Trials of Imperfection*

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Abstract. The speaker identifies the scale of the task facing the ICTY and ICTR. He speaks of the necessary procedural and personnel imperfections by which their performance is bound to be limited along with the imperfections of the people of the regions whose war crimes they deal with. He deals with some inevitable shortcomings in the lawyers and judges working at the tribunals and argues for the need to have personnel of the very highest quality doing the tribunals' work. He highlights the need to be truly objective about the tribunals and their work but expresses optimism about their potential beneficial effects.

1. INTRODUCTION

You discover that you have a brain tumour. You are an internationalist and devoted to the United Nations. You decide to have your tumour dealt with by a Zimbabwean surgeon, a Japanese assistant surgeon, a Colombian anaesthetist, a Canadian nurse and a Basque pathologist. Or perhaps you do not. Maybe it would be a little dangerous to form a team of people with no common culture, background or discipline. Yet that is what we have done at the International Criminal Tribunal for the former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda ('ICTR'). We have formed a team composed of just such disparate nations – lacking

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connection of a common culture or background – to create a new legal system to try the world's most serious cases.[1]

The task of establishing this new untested criminal justice system for crimes committed in the former Yugoslavia and in Rwanda is enormous and bold. The Security Council established the two *ad hoc* Tribunals using its wide powers under Chapter VII of the Charter of the United Nations. The terms of reference of each Tribunal are identified in the relevant UN Statute. The procedures to be followed are identified in the Statute and in the Rules of Procedure and Evidence made thereunder by the judges. The Tribunals' procedures are thought to be essentially adversarial – that is, somewhat like the common law procedures practiced in the USA, the UK, Australia, etc. (procedures made familiar even for 'civil' system lawyers by innumerable films like *Witness for the Prosecution* (starring Dietrich and Lawton) or like *Rumpole* or *Kavanagh Q.C.* on the television). Otherwise the procedures are entirely free-standing. It is sometimes said that they are or are becoming an amalgam of common law and civil system procedures.

There are dangers in not having used one of the tried and tested systems of criminal law. But it would probably have been politically impossible and actually undesirable to do so.

As an immediate litmus test of whether it has been worthwhile consider this: People in Rwanda have pleaded guilty (although one sought to 'undo' his plea but failed) before judges and with lawyers from countries other than their own.[2] At the ICTY in The Hague, five cases have completed all stages including appeal. Four other cases are at the appeal stage. Four cases are at trial. There are 37 men in custody awaiting trial or on trial. The indicting of ever higher ranking soldiers, police officials, and politicians reached its natural limit with the indicting of Miloöevic, although numerous high-ranking persons remain under active investigation. The arrest or surrender of people indicted of higher rank progresses.

From this, may we now say that lawyers of integrity are able to contribute by operation of the rule of law in resolution of the worst instances of criminality and towards the resolution of long standing conflict and distress?

Before answering, let us first return to an analogy of a serious medical operation performed by a team of medics recruited *ad hoc* from around the world. This enterprise – like the medical operation – is *bound* to be associated with shortcomings, at least for the present. There will be imper-

1. This comparison is *not* intended in any way to characterise the Balkan conflict. Rather – and only – is it aimed at showing the scale of the task the lawyers and others took on. The task matches in difficulty the imagined difficulty of conducting a medical problem of the greatest gravity with such a diverse international group.
2. One example is Omar Serushago, son of a leading national politician in Rwanda whose pleas of guilty and co-operation led to the arrest of seven top republican leaders; Jean Kambanda was the Prime Minister who unsuccessfully sought on appeal to 'undo' his plea of guilty to genocide.

fections. To answer questions about appropriateness and efficacy of judicial intervention and about the contribution of lawyers, it is appropriate to examine those shortcomings – imperfections – but to do so with a positive and constructive approach. I will attempt to identify some difficulties we face in many areas. But do not be downhearted. These difficulties, I think, can be a spur to success; and success is what I think we are achieving.

2. TRIALS OF IMPERFECTIONS

A first imperfection may be me. What credentials do I have? I was recruited by the previous chief Prosecutor Justice Louise Arbour,[3] who wanted, it may be, to benefit from the two bits of particular good fortune that UK barristers enjoy. First, because they are all sole practitioners they are often independent and should be fearless in pursuit of the proper goals of their work. Second, because they can prosecute and defend, do criminal and civil cases and, as I have done for many years, sit as part time judges, they see the courts in which they practice from all perspectives. I came to the Tribunal with only a limited background in human rights work and with no relevant experience in international law. That happens to be the case for all the senior trial lawyers who prosecute the cases at the ICTY although we are very well supported at the Tribunal by specialist sections of lawyers. So, I am the engineer in the engine room working the machinery created by others, even serviced by other specialists.

Like every engineer I have views about what the captain should be doing on the bridge, and I will let you have some of these views. But the principal value of these remarks should be to tell you of the reality of these trials.

I was recruited to prosecute one very large case. It is as yet incomplete after 16 months in trial and years in preparation. It concerns a middle-ranking Bosnian Croat politician and a Bosnian Croat military commander in Central Bosnia. It will be the ICTY's first case concerning a politician to reach a conclusion. The issues are wide ranging in time and space. The atrocities are comparatively modest in terms of numbers killed.[4]

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3. Now a Justice of the Supreme Court of Canada.
4. To speak of atrocities as being "comparatively modest in terms of numbers killed" may seem initially callous. Those bereaved might think any grading of atrocities inappropriate – but then the bereaved of any murder victim might think the crime from which they suffer as being beyond comparison or mitigation. But a tough, analytical approach to these crimes is vital. Not only must the Tribunal be prepared – and it may be struggling to achieve this – to distinguish in sentencing terms between horrific crimes of various types but there is a more profound need for us to be prepared to grade the offending with which these Tribunals deal. Any person convicted of a war crime cannot be demonised for that fact alone as worthy of the great opprobrium and cast out altogether from society. Her/his crime, even if and when labelled genocide, does not simply by reason of the label match every other crime bearing the same name. And it may be important to ask why individuals with no criminal backgrounds advance along a path that dehumanises them as they show progressively

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I was also asked to take over a small case concerning a Bosnian Serbian camp executioner – called Jelisić – who publicly gloried in the title 'The Serbian Adolf.' He had pleaded guilty to a number of murders as crimes against humanity but declined to plead guilty to genocide. The Trial Chamber acquitted him of genocide and sentenced him to 40 years imprisonment for the killings. It did this after the close of the prosecution's evidence without calling for or even allowing argument about the facts and law.

The case is on appeal. We are arguing, among other things, that the Chamber threw away a great opportunity in taking the course it did. The question of whether an executioner low down in the killing "management chain" can be guilty of genocide could have been usefully and constructively argued. This argument and its resolution could have provided guidance to those who have to indict and to those who have to try such crimes, particularly in Europe.[5] It would also have helped the Bosnian Muslim inhabitants of the town where he killed – Brčko – to come to terms with what they certainly describe as genocide.

Now we will have only the one stage of argument in the Appeal Chamber to go on. Interestingly – and for further comment later – Jelisić alone from the killing 'management chain' in his town stood trial. Only one other person (in a position comparable to his) has been publicly indicted. No relevant politician has been charged.

3. Cultural Imperialism

One last general observation. The fact that the language of my remarks is in English amounts to a form of cultural imperialism. The cultural imperialists regard themselves as having the good fortune of working on their own terms, in their own language. In truth they are the losers. Their cultural base is narrower than the bases of those who *have* to work with, even to accept, a foreign culture without the choice of using *just* their own.

May we see in the development of the ICTY, ICTR and even the International Criminal Court ('ICC') reflections of a cultural imperialism not just of language but of the common law of the countries that have English as their mother tongue? If so, should we be concerned? A second litmus test? Suppose God sent you to earth fully educated and informed in everything save legal systems and suppose that he told you to discover

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inhumanity to others. Their journey along the path does not mean that they will go to any limit of depravity. How the journey for any individual offender starts and how it stops or may be stopped are all questions the answers to which will help the world. Facing all this means we *have* to accept – however unpalatable – that there can be different levels of appalling offending.

5. In Germany a verdict of genocide has been returned in respect of criminality similar to, but probably less grave than, Jelisić's conduct in the former Yugoslavia. *See* Prosecutor *v.* Nikola Jorgić, Judgement of BGH, Case No. 3StR215/98 BGHSt 45, 64.

who had broken the rules of human kind in Kosovo. Would you immediately decide to have two opposing teams of lawyers playing out the conflict by calling a few witnesses on a selective basis to say what they saw of events? Would you choose to do God's job by having these teams perform a mental tug of war, one team dedicated to establishing, the other to obstructing, 'proof' of guilt? Would you, in short, have a common law trial? Or might you apply your powers of research and reason in a different way?

4. Choice of Countries

The most notorious of our Tribunals' imperfections is to be found in the original choice of territory subjected to their judgments: not US territory, not Russian, not British – and perhaps not properly a matter for comment by a British national. And, in any case, optimistic as I indeed am about the Tribunals' potential for good, the long term truth is that the rule of law applied to Yugoslavia and Rwanda now will inevitably – and by whatever mechanism – lead to the rule of law being applied elsewhere in due course.

5. Level of Offenders Indicted

It used to be a complaint that the ICTY only charged 'small fish.' Maybe there was some truth in that at some time. Maybe things were outside the control of the Tribunal which does, after all, have to rely on politicians or forces controlled by politicians to effect surrenders and arrests. But that is now history. 'Small fish' are left to local courts. The Tribunals concern themselves with the bigger prey or predators. And as for history? We have an English saying: "set a sprat [a very small fish] to catch a mackerel [a much larger fish]." It worked, did it not? It is now impossible or certainly very hard for anyone – even Western powers – to obstruct the call of the Tribunals' indictments.

5.1. Offenders

Most of our offenders are 'imperfect' without necessarily being, or having been, out-and-out villains. They may not be like robbers or burglars who make a decision to break the rules under which they live, recognizing that they will suffer penal consequences if caught. Many – most – would be capable of living blameless lives but for circumstances of war.

This brings difficulties in relation to proof of the relevant criminal state of mind. Our Statute and Rules require that guilt be proved beyond reasonable doubt. That means that the relevant state of mind has to be proved to this same high standard. The politician I prosecute claims a blameless earlier life first in the Communist Party, then in the Croat HDZ Party. He

was only about 30 years old at the time. He has called evidence to show that he became a hero – like the student in Tianamen Square – obstructing convoys protected by soldiers. For much of the conflict he and the Croats he led were undoubtedly in a Bosnian Croat pocket where Bosnian Croats lived in fear of becoming the underdogs.

We have to prove, as against him and his military commander co-accused, not only that soldiers were committing criminal acts. We have to show that the accused were fixed with criminal knowledge and intent. The barometers – or gauges – of their mental states will have changed over time, affected by crises not all of their own making. We must prove that the meter reading of their minds passed beyond merely the point where danger was signalled *to* them. The Chamber must find a reading in that part of the meter where continued action or inaction reflected – and only reflected – an abandonment *by* them of legality to the temptations, needs or pressures of the hour and day.[6]

Even with the offender known as Serbian Adolf – against whom we wish to prove an intention "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,"[7] there are difficulties. We must grapple with the reality that before the conflict he was a small-time crook with no revealed psychopathic tendencies or anti-Muslim hatred.

Imperfect – sometimes inadequate – people can and do become war criminals. But there must be no headlong rush to believe they had the very precise mental states that would reveal guilt. If you think I overstate these difficulties consider how the argument would have been had Mrs Thatcher, her government, and service chiefs, ever had to face analysis over her thinking on the sinking of the Belgrano in the Falklands. And what of Churchill, his state of mind and Dresden? Given the famous inability to open a man's head and observe his mental state, it may be obvious that proving mental state is not an easy task.

6. Investigations and the Investigators

We do not have a police force but we do have investigators from all around the world. They come with different cultures and professional traditions plus dedication and enthusiasm. They come to work with lawyers from around the world, but who should lead whom? Who would you, the international public paying for this exercise, want to initiate the investigations that lead to indictments and to trials? The Prosecutor for the time

6. Examples of the wording drawn from the Statute and to be found in the indictments include "[…] caused, planned, instigated, ordered or committed, or aided and abetted the planning, preparation or execution of, a crime against humanity, that is, the widespread or systematic persecutions of Bosnian Muslim civilians on political, racial, ethnic or religious grounds […]," constituting a crime against humanity, as recognized by Arts. 5(h), 7(1), and 7(3) (persecutions on political, racial, or religious grounds) of the Statute of the Tribunal.
7. Statute of the ICTY, Art. 4(2).

being cannot, of course, decide and manage everything. So should it be investigators or lawyers – or someone else – who map out the places where we will work? What role should investigators take once a prosecution has been started? Should everything be left to lawyers?

In England and, I dare say, other jurisdictions policemen have a pivotal role in deciding who is investigated and for what. They discover the crimes (which in a national setting can be easily recognized), investigate them and charge the offenders. Lawyers come in only later when particular advice is needed, when charges have to be formulated and when the case reaches trial. In civil law systems things may be different with the lawyer or investigating-judge controlling the course of inquiries.

In some countries, after the start of a trial, policemen stay as team members with the case. In other – civil law – systems the policeman's function seems to be spent once he hands over a dossier to the lawyers. From my experience in The Hague, it appears that policemen from some countries expect neither to see the inside of a courtroom nor to be seen from within the court as a significant part of the prosecution team.[8]

Inevitably – I think rightly – qualified lawyers will assume a larger role in the investigations of cases in the ICTY than formerly and will take a central role in deciding who to look at. They and investigators may have different perspectives. Investigators may, from experience, look at complex situations and say "well, he and she are clearly guilty, the evidence exists and is available, lets charge them." The people who would be vulnerable from a wider inquiry might escape (remember how in the Jelisić case no politicians were pursued).

Lawyers who lack the practical experience of policemen might be more willing to require a wider investigation and to charge politicians however difficult the resulting case would be. On the other hand it may not be wise to entrust everything to lawyers – it rarely is. Nor would it be sensible to credit lawyers with a monopoly of wisdom – they do not have such a monopoly. Combining disciplines and skills of investigators and lawyers – in the way the ICTY and ICTR are tending to do – is probably a good model for the future. It is probably what the wider community would prefer.

8. Investigators at the ICTY may have been downgraded in the eyes of the Trial Chambers through lack of 'profile.' Recently – on an interlocutory appeal – the Appeals Chamber ruled as inadmissible the statement taken from a man, now dead, by a Dutch investigator. In many countries statements of dead witnesses are admitted subject to a cautious approach to the evidence and, sometimes, to procedural safeguards. Here, very little credit was given to the careful mechanisms by which statements are taken by investigators. The (American) presiding judge of the Appeals Chamber appeared to place reliance on the fact that the Dutch investigator – a policewoman with many years of experience – did not speak English as her native tongue. And this despite the fact that the Dutch woman's English is excellent, indeed her rough notes – to herself when working – are in English.

7. The Lawyers

At the ICTY there is a clear desire on the part of the working prosecution lawyers to get the right answers from the right law properly applied. This involves hard work and demands an openness of mind, usually to be found in those who volunteer for such work. But it cannot be stressed enough how difficult or impossible it is for even comparatively young lawyers, with open minds, to let go their cultural legal past and grapple with the concepts of others.

Let me give two examples: *Dolus specialis* (*hensikt* in Norwegian, *Absicht* in German), a concept of the state of mind readily understood by many civil system lawyers is the equivalent of Sanskrit to common lawyers. The common law understanding of hearsay – a rule of self-obvious safety to common lawyers – leaves civil system lawyers unbelieving of their fellow jurists. How could such material be excluded unconsidered given the lawyers' – in particular the judges' – obvious ability to weigh evidence according to its nature and established reliability?

Practitioners from each of the two main different systems sometimes cannot – *cannot* – understand the concepts of the other. It has been a recurring experience to see lawyers of good will and ability wrestling in mystification with what others believe to be simple and sensible ideas.

I will return to the conflict between legal systems later but must pay tribute to the industry and enthusiasm of lawyers at the ICTY. But they – we – are subject to criticisms. In particular lawyers plucked from national jurisdictions – like the investigators – may demonstrate unwillingness or inability to deal with highly complex and foreign systemic facts. It may be difficult for them – unaided – to make sense of military/political chains and levels of authority and to identify proper targets. In short, prosecutors cannot conduct business here as they are used to in their domestic jurisdictions and they may have difficulty recognizing this fact.

Working as an advocate at the Tribunal is truly imperfect, and for this reason. In a domestic case of small scale it should be possible to call a witness and get everything possible you need from him or her or, with an opponent's witness, to cross-examine him or her to the best of your ability on everything germane to the case. Likewise arguments can be perfectly honed, developed and delivered. In the ICTY there is *so* much material potentially available from almost all witnesses and so many issues to advance at almost every argument that rationing, by choice or by judicial fiat, leaves the advocate merely *hoping* that he has done his best and covered enough.

8. Judges

No country may have more than one of its nationals as a judge of the ICTY or ICTR. Thus, countries nominate a chosen candidate and the UN elects

– or not, as the case may be. Inevitably politics – or other considerations – may enter into the nomination and election processes. It is not realistic to think that all judges are selected for nomination or voted on by the UN *simply* on the basis of ability and suitability for this particular job.

The result is inevitable. The judges are not necessarily perfect for the work. Some of them have been judges before. These tend to shine out in the management of the Chambers and in the understanding of difficulties faced by litigants on all sides. But in addition to judicial experience there is a requirement for wide knowledge (for example of the armed forces or of politics) of the very type judges – and prosecutors and investigators – should all have but probably lack.

The courts, inevitably, have to proceed with prosecutors, defence counsel and judges having no common cultural background and probably no common or relevant background experience.

Judges also need patience (for the proceedings are very long) and modesty. It is often said – well certainly thought – that the best judges are those who are little known. They do their work, get the right answer and do so with little fuss and no resort to fame. It may be difficult for men and women plucked from other fields and planted in a public court to get it right. It will be especially hard for them when camaraderie on the judicial corridor will be difficult given the lack of common culture and experience.

And there is another problem facing the judges. They sit in combinations of three to try cases. Different members of the same cadre, occupying the same corridor, sit in combinations of five to hear appeals from the Trial Chambers. Appeals occur after a trial is over (every case has been appealed except the one where the accused committed suicide)[9] and sometimes on an interlocutory basis, that is, on various decisions made during a trial.

However modest or even humble a judge may be, it must be difficult to be on perfect terms with men and women whose job is to correct your errors. Being a judge is a lonely job, certainly when sitting alone but also when sitting as one of three. Knowing that your decision may be overturned by the judge in the room next door must make the task even more difficult. It must also make it near impossible for a sense of collegiate solidarity to develop, as it would if first instance judges were structurally separated from the Appeals Chamber.

And to this add yet another difficult feature of our practice. The judges make and remake their own rules. Revisions come out twice a year. Responsive as this may be to the real need for the Tribunal to develop *fast*, it imposes strain by change on practitioners and on the judges alike. The regularity of the need for change points to the imperfection of the system thus far.

9. Prosecution *v.* Slavko Dokmanović, Case No. IT-95-13a-T. Dokmanović committed suicide in custody on 28 June 1998.

None of these shortcomings is the fault of the judges who do their best with the task they are given. The structure creates difficulties. The difficulties may make it impossible to attract the best candidates to this important work. For the future the sense of importance of the work must not be diluted by known difficulties or by the part of the appointment process that passes through diplomatic and other channels.

9. Witnesses

Many witnesses come from the international community of soldiers, diplomats and other observers who oversaw much of the Yugoslav conflict. The evidential base of most cases, however, will still be citizens of the former Yugoslavia, coming in the capacity of witness to crimes by their fellow citizens or as victims.

There is plenty of scope for such witnesses to be given proper protection – by anonymity or by evidence being given in an entirely private session – where the Chamber judges it appropriate.

An abiding impression I have, after calling so many of these witnesses, is that the process of coming to The Hague is inevitably imperfect *for them*. Under pressure of time, the advocates on both sides squeeze from them what is necessary to the case and deny them the chance to speak at length when they want or need to. The process is sometimes confusing to them. But it cannot be otherwise if cases are to finish within a reasonable time.

10. Aspects of Procedure and Practice

Without dwelling here on imperfections, let me focus on three short topics:

1. Indictments: When an indictment is proposed in the Office of the Prosecutor (OTP), it is subject to levels of testing. It is not sufficient for the single team investigating the issue to decide there is enough evidence. First, there is an internal review where the proposal is presented to and tested by other lawyers within the OTP. The reviews can be tough and confrontational and are designed to ensure that the proposed indictment is supported by sufficient evidence and fits in with other guidelines about who should and who should not be indicted. If this test is passed then the team has to present its proposed indictment to the chief prosecutor. She or he has to be satisfied of the appropriateness of the indictment; this is not a rubber stamp exercise. Finally, if the Prosecutor signs the indictment, a single judge of the Chamber considers all supporting material together with the draft indictment for confirmation. The

upshot of all this is that it *should* be almost impossible to indict someone who is innocent.

2. Disclosure: This is probably our biggest difficulty. Our duties of disclosure to the defense come under three Rules and require us to provide material on which we may rely and material that is exculpatory.[10] We gather huge quantities of material in various ways. Investigators get thousands of statements in various languages sometimes with supporting documents. Everything has to be translated. With extraordinarily wide powers, we can demand documents from states, organisations and individuals. Sometimes we get the documents; more often we do not. The war archives of all the relevant armed forces and the associated government archives of the related states and entities of Bosnia and Herzegovina, Croatia and Serbia could be of direct interest to our work. The quantity of material already in our possession is beyond *complete and comprehensive* analysis in accordance with our disclosure rules however many people might be involved in a team. That is a reality to be accepted. After these trials are over the vaults will inevitably provide pieces of paper that lawyers or researchers will say should have been provided to one accused or another.[11] The only way to avoid this inevitability would be for the entire OTP library of documents to be available to all. This is simply not possible. Apart from legitimate security issues that may arise with some documents, many witnesses are properly at risk and in fear if their statements are not kept secret until served on any accused only under very controlled circumstances. But yet we cannot, and should not, ration the amount of material we gather when our task is to help the judges get to the truth.
3. The co-operation of member states: In reality there has been marked lack of co-operation from certain significant states. In the case I prosecute, it is said that Croatia was directly involved in the conflict, as its own archives would reveal. Until the change of government there was a clear policy and practice of obstruction of the Tribunal. Further, we believe the state of Croatia had been actively co-ordinating the defenses of Bosnian Croats (such as the accused in my case). Without the documents that will show the contemporary truth, our task is enormously more difficult or even impossible. If

10. ICTY Rules of Procedure and Evidence: Rule 66, 'Disclosure by the Prosecutor' (essentially material to relied on by the Prosecution); Rule 67, 'Reciprocal Diclosure' (at the election of the defence); Rule 68, 'Disclosure of Exculpatory Material' (material which tends to suggest innocence or mitigate guilt).
11. Sentences of 40 years and more give defendants time to uncover material to appeal. They also allow for a change in political climate such as occurred between the 1930s and the 1970s or the 1950s and the 1990s. Changes in political environment may make convictions today vulnerable unless rock solid – especially with disclosure never having been dealt with perfectly.

and when anyone remarks on the extensive powers available to the OTP – we accept that they are very extensive – remember that they are required for we are regularly enough prosecuting *not* individuals but individuals backed by states who may do almost anything to help their favoured offspring.

11. CONCLUSION

I have focused on the difficulties and problems for two reasons. First, decisions of the Tribunals need to stand the test of time and should be setting the course of future international jurisprudence. That can only be accomplished if we are ruthlessly analytical about these developing courts as they develop. We do not have the luxury of hundreds of years in which the Tribunal can grow. Either we get it right now or the Tribunals will be criticized for failures and rejected as building blocks for the future.[12]

Second, the work is *so* important and the real difficulties *so* great that the very best people should be recruited to do the work. The work should be done without seeking gratitude, kudos or fame; none should come your way. It should be done in recognition of its importance and its need for the best resources the world can offer.[13]

It is the first concern (that verdicts must stand the tests of time) that has led me to caution about the system of law we use, based as it is on the common law system I have operated (and enjoyed) for so many years. This is a system closely associated with the jury system, rooted in mediaeval England. The jury system was ideal for sheep stealers and, as I have hinted, great for entertainment. Several European countries experimented with it at the time of the French Revolution but largely abandoned it thereafter, save in the English-speaking world. Some 90 per cent of all

12. These are institutions (ICTY and ICTR) being created fast. Compare them with long established legal systems that have had centuries to chart a satisfactory course. Those earlier systems will have tacked a little here, made a significant change of direction there, in order to be on course. The ICTR and the ICTY will have completed their voyages in a decade or two at most and in that time they will be expected to have made safe journeys. With voyages complete, log books of jurisprudence and factual findings will be a treasure trove to adventurer academics and lawyers keen to discover shortcomings – or reasons to appeal decisions.
13. Lawyers contemplating applying to the ICTY should consider the following. The establishment of the ICC points to the refusal of the world any more to tolerate empowerment of individuals based on killing of opposition and dissent. It thus marks an increasing role for lawyers as lawyers in world affairs, one to which they can rise only with respect and not the cynical condemnation of their fellow citizens. Louise Arbour noted how international law now permitted lawyers including foreign lawyers to stand between a state and the suppression of its own people and observed that not everyone would want to engage in such work. But, she added, everyone should be committed to seeing it done. She went on to pose this equation to students embarking on professional life: They should pause occasionally to take the only meaningful account of professional life. Measure, she urged the students, whether there is a trade surplus or a trade deficit between what you really want to accomplish and the concession that you will make to get there.

jury trials occur in the US, which uses juries for civil and criminal cases. The system must be the only apparently modern process whereby important decisions come with no reasons from the jury and with little more than a Roman thumb up – or down. For this reason, maybe, everything possible has to be tilted in favour of the defendant – to save him from a wrong but *unreasoned* judgement. The adversarial system – especially as played out before juries – gives to defendants particular rights in relation to procedure and the exclusion of evidence and has as an apparent goal the avoidance of conviction of any innocent person.

But an essentially adversarial system does not have to have the archaic trappings of the jury trial. In particular, it is absurd to allow defence counsel to waste time and obstruct proceedings by requiring proof from the witness box of everything relevant to the prosecution.

It seems to me that the real dangers of the adversarial system are to be found in the *large* case I prosecute, not in the smaller 'Serbian Adolf' type of case. That smaller case, like many cases in normal jurisdictions, would have a clearly defined 'universe' of potential evidence on which to draw.[14] It should not matter much how the trial process is dealt with because all the *relevant* evidence will emerge, by whomsoever called. Similar issues would fall for determination in an adversarial trial as in an inquiry or civil system trial. But in war-crimes cases about really large issues, covering expanses of geography and time, there will be no such identifiable universe of evidence; inevitably there will be selection.

For the defence – for whom the adversarial jury trial system saw its apotheosis in the O.J. Simpson trial – the obvious tactic is to block evidence and to confuse the tribunal of fact.

For the prosecution, however fair, the inability to call all the evidence means that there will be selection. That selection should not be tactical. But how can it truthfully be otherwise given the setting of an adversarial trial? Maybe it would be better – safer for a defendant and for the trial process itself – to have the judges plotting a path to and through the evidence according to their needs for more evidence on this topic or less on that *and to do so explicitly*.

In the large case I prosecute, every effort was made to get or allow the defence to admit facts about the underlying crimes that had to be proved, the real issue being whether the defendants are shown to have been involved in those crimes. The defence admitted nothing, not even the map references of the villages attacked. Time was taken to prove what should have been admitted. The judges then rationed the time remaining for the prosecution to call the really important evidence! We proposed that the judges should take powers analogous to those of a civil system judge and

14. Subject to the duties of disclosure on a prosecution, the universe available to such a defendant might be a little larger than that available to a prosecution because the defendant may be entitled to keep quiet about the witnesses of whom he is aware. This is probably as it should be, even if the defendant has a slight advantage in consequence.

should demand from the defence real answers to the question of what was in issue. Thereafter the judges themselves could have controlled, to a significant degree, the topics on which they required fullest evidence and the topics which should have been admitted by the defence or that could have been covered in a short space of time. The judges declined this invitation to take control. One of their number later gave a talk at Leiden University saying this was the single procedural proposal that would have saved most time – and then almost criticized the prosecution for not appealing their decision against us!

What we were proposing was a true amalgam of systems – or almost a fresh start. Since then other Trial Chambers *have* taken more of this sort of power and it is to be hoped that the time taken in future trials will be less, and that 'judicial economy' will be improved. But throughout the development of this and other procedural reforms that have been proposed there seems to have been some entrenched loyalty to the adversarial system, arguably beyond reasonable justification.

Here, enter a note of caution. Even if the men and women in the engine room are doing *their* best with the machinery at their disposal those on the bridge may have different objectives. Cultural imperialism (starting with the use of English), does not necessarily stop there. Those in positions of power – who may have their national law as a university qualification and its mystery as an item of national pride – want to see it dominate international courts. Why? For fear of the other or of the unknown, perhaps? Perhaps for the better fear that if the common law did *not* dominate in this way then some other system would dominate for equally nationalistic, jingoistic 'reasons,' detached from logic.

So, although we congratulate ourselves – and we can – on the quality and integrity of the lawyers recruited to work in the ICTY and ICTR we should ask these questions. Have we – perhaps – ended up with a common law system masquerading as the product of free thought? Have we really started from scratch to devise the best system for the *ad hoc* Tribunals? These issues, touch on my first concern about the quality of decisions reached. They point to my second concern, namely the need to have the best people at all levels in the Tribunals, and to have them thinking clearly and boldly but with a clear understanding of the risks ahead.

Let me finally highlight both concerns – and return to the title given to this talk – by a personal view. It would be astonishingly good luck for us to be within the generations where human beings gave up their proclivity to slaughter their fellows. Those of us brought up in the Cold War may have *thought* we could look forward to peace (even if bought at the end of a nuclear device) and could look back to World War II and its genocide as an already historic curiosity. Some of us may have clung to that optimism – for such it was – despite contrary evidence from around the world. Then came our own experience in Europe. First, we dealt with it by diverting our holiday jets lightly so that they by-passed the Yugoslav coast and took us instead to Greece. Then, a little later perhaps, we were

to learn that, as we flew by the former Yugoslavia, people had been cutting each others' heads off from time to time and playing football with them and killing each other in hundreds and thousands.

People considering how it all happened inevitably find themselves asking that famous question, the one we ask whenever mesmerized by footage of the Nazis: Could we in similar circumstances have …? The answer, invariably and sadly, is not a firm and certain "No, we are sure we could not have … ." The violence we acknowledge, the violence that I now prosecute, connects us – 'us' not 'them' – to our common violent pasts. And you do not have to dig far into English or Viking history to find massacres on truly horrifying scales.

But the optimism that we felt as children and want our children to feel, remains, however much in conflict with what we know to be our own propensities. These Tribunals recognize *both* lines of thought and their function has to be wider than the punishment of wrongdoers in a couple of small countries or even the restoration of hope and peace to those countries.

Classically, of course, criminal trials serve purposes of retribution and deterrence within the community where they take place. Are the hundreds of millions of dollars spent – in the ICTY – on a limited number of convictions really related only to the society of the former Yugoslavia? Or, in truth, are we not concerned with deterrence *not* just – ultimately – of little countries? Are we not seeking to protect ourselves from *ourselves* by taking this judicial action? Are we not seeking to change the way we think?

The law as a bender of minds is well enough chronicled. Start from opposing ends of the statutory rainbow and the power of the law is equally vivid. The legal requirement to use seat belts has led to the belief that they do you good. Scandinavian drink-drive laws – happily exported to the UK – provide a further example of law changing first behaviour and then attitudes. Civil rights and race laws in the USA changed not only where you sit on the bus but where you would even think you should or should not sit in relation to someone with different coloured skin. Effective international criminal courts may, over time, not only deter those prone to criminal excess of the type we have recently experienced. They may also, slowly but surely, affect the way people allow themselves to think so that optimism and hope can triumph (or triumph more often than now) over baser instincts.