

Contents

<i>Foreword</i>	xiv
<i>Table of authorities</i>	xviii
<i>Table of short forms</i>	lxxxviii
1 The nature of international criminal procedure	1
1.1 What is international criminal procedure?	2
1.1.1 The sources of international criminal procedure	2
1.1.2 The structure of rulemaking at the international criminal tribunals	5
1.1.3 A coherent body of international rules of procedure?	8
1.1.4 Principles and rules	11
1.1.5 Human rights: the legal principles behind international criminal procedure	12
1.2 Common law versus civil law: the old debate in a new light	14
1.3 Scope of this book and terminology used	17
2 Creation and amendment of rules of international criminal procedure	21
2.1 The <i>ad hoc</i> Tribunals	23
2.1.1 Creation of the Rules of Procedure and Evidence	23
2.1.2 Structure of the ICTY and ICTR Rules	25
2.1.3 Amending the ICTY and ICTR Rules	26
2.1.4 Quasi-judicial legislating and the separation of powers in the <i>ad hoc</i> Tribunals	30
2.1.5 ICTY and ICTR Regulations	37
2.2 The International Criminal Court	38
2.2.1 Structure of the ICC procedural framework	38
2.2.2 Creation and amendment of procedural rules in the Rome Statute and ICC Rules	39

vi	<i>Contents</i>	
	2.2.3 Quasi-legislating via the backdoor: the Regulations of the Court and Registry	41
	2.3 Conclusion	44
3	Procedures related to primacy and complementarity	46
3.1	Primacy	48
	3.1.1 Deferral of cases from national authorities to the ICTY or ICTR	51
	3.1.2 Admissibility of cases in the ICTY	57
	3.1.3 Referral of cases from the ICTY or ICTR to national authorities	58
	3.1.4 Other procedures on cooperation deriving from the primacy regime	64
3.2	Complementarity	67
	3.2.1 Situations and cases	68
	3.2.2 Trigger mechanisms placing a situation before the ICC	69
	3.2.3 Admissibility of cases in the ICC	72
	3.2.3.1 Definition and scope of the admissibility factors	73
	3.2.3.1.1 State inaction	73
	3.2.3.1.2 Unwillingness	78
	3.2.3.1.3 Inability	80
	3.2.3.1.4 <i>Non bis in idem</i>	81
	3.2.3.1.5 Gravity	82
	3.2.3.2 Proceedings on admissibility	85
	3.2.3.2.1 Preliminary examination by the Prosecutor and pre-trial chamber authorisation for <i>proprio motu</i> investigation	85
	3.2.3.2.2 Preliminary rulings on admissibility	89
	3.2.3.2.3 Challenges to admissibility	91
	3.2.4 Self-referral	93
	3.2.5 Security Council deferral	95
	3.2.6 Other procedures on cooperation deriving from the complementarity regime	96
	3.3 Conclusion	98
4	Investigations, rights of suspects, and detention	102
4.1	Investigations	104
	4.1.1 Initiating investigations	104
	4.1.2 The prosecution’s investigative powers and duties	105
	4.1.3 Prosecutorial requests for state assistance	106

<i>Contents</i>	vii
4.1.3.1 The <i>ad hoc</i> Tribunals	106
4.1.3.2 The ICC	107
4.2 Rights of suspects during investigations	108
4.2.1 The right against self-incrimination	109
4.2.2 The right to the assistance of counsel during interviews	110
4.2.3 The right to prior advisement in a language the suspect understands	110
4.2.4 The right to have any interview recorded	111
4.2.5 The right not to be coerced, threatened, or tortured	111
4.2.6 The right to be free from arbitrary arrest	112
4.2.7 The right to judicial review of the legality of arrest or detention	113
4.3 Detention and release pending trial and appeal	118
4.3.1 Conditions of detention	118
4.3.2 The length of pre-trial detention	119
4.3.3 Release pending and during trial	122
4.3.3.1 The <i>ad hoc</i> Tribunals and the SCSL	123
4.3.3.2 The ICC	129
4.3.4 Detention and release pending appeal on the merits	132
4.4 Conclusion	133
5 Defence counsel, <i>amici curiae</i> , and the different forms of representation of accused	136
5.1 Legal representation as a human right	137
5.2 Defence counsel representation	139
5.2.1 The appointment and assignment of defence counsel	140
5.2.1.1 Defence counsel at the <i>ad hoc</i> Tribunals	140
5.2.1.2 Defence counsel at the ICC	143
5.2.1.3 Defence counsel at the SCSL	145
5.2.1.4 Defence counsel at the Special Tribunal for Lebanon	147
5.2.2 Professional conduct of counsel	148
5.2.2.1 Hierarchy and primacy of sources	149
5.2.2.2 Obligations to the client	149
5.2.2.3 Obligations to the tribunal	151
5.2.2.4 Obligations to others in the proceedings	152
5.2.3 Conflicts of interest	153
5.2.4 Misconduct	153
5.2.5 Termination, suspension, and withdrawal	154
5.2.6 Fees and costs	155
5.3 Self-representation	156

viii	<i>Contents</i>	
	5.3.1 Self-representation at the <i>ad hoc</i> Tribunals	156
	5.3.1.1 <i>Milošević</i> case	157
	5.3.1.2 <i>Šešelj</i> case	158
	5.3.1.3 <i>Krajišnik</i> case	160
	5.3.2 Self-representation at the SCSL	161
	5.3.2.1 <i>Norman</i> case	161
	5.3.2.2 <i>Gbao</i> case	162
	5.4 Standby counsel	163
	5.5 Imposing defence counsel	165
	5.6 <i>Amici curiae</i>	166
	5.6.1 <i>Amici curiae</i> at the <i>ad hoc</i> Tribunals	166
	5.6.2 <i>Amici curiae</i> at the SCSL	168
	5.6.3 <i>Amici curiae</i> at the ICC	168
	5.6.4 <i>Amicus curiae</i> as <i>de facto</i> defence counsel	169
	5.7 Legal associates and unrepresented accused	171
	5.8 Conclusion	173
6	Pre-trial proceedings	176
	6.1 Charging instruments	178
	6.1.1 Review of proposed charges	179
	6.1.1.1 The applicable standards	181
	6.1.1.1.1 A <i>prima facie</i> case	181
	6.1.1.1.2 ‘Reasonable grounds’ and ‘substantial grounds’	183
	6.1.1.2 The prosecution’s burden and the court’s considerations	184
	6.1.2 Amendment of charges	186
	6.1.2.1 Challenges to the form of the charging instrument	191
	6.1.3 Withdrawal of charges	195
	6.2 Joinder and severance	197
	6.2.1 Joinder of charges	198
	6.2.2 Joinder of accused	200
	6.2.3 Joinder of indictments or trials	201
	6.2.4 Severance	207
	6.3 Orders and warrants	207
	6.3.1 Warrants	208
	6.3.2 Pre-trial orders	210
	6.4 Guilty pleas and plea bargaining	213
	6.4.1 Guilty pleas at the <i>ad hoc</i> Tribunals	215
	6.4.1.1 Legal requirements for a valid guilty plea	216
	6.4.1.1.1 Is the plea voluntary?	217

<i>Contents</i>	<i>ix</i>
6.4.1.1.2 Is the plea informed?	218
6.4.1.1.3 Is the plea unequivocal?	219
6.4.1.2 The plea proceeding	219
6.4.2 Plea bargaining at the <i>ad hoc</i> Tribunals	221
6.4.3 Admissions of guilt and plea bargaining at the ICC	225
6.5 Disclosure and its limits	227
6.5.1 Disclosure by the prosecution	227
6.5.1.1 Non-exculpatory materials	228
6.5.1.2 Exculpatory materials	230
6.5.1.3 Electronic disclosure	233
6.5.1.4 Materials not subject to disclosure	234
6.5.1.5 Delayed disclosure	236
6.5.2 Disclosure by the accused	238
6.5.2.1 Tangible objects and witness statements	238
6.5.2.2 Certain defences	239
6.5.3 Sanctions for non-disclosure	240
6.5.4 Confidential material from other cases	241
6.6 Pre-trial case management	242
6.6.1 Pre-trial case management at the <i>ad hoc</i> Tribunals and the SCSL	243
6.6.2 Limiting the scope of the trial at the <i>ad hoc</i> Tribunals and the SCSL	244
6.6.3 Pre-trial case management at the ICC	247
6.7 Conclusion	248
7 Trial proceedings	250
7.1 Composition of the trial bench	253
7.1.1 Qualifications of judges and election to the tribunal	253
7.1.2 Appointment, composition, and general duties of trial judges	255
7.1.3 Disqualification from sitting on the bench in a given case	256
7.1.4 Temporary or permanent absence of a judge after trial has begun	259
7.2 Location of trial	262
7.3 Trial chamber control over the proceedings	263
7.3.1 Orders on length of trial and evidence presentation	264
7.3.2 Sanctions for courtroom disruption and misconduct	266
7.4 Public nature of trial and exceptions	266
7.4.1 Trial in private or closed session	268
7.4.2 Protective measures for witnesses and documents	268

x	<i>Contents</i>	
	7.4.3 Testimony by video-link	271
	7.5 Trial in accused’s presence and exceptions	272
	7.5.1 Waiver of right to presence	273
	7.5.2 Absence due to disruption	273
	7.6 Stages of trial	276
	7.6.1 Transition from pre-trial phase	277
	7.6.2 Opening statements and presentation of evidence	278
	7.6.3 Reopening of a party’s case	282
	7.6.4 Witness proofing	284
	7.6.5 Mid-trial proceedings for judgement of acquittal	287
	7.6.6 Presentation of sentencing evidence	290
	7.6.7 Deliberations on guilt and sentence	292
	7.7 Reconsideration of a chamber’s own prior decision	292
	7.8 Offences against the administration of justice	294
	7.8.1 Definition of the offences	296
	7.8.2 Procedural steps	298
	7.9 Conclusion	299
8	The role and status of victims in international criminal procedure	303
	8.1 Victims in national criminal proceedings	305
	8.1.1 Adversarial and inquisitorial domestic systems	306
	8.1.2 Relevant international law on victim treatment in national systems	307
	8.2 Victims at the ICTY, ICTR and SCSL	309
	8.2.1 Victims as witnesses	309
	8.2.2 Victims and reparation	310
	8.2.2.1 The unlawful taking of property	310
	8.2.2.2 Compensation for non-property injuries	310
	8.3 Victims at the ICC	311
	8.3.1 Victim participation	311
	8.3.1.1 Who is a victim?	311
	8.3.1.2 The victim’s general participatory right under Article 68(3)	312
	8.3.1.3 Participation under Article 15(3): <i>proprio motu</i> investigations	314
	8.3.1.4 Participation under Article 19(3): jurisdiction or admissibility challenges	314
	8.3.1.5 Participation under Rule 119(3): release pending or during trial and appeal	315
	8.3.1.6 General regulation of the modalities of victim participation	316

<i>Contents</i>	<i>xi</i>
8.3.1.6.1 Applications	316
8.3.1.6.2 Opening and closing statements	316
8.3.1.6.3 Legal representatives	317
8.3.1.6.4 The Office of Public Counsel for Victims	318
8.3.1.6.5 Notice	319
8.3.1.6.6 Reviewing the record of the pre-trial proceedings	320
8.3.1.6.7 Where the chamber desires input	320
8.3.1.7 Pre-trial participation in situations	320
8.3.1.8 Pre-trial participation in cases	322
8.3.1.8.1 The confirmation hearing	323
8.3.1.9 Participation in trial proceedings	325
8.3.1.10 Participation in interlocutory appeals	329
8.3.1.11 Participation in appeals from a conviction or acquittal	330
8.3.2 Victim reparations	330
8.4 Victims at the ECCC	332
8.4.1 Victim participation as a civil party	332
8.4.2 Victims and reparations	333
8.5 Conclusion	333
9 Evidence	335
9.1 Admission and assessment of evidence	336
9.1.1 Admissibility of evidence	338
9.1.1.1 A low threshold	339
9.1.1.2 Few exclusions	342
9.1.2 Evaluation of evidence	343
9.1.3 Treatment of hearsay	347
9.1.4 Evidence in cases involving sexual violence	350
9.2 Methods of adducing evidence	352
9.2.1 Witnesses	352
9.2.1.1 Live testimony and witness statements	352
9.2.1.2 Experts	357
9.2.2 Other documentary evidence	360
9.2.3 Judicial notice and uncontested facts	361
9.3 Privileges	366
9.3.1 Professional privileges	366
9.3.2 Testimonial privileges	368
9.3.2.1 Compelled incrimination	368
9.3.2.2 War correspondents	369
9.3.2.3 International Committee of the Red Cross (ICRC)	371
9.4 Conclusion	373

xii	<i>Contents</i>	
10	Judgement and sentencing	375
10.1	Judgement	377
10.1.1	Requirement of a reasoned, written judgement	377
10.1.2	Majority concurrence in the verdict and separate opinions	383
10.1.3	Proof beyond a reasonable doubt	385
10.1.4	Structure of the judgement	387
10.1.5	Concurrent and cumulative convictions	388
10.1.6	Sentencing judgements	390
10.1.7	Delivery of judgement and notice of appeal	391
10.2	Sentencing	392
10.2.1	Purposes of sentencing	393
10.2.2	Factors for determining the sentence	394
10.2.2.1	Gravity of the crime	396
10.2.2.1.1	Inherent gravity of the crime	397
10.2.2.1.2	Gravity of the crime as committed	397
10.2.2.1.3	Form of participation of the accused	398
10.2.2.1.4	Impact on victims	400
10.2.2.2	Individual circumstances of the convicted person	400
10.2.2.3	Cooperation with the prosecution	401
10.2.2.4	Other aggravating circumstances	403
10.2.2.5	Other mitigating circumstances	404
10.2.2.6	Sentencing practice in a national system	407
10.2.2.7	Time served	408
10.2.3	Consecutive or concurrent sentencing	409
10.2.4	Problems in the application of sentencing factors	409
10.3	Other penalties	410
10.3.1	Fines	410
10.3.2	Restitution, forfeiture, and reparations	411
10.4	Procedures upon conviction or acquittal	412
10.4.1	Status of the convicted person and transfer to national prison	413
10.4.2	Procedure upon acquittal or conviction to time served	415
10.5	Enforcement of sentence and procedures for early release	416
10.6	Conclusion	418
11	Appeal and revision	423
11.1	Structure of chambers in the international criminal tribunals	425
11.2	Evolution of the right of appeal under international law	426
11.3	<i>Stare decisis</i> at the international criminal tribunals	428

<i>Contents</i>	xiii
11.3.1 Status of appellate precedent at the <i>ad hoc</i> Tribunals	430
11.3.2 Status of appellate precedent at the ICC	432
11.4 Interlocutory appeals	435
11.4.1 Interlocutory appeals as of right	435
11.4.2 Interlocutory appeals at the lower chamber’s discretion	436
11.4.3 Standard of review on interlocutory appeals	439
11.5 Appeals against acquittal, conviction, or sentence	441
11.5.1 Bases for appeal	441
11.5.2 Standard of review	442
11.5.2.1 Errors of law	443
11.5.2.2 Errors of fact	444
11.5.2.3 Procedural error	446
11.5.3 Appeals against the sentence	447
11.5.4 Submissions on appeal	448
11.6 Additional evidence on appeal	450
11.7 Revision	451
11.7.1 New facts	453
11.7.2 Standard for revision at the <i>ad hoc</i> Tribunals and SCSL	455
11.7.2.1 Final decision	455
11.7.2.2 Criteria	456
11.7.3 Standard for revision at the ICC	458
11.7.3.1 Criteria	458
11.7.4 Revision versus reconsideration	459
11.8 Conclusion	460
12 Conclusion	462
12.1 International criminal procedure: a coherent body of international law	463
12.2 Innovation and the <i>sui generis</i> nature of international criminal procedure	467
12.3 Judicial appropriation of power at the international criminal tribunals	470
<i>Index</i>	475