International criminal trials: A normative theory

Vasiliev, S.

Publication date
2014

Citation for published version (APA):
SUMMARY TABLE OF CONTENTS

VOLUME I: NATURE

Table of acronyms..................................................................................................................xvi
Table of abbreviated sources..................................................................................................xviii
Table of cases...........................................................................................................................xx
Table of instruments................................................................................................................xcv

PART 1. A THEORY FOR TRIALS:
METHODOLOGICAL FRAMEWORK

Chapter 1. Background and Purpose of the Study:

Chapter 2. Fairness and its Metric in International Criminal Procedure:
Drawing from Human Rights Law.........................................................................................89

Chapter 3. Measuring Effectiveness: Teleology and Efficiency of
International Criminal Justice..............................................................................................159

PART 2. PHENOMENOLOGY OF THE TRIAL PHASE:
CONCEPTUAL APPROACHES

Chapter 4. Trial Phase: A Theoretical and Comparative Outlook.................................221

Chapter 5. Functions of International Criminal Trials.....................................................283

Chapter 6. Centrality of Trial in International Criminal Proceedings...........................360

VOLUME II: ORGANIZATION

PART 3. ANATOMY OF THE TRIAL PHASE:
DESCRIPTIVE AND ANALYTICAL APPROACHES

Chapter 7. Defining the Trial Stage.......................................................................................451

Chapter 8. Trial Preparation: Setting the Scene.................................................................488

Chapter 9. Opening Stage of Trial.......................................................................................613

Chapter 10. Presentation of Evidence..................................................................................649

Chapter 11. Closing Stage of Trial......................................................................................800
PART 4. FACES OF TRIAL:
FROM PRESENT TO THE FUTURE

Chapter 12. Towards a Normative Theory of International Criminal Trial........836

Summary........................................................................................................932
Samenvatting.................................................................................................942
Bibliography..................................................................................................cxvii
# DETAILED TABLE OF CONTENTS*

**VOLUME II: ORGANIZATION**

**PART 3. ANATOMY OF THE TRIAL PHASE: DESCRIPTIVE AND ANALYTICAL APPROACHES**

Chapter 7. Defining the Trial Stage……………………………………………… 451

1. Introduction 451

2. Scope and structure of the trial phase 453
   2.1 IMT and IMTFE 453
   2.2 ICTY, ICTR, and SCSL 456
   2.3 ICC 458
   2.4 SPSC 464
   2.5 ECCC 466
   2.6 STL 473

3. Practical significance of delimitation: Two examples from ICC practice 478
   3.1 Challenges to the admissibility of the case: Katanga and Ngudjolo Chui 479
   3.2 Post-confirmation withdrawal of charges: Muthaura 482

4. Conclusion 485

Chapter 8. Trial Preparation: Setting the Scene…………………………….488

1. Introduction 488

2. Preliminary Phase of Trial Proceedings in a Comparative Perspective 491

3. Preparation for Trial before International Criminal Tribunals 495
   3.1 IMT and IMTFE 495
   3.2 ICTY, ICTR, and SCSL 496
     3.2.1 Introductory remark 496
     3.2.2 Initial appearance 498
     3.2.3 Conferences 500
       A. Status conferences 500
       B. Rule 65ter meetings (ICTY) 504
       C. Pre-Trial Conference 508
         a. Rationale 508
         b. Pre-trial filings 511
         c. Judicial powers 519
       D. Pre-Defence Conference 532

---

* The detailed Table of Contents of volume I can be found at the beginning of that volume.

cxi
a. Rationale 532
b. Pre-defence filings 534
c. Judicial powers 540

3.3 ICC 550
3.3.1 Introductory remark 550
3.3.2 Proceedings leading up to trial 555
   A. Status conferences 555
   B. Record of the proceedings 561
   C. Devising the proceedings and consultation with the parties 564
3.3.3 Commencement of trial 572

3.4. SPSC 573
3.4.1 Introductory remark 573
3.4.2 Preliminary hearing 574
3.4.3 Opening of trial 574

3.5 ECCC 575
3.5.1 Introductory remark 575
3.5.2 Trial management meeting 576
3.5.3 Preparation of the trial and pre-trial filings 577
3.5.4 Initial hearing 578

3.6 STL 581
3.6.1 Introductory remark 581
3.6.2 Initial appearance 581
3.6.3 Pre-trial and pre-defence filings and PTJ’s file 582
3.6.4 Conferences 584
   A. Status Conferences 584
   B. Meetings convened by the Pre-Trial Judge 585
   C. Pre-Trial and Pre-Defence Conferences 585

3.7 Summary 587
3.7.1 Forms of trial preparation 587
3.7.2 Pre-trial (and pre-defence) filing duties 591
3.7.3 Judicial managerial powers 593

4. Assessment 594
4.1 Fairness perspective 594
   4.1.1 Forms of trial preparation 594
   4.1.2 Filing duties 599
   4.1.3 Judicial managerial powers 601
4.2 Teleological perspective: Institutional goals 601
4.3 Efficiency perspective: Streamlining and expediting practice 603
   4.3.1 Forms of trial preparation 604
      A. Status conferences 604
      B. Rule 65ter meetings 604
   4.3.2 Pre-trial (and pre-defence) filings 607
   4.3.3 Managerial powers of judges 607

5. Conclusions and Recommendations 609

Chapter 9. Opening Stage of Trial..............................................................613
B. Examination-in-chief 680
C. Cross-examination 681
D. Re-examination 688
E. Further examination 689
F. Extra-sequential questions by the Judges 690
G. Specifics of examination in multiple-defendant cases 693
3.2.3 Presentation of documents and exhibits 696
3.2.4 Procedure for the judgment of acquittal at the close of prosecution case 698
A. Origin and rationale 698
B. Evolution of the law 702
C. Standard of review 705
D. Applicability and scope 714
3.3 ICC 716
3.3.1 General features 716
A. Order of presentation at trial: A comparative outlook 716
B. Quandary of victim evidence 719
C. Examination of witnesses 724
3.3.2 Order of presentation of evidence in practice 728
3.3.3 Order of examining witnesses in practice 737
3.3.4 Modes of examining witnesses in practice 739
A. Questioning by the party calling the witness / Examination-in-chief 740
B. Questioning by the party not calling the witness / Cross-examination 742
C. Additional questioning by the party calling the witness / Re-examination 745
D. Final questioning by the defence 746
E. Questioning by the legal representatives of victims 747
F. Judicial questioning 752
3.3.5 The order and manner of submission (and other use) of documents at trial 755
A. Introducing documents through a witness and their use in questioning 756
B. Admission into evidence from the bar table 757
C. Use of documents to refresh memory 758
3.3.6. Possibility of mid-trial acquittals 760
3.4 SPSC 761
3.4.1 General features 761
3.4.2 Order of presentation of evidence 762
3.4.3 Order of examination of witnesses 764
3.2.4 Submission and use of documents at trial 765
3.5 ECCC 766
3.5.1 Order of presentation of evidence 766
3.5.2 Order and manner of examination of witnesses 769
3.5.3 Submission of documents at trial 772
3.6 STL 773
3.6.1 Order of presentation of evidence 773
3.6.2 Order and manner of examination of witnesses 774
3.6.3 Procedure for the judgment of acquittal at the close of prosecution case 775
3.7 Summary
3.7.1 Order of presentation of evidence
3.7.2 Order and modes of questioning witnesses
3.7.3 Order of presentation of documents

4. Evaluation
4.1 Fairness perspective
4.1.1 Order of presentation
4.1.2 Order and modes of questioning
4.1.3 Presentation of documentary and physical evidence
4.2 Teleological perspective: Institutional goals
4.3 Efficiency perspective: Streamlining and expediting practice
4.4 Postscript on comparative law: ‘Non-parameter’ with a quasi-normative role?

5. Conclusions and recommendations

Chapter 11. Closing Stage of Trial

1. Introduction
2. Closing Stage of Trial: A Comparative Perspective
3. Status in International Criminal Procedure
   3.1 IMT and IMTFE
   3.2 ICTY, ICTR, and SCSL
   3.3 ICC
   3.4 SPSC
   3.5 ECCC
   3.6 STL
   3.7 Summary
4. Assessment
   4.1 Fairness perspective
   4.2 Effectiveness perspective: Institutional goals
   4.3 Efficiency perspective: Streamlining and expediting practice
5. Conclusions and Recommendations

PART 4. FACES OF TRIAL – FROM PRESENT TO THE FUTURE

Chapter 12. Towards a normative theory of international criminal trial

1. Introduction
2. Reappraising normative parameters
   2.1 Usages and limitations of comparative method: Beyond ‘adversarial’ and ‘inquisitorial’ models
   2.2 Human rights and goals: Impactful but not decisive determinants
   2.3 Efficiency as a normative éminence grise
2.3.1 Impact on procedural development 858
2.3.2 Emancipation from domestic traditions: From familiar to pragmatic 861
2.3.3 Result: Pragmatism and flexibility in procedure 871

3. Nature of international criminal trials 874
   3.1 Objectives, functions and effects of trials: Liberal legalist and socio-legal views 874
   3.2 Truth-finding: Primary function 875
   3.3 Trial stage as a truth-finding locus 880

4. Organization of international criminal trials: Translating flexibility and pragmatism 886
   4.1 Nature of the court: No jury and its implications 886
   4.2 Structure of trial proceedings 889
      4.2.1 Initial question: Structure of case at trial 889
      4.2.2 Trial preparation: Importance of robust case-management 893
      4.2.3 Opening statements and closing arguments: From advocacy to informative function 899
      4.2.4 Presentation of evidence: Variable model 901
      4.2.5 Sentencing: Need for separate hearing and deliberation 908
   4.3. Participants 910
      4.3.1 Role of judges: Active case-managers and truth-seekers 910
      4.3.2 Defendants’ role: Towards participatory model 914
   4.4 ‘Postmodern suspense’ in procedure: Reconciling variability with certainty 919

5. Concluding remarks: International trial adrift and prospects of coherent trial culture 926

Summary…………………………………………………………………………………………932
Samenvatting……………………………………………………………………………………942
Bibliography……………………………………………………………………………………cxvii