



Where the **World** Seeks Redress

*For the past decade, individuals, too, can be summoned to The Hague – chosen after World War I as the seat of the International Court of Justice – to be called to account for international crimes. With the indictment of Sudanese President Al-Baschir and the arrest of Serbian leader Radovan Karadzic, this nascent claim to international criminal jurisdiction has aroused high hopes – hopes that, in the opinion of **ALBIN ESER**, can be fulfilled only if the procedural system is fundamentally improved.*

The Hague, the seat of government in the Netherlands, has good reason to claim to be the “world capital of law”: since World War I, the city’s Peace Palace has been home to the International Court of Justice, the body tasked with settling disputes between countries. In the interim, The Hague has also become the seat of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the permanent International Criminal

Court (ICC), which recently triggered a diplomatic storm with its indictment of Sudan’s President Al-Baschir. The ICTY also attracted worldwide attention with the arrest of former Serbian leader Radovan Karadzic.

Some of the headline-grabbing comments that accompanied the arrest of Karadzic, and the failure to capture Ratko Mladic to date, were enough to give the impression that the Tribunal will be seen to have failed

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in its task if these two are not convicted. This assumption is not wrong, yet it is not correct, either. It is right insofar as the international criminal justice system would indeed have failed in its mission if only the lower ranks were called to account for atrocities on such a massive scale, while those principally responsible once again escaped the consequences. On the other hand, with more than 160 suspects accused and more than 115 already convicted, it would be wrong to conclude that the ICTY has done other than send an unmistakable signal that those who committed international crimes are not as immune to prosecution as they may once have appeared to be.

Ever since my own period of service as a judge at the ICTY, I have been concerned with the question of whether the international criminal justice system is possessed of the optimum procedural structure to enable it to achieve its long-term goals: namely to convict the guilty and acquit the innocent on the basis of truth that has been ascertained as effectively as possible and by fair means, to give victims satisfaction and prevent future international crimes, and – of particular importance in the aftermath of genocide and war crimes that go way beyond the prosecution of mundane criminality – to work toward reconciliation between hostile groups.

The judge as a mere referee?

To put it frankly, these goals will be hard to attain under the kind of “adversarial” structure that has been all too indiscriminately carried over from Anglo-American common law into the international criminal justice system. In the briefest possible terms, it is characteristic of this procedural system that the conduct of the trial, being party-driven rather than judge-led, lies mainly in the hands of the parties – that is, the prosecution and the defense. It is essentially left to the parties to decide what evidence they produce, what witnesses and documents they wish to introduce into the proceedings, and how and in what order the trial is to proceed.

The judge is practically nothing more than a formal referee who, as one ICTY judge put it, is no longer expected to hold “the scales of justice evenly” between both sides without actively intervening in the process of

ascertaining the truth. That may suffice for courts trying mundane crimes, but as judges drawn from the world of common law have themselves since admitted, it is hardly adequate to do justice to the far greater complexity of international crimes.

It is not merely a question of the excessive length for which adversarial proceedings are much criticized, but, far more seriously, of the potential defects inherent in turning over the establishment of truth to parties who are each focused on their own unilateral interests. Nor is there any room for victims – beyond their basic role as witnesses – to play any major role alongside the prosecutor and defender.

Responding to this criticism does not necessarily mean entirely dispensing with the adversarial system in favor of an “inquisitorial” alternative, such as that typified by the continental European tradition. However, international criminal practice ought certainly to be revised in various ways in order to ensure that both convictions and acquittals are arrived at fairly and promptly on the best possible basis of truth. Without pretending to be a complete list, in my opinion, particularly the following improvements would appear to be necessary.

To start with, the much-lamented length of the proceedings, the underlying chain of causation, leads back to the very division of adversarial procedure: there is the prosecution case, in which the prosecutor must present his or her entire body of evidence to substantiate all of the often myriad charges, and the subsequent defense case, in which the defenders may submit their evidence for exoneration.

But since the prosecutor cannot know in advance how the defense might possibly counter his arguments, and must assume that, if one strand of evidence should fail, he or she will have little or no opportunity to substitute another, there remains no alternative but for him or her to introduce from the outset every witness statement and every document that is likely to support the case. And when the time comes, the defense will, of course, proceed in like manner in presenting its evidence.

The inherent excess of potentially superfluous evidentiary material is still further exacerbated by the fact that the parties cannot know what is going on in the minds of the silently reclining judges: whether they believe the case already proved and all else to be superfluous, or

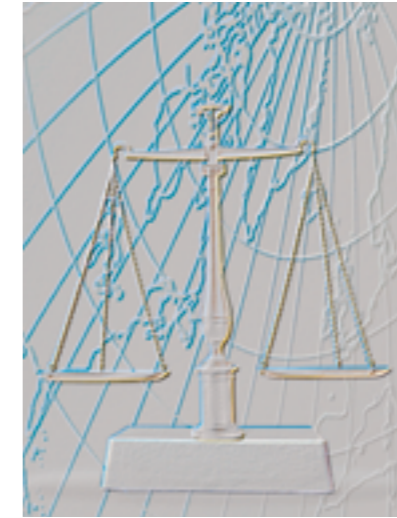
whether there remain other substantial aspects to be tested. As a consequence, the parties must attempt to address this uncertainty by presenting comprehensive but possibly unnecessary or even counterproductive proofs.

To counter such superfluity – or indeed deficiency – and steer the presentation of evidence toward aspects that are legally relevant, and accordingly toward facts that must be proven, the judges should be entitled and obliged as early as possible, ideally when the indictment is first admitted, to assess whether the charges are supported by adequate evidence and whether the legal modalities and elements of criminal responsibility are stated as clearly as possible.

In this way, both the parties and the court itself should be in a position to recognize what is legally necessary to secure a conviction and what actually needs to be proven. It would also then be easier to keep some control over the list of witnesses and other items of evidence, and over the manner in which these are presented by the parties.

What is more, in order to prevent the parties from introducing an excess of witnesses and documents for fear of any subsequent production of evidence being excluded, the parties should be afforded some flexible means of presenting further evidence at a later time, whether to prove guilt or innocence. Naturally, even such methods of sorting and accelerating the proceedings presuppose that the court, and in particular the presiding judge, does not merely adopt a posture of formal arbitration, but is prepared to intervene and be more active in the interest of testing the relevance of the evidence.

On the other hand, speed can be only one goal of the criminal process, and by no means the most important one. It is far more fundamental to establish the truth as a precondition for genuine, and indeed literally true, justice. In a civil case aimed simply at the reconciliation of interests, it might be appropriate to leave it to the parties to decide what evidence of the truth they choose to present or withhold. But that can hardly hold for a criminal trial that is concerned with establishing the guilt or innocence of an individual, and with the victims



touched by the crime. Therefore, at least as far as international criminal justice is concerned, the judges should feel obliged to play a proactive role in the interest of ascertaining the whole truth.

This need not in any way mean that the cross-questioning that, in some adversarial systems, is exclusively the preserve of the parties

should primarily be replaced by the continental European tradition of interrogation by the judge. However, the initial examination of witnesses by the parties should allow more scope for additional questions from the bench.

Truth by contradiction

I am pleased to say that moves in this direction are already incorporated into the rules of procedure for the ICTY, insofar as the judges are empowered to put, at any stage, any question to a witness, to permit inquiry into additional matters, and to order a party to produce additional evidence or, on their own initiative, to summon witnesses and order their attendance. In practice, however, because these conflict to some extent with the spirit of adversarial procedure, little use is made of such proactive powers afforded to judges.

Intervention from the bench, however, would be all the more expedient when the parties are to be prevented from simply blocking one another. For example, in the – by no means rare – event that the parties fail to introduce evidence that is seemingly essential to the establishment of truth because of their mutual fear of potentially being confronted with unwelcome testimony.

Maybe even a change in terminology might contribute to a better understanding of the procedural structure that international criminal justice should be aiming for: it might be better to describe this less as “adversarial” than as “contradictory.”

The term adversarial carries overtones of hostility, whereas contradictory merely expresses the means by which truth is established through contradiction, including the concomitant confrontation. Accordingly, if the parties to a criminal trial were to perceive themselves as partners in a – albeit confrontational – dialog, it would

be easier for the prosecutor to see himself or herself less as a unilateral “opponent,” let alone as an “enemy” who is firmly resolved to win by any means and who is therefore primarily interested only in incriminating facts and evidence. Rather, the office of the prosecutor – in the sense of the Roman “*officium*” and the duties that entailed – should perceive itself as an office tasked with seeking out both incriminating and exonerating factors, even if by way of contradiction.

Downgrading the adversarial nature of the proceedings is also important for the way in which the witnesses see themselves. As the witnesses are customarily called by one party or the other, and are accordingly described as either prosecution witness or defense witness, they must inevitably feel constrained within a unilateral role. All the more so when their examination during the trial is preceded, as is also commonly the case, by a unilateral “witness proofing” by the party that called them – and for lack of supervision under the public eye, it is hard to say where this is likely to spill over into “witness coaching” with a view to pre-programming their testimony.

Neutral witnesses for the court

Despite warnings from the bench to remain impartial, it is not easy to persuade a witness who has been prepared in this way to relinquish his or her adopted role. To counteract this detrimental risk to the unbiased establishment of truth, there is little other option but to prohibit the uncontrolled preparation of witnesses who should perceive themselves not solely as witnesses for the prosecution or witnesses for the defense, but as witnesses for the court, in search of truth.

Neutralizing the role of witnesses in this way is particularly important due to the atmosphere in trials for genocide or war crimes, which are typically the product of political and ethnic conflicts. In cases like these, when the incriminating statements come mostly from the victims’ side while the exonerating testimony is given by adherents of the accused, allocating corresponding roles to the witnesses makes it all too easy for the front lines



to be redrawn in the courtroom, from where they are broadcast through the international medium of television back to suspicious and easily emotionalized warring parties in their homeland.

If, on the other hand, instead of being assigned to one opposing party or another and labeled accordingly, the witnesses were to be perceived

simply as neutral “witnesses for the court” in its search for the truth, it may be hoped that this would help encourage reconciliation.

In the interest of sustained reconciliation between conflicting groups, it is all the more important to establish and preserve the truth with impartiality when hostilities, as is commonly the case in ethnic conflicts, are fueled by legends and the distortion of history. Therefore, it is essential to ascertain the truth as soundly as possible, not only to support a just verdict in individual cases, but also to bring light into the darkness of the history that preceded the conflict.

Naturally, judges need not perceive themselves as historians. Nevertheless, history is written in the assembled facts that underlie the verdict of the court. In this respect, the duty incumbent on the international criminal justice system to ascertain the truth certainly extends beyond the duty of a typical national court.

Last but not least, the following concern should not be overlooked: If an international court should fail, history will not be concerned with whether its failure is due to rules and structures that left it to the parties to the trial to decide what evidence to present to the judges or withhold from them, depending on how their own cause might best be served. The verdict of history will be a verdict on the court as a whole – with its judges at the fore – which will be held responsible for the success or failure of international criminal justice.

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