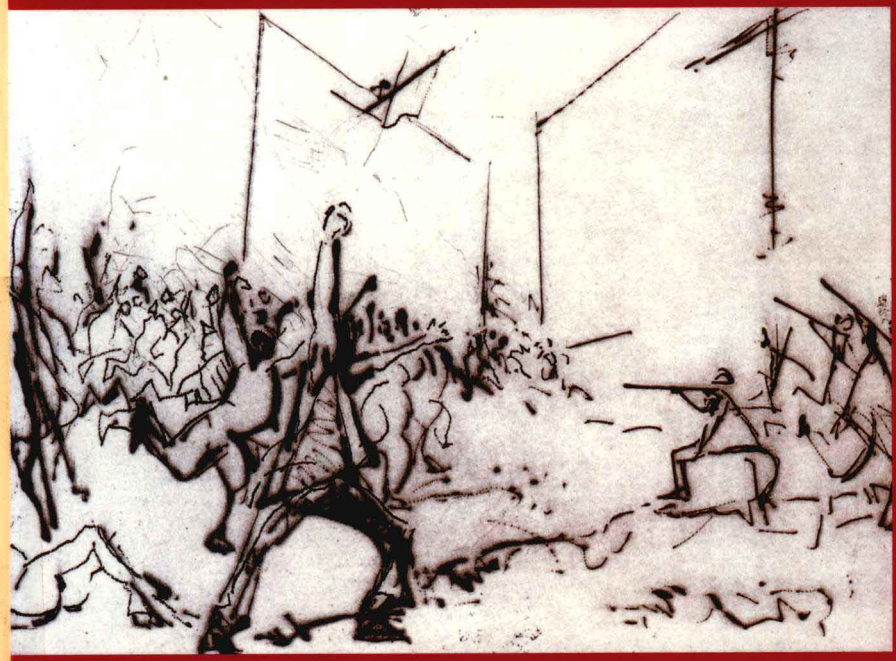
EUROPEAN AND INTERNATIONAL LAW SERIES

Theory and Practice of International and Internationalized Criminal Proceedings

Geert-Jan Alexander Knoops



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Preface

The present volume is the first of a planned series on "European and International Law." Further volumes in the series will deal with other subjects in which international law and European law intersect and interact. The expression "European" law, as used in this series, refers principally to the law that has its source in the treaties, legislation and jurisprudence of the European Union as well as the treaties of the Council of Europe and the case-law of its European Court of Human Rights. The term also embraces those areas of national law that are harmonized with, assimilated to, or impacted upon, by the ever-expanding law promulgated in one form or another by the above-mentioned European institutions. By adding "International Law" in the title of the series, its editors wisely recognize that international law impacts on European law and the national law of European States. The "new" law, which emerges from this fascinating confluence or symbiosis of different legal systems, is reflected on almost every page of the present volume. That is not surprizing, of course, considering that international criminal procedure, more than many other branches of law, traces its origin to national law, European law and international law.

Over the past dozen years, the international community has witnessed the establishment of a number of *ad hoc* international criminal tribunals. Most important of these are the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, both still in existence more than a decade after they were constituted. These two judicial institutions, brought into being by United Nations Security Council resolutions, were followed some years later by the adoption of the Rome Statute. Its rapid ratification by a large number of states created the permanent International Criminal Court, a treaty-based judicial institution. It is noteworthy that these judicial institutions were established within a relatively brief period of each other, but more than 50 years after the Nuremberg Military Tribunal laid the precedent-setting foundation for modern international criminal courts. The Genocide Convention, adopted in 1948 shortly after the Nuremberg sentences had been pronounced, anticipated the existence of an international criminal court. Its Article VI declared presciently, albeit prematurely, that persons charged with genocide were to be tried by a competent tribunal of the State where the act was committed "or by such international penal tribunal as may have jurisdiction...." But, as we have seen, more than half a century had to elapse before such an "international criminal tribunal" came into being. Unfortunately, it took the genocide in Rwanda,

the massive crimes against humanity in the Former Yugoslavia, not to mention the killing fields of PolPot's Cambodia and other horrendous crimes of like nature before the conscience of the international community was sufficiently aroused to revive the seed planted in Nuremberg.

While much has been written to date on substantive international criminal law and its doctrinal foundations, and while the *ad hoc* tribunals mentioned above have already transformed many of the evolving principles of that law into precedent-setting judgments – the International Criminal Court has not as yet had that opportunity – the conceptualization of the law of international criminal procedure has not yet received comparable attention from the scholarly community. The present work by Professor Geert-Jan Alexander Knoops succeeds in articulating and analyzing the conceptual foundation of that law in a sound and thorough manner. That is why it is such a novel and welcome addition to the literature on the law of international criminal procedure.

Professor Knoops sees international criminal procedure not as an assorted accumulation of disparate procedural rules gleaned from national legal systems, on the one hand, and international legal instruments, judicial decisions and practice rules, on the other, but as an "emerging discipline of the law of international proceedings." (p. 24). In the course of substantiating his thesis, the author presents in this book a comprehensive analysis of the elements that comprise the contemporary law of international criminal procedure and of its sources. Thus, whether or not the reader is interested in the conceptual foundation or discipline of international criminal procedure as propounded by Professor Knoops, or merely in obtaining a solid grounding in the basic rules of that body of law, he or she will find this book worth reading and exploring.

Thomas Buergenthal
Judge, International Court of Justice

Foreword

This book is primarily designed to contribute to a greater understanding of the evolving rules of procedure and evidence, which are applicable before international and internationalized criminal courts. Most textbooks on the issue of international criminal law focus primarily on matters of substantive law and rarely touch the procedural mechanisms of these courts in detail. The author therefore seeks to address this lacuna while addressing also the practical implications of the procedural rules applicable before these fora. One problem of doctrinal nature is the absence of a universal code of procedural law governing international criminal trials in general. Through the analysis of all the principles, which underlie the various procedures before international and internationalized criminal courts, this book hopes to illustrate to the reader some general characteristics of these proceedings, whilst identifying new trends and, by setting out relevant human rights jurisprudence, providing an analytical lens through which the evolving jurisprudence and practice in this field can be viewed.

Although it has been noted that "procedure is only the handmaiden and not the mistress of the law," adherence to procedure assists to promote the fundamental goals of certainty of the law and fairness in criminal trials. Hence, as Justice Benjamin N. Cardozo noted in his impressive volume, "The Nature of the Judicial Process"(1921), while citing the teachings of Monroe Smith,

> Every new case is an experiment (...). The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be examined

By combining the theoretical aspects of the procedural rules pertaining to international criminal trials as well as the practical aspects thereof, this book hopes to serve both as an academic and an instruction manual that is useful to both international criminal law practitioners and, by its many examples and case law, students. It is also my hope that this book might be instructive for persons involved in developing both domestic and international procedures and policies relating to international criminal justice. In order to realize the ultimate goal of the procedural rules pertaining to international criminal trials - to ensure the highest standards of international crim-

inal justice - not only the parties to these trials but also the lawmakers should be restrained by the same principles which underlie these rules. Thus, diplomats, judges, staff members, and parties to these proceedings should all bear in mind the principle set forth by US Supreme Court Justice Brandeis, which was adopted by the ICTR Appeals Chamber in the landmark case of *Prosecutor v. Baragyawiza:*

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Accordingly, this book provides a relatively elaborate analysis of all the procedural stages of international criminal trials, whilst addressing some of the strategy, tactics and policy thereof. The book also reviews fundamentals in order to address the nuances of contemporary international criminal trials, which are closely intertwined with the case law of these courts.

By combining these procedural aspects of international criminal trials and the contemporary case law of the ICTY, ICTR, SCSL, and East Timor Special Tribunal, this book aims to counterbalance the scarcity of thorough procedural instruction for these trials. In this regard, the book synthesises the experience of the author as defence counsel before the various international criminal tribunals and therefore, to a certain extent, focuses on the human rights and procedural aspects of fair trial.

As mentioned before, this book provides an extensive discussion of the various aspects of international criminal trials, from its investigative stage to the enforcement of international criminal sentences. In this regard, I am particularly indebted to Melinda Taylor, who is currently assigned to the defence team led by me in Prosecutor v. Stanisic, which is a case pending before the ICTY. Ms. Taylor worked previously for several years as a lawyer at the ICTY, and was able to draw on her experiences by generally revising and updating the text, as well as contributing to the following sections of the book: Chapter II, section 2, Chapter III sections 3.2.1, 3.4, 3.6.4, 3.6.5, 3.7, 3.8.1, 3.8.2, 3.8.3, 3.9, 3.11.2, Chapter IV section 2, Chapter V sections 3.1, 3.2.2, 4.2 Chapter VI sections 3.5m 5.2, 5.4, 5.5, 6.2, 6.3, Chapter VII sections 4.5, 7.3.2, 8, 8.3, 10, 10.1 Chapter VIII sections 2.4.4, 5.2 Chapter IX sections 3, 7.3.

Her work, particularly in the context of the determination of the rights of the accused and in particular, the question whether equality of arms in the context of international criminal trials should extend to having access to sufficient financial resources on the part of the accused, relates to a rather innovative topic which has rarely been touched upon. The same applies for her contribution to the sections on rights of the accused to freely choose and dismiss their counsel. In this regard, her contribution to the book was of invaluable support and greatly improved the initial manuscript.

Finally, I owe thanks to the editorial board of the series International and European Law of Kluwer for their confidence to write the first volume in this series, my colleagues of the University of Utrecht (The Netherlands) as well as my associates from Knoops and Partners Lawyers, Amsterdam, The Netherlands. In the last couple of years, this firm has developed rare expertise in international defence work, and it is has been extremely rewarding experience for me to have been part of this venture. In particular, I am indebted to Ms. Frederique Wessel for her enormous support in composing and preparing the manuscript. I am always grateful to my colleagues, who work before international criminal tribunals to achieve the common goals of international justice and fair trial and who have inspired me in this research. In particular, I would like to mention my co-counsel in the case of Prosecutor v. Stanisic, Mr. Wayne Jordash.

I specially thank my associate and wife Carry (again) for her patience and support during the period in which I was consumed with this project. As of 1994, we have worked as a legal team in our endeavour to further defence work, especially in the fields of international criminal law and human rights. I am extremely privileged to have her as my legal soul mate and hope that our adventures in international criminal law continue.

The law in this book is stated as of August 1, 2005.

Geert Jan Alexander Knoops

Table of Abbreviations

ACHR	American Convention on Human Rights
Add. Prot.	Additional Protocol to the Four Geneva Conventions
AJIL	American Journal of International Law
ALL ER	All England Reports
ASP	Assembly of States Parties
BRIT.Y.B.INT'L.L	British Yearbook of International Law
Conf.	Conference
Crim. L.F.	Criminal Law Forum
Crim. L. Rev.	Criminal Law Review
DEA	Drug Enforcement Administration
Doc.	Document
1988 Drug Convention	United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances opened for signature at Vienna Dec, 20 Dec. 1988, U.N. Doc. E/CONF. 82/15, reprinted in 28 ILM 493 (1989) 51st Sess. Supp. No. 22, 212-93 U.N. Doc A/51/22 (1996)
e.g.	for example
EC	European Community
ECHR	European Court of Human Rights
ed.	Editor
eds.	Editors
EJIL	European Journal of International Law
et al.	and others
et seq.	et sequitur ("and what follows")
FRY	Federal Republic of Yugoslavia
G.A. Res.	(U.N.) General Assembly Resolution
G.A.	(U.N.) General Assembly
GAOR	(U.N.) General Assembly Official Records
IACHR	Inter-American Commission on Human Rights
Id.	ibidem ("same as previous")
ICC Statute	Rome Statute of the International Criminal Court, A/Conf. 183/9, July 17, 1998
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights

ICDAA	International Criminal Defence Attorneys Association
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	International Criminal Law Quarterly
ICRC	International Commission of the Red Cross
ICT	International Criminal Tribunals
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force (Bosnia)
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal; see also Nuremberg War Crimes Tribunal
IMTFE	International Military Tribunal for the Far East
INT'L L. Q.	International Law Quarterly
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
LRTWC	Law Reports of Trials of War Criminals
Mil. L. Rev.	Military Law Review
MTA	Military Transfer Authority
Nuremberg War Crimes	The International Military Tribunal at Nuremberg, created Tribunal by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945 (see also IMT)
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NILR	Netherlands International Law Review
NJ	Nederlandse Jurisprudentie (Dutch jurisprudence)
No.	Number
Nos.	Numbers
NYIL	New York International Law Review
OAS	Organization of American States
OTP	Office of the Prosecutor
Para.	paragraph
paras.	paragraphs
PCIJ	Permanent Court of International Justice
Preparatory Committee	Report of the Preparatory Committee on the Establishment
Report	of an International Criminal Court, Vol. I. U.N. GAOR,

Res.	Resolution
RPE	Rules of Procedure and Evidence
SC	Security Council
SCR	Supreme Court Reporter
SCSL	Special Court for Sierra Leone
sess.	Session
SFOR	Stabilization Force (for the former Yugoslavia)
SG	United Nations Secretary-General
Supp.	Supplement
Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46
U.N. Doc.	United Nations Document
U.N./UN	United Nations
U.S.	United States
v.	versus
Vol.	Volume
Vols.	Volumes
Yearbook of IHL	Yearbook of International Humanitarian Law

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Table of Contents