

# **"Toto, I Don't Think We're In Kansas Any More or The View From the Rabbit Hole --- Why International Criminal Tribunals are So Very Strange"**

One might think that because International Criminal Trials (ICT's) involve Prosecutors and Defense Counsel, Judges, courtrooms, evidence, procedure, precedent, judgments, verdicts, appeals and prison sentences that ICT's are trials as we know them. After all, if it walks like a duck and talks like a duck it is most likely a duck. But, we would be wrong to make that conclusion.

As poor confused Alice found after she landed in the bottom of the rabbit hole, the mere fact that we recognize the shape and texture of familiar objects and systems, may, when put into another context shed little light on their actual function and purpose.

So, trials may not really be a test of evidence. Presumptions may not actually be rebuttable. Due process guarantees may not be available. Equality of arms may not really be so equal. Established rules of procedure may change in mid-trial at the discretion of the court. All is not as it appears.

The comparison to Alice's wild adventure in Wonderland is apt. Towards the end of Alice in Wonderland, the King of Hearts, became the judge of a trial to determine who had stolen some tarts. As the trial unfolds, the king says to a large white rabbit, "Give your evidence," "and don't be nervous, or I'll have you executed on the spot." The rabbit was unable to tell his story, he was so nervous. And so, although no testimony was delivered, the King struck the testimony and ordered the beheading of the rabbit .

Next, the King busily wrote in his notebook while everyone waited quietly. Suddenly, he called out "Silence!" and read out from his book, "Rule Forty Two.

*All persons more than a mile high to leave the court.*" Everybody looked at Alice. Who had consumed a potion which had caused her to grow very rapidly.

"I'm not a mile high," said Alice.

"You are," said the King.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule: you invented it just now."

"It's the oldest rule in the book," said the King.

"Then it should be Rule #1," said Alice.

There was a dead silence in the court. No witnesses had yet testified, no evidence had been considered. The King spoke in an angry tone, "Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first-verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

"Off with her head!" the Queen shouted at the top of her voice. Nobody moved.

"Who cares for *you*?" said Alice (she had grown to her full size by this time).

"You're nothing but a pack of cards!"

No disrespect to the international tribunals is meant by this comparison, but the similarities to recent experiences in ICT's are striking.

Understanding the roots of our domestic criminal justice systems provides real insight into how our systems have evolved into the form we know it. As we know, the past is prologue. Let's first take a look at the criminal justice systems with which we are most familiar. Whether we come from civil or common law systems, we all share some history.

Criminal justice systems grow out of a response by government to some definition of criminality. Criminality is generally defined as any conduct which is unacceptable to the political executive. At various times and places, that political executive may be a clergyman, a monarch, chief minister, council or parliament, likewise a Pope, Imam or United Nations General Assembly.

In Judeo/Islamic/Christian culture justice was primarily defined as retributive. In the Bible, at Exodus 21: 24, the notion of an "Eye for an eye" begins to define the modern "rule of proportionality" standard used in our courts today. That is, the penalty should be proportionate to the harm actually caused.

In Deuteronomy 17:6 we learn that "two or more witnesses" are required for establishing the guilt of a person in a capital case, thus setting the modern precedent for the principle of corroboration. Later biblical verses establish the necessity of an appellate process (in the biblical case... the clergy). Notions of retributive justice abound throughout the Bible. The plagues visited on the Egyptians and pharos left no doubt about the finality of any ultimate judgment.

The determination of criminal liability has always resided with the power elite. Rather than limit the definition of crime to behaviors which directly injure other individuals, those in power defined a new species of crime which generally included conduct which undermined the power base of whoever was in power. So, treason and crimes against the church came to be identified as some of the most serious offenses.

Criminal justice systems today can be said to have generally developed along two routes. Those that followed the development of biblical law (the Judeo/Islamic Christian System) and those that followed one or another Canonical Law Systems. Among the latter systems are those that developed out of the Greco-Roman traditions (from which most civil law systems derived their judicial structure), those that developed out of independent Asian societies and many that evolved from aboriginal peoples throughout the world.

In Canonical systems, if the law said an act was prohibited, then it was bad because the law said so. This notion of **Mala Prohibita** makes prosecution very easy because it eliminates the need for any cumbersome evidentiary rules. Although not much of a system for dispensing "justice", such a system is well-suited for maintaining social order. Roman- Greco law and many Asian systems were therefore more streamlined and perhaps more efficient in a bureaucratic sense than systems which derive from Biblical Law which tend to be more morality based. Judaism and Christianity hold that certain acts are "morally repugnant" and are wrong because they do harm. Such acts are **Mala en Se**, evil in and of themselves.

On the other hand, the Greco-Roman system holds an imperial view of government power. It emphasizes the absolute power of the state. Policy was paramount and Roman law did not trouble itself with whether it was good or bad policy in the moral sense. Even today, we see, in the foundation of civil law systems, a generalized trust in the righteousness of government bureaucrats and the belief that professional truth finders will do their job in the best interests of the populace.

In early versions of both systems, however, process and procedure in determinations of criminality were largely lacking. No significant process was required since the determination of criminality was the province of those who had the revealed truth. That is, since the clergy or the monarch (who was, luckily,

anointed by god to carry out His wishes) no detailed process or checks and balances were necessary.

Both Common and Civil law traditions have evolved through political pressure, populist insistence and the modern developing sense of fairness to limit the power of government through the guarantees of certain rights and freedoms to individuals.

Most of our criminal justice systems now reflect the appreciation of the rights of individuals and the need to limit the power of government. That level of appreciation is likewise reflected in the exclusion of certain kinds of evidence from trials, limits on the ability of government to eavesdrop, limitations on the circumstances under which an individual can be compelled to speak and so forth. We all sleep better at night knowing that the government is restricted from certain kinds of activities in its legitimate drive to maintain order.

Unlike any other existing criminal justice system the International Criminal Court and ad- hoc international criminal tribunals which have preceded it are borne of the desire to avoid impunity of those who commit genocide, war crimes, crimes against humanity and, the still to be defined, “crime of aggression”

Historically, as we know, leaders and defenders of revolutions, revolts, wars, incursions, coups, take-overs, challenges to power and the like have not been legally challenged for their behavior during those activities. Except, of course, by virtue of the likelihood of their being summarily killed if they lost whatever battle they were fighting. While rules of war and conflict have existed for centuries, violation of those rules generally carried no particular sanction save for the possibility of similar violations being visited on the violator or his people.

Our history is, sadly, riddled with examples of governmental excess in its exercise of power during conflict. Hiroshima, Mylai, Carpet bombing in

Cambodia, disenfranchisement and destruction of aboriginal cultures, torture of prisoners and the list goes on.

While we can all applaud the establishment of a system designed to make the world a better, safer place, we might view with some skepticism the notion that the establishment of these ICT's results in a deterrent effect. Those who have studied capital punishment take pains to point out that there is no evidence of a deterrent effect achieved by the existence of the death penalty.

Attorneys who come from both Civil and Common law traditions find themselves dumbfounded, from time to time, by situations which occur in the various international tribunals.

Most would be shocked if the rules of procedure were to change in the midst of trial to facilitate a speedier resolution of the case. Many would find it strange, as an attorney in an active case to be denied access to court facilities. It would be curious for most lawyers to find that their pretrial access to witnesses could only occur in the presence of a representative of the prosecution. The denial of legal aid funding sufficient to carry on an adequate defense, may not be shocking to many, but in a system which trumpets equality of arms as a guiding principal it is mind boggling. The prosecution's ability to appeal an acquittal is jarring to many. That the Registrar (Clerk) of the court should be responsible for screening lawyers for inclusion on the list of potential counsel, protecting prosecution witnesses, managing defense requests for evidence, determining the adequacy of legal aid and administering a disciplinary system seems, at least, deeply flawed.

Those who have practiced in these courts can entertain with endless examples of policy, decisions, practice and procedure which strains credulity. These occurrences do not happen in a vacuum. They exist because the system they occur in is designed to achieve something very different from domestic criminal justice systems. Due process and justice are not the endpoint in the

ICT's. By definition, the endpoint for the ICT's is the avoidance of impunity. That endpoint is achieved by following a distinctly different path than do domestic courts.

The peculiarities of international criminal practice exist due to the unique genesis of these tribunals. ICT's, like all criminal justice systems, are instruments of the power elite. But they are unique because they try the power elite for behaviors which have historically been within the prerogative of governments.

We can not and should not ignore the fact that this unique genesis results in a new paradigm of criminal defense. As defense lawyers in our domestic courts, we are accustomed to being blamed for the ills of the criminal justice system. We are criticized for garnering acquittals for the guilty, needlessly complicating the trials of the accused and confusing juries with discussions about burden of proof and innocence... shame on us all. If we could just get with the program, submit to the authority of the court and the prosecution, then accused people could be convicted much more efficiently.

On this score, at least, things are no different in the ICT's. The defense is clearly required to have a role in the proceedings, but too often the judicial system views the defense as an obstacle to be barely tolerated on the noble road to the avoidance of impunity.

Practicing in the ICT's provides an opportunity to work on the cutting edge of the development of a new body of law. It is exciting and challenging. But it requires a commitment to continually challenge the status quo.

The cement is still wet at the ICC and the tribunals. Practicing attorneys have the opportunity to effect policy, procedure and the development of international criminal law precedent in these jurisdictions and in emerging criminal justice systems throughout the world, who will use the ICC and the

tribunals as their model. Today's attorneys set precedent with every action taken in these new courts. What is done or not done will affect all those who follow.