In this session we will take a look at the law of criminal procedures as applied by international criminal tribunals and courts – an emerging discipline of law that may be labeled international criminal procedures. Our particular focus will be on the ICTY, ICTR and ICC.

Although the origin can be found in domestic procedural principles and laws, these tribunals and courts have developed unique systems (sui generis) with elements from different legal traditions and sometimes even unprecedented procedural mechanisms. Some would call them ‘hybrid systems’ others rather stress their uniqueness. In addition, international human rights law has had an impact on the international criminal procedures.

It is important to note that while the criminal procedures of the ICTY and ICTR are essentially judge-made, the ICC is provided with a detailed procedural regime negotiated and adopted by states. In both cases, however, lawyers from different countries with different legal traditions have had to reconcile their preferences and find solutions that would be acceptable to them all.

The primary sources are the Statutes of the ICTY, ICTR and ICC as well as the Rules of Procedure and Evidence of each institution. For the ICC, the judges has adopted additional Regulations of the Court. In addition to provisions dealing with the criminal procedures, you may also want to take a look at the basic provisions on the organization of the tribunals/court.

The required reading for this session is:


In the following are some questions that may assist you when reading the textbook. Some of the most important questions – and taking into account your own preferences – will be addressed in the seminar. References are also made to some ICC decisions – see the ICC web page – together with questions that we will also touch upon.

**Systemic questions**

- How are the formal law-making powers divided between the founders of the tribunal/court and the judges with respect to the ICTY/ICTR and the ICC?
- How much room does the judges have to establish the law in jurisprudence (discretion, inherent or implied powers, etc.)?
• What impact has the general human rights law and the jurisprudence of human rights courts had on the procedural law of the ICTY, ICTR and ICC? Is such law and jurisprudence binding on these institutions?

Major legal traditions

• What is the essential difference between inquisitorial and accusatorial criminal procedures? Do they reflect different values or simply the practical organization of the proceedings?
• What are the main benefits and drawbacks with the different approaches?
• What are the main difficulties in bridging inquisitorial and accusatorial principles?
• How would you like to characterize the ICTY/ICTR and the ICC criminal procedures respectively in terms of inquisitorial and accusatorial elements? Has the approach changed over time in ICTY and ICTR and, if so, how?

Fair trial and rights of the accused

• Which are the most fundamental safeguards for fair trials and protection of the rights of the accused? To what extent has international human rights law had an influence?
• How is the presumption of innocence being protected?
• How is the independence and impartiality of judges being protected?
• Is the role of the Prosecutor different in the ICC compared with the ICTY/ICTR and, if so, what impact may this have on the proceedings?
• What mechanisms are in place for ensuring a fair and expeditious trial? Is equality of arms particularly difficult in an international criminal tribunal/court? Have the ICTY/ICTR proceedings been fair and expeditious in practice? What lessons have been (should be) learned by the ICC?
• What are the benefits and drawbacks with trials in absentia and how have the ICTY/ICTR and the ICC dealt with this question?
• To what extent has your domestic legal background had an impact on your assessment of the issues now discussed?

The criminal procedures of the international criminal tribunals/courts

• How and under what conditions can a criminal investigation be commenced and what are the main differences between the ICTY/ICTR and the ICC in this respect? Why the difference?
  o Is the prosecutor obliged to investigate a crime that falls under the jurisdiction of the tribunal/court?
  o What investigation/prosecution strategy does the respective institution apply? Why?
• How is the investigation conducted and what are the main differences compared with a domestic criminal investigation?
  o What is the role of the prosecutor and the judges in the investigation?
  o What is the role of states and peacekeeping forces?
  o What are the rights of the suspect and others?
What are the conditions for deprivation of liberty and how does this work in practice?

- What are the conditions for prosecuting a case, who does this, and what are the review/control mechanisms? How does this differ in the ICTY/ICTR and the ICC?
- What other pre-trial proceedings take place before these institutions?
- How are the trial proceedings organized with respect to: Case presentation; Witness testimonies; Control of proceedings; Judgments; Sentencing?
- What are the major features of the law of evidence of the ICTY/ICTR and the ICC?
- Is plea bargaining allowed and, if so, how does it work?
- Can the tribunal/court award reparations to victims? Does the role of victims differ in the ICTY/ICTR and the ICC respectively?
- Who can appeal a judgment or a sentence, on what grounds, and what type of appeals proceedings (a trial de novo, cassation proceedings, etc.) are applied? Are interlocutory appeals against certain decisions possible?
- Can a judgment, sentence and/or other decisions be subject to revision or review also later (i.e. when an appeal is no longer possible or, with other words, when the decision has entered into final force)?
- How are penalties enforced? What are the respective roles of the tribunal/court and states with respect to the conditions for enforcement, supervision, and reduction or commutation of the sentence or pardon?

Conclusions

- What are the major benefits and problems with the international criminal proceedings?

Selected decisions by the ICC

Situation in the Democratic Republic of the Congo (DRC)

Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 (Appeals Chamber 19 December 2008)
- What right do victims have to participate in the criminal proceedings? Are there different forms of ‘participation’ for certain procedures?
- What about participation at the investigation?

Situation in the Democratic Republic of the Congo (DRC) – Lubanga

Decision on the Prosecutor’s application for a warrant of arrest, Article 58 (Pre-Trial Chamber I 10 February 2006 – annexed to decision 24 February 2006)
http://145.7.218.139/iccdocs/doc/doc236260.PDF
- What material did the Prosecutor submit and what test was applied by the Chamber for the issuance of the arrest warrant?
Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(c) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (Trial Chamber I 13 June 2008)  [http://www.2.ice-cpi.int/iccdocs/doc/doc511249.PDF](http://www.2.ice-cpi.int/iccdocs/doc/doc511249.PDF)

- What did the Chamber order and why?
- Do you consider the Prosecutor’s action a misuse of powers or is it rather different interpretations of competing (inconsistent) legal rules?
- (How was the matter resolved – in a subsequent decision?)

Situation in the Central African Republic (CAR) - Bemba

Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute (Pre-Trial Chamber III 3 March 2009) [http://www.ice-cpi.int/iccdocs/doc/doc638848.pdf](http://www.ice-cpi.int/iccdocs/doc/doc638848.pdf)

- Which test is to be applied to the issue of confirmation of charges?
- Why did the Chamber decide to adjourn the confirmation hearing? What is the Prosecutor expected to do?
- Which alternative outcomes are possible?
- (How was a similar matter resolved in the Lubanga case? Which solution do you prefer?)