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Book Review: The Right to a Fair Trial in International Law

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Book Review

Amal Clooney & Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford: Oxford University Press, 2020) 900 pages.

Robert J. Currie†

Beyond the negotiation and conclusion of international human rights law treaties, a good portion of the history of human rights protection is the history of good lawyering. This is true across a broad range of rights, but perhaps no more keenly so than with regard to the right to a fair trial. The right to a fair trial, in fact, is ideally a double-edged sword in the hands of human rights advocates since a fair trial will inevitably be required to obtain remedies for breaches of other substantive human rights. In an era when corruption is on the rise and the integrity of judicial proceedings is under attack in various places throughout the world, this first line of human rights defence is a bellwether. As authoritarian governments are in the ascendancy and "populism" poisons social discourse, it is unsurprising to see that the right to a fair trial "is being abused across the world with devastating human and social consequences."[1]

Good lawyering, then, is required to maintain the fairness of trials, but good lawyering requires effective tools that can assist counsel in helping the contours of fairness be made apparent and cognizable before domestic courts. Translating international human rights law for the purposes of domestic application, in particular, is by no means an easy task, but this new text – *The Right to a Fair Trial in International Law*[2] – provides lawyers with a formidable resource.

The authors of what foreword writer (and former International Criminal Court judge) Sir Howard Morrison appropriately calls a "magisterial" text hardly need introduction to students and practitioners of international human rights law. Amal Clooney's work on behalf of both high-profile and relatively unknown victims of political oppression around the world is well known. Professor Philippa Webb of King's College London has emerged as

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1 "The Right to a Fair Trial" (last visited 23 January 2021), online: *Fair Trials* <fairtrials.org/right-fair-trial> [perma.cc/4MY2-GNAE].

2 Amal Clooney & Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford: Oxford University Press, 2020).

a leading scholarly voice in international human rights law, backed by a decade of experience at and before domestic and international courts and organizations. Together they are a powerhouse of an authorial team and have produced a book that combines an authoritative command of the legal subject matter with a keen, pragmatic sense of how it can be practically framed and employed before courts. In their Introduction, the authors are clear on both the gap they perceived and how they set about constructing a resource that would fill it:

> 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 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 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*.[3]

The opening chapter, while entitled "Introduction", is in fact a 65-page mini-textbook on a number of essential touchpoints, including "Sources and Components of the Right to a Fair Trial", how the right manifests in customary international law, the burden of proof and deference to national courts (in international human rights cases) and the scope of fragmentation and harmonization of the law underpinning the right. At every turn, the substantive text is supplemented by robust footnotes that refer to relevant authorities (including a healthy amount of work by various United Nations bodies and special rapporteurs) and doctrinal writing.

Acknowledging that the right to a fair trial applies across a variety of settings, the authors have chosen to focus on how it is dealt with and applied in criminal proceedings. As befits a book written by lawyers for lawyers – but, regrettably, unusually for international human rights law literature – there is a strong base of international law methodology that informs the written work. This laudable attention to methodology informs the overall approach to the book, which is specific and deliberate in a manner that keeps both the reader and overall trajectory of the work focused.

Clooney and Webb begin their discussion of the scope of the right to a fair trial by noting that "the scope and content of the right is not always easy

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[3] *Ibid* at 3.

to discern given the multitude of international law sources that define it,"[4] and go on to distinguish the various sources (UN and regional treaties, the associated treaty bodies and courts, *inter alia*, as well as customary international law) and settings (armed conflict, international courts, domestic systems, etc.). The authors make the pragmatic choice to focus the work around the 13 different component rights in article 14 of the *International Covenant on Civil and Political Rights* ("*ICCPR*"),[5] given its quasi-universal application. However, they note that this is a focusing device only; each ground of substantive right is assessed in light of parallel sources (e.g. the European, African and Central American systems) and relevant organizational and academic commentary.

This broad approach to sources comes at the cost of the analytics attaching to the rights being somewhat diffuse. In one sense, this is a necessary evil, since the explicit goal of the book is to assess the scope, particulars and status of the relevant norms under *international law*, which is best accomplished by bringing a multiplicity of sources to bear. However, it seems that at times throughout the book, there are relevant skeins of state practice that are neglected, in that the case law and authorities employed by the authors are almost exclusively from the international or supra-national level.

In some settings this is not an issue. For example, the case law of the European Court of Human Rights can safely be said to be "hard" law, given that it is directly applicable in the law of its member states, and is also useful as a point of reference for comparative interpretive purposes. Under the *ICCPR* regime, however, the findings of the Human Rights Committee ("HRC") are for the most part non-binding "views" to which states might or might not adhere. The government of Canada, for example, has in open court characterized the views of the HRC and the UN Torture Committee as "recommendations made by groups with advocacy responsibilities,"[6] suggesting that Canada, at least, does not consider them to be authoritative on the state of the law. While this may seem a picky point, the authors' use of HRC decisions as presenting authoritative interpretations of the *ICCPR* may miss underlying nuance created by actual state practice under the treaty – though the latter is not itself determinative either.

However, that is not to unduly fault the authors' overall sound methodology. Notably, they are cautious regarding how fair trial rights are to be handled in and before domestic courts, acknowledging that different

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4 *Ibid* at 5.

5 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 14 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

6 *Amnesty International Canada v Canada (Chief of the Defence Staff)*, 2008 FC 336 at para 239.

modes of domestic implementation of international law (e.g. whether the system is dualist or monist) may necessitate different means by which to argue whether and to what extent the international norms on the right to a fair trial are justiciable. Nonetheless, the authors are correctly firm in their conclusion that "international standards on fair trials operate across all systems, regardless of the legal tradition,"[7] and they encourage attention to ascertainment of which norms apply to which state.

In each of the remaining chapters, the various components of the fair trial right as enumerated in article 14 of the *ICCPR* are dealt with individually: the right to a competent, independent and impartial tribunal established by law; the right to a public trial; the right to be presumed innocent; the right to prepare a defence; the right to counsel; the right to be tried without undue delay; the right to be present; the right to examine witnesses; the right to an interpreter; the right to silence; the right to appeal; the right to equality; the right not to be subject to double jeopardy.[8] Each chapter follows roughly the same template: treatment of origins, rationale and definitions are followed by detailed attention to the contours of the particular aspect of the right; the relationship with other fair trial rights is canvassed; and exceptions, derogations, reservations and waivers are dealt with. Most chapters conclude with a section on remedies for breaches of the particular aspect, which are supplemented in turn by a final chapter on remedies that concludes the book.

In each chapter, an appropriate balance is struck between cogent explanation of the parameters of the right in question, references to its manifestations among various sources (treaties, statutes of international criminal tribunals and so forth), and thorough but judicious citation of case law, international decisions, views of international bodies and relevant literature. On topics where the specific aspect of the right being discussed interacts with other aspects, the authors make efficient use of cross-referencing. They also acknowledge, as needed, interactions of the various aspects of the right to a fair trial with other human rights without being dragged into tertiary excurses on side topics. One particularly salutary feature is that the authors give a reasonable amount of attention to how states and their courts should treat the danger that an accused person might face an unfair trial in a foreign jurisdiction, a question most apposite in extradition proceedings.

A good point upon which to conclude this review is to emphasize that despite the international scope and flavour of this work, the authors clearly

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7 Clooney & Webb, *supra* note 2 at 12.
8 *ICCPR*, *supra* note 5, art 14.

intend it to be used in domestic proceedings. This has particular resonance for Canadian lawyers who litigate fair trial standards, whether in criminal or administrative proceedings. The authors' goal, they state in the Introduction, is to "define what a fair trial means under international law because international standards provide the minimum protections that states have undertaken to protect."[9] In Canada, our fair trial jurisprudence – under the *Canadian Charter of Rights and Freedoms*[10] – is robust and other states have occasionally drawn upon it in formulating their own domestic standards. Yet, much of that jurisprudence is untroubled by serious engagement with international law norms, whether via the *ICCPR* or otherwise, despite the bindingness of those norms upon our law. Clooney and Webb's statement above brings to mind the still somewhat controversial dictum of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*,[11] where he wrote:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of 'the full benefit of the *Charter*'s protection.' I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[12]

Any case in which fair trial standards are in question should be one in which counsel are bringing to the court's attention the relevant international law that bears upon the points in issue. In compiling their tremendous book, Clooney and Webb have made this job much easier.

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[9] Clooney & Webb, *supra* note 2 at 5.

[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.

[12] *Ibid* at 350. Notably, while Dickson CJ was dissenting in this case, subsequent majority decisions have generally ratified it; see e.g. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70.