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The Administration of Justice and Human Rights

David Weissbrodt*

This article discusses the place of international human rights standards — as elaborated in global and regional treaties, other instruments, and authoritative interpretations — in the advancement of the administration of justice. The administration of justice includes the norms, institutions, and frameworks by which states seek to achieve fairness and efficiency in dispensing criminal, administrative, and civil justice. The United Nations, regional organisations, and other international structures have codified a substantial framework of fair trial and other administration of justice standards, which have been accepted, albeit not always followed, by most nations and which have begun to be used in the context of the International Criminal Court and other international criminal tribunals. In addition to the codified standards, several human rights institutions, including particularly the Human Rights Committee and the European Court of Human Rights, have interpreted and applied norms of justice to specific cases and have thus generated an impressive corpus of jurisprudence which lawyers and judges worldwide should and often do consult.

I. INTRODUCTION

This article discusses the place of international human rights standards — as elaborated in global and regional treaties, other instruments, and authoritative interpretations — in the advancement of the administration of justice. The administration of justice is a broad term that includes the norms, institutions, and frameworks by which states seek to achieve fairness and efficiency in dispensing justice: criminal, administrative, and civil. The rules applicable to the administration of justice are extensive and refer to, inter alia, fair trial, presumption of innocence, independence and impartiality of the tribunal, and the right to a remedy. The integrity with which the state conducts criminal investigation, arrest, pre-trial detention, trial proceedings, and sentencing all fall within the domain of administration of justice. Consequently, various actors, such as judges, lawyers, court clerks, police, penitentiary officials, and policy makers play various roles in achieving fairness in the administration of justice.

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Recognising that hundreds of years of national constitutional drafting, standard setting jurisprudence, and traditions have been built into the administration of justice resulting in a wide diversity of terminology, international and regional supervisory mechanisms have evolved their own approaches to interpret elements relating to the concept. Notably, the European Commission of Human Rights (European Commission) and the European Court of Human Rights (ECtHR) have emphasised that various due process guarantees of fairness have autonomous meaning before international and regional supervisory mechanisms. As the ECtHR stated in Delcourt v Belgium, 'in a democratic society within the meaning of the [European] Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.'

The impact of the administration of justice within a state has practical significance on the affairs of ordinary individuals and groups. First, the fair administration of justice is important for the rule of law in that it ensures state practice and policies protect against the 'infringement of the fundamental human rights to life, liberty, personal security and physical integrity of the person.' Second, as the main vehicle for the protection of human rights at the national level, a system for administration of justice is necessary for the peace and stability of a state. The preamble to the Universal Declaration of Human Rights (UDHR) acknowledges this as follows, 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected.' Third, an equitable and effective system for the administration of justice is essential for protecting minority rights, which is important to ensure the flourishing of an inclusive democracy. In State v T Makwanyane and S Machunu, the South African Constitutional Court, in determining that the death penalty was incompatible with the country's post-apartheid Constitution in spite of public opinion to the contrary, held that:

The very reason for establishing the new legal order and, for vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest among us, that all of us can be secure that our own rights will be protected.

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1. (App No 7601/76) EHRR 335 (Decision of 17 January 1970). 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...' European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, Art 6(1) (entered into force 3 September 1953) as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998, respectively.


This position echoes the earlier comments of Justice Jackson in *West Virginia State Board of Education v Barnette*: “The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts.”

II. RIGHT TO A FAIR TRIAL

The right to a fair trial has been elaborated and guaranteed by no less than twenty global and regional human rights treaties and other instruments. Among the most important are the UDHR, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). International humanitarian law, codified in the four Geneva Conventions and two Additional Protocols, ensures that the right to a fair trial and related criminal justice standards are upheld during periods of non-international and international armed conflicts. Regional treaties such as the African Charter on Human and Peoples’ Rights (African Charter), the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) contain fair trial guarantees and other provisions relevant to criminal justice.

The most visible and recent elaboration of the right to a fair trial has been in the context of the ad hoc international tribunals for the former Yugoslavia, Rwanda, and other

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5 319 US 624, 638 (1943).
6 UDHR (n 3).
7 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The ICCPR has been ratified by 164 countries as of 24 January 2009.
12 213 UNTS 221. The ECHR has been ratified by all 47 member countries of the Council of Europe.
mixed national/international tribunals as well as the Rome Statute for the International Criminal Court.

The right to a fair trial does not focus on a single issue, but rather consists of a complex set of rules and practices. It has been observed that the right to a fair trial has both a structural meaning (the legal environment within a state) and a technical meaning (the specific procedural safeguards). On the one hand, the structural dimensions of the right to fair trial impose a financial burden on the state to put in place the necessary infrastructure to effectuate the realisation of the right to fair trial for both citizens and non-citizen residents within the state. On the other hand, the technical aspects of the right require constitutional, legal, and policy safeguards to facilitate the attainment of a fair trial.

There is near universal consensus on the content of the right to a fair trial even though a few differences can be discerned, particularly at the level of regional treaties and national practices. In most cases, however, it is uncontested that the core minimum of the right includes, inter alia, the right to receive notice of charges, the presumption of innocence, right of the accused to counsel, right to a prompt and public trial before an impartial tribunal, right against self-incrimination, equality before the law, and right not to be tried on the basis of a retroactive law. So fundamental has the right to a fair trial become in the proper administration of justice at both national and international levels that some international law scholars consider it part of customary international law.

A. Global Standards on the Right to a Fair Trial

1. Universal Declaration of Human Rights

In 1948 the UN General Assembly adopted the UDHR which provides a worldwide definition of the human rights obligations undertaken by all UN member states pursuant to Articles 55 and 56 of the UN Charter, including several provisions relating to the administration of justice. For example, Article 10 of the UDHR states that ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’ Article 11, further, provides for the presumption of innocence, public trial, and ‘all guarantees necessary for [one’s] defence.’ It also assures that ‘conviction can

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15 In addition, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon are recent ad hoc tribunals established by agreement between the UN and the respective governments.


only be based on the law applicable at the time of the offence,\textsuperscript{20} and forbids retroactive punishment or penalties. Other provisions of the UDHR — for example, those regarding arbitrary arrest, the right to an effective remedy, the right to be free from torture, the right to security of person, and privacy — are relevant to the criminal justice system and the fairness of the trial process.

2. \textit{International Covenant on Civil and Political Rights}

Following the adoption of the UDHR, the UN Commission on Human Rights drafted the remainder of the International Bill of Human Rights which includes the ICCPR. The ICCPR establishes an international minimum standard of conduct for all participating governments, and further elaborates — primarily in Articles 14 and 15 but also in Articles 2, 6, 7, 9, and 10 — upon the criminal justice standards identified in the UDHR.

Article 14 of the ICCPR is the most extensive treaty provision on the right to a fair trial. It recognises the right in all proceedings to ‘a fair and public hearing by a competent, independent and impartial tribunal established by law.’ Every person is ‘equal before the courts and tribunals’ under Article 14(1). Article 14 also extends the right to a fair hearing to both civil cases and criminal cases, and emphasises that parties to such proceedings are entitled to equality before courts and tribunals. As construed by the Human Rights Committee (HRC) in General Comment No. 13, Article 14(3) deals with the minimum guarantees required in the determination of any criminal charge, the observance of which are not always sufficient to ensure the fairness of a hearing.\textsuperscript{21} Among the minimum guarantees in criminal proceedings prescribed by Article 14(3) are the right for the accused to be informed in a language which the accused understands of the charge against him or her; to have adequate time and facilities for the preparation of a defence, and to communicate with counsel of one’s own choosing; to be tried without undue delay; to examine or have examined the witnesses against the accused, and to obtain the attendance and examination of witnesses on one’s behalf under the same conditions as witnesses against the accused; to the assistance of an interpreter free of any charge, if the accused cannot understand or speak the language used in court; and not to be compelled to testify against oneself or to confess guilt.

Article 14 also gives the accused the right to have one’s conviction and sentence reviewed by a higher tribunal according to law; to compensation if there was a miscarriage of justice; and not to be subjected to trial or punishment for a second time (\textit{non bis in idem}) for the same offence. Under Article 14(4) of the ICCPR, juvenile persons have the same right to a fair trial as adults, but are also entitled to certain additional safeguards. Article 15 codifies the principle of \textit{nullum crimen sine lege} (no crime without law) and


also gives the accused the benefit of any decrease in penalty which is promulgated after the person has committed an offence. Other relevant provisions of the ICCPR forbid torture or cruel, inhuman or degrading treatment or punishment; forbid arbitrary arrest; and require equality before the law.

In 2007 the HRC issued General Comment No. 32 which consolidates its fair trial jurisprudence and provides its most comprehensive interpretation yet of Article 14. This new standard explicitly states that the aim of Article 14 is to ensure the proper administration of justice by providing procedural safeguards to the rule of law. While acknowledging the role of states in interpreting the broad provisions of Article 14 according to their legal traditions and systems, the Committee reserved for itself the ultimate determination of the ‘essential content of the … guarantees.’ This emphasis clearly displays the HRC’s intention to ascribe to human rights terms autonomous definitions that go beyond their meaning at the national level. Such an approach has been utilised most by the ECtHR as will become evident later in this article.

More substantively, the HRC in General Comment No. 32 reiterated its understanding of the scope of the right to equality before courts and tribunals, fair and public hearing by a competent court, rights of accused persons, presumption of innocence, and protection against double jeopardy. It also addressed structural questions on juvenile justice, the conditions which national systems for criminal appellate review must meet, and legislative requirements enabling compensation for wrongful prosecution.

On the specific nature of the right to equality before courts and tribunals in Article 14(1), the HRC observed that equal access to courts applies in both criminal and civil matters and should be available not only to citizens but to ‘all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.’ While observing that the de jure or de facto systematic impediment of an individual’s access to competent courts or tribunals would violate Article 14(1), the HRC noted that in cases of extradition, expulsion, or deportation procedures, such access may be limited.

The HRC further explained that the fair trial guarantees in Article 14 extend to suits at law. It clarified that such suits at law include judicial proceedings in private law issues of contract, property, or torts as well as ‘equivalent notions in the area of administrative law such as the termination of employment … determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of

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23 Ibid [2].
24 Ibid [4].
25 Ibid [9].
26 Ibid [17].
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private property.' Further, the committee reiterated that Article 14 applies to all courts and tribunals 'whether ordinary or specialised, civilian or military,' including state recognised 'customary or religious courts.' In essence, therefore, the HRC's interpretation clarified that the scope of the fair trial provision of Article 14 applied to the entire judicial process and was not confined to the criminal justice system.

The HRC emphasised that a competent, independent, and impartial tribunal in Article 14(1) is required under the ICCPR. In this regard, the HRC indicated that the requirement of an independent judiciary has both institutional and decisional dimensions. On the one hand, the safeguard of institutional judicial independence requires constitutional recognition of the separation of powers between the judiciary and the executive. On the other hand, the decisional independence of judicial officers requires statutory protection of judges' 'term of office, their independence, security, adequate remuneration, conditions of service, pensions, and the age of retirement.' Having earlier determined that judicial corruption 'seriously undermines the independence and impartiality of the judiciary,' the HRC nonetheless believed that the dismissal of a judge on grounds of corruption still needed to comply with the demands of procedural and substantive law.

The determination of impartiality of the judiciary can be based on both objective and subjective criteria. Objectively, an absence of personal bias, prejudice, or pre-judgment must be demonstrated, while subjectively, a reasonable third party must discern behavioural impartiality based on the manner in which the trial is conducted. The competence of the judiciary, while not adequately explained by the HRC, relates to the jurisdictional scope of a court as well as its qualitative decisions.

General Comment No. 32 also addressed the significance of public trials in ensuring transparent proceedings in the interest of a fair trial of the accused, as well as informing the society's perception of the efficacy of the justice system. Consequently, only specific grounds of public order, morality, and national security permissible in a democratic system may constrain the presumption in favour of public trials. Even when such grounds precluded the attendance of the public or media at the trial, the final decisions of a tribunal must be made available to the public, unless the publication of such findings would prejudice the rights of a child or would infringe the privacy of the parties such as in divorce proceedings.

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27 Ibid [16].
28 Ibid [22]–[24].
29 Ibid [19].
31 Human Rights Committee (n 22) [19]
32 Ibid [29].
33 Ibid.
The HRC asserted that Article 14(5) of the ICCPR on the right to review a criminal conviction and sentence by a higher tribunal 'imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law.' Accordingly, the criminal and evidentiary statutes of a state will be scrutinised by the HRC in determining the adequacy of the appellate review mechanism.

The expeditious delivery of justice was also considered by the HRC to be an important component of the right to a fair hearing. Trial without undue delay also impacts the length of time that an accused person’s liberty is deprived, which reflects upon the arbitrariness or otherwise of the judicial system. In this regard, the trial of an accused person who is denied bail must receive the most expeditious determination. The HRC notes a structural dimension to the problem of delay in the administration of justice. For instance, it links delays in criminal and civil cases to budgetary constraints and requires that ‘where such delays are caused by a lack of resources and chronic under-funding, to the extent possible, supplementary budgetary resources should be allocated for the administration of justice.’

In determining whether proceedings have been delayed, the HRC will consider not only the time between the formal charge and commencement of the trial, ‘but also the time until the final judgment on appeal.’

The HRC also demonstrates sensitivity to the interdependence of human rights by clarifying the relationship between the right to a fair trial in Article 14 and other provisions of the ICCPR. In particular, it emphasises that the right to a remedy in Article 2(3)(a) arises upon the establishment of violation of any of the provisions of Article 14. For instance, the HRC counselled that Article 14(5) on the right to appellate review of a conviction is the specific remedy envisaged by Article 2(3) with respect to a criminal defendant, so that proof of violation of Article 14(5) automatically triggers a violation to Article 2(3) of the ICCPR.

The HRC also emphasised that absent compliance with fair trial guarantees in Article 14, an imposition of a death penalty would constitute an abridgement of the right to life in Article 6 of the ICCPR. Similarly, to condone torture or procure consent through duress not only violates Article 7, but runs afoul of the principle against self-incrimination enshrined in Article 14(3)(g).

The ICCPR identifies in Article 4 certain rights as non-derogable — that is, rights which cannot be suspended during periods of emergency. While Article 4 does not specify Article 14 (right to a fair trial) as expressly non-derogable, it does mention Articles 7 (prohibition of torture), 15 (nullum crimen sine lege: no crime without law), and 16 (recognition of every person before the law) as non-derogable. Furthermore, the HRC has interpreted other non-derogable rights (for example, the right not to be subjected to

34 Ibid [48].
35 Ibid [35].
36 Ibid [27].
37 Ibid [35].
arbitrary deprivation of life) as implying that the basic fair trial provisions of Article 14 cannot be suspended during periods of national emergency.

3. **International Convention on the Elimination of All Forms of Racial Discrimination**

The preamble of the ICERD proclaims that ‘all human beings are equal before the law and are entitled to equal protection of the law against any discrimination.’ This principle of equality before the law is applied to the context of the administration of justice in Article 5(a), which imposes upon states parties the obligation to guarantee ‘the right to equal treatment before the tribunals and all other organs administering justice’ without distinction as to race, colour, or national or ethnic origin. Article 2(1)(a) of the ICERD affirms that each state party undertakes to ensure that public authorities and public institutions, national and local, shall not engage in acts or practices of racial discrimination against persons, groups of persons, or institutions. Article 6 further requires states parties to assure to everyone within their jurisdiction effective protection and remedies, as well as the right to seek ‘just and adequate reparation or satisfaction’ for any damage suffered as a result of any unlawful racial discrimination.

Hence, unlike the ICCPR whose fair trial rights in Article 14 gives prominence to procedural safeguards, the ICERD emphasises the institutional aspects of the administration of justice, particularly in regard to its impact on vulnerable groups within the country. In interpreting their respective conventions, however, both the HRC and the Committee on the Elimination of Racial Discrimination (CERD) have provided some specific guidelines for carrying out institutional and legislative reforms within the justice sector.

The CERD has applied the ICERD to the question of administration of justice in a few instances. For example, *LK v The Netherlands* involved *de facto* housing discrimination by members of the neighbourhood where a foreign man wished to reside. In its opinion, the CERD found that the mere existence of a law making discrimination a criminal act was insufficient and decided that the state’s obligation to treat instances of racial discrimination with particular attention was missing. The police and judicial proceedings in the case did not afford the applicant effective protection and remedies within the meaning of Article 6 of the ICERD. The CERD declared that the Netherlands should compensate the applicant and report back to the CERD on measures taken to remedy the situation.

In 2005, the CERD adopted General Recommendation 31 (Recommendation) on the ‘Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System,’ with the aim of ensuring the responsiveness of the justice system with regard to persons belonging to racial or ethnic groups. The Recommendation recognised that discrimination within the institutions of justice has a chilling effect on ‘the principle of equality before the law, the principle of fair trial, and the right to an independent and impartial tribunal through its direct effect on persons belonging to

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groups, which it is the very role of justice to protect.' It, therefore, urged states to combat racial discrimination within the criminal justice sector by collecting desegregated data, tracking compliance, and pursuing legislative and institutional measures. Specifically, the CERD required that states should formulate factual and legislative indicators to ‘gauge the existence, and extent of racial discrimination in the administration and functioning of the criminal justice system.’ States are also required to develop national strategies to prevent such discrimination. In regard to legislation, the CERD recommends that states develop mechanisms to determine the potential of certain laws for discriminating against groups indirectly, and to ensure their repeal.

Adopting a strong position against racial profiling as a basis for arrest, trial, or detention, the CERD called upon states to ‘take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour, or features, or membership of a racial or ethnic group.’ Racial profiling in the criminal justice system has been a subject of concern of the CERD for many years. For example, racial disparities in rates of imprisonment in the US were acknowledged as a problem by the government in its report to the CERD in September 2000. The US report noted that ‘various studies indicate that members of minority groups, especially Blacks and Hispanics, may be disproportionately subject to adverse treatment throughout the criminal justice process.’ Applying the Recommendation to the latest report of the US under Article 9 of the ICERD, the CERD recommended the following:

Bearing in mind its General Recommendation ... on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party strengthens its efforts to combat racial profiling at the federal and state levels, inter alia by moving expeditiously towards the adoption of the End Racial Profiling Act, or similar federal legislation.

In addition, the Recommendation of the CERD clarified that non-citizens facing trial for crimes punishable by capital punishment should enjoy the right to consular protection as provided in Article 36 of the Vienna Convention on Consular Relations in order ‘to ensure ... compliance with the guarantees recognised by international human rights.
Beyond addressing the challenges facing the criminal justice system, the CERD has also engaged with the broader institutional questions relevant to the administration of justice. It has, for instance, suggested that the domination of the judiciary or police by one ethnic community in a multicultural society may not only undermine the public’s perception of the independence of the judiciary and police, but may also negatively affect social cohesion and harm the society as a whole. For instance, the judiciary in Burundi is overwhelmingly dominated by judicial officials from the Tutsi ethnic group, particularly at the higher levels. The governmental institutions responsible for arrests and investigating cases are also heavily dominated by Tutsi. The CERD’s concluding observations on Burundi’s seventh to tenth periodic report are, therefore, apposite:

The Committee recommends that major reform of the judiciary be undertaken and stresses that adequate legal safeguards must be put in place to ensure the security of members of all ethnic communities and their access to effective judicial recourse.\(^4\)

The CERD has also taken issue with poor access to justice in civil cases for indigenous peoples, in particular the weak legal and institutional framework for the determination of their property rights. In its consideration of Canada’s thirteenth report under the ICERD, the CERD expressed:

... concern about the difficulties which may be encountered by Aboriginal peoples before the courts in the establishment of Aboriginal title over land. The Committee notes in that connection that to date, no Aboriginal group has proven Aboriginal title, and recommends that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts.\(^5\)

4. **Convention on the Rights of the Child**

The Convention on the Rights of the Child (CRC) has been ratified by 193 countries as of 24 January 2009, that is, nearly every country in the world except for Somalia and the US. The CRC elaborates on the rights of juvenile offenders in the ICCPR and other treaties.

Articles 12, 37, and 40 are the primary provisions in the CRC relevant to the administration of justice. Article 12 safeguards each child’s right to be heard in legal proceedings. Article

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\(^4\) UNCERD (n 43) [24].


37(b) provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily.' Article 37(c) also provides that 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.' Furthermore, Article 37(d) provides that 'every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

Article 40 of the CRC addresses similar fair trial issues as Article 14 of the ICCPR. This provision significantly expands fair trial protection to children under the age of 18 by using the term 'child' instead of 'juvenile' as used by the ICCPR. This expansive approach is also evident from the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), which defines a juvenile as 'a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.'

The child soldier phenomenon in many conflict situations may result in criminal responsibility for some of the children and may thus increase the relevance of the fair trial guarantees of the CRC. Although the CRC generally defines a child as any person under the age of 18, Article 38(3) uses the lower age of 15 as the minimum for recruitment or participation of children in armed conflict. Article 38(1)/(4) of the CRC further calls upon states to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. In this respect, the CRC is an unusual treaty to the extent that it is expressly concerned with the principles of international human rights law and the application of international humanitarian law.

While it is not an international crime for a child to enlist as a soldier, it is a crime for a government or individual to enlist or conscript a person under the age of 15 as a child soldier under the Statute of the International Criminal Court (ICC). The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (Optional Protocol) not only prohibits the recruitment of children into armed conflict, but it also places certain obligations on states parties which take child soldiers into custody. Article 7 of the Optional Protocol, for example, imposes the following obligation on states parties:

States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in

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49 Ibid [2.2(a)].

50 G van Beuren, The International Law on the Rights of the Child (Martinus Nijhoff, the Hague Netherlands 1995) 349.

51 Rome Statute (n 16) art 8(1)(2)(b)(xxvi).

the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and the relevant international organisations.53

Given its obligation to rehabilitate and socially reintegrate child soldiers, the detention and trial of child soldiers for war crimes committed when they were child soldiers appears to be inconsistent with the requirement of conducting themselves in the best interest of the child’s restoration.54

The Committee on the Rights of the Child, which monitors the CRC, has taken issue with several states with regard to their compliance with both Articles 38 and 40. In the case of Uganda for instance, the Committee expressed concern ‘that the rules of international humanitarian law applicable to children in armed conflict are being violated in the northern part of the State... in contradiction to the provisions of Article 38.’55

The Committee also questioned the administration of juvenile justice in Uganda in terms of its non-compliance with Article 40. For example, it raised concern about ‘violations of the rights of children in detention centres, the remanding of children in adult prisons or police cells, long periods in custody, delays before trial, and the inadequacy of existing alternative measures to imprisonment.’56

The Optional Protocol on the Involvement of Children in Armed Conflict was adopted by the UN General Assembly on 25 May 2000, and came into force on 12 February 2002. The Protocol reinforces Article 38(3) of the CRC by requiring states parties to raise the minimum age for voluntary military recruitment to 18. By recommending various policy options, the Protocol seeks to eliminate the problem of child soldiering and the judicial challenges it presents.57

53 Ibid art 7 (emphasis added).
54 The Preamble to the Optional Protocol states: ‘[T]he best interests of the child are to be a primary consideration in all actions concerning children...’.
56 Ibid [20].
5. Other Global Standards

In addition to the major treaties discussed in previous sections of this article, a number of other binding human rights instruments contain provisions touching on the administration of justice. For instance, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)\(^{58}\) had been ratified by 185 states as of 24 January 2009. By incorporating gender-based violence into the definition of discrimination in Article 1, the CEDAW provides a remedy to a complex set of crimes affecting women within both public and private spheres. The Second Optional Protocol to the ICCPR, aimed at the abolition of the death penalty, has been ratified by 70 nations as of 24 January 2009. Furthermore, the Convention Relating to the Status of Refugees\(^{59}\) (as more broadly implemented by the Protocol)\(^{60}\) contains a few provisions in Article 16 as to the rights of refugees in the context of the administration of justice, such as access to the courts (including legal assistance). The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the United Nations General Assembly on 20 December 2006, but is yet to enter into force. When it comes into effect, this Convention will criminalise enforced disappearances and provide remedies for its victims, including restitution, satisfaction, and rehabilitation, while setting out a broad range of guarantees for persons deprived of liberty by the state.

There are several other global non-treaty standards which relate to criminal justice, for example: Basic Principles on the Independence of the Judiciary; Basic Principles on the Role of Lawyers; Basic Principles for the Treatment of Prisoners; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Code of Conduct for Law Enforcement Officials; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Declaration on the Protection of All Persons from Enforced Disappearances; Guidelines on the Role of Prosecutors; Standard Minimum Rules for the Treatment of Prisoners; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty; United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); United Nations Rules for the Protection of Juveniles Deprived of their Liberty; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules); and the 2004 United Nations Economic and Social Council


(ECOSOC) Resolution on the ‘Rule of Law and Development: Strengthening the Rule of Law and the Reform of Criminal Justice Institutions.’

Most of these standards have been drafted by the UN Committee on Crime Prevention and Control,\(^{61}\) one of the UN Congresses on the Prevention of Crime and Treatment of Offenders which have been held every five years since 1955, the UN Commission on Human Rights, and the UN Sub-Commission on the Promotion and Protection of Human Rights.\(^ {62}\)

These soft law instruments have a significant bearing on the administration of justice. In particular, these instruments provide coherent language which contributes to a better understanding of the rights relevant to the administration of justice. In addition, they supply concrete, measurable, and comprehensive indicators and programmes of action for the tracking of progress and the attainment of key targets relevant to a given justice sector at the national level.

**B. Regional Standards**

1. **European Convention on Human Rights**

The ECHR has enjoyed a very high degree of compliance with its provisions, both because many countries have incorporated its provisions into domestic law and because the ECtHR and European Commission’s judgments have almost always been obeyed.\(^ {63}\)

Fundamental fair trial guarantees are established in Article 6 of the ECHR. Article 6(1) provides that a person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This provision applies to both ‘civil rights and obligations’ as well as ‘any criminal charge.’ Some of the more difficult problems in the interpretation of the ECHR concern the application of Article 6 to non-criminal cases.

Article 6(2) stipulates that a person charged with a criminal offence shall be presumed innocent until proved guilty. Article 6(3)(a–e) addresses many of the same fair trial rights guaranteed in Article 14 of the ICCPR. In particular, the accused must be promptly informed of the charges against him or her in a language that he or she understands; to have adequate time and facilities to prepare his or her defence; to be allowed to defend him or herself or receive legal assistance, including free legal assistance if the accused

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\(^{61}\) The UN Committee on Crime Prevention and Control has since been replaced by the Commission on Crime Prevention and Criminal Justice.

\(^{62}\) Formerly known as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

lacks sufficient means and if the interests of justice requires; to examine or have examined witnesses against him or her; and to have free assistance of an interpreter if he or she cannot speak the language of the court.

The right to a fair trial holds a prominent position in the ECHR, due not only to the importance of the right involved but also to the great volume of applications and jurisprudence that it has generated. More applications involve Article 6 than any other provision of the ECHR. The minimum rights enumerated in Article 6(3) are not exhaustive, according to the European Commission and ECtHR. Rather, the concept has an open-ended, residual quality, therefore providing ample opportunity to infer other rights not specifically enumerated in Article 6(3) within Article 6(1)'s broad protection for a fair and public hearing.

The ECtHR and the European Commission have interpreted the ECHR in light of the cases brought before them and have thus developed the largest single body of international human rights jurisprudence on fair trial and other administration of justice issues. Individuals have very frequently raised questions about the right to a speedy trial. The ECtHR declared in Moreira de Azevedo v Portugal that the ECHR 'stresses the importance of administering justice without delays which might jeopardise its effectiveness and credibility,' thus highlighting the importance of the maxim 'justice delayed is justice denied.'

In regard to criminal proceedings, scrutiny of the reasonable time under Article 6(1) begins at the moment when 'the situation of the person concerned has been substantially affected as a result of a suspicion against him,' and lasts at least until acquittal, dismissal, conviction, or until the sentence otherwise becomes definite. The ECtHR and the European Commission have said that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to its complexity, the conduct of the parties, and the authorities dealing with the case.

The ECtHR considers that the applicant is only required to show diligence in carrying out the procedural steps relating to him or her and to refrain from using delaying tactics. The accused is not held responsible for the delay even if he or she does not request that

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64 With the coming into force of Protocol 11 to the European Convention on 1 November 1998, the ECtHR and European Commission of Human Rights have been consolidated into a unified European Court of Human Rights.

65 For example, Article 6(1) guarantees the right to trial within a reasonable time in both civil and criminal proceedings. Article 5(3) provides that 'everyone arrested or detained... shall be brought promptly before a judge... and shall be entitled to trial within a reasonable time or to release pending trial.'

66 (1990) 189 Eur Ct HR (ser A).

67 Neumeister v Austria (1968) 1 EHRR 91.

68 Eckle Case (1982) 51 Eur Ct HR (ser A) at 33.

69 Buchholz Case (1981) 42 Eur Ct HR (ser A).

70 Union Alimentaria Sanders SA Case (1989) 157 Eur Ct HR (ser A).
the proceedings be expedited.\textsuperscript{71} The ECtHR has held that the accused is under no duty to be more active and is not required to cooperate actively with judicial authorities in connection with criminal proceedings.\textsuperscript{72}

Moreover, the ECHR imposes an obligation upon states to ‘organise their legal systems so as to comply with the requirements of Article 6(1).\textsuperscript{73} Hence, the ECtHR found that delays attributable to a backlog at the Court of Appeals or to the Court of Cassation’s desire to hear cases dealing with a similar issue were unjustifiable under Article 6(1) and constituted a violation.\textsuperscript{74} Generally, a long period of inactivity in a case is entirely attributable to the state unless it provides a satisfactory explanation for the delay.\textsuperscript{75}

Another major element of European ‘fair trial’ jurisprudence is the principle of equality of standing between the accused and the public prosecutor. Under that principle, the ECtHR has examined a number of cases dealing with the position of experts in a proceeding. For example, in the Böni\textsuperscript{ch} Case,\textsuperscript{76} the ECtHR found a lack of equal treatment of the parties because an expert appearing as a witness for the prosecution had a stronger procedural position than another expert appearing for the defence. The witnesses should have been given equal treatment. The ECtHR further held that Article 6(3), which provides that an accused has the right to examine witness against him or her, is a constituent element of the concept of fair trial set forth in Article 6(1). The ECtHR declined to consider a complaint under Article 6(3), but that determination did not preclude it from finding a violation under the more general fair trial grounds of Article 6(1). Each case should thus be examined with regard to the ‘development of the proceedings as a whole and not on the basis of one particular incident.’\textsuperscript{77}

In addition to the ECHR, the Council of Europe has also promulgated a number of more specific treaties dealing with various aspects of criminal justice.\textsuperscript{78} Some of these European regional treaties elaborate on the provisions of the European Convention and others develop new standards.

\textsuperscript{71} Schouten and Meldrum v The Netherlands (1994) 19 EHRR 390.
\textsuperscript{72} Eckle Case (1982) 51 Eur Ct HR (ser A) 33.
\textsuperscript{73} Milasi v Italy (1987) 119 Eur Ct HR (ser A).
\textsuperscript{74} Hentrich v France (1994) 18 EHRR 440.
\textsuperscript{75} Philis v Greece (1997) 40 Eur Ct HR.
\textsuperscript{76} (1985) 92 Eur Ct HR (ser A).
\textsuperscript{77} Le Compte v Belgium (1983) 58 Eur Ct HR (ser A).
\textsuperscript{78} See, e.g., Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; the Convention on the Transfer of Sentenced Persons; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the European Convention on Extradition; the European Convention on Mutual Assistance in Criminal Matters; the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders; the European Convention on the Transfer ofProceedings in Criminal Matters; the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes; the European Convention on the Suppression of Terrorism; and several other treaties.
2. **African Charter on Human and Peoples’ Rights**

Since entering into force on 21 October 1986, the African Charter has been ratified by all 53 African countries. Article 7 of the African Charter guarantees several fair trial rights, including notification of charges, appearance before a judicial officer, right to release pending trial, presumption of innocence, adequate preparation of the defence, speedy trial, examination of witnesses, and the right to an interpreter. Article 7 also provides an innovative guarantee by requiring that punishment must be personal. This principle is crucial for a continent in which the reality of communal punishment exists. Under Article 26, African states are bound to guarantee the independence of the judiciary, which is a basic requirement for a fair trial. In addition to the above, Articles 3 to 6 of the African Charter also provide for the rights to equality before the law, the equal protection of the law, the inviolability of human beings, and guarantees against all forms of degradation of man or any arbitrary arrest or detention.

The African Commission on Human and Peoples’ Rights (African Commission) has sought to strengthen the African Charter’s fair trial provisions by formulating a number of important standards. For instance, in March 1992, it adopted a resolution on the ‘Right to Recourse Procedure and Fair Trial’ which elaborated upon the provisions of the African Charter, including for example the right to an appeal to a higher court. During its 19th Ordinary Session in April 1996, the African Commission further buttressed the fair trial provisions of the African Charter by adopting a ‘Resolution on the Respect and the Strengthening of the Independence of the Judiciary’ as well as a ‘Resolution on the Role of Lawyers and Judges in the Integration of the Charter and the Enhancement of the African Commission’s Work in National and Sub-Regional Systems.’ To specifically provide for the right to legal assistance in the context of criminal trials, the African Commission adopted, during its 26th Ordinary Session in November 1999, a ‘Resolution on the Right to Fair Trial and Legal Aid in Africa.’ The African Commission also established a Working Group on the Right to Legal Aid in Africa in 1999.

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Footnotes:

79 As of 24 January 2009.


81 The African Commission on Human and Peoples’ Rights (ACHPR) is mandated to interpret the African Charter in accordance with Article 45(1)(b) of that document.


Group to prepare more comprehensive guidelines on the right to fair trial and legal assistance under the African Charter. This Working Group formulated the comprehensive ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.’

The African Commission has applied the right to a fair trial in the African Charter and the above resolutions in a number of communications (cases) brought before it pursuant to Article 55. Hence, in Constitutional Rights Project v Nigeria, the African Commission criticised the provisions of the Nigerian Robbery and Firearms (Special Provision) Decree that did not provide a right to judicial appeal as a consequence of which several persons had been sentenced to death. It found that ‘to foreclose any avenue of appeal to “competent national organs” in criminal cases bearing such penalties clearly violates Article 7.1(a) of the African Charter, and increases the risk that severe violations may go unaddressed.

The African Commission has utilised both Articles 7 and 26 to determine that national laws ousting the jurisdiction of courts in criminal matters offended the fair trial guarantees of the Charter. The African Commission has also specifically relied on its latest resolutions and guidelines to find that the right to ‘appeal to a competent national organ’ and the right not to be ‘arbitrarily arrested and detained’ within the meaning of the African Charter had been violated.

3. American Convention on Human Rights

The American Convention on Human Rights (American Convention) as of 24 January 2009 has been ratified by 24 states parties, which is almost all states in the Western Hemisphere except Cuba, Trinidad and Tobago, and the US. Article 7 of the American Convention provides several criminal justice guarantees, including for example the right to notice and to habeas corpus. Article 8 deals with the right to a fair trial in a detailed manner, encompassing for example the right to a hearing, the presumption of innocence, the rights to a free translator and to counsel, the right of the accused not to be compelled to be a witness against himself or herself, the principle of ne bis in idem, and that criminal

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87 ACHPR, Eighth Annual Report (n 85) [13].
proceedings shall be public. Article 9 guarantees freedom from retroactive application of laws. The Inter-American Commission on Human Rights (IACHR) also considers the right to compensation for miscarriage of justice as forming part of the right to fair trial under Article 10. Article 25 of the American Convention further guarantees the right to ‘simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.’

The IACHR has interpreted the American Convention and the American Declaration on the Rights and Duties of Man91 elaborating the rights necessary for a fair trial. The Inter-American Court of Human Rights, through its adjudicatory and advisory jurisdiction, has also examined violations of human rights related to a fair trial, albeit in only a few cases.92

In addition to the American Convention, the Inter-American Convention to Prevent and Punish Torture,93 the Inter-American Convention on Extradition,94 the Inter-American Convention on Mutual Assistance in Criminal Matters,95 and the Inter-American Convention on Serving Criminal Sentences Abroad,96 have also been issued under the aegis of the Organisation of American States. These regional treaties elaborate on the provisions of the American Convention and/or supply additional criminal justice standards on particular issues.

III. HUMANITARIAN LAW

Humanitarian law comprises the body of protective norms extended to combatants and civilians in an international or non-international armed conflict irrespective of the legality of the conflict. Contemporary international law imposes criminal liability for grave

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breaches of humanitarian law in both international and internal armed conflicts.\textsuperscript{97} Hence, there is a need to ensure that such proceedings comply with fair trial guarantees.

Common Article 3 of the four Geneva Conventions for the protection of victims of armed conflict\textsuperscript{98} and Article 6 of Additional Protocol II\textsuperscript{99} contain fair trial guarantees and other provisions relevant to the administration of justice for times of non-international armed conflict. For example, Common Article 3(d) prohibits the ‘passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.’ By further requiring that such courts must afford ‘all the judicial guarantees which are recognised as indispensable by civilized peoples,’ the Geneva Conventions incorporate the fair trial rights in international instruments, particularly Article 14 of the ICCPR. Articles 96 and 99–108 of the Third Geneva Convention prescribe the rights of prisoners of war in judicial proceedings, essentially creating fair trial standards in international armed conflicts. Articles 54, 64–74, and 117–26 of the Fourth Geneva Convention contain provisions relating to the right to fair trial in occupied territories. Article 75 of Additional Protocol I\textsuperscript{100} extends fair trial guarantees in an international armed conflict to all persons, including those arrested for actions relating to the conflict.

\textbf{A. International Criminal Tribunal for Former Yugoslavia and Rwanda}

On 25 May 1993, the United Nations Security Council adopted Resolution 827\textsuperscript{101} in which it approved the establishment of ‘an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia after 1 January 1991, which became the International Criminal Tribunal for Former Yugoslavia (ICTY). Article 15 of the Statute of the ICTY authorises the judges to ‘adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims, and witnesses and other appropriate matters.’ Article 20 of the Statute provides that the Trial Chambers of the ICTY ‘shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’ Articles 20 through 26 contain more specific provisions relating to the right to a fair trial, judgment, and appeal. In particular, most of the fair trial provisions in Article 14 of the ICCPR are reflected in Article 21 of the Statute of the ICTY, although the ICCPR is not specifically mentioned as such.

\textsuperscript{97} \textit{Tadic Case}, Appeals Chamber (Jurisdiction) case no IT-94-1-AR 72 (Decision of 2 October 1995), [84]-[137].

\textsuperscript{98} Entered into force 21 October 1950, ratified by 194 countries as of 23 July 2009.

\textsuperscript{99} Entered into force 7 December 1978, ratified by 164 countries as of 23 July 2009.

\textsuperscript{100} Entered into force 7 December 1978, ratified by 168 countries as of 23 July 2009.

\textsuperscript{101} UNSC Res 827 (25 May 1993) UN Doc S/RES/827.
The Rules of Procedure and Evidence for the ICTY devote more attention to the rights of victims and witnesses than previous international criminal standards. Rules 14–36 contain safeguards designed to ensure the impartiality of the tribunal, Rule 42 ensures the suspect’s right to free counsel and the assistance of an interpreter, Rule 43 provides for the video- or audio-taping of all suspect questioning, Rules 47–61 contain procedural safeguards for all indictments and arrest warrants, Rule 62 requires that all accused be brought promptly before the tribunal, Rule 63 forbids the questioning of a suspect without counsel present, Rule 68 requires the prosecution to disclose all exculpatory evidence to the accused, Rule 79 allows the judges to close the proceedings to the public in certain circumstances, and finally Rules 107–122 and Rules 123–125 provide for appeal and pardon procedures respectively.

On 8 November 1994, the UN Security Council adopted Resolution 955 in which it approved the establishment of an ‘International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States,’ between 1 January 1994 and 31 December 1994. The International Criminal Tribunal for Rwanda (ICTR) has been established in Arusha, Tanzania, but shares the same prosecutor, appellate court, and basic rules of procedure as the ICTY. Article 20 of the ICTR Statute is similar to Article 21 of the ICTY Statute, both borrowing substantially from Article 14 of the ICCPR on the accused’s right to a fair trial.

Both the ICTY and ICTR have produced important jurisprudence that touch on fair trial and thus, the international administration of justice. For instance, in its ‘Application for Adjournment of Trial Date’ rendered in Delalic et al, the ICTY Trial Chamber observed with regard to the question of adequate time for the preparation of an accused’s defence under Article 21(4)(b) of the ICTY Statute:

The operative phrase in the article ‘adequate time’ is flexible and begs of a fixed definition outside of a particular situation of each case. It is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors including the complexity of the case, and the competing forces and claims at play, such as the consideration of the interests of other accused persons.

On the need for equality of arms provided in Article 21(4)(d) of the Statute of the ICTY, the court in Tadic observed that ‘the application of equality of arms principle should be inclined in favour of the Defence acquiring parity with the Prosecution... to

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103 In which Judges Whyte, Benito, and January presided.
104 ICTY IT-96-21-T (Decision of 3 February 1997) [19].
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preclude any injustice against the accused.¹⁰⁵

Articles 9 and 10 of the Statutes of the ICTR and ICTY, respectively, protect accused persons from being tried twice for the same offence in the same manner that Article 14(7) of the ICCPR does. Attempts by accused persons, however, to disclaim jurisdiction of these tribunals on this ground have not been very successful. In its ‘Decision on the Application by the Prosecutor for Formal Request for Deferral in the Bagasora case,’ Trial Chamber I of the ICTR on 17 May 1996 observed:

In the case of Theoneste Bagasora, as Belgian law does not contain any provision concerning genocide or crimes against humanity, it was only for murder and serious violations of the Geneva Conventions ... that the Belgian authorities were able to prosecute him ...¹⁰⁷

Hence, his trial did not offend the double jeopardy provision of the Statute of the ICTR.

Beyond these clear trial safeguards, the greatest contribution of both ICTR and ICTY to the administration of justice has been the establishment of extensive legal aid schemes for impoverished accused persons¹⁰⁸ as well as comprehensive witness protection systems.¹⁰⁹ In a sense therefore, they help model some of the best systems that should be put in place at the national level to ensure international fair trial guarantees are fully respected.

B. International Criminal Court (ICC)

Based upon the precedents of the Nuremberg Tribunal established by the London Agreement of 1945, the International Military Tribunal for the Far East (Tokyo Tribunal) established in 1946, trials in Germany under Control Council Law No. 10 (1946), the ICTY established in 1993, and the ICTR of 1994, a diplomatic conference in Rome adopted a

¹⁰⁶ In which Judges Kama, Aspegren, and Pillay presided.
¹⁰⁷ ICR-96-7-D [3].
statute of 17 July 1998, for a permanent International Criminal Court (ICC).\textsuperscript{110}

Many of the international criminal justice standards in the ICC Statute were derived from the ICCPR and the rules of the ICTY, including the identification of rape as one of the crimes against humanity. The ICC Statute establishes a structure and rules of procedure for the court and protects the rights of suspects, defendants, victims, and witnesses. Further procedural protections have been and will be developed in coming years.

It is noteworthy from the perspective of juvenile justice that Article 26 of the ICC Statute explicitly excludes persons under eighteen from its jurisdiction. This provision differs from that of the Sierra Leone Court Statute, which provides for prosecution of crimes committed by persons aged above fifteen, while emphasising the application of international juvenile justice measures in such circumstances.\textsuperscript{111} The Special Court for Sierra Leone, however, took a policy decision early on that children could not bear the ‘greatest responsibility’ from crimes within its mandate as prescribed by its Statute.\textsuperscript{112}

Perhaps the greatest potential impact on the administration of justice afforded by the ICC Statute beyond the substantive fair trial guarantees is its provision on complementarity in Articles 1 and 17(1)(a). Under these provisions, the admissibility of a case before the ICC shall arise where a state that has jurisdiction over an international crime is ‘unwilling or unable’ to investigate or prosecute it. In making this determination, the ICC under Article 17(2) will consider if the state, which has jurisdiction, is shielding a suspect from criminal responsibility, whether there has been undue delay in the proceedings, or whether there is a lack of impartiality and independence with regard to such proceedings. The principle of complementarity underscores that the ICC is intended not to replace functioning national judicial systems, but rather to provide an alternative to impunity where independent and effective judicial systems are not available. The net effect of the complementarity provision of the ICC Statute is to generate incentives for states to ensure that their criminal justice systems, with regard to international crimes, are more effective and responsive so as to avert the assumption of jurisdiction by the ICC. Thus far, three states parties to the ICC Statute — Uganda, the Democratic Republic of the Congo, and the Central African Republic — have referred situations occurring on their territories to the Court. The Security Council has also referred the situation in Darfur, Sudan — a non-state party.\textsuperscript{113} Each of these cases demonstrates the utility of the complementarity provision.

\textsuperscript{110}The ICC Statute entered into force on 1 July 2002, and as of 24 January 2009, there were 107 states which had ratified the Statute.

\textsuperscript{111}Statute of the Special Court for Sierra Leone (Annexed to Agreement between the United Nations and the Government of Sierra Leone signed on 16 January 2002) art 7, reprinted in C Tofan, Global War Crimes Tribunal Collection: The Sierra Leone Special Court Basic Documents 6 (Global Law Association, Nijmegen the Netherlands 2007) 34.


For example, on 31 March 2005, the UN Security Council issued Resolution 1593 referring the violence in the Darfur Region of Sudan to the ICC. The Sudanese Government then established its own Special Criminal Court for the Events in Darfur, with capacity which in its view could provide a transparent and sufficient means for prosecuting those persons who may have committed international crimes and on the basis of which, it vowed to avoid turning over the two indictees to the ICC. On 2 May 2007, the ICC nonetheless issued its first arrest warrants with respect to the Darfur conflict, seeking to try a former government minister of the interior (Ahmed Muhammad) and a Janjaweed militia leader (Ali Muhammad Abd-Al-Rahman also known as Ali Kushayb) on charges of murder, pillage, and rape. Inadequate as the Sudanese Special Court may be to address the Darfurian cases, the external pressure demonstrates the potential of the ICC complementarity regime to initiate or strengthen national mechanism for addressing crimes including international crimes. At the same time, however, the ICC has issued an arrest warrant against Omar Hassan Ahmad Al Bashir, President of Sudan, for war crimes and crimes against humanity. President Al Bashir and the Government of Sudan have resisted the arrest warrant by seeking support from African countries — even those nations that are States parties to the ICC Statute.

**IV. CONCLUSION**

On the basis of the above review, it is safe to conclude that the UN and regional organisations have codified a substantial framework of international criminal justice standards, which have been accepted (if not always followed) by most nations and have begun to be used in the context of international criminal tribunals. In addition to the codified standards, several human rights institutions (particularly the HRC and the ECtHR) have interpreted and applied criminal justice norms to particular cases and have thus generated an impressive corpus of jurisprudence which lawyers and judges worldwide should and do often consult.

The administration of justice standards relate to civil rights and obligations as well as criminal charges. The standards deal with the right to be informed promptly of charges, trial within a reasonable time, the right to counsel, adequate facilities for the defence, the right to an interpreter, the independence and impartiality of the decision maker, the right to hear witnesses, the right not to incriminate oneself, the presumption of innocence, the public and fair hearing, and public pronouncement of the judgment. The international, regional, and national jurisprudence of the administration of justice is remarkably consistent and has gradually created a unified worldwide definition of procedural fairness.
