.97

The right’s customary status in international humanitarian law is also well established. The International Committee of the Red Cross, in its authoritative study on customary international humanitarian law, concluded that ‘[s]tate practice establishes [the right to a fair trial] as a norm of customary international law applicable in both international and non-international armed conflicts’.98 Fair trial principles were enshrined in the Geneva Conventions, in particular Common Article 3(1)(d). And in discussing these provisions, the Inter-American Commission on Human Rights observed that the (p. 15) ‘fair trial protections in the 1949 Geneva Conventions ... have been recognized as reflecting customary international law governing penal prosecutions in times of armed conflict’.99

Customary status has also been confirmed by international bodies. For instance, the ICTY Appeals Chamber has affirmed that ‘[t]he right to a fair trial is, of course, a requirement of customary international law’.100 The Inter-American Commission considered that ‘[i]t is beyond question that the core rights protected under the American Declaration, including the right to life, the right to liberty and the right to due process and to a fair trial, constitute
customary norms of international law’. The ECOWAS Court of Justice stated that the right to a fair trial ‘is widely accepted as forming part of customary international law’.102

International bodies have confirmed that the right to a fair trial is non-derogable, meaning that no exception to it is permitted even during a time of public emergency ‘which threatens the life of the nation’.103 The Human Rights Committee has clarified that even though the right to a fair trial is ‘not included in the list of non-derogable rights’ in the ICCPR,104 states parties may ‘in no circumstances’ invoke Article 4 of the ICCPR—which allows derogations—as justification for acting in violation of humanitarian law or ‘peremptory norms of international law, for instance … by deviating from fundamental principles of fair trial’.105 Along the same lines, the Inter-American Commission has explained that:

Where an emergency situation is involved that threatens the independence or security of a state, the fundamental components of the right to due process and to a fair trial must nevertheless be respected … although Article 8 of the Convention is not explicitly mentioned in Article 27(2), states are not free to derogate from the fundamental due process or fair trial protections referred to in Article 8 and comparable provisions of other international instruments. To the contrary, when considered in light of the strict standards governing derogation, the essential role that due process safeguards may play in the protection of non-derogable human rights, and the complementary nature of states’ international human rights obligations, international authority (p. 16) decidedly rejects the notion that states may properly suspend the rights to due process and to a fair trial.106

In addition, the African Commission has held that no derogation from the right to a fair trial—or any right in the African Charter—is permitted at all. Although the Charter itself is silent on the question of derogating from any part of the right to a fair trial, the Commission has held that the Charter ‘does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war … cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.’107 The Arab Charter expressly treats the right to fair trial as non-derogable.108 And the American Convention provides that the principle of non-derogability extends to ‘the judicial guarantees essential for the protection of … rights’ for which no derogation is permitted,109 which may be presumed to include fair trial guarantees.110

There is evidence that the right to a fair trial is not only a customary norm, but one that has achieved the status of a jus cogens norm, meaning that it is ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.111 Judge Robinson, of the ICJ, ICTY, and Inter-American Commission, has concluded that the right to a fair trial is absolute and binding on all states, and constitutes a jus cogens norm.112 Judge Cançado Trindade, of the ICJ and Inter-American Court, has similarly held that the right is ‘part of the sphere of jus cogens’.113 In addition, the Working Group has observed that the related ‘conventional and customary prohibition of arbitrary detention has been authoritatively recognized as a peremptory norm (jus cogens) of international law’.114 Given (p. 17) that the partial or non-observance of the right to a fair trial may be so grave as to give a person’s deprivation of liberty an arbitrary character, the jus cogens status of the prohibition on arbitrary detention suggests that the right to a fair trial is also peremptory in nature.115

The customary status of the right to a fair trial as a whole is not undermined by the practice on reservations. Although widespread reservations to a treaty or provision that ‘reveal profound disagreement’ among parties may indicate that ‘there is clearly no norm under customary international law’,116 the practice on reservations to the right to a fair trial, while extensive, does not indicate deeply divided views among states. There are over 40
declarations and reservations to Article 14 of the ICCPR,\textsuperscript{117} which is the highest number of reservations for any article of the Covenant. But the majority reflect concerns about resource constraints or specific appellate procedures, rather than fundamental disagreements regarding the content of the right. Moreover, the Human Rights Committee has clarified that ‘[w]hile reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Convention’.\textsuperscript{118} The Committee has also said that a state may not reserve the right ‘to presume a person guilty unless he proves his innocence’ because it is a customary norm.\textsuperscript{119}

The most common reservations to the ICCPR relate to the guarantee of compensation in situations where there has been a miscarriage of justice and the provision of legal services to a defendant free of charge for an indigent defendant.\textsuperscript{120} The reservations are usually couched in terms of the problems of implementation due to resource constraints or the availability of lawyers.\textsuperscript{121} Another common reservation concerns the ability of an appellate court to render a harsher punishment than that imposed by the lower court or to reverse an acquittal.\textsuperscript{122} Norway, Trinidad and Tobago, and the Netherlands reserve the right to have the highest court hear certain cases at first instance.\textsuperscript{123} Some states have made reservations to the right of defendants to have public trials at which they are present.\textsuperscript{124} France has a reservation to the effect that Article 14 ‘cannot impede enforcement of the rules pertaining to the disciplinary regime in the armies’.\textsuperscript{125} There are also a few reservations to the prohibition on double jeopardy when there has been fraud or procedural defects in earlier proceedings, or in legal systems in which national and regional authorities have differing degrees of autonomy.\textsuperscript{126} Many of these reservations are unnecessary as they refer to limits on the scope of the rights in the treaties as they have been interpreted by regional and international bodies, but in some instances the reservations preceded recognition of the limits.\textsuperscript{127}

The practice of states in the regional treaties broadly resembles the practice in relation to the ICCPR. Of the European Convention’s 47 parties, 27 have filed reservations to one or more provisions of the Convention, with the majority relating to one or more provisions of Article 6 on fair trial guarantees.\textsuperscript{128} Like in the ICCPR context, these reservations do not call into question the fundamental content of the right. A common reservation relates to the requirement of a ‘public hearing within a reasonable time’.\textsuperscript{129} Some states have made reservations to the right of a defendant ‘to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require’ because resources or domestic laws may constrain a state’s ability to provide free legal services in some cases.\textsuperscript{130} There are also ad hoc reservations on discipline in the armed forces\textsuperscript{131} and the burden of proof.\textsuperscript{132}

(p. 19) Nor does the practice relating to the Inter-American Convention change the conclusion that there is strong consensus among states on the right to a fair trial. Of the 23 parties to the American Convention, only two have made reservations to Article 8 on fair trials.\textsuperscript{133} Venezuela had made a reservation that ‘[p]ersons accused of an offense against the res publica [crimes against public administration] may be tried in absentia’, but withdrew from the Convention in 2012.\textsuperscript{134} Dominica included a reservation on the right to counsel, expressing concern over resource constraints on public funding to pay for defence counsel.\textsuperscript{135} The African Charter has 54 states parties, and there are no reservations to Article 7.\textsuperscript{136}

Taken as a whole, the evidence of state practice and \textit{opinio juris} weighs in favour of the right to a fair trial being a rule of customary international law. The evidence of its customary nature in situations of armed conflict as well as public emergency is particularly
compelling. Given that the right must be honoured when order breaks down, it is necessarily binding on all states during peacetime as well.

3.2 Component rights of a fair trial and customary international law

There is strong evidence that the right to a fair trial as a whole is non-derogable.\textsuperscript{137} And there is also strong evidence that many of the 13 components of the right to a fair trial set out in Article 14 of the ICCPR have themselves achieved the status of customary international law. This is indicated by treaty practice, the law applicable in armed conflict, and, in particular, the detailed practice on derogations.

Many component fair trial rights are specifically referred to in international and regional human rights instruments and in the statutes of international criminal courts.\textsuperscript{138} And even when a treaty is silent regarding a component right, the right is often implied through the case law of the bodies responsible for interpreting the treaty.\textsuperscript{139}

In addition, the ICRC’s Customary International Law Rule 100 provides that in a situation of armed conflict ‘no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’\textsuperscript{140}. The list of these guarantees corresponds to the component fair trial rights in Article 14 of the ICCPR.\textsuperscript{141} A detailed comparison of how the application of these guarantees under international humanitarian law contrasts with their application in peacetime falls outside the scope of this book, but it is clear that the fundamental principles apply in both situations, even if modifications may be made for the conditions that exist during armed conflict.\textsuperscript{142}

3.2.1 Derogations and component fair trial rights

Of the 13 component fair trial rights listed in Article 14 of the ICCPR,\textsuperscript{143} the right to a public trial and the right to translation (an aspect of the right to an interpreter) are potentially derogable. The Human Rights Committee has clarified that ‘States parties may in no circumstances derogate from Article 14 if doing so would mean ‘acting in violation of humanitarian law or peremptory norms of international law, for instance ... by deviating from fundamental principles of fair trial, including the presumption of innocence’.\textsuperscript{144} The word ‘including’ makes the reference to the presumption of innocence non-exhaustive.

Moreover, the African Commission has considered that Article 7 of the African Charter is ‘non-derogable’, meaning that all fair trial guarantees contained in it must be ensured at all times.\textsuperscript{145}

According to the Human Rights Committee, the right to a competent, independent and impartial tribunal ‘is an absolute right that is not subject to any exception’.\textsuperscript{146} The ‘Siracusa Principles’ adopted by the UN Economic and Social Council, the Arab Charter, and the Inter-American Commission list it as a non-derogable right,\textsuperscript{147} and it is also guaranteed by international humanitarian law instruments.\textsuperscript{148}

The Human Rights Committee has recognised that the right to be presumed innocent is one of the ‘fundamental requirements of fair trial’ that cannot be derogated from, and ‘must be respected [even] during a state of emergency’.\textsuperscript{149} The non-derogable nature of the presumption of innocence has also been recognised by the Inter-American (p. 21) Commission on Human Rights,\textsuperscript{150} and the Siracusa Principles\textsuperscript{151} and is guaranteed under international humanitarian law.\textsuperscript{152}

The right to know charges and prepare a defence has been recognised as non-derogable by the African Commission, which stated that ‘even if there is a state of emergency in a country that threatens the security of a nation, a person’s right to be informed of the charges ... cannot be suspended/derogated from’.\textsuperscript{153} The ‘right to be informed promptly and intelligibly of any criminal charge’ and ‘the right to adequate time and facilities to prepare a defence’ are also non-derogable according to the Inter-American Commission and the Siracusa Principles.\textsuperscript{154} When Sri Lanka derogated from the right to have adequate time and facilities for the preparation of a defence, the Human Rights Committee expressed concern...
that derogation from this right may not fully comply with the ICCPR.\textsuperscript{155} And the right to know the charges and prepare a defence are guaranteed in international humanitarian law instruments.\textsuperscript{156}

The right to counsel is listed as non-derogable in the Siracusa Principles and the report of the Inter-American Commission.\textsuperscript{157} In the context of Sri Lanka, the Human Rights Committee expressed concern that derogation from the right to communicate with counsel may not fully comply with the ICCPR.\textsuperscript{158} When Turkey notified a derogation in 2016, following the alleged ‘coup attempt’ that had taken place there, this purportedly included the right to counsel; a similar derogation was filed in relation to the European Convention.\textsuperscript{159} This led the Council of Europe’s Commissioner for Human Rights to observe that the Turkish practice raised ‘very serious questions of compatibility with the ECHR and rule of law principles, even taking into account the derogation in place’.\textsuperscript{160} He gave the example of ‘[r]estrictions to the right of access to a lawyer, (p. 22) including the confidentiality of the client-lawyer relationship for persons in detention, which could affect the very substance of the right to a fair trial’.\textsuperscript{161} The right to counsel is also included in international humanitarian law instruments.\textsuperscript{162}

The right to be tried without undue delay is non-derogable, although the views of international bodies are more divided than with respect to other component rights. It is not listed as a non-derogable right in the Siracusa Principles, and according to the Inter-American Commission, it is one of the ‘[p]otentially derogable aspects of due process and fair trial protections’.\textsuperscript{163} The Commission has also acknowledged that derogation from the right to be tried without undue delay might allow for a period of pre-trial detention longer than would otherwise be permissible under ordinary circumstances, where such measures are demonstrated to be required by the emergency situation.\textsuperscript{164} However, international humanitarian law instruments guarantee the right to be tried without undue delay.\textsuperscript{165} The ICRC Study elaborates that the actual length of time ‘must be judged on a case-by-case basis taking into account factors such as the complexity of the case, the behaviour of the accused and the diligence of the authorities’.\textsuperscript{166} In practice, Nicaragua derogated from the right to be tried without undue delay under the ICCPR in the 1980s.\textsuperscript{167} Neither the Human Rights Committee nor other parties to the Covenant protested against the derogation, but there was also no express recognition that the derogation was valid and no cases addressing the issue.

International human rights law suggests that the right to be present is non-derogable. Most clearly, the Siracusa Principles expressly provide that ‘the right to be present at the trial’ is non-derogable.\textsuperscript{168} International humanitarian law guarantees the right to be present with Additional Protocols I and II providing that ‘[a]nyone charged with an offence shall have the right to be tried in his presence’.\textsuperscript{169}

(p. 23) As regards the right to examine witnesses, the Inter-American Commission has stated that the ‘right to attendance of witnesses’ is non-derogable,\textsuperscript{170} but has suggested that ‘the right of a defendant to examine or have examined witnesses presented against him or her could ... be, in principle, the subject of restrictions in some limited instances’.\textsuperscript{171} Its reasoning supporting such a conclusion, however, refers to limitations on the defendant’s right to examine witnesses, for instance because of ‘threats to [the witness’s] life or integrity’, and to procedures ‘whereby witness’ anonymity may be protected’ during the criminal process.\textsuperscript{172} These restrictions have been recognised by international human rights bodies as permissible limitations compatible with the right to examine witnesses as enshrined in international instruments, rather than departing from such instruments and thus requiring a formal derogation in times of emergency. According to the Siracusa Principles, respecting the right to ‘obtain the attendance and examination of defense witnesses’ is ‘essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation’.\textsuperscript{173} And international humanitarian law guarantees the right of a defendant to examine, or to have examined, witnesses against
The failure to guarantee this right was a basis for the finding of a violation of the right to a fair trial in several post-Second World War war crimes trials at Nuremberg. This suggests that such a right should not be derogable even in times of emergency.

The right to silence is considered non-derogable by the Inter-American Commission and the Siracusa Principles. More specifically, the Human Rights Committee has stated that since the prohibition against torture or cruel, inhuman or degrading treatment or punishment is absolute, ‘no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence [in criminal trials,] including during a state of emergency’. International humanist law guarantees the right not to ‘be compelled to testify against himself or to confess guilt’.  

The right to equality before courts and tribunals is non-derogable. Article 4(1) of the ICCPR prohibits discrimination in times of a public emergency, providing that even if states may ‘take measures derogating from their obligations under the … Covenant’, such measures must not be ‘inconsistent with their other obligations under international law and [must] not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’. According to the Human Rights Committee, even though the provisions on equality, including Article 14(1), ‘have not been listed (p. 24) among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.’ The Inter-American Court has gone even further by holding that ‘the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens’. The African Commission has determined that Articles 2 and 3 of the African Charter (on anti-discrimination and equal protection) are non-derogable. International humanitarian law also guarantees the right of a defendant to equality before the courts.

The right to appeal is non-derogable according to the Siracusa Principles and the Inter-American Commission. The African Commission has specifically stated that the ‘right to appeal [is] a general and non-derogable principle of international law’. It is a right guaranteed in international humanitarian law instruments. The ICRC Study calls the right to appeal ‘a basic component of fair trial rights in the context of armed conflict’.  

The right not to be subject to ‘double jeopardy’ is non-derogable in the Siracusa Principles. And although the Inter-American Commission did not list it as non-derogable, the Arab Charter and Protocol 7 of the European Convention expressly prohibit derogations from this component fair trial right. International humanitarian law guarantees the right of a defendant not to be subject to double jeopardy.

The Inter-American Commission has stated that the right to a public trial is ‘potentially derogable’ if derogation is ‘considered strictly necessary in the interests of justice and on a case by case basis’, such as when derogation would ‘protect the life, physical integrity and independence of judges and other officials involved in the administration of justice where their lives or physical integrity are threatened, subject to such measures as are necessary to ensure a defendant’s non-derogable fair trial rights’. In addition, the Siracusa Principles list the right to be tried in public among the rights ‘essential in (p. 25) order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation’. However, the Siracusa Principles also provide that the right to publicity may be derogated from ‘where the court orders [this] on grounds of security with adequate safeguards to prevent abuse’.
But the right to a public trial can be limited on grounds of ‘national security’ and to protect the lives of participants even in peacetime, and other international law sources specify that the right is non-derogable.\(^{193}\) And given that international humanitarian law guarantees the right of at least some members of the public to attend a trial,\(^ {194}\) and guarantees the right to a public judgment for certain offences,\(^ {195}\) this suggests that at least these aspects of the right to a public trial should not be derogable even in times of emergency.

Finally, the right to an interpreter (but not necessarily translation) is a non-derogable right when the defendant does not understand or speak the language of the court. This is the position of the Inter-American Commission, at least in relation to terrorism trials.\(^ {196}\) International humanitarian law also guarantees the right to an interpreter,\(^ {197}\) but is silent as to the right to translation. The right to an interpreter (or to translation) is not listed as a non-derogable right in the Siracusa Principles. The better view is that the right to translation is derogable, but the right to an interpreter is non-derogable.

In sum, the guarantee of component fair trial rights under international humanitarian law during armed conflict and their treatment as non-derogable during a public emergency provides a baseline for respect at other times because there is no justification for lesser human rights protection when the situation is more peaceful. The law and practice applicable during armed conflict and emergencies indicates that nearly all of the component fair trial rights must be respected at all times—and this logically compels the conclusion that they must be respected by all states under customary international law in emergencies as well as in peacetime. In addition, there is strong evidence that the right to a fair trial as a whole is part of customary international law. Therefore, the right—and most of its components—apply even in states that have not ratified the ICCPR or a regional treaty enshrining the right.

\[(p. 26)\]

4. **Scope of the Right to a Fair Trial**

4.1 **Right to a fair trial in criminal proceedings**

In this book, we limit our analysis to criminal proceedings. At the same time, the boundary between the right to a fair trial in civil and criminal proceedings is not a bright line. The overarching right to a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’ in Article 14(1) of the ICCPR is expressly applicable to both criminal and civil proceedings.\(^ {198}\) And even though Article 14(2)–(5) and 14(7) apply to persons charged with a criminal offence, there is case law that provides for ‘parallel guarantees for non-criminal proceedings’.\(^ {199}\) At the same time, there are certain rights in Article 14(2)–(7) that could only apply to criminal proceedings, such as the right to be presumed innocent until proven guilty and the right to be protected from double jeopardy.\(^ {200}\)

The definition of ‘criminal charge’ for the purposes of Article 14 is broader than what is usually qualified as ‘criminal’ in domestic law. According to the Human Rights Committee, even though criminal charges relate in principle to acts declared to be punishable under domestic criminal law, the concept ‘may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity’.\(^ {201}\) The Working Group similarly considers proceedings to be criminal where ‘sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative’.\(^ {202}\)

The European Court also conducts its own assessment of whether proceedings are ‘criminal’, taking into account the severity of the sanctions.\(^ {203}\) It has developed three criteria for determining the existence of a ‘criminal charge’: ‘the legal classification of the measure in question in national law, the very nature of the measure, and the nature and degree of severity of the “penalty”’.\(^ {204}\) According to the European (p. 27) Court, domestic
classification of a law as administrative does not mean that it will not trigger fair trial protections. Conversely, the European Court does not apply the right to a fair trial to proceedings in which detainees try to challenge their deprivation of liberty.

The Inter-American Court has broadly interpreted the American Convention’s reference to the application of fair trial rights to a hearing ‘in the substantiation of any accusation of a criminal nature made against [the defendant]’ and to ‘[e]very person accused of a criminal offense’. It has extended the application of minimum guarantees to ‘matters which concern the determination of the rights and obligations of a civil, labor, fiscal or any other nature’ so that ‘a person has the right to due process in the terms recognized for criminal matters, to the extent that it is applicable to the respective procedure’. It has called for the application of ‘substantially the same [guarantees] as those established in paragraph 2 of Article 8 of the Convention’ with regard to punitive administrative decisions such as those involving a ‘manifestation of the punitive powers of State’.

Similarly, the African Charter’s reference to fair trial rights relating to a person’s ‘right to have his cause heard’, with no express limitation to criminal proceedings, has allowed the African Commission to apply the component rights to administrative proceedings, including the expulsion of refugees.

(p. 28) 4.2 Right to a fair trial in the state’s territory

The right to a fair trial is most often litigated in relation to trials that took place on a state’s territory. However, a trial to be held overseas may be anticipated to be so unfair that it will result in a ‘flagrant denial of justice’ which justifies the non-extradition of a defendant to stand trial there. According to this ‘stringent’ test established by the European Court, a ‘flagrant denial of justice’ requires more than ‘mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6’; there must be ‘a breach of the principles of fair trial … which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right’. The test has been met on occasions when there was a real risk of evidence obtained under torture (of the defendant or witnesses) being used in a trial against a defendant; a real risk of a defendant being denied access to an independent and impartial tribunal to test the legality of his pre-trial detention; a real risk of a defendant being tried in military commissions that did not offer guarantees of impartiality of independence of the executive and were not legitimate as courts established by law both under US and international law; and a real risk of a defendant facing the death penalty following a trial and conviction in absentia. The European Court has also indicated that ‘certain forms of unfairness could amount to a flagrant denial of justice’, including: ‘conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence … ; detention without any access to an independent and impartial tribunal to have the legality the detention reviewed … ; and deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.’

(p. 29) The Human Rights Committee has recognised that certain violations reach a higher bar than simply a regular ‘violation’ and may amount to a ‘denial of justice’ in the context of the right to a fair trial, but to date this has been relevant to the Committee showing less deference to the domestic court when it comes to analysis of evidence rather than in the context of an extradition procedure. Other international human rights bodies have spoken of ‘flagrant’ denials of justice in the context of fair trials, but have not found a violation of that specific right by sending states.
4.3 Right to a fair trial during the trial phase of criminal proceedings

For the sake of clarity and space, this book focuses on the trial phase of proceedings up to and including appeal. A trial usually begins when the charges are read out to the defendant and he enters a plea before a judge or jury. In common law countries, it continues for the opening addresses of the parties; the prosecution case, including witness testimonies; the defence case in reply; as well as the parties’ closing arguments and any summing-up by the judge to the jury. The trial will usually end when the judge or jury deliver their verdict and judgment and, in the case of a guilty verdict, when the defendant is sentenced. In a civil law system, the trial can be much shorter because the court or a part of the court is actively involved in investigating the facts of the case before the trial begins.

The book does not cover the investigation, conditions of detention, or pre-trial proceedings in depth. However, most of the chapters do refer to the extension of the right to the pre-trial stage despite the fact that the right is framed in many international human rights instruments as applying to a defendant as the ‘accused’ or ‘everyone charged with a criminal offence’, rather than a suspect who has yet to be charged.\(^{222}\) And despite the fact that many human rights treaties grant rights to defendants that relate to ‘the determination of any criminal charge’, which could have been understood to exclude sentencing, the sentencing stage is often considered part of the trial by international human rights bodies and many fair trial rights extend to this phase.\(^{223}\) In addition, it must be recognised that some violations of a defendant’s rights at the pre-trial or sentencing phase in themselves lead to violations of the right to a fair trial. This includes a defendant who is ‘unfit’ being made to stand trial, and the imposition of disproportionate sentences at the end of a trial.

4.3.1 Pre-trial phase, including fitness to stand trial

Some violations of a defendant’s rights at the pre-trial phase make it impossible for a defendant to receive a fair trial. For instance, the use of evidence obtained by torture or the empanelling of a racist jury may irreparably taint the proceedings that follow.\(^{224}\) Nor can justice be done if the judges are following orders from the state, the key witnesses have been bribed, the charges are inherently vague, or the legislation itself violates human rights.\(^{225}\) International criminal courts have considered whether the illegal abduction or arrest of a defendant violates his right to a fair trial in international proceedings.\(^{226}\)

A defendant who is mentally unfit to stand trial cannot be granted a fair process. Fitness to stand trial is not expressly mentioned in international human rights instruments, but it is considered ‘as an aspect of the broader notion of fair trial’.\(^{227}\) A defendant is fit to stand trial when his capacities allow him to ‘participate effectively’ in the trial.\(^{228}\) According to the European Court, such ‘effective participation’ includes ‘not only the right to be present, but also to hear and follow the proceedings’ and it ‘presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed’.\(^{229}\) The decision as to whether a defendant is fit to stand trial should be made by the courts, with assistance from medical experts when necessary.\(^{230}\) But (p. 31) unless there is an indication from the defendant’s behaviour that he is not following the proceedings, or he or his counsel raise the issue of his fitness, the trial court may assume that he is fit.\(^{231}\) If a defendant is considered unfit to stand trial, the courts should either adjourn the trial until the defendant becomes fit to stand trial\(^{232}\) or, if there is no substantial likelihood that the defendant will become fit again, the trial may be terminated indefinitely.\(^{233}\) But if a defendant’s mental or physical difficulties can be alleviated through practical adjustments or special assistance
the courts should provide the defendant with such measures instead of declaring him unfit.234

4.3.2 Sentencing phase, including proportionality of sentences

Even if a trial is fair, a sentence may be so disproportionate to the offence that it breaches human rights. Although international human rights bodies have not stated this in the clearest terms, this must be the case: it is of little consolation to a defendant who is sentenced to 50 years in prison for stealing a chocolate bar that his trial was speedy or that he was able to call witnesses in his defence. In practice, the Human Rights Committee has tended to consider disproportionate sentences to be violations of the right to be free from arbitrary detention rather than the right to a fair trial.235 The deference shown to national courts may also deter the Committee from pronouncing on ‘the measurement of sentences’.236 For instance, the Working Group has grouped ‘long prison sentences ... disproportionate with the allegations’ with fair trial violations, such as summary trials and trials with procedural defects.237 In a case in which a defendant was (p. 32) sentenced to life imprisonment for arriving in Iraq without a passport, the Working Group found a violation of his right to a fair trial taking into account that he was sentenced to a ‘harsh and disproportionate sentence’ after a summary trial for which he lacked legal assistance.238 And the Privy Council has found that a ‘manifestly disproportionate and arbitrary’ sentence violated section 10 of the Mauritius Constitution, which mirrors Article 14 of the ICCPR.239 The European Court has found the imposition of an ‘irreducible’ or mandatory life sentence to be a violation of the prohibition on torture or inhuman or degrading treatment or punishment rather than the right to a fair trial.240 It has found imprisonment to be a ‘disproportionately severe’ penalty for contempt or defamation and a violation of the right to freedom of expression.241 The Court has also held that a sentence may be disproportionate to the extent that crimes were incited through entrapment by the police. In the Court’s view, ‘as a matter of fairness, the sentence imposed should reflect the offence which the defendant was actually planning to commit’ and it would be unfair to punish him ‘for that part of the criminal activity which was the result of improper conduct on the part of the State authorities’.242

The disproportionality of a sentence is also an express basis for appeal at the ICC.243 The Appeals Chamber noted that its ‘primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber’s role is not to determine, on its own, which sentence is appropriate, unless ... it has found that the sentence imposed by the Trial Chamber is “disproportionate” to the crime. Only then can the Appeals Chamber “amend” the sentence and enter a new, appropriate sentence.’244

(p. 33) 4.4 Who enjoys the right to a fair trial?

The right to a fair trial belongs to every defendant charged with a criminal offence, every person who faces a deprivation of liberty and, in some cases, execution if convicted at trial. As one commentator has observed, ‘[t]he ghost of innocent men convicted must continue to hover over international criminal justice just as it hovers over domestic criminal law enforcement. It is for good reasons that in enumerating “fair trial” rights, international human rights documents mention only rights belonging to persons charged with criminal offences.’245

There are several core components of the right that are clearly applicable only to the defendant. These include: the right to information about the charges and facilities for the preparation of a defence; the right not to be compelled to testify or confess guilt; the right to counsel; and the right to appeal a conviction or sentence.246 But there are also certain rights that affect others who are party to or impacted by the trial process—such as victims and witnesses—as well as the general public. Sometimes third party interests overlap with the defendant’s: for instance, victims, witnesses, and the defendant may all wish for a trial...
to be held in public or for it to be concluded within a reasonable time. But other scenarios pit these interests against one another: for instance, the defendant’s examination of witnesses who testify against him may need to be balanced against the interests of those witnesses, especially if they are vulnerable; the defendant’s wish for publicity may clash with a rape victim’s desire to take the stand in private; the defendant may argue that a trial should never proceed in the absence of a key witness or when evidence was procured in violation of his rights, whereas a victim may want the trial to go ahead.

Some rights are not only relevant to the experience of victims and witnesses during a trial, but also crucial to the general public’s confidence in the criminal justice system in a state that is governed by the rule of law. The right to a public trial provides a window into the courts and, particularly if there is systemic monitoring, can be an important check that trials are conducted fairly. The public also has an interest in ensuring that the system as a whole includes a competent, independent, and impartial tribunal; the presumption of innocence; and the right to equal treatment under law, as this protects them from being caught by the net of the criminal justice system on political or discriminatory grounds. The right to be tried without undue delay also affects broader society in the sense that it ensures the efficiency and effectiveness of the legal system and good management of public funds being spent on it.

The right of non-defendants to a fair trial gives rise to two issues. First, the extent of the recognition of a non-defendant’s interest and whether this can be said to amount (p. 34) to a separate ‘right’. Second, and relatedly, what such a right might entail, particularly when it conflicts with the rights of a defendant.

4.4.1 Recognition of a non-defendant’s right to a fair trial

The right to a fair trial cannot be understood solely from the viewpoint of the defendant, even though he is the primary beneficiary of the various guarantees in international law. Other participants in the trial process, as well as the broader public, also benefit when the right is given effect. The Inter-American Court has held, for example, that when domestic criminal proceedings were not heard by an independent and impartial tribunal or within a reasonable time the rights of the victims were breached as well as those of the defendant.247 The American Convention describes the right to a public trial as a general principle rather than a right belonging to a defendant,248 and this has been recognised by other international human rights bodies in practice.249 International human rights bodies have also recognised that non-defendants, including victims and witnesses, may be protected by the ‘right’ to a fair trial in the context of criminal proceedings.250 And a Judge of the ICC has observed that the right to a fair trial ‘pertains to all parties: on the one hand the accused, and on the other, the Prosecutor, who acts on behalf of the … victims’.251

The Human Rights Committee has recognised that individuals are protected by the ‘right’ to a fair trial under Article 14(1) when their claims as injured parties within criminal proceedings are of a civil nature, such as by intervening as civil parties.252 Similarly, the European Court has recognised that victims who participate in criminal proceedings may enjoy rights under the Convention if the outcome of the criminal case may be decisive for the adjudication of their civil rights and obligations253 or the (p. 35) victim formally participates in criminal proceedings by intervening as a civil party.254 The Court has also explained that Article 6 provides victims with an avenue for reparation over and above the general positive obligation that the European Convention imposes on states to prevent interferences with the rights of individuals.255 Similarly, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide that states should ensure that ‘any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body’.256 And the ICC has recognised that victims are entitled to access evidence and respond to evidence proposed by the prosecution and defence on the basis that these privileges were attached to ‘the
procedural status of victim ... in national systems of criminal justice of the Romano-
Germanic tradition; and have never been found to violate internationally recognised human
rights standards concerning the rights of the accused and a fair and impartial trial’. 257

The Inter-American Court takes a particularly expansive view of victims’ rights by
recognising that ‘the victims of human rights violations, or their next of kin, should have
wide-ranging possibilities of being heard and taking part in the respective proceedings,
both in order to clarify the facts and punish those responsible, and also to seek due
reparation.’ 258 The Inter-American Court has found the right to a fair trial to be engaged
alongside the right to provide effective judicial remedies to victims of human rights
violation and the obligation to ensure the free and full exercise of rights under the
American Convention. 259 It has also applied specific component fair trial rights to victims
and their relatives. For instance, the right to be present has been interpreted to include ‘the
right of the victims or their next of kin to take part at all stages of the respective
proceedings, so that they can make proposals, receive information, provide evidence,
submit arguments and, in brief, assert their rights’. 260 And the right to an interpreter was
found to have been breached when a victim was unable to file her criminal complaint in her
own language. 261

International human rights bodies have also recognised the role of witnesses in fair
trials, emphasising the need for their protection, but also balancing their interests against
those of the defendant. The European Court has held that ‘Article 6 does not explicitly
require the interests of witnesses in general, and those of victims called upon to testify in
particular, to be taken into consideration’, but states ‘should organise their criminal
proceedings in such a way that those interests are not unjustifiably imperilled’ and ‘that in
appropriate cases the interests of the defence are balanced against those of witnesses or
victims called upon to testify’. 262 Along similar lines, the ICC Statute requires the Trial
Chamber to ensure that trials are ‘fair and expeditious’ and ‘conducted with full respect for
the rights of the accused and due regard for the protection of victims and witnesses’. 263 The
Inter-American Court has acknowledged a ‘duty’ on state authorities to prescribe measures
to protect witnesses. 264 And the Convention against Torture and other Cruel, Inhuman and
Degrading Treatment requires states to ‘ensure that ... witnesses are protected against all
ill-treatment or intimidation as a consequence of ... any evidence given’. 265

Some international bodies also refer to the ‘right’ of the prosecutor to a fair trial, either as a
representative of victims or in his own name. 266 Even though most of the defendant’s rights
impose a corresponding duty on the prosecutor—for instance, to lay non-discriminatory
charges, disclose evidence, or move proceedings forward without undue delay—some
rights, such as the right to an impartial tribunal 268 and the right to appeal, can under
international human rights law belong to the prosecutor as well as the defence. 269

Some international criminal courts have also framed certain errors by trial chambers as
violations of the right of the prosecutor. For instance, the ICTY Appeals Chamber, in finding
that a Trial Chamber had erred in excluding certain evidence, observed that: ‘application 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 victims of the offences
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 of Statute to the accused, and the trial proceeds against the background of
those fundamental protections’. 270

The STL also expressly recognised the prosecutor’s ‘right’ to a fair trial in a decision
on a prosecution request to amend its exhibit list. The Trial Chamber balanced the right of
the prosecutor ‘to present evidence supporting its case’ against the rights of defence
counsel ‘to adequately prepare for trial’ and permitted the amendment. 271 In contrast, the
ICC has declined to recognise that the prosecutor is protected by the right to a fair trial in
one case, observing that it is ‘commonly understood that the right to a fair trial/fair hearing in criminal proceedings, first and foremost, inures to the benefit of the accused’. The Court declined to address whether a procedural error violates the prosecutor’s right to a fair trial ‘in the abstract’, and has instead analysed whether the errors impeded the Court’s object to establish the truth and the prosecutor’s presentation of evidence to prove charges against the defendant.

4.4.2 Addressing conflicts between the rights of defendants and the rights or interests of non-defendants

The conduct of a fair trial is in the interests of defendants, other participants in the trial, and the broader public. Sometimes these interests may complement the fair trial rights of the defendant, such as ensuring an interpreter be provided when a victim or witness cannot speak the language of the court. But there is also the potential for a conflict to arise with the rights of the defendant. International human rights bodies employ a variety of techniques to resolve such conflicts depending on the facts and rights in issue. Depending on the circumstances, it may be appropriate to engage in ‘a delicate balancing of interests’ of the defendant and the non-defendant; to consider that the defendant’s right should be ‘subject to’ the measures adopted for the protection of victims and witnesses; to require the defendant to ‘exercise due diligence’ in asserting a right so that the interests of other participants may be taken into account; or to prioritise not causing prejudice to the defendant.

(p. 38) 4.4.2.1 Witness protection

International bodies recognise the need to balance the interests of witnesses against the right of the defendant when witnesses give evidence of a sensitive nature or fear reprisals. For instance, the European Court has referred to the interest in protecting minors subjected to sexual violence as a good reason for the victim not to provide live evidence, but in some cases found insufficient counterbalancing measures had been taken to protect the defendant’s right to a fair trial because his inability to put questions to the victim caused significant prejudice to his ability to defend himself. Similarly, the Inter-American Court has noted that a state’s duty to ‘ensure the rights … and safety of those who testify in criminal proceedings may justify the adoption of measures of protection’ as long as these do not undermine the defendant’s right to a fair process. Anonymous witness testimony almost never satisfies this test because a defendant’s ability to cross-examine witnesses against him is seriously prejudiced if he is not informed of the witness’ identity. For instance, the Inter-American Court found a violation of the defendants’ right to examine witnesses in a case in which three witnesses were anonymous, because their evidence was of ‘decisive significance’.

The international criminal courts’ procedural framework also expressly provides for protective measures for witnesses, provided they are consistent with the rights of the defence. In a case against a defendant accused of conscripting child soldiers in the Democratic Republic of the Congo, the ICC Appeals Chamber held that the non-disclosure of the identity of the prosecution’s witnesses or portions of witness statements is ‘an exception to the general rule of disclosure’, which was made to ensure the confidentiality of information for the protection of witnesses. A request for non-disclosure required the judges to carry out a ‘case-by-case evaluation’, considering ‘all relevant factors’, including an ‘evaluation of the infeasibility or insufficiency of less restrictive protective measures’, so that the defendant’s rights were restricted ‘only as far as necessary’.
4.4.2.2 Amnesties, non-prosecutions, and acquittals

International human rights bodies have also had to balance the interests of defendants and victims in cases in which a defendant claims to benefit from an amnesty. Indeed, such amnesties have been held to violate international law and the rights of victims. The Inter-American Court found that Peruvian amnesty laws that exempted military, police, and civilians from criminal liability violated the right of victims and their relatives to be ‘heard by a judge’ because the laws obstructed a criminal investigation and access to justice and ‘lead to the defenselessness of victims and perpetuate impunity’. Such laws were held to be ‘manifestly incompatible with the aims and spirit of the Convention’. The African Court found that the enactment of a clemency law in Zimbabwe for ‘politically motivated crimes’ violated the right of victims to have their cause heard because it effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented the victims from seeking effective compensation. And the European Court held that a national court should ‘not under any circumstances be prepared to allow life-endangering offences and grave attacks on physical and mental integrity to go unpunished’.

However, the right of victims to seek justice against a specific individual may be more limited. Although the ICCPR imposes an obligation on states to investigate and prosecute alleged human rights violations, the Human Rights Committee has found that the right to a fair trial does not necessarily ‘provide for the right to see another person criminally prosecuted’. Similarly, the European Court, and historically the European Commission of Human Rights, have found that the right to a fair trial does not include a right to have criminal proceedings brought against a third party with a view to securing that person’s conviction.

By comparison, Inter-American and African Courts have found violations of victims’ and relatives’ right to access the courts when the authorities have failed to investigate and prosecute perpetrators of human rights abuses. The Inter-American Court has been particularly critical of states that have failed to commence or conduct an effective investigation into human rights violations committed by their agents or paramilitaries. And the African Court held that the failure to conduct an effective investigation into the assassination of a journalist violated the right of the victims, their relatives, and other interested parties to have the case heard by a competent court. It ordered Burkina Faso ‘to reopen investigations with a view to prosecute and bring to trial the perpetrators of the murder of Norbert Zongo and his three companions, and thus shed light on this matter and do justice to the families of the victims’.

A step beyond seeking to have a specific individual prosecuted is to have a specific individual found guilty. The Human Rights Committee has criticised the pattern of acquittals in states where so-called ‘honour crimes’ committed against women ‘remain unpunished’. But in a case in which the alleged victims of hate speech claimed that the acquittal of a Dutch right-wing politician for insult and incitement breached their ICCPR rights, the Committee held that the Netherlands was not obliged ‘to ensure that a person who is charged with incitement to discrimination, hostility or violence will invariably be convicted by an independent and impartial court of law’ so there was no breach of the Covenant. In contrast, the Committee on the Elimination of Racial Discrimination stated that the acquittal of a defendant who allegedly made a racist speech was a violation of the CERD Convention because the Norwegian Supreme Court had given too much protection to free speech in deciding not to convict the leader of a march who made an anti-Semitic speech. Such a case represents the most extreme form of prioritising the rights of non-defendants over the right of defendants.
4.4.2.3 Immunities

On its face, the grant of immunity to a defendant may be regarded as unfair to the victims of a crime. A person is able to escape prosecution simply because of their status as a diplomat or other government official.\(^{305}\) However, unlike in the case of (p. 41) amnesties,\(^ {306}\) international bodies have tended to uphold immunity from criminal jurisdiction, treating it as a procedural rule that is unaffected by allegations of crimes, regardless of how heinous.

The ICJ has upheld the immunity of a Foreign Minister accused of inciting genocide, emphasising that immunity from jurisdiction did not mean that such officials ‘enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.’\(^ {307}\)

The Court outlined four scenarios in which the immunities of a Foreign Minister did not represent a bar to prosecution: prosecution in their own state; waiver of immunity by their state; after a person ceases to hold the office, he or she will no longer enjoy all of the immunities accorded by international law in other states; and proceedings before certain international criminal courts, where they have jurisdiction.\(^ {308}\)

In this regard, the ICC Statute expressly provides in Article 27(2) that ‘[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’. The ICC Appeals Chamber held, controversially, that ‘[t]here is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court’.\(^ {309}\) And in its work on the immunity of state officials from foreign criminal jurisdiction, the International Law Commission has considered in what circumstances the immunity ratione materiae of an official (other than a high level official enjoying immunity ratione personae) may be set aside. Draft Article 7, provisionally adopted by the ILC plenary,\(^ {310}\) provides that immunity ratione materiae is subject only to the exception of ‘crimes under international law’ (genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance).\(^ {311}\)

(p. 42) 4.5 Particular application of the right to a fair trial

To fully understand the scope of right to a fair trial, it is also necessary to consider its modified application in certain cases. Although the fundamental principles of a fair trial apply to all defendants and every type of criminal proceeding, certain factors may require the modified application of component fair trial rights. This is different to the waiver of, or exceptions to, a fair trial right, which result in the non-application of the right rather than its modification.\(^ {312}\) The modified application of fair trial rights may for instance be called for due to the minor age of the defendant, cases involving the potential imposition of the death penalty, and trials occurring during a public emergency or an armed conflict, situations that are commented on briefly in each chapter of this book.

4.5.1 Juvenile defendants

The right to a fair trial applies to a juvenile defendant, like an adult defendant, but certain additional protections may also be required to respond to the needs of a child. Indeed, Article 14(4) of the ICCPR expressly provides that ‘[i]n the case of juvenile persons, the
procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation’.  

The procedure may take into account the juvenile defendant by applying the right to a fair trial more strictly, allowing fewer exceptions than would ordinarily be allowed to individual component rights. For example, while international human rights law tolerates some delay in criminal proceedings against adults as long as it is not ‘undue’, a juvenile defendant’s case is to be resolved ‘without delay’. Some additional rights are also granted to juvenile defendants. They must have support from persons other than their lawyer when being questioned by police, and their wider circle must be kept informed of their case. And a court may need to make adjustments in respect of certain component rights. For example, although the right to a public trial promotes transparency and accountability in the criminal justice process for adults, modifications are made for juvenile defendants when extensive publicity could be prejudicial or even render a trial unfair.

(p. 43) Although there is consensus among international human rights bodies that juvenile defendants require special treatment, there is mixed practice on what adaptations are appropriate to a juvenile defendant. Two key issues include the age of criminal responsibility and the question of whether juvenile defendants should be tried in regular or special courts.

Under international law, there is no specified minimum age for holding a juvenile criminally responsible for their conduct. State practice is highly variable. In 2019, Scotland raised its age of criminal responsibility from 8 to 12 years of age, while the Philippines was debating whether to reduce it to 9 years old. Australia sets the age of criminal responsibility at 10 years old despite repeated domestic and international recommendations to raise it to 14. In Canada, the age of criminal responsibility is 12 years old. In continental Europe the minimum age ranges from 10 years in Switzerland, to 14 in Germany, 15 in Sweden, 16 in Portugal, and up to 18 in Luxembourg. Within the United States, 30 states have no minimum age, and others range from 6 to 10 years of age. The Inter-American Commission observed an ‘enormous disparity’ in the region—with some states setting the age as low as 8. This may be contrasted with Peru and Chile, which have set 18 as their minimum age of criminal responsibility, while Brazil has considered reducing it from 18 to 16 years of age.

International human rights law has not set a clear minimum age. Although the Inter-American Commission has urged states to ‘move progressively closer’ towards 18 years old, other bodies have been less prescriptive. The Human Rights Committee has noted that such an age is to be determined by each state ‘in the light of the relevant (p. 44) social and cultural conditions’. The Child Rights Committee has encouraged states parties to increase the minimum age of criminal responsibility to at least 14 years of age. The European Court has taken the view that it does not matter that there is no ‘clear common standard amongst the member States … as to the minimum age of criminal responsibility’.

International human rights bodies, with the exception of the Inter-American Court, have avoided articulating a requirement that states establish special courts for trying juvenile defendants even though such systems exist in some jurisdictions. According to the Human Rights Committee, states ‘should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age’. It has found that when a state may try juveniles before both regular courts and specialist youth courts, the youth court is not required to ‘unilaterally assess’ whether it is in the defendant’s best interest that the case be heard there. It is however clear that juvenile defendants should be held separately from adult defendants if they are in pre- or post-trial detention. The European Court has also not required the use of special courts. It has carefully scrutinised the use of regular courts.
for juvenile trials, and has been critical of proceedings that, for example, did not protect juvenile defendants from intense media attention.\textsuperscript{333} The Inter-American Court has, in contrast, expressly stated that a ‘different court’ is required for juvenile defendants, opining that ‘children under 18 to whom criminal conduct is imputed must be subject to different courts than those for adults. Characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt.’\textsuperscript{334}

4.5.2 Death penalty cases

Fair trial concerns take on a particular urgency in death penalty proceedings. When a defendant is facing execution, his right to a fair trial interacts with other human rights, especially the right to life; the prohibition against torture or other cruel, inhuman, or degrading treatment or punishment; and, if he is a juvenile, the rights of the child.\textsuperscript{(p. 45)} The ECOWAS Court of Justice has stated that the death penalty cannot be imposed if the right to fair trial has not been respected. In a case in which the defendant had been convicted of murder and mandatorily sentenced to death under Nigerian law, the Court observed that Article 6 of the ICCPR is ‘the most important treaty provision in international law relating to [the] death penalty’.\textsuperscript{335} It stated:

there are a number of clear limitations placed on the imposition of death penalty especially in Countries where it has been abolished, namely: First, it may only be imposed for most serious crimes and cannot be imposed if; (i) A fair trial has not been granted ... Death penalty cannot be imposed, if all the provisions of the ICCPR regarding due process have not been complied with. These include but [are] not limited to, the presumption of innocence, informing the accused [of] the nature of the offence committed by him, the accused[’s] right to counsel of his own choice, giving the accused reasonable time to which to prepare and present his defence, trial before an independent and impartial tribunal and the right to review by a higher tribunal.\textsuperscript{336}

Other human rights bodies have stated that the modification of fair trial rights in death penalty cases requires a heightened standard of ‘scrupulous respect’ for the right to a fair trial.\textsuperscript{337} This can mean that, for instance, a defendant charged with a capital offence has the right to be represented by counsel of his choice, and such a right shall be guaranteed even if this requires a hearing to be adjourned.\textsuperscript{338} And the Inter-American Court has held that ‘because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result’.\textsuperscript{339} And the Inter-American Commission has developed a ‘heightened scrutiny’ test in such cases.\textsuperscript{340}

The non-derogable nature of the right to life requires that ‘any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15’.\textsuperscript{341} And even outside of an emergency situation, the imposition of the death penalty following proceedings that did not respect fair trial guarantees will also constitute a violation of the right to (p. 46) life,\textsuperscript{342} and will generally be both unlawful and arbitrary.\textsuperscript{343} Mandatory death sentences are inherently arbitrary.\textsuperscript{344} Examples of violations of component fair trial rights that would also breach the right to life include the use of forced confessions; the inability of the defendant to question relevant witnesses; lack of effective representation involving confidential lawyer-client meetings during all stages of the proceedings; placing the defendant in a cage or in handcuffs during the trial; inability of the defendant to access official prosecutorial applications to the court for the purpose of conducting his defence or appeal defence or appeal; and failure to provide accessible documents and procedural accommodation for defendants with disabilities.\textsuperscript{345} International human rights bodies have found that the
imposition of the death penalty following an unfair trial by a court lacking independence and impartiality will amount to inhuman treatment.\textsuperscript{346}

In addition the Human Rights Committee has emphasised that:

Under no circumstances can the death penalty ever be applied as a sanction against conduct whose very criminalization violates the Covenant, including adultery, homosexuality, apostasy establishing political opposition groups, or offending a head of State.\textsuperscript{347}

Furthermore, individuals who were under the age of 18 at the time the crime was committed may not be sentenced to death, let alone be executed, regardless of their age at the time of trial or sentencing.\textsuperscript{348}

4.5.3 Trials taking place during emergencies or armed conflict

This book is focused on trials taking place in peacetime, but components of the right to a fair trial also apply in situations of public emergency or armed conflict.

In a ‘public emergency which threatens the life of the nation and the existence of which is officially proclaimed’, the right to a public trial and the right to translation may be derogated from to the extent strictly required by the situation and on a non-discriminatory basis.\textsuperscript{349} But the ‘fundamental principles of fair trial’ may not be derogated from during an emergency.

(p. 47) The emergence of the COVID-19 pandemic in late 2019 led a number of states to notify derogations from their obligations under the ICCPR and/or the European Convention, as well as the suspension of guarantees under the African Charter.\textsuperscript{350} Many states did not specify the treaty provisions from which they were derogating. Estonia, however, lodged a specific reservation to the right to a fair trial under the ICCPR and the European Convention, which appeared to be aimed at holding remote hearings.\textsuperscript{351} The Human Rights Committee issued a general statement on COVID-19 derogations recalling that states parties cannot deviate from ‘rights which are essential for upholding the non-derogable rights ... and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy’.\textsuperscript{352} The UN Office of the High Commissioner for Human Rights warned that ‘fundamental requirements of fair trial must be respected ... Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected’.\textsuperscript{353} Civil society has also expressed concern about the impact of the pandemic on the right to a fair trial due to the postponement of proceedings, the use of remote court hearings without properly considering the restrictions on defence rights or public access, and disrupted communications between counsel and defendants.\textsuperscript{354}

In an armed conflict, ‘no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees’.\textsuperscript{355} The ICRC’s list of these guarantees correspond to the component fair trial rights in Article 14 of the ICCPR. A key feature of trials relating to armed conflict is the use of military and ‘special’ courts and commissions. International law does not prohibit the creation and use of such courts, but the Human Rights Committee has stated that such trials must be in ‘full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned’.\textsuperscript{356} Trials by military or special courts should be ‘exceptional’, meaning limited to cases where the state can (p. 48) prove that they are ‘necessary and justified by objective and serious reasons’, and where the regular civilian courts are unable to undertake such trials.\textsuperscript{357} The risk of fair trial standards...
being violated is heightened once the public is denied access to proceedings or limitations are imposed in the name of national security.\textsuperscript{358}

Terrorism trials may fall in a shadow zone between peacetime and wartime or national emergency. The Working Group has rejected the application of international humanitarian law to terrorism trials. It concluded that ‘the struggle against international terrorism cannot be characterized as an armed conflict for the purposes of the applicability of international humanitarian law … [T]he global war on terrorism is not capable of conferring the status of combatant on persons detained for conduct outside of an armed conflict, and such acts of terrorism are treated as criminal offences rather than violations of the laws and customs of war’.\textsuperscript{359} In the case of a person detained indefinitely in Guantánamo Bay in relation to his alleged involvement in 9/11, the Working Group found that ‘even if an armed conflict existed on 11 September 2001, the Geneva Conventions require that enemy belligerents and civilians who are detained as threats to security be released at the end of the armed conflict or hostilities. At the current point in time [2017] … any of the procedures for detention regimes under international humanitarian law as the \textit{lex specialis} have ceased to apply, if they ever did, to Mr. al Baluchi.’\textsuperscript{360} The relevant legal framework was therefore international human rights law.

The UN Office of the High Commissioner for Human Rights has stated that ‘[t]he requirements of a fair trial … apply to terrorism cases \textit{no less than to} any other criminal offence. The best way to ensure that counter-terrorism criminal processes comply with human rights standards is to apply the same processes to terrorism cases as to other crimes.’\textsuperscript{361} The Commissioner notes, however, some modifications may be permitted to trial procedures, such as measures to protect the identity of vulnerable witnesses or using military rather than civilian courts when even high-security civilian courts are inadequate and ‘recourse to military courts is unavoidable’.\textsuperscript{362} If such measures are taken, they must be shown to be clearly necessary, be consistent with the minimum requirements of a fair trial, and be time-limited and subject to ‘sunset clauses’ as well as independent review.\textsuperscript{363} Many limitations on fair trial rights relate to ‘national security’, such as exceptions to a public trial and to disclosure of sensitive evidence to the defense. Threats to national security may be easier to prove when the terrorist threat level is elevated.

5. **Burden of Proof and Deference to National Courts**

Understanding the right to a fair trial in international law also requires consideration of the interaction between international bodies and domestic courts. Throughout the book we consider cases in which international bodies assess that a violation has occurred in relation to a specific aspect of the right to a fair trial. But international bodies have also provided general guidance on the standard of proof that they apply when considering allegations of alleged fair trial violations.

When international bodies consider allegations of fair trial violations at the domestic level (or for international criminal courts, alleged breaches during earlier phases of proceedings), their assessment is two-pronged: (1) whether the allegation has been proven; (2) whether a degree of deference is to be shown to the other court, such as regarding its assessment of the evidence or application of an exception or limitation to the fair trial right in issue.

5.1 **Burden and standard of proof**

As a general rule, ‘it is for the party which alleges a fact in support of its claims to prove the existence of that fact’.\textsuperscript{364} But this rule is not an absolute one applicable in all circumstances. The International Court of Justice has observed that, at least in the context of inter-state cases alleging violations of international law, ‘[t]he determination of the
burden of proof is in reality dependent upon the subject-matter and the nature of each dispute’ and ‘neither party is alone in bearing the burden of proof’.365

International bodies have variable standards of proof. A treaty violation will be found by the Working Group on the basis of ‘convincing evidence’366 whereas the Human Rights Committee proceeds on the assumption that the claims of the individual ‘must be given due weight as long as they are sufficiently substantiated’.367 The Inter-American Court evaluates evidence according to the system of ‘sana crítica’ or ‘sound judicial discretion’,368 but the European Court uses ‘beyond reasonable doubt’,369 which (p. 50) is a high standard but ‘certainly less onerous than proving a defendant’s guilt in a criminal trial’.370

Once a defendant has established a prima facie case for breach of a component fair trial right, the burden shifts to the state to produce the necessary information to show there was no breach or to invoke an applicable exception to the right. For example, in the context of the right to counsel, the European Court held that, ‘in the absence of compelling reasons for the restriction of the [defendant’s] right to legal advice, the burden of proof shifts to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice’.371 Similarly, with torture, once there is prima facie evidence that the victim suffered while in custody, the burden shifts to the state to disprove that torture occurred.372

The rationale for this burden-shifting is the state’s superior access to information. The Human Rights Committee has observed that, ‘the burden of proof cannot rest solely on the [defendant], especially considering that the [defendant] and the State party do not always have equal access to evidence, and that frequently the State party alone has access to the relevant information’.373 Other international human rights bodies also take this approach.374 The state in question is ‘generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law—if such was the case—by producing documentary evidence of the actions that were carried out’.375 Such evidence needs to be sufficiently detailed. In one case before the Working Group, in ‘simply producing a list of witnesses and evidence’ the Maldives failed to rebut the defendant’s assertion that no evidence was produced at the trial regarding the allegation that he had ordered a judge’s arrest.376 And two international bodies reached opposing conclusions on the same case concerning the right to be present because Algeria did not provide information rebutting the defendant’s claim before the Working Group (finding a violation) but did make such submissions before the Human Rights Committee (finding no violation).377

(p. 51) In contrast, in cases involving a claim that the domestic court has assessed the evidence in an arbitrary manner, the defendant bears the burden of providing sufficient material for the international human rights body to evaluate the domestic court’s assessment of the evidence.378 This should usually include court records, trial transcripts, and similar information which would allow the body to verify whether the trial suffered from the alleged defects,379 unless the state has denied access to such materials.

At the international criminal courts, consideration of fair trial violations tends to arise either when a defendant seeks the exclusion of certain evidence at trial or when a defendant claims, on appeal, that their fair trial rights were infringed during the trial. In that circumstance, the burden of proof is on the defendant to show not only that there was a violation, but also that it ‘casts substantial doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings’380 or, if on appeal, that there was an error invalidating the judgment.381

For example, if the defendant claims that their right to be informed of the charges was breached because their conviction was based on alleged incidents that were not included in the indictment and the defendant objects to the admission of evidence to prove such
incidents at trial, the burden shifts on appeal to the prosecution to demonstrate that the defendant’s ‘ability to prepare a defence was not materially impaired’. 382

5.2 Degrees of deference

International human rights bodies agree that they are not sitting as appellate courts or a ‘fourth-instance body’ in relation to decisions by national courts. 383 But they accord different degrees of deference in determining whether unfair trials have taken place. Whereas the margin of appreciation ‘has become the central conceptual doctrine in the institutional and jurisprudential architecture of the European Convention on Human Rights’, it has been expressly rejected by the Human Rights Committee. 384 Nonetheless, the Human Rights Committee and other regional human rights bodies do exercise self-restraint in evaluating the acts of national authorities, especially when it comes to assessment of evidence.

The Human Rights Committee will defer to domestic courts’ findings in relation to facts and evidence, unless it can be shown ‘that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality’. 385 The Committee cannot reverse convictions of domestic courts under domestic law; its competence ‘is solely to consider whether the domestic procedures were in compliance with the Covenant’. 386 The Committee has shown deference to national authorities in relation to a wide range of fair trial issues including the appreciation of evidence, 387 admissibility of evidence, 388 and instructions to the jury. 389

In particular, the Committee will typically defer to domestic courts when it is shown that the domestic court had fully evaluated the evidence, such as by providing reasons for its assessment, 390 or when allegations of impropriety in the proceedings had been heard and considered by the responsible domestic authorities such as an appellate court, the domestic Supreme Court, or the General Prosecutor’s Office. 391 When the (p. 53) evaluation of evidence was in accordance with domestic law, the Committee will usually defer. 392

However, the Committee has refused to defer to domestic courts’ findings when it was specifically shown that these courts were not competent, independent, or impartial tribunals, 393 when the courts failed to provide reasons and justifications for their assessment of the evidence, 394 or when the judge failed to instruct the jury as to where the burden of proof lies. 395 Nor has the Committee deferred when statements, confessions, and other evidence have been obtained in violation of the prohibition on torture and cruel, inhuman, and degrading treatment. 396

Similar to the Human Rights Committee, the Working Group considers that it is generally in ‘no position to assess evidence put forward in the course of trial proceedings’. 397 However, it has refused to defer when allegations have ‘not been sufficiently rebutted by the Government, including by documentary evidence of the trial proceedings and judgment to support the Government’s argument’ and there was ‘overwhelming evidence’ that the trial did not meet international standards. 398 And it applies ‘a heightened standard of review in cases in which the rights to freedom of movement and residence, asylum, thought, conscience and religion, opinion and expression, peaceful assembly and association, participation in political and public affairs and equality and non-discrimination; the protection of persons belonging to ethnic, religious or linguistic minorities is restricted; or human rights defenders are involved’. 399

The Inter-American Court and Commission are less deferential when compared to the Human Rights Committee and Working Group. 400 This is linked to the historical context of having member states that transitioned from dictatorships, and which at one stage had limited capacities to effectively protect human rights. 401 Unlike the (p. 54) European Court, the Inter-American Court does not apply the doctrine of ‘margin of appreciation’ and has,
for example, closely examined and reached its own conclusions in cases involving the assessment and evaluation of evidence\textsuperscript{402} and fair trial and judicial protection.\textsuperscript{403}

The Inter-American Commission has shown deference in a matter involving the disallowance of evidence contained in a notarial document,\textsuperscript{404} but has also refused to defer to national authorities when it found irregularities in the process such as contradictions in the evidence which the prosecution chose to present, and the subsequent refusal to grant an appeal;\textsuperscript{405} racial bias in the jury;\textsuperscript{406} and coercion in obtaining evidence.\textsuperscript{407}

The African Commission, for its part, has referred to the principles of subsidiarity and allowing a margin of appreciation for states to introduce specific limitations in certain articles.\textsuperscript{408} But it has also stated that it ‘would not allow [a] restrictive reading of [the doctrine of subsidiarity and margin of appreciation], which advocates for the hands-off approach by the African Commission, on the mere assertion that [member states’] domestic procedures meet more than the minimum requirements of the African Charter’.\textsuperscript{409} The African Court has also asserted its jurisdiction to examine whether the domestic procedures are consistent with international standards or other applicable human rights instruments;\textsuperscript{410} or whether consideration of a certain evidence by the national judge was in conformity with the requirements of the African Charter.\textsuperscript{411}

Among the international human rights bodies, the European Court appears to accord the greatest deference to national authorities. It has invoked the concepts of ‘subsidiarity, democratic societies and democratic legitimation, institutional competence and comity, and the purpose of establishing minimum rather than harmonized … human rights standards’ to justify its longstanding doctrine of margin of appreciation.\textsuperscript{412} In fair trial cases, the Court has applied the margin of appreciation to issues beyond the admission and assessment of evidence\textsuperscript{413} such as the conduct of defence and appointment of (p. 55) counsel;\textsuperscript{414} whether to require the disclosure of classified information to defendant;\textsuperscript{415} the legality of a trial held \textit{in absentia};\textsuperscript{416} the interpretation and application of European Court jurisprudence by a national court;\textsuperscript{417} the interpretation and application of domestic law;\textsuperscript{418} access to courts, including on appeal;\textsuperscript{419} the presumption of innocence;\textsuperscript{420} and the assignment of a case to a particular court or judge.\textsuperscript{421} Yet, by according a margin of appreciation to the analysis of the domestic courts, the European Court does not forego its duty to determine ‘in the last instance whether the requirements of the Convention have been complied with’, including whether as a whole, the proceedings were conducted fairly.\textsuperscript{422} It has also created exceptions to its ‘default’ of deference on issues involving the admissibility and assessment of evidence in cases where the national court’s finding is ‘arbitrary or manifestly unreasonable’.\textsuperscript{423}

International criminal courts are in a different category to international human rights bodies when it comes to deference because they are generally assessing the respect for fair trial standards displayed by their own trial chambers rather than national courts.\textsuperscript{424} The ICC Appeals Chamber has stated that in reviewing decisions of lower chambers, it will not review their findings \textit{de novo} and will only intervene when there are clear errors of law, fact, or procedure that vitiate the decision.\textsuperscript{425} For example, in reviewing a claim that the Pre-Trial Chamber and Trial Chamber misapprehended facts, it said it ‘will defer or accord a margin of appreciation both to the inferences that the Chamber drew from the available evidence and to the weight it accorded to the different factors’.\textsuperscript{426} A ‘clear error of fact’ is committed when the chamber ‘misappreciates facts, disregards relevant facts or takes into account facts extraneous to the sub \textit{judice} issues’.\textsuperscript{427} The defendant’s mere disagreement with the conclusions drawn by the lower (p. 56) chambers is not enough to establish a clear error.\textsuperscript{428} The ICTR Appeals Chamber similarly gave a ‘high degree of deference’\textsuperscript{429} to the Trial Chamber in its assessment of evidence since it was in the best position to hear the witnesses and assess the probative value of their evidence.\textsuperscript{430} The party alleging the error of fact has the burden to show the error \textit{and} that a miscarriage of justice resulted from that error.\textsuperscript{431} And the ICTR Appeals Chamber deferred to the Trial Chamber in the assessment
of evidence produced during trial but not taken into account in the decision\textsuperscript{432} and discretionary decisions such as decisions on disclosure.\textsuperscript{433}

6. **Fragmentation and Harmonisation of the Right to a Fair Trial**

6.1 **A fragmented legal landscape**

Many states are subject to more than one international instrument and institutional regime for monitoring and holding states accountable for fair trial violations. All 47 states that come within the jurisdiction of the European Court and the 21 states that have accepted the Inter-American Court’s contentious jurisdiction have also ratified the ICCPR. All nine of the states that have recognised the competence of the African Court to receive cases from NGOs and individuals are also ICCPR states parties. The Working Group on Arbitrary Detention, as a non-treaty-based mechanism whose mandate expressly provides for consideration of individual complaints, can act on petitions from individuals anywhere in the world.

Although international bodies have admissibility rules designed to limit scope for duplication,\textsuperscript{434} claims concerning similar issues of law and fact can—and do—come before multiple jurisdictions. For example, the politicised prosecution of former President Nasheed of the Maldives came before both the Human Rights Committee and the Working Group, but the Committee only alluded in passing to the earlier Working Group Opinion and imposed different remedies for the violations found.\textsuperscript{435} And when (p. 57) a case concerning a defendant prosecuted by Portuguese authorities for allegedly insulting a judge came before both the Human Rights Committee and the European Court, the European Court declined by a narrow majority to follow the Committee’s more protective interpretation of the right to defend oneself.\textsuperscript{436} In reaching its decision, the European Court observed that ‘even where the provisions of the Convention and those of the ICCPR are almost identical, the interpretation of the same fundamental right by the HRC and by this Court may not always correspond’.\textsuperscript{437} In another case, the Inter-American Court rejected the European Court’s approach to the exclusionary rule on evidence, referring to a judgment issued in Strasbourg less than six months earlier but not explaining why it rejected the European Court’s analysis on this point.\textsuperscript{438}

Such conflicting results in similar cases may be explained by the fact that international bodies interpreting, applying, and developing the law on the right to a fair trial have diverse mandates; are embedded in different institutional regimes; have their own governing instruments; and employ varied procedures for fact-finding, decision-making, and enforcement. There is no hierarchy nor avenue of appeal among them.

At one end of the spectrum, there is the longstanding European Court, the ‘human rights hegemon’,\textsuperscript{439} with a corpus of 11,000 judgments on fair trial issues, often with detailed reasoning and specific remedies.\textsuperscript{440} At the other end, the African Court has (p. 58) delivered 34 judgments on fair trial issues in its first 14 years of operation.\textsuperscript{441} The Inter-American Court has issued around 300 decisions relating to fair trial over four decades, typically with creative and wide-ranging remedies, and displaying a particular concern for the rights of victims.\textsuperscript{442} Both Inter-American and African Courts have cases referred to them by their respective Commissions, which can also examine individual complaints.\textsuperscript{443}

Within the United Nations system, the Human Rights Committee has issued over 850 decisions on Article 14 of the ICCPR since 1976.\textsuperscript{444} It is a body of independent experts that meets on a sessional basis, and, like the Working Group on Arbitrary Detention, requests or
recommends rather than orders states to remedy a violation. Unlike the regional courts, it never hears oral argument.

Even among the international criminal courts there are variations: the ICC is a permanent, autonomous institution with 123 states parties whereas the ICTY and ICTR were established within the framework of the United Nations to address with specific conflicts in the Balkans and Rwanda. Other courts, such as the ECCC, are ‘hybrid’ in the sense of being a national court with international participation and United Nations assistance that applies international and/or domestic laws.

In this legal landscape, the potential for the fragmentation of the international law on the right to a fair trial is very real. For example, on the right to counsel, the European Court has considered that defendants have a right to choose counsel, regardless of whether counsel is paid for privately or by the state, whereas the Human Rights Committee has held that a defendant has the right to defend himself ‘through legal assistance of his own choosing’. but this ‘does not entitle the accused to choose counsel provided to him free of charge’. On the right to silence, one of the most divisive issues is whether adverse inferences or other negative consequences can be imposed as a result of a defendant’s exercise of this right. The Human Rights Committee, regional human rights bodies, and international criminal courts do not permit the drawing of any adverse inferences from a defendant’s silence. In contrast, the European Court, and many national systems, allow this in some circumstances. When it comes to the right to interpretation in the courtroom, the European Court makes it incumbent on national authorities to ascertain whether the fairness of the trial requires the assistance of an interpreter, while other human rights bodies only require assignment of interpretation when a domestic court is put on notice. In the context of the right to appeal, the European Court differs from its regional counterparts, the Human Rights Committee, and international criminal courts in that it does not allow a defendant to appeal a conviction entered for the first time on appeal; it does not guarantee the right to appeal for ‘offences of minor character’ or when the defendant is tried in the first instance by the highest court in the state; and it has found that oral delivery of trial judgments may suffice for lodging an appeal.

Fragmentation also occurs in respect of remedies for fair trial violations, even with respect to the same case. Other than the African Court, international bodies do not tend to cross-reference remedies granted by other bodies or even explain in their own jurisprudence why a remedy is appropriate for a particular violation of a right in one case but not another. For example, the remedy of release is the most meaningful one for a defendant who is still in detention, as well as the most intrusive from the perspective of a state. This remedy is often awarded by UN bodies, but only rarely by regional courts. For instance, the Human Rights Committee has recommended release in 18 per cent of cases involving fair trial violations. And since 2010, the Working Group has ordered release in the vast majority of cases where it found detention to be arbitrary. In contrast, release has only been awarded by regional courts in a small number of cases in which the integrity of the proceedings as a whole was severely damaged as a result of the fair trial violations. For instance, out of the large number of cases in which the European Court found a violation of the right to a fair trial, the Court only ordered a state to release a defendant in two cases. And despite the Inter-American Court’s activist approach to remedies, it has only ordered the release of a defendant in two out of over 160 cases in which a violation of the right to a fair trial has been found (p. 60) by the Court. And the African Court has set the bar very high for such a ruling in its reviews as well.
6.2 Methods of harmonisation

The fragmented legal landscape of international bodies engaged with the right to a fair trial can lead to component fair trial rights being interpreted differently according to international and regional sources. This presents a dilemma both to an international body seeking to apply the international standards, and to a national court confronted with conflicting decisions of different international bodies.

But despite the significant potential for fragmentation, the reality is that there is far more convergence than divergence on the meaning of fair trial rights.\textsuperscript{461} This is because there is an international legal system, albeit one that is diffuse and decentralised,\textsuperscript{462} as well as general agreement on both the existence and content of the right.\textsuperscript{463} Although there is no orderly arrangement according to a vertical hierarchy governed by avenues of appeal, rules of precedent, and methods of enforcement, there are numerous links and common bonds among international bodies and they are interacting with each other—and with national courts—on an ever more regular basis. It may be best understood as a self-organising system ‘shaped by dynamics of cooperation and competition over time’.\textsuperscript{464}

There is no single principle for resolving conflicts of interpretation. Different methods of harmonisation are employed to varying degrees by international bodies. One method is making reference to other international instruments and jurisprudence. For instance the Inter-American Court expressly adopts a corpus iuris approach: it refers to instruments and jurisprudence to ‘take into account developments in the corpus juris gentium of international human rights law over time and in present-day conditions’.\textsuperscript{465} The corpus iuris derives from treaties, principles of international law, and even soft law instruments and seeks to interpret Inter-American treaties by reference to these other sources of international human rights law so as to ensure ‘the evolutive interpretation of international protection instruments’.\textsuperscript{466}

The African Court and Commission also regularly refer to other international human rights law sources in their decisions, beyond the African Charter and system. This method is provided for expressly in the African Charter and its Protocol, which call for ‘draw[ing] inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members’.\textsuperscript{467} For instance, in a case concerning the right to be present of an unrepresented defendant in ill health, the African Court stated that it was ‘fortified in its reasoning by the decisions of the African Commission and the European Court of Human Rights and the Inter-American Court of Human Rights, which are courts of similar jurisdiction’ in holding the defendant’s right had been violated.\textsuperscript{468}

Without using the term ‘corpus iuris’, the Human Rights Committee and Working Group occasionally refer to other international instruments and jurisprudence. The Committee, for example, has referred to the ICC Statute when addressing the definition of enforced disappearances,\textsuperscript{469} and the Convention on the Rights of the Child when construing Article 10 of the ICCPR as barring states from imposing a mandatory life sentence on juvenile defendants.\textsuperscript{470} The Committee also sometimes refers to the jurisprudence of other international bodies in its General Comments.\textsuperscript{471} However, its cross-referencing is not systematic. In one case, the Committee did not refer to an earlier decision that had been issued by the Working Group, even though both parties referred to that decision, it dealt with issues that were overlapping with those the Committee was considering, and the Committee’s findings ultimately aligned with those of the Working Group.\textsuperscript{472} For its part, the Working Group has been more pro-active than the (p. 62) Committee in referring to
treaties and soft law sources, such as the Convention against Torture, the UN Standard Minimum Rules for the Treatment of Prisoners, and the Convention on the Rights of the Child. 473

The European Court is distinctive in that it is both the ‘court of reference’ for other bodies —given its six decades of operation and prolific fair trial jurisprudence—and makes very limited reference to the jurisprudence of other bodies. 474 While the Court has noted that the Convention’s ‘special character as a human rights treaty’ requires reference to ‘any relevant rules of international law applicable in the relations between the parties’ 475 and it has ‘never considered the provisions of the Convention as the sole framework of reference for the interpretation’ of Convention rights, 476 its jurisprudence remains relatively self-contained as compared to other international human rights bodies. And the instances of divergence highlighted in this book often involve the European Court treading its own path. 477

The European Court has however sometimes approached conflicts on the basis of ‘European consensus’. 478 And it has also relied on the ‘presumption of law-abidingness’ principle, according to which a state’s obligations must be interpreted as producing—and having been intended to produce—effects that comply with states’ pre-existing obligations. 479 In one case the defendants claimed their fair trial rights had been violated because Swiss courts did not provide a meaningful system to judicially review a sanctions listing by the UN Security Council. The Grand Chamber held that, given the UN’s commitments to human rights under the UN Charter, the resolutions needed to ‘always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided’. 480 In particular, ‘the domestic courts must be able to obtain—if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances—sufficiently precise information in order (p. 63) to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary’. 481

As regards international criminal courts, Article 21(3) of the ICC Statute provides that the ‘interpretation and application of law pursuant to this Statute must be consistent with internationally recognized human rights’ and has been the ‘engine of the ICC’s employment of sources of [international human rights law] and precedents from human rights bodies’. 482 Although the Statutes of the ICTY and ICTR do not have an equivalent provision to Article 21(3), they confirmed in a number of Appeals Chambers decisions that international human rights instruments and the jurisprudence of international bodies could assist the Tribunals in interpreting their applicable law 483 and that their trials must comply with such standards. Their statutes, however, remained the primary source of law and lead to the granting of higher protections or modified application of the rights found in human rights treaties to account for differences in international courts’ mandates and operations. 484

Beyond reference to other regional and international instruments and jurisprudence, there are other interpretative principles that some international bodies have used to resolve or reduce conflicting human rights norms by maximising protection of the defendant. The pro persona principle—which means that no provision of a treaty may be interpreted as restricting the enjoyment or exercise of any right or freedom recognised in national law or another convention to which the state is a party—is codified in various treaties, including the American Convention, 485 the ICCPR, 486 the European Convention, 487 and the Arab Charter. 488 The Inter-American Court has invoked the principle to ensure the rule ‘most favourable to the individual must prevail’ when the American Convention and another treaty are applicable. 489 It has, for example, applied the principle to ensure the most favourable interpretation for victims’ right to a fair trial. 490 And a minority of the Human
Rights Committee referred to the *pro persona* principle in a case relating to enforced disappearances.\(^{491}\)

(p. 64) A related principle that also protects the defendant is *in dubio pro reo*, which requires that ‘the definition of a crime shall be construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.’\(^{492}\) The STL has applied the principle in addressing potential conflicts between Lebanese law and the application of modes of liability in international criminal law.\(^{493}\) But it has also declined to apply the principle in a decision that expanded the scope of prosecution of contempt to a corporation even though this was not expressly provided for in its Rules.\(^{494}\)

When addressing conflicts between the right to a fair trial in different human rights instruments, the European Court has in some cases harmonised the European Convention with a higher standard on the basis of the *effectiveness principle*. This principle prevents the Court from adopting an interpretation that would render an individual’s rights under the Convention ineffective.\(^{495}\) It has, for example, used the principle to harmonise its approach to the prohibition on double jeopardy, taking into account the interpretation adopted by the Inter-American Court and the Court of Justice of the European Union.\(^{496}\) However, in another case, the European Court declined, by a narrow 9–8 majority, to follow the Human Rights Committee’s more protective interpretation of the right to counsel.\(^{497}\) The majority applied the doctrine of margin of appreciation to find no violation as a result of the domestic law in question.\(^{498}\) The dissenting judges criticised the missed opportunity to harmonise the fair trial standard, referring to ‘a presumption of normative integrity in international human rights law’.\(^{499}\)

Other interpretative principles place emphasis on predictability in law-making. The principle of systemic integration, which derives from the law of treaties, calls for the interpreter to take into account ‘[a]ny relevant rules of international law applicable in the relations between the parties’.\(^{500}\) It has (p. 65) been invoked by the International Court of Justice and the European Court on occasion.\(^{501}\)

While the emphasis of these various methods of harmonisation varies—from reference to international and regional instruments and jurisprudence, to protection of the defendant, to predictability in law-making—the underlying motivation is to avoid conflicts wherever possible. When a conflict exists, a simple solution would be for the most extended protection to prevail as the international human rights standard, recognising that this may in some cases clash with the rights of non-defendants, including victims. Despite its independent tendencies, the European Court does repeat as a refrain that ‘[t]he right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 para. 1 of the Convention restrictively’.\(^{502}\) A ‘most extended protection’ approach would be in keeping with the status of the right to a fair trial as a core guarantee on which other human rights rely for their protection and implementation.

The most consequential area of fragmentation—remedies for fair trial violations—is the one given the least attention by commentators and indeed by defendants and their counsel. The methods of harmonisation discussed above are rarely, if ever, applied in respect of remedies, and the practice on it varies widely.\(^{503}\) The right to a fair trial is one of the most frequently litigated rights and widely considered to be non-derogable, customary, and, by some, even a *jus cogens* norm. But it will not help defendants and all others who benefit from its enforcement—victims, witnesses, and the general public—if they do not seek, and international bodies do not grant, meaningful relief that extends beyond declarations and compensation. When seeking relief at the international level, defendants and their counsel should have remedies at the forefront of their minds, including which remedies are available and likely to be obtained, and the chances of compliance with those remedies. And
international bodies, for their part, should be clearer about why they are awarding a particular remedy, and where their approach differs from that of other similar international bodies, they should provide reasons for this divergence. At the very least, regardless of the approach taken in cases of fragmentation, clarity of reasoning on remedies will help to make the right to a fair trial more accessible, more coherent, and more meaningful to defendants.

Footnotes:


4 Ibid.


8 T. Yahav, ‘Study: only 0.3% of criminal cases end with acquittal’ (*YNetNews*, 14 May 2012) <https://www.ynetnews.com/articles/0,7340,L-4228980,00.html> accessed 13 July 2020.


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36 The pronoun ‘he’ is used throughout the book, including in hypotheticals, unless the person in question is a woman.

37 See international human rights bodies.

38 This includes the WGAD; UN Special Rapporteurs on extrajudicial, summary, or arbitrary executions; the situation of human rights defenders; the independence of judges and lawyers; the protection of human rights while countering terrorism; torture and other cruel, inhuman, or degrading treatment or punishment; the promotion of truth, justice, reparation, and guarantees of non-recurrence; as well as Special Rapporteurs with country mandates.

39 Soft law also includes fair trial manuals and toolkits used by the UN and leading NGOs.

40 Relevant decisions of the JCPC have also been examined.
VCLT Art. 32. This book is accompanied by a separate ebook with the comprehensive collection of the documents comprising the *travaux préparatoires*.

UDHR Arts 10 and 11.

Only 18 countries have taken no action to sign or accede to the Covenant, including Malaysia, Myanmar, Oman, Saudi Arabia, the UAE, and South Sudan.

ECHR (although it was adopted before the ICCPR, the drafters of the Convention took into account the drafting of the Covenant, being conducted in parallel at the United Nations); ACHR; ACHPR; Arab Charter; ASEAN Declaration.

Each chapter includes a section on the component right in international instruments.

The ICC Statute has 122 states parties, with representation from every region. The initial International Law Commission draft statute ‘contained a provision entitled “Rights of the Accused” that was essentially a copy of article 14 para. 3 of the *ICCPR*’: W. A. Schabas, ‘Article 67: Rights of the Accused’ in O. Triffterer & K. Ambos (eds), *Commentary On The Rome Statute Of The International Criminal Court* (3rd edn, C. H. Beck 2016), 1653. See ICC Statute Art. 67.

Compare, e.g., ICCPR Art. 14(3) with ACHPR Art. 7.

Right to a competent, independent and impartial tribunal established by law; right to a public trial; right to be presumed innocent; right to prepare a defence; right to counsel; right to be tried without undue delay; right to be present; right to examine witnesses; right to an interpreter; right to silence; right to appeal; right to equality; right not to be subject to double jeopardy.

See s. 4.5.1 (Juvenile defendants).

The HRC has found that a trial may fulfil the requirements of Arts 14(2)–(7) and 15 but conflict with the ‘fairness’ required by Art. 14(1). It may find several issues ‘taken as a whole’ breach Art. 14(1): W. A. Schabas, *Nowak’s CCPR Commentary* (3rd rev. edn, N. P. Engel 2019), 371; see, e.g., HRC, *Khostikoev v. Tajikistan* (Comm. no. 1519/2006), 22 October 2009, §7.3. See also ACHR Art. 8; ICC Statute Art. 67(1); ICTY Statute Art. 21(2); ICTR Statute Art. 20(2); ACmHPR Principles on Fair Trial in Africa Principle A(5)(b); ICC, *Prosecutor v. Lubanga Dyilo* (ICC-01/04-01/06-772 OA4), 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, 14 December 2006 (hereinafter: ‘ICC Lubanga Appeal Judgment of 14 December 2006’), §37; ECtHR (GC), *Schatschaschwili v. Germany* (App. no. 9154/10), 15 December 2015, §§101, 106.

See ch. 1, s. 7.2.1.1.2 (As investigator or prosecutor); ch. 10, s. 4.4.2.5 (Deception, covert techniques, and entrapment); ch. 12, s. 5.5.4 (Prosecutorial or judicial bias). There are also international standards that are not discussed in detail in this book, such as the Havana Guidelines; the IAP Standards (1999); and the UNODC Prosecutors Guide.


Ibid., §§139, 145.

Ibid., Separate opinion of Judge Cançado Trindade and Declaration of Judge Robinson.

Ibid., §2(iv). See also W. A. Schabas, Nowak’s CCPR Commentary (3rd rev. edn, N. P. Engel 2019), 371 (‘The right to a fair trial is, however, broader than the sum of these individual guarantees. This follows from Art. 14(3), which expressly refers only to the accused’s “minimum guarantees”’).

The HRC has also made clear that Art. 15 prohibits vague laws that do not clearly spell out the prohibited conduct: HRC, Concluding Observations, Belgium (2004) UN Doc. CCPR/CO/81/BEL, §24. It has also clarified that it applies to criminal laws only: HRC, I.S. v. Belarus (Comm. no. 1994/2010), 25 March 2011, §4.4. See ch. 12, s. 5.5.2 (Vague laws and charges).

HRC, General Comment No. 28 (2000), §31 (noting that this ‘constitutes a serious violation of the Covenant and in particular of Articles 6, 14 and 26’).


HRC, General Comment No. 35 (2014), §§38, 53; W. A. Schabas, Nowak’s CCPR Commentary (3rd rev. edn, N. P. Engel 2019), 393; C. Mbuayang, The Right to a Fair Trial in International Criminal Proceedings (Eleven International Publishing 2018) 94. See also WGAD, Yaman v. Turkey (Opinion no. 78/2018), 21 November 2018, §76 (noting that ‘[g]iven the extensive delay, the courts must reconsider alternatives to detention’).


ECTHR, Guide on Article 6 of the Convention—Right to a Fair Trial (criminal limb), 30 April 2020, §2. The absence of such an assessment is in itself incompatible with the right to a fair trial: ECTHR, Çelebi v. Turkey (App. no. 27582/07), 28 January 2020, §51.

ECTHR, Guide on Article 6 of the Convention—Right to a Fair Trial (criminal limb), 30 April 2020, §2; ECTHR, Tempel v. Czech Republic (App. no. 44151/12), 25 June 2020, §71 (‘the particular succession of events ... strongly indicates a dysfunction in the operation of the judiciary, vitiating the overall fairness of the proceedings’); ECTHR, Mirilashvili v. Russia (App. no. 6293/04), 11 December 2008, §165; W. A. Schabas, Nowak’s CCPR Commentary (3rd rev. edn, N. P. Engel 2019), 371.


ICTY, Prosecutor v. Tadić (IT-94-1-T), Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, §25 (‘In drafting the Statutes and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights’). The Chamber added that Art. 21 of the Statute ‘provides minimal judicial guarantees to which all defendants are entitled and reflects the internationally recognized standard of due process set forth in article 14 of the [ICCPR]’.

ICTY, Prosecutor v. Tadić (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereinafter: ‘ICTY Tadić Appeal Decision of 2 October 1995’), §45. The same applies to the ICTR, which was established the following year.

STL, Prosecutor v. El Sayed (CH/PRES/2010/01), Order Assigning Matter to Pre-Trial Judge, 15 April 2010, §35. See also KSC, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (KSC-CC-PR-2017-01), 26 April 2017, §§11–12; STL, Prosecutor v. El Sayed (CH/AC/2011/01), Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011, §35 (finding that ‘[a]t 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’).

ICC Statute Arts 21(1)(a) and (3) (although it applies ‘in the first place’ its Statute, the Elements of Crimes, and its Rules of Procedure and Evidence).


E.g., the higher tolerance of the international criminal courts for lengthy proceedings justified by the ‘complexity’ of their cases. See ch. 6, s. 5.1.2 (Complexity). See also ch. 3, s. 8 (Right to be Presumed Innocent and Pre-Trial Detention); ICTY, Prosecutor v. Galić (IT-98-29-A), Judgment, 30 November 2006 (hereinafter: ‘ICTY Galić Appeal Judgment of 30 November 2006’) Separate Opinion of Judge Shahabuddeen, §19, arguing that human rights obligations do not apply ‘lock, stock and barrel’ to the ICTY.


Ibid.


Statement of ICC Prosecutor, Fatou Bensouda, following the arrest and transfer of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, a suspect in the Mali situation: ‘We remain steadfast in the pursuit of our mandate under the Rome Statute’, 31 March 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180331-otp-stat-mali> accessed 13 July 2020.

ICC, Prosecutor v. Al Hassan (ICC-01-/12-01/18), Decision confirming charges against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 30 September 2019, The ICC Appeals Chamber later emphasised the gravity of this specific war crime, noting that the right to a fair trial was a ‘fundamental human right[]’: ICC, Prosecutor v. Al Hassan (ICC-01-/12-01/18 OA), Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’, 19 February 2020, §122.

See ch. 4, s. 6.2.1.1 (Right to incriminating and exculpatory material).

See ch. 8, s. 2 (Origins and Rationale of the Right to Examine Witnesses).

See ch. 7, s. 1 (Introduction).

See ch. 5, s. 9 (Right to Self-Representation).
Some national laws explicitly mention the incorporation of international standards to define fair trial rights. See, e.g., Kenyan Constitution Art. 51(3) that requires Parliament to ‘enact legislation that (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments’. See also COE, Report of the Committee of Experts on Human Rights to the Committee of Ministers (1970) H(70)7, 14 (noting that provisions of the ICCPR which may be directly applicable could be regarded as ‘self-executing’).


Note, however, that customary international law status does not necessarily create a crime in domestic law: see, e.g., UK House of Lords, R v. Jones [2006] UKHL 16, 29 March 2006, §§23, 36 per Lord Bingham. Note also that the right to a fair trial and/or component fair trial rights could also be analysed as a general principle of law under ICJ Statute Art. 38(1)(c). See UN Special Rapporteur, M. Vázquez-Bermúdez, Second report on general principles of law (2020) UN Doc. A/CN.4/741, §§86-88, 155-158.


ICJ, North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands), Judgment of 20 February 1969, §77. See also ICJ Statute Art. 38(1)(b); ILC Conclusions on the Identification of Customary International Law, A/RES/73/203 of 20 December 2018, Annex, Conclusions 2, 4, and 6.

This may suggest the right was not customary international law at the time of adoption of the treaty.

HRC, General Comment No. 32 (2007), and HRC, General Comment No. 29 (2001), §11.

See s. 3.2 (Component rights of a fair trial and customary international law).

ICRC Customary International Law Database and Commentary, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 22 July 2020, citing the military manuals of Argentina, Australia, Belgium, Benin, Burkina Faso, Cameroon, Canada, Colombia, Congo, Ecuador, El Salvador, France, Germany, Indonesia, Italy, Kenya, Republic of Korea, Madagascar, Mali, Morocco, Netherlands, New Zealand, Nigeria, Peru, Russia, Senegal, South Africa, Spain, Sweden, Switzerland, Togo, United Kingdom, and United States.

See s. 2 (Sources and Components of the Right to a Fair Trial).

See, e.g., China (Arts 125-126 of the Constitution on public hearing, right to defence, and judicial independence), Saudi Arabia (Arts 38 and 46 of the Basic Law of Governance and Chapter 6 of the Law of Criminal Procedure (Royal Decree No M/39)), and the UAE (Arts 25 and 28 of the Constitution on equality before the law, right to counsel and presumption of innocence).


IACmHR, Lares-Reyes v. United States (Case 12.379), 27 February 2002, §46, n 23 (emphasis added).


Derogations are distinct from limitations on the enjoyment of rights. Limitations may be based on a variety of grounds and often reflect the balancing of competing interests, such as national security, protection of public order, or the protection of rights of others. Derogations are based exclusively on the existence in the relevant state of a (temporary) ‘public emergency which threatens the life of the nation’: ICCPR Art 4. See ACmHPR Principles on Fair Trial in Africa Principle R: ‘No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.’ Experts provided advice to the COE that the ICCPR ‘limits more restrictively the possibilities of derogation’ than the ECHR: COE, Report of the Committee of Experts on Human Rights to the Committee of Ministers (1970) H(70)7, 5.

ICCPR Art. 4(2) lists the rights that cannot be derogated from, but does not include Art. 14 (right to a fair trial). See also ECHR Art. 15(2) and ACHR Art. 27(2). Cf. Arab Charter Art. 4(2) (listing the right to a fair trial as a non-derogable right). See further UNCHR, The Administration of Justice and the Human Rights of Detainees (1994) UN Doc. E/CN.4/Sub. 2/1994/24, §136.

HRC, General Comment No. 29 (2001), §11.


ACmHPR, Commission nationale des droits de l’Homme et des libertés v. Chad (Comm. no. 74/92), 2-11 October 1995, §21.
This position was taken by the former UNCHR, which noted ‘it is unclear what are the required “judicial guarantees” protected by article 27’, but ‘presumably they include fair trial guarantees included in the American Convention (art. 8)—most of which relate to criminal trials’: UNCHR, *The Administration of Justice and the Human Rights of Detainees* (1994) UN Doc. E/CN.4/Sub.2/1994/24, §136. The IACmHR or IACtHR have not clearly set out the limits of the expression and its relationship with Art. 8(5), even in the Court’s advisory opinion on the issue (IACtHR, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 (Series A, no. 9), 6 October 1987).

VCLT Art. 53.


As of January 2020. Reservations or declarations are made by: Australia, Austria (2), Bahamas, Bahrain, Bangladesh (3), Barbados, Belgium, Belize (2), Denmark (3), Finland, France (2), Gambia, Guyana (2), Iceland, Liechtenstein, Luxembourg (4), Malta (2), Monaco, Netherlands (3), New Zealand, Norway, Sweden, Trinidad and Tobago (2), United Kingdom (2), United States (6), Venezuela. There are no current objections to reservations regarding Art. 14. The Republic of Korea’s reservations regarding Art. 14(5) and (7) were objected to by the Netherlands and Czechoslovakia and subsequently withdrawn: UNTC Depositary, Status of Treaties, ch. IV. 4 ICCPR, Declarations and Reservations. See also COE, *Report of the Committee of Experts on Human Rights to the Committee of Ministers* (1970) H(70)7, 12.

HRC, General Comment No. 32 (2007), §5; HRC, General Comment No. 24 (1994), §8. Malta has a reservation to Art. 14(2) declaring that it interprets this provision ‘in the sense that it does not preclude any
particular law from imposing upon any person charged under such law the burden of proving particular facts’: (1999) 1578 UNTS 524.

120 ICCPR Arts 14(6) and 14(3)(d).

121 Bahamas, Bangladesh, Barbados, Belize, Gambia, Guyana, Malta, Trinidad and Tobago, and United Kingdom: UNTC Depositary, Status of Treaties, ch. IV. 4 ICCPR, Declarations and Reservations. See ch. 5, s. 11.2 (Reservations).

122 Austria, Belgium, Denmark, Germany, Luxembourg, Monaco, Netherlands, Norway, and Trinidad and Tobago: UNTC Depositary, Status of Treaties, ch. IV. 4 ICCPR, Declarations and Reservations.

123 See ch. 11, s. 10.2 (Reservations).

124 See ch. 2, s. 7.2 (Reservations).


126 E.g. the federalism reservation of the United States provides that state and federal prosecutions are considered different sovereigns for double jeopardy purposes: UNTC Depositary, Status of Treaties, ch. IV. 4 ICCPR, Declarations and Reservations, United States. See ch. 13, s. 9.2 (Reservations).

127 See ch. 11, s. 10.2 (Reservations); ch. 7, s. 9.2 (Reservations).


129 Austria, Croatia, Estonia, Finland, and Liechtenstein included such reservations.

130 E.g., Ireland says that it ‘do[es] not interpret Article 6.3.c of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland’. The Netherlands included a reservation to Art. 6.3.c as applied to the right to free legal assistance in the Netherlands Antilles. Serbia and Montenegro filed a reservation which carved out an exception for proceedings before magistrates’ courts: COE, Reservations and Declarations for Treaty No.005—Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations> accessed 18 July 2020.


132 Malta’s reservation to the requirement in Art. 6(2) that the prosecution prove guilt beyond a reasonable doubt states that it ‘interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts’: COE, Reservations and Declarations for Treaty No.005—Convention for the Protection of Human Rights and Fundamental Freedoms <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/declarations> accessed 18 July 2020.

Ibid., Venezuela.

Ibid., Dominica.


See s. 3.1 (Right to a fair trial is a rule of customary international law).

See s. 2 (Sources and Components of the Right to a Fair Trial).

E.g., the right to be present at one’s trial is not included in the ECHR or the ACHPR but it has been inferred from other component fair trial rights, including the rights to a fair hearing, to defend oneself in person or with the assistance of counsel, to an interpreter, and to the presumption of innocence. See ch. 7, s. 3 (Definition of the Right to be Present in International Instruments).

ICRC Customary International Law Database and Commentary, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 22 July 2020 (emphasis added).

Ibid., trial by independent, impartial, and regularly constituted court; presumption of innocence; information on the nature and case of the accusation; necessary rights and means of defence (including the rights to defend oneself or to be assisted by a lawyer of one’s own choice; to free legal assistance if the interests of justice so require; to sufficient time and facilities to prepare the defence; to communicate freely with counsel); trial without undue delay; examination of witnesses; assistance of an interpreter; presence of the accused at the trial; compelling accused persons to testify against themselves or to confess guilt; public proceedings; advising convicted persons of available remedies and of their time-limits (including right to appeal); non bis in idem.

See s. 4.5.3 (Trials taking place during emergencies or armed conflict).

This is not necessarily a closed list: see s. 2.3 (Right to a fair trial: exhaustive list or an expanding ‘bundle of rights’?).


HRC, General Comment No. 29 (2001), §11 (emphasis added).

HRC General Comment No. 32 (2007), §19; HRC, González del Río v. Peru (Comm. no. 263/1987), 28 October 1992, §5.2 (although dealing with potential limitations, not derogations, on the facts). See also HRC General Comment No. 29 (2001), §16: ‘[o]nly a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.’

Siracusa Principles §§70(e) and (f) (the Principles were formally included in the work of the UN Commission on Human Rights at its 41st session); Arab Charter Art. 4(2); IACmHR, Report on Terrorism and Human Rights (2002) OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr., §§233, 247, 258. See also IACtHR, Reverón Trujillo v. Venezuela (Series C, no. 197), 30 June 2009, §68.

Geneva Convention III Art. 84; GC-AP I Art. 75(4); GC-AP II Art. 6(2). See also Geneva Conventions Common Art. 3(1)(d).
HRC, General Comment No. 29 (2001), §16. See also HRC, General Comment No. 32 (2007), §6; HRC, General Comment No. 24 (1994), §8.


Siracusa Principles §70(g).

GC-AP I Art. 75(4)(d) (concerning trials for offences related to the conflict); GC-AP II Art. 6(2)(d) (concerning trials for offences related to the conflict). See also ICRC Customary International Law Database and Commentary, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 22 July 2020.

ACmHPR, *Good v. Botswana* (Comm. no. 313/05) 12–26 May 2010, §194.


Geneva Convention III Arts 96 and 105(3) and (4); GC-AP I Art. 75(4)(a); GC-AP II Art. 6(2)(a).


UNCYT, Status of Treaties, ch. IV. 4 ICCPR, Declarations and Reservations, Turkey. Turkey filed a similar derogation in relation to the ECHR, except that this notification did not include reference to any specific articles that were purportedly affected by the derogation. Council of Europe, ‘Secretary General receives notification from Turkey of its intention to temporarily suspend part of the European Convention on Human Rights’ (2016) <https://rm.coe.int/168071f08e> accessed 13 July 2020.


162 Geneva Convention III Arts 99(3) and 105(1) and (3); Geneva Convention IV Arts 72(1) and (2); ICRC Customary International Law Database and Commentary, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 22 July 2020.


164 Ibid., §253.

165 Geneva Convention III Art. 103(1) (‘as soon as possible’); Geneva Convention IV Art. 71(2) (‘as rapidly as possible’).


167 (1984) 1410 UNTS 351 referring to derogation that started on 30 October 1985 of, inter alia, ‘article 14, except paragraphs 2 and 5 and sub-paragraphs (a), (b), (d) and (g) of paragraph 3’. (1987) 1455 UNTS 367 and (1987) 1462 UNTS 383 specifically referred to the suspension of ICCPR Art. 14(3)(c).

168 Siracusa Principles §70(g). It may however be satisfied in certain circumstances by video-link; see ch. 7, s. 5.5 (Right to be ’tried in his presence’). The right is not listed as non-derogable by the IACmHR: IACmHR, Report on Terrorism and Human Rights (2002) OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr., §§246–247.

169 GC-AP I Arts 75(4)(e) and GC-AP II Art. 6(2)(e), respectively. Cf. Geneva Convention IV Art. 123(2), as regards the disciplinary punishment of internees, which provides that ‘[t]he decision shall be announced in the presence of the accused’, but does not guarantee the right to be present for the proceeding.


171 Ibid., §251.

172 Ibid.

173 See Siracusa Principles §70(g).

174 See GC-AP I Art. 75(4)(g).


177 HRC, General Comment No. 32 (2007), §6.

178 Geneva Convention III Art. 99(2); GC-AP I Art. 75(4)(f) (for trials of offences related to the conflict); GC-AP II Art. 6(2)(f) (for trials of offences related to the conflict).

179 HRC, General Comment No. 29 (2001), §8.

180 IACtHR, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 (Series A, no. 18), 17 September 2003, §101. ACHR Art. 27 provides for the scope and conditions for the suspension or derogation of some human rights in cases of emergency, but it must never involve discrimination.

181 ACmHPR, Purohit v. Gambia (Comm. no. 241/2001) 15–29 May 2003, §49. The ACHPR does not include a derogation clause.
182 GC-AP I Art. 75(1).

183 Siracusa Principles §70(g); IACmHR, Report on Terrorism and Human Rights (2002) OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr., §247. The HRC did not take the opportunity to state the right to appeal was non-derogable when it was raised in a case: HRC, Salgar de Montejo v. Colombia (Comm. no. 64/1979), 24 March 1982.


185 Geneva Convention III Art. 106 (right to appeal ‘in the same manner as members of the armed forces of the detaining power’; Geneva Convention IV Art. 73(1) (right to appeal ‘provided for by the law applied by the court’). The Additional Protocols do not expressly refer to a right to appeal.


187 See Siracusa Principles §70(i).

188 ECHR Protocol 7 Art. 14(3); Arab Charter Art. 4(2).

189 See, e.g., Geneva Convention III Art. 86; Geneva Convention IV Art. 117(3); GC-AP I Art. 75(4)(h); the right does not appear in GC-AP II). See also UN Draft Criminal Code Art. 12.


191 Siracusa Principles §70.

192 Ibid., §70(g).

193 ACmHPR, Commission Nationale des Droits de l’Homme et des Libertés v. Chad (Comm. no. 74/92), 2–11 October 1995, §21. See also ACmHPR Principles on Fair Trial in Africa Principle R.

194 See Geneva Convention III Art. 105(5); Geneva Convention IV Art. 74(1) (providing that representatives of the protecting power are entitled to attend the trial, unless, exceptionally, it is held in camera in the interests of security). See further ICRC Customary International Law Database and Commentary, Rule 100 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 22 July 2020. Cf. Siracusa Principles, §70(g).

195 GC-AP I Art. 75(4)(i) (guaranteeing the right to the public pronouncement of judgments for offences ‘related to the armed conflict’).

196 IACmHR, Report on Terrorism and Human Rights (2002) OEA/Ser.L/V/II.116, Doc. 5 Rev. 1 Corr., §261(c)(ii) (‘where the defendant does not understand or speak the language of the court or tribunal, he or she is entitled to be assisted without charge by a translator or interpreter’). Note, however, the right is not listed in §247.

197 Geneva Convention III Arts 96(4) and 105(1); Geneva Convention IV Arts 72(3) and 123(2).

198 There are some aspects of Art. 14 ICCPR that relate to the right of access to a court: HRC, Souaïene v. Algeria (Comm. no. 3082/2017), 27 July 2020, §8.10. We have only discussed this right to the extent that it relates to the right to equality, the right to appeal and/or the right to a remedy.

See also the holding that the right to adequate time and facilities for preparation of a defence does not apply to custody proceedings: HRC, A.J. v. Netherlands (Comm. no. 1142/2002), 27 March 2003, §7.


WGAD, Shalabi v. Israel (Opinion no. 20/2012), 27 August 2012, §22; WGAD, Musa v. Israel (Opinion no. 3/2012), 1 May 2012, §20.

ECtHR, Grande Stevens v. Italy (App. no. 18640/10), 4 March 2014, §94. See also ECtHR, Sardón Alvira v. Spain (App no. 46090/10), 24 September 2013, §44. See further B. Emmerson, Human Rights and Criminal Justice (Sweet & Maxwell 2012), 210–11.

ECtHR, Grande Stevens v. Italy (App. no. 18640/10), 4 March 2014, §94; ECtHR, Engel v. Netherlands (App. nos 5100/71 & others), 8 June 1976, §§80–82; ECtHR (GC), Zolotukhin v. Russia (App. no. 14939/03), 10 February 2009, §§52–53; ECtHR, Tarasov v. Ukraine (App. no. 44396/05), 16 June 2016, §24. This approach was adopted by the CJEU in CJEU (GC), Łukasz Marcin Bonda (C-489/10), 5 June 2012, §37; affirmed in CJEU (GC), Åklagaren v. Hans Åkerberg Fransson (C-617/10), 26 February 2013, §35. The ECtHR has clarified that ‘these criteria are alternative and not cumulative ones: for Article 6 to apply in respect of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by virtue of its nature and degree of severity, belongs in general to the “criminal” sphere’. But this does ‘not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a “criminal charge” ’; see ECtHR, Grande Stevens v. Italy (App. no. 18640/10), 4 March 2014, §94.

ECtHR, Öztürk v. Germany (App. no. 8544/79), 21 February 1984, §56; ECtHR, Ravensborg v. Sweden (App. no. 14220/88), 23 March 1994, §§31–36; ECtHR, Raza v. Bulgaria (App. no. 31465/08), 11 February 2010, §82. See also ECtHR, Ali Riza v. Turkey (App. nos 30226/10 & others), 28 January 2020 (disciplinary proceedings before sport federation tribunals do not trigger the criminal limb of Art. 6) §173; ECtHR (GC), Maasouia v. France (App. no. 39652/98), 5 October 2000, §39 (procedures for expulsion of aliens not under Art. 6(1)); ECtHR, Peñafiel Salgado v. Spain (App. no. 65964/01), 16 April 2002 (extradition proceedings not under Art. 6(1)); cf. ECtHR, Gurguchiani v. Spain (App. no. 16012/06), 15 December 2009, §§40, 47–48 (replacement of prison sentence by deportation and exclusion for 10 years triggers Art. 6(1)).

These are examined solely by reference to ECHR Art. 5(4); ECtHR, Reinprecht v. Austria (App. no. 67175/01), 15 November 2005, §§47–55.

ACHR Arts 8(1) and 8(2).

IACtHR, Ivcher-Bronstein v. Peru (Series C, no. 74), 6 February 2001, §103. Such an extension of the provision was confirmed by the Court in IACtHR, Constitutional Court v. Peru (Series C, no.71), 31 January 2001, §71.

210 ACHPR Art. 7(1). The ACmHPR Principles on Fair Trial in Africa replicate Art. 14 of the ICCPR’s reference to ‘in the determination of any criminal charge against a person’ but also go on to note that the essential elements of a fair hearing include ‘equality of arms between the parties to proceedings, whether they be administrative, civil, criminal, or military’: Principle A(1) and A(2)(a).


212 This expression was first used by the court in ECtHR, Soering v. United Kingdom (App. no. 14038/88), 7 July 1989, §113.


214 ECtHR, Othman v. United Kingdom (App. no. 8139/09), 17 January 2012, §267: ‘[T]he admission of torture evidence is manifestly contrary, not just to the provisions of Art. 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome.’

215 See, e.g., ECtHR, Al-Moayad v. Germany (App. no. 35865/03), 20 February 2007, §101. However, once the German authorities obtained assurances from the United States that the defendant would not be tried by a military commission or other extraordinary court nor mistreated in detention due to his status as a terrorism suspect, the ECtHR found there was no longer any risk of flagrant violation: §§103–107.


217 ECtHR, Bader v. Sweden (App. no. 13284/04), 8 November 2005, §46.

218 ECtHR, Othman v. United Kingdom (App. no. 8139/09), 17 January 2012, §259, citing ECtHR, Einhorn v. France (App. no. 71555/01), 16 October 2001, §33; ECtHR (GC), Sejdovic v. Italy (App. no. 56581/00), 1 March 2006, §84; ECtHR, Stoichkov v. Bulgaria (App. no. 9808/02), 24 March 2005, §§55–56; ECtHR, Bader v. Sweden (App. no. 13284/04), 8 November 2005, §47; ECtHR, Al-Moayad v. Germany (App. no. 35865/03), 20 February 2007, §101.

219 See HRC, I.D.M. v. Colombia (Comm. no. 2414/2014), 25 July 2018, §9.10. See s. 5.2 (Degrees of deference).

220 In S., the applicant invited the Committee to find that arbitrary arrests and lengthy pre-trial detentions, as well as torture of detainees in custody should be a basis for concluded that the receiving state, Bangladesh, would not observe his right to a fair trial owing to his particular circumstances: HRC, S. v. Denmark (Comm. no. 2642/2015), 26 March 2018, §5.5.

221 See, e.g., ACtHPR, Thomas v. Tanzania (App. no. 005/2013), 20 November 2015, §150; IACtHR, Wong Ho Wing v. Peru (Series C, no. 297), 30 June 2015, §136. See also IACmHR,
Lizardo Cabrera v. Dominican Republic (Case 10.832), 19 February 1998, §72 (‘flagrant denial of justice’ mentioned in the context of excessive delay in bringing new charges).

222 See, e.g., ICCPR Art. 14; ACHR Art. 8; ECHR Art. 6; ACmHPR Principles on Fair Trial in Africa Principle N. See also ACmHPR, Kwoyelo v. Uganda (Comm. no. 431/12) 13–22 February 2018, §223 (holding that ‘from the moment criminal charges were pressed against him and he was informed of the same ... the Victim has the right to exercise all his fair trial related rights’). Cf. W. A. Schabas, Nowak’s CCPR Commentary (3rd rev. edn, N. P. Engel 2019), 364 (suggesting that the claim to a fair trial arises not only when the person concerned is formally charged but also when the person is substantially affected by the activity of the state, such as ‘the first official notification of a specific accusation’).


224 See, e.g., HRC, General Comment No. 32 (2007), §6; HRC, Akhadov v Kyrgyzstan (Comm. no. 1503/2006), 25 March 2011, §7.5 (proceedings were ‘vitiating by irregularities’ including ill-treatment by police which ‘cast[] doubt on the fairness of the criminal trial as a whole’). See ch. 10, s. 4.4.1 (Physical coercion); ch. 1, s. 7.2..3.1 (Racial bias); ch. 12, s. 5.2 (Race discrimination).

225 See e.g., ch. 12, s. 5.5 (Discrimination on the basis of ‘political or other opinion’: politicised prosecutions).


229 ECHR, S.C. v. United Kingdom (App. no. 60958/00), 15 June 2004, §29. See also ICC Gbagbo Decision of 2 November 2012, §50. See further IACmHR, Lackey v. United States (Case 11.575 & others) 15 July 2013, §218 (on a person with mental disabilities not comprehending the reason for or consequence of their execution).

230 ECHR, Liebreich v. Germany (App. no. 30443/03), 8 January 2008; ICC Gbagbo Decision of 2 November 2012, §§50–51; ECCC, Co-Prosecutors v. Nuon Chea (Case No. 002/19-09-2007/ECCC/TC), Decision on fitness of the accused Nuon Chea to stand trial, 25 April 2014, §6. See also HRC, M.G. v. Germany (Comm. no. 1482/2006), 23 July 2008, §10.2 (violation of Art. 14(1) because the German regional court ordered the defendant to undergo a medical examination of her physical and mental state of health or to have an expert opinion prepared on the basis of the existing case file ‘without having heard or seen
the [defendant] in person and to base this decision merely on her procedural conduct and written court submissions’).

231 ECTHR, Liebreich v. Germany (App. no. 30443/03), 8 January 2008.

232 For instance, ICC RPE Rule 135(4) stipulates that if the Court is ‘satisfied that [a defendant] is unfit to stand trial, it shall order that the trial be adjourned’, periodically review the case, and when the Court ‘is satisfied that the [defendant] has become fit to stand trial [again], it shall proceed’ with the trial.

233 ECCC, Co-Prosecutors v. Ieng Thirith et al. (002/19-09-2007/ECCC/TC), Decision on Ieng Thirith’s Fitness to Stand Trial, 17 November 2011, §§52–53.

234 The CRPD Com has rejected the concept of unfitness to stand trial, found it to be discriminatory, and called for its removal from the criminal justice system: CRPD Com, Guidelines on article 14 of the CRPD: the right to liberty and security of persons with disabilities (2015) UN Doc. A/72/55, Annex §16; CRPD Com, Concluding Observations on the Initial Report, Republic of Korea (2014) UN Doc. CRPD/C/KOR/CO/1, §28; CRPD Com, Noble v. Australia (Comm. no. 7/2012), 2 September 2016, §§2.6, 8.6. This position has been supported by the WGAD in the WGAD Principles on Remedies §107(b). See also ECTHR, Liebreich v. Germany (App. no. 30443/03), 8 January 2008; ICC Gbagbo Decision of 2 November 2012, §102.

235 For arbitrary detention contrary to ICCPR Art. 9, see, e.g. HRC, General Comment No. 35 (2014), §14; HRC, Nasir v. Australia (Comm. no. 2229/2012), 29 March 2016, §7.7 (mandatory minimum sentences); HRC, Fernando v. Sri Lanka (Comm. no. 1189/2003), 31 March 2005, §9.2 (imprisonment for contempt of court); HRC, Dissanayake v. Sri Lanka (Comm. no. 1373/2005), 22 July 2008, §8.3 (two years’ imprisonment for contempt). See also HRC, Concluding Observations, Bosnia and Herzegovina, CCPR/C/BIH/CO/2 (2012), §7 indicating that consistency in sentencing may be within the scope of Art. 14.

236 HRC, R.M. v. Finland (Comm. no. 301/1988), 23 March 1989, §§4.2, 6.4 (sentenced to eight years and eight months in prison and a fine of one million Finnish marks for smuggling 4.5kg of hashish). See s. 5.2 (Degrees of deference).


238 WGAD, Omar v. Iraq (Opinion no. 5/2014) 23 April 2014, §§20–21. It also found a violation of Art. 9 ICCPR.


241 ECTHR (GC), Kyprianou v. Cyprus (App. no. 73797/01), 15 December 2005, §§176–183 (a violation of Art. 6(1) was also found because the Limassol Assize Court was not impartial: §§128, 133, 135); ECTHR (GC), Cumpănă v. Romania (App. no. 33348/96), 17 December 2004, §120. See also, on imprisonment as a disproportionate penalty for freedom of
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242 ECTHR, Grba v. Croatia (App. no. 47074/12), 23 November 2017, §103.

243 ICC Statute Art. 83(3).

244 ICC, Prosecutor v. Lubanga Dyilo (ICC-01/04-01/06 A 4 A 6), Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’, 1 December 2014, §§2, 39. See also ICC, Prosecutor v. Bemba Gombo et al. (ICC-01/05-01/13 A6 A7 A8 A9), Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’, 8 March 2018, §77 (holding that the principle of legality ensures that the sentencing powers of the trial chamber are ‘limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its quantum’, emphasis in original. It held that the Trial Chamber did not have the power to impose a suspended sentence (at §80)).


246 The prosecutor may also have a right to appeal in certain jurisdictions, but this is not a right that is protected by ICCPR Art. 14(5) which refers to ‘[e]veryone convicted of a crime’.

247 IACtHR, Paniagua-Morales v. Guatemala (Series C, no. 37), 8 March 1998, §155. See also ICC, Prosecutor v. Ongwen (ICC-02/04-01/15 OA4), Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’, 17 July 2019 (hereinafter: ‘ICC Ongwen Appeal Judgment of 17 July 2019’), §136 observing that an ‘expeditious trial is beneficial to victims and witnesses, and unreasonable delay may also diminish public interest and public support for, and cooperation with the Court’. See ch. 6, s. 4.2 (Right of victims to a trial without undue delay).

248 ACHR Art. 8(5).

249 See, e.g., HRC, General Comment No. 32 (2007), §28; ECTHR, Pretto v. Italy (App. no. 7984/77), 8 December 1983, §21; see also ch. 2: Right to a Public Trial.

250 See also UN Declaration on Justice for Victims Principle A6; cf. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA §20 referring to ‘rights’ and the ‘role’ of victims. EU directives are binding legal instruments of general application that the European Union uses to harmonise the laws of its member states and to ensure consistency among its own institutions on certain matters. The form and methods by which the directive is given effect nationally is up to each state (e.g., by enacting national laws), but the state is bound to give effect to the directive if it is addressed to them: TFEU Art. 288.

251 ICC, Prosecutor v. Ruto et al. (ICC-01/09-01/11), Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, Dissenting Opinion of Judge Herrera Carbuccia, §27.

252 HRC, Rabbae v. Netherlands (Comm. no. 2124/2011), 14 July 2016, §10.3. See also HRC, Concluding Observations, Guatemala (2012) CCPR/C/GTM/CO/3, §25 (referring to the ‘right to truth and justice’ in Art. 14 enjoyed by victims, witnesses, and justice officials who are subject to intimidation and attacks).
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254 ECTHR (GC), Perez v. France (App. no. 47287/99), 12 February 2004, §62; ECTHR, Gracia Gonzalez v. Spain (App. no. 65107/16), 6 October 2020, §74 (violation of Art. 6(1) because of the failure to provide a formal opportunity for the victim’s wife, a civil party, to challenge the public prosecutor’s petition to discontinue the proceedings); ECTHR, Moreira de Azevedo v. Portugal (App. no. 11296/84), 23 October 1990, §§63-67 (the applicant, who had the status of an ‘assistente’ in domestic criminal proceedings, could benefit from the guarantees in Art. 6 in relation to those criminal proceedings).

255 ECTHR (GC), Tănase v. Romania (App. no. 41720/13), 25 June 2019, §193.

ACmHPR Principles on Fair Trial in Africa Principle C(c)(i).

257 ICC, Prosecutor v. Katanga et al. (ICC-01/04-01/07), Decision on the Set of Procedural Rights attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, §§60, 64-65, 67. The ICC has held that victims cannot appeal a decision not to authorise an investigation into a situation: ICC, Situation In The Islamic Republic Of Afghanistan (ICC-02/17 OA OA2 OA3 OA4), Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan, 4 March 2020, §23. See also denial of victims’ right to appeal in STL, Prosecutor v. Ayyash et al. (STL-11-01/T/TC), Judgment, 18 August 2020, §940.


259 ACHR Arts 1, 8, 25.

260 IACtHR, Río Negro Massacres v. Guatemala (Series C, no. 250), 4 September 2012, §193.


263 ICC Statute Art. 64(2).

264 IACtHR, Norín Catrimán v. Chile (Series C, no. 279), 29 May 2014, §§242-247.

265 CAT Art. 13.

266 See Y. McDermott, ‘Procedural Actors and the Right to a Fair Trial’ in Fairness in International Criminal Trials (OUP 2016).

267 There is also a duty to prosecute in some national systems. See, e.g., the duty of the Italian prosecutor to initiate criminal proceedings under Italian Constitution Art. 112.

268 See, e.g., HRC, Karttunen v. Finland (Comm. no. 387/1989) 23 October 1992, §7.2 (‘ “Impartiality” of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties’, emphasis added). See ch. 1: Right to a Competent, Independent and Impartial Tribunal Established by Law.
See, e.g., IACtHR, *Mohamed v. Argentina* (Series C, no. 255), 23 November 2012, §§120–126. See ch. 11, s. 4.2.1 (Right to appeal of the prosecution).


**STL, Prosecutor v. Ayyash et al.** (STL-11-01/T/TC), Decision on Prosecution Motion to Amend its Exhibit List and Oneissi Defence Request to Stay the Proceedings, 13 April 2015, §47.

**ICC, Prosecutor v. Ngudjolo Chui** (ICC-01/04-02/12 A), Judgment on the Prosecutor’s Appeal Against the Decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, 7 April 2015, §255.

Ibid., §256.

Ibid.

See s. 4.4.1 (Recognition of a non-defendant’s right to a fair trial).


**ICTY, Prosecutor v. Prlić et al.** (IT-04-74-AR73.4), Decision on the Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing the Time for the Prosecution’s Case, 6 February 2007, §16.

ICTR Statute Arts 20(2) and 21; ICTY Statute Arts 21(2) and 22.


See ch. 8, s. 6.3.1.2 (Anonymous witnesses).


See ch. 8, s. 6.3.1.2 (Anonymous witnesses).


ICC Statute Art. 68(2); ICC RPE Rule 67(1); ICTY/ICTR RPE Rule 75. See, e.g., ICC, *Prosecutor v. Ntaganda* (ICC-01/04-02/06), Decision on Prosecution’s request for in-court protective measures and special measure for Witness P-0815, 30 March 2016, §§5–6; SCSL,
Prosecutor v. Sesay et al. (SCSL-04-15-T), Order on Protective Measures for Additional Witnesses, 24 November 2004, 3. See ch. 4, s. 6.2.2.3 (Protecting victims and witnesses).

ICC, Prosecutor v. Lubanga Dyilo (ICC-01/04-01/06), Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber 1 entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 October 2006, §36.

Ibid., §37.


See, e.g., SCSL, Prosecutor v. Kallon et al. (SCSL-2004-15-AR.72(e)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, §§66–74 (holding that amnesties for grave international crimes are inconsistent with international law); IACtHR, Almonacid-Arellano v. Chile (Series C, no. 154), 26 September 2006, §114 (holding that crimes against humanity are not susceptible to an amnesty); HRC, General Comment No. 31 (2004), §18 (holding that amnesties for breaches of the ICCPR, including torture, arbitrary killing, and enforced disappearance, are inconsistent with the treaty).

IACtHR, Barrios Altos v. Peru (Series C, no. 75), 14 March 2001, §§42–43 (Arts 1 and 25 also violated).

Ibid., §43.

ACmHPR, Zimbabwe Human Rights NGO Forum v. Zimbabwe, (Comm. no. 245/02), 11–25 May 2006, §211. The ACmHPR found a breach of the victim’s right to a fair trial under Art. 7 when the state granted immunity to the perpetrators of human rights abuses as such measures ‘prevent victims from seeking compensation [which] render victims helpless and deprives them of justice’: ACmHPR, Mouvement ivoirien des droits humains v. Côte D’Ivoire (Comm. no. 246/02), 21–29 July 2008, §§97–98.

ECHR, SM v. Croatia (App. no. 60561/14), 19 July 2018, §59 (referring to ECHR Arts 2, 3, 4).


R. Aldana-Pindell, ‘In Vindication of Justiciable Victims’ Rights to Truth and Justice for State-Sponsored Crimes’ (2002) 35(5) Vanderbilt Journal of Transnational Law 1399, 1417–18; IACtHR, Castillo-Páez v. Peru (Series C, no. 43), 27 November 1998, §§106–107; IACtHR, Bámaca-Velásquez v. Guatemala (Series C, no. 70), 25 November 2000, §§182–196; IACtHR, Baldeón-García v. Peru (Series C, no. 147), 6 April 2006, §218; IACtHR, Rodríguez Vera v. Colombia (Series C, no. 287), 14 November 2014, §§435–436. The Court has also held that Arts 8 and 25 require states to conduct fair trials in order to guarantee the right of family members of victims to know the truth about the circumstances of the crime: IACtHR,


301 ACTHR, Zongo v. Burkina Faso (App. no. 013/2011), 5 June 2015, §111(x). See also ACmHR, Hadi v. Sudan (Comm. no. 368/09) 22 October–5 November 2013, §93 (finding the state failed to investigate police and military officers who arrested and detained the victims).

302 HRC, General Comment No. 28 (2000), §31.

303 HRC, Rabbae v. Netherlands (Comm. no. 2124/2011), 14 July 2016, §10.7 (breaches of Arts 2(3), 20(2), and 26 alleged).


305 A defendant may also regard his own immunity as causing unfairness. In the context of parliamentary immunity, the ECtHR found no violation of Art. 6(1) in a case in which Turkey’s refusal to lift the immunity of the defendant was alleged to have hindered criminal proceedings against him and deprived him of the chance to clear his name. Parliamentary immunity was said to serve the legitimate purpose of ‘ensuring the independence of Parliament in the performance of its task’ and in this case the restriction on access to court did not impair the very essence of the right: ECtHR, Kart v. Turkey (App. no. 8917/05), 3 December 2009, §§90–93.

306 See s. 4.4.2.2 (Amnesties, non-prosecutions, and acquittals).


308 Ibid., §61.


310 ILC, Immunity of State officials from foreign criminal jurisdiction: Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session (2017) UN Doc. A/CN.4/L.893.


312 Each chapter considers how and when the component right may be waived. Where relevant, exceptions to the right are also set out, such as the exception to the prohibition on double jeopardy when the first proceeding has suffered from fundamental defects in due process: see ch. 13, s. 7.1 (Initial prosecution tainted by fundamental defects in due process).

313 HRC General Comment No. 32 (2007), §42 (setting out examples of ‘special protections’) and §44 (urging the consideration of ‘measures other than criminal proceedings’ if it would foster rehabilitation). The relevant chapters address each component right that is modified for juvenile defendants. See, e.g., ch. 2, s. 4.4.4 (Juveniles); ch. 4, s. 5.6 (Right of juveniles to be informed of the charges); ch. 6, s. 5.1.5.2 (Juvenile defendants). The ECHR has no counterpart to ICCPR Art. 14(4). See COE, Report of the Committee of Experts on Human Rights to the Committee of Ministers (1970) H(70)7, 39 (finding it ‘difficult to say whether this provisions would constitute an additional obligation’ to those in the ECHR). Cf. ACHR Art. 5(5), ACmHR Principles on Fair Trial in Africa Principle O, Arab Charter Art. 17.
317 See, e.g., CRC, Concluding Observations, Australia (2019) UN Doc. CRC/C/AUS/CO/5-6, §§47, 48.
318 Canada, Youth Criminal Justice Act 2002, s. 2. Previously, children under the age of 16 were dealt with under the Juvenile Delinquents Act that provided fewer procedural protections and included a ‘status’ offence of juvenile delinquency that permitted incarceration of children for such offences as skipping school and running away.
322 Peru, Penal Code Art. 20(2).
326 HRC, General Comment No. 17 (1989), §4; HRC, General Comment No. 32 (2007), §43 (‘It is important to establish a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity’).
327 CRC Com, General Comment No. 24 (2019), §22.
328 ECHR (GC), T. v. United Kingdom (App. no. 24724/94), 16 December 1999, §84.
329 HRC General Comment No. 32 (2007), §43 (emphasis added).
331 ICCPR Art 10(2)(b); Beijing Rules; UNGA, UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) A/RES/45/113, annex. Pre- and post-trial detention is also to be avoided to the extent possible: CRC Com, General Comment No. 24 (2019), §§85.
332 The Court has remarked negatively on Turkish legislation that precluded trials of juvenile defendants in children’s courts on certain charges, but did not find a violation on that basis: ECHR, Güzveç v. Turkey (App. no. 70337/01), 20 January 2009, §§54, 125.
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ECOWAS CCJ, Obi v. Nigeria (Suit no. ECW/CCJ/APP/25/15), 9 November 2016, 15. On the facts, there was no fair trial violation because the defendant ‘did not provide any evidence of rights violation outside the general critique’ of capital punishment (at 17).

Ibid., 15–16 (emphasis added).


IACmHR, Medellín v. United States (Case 12.644), 7 August 2009, §122.

HRC, General Comment No. 29 (2001), §15 (emphasis added).


HRC, General Comment No. 36 (2018), §§11, 17.

Ibid., §37. The possibility to seek a pardon or commutation is not an adequate substitute for the need for judicial discretion. See also HRC, Concluding Observations, Botswana (2008) UN Doc. CCPR/C/BWA/CO/1, §13; UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, Mr P. Alston, Report (2010) UN Doc. A/HRC/14/24, §51(d). See ch. 1, s. 6.3.2 (Non-interference in determining verdicts).

HRC General Comment No. 36 (2018), §41. Other serious procedural flaws not expressly covered by Art. 14 may render the imposition of the death penalty contrary to Art. 6, such as failure to comply with consular notification obligations under the Vienna Convention on Consular Relations (at §42).


HRC, General Comment No. 36 (2018), §36.


See s. 3.2.1 (Derogations and component fair trial rights); ICCPR Art. 4.
As of 5 May 2020, 14 states had made notifications under the ICCPR, 10 under the ECHR, and 12 under the ACHR. 12 of the ICCPR states parties that made notifications are also party to, and have derogated from, the ECHR or ACHR.

Council of Europe, Recommendations of the Council for Administration of Courts for organising the administration of justice during emergency situation (2020) Appendix 3, clause 11. Estonia also derogated from ICCPR Arts 9, 12, 17, 21 and 22 and ECHR Arts 5, 8, 11, and Arts 1 and 2, Protocol 1 and Art. 2, Protocol 4. It is questionable whether such a derogation was required as remote hearings are permitted in some circumstances with appropriate safeguards in place: see ch. 7, s. 5.5 (Right to be ‘tried in his presence’).

Estonia terminated the state of emergency and withdrew its derogations from ICCPR and ECHR as of 18 May 2020.


HRC, General Comment No. 32 (2007), §22. See also IBA Human Rights Institute, Justice at a Crossroads: The Legal Progression and the Rule of Law in the New Egypt (2011) §27; UN Basic Principles on the Independence of the Judiciary, §5, guaranteeing the right to trial ‘by ordinary courts or tribunals using established legal procedures’ and prohibiting the creation of tribunals not meeting such requirements to displace ordinary courts.

HRC, General Comment No. 32 (2007), §22. See HRC, Abbassi v. Algeria (Comm. no. 1172/2003), 28 March 2007, §8.7. The ACmHPR has taken an even stricter stance, holding that military courts ‘should not, in any circumstances whatsoever, have jurisdiction over civilians’: ACmHPR, Media Rights Agenda v. Nigeria (Comm. no. 224/98), 23 October -6 November 2000, §62.

See ch. 1: Right to a Competent, Independent and Impartial Tribunal Established by Law; ch. 2: Right to a Public Trial.


WGAD, al Baluchi v. United States (Opinion no. 89/2017), 24 November 2017, §43.


Ibid., §§76–77.
363 Ibid., §76.
365 Ibid., §§54, 56.
369 ECtHR, Ireland v. United Kingdom (App. no. 5310/71) 18 January 1978, §161; ECtHR, Shamayev v. Georgia and Russia (App. no. 36378/02), 12 April 2005, §338.
371 ECtHR (GC), Ibrahim v. United Kingdom (App. nos 50541/08 & others), 13 September 2016, §301.
374 WGAD, Report (2011) UN Doc. A/HRC/19/57, §68 (‘the burden rests with the Government: it is for the Government to produce the necessary proof ... the matter of the evidentiary burden arises where the source has established a prima facie case for breach of international requirements constituting arbitrary detention’); ACtHPR, Onyachi v. Tanzania (App. no. 003/2015), 28 September 2017, §§142–143 (‘victims of human rights may thus be practically unable to prove their allegations as the means to verify their allegation are likely to be controlled by the State’); IACtHR, Chaparro Álvarez v. Ecuador (Series C, no. 170), 21 November 2007, §73. See further on the IACtHR, Paúl, Álvaro, ‘An Overview of the Inter-American Court’s Evaluation of Evidence’, in Y. Haeck & others (eds), The Inter-American Court of Human Rights: Theory and Practice, Present and Future (Intersentia, 2015).
375 ICJ, Case concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, §55.
376 WGAD, Nasheed v. Maldives (Opinion no. 33/2015), 4 September 2015, §94. See also WGAD, Gaddafi v. Libya (Opinion no. 41/2013), 14 November 2013, §35; ICJ, Case concerning Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, §55.
377 WGAD, Madani v. Algeria (Opinion no. 28/2001), 3 December 2001, §§16, 20, 24; cf. HRC, Benhadj v. Algeria (Comm. no. 1173/2003), 20 July 2007, §8.9 (in which the defendant also failed to respond to the authorities’ explanations). See ch. 7: Right to be Present.
379 See ch. 3: Right to be Presumed Innocent. See e.g., HRC, Uteeva v. Uzbekistan (Comm. no. 1150/2003), 26 October 2007, §6.4; HRC, Ruiz Agudo v. Spain (Comm. no. 864/1999), 31 October 2002, §9.2; HRC, V.S. v. Lithuania (Comm. no. 2437/2014), 23 July 2015, §6.3; HRC,

380 ICC Statute Art. 69(7).


385 HRC, General Comment No. 32 (2007), §26. See HRC, Romanov v. Ukraine (Comm. no. 842/1998), 30 October 2003, §6.4, where the HRC deferred to the findings of fact and evidence of the domestic court in a criminal case where the author failed to show any evidence of impartiality on the part of the court; see also HRC, Cheban v. Russia (Comm. no. 790/1997), 24 July 2001, §6.5; HRC, Griffin v. Spain (Comm. no. 493/1992), 4 April 1995, §9.6; HRC, Campbell v. Jamaica (Comm. no. 248/1987), 30 March 1992, §6.2; HRC, Kelly v. Jamaica (Comm. no. 253/1987), 8 April 1991, §5.13. See further ch. 1, s. 7.4 (Arbitrary rulings at trial); ch. 3, s. 9 (Violations of the Presumption of Innocence when there is Insufficient Evidence to Sustain a Conviction); ch. 4, s. 7 (Arbitrary Assessments of Evidence and Submissions); ch. 8, s. 6.2.2.1 (Time and scope of the questioning); s. 7.1 (Right to examine ‘witness on his behalf’?); s. 7.3 (Permissible limitations on the right to call witnesses).

386 HRC, Lindon v. Australia (Comm. no. 646/1995), 25 November 1998, §6.3. See also COE, Report of the Committee of Experts on Human Rights to the Committee of Ministers (1970) H(70)7, 10 (stating that it ‘could not exclude the possibility’ that the HRC ‘might consider itself competent to examine at least in certain respects whether a decision of a supreme national authority is in accordance with national law or whether the national law is arbitrarily applied’).


396  HRC, General Comment No. 32 (2007), §39.

397  WGAD, Ucan Nah v. Mexico (Opinion no. 36/2011), 1 September 2011, §35.


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IACtHR, Ruano Torres v. El Salvador (Series C, no. 303), 5 October 2015, §126.
IACmHR, Cedena Gonzales v. Costa Rica (Case 116/01), 22 October 2003, §31.
IACmHR, Wright v. Jamaica (Case 9260), 14 September 1988, operative provision §2.
IACmHR, Lopez Aurelli v. Argentina (Case 9850), 4 October 1990, §§21-23.
Ibid., §53.
ACTHPR, Abubakari v. Tanzania (App. no. 007/2013), 3 June 2016, §26; ACTHPR, Onyachi v. Tanzania (App. no. 003/2015), 28 September 2017, §38: ‘The Court also has the jurisdiction to investigate the manner in which the particular evidence that resulted in the alleged violation of human rights of the Applicants was collected and whether such process was carried out with adequate safeguards against arbitrariness.’
ECTHR, Suominen v. Finland (App. no. 37801/97), 1 July 2003, §36; ECTHR (GC), Perna v. Italy (App. no. 48898/99), 6 May 2003, §39(b); ECTHR, Vidal v. Belgium (App. no. 12351/86), 22 April 1992, §33.
ECTHR (GC), Correia de Matos v. Portugal (App. no. 56402/12), 4 April 2018, §§116-117, 128.
ECTHR (GC), Regner v. Czech Republic (App. no. 35289/11), 19 September 2017, §§147, 161.
ECTHR, Jorgic v. Germany (App. no. 74613/01), 12 July 2007, §65.
ECTHR, Mammadov v. Azerbaijan (No. 2) (App. no. 919/15), 16 November 2017, §205. See ch. 3: Right to be Presumed Innocent.

[422] ECTHR (GC), Regner v. Czech Republic (App. no. 35289/11), 19 September 2017, §147. See also ECTHR (GC), Moreira Ferreira v. Portugal (No. 2) (App. no. 19867/12), 11 July 2017, §99; ECTHR, Laska v. Albania (App. nos 12315/04 & 17605/04), 20 April 2010, §57.

[423] ECTHR, Hodžić v. Croatia (App. no. 28932/14), 4 April 2019, §58; ECTHR (GC), Moreira Ferreira v. Portugal (No. 2) (App. no. 19867/12), 11 July 2017, §83; ECTHR, Mammadov v. Azerbaijan (No. 2) (App. no. 919/15), 16 November 2017, §205. See also ch. 1, s. 7.4 (Arbitrary rulings at trial). See further COE, Report of the Committee of Experts on Human Rights to the Committee of Ministers (1970) H(70)7, 12 (stating that ‘it would appear that the terms “arbitrary” and “arbitrarily” are intended to mean both “illegal” and “unjust” and may also include the conceptions “capricious” or “unreasonable”’).

[424] But see, e.g., ICTY Rule 11bis referrals in which the Tribunal had to assess whether the defendant would receive a fair trial in national courts in the context of transferring cases involving lower-level defendants.


[426] Ibid., §17.


[433] ICTR Renzaho Appeal Judgment of 1 April 2011, §143.


[435] HRC, Nasheed v. Maldives (Comm. nos 2270/2013 & 2851/2016), 4 April 2018, §§2.19, 10; WGAD, Nasheed v. Maldives (Opinion no. 33/2015), 4 September 2015, §112. WGAD considered that the adequate remedy was to release Nasheed immediately and grant him compensation in accordance with ICCPR Art. 9(5). The HRC considered the Maldives was obligated to quash his conviction; review the charges against him taking into account the present views; and, if appropriate, conduct a new trial ensuring all fair trial guarantees; restore his right to stand for office, including the office of President; and to take steps to avoid similar violations in the future, including reviewing its legislation to ensure that any
restriction on the right to stand for office is reasonable and proportionate (§10). See also HRC, Sannikov v. Belarus (Comm. no. 2212/2012), 6 April 2018, §§6.4, 6.7, 6.8, 8 in which the HRC found numerous fair trial violations committed against a Belarussian politician and activist and found Belarus was obliged to provide different and additional remedies, including expunging his conviction and conducting an investigation and prosecution against those responsible, to those ordered by WGAD in the same case six years earlier: WGAD, Sannikov v. Belarus (Opinion no. 14/2012), 4 May 2012, §§38, 41-42. The HRC made no reference to the WGAD Opinion.

436 ECtHR (GC), Correia de Matos v. Portugal (App. no. 56402/12), 4 April 2018, operative provision §2; HRC, Correia de Matos v. Portugal (Comm. no. 1123/2002), 28 March 2006.

437 ECtHR (GC), Correia de Matos v. Portugal (App. no. 56402/12), 4 April 2018, §135. In 1970, experts advised the COE that ‘the fact that a right guaranteed, on the one hand in the [ICCPR] and, on the other, in the European Convention may, even if worded in the same terms, be interpreted in a different way by the control organs set up by the two systems’. They noted that the HRC does not deliver ‘legally binding decisions’ and thus ‘may very well use methods and standards of interpretation which differ from the practice of the European control organs’: COE, Report of the Committee of Experts on Human Rights to the Committee of Ministers (1970) H(70)7, 9. See also consideration of the same case and the reaching of different results in WGAD, Madani v. Algeria (Opinion no. 28/2001), 3 December 2001 and HRC, Benhadj v. Algeria (Comm. no. 1173/2003), 20 July 2007. See further ch. 7: Right to be Present. According to some commentators, the Court’s approach, where it did not provide a further explanation as to why it declined to adopt the Committee’s interpretation when it has followed the Committee on previous occasions, ‘adds force to the impression that the Court gives substantive weight to external instruments only when they pragmatically serve its pre-established position …’: Dorothea Staes, ‘Correia de Matos v. Portugal: Fragmented Protection of the Right to Defend Oneself in Person’ (Strasbourg Observers, 24 May 2018) <https://strasbourgobservers.com/2018/05/24/correia-de-matos-v-portugal-fragmented-protection-of-the-right-to-defend-onceself-in-person/> accessed 13 July 2020.

438 IACtHR, Cabrera García v. Mexico (Series C, no. 220), 26 November 2010, §167 and n 261; ECtHR (GC), Gafgen v. Germany (App. no. 22978/05, 1 June 2010.


443 ACHR Art. 61(1); Protocol to the ACHPR Art. 2.

444 Based on a search of the OHCHR HRC jurisprudence database conducted in January 2020. This includes decisions on inadmissibility.

445 ICCPR Art. 2(3); WGAD, Revised Factsheet No. 26 (2019), 8.

446 ICCPR Art. 14(3)(d); See also HRC, General Comment No. 32 (2007), §37.

For a discussion on ‘selective’ silence, see ch. 10, s. 8.3 (Waiver through selective silence).

See, e.g., Ireland, United Kingdom, New South Wales (Australia), Singapore, and Saint Lucia.

See ch. 9: Right to an Interpreter. ECtHR, Vizgirda v. Slovenia (App. no. 59868/08), 28 August 2018, §81.


See ch. 11: Right to Appeal.

See the politicised prosecution of former President Nasheed of the Maldives discussed earlier in this section.

See ch. 14: Remedies.

Ibid.

Ibid.

The typical language used by the WGAD in recent years is: ‘The Working Group considers that, in light of all the circumstances in the specific case, the proper remedy would be the immediate release of the detainees and the granting of reasonable and appropriate reparation in accordance with article 9, paragraph 5, of the Covenant.’ See, for instance, WGAD, Najem v. Lebanon (Opinion no. 57/2014), 21 November 2014, §38.

Exceptions include cases where the applicant was no longer arbitrarily detained at the time of the opinion of the WGAD, see, for instance: WGAD, Martínez v. Mexico (Opinion no. 23/2014), 26 August 2014, §28; WGAD, a minor v. Bahrain (Opinion no. 27/2014), 27 August 2014, §33; WGAD, Mejía v. El Salvador (Opinion no. 20/2014), 1 May 2014, §23.

The Court has ordered release in other cases not involving fair trial violations under Art. 6 but involving violations of the right to be protected from arbitrary arrest under Art. 5. See, for instance, ECtHR, Ilascu v. Republic of Moldova (App. no. 48787/99), 8 July 2004, §490 and operative provision §22; ECtHR, Aleksanyan v. Russia (App. no. 46468/06), 22 December 2008, §240 and operative provision §9; ECtHR, Del Rio Prada v. Spain (App. no. 42750/09), 21 October 2013, §139 and operative provision §3; ECtHR, Tehrani v. Turkey (App. nos 32940/08 & others), 13 April 2010, §107 and operative provision §10(a); ECtHR, Dbouba v. Turkey (App. no. 15916/09), 13 July 2010, §65 and operative provision §5(a); ECtHR, Charahili v. Turkey (App. no. 46605/07), 13 April 2010, §85 and operative provision §7(a). In all these cases, the Court had found a violation of the right to liberty and security and found that release was the only possible measure to remedy that violation.


See ch. 14: Remedies.

Key areas of divergence are highlighted in the conclusion to each chapter.


See s. 3 (Right to a Fair Trial in Customary International Law).

See, e.g., IACmHR, Dann v. United States (Case 11.140), 27 December 2002, §96; IACtHR, Rodríguez Vera v. Colombia (Series C, no. 287), 14 November 2014, §437 (referring to the Inter-American Convention on Forced Disappearances and ACAT); IACtHR, González v. Mexico (Series C, no. 205), 16 November 2009, §502 (referring to the Istanbul Protocol and the UN Manual on Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions); IACtHR, ‘Las Dos Erres’ Massacre v. Guatemala (Series C, no. 211), 24 November 2009, §140 (referring to jurisprudence of the ICTY, ICTR, and ECtHR); IACtHR, Alibux v. Suriname (Series C, no. 276), 30 January 2014, §§89–97 (referring to the ICCPR and decisions of the HRC, and the ECHR and decisions of the ECtHR).


ACHPR Art. 60. See also ACHPR Art. 61 and Protocol to the ACHPR Art. 3(1).


HRC, Blessington v. Australia (Comm. no. 1968/2010), 22 October 2014, §7.11: ‘The Committee recalls in this regard article 37(a) of the Convention on the Rights of the Child, which stipulates that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age.” While the Committee’s main role is to monitor the implementation of the Covenant, the Committee considers this provision, which is included in a treaty ratified or acceded to almost universally, including by the State party, as a valuable source informing the interpretation of the Covenant in the present case.’

HRC, General Comment No. 32 (2007), §§25 and 55 (footnotes citing CERD Com and WGAD).

HRC, Nasheed v. Maldives (Comm. nos 2270/2013 & 2851/2016), 4 April 2018, §§3.3–3.4, 4.4, 5.9, and 8.1ff. See also, in the context of the French burqa ban, HRC, Yaker v. France (Comm. no. 2747/2016), 17 July 2018; HRC, Hebbedj v. France (Comm. no. 2807/2016), 17 October 2018; cf. ECtHR, S.A.S. v. France (App. no. 43835/11), 1 June 2014. See further H. Keller & L. Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’ in H. Keller & G. Ulfstein (eds), UN Human Rights Treaty Bodies: Law and Legitimacy (CUP 2012), 158 (‘[n]o interviewees suggested that a universal human rights system has emerged and that the Committee must accordingly harmonise its product with that of other human rights treaty bodies or courts.’).

Human Rights Council, Methods of Work of the Working Group on Arbitrary Detention (2017) UN Doc. A/HRC/36/38, §7. See also WGAD, Maseko v. Swaziland (Opinion no. 6/2015), 22 April 2015, §29 (referring to Latimer House Guidelines for the Commonwealth in observing that criminal law and contempt proceedings were not appropriate mechanisms to restrict legitimate criticism of the courts).


ECtHR (GC), Loizidou v. Turkey (App. no. 15318/89) 18 December 1996, §43.

ECtHR (GC), Demir v. Turkey (App. no. 34503/97), 12 November 2008, §67.

See s. 6.1 (A fragmented legal landscape).

ECtHR, Glor v. Switzerland (App. no. 13444/04), 30 April 2009, §75 (‘since the Convention [was] first and foremost a system for the protection of human rights’ the Court needed to have regard to ‘changing conditions in the Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved’).

ECtHR (GC), Al-Jedda v. United Kingdom (App. no. 27021/08), 7 July 2011, §102; ICJ, Case concerning Right of Passage over Indian Territory (Portugal v. India), Judgment of 26 November 1957, 142.

ECtHR (GC), Al-Dulimi v. Switzerland (App. no. 5809/08), 21 June 2016, §146.

Ibid., §147.


See s. 2.4 (Right to a fair trial in international criminal courts).

ACHR Art. 29(b). See also IACtHR, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14 (Series A, no. 21), 19 August 2014, §54.

ICCP Art. 5(2).

ECHR Art. 52. See also CFREU Art. 53.

Arab Charter Art. 43.


HRC, Cifuentes Elgueta v. Chile (Comm. no. 1536/2006), 28 July 2009, Individual Opinion of Committee members Ms Helen Keller and Mr Fabián Salvioli (dissenting).

ICC Statute Art 22(2); STL RPE Rule 3(B).


The ECtHR referred, inter alia, to ICCPR Art. 14(7), ICC Statute Art. 20, and Charter of Fundamental Rights of the European Union Art. 50 as ‘Relevant and Comparative International Law’: ECtHR (GC), *Zolotukhin v. Russia* (App. no. 14939/03), 10 February 2009, §§31-44.

HRC, *Correia de Matos v. Portugal* (Comm. no. 1123/2002), 28 March 2006, §§7.3–7.5. The Court disagreed with the HRC that a prohibition in Portuguese law, which had prevented the defendant from exercising his right to conduct his own defence at trial, had not been supported by an objective and sufficiently serious reason that justified the restriction of his right under Art. 6(3)(c).

ECtHR (GC), *Correia de Matos v. Portugal* (App. no. 56402/12), 4 April 2018, §§144–159.

Ibid., Joint Dissenting Opinion of Judges Tsotsoria, Motoc, and Mits, §§2 and 43. See also ibid., Dissenting Opinion of Judge Pinto de Albuquerque joined by Judge Sajó.


See ch. 14: Remedies.