CHAPTER 7

General Principles of Procedural Criminal Law envisioned by ICTs

1 Procedural Nature and Characteristics of Proceedings before ICTs

1.1 The ICTY-ICTR System: A Merge of Common Law and Civil Law Procedural Elements

1.1.1 Introduction

With the creation of the ad hoc international tribunals (ICTY and ICTR) and the International Criminal Court, the international community did enter into a new phase in the internationalization of criminal justice. Whereas the ad hoc courts extracted principles of substantive and procedural criminal law from common law and international treaty-law, the ICC merges adversarial and inquisitorial law traits. Its Statute and Rules of Procedure and Evidence combine elements of both systems into procedural guarantees for truth finding and fair trial, while reflecting ICTY-ICTR experience.

1.1.2 Procedural Reform as a Basis for System Change

The trial practice of the ICTY illustrates a gradual shift to a judiciary having a more prominent role in accelerating trials. A similar trend also occurred at the ICTR.\(^1\) This development merits the question as to whether this shift can be qualified as one from primarily being common law in nature towards one with a more civil law accent. In 2000, the second President of the ICTY, Judge Gabriella Kirk McDonald, wrote that the tribunals’ RPE “are truly unique and are not simply a hybrid of the civil and common law systems.”\(^2\) Be that as it may, it is true that the RPE and practice of the ICTY do not seem to lean in any significant degree toward one or the other of these two primary legal traditions, although ICTY judges adopt an essentially adversarial form of proceedings.

Nonetheless, while the first few trials at the ICTY closely resembled common law criminal trials, the level of control being exercised by the trial

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chambers in the last decade reflected elements of a civil law approach. Consequently, a mixed jurisdiction surfaces that contains elements of both common law and civil law. The ICTY/ICTR yet never became a purely civil law tribunal since its Statutes embrace clear references to several adversarial or common law elements. For example, Article 16(1) ICTYSr. bestows the Prosecutor, rather than the judges, with the responsibility for the investigation and prosecution. It had the consequence that the judges never fully controlled the presentation of the cases they are asked to try. Another example relates to Article 21(4)(e) ICTYSr., which guarantees the accused the right to cross-examine the witnesses against him. This is also a typical adversarial element. It is hard to imagine that the RPE will ever abandon this principal right of the accused to cross-examine the witness in Court instead of solely before an investigating judge. Nevertheless, the ICTY practice gradually transgressed into a more civil law oriented court, thereby abstracting from the more common law centered approach that dominated the early practice of the ICTY. It should be noted, however, that neither system exists in a pure form, but that both systems “borrow from each other.” Two reasons for this tread may be identified:

(i) This evolutionary process is being fuelled to a large extent by the perception that ICTY trials are too lengthy and time consuming. In its first seven years, the ICTY rendered judgments in only twelve cases (Tadić, Erdemović, Delalić, Furundžija, Aleksovski, Jelisić, Kupreškić et al., Blaškić, Kunarac et al., Kordić and Čerkez, Todorović, Krštić).

(ii) This process is also being driven by the notion that the best way to address the situation is by providing judges with more authority to control the proceedings, thus reducing the length of trials. Under the umbrella of improving case management, this process has been ongoing for the last three years, especially since the 18th Plenary session in July 1998.

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4 Article 21(4)(e) ICTYSr. reads: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:...(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”
6 Id., 98.
7 Mundis, “From Common Law Towards Civil Law,” 368.