Contents

Table of Cases			
Table of International Instruments			
List of Abbreviations	cix		
Glossary	cxvii		
Introduction	1		
1. Purpose of This Book	1		
2. Sources and Components of the Right to a Fair Trial	5		
2.1 Sources of the right to a fair trial in international law	5		
2.2 Right to a fair trial in international treaties	7		
2.3 Right to a fair trial: exhaustive list or an expanding 'bundle of rights'?	8		
2.4 Right to a fair trial in international criminal courts	10		
2.5 Right to a fair trial in national courts	12		
3. Right to a Fair Trial in Customary International Law	13		
3.1 Right to a fair trial is a rule of customary international law	14		
3.2 Component rights of a fair trial and customary international law	19		
4. Scope of the Right to a Fair Trial	26		
4.1 Right to a fair trial in criminal proceedings	26		
4.2 Right to a fair trial in the state's territory	28		
4.3 Right to a fair trial during the trial phase of criminal proceedings	29		
4.4 Who enjoys the right to a fair trial?	33		
4.5 Particular application of the right to a fair trial	42		
5. Burden of Proof and Deference to National Courts	49		
5.1 Burden and standard of proof	49		
5.2 Degrees of deference	51		
6. Fragmentation and Harmonisation of the Right to a Fair Trial	56		
6.1 A fragmented legal landscape	56		
6.2 Methods of harmonisation	60		
1. Right to a Competent, Independent and Impartial Tribunal			
Established by Law	66		
1. Introduction	67		
2. Origins and Rationale of the Right	67		
3. Definition of the Right in International Instruments	71		
4. Scope of the Right	73		
4.1 General scope of the right	73		
4.2 When does the right apply?	74		
4.3 What is a 'tribunal'?	75		
5. Right to a Competent Tribunal	76		
5.1 Individual competence	77		
5.2 Judicial competence	79		
5.3 Jurisdictional competence	80		
5.4 Authority to determine competence	81		

xiv contents

6.	Right to an Independent Tribunal	82
	6.1 Definition of 'independence'	83
	6.2 Objective and subjective independence	84
	6.3 Separation of powers	85
	6.4 Appointment of judges	90
	6.5 Tenure	94
	6.6 Promotion	99
	6.7 Discipline, demotion and removal from office	100
	6.8 Immunity	104
	6.9 Compensation and conditions of service	104
	6.10 Assignment and transfer of cases and judges	105
7.	Right to an Impartial Tribunal	106
	7.1 Subjective impartiality	109
	7.2 Objective impartiality	110
	7.3 Adverse media reporting	124
	7.4 Arbitrary rulings at trial	125
	7.5 Courts outside the regular court system	129
8.	Establishment by Law	133
9.	Relationship with Other Fair Trial Rights	136
10.	Derogations and Reservations	137
	10.1 Derogations	137
	10.2 Reservations	140
11.	Waivers	141
	11.1 Requirements for a valid waiver	141
	11.2 Waiver of the right to a competent, independent and impartial tribu	ınal
	established by law?	142
12.	Remedies	142
	12.1 Can a violation be remedied at trial or on appeal?	143
	12.2 Discharge of a jury	144
	12.3 Release	144
4	12.4 Quashing of convictions and expunging records	145
	12.5 Retrial	146
	12.6 Sentence reduction	147
	12.7 Compensation	147
	12.8 Declarations	148
	12.9 Legal reform	148
	12.10 Other remedies	149
13.	Conclusion	150
Rie	tht to a Public Trial	152
,	Introduction	153
	Origins and Rationale of the Right to a Public Trial	153
	Definition of the Right to a Public Trial in International Instrumen	
	Scope of the Right to a Public Trial	157
1.	4.1 Principle of public oral hearings	157
	4.2 What is a 'trial'?	158
	4.3 When is a trial 'public'?	162
	4.4 Exceptions to the right to a public trial	167
5.	Scope of the Right to a Public Judgment	180
	5.1 What is a 'judgment'?	182

9.4 Inter-American Court and Commission on Human Rights

Fair Trial Rights

9.5 African Court and Commission on Human and Peoples' Rights

10. Relationship between the Right to be Presumed Innocent and Other

240

242

243

xvi contents

11.	Derogations and Reservations	244
	11.1 Derogations	244
	11.2 Reservations	247
12.	Waivers	247
	12.1 Requirements for a valid waiver	247
	12.2 Waiver of the right to be presumed innocent	248
13.	Remedies	249
	13.1 Can a violation be remedied on appeal?	249
	13.2 Release, quashing of convictions, and expunging records	249
	13.3 Retrial	251
	13.4 Sentence reduction	252
	13.5 Compensation	252
	13.6 Declarations	253
	13.7 Legal reform	254
	13.8 Other remedies	254
14.	Conclusion	255
4. Ri	ght to Prepare a Defence	257
	Introduction	258
	Origins and Rationale of the Right to Prepare a Defence	258
	Definition of the Right to Prepare a Defence in International	200
<i>J</i> .	Instruments	259
4	Scope of the Right to Prepare a Defence	260
	Right to be Informed of the Charges	261
	5.1 Right to be informed 'promptly' of the charges	262
	5.2 Right to be informed 'in detail' of the charges	266
	5.2 Right to be informed of the 'cause' of the charges	267
	5.4 Right to be informed of the 'nature' of the charges	270
	5.5 Right to be informed of charges in a language the	
	defendant 'understands'	271
	5.6 Right of juveniles to be informed of the charges	272
	5.7 Right to be convicted only of charges of which the defendant	
	was adequately informed	272
6.	Right to Adequate Time and Facilities to Prepare a Defence	279
	6.1 Right to 'adequate time' to prepare a defence	279
	6.2 Right to 'adequate facilities' to prepare a defence	283
	Arbitrary Assessments of Evidence and Submissions	304
	7.1 Arbitrary assessments of evidence	304
	7.2 Arbitrary assessments of defence submissions	309
	Relationship with Other Fair Trial Rights	310
	Derogations and Reservations	312
	9.1 Derogations	312
	9.2 Reservations	315
10.	Waivers	315
	10.1 Requirements for a valid waiver	316
	10.2 Waivers of the right prepare a defence	317
11.	Remedies	318
	11.1 Can a violation be remedied on appeal?	318
	11.2 Release	319
	11.3 Quashing of convictions and expunging records	320
	11.4 Commutation of death sentence and sentence reduction	321

			CONTENTS	XV
		11.5 Retrial	3	322
		11.6 Compensation	3	323
		11.7 Declarations	3	324
		11.8 Legal reform	3	325
		11.9 Other remedies	3	325
	12.	Conclusion	3	26
=	Die	ght to Counsel	3	27
٥.		Introduction		28
				28
		Origins and Rationale of the Right to Counsel Definition of the Right to Counsel in International Instrumen		31
		Scope of the Right to Counsel		33
	4.	4.1 What does 'counsel' mean?		333
				334
	5	4.2 When does the right to counsel apply? Right to be Notified of the Right to Counsel		42
		Right to be Notified of the Right to Counsel Right to Have Counsel Assigned Through Legal Aid		43
	0.	6.1 When is the assignment of legal aid required?		344
				348
	7	6.2 Content of the right Right to Choose Counsel		51
	/ .	7.1 Can the defendant choose counsel?		351
				352
	Q	7.2 Does the defendant have a right to have counsel replaced? Right to 'Effective' Assistance of Counsel		54
	0.	8.1 What type of counsel must be effective?		355
		8.2 What is the standard for effectiveness?		357
		8.3 When will a state be held responsible for counsel's ineffectivene		359
		8.4 Right to 'communicate' with counsel		360
		8.5 Protection of counsel from intimidation or interference		368
	Q	Right to Self-Representation		70
		Relationship with Other Fair Trial Rights		73
		Derogations and Reservations		73
	11.	11.1 Derogations		373
		11.1 Delogations 11.2 Reservations		377
	12	Waivers	3	77
	14.	12.1 Requirements for a valid waiver	2	377
		12.1 Requirements for a variet warver 12.2 Waiver of the right to counsel		378
	13	Remedies		81
	10.	13.1 Can a violation be remedied on appeal?		381
		13.2 Release		382
		13.3 Quashing of convictions and expunging records		383
		13.4 Commutation and sentence reduction		384
		13.5 Retrial		384
		13.6 Compensation		385
		13.7 Declaratory relief		386
		13.8 Legislative reform		386
		13.9 Other remedies		387
	14.	Conclusion		87
6	Ric	ght to be Tried without Undue Delay	3	89
•		Introduction		89
		Origins and Rationale of the Right to be Tried without Undue		91
	And 0			

xviii contents

	3.	Definition of the Right to be Tried without Undue Delay	
		in International Instruments	392
	4.	Scope of the Right to be Tried without Undue Delay	393
		4.1 Length of a 'trial'	394
*		4.2 Right of victims to a trial without undue delay	398
	5.	Right to a Trial without 'Undue' Delay	399
		5.1 What makes a delay 'undue'?	400
		5.2 Proving that delay is 'undue'	424
	6.	Relationship with Other Fair Trial Rights	426
	7.	Derogations and Reservations	429
		7.1 Derogations	429
		7.2 Reservations	432
	8.	Waivers	433
		8.1 Requirements for a valid waiver	433
		8.2 Waiver of the right to be tried without undue delay	434
	9.	Remedies	435
		9.1 Can a violation be remedied on appeal?	435
		9.2 Release	436
		9.3 Quashing of convictions and expunging records	437
		9.4 Retrial	438
		9.5 Sentence reduction	439
		9.6 Compensation	440
		9.7 Declarations	442
		9.8 Legal reform	443
	10.	Conclusion	444
7	Ric	ght to be Present	446
1.	-		
		Introduction Origins and Dationals of the Dight to be Dresent	448
		Origins and Rationale of the Right to be Present Definition of the Right to be Present in International Instruments	450
			452
		A Right or a Duty to be Present? Scope of the Right to be Present	454
	٥.		454
		5.1 Pre-trial stage	454
		5.2 Trial stage	456
		5.3 Appeal stage 5.4 Septencing stage	458
		5.4 Sentencing stage5.5 Right to be 'tried in his presence'	459
	6	Conditions for Trials in the Absence of the Defendant	463
	0.	6.1 States must adequately notify the defendant of the trial	463
		6.2 States must hand over a defendant who is in their custody to the court	466
		6.3 States must safeguard the defendant's defence rights, including the	400
		right to counsel	466
		6.4 States must grant a retrial if the defendant appears	468
	7	Circumstances when a Trial may be Held in the Defendant's Absence	469
	1.	7.1 Waivers	469
	Q	Relationship with Other Fair Trial Rights	480
		Derogations and Reservations	481
	1.	9.1 Derogations	481
		9.1 Delogations 9.2 Reservations	484
		J. LICOUL VALIDITO	104

			CONTENTS	xix
	10.	Remedies	48	5
		10.1 Can a violation be remedied on appeal?	48	5
		10.2 Release	48	5
		10.3 Retrial	48	6
		10.4 Compensation	48	7
		10.5 Declarations	48	8
	11.	Conclusion	48	8
8	Ric	ght to Examine Witnesses	49	1
0.	-	Introduction	49	
		Origins and Rationale of the Right to Examine Witnesses	49	
		Definition of the Right to Examine Witnesses in International		
	٥.	Instruments	49.	5
	4	Scope of the Right to Examine Witnesses	49	
	1.	4.1 Sentencing proceedings	49	_
		4.2 Appeal proceedings	49	
		4.2 Appear proceedings 4.3 Retrial	49	
	5	Right to Examine 'Witnesses'	49	
	٥.	5.1 Definition of a 'witness'	50	
	6	Right to Examine Prosecution Witnesses	50	
	0.	6.1 Right to 'examine or have examined'	50	
		6.2 Right to examination'	50	
		6.3 Limitations on the right	51	
	7	Right to Call and Examine Defence Witnesses	53:	
	/ .	7.1 Right to examine 'witness on his behalf'	53	
		7.1 Right to examine withess on his behan 7.2 Right to 'obtain the attendance' of defence witnesses	53	
		7.2 Right to obtain the attendance of defence withesses 7.3 Permissible limitations on the right to call witnesses	53	
		7.5 Permissible infinations on the right to can withesses 7.4 Right to an 'examination' of defence witnesses	53	
		7.4 Right to an examination of defence withesses 7.5 Right to examine defence witnesses under the 'same conditions'		7
		prosecution witnesses	54	0
	Q	Relationship with Other Fair Trial Rights	54	
		Derogations and Reservations	54:	
	9.		54.	
		9.1 Derogations9.2 Reservations	54 54	
	10.	Waivers	54	
	10.		54	
		10.1 Requirements for a valid waiver10.2 Waiver of the right to examine witnesses	54 54	
	11	Remedies	54	
	11.	11.1 Can a violation be remedied on appeal?	54	
		11.1 Can a violation be remedied on appears 11.2 Release, quashing of convictions, and sentence reduction	54 54	
		11.2 Refease, quasiffing of convictions, and semence reduction 11.3 Retrial	5 4 55	
			55	
		11.4 Compensation11.5 Declarations	55	
			55 55	
		11.6 Legal reform		
	12	11.7 Other remedies	55 55	
	12.	Conclusion	33	<i>J</i>
9.	Rig	ght to an Interpreter	55	6
	1.	Introduction	55	7
	2.	Origins and Rationale of the Right to an Interpreter	55	8

	3.	Dei	finition of the Right to an Interpreter in International	
			truments	561
	4.	Rig	tht to the 'Assistance of an Interpreter'	562
		4.1	Scope of the right to an interpreter	562
		4.2	Right to an 'interpreter': qualifications and quality	566
		4.3	Right to 'free' assistance of an interpreter	568
		4.4	'If the defendant cannot understand or speak the language used in court'	569
		4.5	Language abilities of defence counsel	575
		4.6	Language in which interpretation is provided	578
		4.7	Language assistance for persons with disabilities	581
			Interpretation rights of victims and witnesses	581
	5.	Rig	th to Translation of Documents	582
		5.1	Source of the right to translation	582
		5.2	Scope of the right to translation	583
		5.3	Documents that are relevant or necessary for the preparation of	
			the defence	587
		5.4	Summary or oral translation	592
	6.	Rel	ationship with Other Fair Trial Rights	593
	7.	De	rogations and Reservations	595
		7.1	Derogations	595
		7.2	Reservations	598
	8.	Wa	ivers	598
		8.1	Requirements for a valid waiver	599
		8.2	Waiver of the right to an interpreter or translator	600
	9.	Rei	nedies	602
		9.1	Can a violation be remedied on appeal?	603
		9.2	Release	603
		9.3	Retrial	604
		9.4	Compensation	604
		9.5	Declarations	605
		9.6	Legal reform	606
		9.7	Other remedies	606
	10.	Co	nclusion	606
10.	Rig	ht to	Silence	609
	1.	Int	roduction	609
	2.	Ori	igins and Rationale of the Right not to be Compelled	
			Testify against Oneself or Confess Guilt	611
	3.		finition of the Right in International Instruments	612
			pe of the Right	613
			Right to be informed	614
			Difference between the right to silence and the right not to	
			be compelled to incriminate oneself	615
		4.3	To whom does the right apply?	616
			What does 'compelled' mean?	619
			What kind of evidence is covered?	632
	5.		nsequences of Exercising the Right	636
			ationship with Other Fair Trial Rights	637
			rogations and Reservations	638
			Derogations	638
			Reservations	641

8	. Wa	aivers	641
	8.1	Requirements for a valid waiver	641
	8.2	Waiver of the right not to testify against oneself and confess guilt	642
	8.3	Waiver through selective silence	643
9	. Re	medies	644
	9.1	Can a violation be remedied at trial or on appeal?	644
	9.2	Release	645
	9.3	Retrial	645
	9.4	Sentence reduction	646
	9.5	Compensation	647
	9.6	Declarations	648
	9.7	Legal reform	649
	9.8	Other remedies	649
10	. Co	nclusion	653
11. Ri	ight to	o Appeal	655
	_	roduction	656
		igins and Rationale of the Right to Appeal	657
		finition of the Right to Appeal in International Instruments	659
		pe of the Right to Appeal	661
		Right to appeal of anyone 'convicted' of a criminal offence	661
		Right to appeal of non-defendants	662
		Right to appeal from stage that determined 'conviction and sentence'	664
		Right to appeal and types of offences	669
		Right to appeal from military proceedings and courts martial	674
5		view by a 'Higher Tribunal According to Law'	675
		Conviction by a 'tribunal'	675
	5.2	Review by a 'higher tribunal'	675
		Review 'according to law'	680
6	. Sta	ndard of Review on Appeal	685
	6.1	Substantive review of law and fact	685
	6.2	Review of 'conviction and sentence'	689
7	. Pre	conditions for Exercising the Right to Appeal	690
	7.1	Notification of first instance judgment	691
	7.2	Written, reasoned judgment by court of first instance	691
	7.3	Access to other relevant documents	696
	7.4	Preservation of evidence by court of first instance	697
8	. Du	e Process Requirements for an Appeal	698
	8.1	Certain fair trial rights may apply to a different extent on appeal	698
	8.2	New evidence on appeal	700
	8.3	Timely production of a written, reasoned appeals judgment	701
9	. Rel	ationship with Other Fair Trial Rights	703
10	. De	rogations and Reservations	704
	10.	Derogations	704
	10.2	2 Reservations	708
11	. Wa	ivers	709
	11.	Requirements for a valid waiver	709
	11.2	2 Waiver of the right to appeal	710

xxii contents

	12.	Remedies	712
		12.1 Can a violation be remedied on appeal?	712
		12.2 Release	713
		12.3 Retrial	714
		12.4 Reduction of sentence	714
		12.5 Compensation and declarations	715
		12.6 Legal reform	716
	13.	Conclusion	717
12.	Rig	tht to Equality	719
	1.	Introduction	720
	2.	Origins and Rationale of the Right to Equality before Courts	
		and Tribunals	721
	3.	Definition of the Right to Equality in International Instruments	724
	4.	Scope of the Right to Equality before Courts and Tribunals	727
		4.1 Which 'courts and tribunals' does the right apply to?	727
		4.2 Pre-trial stage	728
		4.3 Appeal stage	728
		4.4 Sentencing stage	729
	5.	Equality of Treatment	730
		5.1 Gender discrimination	731
		5.2 Race discrimination	734
		5.3 Discrimination on the basis of disability	735
		5.4 Other grounds for discrimination: nationality, ethnicity, and religion	736
		5.5 Discrimination on the basis of 'political or other opinion':	=-0.0
		politicised prosecutions	738
		5.6 Different but not discriminatory treatment	747
		Equality of Arms	748
	1.	Equality of Access	754
		7.1 Defendants in detention	754 755
		7.2 Defendants with disabilities	755
	0	7.3 Defendants who are foreign nationals Equality of Access and Special Courts and Droccodings	756 757
	0.	Equality of Access and Special Courts and Proceedings	758
		8.1 Military personnel before military or special courts	759
		8.2 Civilians before military or special courts8.3 Equality of access for victims and relatives	761
	Q	Relationship with Other Fair Trial Rights	762
		Derogations and Reservations	763
	10.	10.1 Derogations	763
		10.1 Derogations 10.2 No right to derogate from 'fundamental principles of fair trial'	764
		10.2 No derogation from the right to equality before courts and tribunals	765
		10.4 Reservations	767
	11	Waivers	767
		11.1 Requirements for a valid waiver	767
		11.2 Waiver of the right to equality before courts and tribunals?	768
	12.	Remedies	769
		12.1 Can a violation be remedied on appeal?	769
		12.2 Release	770
		12.3 Retrial	771
		12.4 Sentence reduction	771

	CO	NTENTS XXIII
	12.5 Compensation	771
	12.6 Declarations	772
	12.7 Quashing of convictions and expunging records	773
	12.8 Legal reform and other remedies	773
13.	Conclusion	775
13. Rig	tht not to be Subject to Double Jeopardy	777
1.	Introduction	778
2.	Origins and Rationale of the Right not to be Subject to Double	2
	Jeopardy	778
3.	Definition of the Right not to be Subject to Double Jeopardy in	1
	International Instruments	783
4.	Scope of the Right not to be Subject to Double Jeopardy	785
	4.1 Scope of 'offence': limited to criminal offences?	786
	4.2 Scope of 'offence': 'same offence' or 'same conduct'?	790
	4.3 Geographic scope	799
5.	Triggering the Application of the Right not to be Subject to Do	ouble
	Jeopardy	801
	5.1 Right generally attaches to acquittals and convictions	801
	5.2 Requirement of a 'final verdict'	802
6.	Right not to be 'Liable to be Tried or Punished Again'	808
	6.1 Right not to be 'liable to be tried again'	808
	6.2 Right not to be 'tried' again	809
	6.3 Right not to be 'punished' again	812
	6.4 Is the right violated when the outcome of the second prosecution	n
	is more favourable to the defendant?	813
7.	Exceptions to the Right not to be Subject to Double Jeopardy	813
	7.1 Initial prosecution tainted by fundamental defects in due proces	
	7.2 Initial prosecution lacked real intent to bring those responsible t	to justice 816
	7.3 New facts discovered after conclusion of the initial prosecution	817
	Relationship with Other Fair Trial Rights	818
9.	Derogations and Reservations	819
	9.1 Derogations	819
	9.2 Reservations	822
10.		823
	10.1 Requirements for a valid waiver	823
	10.2 Waiver of the right not to be subject to double jeopardy	824
11.	Remedies	825
	11.1 Release	825
	11.2 Compensation	826
	11.3 Declarations	827
10	11.4 Other remedies	827
12.	Conclusion	827
4. Rer	nedies	830
1.	Introduction	831
2.	Definition of the Right to a Remedy for Fair Trial Violations in	1
	International Instruments	832
	2.1 Provisions in international instruments on remedies for fair	
	trial violations	832

xxiv	(CON	TENTS	
		2.2	Origin of the remedies provisions in the ICCPR	833
			Reservations and declarations	840
		2.4	Practice of international bodies	841
	3.	Rer	nedies Awarded by International Bodies for Fair Trial Violations	848
			Release	850
		3.2	Pardons and quashing of convictions	864
		3.3	Retrial	867
		3.4	Sentence reduction	874
		3.5	Monetary compensation	879
			Declarations	887
		3.7	Steps to prevent future violations	888
			Orders to investigate and prosecute those responsible for violations	893
			Other remedies	895

897

900

901

4. Compliance with Rulings on Remedies

5. Conclusion

Index