

# INTRODUCTION

*Juris effectus in executione consistit*—‘the effect of the law consists in its execution’. The fact that international criminal law did not contribute a great deal to prevent mass atrocities in the second half of the twentieth century is, amongst many other reasons, due to the lack of its execution at the international level. The international community has come a long way since then in its establishment of an institution for the prosecution of international crimes. The International Military Tribunal in Nuremberg in 1945 is rightly seen as the beginning of this development. The necessity of an international normative order and of an international criminal court was described in drastic terms in the aftermath of World War II:

As long as there is no judicial organ for the trial of international crimes, there will be neither a serious codification of international criminal law nor any serious application of an international sanction. The world will go on living in a judicial anarchy under violence and injustice with the risk of running into destruction.<sup>1</sup>

The horror scenario described here did not materialize, but in the sixty-five years since the end of that war, the world has been shattered by a number of armed conflicts involving millions of casualties. Some fundamental parameters changed during the 1990s. Several international criminal tribunals have been established by the United Nations. With the adoption of the Rome Statute for the International Criminal Court (ICC) in 1998 and the establishment of the ICC on 1 July 2002, the institutionalization of international criminal law reached its peak, and the world now has both a code of international crimes and an international court to execute these norms. Thereby the international community has begun a new chapter of history and demonstrated its willingness to end impunity for massive human rights violations. The ICC has today 117 members worldwide, despite many important states refusing to become signatories to its treaty, including the USA, Russia, China, India, and Israel. Still, the number of States Parties to the Rome Statute continues to rise. The normative structure is in place. Now it must prove its worth in application.

This is a book about international criminal procedure. It takes issue with the procedural order which is to be followed in executing the code of international crimes

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<sup>1</sup> Jean Graven in 1948, cited by V Pella, ‘Towards an International Criminal Court’, 44 *AJIL* (1950) 37, 47.

at the international level. The ICC's legal regime stands in the foreground, as it is believed to be the future of international criminal procedure. However, the ICC's Statute and Rules of Procedure and Evidence are placed in context with other international tribunals like the UN Tribunal for former Yugoslavia (ICTY), the UN Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

Since the renaissance of international prosecution in 1993 with the establishment of the ICTY, a great deal of attention has been paid to the development of substantive international criminal law. Questions about the interpretation of genocide, crimes against humanity, and war crimes have given rise to a myriad of books and articles together with the question of a general part of international criminal law, as the *imputatio* of law and facts.<sup>2</sup> Recently, a great deal of energy has been invested in the drafting of the crime of aggression. The definition which was finally adopted at the Review Conference in Kampala, Uganda, in 2010, completes the Nuremberg legacy.<sup>3</sup>

The concentration on the substantive law has worked in a sense to the disadvantage of procedural law. This is surprising because much of the substantive law has been developed *ad hoc* by judges in ongoing procedures. It is important, therefore, to reflect on the structure of the procedural law as this obviously influences the interpretation of the law in its material sense. But somehow, back then, it was felt that the completion and the acceptance of the code of crimes were more important than procedural law, which was somehow taken as read. However, it was rather obvious from the beginning that nothing could be taken for granted in this regard. As Göran Sluiter, one of the protagonists of research in the field of international procedure, has stated: 'in the international criminal justice system . . . the Achilles' heel lies in procedural law.'<sup>4</sup>

There are several issues at stake which warrant a new and more systematic way of thinking about procedural matters. This holds true for the integration of victims into criminal procedure. For political reasons, victim participation has been integrated into the Rome Statute, but until today no viable concept of participation has been developed. The protection of witnesses in a highly sensitive field—in particular victims of sexual abuse—influences the conduct of the trial. How can a prosecutor investigate properly if s/he is denied cooperation by national states, and what influence would such a denial have on the quest for the truth? Furthermore it is debatable how the presumption of innocence can be implemented regarding high-profile accused like Radovan Karadžić or Slobodan Milošević. Finally,

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<sup>2</sup> A Eser, 'Procedural Structure and Feature of International Criminal Justice: Lessons from the ICTY', in: B Swart, A Zahar, and G Sluiter (eds), *The Legacy of the International Criminal Tribunals for the Former Yugoslavia* (OUP 2011) 108, 110.

<sup>3</sup> Resolution RC/Res. 6 (Advanced Version, 28 June 2010), adopted on the 13th Plenary session of the Review Conference in Kampala on 11 June 2010 by consensus.

<sup>4</sup> G Sluiter, 'Karadzic on Trial—Two Procedural Problems', 6 *JICJ* (2008) 617.

it seems that the procedural system based on the interplay of different judicial chambers, with an extremely complicated system of disclosure of evidence, oscillating between a party-driven system and inquisitorial powers of judges, can readily lose track of its final responsibility. Who, at the end of the day, is responsible for an improper and incomplete searching for the truth? This question needs to be answered. Likewise we need to be clear about the aims and purposes we intend to follow by prosecuting international crimes on an international level, and we need to address the question of how the interaction between national jurisdictions and international prosecution should work in order to establish an effective international criminal justice system.<sup>5</sup>

In 1950, the Romanian law professor, Vespasian Pella, who fought for the establishment of an international criminal court between the two World Wars, wrote: '[T]he new branch of law which international penal law constitutes is as yet little known even to many lawyers'.<sup>6</sup>

To some extent this is true today. While several thousand people work within international criminal courts and tribunals, public attention with regard to international trials seems scant, and university curricula rarely cover this area of international law. International criminal law remains a highly specialized enterprise.

In this book we address students of international criminal law as well as scholars and practitioners. We aim to provide an introduction to the working of the ICC Statute (ICCSt) and previous international tribunals. Our intention is also to put procedural law into context and address questions which reach beyond the interpretation of statutory norms.

The book comprises ten sections. Chapters 1–4 introduce the topic and its key principles and Chapters 5–9 analyse the procedural steps chronologically (as far as is possible). Chapter 10 deals with contempt of court as a specific safeguard for the fairness of the proceedings.

At the outset, an overview of the history of international criminal procedure is introduced in the context of different international tribunals which have dealt in the past with the execution of international criminal law, or still do. The history of the different courts and tribunals unfolds the difficulties in coming to terms with the different procedural ideas, which are commonly referred to as the Anglo-American, or adversarial, system on the one hand, and the Continental European system of inquisitorial investigation on the other. Notwithstanding these differences, human rights law is applicable universally and thus influences criminal

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<sup>5</sup> See also Th Buergethal and D Thürer, *Menschenrechte. Ideale, Instrumente, Institutionen* (Nomos 2010) 135.

<sup>6</sup> V Pella, 'Towards an International Criminal Court', 44 *AJIL* (1950) 37, 66.

procedure everywhere. This is why one has to deal with human rights law in detail, when talking about criminal procedure.

In Chapter 2, issue is taken with circumstances that are specific to international criminal procedure compared to those in national prosecution systems. For this reason, the question is raised whether the aims and purposes of international criminal procedure are different from those of national procedures. One obvious difference in international criminal procedure is its conflict with state sovereignty and its founding in a system of executing international criminal law which is cooperative. These two issues are addressed by looking at the jurisdictional questions, in particular the so-called trigger mechanisms at the ICC, and the principle of complementarity, which influences the admissibility of a case at the ICC and forms one of the basic philosophies of the ICC as a backup structure for national jurisdictions.

The history of international criminal procedure provides us with some twenty years of experience in this kind of prosecution all over the world. This is of course minimal when compared to the domestic systems, whose history runs to several hundred years or more. Under these circumstances, it is striking how self-assured international prosecutors and judges are in acting to fulfil their roles at international tribunals and courts. It seems that the only common rationale on which international criminal practitioners practise is according to the first Nuremberg principle: to end impunity for massive human rights violations. This is a starting point, but does not suffice as a solid theoretical basis for a procedural system. Lacking a long tradition and an international legal culture, such a theoretical underpinning, however, seems inevitable. Even if we cannot answer the relevant questions to the full, we attempt, in Chapter 3, to develop a functional–normative theory for international criminal procedure which will serve as a methodological framework for the further development of the ICC procedural system.

Before looking at the individual procedural steps, we consider, in Chapter 4, the different participants in criminal procedure. We analyse the structure of the ICC in detail, comprising the Presidency, the different judicial divisions, Appeals, Trial and Pre-Trial Chambers, the Registry and the Prosecutor. The incorporation of victims in the criminal trial process is a recent development, which gives rise to many questions concerning proceedings. Therefore it is necessary not only to look at the rules which concern victims, but also to analyse the role of victims in the crime and in the process of dealing with the crime. Lastly, the accused and his defence counsel participate in the prosecution process and their specific procedural roles are analysed.

The remaining sections of the book are reserved for the analysis of the individual steps of the procedure at the ICC in chronological order. The analysis will be based not only on the Rome Statute and the Rule of Procedure and Evidence of the ICC, but take into account the practice at the *ad hoc* Tribunals and the human rights

requirements. At first, we take issue with the procedural questions concerning admissibility and jurisdiction, in Chapter 5. In Chapter 6, the complex topic of investigation is addressed and comprises discretion in whether or not to investigate, the decision to prosecute, and the collection of evidence. As part of the Prosecutor's task to investigate, the difficult cooperation model foreseen in Part IX of the ICCSt is analysed. Pre-trial detention and the rights of the suspect are further elements discussed.

The following stage of the proceeding is the 'confirmation' proceeding, covered in Chapter 7. The ICC entertains a rather laborious and time-consuming procedure. A hearing is necessary for the confirmation of the charges, which has until now rather unfortunately developed into some sort of 'mini-trial'. As part of this stage, the important issue of disclosure of evidence will also be discussed even if 'disclosure', at least in a material sense, takes place in all stages of the trial. Yet as it pertains mainly to the preparation of the defence, it is placed in this pre-trial phase.

The trial, covered in Chapter 8, is the core element of the prosecution process. This is the decisive stage in the sense that the verdict as to the guilt of the accused is being passed. The trial is influenced by a number of general principles, like trial fairness, publicity, orality, and others. Concerning the specific structure of the trial at the ICC, the Statute and Rules leave more questions open than answered. It is presumed, however, that in principle the trial will follow an adversarial structure, which relates the presentation of evidence to the respective parties; ie prosecutor and defence. Yet the judges have an obligation to hear all the evidence which is relevant to the case. The law of evidence—the different forms of evidence and the admissibility of evidence—is the most important topic at trial, as only admissible evidence which has been presented at trial may form the basis of the judgment.

Judgments in criminal matters must be capable of review, discussed in Chapter 9, by a court or chamber of higher instances. This is a human rights prerequisite and is well respected in modern international courts and tribunals. The ICC and the *ad hoc* tribunals go a step further and allow so-called interlocutory appeals which can be raised against many decisions in the pre-trial and trial phase. Despite this being a time-consuming enterprise, these appeals help to develop the procedural law. If new facts appear, the verdict must also be capable of review in favour of the accused at a later stage.

In the final chapter of this book, contempt of court is addressed. As the fairness of the proceedings and the adherence to the legal provisions rests mainly with the participants in the proceeding, there are special norms which address professional misconduct and sanction against misbehaviour. Even if these norms contain substantive criminal law, they are closely related to the fulfilment of procedural obligations and aim at the protection of the criminal procedure as such. Therefore it was

deemed necessary to include a chapter on disclosure of evidence in this treatise on criminal procedure.

What was excluded from this book was a consideration of the principles of sentencing and the execution of the punishment. Neither question is procedural in character. Our conviction remains that the parameters for the decision on the nature and quantity of punishment is closely related to the crime in the material sense. As concerns procedural law, the only issue to raise in this regard is that the parties have been given time and opportunity to state their views on the issue and present evidence concerning aggravating and mitigating circumstances.

This view is certainly debatable,<sup>7</sup> and discloses one important factor: the author of this book is a German lawyer, raised and trained in the German legal system. This holds true also for the co-authors and members of the research team—although one of them is Austrian, which nevertheless has a ‘Germanic’ system of law. All have international experience, but they remain ‘Continental’ lawyers. This has effects not only on language and style—and I sincerely hope that a native speaker will turn a blind eye to the many ‘Germanicisms’—but also on the understanding of the law in general and procedural law in particular. In that sense, this book does not lay claim to present the ultimate truth concerning international criminal procedure. It seeks to explain and describe the structure of international criminal procedure as it appears to an outside observer—none of the authors practises international criminal law—and it raises some critical questions. In this, it is hoped that we will contribute to the exchange between academia and practice, and add a little to the ongoing struggle to refine international criminal procedure. It is, after all, in our all interests to arrive at an international criminal justice system which is acceptable both to the affected societies and to the international community, and thus can promote a more secure life throughout the world.

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<sup>7</sup> See Boas/Bischoff/Reid/Taylor, *ICL III*, 392–410, who contribute a considerable part of their book on procedure on sentencing guidelines.