SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS

ROELOF HAVEMAN, OLGA KAVRAN, JULIAN NICOLLS (EDS.)

Publication of the Grotius Centre for International Legal Studies, Leiden University/Campus The Hague

Intersentia
Antwerp – Oxford – New York
# TABLE OF CONTENTS

## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>vIntersentia</td>
<td>xiii</td>
</tr>
</tbody>
</table>

## I. INTRODUCTION: A SYSTEM *SUI GENERIS*

**ROELOF HAVEMAN**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>2. Supranational Criminal Law: A System <em>Sui Generis</em></td>
<td>3</td>
</tr>
<tr>
<td>3. Topics</td>
<td>6</td>
</tr>
</tbody>
</table>

## II. THE CONTEXT OF THE LAW

**ROELOF HAVEMAN**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>9</td>
</tr>
<tr>
<td>2. The Tribunals</td>
<td>10</td>
</tr>
<tr>
<td>2.1 Nuremberg, Tokyo</td>
<td>10</td>
</tr>
<tr>
<td>2.2 (Former) Yugoslavia, Rwanda</td>
<td>14</td>
</tr>
<tr>
<td>2.3 International Criminal Court</td>
<td>17</td>
</tr>
<tr>
<td>2.4 Conclusion</td>
<td>19</td>
</tr>
<tr>
<td>3. Interpretation of the Law</td>
<td>20</td>
</tr>
<tr>
<td>4. The Facts</td>
<td>22</td>
</tr>
<tr>
<td>5. National Law V. Supranational Law</td>
<td>25</td>
</tr>
<tr>
<td>6. Criminal Law V. International Humanitarian Law</td>
<td>31</td>
</tr>
<tr>
<td>7. Common Law V. Civil Law</td>
<td>33</td>
</tr>
<tr>
<td>8. Summary and Conclusion</td>
<td>37</td>
</tr>
</tbody>
</table>

## III. THE PRINCIPLE OF LEGALITY

**ROELOF HAVEMAN**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>39</td>
</tr>
<tr>
<td>2. The Principle of Legality in Civil and Common Law</td>
<td>40</td>
</tr>
<tr>
<td>2.1 Lex Scripta et Certa</td>
<td>41</td>
</tr>
<tr>
<td>2.2 Non-retroactivity</td>
<td>44</td>
</tr>
<tr>
<td>2.3 Analogy</td>
<td>45</td>
</tr>
<tr>
<td>2.4 Common features</td>
<td>49</td>
</tr>
<tr>
<td>3. Background of the Principle of Legality</td>
<td>50</td>
</tr>
<tr>
<td>4. International Humanitarian Law</td>
<td>53</td>
</tr>
</tbody>
</table>
Table of Contents

5. Defining Crimes: *Nullum Crimen Sine Lege* .......................... 57
   5.1 The ad hoc Tribunals .................................. 57
   5.2 The ICC ........................................... 60

6. Punishments: *Nulla Poena Sine Lege* ............................. 63
   6.1 The Rules on Punishment ................................ 64
   6.2 Nulla Poena ....................................... 66
   6.3 (Former) Yugoslavia .................................. 68
   6.4 Nulla Poena: Conclusion ............................... 72

7. The Trias Politica: Rules of Procedure and Evidence ............ 73

8. Summary and Conclusion ............................................ 75

IV. LEGAL PROCEDURES AT THE INTERNATIONAL CRIMINAL COURT
   PAUL DE HERT ........................................... 79

1. Introduction .................................................. 79
2. A Retrospective Look At Constitutional Development in the West Regarding Criminal Procedures .................. 81
   2.1 Criminal Procedures and American Constitutional Law 81
   2.2 Criminal Procedures and European Constitutional Law 85
   2.3 A Binding Element is Partially Lacking for an International Criminal Procedure 89
   2.4 An Additional Problem: the Refusal to Globalise 90
   2.5 The Problem of Language and Judicial Culture 91

3. First Meeting Between Legal Traditions: the Investigation Phase .............................................. 96
   3.1 Who does the Investigation? ........................... 96
   3.2 Pre-Trial Chamber ................................... 98
   3.3 Rights during the Investigation ........................ 100
   3.4 Review of the Chosen Procedure ....................... 101

4. Second Meeting: the Trial Phase .................................. 104
   4.1 A short Summary of the Court’s Trial Procedure ...... 104
   4.2 The Right of Access to a Jury .......................... 106
   4.3 The Ban on Default Procedures ........................ 108
   4.4 The Expediency of the Guilty Plea ..................... 109
   4.5 The Law of Evidence in America ....................... 112
   4.6 European Evidential Law .............................. 113
   4.7 The Exclusionary Rule in the European Tradition ... 115
   4.8 The Law of Evidence in the Statute .................... 117
   4.9 Review of Choices made Concerning the Trial Phase ... 119
5. Third Meeting: the Appeal Phase ........................1 2 0
  5.1 Procedure .......................................1 2 0
  5.2 Background .....................................1 2 1
  5.3 Evaluation ......................................1 2 4
6. Judging the Choices Made .............................1 2 5

V. THE SUI GENERIS RULES OF PROCEDURE AND EVIDENCE
   OLGA KAVRAN .....................................1 2 9
   1. Introduction .........................................1 2 9
   2. General Outline of the Rules ...........................1 3 0
      2.1 An Overview of the Current Procedure ...............1 3 0
      2.2 Main Features of the Current Procedure ..............1 3 3
         2.2.1 Professional Judges and Rules of Evidence ......1 3 3
         2.2.2 Prosecutorial Discretion, Guilty Plea, Immunity
            and Plea Agreement ............................1 3 5
         2.2.3 Victims and Witnesses ..........................1 3 5
         2.2.4 Written and Reasoned Judgements and Appellate
            Review .......................................1 3 7
         2.2.5 Rule 61 Hearing ..............................1 3 8
         2.2.6 Other features .............................1 3 9
   3. Major Changes to the Criminal Procedure System ..........1 4 0
      3.1 Introduction ....................................1 4 0
      3.2 Guilty Plea and Plea Agreement .....................1 4 2
      3.3 Pre-Trial Proceedings .............................1 4 5
      3.4 Witness Interrogation and Presentation of Evidence ....1 5 0
      3.5 Other Rules Increasing the Power of the Judges ........1 5 1
      3.6 Other Amendments Inspired by the Inquisitorial
         Model of Criminal Procedure .......................1 5 3
   4. Rational Development Or Crisis Management: Is It a
      System Sui Generis? ................................1 5 5
      4.1 Guilty Plea and Plea Agreement .....................1 5 5
      4.2 Pre-trial Procedure ...............................1 5 7
      4.3 Evidence ........................................1 5 8
      4.4 Other amendments inspired by the Inquisitorial
         Model and Increasing the Judges’ Powers ..........1 6 0
   5. Threats .............................................1 6 0
      5.1 Provisional detention .............................1 6 0
      5.2 Illegal arrest ....................................1 6 1
6. Conclusion; Some Observations ..........................1 6 2
VI. DEFENCE AND FAIR TRIAL

CAROLINE BUISMAN ........................................ 167

1. Introduction ........................................ 167
2. The International Standard of Fairness .......... 169
3. The Overall Right to A Fair Trial ................. 172
   3.1 Scope of the right to a fair trial: Ad hoc Tribunals .... 172
   3.1.1 Subject to Art. 22 of the Statute ............... 173
   3.1.2 Omissions .................................... 174
   3.1.3 Lack of protection for the suspect ........... 175
   3.2 Implementation of the principles of a fair trial: Ad hoc Tribunals ....................................... 179
   3.3 Overall right to a fair trial: ICC legislation .......... 183
4. Right to Be Tried by An Independent and Impartial Tribunal Established by Law ........................ 186
   4.1 Are the ad hoc Tribunals established by law? ...... 186
       4.1.1 Pre-establishment .......................... 187
       4.1.2 Non-observance of certain legal codes .......... 190
       4.1.3 Comments of the Author .................... 191
   4.2 Are the ad hoc Tribunals independent? .......... 195
       4.2.1 Structure of the ad hoc Tribunals .......... 195
           (i) The Judges ................................ 196
           (ii) The Prosecutors .......................... 197
       4.2.2 Operation of the ad hoc Tribunals ............ 198
           (i) Pressure from local governments .......... 199
           (ii) Pressure from international institutions ... 202
           (iii) Pressure from the UN organs ............ 203
           (iv) Pressure from the watching international community ........................................ 204
   4.3 Are the judges of the ad hoc Tribunals impartial? ...... 205
4.4 Right to be tried by an independent and impartial tribunal established by law: ICC legislation .......... 209
5. Presumption of Innocence ............................. 211
   5.1 The concept of presumption of innocence as developed by the human rights courts .......... 211
   5.2 Practice of the ad hoc Tribunals .................... 213
   5.3 Presumption of Innocence: ICC legislation ....... 216
6. Equality of Arms ..................................... 217
   6.1 The scope of equality of arms .................... 218
   6.2 Position of the ad hoc Tribunals .................. 219
       6.2.1 Interpretation of equality of arms by the judges .... 219
       6.2.2 Right to assistance of competent counsel ..... 221
7. Concluding Remarks .................................. 232

VII. EVIDENCE: HEARSAY AND ANONYMOUS WITNESSES
    JULIAN NICHOLLS ................................... 239

1. Introduction ......................................... 239
2. The Problem with Hearsay ............................. 240
   2.1 Intrinsic Considerations: Reliability ................ 241
   2.2 Extrinsic Considerations: Policy ..................... 244
3. The Adversarial System ................................ 247
   3.1 Characteristics ................................... 247
   3.2 Strengths ....................................... 248
   3.3 Weaknesses ...................................... 249
   3.4 The Hearsay Rule, Cross-examination and the Right
to Confrontation ......................................... 252
      3.4.1 The Function of Cross-examination ............ 252
      3.4.2 The Intersection of the Hearsay Rule and the
      Right to Confrontation .............................. 253
      3.4.3 The Intersection of the Right to Confrontation
      and Witness Anonymity ............................... 254
4. The Inquisitorial System ............................... 255
   4.1 Characteristics ................................... 255
   4.2 Strengths ....................................... 258
   4.3 Weaknesses ...................................... 260
   4.4 The Hearsay Rule, Cross-examination and the Right
   to Confrontation ......................................... 263
      4.4.1 The Function of Cross-examination ............ 263
      4.4.2 The Intersection of the Hearsay Rule and the
      Right to Confrontation .............................. 263
      4.4.3 The Intersection of the Right to Confrontation
      and Witness Anonymity ............................... 264
5. Hearsay, Witness Anonymity and Confrontation: An
   International Due Process Standard? ..................... 264
   5.1 The Right to Confrontation: the Rights required by
   the ECHR ........................................... 264
      5.1.1 Case Law: Kostovski and beyond ............... 266
Table of Contents

5.2 Limitations on the ECHR Right to Confrontation ...... 269
5.3 Conclusions: the ECHR Right to Confrontation ...... 271
6.1 Historical Context ..................................... 272
6.2 Hearsay, the Right to Confrontation, Cross-
    examination and Witness Protection ...................... 274
    6.2.1 Statutory Provisions ................................ 274
    6.2.2 The ICTY Case Law: Tadić .......................... 278
6.3 Hearsay and Affidavit Evidence ........................... 289
    6.3.1 Statutory Provisions ................................ 289
    6.3.2 Case Law: Tadić and beyond – a Rejection of
        the Hearsay Rule ....................................... 290
    6.3.3 Case Law: Kordić – Introduction of the Dossier
        into the ICTY system ................................... 296
    6.3.4 Assessment ........................................... 297
7. The Future Permanent International Criminal Court ........ 298
    7.1 A Prohibition of Anonymous Witnesses at Trial .......... 298
7.2 Hearsay ................................................... 299
8. Conclusion .................................................. 300

VIII. AMNESTY AND THE IMPLEMENTATION OF THE ICC
    KARLIJN VAN DER VOORT & MARTEN ZWANENBURG ........ 305
1. Introduction ................................................. 305
2. The Duty to Prosecute Under International Law ........... 307
    2.1 Introduction .......................................... 307
    2.2 An Explicit Duty to Prosecute in Treaties ............. 308
    2.3 A General Duty to Prosecute in Human Rights Treaties 311
    2.4 Customary International Law and the Duty to Prosecute 313
    2.5 Conclusion ............................................. 314
3. Amnesties Versus Prosecutions – A Moral Perspective ....... 315
    3.1 Introduction .......................................... 315
    3.2 Can Amnesty be Desirable? ............................ 315
    3.3 Does Justice Always Call for Prosecutions? ............ 318
    3.4 Border between Prosecutions and Amnesties ............ 320
4. The Rome Statute ............................................. 322
5. Amnesties in the Context of Ratification of the Rome Statute 325
    5.1 The Relationship between the Statute and National
        Constitutions ............................................. 325
    5.2 Review of the Statute for Compatibility with the
        Constitution ............................................. 326
6.  Country Studies ........................................ 328
   6.1 Colombia ........................................ 328
   6.2 Costa Rica ....................................... 331
   6.3 Ecuador ......................................... 332
   6.4 Uruguay .......................................... 333
   6.5 The Netherlands .................................. 336
   6.6 France .......................................... 338
   6.7 South Africa ..................................... 339
   6.8 Analysis of the Country Studies ................. 340
7.  Conclusion ............................................ 342

IX.  EPILOGUE: A SYSTEM SUI GENERIS
     ROELOF HAVEMAN .................................. 347

LITERATURE .............................................. 353
# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHR</td>
<td>African Charter on Human Rights</td>
</tr>
<tr>
<td>AIDP</td>
<td>Association Internationale de Droit Pénal</td>
</tr>
<tr>
<td>CDR</td>
<td>Coalition for the Defence of the Republic</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECmHR</td>
<td>European Commission on Human Rights</td>
</tr>
<tr>
<td>EGrtHR</td>
<td>European Court on Human Rights</td>
</tr>
<tr>
<td>FPR</td>
<td>Rwandese Patriotic Front</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICDAF</td>
<td>International Criminal Defence Attorneys Association</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>ILA</td>
<td>International Law Association</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>MRND</td>
<td>National Revolutionary Movement for Democracy and Development</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>OrP</td>
<td>Office of the Prosecutor</td>
</tr>
<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
</tr>
<tr>
<td>SC</td>
<td>Security Council</td>
</tr>
<tr>
<td>SFOR</td>
<td>Stabilization Force Bosnia Herzegovina</td>
</tr>
<tr>
<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNAMIR</td>
<td>United Nations Assistance Mission to Rwanda</td>
</tr>
<tr>
<td>UNCSW</td>
<td>United Nations Commission on the Status of Women</td>
</tr>
</tbody>
</table>