THE AD HOC TRIBUNALS ORAL HISTORY PROJECT

An Interview with

Alphons Orie

International Center for Ethics, Justice and Public Life

Brandeis University

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Q1: In 1994, you were on a working group at the ICTY for the assignment of defense counsel?

Orie: Not on the assignment of defense counsel. The then registrar, Theo van Boven, a famous human rights expert, had no idea about what it takes to organize defense. Of course, he was well aware that defense is important at a tribunal. We knew him. My law firm was at a distance of two hundred meters from here, which made it very easy. He consulted us on, "What should I do?" and then we talked about it, so that's what happened. I think on the basis of these talks he further developed—even in the rules you'll find, sometimes, the traces of that. If you look in the rules about qualifications of defense counsel, you'll see there's a reference that university professors may act as counsel as well. I had noticed that that's the system in Germany. I had quite a bit of
international experience in defense cases. I thought such a tribunal might need some
expertise as well, not just practicing lawyers. It might assist in the quality of the defense.
You'll find university professors still in our rules as qualifying to become defense
counsel.

Q2: That's nice to hear.

Q1: Not just defense counsel; for judges as well, the requirements are not just having
previous judicial experience. Is that right?

Orie: There are no specific requirements, such as judicial, academic, area-of-law or
geographic area, under our statute. That's different from the ICC [International Criminal
Court], where you need expertise in a certain field and you should come from a certain
geographical area. No, for us it's relatively open. You report your candidates to the
Security Council. They make the short list and there will be elections in the General
Assembly. That's it. Professors are very good. Professors tend to want to write books
explaining everything, whereas career judges know better that, sometimes, you should
limit yourself to the question at stake, answer that question, and not fill the whole chapter
of that book with all your other thoughts.

Q2: I practiced before I went into academia. I was in courtrooms, so I'm not just an
academic. Since you were here, Judge Orie — as the tribunal was getting set up, so you
would have been so aware of it—what was your thinking or your impression of having the ICTY at all when you were watching it form? Do you remember back?

Orie: Yes. I wrote already a small pocket on international criminal law for Dutch students in Dutch, and there Tokyo and Nuremberg went down as historical events, not the beginning of a development. Nothing exciting had happened even when we wrote the second edition, International criminal adjudication was not a reality. That was something that happened in the past. There were some groups that were still favoring the establishment of—in the United States you had this society for the establishment for an international criminal court. I thought, "No one thought about it as a realistic thing."

Of course, when it happened, I was thrilled. At the same time, I wondered how it would work because I was aware of the criticism on Tokyo and Nuremberg as well, especially the experiences by the Dutch judge [Bernard] Röling in Tokyo. He's been interviewed by Cassese. A very interesting book [The Tokyo Trial and Beyond: Reflections of a Peacemonger (9780745614854): Antonio Cassese interviewing B. V. A. Röling]. What I would recommend you is to also read—although it's in Dutch; perhaps it should be translated—a recent book published by his son [Hugo Röling's] De rechter die geen ontzag had (2014)] in which most of his correspondence with his family is reflected, often about what he experienced in the Tokyo tribunal. Very interesting.

It was something new. I was very much involved in jurisdictional matters, extradition, mutual assistance. That was my daily work. It was, of course, a totally new thing. We put
ourselves on the list as available to be appointed defense counsel. We thought by ourselves, "We should do it because if there's anyone who can do it, it's us," because we were a highly specialized firm in criminal law matters. We hardly dealt with any other cases. I was the specialist in the international part. It was thrilling and at the same time scary. It's still a little bit.

Q1: Can you walk us through the process of that initial contact with the ICTY in that working group, up to when you were appointed defense counsel in 1995?

Orie: Yes, what happened was the following. I had in my law firm—the name was given by the two lawyers who established the law firm [Wladimiroff & Spong]. One of them was Michail Wladimiroff, That's a good name if someone is interested in seeking counsel, which may be familiar with Eastern Europe. What then happened is that we were approached by—. We knew about the tribunal. We knew the registrar at the time. Then we were contacted by a German lawyer because [Duško] Tadić was being prosecuted before a court in Munich. It was that moment—it was the issue of transferring the case to The Hague. In his contacts with Tadic’s defense counsel in Munich, it turned out that he was not interested in defending Tadić before this tribunal. Then we were contacted and Wladimiroff—I think he even went to Munich to meet, and at least that developed in such a way that he would be defense counsel, as it turned out very soon. I'll leave alone quite a lot of background details, which are not yet for publication.
Finally, he got the case and he soon found out that it's undoable to do it in your own. I was his closest ally in the law firm. He was a professor in criminal law, mainly economic criminal law. I was very much versed in international aspects of criminal law. We made it a joint enterprise, although not a criminal joint enterprise. [Laughter] A JE and nothing else. Then we felt that we had some problems because we were trained not in an adversarial system, so we were offered by the International Bar Association to get some additional training. In one of the side rooms in the Peace Palace, I had a full week’s training. I was the only pupil because Wladimiroff was in his bed with a herniated disc. It was all videoed and we brought the videos in the evening to him. I was grilled by my teachers, one of them being Stephen Kay, and we later invited Stephen Kay to join the team. Finally the Tadić defense team consisted of four persons—Wladimiroff was lead counsel, I was number two, Stephen Kay, and Sylvia de Bertodano, who is now a judge in England and was a barrister at the time in England. So the four of us. That's what happened.

Then we suddenly felt that there was a heavy burden on our shoulders because we were aware that all the basic issues would be decided in the first case. That meant that good defense there would be vital for the development of the case law in international criminal law—but also questions like is the Security Council in the position to create a jurisdiction? To create a court? Does that fit in Chapter 7 of the UN charter? All those questions we had no idea about. Well, of course I was sufficiently—I knew more about treaty law than I would know about the law of the international organizations. We worked hard. We really worked hard to get everything, not under control, but at least that
we would know sufficiently about it to do a good job. We had no illusion about meeting a level of control. That's how it started.

Then of course we first had the issues on jurisdiction, and that was when the war was still ongoing. I remember that it must have been the summer of 1995—we had the hearing sometime in July—the motion on challenging jurisdiction. It was late August. Wladimiroff said to me, "I have to travel to Bosnia to further prepare the defense. In wintertime you can't travel, so you do the appeal on jurisdiction." I said, "Okay." There you are, all on your own, with such excellent judges as [Antonio] Cassese. I felt—not intimidated, but it was quite an exercise to do it.

Q1: Were you on the ground doing evidence gathering or interviewing in the territory?

Orie: Yes, we did that. We also tried to hire investigators, but our experiences were not very good. We were guided by some of the local lawyers, and it turned out not to be very effective and also not to be very efficient. Finally, we distanced ourselves from lawyers of the former Yugoslavia. Of course, we discussed it with Mr. Tadić at the time and we felt that—it's not in general to say that there's anything wrong with lawyers but our experience was such that we thought that, with good interpreters, we could achieve the same results.

It may not come as a surprise, that it's all publicly known, that one of those who was with us on the team was later prosecuted for contempt. Now that's, I would say, the kind of
problems we faced at the time. That was the case against Mr. [Milan] Vujin. But whatever may have been the reasons, our client decided that he would continue with us, and we went. As I said, Wladimiroff said, "You do the appeal on jurisdiction. I have to go there." I’d been there a couple of times as well. The first time was in early January 1996. I went there for the first time. What I do remember—these are silly details—that we flew to Belgrade, where we found a city with empty shops and an empty hotel, apart from us being the only guests in the hotel. It was immediately after Dayton and Wladimiroff had been there already before Dayton, so it was quite a dramatic situation over there.

Now, to get transportation from Belgrade to Banja Luka—we wanted to stay in Banja Luka close to Prijedor, where most of the charged events had happened. We found someone with a car who could cross over to Bosnia. We crossed with the car over a railway bridge because all the ordinary bridges are blown up—no normal bridges any more. With that car, I still remember going over the railway bridge. That was the one bridge that was still available. Later, when we traveled through Zagreb from Croatia, we took a cab up to the river and there would be Bailey bridges. On the one side of the river you had the Croatians. Then you would cross carrying your luggage, etc. Then at the other side, you'd first have—at the time it was UNPROFOR [United Nations Protection Force]; they've changed names now and then—and then of course the Republika Srpska guards, so you had to go through three checkpoints. Crossing that river would easily take you two, two and a half hours. There were no queues; you were the only ones who wanted to cross over.
Q2: Were there security concerns for you?

Orie: The registrar gave us a letter saying, "These gentlemen are preparing for the defense." The registrar invited everyone to assist us as much as possible, but of course apart from that there was nothing. We had some security concerns, yes, now and then, especially because we noticed that if we interviewed any potential witnesses, it could be that they would be visited by the police one hour later, or a day later. That was reality.

We met in the preparation of the defense with the local police chief in Prijedor, Mr. Simo Drljaca. Well, later Mr. Drljaca was—- We didn't know then at the time, but he was indicted. It was a confidential, secret indictment against him. When they tried to arrest him, he didn't survive. What I read in the newspapers is that he took a pistol and wanted to shoot at those who wanted to arrest him. He was then killed by those who wanted to arrest him. So, that was the situation.

You easily forget about security concerns. You try to do your job. This is just a bit of “in the field.” Of course, we went to Omarska. I was in Omarska for the first time a few weeks after Dayton—of course, the premises only. The same for Keraterm and Trnopolje.

Q2: How was the defense viewed at the tribunal at that time?

Orie: I can't speak for all the defense. First of all, we were the only defense counsel at the tribunal because there was only one case. We fought the tribunal on a legal basis. We
said, "How could you possibly establish a court by political organ?" You can read whatever we argued in the decisions. We challenged, but we did it not on an emotional basis. It's not that we considered them the enemies; we just thought that there were good legal arguments to challenge the competence of the Security Council to establish a court. Not that we were very optimistic that the judges would say at the end, "Well, sorry, gentlemen. You're right. We're not even going to decide on whether we were established lawfully, yes or no," because if you're not lawful, you cannot even decide on whether you have been—. We had no great expectation. We tried hard to do whatever was in the interest of our client.

Q1: How did your defense argument come together for the Tadić case? Can you take us through the process of putting together the defense?

Orie: First of all, Michail Wladimiroff was lead counsel. He was the one who mainly had what strategy to follow and what tactics. What I can say is that we did not think it the best approach to deny that any cruelties had happened. We'd rather focus on the individual criminal responsibility of our client—whether he was around at all, whether he was involved—rather than to say nothing happened in these facilities. For Tadić, it was mainly Omarska and some other actions in villages near Kozarac. So that was, apart from that, all the details. I was mainly dealing with general parts of it, less with the facts of the case, but that was the approach that was agreed upon by our lead counsel and the client.

Q1: What do you mean by the "general parts of it"?
Orie: Well, such as challenging the jurisdiction, but also other legal aspects. For example, we had a bit of a battle in the early stage about safe conduct. That has got nothing to do specifically with—Mr. Tadić wanted to call witnesses, and some witnesses were concerned that they might not be able to return. Safe conduct was a concept that I was very familiar with from my practice. It was missing. We thought it would be unfair to the defense that we would have to leave all our witnesses over there and not call them because they were all afraid of being arrested—for good or for bad reasons, I leave that alone. It was pretty standard in international criminal law that if you call a witness from abroad, he can travel there. He is more or less immune for any crime he has committed before. And then return, and then everything is said. That you do not use his presence for other reasons.

Now, we went to the registrar and said, "Well, we don't like this," but we had a problem at the time because the plenary of the judges would decide on the rules. There was no rules committee at the time. Therefore, it's quite different from now because we have now the rules committee. The rules committee makes proposals to the plenary of the judges, but in the rules committee, there are nonvoting members from defense counsel, prosecution, registry, etc. All that didn't exist at the time.

We said, "Well, Madame Registrar, these are our thoughts. You may find a way to bring them to the attention of the judges in the plenary." Soon after that, we got a message that the judges were not that much interested in it. Okay, fine. We had no standing in the plenary. Then it came to the first time that we addressed the trial chamber, and we said,
"We want to call witnesses or at least are preparing to call witnesses, but safe conduct is missing." Then I remember that the presiding judge said something like, "Oh, Mr. Orie, I take it that you know that the judges have considered it." Of course, I thought they would have done so because that was the message we got back from the registrar. Very indirect communication. She said, "Well, you know that."

I said, "Yes, but I've had no opportunity to argue it before the judges. Whatever you think about it, I'd like to argue the matter."

"Okay, go ahead."

We also had understood—not saying how—that especially the then president of the tribunal, Antonio Cassese, was certainly not in favor of anything like safe conduct. We started arguing it. I remember the prosecution—it was Ms. [Brenda] Hollis—"What would the Dutch government say if—?" I said, "That's not a question. I have an answer to the question for you. It's in the host state agreement. There's a safe conduct in there, so don't ask." Of course, I became good friends with Brenda Hollis later, but of course she was not happy that in public I told her that she didn't know the host agreement sufficiently. Suddenly the chamber thought, because I explained it to them, it's in the interest of justice to have it. Because if you say, "No safe conduct," and if the witnesses would decide to stay at home, that would affect the quality of the proceedings.
At the same time, what is lost if you require it? For some time, for some people, it may be a bit emotional to see them walking around. At the same time, if they stay at home, they'll not be prosecuted either. At least at that time, it was the situation. That may be slightly different now. Giving them a safe conduct would not change the situation as far as being prosecuted for the witness.

I tried to convince them of this. They said, "Oh." It was on Thursday or Friday. "Well, could you give us some authorities on the matter?" I worked all of the weekend. I think I had thirty-six, many in the Italian language, knowing that Judge Cassese was not very much in favor. I had put in quite a bit of Italian sources for that. We had thirty-six after the weekend, and we presented it. They had made up their mind already, so it was a bit of a lost weekend, but at least I had thirty-six solid historical, broad, Europe, non-Europe, treaty law, domestic law, everything. I had it prepared.

I was happy because safe conduct is often applied nowadays. If I'm talking about general issues, I think about these kind of things.

Q2: Did they ultimately allow the safe conduct or not?

Orie: It's everyday practice today.

Q2: Was Judge [Gabrielle] Kirk McDonald the presiding judge at the trial in Tadić?
Orie: Yes.

Q2: Who else was on the bench?

Orie: On the bench of first instance was Judge [Lal Chand] Vohrah and Judge Sir Ninian Stephen, the Australian. That was the composition of the bench. The Bench on appeal was Judge Cassese, Judge [Haopei] Li—who was already almost ninety by then.

Orie: Who else was it?

Q2: I'm not sure who else was. I have read the decision, but I'm not sure who else. Everything was so new at that point.

Orie: Oh, I think it was also the Canadian judge. The Canadian judge had been the chairperson of a committee to expel war criminals—the Deschênes committee in Canada in the early 1990s. I knew that very well because, in my practice in the early 1990s, I defended someone who had been sentenced to life imprisonment in absentia in the Netherlands for being a collaborator with the Germans. It was quite a case, which had drawn a lot of attention by the media. He then moved to Paraguay and moved later to Canada. He was living a normal life as an assistant professor at the university. I knew about that commission because it was the only one finally whom they managed to expel from Canada after all the others were unsuccessful.
Q2: Interesting.


Q2: What was it like to appear before this international panel of judges, or the three-judge panel, compared to having been in the Dutch courts?

Orie: First, of course, these are the hot shots. Therefore, we were very impressed by the top echelon of the international judiciary. At the same time, you're also aware that we needed additional training to be able to defend before McDonald, Sir Ninian Stephen, and Vohrah. They all have a common law background. We had to familiarize ourselves sufficiently with a second language. We're defending as non-native speakers before an English-speaking court, although Judge Deschênes very much emphasized that French was one of the official languages of the court as well. But you have to express yourself, all your written submissions, your oral arguments—you have to do it in a language which is not your own. That makes it not easy to do. Of course, we then had Stephen Kay and Sylvia de Bertodano as native English speakers, but of course, we had to be able to argue in court as well. If you do the appeal of jurisdiction on your own, there's no one to assist you.

We were impressed. At that same time, we knew that it was new for everyone. No one could say, "I'm so experienced in international criminal law." None of them ever had been—. We also thought, "Well, let's try to do the best job we can. We'll see." On the one
hand, we were impressed and there was a huge attention. I remember the initial appearance of Tadić. The whole grass area, it was all tents with journalists, etc. It got a huge media attention. So being impressed and at the same time, not impressed at all. We would do to the best of our abilities what I had done over the last fifteen years, which is to defend in a criminal case.

Often, people forget that it's not some kind of mystery law or heavenly law, or whatever you would call it. It's the basics of criminal law including what you would expect from such a tribunal. "We're going to put an end to war crimes, crimes against humanity"—no way. We are simple criminal lawyers. We knew that whenever you prosecute persons for murder or theft, these people now know that if they are thieves, if they are murdering someone, there's a fair risk that they would have to appear before a court. That's of course different, but I had not that many illusions that by this jurisdiction the commission of such crimes would suddenly be over.

People had high expectations—sometimes unrealistic expectations—of what one could achieve in this field. A bit of everything—impressed, not impressed. "Let's do our job, let's work hard. Let's try to make the best out of it. Let's invest to start with $10,000 or $15,000 in books and further literature." That's first thing we did, and we didn't get a dime paid. We had to wait for the first six months. Then, I was remunerated at $25 an hour. My law firm, just office costs, secretaries, was six times that amount. But since the other people in the law firm worked hard, we were still not deprived of an income.
Q2: Do you think people—judges, attorneys like you—had an appreciation that these trials had to be conducted as criminal trials fairly, with all the attention on the ICTY at the outset and a real possibility of victor's justice coming into play? You obviously had a sense of that. Do you feel other people had a sense that this needed to be absolutely done as a fair criminal trial?

Orie: For us, it was just a criminal trial, though a very important one and a very complex one. There was no difference. I'm aware that some people look at it as a kind of NATO [North Atlantic Treaty Organization] invented—. Okay, that's how they look at it. We did not and there's nothing more to be said about—because we considered that it was different from Tokyo and Nuremberg. That was clear. There's no doubt about that. The judges are recruited from all countries. You could say perhaps too many from NATO countries, especially in the end of the conflict. The NATO bombing played a significant role that may have influenced the perception of locals on what the role of the international community may have been in this context.

For us, Judge McDonald was an experienced judge, Sir Ninian Stephen and Judge Vohrah as well, so we're just dealing with court as we always had done. For us and apart from that, media attention—that's one or two days and then it's over.

Q2: So it was a good start for the Tribunal.

Q1: You were on the Tadić defense counsel until 1997?
Orie: Yes.

Q1: At that point, you became a justice of the Supreme Court here in the Netherlands. In 2001, you became a judge at the ICTY. Can you explain the move from being a justice at the Supreme Court here to becoming a judge at the ICTY?

Orie: Let's first do it the other way around, from defense counsel to a justice at the Supreme Court.

Q1: Okay.

Orie: I was already appointed at the Supreme Court, when finally, I wasn't even a member of the Bar anymore. I was in the Supreme Court when, in all its wisdom, the Tribunal took a decision that I was relieved from my duties as defense counsel. They were a bit late with that. Then, I was in the Dutch Supreme Court. What happened—just history. Elections were I think in February or March. I can't remember exactly. The closure of the candidature was in early January 2001. In early December, I got a phone call from our Ministry of Foreign Affairs. They said, "We are considering putting up candidatures. We have a shortlist. You're on that list. If you want to be removed from that list, tell us now." I said, "No. No reason to remove me from that list. You don't have to remove me from that list."
Then nothing happened. I went on a skiing holiday. I hadn't heard anything from the Ministry of Foreign Affairs. I knew that early January, it was closure of the candidature, and also understood that it takes something to—. The day before I went on my skiing holiday, I thought, well, let's give them a call. I said, "Are you aware? I don't know what your plans are. I still don't know whether you have made up your mind yet, yes or no. Just be aware that you can't find me in the next two weeks." "Okay, fine." Then, on the 27th of December, they called me at my holiday address. If I hadn’t given them my holiday address, I wouldn't have ever ended up as a judge at this Tribunal. That's how things happen.

I first consulted my President in the Supreme Court. Then, I found out that the Ministry of Foreign Affairs had thought it better not to contact the Ministry of Justice before deciding that they would put a candidature. That's all the political things that go around. In Holland it's not very political, but they thought they could approach me even without telling the Minister of Justice. That's fine, but I'm not in any way bound by anything the Minister of Justice would do. It's a common thing to inform at least the other departments, the Department of Justice, on plans. Then, I did shorten my holidays for one or two days to prepare the paper work, my CV [curriculum vitae], etc. That's how it happened.

Then, of course, the next step is campaigning in New York, a rather odd way of—. I'm not very much in favor of elected judges. I know in the U.S. it happens.
Q2: At the state level, but not at the federal level.

Orie: No, I know that. Especially appointments in the Netherlands are non-political. I was on the Dutch Supreme Court. I have never told anyone what my political affiliation, if I have any, was. That's not the same all over Europe. In Germany, the composition of the Supreme Court reflects more the—. In the United States, it's clear the way in which it goes and the president using his power to get the right people in the right place, and then they live forever. That's the problem with some of these persons.

Q1: We were just talking about that.

Orie: Yes. Then the campaigning—I don't really like it. For me, it's like sack hopping. It's a bit of a stupid game and not the best athletes would always win the sack hopping competition. But give me the sack. Here's the start, there's the finish. I will do whatever I can do to get at that finish in time. That's how it is. I'm not a real campaigner, but if you put me in that situation, I will try to campaign as well as I can.

Q2: In case some of the people who listen to this are not aware what the campaigning is, could you describe that a little bit?

Orie: Yes. Of course, I was a candidate proposed by the Dutch government. What you then do is you meet with either the ambassadors of the pertinent states at the UN or their legal advisers. I was always accompanied by my campaign person from the Dutch
permanent mission. Then you make appointments—one at 1:15, one at 1:30, and then you have nice conversations with everyone. Sometimes they were interested in my thoughts; often they were not that much interested. Always there's a lively exchange of votes, that is, "Well, we're inclined to vote for your candidate for this position, but we would very much appreciate if you will vote in favor of our candidate for the Fifth Committee, or the Security Council"—not Security Council, of course. That is a state matter.

There's a lively exchange of interests. You observe that. Is that okay? I'm not part of this mechanism. Now and then, and I remember those conversations far better, people were really interested in the substance. The Dutch mission would organize a reception where the permanent representatives or everyone would come in and they would say "This is our candidate. Okay, we have white wine or red wine." [Laughter] Or lunches, which is the UN daily thing to do. Of course, I felt a bit lost there. There was a lot of work waiting for me at the Supreme Court upon return.

A good campaign leader—because I consulted the Dutch judge on the ICJ [International Court of Justice]. I said, "What should I do?" Peter Kooijmans, he meanwhile has died. He said, "Listen to the guy who knows how campaigning goes. That's the most important thing. Do that and don't forget about yourself. It's still you. But all practical things, let him do it." That's what I did. Finally, that was successful, but I still find it a bit of an odd thing.
Q1: After all of this campaigning, and you're finally a judge at the ICTY, what were your impressions going into it and starting your work as a judge?

Orie: Well, of course, my life as a judge changed because, as a Supreme Court judge, if there's any court hearing, it would be half an hour, and most of the weeks there would be none at all. It's all written. I was back, to some extent, to my old profession, dealing directly with the courtroom. I like that. Apart from that, of course, I was in an advantageous position because I'm a Dutch citizen. Instead of turning to the left and biking for ten minutes to the left—well, I often take my car now—I had to turn to the right and get to work—get to my office and do the job I was hired to do. Then, of course, you will have to meet all your new colleagues. They all had to change their lives considerably. That's quite different. I still have my social background here and there. You found the same, that there are some that you become friends with. There are some who, you really are very impressed by their knowledge, by their skills, and sometimes others where I was less impressed. It's normal. We're all just normal human beings. We have some experience.

What was very interesting—when I served on the Dutch Supreme Court, I would say ninety-five percent was common ground. We were educated at the same universities. We were totally familiar with all of the details of the case law. We were professionals. Then, the final battle was in the last five percent, that "Should we move in a different direction or not? Should we just consolidate our case law? Is that a new problem?" But common ground is ninety-five percent.
Of course, it's quite different here because the percentage of common ground is by far less. You come from different backgrounds—one is an expert in international humanitarian law, the other one is specialized in criminal procedure. You have your own system from where you come—an Egyptian colleague, Colombian colleague. Surprisingly, it's not that you feel more familiar necessarily with the colleagues from your own continent, or from your own system. Sometimes, I had a far more direct relationship; I even worked very intensively with colleagues where you would expect there would be a huge difference or a huge distance, and there was not.

Q2: You mentioned earlier when you were talking about being defense counsel, because you were coming from a civil law system, you had to learn cross-examination. There was that civil law/common law effect to what you were doing. What about when you became a judge? Did you perceive that civil law/common law difference again but in a different way, or a similar way?

Orie: What you see here is that, as civil law trained lawyers, we enter an environment which is, I would say, mainly adversarial. Whether you like it or not, you can't just stick to your own. You're entering this arena. There you have to really—there are the rules, and the rules are disclosure, etc. Disclosure is somewhat copied from the U.S. Federal Rules of Procedure, as a matter of fact. There's an explanation for that, because Judge McDonald came with almost a complete set of rules. That's described, at least in books. I wasn't there.
You see, the other judges have to work together with the civil law-oriented trained judges. What you see is that you're doing things you wouldn't have expected that you would do—perhaps less for me because I had already the experience in Tadić. Due to my very much international-oriented practice, I had to study/deal with judgments from Italy. I had to study/deal with indictments from the United States. I had to study judgments or indictments issued by the requesting state. I was involved in foreign courts. I had appeared in foreign courts. Comparative criminal procedure helped me a lot to better understand the situation. That was an advantage. But what you see is that the passivity of the adversarial judges is disappearing a bit, whereas the very active approach by the civil law-oriented judges also is diminishing. Sometimes you see the one-system approaches in these persons. The other—you're sitting together in court.

Q1: You've been involved with the ICTY in initially 1994 and 1995, and now, as a judge since 2001. Fourteen years later, here we still are. What's your perspective on the evolution of the Tribunal in your experience?

Orie: We have achieved one important thing, a very important thing, and that is an end to impunity—not to say that it means that you're punished if you commit war crimes or crimes against humanity or genocide. It's not automatic anymore that you will not be punished. That is what I understand—the basic value of an end to impunity. We have also developed quite a bit on the development of case law in many fields, which were hardly
touched upon in domestic systems—international humanitarian law, the law of The Hague. We have established quite some case law there.

That's not our only achievement, but of course, we were at the beginning of developments, which were ICTY, ICTR [International Criminal Tribunal for Rwanda], [Ad Hoc Court for] East Timor, ECCC [Extraordinary Chambers in the Courts of Cambodia]. It was the starting point. Of course, whether you want it or not, people look at what you're doing. It's the same thing. You see there are huge differences now and then. This is an interesting example—witness proofing. If you compare what they did at the ICC and compared to what we are doing here, it is very interesting to see that it was diverging. At the same time, initially, witness proofing was forbidden, more or less. You could familiarize with the procedure but not necessarily to be done by counsel, etc. It is very impractical as well if you have no idea what you could ask a witness if you—. The development in the ICC case law was initially even stricter in prohibiting witness proofing than it is now, and allowed mainly that witnesses were familiarized with the procedure and it is not to be done by the counsel that called them.

At the same time, of course, I'm aware, that witness proofing can be very dangerous, and that it can be used to influence the witnesses very much and in a improper way. The ICC has now developed its own system that it should be video recorded. You see what started as a clash between what we did and what they did. They did a very good job in further developing the proofing practices and finding ways of avoiding the negative aspects of it.
In many respects, I think I've been part of a historical development. I hope it will be sustainable.

In the beginning of the ICTY, there were, for a long time, no cases, and some people said, "The ICTY was established mainly to get rid of a problem rather than to establish a sincere legal institution." That changed, of course, with Tadić, and then, slowly, we moved on.

Finally, we had a different level of accused. I never talk about the accused in my own cases, but Milošević was one of the first former presidents who went to trial. We see that now in other courts as well. What is also very important is there is an alternative now for the kind of solutions which we have observed, experienced, seen. Saddam Hussein, [Nicolae] Ceaușescu—that is the worst you could do. Not responding in any way is also very bad. Domestic jurisdictions often don't give a good response to atrocities. If they give a response, you could now and then have your doubts as to whether they would be sufficiently independent, etc. Therefore, I think an international jurisdiction is certainly a good step forward.

Now, we have to make sure that we do it well enough to make it a sustainable institution. We need to work hard for that because it's easy to destroy your reputation, etc. To say we are doing such a splendid job is not my approach. We're trying to do our utmost best. We achieved quite a bit, but it needs constant attention to improve and not to, as the French
say, *qui n'avance pas recule*—if you are not going forward, you are going backwards. A bit of a vague answer, perhaps.

Q2: It's a great answer.

Q1: As we're closing up here, maybe not the last question, but is it surprising to you that the ICTY is still going on at this point?

Orie: Surprising in what sense? As long as you have not finished, then it's ongoing. It doesn't surprise me if you've not finished the job. I think everyone has not really understood what it takes to deal with these kinds of cases. In the beginning, the expectation was that you would hear a case in six weeks. That was what they thought at the time. Tadić was a relatively short case and was more interesting for the general issues and, of course, for the client.

Q2: How long did Tadić take?

Orie: We had the preliminary decisions on jurisdiction in the summer and autumn of 1995. The trial started somewhere in May 1996. I think it was the 7th of May. The presentation of evidence concluded after approximately half a year, followed by final arguments three weeks later. The verdict was delivered exactly one year after the trial had started, on the 7th of May 1997. Altogether, one and a half, two years, approximately from arraignment.
Q2: Very quick.

Orie: Only one accused and a limited indictment. At that time, sentencing was still separate from judgment of conviction and the sentencing judgment came therefore later. I have now forgotten your question. Was I surprised we are still here? The Tribunal tried hard in the following years to speed up but it takes in this context at least five or six to tango, not just two. There were huge battles for the prosecution to limit the indictments, and these were hard battles with Carla Del Ponte at the time. "It's unfair to—I can't limit it. For those victims, I can't do that." I thought by myself, but are you really not aware that if you say for this accused, "I need everything," that it means that another accused will not even appear before the court? The other potential accused had victims as well, so I found it analytically rather—well, I hardly dare to say—she would say using usually strong words—found it not very smart. Yes, and that of course caused it, and dimensions of cases is really a problem.

If Milošević asked for 1,600 witnesses, you couldn't expect—. If he's in such a physical condition, you can hear the case only three days a week. That brings you into all sorts of dilemmas. If you would have allowed him to call all 1,600 witnesses—which he was not allowed to do, as a matter of fact. If you'll say three days, two witnesses a day, that makes 800 days in court only hearing evidence in the defense case. You sit three days a week. That means 250 weeks. That's five years without arguments, without legal. Nothing. Okay, now make that easily, because we are talking about fifty weeks. But of course we
need holidays now and then so that makes forty weeks. It's six, seven, eight years and that's only defense case—no judgment drafting and no prosecution. Such a case would easily—.

The right to call witnesses is an essential right. At the same time, if you were to say, "Whoever you would like to call, call him or her," then cases become unmanageable. You have to find a solution one way or another to stick to the fairness of the proceedings and at the same time find practical solutions so as to be fair, not exactly in the same way—I mean, as you do it in ordinary cases in domestic jurisdictions. If I'm a shoplifter and I know that I've got two witnesses, and I plead not guilty, if it comes to court anyhow, then of course that's not a problem, because one out of 500 will do that. You'll spend one more day on that case. Of course, the organization for international criminal justice is a different story. But let's not forget, in Nuremberg they did twenty-six accused in one year. There was some criticism on the fairness of those proceedings. I'm not saying that they were necessarily unfair, but Judge Röling had his afterthoughts about the fairness of the Tokyo tribunal. So surprised? Yes and no.

Q2: How do you see the future of international criminal justice?

Orie: Well, first of all, without me, [Laughter] which is sometimes good. As I said, there is a risk of it becoming politicized. That is a real risk. We should fight against that very much. We should keep up a standard of independence, integrity of the judges, fairness of the proceedings. We should fight for that day by day. Then there is a future. We should
also be aware that international criminal justice, as we know it now, will be a very limited response to international crime.

We have had 161 people, where the ECCC had four accused, and a huge battle about number five and number six. That's one of the important things we also did, is to promote and encourage domestic prosecutions as well. You see more and more that states have to cope with their past. Not necessarily with criminal law—the South African experience, which might not work in many other circumstances, but it worked in South Africa, certainly as a response to its past. The role of domestic courts becomes more important and awareness that there's a duty is also growing.

Q1: Okay, thank you very much for your time today.

Q2: Oh, thank you so much.

Q1: It's been great.

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