GRESHAM COLLEGE

19 OCTOBER 2017

# JUSTICE FOR ALL

DR NENA TROMP

Sir Geoffrey's and mine professional cooperation started some 15 years ago and it was linked to the trial of Slobodan Milošević – the Serbian war time leader who in 1999 was the first sitting president ever indicted for the war crimes and crimes against humanity at an international court. Milošević lost the power in 2000, was arrested in 2001 and after some three months spent in a Serbian jail he was trasferred to the Hague. His trial started on 12 February 2002, a record time measured from the indictment date to the start of the procedings, compared to any other trial held at the Yugoslavia tribunal or any other international court – save for Sadam Hussien's trial if we allow that it was a proper trial at all.

Sir Geoffrey was appoined Principle Trial Attorney for the Prosecution two months before trial was to start. It was a daunting task given the extent of the temporal and geographical scope of the indictments but also becuase Sir Geoffrey had inherited three investigative teams - eacht dealing with one geographic area – and struggleing to forge a functional cooperation. A chronical unwillingness to share infomation and inflighting about important strategic issues - were just examples of the nature and intensity of management problems Sir Geoffrey encountered. He had no time to lose and under enormous time pressure he did succeed to unite not maybe the team - three indictments - to be tried in one trial - so called JOINDER.

On 12 February 2002, with camera lenses of the regional, national and world media magnifying meaning of every word utterd in the courtroom, Sir Geoffrey opened the trial. He started modestly – aware of traps of a potential over-prosecution. He used to tell the us – the memeber of his team «if we understate our position - the only place we can go is up. If we overstate – the only palce to go - is down.

Throughout the trial, he remained true to this principle. In his opening speech at the beginning of the Croatian and Bosnian part of the case, Sir Geoffrey: (T 10187:03-10187:13):

**"There may be a temptation to characterise this accused simply as the sole architect, and that temptation may have to be resisted until the precise outlines of his role are etched by evidence, because plans can emerge without a single originator. Such plans can be joined, and there can be those who choose to lead such plans, once they join them, being criminally opportunistic and coming**

**to be seen as, and indeed to be, central to the plan itself. And this may be a reality of this Accused's personal history, he being a man to whom others committed to the plan looked for leadership that he was able to provide"**

He took the same approach to evidence. Although, observing of the rules of adversarial legal system adopted by international courts - he insisted that we observe the disclosure procedures – stressing – that he was not interested in conviction but in a judgment that would stand the test of time. He also challenged the rules – or the interpretations of the rules. Especially when it came to the rules on protections of evidence as requested by states – not just by Serbia but others as well. He also fought against the right given to Milošević to represent himself – citing his fragile physical state made worse by workload that would be overwhelming for everyone to deal with. Sir Geoffrey argued in many legal documents that the administration of justice should be reduced to the right of an accused to a fair trial. He stressed the right of victims to see the trial finished with a judgement when argued that the judges should impose a professional lawyer to do the job or to continue the trial on the days when Milosevic was to unwell to be in the courtroom.

In March 2006 when Milošević died in his prison and Sir Geoffrey's ears – or rther predictions – that Milosevic will not be able to bring his trial to a conlsuions by being his own lawywr - became reality. Lawyers and judges often lose interest once a trial finished without a judgment – a conviction or acquital. Sir Geoffrey was not one of them.

He was one of very few lawyers I have worked witt who understood and accepted that mass artoricites trials are like no other criminal trials. He showed it when working with us no-lawyers. He engaged with us in political and historical explanation of ideologies that were at hart of criminality of the plan. That made him even more aware and covinced that finished or unfinshed trials of mass atrocities trials will – regardlss of their outcome - serve as a historical record for future generations. Not all his fellow lawyers or judges - for that matter – shared or share his opinion. But some did. Late Judge Antonio Cassese wrote already in 1998 in an offiical ICTY document that:

**Through our proceedings we strive to establish as judicial fact the full details of the madness that transpired in the former Yugoslavia. In the years and decades to come, no one will be able to deny the depths to which their brother and sister human beings sank. And by recording the capacity for the evil in all of us, it is hoped to recognise warning signs in the future and to act with sufficient speed and determination to prevent such bloodshed.**

So when the Milošević trial ended, Sir Geoffrey remained engaged in the professional and public debate about the importance of the unfinished trial of Milošević but also about more general issues concerning the future of international criminal justice. Or rather - is there any future of this type of justice.

In this on-going discussion, Sir Geoffrey remains true to his legal principles and he refuses to engage in any attempt for a post-mortem conviction. He also warned on many occasions against the attempts to simplify the complex processes by demonizing individuals indicted of mass atrocities:

> There's no point demonising Milošević as the 'Butcher of the Balkans'…He held no extreme philosophical positions and simply hung on to power once it had been offered to him and he had enjoyed its taste. He operated in part through government machinery, which allowed him to remain remote from the crimes being committed by Serb militias – the usual privilege of power. But he also operated secret bilateral relationships that hid from view some, maybe much, of what he did.[1]

Yes, by the time Milošević died, Sir Geoffrey had already engaged in writing the closing arguments. But not before he became Gresham professor did he show his first drafts to the outside world. He first draft was kept confidental from the rest of the team. So it shoudl not be surprising that his Gresham lecture on the Milošević trial attracted a huge viewing interent audience. Many details and concepts he shared this very hall with his devoted audience, are now published as a chapter in this book, accasible to his fellow professionals and other interested readers.

But not unimportant is to underline that this lawyer who had a courage to leave the secure confinment of his legal profession, and take a risk to engage in debate on political, historical, and social impact of mass atrocities trial, will almost certainly expand this chapter to a full book. So much more is left tob e said and debated. Let's hope that this book is the first of more to come.



[1] Geoffrey Nice 'Del Ponte's Deal", London Review of Books, 13 December 2010. Available at: http://www.lrb.co.uk/v32/n24/geoffrey-nice/del-pontes-deal.

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# Justice For All

SIR GEOFFREY NICE QC
TIM DUTTON QC

You honour me all very much by coming – thank you very much indeed.

Book launches are always the subject of many thanks – three immediately. To Dr Valerie Shrimplin, Academic Registrar for sitting through 24 of my lectures and tolerating all my difficulties. She then suggested I had the lectures published and referred me to Neil [Titman], and he put me in the hands of Hannah [Bowen], an editor, a bit like Mr Barnier, I should think, we agreed on most things and whenever we did not, she was right and I gave in. She was an immaculate editor. I am immensely grateful to all three of them.

The book is largely the lectures but it is in part autobiographical, and so the question arises: what sort of a lawyer may I be? Well, I am certainly not one of the very clever ones who go to the Court of Appeal and the Supreme Court, and genuinely clever, much to be admired, and deal with the most intricate and difficult problems facing a modern society – not of them. Nor am I one of the barristers or solicitors of equal intellectual calibre such as our first speaker, Tim Dutton, who chose instead to stay at the bar, to organise and to press the law through advocacy, and in Tim's case, by the way, to mount every pinnacle of the bar, running the bar and running a most successful and famous set of chambers, I suppose a bit like a small FTSE 250. So, I am not that sort of barrister either. And I looked up the words that describe people who try to do too many things and they are either far too offensive or far too flattering. So, what am I? I guess I am a sort of travel guide, and I have tried to take people, in the lectures and in the book, to places of the law, legal systems, which might be unfamiliar and where I might be able to give some guidance as to what they might be able to find, and that shapes this evening's event. You are going to hear just a little bit more from me, then seven minutes each from my three speakers, to whom I will introduce you in a second, a bit more from me, and then some questions – short questions. But I thought that it would be helpful if I got my speakers to tell you about the three of the landscapes of the law on which I have operated.

The first, the ordinary, not ordinary, but the English common law bar where I worked in both criminal and civil work, but a large amount of criminal cases, from 1971 until 1998. Tim Dutton, I hope, will be able to deal with some of that and give you something of a picture. He came to the bar eight years after I did. We were in the same chambers for a time, and, indeed, he was the first person I ever led in a case. We were both juniors at the time. It was a criminal case. And it had the feel, for those of you old enough to remember, it had the feel of Rumpole – no really, with the laughs, with the comments on the good bits of the law and the bad bits of the law, and with all the humanity that he always feeds into those wonderful episodes. I cannot remember a case I have enjoyed more than the case I enjoyed leading Tim, but despite the fact that we had such fun, I do not think our client suffered at all – that was probably down to Tim.

The second landscape is the landscape I went to in 1998 and stayed at, more or less, until 2006. To help you with that is Dr Nevenka Tromp, who joined that same landscape, but not as a lawyer. She was, and is, an academic at the University of Amsterdam, and so she and I, from different disciplines, were finding ourselves on a new landscape, a different landscape, and I hope, in her seven minutes, she will be able to give you some reliable account of that.

The third landscape is a rather different one, it is the landscape of Jersey, where I was only present for a short period of time, and as many of you will know from the lectures, or from other places, it was a landscape which brought trouble to me. After the case I was there to try as a judge in 2007, there was an appeal to the ultimate appeal court, the Privy Council, and they clearly formed the view that I was not Judge Geoffrey Nice but Judge Jeffreys, nasty, and they thought that I had it in for the defendant, and they were completely and totally wrong on every count. So, I did that which is not really expected of an English barrister, or indeed of anybody from the English assumed middle-class, which is, when you are thrashed like the lad in another country, thrashed and thrashed unfairly, you turn round and shake their hands and say, "Thank you very much" – no, not my disposition. So, I challenged the judgement, which was clearly going to destroy me or damage me – it caused a great deal of damage, and I made absolutely no headway. The judges were determined that they were right, and if they were not right, they had a number of procedural defences to put up in their own defence – they refused to hear me, they refused to discuss the case. When the case of the man who sought the appeal was over, he got a re-trial and pleaded guilty. Well, that is a bit strange. When it was over, there was then no chance of his going back to the Privy Council and therefore he would not be prejudiced by anything else that I might do, so I wrote to the one person who might be able to provide an objective view of the case and to say whether I was in fact off my rocker or whether I might be right and that was the counsel for the co-defendant who had been acquitted at the case, not by me but by the jury – that is their semi-professional jurors. That is Catriona Fogarty, the last person from whom you will hear before you come back to me. She immediately wrote a letter, knowing it was going to the Privy Council judges, heedless of her own career and the risks it might bring her, and absolutely straightforward and honest in what she had observed of that trial and that letter is a letter you can read in what is called Appendix B of the book. Many other things happened that slowly moved the needle that was against me, but not very far. The judges refused to see her or to hear from her, to despite saying, in writing, "If Miss Fogarty is right, we may be wrong". Unhappily, they did not say that to me, they said it to a member of the House of Lords, while saying to me "You better put it behind you". So, you will hear from her, not about her letter, you will hear from her about the culture that I went into, a bit, I suppose, like Tigger, with two wagging tails and getting it all a bit wrong and not understanding where I was. You will hear from her about that culture, and then you will hear from me, but at question time, you will be able to ask all of us if you want to questions that may occur to you. Meanwhile, Tim…

**Tim Dutton**

It is a great privilege to be asked by Geoffrey to say something and he is a man to whom I owe an enormous debt of gratitude. So, although Geoffrey thought I was going to speak in segment one about the common law, he and you will have to put up with a little bit of background material, but I promise that if you stick with me on the background material, the threads will all draw together and they will have relevance to the book you are about to enjoy and the drinks which you will ultimately enjoy even more.

In October 1977, I started my final year at Oxford. My tutor read out, to a group of us as we were about to set upon the path of getting ready for finals, two letters. The first, he said, was from a young barrister, Geoffrey Nice, and the letter read more or less as follows: "If you have anybody" – we were both at Keble – "wanting to be a barrister, please ask them to apply to my chambers. Life at the common law bar is interesting and we would welcome anybody of talent whom you could send in our direction." The second letter, read out by the same tutor, was from a chap who had also been to Keble, who got a First, and whom we were told was very able. He had completed his pupillage but he did not get a tenancy, and his letter was more or less a diatribe about how ghastly life at the bar was – it was all a waste of time, grotesquely unfair, at the end of which the tutor said, "And my advice to all of you is, do not, whatever you do, try to go to the bar." Fortunately, three of us disobeyed the instruction, I am one, and I wrote to Geoffrey, and after doing a monumentally boring commercial pupillage in a set of chambers, not currently my own but another one, I did my second six months in Farah's building, having written to Geoffrey and having been given a pupillage. He was the first barrister I watched in court. "Geoffrey Nice", I was told, "is a brilliant advocate – please go and watch him", and so I did, I went to the court, I saw this glamorous and powerful advocate making a plea in mitigation to the Billericay Magistrates, and he said how terribly sorry his client, the local supermarket, was for putting wrong pricing labels on Domestos bottles, and I thought this glamorous barrister really was turning a pretty fine phrase in an area which did not seem to me, frankly, to justify all of the effort and power of his oratory, but the advantage for me, apart from hearing powerful advocacy at Billericay was that I was driven back by Geoffrey, for those of you who remember, in his black Citroen Traction, with Geoffrey asking questions about what I thought, not just about

the law but music, because we had had some musical background in common, the future, and we had a very engaging conversation, all with a kind of risqué glamour attached to it, as I saw.

And there it was, as Geoffrey has just mentioned, two years later, in 1981, he and I worked together in my first big case at the bar, a corruption trial. Geoffrey was brought in to lead. Our client was an engineer at the National Grid power-station, in one of the Kent power-stations, who rejoiced in the name of Brian Lesley. The allegation was that he had received favours in the form of fridges, freezers, t-bone steak dinners, washed down with Guinness, parts for the yacht he was building, indeed all of the parts for the yacht he was building, from the builders who were favoured with the contracts at the power-station in many millions of pounds, not just in Kent but also Battersea Power Station when it had been working in the 1970s. And here, we get to the first part – this eventually links to the book. In a conference with Geoffrey and the client, the client's defence was: "I went to get these fridges, I did not realise I was not being charged for them – I never thought anything of it, and there was no corruption involved at all, it was not for favours, I just happened to get them for next to nothing, or indeed, no bill ever arrived, it just so happened". And there we were in con, and Geoffrey said, "Why did you go to London for the fridges, the freezers, the white goods, when you live in Faversham?" Pause. The client says, "Ah, it is because my wife particularly liked the fridge shop in London", to which Geoffrey said, "Fridges are fridges – you travelled 40 miles to get a fridge when you could have got one in Faversham." "Ah, it is because of the wife." At that point, Geoffrey says, "Right, we are going to have a break", a few minutes into the consultation. I could not quite work out why we had to have the break. Geoffrey sent the client out and took me to one side and said, "Right, are we going to take a statement from the wife?" and I said, "Well, we may as well – she may corroborate him". "Ah," he said, "but if we do and she comes up with the same story, and when he is cross-examined, he will be cross-examined on the basis you have just made this up, it never appeared in your interviews, and you have just cooked this up with the wife." I said, "Well, yeah, that is certainly a possibility, I had not thought of that." He said to me, "Suppose the wife then says, "No, no, no, I am afraid my husband is lying to you", what is our position then?" I said, "Well, I suppose, in that position, we may not be able to carry on and I am going to lose a brief – I need this brief to pay the mortgage on the flat I have just bought!" Geoffrey said, "Well, suppose she is unwilling to corroborate." I said, "Oh, my God, I cannot suppose all of these things!" Of course, this is typical Geoffrey and you see it in the book. He was posing absolutely pertinent questions and eventually came up with the solution because the first time we had heard this story was from the client, where there was a real risk that we were going to become embroiled in the very things the client was going to be speaking about when he gave evidence, so Geoffrey said, "An independent solicitor should speak to the wife and all we need to know is whether she is prepared to give evidence, and if she is, the independent solicitor can take the statement." Back came the answer, some weeks later, the wife is not prepared to give evidence, but our ethical position was uncompromised, and we might well have led ourselves into some difficulties had Geoffrey not had the foresight to ensure that things happened independently.

Well, that was 1981, and the client went on to have a trial with many fashionable QCs from the London bar appearing for others, but Geoffrey, at the end of the prosecution case, made a powerful submission that there was no case to answer – it was unanswerable, because we had worked out, Geoffrey had, that the prosecution had charged the wrong conspiracy. There were so many potential conspirators that the prosecution had not identified actually that our client belonged in Conspiracy A and they had charged him in Conspiracy C, which was fundamentally a failure in the approach to the case. The judge, Sir Donald Farquharson, newly appointed and also ex-Keble College Oxford, was then confronted with the prospect of a trial going belly-up in circumstances where this was his first big Crown Court trial. There were all sorts of defendants, huge costs – the pressures were on him to keep the trial on the road. And I am afraid we watched as the prosecution scrabbled around to amend their indictment, re-charge it, they were given permission to do so, the case proceeded, and the half-time submission, which was extremely well-founded, failed. You may think it failed because to keep the show on the road a permission to amend was made.

We then get to the closing speech, again powerful oratory from Geoffrey. The jury go out, and the Judge then does the second prosecution closing. In those days, that was possible. The prosecution could do a closing speech, the Judge could himself, frankly, do a closing speech, as Joe Cantley, those of you who may remember, did a defence closing speech in the Jeremy Thorpe trial. The Judge, having summed up for the prosecution, our client was convicted. He may have been convicted, but the Judge, after Geoffrey's very powerful plea on mitigation, felt a degree of concern and, having heard a powerful story from Geoffrey about the harm this would all cause, decided to fine him the grand sum, for years of corruption, of £1,500. At that point, there was whooping from the public gallery, and the Judge looked up and saw our client's wife, who had not been

prepared to give evidence, standing cheerfully in the brand-new fur-coat of many she had been wearing, which was itself part of the proceeds of his corruption and far more valuable than the £1,500 which the Judge had imposed by way of fine. The look on the Judge's face as he realised that Geoffrey's advocacy had achieved, frankly, a measure of compromise justice, a man who probably should have walked may well have been guilty had gone down and had got out with a very modest penalty. Well, that was 1981 to 1982. Through all of that, I learnt some lessons from Geoffrey, that one should always think ahead, never take for granted in the common law system in which we have been operating the status quo.

I am going to move to 1982. A young bar student was sent to Knightsbridge Crown Court, and in fact took the option to go to Knightsbridge Crown Court, because she thought that Knightsbridge Crown Court, being next to Harrods, was a very convenient place to watch, as a bar student, advocacy being performed in the Crown Court, which now has become a block of flats but was extremely useful for those who, during the lunch adjournment, like to study jury. The barrister in the case, which the young beautiful student was watching, was one Geoffrey Nice, and she wrote to the Head of Pupillage in our Chambers, Michael, and said, "I have just seen the most powerful advocacy in Knightsbridge Crown Court performed by the brilliant (and handsome) Geoffrey Nice". She was eventually offered a pupillage but when she turned up, she was told – I hope Michael is not here – in this rather condescending voice, "I do not give pretty girls to Geoffrey Nice, so you will be having your pupillage with David Pitman". Forgive me for saying this, but David Pitman's advocacy and Geoffrey's are at diametrically opposite ends of the spectrum. The common law is full of different types of advocate who perform their functions. Sappho, having wanted to go to see Geoffrey, landed with a rather more conventional barrister, but what was the joy of this? I shared David Pitman's room, and by this means, Geoffrey has been responsible for making sure that I met my wife and we have been married for 30 years ever since. So, Geoffrey is responsible for my coming to the bar, for my meeting and marrying my wife, and for most of what has happened in terms of my thinking from those very early days of the stimulation which he gave me.

Next, in the years after we had been working in chambers, Geoffrey came to teach at the advocacy course in Keble. The convention at the bar was that you could not teach advocates how to be good advocates. To say that now sounds utterly ridiculous, but it was the convention that, somehow, you learnt your trade, through some process of osmosis, practised, as Geoffrey says in the book, on real clients. Think of it. Real clients go to prison, real clients are made bankrupt, if their barristers make mistakes, but until the early-1990s, we simply did not teach barristers the craft and art of advocacy. It is no different from saying that you cannot teach a violinist how to perform the violin better. It was as ludicrous as that. Geoffrey was in the forefront of helping us to fashion good teaching techniques, and substantive teaching, which has enabled generations of barristers since to ensure that when they practise their art, they are doing it at least safely, if not with the gifts which Geoffrey and others have.

Geoffrey developed a thundering common law practice, but he always asked moral questions. He never took for granted the status quo, and I think it was this aspect of Geoffrey's character which led him to the ICTY, where he embarked on huge cases which Nena will tell you more about, its massive stresses and so on. Within the book, Geoffrey is forever, as he always has done, asking questions, and as he is done in the Gresham lectures, and the book is based around the questions which Geoffrey asks. I suggest that there are four features of the book which emerge certainly from the common law, if not the whole of the book, parts of it: first, that the things we take for granted should not be taken for granted. They may mask unfairness or injustice. The examples he gives in the common law system are of politicians, judges and prosecutors, as well as, for example, the absence of training. Second, Geoffrey is always asking how can we do something better. At the very beginning of the book, he talks of the fact that the judges in cases like the Bentley case, Derek Bentley, remember "Let Him Have It", the conspiracy to murder, where the Lord Chief Justice managed to sum up the burden and standard of proof wrongly, as was subsequently said in a judgement more than 30 years later. Geoffrey says, "They all go to bed and sleep after committing these injustices happily. Why? Because they do not question the status quo. They are not intellectually keen enough to keep asking whether they're doing the right thing." Third, Geoffrey asks in the book, I think, where does the truth lie in the processes of justice we have set up, and that question is posed in the adversarial system which I have been describing and of course is posed within the politics and law of the international tribunals. The fourth lesson that emerges, is that justice is supposed to serve all of us, whether that is within the common law jurisdictions or the international or civil jurisdictions, and there is a theme which runs through the book, which is that if we permit the interests of one cog in the wheel, for example, judges or prosecutors or the politicians who engineer the establishment of our

processes, to prevail or to gain some special status over and above any other, we do not deliver justice because we do not deliver justice, as the book says, for all.

Can I close by saying I am extremely grateful to have been given the opportunity to make these remarks, for a great deal more than seven minutes, and to renew my thanks to Geoffrey?

**Geoffrey Nice**

It is hard adequately to express my gratitude to these three speakers. There are two major lessons from the Jersey case. The more important one, I will come to right at the end of remarks that I will abbreviate while I make an application to Valerie for a short extension. Granted? Granted! But the most obvious lesson is that this is the sort of circumstance where you will discover your friends, your true friends. It is quite an interesting experience to go into restaurants and bars and see people you know suddenly find the wall a lot more interesting than the place where you are standing, but it is even more interesting to find those people who stood by you when times were difficult, and I am going to use this opportunity to name some of them. They are here tonight – not all of them. Tim and Sappho are unendingly supportive of me; my family, completely supportive; Nena, completely supportive; Paul Spencer, wonderfully supportive; Rod Dixon, in my Chambers, supportive of what happened – real friends; and Desmond Brown, who, with Tim, helped set the needle right. Paul Spencer is a tough nut. He looks after you, but he does not take anything for granted, a perfect sense of justice.

Let us come back to the subject matter of the lectures, to some of the things we have heard, and a few conclusions and perhaps time for a few questions. There are some conclusions, but before I come to those conclusions, my travelling in three different landscapes was only part of the late onset broadening of my experience. Tim's wife, Sappho Dias, herself a leading lawyer in her own field and from Burma, had already expanded my interest when, years ago, she asked me and various other people to be involved in Burma and in the human rights abuses being committed in Burma. Long before the fashion of the last year or so to raise it in the popular press, decades of reporting on Burma had gone on. And so, she got me to be involved and I started to do the little bit I could while she was doing very important work in taking cases to United Nations Committees. From that, I spread my wings a bit and got involved in North Korea. The two people who helped me particularly with that, Ben Rogers, the chap who was, do you remember, sent back from Hong Kong the week before last, and David Alton in the House of Lords. They got me involved in North Korea. It was in this room, as a result of that, that we were able to launch in England the report of Michael Kirby, the Australian Judge, who gave a damning report three or four years ago on the human rights abuses in North Korea, and recommended that the case be sent to the International Criminal Court. Then there was Hamed Sabi who got me involved in looking at the problems of Iran in the 1980s, where there had been wild atrocities by the regime of the Ayatollahs, thousands killed in horrible circumstances.

Why do I tell you about these three different examples of unhappy events around the world? It is because of the first unhappy conclusion, that working in this kind of law bring me to, and brings other people to as well, and it is that, where other interests are involved, the interests of the victim will always be at the bottom of the pile. The victims in Burma, for a time, Sappho was able to get Ministries in London, and I suppose around the world, to say what a good idea it would be to take this case to the International Criminal Court. Then, Aung San Suu Kyi was released from house arrest and the place became a nice holiday destination and it is good for business, and so no longer a good idea. Did they think, when they said it was not a good idea, about the victims, and the victims who would not learn, as they might do through a judicial process, of what had actually happened? The same in North Korea. Justice Kirby's report, launched in this room, is the strongest report you can imagine, recommends that the regime of North Korea be referred to the International Criminal Court. How far did it get? It actually got as far as the General Assembly, but not to the critical Security Council. It is presently on a shelf. And of course, a different kind of problem but similar in one respect, the diaspora of Iran, who put on, with Hamed Sabi's assistance, an informal tribunal to leave a record of the terrible things that happened in the 1980s, they would never have satisfaction from an official body because no official body would dare to investigate Iran publicly. In all cases – there may be some good reasons, there may be good, what is it, geopolitical reasons, for not dealing with these things in a formal way, but the result of that is that the interests of the victims, the real victims, are overlooked.

In the lectures, I dealt with one connected example of victims' interests being overlooked in the various cases at the ICTY that dealt with Srebrenica, the terrible massacre of 8,000 plus men and boys in July of 1995, and I

revealed, I hope, to those of you who were here, how evidence was either blacked out from public view or, so far as intercepts were concerned, kept away altogether from the court, and it is important for us to remember for Srebrenica that the West waved Srebrenica through. I was shocked myself to see a Newsnight programme, of 2009 I think, where Holbrooke, the President's man, Clinton's man, negotiating everything that there was to negotiate in the Balkans, face to camera, says, "I was instructed to abandon Srebrenica, Žepa and Goražde". Somebody wrote to him and said, "When you said "abandon", did you mean the territory or the territory and the people?" and he wrote back by email "Both". On the same programme, I was shocked not to have remembered the Dutch Defence Minister, Voorhoeve, saying two members of the permanent five of the Security Council knew in advance of the attack. Asked the question "Which two?" he says, "I am forbidden from telling you".

Now, again, whose interests are involved here in international justice mechanisms or in possible international justice mechanisms that don't work? The victims – because it is they who want to know, by some formal process, what happened. If you keep away from a court the evidence of what the two principal defendants in the Srebrenica example, because the intercepts were between Mladić and Milošević at exactly the time of Srebrenica, if you keep that information out of the public domain, who are you harming? Are you harming the great players who thought, well, it would be a good idea to suppress this evidence because it shows how badly involved the West was? Not really. But you are harming the people who are of course coming to the end of their lives in a natural way who do not have access to the truth, and did we not see another example of it last week with HMS Sheffield? Here was a report of our own Government that showed the truth of what happened and that will have been wanted by the people whose relations and friends died on that vessel, but it was kept from them because it would have upset the euphoria, the post-Falklands euphoria.

As you think about these issues, if you do, think of what actually must have happened. Some maybe mid-level diplomat of one country or another or two saying, "Well…I don't think it's a good idea to reveal that evidence, do you?" "No, I don't. I think it's better suppressed." "Quite right!" Do you think that their conversation included, "But if we do that, we will be harming the interests of the people most affected"? I fear not.

Two other quite connected points, and then I will end. The next connected point, which has come from my looking at various conflicts and various legal systems, and you can think this is idealistic, schoolboy-like if you like, is that there is no public culture of confession, as far as I can see, in any country. All our governments, especially our adversarial one, which is good for television but I am not sure how good it is for government, work on the basis that people will lie to one another and hide truths and that they will not reveal the truths to the public. I heard that MP who I sometimes like, Kenneth Clarke, saying, "Never admit a thing". Why not? And it is a huge and unforgiveable hypocrisy. Why? Because the ordinary person, you or me, in the dock of the Magistrates' Court or the Crown Court facing a trial of any kind, are expected to confess. We get benefit from confession. But it is sort of expected that you will tell the truth. And yet there are no state organs that see it as their duty to reveal the truth, unless they are really forced to it, and I think recently, in the Brexit – I do not want to talk about Brexit, but I think recently there was a letter from 125 MPs asking for revelation of the documents that exist in Government showing the actual consequences for the country of Brexit, and they will not be made available necessarily. All round, we have no policy, no culture really of telling the truth, and we should do.

And connected to that, I suppose, in a curious way, is the second lesson from Jersey but a pretty obvious lesson, which is that, whenever there is a state institution whose interests may be engaged, then your interests, or the interests of smaller, less powerful people, will count for nothing.

So, I am going to end with that concept in mind, offering a corrective. In all areas of the legal profession that I have experienced here and overseas, there are many extremely good lawyers, well-disposed, professional, honest, and true. It is only the minority of occasions when the processes get corrupted to the limited extent they do. And I hope that in the lectures I gave, and also in the book, if you read it, there is a balance between, as Tim in his analysis of the book saying that things were not to be taken at face value, there is a balance between that and recognising the huge good that lawyers can and do do in society, but like everything else, you have to be on guard for what you see. This business of not being able to trust anyone, which is, in a sense, or any standard, which is something Tim picked up from the opening part of the book that dealt with how people will do things thinking they have done right because they are acting according to standards that are now past, with that idea in mind, he referred to the judge in the Bentley case.

I will give you a short passage that explains why I wrote the book, but before I do, I am looking around. I am not sure, did I mention Rod Dixon earlier on? I did. But what I did not mention in relation to one matter, the Jersey matter, was Graeme Williams, whose wife, Anna Worrall, is here, and this is a little touch that I really must mention. Graeme did not know me especially well, but we were sort of vaguely associated, and he wrote a little book called 'A Short Book of Bad Judges', and he mentioned me in it, in a very carefully crafted introduction, but if you read it, it was not I who was the bad judging – that was elsewhere, and I am very grateful to him and to Anna for helping me out in that respect.

I hope I have not missed anybody else to whom I should have been referring, the Bonomys, immense supporters of me throughout my life since they first encountered me, and if I have, please forgive me.

But I will tell you how and why I wrote this book in a way, from the last lines of the epilogue, and I will just read you half a page. It refers to a man called Tom Early, who was the Communist, Marxist, conscientious objector, Vietnam demonstrator, teacher, surprisingly engaged at my ultimately respectable day public school or whatever it was, and he was also a Welsh poet, and his daughter Jean is here, because I became friends of their entire family, to represent him, Tom being dead, and this is how I will end my presentation.

Calibrating personal goodness in the course of aging is to add one task to an already difficult battle. Growing old is probably the greatest battle many will face, not least because the outcome is certain, and victory or defeat will be assessed only by how defeat is handled. Many, perhaps most, of us who have spent some of life wondering how we have contributed approach the end of a conveyor-belt that is going to tip us over a cliff into an unknown emptiness, unable properly to assess what we have achieved, but already beyond use to the society of which we were a part. The last two verses of Tom Early's poem, 'Rebel's Progress', about his life from Marxist to anti-Vietnam War demonstrator sets out how his activist's political journey would end:

So now I will leave the politics to others,
And not be an outsider anymore.
I will go back to the valley, to my mother's,
And never set my foot outside the door,
Except to go to chapel on [Brynsyon]
And maybe join the [Cwmbran] Male Voice Choir.
I will sit at home and watch the television
And talk about the rugby by the fire.

No Welsh valley, or talking about the rugby, for me, as it happens, but surrender of a lifetime of thinking constructively about world affairs, to little more than reminiscing about cosy times past. Is this what aging lemming gangs of skilled surgeons, school crossing keepers, scientists, judges, street cleaners and astronauts all face, knowing the cliff is near? Leaving some record, little better than a message in a bottle thrown into the sea before this particular lemming falls may be a better thing to do.

GRESHAM COLLEGE

19 OCTOBER 2017

# JUSTICE FOR ALL

CAITRIONA FOGARTY

I am Caitriona Fogarty a Jersey lawyer.

I knew Geoffrey long before I really knew Geoffrey. He was the English judge who agreed to finish a Jersey trial started by another off -Island judge who had severed an indictment, tried a tenth of it, and then flounced off the case in a huff.

Like all lawyers facing a judicial unknown quantity, I took a very good look at Geoffrey the first time I appeared before him, as did no doubt the lawyer acting for my client's co-accused, the subject of the eventual Privy Council case. Geoffrey probably did not notice the scrutiny. But if he had done, he had nothing to fear. By the end of that short first appearance I knew that the case was in good hands. He was firm, fair, and above all polite to counsel. This latter point is utterly essential in any complex case where there are a number of accused and a number of lawyers. The tenth of the trial already tried had been the most unpleasant experience I had ever had in a court of law since the day I qualified. With Mr Nice (as he then was) it was clear that there would be no tantrums, no throwing of weight about, no bullying. In short, Geoffrey, as the trial was to make plain, was indeed "The Very Nice Sir Geoffrey" as his nickname became between defence Counsel over the course of the next five months". It was a huge relief. In fact I was so horrified after reading the Privy Council judgment of 2009 , that I wrote a long letter outlining what had happened in the Royal Court and the factors which underpinned the case (some of which I touch on here) for onward provision to the Privy Council. It was obvious that the judgment could destroy Geoffrey. I had been at the trial. None of the Counsel appearing before the Privy Council had been there. As I said in that letter, had it not been for the inclusion of names I

would have thought the judgment referred to some other case. It bore no resemblance whatsoever to the case in which I had appeared. It has certainly shown me just how easily a court may be bamboozled.

What Geoffrey did not know (and this is something Jersey lawyers took for granted) was that the jurisdiction had undergone rapid and significant changes in the few years prior to the trial of Peter Michel and Simone Gallichan over which he was to preside. The Island has always been savage on any form of dishonesty by Islanders towards investors. There had been, however, a rapid and hugely significant change in Island financial services prior to the coming into force of the Proceeds of Crime (Jersey) Law on 1 July 1999 under which the charges to be tried were framed. About this change, a non-local judge could not be expected to know.

As all lawyers of a certain vintage know, there was a time when jurisdictions tax arrangements were its own affair. This changed with the advent of the "global" economy. The expansion of the European Union, the growing concepts of tax harmonization and unfair tax advantage led to profound change in the European jurisdictions of which the UK was one. Jersey is not part of the EU and has a separate relationship with it under Protocol 3, negotiated by the UK which is responsible for Jersey's external affairs. It is a third country as regards fiscal harmonization and financial services. Nevertheless, a certain pressure was applied to ensure greater conformity, both legal and moral, in the "global" world.

The Island to which I returned after a long absence in 1985 was a place where knowing your client (or KYC in financial services jargon) effectively meant having had a long relationship with him. The lawyer had, of course, to be satisfied that his client was not involved in criminal activity which broadly meant guns or drugs, and if a service provider was personally confident that neither guns nor drugs underlay the financial services activity of the client, he could be 'satisfied' and do what was asked of him. Jersey, like other low tax jurisdictions, did very well out of this state of affairs. Thus the enactment of the 1999 Law, which was some years in the preparation, and which made the checks to be performed before doing business extremely rigorous, was a major upheaval. The change was neither welcomed nor understood by all FS providers such as Mr Michel at that time, although that is not the position today.

I well remember my astonishment on returning to the Island after a long period away but long before the change in the law, at the £50 English banknote cash machines of the 1980s and early 90s located outside and inside high street banks, seemingly on every street corner, that allowed cash to be drawn in immense sums to be handed to or withdrawn by a FS client, no questions asked provided that neither guns nor drugs were involved..

As I studied for the local law exams I became aware of concepts such as the Exempt Company used by non-locals which paid no Jersey taxes provided that its activities in the Island were 'administrative' in nature. Local financial service providers usually had a plethora of foreign corporate nameplates affixed to their entrance halls and multiple telephone lines for the provision of corporate "administration" installed at the service providers address, and it was to the owners of such companies that these immense sums could be transferred – provided of course there was no suspicion about drugs or guns.

It is easy to see now how such facilities, amongst others, might be utilized by organized criminals, including tax evaders, as indeed the evidence in the Michel case showed that they were. What is less easy to see from the perspective of 2017 is that before the 1999 Law, such things were perfectly legitimate in Jersey. The activities facilitated by the Exempt Company, the related International Business Company, and the English note cash machines, coupled with long professional acquaintance (nothing to do with drugs or guns, mind) might be perfectly legal in Jersey although the effects of their operation might be illegal elsewhere. Broadly it was up to other jurisdictions to enforce their own laws. It may now seem like the Wild West. Well – times have most definitively changed and for the better. In today's world a man is deemed to be a rogue until proven otherwise by extensive statutory KYC.

If Geoffrey and indeed the two Jurats at the trial – neither of whom had a professional background in financial services - were to understand the evidence in the Michel case, they had to know about the landscape before and after 1 July 1999. The prosecution case was investigated largely by English lawyers who could not be expected to know - and indeed appeared not to know - about these things, which led to the drawing of misleading and in some cases downright unfair conclusions from the evidence. Fortunately Geoffrey was mightily puzzled by some of the testimony both written and oral. He asked for assistance and as a lawyer educated during the

relevant period before and after the 1999 Law I was in a position to help by the provision of a substantial and no doubt rather boring exposition of the bones of the culture change.

The evidence in the case showed that it was not just Peter Michel who failed to change his ways after 1 July 1999. Major high street banks and others were quite clearly doing many of the same things as Michel after the relevant date. Why was Michel prosecuted and they not prosecuted? I don't know. Maybe it was because the jurisdiction did not need the small operators but did need the major banks; maybe their temporary transgressions were overlooked in return for the provision of evidence against the smaller unnecessary scapegoat. Probably a Policy decision – taken in the so-called public interest. I have never liked "policy" decisions of this kind when all are supposed to be equal before the law. But that is another story.

The Michel case and its consequences were undoubtedly traumatic for Geoffrey. However from my perspective it enabled me to get to know him, to attend some of his lectures and become acquainted with the important work in the wider world he has undertaken during a lifetime as a lawyer. My admiration for his legal achievements and even more for his personal fortitude in the face of adversity is unbounded. My former tendency to treat all judges as if they were angry hornets has been much modified. Being a judge is no doubt a lonely life, but a judge is also a real person, a man of feeling, and capable of great humanity.