

## 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 of Contents

---

2. The <i>Erdemović</i> Sentencing Judgment.....	66
a. Background.....	66
b. Judge Cassese Dissenting .....	68
3. Two Extreme Positions.....	71
4. The Differentiating Solution .....	74
5. Conclusion.....	75

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 <i>Mens Rea</i> of Imputed Command Responsibility .....	84
a. The Statute of the ICTY .....	84
b. ICTY Case Law and the Application of the <i>Mens Rea</i> Requirement .....	85
4. Analysis of the ICTY's Interpretation of Customary Law.....	89
a. Overview.....	89
b. <i>Nullum Crimen</i> in International Criminal Law .....	89
c. No Violation of <i>Nullum Crimen</i> .....	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. <i>Tadić</i> and the Development of Joint Criminal Enterprise.....	99
a. The Facts of <i>Tadić</i> .....	99
b. The Law of <i>Tadić</i> .....	101
c. The <i>Tadić</i> Appeals Chamber .....	103
d. Problems in <i>Tadić</i> .....	105

3. <i>Kvočka</i> and the Evolution of Joint Criminal Enterprise .....	106
a. Background of the Case .....	106
b. Findings of the Trial Court .....	108
c. <i>Kvočka</i> Appeals Chamber .....	110
d. Problems with <i>Kvočka</i> .....	111
4. <i>Gotovina</i> 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 <i>Lex Lata</i> .....	129
dd. JCE and the Principle of Culpability .....	132
b. Command Responsibility .....	136
4. Final Considerations: JCE, Command Responsibility and <i>Organisationsherrschaft</i> .....	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. <i>Stare decisis</i> .....	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)

<b>The Right to a Fair Trial: Common Law vs. Civil Law in the ICTY Proceedings .....</b>	<b>185</b>
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

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 <i>Chinkin-Leigh</i> 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 <i>A.P.</i> and <i>Ž.C.</i> .....	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

aa. The Jurisprudence of the WCC .....	278
bb. Assessment of the WCC Jurisprudence .....	281
6. Conclusion.....	282

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

<b>Protecting Witnesses in International Criminal Trials: The Experience of the ICTY .....</b>	<b>283</b>
1. Introduction.....	283
2. The Particularities of Witnesses Protection at the Tribunal .....	283
3. The Tribunal's Legal Framework for Witness Protection .....	284
4. The Role of the Victims and Witnesses Section and Non-judicial Protective Measures.....	287
5. The Enforcement of Witness Protection .....	289
6. Witness Protection in the Light of Co-operation with National Courts.....	291
7. Concluding Remarks .....	292

Gabriel AMANN (University of Graz, Austria)

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

## **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 <i>proprio motu</i> 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
3. Current Position in International Criminal Procedure Law .....	345
4. Conclusion.....	350



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

Table of Contents

---

(4) <i>Violation of the Right to be Informed of the Charges</i> .....	385
(5) <i>Information Obtained via Unlawful Modes of Investigation</i> .....	386
(6) <i>Conclusion</i> .....	388
bb. Evidence Obtained in Violation of the Individual Right to Privacy and Secrecy of Communications .....	388
(1) <i>Illegal Telephone Intercepts</i> .....	389
(2) <i>Evidence Obtained in Illegal Search and Seizure Operations</i> .....	391
5. Conclusion.....	392
Bibliography .....	395
List of Contributors .....	415