Experimental Justice:
Do International Tribunals Work?

Howard Morrison*
36 Bedford Row, London; Recorder of the Crown Court

On the verge of my third year of active involvement in defense work at the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), it is instructive to take time to see where one has been and where one is likely to head with the work in the future.

In an era of human rights legislation and, in particular, anticipation of the practical impact of the UK Human Rights Act from the dual viewpoints of a barrister and recorder, it could be tempting to think of the International Tribunals as some form of national court clone with a superstructure of international human rights jurisprudence; tempting, but fundamentally wrong.

Experience has proved that the proper starting point for understanding the ethos and structure of the international tribunals is to read paragraph 2 of Resolution 827 of 25 May 1993 in which the UN Security Council decided 'to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violation of international humanitarian law'.

The essence of the mandate from the Security Council, whatever words were used, was to create what are essentially prosecutorial entities. That was reinforced by the organic structure with the three central components being the Judiciary, the Registry and the Office of the Prosecution with a plethora of sub-departments and support teams. As a form of incorporeal association, the defense teams find themselves outside the body politic and administrative of the UN machine, attached only by the small departments allocated to them to provide some interface with the system and limited administrative support.

This is not to doubt the professionalism of certain individuals within those departments but it remains necessary to be aware that the tribunals are creatures of the UN, a quintessential bureaucracy that, until the creation of those tribunals, had no experience of organizing or running judicial machines. It follows that the ad hoc tribunals were and remain experiments in both administration and jurisprudence and cannot be viewed as some form of international super-clones of any national court or tribunal. The realpolitik of practice at the tribunals is that you are immersed in a bureaucracy where individual careers and the importance of maintaining UN structures always appear to outweigh the overriding aim of the Security Council which was to ensure that serious violations of international humanitarian law were halted and effectively redressed. It remains doubtful as to whether or not that can be possible in any event; Sierra Leone, West Timor and, arguably, the West Bank, provide the counter argument.

Costs of the tribunals

The costs of the tribunals are enormous. It is difficult to be precise as to the costs of each trial but however one approaches the accounting, the reality is that each trial is costing millions of dollars. When it comes to trying to allocate or curtail costs, it seems that the defense bears the brunt of the initial onslaught, a feature not unknown to UK practitioners, although at the ICTY, the costs of defense are but 13 per cent of the overall budget. It is not possible to equate the costs of prosecuting and defending a case, but to achieve a transparently fair trial, direct costs of both prosecution and defense have to be viewed from the standpoint of equal facility and opportunity. The Office of the Prosecutor (OTP) has significant manpower, a high degree of technical support and can rely on the overall political support of the UN and powerful national interests. In more fundamental terms, they have adequate office space, computers and all the other electronic aids to enable them to function as they need to.

By contrast, most defending lawyers are effectively one-man bands, working away from whatever logistical backup they have in their own practices and relying very heavily on their own initiatives and instincts. At best, an accused person can have a team of two lawyers, an assistant and two investigators whose remunerated hours are limited and capped. Although paid a *per diem* allowance while in The Hague or Arusha, office space and facilities are extremely basic and limited and the reality is that defense teams have to fend for themselves in terms of providing accommodation and office equipment. There have been well documented cases of institutional hostility and some of the limitations that have been imposed on the defense run counter to the idea of any level playing field as between the defense and prosecution and strike at the heart of professional, effective representation. A recent example is the decision of the ICTR Registrar to limit visits by defense counsel to their clients detained in Arusha to three during the pre-trial period, excluding visits for actual court hearings. The notion that one could effectively take instructions and deal with the huge and complex volume of material involved in a genocide trial, either adequately or at all, in three visits is frankly nonsense. There is already, among the detainees, a very real defeatist air as they view the tribunals as hostile prosecutorial agencies and the diminution of their defense for fiscal reasons understandably heightens their sense of isolation and mistrust.

Hybrid rules of evidence

Many of the problems that arise in practice derive form the hybrid rules of evidence and procedure that have been adopted in the tribunals, effectively a mix of common law and civil systems but with widely differing approached by individual judges and indeed individual prosecutors. The reality is that common law systems and their civil counterparts have evolved their structures over hundreds of years, honed and modified by necessity and expediency and understood by practitioners and judges alike. To try and mix some components from each system and add differing judicial experience and interpretation causes confusion and significantly diminishes any certainty in the minds of defense counsel as to how their individual court will react to any given evidential or procedural problem. There have been instances where civil judges have so limited cross-

examination as to reduce its effectiveness to a wholly unfair degree, but allowed even third-or fourth-hand hearsay concerning critical events going to the heart of the indictment. Likewise, common law judges, unused to the freedom of judicial intervention that is second nature to their civil judicial brethren have, on occasion, stayed unhelpfully out of the arena when civil law practitioners with no proper understanding or experience of cross-examination have allowed damning testimony to go unchallenged.

In all instances it is the fairness of the proceedings that suffers and, by extension, the reputation and effectiveness of the tribunals. More worryingly from the individual's point of view, the opportunity for a defendant to get an unambiguously fair trial is diminished and the perception of the detainees as a whole is that the system is designed to work in favour of conviction. If one starts from the standpoint that persons accused of widespread murder or even genocide are not strong candidates for public sympathy or support, it is even more evident that the judicial system that is processing their cases retains, at the forefront of its thinking, the burden and standard of proof in criminal cases. In that regard, it is unfortunate that there is a real polarity between individual prosecutors and defense counsel that would be much more familiar to a US rather than UK practitioner. Some individual prosecutors have been positively dishonest when it has come to disclosure and it is understandable that criticism has been made that some elements of the OTP are more interested in conviction that justice. By the same token, the standards and ethics of some defense counsel have been woefully inadequate and there is plain evidence of some highly questionable practices. One of these, alleged to be common at the ICTY, is of detainees and their lawyers being involved in fee-splitting arrangements.

Remuneration of defense counsel

Remuneration of defense counsel from public funds is a perennial source of problems and discontent from both payee and payer. A very real problem is that for some practitioners, notably those from the USA and Western Europe, the hourly rates are very low compared to the level of expenses that theses cases generate. By contrast, the rates are high compared to the money that can be earned in national practices in the former Yugoslavia and many African countries. Inevitably, that contrast has led to dissatisfaction, on the one hand, and allegations of unreasonable enrichment, on the other. There is no easy solution but if senior, competent lawyers are to be attracted to assist in the discharge of cases before the ad hoc tribunals, the rates of remuneration have to be at least as beneficial as the practitioner could reasonably expect in his or her domestic system.

Delays to trials

One of the principal sources of concern as to the issues of any abuse of process at the ad hoc tribunals is the extraordinary delay in bringing cases to trial and the length of the trial and appellate process itself. There have been many instances of detainees waiting for periods in excess of two years to face their trials that are then subject to the restrains of limited court space and judicial time. The nature of the proceedings limits expedition and, in virtually all cases, testimony has to be interpreted for the benefit of not only the defendants but also the judges and counsel. The two languages of the tribunals are

English and French but most of the detainees and witnesses give their evidence in either Serbian or Kinyarwandan in the ICTY and ICTR respectively. Practice at ICTY for UK practitioners does not require any particular competence in French but does require facility and experience in the use of translators and interpreters. In contrast, practice at ICTR does require a working knowledge of French, or at least the ability to read and understand French to approximately UK A level standard.

So far, a reader could be forgiven for thinking that this is a litany of complaint. In reality, it is simply a reflection of some of the very real problems that the ad hoc tribunals have generated. On the positive side, there is widespread acknowledgement that at the ICTY there have been significant improvements in all areas of practice as the experience of past failures has led to revision of practice and procedure. Unhappily, the same cannot properly be said of the ICTR where reports of delay amounting to paralysis appear to be justified; a cogent example being the fact that until October 2000 two of the three judges of one Trial Chamber had heard no cases in spite of being two years into their initial four-year contracts of employment. Indeed, it a was only for the first time in October 2000 that all three of the ICTR's Trial Chambers were hearing cases simultaneously.

Arguably, the remedy for many of the failures and delays at the ad hoc tribunal is for defense counsel to be more publicly outspoken and to demand a more vigorous and consistent application of basic rights for the defense and an end to the practices that have given rise to what in the UK would be regarded as abuses of process.

That, in turn, necessitates that cases are defended by experienced and well trained advocates with a sound knowledge of the Rules of Evidence and Procedure of the tribunals, the basics of international criminal law, in particular, conventional and customary law and, not least the fundamentals of human rights legislation and practice. That will only be achieved through consistency in selection and training and, arguably, by the creation of a strong and effective international criminal bar.

The International Criminal Defense Attorneys Association (ICDAA), based in Montreal, is making significant inroads into the creation of such a bar. There is a growing perception in both national governments and the UN that if the future International Criminal Court (ICC) envisaged by the Rome Statute is to become and effective forum and tribunal, a prerequisite is the creation and maintenance of such an international criminal bar.

Conclusion

There can be no complaint if war criminals are convicted after a fair trial conducted by a properly and professionally constituted and staffed court on the admission of relevant evidence. Likewise, there should be no complaint or political reaction should such a trial result in an acquittal.

It would, however, diminish us all if either conviction or acquittal should follow on from any unfair trial when the remedies are already foreseeable form the lessons to be learnt at the ad hoc tribunals.

Human rights and the application of humanitarian law are neither partisan nor political; taking the politics out of the ad hoc tribunals is a first and fundamental step to ensuring support for the ICC. As someone involved in the ICC Preparatory Commissions at the UN in New York for the ICDAA, this author recognizes that the reluctance of the United States to sign or ratify the Rome Statute is understandable, although unwelcome, considering some of the decisions and failures of the ad hoc tribunals.

In the current climate of the majority of nations trying to improve and publicize human rights through legislation and education, it cannot be too much to ask that the international community takes a hard look at its own record in its own tribunals and creates systems of which we can be justifiably proud and which actually achieve the aim of international humanitarian law.

In spite of all the pitfalls, the challenge of practice at the ad hoc tribunals is worthwhile and demanding. I would encourage any reasonably senior criminal practitioner to investigate the possibilities and to visit the tribunals' websites to be found at www.un.org/icty and www.ict.org. In particular, I would encourage them to join the ICDAA which can be done online at www.hri.ca/partners /aiad-icdaa/.

---

[*]Counsel in the cases of Mucic and Nikolic at the ICTY and Mugenzi at the ICTR. Also called to Fijian and Eastern Caribbean Bars.