# Table of Contents

Joseph MARKO, University of Graz (Austria)

Preface ......................................................................................................................... 7

List of Common Abbreviations .............................................................................. 19

Thomas KRUESSMANN, University of Graz (Austria)

Introduction ........................................................................................................... 21

**Truth-Finding and Trial Fairness: Two Competing Goals?**

Ksenija TURKOVIĆ, University of Zagreb (Croatia)

The Value of the ICTY as a Historiographical Tool......................................... 29
1. Introduction............................................................................................................. 29
2. Constraints in Providing a Historical Interpretation of the Past.................... 32
3. Performing the Work of Historical Memory the ICTY Puts at Risk the Exercise of Justice................................................................. 40
4. Conclusion............................................................................................................ 42

Stefan KIRSCH, Rechtsanwalt (Germany)

Finding the Truth at International Criminal Tribunals.................................. 47
1. Introduction............................................................................................................. 47
2. The Nature of the Proceedings before the ICC .............................................. 48
3. Trial Practice before the ICTY and the ICTR .................................................. 52
4. Major Differences between the Procedural Regimes.................................... 56
5. Proposal ................................................................................................................ 58
6. Conclusion............................................................................................................ 61

**The Interrelationship of Substantive / Procedural Law and its Relevance for a Fair Trial**

Matjaž AMBROŽ, University of Ljubljana (Slovenia)

A Need for Differentiation between Justification and Excuse in International Criminal Law................................................................. 65
1. Introduction............................................................................................................. 65
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.</td>
<td>The <em>Erdemović</em> Sentencing Judgment</td>
<td>66</td>
</tr>
<tr>
<td>a.</td>
<td>Background</td>
<td>66</td>
</tr>
<tr>
<td>b.</td>
<td>Judge Cassese Dissenting</td>
<td>68</td>
</tr>
<tr>
<td>3.</td>
<td>Two Extreme Positions</td>
<td>71</td>
</tr>
<tr>
<td>4.</td>
<td>The Differentiating Solution</td>
<td>74</td>
</tr>
<tr>
<td>5.</td>
<td>Conclusion</td>
<td>75</td>
</tr>
</tbody>
</table>

Ivona JOSIPOVIĆ, University of Michigan (U.S.A.)

**The ICTY’s Approach to Customary Law: A Case Study of the *Mens Rea* of Imputed Command Responsibility** ................. 77

1. Introduction......................................................................................... 77

2. Background ........................................................................................ 78
   a. Post-World War II Case Law ......................................................... 78
      aa. Yamashita v. Styler......................................................................... 78
   bb. U.S. v. von List et al.............................................................. 79
   cc. U.S. v. von Leeb et al. .......................................................... 80
   dd. Conclusion.................................................................................... 80
   b. Treaty Law .................................................................................... 81
      aa. Additional Protocol to Geneva Convention................................ 81
      bb. Draft Code of Crimes Against the Peace and Security of Mankind.... 83
      cc. Rome Statute ............................................................................ 83
      dd. Conclusion................................................................................ 84

3. The ICTY’s Approach to the *Mens Rea* of Imputed Command Responsibility ..................................................................................... 84
   a. The Statute of the ICTY ............................................................... 84
   b. ICTY Case Law and the Application of the *Mens Rea* Requirement .................... 85

4. Analysis of the ICTY’s Interpretation of Customary Law........................ 89
   a. Overview....................................................................................... 89
   b. *Nullum Crimen* in International Criminal Law ................................ 89
   c. No Violation of *Nullum Crimen* ................................................ 90
   d. Critics............................................................................................ 90
   e. The Modern Approach to Custom................................................ 92
   f. Conclusion.................................................................................... 94

Kerstin Bree CARLSON, University of California, Berkeley (U.S.A.)

**Joint Criminal Enterprise: The ICTY’s Contentious Addition to International Criminal Law** ................................................. 97

1. Introduction......................................................................................... 97

2. Tadić and the Development of Joint Criminal Enterprise........................ 99
   a. The Facts of Tadić ......................................................................... 99
   b. The Law of Tadić ........................................................................ 101
   c. The Tadić Appeals Chamber ...................................................... 103
   d. Problems in Tadić ......................................................................... 105
Table of Contents

3. *Kvočka* and the Evolution of Joint Criminal Enterprise .......... 106  
   a. Background of the Case ......................................................... 106  
   b. Findings of the Trial Court ....................................................... 108  
   c. *Kvočka* Appeals Chamber ...................................................... 110  
   d. Problems with *Kvočka* ......................................................... 111  
4. *Gotovina* and the Future of Joint Criminal Enterprise .......... 114  
5. Conclusion .................................................................................. 115  

Kai AMBOS, University of Göttingen (Germany)  
**Joint Criminal Enterprise and Command Responsibility** ............ 117  

1. Joint Criminal Enterprise and Command Responsibility in  
   Modern Case Law: the Basics ..................................................... 117  
   a. Joint Criminal Enterprise .......................................................... 117  
   b. Command Responsibility ............................................................ 120  
2. The Simultaneous Application of JCE and Command  
   Responsibility ................................................................................ 121  
3. Theoretical Considerations on JCE and Command  
   Responsibility ................................................................................ 125  
   a. JCE ............................................................................................. 125  
      aa. General ............................................................................... 125  
      bb. JCE and the Traditional Law of Participation ...................... 126  
      cc. Classification with Regard to the *Lex Lata* ...................... 129  
      dd. JCE and the Principle of Culpability ................................... 132  
   b. Command Responsibility ............................................................ 136  
4. Final Considerations: JCE, Command Responsibility and  
   Organisationsherrschaft ................................................................. 138  

Fair Trial Standards in Human Rights Law as well as in  
the Civil and Common Law Traditions  

Roza PATI, St. Thomas University School of Law (U.S.A.)  
**Fair Trial Standards under Human Rights Treaty Law and  
the ICTY: A Process of Cross-Fertilization?** .............................. 147  

1. Introduction ....................................................................................... 147  
2. Fair Trial Guarantees in Human Rights Law and Jurisprudence ..... 148  
   a. The Jurisprudence of the Human Rights Committee ............... 148  
      aa. Right to Liberty and Security of Person .............................. 148  
      bb. Right to a Fair Trial ............................................................. 150  
      cc. Right to Judicial Review ..................................................... 154  
      dd. Freedom from Torture ....................................................... 155  
   b. The Jurisprudence of the European Court of Human Rights ..... 156  
      aa. Right to Liberty and Security of Person .............................. 156  
      bb. Right to a Fair Trial ............................................................. 156  
      cc. Right to Judicial Review ..................................................... 159  


Table of Contents

3. Fair Trial Guarantees in the Statute and Rules of the ICTY ............ 160
   a. Overview.................................................................................. 160
   b. Pre-Trial Rights........................................................................ 161
   c. Rights at Trial.......................................................................... 163
   d. Rights to and in Appeal........................................................... 166
   e. Conclusion.............................................................................. 166

4. The Impact of Human Rights Law and its Authoritative Interpretation on the Jurisprudence of the ICTY......................... 167
   a. Introductory Observations.......................................................... 167
   b. Fair Trial................................................................................... 168
      aa. Nullum crimen sine lege ................................................... 168
      bb. Right to Presumption of Innocence as Related to Release Pending Trial ......................................................... 169
   cc. Right to Be Tried Before an Independent and Impartial Tribunal................................................................. 171
   dd. Equality of Arms .................................................................. 172
   ee. Right to a Reasoned Opinion ............................................. 173
   c. Other Procedural Provisions......................................................... 173
      aa. Stare decisis......................................................................... 173
      bb. Contempt of Court.............................................................. 174
   d. Rules of Evidence....................................................................... 175
   e. Sentencing.................................................................................. 175
   f. Right to Appeal.......................................................................... 178

5. The Impact of ICTY Statute, Rules and Case Law on Other International Tribunals and Human Rights Courts and Commissions................................................................. 179

6. Conclusion........................................................................................ 183

Feruza DJAMALOVA / Rakhmadjon SOBIROV (Uzbekistan)
The Right to a Fair Trial: Common Law vs. Civil Law in the ICTY Proceedings............................................. 185

1. Introduction....................................................................................... 185
2. The Concept of Fair Trial.................................................................. 186
3. Hearing by an Independent and Impartial Tribunal: the Role of Judges................................................................. 188
   a. Basic Concepts......................................................................... 188
   b. The Role of Judges in the Common Law Procedural Model..... 189
   c. The Role of Judges in the Civil Law Procedural Model........... 191
   d. The ICTY: The Role of Judges in International Criminal Proceedings................................................................. 192
4. Equality of Arms between the Prosecution and the Defence............ 195
   a. Overview..................................................................................... 195
   b. The Role of the Prosecution and Defence in the Common Law Procedural Model....................................................... 196
   c. The Role of the Prosecution and Defence in the Civil Law Procedural Model........................................................... 197
   d. The ICTY: Equality of Arms ...................................................... 197
Table of Contents

5. Equality before the Law: Victims’ Fair Trial ........................................ 200
   a. Overview ..................................................................................... 200
   b. Victims’ Fair Trial in the Common Law Tradition ....................... 201
   c. Victims’ Fair Trial in the Civil Law Tradition ............................ 202
   d. Victims’ Fair Trial in International Criminal Proceedings: The ICTY’s Experience ............................................................... 203

6. Conclusion ........................................................................................ 205

Albin ESER, Director Emeritus of the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg (Germany), Former Judge at the ICTY in The Hague (The Netherlands)

The “Adversarial” Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? .................. 207

1. Preliminary Remark .......................................................................... 207
2. Common Assumptions – Personal Concerns ................................... 208
3. The Objectives of International Criminal Justice as Criteria for Success or Failure ............................................................... 209
4. The Length of Proceedings: Causes ................................................ 212
5. Causes Conditioned by the Adversarial System ............................... 216
   a. The Proceeding as Party-driven rather than Judge-led ............... 216
   b. The Separation of the “Prosecution Case” and “Defence Case” .... 218
6. Changes Blocked by the Statute and / or the Procedural Structure? .. 220
7. The Need and Chance for Procedural Changes within the Basic Adversarial Model ................................................................. 222
   a. Measures for the Expediency of the Proceeding ......................... 223
   b. Measures for Ascertaining the Truth .......................................... 224
   c. Positive Side-effects upon the Mission of International Criminal Justice – Outlook .......................................................... 226

Protection of Victims as a New Fair Trial Dimension in International Criminal Justice

Besa ARIFI, South East European University (Republic of Macedonia)

Human Rights Aspects of Witness Protection and its Importance for the ICTY ................................................................. 231

1. Introduction ....................................................................................... 231
2. The Balancing of Rights ................................................................... 232
3. The Anonymity Issue ........................................................................ 234
   a. Introduction ............................................................................... 234
   b. The Case Law of the ECtHR ...................................................... 235
   c. The Case Law of the ICTY ......................................................... 238
# Table of Contents

4. The Chinkin-Leigh Debate Reconsidered .................................................. 241
5. Conclusion .................................................................................................. 247

Angela CARSTENSEN, Johann-Wolfgang-Goethe-University (Germany)

**The Defendant’s Right to a Fair Trial – Does Witness Protection Violate the Defendant’s Right to Confront the Witness against Him?** ................................................................. 249

1. Introduction ................................................................................................. 249
2. The Right to a Fair Trial under Article 6 ECHR and Article 14 ICCPR and Witness Protection in Criminal Proceedings ........................................... 251
   a. Overview .................................................................................................. 251
   b. Defining the Right to a Fair Trial .............................................................. 251
   c. The Right to the Assistance of an Interpreter ........................................... 253
   d. The Defendant’s Right to Confront the Witness against Him ................. 254
   e. Granting Anonymity – a Legitimate Measure to Protect Witnesses? ....... 255
3. The Right to a Fair Trial and Witness Protection under the Relevant ICTY Provisions – Curtailing the Defendant’s Rights or Necessary Limitation? ........................................................................ 257
   a. Overview .................................................................................................. 257
   b. The Right to a Fair Trial .............................................................. 258
   c. Translation of Documents into the Language of the Accused ............... 259
   d. Disclosure of Evidence and Witness-related Material ......................... 260
   e. Further Protective Measures ....................................................... 263
   f. Conclusion ................................................................................................. 266
4. The Right to a Fair Trial under the Applicable Law in Bosnia and Herzegovina ................................................................................................. 266
   a. Overview .................................................................................................. 266
   b. The Right to the Free Assistance of an Interpreter ............................... 268
   c. The Defendant’s Right to Confront the Witness against Him and Witness Protection ......................................................................................... 270
      aa. Overview .................................................................................................. 270
      bb. Safeguarding the Defendant’s Right to a Fair Trial – the Constitutional Court’s and the Human Rights Chamber’s Jurisprudence at a Glance ................. 270
      cc. The Defendant’s Right to a Fair Trial and Witness Protection: The Case of A.P. and Ž.C. ................................................................. 273
      dd. Assessment of the Constitutional Court’s and the Human Rights Chamber’s Jurisprudence .................................................. 274
5. The Protection of Victim-Witnesses in the Light of the Defendant’s Right to a Fair Trial in War Crimes Proceedings ............................................... 274
   a. Overview .................................................................................................. 274
   b. Available Protective Measures under the Law on Protection of Witnesses under Threat and Vulnerable Witnesses and the BiH CPC ................................................................................. 275
   c. The Defendant’s Right to Confront the Witness against Him in the Light of Witness Protection .................................................. 278
### Table of Contents

15

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>aa. The Jurisprudence of the WCC</td>
<td>278</td>
</tr>
<tr>
<td>bb. Assessment of the WCC Jurisprudence</td>
<td>281</td>
</tr>
<tr>
<td>6. Conclusion</td>
<td>282</td>
</tr>
</tbody>
</table>

Romana SCHWEIGER, Associate Legal Officer ICTY, OTP
(The Hague, The Netherlands)

**Protecting Witnesses in International Criminal Trials: The Experience of the ICTY** ................................................. 283

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>283</td>
</tr>
<tr>
<td>2. The Particularities of Witnesses Protection at the Tribunal</td>
<td>283</td>
</tr>
<tr>
<td>3. The Tribunal’s Legal Framework for Witness Protection</td>
<td>284</td>
</tr>
<tr>
<td>4. The Role of the Victims and Witnesses Section and Non-judicial Protective Measures</td>
<td>287</td>
</tr>
<tr>
<td>5. The Enforcement of Witness Protection</td>
<td>289</td>
</tr>
<tr>
<td>7. Concluding Remarks</td>
<td>292</td>
</tr>
</tbody>
</table>

Gabriel AMANN (University of Graz, Austria)

**Reparation for Victims in International Criminal Justice** ........ 295

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>295</td>
</tr>
<tr>
<td>2. Retributive vs. Restorative Justice</td>
<td>296</td>
</tr>
<tr>
<td>3. Reparation as a Key Concept of Victim Protection</td>
<td>297</td>
</tr>
<tr>
<td>a. General Rule for Reparations in International Law</td>
<td>297</td>
</tr>
<tr>
<td>b. The Victim’s Right to Reparation</td>
<td>297</td>
</tr>
<tr>
<td>c. Enforcement of the Right to Reparation</td>
<td>300</td>
</tr>
<tr>
<td>4. Reparations in International Criminal Justice</td>
<td>301</td>
</tr>
<tr>
<td>a. The Tribunals of Nuremberg and Tokyo</td>
<td>301</td>
</tr>
<tr>
<td>b. The ad hoc Tribunals for the Former Yugoslavia and Rwanda</td>
<td>301</td>
</tr>
<tr>
<td>c. The Reparations Regime of the International Criminal Court</td>
<td>304</td>
</tr>
<tr>
<td>aa. Overview</td>
<td>304</td>
</tr>
<tr>
<td>bb. The Legal Definition of the Victim</td>
<td>304</td>
</tr>
<tr>
<td>cc. The Right to Reparation before the ICC</td>
<td>305</td>
</tr>
<tr>
<td>dd. The Trust Fund for Victims</td>
<td>306</td>
</tr>
<tr>
<td>5. Conclusions</td>
<td>307</td>
</tr>
</tbody>
</table>
Selected Fair Trial Issues in the Law of International Criminal Procedure

Ignaz STEGMILLER, University of Göttingen (Germany)

The Pre-Investigation Stage of the ICTY and ICC Compared ..... 311

The Decision to Initiate an Investigation (Art. 18 (1) ICTY Statute and Art. 53 (1) ICC Statute Respectively)

1. Introduction ....................................................................................... 311
2. Procedural Law Sources of the ICTY/ICC ........................................ 312
   a. Overview ..................................................................................... 312
   b. ICTY Statute ............................................................................... 312
   c. Rules of Procedure and Evidence............................................... 312
   d. Other Specific Provisions ............................................................ 313
   e. ICC Statute ................................................................................. 313
   f. ICC Rules of Procedure and Evidence ....................................... 314
   g. Other Specific Provisions of the ICC ........................................... 315
3. An Overview of the Proceedings at the ICTY/ICC ............................ 316
   a. ICTY Proceedings ....................................................................... 316
   b. ICC Proceedings ......................................................................... 317
4. The Pre-Investigation Phase ............................................................ 319
   a. The Trigger Mechanism, especially proprio motu
      Proceedings according to Art. 15 ICC Statute ............................ 319
   b. Communications under Art. 15 ICC Statute ............................... 323
5. Decision to Initiate an Investigation (Art. 18 (1) ICTY Statute and
   Art. 15 (3), 53 (1) ICC Statute respectively) ...................................... 328
   a. Art. 18 (1) ICTY-Statute: Prosecutorial Discretion (or
      "Opportunity Principle") ............................................................... 328
   b. Art. 53 (1) ICC Statute: Generally Obligatory Prosecution
      ("Legality Principle").................................................................... 330
      aa. The First and Second Parameters...................................... 331
      bb. Third Parameter .................................................................. 332
      cc. Fourth Parameter ............................................................... 336
   c. Conclusion .................................................................................. 338

Stephen C. THAMAN, Saint Louis University (U.S.A.)

The Role of Plea and Confession Bargaining in International Criminal Courts ................................................................. 341

1. Plea Bargaining in Historical Perspective ........................................ 341
2. Current Trends in National Law ........................................................ 343
4. Conclusion ........................................................................................ 350
Table of Contents

Károly BÁRD, Central European University (Hungary)

The Defendant’s Right to Be Present – Can the Right Be Waived? 351

1. Introduction 351

2. Is the Waiver of the Right to be Present at Trial Permissible at all? 352

3. Is Compelling the Accused to be Present Permissible? 357

4. Are there Limits to Compulsion? 360

5. Conclusion 364

Sabine SWOBODA, University of Passau (Germany)

Admitting Relevant and Reliable Evidence 365

The ICTY’s Flexible Approach Towards the Admission of Evidence under Rule 89(C) ICTY RPE 365

1. Introduction 365

2. The U.N. ad hoc Tribunals’ Rules on Admissibility 366
   a. The Basic Human Rights Framework for Admissibility of Evidence 366
   b. The Rules of Procedure and Evidence 367
   c. The Trial Chamber Guidelines on Admissibility of Evidence 367

3. The Concept of Admissibility, Reliability and Relevance 370
   a. The Concept of Relevance 370
   b. The Concept of Probative Value 371
   c. Reliability as an Inherent Component of Admissibility 371
   d. When to Determine Reliability, Relevance and Probative Value? 372

4. The ICTY Case Law on Illegally Obtained Evidence 373
   a. Possible Approaches towards Illegally Obtained Evidence 374
      aa. Guarding the Court Against Distortions of the Truth-Finding Process 374
      bb. Disciplinary Measures and Deterrence Rationale 374
      cc. Exclusionary Concepts to Safeguard Judicial Integrity 375
         (1) Protective Objective Doctrine 376
         (2) Permitting the Accused to Control his Personal Information 377
         (3) The General Preference for Balancing Tests 377
   b. Evidence Illegally Obtained under the Case Law of the ICTY 378
      aa. Evidence Obtained in Violation of Human Rights Standards During Interrogations of a Suspect or Accused 379
         (1) Consequences of Denying an Interviewee the Status of a Suspect 379
         (2) Statements Obtained in Violation of the Right to Counsel 382
         (3) Inadequate Representation of Counsel 384

17
Table of Contents

(4) Violation of the Right to be Informed of the Charges ................................................................. 385
(5) Information Obtained via Unlawful Modes of Investigation ....................................................... 386
(6) Conclusion ................................................................................................................................. 388
   bb. Evidence Obtained in Violation of the Individual Right to Privacy and Secrecy of Communications ................................................................. 388
(1) Illegal Telephone Intercepts ........................................................................................................ 389
(2) Evidence Obtained in Illegal Search and Seizure Operations ....................................................... 391
5. Conclusion ................................................................................................................................. 392

Bibliography .................................................................................................................................. 395
List of Contributors .......................................................................................................................... 415