

Christiane Kamardi, Die Ausformung einer Prozessordnung sui generis durch das ICTY unter Berücksichtigung des Fair-Trial-Prinzips

Summary

The Shaping of Procedural Rules by the ICTY in View of the Right to a Fair Trial

The ICTY was the first international court for the prosecution of war crimes by way of international criminal law established by the UN Security Council in the 1990s of the 20th century following the Nuremberg IMT and the Tokyo IMTFE after World War II. With respect to the procedural law applicable, the Statute of the Tribunal contained only very few provisions, basically codifying the basic structure of the Tribunal and the court procedure and binding the Tribunal to the principle of fair trial. Article 15 of the Statute enabled the judges to develop and adopt adequate and detailed procedural rules.

Against this background, this paper deals with the development of procedural rules by the judges of the ICTY and attempts to assess the procedural regime established. After a short outline of the history of international criminal (procedural) law and the factors leading to the establishment of the Tribunal, the author raises the question, which factors and aspects are important for the development of procedural rules by international courts in general and what could make up a yardstick for the assessment of the procedural rules of the ICTY. In that context, she analyses the situation and approach of three other international courts (ICJ, ECHR, ECJ) to the development of procedural law and concludes that the assumption that international courts need to pass the 'test of general acceptance' in order to fulfil their mandate applies to the ICTY, too. She identifies the general perception of the respective court as fair, as a major element of this test. The general perception of a court as fair in turn, in her view, rests on the perception of three factors: firstly the formation and composition of a court – the protagonists, secondly its technique and approach to the administration of justice and thirdly the result of it – the court decisions as well as the procedural law developed, in the particular case of the ICTY.

The author then goes on to search for a detailed and workable standard of fair trial in criminal proceedings which are perceived to be fair as requested by the Statute and the 'world society' forming the 'court community' of the ICTY. She also gives a short analysis of the history of the

right to a fair trial and its incorporation into all major international human rights instruments.

In its main part, the paper examines the three factors previously enumerated. At first, the chapter on the protagonists of the Tribunal deals with the election criteria and modus and their contribution to the generation of a general perception of the Tribunal as being fair. The next chapter on the judges' approach to the administration of justice and development of law, in particular procedural law, explores the course of the judges' action in plenary sessions and individual decisions in ongoing proceedings. It outlines the sources of law introduced by the judges and the judges' way of incorporating them into the law of the Tribunal as well as their legal reasoning for the solution chosen. The third chapter deals with the outcome of it, the procedural regime of the ICTY. Firstly, it gives a short chronological summary of the development of the procedural rules since the establishment of the Tribunal in 1993 and briefly outlines the current court proceeding. It then selects a few individual aspects of the procedural law of the Tribunal and examines them in detail. It focuses on the rules on the disqualification of a judge, some specific aspects of the law on evidence, i.e. the implementation of the principle of equality of arms, hearsay evidence and the area of conflict between provisions for the protection of victims and witnesses on the one hand and the rights of the accused on the other hand, e.g. anonymous testimony. It also deals with the increasing number of guilty pleas on the basis of plea agreements and its implications. The author then attempts to categorize and qualify the procedural law developed by the ICTY.

In her final assessment, the author takes the view that such assessment of the Rules of Procedure and Evidence developed by the ICTY requires an overall view taking into account various factors.

First of all, this overall view needs to take into consideration that the ICTY was the first truly international tribunal of its kind. When the ICTY was set up, there were only the rudimentary Rules of Procedure of the Nuremberg IMT and the Tokyo IMTFE and the decisions made on their basis by these tribunals.

Formally, at the time of the creation of the ICTY the concept of a "fair trial" as a yardstick of the implementation and assessment of an international code of criminal procedure such as the Rules of Procedure and Evidence of the ICTY, had found its way into a number of international human rights conventions and other documents. It was generally considered to have been embodied into the world society's consciousness. However, the concept of a fair trial within criminal proceedings was not

substantiated and detailed enough at the international level so that a truly international tribunal that sees itself as a representation for the entire 'world society' and was intended as such by its founders, could have easily benefited from it for its own decisions and actions. Thus, there was no concrete yardstick as basis or benchmark for the decisions and actions of the ICTY. Apart from some general rules, the terminology of which was taken from the ICCPR, but with hardly any practical implementation and guidelines, the UN Security Council had assigned the development of the procedural law of the ICTY to the judges of the ICTY in accordance with Article 15 of the Statute – without providing them with appropriate tools for the creation of (procedural) precedent. In a figurative sense, the ICTY was and still is a body¹¹⁴⁵ of a 'world society' or 'international criminal court community' still under development that had neither at the point of its establishment nor today come to an agreement on the details of its core values and regulations derived from these values as is the case in national legal systems. Due to this level of development and the lack of own implementation mechanisms, the ICTY – like all international courts – depended and still depends on the cooperation of the court community and its acceptance in order to be able to fulfil its mandate. The court community's acceptance in return depends on their perception of the tribunal and its proceedings.

The factual particularities of its establishment must also be taken into account. During a persisting conflict – thousands of miles away from the scene of conflict – what makes the difference between this tribunal and common national courts? The problems in the field of cooperation with the states on the territory of the former Yugoslavia should also be mentioned, in relation to collecting evidence and arresting the accused. Even the support of the international community was and is not sufficient to all intents and purposes due to a complete lack of political will, financial constraints and a refocussing of world policy.

Furthermore, there are three additional areas of conflict imminent to international prosecution of war crimes which apparently are difficult to answer: The first one is the tension between the need to focus on the individual behaviour of the individual accused being subject to the particular criminal proceeding and at the same time the need to create to a comprehensive historical record of the events. Secondly, there is the

¹¹⁴⁵ Formally the ICTY is a subsidiary body of the United Nations in accordance with Article 29 of the Charter of the UN while the name chosen in the text "body of an international criminal law community" only applies for the permanent International Criminal Court.

conflict between meeting the requirements of criminal proceedings under the rule of law, which are generally considered to be fair and ensure the protection of the accused's rights on the one hand and being responsive to the individual suffering of the individual victim and witness at the same time on the other hand. What must not be neglected either is the conflict between the demand to bring the incomprehensible events of the past into the centre of criminal proceedings and the parallel demand to contribute to a peaceful future and to the reconciliation of the former warring parties.¹¹⁴⁶

The ICTY is to be considered and the establishment of a code of criminal procedure of the ICTY is to be assessed against this background. The named factors and areas of conflict affect all fields of activity and function of the ICTY. Nevertheless, during the twelve years of its existence, the ICTY has developed from a 35 pages report by the Secretary General of the UN to a functioning international criminal court with its own substantive law and its own Rules of Procedure and Evidence. It also has its own prison for pre-trial detention and its own regulations for it, a Victims- and Witnesses Unit, its own Legal Aid Programme and an association of the attorneys who are admitted to the Tribunal as defence attorneys (ADC-ICTY).

There is no doubt that this development was not without deficits and imperfections. As a matter of course, proceedings at the ICTY take very long. According to calculations of the *International War & Peace Reporting Institute*, the average accused spends almost three years in pre-trial detention in Scheveningen until judgement at first instance. If he appeals against the judgement, two and a half more years are to be added in general. This is a fact that "causes a pain in the stomach" in view of the fact that the accused's right to fair proceedings goes hand in hand with his right to be tried without undue delay, the latter being considered as one element of fair proceedings. In the end, there is a risk that for this reason, proceedings at the ICTY are not considered to be fair in general and the ICTY as a consequence cannot fully meet its designation.

As a matter of course, the application of law, that is literally still under development like the Rules of Procedure and Evidence of the ICTY which were changed more than 36 times from their first version in February 1994 to January 2006 and thus seem to be disposable to the judges

¹¹⁴⁶ *Dembour/ Haslam*, Silencing Hearings? Victim-Witnesses at War Crimes Trials, EJIL 15 (2004), 151, 152.

to a certain extent, is not unproblematic as a matter of principle under the aspect of legal certainty and legal clarity as elements of the rule of law. Without doubt, the deficits elaborated exemplarily within this paper, such as the deficits in the area of the judges' approach to the development of law and the finding of justice, e.g. their choice and use of legal sources, but also its dogmatic justification and the subsumption of given facts under the law are to be improved. The same holds true, for instance, for the inconsistent reference to or use of existing legal sources. An example of this may be the legal concept of the appearance of bias which was taken from the jurisdiction of the ECHR and incorporated into the law of the Tribunal, while the Tribunal did not even consider taking on the legal concept of the appearance of the violation of the basic principle of equality of arms from the jurisdiction of the ECHR without providing justification for it.

Not to be disregarded either are the difficulties when implementing the Rules of Procedure and Evidence which result from the fact that the criminal proceedings of the ICTY are adversary in their basic structure and therefore not easily compatible with inquisitory elements implemented via a rather eclectic approach taking into account the special situation of the ICTY and the different concepts for ensuring a fair trial. As has been shown, legal concepts ensuring the fairness of criminal proceedings at national level are not necessarily suited for accomplishing the same in an international context.

With all legitimate criticism, at this point the question about a realistic alternative to ICTY's chosen pragmatic approach comes up. Almost fifty years of almost complete standstill in the field of international criminal law preceded the establishment of the ICTY. There simply was no modern international criminal (procedural) law meeting the current demands on criminal proceedings. As a matter of course, there would have been the option to wait for an agreement of the world society at least on concrete core principles of fair criminal proceedings for the prosecution of war crimes. However, this would have meant that international prosecution of the war crimes committed in the territory of the former Yugoslavia would not have been possible. Since the prosecution at national level, as has been stated in the paper, seemed to be very difficult in major parts of former Yugoslavia and only started rather slowly during the past years, an abandonment of the prosecution at international level would have meant that there would have been no prosecution of the war crimes at all – with immense consequences not only for the pacification and reconciliation of societies on the territory of former

Yugoslavia, but also for the increasing self-perception of the world society as a community based on law.

The author takes the view that tested against the background described above the Rules of Procedure and Evidence of the ICTY and the proceedings conducted on their basis in general deserve to be referred to as 'fair' and that they are in general perceived as such by the court community.

This general perception of the procedural rules and the proceedings conducted on their basis as fair is on the one hand backed up by other international institutions like, for instance, the ECHR, which in its decision *Naletilic v. Croatia*¹¹⁴⁷ confirmed that proceedings at ICTY adhere to all procedural guarantees according to the European Convention for Human Rights and are therefore in line with it. The establishment of the ICTY at the beginning of the 1990s of the 20th century started a development in the field of international criminal (procedural) law. This ultimately led to the establishment of a permanent International Criminal Court by virtue of an agreement under international law having entered into effect on 1 July 2002 – a development that may not have taken place without its *ad hoc* predecessors ICTY and ICTR which showed that international criminal proceedings can work. Furthermore, the case law and experience of the ICTY could have influenced the discussion about the procedural law of the permanent International Criminal Court in many ways and might at some point have prevented it from the mistakes which the ICTY made during its first years.

Basic principles developed by ICTY found their way into national law or served national courts as stimulus as proceedings against Pinochet have shown in the United Kingdom, for instance – a development that implies that proceedings in front of the ICTY are perceived to be fair and that the Tribunal is accepted in these states.

A corresponding development can be observed in the follow-up states on the territory of former Yugoslavia particularly in recent years which may lead to the conclusion that the Tribunal is considered to be fair and

¹¹⁴⁷ *Naletilic v. Croatia*, Decision of 4 May 2000, Complaint 51891/ 99, 1.b), EuGRZ 2002, 143.

that it is generally accepted.¹¹⁴⁸ This holds true for Bosnia-Herzegovina as well as for an increasing part of the populations in Croatia and Serbia even if there is still a long way to go as regards the latter. Here the expectations should not be too high in the near term considering how long the Nuremberg trials at the IMT were perceived as “victor’s justice” in major parts of the German population and how long they were rejected, but are today even in Germany – more than fifty years later – considered fair and positive by a vast majority.

It remains absolutely vital that the ICTY continues to work on the fairness of its proceedings in particular in view of the completion of its mandate and that it does not lose sight of it particularly in relation to the framework of the ongoing implementation of the *Completion Strategy* and does not endanger the achievements and thus the overall fulfilment of the mandate of the ICTY. Correspondingly, the Tribunal, and in this case especially the prosecution, should be very careful, for instance, when concluding *plea agreements* and other acceleration measures. Apart from that, the entire process should be more transparent and should be made accessible in particular to the peoples on the territory of former Yugoslavia. Therefore, it seems hardly understandable why the Security Council repeatedly underlined the importance of the *Outreach Programme*, but up until today has not included it into the ICTY budget. For meeting its mandate, which mandatorily requires proceedings before the Tribunal generally perceived to be fair, the Tribunal should not succumb to political and financial pressure. Correspondingly, the ‘world society’ should stay on track till the end – a decision that should be easy in view of the fact that the budget of the past 10 years, with an annual budget of approx. 100 million dollars each, amounts to half the price of a B2 stealth bomber.¹¹⁴⁹

¹¹⁴⁸ *Mladjenovic*, The ICTY: The Validation of the Experiences of Survivors, in: Ratner/ Bischoff (Hrsg.), *International War Crimes Trials: Making a Difference?*, 2003, 59, 64.

¹¹⁴⁹ Wolfgang Schomburg, ICTY Judge, in: *Caroline Fetscher*, *Der Deutsche*, Die Zeit, 10/2002.