

CHALLENGES FOR DEFENCE LAWYERS TAKING CASES FOR AN INTERNATIONAL TRIBUNAL

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Introduction

Before discussing these tribunals, let me recall the words of the great Dutch scholar of the 17th century Hugo Grotius, who wrote on international law: "*Ubi iuditia deficient, incipit bellum*", or in proper English: 'where justice fails, war begins'. Indeed, history has shown that in times of conflict the civilized language of law and justice has been shouted down all over the world by thunder of arms and violence over and over again. People, leaders and states have so far not been able to administer basic rules of humanitarian law under all circumstances. Efforts of the international community to recognise violations of humanitarian law, to create legal instruments to prevent further violations and to establish bodies to prosecute such violations, did however not bring these violations to an end. Now, let me focus on two tendencies of the experience of these efforts over the past decades.

The first is the reluctance of the world community to become involved in many situations, which could or should be dealt with by international criminal trials. There were trials following the Second World War in *Nürnberg* and Tokyo and, indeed, after the violent breaking up of the former Yugoslavia and the Rwandan genocide, the Security Council established the *ICTY* in 1993 and the *ICTR* in 1994. But no trials followed for example the horrors of the Vietnam War, the Killing fields of Cambodia, the murders, tortures and disappearances in Chile and Uruguay, the Iraqi massacres of the Kurds, and so many other atrocities on the African continent and elsewhere on the world. We see the same reluctance after the recent tragic events in the Palestinian territories occupied by Israel.

All hopes now focus on the permanent International Criminal Court (*ICC*), established in 1998 in Rome and effective in Den Haag by July this year. This world court is intended to be an answer to the appeal of all victims, named and unnamed, who suffered and still suffer from the terrible consequences of violent disputes between peoples and is not limited to a specific part of the world. But even today some states are reluctant to recognise the

new court because of the fear that this would be a surrender of the sovereignty of their legal system to an international jurisdiction without proper legitimisation, rather than accepting an international obligation to bring to justice those who are responsible for the most heinous atrocities.

The second tendency is the eagerness of the world community to expect convictions, not merely fair proceedings from war crimes trials. This pressure comes from many sources, including the media, politicians and non-governmental organisations. The popular perception is that an acquittal of a suspected war criminal is a failure. This should never be allowed to influence an independent judiciary. Fair trials are bound to result in acquittals of some guilty men as well as innocent ones; that is the inevitable consequence of the principle enshrined in the high standard of proof imposed on the Prosecution in any properly conducted criminal trial. Moreover, a proper administration of law should not make any distinction between 'ordinary' criminals and those who are prosecuted for alleged war crimes.

The rise of international trials may be reverse the Latin maxim of *Hugo Grotius* into a call for a halt to atrocities and to bolster the role of justice during armed conflicts, as long as those who are prosecuted for war crimes are not excluded from fair trials. The challenge of an international criminal court is to bring justice both to the victims without any prejudice to any party of the conflict, and to the accused by administering an uncompromised fair justice where national bodies may fail to do so. A failure to meet an indisputable impartiality to the conflict and the highest standard of fairness of trial will only fuel new hate and further retaliation, if not more public outcry for convictions at any costs.

The requirement of a fair trial fascinates all of us. Although the public may think the opposite, we lawyers have no problem to agree that criminals should be prosecuted, but being lawyers, we also say: yes, but only by a fair trial. And indeed, civilised states claim that their criminal justice system provide for a fair trial. So far so good, but domestic systems however differ a lot. Criminal lawyers working in accusatorial oriented systems may tell things about the requirement of a fair trial that may differ from what criminal lawyers who work in inquisitorial orientated systems say. International criminal lawyers will tell you that the concept of a

fair trial is ambiguous and that it should be understood in the context of the system in which it should operate.

Well then, you will appreciate that the value of a mature legal system derives from the checks and balances within that system, structured and restructured by generations of legislators and refined by case law. Being so, the creation of a typical own context seems to be inherent to the functioning of any legal system. Given this phenomenon of sociology of law, the European Court of Human Rights, for example, interprets the conventional concept of a fair trial in the context of the domestic legal system of the case at hand. What is acceptable in one system may be unacceptable in the other.

The legal system of the Tribunal, though, is a novelty, a mixture of elements of common law and civil law systems. This mixture is supposed to provide for the best of both systems. That is alright with me if such mixture is given the best opportunities a state, recognising the separation of powers, can give to the administration of criminal justice. But, there is no state here. The Tribunal is not an organ of any domestic system. It is a subsidiary of the Security Council, acting as a supra-national tribunal for a specific area. It does not function in any system. Now what is the nature of this mixture of legal systems without a feed back from the community? This brings us to the actual legal system of the ICTY and the ICTR.

The legal system of the *ad hoc* tribunals

Roughly speaking the law of these tribunals can be found in their Statutes and Rules of Procedure and Evidence. The Statute deals with organisational matters of the Judges, the Prosecutor and the Registrar, and a selection of general issues of substantive criminal law, like the competence of the court and the parameters of criminal responsibility. The remarkable missing feature is a proper description of the crimes under the competence of the courts. There is no code of crimes detailing the elements of each of the crimes under the competence of the court. The difference between an ordinary murder and a war crime was a matter of customary law at the start of the ICTY, now a matter of case law as well.

When I was involved in the first case before the ICTY in 1995, as the lead counsel of Duško Tadić, much effort was put in the unravelling of the relevant elements of each of the alleged

offences. At that period of time Prosecution and Defence were for example arguing the scope of crimes against humanity. The argument was whether the Prosecutor would have to prove that the indicted acts happened systematically or wide spread, or was the right test: systematically *and* wide spread. These kind of arguments were not common to me, being educated in a system of *lex conscripta et certa*.

Besides the Statute, there are the Rules of Procedure and Evidence regulating the proceedings and related issues before the *ad hoc* tribunals. These proceedings are not based on any specific national legal system. It is, on the face of it, a common law oriented procedural system blended with civil law elements. Given this hybrid character of the system, one realises that in an accusatory system different action is required of the Defence counsel than in an inquisitorial system. Defence counsel should not only be familiar with the rules but must really understand the system to which he has to refer. The conduct of the trials before the international tribunal is conducted with an accusatory face, because the responsibility for the presentation of the facts rests primarily with the parties. Contrary to the common law system, however, it is not a jury that decides on the facts and guilt but a bench of judges, the court. Like in inquisitorial legal systems, the court has full responsibility to arrive at the truth, independently of the parties. In this system it is the court that decides what and to what extent issues are to be examined during the trial. In this system the criterion is not the judgment of the parties about the success of their case presentation, but the extent of satisfaction of the court whether it has been sufficiently informed to reach a decision on the on guilt of the accused.

As a consequence the court can reject the presentation of certain facts by the parties and the court generally follows its own policy with respect to fact-finding. This new system of both *ad hoc* tribunals, in which the judges are involved in establishing the facts in the context of an accusatory presentation of facts by the parties, the judges' role as juror of facts is still being developed. This can cause uncertainties for the parties, wondering if they should present certain facts and circumstances or not. In some cases this uncertainty in practice has resulted in a profusion of witnesses and exhibits, in other cases, like the Milošević trial, it has resulted a radical reconstruction of the case presentation by the Prosecution because of time constrains ordered by the Trial Chamber.

The unique mixture of elements of different legal systems developed its own dynamics over the years. It has become a more or less coherent but certainly not an exhaustive body of procedural law. It only provides for minimum guidance, a lot is left to be dealt with by case law. Having said this, it is obvious that the nature of the legal system has a dominant influence on the role of counsel acting on behalf of each of the parties. In my presentation today, I will confine myself to the role of Defence counsel, and I will only touch briefly on the role of the Amicus Curiae in the Milošević trial.

The role of the defence counsel

The Rules contain no specific quality-requirements for lawyers to be admitted as Defence counsel. It is sufficient that the counsel is admitted to the practice in a state, or is a university professor, and speaks one or both of the working languages of the Tribunal. The courts however have accepted lawyers who do not speak English or French but only the language of the defendant. A defendant can appoint, or when indigent, be assigned, anyone who meets the requirements of the Rules. The principle is that the defendant can get legal representation of his own choosing, or if indigent, the widest possible choice.

Although free choice enhances confidence in the Defence counsel, practice has unfortunately shown that the relative inexperience of the defence counsel can be a great disadvantage. The lack of knowledge of 'the other' system, be it adversarial or inquisitorial, can also be a handicap, as can insufficient knowledge of international law. Considering the importance and magnitude of the interests involved, it would be advisable to introduce teams of counsel and co-counsel, each originating from one of the two major legal systems. In my view Defence counsel should have sufficient knowledge of international law. A demand for higher quality-requirements is in keeping with the tendency towards specialization, which most Bar Associations throughout the world are promoting. In addition, there is no reason to be satisfied with considerably lower quality-standards for defence counsel as compared to prosecutors and judges.

Defence counsel is not an organ of the tribunal, like the judges, the Prosecutor and the Registrar and their respective staffs, all mentioned in the Statute. Defence counsel has no

official status affording him authority in his relation neither to foreign officials, nor as he any kind of protection. These deficiencies negatively affect the principle of equality of arms, as articulated in the Statute.

The rule of law within any criminal justice system does not only depend on the way in which investigative, prosecutorial and judicatory institutions fulfil their duties, but also on the proper fulfilment by the Defence counsel of his duties. The role of the defence counsel is not spelt out in the Rules of the *ad hoc* tribunals; much is left for the counsel to understand his role in the system.

To put the case of the accused

In European continental systems of investigating judges, a defence lawyer does not have the same powers and rights as his colleague in common law systems would have. In civil law systems a defence lawyer is not putting his case, it is, as I indicated above, for the bench to dig up the truth despite any activity of defence lawyers. A hallmark of the proceedings before the tribunal is that each party has to put his case. This implicates that both parties should be able to locate, approach and interview witnesses. If not, the law should respond to inequalities by providing for legal instruments or procedural compensation.

Now, how does the law of the Tribunal deal with this problem? The Rules grants the prosecution legal instruments in relation to witnesses, not to the defence. The prosecution may summon and question witnesses; the defence may not. Comparable to the provisions of treaties dealing with mutual assistance in criminal matters, the prosecution may seek the assistance of any state authority as well as of any international body; the defence may not. According to the Statute, states have to comply forthwith with requests of the prosecution. This odd inquisitorial element in an accusatorial trial where both parties will have to put their case may cripple the fairness of the trial.

In a trial before a national court, such an inequality might perhaps be compensated because in most cases an experienced defence lawyer might well be able to locate, approach and interview witnesses, simply because of being familiar with how things happen in his own backyard. There is no backyard here; witnesses are living all over the world. Defence lawyers in Bosnian cases may experience that most prosecution witnesses live outside the original area

in states that comply forthwith in accordance with the Statute. Defence witnesses, however, usually live in the area itself, as for example in cases against Bosnian Serbs in Republica Srpska, which is a part of the Bosnian Federation without a firm state structure. In this situation, defence lawyers are handicapped when the conflict is still going on. In the Tadic case, for example, it was almost impossible to do an effective discovery on location for this reason. We could not enter war zones, located witnesses disappeared and most male adults were mobilised by the army. The accessibility of witnesses did not really improve after the Dayton agreement in December 1995. Local authorities frustrated discovery by arresting potential witnesses, others were threatened by the police not to give evidence. Many were afraid to speak with the defence. Any legal instrument did not compensate this specific problem, due to the exceptional circumstances in the area.

A special feature of trials before the tribunals is the protection of witnesses. Witness for the prosecution witnesses may be granted protection by allowing them to testify in private to avoid retraumatization or possible retaliation. The concerns of the defence witnesses may be the same but in most cases there are different concerns. I remember of the Tadic case, we had two classes of witnesses. Those who testified about the alibi of Tadic and those who have been involved with any of the facts and who testified that Tadic was not there. Witnesses of the both classes may have had two kinds of concerns: retribution by the local authorities if they testify in Den Haag or arrest by the prosecution. Some, witnesses of the second class and those who had an official capacity during the conflict, feared both. This problem was not compensated by the Rules, but we persuaded the Trial Chamber to provide some compensation by creating new legal instruments, such as a safe conduct and giving evidence through video link.

Another feature of these trials is the involvements of officials in the conflict and therefore the need to have access to information documented by official bodies. This may not only be a problem related to the factual aspects of a case, but more specifically to the legal elements of the alleged crimes. Elements in relation to war crimes like: whether the conflict is of an internal or an international character. Or elements in relation to ethnic cleansing: whether an

action was widespread and systematic. Contrary to the prosecution, the defence has no excess to such information.

The reliability of witnesses is an issue typical for trials, wherever conducted. In cases before the tribunals the risks of lies or painting the picture black is more likely to happen. In most cases, opposing witnesses are, almost by definition, of the other ethnic group. A dramatic example was the tale of witness L and his exposure as a liar trained by Bosnian officials to tell the court a pack of lies in the Tadic case. This witness, now known by his real name Dragan Opacic, was the final number of the prosecution show in chief. He charged Dusko Tadic with some dozen rapes and about twenty killings in the Trnopolje Camp. In order to obtain protection against public exposure, he made up a story about his mother and little sister living in danger after his father died. We found his father still alive and presented him to the court. Dragan Opacic testified about rapes and killing taking place in and near a cellar in a white house. We established that all houses in the area were white, none had a cellar. He claimed all kinds of other details and each time again we proved the opposite. But let's face it; the success story of the exposure of witness L was an exception. Reality was that we could only produce a small part of all relevant witnesses. We could not get some key witnesses.

Pre-trial issues

The tribunal, not having a police corps of its own, nor any other body that operates at large to support the work of the court, has no arms and legs. It is totally dependant on the assistance of states and international organisations. All states are bound by international law under the Statute to cooperate with the tribunal. States are obliged to arrest and transfer suspects found on their territory to the seat of the tribunal, even when these persons are prosecuted under national law. The tribunal has primacy over national courts, meaning that states have to defer cases against suspected persons indicted by the prosecutor, to the tribunal. An example of this supremacy was the transfer of Tadić, from Munchen to Den Haag. When states fail to perform according to their obligations under international law, international organisations being on the spot, like NATO in Bosnia, are mandated to engage themselves with the required duties. NATO-troops may arrest Karadžić when spotted.

Once a person is arrested the law of the tribunal is triggered. This may raise questions when the requested person is detained on request of the prosecutor by the state that made the arrest. Which law is applicable, national law or international law and what if both laws conflict. In most cases national jurisdictions have adopted specific legislation in conformity with the statutory obligation to cooperate fully with the tribunal. Still there may be some loopholes, as for example the impossibility of the transfer of an indicted German citizen to the tribunal. Such transfer would require an adoption of your constitution. In so far Germany fails to comply with its obligations under international law. But also other issues may arise. Do arrested persons have access to national courts under national habeas corpus provisions to argue mistaken identity? Are states, signatory to the European Convention, obliged to test the transfer of persons to the tribunal against the convention. So far none of these issues have lead to calamities but one day it might happen.

Arrested persons are brought before a trial chamber of the tribunal as soon as possible. At his initial appearance the accused is asked how he pleads. This may cause problems when the accused is not familiar with the case against him, having seen nothing more than the indictment. At that stage defence counsel is not familiar with the case either; nothing has been disclosed yet. Whereas the court will not hear any evidence on the charges after a guilty plea (only hear submissions and evidence on sentencing), it would be risky to enter a guilty plea without being properly informed about the details of the prosecution case against him. I observe that guilty pleas are unusual before the tribunals. And frankly, given the heinous character of the allegations, accused person hardly has a choice. The lack of guilty pleas is perhaps the reason that no practice of plea-bargaining has emerged in cases before the ICTY and the ICTR. This is a bit surprising whereas the Rules stipulate that substantial cooperation with the prosecution is a mitigating circumstance to be taken into account by the courts. So no crown-witnesses' have popped up in proceeding before the tribunals, except for perhaps, *Erdemović*, who gave incriminating evidence in other cases. Who knows what will happen once *Karadžić* or other big shots of the old regime will arrive in Den Haag.

Contrary to the practice in national jurisdictions operating under article 5 of the European Convention, custody is the rule in cases before the tribunal and provisional release is an exception. Given the unique circumstances under which the International Tribunal

operates two concerns should be considered. The risk that the accused, if released, would pose a danger to any victim, witness or other person, and the risk that the accused, once released, would not return when required to do so. The first risk is for the prosecution to show, the other risk the proof of the contrary rests on the defence. Different to similar situations in national jurisdictions, an undertaking of the accused to return and to accept bail may not be sufficient before the tribunal if one realises that the tribunal is not in possession of any form of mechanism, such as a police force, that could exercise control over the accused, nor does it have any control over the area in which the accused resides after his release.

The basis of all trial preparations is the indictment. In order to safeguard the right of the accused to be informed in detail of the nature and cause of the charges against him, the function of the indictment is to inform the accused unequivocally of the factual acts he has to stand trial for and what criminal offences these acts constitute. In the accusatory oriented system of the tribunals, the materiality of the prosecutor's evidence is more difficult to assess than in a more inquisitorial system, in which the materiality of such evidence can be concluded beforehand from the case file. This is to be taken into account when interpreting the provisions of the Statute and the Rules with respect to the requirements set for the indictment. The style and detailed factuality of indictments before the tribunal differ and it seems that the office of the prosecution has not yet settled for one modus.

Case preparation

Case preparation is of paramount importance and one cannot do so before understanding the prosecution case. Before being able to prepare a full and effective answer to the charges, to conduct one's own investigation and to put the case of the accused, the defence has to be informed by the prosecutor what evidence will be brought against the accused during the trial. Rather than running a file system, an interparty disclosure mechanism is applied. The prosecutor is obliged to disclose all relevant information, files and documents in their possession or control to the defence. The scope of the duties of the prosecutor is not only related to the evidence as such, but also to the details of it, including particulars about witnesses to allow cross-examination as well on the merits of the case as on the credibility of the witnesses. In most continental jurisdiction such questioning would not be allowed. The Rules grant a conditional right to inspect further materials such as books, documents,

photographs and tangible objects in the prosecutor's custody or control, which are material to the preparation of the defence or are intended for use by the prosecutor as evidence, or were obtained from the accused. The prosecution is also placed under the obligation to disclose to the defence any evidence known to the Prosecutor, which tends to suggest the innocence or mitigates the guilt of the accused or which may affect the credibility of prosecution evidence.

On his part the accused is obliged to inform the prosecutor, if he intends to put forward a defence of alibi or any other special defence. This obligation is mitigated by the stipulation that default on this point shall not limit his right to testify on these defences. If the defence makes use of its right to inspect the prosecutor's documents the defence on its part shall have to allow the prosecutor to inspect similar documents of the defence. This reciprocal disclosure may cause problems with regards to the right of the accused to silence and protection against self-incrimination. Inspection of the files of the defence may well jeopardize these rights when the files contain documentation that may suggest or even establish the guilt of the accused. From case law of the tribunals it appears that the judges are aware of these kind of concerns. As they ruled for example that the defence is not obliged to divulge information about previous statements of its witnesses to the prosecutor.

As far as I am aware of it, the implementing laws of states tend to be silent with respect to the extent defendants can obtain evidence under national law or can request to have evidence traced. It seems that the defendant or his counsel can independently perform some investigatory acts only in some common law countries. In civil law countries the gathering of evidence in general tends to be a prerogative of national authorities. As a result the defendant has to rely on the Tribunal to order the performance of investigatory acts he deems essential to the defence. The right to request and ultimately order the cooperation of states is a kind of secondary jurisdiction over states separate from its primary jurisdiction over individuals. In this system individuals requested or ordered in an official capacity of the state to cooperate with the Tribunal may refuse to do so. State cooperation with the tribunal may also be subject to national privileges recognized by international law.

This lack of powers in the law of the tribunals is unfortunately not compensated for by powers conferred by the national law available to the defence in a domestic context. It is not clear, for instance, to what extent a defence counsel, acting on behalf of a person standing trial before the Tribunal, could in his own national jurisdiction make use of his national law to obtain an injunction from a national judge ordering one or other government agency to surrender a document. I do not exclude the possibility that a Croat defence counsel, for instance, can apply Croat law in this manner. However, as long as such a facility is not available to every (in this example non-Croat) defence counsel acting on behalf of a person standing trial before the tribunal, it remains true that the facilities for the defence to prepare its case are more limited than those available to the prosecution.

It is, for instance, a serious handicap that the defence has no legal instruments to trace witnesses or obtain their surrender, when they have been called to arms, for example, and the local authorities are not surrendering them. Moreover, conducting a discovery in an area not sufficiently controlled by a central government, without proper functioning of local government agencies and logistically crippled by the conflict, poses numerous practical and legal problems. The facilities for the prosecutors to obtain relevant evidence are already far from ideal, but for the defence this problem is usually disproportionately worse.

Conducting a fair trial

On the one hand the defendant should be allowed sufficient time to properly prepare his case. On the other hand the trial should not be postponed too long and the whole proceedings should be wound up within reasonable time without undue delay. This matter has not been unequivocally regulated in the law of the tribunals. A lot will depend on the complexity of the case, as well as on the need and possibility to conduct investigations. Unlike national administration of justice, international trials poses certain specific problems which justify the acceptance of a longer period of time before it can be established that the right to trial within a reasonable period of time has been violated. It is simply true that international investigations *in situ* or elsewhere in the world take up more time than national investigations in a national case. On the other hand it is also true that defendants before the tribunals as a rule remain in pre-trial detention. It should be noted that the matter of 'trial

within a reasonable period of time' is not worded as a right of the defendant in the statute, but as an obligation on the part of the judges: 'the Trial Chambers shall ensure that a trial is [fair and] expeditious'.

The accused has the right to defend himself in person. This right is perfectly demonstrated in the Milošević case. The Directive on the Assignment of Defence counsel, however, allows the Registrar to assign counsel to a defendant in the interest of justice when he intends to conduct his own defence. This authority conferred upon the Registrar could curtail the accused's right to defend himself in person. An extra complication could be that the assigned counsel in fact cannot (and does not want to) do the work assigned to him due to the absence of a relationship of confidence and trust. Here it should be noted that unlike in inquisitorial systems, the accused does not play an active role in the trial before the Tribunal (unless he is called to give evidence). During the trial the defence counsel plays the central role. This can give rise to unacceptable situations, if the accused, despite the fact that a defence counsel has been assigned to him, starts exercising the rights of the defence counsel during the trial. Does this release the assigned counsel from his duties, or is there duplication? In the light of the right to defend oneself, it is impossible that the Trial Chamber would in such a situation prohibit the accused, who is acting as his own counsel, to speak or would not allow the accused to cross-examine the witnesses. I refer in this connection to the difficulties, which arose in Germany, when 'Pflichtverteidiger' were assigned to defendants in the cases concerning the Rote Armee Fraktion.

Another area of interest is the rules of evidence of the Tribunal. There are only 10 rules dealing with matters of evidence. Except for the usual rules dealing with verification, judicial notice, consistent pattern and confessions and special provisions in cases of sexual assault, the rules of evidence come down to this: any evidence may be admitted when the Trial Chamber deems it to have probative value unless (-) its probative value is substantially outweighed by the need to ensure a fair trial or (-) when it is obtained by methods which cast substantial doubt on its reliability or if its admission is anti-ethical to, and would seriously damage, the integrity of the proceedings.

I already mentioned that the judges both sit as triers of fact and rule on the admissibility and sufficiency of any evidence presented. It follows from the rules I just described that the judges

are not bound by strict rules of evidence. The key for admissibility and sufficiency of evidence is: probative value, unless. I have no problem to recognize that a bench trial reduces the need for elaborate rules, but in the framework of the present rules the judges have - in my opinion - to much discretion whether they will admit evidence or not.

This can lead to a degree of uncertainty regarding the admissibility of evidence especially when it comes to hearsay evidence. It seems to me that a further elaboration on hearsay evidence is required along the lines of substantial doubts of reliability (the second exclusion, I just mentioned) to protect a defendant against trial on basis of rumours. I have heard evidence in the Tadic trial that indicates that witnesses pass hearsay evidence and from what I have heard of evidence given by witnesses in the present ongoing case I seems to me that prudence to accept hearsay evidence fades away.

Tribunal should refuse to hear evidence relating to the guilt of the accused which is not within the direct knowledge of the witness giving such evidence, unless the Tribunal considers that its probative value substantially outweighs its prejudicial effect. It has been argued that, although it is recognised that the Tribunal is not bound by any national rules of evidence, the fact that most common law systems contain a general exclusionary rule against hearsay illustrates the fact that it is a generally held belief that the admission of hearsay evidence may substantially prejudice the fairness of a trial.

A defence counsel's concern is the fear and confusion which may be endemic in the traumatised area and time with which the trial is concerned, which is likely to lead to the proliferation of stories and rumours which may or may not be reliable. The length of time since the hearsay statements given in evidence were heard by the witness may adversely affect the reliability of their recall and that the extreme provocations and abuses suffered by most of the prosecution witnesses may also have affected their powers of memory. In my opinion the permission to present hearsay evidence is more likely to assist the prosecution than the defence. This is because of the nature of the burden of proof, which requires that the prosecution established the facts on which its charges are based. I may add that it is of paramount importance that a trial is not only fair, but is also seen to be fair.

The accused has the right to a public trial subject to narrow limitations. In the Statute it is acknowledged that the accused has a right to '*a [fair and] public hearing, subject to article 22 of*

the Statute'. This article permits the court to take measures to protect victims and witnesses, including *in camera* hearings and protecting the victims' identity. Witness protection may have a negative influence on the right of the accused to cross-examine witnesses against him. It jeopardises the ability of the accused to assess and challenge the evidence thus brought forward. The right to examine, or have examined, the witnesses against one is not simply a matter of equality of arms, but a fundamental component of the right to a fair trial. The accused must have an opportunity to conduct an in-depth examination of the background of prosecution witnesses, to test the veracity of their testimony and to identify their potential bias. This is particularly important with respect to the core crimes within the jurisdiction of the Tribunal. In many cases, the objectivity of the prosecution witnesses will have to be thoroughly examined by the defence counsel in close consultation with the accused. For instance, they may be former neighbours who may have quarrelled with the accused in the past, or they may be members of different ethnic or religious groups now occupying the home of the accused and vice versa. In such highly charged situations some may even perjure themselves. In my opinion, in the law of the tribunal the solution is not sufficiently sought in the use of evidence of statements obtained at the pre-trial stage, where the defence can be given an adequate and proper opportunity to challenge and question the witness without jeopardising a sufficient and proportional protection of the witness.