Public Annex B17: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant to the Appeals Chamber's order ICC-01/05-01/08-3579

Kreß, C., 'The Procedural Texts of the International Criminal Court' (2007) 5 *Journal of International Criminal Justice*, pp. 537, 540

The Procedural Texts of the International Criminal Court

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Abstract

With the recent approval of the Regulations of the Registry the procedural law applying before the International Criminal Court has been written down in the books almost completely. The following overview of the pertinent documents is to facilitate a thorough study of this new international criminal procedure, the architecture of which is of unprecedented complexity.

1. Introduction

On 6 March 2006, the Presidency of the International Criminal Court (ICC) approved the Regulations of the Registry of the Court. This piece completed the Court's law on the conditions of detention (above all: pre-trial detention)[1] just in time for the appearance of the first accused before the ICC on 22 March 2006.[2] Moreover, as the Regulations of the Registry enter into force, they have filled the last discernible lacunae of the ICC's international criminal procedure. Assembling the international criminal procedure of the ICC has taken roughly 11 years from the setting up of the Ad Hoc Committee for the ICC in 1995.[3] The outcome of these efforts[4] is not only of interest to scholars of both

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1 Cf. Regulations 150 *et seq.* of the Regulations of the Registry.

2 The accused in question is Congolese militia leader, Thomas Lubanga Dyilo; for the transcript of the initial appearance pursuant to Art. 60 ICCSt., see online http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-T-3.English.pdf (visited on 14 September 2006).

3 For a brief account of the history of negotiations and an introduction to the ICC, see C. Kreß, 'Vorbemerkungen zum Römischen Statut des Internationalen Strafgerichtshofs', in P.-G. Pötz and C. Kreß (eds), *Internationaler Rechtshilfeverkehr in Strafsachen*, vol. III (2nd edn., Heidelberg: R.v. Decker's Verlag, 2003), 26.

4 The author has participated in these efforts since 1998; during the Rome Conference (summer of 1998), in the Preparatory Commission for the ICC (1999–2000) and in the Assembly of States Parties as a member of the German government delegation (2003–2005); in the making of the Regulations of the Court as chairman of the Drafting Committee (2003–2004) and in the phrasing of the Regulations of the Registry as consultant to the Court's Presidency (2005–2006).

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international and comparative criminal procedure, but they also ought to be considered in the debate on a potential European criminal procedure.[5] The following overview of the pertinent documents is to facilitate a more thorough study of the new international criminal procedure.[6] All of these documents have been published in the *Official Journal* of the ICC,[7] and their current version can be retrieved from the Court's website.[8]

From their experience with the International Criminal Tribunals for the former Yugoslavia and for Rwanda, both established ad hoc by the United Nations Security Council, those working in the field of international criminal procedure are already accustomed to gathering the applicable law in its entirety from the interplay of many legal documents: the Security Council resolutions that established both Tribunals provided the international judges with an extremely fragmentary procedural framework which ultimately did not go much beyond that of the Charter of the Nuremberg Military Tribunal. Filling in the framework was left — as it was in Nuremberg — to the judiciary, namely by vesting it with the power to promulgate Rules of Procedure and Evidence (RPE); further, numerous so-called Practice Directives needed to be considered. The dynamic development of this procedural regime has been amply demonstrated by the countless amendments and alterations of the RPE.[9] Such a practice yields the advantage of quick adjustments to the often novel intricacies of international criminal procedure. On the other hand, to give such wide-ranging powers to participants in the proceedings, even if impartial, seems contestable as a matter of principle.

2. The ICC Statute[10]

Even the procedural portions of the original treaty, which came into force on 1 July 2002 pursuant to its Article 126, are considerably more

5 Cf. C. Kreß, 'Das Strafrecht auf der Schwelle zum europäischen Verfassungsvertrag', 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2004), 474.

6 A comprehensive treatise on the ICC's criminal procedure remains to be written; the annotations in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) and the handbook-style analyses in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) are fragmentary for the simple reason that they could not incorporate many of the legal documents featured herein due to their publication dates.

7 Cf. Regulation 7 of the Regulations of the Court.

8 Cf. Regulation 7 of the Regulations of the Court; available online at http://www.icc-cpi.int (visited on 14 September 2006).

9 The current version of the documents of the International Criminal Tribunal for the former Yugoslavia can be retrieved from http://www.un.org/icty/; of the International Criminal Tribunal for Rwanda from http://www.ictr.org (visited on 26 April 2006).

10 UN Doc. A/CONF.183/9.

conclusive — despite having fallen victim to compromise occasionally[11] — than those found in the Statutes of the Yugoslavia and Rwanda Tribunals: Part 2 contains the linchpins of judicial policy on the jurisdiction of the Court and the admissibility of international criminal proceedings. Parts 4–6 and 8–10 lay down vital pronouncements on the organization of the Court, the investigation phase, the confirmation of the indictment, the trial, the appellate proceedings, international cooperation and the enforcement of sentences.

3. The Rules of Procedure and Evidence[12]

The Member States, however, were not satisfied with only a *primary* set of rules for the new international judicial body. The *secondary* set of procedural rules, the Rules of Procedure and Evidence, were adopted by the Assembly of States Parties pursuant to Article 51 ICCSt. — notwithstanding urgent cases.[13] The pertinent adoption was effected by the first Assembly of States Parties in September 2002.[14] This instrument has been in force since. No discernible criteria exist for assigning a procedural provision to either the ICC Statute or the RPE. The delegates were certainly guided by some notion of significance, but this does not yield a clear-cut designation in many instances. Moreover, the particular shifts in the negotiations left their imprint: judging from significance, a case could be made *inter alia* for conclusively incorporating the various privileges to refuse testimony as part of the primary rules. However, Article 69(5) ICCSt. features a very broadly phrased statutory hull only because the debates were stalled due to the considerable disparities among the domestic systems which eventually left delegations with insufficient discussion time in Rome.[15] The sheer number of 225 rules indicates that the States Parties did not limit themselves to a narrow approach in drafting the RPE, which would have meant an elaboration of the rules only where the ICC Statute explicitly mandated it.[16] They went further in many respects and came up with some rather detailed provisions.[17] The outline of the RPE evidently,

11 On the fundamental compromises, see C. Kress, 'The Procedural Law of the International Criminal Court in Outline: The Anatomy of a Unique Compromise', 1 *Journal of International Criminal Justice* (2003) 603.

12 ASP/1/3 (part II-A).

13 Addressed in Art. 51(3) ICCSt.

14 Cf. Art. 119 ICCSt.; the Assembly publishes the conclusions of its debates in its *Official Records* which are available on the Court's website (see *supra* note 8).

15 For an in-depth study of the right to refuse testimony in international criminal law, see C. Kreß, 'Witnesses', in H. Fischer, C. Kreß, S.R. Lüder (eds), *International and National Prosecution of Crimes Under International Law* (Berlin: Berliner Wissenschaftsverlag, 2001), at 325.

16 One example of such a legislative mandate would be the aforementioned Art. 69(5) ICCSt. on privileges of confidentiality.

17 This can be said of, e.g. Rules 44 to 62 on the State-sensitive issues of jurisdiction and admissibility.

although not rigorously, follows the structure of the ICC Statute. Especially worthy of notice — since they are not necessarily expected to be part of the law of procedure from the perspective of many national procedural laws — are the provisions on penalties in Article 77 ICCSt., and in particular those on sentencing in Article 78 ICCSt.;[18] those on offences against the administration of international criminal justice in Article 70 ICCSt.; and those on misconduct before the Court in Article 71 ICCSt.[19]

4. The Regulations of the Court[20]

This relatively comprehensive regime consisting of the ICC's primary and secondary sets of provisions has banned rule-making by judges to a considerable degree but has not fully eradicated it. The judges of the ICC still possess the power to create the Regulations of the Court under Article 52 ICCSt. Pursuant to Article 52(1), the Regulations promulgated by the judges are intended to govern the routine functioning of the Court. In this regard, too, there is no clear-cut definition or precedent in international criminal procedure. The Regulations of the Court are surely not limited to rules of a purely internal nature; for example, in the case of Rule 21(2) RPE, the States Parties have vested the judges with the power to specify the conditions of admission for defence counsel appearing before the Court as part of the Regulations of the Court. This demonstrates that the Regulations of the Court, the first version of which was enacted on 26 March 2006, should not be underestimated in their importance in the field of international criminal procedure.[21] The Regulations of the Court contain important rules on the Court's organization, such as the establishment of Pre-Trial Chambers,[22] and meticulous time and format limitations.[23] In addition, they contribute crucial specifications regarding *inter alia* the difficult delineation of the Chief Prosecutor's and the Pre-Trial Chamber's powers[24] and regarding cooperation between States Parties and the ICC.[25] Moreover, the document contains important institutional provisions designed to assist the defence and the victims in international criminal proceedings.[26] It also sets forth, in its Sixth Chapter, the principles of the law

18 Chapter 7, Rules 145–148.
19 Chapter 9, Rules 162–172.
20 ICC-BD/01-01-04/Rev.01–05.
21 The first round of amendments promulgated by the Judges' plenary in March 2005 is of a clerical character and concerns mainly the French version; Art. 52(3) ICCSt. applies to amendments in general; the judges did not introduce a specific corrigendum procedure for clerical errors.
22 Of foremost importance is Regulation 46; cf. in all other regards all of Chapter 2.
23 See in particular Regulations 33–38 in Chapter 3.
24 Particularly relevant in this context is Regulation 48.
25 Chapter 7, Regulations 107–118.
26 The establishment of the Office of Public Counsel for the Defence and the Office of Public Counsel for Victims, pursuant to Regulations 77 and 81, respectively, should be noted.

on provisional detention, and it provides for a disciplinary regime for the Judges, the Chief Prosecutor, and the Deputy Prosecutors as well as the Registrar and Deputy Registrar in the Eighth Chapter. Lastly, Regulation 55 merits special attention, not least from a comparative perspective, as it acknowledges the 'authority of the (Trial) Chamber to modify the legal characterisation of the facts'. This rather important provision is found in a spot within the house of international criminal procedure where not everybody would have bothered to search.

5. The Regulations of the Registry[27]

The Court's international criminal procedure does not come to stop at this tier of tertiary rules, however. The Regulations of the Court are complemented in accordance with Rule 14(1) RPE by Regulations of the Registry which, as mentioned above, recently entered into force. Even on this quartenary level, an extensive document with 223 provisions emerged and does not simply dispose of trivialities. Noteworthy provisions include ones on (electronic) file management,[28] the funding of international duty counsels[29] and the law of provisional detention.[30]

6. Further Ancillary Instruments on Criminal Procedure Drafted by the Assembly of States Parties, Including International Agreements with Procedural Elements

As far as the possibility of a significantly relevant quinary set of rules of international criminal procedure is concerned, it seems safe to give the all-clear. Nevertheless, further ancillary instruments to the ICC Statute need to be mentioned, some of which are of utmost importance in procedural terms. In all cases, the Assembly of States Parties was decisively involved in the drafting process. First of all, the international agreements should be mentioned: on 22 July 2004, the Agreement on the Privileges and Immunities of the ICC came

27 ICC-BD/03-01-06.

28 See in particular Regulations 20–33 which also codify the ICC file numbering procedure helpful for handling pertinent documents. It is expressly noted for the reader that the Regulations of the Registry do not govern the file management of the Office of the Prosecutor; so far, nothing in the ICC's procedural scheme commands this body of the Court to create an investigative *dossier*. Moreover, the Chief Prosecutor has not yet complied with the mandate of Rule 9 RPE that requires him to enact regulations *for the management and administration* of the Office of the Prosecutor.

29 Regulation 134 provides for a so-called *action plan* that will play a pivotal role herein.

30 See the Fifth Chapter of the ICC Statute.

into force to implement Articles 48(2) and 48(3) ICCSt.[31] Of particular interest in terms of procedure are the contents of Articles 18–21 on the (functional) immunities of criminal defence lawyers, witnesses, presumed victims participating in proceedings and expert witnesses. Next, the Relationship Agreement between the ICC and the United Nations (UN) came into effect on 4 October 2004,[32] bringing the Court, an independent entity under international law, into a treaty relationship with the UN in accordance with Article 2 of the ICC Statute. Within the context of criminal procedure, Articles 15–18 and 20 which govern potential legal assistance from the UN to the ICC should be underscored. Thus, only the Headquarters Agreement with the Netherlands mentioned in Article 3(2) ICCSt. awaits completion among the ancillary agreements relating to criminal procedure.[33]

In addition to the agreements, two further documents that the Assembly of States Parties could and recently did enact unilaterally merit attention: On 2 December 2005, the Assembly adopted the Code of Professional Conduct for Counsel[34] pursuant to Rule 8 ICC RPE. This constitutes an ambitious endeavour to spell out supranational rules of professional conduct for defence lawyers and counsel for presumed victims and includes a disciplinary regime.[35] On 3 December 2005, the Regulations of the Trust Fund for Victims followed.[36] These contain *inter alia* important propositions on the coordination between investigative measures by the organs of the ICC under Article 34 ICCSt. and activities aimed at compensating victims under Article 79 ICCSt. A provision which some commentators may criticize as potentially compromising fundamental tenets of criminal due process is in Chapter II, Section I, No. 50(a) of these Regulations: the prominently staffed Board of Directors of the Trust Fund may, if certain requirements are met, begin activity well before a judicial order on reparation or restitution issues under Article 76(1) or (2) has been handed down.

7. Conclusion

As has been illustrated earlier, the Court's international criminal procedure has by now been written down in the books almost completely. Even from a purely

31 ICC-ASP/1/3.

32 ICC-ASP/3/Res.1.

33 In addition, individual bilateral or multilateral agreements are conceivable, especially within the domain of judicial and enforcement assistance; cf. for instance, the apparently first ever Enforcement of Sentences Agreement between the ICC and Austria of 10 October 2005, pursuant to Rule 200 ICC RPE and the Agreement between the ICC and the European Union on Cooperation and Assistance of 10 April 2006, ICC-PRES/01-01-06; a treaty-making competence of the Chief Prosecutor is provided by Art. 54(1), (3)(d) ICCSt., as mentioned in Regulation 107(2); this may lead to the non-public conclusion of treaties.

34 ICC-ASP/4/Res.1.

35 Cf. the Fourth Chapter of the Code, to which Regulations 147–149 of the Regulations of the Registry refer.

36 ICC-ASP/4/Res.3.

textual angle, this overview of the key documents indicates a vertical and horizontal complexity that has no precedent. A full scrutiny of legal sources would further command the inclusion of the general principles of international procedure which, according to Article 21(2) ICCSt., must be derived from a comparison of national laws and from internationally recognized human rights standards in order to be respected under Article 21(3) ICCSt. Finally, the domestic implementation acts, particularly the provisions on judicial and enforcement assistance, will prove highly relevant in the realm of procedure.[37] Any further evolution of the existent provisions will have to be left to the Court's jurisprudence which is now in the process of coming out of its embryonic phase. Pre-Trial Chamber II has already stressed, and rightly so, that anyone should, in the ongoing process of moulding the pertinent law, beware of hastily adopting the established *acquis* of both ad hoc Tribunals. As a verbatim passage from an early Chamber decision puts it:[38]

> [T]he rules and practice of other jurisdictions, whether national or international, are not as such 'applicable law' before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing into the Court's procedural framework remedies other than those enshrined in the Statute.

Keeping all of this in mind, the wait for the ICC's international criminal procedure *in action* to unfold promises to be a time rich in suspense.

37 For an initial comprehensive comparative analysis, see C. Kreß, F. Lattanzi, B. Broomhall and V. Santori (eds), *The Rome Statute and Domestic Legal Orders. Vol. II: Constitutional Issues, Cooperation and Enforcement* (Baden-Baden/Ripa Fagnano Alto: Nomos Verlagsgesellschaft/Editrice il Sirente, 2005), *passim*.

38 *Situation in Uganda*, ICC-02/04-01/05, Decision on the Prosecutor's Position on the decision of Pre-Trial Chamber II to redact factual descriptions of crimes from the warrants of arrest, motion for reconsideration, and motion for clarification, 28 October 2005, § 19.