Part I – The Defendant in International Criminal Proceedings

This first main part of the book tries to establish what the position of the defendant is in and in relation to the criminal trial conducted against her. It will do so in a comparative fashion, examining the provisions of international criminal procedure on the position of the defendant in order to discover differences in national systems or other peculiarities. The following sections will give a quick overview of the procedural aspects dealt with and of the various criminal jurisdictions to be compared.

I. Methodology

Chapters 1 to 3 will deal with provisions concerning three main sub-questions: chapter 1 will ask *whether* there can be proceedings in the presence of the defendant at all, ie whether there will be proceedings against her and if so, whether she will be present. Chapter 2 will deal with the defendant's position *in the trial* itself – this includes her position vis-à-vis her counsel and vis-à-vis the Chamber and prosecution, as well as her ability to make statements in the trial. Chapter 3 will consider the defendant's position in events happening alongside *the trial* – this particularly concerns her ability to gain pre-trial release and/or to participate in other developments in her home state or elsewhere.

Some comments on the limits of this study in terms of content seem called for at this juncture: I will only consider questions having to do directly with the position of the defendant in or relating to the trial. This means that I will not consider *general* fair trial considerations, even though the ability of the defendant to actively participate in the trial will generally be greater if proceedings are fair. Finally, while many defendants will participate in their trial largely through their defence counsel, I will deal with counsel only in as much as the relationship between counsel and defendant is in question.

As to types and stages of proceedings, the following chapters will for obvious reasons deal with domestic provisions only in as far as they are applicable to serious crimes. For the German system, this covers proceedings concerning *Verbrechen*[4] conducted in the first instance before the *Landgerichte* or

[4] See Criminal Code (Strafgesetzbuch, StGB), § 12 (1). An English version of the StGB is available at http://www.iuscomp.org/gla/statutes/StGB.htm.

Oberlandesgerichte.[5] For the French system, the focus is on proceedings concerning *crimes,* in which the investigation (*instruction*) is conducted by an investigating magistrate (*juge d'instruction*) and the trial takes place before the Cour d'assises.[6] Finally, for the United States of America, I will only consider trials before federal courts under the Federal Rules of Criminal Procedure. I will not deal with specific provisions for capital cases since many of these seem motivated not by the seriousness of the alleged crimes, but by the fact that such proceedings may lead to the defendant being killed by the state. As none of the international courts dealt with here may sentence defendants to death, such considerations do not apply here.

I will focus on proceedings at first instance, dealing with appeals proceedings only where they include a full review of the facts of the case. The book will not deal with the position of convicted persons serving their sentence, or with those released after having finished serving their sentence, or with those who have been finally acquitted – their status is largely governed not by international criminal procedure, but by the provisions of the state where they are serving their sentence[7] or where they reside.[8] Finally, I will not deal with trials against minors as all international trials have been against adults.[9]

As concerns the interpretation of the law, I will not argue for one 'right' interpretation, but rather aim to show the law as it is or will be applied by the courts in question. Thus, where there is already evolved case law, I will limit myself to summarising that case law, referring to literature only where helpful for a deeper understanding of that case law. Where there is no or limited case law, I will attempt an interpretation of the provision in question and refer to the literature to make an educated guess at 'what the courts will do in fact'.[10] However, where the provision allows for more than one interpretation, I will not attempt to find a single 'correct' interpretation. This is because the interpretation of international criminal procedure may depend on a variety of extrinsic factors, including such

[5] See Law on the Constitution of Courts (Gerichtsverfassungsgesetz, GVG), §§ 74 and 120.

[6] See Criminal Procedure Code (Code de procédure pénale, CPP), Arts 70 *et seq*, 231 *et seq*. An English translation of the CPP is available at http://195.83.177.9/code/liste.phtml?c=34.

[7] Art 27 StICTY; Art 26 StICTR; Art 103 RSt; Art 22 StSCSL; Art 29 StSTL.

[8] Two examples: In Bosnia, persons released after having served their sentence seem to be fully eligible to participate in political life, as evidenced by Simo Zarić's bid for mayor of Bosanski Samac after he had finished serving his sentence for the ethnic cleansing of that very town – see IWPR, 'Bosnia: Convict May Govern Town he Ethnically Cleansed', Tribunal Update No 375, 1 October 2004; Briefly Noted, Tribunal Update No 376, 8 October 2004. Some defendants acquitted by the ICTR, on the other hand, for a while were not even able to find a country willing to allow them on its territory – see Heller (2008), 663.

[9] Art 7 StSCSL would allow the court to try defendants 15 to 17 years old at the time of the alleged crime under a specialised procedure, but this provision has never been put to use – see SCSL, Press Release of 2 November 2002, 'Special Court Prosecutor Says He Will Not Prosecute Children'. The Rome Statute specifically states, in Art 26, that the Court may not prosecute those who were minors at the time of the alleged crime. The legal regimes at the other courts under scrutiny here do not explicitly address this question, but none of them have ever initiated proceedings against minors.

[10] See the famous statement by Oliver Wendell Holmes that '[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'. Holmes (1897), 461.

factors as the national background of the judges interpreting it,[11] which makes a prediction of the outcome of such interpretations seem imprudent.

II. The Objects of Comparison

Since large parts of this book will consist of a comparative approach to international criminal procedure, a short introduction of the objects of the comparison seems called for. Three national criminal procedures – those of Germany, France, and the United States of America – will set the standard against which international procedure will be considered. These systems are representative of the three main traditions of criminal procedure – civil law in both its Germanic and Romanic strands and common law – which form the basis for the development of international criminal procedure.

Five international criminal tribunals will be considered against the standards set by these procedures, namely the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL).

Finally, both national and international criminal procedure is influenced by and measured against requirements contained in human rights law. Therefore several systems of human rights protection will also feature in this book.

1. National Criminal Procedures

I will consider three national systems in order to lay down a general standard against which international criminal procedure will be measured. These three systems are representative of the three main traditions in criminal procedure, namely the common law and the civil law in its Germanic and Romanic branches. They are thus sufficient to establish a general standard against which international criminal law can be compared, despite the still-existing influence of other traditions worldwide, the rise of more and more 'mixed' systems, and methodological warnings against too strictly following a 'genealogical' approach to comparative criminal procedure.

As to other traditions worldwide, while these certainly exist, they are not considered here for two reasons. First, even though a number of legal systems worldwide are influenced by other traditions, the vast majority is still based, wholly or

[11] This begins with questions of procedural protocol, such as whether the defendant is brought into the courtroom before or after the judges. But it also covers more substantive questions: Safferling (2002), 245 argues that the difference in ICTY Trial Chambers' early decisions on provisional release may have been partly due to the national backgrounds of Presiding Judges Schomburg (Germany) and May (United Kingdom). Similarly, the decision in *Stakić* to allow defendant statements throughout the trial, which goes far beyond the wording of r 84 *bis* (see below [143]), was likely due to Judge Schomburg being used to this state of affairs from the German system.

in large part, on the civil and/or common law systems.[12] Second, international criminal law, particularly international criminal procedure, has been designed against the background of the civil law/common law distinction; other traditions have hardly played any role at all.[13]

As to the limits of a 'genealogical' approach, it is certainly true that many of the differences commonly cited to distinguish these systems – eg adversarial, largely oral proceedings (common law) versus inquisitorial, largely written proceedings (civil law) – are only true on an abstract level and as descriptions of archetypal cases.[14] In reality, one will find many mixed systems[15] which result from national laws importing aspects of the respective 'other' tradition[16] and adapting them to their own systems, often resulting in significant changes to these imported features.[17] Finally, what is true for the 'archetypal' criminal case need not be true for the vast majority of cases.[18]

True, such limitations of 'pure' presentations of criminal law traditions may serve as a warning against putting too much emphasis on the extent to which an international tribunal follows one or the other legal tradition – if one can say that most national criminal justice systems are best described as 'mixed systems', this is even more true of international criminal procedure,[19] particularly given that it is a still rather young system that continues to evolve over time.[20] However, this does not invalidate all attempts at comparison. First, drawing broadly on three national jurisdictions, which are emblematic of their respective traditions and

[12] In an examination of 191 legal systems worldwide, Reichel (reprinted in Fairchild and Dammer (2001), 357–59) found that 149 systems could be described as civil or common law or some combination thereof; 29 countries in Africa and Asia fell under the heading 'Islamic and Combinations'; Cuba and four Asian countries were described as 'socialist'; eight countries in Africa, Asia and Oceania as 'other'.

[13] See, eg Roberts (2007), 351–54; *Badar* (2011), 411, as well as the literature on international criminal procedure as a mixed or *sui generis* system, below n 19.

[14] See on limitations of this approach, and for other ways of classifying criminal procedures, Damaška (1986); Örücü, 'A General View' (2007), 170–71; Vogler (2005), ch 1 with further references and *passim*.

[15] See, eg, Örücü, 'A General View' (2007), 169–70. European criminal procedures are also harmonised under the influence of the ECHR – see Esser (2002), 817–73, Spencer (2002), 46–50.

[16] See, eg, Spencer (2002), 21–22 on German law borrowing from the common law the concept of largely oral and public criminal procedures.

[17] Thus the German system for consensual resolution of criminal cases – where negotiations occur under the guidance of the the court and the court is obliged to hear evidence beyond the defendant's confession if necessary to uncover the truth – would be totally alien to a practitioner from the US, where plea bargaining is conducted between the parties and the defendant is simply convicted based on her plea. See [below 95–96, 104–107].

[18] eg while the archetypal trial in common law systems focuses on the oral presentation of evidence before the court during trial, in the 90% or so of cases which are resolved by plea agreements, the case is decided prior to trial, no evidence is presented in court at all and the defendant's "day in court" is reduced to entering a plea of guilty – see Spencer (2002), 21–22.

[19] See, among many others, Ambos (2003); Kreß (2003); Kamardi (2008), 383–91, 393–98; Boas (2007), 286–88 with further references; Damaška (2009); from the perspective of international judges, see, eg Kwon (2007), 361–62; *Prosecutor v Erdemović* (Judgment, Separate and Dissenting Opinion of Judge Cassese) IT-96-22, Appeals Chamber (7 October 1997), particularly paras 3–4.

[20] See, eg, Mundis (2001); Meron (2004); Kamardi (2008), 383–91; Miraglia (2006). On divergences between the various international courts, see Sluiter (2010).

which have influenced plenty of other national systems – be it via colonisation or via legal export – and/or international criminal procedure directly, should provide a sufficiently representative picture of a *general standard* set by national criminal procedures. This is particularly true given that this work will mostly engage in micro-comparisons[21] concerning specific procedural details. Further, such comparison might determine whether the fact that international criminal procedure follows sometimes one, sometimes the other tradition has a negative impact on the role of the defendant by stringing together the more restrictive aspects of various traditions.[22]

The Romanic branch of the civil law will be represented by the French system,[23] which is one of the oldest inquisitorial systems and may be considered the *fons et origo* not only of the Romanic tradition, but of inquisitorial criminal procedure generally.[24] Similarly, the German system[25] can probably be considered emblematic of the Germanic branch of the civil law tradition and has influenced a number of other legal systems through legal export.[26]

By contrast, the United States system has been chosen not so much as an example of a 'typical' common law system – this honour would probably fall to the system of England and Wales. Rather, this choice is based on the direct influence of the United States in the establishment of modern international criminal justice, which has resulted in certain parts of international criminal procedure being modeled rather directly on US federal procedure.[27]

2. *International Criminal Procedures*

As to international criminal procedure, I will consider five courts representing modern international criminal justice, which started with the International Criminal Tribunal for the Former Yugoslavia (ICTY)in 1993.[28] It is axiomatic that

[21] On this term see Örücü, 'Developing Comparative Law' (2007), 56–62.

[22] Authors warn of the dangers arising from 'rough edges in the alignment of legal systems' (Robinson (2005)) or of due process deficits as a 'progeny' of the 'marriage of Common and Continental Law at the ICTY' (Fairlie (2004)). See also Sluiter (2009), 234. On some of the problems hindering a successful combination of civil and common law in international criminal courts, see Bohlander (2011), particularly 406 *et seq.*

[23] For an English language introduction of the French system of criminal procedure, see, eg, Dervieux et al (2002). An overview of developments in a typical murder case is provided by McKillop (1997).

[24] See Pakes (2004), 17.

[25] For an English language introduction of the German system and an overview of the development of a typical case, see Feeney and Herrmann (2005), 201 *et seq.*

[26] See Fletcher (2009), 105.

[27] One example of direct influence of national law on international criminal procedure is the disclosure regime at the *ad hoc* Tribunals and the ICC, which is based almost directly on the US Federal Rules of Criminal Procedure. Generally on the considerable influence of a US proposal based on federal criminal procedure laws on the RPE at the ICTY, see Cassese (2004), 594.

[28] It should be noted that modern international criminal law follows not only the International Military Tribunals established after World War II (on which, eg, Ahlbrecht (1999), ch 5), but that precursors arguably date back centuries if not millennia (see Green (2002), 82–88; Cryer (2005), 9–35).

three courts have to be dealt with. This is true, first of all, for the ICTY, which was the first tribunal to be set up since the post-World War II Tribunals, and for its sister institution, the International Criminal Tribunal for Rwanda.[29] Second, no consideration of modern international criminal justice could leave out the International Criminal Court,[30] which is the only court whose mandate is not limited to specific conflicts and therefore the institution that most represents the future of the field.

Among the many 'internationalised' or hybrid tribunals which have proliferated in recent years,[31] I will not consider those judicial bodies which contain an international component in terms of personnel and applicable law, but still form part of the national judiciary.[32] Instead, I will focus on two courts which – more or less – belong to the group of international tribunals established under an agreement between the United Nations and the national government, namely the Special Court for Sierra Leone instituted after the Sierra Leonean civil war [33] and the Special Tribunal for Lebanon set up to investigate the 2005 bombing attack which killed former Prime Minister Rafik Hariri.[34] The Special Court is considered here, first, because it represents the first internationalizsed court of its type, and second, because it shares the responsibility of dealing with conflicts in Sierra Leone with the Truth and Reconciliation Commission for Sierra Leone,[35] which thus also considered the acts that SCSL defendants were accused of. The Special Tribunal represents a new step in international criminal justice in that it deals with attacks falling under the heading of terrorism and thus 'political' crimes rather than the usual trias of genocide, crimes against humanity and war crimes.

[29] The literature on the establishment of the ICTY and ICTR is vast. For a brief overview, see, eg, Ahlbrecht (1999), 232–43, 302–07; Zahar and Sluiter (2008), 6–11; Schabas (2006), Pt I; Kamardi (2008), ch 1.

[30] For general introductions to the ICC, see, eg, Schabas (2011), particularly chs 1–2; Kaul (2005), as well as the several introductory texts in Triffterer (2008), xxv–47.

[31] See generally Zahar and Sluiter (2008), 11–14.

[32] Many of these institutions have been set up by UN territorial administration missions. They include the War Crimes Chamber in the State Court of Bosnia and Herzegovina, the Serious Crimes Panels in the District Court of Dili, East Timor, the 'Regulation 64 Panels' in the courts of Kosovo, and the Extraordinary Chambers in the Courts of Cambodia. On these courts, see contributions in Romano et al (2004) (Cambodia, East Timor and Kosovo); Dickinson (2003) (Kosovo); Cohen (2007) (Cambodia and East Timor); Human Rights Watch, 'Looking for Justice – The War Crimes Chamber in Bosnia and Herzegovina', 7 February 2006; Human Rights Watch, 'Narrowing the Impunity Gap – Trials before Bosnia's War Crimes Chamber', 11 February 2007 (Bosnia).

[33] For general introductions to the SCSL, see, eg, Schabas (2006), Pt I; Cryer (2005), 61–65.

[34] See generally Wetzel and Mitri (2008), 81–86, 95–98.

[35] Truth and Reconciliation Act 2000 (hereinafter: TRC Act), s 6; reprinted in 'Witness to Truth': Report of the Sierra Leone Truth and Reconciliation Commission, 5 October 2004 (hereinafter: SL TRC Report) vol I, ch 1, para 6.

3. International Human Rights Law

Finally, international human rights provisions dealing with criminal proceedings provide another instructive base for comparison as they have had, and continue to have, a significant influence on both international and domestic criminal procedure.

Human rights law has influenced the drafting of international criminal procedure. This is, of course, true of the provisions on defendant's rights, based on Article 14 of the International Covenant of Civil and Political Rights (ICCPR).[36] But it is also true of other provisions of international criminal procedure, for example the provisions on trials *in absentia*: During the drafting of the ICTY Statute, such trials were considered, but ruled out as a violation of the right to presence under Article 14 ICCPR.[37] Neither were provisions on trials *in absentia* included in the Rome Statute of the ICC as no consensus on the question could be reached during the drafting process, with most of those opposed again referring to human rights norms.[38] Finally, when drafting the Statute of the STL, which does foresee trials *in absentia*, reference was again made to human rights provisions. In his report on the establishment of the Tribunal, the Secretary-General stated that the provision 'takes account of the relevant case law of the European Court of Human Rights, which determined the regularity of trials *in absentia* in full respect for the rights of the accused'.[39]

International courts' legal regimes have not only been drafted with human rights in mind, but it is also accepted that they must be *interpreted* so as to be compatible with human rights.[40] Consequently, all international courts considered here have, sometimes after initial hesitation, referred to human rights law, including the jurisprudence of human rights treaty bodies, in interpreting their criminal procedure.[41]

[36] On the ICTY, see Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993 (hereinafter: SG Report on ICTY), para 106. In the case of the Rome Statute, most delegations considered Art 67 an enlarged version of the rights contained in Art 14 ICCPR – see Schabas in Triffterer (2008) Art 67, mn 4–6 with references to the drafting history.

[37] SG Report on ICTY, para 101.

[38] See, eg, Schabas in Triffterer (2008), Art 63, mn 3–10.

[39] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, UN Doc S/2006/893, 15 November 2006 (hereinafter: SG Report on STL), para 33.

[40] According to the SG Report on ICTY, para 106, it is 'axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings'. Similarly, Art 21 (3) Rome Statute requires that 'The application and interpretation of [the ICC legal regime] must be consistent with internationally recognized human rights'. On this provision, see Young (2011); Sheppard (2010).

[41] For the ICC, see the articles cited in the footnote above. For the ICTY: Sluiter (2003); Margueritte (2011), 439–43, as well as, from the viewpoint of an ICTY judge, Rodrigues (2009), 210 *et seq.* For an example from the very early jurisprudence of the STL, see STL, President, Order on Conditions of Detention, 21 April 2009, para 13 *et seq.* On the extent to which the interpretation of international criminal procedure is actually in conformity with human rights, see, eg Croquet (2011).

The influence of human rights norms on national proceedings concerns, first of all, the interpretation of applicable law.[42] In Germany, the European Convention of Human Rights (ECHR) and the ICCPR are applicable in national proceedings at the rank of federal statutes[43] and a finding of an ECHR violation by the European Court of Human Rights is grounds for a reopening of criminal proceedings.[44] Arguments stemming from the ECHR are often taken into account already in national proceedings,[45] and many commentaries on criminal procedure contain at least a short section on the ECHR. In France, the ECHR is incorporated into national laws at a rank above that of statutes,[46] a finding of a violation by the European Court of Human Rights may lead to reconsideration of a final judgment,[47] and French courts have referred to ECHR arguments in a number of cases.[48] A number of other countries not dealt with here also apply human rights provisions in national proceedings.[49] Even in countries like the United States, which have not ratified the American Convention on Human Rights (ACHR) and do not consider the ICCPR to be applicable in domestic proceedings,[50] the content of human rights provisions may still find its way into the domestic system, for example by way of Supreme Court decisions relying on such norms in interpreting the US Constitution.[51]

Besides influencing the interpretation of existing provisions, human rights provisions may also lead to legislative reforms of criminal procedure, even concerning aspects perceived as rather central to the criminal procedure as applied in such countries. In France, the 2000 reform of the Code of Criminal Procedure incorporated changes to a number of provisions which the European Court of Human

[42] See Spencer (2002), 46–50. Generally on ECtHR jurisprudence as a 'driving force for the harmonization of national criminal procedures', see Esser (2002), 817–73.

[43] BVerfG, NJW 1987, 2417; BGH, NJW 2001, 309, 311.

[44] § 359 (No 6) StPO.

[45] See BGH, NJW 2001, 309 on the right to translation and interpretation, BGH, NJW 1988, 1288 on the right to trial without undue delay. Generally see Esser (2002), 870–73.

[46] Grabenwarter (2008), § 3, paras 3–4.

[47] See CCP, Arts 626-1 *et seq.*

[48] See, eg *Cass plen*, 2 March 2001, *Bull Crim* No 56. French courts are, however, more reluctant than German courts to directly refer to ECHR arguments – see Hodgson (2002), 785–87.

[49] See, eg, the Human Rights Act 1998 in the United Kingdom (an Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes, 9 November 1998, 1998 (c 42)) and the Austrian Law of 4 March 1964 (Bundesverfassungsgesetz vom 4. März 1964, mit dem Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge abgeändert und ergänzt werden, BGBl. 1964/59, Art II, No 7), which grants constitutional status to the ECHR.

[50] According to para 1 of the declarations made by the USA upon ratification of the ICCPR, 'the provisions of articles 1 through 27 of the Covenant are not self-executing' – see the list of reservations and declarations to the ICCPR at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.2.Rev.4.En. Accordingly, the ICCPR has not significantly impacted criminal procedure – see, eg, *Hain v Gibson*, 287 F. 3d 1224 (10th Cir 2002).

[51] See, eg, *Roper v Simmons*, 543 US 551 (2005), referring, inter alia, to several human rights instruments in finding the execution of minors to be in violation of the Eight Amendment.

Rights had held to violate Article 6 ECHR.[52] In the Netherlands, an ECtHR judgment concerning trials *in absentia*[53] led to a legislative reform trying to incorporate the ECHR requirements into national law while still allowing widespread use of *in absentia* proceedings, with mixed results.[54]

Given this importance of human rights law for both national and international criminal procedure, this book will consider the provisions dealing with criminal trials contained in four of the most prominent international human rights instruments/systems,[55] as interpreted by the relevant treaty bodies.

First and foremost among these is the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 3 September 1953, and its Additional Protocols. The ECHR, while not universally applicable,[56] still features very prominently in international criminal procedure. This is likely due to it being the first ever binding human rights treaty and, most importantly, to the vast and detailed jurisprudence amassed by the Strasbourg treaty bodies.[57]

The only human rights treaty of universal application, with currently 160 parties, is the International Covenant on Civil and Political Rights, which was adopted by Resolution of the UN General Assembly on 16 December 1966 and entered into force in March 1976. It is considered here largely as interpreted by the Human Rights Committee.[58] Also considered under the heading of the ICCPR is the non-binding UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.[59]

I will also consider two further regional systems. The first of these is the Inter-American system, composed of the 1948 American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, which entered

[52] Loi no 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes, JO 16 June 2000, 9038. On this reform, see Hodgson (2002), 782–88.

[53] ECtHR, *Lala v the Netherlands* (1994) Series A no 297-A.

[54] Stamhuis (2001).

[55] A fourth regional human rights instrument, the Arab Charter on Human Rights of 23 May 2004, which entered into force on 15 March 2008 (reprinted in (2006) 24 *Boston University International Law Journal* 147–64), will not be considered. The Charter contains, in Arts 13–16, rights in the context of detention and criminal trial which are largely similar to those in the other conventions considered here. However, while the Arab Human Rights Committee under Art 45 of the Charter has been established, it has not yet pronounced on the interpretation of these rights. Generally on the Arab Charter, see Rishmawi (2010).

[56] It is only open to members of the Council of Europe and currently has 47 states parties – see Chart of Signatures and Ratifications to the ECHR, 19 December 2011, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&CL=ENG.

[57] More than 39,000 individual complaints had been considered and 732 final judgments of the Court delivered in the period between 1955 and 1998. Since then the case-load has increased immensely, with tens of thousands of complaints brought each year and the court having broken the barrier of 1,000 judgments per year in 2005 (ECtHR, Annual Report 2007, at 149).

[58] The Committee, established by Pt IV of the ICCPR, inter alia, has jurisdiction over individual complaints against the 114 states parties to the (First) Optional Protocol to the ICCPR (see List of Signatories at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en). The Committee may also pass general comments on the interpretation of the ICCPR.

[59] GA Res 43/173 of 9 December 1988, Annex (hereinafter: UN Body of Principles).

into force in July 1979. These provisions are considered here as interpreted by the two treaty bodies entrusted with the protection of human rights in the Americas, the Inter-American Commission of Human Rights[60] and the Inter-American Court of Human Rights.[61]

Finally, I will consider the African Charter on Human and Peoples' Rights,[62] as interpreted by the African Commission on Human and Peoples' Rights.[63] Besides the jurisprudence of the Commission, much of which has concerned rather egregious violations, guidance may also be derived from its non-binding resolutions on criminal procedure, such as the 1992 Resolution on the Right to Recourse and to Fair Trial[64] and the 2003 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.[65]

[60] The Commission was established by the Organizsation of American States in 1959 (see Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12 through 18, 1959, Final Act. Document OEA/Ser. C/II.5, at 10–11). It has mandatory jurisdiction over individual complaints under the ADRDM (see Final Act of the Second Special Inter-American Conference. OAS Official Records, OEA/Ser. C/I.13, 1965, at 32–34) as well as optional jurisdiction over individual complaints under the ACHR (Arts. 44, 45 ACHR), which has been accepted by 10 states (see Chart of Signatories and Ratifications available at http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm).

[61] The Court, established under the ACHR, has optional jurisdiction over complaints concerning ACHR violations brought by states or the Commission (Arts 61, 62 ACHR); this jurisdiction has been accepted by 22 states (see Chart of Signatories and Ratifications, above n 60).

[62] This Charter, which was adopted under the auspices of the Organisation of African Unity, entered into force in October 1986 and currently has 53 contracting parties (see the List of Signatures, Ratifications and Accessions available at http://www.achpr.org/english/ratifications/ratification_african charter.pdf).

[63] The Commission has mandatory jurisdiction over both state and individual complaints (Arts 47 *et seq*, 55 *et seq* AfrCHPR). An African Court on Human and Peoples' Rights has also been established (see its website at http://www.african-court.org/en/), but has so far not passed any decisions on substantive rights.

[64] Res 4(XI)92, March 1992.

[65] OAU Doc DOC/OS(XXX)247, May 2003.

Part II: Between Impunity and Show Trials? – Between Law and Historiography

As noted in the introduction, the aspects of international criminal procedure that Part I of this book focuses on all concern the question whether, how and by whom the facts concerning the alleged acts of the defendant are considered and laid down. Given that these trials concern not ordinary crimes but rather conflicts of world significance, it follows that these aspects of procedure also concern whether, how and by whom historical facts concerning these conflicts are established.

There has been a long debate on whether criminal courts should endeavour to participate in such history-writing through criminal trials or whether they should focus solely on establishing the guilt or innocence of the individuals before them, leaving the historiography to someone else. This part of the book aims to add to that debate, albeit from an angle that differs slightly from that of the majority of contributions. It consists of two chapters:

Chapter 5 will give a short overview of the debate concerning (international) criminal trials and historiography. It will also outline the contribution that this book aims to make to that issue, namely an answer to the question to what extent considerations of historiography influence the position of the defendant in the trial. Chapter 6 will then try to answer that question by taking another look at the aspects of criminal procedure highlighted in the first part and by asking whether the peculiarities of international criminal procedure can be traced back to historiographic considerations.