

*TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE*,  
CHRISTOPH SAFFERLING (OXFORD, UK: OXFORD  
UNIVERSITY PRESS, 2001) 395 PAGES. PRICE AU\$230.00  
(HARDCOVER). ISBN 0199243506.

As these lines are being written, the states parties to the *Rome Statute of the International Criminal Court*<sup>1</sup> have just elected the Court's first Prosecutor, Luis Moreno Ocampo, thereby taking a further crucial step in the process of establishing the International Criminal Court ('ICC').<sup>2</sup> Since July 1998, when the *Rome Statute* was adopted, this process has been accompanied by a flurry of publications, ranging from introductory texts to in-depth commentaries.<sup>3</sup> Despite the enormous body of existing literature, this book by Christoph Safferling — a PhD thesis conducted under the supervision of Professor (now Judge) Bruno Simma at the University of Munich, Germany — provides a new perspective and fills a niche. It presents a comparison of German and Anglo-American criminal procedural law, as well as an analysis of the experiences of the ad hoc International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the provisions of the *Rome Statute*. In doing so it deconstructs the 'unique legal order'<sup>4</sup> that comprises international criminal procedural law, and presents a strong argument in favour of a legal order based on both national and international approaches, and on common standards of international human rights law.

In five chapters (which are preceded by an introductory section on the 'Necessity of Respect for the Alleged Offender'), Safferling addresses a range of issues that arise in regard to criminal procedural law. In keeping with the stages of standard criminal trials, these are the pre-trial inquiry, the confirmation of the indictment, the trial, double-jeopardy and appeals, and forms of punishment. The result is an extremely broad discussion of issues of comparative criminal procedure, all of which are assessed against the background of fair trial

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<sup>1</sup> Opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>2</sup> In a secret ballot, held on 21 April 2003, the states parties unanimously elected Moreno Ocampo of Argentina to the position of Prosecutor of the ICC. Moreno Ocampo holds office for a non-renewable term of nine years, and is responsible for conducting investigations and prosecutions of crimes that fall within the jurisdiction of the Court. For a transcript of the election results, see <[http://www.un.org/law/icc/elections/results/prosecutor\\_results.htm](http://www.un.org/law/icc/elections/results/prosecutor_results.htm)> at 1 October 2003. Between 3–7 February 2003, states parties elected the first 18 judges of the ICC: see <[http://www.un.org/law/icc/elections/results/judges\\_results.htm](http://www.un.org/law/icc/elections/results/judges_results.htm)> at 1 October 2003. At their first meeting in The Hague following their inauguration, the judges elected Philippe Kirsch (Canada) to the position of President of the Court.

<sup>3</sup> For a detailed analysis, see especially Antonio Cassese, Paolo Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002); Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (1999). For further analysis, see, eg, Ilias Bantekas, Susan Nash and Mark Mackaral, *International Criminal Law* (2001); Antonio Cassese, *International Criminal Law* (2003); Kriangsak Kittichaisaree, *International Criminal Law* (2001); Mauro Politi and Giuseppe Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001); William Schabas, *An Introduction to the International Criminal Court* (2001); Dinah Shelton, *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000).

<sup>4</sup> Christoph Safferling, *Towards an International Criminal Procedure* (2001) 378.

provisions contained in the major human rights conventions.<sup>5</sup> The ‘truly international criminal procedure’<sup>6</sup> which Safferling’s work seeks to help establish is therefore a synthesis of divergent criminal procedures and international human rights law.

The discussion regarding comparative criminal law is thorough and prompts a wealth of interesting conclusions. To take just two examples, the author’s inquiry into the origins of the criminal trial is concise and informative,<sup>7</sup> and his analysis of the differences between inquisitorial and adversarial modes of trial is lucid. These analyses culminate in a compelling discussion of rules governing the cross-examination of witnesses.<sup>8</sup>

As regards international human rights law, Safferling examines an impressive range of (quasi-)judicial pronouncements (most notably the work of the United Nations Human Rights Committee and the organs established under the *European Convention on Human Rights*) to deduce common principles governing the conduct of criminal trials. As his analysis shows, the different systems of criminal procedure do not always meet the standards demanded by international human rights law.<sup>9</sup> At the international level, the approach of the ICTY to the detention of indicted individuals provides a case in point. As Safferling notes, in the early stages of the ICTY’s existence there was an informal presumption against provisional release during the investigation. While this approach has changed over time (once cooperation with the former Yugoslav countries began to improve), Safferling is right to note that the initial practice was at odds with the presumption of innocence and the right to liberty, which mandate that detention during the pre-trial stage only occur in exceptional circumstances.<sup>10</sup>

Inevitably, given the immense task that the author has set himself, his analysis is not always of the same depth. The issue of sentencing, for example, is dealt with in a mere four pages, which primarily summarise the ICTY’s case law and neglect to explore differences between the respective national legal systems.<sup>11</sup> Also, some interesting issues arising out of the ICTY’s recent practice have not been addressed at all. This is perhaps attributable to the rapid evolution of international criminal procedure. With the benefit of hindsight, the section on guilty pleas,<sup>12</sup> for example, might have been expanded. As the *Plavsic*

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<sup>5</sup> See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 14–15 (entered into force 23 March 1976); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, arts 6–7 (entered into force 3 September 1953) (*‘European Convention on Human Rights’*); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, art 8 (entered into force 18 July 1978); *African Charter on Human and Peoples’ Rights*, adopted 27 June 1981, 1520 UNTS 217, art 7 (entered into force 21 October 1986).

<sup>6</sup> Safferling, above n 4, 366.

<sup>7</sup> *Ibid* 5–16.

<sup>8</sup> *Ibid* 283–8.

<sup>9</sup> *Ibid* 66–73.

<sup>10</sup> *Ibid* 133–50.

<sup>11</sup> *Ibid* 314–18.

<sup>12</sup> *Ibid* 272–6.

proceedings before the ICTY show,<sup>13</sup> prosecutors at the international level have been prepared to dismiss charges even in respect of accusations of genocide,<sup>14</sup> a crime often considered non-derogable and condemned as the 'crime of crimes'.<sup>15</sup> These developments (which occurred after the publication of Safferling's book) raise important questions regarding the prosecution's discretion in formulating and amending indictments, and the negotiability of proceedings. The evolving rules of international criminal procedure cannot ignore such questions.

The same applies to the issue of *amici curiae*, which has caused much debate in the course of the pending *Milosevic* trial before the ICTY.<sup>16</sup> In response to Mr Milosevic's refusal to appoint defence lawyers, the Trial Chamber, in an unprecedented step, appointed three lawyers (Steven Kay, Branislav Tapuskovic and Timothy McCormack) as friends of the court in order to secure a fair trial for the accused.<sup>17</sup> Again, as with the case of plea agreements relating to grave crimes, it is by no means certain how this approach accords with the traditional understanding of the role of counsel, and the human rights of the accused. While Safferling cannot be blamed for not having foreseen this (indeed unexpected) problem, it certainly merits discussion in subsequent works.

Beyond these minor quibbles, Safferling's work presents two larger problems. Firstly, the comparative analysis of different legal systems does not always meet the standard of impartiality that the author has set for himself. This is particularly evident in his analysis of jury trials, which fails to be presented in a balanced, unbiased way. Admittedly, Anglo-American lawyers have themselves long criticised the jury system which, especially in England, has undergone considerable changes in recent decades.<sup>18</sup> However, for a comparative analysis to discount the jury system as an 'anachronistic'<sup>19</sup> and 'dubious institution'<sup>20</sup> that

<sup>13</sup> *Prosecutor v Plavsic (Initial Indictment)*, Case No IT-00-40-I (7 April 2000); *Prosecutor v Krajisnik and Plavsic (Amended Consolidated Indictment)*, Case No IT-00-39&40-PT (7 March 2002); *Prosecutor v Krajisnik and Plavsic (Plea Agreement)*, Case No IT-00-39&40-PT (30 September 2002); *Prosecutor v Plavsic (Decision Granting Prosecution's Motion to Dismiss Counts 1, 2, 4, 5, 6, 7 and 8 of the Amended Consolidated Indictment)*, Case No IT-00-39&40/1-S (20 December 2002); *Prosecutor v Plavsic (Sentencing Judgment)*, Case No IT-00-39&40/1-S.

<sup>14</sup> *Prosecutor v Krajisnik and Plavsic (Plea Agreement)*, Case No IT-00-39&40-PT (30 September 2002); *Prosecutor v Plavsic (Decision Granting Prosecution's Motion to Dismiss Counts 1, 2, 4, 5, 6, 7 and 8 of the Amended Consolidated Indictment)*, Case No IT-00-39&40/1-S (20 December 2002).

<sup>15</sup> *Prosecutor v Kambanda (Trial Chamber Judgment and Sentence)*, Case No ICTR-97-23-S (4 September 1998) [16]; *Prosecutor v Serushago (Trial Chamber Sentence)*, Case No ICTR-98-39-S (5 February 1999) [15]. On the special character of the crime of genocide, see *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23; Cassese, Gaeta and Jones (eds), above n 3, 335; and for a comprehensive discussion, William Schabas, *Genocide in International Law: The Crime of Crimes* (2000).

<sup>16</sup> *Prosecutor v Milosevic*, Case No IT-02-54 ('*Milosevic*').

<sup>17</sup> See *Milosevic (Order Inviting Designation of Amicus Curiae 'Kosovo')*, Case No IT-02-54 (30 August 2001); *Milosevic (Order Appointing Amicus Curiae)*, Case No IT-02-54 (22 November 2002). Timothy McCormack succeeded Michail Wladimiroff, who had initially been appointed but subsequently resigned from his position as *amicus curiae*.

<sup>18</sup> For criticism of the jury system, see Geoffrey Robertson, *Freedom, the Individual and the Law* (6<sup>th</sup> ed, 1989); Mark Findlay and Peter Duff (eds), *The Jury under Attack* (1988). The changing role of the jury in English law is also addressed by Safferling, above n 4, 210-11.

<sup>19</sup> Safferling, above n 4, 212.

<sup>20</sup> *Ibid* 216.

'tends to run counter to respect for the dignity of human beings'<sup>21</sup> is both unfortunate and unnecessary.

The second point is more fundamental but, unlike the first, is beyond the author's control. As is evident from the preface,<sup>22</sup> research for the book was completed in 2000. Unfortunately, this has prevented Safferling from properly taking into account the comprehensive *Rules of Procedure and Evidence*, adopted on 30 June 2000.<sup>23</sup> Safferling has tried to compensate for this by attaching short sections to the majority of chapters. However, the brevity of these sections and the failure to fully integrate them into the analysis prevents them being entirely redemptive. As a result, his book does not properly address what would seem to be one of the more interesting questions — to what extent does the ICC's own procedural law meet the demands of international human rights law? Assessing the ICC's position within the 'unique legal order'<sup>24</sup> therefore remains a task for future research.<sup>25</sup>

These problems notwithstanding, the breadth of Safferling's analysis is enormous and his knowledge of both criminal and human rights law impressive. It is to be hoped that the ICC's prosecutors and judges share the author's concern for human rights, upon which the evolving law of international criminal procedure must undoubtedly be based.

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<sup>21</sup> Ibid 215.

<sup>22</sup> Ibid vii.

<sup>23</sup> *Report of the Preparatory Commission for the International Criminal Court: Addendum I — Finalised Draft Text of the Rules of Procedure and Evidence*, UN Doc PCNICC/2000/1/Add.1 (2000). For a comprehensive analysis of this instrument, see Roy Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2<sup>nd</sup> ed, 2001) 237–702.

<sup>24</sup> Safferling, above n 4, 378.

<sup>25</sup> How the ICC approaches questions of criminal procedure not only depends on the text of the *Rules of Procedure and Evidence*, but also to a large extent on its future practice. Even at this stage however, it is interesting to note that pursuant to art 51 of the *Rome Statute*, the states parties to the ICC have reserved the right to adopt and amend the *Rules*. Considering that other international judicial bodies place these powers in the hands of judges, the reservation of this right suggests that states parties wish to keep a firm grip on subsequent developments.

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