

**A SUMMARY OF LEGAL SYSTEM
AMALGAMATION: AN INTRODUCTION TO
JUDGE PATRICK L. ROBINSON'S OBSERVATIONS
ON THE HYBRID NATURE OF THE RULES OF
PROCEDURE AND EVIDENCE OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR
THE FORMER YUGOSLAVIA**

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On 14 February 2009, His Excellency Judge Patrick L. Robinson of Jamaica, President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), spoke at the Nova Southeastern University (NSU) Shepard Broad Law Center, for Black History Month. The event was initiated by the Consul General of Jamaica and co-sponsored by the Caribbean Law Programs, the Inter-American Center for Human Rights of NSU Law Center, the Latin American Caribbean Forum of NSU's Graduate School of Humanities and Social Sciences, and Unique Creations, Inc. After the presentation, Judge Robinson submitted his speech for publication to the ILSA Journal of International and Comparative Law. Judge Robinson's comments are insightful and timely in their exploration of the interaction between the common law and civil law systems in the structure and procedure for the ICTY.

Judge Robinson has served as the President of the ICTY since 17 November 2008, and has been on the ICTY since 1998. He has served as the Presiding Judge for Trial Chamber III since 2004 and oversaw the historic trial of the former President of Yugoslavia, Slobodan Milošević, and the first former Head of State to be brought to trial for war crimes. The ICTY is a body of the United Nations established to prosecute the alleged perpetrators of serious crimes committed during the wars in the former Yugoslavia.

The ICTY was established by United Nations Security Council Resolution 827 on 25 May 1993. As explained in that resolution, the ICTY was created for "the sole purpose of prosecuting persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by

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the Security Council.”¹ In its sixteen years, the ICTY has completed proceeding against 116 individuals. These proceeding have resulted in fifty-seven convictions and ten acquittals.² In accordance with the ICTY Completion Strategy, the work of the ICTY was set to end in 2010.³ In his address to the United Nations General Assembly on 8 October 2009, however, Judge Robinson indicated that “all but four of [the ICTY] trials will conclude in 2010.”⁴ Most notably, the trial of Radovan Karadžić, “former President of Republika Srpska, head of the Serb Democratic Party (SDS) and Supreme Commander of the Bosnian Serb Army (VRS),” is scheduled to begin on 26 October 2009.⁵ All appellate proceedings of the ICTY are expected to end by mid-2013.⁶

Since its creation, the ICTY has merged components of both the civil law and common law systems. As Judge Patrick Robinson has previously explained, “[t]he debate as to the nature of the legal system established, by the International Criminal Tribunal for the former Yugoslavia's Statute and Rules of Procedure and Evidence is ultimately unproductive and unnecessary; it is neither common law accusatorial nor civil law inquisitorial, nor even an amalgam of both; it is *sui generis*.”⁷ In the following article, Judge Robinson further explores this amalgam by explaining the civil law and common law components of the ICTY in terms of the role of the judges and parties, evidentiary matters including written statements, judicial notice, and witnesses.

Judge Robinson starts with the premise that civil law trials are inquisitorial and judge driven and that common law trials are adversarial and party driven. First, he notes that the role of the Judges at the ICTY is more akin to the civil law model because, in the absence of a jury, “the Judges are both triers of fact and law.”⁸ Later in the article, he reinforces the civil law tendencies of the judges by explaining the power of the Trial

1. S.C. Res. 827, at 2, U.N. Doc. S/RES/827 (May 25, 1993).

2. Message from Patrick L. Robinson, President, Int'l Criminal Tribunal of the Former Yugo. (July 2009), available at <http://www.icty.org/sid/142> (last visited Nov. 11, 2009) [hereinafter ICTY].

3. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

4. Patrick L. Robinson, President of the ICTY, Address to the United Nations General Assembly (Oct. 8, 2009), available at http://www.icty.org/x/file/press/pr_attachments/pr1335a.pdf (last visited Nov. 9, 2009).

5. Press Advisory, The Hague, Radovan Karadžić Trial to Begin on 26 October 2009, (Oct. 16, 2009), available at <http://www.icty.org/sid/10250> (last visited Oct. 18, 2009).

6. Robinson, *supra* note 4.

7. Patrick L. Robinson, *Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia*, EUR. J. INT'L L. 11(3) 569–589 (2000).

8. Patrick L. Robinson, *The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia*, 16 ILSA J. INT'L & COMP. L. 5 (2009).

Chamber to call witnesses under ICTY Rule 98 after the parties have completed their evidence.

Next, Judge Robinson explains that the presentation of evidence at the ICTY more closely resembles the common law system. In the ICTY, “an independent Prosecutor is responsible for the investigation and prosecution of crimes.”⁹ Thus, the presentation of evidence relies on the parties as in the common law system rather than the judge as found in the civil law system. Yet, the rules concerning admissibility of evidence more closely follow the civil law model due to the fact-finding role of the Judge in the ICTY. In particular, Judge Robinson explains “the interaction between the systems” in the ICTY by observing that “although the Tribunal’s trial process is at base common law adversarial—with a Prosecution and a Defence—we use the civil law procedure of written statements *and* it is the Judge who determines whether there is cross-examination.”¹⁰

Judge Robinson then illustrates this integration by describing 2006 amendments to the Rules of the ICTY. Rules 92*ter* and 92*quater* allow for the admission of written evidence under certain conditions. He concludes that these rules are “examples of civil law inspired procedures that have been introduced for the purpose of expediting proceedings.”¹¹ He then explains the use of judicial notice in the ICTY as a common-law inspired procedure to expedite the collection of evidence. ICTY Rule 94, however, goes further than “judicial notice of facts of common knowledge” by recognizing “adjudicated facts or documentary evidence from other proceedings at the Tribunal.”¹²

In considering the role of witnesses in the ICTY, Judge Robinson notes another interesting amalgamation of systems. While the ICTY adopts the civil law approach of treating witnesses as “witness[es] for the Court, not for a party,” it still uses a common law approach in a fairly liberal adaptation of the hostile witness rule for cross-examining one’s own witness. Conversely, the Tribunal employs a civil law approach by allowing the Trial Chamber to call its own witnesses.

Finally, Judge Robinson observes that the ICTY has also adopted two time-saving measures—one common law based and the other civil law inspired. Rule 98*bis* permits the entry of a judgment of acquittal after the close of the Prosecutor’s case when “there is no evidence capable of

9. *Id.* at 11.

10. *Id.* at 12 (emphasis in original).

11. *Id.*

12. *Id.*

supporting a conviction.”¹³ Judge Robinson observes that this measure is very similar to “No Case to Answer” in the Commonwealth countries and the United Kingdom. After that explanation, Judge Robinson describes the pre-trial procedure in Rule 73bis (D) that allows the Trial Chamber to reduce the number of counts in an indictment should the Prosecutor decline to do so. In considering a Prosecutor’s request to amend an indictment an ICTY Trial Chamber has congruently observed:

National legal systems generally permit amendments both before and during trial. Civil law systems and the common law systems treat the process differently. In many civil law systems, indictments are subject to judicial scrutiny by the investigating judge before the trial. Due to the inquisitorial nature of those systems, amendments are not as contentious as in the common law system, but if new allegations are based on different facts, it is common for the prosecutor to bring a separate indictment on those allegations.¹⁴

Judge Robinson concludes by observing that Rule 73bis (D) has frequently been employed by the Trial Chambers and has resulted in a significant reduction in the scope of indictments.¹⁵

At the close of his address, Judge Robinson comments that “the system that is evolving at the Tribunal is neither party-driven nor Judge-driven; it is fairness-driven.”¹⁶ Indeed, the combination of legal systems apparent in the ICTY Rules has yielded a flexible system intended to employ ordinary legal procedures to an extraordinary legal institution and its proceedings. I am grateful to Judge Robinson for sharing with us his clear insights on the systemic fusion observable in international criminal tribunals.

13. United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, U.N. ICTY, U.N. Doc. IT/32/Rev. 43, Rule 98bis (Sept. 22, 2009).

14. Prosecutor v. Milan Kovačević, (ICTY Mar. 5, 1998), http://www.icty.org/x/cases/milan_kovacevic/tdec/en/80305ai2.htm (last visited Oct. 18, 2009).

15. Robinson, *supra* note 8, at 13.

16. *Id.* at 14.