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## LIFE IN THE BUBBLE: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA†

Robert A. Stein\*

My limited waiver of the admonition against telling war stories came with several caveats. Mike Bromberg told me to be relevant. My former professor, John Reed, told me to be educational. Dan Kelly just said, “Do your own thing, man, do your own thing.” And my wife, Claire, warned me not to be boring and to try to inject some humor.

Moreover, there are some constraints on what I can say about my experiences before the International Criminal Tribunal for the Former Yugoslavia located in The Hague. The Tribunal imposed a gag order, or “order of protection,” on all participants.

With all these admonitions in mind I will tell you a little about “life in the bubble.”

### HOW I WAS SELECTED

In the fall of 1998 I was pondering the great issues of life, such as why David Nixon gets all the great personal injury cases, whether New Hampshire will ever have a broad-based tax, and whether medical school is still an option for me, when I received a call from a friend of mine named David Geneson, who is a partner at Hunton & Williams, a large Virginia law firm with offices in Washington, D.C., and throughout the world. I have taught with Dave for many years at the National Institute for Trial Advocacy. Dave asked me if I had a passport, and I said yes. He then asked how I felt about defending people charged with murder and torture—lots of murders and tortures. That got my interest. Dave asked me to get involved in the training of several Croatian lawyers and judges who were part of the defense team in a case to be tried in The Hague, before the international war crimes tribunal located there. The client’s name was Dario Kordic. Mr. Kordic, along with his co-defendant, Mario Cerkez, had been indicted and was to appear before the International Criminal Tribunal for the former Yugoslavia.

When I took the assignment to help train defense counsel, I never guessed I was going to end up wearing a robe and bib, and little did I know that I was

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going to end up spending eight months in The Hague, appearing on behalf of an alleged war criminal.

#### THE END RESULT

The trial began on April 12, 1999, and ended on December 25, 2000. Judgment was rendered on February 26, 2001. There were 240 trial days, 241 witnesses (122 for the prosecution, 117 for the defense, and two court witnesses), 4,665 exhibits (2,721 from the Office of the Prosecution, 1,643 from us, and affidavits and transcripts from other cases from the International Criminal Tribunal). There are over 30,000 pages of transcript.

The written judgment in this case runs 240 pages, with 1,857 footnotes, and six appendices. It is a book. I was in trial from April of 1999 until nearly the end of prosecution's case in February 2000. At that point in time, my lovely wife called and said, "It's February, the power is out, it is cold, and we are out of wood. Get home." (Additionally, I had a substantial case to try in New Hampshire that summer.)

The trial was not held on contiguous trial days, and during the gaps we would prepare for the next segment, interview our own witnesses, or fly home to visit our families. The trial lasted longer than both the Nuremberg and Tokyo trials. The prosecution sought life imprisonment for our clients. There is no death penalty under the applicable international law.<sup>1</sup>

#### HOW DOES ONE PREPARE FOR A MARATHON WAR CRIMES TRIAL?

So how does one prepare for the defense of an alleged war criminal? I had to learn about the court, the court rules, the Geneva Convention, Yugoslavian history, the civil war in Bosnia, the politics of that civil war, Yugoslavian morés, Yugoslavian lawyering, and prior Tribunal decisions. I had to wrestle with all the indictments, which remain the strangest charging documents I have ever seen. Finally, I had to set up an office from scratch. Let me touch very lightly on each.

##### *Historic Background of the Tribunal*

The Tribunal was begun on May 25, 1993, having been created by United Nations Security Council Resolution 827. Its historical underpinnings were the 1864 Geneva Convention, which covered the Treatment of the Sick and

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<sup>1</sup>Ultimately, the court acquitted my client on half of the charges, including the major "command responsibility" charge, convicted him on the remainder, and sentenced him to 25 years in prison, with credit for time served.

Wounded in Wartime, and the 1899 Hague Convention codifying the Laws of War. Neither Convention had been used in a trial since the aftermath of World War II. They had been used in November 1945, when the International Military Tribunal in Nuremberg opened its cases against twenty-two Nazi leaders, ten of whom were hanged a year later, and again in May 1946, when the International Tribunal for the Far East in Tokyo put on trial twenty-eight Japanese leaders, all of whom were convicted. Seven Japanese defendants received death sentences, and seven were sentenced to life imprisonment. We studied those judgments. I can tell you that it is one thing to read those cases as a student of history, and quite another to read them as a lawyer about to go into a war crimes trial. The term "victors' justice" does come to mind, but that is another topic for another day.

On May 7, 1996, the first international war crimes trial since Nuremberg and Tokyo opened in The Hague against Dusen Tadic, a former Bosnian-Serb police officer. Beginning with the Tadic trial and judgment, new decisional law was created routinely, and we had to keep up with the ever-shifting developments as defenses were accepted or rejected and processes explained.

#### *Court Rules and Processes*

One of our first tasks was to learn the Tribunal's rules. These are an unhappy amalgamation of rules from common law and code jurisdictions. The judges came from both of those cultures and systems of training, and they had difficulty crossing over. In order to appear before the Tribunal, one must be a member of the bar of his or her home state or jurisdiction. Those on the defense side must adhere to the Tribunal's code of professional responsibility for defense counsel. There is no similar code for the prosecution. One must speak either French or English, the two official languages of the Tribunal. The language also being used of course was BCS (Bosnian Serbian or Croatian) which was translated to the participants. That language presented an interesting political problem in and of itself. If you were representing a Bosnian, the language spoken was called Bosniac. If you were representing a Serb, the language spoken was called Serbian. If you were representing a Croat, they were very unhappy if you called the language anything other than Croatian. So the blend became BCS.

The attorneys generally dressed in their national home garb, whatever that is. Since the court deemed the American custom of business suits to be uncivilized, however, we had to adopt some sort of dress code. Consequently, we ended up in robes and bibs like our European and Canadian counterparts.

Under the rules of the Tribunal there are no juries. The Tribunal sat in panels of three "professional" judges. The judges consider themselves above the foibles of juries. They are not subject to the "passions" of juries. They

claim to be individuals of superior judicial training and/or experts in international law. In fact, only about half had ever been judges. Some were international lawyers with no judicial experience, some were mid-level politicians, and some were law professors. As a result, the trial became one in which all the evidence was admitted, also known as "death by a thousand cuts." Although there was an evidence code, very few rules of evidence were followed, and fewer yet were followed consistently.

There is an appeals chamber. Both the prosecution and the defense have a right of appeal, and there were a variety of interlocutory appeals taken throughout the course of the trial on a variety of issues. Members of the appeals chamber were rotated on a regular basis with members of the trial bench. Hence, trial judges also sat on appeals, although not on any case on which they were bench members at trial. Apparently, this procedure is going to change.

There is no plea bargaining. There is no separate phase for sentencing once someone is found guilty. Guilt, mitigation, and all other issues are tried simultaneously. If you have ever tried a criminal case, you will know that putting on your mitigation evidence at the same time as your substantive defense is bizarre.

Initially, there was no bail. Individuals who turned themselves in or who were arrested remained in confinement for the entire time. The rule on bail did change midstream, and bail is now allowed in limited cases. It was at that point in time that I had one of my many out-of-body experiences. I will mention a couple of others later.

As the bail change suggests, the rules of the Tribunal may change, and they did so on a regular basis.

The accused is entitled to counsel. If an accused cannot afford to hire his own lawyer, then two lawyers and an investigator are appointed.

Hearsay is admissible. All reliable evidence is admissible. At one point, the prosecution successfully urged on the court the distinction between rumor and pure rumor, the former being admissible and the latter, of course, not admissible.

The Tribunal is bound by the European Convention on Human Rights, which is probably the hottest legal topic on the continent right now; as of October 10, 2000, the European Convention on Human Rights became applicable to all EU countries. (Subsequent to my appearance at The Hague, I was in both Ireland and England, teaching solicitors who now have rights of advocacy in certain circumstances. We met with Crown judges, and the European Convention and its implications were the topic in all our meetings.)

There is pretrial "discovery" of the prosecution's case. The Office of the Prosecution (OTP) supplied us with four feet of discovery before trial—dis-

covery that had little, if anything, to do with the case we tried. We received new discovery on a regular basis: weekly, daily, and usually the morning of or right before the offered testimony. The only sanctions for presenting late discovery were some trial delays.

The duty of the prosecution is to provide exculpatory evidence to the accused, just as in our system. Yet, our prosecutor was quite clear that with the reams and mountains of information, paper, and documents available to the prosecution in warehouses in Zurich and New York and other parts of the world, he would make no representation that we had all the exculpatory evidence, nor was he going to look for it, and there was nothing the Tribunal could do to make him do so.

Another example of this cavalier approach to processes involved our co-defendant, who was to testify on a Monday morning. On the preceding Thursday at the close of court, the OTP gave the co-defendant two feet of new documentary evidence against him. Since our co-counsel could not visit the client at the detention center over the weekend, that defendant elected ultimately not to testify at all.

Ex parte applications were made on a regular basis. The prosecution took advantage of chats with the bench about a variety of issues. The first time this happened was another in a series of out-of-body experiences for me. In the middle of trial, the prosecutor announced that he needed to see the court ex parte. We were ushered to the hallway. It happened so fast, the defendants themselves remained in the dark as the prosecutor was making this ex parte application.

The most unique and inherently prejudicial procedure that the Tribunal allowed was the application for "protective measures." Upon application, the witnesses may be afforded a degree of anonymity, ranging from pseudonyms to a closed session of a particular witness's testimony. The OTP would ply the court with reasons as to why the witness was in fear of the defendant and his cohorts. If protective measures were granted, instead of saying the witness's name, the OTP would write the witness's name on a piece of paper, which was shown to defense counsel and the court, but the witness was called "Witness A." We had witness A, witness B, witness C, all the way through AA, AB, AC . . . . Additional protective measures included voice or facial distortion, and, as I already indicated, some of the sessions were closed to the public altogether. There was even a series of witnesses called "confidential witnesses." These witnesses were so highly confidential that their identities were allowed to be known only by a limited number of the defense team (in our case it was four). No one else could know their identities or the purport of their testimony. The result was a minefield of evidence about which you could not comment, and persons you could not reference

in open court. It was very difficult indeed to remember what was in evidence, what was in evidence but by way of pseudonym, and what was in evidence by way of confidentiality. Thirty-seven percent of the evidence was subject to some form of protective measures. The result was that more than a third of the trial transcript contained evidence from unspecified people or excluded altogether from public scrutiny. So much for history.

*Yugoslavia: A Short History*

After studying the Tribunal's rules, we had to learn about the break-up of Yugoslavia and the civil war in Bosnia. Allow me to give you the two-minute course: The republics of Yugoslavia were held in a semi-Communist iron fist by Marshal Josip Broz Tito. When he died, first the Slovenes and then the Croats demanded separation from the federation, and independence. They were the first republics to be recognized as independent. Ultimately, Serbia, Kosovo, Macedonia, and Albania hung together politically. The result was a brutal, awful civil war, when the Serbs crossed through central Bosnia into Croatia to attack, and to try to make Croatia and Bosnia part of the republic again. That attack failed.

Beyond this, the modern history of Yugoslavia is about three men: Franjo Tudjman, now deceased, the President of Croatia and a Ph.D. in history; Alija Izetbegovic, who is the Bosnian President; and Slobodan Milosevic. Before Yugoslavia's break-up, both Tudjman and Izetbegovic were jailed by Marshal Tito for their views on nationalism. As a result of that incarceration, Tudjman wrote widely on Croatian historical claims and was known to have great desires for an expanded Croatia in central Bosnia. Izetbegovic, who is a Muslim, extolled the concept of "Holy Jihad" or war against all Christianity, a tenet he has never rejected. Of course, so much has been written about Milosevic that I could not do the topic justice. Slobodan Milosevic is in many ways a brilliant politician and a lawyer. Suffice it to say that "blind territorial ambition" comes to mind.

In the geographic center of the former Yugoslavia is the republic of Bosnia and Herzegovina. Bosnia and Herzegovina are about the size of West Virginia, with a population about the same as that of South Carolina. What makes this particular republic so unique, and created such a bastion of hatred, is that all of the nationalities within Yugoslavia—the Croats, the Serbs, and the Muslims—laid claims of historical rights to Bosnia. There is no popular ethnic majority in Bosnia. In the former Yugoslavia, if you were Croat, you lived in Croatia, if you were Slovene, you lived in Slovenia. The Macedonians view themselves as Macedonians. The people have strong ties to those cultures historically, geographically, and socially. Bosnia and Herzegovina are the only provinces among the republics in which there was no ethnic majority. The sta-

tistics are varied, but there were roughly twenty-two percent Croats, forty percent Serbs, and thirty-five percent Muslims living in Bosnia.

The project of understanding an enormously complicated civil war was further complicated by the ever-shifting alliances of the pugilists. One example is most interesting. Initially, the Bosnian Croats and Bosnian Muslims were allies against the invading Serbs. When the Serbs retreated through Bosnia, that alliance broke down, and the Bosnian Croats and the Bosnian Muslims started to fight each other. One day in court, an artillery officer claimed that on a given day the Bosnian Croats "borrowed" artillery from the Serbs for 10,000 Deutschemarks a day to use against the Muslims. That seemed beyond bizarre to me. I turned to my colleague, Mitko Numovski, a wonderful guy who was a Croatian judge before he got involved in the war crimes tribunal. (In the classic European tradition, he wrote down nothing but kept a reservoir of facts in his head.) I whispered to him, "Borrowed artillery?" and he closed his eyes and nodded in affirmation. It was just amazing.

At its core, the dispute was about gaining geo-political and ethnic control over Bosnia. From the Croat side, Tudjman had laid down historical claims to Bosnia. On the Serbian side, Milosevic wanted this part of the world because Bosnia is rich with munitions. Munition manufacturers dot the landscape. Parenthetically, it is a beautiful, wooded, mountainous country. From the Muslim perspective, Bosnia was to be a homeland in Central Europe.

So ethnic issues, political and historical claims all were involved. We had to separate each out. We read and we read and we read. It was akin to cramming for a final exam in a completely foreign discipline.

There were also minefields of language, pronunciation, and abbreviation. This was very important because we had to figure out people's names and proper pronunciations so as not to insult them. We used a little chart for pronunciations and abbreviations. For example, HVO stands for the Croat Council of Defense, and JNA stands for the former People's Army in Yugoslavia.

### *The Players*

Our client was a Bosnian Croat, a former journalist whose parents were a pediatrician and a veterinarian. He never lifted a gun. He was, in fact, a mid-level politician who was accused by the prosecution of being a high-level politician. Hence, the command responsibility charges.

The Office of the Prosecution consisted mainly of British, Canadian, and Australian barristers. There were also some American lawyers who were former U.S. attorneys or military JAG officers. The OTP had nine lawyers on our file, plus a case manager. The prosecution began with an investigative team working up the file. They passed it to a case manager, who presented the case to the barrister. I watched this process break down regularly,

as the case unfolded and the barrister in court was "surprised" by his own file. It was fascinating to me, and I am still not sure why or how the hand-off works, but the English and Irish barristers with whom I spoke had mentioned the disconnect inherent in this method. Information passing from a pretrial team to the case manager and on to the barrister, who is supposed to digest it all and then provide it to the Tribunal, might work in a small case, but here, there were four years of war to synthesize. Additionally, every time there was a peace plan proposal, all the various players on the ground reconfigured. I thought the prosecution was at a tremendous disadvantage as a result of the terribly complicated shifting set of facts, and the manner in which they divided prosecution responsibilities.

As I already indicated, the bench consisted of judges, law professors, mid-level politicians, and legal attachés. Our particular panel included a Moroccan law professor, a British judge with a brilliant mind who had written a treatise on evidence, and a Jamaican judge. They were lovely people, very well educated, but each had a different outlook on the world, and each certainly had a jaundiced view of American defense lawyers. Dutch lawyers acted as defense counsel for the first few defendants, but normally, the defense counsel were Croatian or Serbian. Few Americans appeared. (There was a rumor circulating that in order to represent a Serb, you had to guarantee that half of the income from the representation would be kicked back to the defendant's family. This was never confirmed.)

At various points in time, our team consisted of up to eight lawyers. It included the wonderful Mitko Numovski as co-counsel, and our paralegals, all of whom spoke Croatian. The co-defendant was also represented by two Croatian attorneys and a Croatian investigator.

### *The Indictment*

What I found most intriguing, although it would bore most of you to tears, was the indictment itself. Finding out the law to be applied was not simply a matter of reading the indictment, then going to a law library and reading statutes. The Tribunal borrows the decisional law, as well as what is called customary law, both of which are superimposed and subsumed in the indictment. The indictment in this case is twenty-two pages long. It was difficult to understand. It was multiplicitous. We challenged it in a variety of ways. We did not get very far. It contained forty-four counts and charges, with each accused being charged with eight Grave Breaches of the Geneva Conventions, ten Violations of the Laws or Customs of War, four Crimes Against Humanity. The first two counts charged the accused with Persecution, a Crime Against Humanity. The other charges were Murder, Inhumane Treatment, Detention, and Destruction. The indictment alleges that the accused participated in a

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widespread or systematic campaign of persecution of the Bosnian Muslims in the region known as the Lashva Valley, which is in the heart of central Bosnia. The indictment was amended several times. Consequently, it was a difficult document with which to work, in order to assert jeopardy and to determine the relevance of the evidence.

### *Setting Up an Office*

We had to set up an office from scratch, which, as anyone who has ever tried to do business in Europe knows, was a project in and of itself. Getting the phone lines and the fax lines and everything else to work was a daunting task. Our work papers, when shipped, were delayed and inspected. Translating documents, organizing documents, and correlating the discovery to the witnesses were all complicated tasks. Our database needed to be updated daily in both English and Croatian.

### *The Daily Grind*

There is an International Court of Justice in The Hague. It is a beautiful building that sits back on a high reach. It was built with Andrew Carnegie's money. I did not work there. About half a mile down the road is an old insurance building. That was the International Criminal Tribunal for the Former Yugoslavia.

Security abounds. There is an iron fence all the way around. Observers would get into the building through a checkpoint at which their passports were shown. We were issued security badges. Defense counsel had to go through a first door where all belongings and briefcases were searched. We then came to a series of lockers. In the lockers were our daily "new discovery," applications, other motions, and our daily messages from the prosecution. To enter the main building, we had to wait for a guard to open the defense counsel door. Members of the prosecution, the judges, and members of the Tribunal passed through a different door with a card swipe. We would wait, and watch them pass by us. Separate but equal was alive and well. It was a very strange experience, to be kept waiting while our adversaries trotted right through. When we cleared that door, we went into the main lobby of the courthouse. It was filled with cigarette smoke. Next was a second security checkpoint, at which the guards again searched us and our belongings. Parenthetically, the guards were great folks, and as we got to know them, they would let us pass through with a cursory search. Most were soldiers, MPs, police officers from all around the world. They all spoke English. They worked really well together, which was great to see. Finally, we would climb the stairs to the robing room and "robe up." However, when the defendants arrived, escorted by half a dozen uniformed and armed guards, everyone else

had to remain out of the halls as they passed. The defendants wore blue U.N. flak jackets and helmets, were shackled at the hands and feet, and were escorted into the courtroom by, now, at least a dozen guards.

I called this talk "Life in the Bubble" because there is a bulletproof glass wall that separates the courtroom from the audience and general public. There were no windows in the courtroom itself. The judges' benches were elevated, in the front of the courtroom. The video booth and translators' booths were around the perimeter. The registrar and legal officers and court clerks were in front of the judges. French and English court reporters were around the perimeter. The defendants sat in the dock surrounded by guards and away from counsel. In order to speak with counsel, a defendant would write down what he wanted to say and a guard would deliver the message to us. The office of the prosecution had three benches to the right, and defense counsel was to the left. The witness stood or sat in the middle. The glass walls could be curtained off if the proceedings were to be hidden from public view. There were three courtrooms in the Tribunal.

Each morning, everyone would come in and gather, as in any courtroom. At some point, the court clerk came in with robed court officials, which signaled that the judges were next. Then there would be a knock on the door, and in French it was announced: "The International Criminal Tribunal for the Former Yugoslavia is now in session." The judges entered wearing their resplendent red robes, and they bowed. We were expected to bow back. After that little bowing ritual, everybody was seated. The presiding judge would lean forward and say, "The registrar may call the case." The registrar would call the case, "Prosecution v. Dario Kordic," whereupon the presiding judge would lean forward and say, "Yes, Mr. Stein." There was a Rumpole of the Bailey quality about the whole thing.

#### HIGHLIGHTS OF THE TRIAL ITSELF

Most of the witnesses were victims or soldiers. The Bosniacs (as the United Nations wanted them to be called) are simply incapable of answering a direct question. That was problem one. Problem two was that the Bosniacs had a tradition of collective knowledge. They would testify as if they had witnessed some event or atrocity themselves which, in fact, they never had. The prosecution and the court were frustrated by this phenomenon, particularly when we would clarify in cross-examination that the witness had never seen or heard what he was testifying about but rather had been told about it by somebody else. As a result, the prosecution was urged, and finally ordered, to prepare or vet each witness with a series of point-by-point writings about what the witness was going to say. The points were set

out and provided to the court and defense counsel. It then fell on defense counsel to delineate what was controverted and what was not. We dubbed those memos "cheat sheets," and pretty soon, everybody was calling them cheat sheets. We would receive the cheat sheets early in the morning, and the witness would testify from them as if they were a script. Despite the cheat sheets, and despite the fact that the witnesses were supposedly vetted by the prosecution, I would estimate that twenty percent of the witnesses who gave damaging testimony on direct examination recanted when confronted by the accused who was present in court. Those witnesses often acknowledged that what they had just said on direct was told to them by somebody else, and that they had not really seen it; or they agreed entirely with what was put to them in cross-examination.

As I previously mentioned, rumor had its place in the Tribunal. The OTP successfully urged the court to admit evidence of rumor as distinguished from evidence of pure rumor.

Witnesses also included spies, diplomats, and many military officers from the U.N. troops. From generals to sergeants, all were called. The British officers were known as "Brit Bat," for British battalion, Canadian officers were known as "Can Bat," and the Dutch officers as "Clog Bat."

Let me touch a little more on cross-examination. The art of impeachment, American-style, was disrespected. We were told to cross-examine British style, and we were expected to "put it to the witness." So, we "put it to the witness." That means that you first present to the witness the result you want to achieve. For instance, you say, "I put it to you that you are lying," and then you prove up that he is lying by some inconsistency, etc. I concluded that the reason for this procedure is that the British judges, who write all their own opinions, utilized this method and would write down, "Witness is lying," and then fill in the blanks as to whether or not it was proven.

Consistent with the British approach was that the defense tables were angled away from the witness. The purpose was to keep defense counsel and the prosecution from looking at the witnesses; the witnesses were supposed to direct their entire attention to the judges. Those of you who try cases know that eyeballing the witness is an important part of cross-examination. I have been accused of hypnotizing witnesses. I assure you that I do not, but I do try to look them in the eye and cross-examine without paper. The configuration of the court would not allow that tactic, unless you went all the way to the left-hand side, and then sometimes the witness would start to look at you.

Moreover, if you spoke with the speed with which I am giving this talk, the translators could not keep up with you. So, if you were doing rapid-fire cross-examination, you would fail because you would hear, "Mr. Stein, you are going too fast," as the reporters interrupted. This was very hard for me

to get used to, until I had a stroke of genius. I thought to myself, "Whom — do — I — know — who — speaks — so — slowly — that — soon — the — witness — *wants* — to — say — something?" I adopted my hero Gene Mac Winburn's approach to cross-examination. The only problem was that when I spoke that slowly, I found I had a Georgia accent.

The bench continually asked questions, as was their right, but every time you had a perfect examination nicely completed, they would try to undo it.

Ours was also a high-tech courtroom. There were computers on each station, each programmed to provide a rolling transcript so that within twenty-four hours you could download the semi-final version for your office use. This was also a high-tech courtroom with regard to television, and the U.N. programmed the proceedings, albeit with a half-hour delay, which were then broadcast over the Internet. The irony was that with all the high-tech ELMOs, computers, and other equipment, things did not work. The prosecution could not provide a decent map or a good three-dimensional blow-up of Bosnia. Last, because of all the television cameras and lights, the courtroom was always bloody hot. It was not exactly the high-tech courtroom of the future.

As I mentioned, the witnesses were fascinating. There were ambassadors, knights, generals, and spies. For me, however, the most fascinating ones were the OTP experts, because I had to cross-examine them. In my view, the prosecution needlessly called four experts. They called a stockbroker who had a Ph.D. in history from my alma mater, the University of Michigan. He had left Michigan during a Ph.D. glut and ended up with Merrill Lynch because he could not get a job in academia. He was to talk about the history of Bosnia. I hope he is a better stockbroker than historian!

The OTP also called a sociologist who was to opine on all manner of evil things about Croatian political culture and the top-down political power vacuum that our client filled. The power of the Internet is amazing. His cross-examination was basically this:

"Dr. Alcott, what was the title of your Ph.D.?"

"Oh, I do not recall."

"You do not recall the title of your Ph.D.?"

"Oh, it was something, I am sure you can remind me."

"Well, Doctor, your Ph.D. was 'Tourism in Yugoslavia,' that was your Ph.D. title, wasn't it?"

"Well, yes, that's right."

That information came right off the 'net. But then, I violated the first rule of cross-examination and asked a question to which I did not know the answer: "By the way, what was your Master's thesis?" His answer was, "Oh, that was 'Nuclear Power Protests in Canada circa 1964.'" We waived further cross-examination of him; there was nothing more we had to do with that witness.

The OTP also wanted to call a spy, a true spy, a fellow who worked for the CIA and taught spying. He had written a book on Yugoslavia. His whole testimony was to be an "analysis" of newspaper articles that appeared during the past four years in the region. We broke down his report by hearsay, secondary hearsay, third-level hearsay, fourth-level hearsay. It was all color-coded, and we gave it to the court and argued against its admissibility. The court ultimately agreed with us.

My first and most profound out-of-body experience occurred when the prosecution suggested that if the defendant was going to take the stand, he must be the first defense witness in order that "we know his defense." I was scheduled to argue in opposition. It was the first day of the trial, April 12, 1999. I tried to make a very simple point: In our system of fifty states and four hundred or so federal judges, there has been a lot of judicial thought about the timing of the defendant's testimony. Hence, the Tribunal might want to consider this wealth of common law and experience, which uniformly holds that the defendant may testify on his own behalf, or not, and his testimony may be at the end of the case, or in the middle of the case, or whenever he chooses. The British judge's response was, "Well, Mr. Stein, this is, after all, the International Court of Criminal Justice, and we are not bound by these national jurisdictions." Next, the Moroccan judge turned his microphone to me and started speaking French—a language I do not understand, do not read, and do not speak. I did not have my headset on; I was listening to his question, expecting to suddenly be bestowed with the gift of tongues, to understand and be able to speak beautifully fluent French. Suffice it to say that did not happen. I scrambled, put on my headset, and read the computer transcript. I was able to catch up with where he was going, and answered his question.

My last out-of-body experience occurred while listening to Steve Sayers, one of my colleagues from Hunton & Williams, cross-examine another expert. A Brit by birth, first in his class at Oxford, then a student at Georgetown Law School, Steve Sayers is proud to be an American. He is the hardest-working lawyer I have ever known. He was called upon to cross-examine a *Slovenian* law professor on Bosnian constitutional law, before a *Jamaican*, a *British*, and a *Moroccan* judge. The result was layer upon layer of esoteric abstraction.

There is one other bizarre argument that I would like to share, and this is bigotry in reverse. The prosecution urged that since my client was of Croatian lineage, although he was born and raised in Bosnia, he was "affiliated" with the country of Croatia, and since the country of Croatia was fighting with the OTP about producing documents, the court should presume that my client was in league with Croatia, that the documents were adverse

to him, and therefore, the Tribunal could draw adverse inferences about him. It was all too strange.

#### RELEVANCE TO THE REST OF US

The relevance of my experience is that now there is to be a permanent international criminal court located in The Hague. The site has been proposed, and \$130 million of U.N. funds have been allocated to build it. It is proposed that this be a permanent sitting court, the jurisdiction for which is to be all international armed conflict. Our American military is justifiably concerned about periodically being forced to appear there, given the kind of process I have just described.

#### DIVERSIONS

My experiences in The Hague were not without humor, or at least pleasant moments. I would bike to and from work. The Dutch love to bike and have wide biking lanes. It is a wonderful way to travel. As I biked home, I would take out my cell phone and call Claire, so we'd be chatting about the day, and I would give her a guided tour of The Hague.

Then, of course, there were the coffeehouses, where coffee is an afterthought. On Sunday mornings there were fresh-baked breads. The food was wonderful.

There were also co-ed spas. The Dutch are very big on spas, and when you walked in, you found only one locker room, and only one spa area, and no bathing suits. Everyone simply undressed and went into the shower and then to the various whirlpools and saunas and steams. It is a lovely experience once you get over the cultural shock. One of my female colleagues from Texas said that when she was in the steam room one day, she saw two of the judges from her panel also in the steam room, which gave new meaning to the term "naked truth."

Then there were the coffeehouses.

There were the Dutch holidays. The Dutch are very professional and very formal at work. When they call it off for a weekend, or on the Queen's birthday or other holiday, however, it is "party time," and the streets are wild.

Then there were the coffeehouses.

Finally, there were the beaches to visit. European beaches, God bless them. There is only one form of attire at those beaches. I have gone topless all my life, but it was a little different when everyone else was topless, too.

And, of course, there were the coffeehouses.

## CONCLUSION

Let me end with some conclusions about Bosnia. There will be peace in Bosnia only if the United Nations continues to have 30,000-plus troops actually present there. The cost thus far has been \$198 *billion*, with the United States contributing roughly \$13.8 *billion*. I will give you an example of the pervasive sense of unrest and threat. When I interviewed witnesses in central Bosnia, I talked to a federation major. He said that he wanted to be a teacher more than anything, and that he was then attending college to become one. However, he would not leave the army to be a teacher unless or until he could keep his guns, because he was not about to live without them.

Contrary to U.N. propaganda, the people in Bosnia had no social interaction in any way with folks outside their ethnic groups. They led parallel lives. There were two or three barbershops, there were two or three butcher shops. The people did not relate in any fashion except in the public high schools. Tito's "brotherhood and unity" commanded that each group tolerate the others. This was the law under which both Izetbegovic and Tudjman were jailed. It was imposed on the ethnic groups at gunpoint. While there was some social interaction in Sarajevo and some of the other cities, in more urban settings in central Bosnia, it just did not exist in the lovely wooded hills and mountains.

I ultimately concluded that the role of religion was not to unify but to destabilize, and there is a Christian-Muslim fault line that runs right through central Bosnia. One Islamic Oxford scholar opined that this demarcation is where the next world war will start because, on one side there exists Christianity, and yet on the other side, there exist Muslims who swear holy allegiance to making their faith the majority rule. Let me be clear: I am merely reporting what I observed.

I concluded that democracy is not necessarily exportable.

I also concluded that evil is the lack of empathy. Crimes against humanity happen when people are unable to empathize with their fellow men and women.

Nationalism is an excuse for exclusivity. Countries that preach nationalism—Croatia, Serbia, and some of the Muslim nations—preach exclusivity. Exclusivity breeds lack of empathy.

In the new world order, the role of sovereignty is becoming anachronistic, and the sovereignty of nations is yielding to a concept of humankind. Whether this is good or bad only time will tell. Certainly in Europe, with the continuing vitality of the E.U., that whole concept of sovereignty is breaking down. The United Nations and the growing role of international law contribute to the demise of sovereignty.

There is huge antipathy toward the United States, U.S. attorneys, U.S. rights, our jury system—especially the jury system. The intellectuals who study our legal system think that our Bill of Rights is the most advanced in the world, but that our drug laws are the most backward and misplaced.

Relative to due process, I have concluded that if the process is flawed, even a correct result is a flawed result. If the process is fair, then the result, whether correct or not, will be just. Moreover, prosecutors do a disservice to all once they become enamored of the righteousness of their cause and the desire to seek retribution for the victims of atrocities.

Last, the uniqueness of the North American experience is that nearly all of us are immigrants. Each one of us is Irish, English, German, Russian, Hungarian, French. We have overseas roots and heritages, of which we can be proud. But our origins do not dictate the way we relate to each other, nor do they dictate the joy with which we honor each other. We are southern and northern, eastern and western, black, white, Jew, Gentile, but we are all card-carrying believers in democracy. We are unique among the nations and people of the world in that we extol each other's differences as virtue, and do so without fear. We should be enormously thankful, for we are truly blessed as a result of those differences.