

Proceedings of the Sixth International Humanitarian Law Dialogs

August 26-28, 2012, Chautauqua Institution

Edited by Elizabeth Andersen and David M. Crane



**American Society
of International Law**

**Proceedings of the Sixth
International Humanitarian Law
Dialogs**

*August 26 – 28, 2012
at Chautauqua Institution*

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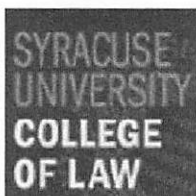
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*Dedicated to M. Cherif Bassiouni,
2012 Recipient of the Joshua Heintz Award for
Humanitarian Achievement*

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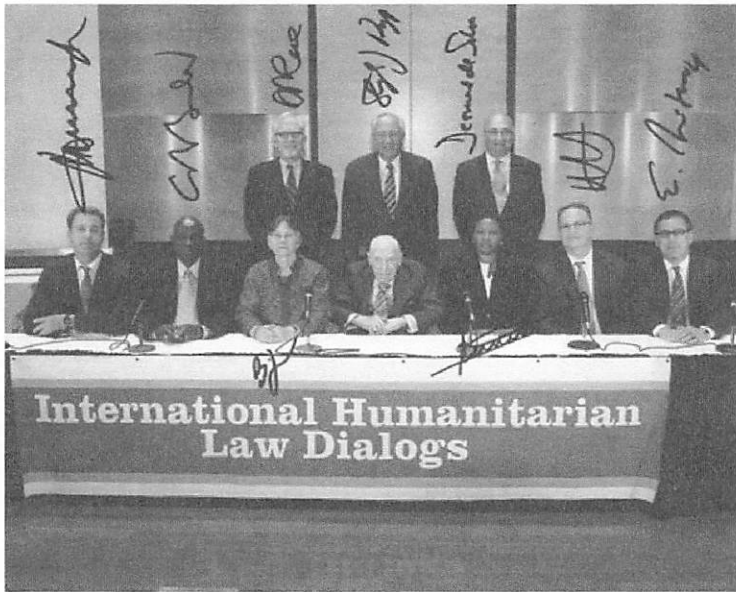
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**Prosecutors at the Sixth International
Humanitarian Law Dialogs**



*Back row, left to right: David Crane, Stephen Rapp, and
Sir Desmond De Silva*

*Front row, left to right: Serge Brammertz,
Hassan Jallow, Brenda Hollis, H.W. William Caming,
Fatou Bensouda, William Smith, and
Ekkehard Withopf*

Introduction

Introduction

David M. Crane*

In honor of the tenth and final anniversary date of the Special Court for Sierra Leone, the Chief Prosecutors of the world's various courts and tribunals, leading policymakers, and academics once again assembled to look back and consider the lessons learned on the decade that was the Special Court for Sierra Leone. The two and a half days along the banks of Lake Chautauqua allowed for a serious, yet relaxed discussion. Once described as "the little engine that could," the overall assessment was that the Special Court for Sierra Leone was a success in accomplishing its mandate to prosecute those with the greatest responsibility for war crimes and crimes against humanity and other serious violations of international humanitarian law during the Sierra Leonean civil war from 1996 to 2002. *What were those lessons learned?*

Perhaps the most important precedent set by the Special Court is the concept of a focused mandate. The Special Court was successful because it is one of the first tribunals with a workable mandate—to prosecute those who bore the greatest responsibility. This mandate allowed the Special Court to develop an efficient and

* Professor of Practice, Syracuse University College of Law and Founding Chief Prosecutor, Special Court for Sierra Leone, 2002–2005.

effective prosecutorial strategy that could be completed within a politically acceptable time frame.

Another lesson learned was that a tribunal should be placed at, or near, the scene of the crimes. A tribunal is most effective when it is located in the region of the conflict. To the extent that this can be done, regional tribunals need to be located right where the crimes took place. It allows for the victims to see justice done and renews or restores faith in the rule of law. Doing so serves as a closure mechanism, and those affected can actually see that justice is working. Because the Court was based in Sierra Leone, Sierra Leoneans developed a genuine interest in what was happening in their Court and supported its work.

A further lesson learned was that outreach is essential to assist a people in the understanding of the importance of the rule of law and international justice. A tribunal can only complete its work if the citizens of the region appreciate and understand why the international community is there seeking justice and accounting for the various international crimes allegedly committed. At the end of the day, it will be the people living in the area who will have to live with the results. Therefore, it was imperative to reach out to them and to listen to them and address their questions and concerns.

It is also important to note that consideration of regional cultures helps to establish confidence in the rule of law. Cultural perspectives must be respected and factored into the prosecutorial strategy and plan. This also assisted the investigators and witness managers in

preparing West African witnesses to testify before an international tribunal in a way that they understood. Furthermore, legacy activities bolster the future success of establishing the rule of law, and they help develop a trained local cadre of prosecutors, investigators, and court administrators who can help to restore a devastated judiciary and promote peace.

A final lesson learned was that a justice mechanism, such as the Special Court for Sierra Leone, and a truth telling mechanism, such as the Truth and Reconciliation Commission for Sierra Leone, can coexist and work together to build a sustainable peace. Having a truth commission concurrent to the investigations and indictments of war criminals allowed the citizens of Sierra Leone to tell their story in a way that kept them out of the court system. A reconciliation commission (such as the Truth and Reconciliation Commission for Sierra Leone) served to calm and assure the citizens that their voices would be heard, and the story of the civil war in the 1990s would be told.

The ultimate challenge for the Special Court for Sierra Leone was state responsibility and the indifference states showed in supporting the Court. This indifference challenged the Special Court politically and financially throughout its existence. Initially the Court was financed purely through voluntary contributions from U.N. member states. After receiving enough voluntary funding to last one and a half years, the political will to donate to a war crimes tribunal waned. In a war-crimes-weary world, the international community was, and is, easily distracted. Political

support is key for a successful international tribunal; it is the central thread throughout the process. State support waxes and wanes, depending on the process and/or progress of the prosecution of the indictees and the political will of the various interested states and other international organizations. It is the Achilles' heel of the entire transitional justice process. This manifested itself throughout the life of the Special Court.

Yet despite all this, it was proven that international criminal justice can be effectively and efficiently delivered within a politically acceptable time frame. The Special Court for Sierra Leone has shown that it can be done—proving that this bold new experiment of international justice works. Regional hybrid tribunals are effective in delivering justice directly to the victims, their families, districts, and towns, and they can work within the paradigm of the Rome Statute that established the International Criminal Court. With the hybrid model such as the Special Court for Sierra Leone, we now have a proven model in place to face down impunity wherever it rears its ugly head so that the tragedies of the 20th century—mankind's bloodiest—are not repeated in the 21st century. *The little engine that could... did.*

The International Humanitarian Law Dialogs convenes each year to focus on issue(s), challenges, and successes of the modern international criminal law system, which are highlighted in a declaration signed by each of the world's current and former Chief Prosecutors. The Sixth Chautauqua Declaration highlighted significant progress and recurring challenges. All of the declarations of the past show that

the modern international system of justice espoused in the Rome Statute is in large measure working, with the Special Court for Sierra Leone as an example of the system delivering justice to victims of atrocity.

Each year, through the Joshua Heintz Annual Humanitarian Award, the International Humanitarian Law Dialogs recognizes a person who has made an exceptional difference to the advancement of human rights and international justice. Professor Cherif Bassiouni was recognized during these IHL Dialogs for his pioneering work in the documentation of crimes and in the codification of international humanitarian law. We congratulate him for his important contributions to our field.

The International Humanitarian Law Dialogs could not exist without the important support of the numerous sponsors who provide the financial, administrative, and logistical means that make the Dialogs such a success each year. To all of them, particularly our friends at the Robert H. Jackson Center and Chautauqua Institution, we say thank you.

The substance that follows is impressive. As in the past, the speeches, lectures, notes, and articles are exceptional in exploring whether the hybrid model for international courts is a workable model. We offer them to you for your review and consideration.

Lectures

**Second Annual Katherine B. Fite Lecture:
Drone Wars and the Nuremberg Legacy**

Leila Sadat*

This lecture is dedicated to the memory of the women of Nuremberg. Fittingly, it takes place on the shores of Lake Chautauqua at the Athenaeum Hotel—which, in ancient Greece, identified a temple dedicated to the goddess Athena, which served as a gathering place for the learned. In modern times, it has come to symbolize an association of persons dedicated to education and humanistic causes. This is a wonderful description of these dialogs and the work of the Chautauqua Institution itself.

My lecture begins with a story, a tale of Athena, a great warrior who was revered not only for her thoughtful use of military strategy but for her wisdom. In one famous myth, Athena and Poseidon, the god of the sea, struggled to win the hearts of an ancient Greek city. Poseidon gave the people of the city a river, which he

* Leila Sadat, Henry H. Oberschelp Professor of Law and Director of the Whitney R. Harris World Law Institute, Washington University in St. Louis. Delivered on August 27, 2012 on the occasion of the Sixth Annual International Humanitarian Law Dialogs. Thanks to John Grothaus for superb research assistance. This publication is based on Professor Sadat's lecture presented on August 27, 2012 at the Sixth International Humanitarian Law Dialogs held in Chautauqua, New York.

created by plunging his trident into the ground of the Acropolis. Unfortunately, although impressive looking, the river was of little use to the people living there as the water flowing in it was salty—they could neither drink from it nor use it to water their crops. According to legend, after Poseidon presented his gift, Athena stepped forward and struck her spear into the earth; she planted an olive tree in the hole, and as the tree grew, it provided food and shelter to the people of the city, who came to love her. They chose Athena as their patron, and the olive tree became a symbol of peace and prosperity. The city, of course, was Athens.¹

I tell this story to frame the issues I will discuss in today's Katherine B. Fite lecture at this sixth International Humanitarian Law Dialogs. I am honored to represent the female voice—*la voix feminine*—in our dialogs this year and am humbled to deliver it before such an illustrious gathering. I recount it as well to make the point that our left brain understanding of the law and its logic cannot always answer the question about what is the right thing to do. As Jill Bolte Taylor, the famous neuroscientist reminds us in her astonishing story of what life was like without her left brain functions, which

¹ There is a postscript to the story: Poseidon was furious, and being warlike and generally bad tempered, cursed Athens for rejecting him; the citizens tried to appease him by later denying women the right to vote. This triumph of the female sex was thus rather short-lived!

she lost temporarily as a result of a stroke,² as human beings, we need our right as well as our left brains—our wisdom as well as our strength—the female as well as the male voice, the yin as well as the yang, to make sound decisions.

Last year Diane Amann treated us to a superb lecture surveying Katherine Fite’s work at Nuremberg as well as the relationship between politics and prosecutors; the year before, we heard a wonderful exposé about Cecilia Goetz, a female lawyer who delivered an opening statement at Nuremberg. Rather than continuing to revisit the work of the trail-blazing and extraordinary women who have preceded me, I have chosen to address the application of the Nuremberg precedent that they helped establish in a modern setting, taking up the question of the use of drone strikes—“lethal operations conducted with the use of unmanned aerial vehicles”—in the conduct of the U.S. “war on terror.”

I chose this topic because of its legal, moral, and policy implications for the United States and for international humanitarian law and its connection to the important work accomplished by the international criminal tribunals and courts which are the subject of these dialogs. Indeed, steeped as we are in the living legacy of the Nuremberg Trials at this conference, this

² See generally JILL BOLTE TAYLOR, MY STROKE OF INSIGHT: A BRAIN SCIENTIST’S PERSONAL JOURNEY (2009).

subject seems exceptionally apropos, as the American use of targeted killing in Afghanistan, Pakistan, Yemen, Libya, Iraq, and Somalia—popularly referred to as the “drone wars”³—raises the question of the application of the Nuremberg principles to the conduct of America’s longest-running war. Yet it not only presents complex issues of international law but difficult moral and ethical questions. Administration officials and some academics and commentators have praised targeted killing as effective and lawful. Others have criticized it as immoral, illegal, and unproductive. In this essay, I conclude that conducting targeted killing operations outside areas of active hostilities violates international law. In addition, even in areas in which targeted killings may be lawful, particular uses of drones may violate international humanitarian law if insufficient attention is paid to principles of proportionality and distinction in their use, particularly as regards decisions of whom, how, and when to target an individual for death. Moreover, to the extent that drones become a means to terrorize a civilian population, their use may be prohibited by international humanitarian law. Finally, decision-makers in the United States must engage not only with the question of whether their use of targeted killing is legal but also whether it is a policy that resonates with America’s deepest values and promotes

³ David Rohde, *The Drone Wars*, REUTERS, Jan. 26, 2012, available at <http://www.reuters.com/article/2012/01/26/us-david-rohde-drone-wars-idUSTRE80P11I20120126>.

U.S. long-term interests, including its interest in international peace and justice.⁴

I do not pretend to have all of the answers in this regard but am grateful to David Crane, the Jackson Center, Chautauqua Institution, and to my good friends Diane Amann and Beth van Schaack at *IntLawGrrls* for the opportunity to raise these important questions before the distinguished men and women present today.

Introduction

In November 2008, the Taliban captured *New York Times* journalist David Rohde, along with two Afghan colleagues, and held them for seven months in North and South Waziristan, the focus of the American drone

⁴ A full treatment of this question is beyond the scope of this short essay, which admittedly raises more questions than answers. For other writings see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT'L L. 171 (2005); Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQ. L. 111 (2004); Mary Ellen O'Connell, *Seductive Drones: Learning from a Decade of Lethal Operations*, J.L. INFO. & SCI. 116 (2011); Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT'L L.J. 595 (2012); Mark V. Vlasic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259 (2012).

campaign at the time. Rohde was lucky enough to escape from his captors and penned a series of gripping articles about his captivity that appeared on the front pages of the *Times* in 2009.⁵ His articles recount an astonishing tale of his capture, the death threats he endured, and the hardships he faced; but what is perhaps even more extraordinary are his insights into the minds of his Taliban captors. In particular, because he was being held in an area patrolled by drones and in which drone strikes were taking place with regularity, he wrote about the experience of being on the ground while U.S. drones circled overhead. He recently summarized this experience in Reuters, observing:

Throughout our captivity, American drones were a frequent presence in the skies above North and South Waziristan. Unmanned, propeller driven aircraft, they sounded like a small plane—a Piper Cub or Cessna—circling overhead. Dark specks in a blue sky, they could be spotted and tracked with the naked eye. Our guards studied their flight patterns for indications of when they might strike...

⁵ David Rohde, *A Rope and a Prayer*, N.Y. TIMES, Oct. 22, 2009, at A1; David Rohde, *A Drone Strike and Dwindling Hope*, N.Y. TIMES, Oct. 21, 2009, at A1; David Rohde, *'You Have Atomic Bombs, but We Have Suicide Bombers,'* N.Y. TIMES, Oct. 20, 2009, at A1; David Rohde, *Inside the Islamic Emirate*, N.Y. TIMES, Oct. 19, 2009, at A1; David Rohde, *7 Months, 10 Days in Captivity*, N.Y. TIMES, Oct. 18, 2009, at A1.

The drones were terrifying. From the ground, it is impossible to determine who or what they are tracking as they circle overhead. The buzz of a distant propeller is a constant reminder of imminent death. Drones fire missiles that travel faster than the speed of sound. A drone's victim never hears the missile that kills him.⁶

Rohde was almost beheaded by his captors after a drone strike took place near his prison, inflaming his captors.⁷ In his writings, he admits that the drone strikes clearly disrupted Taliban operations and seemed to be tactically effective. At the same time, he observes, as have others, that the strategic value of U.S. drone strikes may be problematic, as they have also resulted in tremendous hatred of, and anger with, the United States and increased support for the militants.

Though only recently acknowledged by U.S. government officials, attacks by unmanned aerial vehicles (commonly called "drones") have become a major part of U.S. military strategy and counterterrorism operations. The drones include the MQ-1 Predator and

⁶ Rohde, *supra* note 3.

⁷ *Id.*

the MQ-9 Reaper.⁸ The Predator is more commonly used and is an “armed, multi-mission, medium-altitude, long endurance remotely piloted aircraft,” with a “unique capability to autonomously execute the kill chain (find, fix, track, target, engage, and assess) against high value, fleeting, and time sensitive targets,” according to U.S. Air Force reports.⁹ Predator drones are fitted with two video cameras, an infrared sensor, a laser system, and two laser-guided Hellfire missiles, which the Air Force describes as having “highly accurate, low collateral damage, and anti-armor and anti-personnel engagement capability.”¹⁰ Besides a small on-site crew that handles the Predator’s takeoff and landing, the Predator is controlled remotely by a crew based in the United States.¹¹

⁸ *MQ-1B Predator*, US AIR FORCE (Jan. 5, 2012), <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>; *MQ-9 Reaper*, US AIR FORCE (Jan. 5, 2012), <http://www.af.mil/information/factsheets/factsheet.asp?id=6405>.

⁹ *MQ-1B Predator*, *supra* note 8.

¹⁰ *Id.*

¹¹ *Id.* The Reaper is also an “armed, multi-mission, medium-altitude, long endurance remotely piloted aircraft,” but is primarily a “hunter/killer” and only collects intelligence secondarily. As such, it is both larger and carries more power than the Predator, and can use additional weapons and carry up to four Hellfire missiles. *MQ-9 Reaper*, *supra* note 8.

The Obama Administration “Lawyers Up”

In 2009, Jane Mayer reported in *The New Yorker* on a drone strike that had taken place in Pakistan and discussed both the CIA’s highly classified program of drone strikes in Pakistan and other countries around the world, as well as the open use of drones by U.S. military forces operating in theatres of war in Afghanistan and Iraq.¹² The story generated a great deal of criticism of U.S. policy and, just as lawyers were asked to justify Bush administration policies on detention after the 9/11 attacks, Obama administration lawyers were asked to do the same for the drone program.

In March of 2010, the Legal Advisor to the U.S. Department of State, Harold Hongju Koh, gave a much-anticipated speech at the Annual Meeting of the American Society of International Law in which he defended the Obama administration’s increasing use of drones against individuals alleged to be members of al Qaeda, the Taliban, or “associated forces.”¹³ The speech emphasized the desire of the United States to comply

¹² Jane Mayer, *The Predator War*, THE NEW YORKER (Oct. 26, 2009), http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer.

¹³ Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the Am. Soc’y Int’l L., (Mar. 25, 2010), available at www.state.gov/s/l/releases/remarks/139119.htm.

with international humanitarian law, and specifically, the principles of distinction and proportionality. Koh argued that, as a matter of law, the right of the United States to kill suspected terrorists and militants was predicated upon the existence of an armed conflict between it and various individuals and organizations that allowed the United States to use “self-defense” against these individuals and organizations.¹⁴ The speech was controversial. Although Obama had promised to pursue terrorists and “finish” the war in Afghanistan during the presidential campaign, many human rights activists did not expect his administration to cleave to the same legal arguments about the “war on terror” that his predecessor had and were surprised that he had done so. Dean Koh’s speech responded to very few of the difficult legal and moral questions raised by targeted killing, and although he never used the Bush administration term of “unlawful enemy combatant” to describe those targeted, the speech seemed more in line with past administration policies than a departure from them.

Subsequently, the drone campaign intensified, additional strikes took place in more countries and, occasionally, not only against foreigners but U.S. citizens. Because the program has largely been operated by the CIA and classified as secret, accurate quantitative assessments of the number of strikes, the locations of the strikes, the number of persons killed, and the identities of those killed or injured is very difficult to come by.

¹⁴ *Id.*

Nonetheless, based upon information available in the public domain, it has been estimated that during his eight years in office, President George W. Bush authorized forty-four strikes in Pakistan.¹⁵ Conversely, in less than four years, it has been reported that President Obama authorized 294 strikes in Pakistan, Yemen, and Somalia as of May 28, 2012, in addition to strikes in Afghanistan, Libya, and Iraq.¹⁶ In Pakistan alone, it has been reported that these strikes resulted in between 2,524–3,247 casualties, including 482–852 civilians, and an additional 1,204–1,330 injured.¹⁷ Other sources suggest that the

¹⁵ Peter Bergen & Katherine Tiedemann, *Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan*, FOREIGN AFF., July–Aug. 2011, at 12, 12.

¹⁶ *Striking Al Qaeda*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/interactive/2012/05/29/world/middleeast/striking-al-qaeda.html>.

¹⁷ *Obama 2012 Pakistan Strikes*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes> (last updated Dec. 28, 2012). *The Bureau of Investigative Journalism* is a London-based nonprofit journalism organization that collaborates with media outlets such as *the BBC*, *Financial Times*, *Daily Telegraph*, and *Le Monde*. *About the Bureau*, THE BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/who> (Feb. 11, 2013). See also STANFORD INT'L HUM. RTS. & CONFLICT RES. CLINIC & NYU GLOBAL JUST. CLINIC, *LIVING UNDER DRONES: DEATH, INJURY AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* (2012) [hereinafter *LIVING UNDER DRONES*] (concluding that there is significant evidence that U.S. drone strikes have injured and killed civilians).

number of civilian casualties may be considerably lower,¹⁸ and the Pakistani government suggests that the civilian casualties have been much higher.¹⁹ Regardless of the precise number of casualties, there seems to be little doubt that thousands of human beings have been killed by drone strikes and thousands more have been injured. Moreover, most of this has occurred outside the theatre of active hostilities.

In 2011, a 50-page memorandum drafted by David Barron and Martin Lederman, attorneys in the Department of Justice's Office of Legal Counsel, and signed by Barron, authorized the targeted killing of U.S. citizen Anwar al-Awlaki in Yemen. This memo has not been made public, however, its contents were described by anonymous sources to journalist Charlie Savage and published in the *New York Times*.²⁰

¹⁸ The *Long War Journal*, a U.S.-based nonprofit media organization has reported 2,354 militant casualties and 138 civilian deaths in Pakistan since 2006. *About the Long War Journal*, THE LONG WAR JOURNAL, <http://www.longwarjournal.org/about.php>.

¹⁹ Bergen & Tiedemann, *supra* note 15, at 13 (according to Pakistani government officials, 700 civilians were killed in 2009 alone).

²⁰ Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1. According to the article, the Obama administration refused to acknowledge its role in the strike, and the memorandum, which was written more than a year before Mr. Awlaki was killed, did not independently analyze the quality of the evidence against him. The *Washington Post* reported

According to Savage's sources, the memo authorized the killing of al-Awlaki only if it was not feasible to capture him.²¹ Such a killing was justified because al-Awlaki "was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans."²² The memorandum argued that killing al-Awlaki was not an assassination, as he was a lawful target in an armed conflict, and wasn't murder since he was a lawful target in an armed conflict. Further, it concluded that the drone's pilot, as a C.I.A. official, would not be committing a war crime even though he or she was not a uniformed soldier.²³ Finally, relying on precedent allowing American citizens to be prosecuted in a military court if they had joined an

on the story several days earlier. See Peter Finn, *In Secret Memo, Justice Department Sanctioned Strike*, WASH. POST, Oct. 1, 2011, at A9.

²¹ Savage, *supra* note 20. See Jordan J. Paust, *Propriety of Self-Defense Targetings of Members of al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 ILSA J. INT'L. & COMP. L. 565, 574–76 (2012) (arguing that the killing of al-Awlaki was legal); *but see* Mary Ellen O'Connell, *The Right to Life in War and Peace: A Legal and Moral Critique of Targeted Killing*, Remarks for the Institute of Theology and Peace (Hamburg) (Aug. 15, 2012), available at <http://chicagotonight.wttw.com/sites/default/files/The%20Right%20to%20Life%20in%20War%20and%20Peace.txt>.

²² Savage, *supra* note 20.

²³ *Id.* (although apparently this official could be prosecuted in Yemen for murder, according to the memo).

enemy's military, the memorandum apparently stated that the process due to al-Awlaki was "due process in war,"²⁴ not the protections of the U.S. Constitution. Accordingly, if killing or capturing al-Awlaki was justifiable to avoid imminent attack, then his targeted killing abroad was legal.²⁵

On March 5, 2012, another prominent government lawyer, Attorney General Eric Holder, also went public to justify the targeted killing of foreigners and U.S. citizens by the government.²⁶ Holder's speech laid out the procedures used by the president in determining who to target for capture, who to target with lethal force, and who to try before military commissions as opposed to civilian courts.²⁷ Reading the speech, it is clear—if it hadn't been before—that the precedents set and the tactics employed during the Bush administration were not rejected by the Obama administration but have become part and parcel of U.S. policy. In fact, the fundamental conceptual error of the Bush administration's legal regime—that the targets of the

²⁴ Finn, *supra* note 20.

²⁵ Savage, *supra* note 20.

²⁶ Eric Holder, Attorney General., Dep't of Just., Speech at Northwestern University School of Law (Mar. 5, 2010), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

²⁷ *Id.*

U.S. “war on terror” are entitled to neither the protections of the criminal law (or human rights law), nor the protections of international humanitarian law, but exist instead in a legal “black hole” subject to the whim or the grace of the executive branch—remains virtually unchanged.²⁸ Although generally avoiding the term “unlawful enemy combatant,” the Obama administration appears, in fact, to be using the identical legal analysis as its predecessor.

Finally, on April 30, 2012, the day after a particularly controversial drone strike in Pakistan, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, gave a spirited defense of Obama’s targeted killing policy at the Woodrow Wilson Center at Princeton University. Brennan is not a lawyer, but asserted that “the United States Government conducts targeted strikes against specific al-Qaida terrorists” in order to “prevent terrorist attacks on the United States” and to “save American lives.”²⁹ He also

²⁸ While other legal issues in the conduct of the drone wars are debatable, I have argued in earlier writings that this is not. *See, e.g.,* Leila Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 *DENV. J. INT’L L. & POL’Y* 539 (2009).

²⁹ John O. Brennan, White House Counter Terrorism Adviser, Speech on U.S. Drone Strikes Targeted at al-Qaida at the Woodrow Wilson Center (Apr. 30, 2012), *available at* <http://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>.

argued that the strikes were lawful “beyond hot battlefields like Afghanistan” and argued that they were legal, ethical, and effective. Finally, he concluded that “we” (meaning the administration) employ standards and processes designed to ensure that targeting is legal and effective.

Brennan’s speech, however, did not quell the international criticism of the U.S. drone program nor did it satisfy Pakistani objections to its conduct. This is unsurprising, for other than Israel, the United States is the only country in the world to aggressively use targeted killing as part of its counterterrorism strategy.³⁰ Two U.N. Special Rapporteurs on Extra-judicial Executions, Philip Alston and Christophe Heyns, have criticized the drone program,³¹ and ICRC President, Jakob Kellenberger, has worried aloud that it is undermining fundamental principles of international humanitarian law.³² More recently, on October 25, 2012,

³⁰ Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 13–26, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010). Russia has also reportedly used targeted killings in Chechnya, which its military refers to as a counter-terrorism operation. *Id.* at ¶ 23.

³¹ *Id.* at ¶ 10; Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says UN Rapporteur*, THE GUARDIAN (UK) (June 21, 2012), <http://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un>.

³² Jakob Kellenberger, IHL and New Weapon Technologies, 34th Round Table on Current Issues of International Law (Sep. 9, 2011),

the United Nations announced the opening of an investigation into the “extrajudicial killings of suspected insurgents and the innocent civilians all too often executed in the process.”³³

Some Preliminary Legal Questions Raised by the Use of Drones by the United States

In spite of the fact that many top U.S. lawyers have justified the use of targeted killing by the United States, they have not answered all of the questions surrounding the use of this controversial new weapon of war. Perhaps in response to the fury generated by the Bush administration’s torture memos, which were either released or leaked to the press and then subjected to intense analysis and debate by other lawyers, the “lawyering up” of targeted killing by the Obama administration has largely remained vague, policy-oriented, and secret. The speeches of both Koh and Holder are imprecise as to which targets are permissible, where attacks may take place and under what conditions, whether or not specific congressional authorization exists or is needed for the attacks, who is entitled to

available at <http://intercrossblog.icrc.org/blog/ihl-and-new-weapon-technologies>.

³³ See, e.g., *United Nations to Begin Investigating US Drone Strike Targeted Kills*, RT.COM (Oct. 25, 2012), <http://rt.com/usa/news/us-drone-emmerston-un-256/>.

carry out the operations (the military or the CIA), and the expected purpose of the killings. They rest upon assumptions about the law of war that have been challenged by many scholars and U.N. bodies, including the assumption that the United States is entitled to attack non-state actors under Article 51 of the U.N. Charter as a response to terrorist activity,³⁴ that the ensuing “war” follows the alleged terrorists wherever they may be found,³⁵ and that the war has no temporal limitations.³⁶ Some have suggested that the Obama administration has resorted to killing terror suspects to avoid legal problems surrounding their indefinite detention and trial.³⁷ I do not know if this is true. Yet, the picture emerging suggests that the Obama administration, like the Bush

³⁴ See, e.g., Leila Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOB. STUD. L. REV. 135, 143–144 (2004) (and authorities cited). See also Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 996 (2001); Luigi Condorelli, *Les Attentats du 11 Septembre et Leurs Suites: Où Va le Droit International?*, 105 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 829 (2001).

³⁵ Sadat, *supra* note 34, at 142.

³⁶ *Id.* at 143–44. See also Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009* (Notre Dame L. Sch. Legal Stud. Res. Paper No. 09-43, 2010).

³⁷ Claire Finkelstein, *Targeted Killing as Preemptive Action*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 161 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) [hereinafter TARGETED KILLINGS].

Administration before it, has implicitly reversed the normal rules and burdens of proof that accompany the use of lethal force by states, obliging those targeted to prove their innocence or status as civilians, and adopted a “presumption of guilt” rather than innocence for terror suspects. As Claire Finkelstein has observed:

Our current approach to targeted killing is betwixt and between. We treat targeted individuals as belligerents insofar as we regard them as legitimate targets by virtue of status, rather than action. But we treat them as subjects of law enforcement in that we resist according them the privileges that go along with the status of combatants, such as affording them the rights of P.O.W.s and recognize their equal right to kill in combat.³⁸

This raises at least five sets of legal questions regarding U.S. targeted killing operations:

- a) Questions as to the legal regime justifying the government’s use of lethal force;
- b) Questions as to the permissible targets;
- c) Questions regarding the processes used to create the “kill list,” as it is called;

³⁸ *Id.*

- d) Questions as to whether drone strikes are lawful methods of warfare; and
- e) Questions regarding the intended purposes of the strikes.

Finally, given that some uses of drones are clearly lawful, this essay will briefly explore the questions surrounding even lawful uses of these very controversial new weapons.

What Legal Regime Justifies the Use of Lethal Force Against Terrorists or Taliban Armed Forces

The Authorization for the Use of Military Force Resolution (AUMF) adopted by Congress in 2001 states that the President is authorized to use “all necessary and appropriate force” against:

[T]hose nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism

against the United States by such nations, organizations or persons.³⁹

This resolution seems to limit the targets of America's war on terror to those having a nexus to the September 11th attacks. But it would not, on its face, suggest that individuals having nothing to do with those attacks could still fall within the armed conflict authorized by Congress in 2001. Indeed, recently, even conservative commentators and Republican presidential candidate Mitt Romney have suggested that the drone program may need to be specifically reauthorized by Congress under the Constitution and the War Powers Resolution.⁴⁰

The government's current position, as stated by Koh, is that the United States is engaged in an armed conflict with various individuals and organizations, which gives the United States a right to use "self-defense" against these individuals and organizations.⁴¹ Under this view, this right of "self-defense" allows the

³⁹ Authorization for the Use of Military Force, S.J. Res. 23, 170th Cong. § 2 (2001) (enacted).

⁴⁰ Romney for President, *An American Century: A Strategy to Secure America's Enduring Interests and Ideals* 40 (A Romney for President White Paper, Oct. 7, 2011).

⁴¹ Koh, *supra* note 13.

government to kill individuals alleged to be enemies of the United States even if those individuals are found in the territories of states with which the United States clearly is not at war. Even assuming that the individuals in question were combatants that can be targeted in war—an assumption that in many cases is highly questionable, as some of the individuals targeted clearly appear to be civilians—the fact that most drone strikes are taking place in states “at peace” with the United States suggests not only that the use of military force against individuals in those states may be ill-advised but that they may be unlawful.⁴² Although the United States continues to maintain that there are no geographical constraints to the “war on terror,” which follows suspected terrorists wherever they may be, that position has not generally been accepted by most authorities, at least not as a rule of international law.⁴³ To the extent that military weapons are targeting individuals in areas outside a theatre of war, their use amounts to a violation of international human rights law, not a proper

⁴² Mary Ellen O’Connell makes this point, noting that without a state of armed conflict, even killing with permission of the government does not make the operation lawful. O’Connell, *supra* note 36, at 16 (noting that even “express consent” from Pakistan would not justify the use of drones by the United States on Pakistani territory given the absence of an armed conflict for most of the period that the United States has been using drones there).

⁴³ *Id.* at 23–24; *but see* Paust, *supra* note 21, at 573 (arguing that although the United States cannot be “at war” with al Qaeda, it can use military force in self-defense against al Qaeda members anywhere in the world).

application of international humanitarian law. Philip Alston has made this point several times⁴⁴ as has Professor Mary Ellen O'Connell.⁴⁵ Moreover, it may be observed that if taken without the consent of the territorial state against whom they are launched, U.S. drone strikes may amount to acts of aggression as well.

It is possible to argue, as the United States does,⁴⁶ that international human rights law is inapplicable to its extraterritorial activity, meaning that apparently no international norms specifically protect the right to life of individuals residing outside the United States in countries with which the United States is at peace, other than the domestic law of the countries in which the individuals are targeted. International human rights bodies and international courts and tribunals have, for the most part, rejected this assertion.⁴⁷ Yet the strikes

⁴⁴ See, e.g., Alston, *supra* note 30, ¶ 22.

⁴⁵ See, e.g., Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y J. 343, 355 (2010).

⁴⁶ Hum. Rts Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 2003: United States of America*, ¶ 130, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

⁴⁷ See, e.g., Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8, 1996) (the protection of the ICCPR does not cease in times of war, and in principle the right not arbitrarily to be deprived of

may violate the international human rights obligations of those governments permitting (or acquiescing to) U.S. targeted killing activities on their territories.

Moreover, the U.S. position also suggests that there are no temporal constraints on self-defense, which may continue *ad infinitum* after a terror attack—or at least one on the scale of the September 11th attacks—and continues to refer to U.N. Security Council Resolution 1373 as authorizing drone strikes taking place 11 years later. Professor Monica Hakimi has recently suggested that the legal problems caused by U.S. targeted killing policies stem from the effort to place them in either the “domain” of international human rights law or international humanitarian law and proposes a single balancing test that would be used in all cases.⁴⁸ Yet her work, like the administration’s approach, takes as its starting point the necessity and appropriateness of targeted killing of individuals living outside the United States as a remedy to U.S. insecurity about future terrorist attacks. This is a “war” paradigm, which takes killing as a given, rather than a “peace” paradigm, which takes the protection of life as the most fundamental duty of the state. International law has traditionally taken a bright line rather than a balancing approach to certain jus

one’s life applies also in hostilities, but is evaluated under international humanitarian law).

⁴⁸ See Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012).

cogens norms, such as the prohibition of torture and the protection of life, both of which are non-derogable norms under the International Covenant on Civil and Political Rights.⁴⁹

Questions as to the Permissible Targets

The rhetoric used to describe the individuals placed on the CIA's "kill list" is imprecise. The individuals in question are alternatively described as "terrorists,"⁵⁰ "suspected terrorists," "Islamic radicals," "insurgents," "members of al Qaeda and its associates," "Taliban," "jihadists," "[M]uslim extremists," and "unlawful combatants" depending upon the source consulted. None of these, with the possible exception of "members of al Qaeda and its associates" have much legal consonance, nor are they particularly well-defined categories of individuals. Is a "suspected terrorist" a proper target? Is he or she a civilian? A combatant? What constitutes direct participation in hostilities? Who decides? The ICRC has issued guidelines that the U.N. Report on Extrajudicial Killings has criticized because it can be read as allowing individuals to be included because of

⁴⁹ International Covenant on Civil and Political Rights arts. 6-7, G.A. Res. 2200(XXI)A, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200(XXI)A, (Dec. 16, 1966).

⁵⁰ Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

their status and not just their conduct.⁵¹ But it is not clear that the United States respects even the ICRC guidelines, as U.S. rules could permit the targeted killing of drug traffickers, whereas the ICRC guidelines do not.⁵² How sure must the CIA be of an individual's membership and active participation in al Qaeda before he or she can be placed on the CIA's kill list? How is it that the U.S. government can now use lethal military force to kill a U.S. citizen with no judicial process in a foreign country far from any active theatre of war?

In 2002, an American of Yemeni background, Kamal Derwish, was killed by a missile from a Predator Drone. Derwish was not the target of the attack, according to media reports, but the U.S. position was that "as an enemy combatant... [he] had no constitutional rights."⁵³ Nonetheless, it shocked many, and the killing was widely reported and denounced in the U.S. media. Fewer than ten years later, government policy has been transformed from accidentally killing U.S. citizens to targeting them, with very little public explanation or justification. The kill lists target specific individuals, not just soldiers on a battlefield, and of course, no surrender is possible once a targeting decision has been taken.

⁵¹ Alston, *supra* note 30, ¶ 65.

⁵² *Id.* ¶ 68.

⁵³ John J. Lumpkin, *Administration Says That Bush Has, in Effect: A License to Kill*, ST. LOUIS POST-DISPATCH, Dec. 4, 2002, at A12.

Questions Regarding the Processes Used to Create the “Kill List”

It has been reported that President Obama himself oversees decisions to place terrorists on a “kill list,” looking at pictures and intelligence briefings and considering discussions with his advisors.⁵⁴ According to the published information available, each week the President and his advisors gather by teleconference to decide which individuals should be targeted and killed. President Obama reportedly must personally approve every name, signing off on every strike in Yemen, Somalia, and Pakistan—including al-Awlaki—about one third of the total.⁵⁵ Yet in Pakistan, the President had approved not only “personality” strikes, aimed at named individuals, but “signature” strikes that target alleged training camps and suspicious compounds in areas allegedly controlled by militants and individuals whose identities are unknown. Because signature strikes became so controversial, they were stopped in Pakistan, but the CIA had, according to the media, sought authority to carry them out in Yemen.⁵⁶

⁵⁴ Becker & Shane, *supra* note 50.

⁵⁵ *Id.*

⁵⁶ Robert Naiman, *Could We Stop ‘Signature’ Drone Strikes in Yemen and Pakistan?*, HUFFINGTON POST WORLD, (Apr. 27, 2012), www.huffingtonpost.com/robert-naiman/drones-yemen_b_1458668.html.

The process used by the executive branch to determine who and when to target human beings for death can be summarized in two words, “Trust us.” They would undoubtedly add, “We are very careful.” I believe that a sincere effort to be careful has been undertaken by U.S. government officials, including the President himself; this is clear from both Holder’s and Brennan’s remarks, as well as media accounts of President Obama’s personal engagement with targeting terrorists. Yet it is simply not consistent with the rule of law to make the lives of thousands of individuals depend solely on executive grace or the wisdom and integrity of the person inhabiting the Oval Office in a particular year. Unsurprisingly, there have been mistakes reported, errors that resulted in families, including women and children, being killed by drone strikes. Some of these “mistakes” end up as YouTube videos of “children’s bodies and American missile parts,”⁵⁷ which serve as recruitment devices for al Qaeda and its associates and fuel anti-American sentiment in areas where drones are operating.

Questions as to Whether Drone Strikes Are Lawful Methods of Warfare

States generally assume that unless a particular weapon is prohibited by treaty, or a particular method of

⁵⁷ *Predator Drones and Unmanned Aerial Vehicles (UAVs)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html.

warfare has not been outlawed by treaty, it is lawful. Indeed, there is perhaps no area of international law more deeply dependent upon the application of the Lotus principle, which provides that restrictions on the sovereignty of states are not to be presumed,⁵⁸ than questions involving the use of weaponry by a state. Although states may concede the application of the principles of distinction and proportionality, as Koh has done with respect to drone attacks, they typically do not concede any limitations upon their choice of weaponry or means of warfare.

Human rights groups, on the other hand, have often challenged particular weapons as violating the principles of distinction per se, or have challenged particular means of warfare as violating international law. During the NATO bombing campaign in the former Yugoslavia, for example, human rights organizations and the government of the Federal Republic of Yugoslavia (“FRY,” the target of the campaign) argued that the NATO decision to wage a “zero-casualty war” caused NATO pilots to fly at “heights which enabled them to avoid attack by Yugoslav defenses and, consequently, made it impossible for them to properly distinguish between military or civilian objects on the ground.”⁵⁹

⁵⁸ S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

⁵⁹ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 2 (1999) [hereinafter Final Report to the

When the ICTY Prosecutor rejected this assertion, a committee asked for an examination of the legality of NATO's actions, stating:

The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.⁶⁰

Today's drone pilots, who are even further removed from their targets than NATO air commanders during the 1990s, may have even greater obligations under the laws of war to ensure that they are able to distinguish military from non-military targets with a degree of certainty. It is not clear, given the high levels of civilian casualties

Prosecutor by the Committee Established to Review the NATO Bombing Campaign].

⁶⁰ *Id.* ¶ 55.

resulting from the drone strikes, that they are doing so. By way of comparison, the committee on the NATO bombing reported that the FRY (the targeted state) reported 495 civilians killed and 820 civilians wounded⁶¹ in a bombing campaign that lasted for several months and involved more than 38,000 sorties, 10,000 strike sorties, and the release of more than 23,000 air munitions.⁶² Yet, as noted earlier, America's drone strikes in Pakistan alone from 2004 until 2012 are estimated to have resulted in between 2,524–3,247 casualties, including 482–852 civilians, and an additional 1,204–1,330 injured,⁶³ from an estimated 350 strikes. While these figures are not uncontroverted, it would appear, if they are correct, that the ratio of civilians killed to air strikes undertaken is dramatically higher by many orders of magnitude in the case of the drone wars than the NATO intervention in 1999. While numbers alone do not tell the story, this seems much closer to the kind of reckless intent suggesting the offense of unlawful attack upon civilians that was alleged to have been violated by NATO in 1999.⁶⁴

⁶¹ *Id.* ¶ 90.

⁶² *Id.* ¶ 54.

⁶³ *Obama 2012 Pakistan Strikes*, *supra* note 17; *LIVING UNDER DRONES*, *supra* note 17, at vi (reporting similar statistics).

⁶⁴ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign, *supra* note 59, ¶¶ 28–29.

Questions Regarding the Intended Purposes of the Strikes

The purpose of the drone strikes depends upon the nature of the target and the areas being targeted. In Pakistan, for example, in 2009 it was reported that only six of the 41 CIA drone strikes conducted by the Obama administration targeted members of al Qaeda. To obtain the cooperation of Pakistan for the drone program, Pakistani officials were permitted to nominate targets then “taken out” by U.S. drone strikes, and 18 strikes were therefore directed at Taliban targets, 15 of which were aimed at Baitullah Mehsud, the leader of the Taliban in Pakistan.⁶⁵ Some strikes seem to target al Qaeda leaders; others appear generally directed at the Taliban or other “suspected militants.” Some strikes are taking place during active military conflict in war zones, such as the U.S. drones flown in Libya in 2011, whereas others are on the territories of states such as Yemen, with which the United States is not at war. In terms of the counter-terrorism use of drones, which is clearly the most controversial, there are several possible purposes for the strikes:

- Specific deterrence (killing “terrorists” to punish them and so they cannot engage in future operations against the United States or its allies);

⁶⁵ Mayer, *supra* note 12.

- General deterrence (demonstrating U.S. ability to kill at great distances and thereby deterring other would-be “terrorists”);
- Retribution (punishing those who are deemed morally blameworthy because they have “hurt” the United States or attacked U.S. interests, allies, or persons, or have allegedly allied themselves with persons who have done so); and
- Preventive or pre-emptive strikes to eliminate potential threats against the United States, U.S. interests, allies, or persons (combining specific and general deterrence).

In this brief discussion, it is impossible to fully elaborate upon each of these categories, but it is worth noting that several either violate principles of international humanitarian law (such as killing for retribution and preventive strikes), and others may do so as well. Given that experts have suggested that the number of high-value targets killed in Pakistan is as low as one in seven persons killed, one wonders whether the purpose is general deterrence or frightening the civilian population in areas of alleged terrorist activity to prevent civilians from possibly assisting alleged terrorists and disrupting their operations. Yet terrorizing a civilian population may be a war crime, as the ICTY found in the *Galic* case⁶⁶ and the Special Court for Sierra Leone has

⁶⁶ See Prosecutor v. Galic, Case No. IT-98-29-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Dec. 5, 2003).

held as well.⁶⁷ To the extent that the United States is perceived as carrying out reprisals for the 9/11 attacks against Pakistanis who may not have had anything to do with them,⁶⁸ the drone campaign is more suggestive of collective punishment than the surgically precise targeting of particularly dangerous individuals, which is how it is justified by the U.S. government. Indeed, a recent study carried out by clinics at New York University and Stanford University law schools suggests that the presence of the drones “terrorizes men, women, and children, giving rise to anxiety and psychological trauma among civilian communities.”⁶⁹ Finally, a Pakistani professor at Lahore University has made the additional point that while it may be admitted that al Qaeda has as its mission the carrying out of jihad against U.S. forces and persons wherever possible, the Taliban has as its goal to regain power in Afghanistan and reinstitute its vision of a purist state.⁷⁰ If this is correct, the drone campaign at best appears over-inclusive, targeting the Taliban which is not fighting a global war

⁶⁷ See, e.g., Prosecutor v. Fofana and Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 115 (Aug. 2, 2007).

⁶⁸ Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 87 (2010).

⁶⁹ LIVING UNDER DRONES, *supra* note 17, at vii.

⁷⁰ *Id.* at 17-18.

against the United States but a local war for control of its territory, as well as targeting many low-level terrorism suspects and civilians.

Ethical and Moral Questions Raised by U.S. Targeted Killing Operations

This essay has argued that the legal framework within which U.S. drone strikes are carried out as part of the “war on terror” is shaky, especially outside of active war zones. Indeed, it rests upon assumptions about international humanitarian law that are highly contested. At the same time, it is certainly correct that some drone strikes are legal under more traditional notions of international humanitarian law than those the U.S. government currently seems to employ. Yet, as this essay has already noted, international humanitarian law rules do not address the questions whether the use of drones by the United States is effective, whether it is morally justified, or represents U.S. values.

As Whitney R. Harris wrote, some years before his death,

[T]he rule of law of Nuremberg, and of modern Rome [meaning the Rome Statute of the International Criminal Court] is universal, binding large states and small, victor and vanquished in any future war. The principle was most forcefully expressed by Mr. Justice Jackson when he declared that international

law condemned aggression by every nation, “including those which sit here now in judgment.”⁷¹

This idea has been captured by Jeremy Waldron’s work requiring legal norms to be neutral in their application and has particular salience for the use of drones and targeted killing as tactics of war. The United States now conducts its targeted killing campaign as if only states with “good” purposes (like us) will have access to or deploy these weapons. Waldron notes that if we defend as legal (and appropriate) a norm (N1) such as, “named civilians may be targeted with deadly force if they are presently involved in planning terrorist atrocities or are likely to be involved in carrying them out in the future,”⁷² we must expect N1 to be used by other states, including enemies of the United States because international humanitarian law applies to all states alike. Moreover, given American disinclination to permit international, or even domestic scrutiny, of its targeted killing operations, the United States cannot expect other countries to do much better, especially countries we might expect to use targeted killing—and

⁷¹ WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF THE WORLD WAR II AT NUREMBERG GERMANY 1945-1946* 560 (1995).

⁷² Jeremy Waldron, *Justifying Targeted Killing with a Neutral Principle?*, in *TARGETED KILLINGS*, *supra* note 3737, at 112.

drones if they had them—unscrupulously. The notion that the “good guys” get to use different rules than the “bad guys” has periodically surfaced in both moral analysis⁷³ and at the international criminal tribunals. Recall the arguments made, and initially accepted, in the *Civil Defence Forces* (CDF) case at the Special Court for Sierra Leone that, as the opponents of the Revolutionary United Front, the CDF was operating under different principles.⁷⁴ Yet those arguments have been overwhelmingly rejected by the nations of the world in the Statute of the International Criminal Court. By its terms, Rome Law applies to all nations, small or large, rich or poor,⁷⁵ with, unfortunately a possible escape hatch for the Permanent Members of the Security Council and countries under their protection. It is estimated that over seventy other countries, including China, Russia, Pakistan, and Iran, now possess drone technology.⁷⁶ Current U.S. policy on drones appears to be providing other countries with unintended incentives to both develop and use these weapons.

⁷³ Particularly in the work of philosophy professor Jeff McMahan.

⁷⁴ See *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007).

⁷⁵ Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90.

⁷⁶ Drone Wars UK, *Mapping Drone Proliferation: UAVs in 76 Countries*, GLOBAL RES. (Sep. 18, 2012), <http://www.globalresearch.ca/mapping-drone-proliferation-uavs-in-76-countries/5305191>.

Finally, as Peter Singer recently noted, specific uses of drones in war may not only violate international humanitarian law, but they represent a technology that appears to remove the last political barrier to war. The drone campaign involves hundreds of strikes and thousands of deaths, and yet it has never been seriously debated or authorized by Congress. Moreover, it has spread to additional countries and campaigns: nearly 150 American unmanned systems were deployed over Libya, without approval by Congress.⁷⁷ When asked why there was no need to comply with the War Powers Resolution to obtain additional authorization for the use of force, the White House argued that the operations did not “involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof.”⁷⁸ As Singer notes, however, “they did involve something we used to think of as war: blowing up stuff, lots of it.”⁷⁹

Drones are fired from thousands of miles away, using technology that resembles a video game. After the killing is over, the drone operator returns home to a “normal” life—perhaps grabbing a bite to eat, hugging his kids, or enjoying time with friends. Some uses of drones may be clearly legal under the principles of the

⁷⁷ Peter Singer, *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 22, 2012, at SR5.

⁷⁸ *Id.*

⁷⁹ *Id.*

laws of war, but their misuse and overuse as counterterrorism tools raise real legal and moral problems. While the occasional or exceptional use of drone strikes to target very dangerous individuals that cannot be captured might be tolerable, the widespread use of these controversial weapons by the United States is deeply problematic. As we saw with the practice of torture by the United States following the 9/11 attacks, the exception easily becomes the rule, and those opposing the use of targeted killing find themselves trying to justify why a particular individual should not be killed, rather than the government being required to show not only why it is legal for the killing to take place, but that capture is impossible.⁸⁰

For several months I have had a newspaper clipping on the corner of my desk about the death of a young man named Tariq Aziz who was killed in Pakistan by a Hellfire missile strike launched by the United States. Tariq's story emerged from the shadows of the CIA's drone war only because he had encountered a lawyer, Clive Smith, at a meeting organized to discuss the drone strikes held between Westerners and Pashtun tribal leaders a few days before his death. Tariq was brought to

⁸⁰ In this essay, I do not focus on the requirement that a government must claim that capture is not feasible. Indeed, under the laws of war, individuals who surrender must be captured rather than killed. Because it is impossible to surrender to a drone, that rule is, by definition, difficult to apply in the context of targeted killing with aerial unmanned vehicles. *See, e.g.,* Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268 (2013).

the meeting to experience the interaction with Americans, and, according to Smith, was friendly, open, and warm—“too young for much facial hair; too young to have learned to hate.”⁸¹ For some reason, he was targeted for death and killed by a Hellfire missile fired from a Predator while driving a car with his twelve-year old cousin—who was also killed—on the way to pick up his aunt and bring her home to his village.⁸² As Smith wrote in *The New York Times*:

My mistake had been to see the drone war in Waziristan in terms of abstract legal theory—as a blatantly illegal invasion of Pakistan’s sovereignty, akin to President Richard M. Nixon’s bombing of Cambodia in 1970.

But now the issue has suddenly become very real and personal. Tariq was a good kid, and courageous. My warm hand recently touched his in friendship; yet, within three days, his would be cold in death, the rigor mortis inflicted by my government.

And Tariq’s extended family, so recently hoping to be our allies for peace, has now been ripped apart by an American missile—

⁸¹ Clive Stafford Smith, *For Our Allies, Death from Above*, N.Y. TIMES, Nov. 4, 2011, at A31.

⁸² *Id.*

most likely making any effort we make at reconciliation futile.⁸³

Tariq's story reminds us that war and international humanitarian law are not just abstract legal and political concepts but deeply personal realities for the human beings caught in their throes. His story could have been our story, had we been unlucky enough to live in a different time or place. In assessing the legality, morality, and policy considerations surrounding America's targeting killing policy, that is a sobering thought.

What would Athena choose in this war? What wise counsel would she offer to those who have to make these difficult decisions? I believe it would be policies that encourage the people of Afghanistan, the people of Pakistan, the people of Yemen, the people in countries unnamed who do not yet know that one day their sleep may be disturbed by the buzzing of drones flying overhead, to choose peaceful relations with America and the rest of the world, rather than policies that sow enmity and hatred. She would encourage the United States to offer olive trees rather than swords and be sparing in our use of military force to achieve our objectives. Certainly, such a gift is more in line with values that we cherish

⁸³ *Id.*

dearly as Americans than the bitter taste and scorched earth left by the firing of a hellfire missile.

Reflections on International Criminal Law Over the Past Ten Years

Hans Corell*

Distinguished colleagues and friends,

First of all, let me thank the sponsors of the sixth International Humanitarian Law Dialogs for inviting me to address you. This is the first time that I am participating in the Dialogs. I accepted the invitation with particular pleasure since I knew that I would meet many friends from the many years during which I was actively involved in the efforts to establish an effective administration of criminal justice at the international level.

My first experience of this work was as a war crimes rapporteur in the former Yugoslavia in 1992-1993. My colleagues and I presented the first proposal for the tribunal that eventually became the International Criminal Tribunal for the former Yugoslavia (ICTY).¹

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¹ HANS CORELL ET AL. PROPOSAL FOR AN INTERNATIONAL WAR CRIMES TRIBUNAL FOR THE FORMER YUGOSLAVIA (1993), *available*

My last official function in my capacity as the Legal Counsel of the United Nations was in March 2004, when I represented the U.N. Secretary-General at the inauguration of the courthouse for the Special Court for Sierra Leone (SCSL) in Freetown.

I have been asked to address the topic, “Reflections on International Criminal Law over the Past Ten Years.” I will do this in four main points:

- Salient features in the development of international criminal law over the last few years;
- The Rome Statute and the obligations of states;
- The role of the Security Council; and
- Crime prevention and protection of human rights.

Before embarking on this exercise, I must make clear—particularly when I see all of the expertise present in the room, including persons with day-to-day experience of serving in different capacities in these international institutions—that my experience is somewhat different. I have served on the bench for some ten years in national courts but not in international courts. All my activities relating to the institutions that we discuss here have been focused on their establishment and administration. Therefore, I do not have the same kind of experience that most of the participants in this year's Dialogs have.

Furthermore, since my retirement from the United Nations and from public service in my native Sweden in 2004, I have been deeply involved in so many other matters that I have not been able to closely follow the case law that has developed in the international criminal courts over the years. My focus on international criminal justice has mainly been on the International Criminal Court (ICC) and the situation in Kenya. The simple reason for this is that since February 2008, I have been the legal adviser to former U.N. Secretary-General Kofi Annan and the other members of the Panel of Eminent African Personalities engaged in the Kenya National Dialogue and Reconciliation.

The main focus of my work in recent years has been on the protection of human rights and the importance of establishing the rule of law at both the national and the international levels. These elements are therefore important points of departure for my presentation today. You will also notice that my presentation will be very personal.

Salient Features in the Development of International Criminal Law Over the Last Few Years

With these provisos, let us now focus on the first main point: salient features in the development of international criminal law over the last few years.

When the agreement on the SCSL was signed in Freetown on January 16, 2002, both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) had

been in operation for almost ten years. The Rome Statute of the ICC would enter into force on July 1, 2002, and on February 8, 2002, U.N. Secretary-General Kofi Annan would withdraw from the negotiations with Cambodia on the establishment of what eventually would become the Extraordinary Chambers in the Courts of Cambodia (ECCC).

While the Security Council had deemed it appropriate to establish the ICTY and the ICTR, they were not comfortable with the idea of establishing yet another tribunal of this nature in Sierra Leone.

An important difference between the two tribunals established by the Council and the SCSL is that states have different obligations. With respect to the two tribunals established by the Council, states are bound by resolutions adopted under Chapter VII of the U.N. Charter. The same obligations do not flow from the agreement between the United Nations and Sierra Leone. I, for one, had hoped that the Council would adopt a resolution creating Chapter VII obligations to cooperate with the SCSL once the agreement was concluded, but this did not materialize.

The negotiations between the United Nations and Sierra Leone were conducted on the basis of Security Council Resolution 1315 of August 14, 2000. In paragraph 8(c) of that resolution the Council requested the Secretary-General to include recommendations on “the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, including through the offer of expert personnel that may

be needed from states, intergovernmental organizations and nongovernmental organizations.”

Within the Secretariat, we concluded that the intention of the Council was that the SCSL would be financed from voluntary contributions from U.N. member states. The Secretary-General's view was that the only realistic solution was financing through assessed contributions, and he provided reasons for this opinion. I have, in another context, expressed regret that we did not advise the Secretary-General to include in his report yet another argument in favor of assessed contributions, namely the constitutional argument.² One should make a comparison with funding of courts at the national level. If national courts were funded by different donors and not from taxes or similar official revenues, what credibility would they have? This reasoning should actually be applied at the international level as well.

In a more general perspective there has, of course, been tremendous development in the field of international criminal law over the last few years. There is no point in giving an account of the records of the existing international criminal tribunals to the present audience. As you know, both the ICTY and ICTR are being wound up according to plan, and a residual

² Hans Corell, *Foreword* to INTERNATIONAL PROSECUTORS v (Luc Reydamas et al eds., Oxford Univ. Press 2012), available at http://www.havc.se/res/SelectedMaterial/internationalprosecutors_prelims.pdf.

mechanism has been set up to manage the remaining issues.

This Mechanism for International Criminal Tribunals (MICT) was established by Security Council Resolution 1966 of December 22, 2010. As you are aware, it has two branches: one branch focusing on matters relating to the ICTR, and one branch that will focus on matters relating to the ICTY. The first branch is located in Arusha and is in operation as of July 1, 2012. The second branch will be located in The Hague and operational as of July 1, 2013. The Security Council has determined that the MICT will continue to operate until it decides otherwise. In accordance with the resolution, the progress of the work of the Mechanism will be reviewed in 2016 and every two years thereafter.

I believe that it is fair to say that the record of these two tribunals is impressive. In particular, the trial and conviction of high-level perpetrators has made an important mark in the history of international criminal law.

The same could be said about the work of the SCSL. The most significant case is the trial of Charles Taylor. If anyone had suggested to me, when I signed the agreement with Justice Minister Solomon Berewa in Freetown on January 16, 2002, that Charles Taylor would stand trial before this court, I would not have believed it.

The ECCC presents a complex issue. I am sure that you understand that my position is somewhat delicate

here. While others may be free to express their views about this process, I am still bound by the rules of discretion that apply to international civil servants. It also goes without saying that I must support the ECCC and hope that its work will benefit the people of Cambodia. I have the greatest respect for those serving the ECCC who are trying to make the best of the situation.

I may still say, however, that I was extremely concerned by the development of the negotiations that led to the establishment of the ECCC. In particular, I was concerned about some of the features that appeared in the final agreement. The reason is partly that, when the United Nations conducts negotiations, there are many actors involved behind the scenes. This was certainly the case here. Several states demonstrated a keen interest. Most of the persons engaged here had no courtroom experience. This, in my view, is the reason that the U.N. Secretariat was obliged to accept features that led to the current difficulties.

I actually suggested to the Secretary-General that he should open to the public the U.N. records from the negotiations. I have no idea if this will happen soon, but one day the information will be made public. The efforts by the U.N. delegation to arrive at a result that respected international standards for the conduct of proceedings in criminal cases will then be apparent.

Let me just say that, as a professional judge, I was extremely concerned when the U.N. Secretariat was forced back to the negotiation table by the U.N. General Assembly in December 2002. In some respects our

hands were tied. Now, some of the things I warned against have actually occurred. I am sure that today even people without courtroom experience realize that the solution chosen for the ECCC should not be used as a model for any future effort of this nature. The U.N. imprint should not be given to institutions over which the organization does not have full administrative control.

The ICC can now look back on ten years of activity. It is obvious that establishing an institution of this nature requires careful considerations and a considerable start-up phase.

I agree with current U.N. Legal Counsel Patricia O'Brien when she said:

For several decades, the voices of victims who suffered unimaginable atrocities went unheard as the international community struggled to build upon the legacy of the Nuremberg and Tokyo Tribunals.

The tide has finally turned. Today, those responsible for genocide, war crimes, crimes against humanity and other gross violations of international humanitarian and human rights law are being held accountable. Heads of state

and senior officials can no longer hide from justice.³

However, there is still a long way to go. And I must confess that I am somewhat concerned that the ICC's record so far is rather meager, at least in comparison with the achievements of the ICTY, ICTR, and SCSL during a similar period of time. There could be several reasons for this, in particular the degree of willingness of states to cooperate effectively with the Court.

The Rome Statute and the Obligations of States

This brings me to my second main point—the Rome Statute and the obligations of states.

Let me first focus on the principle of complementarity. There are presently 121 States Parties to the Rome Statute. The first obligation is to see to it that the Statute is properly implemented at the national level. In my view this is one of the most important contributions that the Rome Statute makes in the field of criminal justice.

Already in 2000, when discussing this question at a conference in The Hague, I suggested that perhaps the

³ Patricia O'Brien, *Impunity Over for Heinous Crimes Against Humanity*, IRISH TIMES, July 23, 2012, at 14.

most important factor in fostering the acceptability of the ICC is the fact that the Court was not created as a replacement to national jurisdictions. Instead, it would act as a complement to them.⁴

This complementarity principle became a key element in the negotiations in Rome. The Court may determine that a case brought before it is inadmissible if the case is being investigated or prosecuted by a state which has jurisdiction. However, if the state is unwilling or unable to genuinely carry out the investigation or prosecution, the ICC may decide to take the case.

From this follows that states have an obligation to carefully examine their national criminal justice systems in the process of ratifying the Rome Statute. In many cases it will be necessary to introduce rather elaborate implementation legislation. A natural ingredient in this process should be to see if improvements of a more general nature can be made to the national system based on the common effort in Rome. Hopefully this will lead to a harmonization of criminal law and criminal procedure in the community of states.

I am not aware of exactly how this work has proceeded in the states that have ratified the Rome

⁴ Hans Corell, Under-Secretary-General for Legal Affairs, U.N., Evaluating the ICC Regime: The Likely Impact on States and International Law (Dec. 21, 2000), *available at* http://untreaty.un.org/ola/media/info_from_lc/romestatute_dec00.pdf.

Statute. However, I have a feeling that much remains to be done here. I say this since I have observed that in my country, which has ratified the Statute, work still remains to be done in this respect. Sweden would normally meticulously examine the need for legislative acts before ratification of international agreements. This work is, however, not yet fully completed with respect to the Rome Statute.⁵

Another obligation that falls upon states is that they must see to it that attention is paid at the national level to ICC case law; this case law should also influence the national justice systems.

When we discuss the obligations of states, the provisions in Part 9 of the Rome Statute on international cooperation and judicial assistance are of great importance. Article 86 of the Statute contains a general provision that obligates states to cooperate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the Court. As you are well aware, this provision is followed by a number of detailed rules on the topic. The question is, to what extent do states fulfill these obligations?

There are many present here who are better placed than I am to provide information about this. And perhaps

⁵ A report entitled "International Crimes and Swedish Jurisdiction" (SOU 2002:98) was presented in November 2002 by the Commission on International Criminal Law and is still under consideration in the Ministry of Justice.

this could be a topic for discussion at the present Dialogs. Suffice it to say that criticism is sometimes unjustly voiced against the ICC for not being effective when the criticism should actually be directed against states that do not cooperate. I note in this context a very pertinent remark that ICC Prosecutor Fatou Bensouda made to *Al Jazeera* in July this year in relation to the prosecution of the president of Sudan:

The way that ICC has been set up we do our legal part, we investigate and we request for arrest warrants to issue. This is our part. And if we do have the person brought before the court we prosecute. But the obligation to arrest, the obligation to execute the warrants of the court are with the states parties. We've done what we were supposed to do and I think it is up to the states parties to ensure that Omar al-Bashir is arrested and brought to the court. I think his destiny is with the ICC... It is not yet time perhaps for Bashir, but I believe he will be arrested, eventually.⁶

In this context, we should also note the attitude that has developed within the African Union with respect to cooperating with the ICC. One can fully understand that this discussion takes place in Africa; the situations and

⁶ *Fatou Bensouda: 'Al-Bashir will be arrested,'* AL JAZEERA (July 7, 2012), <http://www.aljazeera.com/programmes/talktojazeera/2012/07/20127792042321699.html>.

cases presently before the ICC are focused on that continent. However, the Prosecutor has to go where the evidence leads him or her. This is a common feature in the field of criminal justice. Furthermore, in most of the situations, the state in question has requested the assistance of the ICC.

At the same time there is a genuine problem that flows from the fact that many states, including some of the most powerful ones, are not parties to the Rome Statute, among them, regretfully, the United States of America. Another problem is the tendency by some states to apply double standards when it comes to international criminal justice. I will revert to this question shortly.

An interesting example of cooperation with the ICC is the situation in Kenya. You will recall that the general and presidential elections in Kenya in December 2007 were followed by a period of extreme violence in the country. Some 1,300 people lost their lives, and around 650,000 became internally displaced.

To make a long story short, a national commission examined the so-called “post-election violence” and proposed that a special court should be established at the national level for trying those suspected of having orchestrated the violence. When a proposal for the establishment of such a special court had twice been defeated in the National Assembly, representatives of the government of Kenya visited the ICC Prosecutor to seek assistance. Eventually, this led the Prosecutor to seek *proprio motu* indictment of six persons for crimes against humanity. The Pre-Trial Chamber came to the

conclusion that the cases against four of these individuals could proceed before the ICC, and these rulings were confirmed by the Appeals Chamber.⁷

What is striking in this context is the attempt some time ago by the government of Kenya to try to convince the Security Council that it should stay the hand of the Prosecutor in these cases in accordance with Article 16 of the Rome Statute. Furthermore, the African Union is considering expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights (the African Court) to include international crimes such as genocide, crimes against humanity, and war crimes.⁸ A similar extension of jurisdiction is also contemplated for the East African Court of Justice.⁹

⁷ Press Release, ICC, Kenyan cases: Appeals Chamber Rejects Appeals Regarding Challenges to the ICC's Jurisdiction, ICC-CPI-20120524-PR797 (May 24, 2012), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr797.aspx.

⁸ African Union, Assembly of the Union, Decisions, Resolutions and Declaration, 18th Ordinary Sess., Jan. 23-31, 2012, *available at* [http://www.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20\(XVIII\)%20_E.pdf](http://www.au.int/en/sites/default/files/ASSEMBLY%20AU%20DEC%20391%20-%20415%20(XVIII)%20_E.pdf).

⁹ East African Community News, Council of Ministers to Discuss Extended Jurisdiction for EACJ (June 26, 2012), *available at* <http://www.eac.int/about-eac/eacnews/1038-council-of-ministers-to-discuss-extended-jurisdiction-for-eacj.html>.

I noted that on May 3, 2012, some 50 African civil society organizations and international organizations with a presence in Africa sent a letter to African justice ministers and attorneys general to share their concerns regarding the proposed expansion of the African Court's jurisdiction. Let me quote the following from this letter:

African Union (AU) members have the primary obligation to investigate and, if there is sufficient evidence, prosecute persons suspected of crimes under international law before their national courts. The ICC already promotes complementarity at the national level. Expanding the African Court's jurisdiction and diluting the work of the current African Court on Human and Peoples' Rights may not only undermine human rights protection but also divert resources and attention from strengthening the ability and willingness of national authorities to prosecute international crimes.¹⁰

I could not agree more. The contemplated extension of jurisdiction is, in my view, utterly troubling. Based on

¹⁰ Joint Letter to the Justice Ministers and Attorneys General of the African States Parties to the International Criminal Court Regarding the Proposed Expansion of the Jurisdiction of the African Court of Justice and Human Rights, *available at* <http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties-internat>.

my experiences from the bench in criminal cases and my responsibility as the agent of the Swedish government before the European Court of Human Rights for a period of 11 years, my considered opinion is that it would be a disaster to extend the jurisdiction of the African Court in the manner contemplated. A human rights court is completely different from a criminal court. And it must be different from such a court. I suspect that a similar reasoning could be made with respect to the East African Court of Justice.

Another striking feature with respect to the situation in Kenya is that two of the persons indicted before the ICC are candidates in the presidential election that will take place in March 2013. They are now campaigning as if nothing has happened. The trials are scheduled to start in April 2013.

When U.S. Secretary of State Hillary Clinton raised this matter during her recent visit to Kenya, she was criticized by some for meddling into the internal affairs of the country. In my view, she was absolutely right in raising this issue. True, there is the important principle of presumption of innocence. This must be emphasized emphatically. However, it is a completely different matter if a person indicted for serious international crimes starts campaigning to become the head of state in his or her country. Common sense provides an answer—it is unthinkable that persons suspected of such grave crimes should be accepted as candidates in a presidential election. In my view one does not even have to go to Chapter six of the Constitution of Kenya to understand this.

Let me now revert to the responsibility of states and to the specific responsibility that rests with the states parties to the Rome Statute. Obviously, a proper administration of the ICC is heavily dependent on the support of the Assembly of States Parties (ASP). I do not intend to dwell too much on this self-evident requirement. However, I would like to reiterate three concerns that I have expressed in the past.¹¹

First, there is the question of the qualifications of candidates for election to the Court. In my view, too much emphasis has been put on the requirement of knowledge of international law. Much more emphasis should be put on courtroom experience. I have actually suggested that if the only intention behind List B for ICC judicial candidates is to allow persons with no courtroom experience whatsoever to sit on the Court, the ASP may be wise to abolish this list.

Another matter is the question of age. I have suggested that the ASP should not elect candidates who will turn 70 years old before the expiration of their nine-year term. A closer look at Annex III to the Report of the Independent Panel on International Criminal Court Judicial Elections reveals that, out of the 96 States Parties that provided information about retirement age, 76 States Parties, or 80 percent, have a retirement age which is 70 years and younger.¹² If it transpires that the

¹¹ See *supra* note 2.

¹² The Report is available at <http://iccindependentpanel.org>.

ICC consists of judges who are no longer regarded as suitable for service on the bench in their own countries, there is a clear risk that the ICC will lose respect.

My third concern relates to the method of electing judges. In this respect I have suggested a method where an independent committee of experts should review not only the candidates for election, but also the judges who remain on the Court, so as to be able to propose candidates who would be most suitable from the point of view of the composition of the ICC as a whole. Such a method would allow the committee to present a “clean slate,” which could be accepted by the ASP. Under all circumstances it is imperative that vote trading and similar unworthy features be abandoned in the election process. The ASP should be looking for the very best.

In making these proposals I have emphasized, as I do now emphatically, that they should in no way be understood as criticism of the present judges of the ICC. The subject matter is a systemic question and, consequently, the sole responsibility of the ASP.

With the benefit of the experience from the two Kenyan cases, the ASP may also wish to consider whether the Rome Statute should allow appeals from Pre-Trial Chamber decisions that the ICC has jurisdiction in a particular case. The fact that the Rome Statute allows appeals from such decisions entails a clear risk that the pre-trial phase will get mixed up with the trial phase. A decision of this nature by the Pre-Trial Chamber should be delivered promptly and should be as brief as possible. As it is now, the Pre-Trial Chamber may have to spend too much time in formulating its

decisions, which have to stay clear of issues that relate to the substantive merits of the case, as opposed to the issue of whether the Court has subject matter jurisdiction to consider such questions.¹³ If the Pre-Trial Chamber finds that the ICC has jurisdiction in a particular case, I really do not see any reason why this decision should be appealable. Too much focus on the pre-trial phase, which in this context is basically an extra check on the Prosecutor, risks causing serious delays in trials before the ICC. The ASP may wish to look into this question.

The Role of the Security Council

The third main point—the role of the Security Council—is an obvious issue to discuss. The provision in Article 13(b) of the Rome Statute allows the Security Council, acting under Chapter VII of the U.N. Charter, to refer to the Prosecutor of the ICC a situation in which one or more of the crimes referred to in Article 5 of the Statute appears to have been committed.

In my view, this provision in no way prevents the Security Council from establishing new criminal tribunals of the kind that the ICTY and the ICTR represent. However, the whole idea is that this should not be necessary when there is a permanent and fully functional court established.

¹³ See the reasoning of the Appeals Chamber, *supra* note 7.

However, the way in which this provision has been applied so far is somewhat problematic. As is well known, the Council has referred two situations to the ICC Prosecutor: the situation in Sudan and the situation in Libya. But the question must be asked, why in these situations and not in other situations?

In my view, the situation in Gaza in 2008-2009 would be an obvious case in point. And what about Syria at present? To an objective observer it would seem that the members of the Security Council, and in particular the permanent members, do not use the same yardstick when applying Article 13(b) of the Rome Statute in different situations.

Furthermore, in the two cases where Article 13(b) has been applied, the resolutions contained the following paragraph:

Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;¹⁴

¹⁴ S.C. Res. 1593, ¶ 7, U.N. Doc. S/Res/1583 (Jan. 28, 2005) and S. C. Res. 1970, ¶ 8, U.N.Doc. S/Res/1970 (Feb. 26, 2011).

I must confess that I did not believe my eyes when I read this provision for the first time. Surely, in an international society under the rule of law, the organ that makes a decision under Article 13(b) of the Rome Statute should be prepared to contribute in a reasonable manner to the costs generated by that decision. I refer also to what I said a while ago about financing criminal courts through voluntary contributions.

One could also discuss the appropriateness of operative paragraph six in the two resolutions mentioned, namely the provision that exempts nationals, current or former officials, or personnel from a state outside the situation area which is not a party to the Rome Statute from the jurisdiction of the ICC. However, here it is easier to understand the background, provided that any criminal offences by persons falling under the exemption are properly addressed by competent national courts.

Furthermore, would one not expect the Security Council to follow suit and act in accordance with its own resolutions? If the evidence leads the ICC Prosecutor to the level of head of state, would one not expect the Council to support the ICC, including, if need be, by ordering the state in question to deliver the accused to the ICC?¹⁵

¹⁵ Hans Corell, *International Prosecution of Heads of State for Genocide, War Crimes, and Crimes Against Humanity*, 43 J. MARSHALL L. REV. iii (2009).

One of the lessons from this development over the last few years is something that my colleagues and I discussed when we were war crimes rapporteurs in the former Yugoslavia back in 1992–1993. If persons at this level are suspected of war crimes, crimes against humanity, or genocide, sooner or later they become a burden to their country. We have certainly seen this in the former Yugoslavia. The same can be expected to happen also elsewhere.

I am fully aware that a reasoning of the kind that I have presented here can be viewed as idealistic and out of touch with reality. But here again I would like to refer to the very firm positions that the organizations of former heads of state and government, the Madrid Club and the InterAction Council of Former Heads of State and Government, have taken. In their view, the only way ahead in addressing the challenges mankind faces is through multilateral solutions within a rule-based international system.¹⁶

This also brings to the forefront the formidable contribution that the members of the Security Council could make to our efforts to establish the rule of law both at the national and the international level. It cannot be stressed enough how important it is that these states, and in particular the five permanent members, take the lead by demonstrating that they bow to the law and, in particular, to the law that they are set to supervise—the

¹⁶ See, e.g., <http://www.interactioncouncil.org/final-communiqu-29>.

Charter of the United Nations. I will not go further into detail here but refer to my reasoning elsewhere.¹⁷

Crime Prevention and Protection of Human Rights

This brings me to the fourth main point—crime prevention and the protection of human rights.

International criminal justice should of course reflect the classical objective underlying the criminal justice system at the national level—crime prevention, be it individual or general.

By bringing individuals to justice for crimes committed, the perpetrators will be prevented from continuing their criminal activity. This is an obvious purpose of the system. However, the community of states should also vigorously aim for general prevention. By demonstrating that perpetrators are being investigated and prosecuted, there is a greater chance that humankind can live in peace and security in the future. One should certainly not oversimplify here, but it goes without saying that the moment prominent rulers who violate international criminal law are brought to justice, other rulers will note this and hopefully adjust their behavior.

¹⁷ Letter from Hans Corell to the Governments of the Members of the United Nations (Dec. 10, 2008), *available at* <http://www.havc.se/res/SelectedMaterial/20081210corellettertounmembers.pdf>.

The connection between crime prevention and protection of human rights is obvious. The first element that comes to mind in this connection is the fact that those who are brought to justice should be protected by due process and other human rights guarantees required in a proper criminal justice system. However, I am specifically speaking of the human rights of the many thousands around the world who are suffering under rulers who abuse their power.

Protection of human rights is a core element in the rule of law. The rule of law must permeate a society in all its aspects. The connection between criminal justice and other fields of law cannot be overemphasized. The legal system must be seen as a whole.

By way of example, a couple of months ago the World Congress on Justice, Governance and Law for Environmental Sustainability took place in Rio de Janeiro. This Congress gathered well over 200 high-level judges, public prosecutors, and auditors, and it preceded the Rio+20 Conference. At the end of the Congress, the participants adopted a resolution in which they emphasized the importance of societies based on the rule of law and standards of transparency and accountability, and they stated that environmental sustainability can only be achieved in the context of fair, effective, and transparent national governance arrangements and rule of law.¹⁸

¹⁸ Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability (June 20, 2012), *available at*

Since we are now in the United States, I feel obliged to point to the responsibility that falls upon the Western democracies in this respect. If we are to succeed in establishing the rule of law at the national and international levels, these states simply have to set the example. But unfortunately, much remains to be done here. Developments in the United States in recent years are, in my view, a source of great concern.

In the latest newsletter from the American Society of International Law, President Donald Donovan presented a very interesting analysis of the United States' relationship with international law. His point of departure was that the United States had long been in the vanguard of the developing system of international law and international dispute resolution. Based on its experiences in recent years, he asked the question why some segments of the U.S. body politic have become so skeptical of international law. His conclusion was that it is in the U.S. interest, now more than ever, to promote the rule of law on the international plane, as well as to support fair and independent adjudication as a component of the rule of law.¹⁹

<http://www.unep.org/delc/worldcongress/Portals/24151/Rio+Declaration.pdf>.

¹⁹ Donald Donovan, *Honoring the Founders' Vision*, 28 AMERICAN SOC'Y INT'L L. NEWSL. (Apr./June 2012), available at http://www.asil.org/pdfs/asilnewsletter/2012_Q2_Newsletter.pdf.

The United Nations is an important institution for establishing the rule of law both nationally and internationally. The United States of America was the main engineer behind the creation of this organization. Sadly, today the President of the United States of America does not dare to even reference the United Nations in his State of the Union addresses.

When it comes to criminal law, the same standards must be applied all over the world. According to a *New York Times* article from November 14, 2011, three of the contenders for one of the political parties' nomination for president came out in favor of authorizing waterboarding in order to extract information—in other words they would authorize torture.²⁰ And what about Guantánamo? And the use of drones?

And what should the ICC Prosecutor do if in a situation before the Court it turns out that drones had been used in a manner that civilians were killed? I am afraid that this question may soon no longer be hypothetical.

To a great friend of the United States, these are extremely troubling elements. What is needed to remedy the situation in this country, as well as in Europe and the rest of the world, is education. What people, and in

²⁰ See *The Torture Candidates*, N.Y. TIMES, Nov. 15, 2011, at A30.

particular politicians, must know is that the rule of law has to apply absolutely to all people at all times.²¹

The behavior of the major states, and in particular the five permanent members of the Security Council, will be a determining factor, if not *the* determining factor, for the maintenance of international peace and security in the future. It is of particular importance that Western democracies take the lead here.

To conclude, I wish you interesting, stimulating, and successful Dialogs! It is important that the knowledge and experience that you have gathered over the years can be transferred to new generations of prosecutors in an organized manner. I know that this question is on your minds. Let us hope that you will succeed in finding a suitable method for carrying this knowledge on in the interest of humankind.

Thank you for your attention.

²¹ Cf. HIL & RAOUL WALLENBERG INST. RULE OF LAW: A GUIDE FOR POLITICIANS (2012), available at <http://rwi.lu.se/what-we-do/academic-activities/pub/rule-of-law-a-guide-for-politicians/>.

**First Annual Clara Barton Lecture:
Origins of the Special Court for Sierra Leone**

David Scheffer*

It is a distinct honor for me today to deliver the first annual Clara Barton Lecture at the International Humanitarian Law Dialogs, and I want to thank the American Red Cross and all of the institutions that are sponsoring the International Humanitarian Law Dialogs for the sixth year. I also want to congratulate Jim Johnson on assuming the presidency of the Robert H. Jackson Center.

It is indeed humbling, almost frightening, to be addressing such a distinguished audience of the highest officials of the tribunals and my wise colleagues in the legal academy. In light of why we have gathered this year, I particularly want to acknowledge the presence of so many veterans of the Special Court for Sierra Leone in the room, including David Crane, Sir Desmond de Silva, Brenda Hollis, Stephen Rapp, and Robert Petit. But whenever I am in the same room as Cherif

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Bassiouni, Judge Hans Peter-Kaul, William Schabas, Michael Scharf, Leila Sadat, Diane Amann, Michael Newton, John Barrett, and so many others of you, I know I am in the land of titans in this profession.

I especially want to thank David Crane for his leadership of, and dedication to, this endeavor and to congratulate him on his chairmanship of the Robert H. Jackson Center Board of Directors. David visited me at my office in New York City in 2002 as he was deploying to Sierra Leone. He wanted, like the true professional that he is, to know everything he could about the origins and constitutional structure of the Special Court for Sierra Leone. So, over a long afternoon talk, we waded into the past. And then he flew east across the Atlantic to make history.

Just one small caveat: I speak strictly in my personal capacity today, and nothing I say should be associated with the United Nations or the U.N. Secretary-General.

Some of my remarks today are drawn from my book, *All the Missing Souls: A Personal History of the War Crimes Tribunals*. I wrote a chapter, entitled "Freetown is Burning," about this entire exercise of creating the Special Court for Sierra Leone, and you will find much detail there, including how I engaged with Sierra Leone and the atrocities swamping that nation in

1998, 1999, and early 2000 before the tribunal negotiating exercise began.¹

By the time negotiations commenced in May 2000 on the creation of the Special Court for Sierra Leone, there had already been intensive negotiations and tribunal-building exercises for the International Criminal Tribunals for the former Yugoslavia and Rwanda, for the International Criminal Court, and indeed for the Extraordinary Chambers in the Courts of Cambodia. Most of the heavy-lifting for the latter, the Cambodia Tribunal, had been accomplished, including the prospect of there being a domestic court tied to the United Nations through a treaty arrangement. Thus, we had many templates with which to examine and learn from by that stage. So of the five major war crimes tribunals that emerged from the 1990s, the Special Court for Sierra Leone was the last one to be conceived and then negotiated during the last eight months of 2000 and into early 2001.

The real start point for the Special Court occurred in early May 2000, and it was not triggered by atrocities against civilians in Sierra Leone, for that had been raging for years in the civil war. The horrors were bountiful enough many times over to merit the creation of a war crimes tribunal sooner than later. But the trigger occurred in early May 2000 with the kidnapping of

¹ See DAVID SCHEFFER, *Freetown is Burning*, in ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS, 296-340 (2012).

hundreds of U.N. peacekeepers by the Revolutionary United Front, which had renounced the flawed Lomé cease-fire of 1999. The U.N. Force Commander had spread out his troops in small groups in various parts of the country, and that made them vulnerable, especially for purposes of rescue in the aftermath of a kidnapping.

Meanwhile, atrocities picked up in the northern sector of Sierra Leone, and there were reports that Foday Sankoh, the head of RUF, had ordered his troops to invade Freetown. In the State Department, Harold Koh, then the assistant secretary of state for human rights, and I determined the time had finally arrived in Sierra Leone to consider some serious options for accountability. We knew we had some wind in our sails due to the outrage in New York over the kidnapping of the U.N. peacekeepers. There were years of atrocities in Sierra Leone to build upon for the rationale of a tribunal of some character, so the crime base was not that difficult to map out, and to his credit Koh was on top of doing so with his staff.

By May 10, 2000, I briefed my State Department colleagues about three scenarios that could unfold in Sierra Leone and the role of accountability under each one of them. We decided to start talking privately with other Security Council members about issues of accountability, collection of evidence, and apprehension as matters to be factored into any U.N. peacekeeping or multinational force mandate following the kidnappings. And we needed to start discussing prospects for an international or regional criminal tribunal.

The diplomacy to build the Court for Sierra Leone began the next day, on May 11, 2000, when I sat down with Hans Corell, the United Nations's top legal counsel. He emphasized, correctly, the no-amnesty position of Secretary-General Kofi Annan with respect to the Lomé Peace Agreement of 1999 and anything that might now follow. The character of any tribunal, however, remained open to creative thinking.

One week later, British intervention forces arrested Sankoh and put him under the custody of the Sierra Leone government. That act meant that if a criminal tribunal were created, at least one likely defendant was already in custody. This was very significant to me personally because the quest to bring Pol Pot into custody in 1997 and 1998 in Cambodia had been the predicate to galvanizing sufficient political support, particularly in the Security Council, for a war crimes tribunal covering the Pol Pot atrocities of the 1970s. The failure to capture Pol Pot prior to his death in March 1998 was a huge setback to that endeavor. We were constantly beset by the paradoxical dilemma of having to achieve custody first before we could gain political support to build the Court that could indict Pol Pot and his colleagues and simultaneously try to figure out how to maintain custody in the absence of a prosecuting court. But Sankoh was in custody, at least in a Sierra Leone jail, and that was a very useful development. I knew we had to seize the moment for a new tribunal.

I quickly sent a memorandum of possible options for accountability and justice to Susan Rice, the Assistant Secretary of State for African Affairs, and Harold Koh. I predicted that upon the safe release of the

U.N. peacekeepers, a broad consensus would emerge to hold Sankoh and other hard-line RUF leaders accountable for atrocity crimes. The issue would not be whether to do it, but how. While a domestic prosecution was theoretically possible, I was deeply skeptical of the Sierra Leonean courts' capabilities. The country's death penalty would make it impossible for European governments to provide expertise, funding, and logistical support, which were desperately needed. The other option would be some kind of regional or international tribunal similar to the Yugoslav and Rwanda Tribunals. I suggested that any regional court (perhaps forged by the Economic Community of West African States) could still benefit from U.N. Security Council engagement in a joint enterprise of legal authority, expertise, and funding.

There were basic questions, however, still to answer: How broad would the scope of the Court be in terms of the individuals it could prosecute? Would only Sierra Leoneans be held accountable, or would foreign nationals (such as Charles Taylor) who had allegedly committed crimes on Sierra Leone's territory also be accountable? What would be the chargeable offenses, and would there be a way to bring the blood diamond trade into the realm of criminal conduct? Would international forces in Sierra Leone have the authority to investigate and arrest suspects?

In early June 2000 I began to press for a full-fledged international criminal tribunal for Sierra Leone. That was the option I felt most comfortable with under the circumstances. Given the clear threat to peace and security in that country, the Security Council had jurisdiction to engage on the judicial front. We

determined that President Kabbah preferred a Security Council tribunal as well. Attorney General Berewa confirmed that Sierra Leone would approach the United Nations for a U.N. court rooted in the Sierra Leone legal system and would seek flexibility about moving the trial elsewhere in West Africa if security demands so required. He wanted a Security Council resolution soon.

One option was to expand the Rwanda Tribunal to absorb Sierra Leone. But several problems cropped up on that front and we abandoned it fairly quickly, despite the fact that the U.S. Permanent Representative to the United Nations, Richard Holbrooke, would press hard for that option from his perch in New York.

The kidnapping of several hundred U.N. peacekeepers clearly was the major grounds for stoking international support for a Security Council-sponsored tribunal, even though the magnitude of atrocity crimes in Sierra Leone for years far exceeded anything done to the peacekeepers. But the kidnapping was a direct slap at the United Nations, it angered everyone, and it had the fortunate by-product of finally focusing attention on prosecuting the atrocity crimes writ large.

The concept paper for the Special Court that I prepared in early June 2000 proposed that the Security Council create a "special court," with the power to enforce cooperation by relevant governments and financed by voluntary contributions from interested governments. It was, unfortunately, unrealistic to propose the type of assessed contributions that funded the Yugoslav and Rwanda Tribunals, as most Security

Council members, including the United States and other permanent members, and woefully few other U.N. member states had told me that they had no interest in being compelled to pay for the Sierra Leone Tribunal. I perfectly realized at the time how problematic voluntary funding could be, and it certainly proved to be so throughout the life of the Court, but I also knew that any proposal requiring assessed funding would die within hours on any desk in capitols or at missions in New York.

In this first planning document, the Court's Statute blended international and domestic law. This would create flexibility in charging suspects, give Sierra Leone a greater stake in the Court, and allow the Court to prosecute crimes against the peacekeepers. There would be co-prosecutors, one from Sierra Leone and the other a foreign prosecutor. Initially there would be a single trial chamber of three judges. There would be an additional chamber to hear pretrial motions. If more chambers were needed, then they would be appointed as circumstances required. The objective was to start with a lean and robust judicial task force.

The mandate of the existing Appeals Chamber for the Yugoslav and Rwanda Tribunals would be expanded to include Sierra Leone. The Special Court would sit in Sierra Leone for pretrial and trial proceedings but have the power to move them out of the country for security purposes. Sentences likely would be served outside Sierra Leone. This contingency arose partly because when the RUF invaded any area, they first went to the prisons to liberate their militia. The alternative would be to create a maximum-security prison inside the country

for which it would be extremely difficult to raise funding.

To garner sufficient international support, the mandate of the Special Court needed to be narrow, thus pointing to those “most responsible and the leadership.” We suspected that would limit the reach of the Tribunal to a few dozen suspects. I was undecided whether the Special Court’s temporal jurisdiction must be limited to post-Lomé violations but suggested that the Security Council allow the mandate to continue indefinitely until peace and security was established in Sierra Leone. Such open-ended jurisdiction might deter future crimes and was the model adopted for the Yugoslav Tribunal. The mandate needed to remain silent on limiting the nationality of the suspects so that the Special Court could investigate Charles Taylor. He was a target for prosecution from the very beginning of our discussions to build the Special Court for Sierra Leone. We also had to get UNAMSIL on board to assist with the apprehensions and security for tribunal investigators and other court personnel, as well as any special offices. Finally, the Kabbah government sought U.S. assistance in sponsoring the Security Council resolution.

President Kabbah sent Secretary-General Kofi Annan a letter on June 12, 2000, accompanied by a “Suggested Framework” that triggered further consideration in New York for a special court in Sierra Leone. The Kabbah letter set the stage for serious talks in the Council and particularly between Washington and London, the two permanent members with the strongest engagement in Sierra Leone.

On June 14, the British informed me that they would not commit to a Security Council tribunal like the Yugoslav or Rwanda Tribunals. In fact, they wanted to stand down on any resolution and await a report by a Security Council mission to the country before determining how to structure a court with a two-year mandate that, in their view, would transform into a regional criminal court. But Holbrooke pushed back in New York, telling the Security Council on June 20 that RUF leaders must be brought to justice. He invoked Kabbah's own request of June 12 and called for some form of international umbrella, perhaps as an expansion of the Rwanda Tribunal, and he urged that it be done quickly to defeat the influence of impunity over Sierra Leone's rebels. Holbrooke described as "farsighted" the reservation Kofi Annan had made to the Lomé Peace Agreement leaving open international accountability for atrocity crimes, and said the United States highly approved of it. But there needed to be a vigorous international mechanism or an extension of an existing one to accomplish this, he said.

In the following days I worked through details of how the Special Court could be structured, including its legal character internationally and its jurisdiction. The key remained for the Security Council to establish the tribunal, even if it had hybrid characteristics with Sierra Leonean participation so that it could share the existing Appeals Chamber of the Yugoslav and Rwanda Tribunals, compel cooperation of governments, enforce sentences, and require U.N. selection of key staff, particularly a lead prosecutor and the judges. Although Sierra Leone wanted to share or even chair the prosecutorial duties, we quickly realized that such a lead

or co-equal role would be unworkable in New York. We already had been pushed to the wall in Cambodia on that issue, and there was no appetite to repeat the sharing model for Sierra Leone. Most council members would insist on an international prosecutor selected by the Secretary-General to head up the prosecutions.

But we got bogged down by late June over whether the Special Court would be of an international origin and character (namely, created by the Security Council under its Chapter VII enforcement powers, which was the American preference) or would be established within the Sierra Leonean system with a heavy dose of international assistance (which was the British preference despite the death penalty issue looming over that particular horizon).

An innovative approach was needed to break the logjam. I was nearing the end of weeks of negotiations at the United Nations over the rules of procedure and evidence and the elements of crimes for the International Criminal Court, two documents for which the United States joined consensus on at the end of June 2000. During a break in the talks, I was lost in thought walking along Second Avenue, bound for a Dunkin Donuts coffee actually, when the idea struck me: If the International Criminal Court was to be created by a treaty among governments, why not also establish the Special Court for Sierra Leone as an international criminal court with a treaty between the United Nations and the government of Sierra Leone? That was certainly being contemplated for the Cambodia Tribunal, albeit with a domestic court acting as the fulcrum of that particular treaty. Surely we could reverse the equation and create an international court, with Sierra Leonean

participation, by treaty between the United Nations and the government and thus avoid having to use the Security Council's enforcement authority, which the British so firmly opposed given the recent arrival of the International Criminal Court and the collective desire in New York, mostly for financial reasons, to remove the Security Council from tribunal-building exercises.

I described my approach as the "co-establishment concept" and immediately began to draft the treaty language and talk up the idea back in Washington. Granted, we would lose the powerful enforcement authority of the Security Council from which the Yugoslav and Rwanda Tribunals had benefited, at least in theory and law, because the Special Court would not be established as a subsidiary organ of the Council as had been those tribunals. But the proposal suggested an easier pathway toward political acceptance by skeptical and tribunal-fatigued council members and those non-aligned governments (such as Mexico and Brazil) that despised empowering the Security Council to build more courts. It also had the advantage of giving the U.N. Secretary-General the upper hand in staffing the Court with international prosecutors, judges, and administrators, thus ensuring international control of the proceedings. This was far different from the Cambodian negotiations at the time, where Phnom Penh was insisting on a Cambodian court staffed in the majority with its own nationals. Freetown refrained from making those kinds of demands during the negotiations.

But until the remaining kidnapped U.N. peacekeepers were released, there was little chance of making headway in the Security Council on a court-

building resolution. The fate of the peacekeepers had to remain the only priority until the crisis was resolved. More delegations also were reacting negatively to yet another Security Council tribunal on the horizon. The U.N. peacekeepers were released by the end of July 2000.

Harold Koh and I engaged the British government in fairly intense negotiations in mid-July to achieve an agreement on the way forward. The British wanted a domestic court bolstered with international assistance. Secretary of State Madeleine Albright called British Foreign Secretary Robin Cook, who was still smarting from the Yugoslav Tribunal prosecutor's review of NATO bombing decisions during the Kosovo campaign. Cook did not want another Carla Del Ponte in charge as prosecutor. He refused to offer his own country as an available site for any trials that might need to be held outside Sierra Leone for security reasons. So the hard slogging continued.

Then, on July 19, the U.S. Deputy Permanent Representative to the United Nations, James Cunningham, called me with the breakthrough we needed. The British wanted to settle differences over the structure of the Court. I immediately drafted a short concept paper and shot it up to Cunningham in New York. Within a week word came back that the British could work on the basis of our concept paper and the text of the Security Council resolution and treaty we had prepared.

I flew to Freetown to nail down terms with the Sierra Leone government. Upon my return, more negotiations followed and on August 14 the Security Council adopted Resolution 1315, which became the launching pad for the ultimate establishment of the Special Court for Sierra Leone. The resolution requested that Secretary-General Annan negotiate an agreement with the Sierra Leone government “to create an independent special court consistent with this resolution,” with jurisdiction over atrocity crimes and several categories of crimes under Sierra Leonean law.

The Council recommended that the Special Court “should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes...including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” The Security Council, following Kabbah’s lead from his June 12 letter, requested that Annan send a team of experts to Sierra Leone to prepare a report on how precisely to establish the Special Court. Key issues the experts had to address included the Tribunal’s temporal jurisdiction, how to set up an appeals chamber and whether to share the one used by the Yugoslav and Rwanda Tribunals, and where else the Special Court could sit if Sierra Leone proved too dangerous. The critical issue of how voluntary contributions could support the Special Court’s operations loomed as a major challenge for the experts to address in their report, which was delivered on October 4, 2000.

For months following the August 14 Security Council Resolution, an intensive debate unfolded

between Security Council members and the U.N. lawyers over how to finalize key provisions of the governing statute of the Special Court and ensure they mirrored sections in the agreement to be entered into between the United Nations and the government of Sierra Leone to establish the Court. For example, I spent weeks negotiating the scope of the Special Court's personal jurisdiction. The U.N. lawyers wanted prosecutors to go after a relatively broad group of individuals who were "most responsible" for the atrocity crimes. The United States and most of its Security Council partners wanted a smaller set of possible suspects given the Special Court's limited capacity and reliance on voluntary contributions. We also wanted to focus on those individuals who had violated the Lomé Peace Agreement. So council members insisted on "persons who bear the greatest responsibility" for the atrocity crimes, and that language prevailed in the final text.

There were humorous moments when the difference between "most responsible" and "greatest responsibility" descended into distinctions without a difference, but the dueling definitions dogged countless discussions. The Security Council also prevailed with explicit reference to "those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone." While their crimes reaching back to November 30, 1996 were fair game for an international prosecutor to investigate, leaders who failed to abide by the Lomé Peace Agreement had to know they were primary targets for the Court.

Another highly sensitive issue was how to deal with the largely Nigerian ECOMOG peacekeepers who had allegedly committed their own crimes and human rights abuses against rebel forces and civilians during their long deployments in Sierra Leone. The issue of peacekeeper liability also focused on the UNAMSIL forces then deployed in large numbers throughout Sierra Leone. The sending state governments had zero interest in their own military personnel falling under the Special Court's jurisdiction. But nongovernmental organizations and the U.N. lawyers argued that the prosecutor could not credibly pursue only certain categories of top perpetrators while ignoring the past or contemporary conduct of the peacekeepers, be they of ECOMOG or UNAMSIL identity. While logic pointed to inclusion, political reality dictated exclusion. The controversy also involved the International Criminal Court and whether troops from countries not party to that court should be subject to its jurisdiction under any circumstances. Most of the contributors of troops in Sierra Leone were not party to the International Criminal Court and thus did not want the Special Court to pretend to exercise jurisdiction the same way some were arguing the International Criminal Court should be able to if atrocity crimes were committed on the territory of a country (like Sierra Leone) that had joined that court.

The compromise that eventually emerged held that "any transgressions by peacekeepers and related personnel present in Sierra Leone" under agreement with, or with the consent of, the government of Sierra Leone would be within the primary jurisdiction of the government that sent the particular soldiers, meaning, for example, that the courts of Nigeria would be responsible

for investigating and prosecuting Nigerian peacekeepers deployed in Sierra Leone. However, in a nod to the complementarity principle firmly lodged in the Rome Statute, the governing statute and treaty for the Special Court required that, “in the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.” This potentially exposed peacekeepers to the Special Court’s jurisdiction. The U.N. lawyers long argued that the Secretary-General, rather than the Security Council, should make the determination of whether a nation was “unwilling or unable” to investigate or prosecute, but the Security Council insisted that it retain that authority. Not surprisingly, there proved to be no political will to reach any such decision in subsequent years.

The third major issue of contention involved whether juveniles under the age of eighteen at the time of the commission of the crimes could be investigated and prosecuted by the Special Court. The Kabbah government insisted that teenagers between 15 and 18 years of age when the alleged crimes were committed be subject to the Court’s scrutiny. These teenagers often were the militia gang leaders who led the mutilation and killing sprees throughout the country, and there was no willingness to show them mercy. This led to a long and intense debate, as many key governments, including the United States, and UNICEF, strongly opposed any juvenile liability for the Special Court. The Rome Statute had recently set the liability barrier at 18 years of age. This became a make or break issue for the Kabbah government, similar to the death penalty imperative for

the Rwandan government in 1994 which led to its negative vote in the Security Council on the creation of the Rwanda Tribunal.

We finally found a compromise that permitted prosecution of the crime of “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.” This was the recent Rome Statute standard for that war crime. The Sierra Leonean domestic law criminalizing abuse of young girls and their abduction for immoral purposes was incorporated as an offense into the Special Court’s Statute. Children between 15 and 18 years of age could be prosecuted but with several key caveats relating to how they would be treated and punished. There would be no imprisonment as a means of punishing juvenile offenders. As we all know, the first prosecutor, David Crane, never charged anyone who had been under the age of 18 at the time the crimes took place, so these provisions of the constitutional documents of the Court never were put to the test.

The notorious amnesty clause of the Lomé Peace Agreement, which Kofi Annan had disowned after the document was signed and Hans Corell reaffirmed when the Sierra Leone negotiating process began, was buried for purposes of the Special Court, and the Kabbah government never objected to the reality of having to do so. But the negotiations centered on ultimately limiting the no-amnesty principle to atrocity crimes and not to the specific violations of Sierra Leonean law also forming part of the Court’s jurisdiction. The Lomé amnesty was litigated by defense counsel in cases that came before the Special Court in later years but was never successfully

invoked to shield a defendant from criminal charges or conviction.

The final major contention between the Security Council and U.N. lawyers was the question of how to fund the Special Court. Since it would not be a Security Council tribunal established under Chapter VII, and there was no interest among most council members to finance the Court through U.N.-assessed contributions, the only way it could be funded was through voluntary contributions of interested governments. We all knew this was far more problematic than the kind of funding enjoyed by the Yugoslav and Rwanda Tribunals, but either the Special Court would be voluntarily financed or there would be no such court established. So we struggled for months over this key issue. Russia, China, France, and even Britain flatly refused assessed obligations, and the U.S. Congress did not even want to imagine the idea. Kofi Annan refused to conclude the treaty with the government of Sierra Leone until there was enough cash on hand to finance the first year of operations and pledges to cover the second and third years of work. That did not occur until January 2002. Everyone associated with the Special Court for Sierra Leone, including the prosecutors and Hans Corell, can tell you the nightmarish reality that followed as each year's funding had to be raised. Believe me, I feel your pain, as I am now the one scouring the globe for funds to sustain the work of the Extraordinary Chambers in the Courts of Cambodia on a month-to-month basis. But the alternative in both situations likely would have been no tribunal at all, and you can certainly argue the merits of that particular outcome. I firmly believe it has been worth it both in Sierra Leone and in Cambodia.

I would further argue that despite the criticism of how the Special Court for Sierra Leone ultimately performed some of its duties and the quality of some of its personnel, the accomplishments of the Special Court remain largely faithful to its original design and purpose. I am thankful that everyone in this room who committed themselves to this enterprise did so with good faith intentions and incredibly hard work.

One key element to this entire process that I have not discussed is the Truth and Reconciliation Commission (TRC), which was also on deck during this time frame. In fact, discussions for a TRC commenced long before those for a special court. I believe it is a tribute to Mary Robinson, who was the U.N. High Commissioner for Human Rights at the time, and Commission members like Professor William Schabas, who is with us, as well as David Crane, that there ultimately emerged a fairly successful partnership between the Special Court and the TRC. I can assure you that in the early days, while atrocities raged, that was not easily assumed whatsoever.

For all these reasons, it thus is very fitting that we celebrate the tenth anniversary of the Special Court for Sierra Leone.

Thank you.

The ICC of the Future

Hans-Peter Kaul*

In this sixth meeting of the International Humanitarian Law Dialogs—once again so rich, so substantial, so thoughtful—we have together considered lessons learned and the legacy emanating from the Special Court for Sierra Leone. I believe that these lessons learned may also in many ways contribute to, and strengthen, the International Criminal Court (ICC) of the future.

Allow me to start with a basic, but not unimportant, question, “When will the United States become a State Party of the ICC?”

It was exactly this question which was put to me in an interview by the *Süddeutsche Zeitung*, a German newspaper, published on June 28 of this year, on the tenth anniversary of the entry into force of the Rome

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Statute.¹ The answer that I gave then is essentially the same as my assumption today: regrettably there is no chance that the United States will join the Court in the foreseeable future. But I assume—no, I believe—that the United States will be a State Party of the Court at the latest by the year 2040, almost forty years after the entry into force of the Rome Statute. It also took the United States almost forty years to ratify the Genocide Convention.²

When this happens, it seems quite likely to me that China will already be a member of the Court. I continue to be in regular contact with well-informed Chinese interlocutors.³ Already in 2003, when then-President

¹ *Wie ein argentinischer Großgrundbesitzer*, SÜDDEUTSCHE ZEITUNG (June 28, 2012), <http://www.sueddeutsche.de/politik/richter-kritisiert-internationalen-strafergerichtshof-wie-ein-argentinischer-grossgrundbesitzer-1.1395674>.

² The text of the Convention for the Prevention and Punishment of the Crime of Genocide was adopted by the U.N. General Assembly on December 9, 1948. After obtaining the requisite twenty ratifications required by article XIII, the Convention entered into force on January 12, 1951. The United States of America ratified the Convention only on November 25, 1988. See William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide* UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf.

³ See, e.g., “*Implications of the Criminalisation of Aggression.*” LI Haopei Lecture Seminar, Judges Hans-Peter Kaul and LIU Daqun FICHL Policy Brief Series No. 2 (2011).

Kirsch and I were invited to Beijing,⁴ the Legal Adviser of the Chinese Foreign Ministry said to us, “China, even as a non-State Party, wants to be regarded as a friend of the ICC. We will follow a wait-and-see policy for some time and observe whether the Court behaves as a purely judicial institution or whether it engages in politically motivated prosecutions. If the latter is not the case, the time for Chinese membership may come.”

More importantly, in the next decade there will be further profound changes in China with a new leadership replacing the old guard and a more democratic society; these developments may lead to Chinese membership in the ICC system sooner than expected.

I am grateful for the chance to share with you my personal view of, and hopes for, “the ICC of the future.” I will address three sets of issues. The efficiency and administrative culture in the ICC of the future; possible or likely developments with regard to judicial proceedings or with regard to the applicable criminal law; and the relationship between the ICC of the future and State Parties, states in general and the Security Council. With regard to this third question, please

http://www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/FICHL_PB2.pdf

⁴ See Hans-Peter Kaul, *Germany: Methods and Techniques Used to Deal with Constitutional, Sovereignty and Criminal Law Issues*, in STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 65 (Roy S. Lee ed., 2005).

remember what Hans Corell said yesterday in his impressive keynote speech on the Rome Statute and the obligations of states.⁵ Last night, Hans was kind enough to slip a copy of this keynote under my door. Having read it again, please permit me to put on record now my full agreement with his comments on the ICC and the obligations of states. I will come back to this.

It is obvious that when discussing the ICC of the future, I am bound to set out some assumptions, likely scenarios, or other predictions. At the same time, there is a problem with such forecasts and prognostications. As a wise man once said—was it Einstein?—“The problem with prognoses is that they deal with the future.”

We all know that the future is unclear. Incorrect assumptions and errors are always possible. But it is my hope that such a look into the future—maybe at the ICC situation around 2030—will be interesting and hopefully even a little thought-provoking.

Efficiency and Administrative Culture

The work of the ICC of the future will be characterized, in my view, by much more efficiency and

⁵ Hans Corell, *Reflections on International Criminal Law over the Past Ten Years*, PROCEEDINGS OF THE SIXTH INTERNATIONAL HUMANITARIAN LAW DIALOGS p. 53 (Elizabeth Andersen & David M. Crane eds., 2013).

a better work culture, in a comprehensive sense. I will give some examples. Why is this so? Not because of the control efforts of State Parties but out of sheer necessity which the leadership of the Court will have to recognize or is about to recognize. One major positive factor will be, for example, more respect for, and much better compliance with, the “One Court principle,”⁶ both internally and in all contacts and communications with external stakeholders. Forgotten will be the days when admittedly objective observers, including myself, sometimes could have the impression that the Office of the Prosecutor, the Registry, and the Chambers were seeking to be separate small organizations or even kingdoms of their own. While these centrifugal tendencies occasionally have done much damage, the Court of the future will appear unified as “one court,” with the common mission to contribute to effective investigations and judicial proceedings with regard to core crimes, and thus to fight against impunity. This presupposes that possible internal differences of views are settled within the Court and that its standing is not negatively affected by the perception of an internal divide at the ICC. Instead, a general atmosphere of mutual trust, confidence, and reliability between all elected officials, organs, units, and staff of the Court will

⁶ The so-called “One Court” principle was originally mentioned in the Rep. of the Comm. on Budget and Finance, ICC-ASP/3/18, ¶12, during the 3d plenary meeting of the Assembly of States Parties (ASP) in September 2004. The principle has often been recalled, most recently in ASP Resolution ICC-ASP/11/Res.8, 8th plenary meeting, 11th Sess., ICC-ASP/11/20, at ¶ 33 (Nov. 21, 2012).

contribute to more efficiency and a much better work culture.

Next point: the budget of the ICC. Yes, budget preparation, financial control, and proper budget implementation all matter. In the past decade, those involved had to learn through a difficult process of trial and error that a good budgetary process and proper budgetary means are not self-understood. Even today, the process of the preparation of the Court's annual draft budget takes up, year after year, too much work, too much time, and often the patience of too many officials, especially when competing priorities arise.

I am, however, convinced that the ICC of the future will have a proper budget methodology, achieving a "best practice" standardization of the budget elaboration. Such a positive budgetary routine will free up much positive energy, in particular work capacity for the core functions of the Court, namely prosecution activities and judicial proceedings. In addition, more financial means will facilitate the work of the Court as the forthcoming dissolution of the ad hoc and hybrid Courts will leave the ICC as the only international criminal justice mechanism.⁷ This will alleviate⁸ the burden of the

⁷ The Mechanism for International Criminal Tribunals (MICT) was established by the U.N. Security Council on December 22, 2010 to carry out a number of essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) after the completion of their respective mandates. *See* <http://www.unmict.org>.

international tax-payer by around 300 million U.S. dollars per annum.⁹

In the ICC of the future, the Registrar and the Registry will consistently demonstrate a proper understanding of their role, namely that the Registry is not an independent organ of the Court, and that the Registrar is “the principal administrative officer of the Court, acting under the authority of the President”¹⁰—no less but also no more. In the future, there will be a work procedure in which the Registry acts without fail as the main service provider to the Judiciary and the Office of the Prosecutor. It will thus be a positive normalcy that all activities of the Registry, including the Court’s external relations, are aligned with the strategic and policy decisions taken by the Judiciary, the Presidency, and, where appropriate, the Prosecutor.

⁸ See the analysis by Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States, to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U.L.J. 953, 956, 961 (2011).

⁹ As approved by the Assembly of States Parties (ASP), the ICC’s 2013 budget totals €115,120,300, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res1-ENG.pdf.

¹⁰ Article 43 (2) of the Rome Statute of the ICC states, “The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.”

It is nowadays generally recognized that international courts need strong and courageous leadership. This is true in particular for the ICC. There is more and more agreement in The Hague that the role of the Presidency really goes beyond protocol and representational activities. There is no doubt in my mind that in the future, it will include an active approach to all problems and challenges facing the Court, including difficult issues, such as the budget and the proper administration of the Court. Needless to say, the lead role of the Presidency must be exercised in close coordination with the Prosecutor, whose full authority over the management of his or her office shall be respected.

In the future, the Court will have to live up to two other requirements: first, a consistent practice of “trust but verify” that tasks and challenges arising are indeed addressed. Second, there will have to be more respect for basic work requirements, such as discipline, diligence and punctuality, reliability, respect for deadlines and cost awareness, observance of the working hours and no absence from work without proper notice and permission. Non-compliance with the aforementioned is particularly unfair to all who do their job as usual.

There is, however, a related necessity for the elected officials of the Court, including the judges: the leadership of the ICC of the future will have a much better understanding of how important it is to motivate the staff and to encourage all concerned. One has to lead by example and take the personnel with you. Experience shows that good work morale and staff that feel appreciated at work are the most important factors for

efficiency and performance. This is valid for Google and Apple; it is also valid for the ICC of the future.

There is another development which will enhance the work culture and efficiency of the ICC quite soon; by 2015/2016 the ICC will already have—and here I use a term coined by Ben Ferencz—its own “temple of law,”¹¹ namely a permanent premises which are in full conformity with the functional, organizational, security, and related needs of the Court. Perhaps I may mention, in all modesty, that from 2003 until quite recently, I have invested an enormous amount of work and effort to drive this project ahead, which involved determining the key parameters of the premises, the site, the financing, and conducting professional project management and organizing an international architectural competition. A contract was only awarded to a construction company on August 24, 2012. The ICC will thus be the first international criminal court in the history of mankind to have its own permanent premises, built specifically for its purposes for generations to come. As this project is currently on track, there is, as usual, no more acknowledgement of my ground-laying role, but I do not mind. Maybe they will invite me to the inauguration ceremony.

¹¹Hans-Peter Kaul, *Über Hoffnung und Gerechtigkeit*, in FAKULTÄTSSPIEGEL DER KÖLNER JURISTISCHEN FAKULTÄT 83, 91 (Verein zur Förderung der Rechtswissenschaft an der Kölner Juristischen Fakultät ed., 2008/2009).

Judicial Proceedings and Applicable Criminal Law

In the main part of my presentation, I will set out some possible or likely developments which, in their combined effect, will probably make the judicial proceedings at the ICC of the future much more efficient and expeditious.

In the ICC of the future, Chambers will be more certain that they will receive the necessary resources to properly and expeditiously carry out their functions. It is expected that not a single hearing, or if necessary simultaneous hearings in Chambers on the same day, will be delayed or adjourned due to the lack of courtroom support staff or other necessary resources.

Second, victim's participation¹² and the related current practices of the Court will undergo significant change so to entail more meaningful participation.¹³ The

¹² There are numerous articles on victims' participation. *See, e.g.*, Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. RED CROSS 409 (2008); Mariana Pena, *Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. INT'L & COMP. L. 497 (2010).

¹³ The ICC's Trial Chamber V recently issued a decision which promotes a modified understanding of the application process for victims who wish to participate in the proceedings. *See Prosecutor v. Muthaura and Kenyatta*, Case No. ICC-01/09-02/11 Decision on Victims' Representation and Participation (Int'l Crim. Ct. Oct. 3, 2012).

current practice is, in my view, largely characterized by a deplorable lack of genuine victims' participation. Instead of such genuine participation which may enable victims to see justice done and enjoy the related potential for healing, there is a bureaucratic, slow, and costly system of victims' admission, in which the victims are, at best, "virtually" present.

Victims are routinely represented by a new sub-category of counsel, the so-called legal representatives of victims,¹⁴ who all too often do not maintain proper contact with the victims represented.

In the future, various ways and means will be explored to achieve more proximity, to bring the victims closer to effective participation in the judicial proceedings, in particular:

- Through the possibility of collective participation: the intervention of elders or community leaders who represent a group of victims throughout the proceedings;
- Through the more consistent appearance of victims in hearings, also as witnesses;
- Through the presence of elders of affected communities or the presence of victims elected as representatives of victims groups in the courtroom or in the gallery; to this end, a network

¹⁴ See Article 68 (3) of the Rome Statute and Rules 89–91 of the ICC's Rules of Procedure and Evidence.

of NGOs could assist the victims and the Court in facilitating the organization of those visits to the Court;

- Through *in situ* hearings of Chambers or judges in which they receive oral and direct “representations” or the “views and concerns” of victims; and
- Through the holding of confirmation of charges or trial hearings or parts thereof *in situ*.

These measures¹⁵ can and will be as simple and practical as possible to create real opportunities for the victims to see that their suffering is acknowledged and that serious efforts are being made to prosecute their tormentors.

In the Court of the future, proceedings will be much more expeditious than they are today. In particular, two related problems that have caused many complications and delays will no longer exist. First, there will be no more “phased investigations” in which the Office of the Prosecutor seemingly seeks to assemble just enough

¹⁵ The various ways and means to ensure effective participation of victims in the judicial proceedings as set out above are based on existing provisions of the Rome Statute and do not require, in the view of the author, any amendment of the present provisions of the Statute or of the Rules of Procedure and Evidence. It should be noted, however, that some experts are of the view that the Rome Statute’s system of victims’ participation is essentially “irreparable” and thus structurally unable to form a basis for any effective and meaningful participation of victims of core crimes.

evidence to reach the next threshold, instead of working full power *ab initio* to achieve evidence “beyond reasonable doubt.”¹⁶ Second, there is the questionable prosecutorial practice of requesting across the board redactions, which in hindsight are often recognized as excessive, inconsistent, and unfair to the defense.

With regard to so-called “phased investigations,” there is still an Appeals Chamber decision explicitly allowing the continuation of investigations after the confirmation of charges.¹⁷ Fortunately, there is a recent Appeals decision in *Prosecutor v. Callixte Mbarushimana* in which the Appeals Chamber clarified its position on this point by specifying that “the investigation should largely be completed at the stage of the confirmation of charges hearing.”¹⁸ I have argued

¹⁶ Regarding the question of evidence “beyond reasonable doubt,” see also the ICC Trial Chamber II’s most recent judgment in *Prosecutor v. Mathieu Ngudjolo Chui*, *Case No. ICC-01/04-02/12*, Judgment Pursuant to Article 74 of the Statute (Int’l Crim. Ct. Dec. 18, 2012).

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, *Case No. ICC-01/04-01/06*, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence,” ¶ 54 (Int’l Crim. Ct. Oct. 13, 2006).

¹⁸ *Prosecutor v. Callixte Mbarushimana*, *Case No. ICC-01/04-01/10*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled “Decision on the Confirmation of Charges,” ¶ 44 (Int’l Crim. Ct. May 30, 2012).

that it is “risky, if not irresponsible”¹⁹ for the Prosecutor to only gather the minimum amount of evidence needed to move to the next phase of the proceedings,²⁰ and it is my expectation that the quality of investigations will improve as the Court goes forward.

An investigation as focused and effective as possible *ab initio* with a strong investigation team will also largely eliminate a problem which continues to plague particular pre-trial proceedings, namely, pervasive, often exaggerated or precautionary redactions, which have often been a major problem. In particular their consideration in pre-trial proceedings has absorbed an inordinate amount of time and energy of all concerned. However, if investigations are more advanced or almost complete before cases are commenced, then the need for such extensive redactions can be eliminated. There is time to move witnesses in vulnerable locations, disclosure consent forms can be obtained, and tactical decisions can be made as to whether using vulnerable witnesses is necessary. Redactions will be used in a

¹⁹ For further comments on this issue, see AMERICAN UNIVERSITY COLLEGE OF LAW WAR CRIMES RESEARCH OFFICE, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT’S OFFICE OF THE PROSECUTOR 64 (2012).

²⁰ Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case. No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,” ¶ 47 (Int’l Crim. Ct. Jan. 23, 2012) (Kaul, J., dissenting).

limited and much more pragmatic way than they are now.

Therefore, in the future, unredacted disclosure of all relevant material will probably take place immediately after the confirmation of charges hearing. Trial proceedings will commence two or three months thereafter, that is, after the defense is afforded a reasonable time to prepare its case.

I also foresee much more effective investigations and cooperation work in the Office of the Prosecutor (OTP) through perhaps a doubling of the staff in the Investigation Division (currently 111 positions) and in the Jurisdiction, Complementarity and Co-operation Division (currently 32 positions, only 15 professional positions).²¹ There is already an emerging awareness among States Parties that the limited staff for investigations and cooperation is problematic—and please do not forget that ICC staff are also entitled to annual leave, to training, and some may need time off for legitimate reasons. How is it possible with around 100 staff to fully cover the investigation and cooperation necessities for eight situations, 14 outstanding arrest warrants, and another eight situations under preliminary examination?

²¹ The approved Programme Budget of the ICC for 2013 foresees 111 positions (including 79 professional staff) in the Investigation Division and 32 positions (including 15 professional staff) in the Jurisdiction, Complementarity and Co-operation Division.

Consequently, as an ICC judge that has served now for almost a decade, as somebody who knows our Court, and also as a former Vice-President, I fully encourage Ms. Bensouda, our distinguished Prosecutor, to seek in the years to come such a doubling of her staff, particularly in these key areas. The work of Chambers, which is on the “receiving side,” is fully dependent on effective and professional investigations, prosecutions, and related cooperation efforts. I am also quite confident that the Assembly of States Parties (ASP) will approve these OTP staff increases. They will understand this compelling necessity reflected in a metaphor often used at the Court, namely, that “The Office of the Prosecutor is the engine, professional and effective investigations are the fuel of the Court.” I believe that the ICC of the future will have more than enough fuel in this regard.

The combined effect of all these positive changes on judicial proceedings will make these proceedings more convincing and more expeditious. Positive change is also possible with regard to the future work of the judges. It is indeed my expectation that a careful pre-selection of judicial candidates through the Advisory Committee on nomination of judges,²² established by last year’s ASP in

²² Resolution ICC-ASP/10/Res.5, 9th plenary meeting, at ¶ 19. The paragraph reads as follows: “Welcomes the report, adopted by the Bureau pursuant to paragraph 25 of resolution ICC-ASP/9/Res.3, decides to adopt the recommendations contained therein, and requests the Bureau to start the process of preparing the election, by the Assembly of States Parties, of the members of the Advisory Committee on nominations of judges of the International Criminal Court in accordance with the terms of reference annexed to the report.”

New York, will increase the chances that only candidates who, beyond the necessary formal qualifications, also have a solid inner compass and proven commitment to the cause of international justice, may be elected as judges of the ICC of the future.²³

Improvements are also possible in the methodology of the Appeals Chamber. The Appeals Chamber of the future should, and will in my view, leave behind the somewhat minimalistic approach of decisions on appeal, in which all too often the tendency has obviously become to seek an “easy way out.” The Appeals Chamber of the future will hopefully demonstrate a consistent will to consolidate the jurisprudence of the Court with substantial decisions clarifying complex issues as they arise.

On the basis of these positive developments—which may occur as a result of sheer necessity, more insight and experience, or even both—it is quite likely, at least in my view, that proceedings and trials will be more expeditious in the future. As with many cases at the ICTY, it took ICC Chambers in the two first trials five to six years to come to a verdict or a formal judgment. Pre-trial proceedings regrettably took around ten to twelve months. In my view, this is unsatisfactory.

²³ *Id.* at par. 20, which reads as follows: “Emphasizes the importance of nominating and electing the most highly qualified judges in accordance with article 36 of the Rome Statute; for this purpose encourages States Parties to conduct thorough and transparent processes to identify the best candidates...”

It will mean significant progress if the duration of the trial of mass crimes can be reduced at the ICC of the future to approximately three years through proper case management. This includes, first and foremost, a strong role for the judges and their control of the proceedings. It also means streamlining and accelerating the disclosure process and dealing expeditiously with the related issue of redactions, to which I have already referred. The overall time for trials could be reduced, as well, through the use of a single judge²⁴ for the preparation of the court proceedings and the use of case managers and legal officers with specialized knowledge, for example, on victims' participation and protection issues.

Likewise, it is in my view not impossible to reduce, through the focused work of all concerned, the length of pre-trial proceedings to around six months. Here, I would like to refer in particular to my earlier comments on the need to abandon the practice of the so-called "phased investigations." Needless to say, in the future, there will also be many *imponderabilia* and unforeseen developments which may cause delays. The task, however, is clear: as the duration of judicial proceedings is one of the most corrosive factors for the standing of the Court, all must be done to come closer to a trial

²⁴ See Articles 39(2)(b)(iii) and 57(2)(b) of the Rome Statute, Rules 7 and 132 *bis* of the Rules of Procedure and Evidence, and Regulation 47 of the Regulations of the Court. The Rules of Procedure and Evidence were amended through Resolution ICC-ASP/11/Res.2, 8th plenary meeting (Nov. 21, 2012) by including Rule 132 *bis* which allows for the designation of a single judge for the purpose of preparing the trial.

“without undue delay” as referred to in Article 67 of the Statute.²⁵

The quality of the judicial proceedings will also be better because judges, legal support staff, and others may have benefited from regular and professional training seminars organized, in particular by the International Nuremberg Principles Academy.²⁶ The mandate of this new institution will be to promote, to disseminate, and to implement the legal and moral legacy of the Nuremberg Trials and of Robert H. Jackson, Telford Taylor, Whitney Harris, Benjamin Ferencz, H.W. William Caming, and others. As some of you were in Nuremberg on August 17 and 18, 2012, including Stephen J. Rapp and Beth Van Schaack, you are aware that such training seminars for ICC members will probably be one main support activity of this new Academy, which hopefully may be officially founded by 2014. Another important support activity of the Academy for the ICC will be customized information work on the objectives and

²⁵ Article 67 (1) of the Rome Statute provides: “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay.”

²⁶ The International Nuremberg Principles Academy (INPA) is a project based on the German Government’s Coalition Agreement of October 26, 2009, Chapter V, Item 6, Protecting Human Rights – Promoting the Rule of Law. The city of Nuremberg acts as a leading partner. For more information see <http://www.museums.nuremberg.de/academy/index.html>

functioning of the Court, tailored to the needs of specific target groups.

Last night, I had a good exchange with David Crane about this. It was not difficult for us to conclude that the Academy and the Robert H. Jackson Center may be natural partners for work in the same direction, or even for common work and projects.

With regard to the substantive criminal law applicable before the ICC of the future, one significant development is already generally known. At the end of this decade the ICC will have, at least to a certain extent, a somewhat symbolic jurisdiction with regard to the “supreme international crime,” the crime of aggression.²⁷ The necessary ratifications of the Kampala Amendments by 30 countries and the necessary affirmative vote of at least two thirds of the States Parties will not be difficult to achieve. Germany will ratify the amendments at the latest in 2013.²⁸

²⁷ See Articles 5 (d), 8 *bis*, 15 *bis* and *ter* of the Rome Statute.

²⁸ On November 29, 2012 the German Parliament (Bundestag) in its final reading unanimously approved the ratification bill on the amendment of the Rome Statute in order to include the Crime of Aggression. This step enabled German Foreign Minister Guido Westerwelle to deposit on June 3, 2013 the instrument of ratification at the United Nations in New York, in the presence of the author.

It is, however, my assumption that the Court may not have yet, even around 2030, a concrete case in which a crime of aggression pursuant to articles 8 *bis* and 15 *bis* and *ter* of the Rome Statute will be prosecuted. Why? Well, experience shows that overt crimes of aggression reaching the high threshold of article 8 *bis*, such as the Iraqi invasion of Kuwait and the crimes against peace or the German attack on Poland on September 1, 1939, are not committed very often. The existence of ICC jurisdiction with regard to the crime of aggression, even to only a limited extent, will nevertheless have significant positive effects: whenever there is a questionable use of armed force against another state, international commentators or media will raise the question whether the individual leaders may have committed a crime of aggression. One can hope that this may reduce or contain, at least to a certain extent, the readiness of political or military leaders to use brutal armed force for their goals.

With regard to crimes against humanity pursuant to Article 7 of the Statute, it is my hope that the current majority jurisprudence established in the Kenya cases²⁹ will have become obsolete and overturned by future ICC decisions. To blur or to do away with the fundamental difference between crimes against humanity and multiple ordinary crimes is, in my view, simply wrong. A vague

²⁹ Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Int'l Crim. Ct. Jan. 23, 2012).

formula that any kind of non-state actor may qualify as an “organization” within the meaning of Article 7(2)(a) of the Statute, that “has the capability to perform acts which infringe on basic human values”³⁰ remains totally unconvincing to me. In the future, it will hopefully become clear that this type of jurisprudence, which also carries the risk of extending ICC jurisdiction indefinitely and beyond its capacity, is not sustainable. In this regard, however, I note with appreciation that more recent ICC decisions have consciously shied away from using the aforementioned formulation.³¹

The jurisdiction of the ICC of the future will continue to be limited to the four core crimes as enumerated in Article 5 of the Statute. Further attempts to include terrorist crimes and suggestions to include financial crimes within ICC jurisdiction will go nowhere. Other mechanisms will have to be found to prevent impunity for enormous financial crimes which seemingly continue to be committed almost day by day.

³⁰ *Id.* at 184.

³¹ Situation in the Republic of Côte d’Ivoire, ICC-02/11, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire,” ¶ 46 (Int’l Crim. Ct. Nov. 15, 2011); Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor’s Application under Article 58, ¶ 24 (Int’l Crim. Ct, July 13, 2012).

States, the Security Council and the ICC

At the outset, let me recall what Hans Corell said yesterday in his keynote speech. The ICC of the future will be stronger and more accepted around the year 2030. By then, it will probably have around 140 States Parties or more and not 121 as it has today.³²

Even more important, there will be a much more positive attitude of the States Parties towards “their” Court. Forgotten will be the current attempts of some States Parties organized in the so-called “G5”³³ or “G6”³⁴ to impose a “Zero Nominal Growth” (ZNG) policy on the Court—this despite the fact that the

³² There are currently 138 Signatory States and 122 States Parties to the Rome Statute. For the current status of statute ratification, see http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=XVIII-10&chapter=18&lang=en.

³³ During the budget preparations for the ICC draft budget for 2012, the United Kingdom in early autumn 2011 took the initiative to establish an informal group of five major contributors (“G5”) to the ICC budget, consisting of the United Kingdom, Japan, Italy, France and Germany. On October 28, 2011 this newly founded G5-group submitted a quite critical and restrictive paper on the 2012 ICC Budget entitled “Zero Nominal Growth Approach” demanding far reaching and drastic budget reductions of more than 20 million Euros. Objective observers were particularly astonished that Germany, which had until then regularly supported the draft budget of the ICC, joined this group.

³⁴ In 2012 Canada joined the group of the G5 whose overall aim continued to be to limit the ICC budget.

workload of the ICC is constantly increasing and that the sums which may be saved through a ZNG policy are ridiculously small. They are indeed irrelevant compared, for example, to the costs of fire brigades in capitals of States Parties or the costs of one single tank. Furthermore, the expected shutting down of the ad hoc tribunals, of the Special Court for Sierra Leone, of the Lebanon Tribunal and the Extraordinary Chambers in the Courts of Cambodia in the near or foreseeable future will dramatically reduce the costs for international criminal courts and alleviate the budget of ICC States Parties by at least 300 million U.S. dollars per year. Governments and Finance Ministries of States Parties will gradually understand that henceforth more funds are available and that complementary ICC jurisdiction will soon be the only remaining mechanism to promote more criminal justice worldwide. There is therefore good hope that there will be enough breathing space to provide the ICC with a solid financial basis in the decades to come.

There is a further area in which a change of States Party behavior towards the ICC is necessary and likely to come about. This concerns a quite obvious, if not excessive, current tendency of certain States Parties and their delegates to micro-manage, interfere in internal matters of the Court, or excessively demand all kinds of written reports on complex issues. This problem is compounded by the proliferation of subsidiary bodies for inspection, evaluation, and investigation of the Court, concerning its efficiency and economy. Believe it or not, in 2012, there were some 12 to 15 such bodies, working

groups, or subgroups.³⁵ Needless to say, this imposition of additional work often absorbs almost all of the working time of senior officials and staff, thus having a detrimental effect on the regular functioning of the Court.

There is, however, light at the end of the tunnel: there are hopeful indications that in the next years it will be possible to (re)establish a fair balance between the independence of the Court and the legitimate desire of States Parties to provide oversight management as foreseen in the Statute.

A fundamental strengthening of the ICC may also become possible in a crucial, if not decisive area: arrest actions may be much more vigorously supported by States Parties or even non-States Parties such as the United States. Informed observers have noted for some time a growing awareness in the international

³⁵ According to an informal document dated May 23, 2012 put together by the Ambassador of Switzerland to the Netherlands, The Hague Working Group consists of the following sub-groups: Victims and Affected Communities and Trust Fund for Victims, Independent Oversight Mechanism, Complementarity, Strategic Planning Process, Cooperation, Legal Aid, Budget, Reparations, Study Group on Governance, Increasing the Efficiency of the Criminal Process, and Budgetary Process. Furthermore, the New York Working Group consists of the following sub-groups: Peace and Justice, Geographical Representation and Gender Balance in the Recruitment of Staff of the Court, Arrears, Plan of Action for Achieving the Universality and Full Implementation of the Rome Statute.

community regarding the total dependence of the ICC on effective international cooperation, notably with regard to arrest and surrender to the Court, which needs to be addressed. Currently, only six arrest warrants have been executed, 14 remain outstanding. This points to the necessity that states one day will form or make available task forces to arrest suspects for the ICC, just as it is now routine to use such forces domestically against armed criminals. The fact that the United States recently sent a small number of military advisers to Uganda to train forces for the possible arrest of Joseph Kony and his commanders is encouraging, a step in the right direction. Other measures will have to follow in the well-understood interest not only of the ICC.

For the ICC of the future, there is also room for improvement in its relationship with the U.N. Security Council or even with respect to the treatment of the Court by the five permanent members. The ICC is an independent and non-political institution, acting in the interest of the international community—it should not be treated as a political instrument of the Council. To use the Court as a tool of the Security Council will inevitably politicize it, make it controversial, and damage its chances of becoming a universal institution.

One must especially hope that future Security Council referrals of situations will be decided upon with wisdom and a visible sense of responsibility. In my humble view this means, in particular, that the responsibility of the Council to support the work and intervention of the ICC does not end with the adoption of the referral resolution under Chapter VII of the U.N. Charter. Why is it not possible, as Hans Corell suggested

yesterday, that the Council may adopt, if necessary, a resolution under Chapter VII ordering the government of Sudan to arrest and surrender the Sudanese suspects sought with an international ICC warrant of arrest? Furthermore, Article 24 of the U.N. Charter leaves no doubt that the Security Council, when exercising its authority for the maintenance of international peace and security, acts on behalf of the members of the United Nations. The logical consequence of this, at least in my view, is that the costs for ICC interventions after a Security Council referral should be borne by the United Nations, and not by ICC States Parties alone.

Perspectives and Outlook

I would like to conclude with the following:

I believe that in a foreseeable time, around the year 2030, we will see a stronger, more effective ICC, working more successfully in a more favorable international environment.

Yes—and I am prepared to admit this quite openly—there are problems and weaknesses at the current ICC. Yes, progress and positive change continue to be difficult, and setbacks are possible. Compared with the violent crises in this world, compared with the forces of realpolitik as explained by Cherif Bassiouni, the Court will always be small and weak, more a symbol, more moral authority than real might.

But the ICC of the future is possible, despite so many difficulties. It is encouraging that the abbreviation “ICC” has become, in only ten years, a universally-recognized symbol; the Court has become some kind of worldwide visible lighthouse for the message that nobody, no President or general, is above the law and that there shall be no impunity for core crimes, regardless of the rank or nationality of the perpetrator. This is the ICC’s standard-setting message, and one should not underestimate its impact. It is only logical that this message is not to the liking of those who continue to regard the use of brutal armed force as a possible means for their political objectives.

To conclude, steadfastness and patience, much patience, will be necessary to achieve the ICC of the future. And even after 2015, when my tenure as judge will have ended, I will follow the development of the Court with hope and in good spirits. And should it happen that the positive changes that I have mentioned take too long, then I may, if necessary, pass away—still with hope and in good spirit—so be it!

Commissions of Inquiry: Some Personal Reflections

M. Cherif Bassiouni*

Thank you all for attending this early morning breakfast. It is either a tribute to the fact that you're early risers or a personal tribute to me that you have endured the difficulty of waking at such an early hour.

Yesterday we were treated to a magnificent academic lecture by Leila Sadat, but I thought this format may not necessarily be the best thing for you to start the day with, and so allow me to take a lighter, non-academic approach, even at the risk of sounding quite personal in the experiences I am going to share with you.

Now, I am not sharing these experiences and thoughts with you to memorialize what I have seen in my work on five different commissions in five different war settings but, rather, because I know that this will connect with so many of you who are working as prosecutors, investigators, judges, and for those of you who are doing research from the outside. So I will be somewhat eclectic, if I may. I am going to start with an observation, and I'm sure many of you who know the

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background of Nuremberg and Robert Jackson better than me will probably have more to say about it than I do—certainly John Barrett will. I read how the press reacted a year into Nuremberg, how the public had become rather bored. They said, “These proceedings are taking far too much time;” “The translation isn’t always working well;” “It is taking so much time, what are these people doing?;” “Why are they playing these games?” And in the back of people’s minds was the Churchill formula from the Moscow meeting in 1943—just line them up on a wall and shoot them. And they began to wonder why we were not doing that.

I think about how easy it is for us to have glamorized things that were not necessarily full of glamour, and I think again of my experience by looking at pictures of Nuremberg. When you wind up in a place with two or three other people and say, “Well, okay, where do we start? How do we put the furniture together? Where is the screwdriver so that we can put the bench or the desk together and get started?” I imagine somebody arriving in Nuremberg, a city that was destroyed and asking, “How do I walk through the streets?” Yes, they found the only building that hadn’t been bombed to go and work in, but that’s basically about it, and they were really dependent on the MPs to take them around and to find them a place to sleep. While the logistics of Nuremberg must have been relatively easy with respect to those working there, think of somebody like David Crane, in the middle of Sierra Leone, having to start fresh and put the furniture and the desks and the beds together. Imagine starting at that level. It’s an impressionistic approach. You want to think of a Chief Prosecutor as a general or a field marshal, but,

you know, my experience as a second lieutenant was probably most meaningful in all of my five field missions, because I had to do some of the logistical and practical things that needed to get done.

For example, in Libya, I was appointed as Chairperson of the International Commission of Inquiry. We needed to go into the field to investigate, but we needed approval from the people in New York who were in charge of security. They're in New York, but they have to decide what's happening in Libya, and they said, "You can't go to Libya." So I learned the tricks of the game. By the time I started working on Libya, it was my fifth international investigation, and so I knew how to get around this. So I asked, "Can I go to Cairo?" and they said, "Oh, of course you can go to Cairo." So I went to Cairo. And from Cairo, I said, "Can I go to the border?" And so they said, "Oh, sure, you can go to Siwa," so I went to Siwa. And I said, "Can I get into Libya?" "Well, you can't get into Libya." And, of course, they needed an excuse. You have to think in those bureaucratic terms.

So they said, "You need certain armor-plated cars. You don't have armor-plated cars." So I called some people that I knew in the Egyptian military and they got the military at the border to cooperate with me. Every time I saw a U.N. car come by, we would stop the car. It was either a UNHCR or UNICEF car, and I would talk to the driver and the person being transported, and I would ask, "Who is your boss?" They would give me the name of their boss, and I would call the boss in Cairo and I would ask if I could have their car. And they would say, "Well, of course you can't have my car." I said, "But

relax. I have a car like it in Cairo. I will give it to you in trade, but I need this car because it supposedly has armored plates on it that will save us.” And so after a little bit of going back and forth, I was able to trade five cars.

I had a team of 25 people, so we decided that we would do away with the driver, and instead, one of our close security personnel acted as the driver. Five of us got into a car, and we crossed into Libya. That required making contact with people in Libya, again through my Egyptian friends. I called people in Benghazi, and they sent a couple of people with us to guide us through.

The problem was that we had not anticipated that during the months of March and April there is the march of the strong easterly winds. These winds are about 40–50 miles per hour, and they blow a lot of sand in the desert. When you're going against 40–50 miles-per-hour wind with a lot of sand, it's a bit difficult to drive. So we did about 2,000 kilometers, 1,000 coming and 1,000 going, not knowing where to stop. We stopped at whatever big building we thought was a hotel. Sometimes there was somebody in it, sometimes there wasn't. It was difficult to find food or water, but we proceeded and kept at our task. Our job was full of improvisation, just as many of you who have gone through some of these tribunals and some of these missions have had to improvise.

I hope I'm not misquoting, but I remember Hans Corell, U.N. Under-Secretary-General for Legal Affairs, once telling me that he flew to Kigali after the

Security Council Resolution on Rwanda. He looked around and said, "We can't have a tribunal here, there is absolutely no logistical support or basis." He ultimately felt that they had to go to Arusha because that was the only place where they could have the basic logistical support and facilities to be able to get started.

So I'm sure that the same difficulties were not encountered in The Hague, nor would they be encountered in other major capitals as was encountered in Sierra Leone and things that I have encountered in the former Yugoslavia. Logistics are the biggest hurdle, the biggest problem, and that is the one thing you'll never see written about. When people are writing about the stories and glamorizing the experiences, you will never realize that.

Let me give an example that may interest those of you who are involved in the former Yugoslavia. I was part of the U.N. Security Council Commission of Experts, and we discovered the Vukovar mass grave. So we decided to go to Vukovar with our forensic team. The bodies were buried in a cooperative farm a little off the beaten path. It was difficult to find, but we had some information, and we went there. We were in the middle of nowhere. An infamous character by the name of Arkan had his camp a few kilometers away, and this was where he was doing all of his smuggling trade in gasoline. This was in 1993.

So we went to Vukovar, we discovered the mass grave, and we started taking pictures. Then I went to Headquarters, saw the Commanding Officer of the U.N.

forces, and I said, "We need to do a mass grave investigation." And he said, "Where are you guys going to live?" And I said, "I don't know. I suppose we're going to find some tents." He said, "Where will you find the tents?" So we started looking for the tents, and we needed staff. I knew the then-Minister of Foreign Affairs of the Netherlands, and, as you all know, it's these personal contacts that save the day. So I went to see my colleague, Mr. Kooijmans, and I said, "Can you talk to the Defense Minister?" The Defense Minister agreed to loan us 65 soldiers from a Dutch engineering battalion with all of their equipment, which included tents. Lo and behold, I realized that tents is not enough, you need portable toilets.

That was a big problem. So we got the tents, set them up, and I went back to the U.N. Commanding Officer. He said, "There is a Russian battalion next to you. Why don't you see if they'll help you out?" So I went to the Russian battalion. The guy offered me a glass of vodka, laughed, and said, "We have two portable toilets for 400 soldiers and officers. You're welcome to send your people to stand in line."

But if you do a mass grave exhumation, which I hope you don't have to do, you soon realize that in addition to the terrible experience of seeing bits and pieces of human bodies coming out, like a piece of a hand or a piece of a foot, and other things that are quite disturbing, it also usually smells a great deal. There is a lot of muck on the ground, especially if there is water. In addition to the psychological and the practical difficulties, it also requires something very simple, like a lot of hot water, so that the people who are working in

the mass graves can occasionally go out and clean themselves up from all of the muck and the microbes and things that they accumulate as they're going through the grave. But where do you get hot water in the middle of nowhere?

I knew that I wasn't going to get away with anything with the Russians, so I went to the Belgian battalion on the other side. He said he didn't have any hot water. Occasionally some cold water was brought to him by truck, but it was barely enough for his men, so no hot water for us. So we had to find our own transportation, get some water in, and figure out how to heat the water.

Then other things came about. We were all getting ready to move, and I had this beautiful contingent of 65 Dutch engineering battalions when, lo and behold, we realized that the Security Council had a ceiling on the number of U.N. forces—UNPROFOR—that could be in the field at a time. So we had to go and get a special Security Council resolution in order to authorize 65 additional men. So you have the logistics on one side and now the politics on the other.

By the time you get into the politics, you get into a completely different world of intricacies, no less complicated than the logistical problems you face, but the political problems have all sorts of different considerations. You think that maybe it's all about the geopolitical grand design of the political interests of states, until you get into it, and you realize that it is much more difficult to deal with because you're dealing with personalities. Who is the ambassador that you're dealing

with? And who is the foreign minister that you're dealing with? And how does this ambassador mix with that ambassador, and do the two get along well? In my days in the former Yugoslavia, it was Sir David Hannay who was in a constant tiff with Secretary-General Boutros-Ghali. I was known to have been appointed and supported by Boutros-Ghali, so I was a *persona non grata* in the company of Sir David. It had absolutely nothing to do with me. It happened to be that the person who had sponsored me was not getting along with him. So you need to figure out whose door you want to go and knock on and see how it's going to help. You have different levels of those political aspects and political dimensions to take care of.

And then you sort of find yourself in another situation that I would analogize to a shifting of gears, but bear in mind that you're constantly shifting gears. You're going from the logistics to the political, and now I am going to go to my third gear, and that's the U.N. bureaucracy. With all due respect to the many people who work assiduously at the United Nations, the system isn't good. Fortunately you have a lot of very dedicated people who are trying to make it work, but it's sort of like making it work against itself.

I'll give another example from my experience in Libya. When we first got going, I was allowed to choose the staff that I wanted. I wanted to choose my staff based on experience and on the fact that we needed people who spoke Arabic. We couldn't go into Libya with interpreters for a variety of reasons. But Gaddafi had banned the English language for 40 years, so there were very few people in Libya who spoke English. In my

opinion, it just doesn't work when you go with an interpreter. You can't go to see people who are injured in hospitals, people whose relatives have been killed, or people who have been tortured, and use an interpreter. There is an element of insensitivity that goes with it that you cannot subject the victim to again. You've got to be able to communicate a sense of empathy, and that is more important than anything else—the sense of human solidarity.

When I did what was really the first rape investigation in the former Yugoslavia, I and a team of 33 women interviewed 222 women victims. I was the only man on the team. I thought that there shouldn't be other men—they were all women. Each team was made up of three women: one woman prosecutor with experience in violent crimes, one woman psychologist or psychiatrist, and one woman interpreter. The first thing that I or anybody else would tell the victim is something to the effect that we've heard about you, we came here to express our concern and support for you and solidarity with you. Invariably the 220 women would fall into the arms of our three women investigators and go through a cathartic cry, and that was more important to me than anything else.

Now, granted, the affidavits that we took that wound up in the Prosecutor's office may or may not have been as useful as some people think, but at least they were there. And, you know, it may not be too much comfort for an estimated 20,000 women who were raped in Bosnia. As I said, we obtained 575 affidavits of women, most of whom identified their perpetrators. But indications are that there were over 4,200 cases of

women who were raped. It may not be enough for them to know that there was a case in *Foča* in which three persons were found guilty of rape.

The record of history is never established in criminal proceedings. Criminal proceedings are very narrow. They are directed in a particular way. They are not a substitute for establishing the historic truth. They are not a substitute for bringing closure to the victims who have suffered. And we have to start thinking in terms of how we balance the legal needs with other mechanisms such as victim compensation and other modalities of reaching out to the victims.

So then you get to the bureaucracy. We had this excellent team, and we really did very good work. We had to go through 12 days in the desert together. It was an adventure because we never knew where we were going to be the next day, and NATO was still bombing. Fortunately we communicated our positions almost by the minute to New York, which communicated to Brussels, and so we assumed that no stray plane was going to decide to shoot the convoy of five cars that was down there.

So we came back and we were pretty satisfied with our work, only to discover through the Office of the High Commissioner that our team was going to be disbanded because the rules are that you can't have a team for more than 90 days. So our team was gone. Well how do we get another team? You get another team by advertising the positions. People apply from within the system, and then you have to have a committee that

decides on the most meritorious and best people, and you, as Chairman of the Commission, have nothing to say about who is going to be on it or not. And so after three and a half months, during which the commission did almost absolutely nothing, we finally had a new team.

Well, of course, the new team had to be trained and indoctrinated, and anybody who has done investigations knows that it's not easy to train a team of investigators together and to brief them on the background, the conditions, and the quirks of the people. I mean, if you go to the Zintan mountain areas, the people there have completely different attitudes. Please don't tell them that you like the people from Benghazi or from Tripoli—that would be like going into Gaza and telling them you have great friends in Tel Aviv. Things like that you can't learn in the books; it's the sensitivity you acquire from being part of the ethos and pathos of what's going on. But after three and a half months, we had a new team, and we tried to make the team work together as best we could. Then we ran into a bureaucratic quirk that none of us would have thought about.

As we decided on our first field missions, we planned on having 12 of our 19 staff go with us, but we were informed by the Office of Security that we could only have six. Why could we only have six? We're an independent commission, why can't we take the people we want or the people we think we need? Well, after a lot of digging, it turned out that there was an emergency evacuation plan that contemplated evacuating X number of people—I think it was 256—and you couldn't have more than 256 U.N.-affiliated persons in country

because that was the number of seats available on a plane that was chartered and sitting in Malta to be flown in to remove people from there. Other agencies had already sent people in, and they were on the ground, so there was only room left for six more people. So for the six-month remainder of our mission, we had to rotate our investigators in and out of the country for periods of ten days to two weeks, six at a time. Imagine what this meant in terms of the continuity of the work, in terms of the synergies of the work that needed to be done. It was a total disruption of the work and made it very difficult to put things together. By the time you could put something together, you couldn't go back to the field to check something out.

I'll give you a small example. We discovered a certain number of locations that were bombed by NATO. They were very weird locations. They were all in civilian areas totally off the beaten path and had nothing to do with any military or political target. So we scratched our heads and asked, "Why would they bomb here?" And we're talking about extraordinary bombs, the 2,000-pound bombs, which are extremely accurate. If this part of the room was to be bombed, then this table would be untouched. It's just extraordinary how accurate these bombs are. So why were we finding these places bombed? We discovered over 20 such targets and over 100 persons killed as a result of these bombings. The families were coming up and talking to us. So I thought to myself in logical terms, "Could it have been pilot's error?" But there were thousands of sorties and there were never any pilot's errors. I talked to a few of the pilots, and they said, "No, it's impossible." Alright, so it wasn't pilot's error.

Maybe it was intelligence error. Maybe somebody gave faulty intelligence that said Gaddafi came and spent the night here. Again, I thought back to my experience in Iraq when Saddam was moving from house to house, and I said, "Well, maybe he or somebody important was there." But this was so off the beaten path that nobody had ever dreamt of it. So that explanation had to be discarded. So what was it?

Well, the only explanation left was faulty something. And, yes, maybe there was something faulty in the guidance mechanism of the projectile. You know, now you're back smack into the politics of things. Who are you going to lay this story on? You know, you have to deal with all of these dimensions.

But the bureaucracy, unlike the politics, does not always have the high-level personalities and the personality clashes that you can get between a Boutros-Ghali and a David Hannay. It's all, if you'll forgive me, small and petty stuff, and that is absolutely the worst. You get into the quagmire of the small and petty stuff of bureaucracy. It's a fight between different agencies wanting to have credit for this or greater recognition for that, or vying to be the future unit that will be doing more of that work. Because, you know, that means more personnel, and more personnel means you get promoted as a chief. If you're a P4 in that section and you get ten more people, you're a P5, and maybe you hope to be a D1 before your career ends.

So there are all sorts of things that get mixed into the work. And unless you have a lot of friends

throughout the bureaucracy, once you get in that quicksand—that's the best word I can think of—you are never going to extricate yourself. The system will not work. You can only navigate these troubled waters, to use another metaphor, by the connections you have, by the friends you have, by those who will be able to produce results. Again, you never see that in books and law review articles, you never see that in people's recollections of how things were at a given time, especially when you start adding all of these dimensions together.

I apologize for what may seem to be a sign of pessimism. For many years I continued to refer to it as a sense of realism, and maybe now I'm getting to the point where I must confess a little bit of pessimism. But I cannot rationally understand why it is that every time you have a commission of inquiry—and the Human Rights Council has established 30 of them—every time you have a special procedure—and there are about 40 of them going on—every time you have a special tribunal or whatnot, that we have to start from zero. Why is it that we all have to start from scratch?

I'll talk about commissions of inquiry. In commissions of inquiry, why is it that we don't have a simple database program that every commission can use to input the data or information that they have so that the data can be compared, and new prosecutors don't have to wrestle with developing a database system on their way into the job? It doesn't make sense.

Why don't we have a real manual of what we call best practices? Those of us who have been in the military see that manuals do work. I've never seen best practices translated into a manual. So if you're a new chairman appointed to a commission, here's the manual. Step 1, you do this, Step 2, you do this, Step 3, you do this, so we're not reinventing the wheel. It doesn't happen. We reinvent the wheel on the logistics, on the resources, on the personnel, on almost everything, and it continues like this.

At one point you can say, "Well, it's the nature of the beast," but I think you get to the point where you ask whether there is any method to this madness. Is it intentional? Is the sense of *realpolitik* so overpowering that there is an inertial force that brings about these obstacles and prevents us from moving forward? I think there might be for one simple reason: because the notion of *realpolitik* and political interest varies depending upon each conflict and is sort of unexpected.

Did anyone really expect Russia's reaction with respect to Syria in the way that it manifested itself? Probably not. I would have assumed that Russia's primary interests were the two naval bases they have on the Mediterranean in Syria. I would have thought that Secretary Clinton would call up Foreign Minister Sergey Lavrov and said, "Hey, whatever comes out of Syria, don't worry, you can keep your two bases," and neutralize the Russians. Maybe that's the obstacle, maybe it isn't. The idea that Syria is a good customer of Russia and buys the weapon doesn't make sense to me. Yes they are customers, but they don't pay, so I don't know how good a customer that is.

It's a little questionable here, but you don't know what the dynamics are. Think back to when I first joined the Yugoslavia Commission. The Security Council Resolution was adopted in October of 1992. Now, between October of 1992 and 1947, what happened? Nothing really. We went through the Cold War. International justice was at a stop. Sure, there were efforts. The United Nations valiantly continued to push forth the idea of establishing a draft code for the peace and security of humankind. There was a committee that, in 1951, produced a draft statute for an International Criminal Court, but because the Code was not ready, it was passed over.

Allow me here a little parenthetical. Look at the timing of things. In 1946, we had the first U.N. General Assembly Resolution embodying the Nuremberg Principles. In 1947, we had the establishment of the Commission for the Draft Code. In 1950, we had the establishment of the Committee for the Court. So in this first effort, the Code was separated from the Court. Does that make sense? No, it doesn't. Also, does it make sense that the committee working on the Code was in Geneva, and the committee working on the Court was in New York? No, it doesn't make sense. Does it make sense that one met in the summer and the other met in the winter? Of course not. What was the purpose of that? Delay.

When the committee in New York finally decided on a first draft of the statute, it was 1951, but the Code wasn't ready yet, so they decided to go back to the drawing board. They produced the next text in 1953. In 1953, the draft code was still not ready. So the 1953 Code to establish the International Criminal Court had to

be tabled because the Code wasn't ready. You see, there is some method to that madness. So it was tabled, and we waited.

In 1954, a Draft Code came out. But wait. In 1952, the General Assembly, in its infinite wisdom, withdrew the crime of aggression from the committee drafting the Code and gave it to another committee—a governmental committee, so as to avoid the possibility that the Experts Committee might go faster. So now we had the Governmental Committee working from 1952 to 1974 on defining aggression. In the meantime, the Draft Code of Offenses was completed in 1954 and submitted to the General Assembly. What was the General Assembly going to do with it since it doesn't include aggression? It had to be tabled too. So we tabled the Court in 1953 because the Code wasn't there. We tabled the Code in 1954 because aggression wasn't there. And when aggression came about in 1974, it took four more years of political battle to put the item again on the agenda in 1978. Then the whole thing got transferred back to the International Law Commission, which meant another bureaucratic device came into play.

It's very simple: if you want something done, you give it to somebody who can do it, right? If you don't want something done, you give it to somebody who can't do it. The ILC had a very distinguished Senegalese judge, who had been the Minister of Foreign Affairs, by the name of Doudou Thiam. Doudou had, I think, stopped reading anything by the 1950s. And if he did read anything, it had to be in French. If it wasn't in French, it wasn't worth reading. English was sort of on

his black list. He was given the task of putting together the Draft Code.

Doudou went along, and by 1991, he produced a text consisting of 26 articles he felt should be included. These were things that we may all agree with: that colonialism is an international crime, that anything that deeply affects the environment is an international crime, etc. But of course, when you looked at it, you said, "Well, these are very laudable objectives and goals, but what about the principles of legality? This is not the way you define a crime." So there was a little bit of madness in that. Anyway, to date, there is no such thing as the Draft Code of Offenses Against the Peace and Security of Humankind, a laudable effort that started in 1947. They had finally produced a text in 1996 and went to the General Assembly, and it is still pending before the General Assembly. However, the 26 crimes have been reduced to five crimes, three of which are defined in the ICC Statute. Nevertheless, the draft never saw the light of day.

So, again, you can see how bureaucracy, how prolonging things, how sending things from committee to committee, manages to eviscerate the substance of the certain initiatives.

In the meantime, other things were going on to keep us occupied and to answer public opinion. I am reminded of what must have happened around 1919. Project yourself, if you can, into the aftermath of World War I and the terrible destruction that had taken place: 20 million people killed in an absolutely senseless, stupid

war. It was trench warfare where people came out of the trench attacking and being killed and mowed down. Truly the European youth of the time was totally decimated by the stupid warfare.

A lot of very strange things happened, but the one thing that was very important, especially to the French and to the Belgians, was the responsibility of the Kaiser, the responsibility of the heads of states. The great success of convicting a Taylor or an Akayesu and other heads of states really has its genesis in going after Kaiser Wilhelm II. Everybody in France and in Belgium was really intent on the prosecution.

The U.K., which sometimes manages to develop the finest draftspersons in the world, sent somebody from Whitehall to Versailles to draft what became Article 227 of The Treaty of Versailles. I really urge you to read it. It's a masterpiece. It's a masterpiece because it defines what we now call the crime of aggression as the supreme crime against the sanctity of treaties. Now, anyone who has taken first year criminal law knows that the supreme offense against the sanctity of treaties does not satisfy the principles of legality. You really can't establish the elements of that crime. But you know what? It really had a positive effect on the front pages of newspapers. Every newspaper of the time had this as the headline: "Kaiser is charged with the supreme offense against the sanctity of treaties." And lo and behold, the Kaiser found refuge with his good relatives in a nice castle in the Netherlands.

There is a story that I think Claud Mullins included in a book he wrote at the time where a lieutenant colonel from Texas, who believed the things he read in the newspapers, thought that the Kaiser was really wanted by the world community and wondered how it was possible that he could have gone and sought refuge in this castle. So he gathered eleven of his men and two Ford cars and drove the 40 kilometers to see the Kaiser.

The Kaiser, by the way, was a short fellow, and when you wear the long gray coat of the German army at the time and you're at a distance, you appear even shorter. The lieutenant colonel was sort of flabbergasted to see that this was "the ogre of the world," as the Kaiser had been called at the time.

Being from Texas, the lieutenant colonel didn't quite know how to address him, so he said, "Are you Mr. Kaiser?" The Kaiser responded, "Yes." And to the lieutenant colonel's absolute discomfiture, he saw a brigadier wearing a British uniform come running out of the castle. The lieutenant colonel asked the brigadier, "What are you doing here?" and the brigadier responded, "I'm the liaison officer with the Kaiser here." So he discovered that the Kaiser was not only in the Netherlands by the grace of the Dutch government but also with the great understanding of the British government.

People should have read a little bit of genealogy. The Kaiser was the grandson of Queen Victoria, just as the Czar of Russia was the grandson of Queen Victoria. They were cousins! There was no way that the monarchy

in England was going to allow the grandson of Queen Victoria to be put on trial. Why, the next thing you would have is the Queen or King of England put on trial, and that would be totally unacceptable. And so as a result of that, the Kaiser found refuge in the Netherlands, and the Dutch, of course, took the blame for it, as they did in Srebrenica.

But the Dutch asked, “Well, what is the crime? If we want to extradite him, we need double criminality, and we really don't have a crime in the Netherlands called the supreme offense against the sanctity of treaties.” So the Kaiser stayed there. This beautiful provision remained in Article 227, and off we went.

In the meantime, the War Crimes Commission named over 20,000 persons to be prosecuted. When they first started in Sierra Leone, I think there were 70,000 or 80,000 people that could have been indicted. Certainly in Rwanda there were a large number of people that could have been indicted. How do you go about doing that? You suddenly realize that, well, you can't. That's why we have the formula about prosecuting the most significant or the highest-ranked perpetrators. Then you have to make that choice. But that choice is different when you have a “Category B,” like in Tokyo with the Yokohama trials. But if you don't have a Category B that you can prosecute elsewhere, it's not going to be very good to just have a small sliver of people. So you look at who you could possibly include and who you could exclude. Suddenly you realize again that you've got a very difficult task ahead of you.

I am going to summarize by saying this. It may be something very simple and very obvious, but what you see is not what's necessarily there, and for those of you who are doing research, historical or otherwise, you have to dig a little deeper. You have to understand the practicalities of things, and you have to make allowance for the political circumstances, the political environment.

I'll go back to 1992 when the Commission of Experts was established. This was a period of time in which there was a hiatus in international criminal justice with the Cold War that dated back from 1947. Was the international community ready to shift gears in 1992? I suspect not. Was the international community willing to make a choice between the pursuit of a political settlement, which is sometimes erroneously called the pursuit of peace—it's not peace; it's a political settlement—or justice, however relative it may be? You know, at the time, David Owen and then Cyrus Vance were negotiating and—again, forgive me for personalizing—but where did I stand? Where did the Commission stand in relationship to what they were doing? What was more important? Of course, politically their work was more important. So the Commission had to be kept in check, and there was somebody who made sure the Commission was kept in check. It wasn't going to be in an obvious way, it was in a bureaucratic way. They would say things like, “We don't have offices for you,” or “You've got to be in New York first, then you've got to go to Geneva.” Then there were two offices in Geneva, and they would say, “We don't have a staff,” and then, “We don't have a budget,” and so on and so forth.

So in a sense, *realpolitik* does not take the same form that it historically took of saying no to justice. It's a question of how justice is co-opted. Bureaucracies are instrumentalized, and other techniques and mechanisms are deployed in order to slow justice down or make it difficult to reach results that impair the *realpolitik* goals and objectives of the international community.

That situation, frankly, was very difficult. But we were ultimately able to produce a report of 3,500 pages, find the resources to publish it, attach 72,000 documents to it, over 300 hours of videotapes, 3,000 pictures. And we reached out—with a lot of difficulty—first to Ramon Escovar and then to Richard Goldstone to train his staff, give him the material, and get them started. I don't think that what Kathryn Sikkink has called “the justice cascade” would have really happened without our work. I don't mean to sound self-congratulating, that's not the purpose, but what I'm trying to say is that this sort of broke the barrier, and then the justice cascade followed.

The importance of the justice cascade is the power of the cascade effect. But my fear is that, with ICTY and ICTR and all of the mixed-model tribunals disappearing, the justice cascade has come to an end. We're left with the ICC, and it has a slim record. We can spend a lot of time blaming people for why the record is slim or discussing the difficulties, but that's not the point. The point is figuring out what we can do to shore up that record in the future.

Hans Corell was absolutely correct when he said that the adoption of complementarity was probably the

most important conceptual accomplishment of the General Assembly's Preparatory Committee for the ICC and then of the meetings in Rome. That is the most important concept for the future of international criminal justice. The future of international criminal justice may no longer be in the direction of international tribunals which are going to substitute for or replace national institutions. It's going to be for national institutions to assume their own responsibilities. It's going to be for national institutions to use their jurisdictional mechanisms to reach those people who have been caught in the impunity net. The international institutions will be there for the absolutely exceptional cases.

But the problem that we have is a problem of timing. As we get to the end of 2013 and the ad hoc tribunals close—I hate to use these term—but who now remembers the tribunal in East Timor or in Kosovo? They're gone, they're out of the memory. Tomorrow will we still remember Sierra Leone? And so, as these ad hoc and mixed-model tribunals disappear and we're left with the ICC with a limited number of cases, high-level personnel, extraordinarily expensive budget, failure to go into the field to investigate, responsiveness only to one region of the world and not to others, where does that leave us? Is there going to be a sense of disillusionment? How can those of us who are in the international criminal justice field make sure that we cushion the sense of disillusionment when it hits? How can we fill the void that will appear? And how can we hasten the process of complementarity by enhancing national legislation?

It certainly is not by touting that there are over 100 countries in the world that have passed laws against crimes against humanity, as the Coalition for the International Criminal Court or Amnesty International does. That is wrong. One does not manipulate data like that to create wrong impressions. The fact that a given government has acceded to the ICC Statute and passed some general legislation doesn't mean that they have amended their criminal code or their military code and so on and so forth.

There's a lot that needs to be done and the next year or two years are very important, very big. We need to be able to salvage, if you will, the moral standing of the ICC by not enhancing expectations upon it and by making sure that we get States Parties as well as non-States Parties to assume responsibility. And we need to make sure everyone understands that the international community is not going to fill a void. I have to tell you that this void is going to be reinforced by the difficult economic and financial situations throughout the world and by the dawning of a new era of globalization in which we are going to have different dynamics of international decision-making that may not take into account international criminal justice or human rights. When those who meet in Davos every year to decide on the fate of the world reinforce their links, their strength, and their ability to make an impact on the world, I can assure you that issues of human rights are not going to be on their agenda. It's going to be incumbent upon us to make sure that these issues are not going to be forgotten.

Thank you.

Commentary

Partners in the Search for Truth: The Truth Commission and the Special Court

William Schabas*

“We'd forgive most things if we knew the facts,” wrote Graham Greene in *The Heart of the Matter*, his novel about the lives of British administrators in Second World War-era Sierra Leone. Greene's words seem prophetic in light of the importance attached to the clarification and assessment of the facts of the civil war that was to ravage the country half a century later. The internal conflict ended in 1999 with a tendentious peace agreement, premised on an amnesty associated with the establishment of a truth and reconciliation commission (TRC). The commission was “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.”¹

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¹ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. xxvi (1), July 7, 1999, available at <http://www.refworld.org/docid/3ae6b5064.html>.

Preparations for the Sierra Leone Truth and Reconciliation Commission began in earnest,² and enabling legislation was adopted by the Sierra Leone Parliament, on February 22, 2000.³ But before the Truth and Reconciliation Commission was actually established, there was a breakdown in the peace process. There were initiatives to establish an international criminal tribunal broadly similar in conception to the ad hoc tribunals that had been created several years earlier by the U.N. Security Council to address impunity in the former Yugoslavia and Rwanda.⁴ Using language not all that different from the rationale for a truth and reconciliation commission found in the peace agreement, the Security Council proposed the establishment of “a credible system of justice and accountability for the very serious crimes committed that would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”⁵

From that point, two transitional justice institutions were on the agenda, but not because they had been

² Richard Bennett, *The Evolution of the Sierra Leone Truth and Reconciliation Commission*, in TRUTH AND RECONCILIATION IN SIERRA LEONE 37 (UNAMSIL, 2001).

³ Truth and Reconciliation Commission Act 2000, Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9.

⁴ DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 296-340 (2012).

⁵ S.C. Res. 1315, UN Doc. S/RES/2000/1315 (Aug. 14, 2000).

planned together as part of a holistic approach. In the absence of any guidance as to how the two bodies might work simultaneously, attempts were undertaken—even before either the Court or the Commission actually became operational—to anticipate the nature of the relationship and to create formulae in order to resolve difficulties that might arise. On October 2, 2000, subsequent to the Security Council resolution proposing the establishment of the Court but prior to the Secretary-General’s first draft of a statute, the United States Institute of Peace, the International Human Rights Law Group, and two experts, Priscilla Hayner and Paul van Zyl, held an expert round table on how the Truth Commission and the Court would relate to each other.⁶

The Secretary-General’s report of October 4, 2000, which first set out the draft statute and the reasoning behind it, said that “relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.”⁷ In November 2000, an international workshop organized by the Office of the High Commissioner for Human Rights and the U.N. Assistance Mission for Sierra Leone proposed

⁶ Bennett, *supra* note 2, at 43.

⁷ U.N. Secretary-General, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, ¶ 8, U.N. Doc. S/2000/915 (Oct. 4, 2000).

establishing a consultative process “to work out the relationship between the TRC and the Special Court.”⁸ In a letter to the U.N. Security Council, dated January 12, 2001, the U.N. Secretary-General said that “care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.”⁹ Subsequently, the Secretary-General reported that the Office of the High Commissioner for Human Rights and the U.N. Assistance Mission for Sierra Leone would be preparing “general guidelines” for the relationship between the TRC and the Special Court.¹⁰

In December 2001, the High Commissioner for Human Rights and the U.N. Office of Legal Affairs convened an expert meeting in New York City. The meeting was described as follows in the report of the High Commissioner:

⁸ U.N. ESCOR, Situation of human rights in Sierra Leone, ¶ 41, U.N. Doc. E/CN.4/2001/35 (Feb. 1, 2001).

⁹ Letter from the Secretary-General to the President of the Security Council, ¶ 9, U.N. Doc. S/2001/40 (Jan. 12, 2001).

¹⁰ U.N. Secretary General, Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, ¶ 47, S/2001/857 (Sept. 7, 2001).

The expert meeting on the relationship between the TRC and the Special Court was organised by OHCHR and the Office for Legal Affairs (OLA) of the United Nations in New York on 20 and 21 December 2001. The participants discussed the important issue of an amicable relationship between the two institutions that would reflect their roles, and the difficult issue of whether information could and should be shared between them. The pros and cons of a wide range of possibilities regarding cooperation between the Commission and the Court were examined. Based on those discussions, the participants agreed on a number of basic principles that should guide the TRC and the Special Court in determining modalities of cooperation. These principles include the following:

- i. The TRC and the Special Court were established at different times, under different legal bases and with different mandates. Yet they perform complementary roles in ensuring accountability, deterrence, a story-telling mechanism for both victims and perpetrators, national reconciliation, reparation and restorative justice for the people of Sierra Leone.
- ii. While the Special Court has primacy over the national courts of Sierra Leone, the TRC does not fall within this mould. In

any event, the relationship between the two bodies should not be discussed on the basis of primacy or lack of it. The ultimate operational goal of the TRC and the Court should be guided by the request of the Security Council and the Secretary-General to “operate in a complementary and mutually supportive manner fully respectful of their distinct but related functions” (S/2001/40, paragraph 9; see also S/2000/1234).

- iii. The modalities of cooperation should be institutionalised in an agreement between the TRC and the Special Court and, where appropriate, also in their respective rules of procedure. They should respect fully the independence of the two institutions and their respective mandates.¹¹

In addition to the U.N.-sponsored meetings, some international NGOs developed rather elaborate proposals on the type of provisions that might be governed by a relationship agreement. Although the possibility of joint or common efforts at witness protection, translation, and public awareness was considered, most of the reflection on how the two bodies might cooperate tended to dwell on what was called “information sharing,” something the

¹¹Report of the High Commissioner for Human Rights pursuant to Commission on Human Rights Resolution 2001/20, ¶ 70, U.N. Doc. E/CN.4/2002/37 (Feb. 18, 2002).

December expert meeting had agreed was a “difficult issue.”

There was major concern about whether perpetrators would be willing to testify before the Commission if they feared prosecution by the Court. A 2001 report by the Secretary-General indicated that the Revolutionary United Front was “receptive” to the Truth Commission, but that it expressed “concern over the independence of the Commission and the relationship between it and the Special Court.”¹² Some, including NGOs associated with former combatants and participants in the abuses, manifested their willingness to cooperate with the Truth Commission but only on the condition that this material not be used for criminal prosecution. According to Human Rights Watch, doubts about the ability of the Truth Commission to obtain information in confidence “could potentially undermine the willingness of persons to come before the TRC to provide testimony.”¹³ The International Center for Transitional Justice referred to a statement by a local NGO that worked closely with ex-combatants:

¹² U.N. Secretary General, Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone, ¶ 44, S/2001/857 (Sept. 7, 2001).

¹³ HUMAN RIGHTS WATCH, THE INTERRELATIONSHIP BETWEEN THE SIERRA LEONE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION 2 (April 18, 2002).

We have witnessed the negative reaction of ex-combatants about information sharing... Many out-rightly have reversed their initial consent to face the TRC upon hearing about this possibility [of the TRC being compelled to give evidence to the Special Court]. To them, there seems to be evidence that the TRC will be an investigative arm of the Special Court and that whatever is being said at the TRC will be used to prosecute them or point the Prosecutor towards them as potential witnesses against their commanders... From our daily interactions, we know that many are willing to participate with the TRC so long as they can be guaranteed that this will not send them to the Special Court as a defendant or a witness against their commanders.¹⁴

The two institutions became operational in mid-2002. Neither seemed to feel any imperative to develop norms regulating the relationship, which was generally cordial and constructive. The “information sharing” that had preoccupied the earlier discussions did not materialize. Those who had expected that Court investigators would be anxious to mine the files of the Commission must have been surprised when the Prosecutor, David Crane, indicated he had no interest in

¹⁴ Letter from PRIDE to ICTJ, *cited in* EXPLORING THE RELATIONSHIP BETWEEN THE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE 8 (June 24, 2002).

such materials. As the Commission's fact-finding work progressed, it became increasingly evident that perpetrators willing to testify had little concern about possible exposure to prosecution by the Court. Prosecution would be limited to those who bore "the greatest responsibility," and it never seemed likely that the number of persons indicted would surpass more than about a dozen. Most perpetrators of atrocities seemed to understand that they did not belong in such an elite category of offenders.

Much credit for the serenity of the relationship should be given to Prosecutor David Crane, who often went out of his way to reassure the Commission of the value he attached to its contribution. The early discussions about the relationship between the Commission and the Court had speculated on the possibility that perpetrators might face prosecution based on testimony given to the Commission. But the Commission never took testimony from any of those accused by the Court.

Nor were there issues with witnesses before the Court being cross-examined on the basis of inconsistency with prior testimony before the Commission. In the *Taylor* trial, a witness was challenged about inconsistencies with respect to a statement that had been prepared for the Truth and Reconciliation Commission, but the witness indicated the statement was in draft form and the Trial Chamber

was unable to conclude that it had actually been submitted to the Commission.¹⁵

Finally, it had been expected that defense counsel would attempt to adduce evidence held by the Commission on a confidential basis. There is a confidential ruling on an application by Sam Hinga Norman for a binding order of subpoena duces tecum to the Truth Commission for its “unexpurgated underlying documents.”¹⁶ The motion was denied.¹⁷ At the time, the Commission had finished its work and had no legal existence, and there was nobody upon whom a subpoena could be served even had it been authorized by the Trial Chamber.

There were only two real incidents of tension between the Commission and the Court. Neither of these was particularly serious or profound, and lessons were generated that might help to avoid similar difficulties when truth commissions and international courts work in parallel in the future.

¹⁵ Prosecutor v. Taylor, Case No. SCSL-03-1-T, Judgment, ¶ 222 (May 18, 2012).

¹⁶ Prosecutor v. Norman, Case No. SCSL-04-14-AR72(E), Confidential Decision on Confidential Motion (July 25, 2005).

¹⁷ Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, Annex F, ¶ 19, (Aug. 2, 2007)

The first problem that arose concerned one of the accused, Sam Hinga Norman, who approached the Truth and Reconciliation Commission in mid-2003 with a request to testify in a public hearing. As he was being detained by the Special Court, arrangements had to be made if such testimony were to be delivered. The procedure was debated first before Judge Bankole Thompson,¹⁸ sitting as a member of the Trial Chamber, and then Judge Geoffrey Robertson, the President of the Special Court at the time.¹⁹ Judge Robertson explained that “[t]he spirit of co-operation envisaged by the Secretary General had in fact resolved all problems without the need for any formal agreements, until this particular issue concerning whether indictees should give public testimony to the TRC arose.”²⁰ He reversed the decision by Judge Bankole Thompson and authorized the testimony but in a closed session. Judge Robertson’s solution was a reasonable answer to a difficult problem. Norman then refused to cooperate with the Truth and Reconciliation Commission. Similar proceedings took

¹⁸ Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on the Request by the Truth and Reconciliation Commission to Conduct a Public Hearing with Samuel Hinga Norman (Oct. 29, 2003).

¹⁹ Prosecutor v. Norman, SCSL-2003-08-PT, Decision on Appeal by the TRC and Chief Samuel Hinga Norman JP Against the Decision of His Lordship Mr Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC’s Request to Hold a Hearing with Chief Samuel Hinga Norman JP (Nov. 28, 2003).

²⁰ *Id.* at ¶ 6.

place with respect to another defendant, Augustine Gbao.²¹

The second difficulty concerned an investigator who had initially been employed by the Commission but who later went to work for the Special Court, where the working conditions were better. There was concern within the Commission that confidential information might thereby leak out to the Court. The problem could have been addressed with a restrictive covenant in the employment contract by which the investigator would have renounced the possibility of working for the Court for a reasonable period of time after leaving the Commission. Future commissions might remember this when they draft employment contracts.

In his ruling on the Norman application to testify before the Truth and Reconciliation Commission, Judge Robertson noted that judicial notice of the Commission's final report might be taken by the Court, "and it might provide considerable assistance to the Court and to all parties as an authoritative account of the background to

²¹ Prosecutor v. Gbao, Case No. SCSL-03-08-PT, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Augustine Gbao (Nov. 3, 2003); Prosecutor v. Gbao, Case No. SCSL-03-08-PT, Decision on Appeal by the TRC and Accused Against the Decision of Hon. Judge Bankole Thompson Delivered on November 2003 to Deny the TRC's Request to Hold a Public Meeting with Augustine Gbao (May 7, 2004).

the war.”²² In reality, the decisions of the Court rarely drew upon the findings or conclusions of the Truth and Reconciliation Commission. None of the Appeals Chamber decisions of the Court has referred to the Truth and Reconciliation Commission. The only Trial Chamber decision that made significant reference to the Report of the Truth and Reconciliation Commission was in the case of Charles Taylor. Portions of the report were formally admitted into the record of the proceedings.²³ There are several footnote references to the report as an authority for general factual observations about the conflict.²⁴ Many of the citations were to the statement delivered by President Kabbah at the final hearing of the Commission, which was submitted by the defense as a distinct exhibit.²⁵ The Chamber referred generally to Volumes II and III of the Report of the Commission which had been submitted by both the Prosecutor and the defense as exhibits.²⁶ At one point, the Trial Chamber

²² *Id.* at ¶ 7.

²³ Prosecutor v. Taylor, Case No. SCSL-03-1-T, Decision on Prosecution Motion for Admission of Extracts of the Report of the Truth and Reconciliation Commission of Sierra Leone (Feb. 19, 2009).

²⁴ Prosecutor v. Taylor, Case No. SCSL-03-1-T, Judgment, ¶¶ 18 n. 58, 27 n. 97, 30 n. 107-108, 201 n. 471, 516 n. 1210, 518 n. 1215, 529 n. 1251, 2387 n. 5183, 5184, 2750 n. 6783, 4367 n. 9767 (May 18, 2012).

²⁵ *Id.* at ¶ 4359 (Exhibit D-026).

²⁶ *Id.* at ¶ 2439 (Exhibit P-497); ¶ 2440 (Exhibit P-498); ¶ 2741 Exhibit D-030).

referred to the Commission Report as authority with respect to testimony of a confidential witness.²⁷ At another, the Trial Chamber invoked the report as corroboration of testimony heard in Court.²⁸ None of the references was particularly important or at all decisive. They present themselves as obscure citations buried among some 15,000 footnotes in a decision of unprecedented length.

The Commission devoted a large chapter in Volume IIIB of its report to the Special Court, the bulk of it consisting of a lengthy review of the debate about the Norman testimony and the proceedings before Judge Robertson.²⁹ This extensive treatment in the report is quite disproportionate and seems to reflect a personal obsession of one of the authors rather than a balanced assessment of the importance of the matter. In its final report, the Commission made a number of recommendations premised on the possible parallel operation of similar bodies in the future.³⁰ These proposals for future conduct were highly speculative given that serious consideration of such matters had not really figured in the work of the Commission. Moreover,

²⁷ *Id.* at ¶ 1600 n. 3682.

²⁸ *Id.* at ¶ 525.

²⁹ WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION Vol. IIIB, 362-430.

³⁰ WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, Vol. II, 474-476.

the initial assumption that future designers of transitional justice mechanisms would have the option to choose between parallel or consecutive operation of truth commissions and international courts is flawed. With the growing number of ratifications of the Rome Statute, there can really be no discussion about whether international criminal justice institutions will be involved. The only really interesting issue is how future truth and reconciliation commissions may work alongside the International Criminal Court.

The main lesson from Sierra Leone is of the fundamental compatibility of the two types of bodies. If those engaged in the process seek to quarrel, there will be no shortage of opportunity. However, if they are committed to the importance and validity of a variety of institutional mechanisms and processes, including international courts and truth commissions, the experience in Sierra Leone suggests that this can be a very viable exercise. Nor, would it seem, is any special agreement or arrangement necessary, because the two bodies are unlikely to have major conflicts. Sensible people will resolve the inevitable minor difficulties, as they did in Sierra Leone.

Recent Developments in International Criminal Law: 2011-2012

Valerie Oosterveld*

I have been asked to provide you with a review of developments in international criminal law from August 2011 to August 2012. I will do this by framing my comments through two questions: first, what made it into the media headlines in 2011–2012? Second, what did not make it into the headlines but is important nonetheless?

Special Court for Sierra Leone

This year's session of the International Humanitarian Law Dialogs is focused on the Special Court for Sierra Leone (SCSL), so I begin with this Tribunal. The oral judgment in the SCSL's case of *Prosecutor v. Charles Taylor* was handed down by Trial Chamber II on April 26, 2012.¹ The written judgment

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¹ *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment Summary (Special Court for Sierra Leone, Trial Chamber II, April 26, 2012).

was released on May 18, 2012 and was 2,532 pages in length, perhaps the longest international criminal judgment issued to date.² Taylor faced an 11-count indictment for crimes against humanity and war crimes.³ These charges included the crimes against humanity of murder, rape, sexual slavery, enslavement, and other inhumane acts, and the war crimes of committing acts of terror, murder, outrages upon personal dignity, cruel treatment, pillage and conscripting or enlisting children under the age of 15 years into armed forces or groups, and using them to participate actively in hostilities.⁴ In a unanimous judgment, Trial Chamber II convicted Taylor on all counts of aiding and abetting the Revolutionary United Front (RUF) and Armed Forces Revolutionary Council (AFRC) rebel groups and/or Liberian fighters operating in Sierra Leone.⁵

Taylor was also convicted of planning certain crimes.⁶ Specifically, Taylor was found to have provided

² Prosecutor v. Charles Taylor, Case No. SCSL-03-01-T, Judgment (Special Court for Sierra Leone, Trial Chamber II, May 18, 2012) [*Taylor* Trial Judgment].

³ Prosecutor v. Charles Taylor, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment (Special Court for Sierra Leone, May 29, 2007).

⁴ *Id.* at counts 1-11.

⁵ *Taylor* Trial Judgment, *supra* note 2, ¶ 7000(i).

⁶ *Id.* at ¶ 7000(ii).

assistance to the RUF, the AFRC, or the joint RUF-AFRC junta in a number of ways. First, he was found to have provided arms and ammunition, either directly or through intermediaries. For example, he facilitated two large shipments of arms used by the RUF in its military operations, including Operation Pay Yourself and the Freetown invasion. These weapons and ammunition had a substantial effect on the crimes committed by the RUF and RUF-AFRC during the indictment period.⁷ Second, he was found to have provided military personnel who helped commit crimes in various operations.⁸ Third, he was found to have provided operational support, such as phones and radio contact, and financial support—for example, funds to RUF leader Sam Bockarie (former Battlefield commander of the RUF) to purchase arms.⁹ He also provided a guesthouse in Monrovia, the capital of Liberia, for the RUF, which facilitated their procurement of arms and ammunition.¹⁰ Fourth, he was found to have provided security escorts, free passage through checkpoints, medical support, safe haven for RUF fighters, food, clothes, cigarettes, and alcohol for the RUF.¹¹ Finally, the Trial Chamber found that he had provided moral support through ongoing advice and

⁷ *Id.* at ¶¶ 6917-6921.

⁸ *Id.* at ¶¶ 6924-6930.

⁹ *Id.* at ¶¶ 6933-6943.

¹⁰ *Id.* at ¶ 6939.

¹¹ *Id.* at ¶ 6940-6941.

encouragement on tactics to senior members of the RUF.¹²

Taylor was also found guilty of working with Sam Bockarie to select strategic areas within Sierra Leone to attack and control, namely the diamond areas and Freetown.¹³ The Trial Chamber referred to this as the Bockarie-Taylor two-pronged attack.¹⁴ Taylor was found to have told Bockarie to make the attacks “fearful,” and Bockarie repeated this request, again and again, as he conveyed his orders for the attacks.¹⁵ Taylor was also found to have told Bockarie to “use all means” to get to Freetown.¹⁶ The Court found that these directives contributed to the brutal nature of the atrocities committed in the invasion of Freetown.¹⁷ The Trial Chamber found that Taylor was kept aware of the evolution of the Bockarie-Taylor plan and the resulting RUF-AFRC crimes committed against civilians.¹⁸

¹² *Id.* at ¶¶ 6946-6952.

¹³ *Id.* at ¶¶ 6964-6975.

¹⁴ *Id.* at ¶¶ 6964, 6970.

¹⁵ *Id.* at ¶¶ 6964-6965, 6975.

¹⁶ *Id.* at ¶¶ 6964, 6975.

¹⁷ *Id.* at ¶¶ 6973-6975.

¹⁸ *Id.* at ¶ 6975.

The Trial Chamber also held that the Prosecutor failed to prove beyond a reasonable doubt that Taylor had superior responsibility for the RUF, AFRC, joint RUF-AFRC junta, and/or Liberian fighters, or that he had participated in a joint criminal enterprise (JCE) with these groups.¹⁹ The Trial Chamber additionally held that the Prosecutor did not prove beyond a reasonable doubt that Taylor had ordered RUF or AFRC crimes in Sierra Leone.²⁰ The Court concluded that the RUF's leaders—Foday Sankoh, Sam Bockarie, and Issa Sesay—did not take orders from Taylor, though Taylor did provide them with guidance.²¹

While the “not guilty” finding on certain modes of liability was surely a disappointment to the Prosecutor, the verdict was also clearly a disappointment for the defense, who had argued that Taylor was not involved with the conflict except as an elder statesman trying to bring peace to Sierra Leone.²² The Trial Chamber found that Taylor was hypocritical—claiming to advance peace in Sierra Leone while supporting war.²³

¹⁹ *Id.* at ¶¶ 6897-6906, 6983-6992.

²⁰ *Id.* at ¶ 6979.

²¹ *Id.*

²² *Id.* at ¶ 17(iv).

²³ Prosecutor v. Charles Taylor, Case No. SCSL-03-01-T, Sentencing Judgment (Special Court for Sierra Leone, Trial Chamber II, May 30, 2012), ¶¶ 96-97 [*Taylor Sentencing Judgment*].

The exchange of diamonds was an important part of the Trial Chamber’s discussion: Taylor was found to have accepted diamonds from the RUF—so-called “blood diamonds”—and, in exchange, to have supplied the RUF with weapons and ammunition.²⁴ Taylor was also found to have accepted diamonds from the RUF to hold for “safekeeping.”²⁵

One unusual and very curious event occurred at the end of the oral reading of the trial judgment. After the judgment had been read, but a moment before the microphone had been turned off, the alternate judge, Judge Sow, began to make a statement. Judge Sow had been appointed as an alternate, which means that he was not one of the judges empowered to make a binding decision.²⁶ He was there in the event that one of the other judges could not carry on (became ill or otherwise had to leave the bench of the trial). If that happened, Judge Sow would be able to step in and serve as the third required judge without an interruption in the trial. It may seem like a luxury to have a fourth judge sit through the entire trial but, in fact, if the worst-case scenario did occur, it would save the need for a retrial for such a long, complex, and high-level case.

²⁴ *Taylor* Trial Judgment, *supra* note 2, ¶¶ 5877, 5951, 5993, 6060-6061.

²⁵ *Id.* at ¶ 6060.

²⁶ Special Court for Sierra Leone Rules of Procedure and Evidence, Rule 16 *bis* (adopted May 14, 2007).

Just as the regular judges were leaving the courtroom, Judge Sow made an unexpected statement, the beginning of which was caught on the microphone, and the end of which was caught by the Court's stenographer. One of the legal assistants from the *Taylor* defense team copied and distributed the text, which was struck from the official transcript.²⁷ Judge Sow said:

The only moment where a Judge can express his opinion is during the deliberations or in the courtroom, and pursuant to the rules, when there is no deliberations, the only place for me in the courtroom. I won't get—because I think we have been sitting for too long but for me I have my dissenting opinion and I disagree with the findings and conclusions of the other Judges, standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the Prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with the values of international criminal justice, and I'm afraid the whole system is under grave danger of just

²⁷ The striking of Judge Sow's statement from the official transcript forms part of Taylor's appeal: Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-A, Public with Confidential Annex A and Public Annexes B and C, Appellant's Submissions of Charles Ghankay Taylor (Special Court for Sierra Leone, October 1, 2012), ¶¶ 690-707 [*Taylor* Appeal brief].

losing all credibility, and I'm afraid this whole thing is heading for failure.²⁸

It was a rather dramatic and unexpected conclusion, but it is not clear what Judge Sow meant by this.²⁹

On May 30, Taylor was sentenced to a term of 50 years of imprisonment.³⁰ This was longer than many commentators expected, but shorter than the term of 80 years requested by the Prosecutor. Taylor is appealing both the trial judgment and his sentence. The Prosecutor

²⁸ This statement is reproduced in *id.* at Public Annex C. Taylor's defense counsel brought an unsuccessful motion for partial voluntary withdrawal or disqualification of Appeals Chambers judges because these judges had participated in the judicial plenary suspending Judge Sow as a result of his behaviour at the close of the oral judgement in the *Taylor* case: Prosecutor v. Charles Taylor, Case No. SCSL-03-01-A, Decision on Charles Ghankay Taylor's Motion for Partial Voluntary Withdrawal or Disqualification for Appeals Chambers Judges (Special Court for Sierra Leone, Appeals Chamber, September 13, 2012).

²⁹ This has led to discussion. See e.g., Jennifer Easterday, "Judge Sow's Struck Statement & Reflections on the *Taylor* Judgment & the SCSL's Legacies", IntLawGrrls blog (April 28, 2012), online: <http://www.intlawgrrls.com/2012/04/judge-sows-struck-statement-reflections.html>; and William Schabas, "More Mystery About the *Charles Taylor* Judgment (and its Appeal)", PhD Studies in Human Rights blog (September 14, 2012), online: <http://humanrightsdoctorate.blogspot.ca/2012/09/more-mystery-about-charles-taylor.html>.

³⁰ *Taylor* Sentencing Judgment, *supra* note 23, 40.

is also appealing. Taylor's Notice of Appeal listed 45 grounds of appeal, and the Prosecutor's Notice listed four grounds of appeal.³¹ These grounds for appeal include appeals based on Justice Sow's statement, and the defense is claiming irregularities in deliberations, with Justice Sow's statement as evidence.³²

How was this judgment received in the international community? Many individuals and governments—including the U.N. Secretary-General—hailed it as an illustration that no one is above the law, not even the most powerful individuals in a given society.³³ And, I think, this is an important message that should not be underestimated, one that provides hope and also points to the potential that individuals such as Omar Al-Bashir, President of Sudan—against whom a warrant of arrest has been issued by the ICC for crimes in Darfur—will, eventually, be brought to justice. But how was Taylor's conviction received in Sierra Leone and Liberia? Largely, it was also hailed.³⁴ Predictably, Taylor's

³¹ *Taylor Appeal brief, supra note 27*; and *Prosecutor v. Charles Taylor, Case No. SCSL-01-01-A, Public Prosecution Appellant's Submissions With Confidential Sections D & E of the Book of Authorities (Special Court for Sierra Leone, October 1, 2012)*.

³² *Taylor Appeal brief, supra note 27*, ¶¶ 690-707.

³³ UN News Centre, "UN Officials Welcome Court's Guilty Verdict in Charles Taylor Trial" (April 26, 2012), online: <http://www.un.org/apps/news/printnewsAr.asp?nid=41864>.

³⁴ *See, e.g., IRIN Humanitarian News and Analysis, "Sierra Leone: "Now we can move on" (April 26, 2012), online:*

supporters in Liberia said that it was unfair that he was singled out or that the judgment was an example of a neo-colonialist imposition of Western law on Liberia.³⁵ However, victims and victims groups have a different view. As Abioseh, a former “bush wife” told IRIN News, “Taylor got what he was due—now we have seen justice and can move on.”³⁶

The *Taylor* judgment deservedly received the attention of the media. However, the SCSL has been very busy in other ways, many of which were not discussed in the media. The Court has been busy addressing a number of cases related to witness tampering or other interference with the work of the Court. On June 22, 2012, Justice Teresa Doherty convicted a former member of the Revolutionary United Front, Eric Koi Senessie, on eight out of nine counts of witness tampering.³⁷ Senessie was convicted on four counts of offering a bribe to a witness and on four counts of attempting to influence a witness to recant testimony

<http://www.irinnews.org/printreport.aspx?reportid=95368> [IRIN, “Now we can move on”].

³⁵ See, e.g., Mark Doyle and Jonathan Paye-Layley, “Taylor Verdict: Liberians and Sierra Leoneans React” (BBC World News, April 26, 2012), online: <http://www.bbc.co.uk/news/world-17859012?print=true/>.

³⁶ IRIN, “Now we can move on”, *supra* note 24.

³⁷ Prosecutor v. Eric Senessie, Case No. SCSL-2011-01-T, Judgment in Contempt Proceedings (Special Court for Sierra Leone, Trial Chamber II, June 21, 2012) 28-30.

given in the *Taylor* trial.³⁸ He was sentenced on July 5, receiving a two-year term of imprisonment.³⁹ Under the Rules of the Special Court, Senessie faced a maximum sentence of seven-years imprisonment, a fine of two million leones, or both.⁴⁰ Senessie will serve his sentence at a detention facility on the Special Court premises in Freetown.⁴¹

The Court has also been busy downsizing as it implements its completion strategy. After the close of appeals in the *Taylor* case, the Court will officially close.⁴² Then, its remaining duties and responsibilities will be turned over to a residual mechanism; the Court cannot simply close its doors and walk away. First, there are victims and witnesses who must continue to be protected. Many are at risk of retaliation for testifying

³⁸ *Id.*

³⁹ Special Court for Sierra Leone Outreach and Public Affairs office, "Press Release: "Eric Koi Senessie Sentenced to Two Years in Prison for Contempt of the Special Court" (July 5, 2012), online: <http://www.sc-sl.org/LinkClick.aspx?fileticket=UQPelGgBKww%3d&tabid=232>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Special Court for Sierra Leone, "Ninth Annual Report of the President of the Special Court for Sierra Leone: June 2011-May 2012" (Freetown, Special Court for Sierra Leone, 2012) 38-39, online: <http://www.scsf.org/LinkClick.aspx?fileticket=ZEDnSBp6ahc%3d&tabid=176>.

before the Court, and this risk might last for decades. Therefore, it is crucial that they have a place to turn should they face any threats or danger. Second, the Court has a large number of materials—documents, physical evidence, tapes of proceedings, videos of proceedings, outreach materials, etc. It is very important that they remain available to Sierra Leoneans and to the international community, balanced against the need to keep some materials confidential, for example, to continue to protect victims and witnesses. Thus, the Residual Special Court for Sierra Leone will manage these archives.⁴³ The Court has been fundraising for the Residual Special Court, which will be voluntarily funded (as is the SCSL itself).⁴⁴ I am very concerned about this: if the Court had severe difficulties fundraising for the actual trials—including the most high profile *Taylor* trial—how will it be able to fundraise for the long term for the Residual Mechanism, which will carry out very necessary, but, from a funder’s point of view, quite boring duties?

International Criminal Court

This year marks the tenth anniversary of the creation of the International Criminal Court (ICC). The ICC was created as a permanent court to address the most serious international crimes: genocide, crimes against humanity,

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 39.

and war crimes, and perhaps, in the future, aggression.⁴⁵ It is prospective in that the crimes it considers must have taken place after July 1, 2002.⁴⁶ At present, the Court is active in eight situations (in Central African Republic, Cote d'Ivoire, Darfur (Sudan), the Democratic Republic of the Congo, Kenya, Libya, Mali, Northern Uganda) and is considering 16 cases (some of these cases have multiple accused). There was much media coverage of four very important events over the past year.

In the first judgment issued by the ICC, on March 14, 2012, Thomas Lubanga was convicted of the war crimes of conscripting, enlisting, and using children under the age of 15 to participate actively in hostilities from September 1, 2002, to August 13, 2003.⁴⁷ Lubanga, the first person to stand trial before the ICC, is the founder and former President of the *Union des Patriotes Congolais* (UPC), and former Commander-in-Chief of the *Forces Patriotiques pour la Libération du Congo* (FPLC), a militia group operating in the Ituri region of the eastern Democratic Republic of the Congo (DRC).⁴⁸

⁴⁵ Rome Statute of the International Criminal Court arts. 5-8, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002, available at <http://untreaty.un.org/cod/icc/statute/rome.htm>).

⁴⁶ See *id.* at art. 11.

⁴⁷ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (International Criminal Court, Trial Chamber I, March 14, 2012) ¶ 1358 [*Lubanga* Trial Judgment].

⁴⁸ *Id.* at ¶¶ 22, 28.

On July 10, 2012, Trial Chamber I sentenced Lubanga to 14 years of imprisonment, which, after accounting for time served, will amount to eight more years of imprisonment from the date of sentencing.⁴⁹ This was significantly less than the prosecution's request of 30 years, but the Court indicated it was based on the gravity and nature of his crimes, harm done to victims and their families, the circumstances of the conflict, Lubanga's personal circumstances, and his position of authority.⁵⁰

The *Lubanga* case is notable for its subject matter—child soldiers. As the evidence emerged in the case, it highlighted the vulnerability of children in conflict who are forced to serve as soldiers or in other support roles for armed groups, for example in battle, as bodyguards for senior officials like Lubanga, or to perform domestic work for soldiers. The case also demonstrated that those who are responsible for recruiting and using children in war can be held accountable. Many former child soldiers, male and female, were also active participants in the trial, with many providing testimony. The testimony demonstrated that boy and girl soldiers were

⁴⁹ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (International Criminal Court, Trial Chamber I, July 10, 2012) ¶ 107 [*Lubanga Sentencing Decision*]. Lubanga had already spent six years in detention in The Hague: Coalition for the International Criminal Court, 'Lubanga Case', available online at <http://www.coalitionfortheicc.org/?mod=drc> (last accessed June 10, 2013).

⁵⁰ *Lubanga Sentencing Decision*, *supra* note 49 at ¶¶ 97.

subjected to brutal treatment, with girl soldiers also subjected to sexual violence, including rape. On this, the evidence showed that rape was pervasive: girls were raped as they were being recruited as child soldiers; during their training, recruits were encouraged to rape; and child soldiers were taught to abduct and bring girls and women to UPC camps to be raped.⁵¹ Girl soldiers were very vulnerable, often experiencing rape as a daily part of their lives in the UPC.⁵² Girls who became pregnant were sent away from the UPC camp, and unfortunately were often shunned by their communities.⁵³ As Lubanga was not charged with sexual violence crimes, this evidence was used solely for the purpose of illustrating the context of Lubanga's acts.⁵⁴

The prosecution's use of intermediaries proved problematic in this case. Intermediaries are third parties, usually on the ground, who are not from the Court. They play an important role in locating and communicating with victims and witnesses and linking them with the

⁵¹ For a summary of the evidence in this respect, see Women's Initiatives for Gender Justice, Legal Eye on the ICC eLetter, 'DRC: Trial Chamber I Issues First Trial Judgment of the ICC – Analysis of Sexual Violence in the Judgment' (Special Issue #1 – May 2012), online: <http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Lubanga* Trial Judgment, *supra* note 47 at ¶ 896.

ICC's Office of the Prosecutor to gain the evidence needed for a trial. Intermediaries are very important in the Court's work, but the Trial Chamber found that the prosecution's undue reliance on three of its principal intermediaries, without appropriate supervision, created the significant possibility that they improperly influenced witnesses to falsify their testimony, rendering most of it unreliable.⁵⁵ The Chambers did not direct the Prosecutor to stop working with intermediaries; instead it indicated that the prosecution could not delegate its investigative work to intermediaries.⁵⁶ The Court has responded to these concerns—draft Court guidelines on the use and oversight of intermediaries were completed in 2011.⁵⁷ These Draft Guidelines are to be considered by the ICC Assembly of States Parties meeting in November 2012.

There has largely been a positive response to the Court's judgment in *Lubanga*. For example, Human Rights Watch called the decision "a victory for the thousands of children forced to fight in Congo's brutal

⁵⁵ *Id.* at ¶¶. 178-477.

⁵⁶ *Id.*

⁵⁷ Draft Guidelines Governing the Relationship between the Court and Intermediaries, as cited in Open Society Justice Initiative, "Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties" (December 2011), online: <http://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties>.

wars.”⁵⁸ There have been, however, mixed reviews of the 14-year judgment. Some victims felt the sentence was too lenient, while others expressed their appreciation for the verdict but also demanded that Bosco Ntaganda be similarly held to account.⁵⁹

Since the *Lubanga* judgment is the first issued by the ICC, it is also the first to consider the issue of reparations. This was not highlighted in the international media, but on August 7, 2012, Trial Chamber I of the International Criminal Court issued guidance on addressing reparations for victims of Lubanga’s crimes.⁶⁰ In their lengthy decision, the judges stressed the importance of reparations in international criminal law. Reparations go “beyond the notion of punitive

⁵⁸ Human Rights Watch, “ICC: Landmark Verdict a Warning to Rights Abusers” (March 14, 2012), online: <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers>.

⁵⁹ See e.g., IRIN Humanitarian News and Analysis, “DRC: Lubanga Verdict “a First Step” (March 14, 2012), online: <http://www.irinnews.org/printreport.aspx?reportid=95073>; IRIN Humanitarian News and Analysis, “Global: New ICC Prosecutor Vows to Focus on Victims” (July 30, 2012), <http://www.irinnews.org/report/95982/global-new-icc-prosecutor-vows-to-focus-on-victims>. Bosco Ntaganda was Lubanga’s chief of military operations – his case is discussed *infra*.

⁶⁰ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations (International Criminal Court, Trial Chamber I, August 7, 2012).

justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.”⁶¹ Reparations are specifically mentioned in Article 75 of the Rome Statute, the founding document of the ICC, which lists restitution, compensation, and rehabilitation as forms of reparations. The judges also noted that reparations with symbolic, preventative, or transformative value may be appropriate.⁶² They stressed that reparations should be applied in a “broad and flexible manner” and laid out principles to be applied in the *Lubanga* case.⁶³ One such principle is that victims are to be treated fairly and equally, irrespective of whether they participated in the trial proceedings.⁶⁴ However, priority may be given to certain victims who are in a vulnerable situation, such as victims of sexual violence, individuals who need immediate medical care, and traumatized children.⁶⁵

Rule 97(1) of the Rules of Procedure and Evidence states, “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both,” and the judges determined

⁶¹ *Id.* at ¶ 177.

⁶² *Id.* at ¶ 222.

⁶³ *Id.* at ¶ 180.

⁶⁴ *Id.* at ¶ 187.

⁶⁵ *Id.* at ¶ 200.

that the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.⁶⁶ It was held that individual and collective reparations are not mutually exclusive and may be awarded concurrently.⁶⁷ Lubanga has been declared indigent by the Court and cannot contribute monetarily towards a reparations program. However, he can, on his own volition, participate in symbolic reparations, such as issuing a public apology—but the Court will not order such symbolic acts.⁶⁸ As well, since Lubanga does not have any assets, the ICC’s Trust Fund for Victims can use its own assets to award reparations.⁶⁹

Going forward, the judges stated the reparations for Lubanga’s victims will be primarily handled by the ICC’s Trust Fund for Victims and overseen by a different trial chamber of the ICC.⁷⁰ The judges endorsed a five-step implementation plan: the Trust Fund for Victims, the Registry of the ICC, the ICC’s Office of Public Counsel for Victims, and an appointed team of experts will first decide the localities to be

⁶⁶ *Id.* at ¶ 219.

⁶⁷ *Id.* at ¶ 220.

⁶⁸ *Id.* at ¶ 269.

⁶⁹ *Id.* at ¶¶ 270-271.

⁷⁰ *Id.*

involved with the reparations process specific to the *Lubanga* case.⁷¹ Second, consultations will be held in each relevant location.⁷² Third, the team of experts will carry out an assessment of harm during the consultations.⁷³ Fourth, reparations procedures and principles will be explained to communities through a series of public debates.⁷⁴ Finally, proposals from each location will then be collected and presented to the Trial Chamber overseeing reparations.⁷⁵

The second major story in the international media on the ICC relates to Libya. On February 26, 2011, the U.N. Security Council referred the situation in Libya to the ICC.⁷⁶ An investigation was initiated on March 3, 2011.⁷⁷ Arrest warrants were issued on June 27, 2011 for

⁷¹ *Id.* at ¶¶ 281-282.

⁷² *Id.* at ¶ 282.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ UNSC Res. 1970 (2011) (February 26, 2011), ¶ 4.

⁷⁷ International Criminal Court, Statement of the Prosecutor, “ICC Prosecutor to Open an Investigation in Libya” (March 2, 2012), online: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/statement%20020311.aspx.

Muammar Gaddafi, Saif Al-Islam Gaddafi (his son), and Abdullah Al-Senussi (a Colonel in the Libyan Armed Forces and head of Military Intelligence) for crimes against humanity.⁷⁸ Muammar Gaddafi was killed on October 20, 2011, and his case was terminated.⁷⁹ In early June 2012, four ICC staff members from the Office of Public Counsel for the defense were detained by Libyan authorities following a meeting with their client, Saif Gaddafi.⁸⁰ They were accused of spying and smuggling documents to Mr. Gaddafi.⁸¹ They were detained incommunicado, despite widespread recognition that the detention was contrary to

⁷⁸ Situation in the Libyan Arab Jamahiriya, Situation No. ICC-01/11, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi” (International Criminal Court, Pre-Trial Chamber I, June 27, 2011) 41.

⁷⁹ Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11-01/11, Decision to Terminate the case Against Muammar Mohammed Abu Minyar Gaddafi (International Criminal Court, Pre-Trial Chamber I, November 22, 2011) 5.

⁸⁰ International Criminal Court, “Press Release: Four ICC Staff Members Detained in Libya; Immediate Release Requested” (June 9, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr805.aspx.

⁸¹ See e.g., Luke Harding, Julian Borger and Chris Stephen, “Libya Accuses Australian ICC Official of Passing Secret Letter to Gaddafi’s Son” (The Guardian, June 25, 2012), online: <http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying>.

international law.⁸² There were many calls for their release, not only from the ICC, but also from, among others, the International Criminal Tribunal for the former Yugoslavia and the SCSL.⁸³ All recognized what a very serious threat such illegal detentions represented to their work.

The ICC staff members were only released on July 2, 2012, after three and a half weeks of detention, and only after the ICC had apologized to Libya for any “difficulties” caused by its staff.⁸⁴ It appeared, from the outside, as if the ICC had been forced to apologize. Details later emerged of the staff members’ ordeal, and it became clear that the staff were not permitted to have a confidential meeting with their client, were spied upon, were secretly filmed, and documents protected by lawyer-client privilege were seized.⁸⁵

⁸² See e.g., United Nations Security Council, “Security Council Press Statement on International Criminal Court Staff Detained in Libya”, UN Doc. SC/10674, AFR/2405, L/3196 (June 15, 2012).

⁸³ See e.g., Special Court for Sierra Leone Outreach and Public Affairs office, “Press Release: Statement by Special Court President Shireen Avis Fisher on the Detention of ICC Staff in Libya” (June 15, 2012), online: <http://www.sc-sl.org/LinkClick.aspx?fileticket=wngR2Nli8d0%3d&tabid=53>.

⁸⁴ International Criminal Court, “Press Release: Statement on the Detention of Four ICC Staff Members” (June 22, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr815.aspx.

⁸⁵ For a summary of this, see Kevin John Heller, “The Most Complete Account to Date of Melinda Taylor’s Detention” (Opinio

The Libyan government (the National Transition Council) is challenging the ICC's jurisdiction over Gaddafi and Al-Senussi. It claims that it wishes to prosecute the two men in Libya, under Libyan law, by Libyan judges, and that its national judicial system is already actively investigating.⁸⁶ Problematically, however, Libya still does not actually have custody over Gaddafi or Al-Senussi. Despite numerous declarations by the NTC that he would be transferred to Tripoli, Saif Gaddafi remains in the hands of the Zintan brigade that arrested him in November 2011, which has refused to surrender him to Libya's national authorities.⁸⁷ Given the unwillingness of the Zintan brigade to cooperate with the NTC, it is far from clear that Libyan authorities themselves would be able to conduct the trial. As well, Al-Senussi is not in Libya. In March 2012, he was arrested in a joint operation between French and Mauritanian authorities in the Mauritanian capital, where he remains—Mauritania will not extradite him to Libya.⁸⁸ It appears that Libya will have some difficulty

Juris blog, August 1, 2012), online: <http://opiniojuris.org/author/kevinjonheller/page/13/#>.

⁸⁶ This challenge has now been decided with respect to Saif Gaddafi, and these claims are highlighted in the Pre-Trial Chamber's rejection of Libya's admissibility challenge: Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi (International Criminal Court, Pre-Trial Chamber I, May 31, 2013), ¶¶ 25-41, 182-198 [Libya Admissibility Challenge].

⁸⁷ *Id.* at ¶¶ 206-207.

convincing the ICC that it is actually able to prosecute the two men.⁸⁹ This also means is that the ICC itself does not have the indictees in its custody, either.

The third set of headlines was quite recent and involved an ICC indictee, Bosco Ntaganda, Thomas Lubanga's Chief of Military Operations. The ICC issued an arrest warrant for him in 2006 for the recruitment and use of child soldiers.⁹⁰ On July 12, 2012, additional charges of war crimes and crimes against humanity were added to his arrest warrant, including murder, persecution, rape, sexual slavery, and pillaging.⁹¹ Unlike Lubanga, Ntaganda has eluded arrest. After his time with

⁸⁸ This was correct at the time of the Sixth IHL Dialog: "Ex-Gaddafi Spy Chief Al-Senussi "will not be Extradited" (BBC News Africa, August 6, 2012), online: <http://www.bbc.co.uk/news/world-africa-19145021?print=true>. However, shortly afterward, Mauritania did extradite Al-Senussi to Libya: "Mauritania Deports Libya Spy Chief Abdullah Al-Senussi" (BBC News Africa, September 5, 2012), online: <http://www.bbc.co.uk/news/world-africa-19487228>.

⁸⁹ Indeed, this is the case with respect to Gaddafi. On May 31, 2013, Pre-Trial Chamber I ruled against Libya's claim: Libya Admissibility Challenge, *supra* note 86.

⁹⁰ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (International Criminal Court, Pre-Trial Chamber I, August 22, 2006) 4.

⁹¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application Under Article 58 (International Criminal Court, Pre-Trial Chamber II, July 13, 2012) 36.

Lubanga, he joined another armed group and, in 2009, was made a general in the Congolese army. The Congolese government dismissed the ICC's calls for Ntaganda's arrest and said he was necessary for the peace process in eastern Congo. However, his forces continued to commit atrocities and, for many, his case became a lesson in what happens when impunity reigns.

In March 2012, Ntaganda mutinied and orchestrated a new rebellion, known as the M23. His forces continued to commit horrendous crimes. In April, finally, the Congolese government said it was prepared to arrest him.⁹² But it has not been able to do so. M23 rebels are taking over villages and towns in Rutshuru territory, overthrowing the defenses of the Congolese army and U.N. peacekeepers in the area. Human Rights Watch and a U.N. group of experts have uncovered evidence that Rwandan military officials have been supplying weapons, ammunition, and recruits to Ntaganda and his forces.⁹³ This certainly undermines international justice

⁹² See e.g., David Zounmenou and Naomi Kok, "Is President Joseph Kabila's Call for Ntaganda's Arrest a Move Towards Justice in the DRC?" (Institute for Security Studies, African Centre for Peace and Security Training, 2012), online: <http://www.issafrica.org/acpst/news.php?nid=15>.

⁹³ Human Rights Watch, "DR Congo: M23 Rebels Committing War Crimes" (September 11, 2012), online: <http://www.hrw.org/print/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes>; United Nations Security Council, Letter Dated 26 June 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the

efforts and shows how important it is for ICC indictees to be arrested sooner rather than later.

In an interesting about-face, in late August 2012, an M23 commander accused the DRC army of recruiting child soldiers, telling the media, “The law bans the recruitment of child soldiers.”⁹⁴ This demonstrates that Lubanga’s conviction has sent a message about the unlawfulness of recruiting child soldiers, although it is presented here by a group that is also accused of using child soldiers.

I will briefly mention one more ICC-related headline that reverberated in media outlets around the world: on June 15, 2012, Fatou Bensouda made her solemn undertaking and formally took office as the Prosecutor of the ICC during a ceremony held at the seat of the Court in The Hague.⁹⁵ She has been elected for a nine-year term. The ceremony was presided over by ICC President Sang-Hyun Song. Referring to Ms. Bensouda’s wealth of prosecutorial experience and staunch

President of the Security Council, UN Doc. S/2012/348/Add.1 (June 27, 2012).

⁹⁴ South African Press Ass’n, “Rebels: DRC Army Recruits Child Soldiers” (August 24, 2012), online: <http://www.iol.co.za/news/africa/rebels-drc-army-recruits-child-soldiers-1.1369403>.

⁹⁵ Int’l Crim. Ct., “Press Release: Ceremony for the Solemn Undertaking of the ICC Prosecutor, Fatou Bensouda” (June 15, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr811.aspx.

international support, ICC President Song stated, “I am confident that her strong independent voice, legal expertise and genuine concern for human rights issues will contribute greatly to the continued fight against impunity.”⁹⁶ In a lesser-known but very positive development—one that did not make the international headlines—Prosecutor Bensouda appointed Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as her Special Gender Advisor.⁹⁷ Ms. Inder will provide strategic advice to the Office of the Prosecutor on gender issues, including sexual and gender-based violence.

International Criminal Tribunal for the Former Yugoslavia

This past year, press attention on the International Criminal Tribunal for the former Yugoslavia (ICTY) tended to focus on the proceedings against two high-profile accused: Ratko Mladić and Radovan Karadžić.

⁹⁶ As quoted in the International Criminal Court Weekly Update #132 (June 18, 2012) 5, online: http://www.icc-cpi.int/NR/rdonlyres/77F6A227-0DE5-4667-A538-5E25808D0DC4/284634/ED132_ENG.pdf.

⁹⁷ Int’l Crim. Ct., “Press Release: ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as Special Gender Advisor” (August 21, 2012), online: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr833.aspx.

Mladić was commander of the Main Staff of the Army of the Republica Srpska, and he is charged with a number of crimes, including rape and other acts of sexual violence as a method to eliminate Bosnian Muslims and Croats.⁹⁸ Kelly Askin of the Open Society Justice Initiative has commented that this “recognizes the profound and far-reaching impact that sex crimes have on the individual victims, their families and whole communities.”⁹⁹ Mladić is also accused in relation to the shelling and sniping campaign in Sarajevo and the plan to eliminate Bosnian Muslims in the Srebrenica massacre.¹⁰⁰ After various setbacks, his trial began on May 16, 2012, only to be halted again when it became clear that the Prosecutor had failed to disclose a substantial amount of evidence to the defense.¹⁰¹ The trial began again in June 2012, and the presentation of

⁹⁸ Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, December 16, 2011) ¶¶ 39(b) and (c), 52, 53, 59(e), 70 [*Mladić* Indictment].

⁹⁹ Kelly Askin, “The Trial of Ratko Mladić: A Gender Crimes Perspective” (Open Society Justice Initiative blog, May 16, 2012), online: <http://www.opensocietyfoundations.org/voices/trial-ratko-mladic-gender-crimes-perspective>.

¹⁰⁰ *Mladić* Indictment, *supra* note 98 at ¶¶ 7, 19, 21-23, 41-51, 55-61, 64-65, 67-68, 72-74, 76-78, 80, 84-85, 87.

¹⁰¹ BBC News Europe, “Ratko Mladić War Crimes Trial Suspended Over Evidence Error” (June 18, 2012), online: <http://www.bbc.co.uk/news/world-europe-18499018>.

evidence began on July 9. In May, Mladić caused controversy for his demeanor in court when he made a nasty throat-cutting gesture to a woman in the audience whose son and husband were murdered in Srebrenica.¹⁰²

The case of Radovan Karadžić, former President of the Republika Srpska, also received much press attention. Karadžić has been charged with participating in a joint criminal enterprise to forcibly remove Bosnian Muslims and Croats from territory claimed as Bosnian Serb through genocide, crimes against humanity, and war crimes, including the Srebrenica massacre and the sniping and shelling of Sarajevo.¹⁰³ In late June, 2012, the Trial Chamber decided to dismiss the genocide charge relating to various municipalities in Bosnia, though it left the genocide charge relating to Srebrenica.¹⁰⁴ The prosecution started presenting evidence on April 13, 2010. Its case was rested on

¹⁰² Julian Borger, "Ratko Mladić's Trial Opens with a Cut-Throat Gesture" (The Guardian, May 16, 2012), online: <http://www.guardian.co.uk/world/2012/may/16/ratko-mladic-war-crimes-trial>.

¹⁰³ Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Prosecution's Marked-Up Indictment (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III, October 19, 2009) ¶¶ 6-87.

¹⁰⁴ This oral decision is documented in Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Decision on Prosecution Request for Certification to Appeal Judgment of Acquittal Under Rule 98 *bis* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III, July 13, 2012) ¶ 1.

May 25, 2012. In early June 2012, Trial Chamber III judges, prosecution, and defense teams took a five-day visit to Srebrenica.¹⁰⁵ This is interesting, as it is not common for the Court to visit the scene of the crime. The defense case is scheduled to commence on October 16, 2012.¹⁰⁶

Underneath the headlines, we see a very busy tribunal, with 35 cases still ongoing even as it is working to complete its mandate. For example, the trial of Goran Hadžić, former President of the Republic of Serbian Krajina, will commence on October 16.¹⁰⁷ The ICTY is also working hard to solidify its legacy with a number of outreach events—for example, releasing a documentary, entitled “Sexual Violence and the Triumph of Justice” about the crucial role of the ICTY in prosecuting

¹⁰⁵ Int’l Crim. Trib. for the former Yugoslavia, “Press Release: Karadžić Case: Trial Chamber Conducts Site Visit in and around Srebrenica” (June 5, 2012), online: <http://www.icty.org/sid/10980> [ICTY Srebrenica Site Visit]. A site visit to Sarajevo took place in 2011: International Criminal Tribunal for the former Yugoslavia, “Press Release: Karadžić Case: Trial Chamber Conducts Site Visit in Sarajevo” (May 16, 2011), online: <http://www.icty.org/sid/10651>.

¹⁰⁶ ICTY Srebrenica Site Visit, *supra* note 105.

¹⁰⁷ Int’l Crim. Trib. for the former Yugoslavia, “Case Information Sheet: Goran Hadžić”, 2, online: http://www.icty.org/x/cases/hadzic/cis/en/cis_hadzic_en.pdf.

wartime sexual violence.¹⁰⁸ The documentary has been screened in Zagreb and Belgrade.¹⁰⁹

International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) has largely finished its trial phase and is now focusing on appeals. The Tribunal seems to be on track to finish all appeals by December 2014.¹¹⁰ In recognition of this progress toward closure, on July 1, the Arusha branch of the Mechanism for International Criminal Tribunals (MICT), a residual court, opened. This development received some press coverage.¹¹¹ The MICT is to continue operations of the Court that cannot be closed down when the Court-proper closes its doors. For example, three indictees under ICTR jurisdiction

¹⁰⁸ The documentary is described on the ICTY's website, "Sexual Violence and the Triumph of Justice" (2011), online: <http://www.icty.org/sid/10949>.

¹⁰⁹ *Id.*

¹¹⁰ U.N.S.C., Letter Dated 22 May 2012 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council, UN Doc. S/2012/349 (May 22, 2012), ¶ 100 [ICTR Completion Strategy Report].

¹¹¹ U.N. Mechanism for Int'l Crim. Trib., "Press Release: Mechanism for International Criminal Tribunals (MICT) Begins Work in Arusha" (July 2, 2012), online: http://unmict.org/news/2012/120702_PR1e.html.

remain at large: one in Kenya, one in Zimbabwe, and one in the Democratic Republic of the Congo. The MICT will continue to track them.¹¹²

This year was a significant one for the ICTR in that the judges finally accepted requests from the Prosecutor to transfer cases to Rwanda.¹¹³ Eight cases have been referred to Rwandan jurisdiction.¹¹⁴ In addition, beneath the press reports, the ICTR issued several important judgments over the past year. For example, Callixte Nzabonimana, the Rwandan Minister of Youth and Associative Movements in 1994, was convicted of genocide and crimes against humanity and sentenced to life imprisonment.¹¹⁵ In June 2012, Ildephonse Nizeyimana was sentenced to life imprisonment for his actions that led to the killing of thousands of Tutsis, as well as the targeted killings of several high-profile Tutsis

¹¹² ICTR Completion Strategy Report, *supra* note 110 at ¶ 5.

¹¹³ *Id.* at ¶ 4.

¹¹⁴ U.N.S.C., Letter Deated 14 November 2012 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council, UN Doc. S/20012/836 (November 14, 2012), ¶¶ 4-5, 12-16.

¹¹⁵ Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber III, May 31, 2012) Disposition at 360 and ¶ 1822.

to advance the genocide.¹¹⁶ The ICTR also issued judgments in two multi-accused trials, popularly known as “*Government I*” and “*Government II*.” *Government I* was decided in February 2012, and *Government II* was decided on September 30, 2011 (with two acquittals).¹¹⁷ While this does not relate to the ICTR directly, it is relevant to note that the gacaca community courts in Rwanda completed their work in June 2012, having considered the cases of over two million people, according to official government statistics.¹¹⁸

¹¹⁶ Prosecutor v. Ildéphonse Nizeyimana, Case No. ICTR-2000-55C-T, Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber III, June 19, 2012) ¶¶ 1581, 1599.

¹¹⁷ “*Government I*” is Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse, Case No. ICTR-98-44-T. Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber III, February 2, 2012), convictions at 310. sentencing at ¶¶ 1762-1763; *Government II* is Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza, Case No. ICTR-99-50-T, Judgment and Sentence (International Criminal Tribunal for Rwanda, Trial Chamber II, September 30, 2011), convictions and acquittals at 538-539, sentencing at ¶¶ 2021-2022.

¹¹⁸ BBC News Africa, “Rwanda ‘Gacaca’ Genocide Courts Finish Work” (June 18, 2012), online: <http://www.bbc.co.uk/news/world-africa-18490348>.

Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in response to the atrocities committed by the Khmer Rouge regime, which controlled Cambodia from 1975-1979. The Khmer Rouge forced millions of Cambodians from the cities to the countryside in an attempt to create a classless agrarian society. It is estimated that over two million Cambodians died as a result, from execution, starvation, exhaustion from overwork, and disease. The ECCC was in the news this year for a positive reason and also for negative reasons.

The positive reason for media attention is that the trial in *Case 2* against three senior Khmer Rouge officials commenced on November 21, 2011.¹¹⁹ This trial will only deal with the forced transfer of persons out of Phnom Penh and other urban areas and the related crimes against humanity charges.¹²⁰ The Court has already heard a great deal of evidence.

¹¹⁹ Extraordinary Chambers in the Ct. of Cambodia, “Press Release: Trial Chamber Announces Date for Opening of the Substantive Hearing in Case 002” (October 18, 2011), online: <http://www.eccc.gov.kh/sites/default/files/media/ECCC%2018%20Oct%202011-Eng.pdf>.

¹²⁰ Extraordinary Chambers in the Ct of Cambodia, “Press Release: Severance of Proceedings Ordered in Case 002” (September 22, 2011), online: <http://www.eccc.gov.kh/sites/default/files/media/ECCC%2022%20September%202011-Eng.pdf>.

The negative reason for the ECCC making headlines is that there appears to be political interference in *Cases 3 and 4*. *Cases 3 and 4* involve five lower-ranking Khmer Rouge officials. Investigations into the crimes began in September 2009 but were closed in April 2011 amid claims of interference by the Cambodian government. The decision to end the investigations was strongly criticized by Co-Prosecutor Andrew Cayley, who made a formal request for the investigations to proceed and accused the co-investigating judges of trying to bury the cases.¹²¹ Co-Investigating Judge Blunk eventually resigned in October 2011, amid criticism.¹²² Then the Reserve Judge was appointed as the new International Co-Investigating Judge, but he was blocked in his work and it appeared to be again by Cambodian government interference.¹²³ He resigned in March 2012, citing an inability to perform the functions of his office.¹²⁴ Thus, this past year at the ECCC has seen

¹²¹ Extraordinary Chambers in the Ct. of Cambodia, “Statement from the International Co-Prosecutor regarding Case File 003” (May 9, 2011) online: <http://www.eccc.gov.kh/en/articles/statement-international-co-prosecutor-regarding-case-file-00>.

¹²² Extraordinary Chambers in the Ct. of Cambodia, “Statement by the International Co-Investigating Judge” (October 10, 2011), online: <http://www.eccc.gov.kh/en/articles/statement-international-co-investigating-judge>; and Open Society Justice Initiative, “The Future of Cases 003/004 at the Extraordinary Chambers in the Courts of Cambodia” (October 2012), online: http://www.opensocietyfoundations.org/sites/default/files/eccc-report-cases3and4-100112_0.pdf [OSJI Report on Cases 003/004].

¹²³ OSJI Report on Cases 003/004, *supra* note 123 at 9-10.

growing tensions between the Cambodian and international judges at the ECCC, as well as continuing allegations of interference by the government of Cambodia. Unfortunately, these developments cause many to question the Court's credibility.¹²⁵

Flying somewhat under the media radar was the appeal in the ECCC's first case, that of Duch, former Commander of the notorious S-21 prison. He was originally convicted in July 2010 to 30 years' imprisonment, which he appealed.¹²⁶ He argued that he was not a senior leader or one of those most responsible for Khmer Rouge atrocities.¹²⁷ On February 3, 2012, the Supreme Court Chamber (SCC) ruled, rejecting these arguments. The SCC found that the concepts of "most responsible" and "senior leaders" were non-justiciable policy guides for the co-investigating judges and Co-Prosecutors when determining the scope of the ECCC's investigations and prosecutions.¹²⁸ They also increased

¹²⁴ *Id.* at 10-11.

¹²⁵ See entire report at *id.*

¹²⁶ Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment (Extraordinary Chambers in the Cts. of Cambodia, Trial Chamber, July 26, 2010).

¹²⁷ Prosecutor v. Kaing Guek Eav *alias* Duch, Case No. 001/18-07-2007/ECCC/SC, Appeal Judgment (Extraordinary Chambers in the Cts. of Cambodia, Supreme Court Chamber, February 3, 2012) ¶ 23.

¹²⁸ *Id.* at ¶¶ 63-74.

his sentence to life imprisonment, saying that “the high number of deaths and the extended period of time over which the crimes were committed place this case among the gravest before international criminal tribunals.”¹²⁹

Special Tribunal for Lebanon

The Special Tribunal for Lebanon is not often in the international media, though it is discussed quite a bit in the local Lebanese media, so the Court may be unknown to many of you. It is tasked with addressing responsibility for the assassination of former Lebanese Prime Minister Rafiq Hariri who was killed, along with 21 others, in an attack in Beirut on February 14, 2005. It is the first international tribunal with the mandate to prosecute the international crime of terrorism in peacetime. In June 2011, four individuals were indicted by the Tribunal—all are suspected members of Hezbollah.¹³⁰ Their arrest warrants were made public in August 2011.¹³¹ Each has been charged with nine

¹²⁹ *Id.* at ¶¶ 376, 383.

¹³⁰ Prosecutor v. Mustafa Amine Badreddine, Salim Jamil Ayyash, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/I/PTJ, Indictment (Special Tribunal for Lebanon, Pre-Trial Judge, June 10, 2011) [STL Indictment].

¹³¹ Special Trib. for Lebanon, “Press Release: Indictment and its Confirmation Made Public” (August 17, 2011), online: <http://www.stl-tsl.org/en/media/press-releases/17-08-2011-indictment-and-its-confirmation-decision-made-public>.

criminal counts, including the premeditated intentional homicide of Hariri and 21 others.¹³²

The most significant ruling of the Special Tribunal of the past year came on February 1, 2012, in a finding that the proceedings against an accused could proceed in absentia.¹³³ Trial in absentia is a form of trial of last resort for the Special Tribunal, so the Trial Chamber only permitted this form of trial after it had concluded that the accused had in fact absconded and that the Lebanese authorities had done all that could be expected to apprehend the accused.¹³⁴ Since deciding that the trial could proceed in absentia, defense counsel have been assigned, and preparations by both the Prosecutor and defense, including disclosure of documents, the examination of witnesses, and collection of evidence have begun.¹³⁵ In May 2012, the defense filed a motion to reconsider the decision to proceed in absentia, but this

¹³² STL Indictment, *supra* note 131 at ¶ 1.

¹³³ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/I/TC, Decision to Hold Trial *In Absentia* (Special Tribunal for Lebanon, Trial Chamber, February 1, 2012).

¹³⁴ *Id.* at ¶ 111.

¹³⁵ Special Trib. for Lebanon, “Special Tribunal for Lebanon: Fourth Annual Report (2012-2013)” (2013), 29-31, 33, online: <http://www.stl-tsl.org/en/documents/president-s-reports-and-memoranda/fourth-annual-report-2012-2013> [Report of the STL President].

was rejected by the Trial Chamber on July 11.¹³⁶ The date for the trial is tentatively set for March 25, 2013.¹³⁷

Another important development—though not widely reported—is that, on July 30, 2012, the Trial Chamber released its decision on the legality of the jurisdiction of the Tribunal, finding that the Tribunal did in fact have jurisdiction to try the accused.¹³⁸ The defense had earlier brought a motion claiming that the Security Council resolution creating the Tribunal was an abuse of Council powers.¹³⁹ Also not widely reported: the possibility of more indictments or more charges in cases involving killings similar to that of Hariri; in May 2012, 58 of 73 victim-participation applications were approved; and a

¹³⁶ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/PT/TC, Decision on Reconsideration of Trial *In Absentia* Decision (Special Tribunal for Lebanon, Trial Chamber, July 11, 2012) 14.

¹³⁷ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/PT/PTJ, Order Setting a Tentative Date for the Start of Trial Proceedings (Special Tribunal for Lebanon, Pre-Trial Judge, July 19, 2012) 8.

¹³⁸ Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra, Case No. STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal (Special Tribunal for Lebanon, Trial Chamber, July 27, 2012) 30.

¹³⁹ *Id.* at ¶ 1.

Legal Aid Policy for Victims' Participation was adopted by the Tribunal.¹⁴⁰ In June 2012, victims' counsel were sworn in.¹⁴¹ Clearly, the Special Tribunal for Lebanon is more active than the press coverage would lead one to believe.

Conclusion

International criminal justice makes headlines these days. I have covered a number of important stories in the media over the past year. But international criminal justice is so much more than just the issuances of groundbreaking trial judgments: there are the stories behind the stories of individuals working hard to make this world a more just place. And yet, of course, there is still much more that can be done in the legal sector and in other areas. This is encapsulated in a comment by James Kpomgbo, whose arm was cut off during the Sierra Leone civil war, after the release of the *Taylor*

¹⁴⁰ Report of the STL President, *supra* note 135 at 27; Special Tribunal for Lebanon, "Press Release: Victims' Participation" (May 9, 2012), online: <http://www.stl-tsl.org/en/media/press-releases/09-05-2012-victims-participation>; Special Tribunal for Lebanon, "Legal Aid Policy for Victims' Participation" (April 4, 2012), online: <http://www.stl-tsl.org/en/documents/victims-participation-documents/legal-aid-policy-for-victims-participation>.

¹⁴¹ Special Trib. for Lebanon, "Press Release: Victims' Legal Representatives Sworn In" (June 5, 2012), online: <http://www.stl-tsl.org/en/media/press-releases/05-06-2012-victims-legal-representatives-sworn-in>.

judgment: “I will reflect on the suffering we suffered today, but I want to forget—we have known all along Charles Taylor is guilty. Today is just another day where we must find food.”¹⁴²

¹⁴² IRIN, “Now we can move on,” *supra* note 24.

**Impunity Watch Essay Contest Winner:
Until It Happens to You**

Abigail Cordaro*

Human rights are the fundamental basis of modern society. They are the inalienable rights people are entitled to simply because they are humans. Every person is equal and entitled to the same rights and freedoms, and as a society, it is essential that these rights be acknowledged. Without this foundation of society, the world as we know it would not exist. Mass killings have occurred in the past and still occur in present, due to a lack of respect for these rights. Fortunately, there are many organizations and individuals who work to the best of their abilities to protect the rights of others around the world. Human rights are often taken for granted and disregarded, but without them, and without the work of charities and organizations, our planet would be a world in which no person would choose to live.

Genocide is a term often used to describe the mass killings of people. It is the deliberate and methodical annihilation of a political, racial, national, or cultural group, and it encompasses countless human rights

* Sophomore at Immaculata Academy. This is the winning essay in a high school essay contest sponsored by the Summer Institute for Genocide Studies, the Robert H. Jackson Center, and Impunity Watch. The winning essay was formally recognized at the sixth Annual International Humanitarian Law Dialogs.

violations, such as the right to not be persecuted due to race, religion, or other beliefs. The word genocide is derived from the Latin root *gens*, meaning tribe, and the root *cide*, meaning murder. A Jewish lawyer from Poland named Rafael Lemkin coined the term “genocide” and the concept of the term. Lemkin dedicated his life’s work to creating legal policies that would protect human rights. In the 1950s, he was nominated twice for the Nobel Peace Prize for his diligent work. Because of Lemkin, the crime of genocide was added to the criminal statutes of most countries.

There are various common warning signs of genocide. Mass killings around the globe occur partly because of many of these signs. Some of the warning signs include: discrimination, tension between groups, corrupt governments, leaders who purposely heighten tension between groups by using violence, imperialism, uncontrolled political power, rival political parties, natural resources, and tyrants who take away their citizens’ rights. Genocide occurs not only due to these warning signs, but also because of disrespect for human rights and contempt for the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights is a document that explains what human rights are and lists these rights. This document is one of the most important proclamations on the planet because it applies to every human being on earth. The Declaration was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. Generally, when murders and genocides occur, many of these rights are violated. Some of the human rights that tend to be

violated frequently are: Article 1, which states, “All human beings are born free and equal in dignity and rights,” and Article 3, which states, “Everyone has the right to life, liberty, and security of person.” These rights are often violated when murders are committed or when peoples’ rights are stripped from them. Another right that is often violated in the midst of genocide is Article 9, which claims, “No one shall be subjected to arbitrary arrest, detention, or exile.” Violations of this right occur most when people are randomly persecuted because of who they are.

Although it is often defiled, the Universal Declaration of Human Rights is in effect today due to the work of Eleanor Roosevelt, wife of President Franklin Delano Roosevelt. The Holocaust is arguably the most well-known genocide in history. Other mass killings are frequently compared to the atrocities that occurred in Europe during the Holocaust in World War II. Countless human rights were violated during this time. When the leader of the Nazi party, Adolf Hitler, seized parts of Europe, people were taught to hate others because of their religion, race, disability, lifestyle, or sexuality. Although Hitler’s persecution of Jewish people was the most widely publicized, many other minority groups also suffered.

Through false education and propaganda, Hitler and his followers taught the next generation of young people to disregard human rights and act inhumanely toward minority citizens. Gradually and methodically, the rights of these persecuted groups were taken away. As a result of this hatred and contempt for human rights, approximately 11 million people were tortured mentally,

physically, and spiritually before being brutally murdered. This included Jews, gypsies, homosexuals, disabled people, and other religious or political opponents of the Nazi regime. A woman by the name of Kitty Werthmann, who lived in Austria during Hitler's reign, recalls what she witnessed and experienced during World War II in an article in the *Money Saver* from July 12, 2012. She remembers what it was like to have her rights taken away from her, one by one, as Hitler systematically took control of Austria while the country was in a deep economic depression. In the article, Kitty states:

Our education was nationalized. I attended a very good public school. The population was predominantly Catholic, so we had religion in our schools. The day we elected Hitler, I walked into my schoolroom to find the crucifix replaced by Hitler's picture hanging next to the Nazi flag... Our teacher told the class we wouldn't pray or have religion anymore.

Kitty recounts how her mother was unhappy with the changes that were taking place in the country, and how she took Kitty out of public school and placed her into a convent. When Kitty would go home to visit her friends and family, she remembers how shocked she was at how they were living. She wrote, "Their loose lifestyle was alarming to me. They lived without religion." At this time, a significant right was taken away from many people: freedom of religion. Throughout World War II, Hitler continued to methodically take control of Austria,

making life worse for Austrians in the process. Unfortunately, it was not until the people were powerless that they realized the extent of Hitler's dictatorship. Kitty Werthmann is just one of millions of people who had to live through the ordeal of having her rights slowly taken away from her. Unfortunately, atrocities still take place today as they did in the Holocaust, but, fortunately, most are not of the same magnitude.

Recently, in Sierra Leone, a civil war and genocide took place. Although this was due to many factors in common with some of the major warnings of genocide, the most contributing factor was the disregard for human rights. Many atrocities occurred during this war, including the mass killing of civilians, the abduction and use of children as soldiers, physical and mental torture, rape, and forced labor or slavery, which was used to fund the rebel forces. In 2002, the civil war came to an end after more than ten years of major conflict. However, there are still large amounts of conflict pertaining to the aftermath of the war.

Presently in Sierra Leone, there are still various problems, and many citizens have yet to overcome the trauma and torture they were put through. The civil war not only displaced more than two million people and killed more than fifty thousand, but innumerable human rights were also defiled in the process. A woman named Hassanatu Kamara is one of the unfortunate civilians who had to endure the trauma of the war. Currently, she is twenty-seven years old. During the war, she was abducted by the rebel forces, the RUF, and repeatedly raped and forced to give birth to the rebels' children. According to an online article in the *Irish Times*, she

states, “I find it very difficult to talk about the war.” When Kamara made her way back to Sierra Leone after the war, she participated in a vocational program, Caritas, which provides counseling services and education to war victims. Today, she is a healthy, independent, and educated woman because of the programs and organizations that aided her in a time of great need.

Although genocide and other atrocities against humanity still take place, there are many charities, organizations, advocates, and activists whose missions are to aid the victims of these crimes and to help prevent these atrocities. These “upstanders,” or people who are trying to make a difference in the world, do things such as raise awareness about current crimes, raise money to purchase supplies and send aid to victims and refugees, provide counseling to traumatized victims, raise money to provide education, and help victims get medical care.

Nongovernmental organizations, or “NGOs,” are nonprofit organizations that perform these tasks with the help of donations and fundraisers. Some well-known NGOs that aid victims in Sierra Leone are Amnesty International and the International Rescue Committee. Both organizations send aid to refugees in need, provide counseling and education for people, and help victims overcome the trauma they endured.

The importance of organizations like these and other upstanders is immeasurable. Not only are they helping people in need by protecting and preserving their human

rights, but they are helping the global community and making the world a better place as well.

There are numerous explanations why human rights are not only important but are also the reason modern society exists. Without these rights, people could not co-exist peacefully in any form. If this were the case, the populace would have no respect for each other, and would rarely work together to set the precedents of society we use today. When political leaders persecute their constituents without impunity, it breeds an environment where further abuses of human liberties can occur. Human rights, therefore, are the most significant fundamentals of what makes us human.

Transcripts and Panels

Discussion with Prosecutors of Charles Taylor

This roundtable was convened on Sunday, August 26, 2012, by its moderator, Greg Peterson of the Robert H. Jackson Center, who introduced the panelists: David Crane; Sir Desmond de Silva; Ambassador Stephen Rapp; and Brenda J. Hollis. An edited transcript of their remarks follows.

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GREG PETERSON: This is something I have wanted to do for some time. I looked forward to the time when the *Charles Taylor* case would draw to a close and the opportunity would present itself—I was never sure it ever would—when all four of the Prosecutors of the Special Court for Sierra Leone would be in one place at the same time to talk, specifically, about the *Charles Taylor* case.

We're here at the sixth annual International Humanitarian Law Dialogs, and the title of it is, "The Special Court for Sierra Leone: A 10-Year Anniversary Retrospective," with the question, "Is the justice we seek the justice they want?" That's going to be the overall theme that we'll be discussing throughout the next couple of days. Tonight, though, we will be focusing in on a case which just concluded, and that is the case against Charles Taylor, head of the National Patriotic Front of Liberia from the late 1980s onward and President of the Republic of Liberia from August 2, 1997 until August 11, 2003.

We have a very distinguished panel. David Crane was the initial Chief Prosecutor. Next to David is Sir Desmond de Silva. Next to Sir Desmond is Ambassador Stephen Rapp, and next to him is Brenda J. Hollis, the current Chief Prosecutor of the Sierra Leone Tribunal.

As one of the founders of the Robert Jackson Center, I'm just thrilled to have all four of you here. I'm looking at the four of you, and I see a continuum of the work done by the U.S. Chief Prosecutor Robert H. Jackson. His legacy lives on through the work the four of you did for Sierra Leone, and specifically dealing with the *Charles Taylor* case.

Let me just put this into perspective. The Statute of the Special Court for Sierra Leone reads:

Having been established by an agreement between the United Nations and the government of Sierra Leone pursuant to Security Council Resolution 1315 of 14 August 2000, the Special Court for Sierra Leone shall function in accordance with the provisions of a statute which was created. The Special Court... shall have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30th, 1996.

Article 15 specifically deals with the prosecutors. It reads, "The Prosecutors shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996." It goes on to state, "The Prosecutors shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source."

David Crane was the first Chief Prosecutor of the Special Court for Sierra Leone.

David, were you aware of the existence of that Court before you were being considered as a candidate?

DAVID CRANE: No, I was not. I knew that there were issues in Sierra Leone, but I didn't know much about plans for a tribunal before I was asked if I would be interested in serving as prosecutor. I didn't even take the offer seriously because I was an American, and nobody was going to pick an American to be a Chief Prosecutor. If you recall, at the time we were unsigned a rather important document, and the world was, frankly, angry at us. I thought that my candidacy was a throwaway candidacy, and I really didn't take it seriously for quite some time.

GREG PETERSON: At one point you got a call. Can you give us details of that call?

DAVID CRANE: I thought, “You’ve got to be kidding me.” You know, it was interesting. It was two weeks before 9/11, and I had a very senior position in the Department of Defense. Yes, I was interested. Who wouldn’t be interested? But I had a lot going on. After the call, my wife Judy asked me who was on the phone, so I told her. She laughed and said, “You’re not going to get that,” and I said, “I know,” and we promptly went back to our spaghetti dinner. And two weeks later the planes hit the buildings and all of a sudden we were at war. Judy and I were both seniors in the Department of Defense, so we just moved on. But then I got a call from Mike Newton, who was a deputy in the War Crimes Office and he said, “Hey, send me a résumé.” And I said, “You’re serious about that?” I knew Mike. Mike and I have known each other for well over a decade. So I did, and the rest is history.

GREG PETERSON: Let’s talk a little bit more about that history. This was a U.N. appointment?

DAVID CRANE: Yes, it was, and it was interesting because the tribunal was a new idea..It wasn’t like the ad hoc international tribunals—it was a hybrid model.

GREG PETERSON: Can you explain that a little bit?

DAVID CRANE: It’s a mixed court—it consists of both international jurists as well as, in this case, barristers, jurists, and judges from Sierra Leone. The concept is a good one; the mandate was as well. This

was the first time ever in history that the concept of a hybrid international war crimes tribunal was considered.

GREG PETERSON: When President Truman appointed Justice Jackson, they told him much about the evidence that was available, that in essence a lot was in place and that he would just have to basically be an administrator-prosecutor. What did they tell you was available as far as evidence?

DAVID CRANE: I had no idea what evidence we had. I know that there was a working group that went out and found some evidence in January of 2002, but there were no trainloads full of documents directly implicating 23 individuals for war crimes, crimes against humanity, and genocide. We initially had very little evidence. We had to go out and find it ourselves.

GREG PETERSON: At some point you kissed Judy goodbye, you got on a plane, and the next thing you knew, you were in Freetown. What was your welcome like?

DAVID CRANE: We arrived on this plane. It was the first time—then it was called SN Brussels—that it had ever flown into Freetown. There were 12 people on this 777. The stewardesses were thrilled. We landed in Guinea, in Conakry, and then we flew from Freetown, which is only about 75 miles away. The plane never got above 1,000 feet, nap-of-the-earth straight to Freetown.

It was rather strange. We landed, and there was no one there. We went through, and we stood around in the

hangar waiting for this widow-maker called Paramount Airlines, which took us to the other side of the bay, and standing there was the entire Special Court for Sierra Leone. There was Robin Vincent, the late Registrar of the Court, standing next to a vehicle that he somehow stole from the United Nations, and he welcomed us to Freetown. Our arrival quadrupled the size of the Court.

GREG PETERSON: What was your sense? I mean, you really had to develop this out of whole cloth.

DAVID CRANE: Indeed.

GREG PETERSON: Did you get any guidance from the other tribunals in terms of templates that you might use, David? At that point, Yugoslavia and Rwanda were already in place—

DAVID CRANE: Of course. I was doing a lot of listening and a lot of talking. The nomination process took six months, and during that time I was reaching out. In fact, I even invited Brenda Hollis, who had been in town, to come by my office at the Department of Defense, and we chatted and I got her perspective. But I immediately reached out to NGOs—Physicians for Human Rights, Human Rights Watch, what have you—just to get a sense of what was going on there in Sierra Leone. I was also already in government, so I had the ability to find data on Sierra Leone. So I was gathering and doing and meeting with people.

When Hans Corell called to tell me that I had been chosen as Chief Prosecutor, I had already planned out

the entire prosecution in ten phases, and we largely stuck to that plan. We presented that strategy at the United States Institute of Peace in May of 2002, about a month after I had been chosen. I think that's where I met Bill Schabas for the first time, who had just been picked to be a member of the Truth and Reconciliation Commission. And I told the assembled people from the United Nations and NGOs, "Here is how we're going to do it in a strategic sense." I mean, I wasn't telling them about my specific cases.

So when we left the United States, we already were in Phase Three of a ten-phase program. Our intent was to be somewhat fully operational, in at least an office sense, by November of 2002, and we largely were in that position. Then, of course, we executed Operation Justice on March 10, 2003, led by Alan White, who was also my Chief of Investigations.

GREG PETERSON: And prior to that, you had to gather information and identify who were the individuals most responsible. Please explain that process.

DAVID CRANE: I was dialoging and asking the NGO community but, more importantly, we went and asked the people of Sierra Leone who they thought should bear the greatest responsibility. I had a list—I had about 20 people that were within the ballpark, but we went out and asked. We asked colleagues and friends who they thought should be indicted. Of course, working in the U.S. government meant that I had data on all these individuals, so I had a sense of what was going on. But Binta Mansaray, Registrar of the Special Court, and I

went out very quickly and asked the people of Sierra Leone. By the time November rolled around, when Brenda and Desmond and I were actually starting to put pen to paper, we had a good sense of who bore the greatest responsibility. This was the first time that standard had ever been used, and we had some interesting professional dialogs as to what it meant. As we narrowed down the list, we started to have to throw some fish back in the water that were bad people, but didn't necessarily rise to the level of greatest responsibility.

GREG PETERSON: At one point you had a staff meeting and you came up with the name of Charles Taylor. Now, he's a sitting president. What was the conversation about?

DAVID CRANE: Certainly I think that all of us at that table realized that Charles Taylor was in this mix somewhere. As we began to develop evidence of, what we euphemistically call, his West African Joint Criminal Enterprise, drew out on a wet board out the criminal enterprise—guns, diamonds, gold, timber, where it was going, who was bringing in the arms—and we began to see who the peripheral players were and who were those bearing the greatest responsibility. Interestingly enough, we kept tripping over Blaise Compaoré and Muammar Gaddafi. We never seriously thought of indicting those two individuals, but they were clearly involved. But our decision at the end of the day was that it all went back to Charles Taylor, and fortunately the Statute allowed us to indict a sitting head of state.

GREG PETERSON: So on March 3, 2003, you signed and filed the indictment against Charles Taylor while he was the sitting President of Liberia. What was the process? You signed a piece of paper. Where did it go? To the judge?

DAVID CRANE: Charles Taylor was just one of, I think, six that day. We had a ceremony on March 3, 2003. Brenda and her teams had been working long hours. I had spent long hours along with Desmond reviewing all of their work. But on March 3, 2003 we had a ceremony in my office. We brought together the entire Office of the Prosecutor (OTP), which was about 30 people. Tom Perriello had brought in some champagne, I believe. It was warm, but so what?

We had a stack of our indictments—Brenda was the Acting Chief of Prosecutions—and we started with indictment number one, which I believe was Charles Ghankay McArthur Taylor. Brenda slid it across the table to me. I signed it. Then we had members of our OTP team print out a copy of an indictment of each individual that we were prosecuting—Foday Sankoh, Sam Hinga Norman; all of the people that had destroyed this area. First we went through the whole pack of indictments, and we signed each one of them. Taylor was first; I believe that Samuel Bockarie was number two; and then it went to Foday Sankoh, Hinga Norman, all the way down, and we finished that off. Then each team member picked out an indictment that would be originally signed by both myself and Desmond, which we did as well. Next we took pictures standing next to the flag of Sierra Leone. And then we poured some champagne.

Someone had a tape—I don't know who did this, but I am just remembering it now—someone played “Ode To Joy.” It was a very moving moment. I was looking around the room, and there were people weeping. Seven months earlier, we got off a plane and it was only Al White, Mike Pan, Robin Vincent, and me. And now, seven months later, we had put together a great team. We were not quite fully there, but we took down a majority of the perpetrators of that horror story in seven months.

GREG PETERSON: Let's establish a timeline. On March 7, 2003, the Trial Chamber of the Special Court for Sierra Leone confirmed the indictment against Charles Taylor and ordered it to remain under seal. Was there any question, any doubt, that the Court would confirm?

DAVID CRANE: Well, this is a great story because we did some things that had never been done before. We did a thing called Notice Pleading. Our indictments were 20 pages or less including the signature page and the title page. Each of the charges was quite brief. We weren't exactly sure how the judges would perceive the brevity. The judges were meeting in London, so after the ceremony, Brenda took all of the original indictments and the supporting packets that proved probable cause, and she flew up to London to present them to the Article 28 Duty Judge for a review. It wasn't a probable cause type review, but it was more like them asking, “Is there a crime that has been committed, and is there some evidence to show this individual did it?”

Brenda, you might want to describe that moment in London.

BRENDA J. HOLLIS: It was quite interesting. The judges were in London having a plenary session where they were reviewing the Rules of Procedure and Evidence and amending them as they felt was necessary. Judge Bankole Thompson took the indictments, reviewed them, and he kept coming and asking questions, while working on the plenary for the amendment of the Rules. Eventually he approved all of the indictments that we took to him. I went back to report that to my boss in Sierra Leone. But first Robin Vincent and I made a trip to The Hague to see if at least one of our indictees could be held in The Hague because there was concern about the sensitivity of that prosecution. We thought it might be better to have him out of the country at least until the time of the trial and perhaps even for the trial itself. So it was a very busy time for the judge who had to review all of that in the midst of the amendment of the Rules.

DAVID CRANE: It was quite the packet.

BRENDA J. HOLLIS: Eventually I made my way back to Sierra Leone to brief everybody, including my team, who had been up for a couple of nights putting everything together before I left. So it was an eventful time.

DAVID CRANE: I remember getting that call. We were at Mamba Point and my phone rang. It was Brenda calling from London. We were all sitting on pins and

needles. We were having pizza and beer, which we usually did on Friday nights, and the phone rang, and it was Brenda, and she said, “He approved them.” I just leaned over and I said, “They’re approved.” Gilbert Morissette yelled out—and to my Canadian friends, I apologize—“*Tabernacle*.”

It was a joyous occasion because we hadn’t been sure whether we had done this right since this was a new way of charging. It was a special moment because at the end of day, it wasn’t about us; it was about the people of Sierra Leone.

GREG PETERSON: So you had indictments in hand. As I understand, it was decided that the Charles Taylor indictment would be under seal. The rest of the indictments were public, and the indictees were alive. How did you decide how to serve those indictments?

DAVID CRANE: This was a four-month-long effort that was culminating. Corollary to what Brenda and her team were doing, corollary to what Desmond and his team were doing, preparing pretrial briefs, we were also secretly working a geopolitical national security team made up of the British High Commissioner, the American Ambassador, the Chief of Staff of the U.N. Peace-keeping Force in Sierra Leone, the Inspector General of the Sierra Leonean police, and the British commander of the training unit in Sierra Leone—a brigadier—all of whom were quietly putting together the takedown. Of course, we didn’t reveal anything that they couldn’t know, but we were planning this. I remember going to a London meeting at the

British Ministry of Defense in the Foreign and Commonwealth Office and asking for military backup should this thing go sour.

We developed a plan where the Third Battalion of the Parachute Regiment was going to land in an ostensible training exercise a week before the takedown, which they did every year anyway, so there was no visibility. They said, quote, "This year what we're going to do is we're going to take down the airfield." So they went in and took down the airfield. Also, we had agreed that the West African Squadron of the Royal Navy was going to sortie and sail to Sierra Leone and be just over the horizon during the beginning of Operation Justice, where we took everybody down in one hour across Sierra Leone. We had two frigates and a destroyer of the British Royal Navy off the coast over the horizon.

Then at noon, when the takedown took place, the HMS Iron Duke sailed into Sierra Leone harbor at general quarters and sailed up and down the beach with its flag flying and guns up just to let whoever thought this was not going to be a good thing know that the British Navy is there. Remember the Third Battalion of the Parachute Regiment had already seized Lungi Field. So we were ready to evacuate in case this went sour. Also during this timeframe we had Pakistani Special Forces standing by to secure the three landing zones where we had helicopters that were contracted by the United States to take our indictees to a secret camp that we had put together on Bonthe Island under the pretense of a legacy program. We claimed we were fixing a jail as our first efforts toward showing our respect to the people of Sierra Leone. So we, quote, fixed up a jail in Bonthe

Island, and they thought it was just something we were going to hand over to the police. But really it was the nine jail cells of the individuals we were arresting, including the Minister of Interior, Hinga Norman, who was actually in charge of the prison system.

GREG PETERSON: So then somebody had to pull the trigger.

DAVID CRANE: The credit goes to Alan White, the Chief of Investigations. It was handed over to him. Brenda had done her job. We have approved indictments. The indictments were ready. They were in proper form. Arrest warrants had been executed by the Duty Judge. So it was handed over to Alan White and Gilbert Morissette who had assembled a team and had already put eyes on target. All of the individuals who had been indicted were already being followed. It was Alan White then who executed the arrests on the morning of March 10. It started at noon, and at 12:55 he called me and said, “We have all of them. Most of them are in helicopters.” Jim Johnson—who was at the time one of the heads of our team—was detailed to represent the Office of the Prosecutor where each defendant was given his packet, indictment and arrest warrant, and was advised of his rights, including the right to counsel. That was served on them while they were in the helicopters flying off to the incarceration facility on Bonthe Island, 150 kilometers south of Freetown.

They don't teach you this stuff in law school.

GREG PETERSON: Needless to say, the newspapers in Freetown had a very large headline. What was the reaction of the populace?

DAVID CRANE: Well, you know, it's interesting. We had planned that I would address the world press at 4:00 that afternoon. Desmond and I went down to the U.N. Headquarters, and the Press Secretary for the U.N. Headquarters said, "Mr. Crane is only going to read a statement." Some press was there—regional, international, as well as local. So I just read this statement, and it's online; you can read it. But I basically said that today is a new dawn for Sierra Leone and carefully read out all the names all of individuals who had been indicted and arrested. Of course, I left one out, Charles Taylor, because it was already sealed. When I first stopped, there was silence. That's what the reaction was. I have never seen a group of press just look at me, blinking, trying to digest the fact that we had already taken down most of those who bore the greatest responsibility for the atrocities. Then all of a sudden, the first guy broke for the door, and the room emptied out in five seconds after that so they could go publish their stories. Remember, this was only 2003, so we didn't have smartphones. They actually had to go use land lines and stuff like that. So off they went to file their stories.

As I was driving back to the court, word was getting out, and people were flowing into the streets in a positive way. Although we had a lot of people with guns at the ready just in case, and the HMS Iron Duke was still floating about, but the day ended quietly.

GREG PETERSON: Did you have a lot of protection?

DAVID CRANE: We did. We had to. We had a 30-foot wall around our compound with concertina wire. We had guards at the gate, close protection, a lot of guys with guns around. But, yes, we had to be careful. We stayed in the compound. Everybody on the team stayed close because we weren't sure how the public was going to react. But at this point in time, Charles Taylor did not know he had been indicted.

GREG PETERSON: In hindsight, do you think that Charles Taylor knew he was in harm's way?

DAVID CRANE: No, not really, not at that point. Our concern was that he would start knocking off witnesses very quickly if he would get even a hint of that. This was very sensitive information. We had Sierra Leoneans and people from around the world drafting these indictments, conducting investigations, and yet not a word leaked. That's something I am very proud of. If someone would have said one word, none of this would have worked because the indictees would have fled into the bush. So I'm very, very proud of the operational security and our office's sense of duty. This continued for the rest of the years that I was there, and I know it was that way subsequent to my departure. The professionalism of not letting the information get out saved lives and allowed this to happen in a just and appropriate way.

GREG PETERSON: One June 4, 2003, Charles Taylor was attending peace talks with other African leaders in Ghana. You decided to unseal the indictment. Why then?

DAVID CRANE: Well, it wasn't that I got up one morning and said, "I think I'll just flip the card." This was also an operation that we had put together and carefully considered. We weren't exactly sure when it was going to happen, but we began to play with Charles Taylor's mind a bit. I got into a back-and-forth with him through the newspapers. We knew we had Johnny Paul Koroma somewhere in Liberia at the time. We also knew that Samuel Bockarie was working for him in the Ivory Coast, leading his force that was causing disruption in that country. So as part of this plan of starting to ramp up our move towards taking Charles Taylor down, we put in the press that Charles Taylor was harboring indicted war criminals and demanded that he hand over Johnny Paul Koroma and Sam Bockarie. If he had said nothing, it would have probably died, but he took the bait, and he began to deny that he had them. Of course, we knew exactly where they were. He had developed an information asset system, so he had assets looking at them. And we knew exactly where they were. So we told the press exactly where they were. This played with Charles Taylor's mind. We wanted him to think that we had penetrated his inner circle, that we knew what he was doing.

He came back and admitted that they were there, and then I demanded that he hand them over for a just trial. This was in May of 2003. All of a sudden, out of the clear blue sky, we got this note that Samuel Bockarie

had died resisting arrest, and I demanded that the body be sent to us. And on my birthday, May 29, 2003, Charles Taylor sent me Samuel Bockarie's body in a cardboard box on the back of a U.N. helicopter. I remember standing there in the rain watching them slide that cardboard box off the back of that helicopter. It was very, very chilling. Of course, we subsequently found out through an autopsy that he had been shot by a firing squad, two hits at an angle of 45 degrees. They had him kneeled against the wall because there were chips of the wall on his back, and one guy pulled the trigger. We subsequently learned that Charles Taylor had also killed Bockarie's family, his children and his mother-in-law as well. That's how Taylor reacted to our demands.

At the time, we didn't know exactly what was going on, but there was a lot of pressure on Taylor. He was in the middle of a battle with rebel forces against him, the Accra Peace Accords were beginning to come together, and all of the leaders of West Africa, as well as other African leaders, were called together to try to solve the Liberian mess.

On June 3, I went and told the American Ambassador, the British High Commissioner, the President of Sierra Leone, and the SRSG that within 24 hours a significant event would take place that would potentially have an impact on their national security. During this timeframe, Robin Vincent had put together the arrest warrant, the indictment, and the next morning at 8:00 he served that on the Ghanaian High Commissioner—this is where Charles Taylor was—in Ghana. He also faxed and e-mailed copies of that information to Ghana's foreign ministry. As soon as that

was confirmed, then we had letters from me to the President of Sierra Leone, the American Ambassador, the British High Commissioner, and the SRSG, that at 11:00 today I was going to unseal the indictment against Charles Taylor, and we did.

Now again, this is never done in a vacuum. This was the result of hours of discussion and back-and-forth with our senior team thinking about the potential consequences of our actions.

At 11:00 am, we held a press conference, and it was amazing. Sometimes these things take on a type of movie drama. Taylor was walking up the steps in Accra, Ghana and I unsealed the indictment at the moment that he entered the hallway. I was told afterward that he was informed that he had just been indicted for war crimes and crimes against humanity. He was moved off to another room and he conferred with several heads of state—Thabo Mbeki from South Africa, John Kufuor from Ghana, and I believe Obasanjo from Nigeria—and they hustled him off into a car and got him back to Liberia. We never thought that they were actually going to hand him over. We would have taken him—in fact, we were ready to take him—but they chose not to. This is how the fateful summer of 2003 began. There was a back-and-forth, and finally U.S. marines were brought in to stabilize the situation, and then a peacekeeping force was brought in. Finally, in August of 2003, Taylor stepped down as President of Liberia and was sent off into some type of exile or house arrest—I never really could put my head around it—in Calabar, Nigeria, where he resided for the next several years.

GREG PETERSON: Then entered Sir Desmond de Silva.

DAVID CRANE: Indeed.

GREG PETERSON: So Sir Desmond, you had been working with David as Deputy Chief Prosecutor?

SIR DESMOND DE SILVA: Yes. Once the indictments had been sent out, David asked me to be in charge of any appeals that arose because there were a number of jurisdictional issues that came up. So to enable the trials to proceed in a speedy fashion, these jurisdictional matters were dealt with prior to any trials beginning. I handled all of those through 2003 and so on. Then knowing that we had to get Taylor, David said to me, “Desmond, I'm going to ask you to try and mobilize opinion in order to get one country after another to call for the surrender of Charles Taylor.” So I said to David, “I'm going to go to the European Parliament,” where I had a number of friends, and I mobilized them. A unanimous resolution was passed, and I point this out because the European Parliament has never agreed about anything before or since.

But on the issue of Charles Taylor, I mobilized them, and they passed a unanimous resolution that Charles Taylor should be surrendered to the Special Court. Indeed, they went further and said that that resolution should be sent to Congress and to the U.N. Secretary-General. So that was fairly successful because I remember calling David from Brussels, and he said, “How many votes?” and I said, “Unanimous,” and he

seemed to be reasonably pleased with his deputy at that stage.

DAVID CRANE: I was somewhat pleased.

SIR DESMOND DE SILVA: Then I also had a similar resolution passed in the House of Commons in London. The whole object was to ramp up the pressure so that the world would know that the opinion was that this man had to be brought to justice. Then we had the continent of Africa to deal with, and again we met with some success there. But then David, having very successfully indicted Taylor, left Sierra Leone, and his mantle fell upon my shoulders. It remained for me to carry on the fight. So I had to sit and think about how I was going to get this fellow. He was on the Calabar coast of Nigeria where he had retired with a great deal of money and a large number of “ladies of the night” from Liberia.

How was I going to pry him out of Nigeria and away from these ladies? That was the great difficulty.

By now it was 2005, and President Obasanjo of Nigeria had become a great friend of Charles Taylor's. Taylor used to spend every weekend at Obasanjo's country lodge. Obasanjo would be at one end of the table and Taylor at the other. I realized that there was no way I was going to get this man because of the friendship that had developed between these two characters. Something fairly original had got to be thought of.

Some may remember that this was a time when there was a great deal of talk about the expansion of the Security Council. As you all know, the Security Council consists of 15 members, five of whom are permanent. Nigeria, on account of her peacekeeping role in West Africa and other parts of Africa, hoped to attain a place as a permanent member of the Security Council. I knew that this was something Obasanjo wanted very much for Nigeria. When Serbia was applying to join the European Union, my counterpart in the ICTY, Carla Del Ponte, had opposed its acceptance because Serbia had failed to surrender Mladić and Karadžić. So I adopted a similar tactic, and I said to the High Commissioner of Nigeria in Sierra Leone, “Would you please convey to your president that I will object in the same way as Carla Del Ponte is objecting. I will object to any consideration being given to Nigeria as a possible contender to join the Security Council because your president is giving a house room to an indicted war criminal.”

I did this about two or three days before President Obasanjo of Nigeria was due to come to Washington to see President Bush. I chose my moment carefully. I was also in touch with Washington, and the State Department was expressing certain doubts at that stage as to whether or not President Bush was going to meet him. So President Obasanjo realized that he faced some difficulties.

I knew that there were generally about 100 people looking after Charles Taylor in Liberia. Then, all of a sudden, I got an intelligence report to indicate there were only two. So I realized that this was a trick. The game plan was to lift security on Taylor to encourage him to

make a run for it. And I didn't quite know what the end result of that run would be. Well, Taylor did make a run for it and then President Obasanjo had him arrested on the border of the Cameroons on the basis that he had broken his promise to stay where he was. On that basis he was surrendered.

I remember starting that particular day. I did not know what was going to happen. At 9:00 that morning, I realized that Charles Taylor had been picked up at the border, and as the hours progressed, I realized that he was going to be flown out of Nigeria at night. So we had quite a substantial U.N. military presence at the airport when the plane taking Taylor arrived.

Then there was a complication. It was about 6:00 in the evening, and I was on the telephone to Liberia. I said, "Now he's going to be handed over to the people from the Special Court." And they said, "He's got to have a full medical." I said, "What medical?" They said, "Well, he's got to have his heart checked." And I said, "I'll check his heart here when he comes, don't worry."

So I got on the phone with the American Ambassador in Freetown and said, "Look, all you Americans are hypochondriacs. I'm sure you've got a heart machine in the embassy," and the American ambassador said, "Yes." I said, "Can I borrow it?"

So I called Liberia and said, "Just send him through. I've got the heart equipment here." And it was just as well because all sorts of things could have gone wrong. I recall standing in the compound of the Special Court

around 7:00 that evening, watching this helicopter come in with helicopter gunships on either side. Eventually Charles Taylor got out of this helicopter. He was manacled, looking rather disheveled, and his rights were read to him, and he was put into a cell. In Sierra Leone, as in all sensible places, once a person is arrested, he is supposed to be brought before a court at the earliest opportunity. But I got a message from Charles Taylor saying, "I'm very disheveled. Would you mind waiting three days whilst I have some clothes sent for me from London and Paris?"

If you have seen Taylor on television, you realize how immaculately dressed he always was. And I thought to myself, well, never mind the rules that say that I've got to get him before a court at the earliest opportunity. If this man is going to spend the rest of his life in prison, and he wants to be well dressed on the first day, why not?

These are the little fine judgments you've got to make as a prosecutor. And that was one of my finer judgments.

Well, he appeared in court, but there were security concerns. The seat of the Court was in Freetown. So I had to fly to New York. I saw the American and British Permanent Representatives to the United Nations, and I said, "Now, look here, you people are going to have to pass a resolution to get him tried in The Hague because I'm stuck with this man in Freetown, and I've got to get him out." Certainly the British and the Americans agreed, and a U.N. Security Council resolution was

passed. I thought that was the end of my problems. Then the Dutch said, “No, no, no, we're not going to try him here unless some country agrees to take him once he's convicted, if he's convicted.” So I had to start all over again.

I eventually went country-to-country saying, “Would you please take this man if he is convicted?” and they all said, “No.”

So then I went back to the British government and said, “Now, look, you were kind enough to help pass the resolution to have his trial in The Hague. Now, you've got to take the responsibility of putting him behind bars in Britain if he is convicted.” So finally Britain agreed. Then, and then only, did the Dutch agree to the trial in The Hague.

So it was a lot of convoluted stuff, doing a bit of blackmail of Obasanjo and so on. But it's all in a day's work for a decent prosecutor. And there it is.

GREG PETERSON: There it is. So you did all the hard work. You got him to The Hague.

SIR DESMOND DE SILVA: No, I didn't do all the hard work—David, of course, indicted him. I got him. Stephen opened the case against him. And Brenda put him behind bars. So we've all played our bit.

GREG PETERSON: So there was this high diplomacy at The Hague. By the way, your good friend

Jim Johnson was explaining how you spent the afternoon while you were waiting for Charles Taylor.

SIR DESMOND DE SILVA: Well, you have to pass the time somehow. I recall a few corks popped and there was some liquid refreshment taken of a purely innocent kind.

GREG PETERSON: That may not make the final cut, but anyways I had to ask.

GREG PETERSON: Now, Steve, it's your opportunity. Were you in the Court at that point?

AMBASSADOR STEPHEN RAPP: No, absolutely not. I was over on the other side of Africa, in Arusha, watching all of this and meeting periodically with colleagues from the Special Court. I came over to the Court as part of our meeting of international prosecutors in June of 2005 with Hassan Jallow, who was my boss, the Prosecutor of the ICTR. I was quite interested, and I remember how excited I was, almost as excited as those people who were in Freetown when Charles Taylor was flown in on that night in March of 2006. It happened a few weeks after the death of Milošević, which was a tragedy in The Hague. So this was really a new opportunity for international justice to try a chief of state in a process that was transparent and fair in a way that would do the world proud. I very much wanted to see that done.

I hadn't seen myself in the role of Prosecutor of the SCSL. I think it was in July of the year 2006 when

Desmond decided to resign and the position became open that I was encouraged to put my name in. I did not think I had a realistic chance. I was interviewed in November but was very busy as Chief of Prosecutions in the ICTR, trying and supervising cases in Arusha of those responsible for the Rwanda genocide. I remember I was leading a witness in trial, which is a very exhausting experience, and was sound asleep at 2:00 a.m. on the sixth of December when I got a call from New York. It was the Assistant-Secretary-General, Deputy Legal Counsel, Larry Johnson. I couldn't understand what he was talking about for a while, until I suddenly realized that I was being offered the position as Chief Prosecutor. And, of course, they wanted me there yesterday.

The United Nations had just commissioned a report from Judge Cassese, the first president of the ICTY, that had suggested that there were a lot of challenges now at the Special Court for Sierra Leone in getting this case tried. The first thing was that it needed to have a chief prosecutor and a full trial team. So I got some time off from Hassan Jallow and was in Freetown within a week meeting the staff before the Christmas holidays. I decided I would arrive in January, but I would face immediate challenges. Taylor had been flown to The Hague at the end of June, and one of the first things I did was to appear at a pretrial conference where the presiding judge was still talking about an April 2007 trial date. Brenda had been involved in the Court's early days and then as a consultant had drafted a very good revised indictment that had cut the counts down from 17 to 11, and it was confirmed just a few days before Taylor was arrested. But Brenda was no longer working with us and, as I understood, wasn't interested in coming back. We

had some very, very good juniors working on the case, but we faced a situation where I was going to have to be in Freetown most of the time while we were still finishing our trials there and where the Court was headquartering. But we were going to have to try this case in The Hague in just a few months.

The first step was putting together a trial team, and the crucial thing was to convince Brenda to take on that task. Within three days of arriving in Freetown in January, I was off to New York to meet Brenda to persuade her to agree to take on the leadership of the *Taylor* case in the Trial Chamber. Then we began the work of getting the case in shape for trial. I had led trials myself in Arusha, including the *Media* trial, which I took over in the seventh month of a 34-month trial. I knew that it is one thing to read in the newspapers that so-and-so person is responsible and this is what happened, but proving it in court is quite another challenge. And unlike Robert Jackson, who spoke in his opening address about convicting the Nazi leaders on their own records, we didn't have many records. We had some newspaper clippings and a few other documents, but this was going to be a case that was going to have to depend on testimony, and it was going to have to depend on a lot of insider witnesses, some of whom had been used in the other trials, but many of whom were in Liberia, in situations where they were at risk.

So the challenge was to put together the evidence that we needed to tie Charles Taylor, who, as we always admitted, had not set foot in Sierra Leone, to these horrendous crimes that had been committed there. This happened at the same time that we had a challenge at the

Court. The Court had already been working for three years, and it had prosecuted these other cases. So now the international community was saying, “do this thing in three years and be done.” We had to raise the resources, the funds. This was a court that depended on voluntary contributions. So we had to go to capitals and convince them that this was the most important trial in the world and that they should not be freeloaders but voluntarily put in their own tax monies for the trial.

Fortunately, the Court had ordered a couple of months delay in the trial start date, though it was a massive amount of work for Brenda and her team to put together the pretrial brief by the early April deadline. But the judges were quite adamant that we were going to begin the case on the fourth of June. And so on the fourth of June in 2007, we opened the trial against Charles Taylor. Brenda wasn't yet available to join us, so it Mohamed Bangura and were prepared to lay out the case before the judges. Those of you who watched it—it didn't get seen in the United States much unless you got up at 4:00 in the morning—but we started it. There was a famous scene where Taylor didn't turn up, and though his defense attorney was there, he refused to participate. The judges said to him, “You'll sit down and listen,” and they turned to me. So I was beginning my address when the defense attorney started walking out of the courtroom. He went to the back door of the courtroom to get out—I don't know if people saw this but it played live on CNN and BBC—and it was actually the room where Taylor would have been detained, so the door was locked. The defense attorney was trying very hard to walk out of the courtroom through a locked door with all of his books falling out of his arms, until the presiding

judge finally interrupted me and said, “Mr. Khan, what are you doing?” And he replied, “I’m just trying to walk out.”

Though the judges were quite disturbed by his display, they eventually said, “If you want to go and be contemptuous of the Court, you can, but your Duty Counsel will remain.” So we were able to proceed and conclude our address that day, but it was clear then that we also had this challenge of making sure that Taylor had an attorney that would represent him. The Court spent a couple months finding a new team, and then there was a delay where we weren’t able to begin the evidence until January of 2008.

GREG PETERSON: I’ve just got to ask personally, when you’re on a roll, you’re doing the opening statement, you’re ready to rock and roll, and there are all these distractions, doesn’t that throw you off?

AMBASSADOR STEPHEN RAPP: No, you can’t be thrown off.

There are so many things in this world that would throw you off. It was a very tough morning for many of us because we got up and found out that the Paramount helicopter that David described flying on had crashed the previous night killing everybody aboard except for one person. This was the same helicopter that we had flown on just a few days beforehand. We used it because if you’re in Freetown, the airport is across a 20-mile estuary and you have to fly a helicopter or take a boat or a ferry or swim—those are the only options for getting

across. I was actually in the beginning of my address, honoring the people who had given their lives the previous day before I got to the facts of the case. Before I even got to those facts, we had the defense walking out. But there is a lot in these processes that you constantly have to work through, just day after day. I know from all the cases I did in Arusha that if you go to bed at night not thinking about four or five or six things that could go wrong the next day, you're not going to be prepared, because there are just so many ways that you can have difficulties. You're bringing in witnesses from thousands of miles away; you've just got a whole variety of tough issues that have to be faced if you're going to be able to put these kind of cases on trial.

GREG PETERSON: You had quite a leg, though, between when you did the opening in June and when the actual trial started in January of the next year.

AMBASSADOR STEPHEN RAPP: In terms of actually bringing the evidence, yes, there was a big gap. To be frank, we were able to benefit from that time to put together and organize our case. I was using that time very well and, of course, also trying to make sure that we could continue to get the resources that the Court needed. We had to make sure that we could try this case, provide an opportunity for the defense to challenge our evidence in every reasonable way possible, complete the case, go through an appeals process, and have the resources to do it all. So we were constantly in this kind of tension about whether we would run out of fuel before we got to the end of the task. We were constantly weighing the issue of how important each piece of

evidence was and looking for ways in which we could potentially shorten and limit our cases.

Everyone complains about these international cases taking too long. We had 92 witnesses or so on our list, and eventually we wanted to bring about 40 of them only on paper, as they were crime-based witnesses. But we needed to prove 11 different crimes—child soldiers and pillage and sexual slavery and rape and murder and mutilation, both as war crimes and as crimes against humanity, and the overarching crime of terror against the civilian population as a war crime. We had to prove that all that occurred, and so we had to put on a certain number of witnesses. We limited the crime scenes, or the districts, to only about a half of where the crimes occurred, but we still had to prove that the crimes were committed. We tried to do it in a very expeditious way, and one of the ways the Rules allowed us to do so was to bring witnesses in writing, to provide their written statements, if their evidence didn't go to the acts and conduct of the accused. But the defense wanted to hear those witnesses. They objected and we had to bring all of them except one.

Eventually we brought more than 90 witnesses to The Hague. Almost all of them had to be flown from Monrovia or Freetown to Brussels and then transported either by air or ground to our safe house. Every one of them appeared, testified, and returned safely. It was an immense exercise, and many of these people had rarely traveled more than 100 kilometers in their entire lives. We put it on in, I think, a total of 13 calendar months, about 44 weeks of trial. Then we had to face the defense

case. It was certainly one of the most challenging things that any of us had ever been involved in.

GREG PETERSON: Your first witness was Ian Smillie. Why did you pick him? Because he had expertise in diamonds? Was that just to go at the press, get a little bit of attention to the blood diamonds? Was that the thinking there?

AMBASSADOR STEPHEN RAPP: We always wanted to lay out the picture of what had happened. Clearly the motivation for Charles Taylor, which was only reinforced as he faced the necessity of fighting the various wars that he had gotten himself into, was to be able to take advantage of the diamonds of Sierra Leone. Ian had talked about how those diamonds are the most valuable in the world in terms of the run of the carat, and they can be dug up with backbreaking labor. They are found in streams, close to the surface, and they provided a kind of wealth, a kind of value, that you can use to trade for guns, and not just for guns. In one of the classic memos we had in evidence, Charles Taylor was delivered about 1,600 diamonds, and he allowed about 200 of them to be used for arming the rebels, but the other 1,400 he retained for safekeeping. So they were valuable for the war, but they were also immensely valuable for his other ends.

GREG PETERSON: Well, it was nice of him to take care of that safekeeping. One of the 92 witnesses you called was Naomi Campbell, and I just wondered if you offered your safe house as her safe house.

AMBASSADOR STEPHEN RAPP: Well, understand that Brenda and I were back and forth between Freetown and The Hague. I led several witnesses, including Taylor's own successor, Moses Blah, who was Vice President and earlier was Inspector General of Taylor's forces. We convinced him to testify against his former boss as a witness, but we concluded the prosecution case at the end of February 2009. The defense case began in July, after its motions to knock the prosecution case down were denied by the Court. Shortly thereafter I was appointed to my position in the Obama administration, and Brenda became the Chief Prosecutor. It was during the course of the defense case that the prosecution moved to reopen its case to add the testimony about diamonds that Charles Taylor had offered and delivered to Naomi Campbell in South Africa in 1997.

GREG PETERSON: So we're going to let Brenda talk about this.

AMBASSADOR STEPHEN RAPP: She can if she'd like.

GREG PETERSON: Yeah, let's talk about Naomi Campbell. So was it principally designed to draw attention back again to the trial?

BRENDA J. HOLLIS: Well, that's what the defense would have you believe, but actually we called Naomi Campbell because one of the members of my team had gone on a vacation to visit a friend in another country in Europe, and when he came back he told me

about meeting someone who was telling some tales about Charles Taylor. One of the tales was that Charles Taylor went to South Africa at one point and was at a dinner there where he met this woman, Naomi Campbell, and actually gave her diamonds. Of course, we didn't know anything about that, but the time period when this happened was very important for us. Our argument was that after a coup in Sierra Leone in May of 1997 and after Charles Taylor became the President of Liberia, the coupists actually sent a delegation to Liberia to speak with Charles Taylor to get his support for the junta because there was a prohibition on sending arms and ammunition and other support to this coupist government. They were unable to meet with him, but they met with his representatives, and when this delegation made its way back to Freetown, one of Charles Taylor's representatives was there and said Charles Taylor would help them get arms and ammunition, but he needed 90 carats in diamonds and \$90,000 in order to do this. The 90 carats in diamonds and the \$90,000 were given to this representative and taken back to Charles Taylor, and it was not long after that that Charles Taylor went on this multi-nation trip, and the first stop was South Africa.

So the story about him giving raw diamonds—raw, rough diamonds—to Naomi Campbell fit into the same time period where our evidence said he had been given these diamonds in order to get arms and ammunition. It reinforced our evidence. So we began to pursue this and got in touch with Naomi Campbell's agents. We never were allowed to speak with her. But we also found out that Mia Farrow had been at this party, as had the then-agent for Naomi Campbell. We got in touch with them,

and they remembered it very well. So we thought it was important to corroborate this part of our evidence, because it showed Mr. Taylor was getting diamonds and that he was giving arms and ammunition to the rebels in Sierra Leone. That's why we reopened the case. If he had given the diamonds to the cleaning lady, we would have called the cleaning lady, but he gave them to Naomi Campbell. So that's why we called Naomi Campbell.

GREG PETERSON: It's consistent with what Sir Desmond was telling us about his habits, then. Speaking now, not only as the Chief Prosecutor, but as the constant actors throughout the prosecution, how did you think it went after you closed the prosecution? Your case closed and the defense came on. Did you have a good feeling about where you were in the case? Did you feel that you had put in what you needed to put in? Were you comfortable?

BRENDA J. HOLLIS: We felt that we had put in very, very solid evidence. That was one of the reasons that we closed our case when we did--we thought we had proven the elements. Of course, attorneys propose, judges dispose, so ultimately it was for the judges to decide. But we were very comfortable with our case.

GREG PETERSON: Charles Taylor took the stand in his defense on July 13, 2009. What kind of witness was he?

BRENDA J. HOLLIS: He was quite eloquent when he spoke. His defense counsel was able to lead him quite a bit, so very often it was the defense counsel

giving the story, and occasionally Charles Taylor saying, "Yes," "Yes," "No." But he is a very charismatic man, he is a very eloquent man, he is a very intelligent man, and all of that came across as he testified. And, of course, he had the entire time before we began our trial, the entire time during our trial, and then many months after we concluded our evidence to prepare his story, to be able to explain our evidence, and to accept the evidence where he had to, with minimal harm to himself. He was very good at that.

GREG PETERSON: You actually started the cross-examination in November. Did you feel like he was being truthful with you?

BRENDA J. HOLLIS: Not really. He was very clever, as I said. You could tell that he was a very good politician because you would ask him a question and he would give you a message response. So we didn't feel that he was truthful. But he had changed his story a bit. It was a very, very long direct examination, many months long, which gave him the opportunity to confuse his evidence and to say things that later would come back to haunt him. We were able to use that in the cross-examination. On some occasions he would even deny that he had said something, and when we would read to him from the transcript, he would still not be sure whether he had really said that or whether we just misunderstood him. So he was not a good witness for himself on cross-examination.

GREG PETERSON: At some point the trial ended, and you had a chance to do the closing statement. As you

prepared for that, were there areas within that closing statement where you knew you had to accent probably a little bit more than others based on the evidence or perhaps the lack of the evidence had turned out, just from a focus perspective?

BRENDA J. HOLLIS: Well, we felt that we had evidence to prove all of the charges against him as well as all of the modes of liability that we had charged. So it was a matter of focusing on the areas that we thought perhaps the judges would give the most attention to as they were sorting through the evidence, and that's really how we focused our arguments. Really the Charles Taylor trial ended as it began, because, as Stephen told you, Charles Taylor did not show up for the prosecution's opening statement, and the defense counsel tried, eventually successfully, to leave the courtroom. They also boycotted our closing oral arguments. So we were speaking to the judges and there was nobody on the other side of the room.

GREG PETERSON: Finally, the defense was convinced to present its closing arguments. How did they do that? How did the Court get the attention of Defense Counsel Griffiths?

BRENDA J. HOLLIS: We, as the prosecution, felt that when we received an order from the judge, it was an order. The defense seemed, at times, to think that when they received an order from the judge, it was a suggestion. And they took the order from the judges to file their closing submissions on a certain date as a suggestion. So a majority of the Trial Chamber said,

“You have missed the deadline, you may not file closing submissions.” The defense appealed that, and the Appeals Chamber said to the Trial Chamber, “Well, you did not get an effective waiver from Charles Taylor that he really understood the consequences of missing the deadline. So we're going to allow the defense to file written submissions and to make oral argument.” So eventually they did that in March just before the hearing was closed.

GREG PETERSON: And it was closed on March 11, 2011, after three and a half years. Then you had to wait for over a year for a verdict. What kind of signals were you getting from the Court as to how the deliberations were going time-wise? I mean, this had to be an excruciatingly long period of time. Or did they tell you right up front it was going to take a year?

BRENDA J. HOLLIS: They had various estimates as to how long it would take. We were getting no signals at all from the Trial Chamber, nor should we have been getting any signals. It was a very tense time for us because we were thinking, “Well, we have a very strong case,” and then time went by and we starting thinking, “Well, maybe they don't think it's that strong a case. Why is it taking this much time?” We didn't know, but eventually in April 2012 they did come forward with the verdict.

GREG PETERSON: So they told you that they were going to deliver the verdict on April 26, 2012. Did you call your buddies here and say, “Come join us”?

BRENDA J. HOLLIS: We certainly put the word out because, you know, when you are preparing a case and then indicting and then prosecuting a case, it's a team effort. The Taylor prosecution benefited from the hard work that had been done, and the foundation that had been laid, by both David and by Sir Desmond. And Mr. Taylor, being a fugitive from justice for three years, allowed the other cases to move forward, so we were able to benefit from those cases in refining our case against Charles Taylor. So, of course, I wanted them to know and to be there to share in whatever the outcome would be. We had absolutely no inkling as to what the outcome would be.

GREG PETERSON: How did you prepare your staff for the good or the bad?

BRENDA J. HOLLIS: We talked about that, and I told them that no matter what happened, they had to remain very solemn and that under no circumstance could they throw up in the courtroom.

GREG PETERSON: So you were in there, listening and you were not given any clues. In fact, there was some negativity coming out as the judges were reading. How was your blood pressure?

BRENDA J. HOLLIS: Fortunately I normally have low blood pressure, so when it goes up, it's not too bad, but it was very tense in the courtroom, very tense.

GREG PETERSON [*pointing to the other prosecutors*]: Were you folks there at the time?

DAVID CRANE: We sure were.

GREG PETERSON: Where were you located? In the courtroom?

DAVID CRANE: I was in the audience watching with Steve and Fatou Bensouda.

GREG PETERSON: Okay. Desmond, you were looking for your favorite area?

SIR DESMOND DE SILVA: Brenda very kindly invited me to sit in counsel's row, so I was able to watch this historic judgment being delivered against this man whom I once called "Africa's Hitler." It's a remark he didn't care for, and he complained about it bitterly, but there it is.

GREG PETERSON: Again, respond if you will, as you heard the judgment roll out and it wasn't all quite clear because the judges began by saying, "you didn't prove x, you didn't prove y..." What was your sense of this?

AMBASSADOR STEPHEN RAPP: There was a moment when I heard "substantial." Judges hint at these things, and they were saying substantial assistance was provided, and I realized that that would then open the door to say there was an aiding and abetting responsibility. At that point, I had that feeling that this had been a success. I must say that later on, as the judges began to pull it all together and talk about the role of Charles Taylor in planning the attack on Kono and the

campaign that led up to certainly the worst atrocities committed in a capital city in memory, in Freetown in January of 1999, I realized that this was really an historic judgment. From knowing the people in Freetown that had experienced that horror, from spending time with the amputees and those who had lost family members and those who had been raped and devastated, I knew that the team had been successful in convicting Charles Taylor for his role in that horror, which was an enormous and historic accomplishment.

GREG PETERSON: David, in 2003, the day before you unsealed the indictment against Taylor was the first time the U.S. government and other governments knew what you were doing. You were working completely independently, as the Statute provided. What kind of blowback did you get?

DAVID CRANE: “I’ll never work in this town again,” so to speak. Yeah. I remember going by to say goodbye to Colin Powell—he had resigned due to issues in Iraq—and we were just chatting. He was really my political cover in the Bush administration, which was furious with me personally. But I said to him, “You know where this is going.” They had full knowledge of the fact that the case was going in that direction and so they should not have been shocked, but they weren’t happy. You have to understand that in those days, the power of an independent prosecutor to take down a head of state wasn’t obvious. That wasn’t something that had been done often, and in the way that we had done it.

The United States was quite upset with us due to it even happening in that summer. There had been a lot of back-and-forth where Charles Taylor tried to cling to power even though he really didn't have any more power. The LURD and the force, MODEL, were more invigorated, and Taylor had allowed them to attack Monrovia, to try to take it over, and the United States had to intervene. It was the first time that U.S. marines landed in Africa since Somalia in 1990 or 1991. So it was a pretty tense time. But as Cherif Bassiouni mentioned, you do the job you're asked to do, and it's the only time in my life that I had people angry at me for doing it. Really there was a lot of anger related to the takedown of Charles Taylor.

AMBASSADOR STEPHEN RAPP: This is an important part of the lesson of the Court. Many have seen this Court as less independent than the other ad hoc international criminal tribunals, but each of the prosecutors has had to exercise that independence and make decisions to push this forward. I know the decision to go after Sam Hinga Norman and the CDF wasn't popular. The British Ambassador, the High Commissioner, ended up testifying as a defense witness, and Desmond cross-examined him during the *Sam Hinga Norman* case.

But you have to make these independent decisions. I think the American government was quite happy that Charles Taylor was charged, but there's always the comment, "Oh, this isn't the right time," because it's frankly never the right time, you know. You need to put your case together and make the decisions that need to be made. Of course, at the end of the day, you're also

going to have to go back to governments and ask for their cooperation. It's a world of states, but it's through the professional exercise of independence that these courts earn respect so that the verdicts and the judgments they render can have the respect of the whole world.

DAVID CRANE: Indeed. And stop and think about this. The world howled for about two months. Charles Taylor was finally sent off to Calabar. A period of transition came in. The United Nations came in. Things settled down in Liberia. Things settled down in Sierra Leone. A new government was formed in Liberia. The people of Liberia elected for the first time in African history a female head of state, and now we have a country that has the ability to move forward and rejoin the family of nations. In my mind, that's a great endorsement of our indictment because the indictment is what took Charles Taylor out of the equation. I think that over time it has shown that in order to have true peace, you have to have true justice.

AMBASSADOR STEPHEN RAPP: And you can look at it today. This is a court with limited jurisdiction. We only had the ability to go after those with the greatest responsibility. It was only 13 indictments, 12 of citizens of Sierra Leone, 1 of Liberia, but the impact of these judgments—of sending the signal that no man is above the law, that you don't gain power through violence, you don't gain power by terror—has certainly contributed to a situation where it's been possible for power to change hands in these two countries without lethal violence.

DAVID CRANE: Indeed.

GREG PETERSON: Sir Desmond, what's the legacy?

SIR DESMOND DE SILVA: The legacy is the message that has gone out. It is very simply this: however powerful you are, however mighty you may be, the law is always above you. That is the message that went out, and I hope will remain out there to be heard by all future tyrants and dictators. It is only if they're answerable and brought to account that mankind will possibly have an easier time with the sort of monsters that we've seen in history. I know David touched upon the difficulties he had with the ambivalence of the U.S. administration about getting Charles Taylor. I had endless difficulties in the State Department and I had to finally say to the Bush administration, "Now, look, I need your support. I've got him in Freetown, and I need your support for the resolution to get him to The Hague," I had great difficulties, great difficulties. There were sections of the administration that didn't want me to get him anywhere. There were sections of the administration that didn't want him brought to trial.

AMBASSADOR STEPHEN RAPP: That's true.

SIR DESMOND DE SILVA: It was apparent to me that at some time or another he had been run by one of the agencies, and therefore there were people in Washington who didn't like the prospect of this man ending up in a witness box where he might say all sorts of things. He might embarrass the U.S. administration.

So there was a certain amount of tension, and I had to battle with all of that. It wasn't easy. But I must say, when the administration finally agreed to give me their help, I got it totally and without stint. I had full and complete cooperation, and had it not been for the support of that administration, the whole business of getting Charles Taylor to trial in The Hague would have been extremely difficult.

BRENDA J. HOLLIS: I think a very important legacy of the Special Court, beyond the Charles Taylor trial, is that, regardless of whether your ultimate goal may be seen as a very laudable one, you may not commit crimes against humanity, war crimes, or other serious crimes to achieve that goal. In Sierra Leone, the government very laudably cooperated with us 100 percent to arrest the leaders of the group that fought to reinstate the democratically-elected government of Sierra Leone, the Civil Defense Forces, CDF. Because while they were trying to achieve that goal, which many saw as very laudable, they committed these types of crimes. It's not just the very evil and malicious dictators of the world who are held accountable when you engage in these kinds of criminal acts, but anyone. Even if you are pursuing what many may see as a very positive goal, you simply may not commit those crimes with impunity. I think that's a very important lesson. And it's a very, very significant achievement for the government of Sierra Leone—which was brought back into power by this group—that it supported us in our efforts to arrest them and supported us during the trial of these leaders. So I think that's a very, very important legacy for this Court.

SIR DESMOND DE SILVA: I agree with what Brenda says because, as I expressed it once, you can fight on the side of the angels and still commit war crimes. It doesn't really matter who you are fighting against.

DAVID CRANE: Yeah. Defending your homeland is not a defense against war crimes and crimes against humanity.

AMBASSADOR STEPHEN RAPP: As we see other leaders committing horrendous crimes, you may think that for now there won't be an end, that these people won't be brought to justice, and, indeed, for people that were experiencing the crimes in Liberia and Sierra Leone between 1997 and 2003, they couldn't envision a day that Charles Taylor would be brought to justice. At least the initial solution had been the safe and comfortable exile that he was able to go to in Calabar. That had been the pattern for the past, for the Idi Amins and for the Mengistus and others that had committed crimes and had been allowed to escape with their loot. Heads you win, tails you don't lose. But with Taylor we saw that the world has changed, you can't get away with atrocities anymore, and there will be justice no matter what level of authority the individual held.

In the case of Sierra Leone there was no Chapter Seven powers that said that Nigeria had to surrender Taylor, but there was the moral force of what the Court had done with the indictment and with the evidence. The same can be done by other courts, and other leaders will face the same kind of justice that Charles Taylor

received with that verdict in April, and by the end of next year with the decision on appeal.

GREG PETERSON: And to fill it all in, Taylor received a 50-year sentence. I would like to congratulate you and to say on behalf of the Robert Jackson Center and everybody here, this has been an incredible opportunity to sit and talk to four individuals who, over a span of virtually ten years, brought together an incredible sense of justice and certainly a precedent upon which many in the international humanitarian law community can seek a sense of pride. So thank you. This has been magical.

Update from the Current Prosecutors

This roundtable was convened at 10:30 a.m., Monday, August 27, 2012, by its moderator, Professor Michael Scharf of Case Western Reserve University School of Law, who introduced the panelists: Serge Brammertz of the International Criminal Tribunal for the former Yugoslavia (ICTY); Hassan Jallow of the International Criminal Tribunal for Rwanda (ICTR) and the International Residual Mechanism for Criminal Tribunals (MICT); Brenda Hollis of the Special Court for Sierra Leone (SCSL); Fatou Bensouda of the International Criminal Court (ICC); William Smith of the Extraordinary Chambers in the Courts of Cambodia (ECCC); and Ekkehard Withopf of the Special Tribunal for Lebanon (STL). An edited transcript of their remarks follows.

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PROFESSOR MICHAEL SCHARF: This is the International Humanitarian Law Dialogs, and often the high point of the Dialogs is the discussion with the Chief Prosecutors and their Deputies. We've experimented with various formats throughout the years. For the last couple of years, we have had each of the Prosecutors give you about 15 minutes of highlights from their last year. This year we decided to go to a more interactive format. I am going to ask the Prosecutors, in the order in which their tribunal was established, to briefly answer a series of questions in about two or three minutes each. That will give us a comparison of what's going on with all of the tribunals, what their major challenges are, what

they see coming up in the future, and what precedents they have set.

Now, you've met all of these people before, and they are so well known in this field that I don't really need to go into biographies, so I will just name them. We have represented here the first tribunal that was created in modern times, the Yugoslav Tribunal, which is now headed by Chief Prosecutor Serge Brammertz. Second after that, a year later, the Rwanda Tribunal was created, and for many years now Hassan Jallow has been the esteemed Chief Prosecutor. Next we have the Special Court for Sierra Leone, and as you saw last night, there have been four prosecutors who have together done a great job culminating in the recent verdict against Charles Taylor. We have here the current and final Chief Prosecutor of that court, Brenda Hollis. Then we have the Cambodia Tribunal, formally known as the Extraordinary Chambers in the Courts of Cambodia. In the past, we have seen Andrew Cayley, but since he could not attend this year, he was nice enough to send us somebody who has been at the court from the very beginning. And Andrew says he works so hard, he absolutely needed this trip out to Chautauqua, so we welcome Bill Smith. And then the Lebanon Tribunal is the newest tribunal, and we are very happy to have it join the ranks of the other tribunals. We have Ekkehard Withopf from Germany, who is one of the prosecuting attorneys there. All of these ad hoc tribunals are situation-specific, but then we have the permanent International Criminal Court, established in 2002. We are very, very fortunate to have the new Chief Prosecutor of the International Criminal Court, Fatou Bensouda. Thank you.

We're going to ask the same questions of everybody. Please keep your comments brief. The first question is: what were the one or two most important developments in your tribunal during the past year?

SERGE BRAMMERTZ: As far as the Yugoslav Tribunal is concerned, the most important development since we last met is that Karadžić and Mladić are finally both on trial. For Karadžić, the defense phase will start in October, and for the Mladić trial, the presentation of evidence is ongoing. The prosecution began its opening statement in May this year.

Why is it very important? It is important because they were fugitives for many, many years. They were indicted for the first time in 1995. Karadžić was arrested in 2008 and Mladić in 2011, so they were fugitives for a very, very long period, and both are allegedly two of the perpetrators most responsible for crimes committed in the former Yugoslavia. As our indictment reveals, we consider Karadžić to be the architect of the ethnic cleansing policy in Bosnia. Mladić held the highest military office; he was General of the Serbian-Bosnian Army. So, in this sense, I would say that definitely the most important development has been to have them both on trial now in The Hague.

PROFESSOR MICHAEL SCHARF: Yes. And with Milošević's death, some people said that if those two had not been brought to justice, international law would not have remembered the Yugoslavia Tribunal as such a success. So we look forward to seeing how those cases continue to unfold.

Now going down into the middle of Africa, to the Great Lakes region, Arusha, Tanzania; Hassan, tell us what's going on in your tribunal.

HASSAN JALLOW: Well, with the conclusions of proceedings this month in the case of Augustin Ndirabatware, the Arusha Tribunal has finished the trial phase of its program after some 17 years and having concluded some 72 cases. That's a significant development. We have no more trials to bring; all we are focusing on now is dealing with the appeals that have arisen from those trials. We expect the appeals to conclude towards the end of next year, or at the latest in 2014.

Closely related to that—having also helped in the conclusion of the trials—is the fact that during this past year we were able to secure for the first time judicial approval for the referral of cases to Rwanda. There has been an ongoing attempt to do this, but each time the judges declined for various reasons. But now, as a result of some legal reform and capacity-building which was carried out within the Rwandan legal system, we were able to finally convince the judges that Rwanda can provide fair trial opportunities, and so the ICTR judges have transferred a number of cases to that jurisdiction for trial.

The second important development is the fact that as we are moving towards closure. The Security Council had decided that there should be a successor mechanism to the Yugoslav and Rwanda Tribunals, and so by a resolution passed in December last year, Resolution

1966, the Security Council requested that our Tribunal and the ICTY work towards the establishment of that Residual Mechanism by July 1. We have succeeded and managed to get the Residual Mechanism off the ground since July 1, 2012, at least the Arusha part of it, so it is functioning now. And the Yugoslav part is expected to commence on July 1, 2013. So there is a successor institution now in place to take over the residual functions of both the ICTY and the ICTR. Those have been our major developments.

PROFESSOR MICHAEL SCHARF: Now, Brenda, it's been a "real quiet year" at the Special Court for Sierra Leone, but surely there is something worth talking about, right?

BRENDA J. HOLLIS: Well, thank you, Michael, and I'll take that question for 100 points.

Of course, the verdict and the sentence in the *Charles Taylor* case was a very important milestone for the Special Court for Sierra Leone. Mr. Taylor was found guilty of all 11 counts of the indictment for planning and aiding and abetting atrocities. The sentence was very important because they gave this man 50 years for planning the most horrific campaign of atrocities against civilians, as well as for being a critical contributor to the ability of the two major rebel groups to commit these crimes. It was of obvious historical importance and of legal importance. But most significantly, it was of importance to the people of Sierra Leone, because it confirmed and affirmed what they had told us from the very beginning—that Charles Taylor

was among those most responsible for these crimes. In fact, in the view of many Sierra Leoneans, he was the man most responsible for these crimes. So we had a very important achievement there.

Over the last year, the legislature in Sierra Leone also ratified the agreement creating the Residual Special Court for Sierra Leone, which will stand up when we close, shortly after the appeals judgment is delivered in the *Charles Taylor* case. That is expected in the last quarter of 2013.

We had another significant development over the last year in that we have six persons who have been, or currently are, subject to contempt proceedings, including the former lead defense counsel in the *Charles Taylor* case. That counsel is before a judge for contempt because of alleged violations of protective measures. The others are before the judges for violation of protective measures or attempting to bribe witnesses. This is very important because we need to send a message that witnesses must be free from interference even after the Special Court closes, and that those who interfere with these witnesses will face judicial proceedings. So I believe those are the most significant accomplishments over the last year.

PROFESSOR MICHAEL SCHARF: And now on June 15th, when she was sworn in as the new Prosecutor of the International Criminal Court and required for nine years to come back to Chautauqua—the *New York Times* called Fatou Bensouda “the new face of international justice.”

What's been going on at the ICC this year?

FATOU BENSOUDA: I think this has been a very important year for the International Criminal Court. We completed the trial of Lubanga last year, and this March, the trial chamber unanimously found him guilty of committing the crimes of enlisting, conscripting, and using children under the age of 15 to participate in hostilities, in the Ituri region of the Democratic Republic of Congo. I think it is significant in that it was the first trial brought and the first final decision rendered in the International Criminal Court. Also, closely connected to that, is the subsequent decision of the judges in relation to reparations for victims.

Another important event worth mentioning took place in July of this year, just a few days after I was sworn in, when I received a delegation from Mali, led by the Minister of Justice, coming to refer the situation in Mali as of January 2012 to the ICC Prosecutor for investigation and prosecution. This is particularly significant as it is the fourth African state that referred a situation to the Prosecutor for investigation and prosecution; it shows what I always say: that contrary to what is being said about the ICC targeting and focusing on Africa, this demonstrates yet again the engagement of African States with the ICC.

PROFESSOR MICHAEL SCHARF: Now, Bill, the international press seems to hang out in The Hague, and there's not as much of a presence down there in Cambodia, but big things are happening in Phnom Penh. Can you tell us about those?

WILLIAM SMITH: Yes. Good morning. I think the most significant thing that has happened at the Khmer Rouge Court, or the Extraordinary Chambers in Cambodia, is the start of the main case against the senior leaders of Democratic Kampuchea. As many of you know, between 1975 and 1979, the Communist Party of Kampuchea took over Cambodia, and during its rule basically attempted a social experiment to rapidly change that society from a capitalist society to a socialist one through a forced agricultural revolution. The cities were emptied within the first couple of days and people were sent to labor camps. Anyone that was an enemy, or anyone who was perceived to be an enemy to those rapid policies, was taken to torture centers, and many were killed. Some were attempted to be reeducated.

The ultimate result of that regime was approximately two million Cambodians. About one million people were executed, and the rest died of starvation, lack of medical help, and disease. And so that was about one-third to a quarter of the Cambodian population.

The main trial began in November last year, and it has been continuing right up until August. We've heard 100 days of testimony. We've had many, many documentary debates on the evidence that was discovered from the period, similar to the German cases. There was a trail of paper, not as significant and not as all-encompassing as the Germans, but by the same token, it has given us an idea of who the people were that were most responsible. Witnesses have been coming and telling their stories.

For the people of Cambodia to finally have the second-in-charge of the Communist Party of Kampuchea, the third-in-charge, and another senior leader on trial at the ages of 84 to 86 is justice a long time coming. It is not over. It's a difficult exercise. We understand the issues and the complexities that have been raised by Hans Corell in terms of setting up of the Court. Did the Cambodian judges have enough experience? Were the courts independent enough to be able to run these trials? The United Nations has become involved.

The court is a marriage between the United Nations and the Cambodian government, and in relation to this second main trial, we, as a prosecution team, are trying our best to make sure that the evidence is on record as to the crimes committed and as to the responsibility of these accused. We think that the best way to counter criticism about whether this court should have ever been set up is to present evidence, and lots of it, to ensure that the trial is heard on evidence and the process is fair. It's a difficult exercise, but this is a major concern in Cambodia. People have waited 30 years for this type of justice, and so that's our focus at the moment.

There are other developments. I'll address other aspects of our work in relation to your further questions.

PROFESSOR MICHAEL SCHARF: Okay. Now, Ekkehard, a year ago, everybody was abuzz about Judge Cassese's decision, the first appeals decision out of your court, the Special Tribunal for Lebanon, which defined terrorism. Unfortunately, one of the developments since

then is that Judge Cassese, a dear friend of many of ours, has passed away. So, for a second, I think we should take a moment to respect his passing. [*Moment of silence.*]

There have been many other developments this year, and we're very happy that you could be here today to tell us about some of the exciting news out of the Special Tribunal for Lebanon, which sits in The Hague, in the same building that Brenda occupies on the south side of town.

EKKEHARD WITHOPF: Yes, indeed. There have been a series of quite important developments, and I believe the most important one is the decision to hold a trial in absentia that was taken by the trial chamber in early February of this year and which has recently been followed by a decision of the pretrial judge on the trial date.

The Special Tribunal for Lebanon is the sole tribunal amongst the currently existing international courts and tribunals that provides for trials in absentia. Of course, we do realize that they are problematic as a matter of principle. It is, however, a very unfortunate fact that in the context of investigating the assassination of former Lebanese Prime Minister Hariri, there is no likelihood at all that any of the four defendants—and they're all supporters of Hezbollah—would be arrested in the foreseeable future.

Based on this situation, the trial chamber, after careful consideration of the steps that have been taken by the Lebanese authorities in trying to arrest the four

accused, came to the conclusion that all reasonable steps have been exhausted. That was the requirement for deciding on a trial in absentia. That decision has been taken. The decision was appealed by a defense motion for reconsideration. The trial chamber has dismissed this motion for procedural reasons, and the issue is now before the Appeals Chamber.

Nevertheless, in parallel, the pretrial judge has scheduled a trial date for March 25, 2013. He very deliberately indicated that the trial date is only tentative. He added a number of caveats, the first one being a potential arrest—we talked about this—the second one being an amendment to the indictment, which would include potentially connected cases, and the third one being adding one or more accused individuals. While the first scenario is highly unlikely, I think the other two scenarios, adding charges and adding accused persons, are certainly within the range of possibilities.

I want to briefly touch upon on the decision of the trial chamber on the legality of the establishment of the Special Tribunal for Lebanon. As it has been anticipated, the trial chamber came to the conclusion that the Special Tribunal for Lebanon was legally established, and as a last important decision, the pretrial judge allowed 59 victims to participate in the proceedings.

PROFESSOR MICHAEL SCHARF: Now, the next question is related to the first, but it zeroes in on the issue of legal precedent. People say that the field of international criminal law is the fastest growing and evolving field of international law and maybe of any

legal field, and that's because we have all these tribunals generating all these new cases. And luckily, the judgments are online. People can research them, and students are taking international criminal law classes all around the world. It's one of the most popular areas of law for students to study.

So the next question is: what was the most important legal precedent set by your tribunal this year? Explain why and what you think the precedent means for the greater development of international criminal law. We'll begin again with Serge.

SERGE BRAMMERTZ: Thank you. I would like to say a few words about the *Perišić* judgment from September of last year. Perišić was the chief of staff of the Yugoslav Army and as such provided logistical support to the Serbian Army in Bosnia. He was prosecuted for aiding and abetting crimes committed on the territory of Bosnia, crimes for which many people have already been convicted by the Tribunal in the past.

The trial chamber found him guilty for aiding and abetting a number of specific crimes: murder, inhumane acts, persecution, attacks on civilians, and aiding and abetting those crimes committed by the Army in Bosnia. He was, however, acquitted for aiding and abetting the crime of extermination in Srebrenica because the trial chamber was of the opinion that the *mens rea* was not there at that level—they said that he was fully aware that there was a policy of committing crimes, but not to the level of extermination or genocide. He was also convicted as a superior for having failed to punish those

responsible for crimes committed in the shelling of Sarajevo.

It was an important judgment. The sentence was 27 years. Why is it important? Because it is part of the precedent that shows that a person can be convicted for aiding and abetting if he provides assistance to a party in the conflict, knowing that this party is implementing a policy that involves the commission of crimes. We are speaking here about logistical support in the sense of paying salaries out of Belgrade, providing fuel for tanks, providing training. We are not even speaking about weapons in this case. The trial chamber was of the opinion that the evidence clearly showed that weapons had also been provided by the chief of staff or people on express responsibility but held that no factual link had been established during the trial between the weapons that had been delivered and the crimes committed in a number of municipalities.

So I think that aiding and abetting is receiving a broader interpretation and that this is an important precedent. Of course, we have to wait for an appeals decision, but I think it's an interesting development.

PROFESSOR MICHAEL SCHARF: Now, Hassan, what would you say was the most important legal precedent at the Rwanda Tribunal?

HASSAN JALLOW: I'd say, if you'll permit me, that we had two very important precedents.

PROFESSOR MICHAEL SCHARF: Absolutely.

HASSAN JALLOW: I have already alluded to one of them, which is the decision by our judges to refer eight cases to Rwanda for trial, including the cases of two detainees. In doing so, the judges went to great lengths to really identify and explain the fair trial requirements and what they would be looking for in order to satisfy themselves that a particular legal system would provide a fair trial for an accused person.

The decisions are very important in many respects. First, they have enabled us to finish our work by removing some of the workload from our own court. Second, the cases are important because they have also now enabled other jurisdictions, which were in a situation where they could not prosecute or even extradite suspected génocidaires found in their countries, to now be able to extradite them to Rwanda. Since the ICTR found that the legal system in Rwanda can provide a fair trial and gave the green light for extradition, a number of jurisdictions in Europe, the United States, and Canada have been able to send suspected génocidaires to that country for trial. So we have filled the gaps in combating impunity now that we no longer have a situation where some people could find safe havens in countries that would not extradite or prosecute them.

I think the decisions are also important in a third respect—for the ICC. I think they provide some pointers as to what needs to be done if you are going to implement complementarity. They show what reforms and capacity-building measures you need to have in order to make sure that a particular legal system satisfies the conditions for fair trial. So it's a good series of decisions for us.

Then we had the *Karemera* judgment, which involved the prosecution of two of the leaders of the then-ruling party at the time of the genocide in Rwanda. The U.N. report on the genocide in Rwanda, you will recall, highlighted the fact that sexual violence was a major weapon of the génocidaires and that up to a quarter of a million women may have been subjected to it during those 100 days. We did indict these two leading personalities, leaders of the MRND, with sexual violence, with rape, not as direct perpetrators, but based on the evidence that the Interahamwe, which is the militia wing of their ruling party, was the main body responsible for the killings and the violence. It was good to see the trial chamber judges agreeing and convicting these two leaders of the ruling party for rape and sexual violence committed by the members of the ruling party. The judges held that the leadership should have foreseen that sexual violence would be a natural consequence of the genocide, which they had conspired to cause, planned, and implemented.

It's been a good decision for the struggle against rape and sexual violence to have these two leaders of the ruling party convicted. They were not engaged in acts themselves, but the judges held them legally responsible for all acts of rape and sexual violence committed and they were sentenced to life for that.

PROFESSOR MICHAEL SCHARF: Hassan's comments remind us that the precedents that come out of these courts are not confined to just these courts. The different tribunals are looking at each other and are guided by the precedents that are coming out of all of

them, and the domestic legal systems are starting to cite your case law on a regular basis.

Now, Brenda, you were telling us about the *Charles Taylor* judgment. I know it's over a thousand pages long. What in there would you say are the one or two most important precedents for the future of international criminal law?

BRENDA J. HOLLIS: Well, I think, first of all, just the conviction of a former head of state for crimes committed by others in another country—a country which this accused never entered during the commission of these crimes—is an important development. And I think that one basis for Taylor's responsibility, aiding and abetting, has the same consequence as Serge talked about with the *Perišić* case. The Court found Taylor to be a substantial contributor to the commission of these crimes through his ongoing aiding and abetting, and I believe that is a very important precedent.

Also, as Hassan has mentioned, Mr. Taylor, was found guilty of rape and sexual slavery and outrages on personal dignity, among other charges. Again, these crimes were committed by others, but they were committed through his involvement with the perpetrators, with the awareness that there was this ongoing campaign of terror that included these crimes. So I think that was also very significant for us.

The other significant part of the case is that the Court refined its jurisprudence in relation to the crime of sexual slavery.

In an earlier case, the prosecution had alleged forced marriage as one of the forms of sexual violence during the conflict. What would happen is that they would capture women and girls, and they would rape them. There would be multiple rapes at the beginning, and then they would keep these girls and women, and perpetrators would own them. If you were lucky, you were owned by one person, but when that person no longer wanted you, then you were handed to someone else.

There was a dissent at the trial saying that this was forced marriage, and on the appeal, that dissent was upheld. So a conviction of forced marriage was entered in that case for the first time. That dissent was upheld on appeal after we had begun to present our evidence in the Taylor trial, so we did not feel we could go back and amend our indictment to include another crime. We proceeded with sexual slavery, and in the judgment against Charles Taylor, the judges again had to look at the jurisprudence. They determined that forced marriage was not really the factual characterization of what had happened, nor was it the legal characterization. It really amounted to sexual slavery with an additional component, and that was this forced conjugal association, this forced exclusive ownership that could be passed on. So they found Mr. Taylor guilty of sexual slavery with this component of conjugal slavery. I think that was a very important decision as well.

PROFESSOR MICHAEL SCHARF: I know over at the Cambodia Tribunal, there has been talk of prosecuting forced marriage of a slightly different kind. The Khmer Rouge would force husbands and wives to marry who didn't know each other or want to marry, and

they are looking very closely at the jurisprudence coming out of the SCSL. It's strong dicta. As you said, it wasn't part of the indictment, but the Court strongly said, "We do not think that this case is about forced marriage."

Now, Fatou, your court has had numerous pre-trial and Trial Chamber decisions in a variety of cases this year. It's going to be hard for you to pick, I think, the one or two most important precedents, but I am interested in hearing what you prioritize.

FATOU BENSOU DA: I think I would prioritize the decision on reparations. I think this was a very significant legal development at the ICC.

As you know, victim participation and reparation is a unique feature of the Rome Statute. Following the Lubanga conviction, a decision was made on August 7, 2012, for the first time in proceedings at the ICC, on the principles that are to be applied to reparations for victims in the context of the case against Lubanga. The trial chamber ordered that proposals for reparations, as advanced by the victims themselves, are to be collected by the Trust Fund for Victims and presented to a newly-constituted Trial Chamber for approval. Reparations will then be implemented through the resources of the Trust Fund for Victims that are available for this purpose. The decision sets out important principles about the reparations, including about who are the beneficiaries of the reparation decision.

PROFESSOR MICHAEL SCHARF: How much money are we talking about, ballpark?

FATOU BENSOU DA: I don't know.

PROFESSOR MICHAEL SCHARF: Okay. But it could be large sums?

FATOU BENSOU DA: It could be. It's a large sum of money, but more important is the fact that both direct and indirect victims can benefit. Direct victims are those who suffered the harm, but indirect victims can include family members and persons who intervened to either help victims or to prevent the crimes from being committed. This is a novelty and therefore very significant.

PROFESSOR MICHAEL SCHARF: Excellent. Bill, what would you say is the one or two most important precedents, and how are they significant?

WILLIAM SMITH: Perhaps I can give some background in relation to the nature of the Court and how these pretrial chamber decisions came about to help clarify why they were so important to restore faith in the ECCC, which has been under much criticism. Even from the beginning, many people thought that the ECCC shouldn't have been set up because there wasn't the appropriate expertise, as we've discussed.

The ECCC is based in a civil law system. So rather than the prosecutors and the investigators working together, as they do in a common law system, there is an

investigative judge that works separately from the prosecution, separately from the defense and from the trial chamber, and the case is investigated under the supervision of that judge. In the case of the ECCC, the investigations are led by two judges, one national and one international. The prosecution and the defense request them to carry out activities to pursue their interests, and then the case eventually goes to trial or is dismissed.

At the ECCC, we have completed one trial. The person was convicted and on appeal, the verdict was sustained. We are in the process of prosecuting the three main remaining senior leaders of Democratic Kampuchea who are still alive, and we have two other cases under investigation of five suspects we think are the next most responsible for the killings of hundreds and thousands of victims. These two cases, *cases 3 and 4*, have been a thorn in the side of the Cambodian government because they have wanted to limit the prosecutions to the first two cases, five accused. This government will appear to have been reflected in the behavior of the Cambodian side of the Court and the behavior of the Cambodian judge who was jointly responsible for the investigations. The national investigators employed by the Cambodian government have not been assisting in the investigations, and consequently it has been a challenge for the Court to maintain its independence and not have the government of the day decide who will be investigated and prosecuted.

On the international side, Marcel Lemonde, the first International Investigating Judge working with the

national judge left after three years and was replaced by a second international judge who remained for only 10 months after resigning. During this short tenure the international community was surprised that many of his decisions he took were consistent with the prevailing opinion of the government at the time—namely that these cases should not be investigated. The International Co-Prosecutor and the international community believed that the structure of the Court—as a U.N. and Cambodian hybrid structure—would ensure that judicial officials would carry out their functions independently and investigate and not take instructions from any government or the United Nations or any other authority. Unfortunately, during the tenure of the second Investigating Judge, that didn't seem to happen, and it was a real affront to the victims of the Khmer Rouge regime. It was a real affront to the value of what a legal system is meant to be, because many Cambodians know that their system isn't strong, and it's not as independent as it should be. And they were expecting the United Nations, through their officials, to come in and make sure that the Court is independent.

Four months after the second international investigating judge's arrival he closed one of the investigations. During that time he ordered that the investigators stay at their desks and not investigate. The judges rejected applications from civil parties, which allowed victims to participate as parties in the process. They rejected them on criteria completely contrary to the previous jurisprudence of the Court. Under the Court rules and jurisprudence, family members of people that were killed or executed were considered to be victims. In the first trial and the current trial, thousands of these

victims have been allowed to participate as civil parties; however, in these investigations that the Cambodian government has not wanted to proceed, these judges refused similar applications. The effect being that no one would see that nothing was happening in relation to these investigations.

As these refusal decisions to investigate were delivered we appealed them. A number of decisions came down. We appealed. We requested the investigative judge to carry out further investigations. You cannot keep investigators in their office and then close the investigation after three interviews. You just can't do that. We have a responsibility to the victims and to the public to investigate these cases.

After 10 months the international judge resigned under pressure from international judges hearing these appeals, pressure from international NGOs and local NGOs who stated he was simply not doing his job. The behavior of the judge was an affront to Cambodians as the U.N. representative wasn't performing his task. What does justice mean to Cambodians, if that is the international standard?

As to the view of the Pre-Trial Chamber, the appellate court, on the failure to properly investigate *cases 3 and 4*, it was divided. The three national judges did not overturn the decision of the judges to not further investigate; however, the international judges, the two in minority, took a different view. They said, "This is not right. This is not correct that you can come in and not investigate when you have been requested to by the

Prosecutor. It's not right that you can refuse applications from civil parties who are victims in the case and just say they are not victims." They held it was an affront to the principles underpinning the reason for the existence of courts.

Even though precedent normally comes from the majority, and this came from the minority, it was significant that the two internationals spoke out to say, "This is not the standard. This is not the international standard of justice." These opinions from the international judges were really valuable for our court to restore credibility in the system that the international community, or at least the judges representing it, didn't support that the actions of the international investigative judge; a judge that set international criminal law and the basic ideas of due process backwards. So these decisions, his resignation, allowed the ECCC to move forward again. There are more positive aspects to the story, but I'll perhaps save it for another question.

PROFESSOR MICHAEL SCHARF: The story, however, reminds us that judges, especially in the international world, are not mere computers that put the facts and the law together. There are human personalities and politics involved, and it makes these international tribunals extremely complicated places to work.

Now our newest tribunal is represented here by Ekkehard Withopf. You had mentioned already the fact that the Tribunal has decided to go forward with a trial in absentia. This will be the first international trial in absentia since Martin Bormann was tried at Nuremberg.

The Yugoslavia Tribunal experimented for a while with Article 51 hearings that some people characterized as mini trials in absentia, but they really weren't full trials. So this really is precedent for the world of international justice. Is it a good thing, do you think?

EKKEHARD WITHOPF: I think I got the most delicate question. Obviously, there are a lot of thoughts on trials in absentia. The vast majority of practitioners see the downsides of trials in absentia, and I concur with their views. It is, however, a reality in a number of civil law countries, including Belgium, where our pretrial judge comes from, and Italy, and it is, most importantly, a reality in Lebanon. For that reason, I think it makes sense to have a trial in absentia despite all of the shortfalls.

The question will arise, how we conduct a trial in absentia? What will it look like? Will it be a short paper trial of about three to four months, or will it be a very long, full-fledged adversarial trial that may last two to three years, maybe even longer? One consideration is the mere fact that counsel don't have clients, and if they don't have clients, they can't run alternative defenses, which is, of course, a means for prolonging the trial.

It also has other consequences. It has consequences in respect of stipulations to facts. Counsel for the defense at least put forward the idea that due to the lack of clients, they cannot agree to any fact. We certainly take a different view on that proposition, but this has been put forward. And, of course, it is a very weird idea to run a

trial for two to three years without any of the accused persons in the box.

So, despite the fact that there are very many good reasons not to conduct a trial in absentia, our law provides for it, and as you have rightly mentioned, it is not the first time for an international or military tribunal—the Nuremberg Tribunal provided for it, if I recall correctly, by Article 12 of its chapter, and Bormann was convicted, and he was sentenced to death by a trial in absentia proceedings.

But here's the main difference. In Nuremberg, the evidence was mainly based on documents, which bore the signature of Bormann. In our case, as some of you may know, the evidence is mostly based on the analysis of call data records, which is a completely different story, and it remains to be seen how such a trial in absentia will evolve.

PROFESSOR MICHAEL SCHARF: Now, they say to be an international prosecutor, you have to have a thick skin, you have to be patient, and you have to be ready to work within this very complicated world of international justice. So far, we have been talking about the most important developments and the most important legal precedents. Now I want to ask you to objectively talk about some of the most controversial things that are going on at your tribunal, the things where maybe you are seeing some bad press or where you hope that a new direction will emerge. And we'll begin with Serge.

SERGE BRAMMERTZ: Thank you. The most controversial ongoing decision-making process, if I may say, is in relation to the Karadžić trial. The trial chamber, a few weeks ago, decided to dismiss one count of genocide in the Karadžić indictment based on the Rule 98 *bis*. For those who are not so familiar with the Rules of Procedure and Evidence, Rule 98 *bis* is a rule that is applied after the presentation of evidence by the prosecution where the judges, before the start of the defense case, decide if there is a case to answer. So there can already be acquittals for certain counts, while a trial takes place for others.

What is controversial about the issue in this case is that the trial chamber made this decision in June, at such a very early stage of the proceedings. We have appealed this decision, because we are of the opinion that the trial chamber applied much too high a standard at mid-moment of the proceedings by almost requiring responsibility without any reasonable doubt. But, of course, the threshold to be used is if a reasonable trial chamber could, based on the evidence, come up with a conviction. So we will see what will happen. As I said, we are of the opinion that the trial chamber has already at this early stage looked into the evidence and already attributed weight to the evidence. We are of the opinion that the evidence has to be taken as true at this stage, and that a decision on the weight to accord the evidence should have been taken at a later stage.

It is also controversial because, in every other case where we have charged genocide for crimes committed in the municipalities in 1992, we have succeeded in passing the Rule 98 *bis* stage. There have been a number

of trials where there have been two counts of genocide, one in relation to the ethnic cleansing in the municipalities in Bosnia between 1992 and 1995 and a second count of genocide in relation to the genocide in Srebrenica where in just a few weeks more than 8,000 men and boys were executed by Serbian forces in Bosnia.

In the past, in all other trials, including the Milošević trial, the Count 1 passed the 98 *bis* stage. We have appealed this decision for the reasons I already mentioned, but also for strategic reasons. So far, none of the persons prosecuted for genocide in the municipalities have been convicted. We are of the opinion that if there are one or two cases where there could be a chance for a conviction, where we want the judges to look very carefully into the evidence presented, it's in relation to Karadžić and Mladić, who bear the greatest responsibility in relation to the crimes committed.

It's also a very important legal question for us. It's, of course, up to the judges at the end of the day to decide about responsibility, but we think that this decision has to be taken at the end of the entire trial after all the evidence has been presented. I think that's really the most controversial question ongoing currently at our tribunal. We hope that the Appeals Chamber will look carefully into this issue.

PROFESSOR MICHAEL SCHARF: Yes, that's a most unfortunate precedent.

Hassan, what are the recent developments that are keeping you up at night?

HASSAN JALLOW: There are a few. We have appealed against a decision acquitting a senior military officer of superior responsibility. The situation was that a number of soldiers had carried out massive killings. This officer was aware of them at the time, but he was not their superior officer, so he had the knowledge but not the responsibility to take action against them.

Within a few days of this incident, however, he became the army chief of staff. He became the head of the army, and, of course, he carried this knowledge with him, and we argued that as head of the army, he carried with him the responsibility to punish them. But the judges thought otherwise, and they acquitted him on that particular count. We have appealed the matter, and we think the outcome may well be a greater clarification of the law relating to superior responsibility, because we think he had an obligation, having become their superior officer within a few days of the incident, to have taken punitive measures and disciplinary measures against them.

Apart from that case, there continues to be some concern about sentencing. Whereas we've had a number of life sentences for genocide, there is a perception by some that increasingly the Trial Chambers are imposing sentences for genocide which are not really commensurate with the gravity of that particular offense.

We have had the situation where, for instance, a chief of the Gendarmerie was convicted of superior responsibility, and his sentence was just the time that he had already served in pretrial detention, 11 years. That was considered quite low.

We've had another case where a local government administrator was found guilty of genocide or aiding and abetting the killing of some 2,000 Tutsis in a church, and he got 15 years for that. Again, there are concerns that sentences of 15 years, 20 years, et cetera, dilute the gravity of the offense of genocide.

We have taken these concerns to the Court of Appeal on a number of occasions, but they have not changed their position. We have tried to get victims' views through victims' organizations in the Court of Appeal, and we haven't succeeded in that respect. But we are concerned that the sentences now seem to be on the low side and may not reflect the gravity of these offenses. It is time we considered the plight of the victims. We are still concerned with the accused's right to a fair trial, but we must also be concerned for the victims and survivors and make sure that perpetrators who are convicted are appropriately punished.

PROFESSOR MICHAEL SCHARF: If that's a concern for you, the studies that have come out recently show that the sentencing in your tribunal is much harsher than any of the other tribunals, so I'm sure everybody shares that concern.

Let me turn to Brenda and ask a question that I keep getting asked about the final day when the *Taylor* judgment was announced. Apparently, the alternate judge said some things that were caught on microphone and broadcast on the news and then he afterwards said some very controversial things about the decision. You can add whatever else you were planning to talk about, but it would be a good time for us to understand what was going on with the alternate judge, if you know.

BRENDA J. HOLLIS: Well, this is the subject of one of the defense grounds of appeals, so I would need to be very circumspect in my comments. But at the conclusion of the announcement of the unanimous judgment on the merits in the *Charles Taylor* case, the alternate judge expressed a personal view that was not, as I understand it, broadcast but was captured in draft form in a simultaneous transcription. My understanding is that the defense basically copied that onto a document and then handed out some copies of that at a press briefing afterward.

The alternate judge's personal view was very different than the unanimous decision of the three voting judges. That different view became a source of much discussion and controversy and, as I said, is the basis for some of the grounds of appeal that the defense are now advancing. This was certainly a very unexpected, unusual, and controversial expression of a personal view by an alternate judge which the Appeals Chamber will have to address in deciding the appeal in this case.

We are appealing other aspects of the judgment that we felt were controversial. Many people would ask, We got a 50-year sentence for what others characterized as an aiding and abetting case, with some planning, and we got a conviction on all 11 counts, so why do we think anything is controversial? One of the things that we are contesting at the appellate level is the failure to convict Mr. Taylor of ordering the atrocities, even though throughout the judgment, the judges found that he instructed the perpetrators in various ways. They used the language of “instruction” and “imperative,” and they also talked about his critical role in the ability of the perpetrators to commit the crime. So we will be appealing their finding that he did not order the crimes, and we will be arguing that the plain language of their judgment in fact established ordering. So that's a bit controversial.

But I think in a broader sense, the controversial aspect of this case is something that is known to the ICTY, certainly, and that is the politicization of the trial, the conviction, and the sentence. Throughout the trial, the argument was that Mr. Taylor was before these judges not for anything he had done wrong, because others had done the same thing, but because he had stood up to neocolonialist western powers. In this view, the Court was in effect simply puppets of the neocolonialist western powers, and that was the only reason Mr. Taylor was before the Court.

This is something that happens often during high-level prosecutions because defendants want to deflect attention away from the evidence and the law, which show their culpability, and instead put it in a political

spectrum where they have been very successful in the past. This certainly happened in the Taylor trial. People are often willing to accept those arguments, and there were people willing to accept them in this trial. They continue to accept them today. So I think perhaps that was the most controversial aspect of this case.

PROFESSOR MICHAEL SCHARF: Fatou, echoing what Hassan was talking about, the most negative publicity I saw about the *Lubanga* judgment was the relatively short sentence. Was that something that you were concerned with, and are you appealing that?

FATOU BENSOU DA: It's definitely something that we are discussing in the office. I think that to lend seriousness to these kinds of crimes, especially the crime of enlisting children under the age of 15, to receive a sentence of 14 years, I think it is relatively on the low side. But if you look at the precedents—apart from the Special Court in Sierra Leone, where I think there were sentences of 30 years and 50 years—but if you look at the other tribunals, it has generally been within this range of around 15 years. But we still think that with respect to the *Lubanga* trial and these serious charges, a 14-year conviction is on the low side. At the moment, the office is debating appealing the sentence. There are, of course, those who feel that it should be left alone and not be interfered with, but there are others who feel very strongly about appealing the decision. We have time, and we will debate it thoroughly. I personally feel that the sentence is on the low side.

PROFESSOR MICHAEL SCHARF: Are there other things that are keeping you up at night?

FATOU BENSOUDA: You will recall that this year there was the detention of the four ICC staff in Libya. This was a development that shows not only the vulnerability of staff but also the difficult circumstances in which staff of international courts and tribunals have to operate at times. Even though it involved representatives of the registry and the defense, it also impacts the Office of the Prosecutor's work in the field. We are the first organ that deploys to the field to collect information and evidence, so the detention shows what staff can be confronted with.

We tried to handle it at a court level. I think this is what we should do, and we have taken certain measures on the part of the staff to investigate what really happened. These are very delicate and difficult moments. It was an episode fairly widely publicized, and there was no distinction as to which staff was involved in this. It was the whole of ICC and some chose to interpret this to mean that ICC is actually not doing the right things in the field. So there were definitely some moments that kept us awake.

Another thing that is still keeping me awake, as well as I think the other heads of organs, is related to resources for the Court. Over the years, the Court has been trying to deal with a zero-growth budget, to manage with the staff and the resources we have, and we have been trying as much as possible to shift resources to where we need them. But the budgetary situation is

getting to a point where this will be difficult for the Court. The ICC is funded through contributions of its States Parties, and we do appreciate and understand the difficult economic circumstances which these states are facing. But at the same time, if we do not have the adequate resources, we may not be able to carry out our mandate. These are difficult discussions which we are trying to manage.

So, hopefully, with all the meetings and discussion that we are having leading up to the Assembly of States Parties (ASP), we will be able to find a way to make these discussions less tense and also take into account the difficulties that the Court is potentially going to face if the resources that we have for one or a few cases would be the same resources we would have for the increasing workload of the Court. This is keeping me awake.

PROFESSOR MICHAEL SCHARF: The second story you told about the defense counsel reminds us that everybody, from the Chief Prosecutors down, have to go into the field and that all of you have done it.

FATOU BENSOU DA: Yes.

PROFESSOR MICHAEL SCHARF: You have very heroically and bravely put yourself in a degree of danger. In the ivory towers, it's easy for us just to say, "Well, yes, they are Prosecutors, of course." But recently, Paul Williams, Anna Triponel, and I went to Libya while the defense counsel were still in custody, and I got a sense of what it's like to be in a place right

after a civil war where the situation is tense and militias are surrounding each and every city. And I just have to hand it to you all who do that on a regular basis. It's very courageous.

Now, both Bill and Ekkehard have already told us about very controversial things at their tribunals. Do you want to add more to that, or shall we go to the last question?

WILLIAM SMITH: I might just briefly add that there have been two controversies at the ECCC over the last year; one is in relation to the clash between law and politics, and one is just purely law. In the last year, we've had two investigative judges resign, and I've talked about the second investigative judge that resigned on the basis of political pressure. The difference between the resignation of the second and third one is that the second judge appeared to bow to political pressure, by not carrying out investigations, but the third was in fact trying to do his job. He was trying to investigate despite the government statements at various times that these extra cases shouldn't be investigated. However, that pressure was too much for him for a number of reasons, and things weren't going smoothly. Sometimes drivers weren't being made available for the cars to go out on investigations. Sometimes interpreters weren't being made available. There was a dysfunction in the investigating office between the staff employed by the Cambodian government and the staff employed by the United Nations. The ECCC law allows for the investigations to proceed and for the international investigators to still carry out their jobs, but it was too

much pressure for the third judge, and he left after five months.

And now for the hope, we come now to the approval of the fourth Investigating Judge, and maybe that's the magic number because the Sierra Leone Court had four Prosecutors and you finally came out with a great result, but I think the first ones contributed to that great result. The reason why I am happy about the situation that has developed now is that this investigating judge that is coming to the Court has had 15 years of experience in mass war crimes cases with the Yugoslavia Tribunal, so I think that if he can't make it work, it will be difficult for anyone to. But I think it's possible. I think people do make a difference. Leaders of offices do make a difference, and that's the positive end of this story—that the United Nations has decided to continue to push the idea that the Court should be independent and, rather than fold and say no more cases, they decided to try to maintain the independence of the Court. We hope that the new investigative judge starting in the next two or three weeks will be a very positive development.

So it will be very interesting to see what happens. He is a very experienced prosecutor, now becoming judge, and he is a very good diplomat. So we'll see if he can work with the Cambodian government. Things can change, and we are certainly viewing it that way.

As to the legal controversy, the severance order issued by the Trial Chamber in relation to this current trial presented a major problem for the prosecution. Three months before the trial started, the trial chamber

said, “This is the main trial against the three main leaders of Democratic Kampuchea.” They said, “We will only prosecute in this case the forced transfer of moving the people out of the cities to the countryside against their will, but we won't prosecute the killings, the torture, the forced labor, and the forced marriage. That will happen in a second case and a third case.” They weren't saying that they would never prosecute these crimes but they wanted to do it in a second case so as to have shorter trials.

We objected to that. We weren't able to be heard on that order. To prosecute a case of forced transfer or torture or murder, in some respects, can be the same because the proof of the linkage evidence and the jurisdictional elements takes the same amount of time, and our complaint was if you're going to pick a representative crime to make the trial shorter—and we agreed with that, we can't have trials going forever—make those crimes the most serious. Make them representative of the crimes that occurred, because we don't believe that the international community will support—and we've told the trial chamber this—a second trial. Our view is that the international community has basically said, “You have one chance, get it right,” because they're expensive. These trials are very expensive, and if you reduce it down to the most representative horrendous examples of what happened, it can take the same amount of time as prosecuting the forced transfer. That was our concern. We've asked the Court to reconsider, and they refused. Then we asked them again, and they said no. And we've asked them a third time, and they're starting to say yes; hopefully, in the next week, they will say yes. So we've gone back, but

we are going forward, and that's the positive end of that story at this point in time.

PROFESSOR MICHAEL SCHARF: I don't know if this will resonate with your Cambodian and international judges, but I would say to them two words: Al Capone.

Okay. Ekkehard, are there to any other controversies that are plaguing the Lebanon Tribunal?

EKKEHARD WITHOPF: Mindful of the time, I will limit my observations to two aspects. The first one is, unfortunately, in respect of victim participation. The Office of the Prosecutor of the Special Tribunal of Lebanon is very much in favor of victim participation, but the decision of the pretrial judge makes it very difficult for us.

The pretrial judge has decided to allow 59 victims to participate in the trial, and he also decided that victim participation in the cases will remain *ex parte*, meaning that neither the defense nor the prosecution will know the identities of the participating victims at this stage. This is a major concern to the Office of the Prosecutor because a rule in our Rules of Procedure and Evidence states that participating victims can only testify as prosecution witnesses as an exception.

So, we are getting closer to the filing of the pretrial brief, and we still don't know who the participating victims are. The pretrial judge was of the view that prior to revealing the identities of the participating victims, the

Victims and Witness Unit must conduct a risk assessment. I have serious difficulty understanding how the Office of the Prosecutor poses a threat to victims. This is a particularly difficult situation for the Office of the Prosecutor at this stage.

PROFESSOR MICHAEL SCHARF: It's the other side of the coin of what Fatou was saying about the reparations decision. You're dealing with the downside of victim participation.

EKKEHARD WITHOPF: That's exactly right, and again, the Office of the Prosecutor is in favor of victim participation and we also consider our situation to be quite different from the ICC, where the number of victims is the real problem. In our situation, the difficulty is the question of identifying the participating victims. If you think about the main target of the attack on February 14, 2005 against former Prime Minister Rafiq Hariri and if you consider that family members are entitled to participate, you can easily imagine that we have an interest in knowing the identities of the participating victims.

There's one other aspect I want to briefly touch upon, and that's looking ahead. We will face a situation, probably in the not-too-far future, where presumably the trial chamber will have to take a decision on the admissibility of call data records. Our evidence is mainly based on the analysis of call data records. The Office of the Prosecutor and its predecessor, UNIIC, has obtained billions of call data records. The big question that will arise is about the tension with privacy rights of the

individuals concerned. This is a decision to come, and I think it will have quite some impact on the future of prosecutions.

PROFESSOR MICHAEL SCHARF: I do want to give each of you a chance to briefly address the last question, which is the issue of looking forward: what are the biggest challenges that you think you will be facing in the future? For the ad hoc tribunals, what are the challenges of transitioning to a Residual Mechanism?

Hassan Jallow, in particular, I want to hear about the Best Practices Manual that you've been working on.

SERGE BRAMMERTZ: There are two elements I want to address in this regard. Of course, the completion strategy is a big issue. We still have trials and appeals ongoing in relation to 35 people, but we are in downsize mode, so our budget is going down. We have less and less staff working at the Tribunal, so this is a challenge.

At the same time, we are working towards a resolution mechanism, making sure our OTP database—holding our seven million documents—is ready to move to the so-called Residual Mechanism. A lot of work has to be done in this regard.

Luckily, the Security Council made the very wise decision to appoint my brother Hassan as Prosecutor of the Residual Mechanism, so all the problems in this regard will shift from our tribunal to his very responsible hands.

Very soon, in two years perhaps, our tribunal will close its doors. I think our record is not too bad, with 161 indictments in total, but it's very little in comparison to the number of perpetrators who still have to be prosecuted in the region. So one of our priorities is the continuation of war crimes trials in the countries of the former Yugoslavia, especially in Bosnia, where there are hundreds of trials still to be conducted. We believe that our support will be instrumental over the next years in terms of capacity-building. Thank you.

PROFESSOR MICHAEL SCHARF: Hassan, tell us about this Best Practices Manual project.

HASSAN JALLOW: I think one of the challenges for all of the ad hoc tribunals, not just the ICTR, is to make sure that they pass on a legacy to succeeding generations, which will be involved in the investigation and prosecution of these types of crimes. Collectively, as Prosecutors in 2006, we decided that one of the best ways to do this is for us to try to document the best practices for all aspects of the investigation and prosecution of these kinds of offenses: the dos and the don'ts, the successes, the challenges, and the failures.

With the help of our staff, we now have an almost-final draft manual of best practices in this particular area, which should be a guide for national prosecuting authorities, for international prosecutors, but more particularly for the ICC. The ICC, which is just coming now into the arena, could benefit from our successes and some of the difficulties that we've had. This will cover, as I said, all aspects of our work, and we hope to actually

adopt the Best Practices Manual at a meeting in Bangkok in November, and then it would become available to the ICC and all others in the field.

But speaking specifically about the ICTR and the Residual Mechanism, we do have challenges, of course. Even though we've now concluded the trials of more than 70 accused persons for genocide and related crimes, we still have three top-level fugitives still at large. That's a major challenge for the Residual Mechanism, because we have passed those files from the ICTR to the Residual Mechanism, and it's the task of that mechanism now to track them and make sure they are arrested and brought to justice.

There is good information about their whereabouts. It's Kenya for Kabuga and Zimbabwe for Mpiranya. Bizimana currently has two graves situated in two different countries. It was reported that he had died, but of course, the story was not very credible, so we have to track him as well. But that's a major challenge, and neither Kenya nor Zimbabwe is being very cooperative on these matters. We continue to hope that the Security Council and some of the big actors on the international scene will put enough pressure on these countries for them to collaborate with us to make sure that these people are brought to justice.

Part of the work of the Mechanism is also passing on the archives. Enormous documentation has been created in the process of these trials. It's estimated that, for instance, the ICTR has some 2,000 linear meters worth of documents. That's like two miles of documents

in 15,000 boxes, and all of this has to be sorted out. We have to decide what should be destroyed, what should be retained, under what conditions of confidentiality, and who would have access to it, bearing in mind the need to protect witnesses on the one hand and also the need to provide access for researchers and for national prosecuting authorities who may want to access our database. So that's one of the tasks which is actually keeping us very, very busy at the moment.

PROFESSOR MICHAEL SCHARF: Can I get news-bite sized answers from the remaining four panelists, starting with Brenda?

BRENDA J. HOLLIS: Bite-sized. The biggest challenges we face are the completion of our judicial mandate as well as the ability to take all actions that are necessary to transition to the residual court, including our archiving protocol for access for the archives, doing all of that in the face of very significant budgetary challenges, and also ensuring that there are adequate mechanisms and funding in place such that the residual court will have the ability to continue its obligation to protect witnesses and sources. We can't outsource that, and we need to be sure that we can protect them. Those are the biggest challenges that we are facing.

PROFESSOR MICHAEL SCHARF: Thank you. Fatou?

FATOU BENSOUA: The independence of the Court; we should never take this for granted. Political or economic interests may provide incentives for States to

try controlling the Court. This can materialize for instance through oversight prerogatives, such as those relating to governance or the budget, but also on a completely different level: we are witnessing a new reality where individuals sought by the Court may try to blackmail the international community, for instance by portraying the Court in a certain manner, saying that it interferes with national sovereignty or targets only a certain region. It is important that political leaders react strongly against such allegations, and support the independent course of justice. They should ensure the Court does not operate in isolation.

Of course, I should also specifically, mention the importance cooperation, both timely and full support for the operations of the Court. I cannot emphasize it more, and I am very grateful for Hans Corell's presentation about this. The court needs cooperation to be able to be effective. I don't think I need to say anything more.

PROFESSOR MICHAEL SCHARF: Excellent. Now, Bill, everything about your job is a challenge. Do you want to try...

WILLIAM SMITH: Yeah, I'll try and do a sound-bite version. Our biggest challenge is time. I think all of our challenges in everything we do is time. But our accused, the main leaders, are between 84 and 86 years of age, so we need to go fast with the prosecution. We plan to finish it by August of next year, but trials must be fair and expeditious. We can't forfeit the fairness of the trial just to obtain the speed. So the judges and the prosecutors need to step very carefully and very quickly over the next 12 months to get it right, and I think the

role of this court is important in terms of providing an example to Cambodian courts when you are in trial, the evidence process is very important to help build the rule of law in the country.

We have developed a similar book, taking the lead from the Best Practices manual, to help get the jurisprudence of this court and relating it to their local legislation. So it's a very unique opportunity that we have. It's not perfect, I completely agree, but people can make a difference. People in all their respective positions can make the trial fair, and so we will have lots of headaches, but we are going to step as fast as we can. Hopefully we will look back and see that we've obtained justice for the victims of the Khmer Rouge but not produced a show trial. That's our aim.

PROFESSOR MICHAEL SCHARF: And, Ekkehard, you're going to have the last word. Go ahead.

EKKEHARD WITHOPF: One of our biggest challenges—and you will not be surprised to hear this, considering that the “opposing party,” is Hezbollah, a terrorist organization—is witness protection. Without me going into any detail, you can imagine that there are concerns about whether witnesses will be prepared to come to court to testify, and we are thinking about alternative means for witness protection in close cooperation with the Registry and the Victims and Witnesses Unit.

The other challenge, and I touched on this briefly, is the question as to how the trial will unfold. At this stage,

there are too many uncertainties for the Office of the Prosecutor to prepare for. We prepare for all scenarios that are currently within the range of possibilities, and we would hope that sooner or later, we will get a better idea from the trial chamber, on how they think a trial should unfold in an in absentia situation.

PROFESSOR MICHAEL SCHARF: Well, this was an extraordinary panel, and I think we all have gained some new insights.

The Special Court for Sierra Leone: An Assessment

This roundtable was convened at 2:30 p.m., Monday, August 27, 2012, by its moderator, Professor William Schabas of Middlesex University in London and Leiden Law School, who introduced the panelists: Ambassador David Scheffer, Former U.S. Ambassador for War Crimes; Ambassador Stephen Rapp, Former Prosecutor; Binta Mansaray, Registrar; Bankole Thompson, Judge; Raymond Brown, Defense Counsel. An edited transcript of their remarks follows.

* * * * *

PROFESSOR WILLIAM SCHABAS: Good afternoon, everybody. This is the third of the sessions on the Special Court for Sierra Leone. We heard about the *Charles Taylor* trial last night. We heard at lunch from David Scheffer about the establishment of the Court, and this afternoon, we're going to reflect on some of the issues that arose over the ten years that the Court has been operating. I'm going to raise issues about the operation of the Special Court for Sierra Leone and ask the panelists to intervene if they wish. They don't all have to speak to every point, and I will give them a chance to raise their own issues and points.

Some of the panelists have already been adequately introduced: David Scheffer was introduced earlier during his wonderful keynote speech at lunchtime, and I think Ambassador Stephen Rapp was also introduced yesterday evening.

I want to say a few words of introduction about the others. Justice Bankole Thompson, who is serving as a judge on the Special Court for Sierra Leone, has graced us with his presence here. He is a distinguished jurist from Sierra Leone, holds a doctorate from Cambridge University, worked as a high court judge for several years in Sierra Leone, and then changed careers, in a sense, by becoming an academic here in the United States. He had an academic career for many years and then was appointed to the Special Court for Sierra Leone in 2002. He has served there throughout much of the life of the Court as a member and, for a time, as Presiding Judge of Trial Chamber No. 1.

Raymond Brown is on the defense side, and this too is a very important perspective to add to a conference that is just a little bit top-heavy with prosecutors, if I may so politely.

Raymond worked at the Special Court for Sierra Leone as defense counsel in the *Morris Kallon* trial. This was the trial of the Revolutionary United Front, and Morris Kallon was the second defendant to be convicted. His co-defendant received, I think, 52 years, but Morris Kallon got off relatively lightly with a 30-year sentence, so that's a tribute, no doubt, to Raymond's advocacy skills.

Finally, last but not least, Binta Mansaray is currently serving as the Registrar of the Special Court for Sierra Leone. She is the head of the Registry, one of the three organs of the Court, and she has fulfilled that

role for two years. Prior to that, she served as the Acting Registrar and prior to that as the Deputy Registrar.

So let's turn now to the work of the Special Court for Sierra Leone. In his wonderful talk this morning, Ambassador Hans Corell touched on the difficulties with the Extraordinary Chambers in the Courts of Cambodia (ECCC). I think Hans basically said, "Don't follow this model again."

We have here, in addition to the International Criminal Court, five ad hoc international criminal tribunals represented by senior or Chief Prosecutors. The International Criminal Tribunals for Yugoslavia and Rwanda are joined at the hip, not only in the sense that they have similar instruments for their operation, but also in that they will be reunited in the residual mechanism that is being established. The other three each have their own peculiarities, and David Scheffer spoke about some of the differences involved in the creation of the Special Court for Sierra Leone.

So if we accept Hans Corell's comment that we shouldn't follow the model of the Extraordinary Chambers of the Courts in Cambodia, the question arises, should we follow the model of the Special Court for Sierra Leone? Is it a better model? How does it look after ten years of operation—as something to be emulated, perhaps not in whole, but in part? Are there aspects of it that actually worked well and can serve as a model for us?

Justice Bankole Thompson, would you like to speak to that first?

BANKOLE THOMPSON: Let me begin by saying that some judges refuse to pontificate on matters that they believe properly fall within the jurisdiction of social scientists. I am one such judge, and on matters of this nature, I tend to speak with a considerable amount of judicial circumspection.

But I certainly think there is a consensus among academics, professionals, international lawyers, and judges, that, indeed, the Special Court for Sierra Leone can be regarded as a model for international criminal justice. The literature that I have read convinces me that the Court has done a very good job. Speaking judicially, I would assess the performance of the Court from the perspective of certain criteria, especially compliance with the Court's mandate, both in terms of its terms of reference to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law, and also in terms of its temporal jurisdiction, its personal jurisdiction, and subject-matter jurisdiction.

I was there as one of the judicial gatekeepers of the Court, and there were times when we had to do a lot of judicial soul-searching as to whether we were following the mandates of the Court with the required scrupulousness.

I also think that we can measure the performance of the Court in terms of its adherence to its Statute. We, the

judges, meticulously studied and digested the Statute, and, again, because we were in a gatekeeping role, we made sure that nothing was done to infringe upon the entrenched provisions of the Statute. The principle of legality was paramount in everything we did.

Another criterion is overall compliance with the Court's Rules of Procedure and Evidence. These were modeled scrupulously on the ICTR, and we made sure that we were not departing from established procedures.

The Court had the job of amending its Rules of Procedure and Evidence. I was one of the judges who took the position that a court of such a character that exercised both legislative and judicial functions should be very careful when exercising its legislative function not to tend to act out of expediency because a rule hasn't worked in court. That was another aspect which was very important for us, and I think we did a fairly satisfactory job of that.

Another criterion would be the quality of the Court's jurisprudence, in terms of both its interlocutory decisions and its final decisions and judgments. It may surprise you to know that the Court was confronted with a plethora of interlocutory issues. There was hardly any time to sleep. The moment we finished giving a decision on an interlocutory matter, the next morning, some defense counsel or the prosecution would come up with another interlocutory issue. We rendered something like 400 decisions on interlocutory matters that were never tested on appeal. So the Trial Chamber's decisions on

those subjects remained the law, whether we were right or wrong.

I remember that we tried, in our own way, to add to the existing jurisprudence of the other international tribunals on the law regarding the framing of the indictments. We thought that what we were doing was very experimental, so we were very cautious about defective indictments. There were times when we did extensive research to be able to frame new principles that we thought should govern the framing of the indictments. We were in for precision, conciseness, and avoidance of language that would raise such problems of duplicity or multiplicity of evidence.

I think that, in terms of consistency with the principles of international criminal law that were developed and expanded by the other tribunals, generally speaking, the Special Court for Sierra Leone adhered in a flexible way to the doctrine of judicial precedent. Even though we may have declared that we were not going to slavishly follow the decisions of other tribunals, we still had regard for the doctrine of judicial precedent, particularly when there were settled authorities and we could test those decisions in terms of logic. For example, there were areas of the law that were so settled that we could not be unduly creative or innovative without upsetting the judicial appletart. We were very, very careful. I can produce the empirical evidence that this was a model court because of its meticulousness.

Another criterion that we could use is the conduct of the trials. Were the trials conducted fairly, impartially,

and in accordance with established rules of procedure and evidence? I would say, generally speaking, they were, and I would place this at something like an A-level. We did struggle to maintain that, because that was seen as one of the core values of the judicial culture.

There was the other aspect of it: expeditiousness. We thought this was a difficult issue because we always had to balance expeditiousness with the conflicting values of fairness, impartiality, and regard for established rules of procedures. We decided how to balance these values, but I think on the whole cases were disposed of expeditiously, having regard to the number of witnesses called by both parties.

I would also add two more criteria to my list. The first is the Court's full recognition and application of the doctrine of equality of arms. This was a court that recognized that there should be equality of arms between the adversarial parties. We are often criticized for this. After all, it's the prosecution that has this high burden and standard of proving the case against the defendant beyond a reasonable doubt, so why bother with the application of the doctrine of equality of arms? But we thought judicial impartiality compelled us to support this. And I think the Special Court is renowned for being the only tribunal that has an independent defense office within the Registry.

And finally, I think it can be said without much fear of contradiction—and I would only accept that I am wrong by examining the records—that justice at the Special Court was administered relatively inexpensively.

In my respectful judgment, it was justice administered according to the principle of least cost.

PROFESSOR WILLIAM SCHABAS:
Ambassador Rapp, please.

AMBASSADOR STEPHEN RAPP: I'll jump in from a personal point of view. I was in Freetown for almost three years, but this period followed the six years I spent in Arusha. So I saw two of these institutions and worked within them, and I think they both had great success. David shed some light on the reasons they were created and the way in which they were created in terms of the political situation and the possibilities that were available at the time. But in a comparative sense, I really appreciated the difference in Freetown. Being at the scene of the crimes, I was able to get to know and spend time with people that had experienced these events. Of course, in Arusha, we would get on the Beechcraft, which would fly every week, and we could go over and make visits to Rwanda, but it wasn't the same as living in the country. And at the SCSL, we had a mixed constitution and a substantial number of the staff in senior and other positions was from Sierra Leone. At the Rwanda Tribunal, at least initially, the only people that came from Rwanda were the translators. Eventually, we added a few attorneys and investigators.

But in Sierra Leone, more than 60 percent of our people in the Court were locals. I know it was of immense value to us in investigations and witness protection that we had Sierra Leonean police officers who came from different parts of the country and who

came from different ethnic and religious backgrounds. I think this informed us enormously in terms of knowing whom to believe and whom to trust, who was seeking benefits from us in a selfish way or who really wanted to cooperate with justice.

And the local staff benefitted, I know. I remember when some of the investigators moved on to work in the U.N. peacekeeping mission in Sudan, they talked about how much they had gained by working with the international staff. So I think that mixing together was an enormous value that we had at the Court, and it was something that I think needs to be emulated elsewhere.

As I travel a great deal to respond to a variety of situations, I hear people say that we should follow this Special Court model, particularly if it's a pre-2002 situation where the ICC can't be involved, or some other situation where you want to go well beyond what the ICC is doing. But frankly, the model suffers because of the difficulty that the Court experienced in running on voluntary contributions. It was certainly a less expensive institution than the other courts, but if you add up all the figures—and we've been involved in raising the funds and dealing with a budget—the Court spent close to \$250 million for finishing trials of ten people, one of whom died before the judgment was rendered. That's about \$25 million per person. And when we go to other places and say let's do this, people respond that there's no way we can come up with those kinds of funds. We have to find a more economical way to do it.

As you have probably read in the last days—and we've been involved in it—the new government in Senegal under President Macky Sall, after a lot of foot dragging with President Wade, has finally agreed to proceed with the case against Hissène Habré, who has been living in Senegal now for 22 years. In 2006, the African Union asked Senegal to try him in the name of Africa. Now the new government is proceeding. We are looking at a budget of around \$12 million and a court that will be based on an international agreement between the African Union and Senegal. There will be a couple judges coming from the international level, but it will be a court within the Senegalese system with the pay scales, expectations, and the general features being largely consistent with the judicial process in that country now.

Can it be done within that budget? I think it can. Many people think that the proposed budget is a rich one. I think in the future, we'll probably see some of the lessons of the Special Court learned in the sense of the importance of mixing international and national personnel, but I think the direction will go even further toward building these tribunals within national systems. Of course, we could again face the challenges that we now have in Cambodia, but there are ways around that, like in Bosnia where we initially had a majority of international judges, and then they were phased out.

I think we have learned lessons here. This has been a great success, and we need to look at the very positive things that have occurred here and build on them, but build the Court at the right size.

PROFESSOR WILLIAM SCHABAS: Thank you. Raymond, you have the floor.

RAYMOND BROWN: I think I might add a slightly discordant note to today's conversation, because I think we're actually at a critical transformative moment. I think that the project of challenging impunity has been the subject of some premature declarations of triumph. And I say that, further inspired by the comments of Ambassador Corell this morning, because I believe that the question of adequate resources for defense counsel is a serious, serious problem, beyond the question of equality of arms.

I think certainly in the two institutions I've been involved with—the International Criminal Court and the Special Court for Sierra Leone—the lack of equality of arms raised its head in difficult ways, and I think it cannot be ignored.

Let me just take a brief step back. I was in Kampala in 2010 with my wife Wanda, who was my co-counsel in Sierra Leone and is with me in the International Criminal Court where we represent victims from Darfur. We were in Kampala where I was sitting and having lunch with David Crane, and a woman joined us and asked us how we knew each other. And I began the most impartial, disinterested description of the *Kallon* trial. About two minutes into it, David tapped me on the shoulder and said, “You are arguing the defense for Morris Kallon.” So I will try not to be an advocate in that sense, and I have no reason to disagree with the claims that much of what's done by prosecutors in this area is God's work.

But by any theological structure that I can understand, God cares about the defense function as well. It is a function that I think is not fully appreciated and is often decried by voices in the public space that should know better. So I think it's important for me to be in places like this where there are people who understand that function.

For example, we eventually went to Sierra Leone. I had been trying cases domestically for 25 years—some pretty complex cases—commercially and in the white collar law area. My wife was much younger but had similar experience. We had also been teaching international criminal law in Cairo and other places for some time, so we knew the substantive law. But we were substituted as counsel about four months prior to the beginning of trial with thousands of documents. By the way, David Crane showed that the ECOMOG guys from Nigeria had committed some pretty bad violations. But we had to absorb it all quickly.

When we got to Freetown for the first time, we encountered a problem that proved to be endemic, along with many other problems that came out in Judge Cassese's report. There were three sets of defense teams, one each for the CDF, the RUF, and the Armed Forces Group, and each defense unit had three defendants—that's three groups constituting nine teams—and we all had to share one vehicle!

There were other kinds of problems. We had very few interpreters. We didn't have access to resources. We

were scuffling in, what I agree with Professor Scheffer, is an evolving and extraordinarily complex area of law.

We heard Ambassador Rapp talk about the reduction of crime bases the other night. Even with reduced crime bases, they are still of extraordinary factual complexity, so it's particularly difficult for the defense when it is hamstrung by significantly inadequate resources.

We left Sierra Leone after about a year and a half, in part for resource reasons, and in part because Wanda got her first case of malaria, and we wound up representing victims in the Darfur. But both the victims' and defense counsel are faced with significant restrictions on resources. I think there's a problem when a prosecutor as fine as Fatou Bensouda has to say, "We'll make do with zero growth." What does that reflect? The one thing I wasn't trained to do was to talk to the scores of diplomats that Wanda and I have talked to over the past several years, almost all of them in private and in confidence, who will say, either about their own countries or others, that some countries are only concerned with shepherding their countries' resources. There are other countries that are not as financially committed as they are rhetorically committed. So it seems to me that that to squeeze the prosecution function while expanding its situations in cases is obviously absurd. What happens to the defense—and surprisingly this is an issue even for the victim function where private counsel is concerned—when resources are similarly squeezed to the level where work cannot be effectively performed?

Now, on the big stage, there are not ordinary folks in large numbers who really want to think about what the defense function is or why it matters. Even with victim representation, we find people not really able to comprehend how there can be a function that isn't appropriately financed. But at the end of the day, the quality of justice, in which Judge Thompson can take pride in terms of the jurisprudence, suffers tremendously when counsel doesn't have sufficient resources. By the way, I don't know of any lawyers representing the defense or victims that are getting rich or that are less concerned about impunity or that are any less noble than prosecutors.

So, at the end of the day, the voices that are associated with this organization, with the Jackson Center, with this event, need to be as effective in talking about those other functions. I think it's a deep conversation, not just a public one, but one that involves civil servants and diplomats, because the question that I earlier suggested was transformative is, "Are we at a point where we can declare victory and go home," or are we really prepared to devote the resources that are even sometimes necessary for justice to be done in ordinary trials with ordinary crimes. In countries where the crimes are complex, the pre-trial period can be years; the trials can last for weeks and months. Why would we not expect cases that involve thousands of events and incidents and hundreds of people and profound and complex legal questions to have a cost associated with them? I think that's an issue we have to meet head on. I don't think that we can forever ignore that issue.

PROFESSOR WILLIAM SCHABAS: Can I ask the panelists to explore this issue of the funding and the cost of the tribunal a little more? Ambassador Rapp gave us the figure of a quarter of a billion dollars to operate a court that has effectively tried ten people. If we compare that with the Yugoslavia Tribunal, which cost in the ballpark of 100 million a year for 20 years, it's cheaper. But if we divide two billion by the number of people who were processed by the Yugoslavia Tribunal, if it was the same cost, it would be 8 times 10, which is 80, and many more than that went through the Yugoslavia Tribunal. When the Special Court was being set up, it was vaunted as a superior model financially, but I wonder if that's the case.

In his remarks at lunchtime, David also pointed out that when the Special Court was being discussed, there were many reasons why its being funded by states' voluntary contributions was troublesome.

So here we are, ten years later. You found the money, so it actually worked. You could look at it that way and say that it can be done. So can you reflect a little bit about the funding? Is that a model that could be followed again? Because I can imagine people in the United Nations saying, "You see. You pulled it off once. You could do it again," and others saying, "Don't ever do that again with the contributions." Binta Mansaray, do you want to start?

BINTA MANSARAY: Before I get to the question of funding, my good friend, Raymond, raised very interesting issues. To respond to all of them would be

beyond the scope of this panel discussion. I very much look forward to an opportunity to have a constructive dialog with defense counsel in terms of the issues they raise concerning adequate resources, which is all relative, because I think this court stands out in terms of providing adequate resources, not only to the prosecution for trying cases on behalf of victims, but also in ensuring due process and the rights of the accused. But, as I say, it's beyond the scope of this discussion.

Talking about funding, yes, we found the money but at a great cost. Sometimes it's not just a headache but a migraine. For us, the Special Court has been all about financial crisis management over the years. 2011 was the only year in ten years that we had adequate funding for the entire year. Usually, it was about having adequate funding for three months, then for four months, you go back to two months, and then you run all over the world. This was time taken away from what could have been spent on the ground providing the kind of leadership required in administration, providing support services to the organs. Instead, we spent most of our time on the road seeking funding, going to the European Union, coming to the United States—all over the world.

Even judges, even the President of the Court, got involved in this. It does question the credibility of the Court. We have confidence in the credibility of the Court, but it's all about perception. Defense counsel at the Special Court raised this issue about big donors providing money. It's a nonissue, but still it's a perception issue. I say it's a nonissue because the money provided to the Court is the money used to pay judges,

prosecutors, and defense counsel, so that's why I'm saying it's a nonissue.

Our annual budget has ranged from \$16 million per annum to \$36 million at the time we had all cases running. In that sense, we are, relatively, a very cheap court. But to say that because we found the money, it worked, is not fair. I would say it didn't work, although we were able to find the funds. As of right now, we will run out of funds by September 15, 2012. That's not a way to run a court. So it's not working. We have to find a better way of funding these institutions in order to enhance the credibility of the institutions.

AMBASSADOR STEPHEN RAPP: I would say at the moment, it's even more challenging. There are countries that were major contributors to the Court, that gave us millions, that are now saying, "Well, maybe we'll give you 200,000 because of the global financial crisis." If we were setting this up today, I don't think we could look forward to raising the funds that we need, so it's not a good model in that sense. On the other hand, it may be the only model that you have available to you because you don't have the support to do it through assessed contributions, and then you have to figure out how you can raise it.

PROFESSOR WILLIAM SCHABAS: So you are saying that when Ambassador Corell says, "Don't follow the model of the Extraordinary Chambers," you'd say, "Please don't do what they did in Sierra Leone if you don't have to."

AMBASSADOR STEPHEN RAPP: Yes, if you don't have to is what I'm saying.

PROFESSOR WILLIAM SCHABAS: Justice, we go back to you.

BANKOLE THOMPSON: Let me underscore the acuteness of the problem that Defense Counsel Brown has raised. I was one of those judges adamantly opposed to responding to interlocutory motions brought before the Court by defense lawyers for judicial intervention in fiscal matters. We had about ten motions asking us to intervene, to order the Registrar to provide adequate financial resources for defense counsel, often because counsel had complained about the amount of money they got in their contract for this particular case. The *RUF* case was a case in point. We constantly received these interlocutory motions.

I said to my colleagues, "But how do judges determine whether the amount of money that's given to defense counsel is sufficient or not? Is it within our jurisdiction to summon the Registrar before the Court and to ask her or him to provide all the details?" We, the judges, were going to get into a difficult area of accounting and financing, which is not part of our judicial mandate. But somehow in the exercise of our so-called inherent jurisdiction, we were able to urge the Registrar to do justice. And, of course, we left the matter to the Registrar and to the defense counsel to negotiate the most acceptable compromise. Judges have sometimes been invited to get involved in matters for which they do not have any training. I do not remember

when I was at law school that I did anything in fiscal sustainability, financing, and anything of the kind.

When I highlighted the doctrine of equality of arms, my point was merely in the context of the desire of the Special Court to ensure that its proceedings were in fact conducted fairly, impartially, and in accordance with established rules. I was not really alluding to the sufficiency of the resources supporting the defense office.

RAYMOND BROWN: I want to quote Ambassador Rapp just briefly. Yesterday, he said, "This is a world of states." I agree, because in both the courts that we've been involved with, we had no quarrel really with the jurisprudence or with the Registry, but rather with people who would tell us in confidence, "Look, we're constrained by the funders of this institution." That's what I'm saying. There is another model for which, quite frankly, I'm not trained, and quite frankly, no one listens. They don't even listen to us as counsel for victims, who you would think are sympathetic. We've met with many staff members from many missions involved with the ICC, who have been very receptive and talk to us confidentially, but we have no clout. Defense counsel have no clout.

So the question is, who in the institution has the capacity to reach the states that are ultimately funding the Court, some of whom are sincerely facing fiscal crunches, and some of whom find this is a convenient way to rhetorically support the concept of ending impunity but in fact subvert it? I think that's the

fundamental challenge that has to be at least talked about and thought about.

PROFESSOR WILLIAM SCHABAS: David Scheffer.

AMBASSADOR DAVID SCHEFFER: I'll just add a bit to all of the rich points that have been made so far, no pun intended. We have transitioned from a period in the 1990s when we did reach tribunal fatigue, and that is what led to moving from an assessed basis to a voluntary basis, moving it outside of the Security Council into an alternative formulation for creating the Sierra Leone and Cambodia courts.

We have now moved very much into a period of donor fatigue. I experience this every single day. Part of my responsibility as the U.N. Secretary General's Special Expert on U.N. Assistance to the Khmer Rouge Trials is to raise the funding for the international budget, which was \$32 million for this year and will only get close to about \$26 million if I can succeed in raising \$4 million more. We were going to go cash-dry on the Court three weeks ago for the end of August. We had no money left at the end of August for the Court. Since then we have raised about \$5.2 million in pledges, some of which we know are going to get paid soon. That gets us through September–October. I really share Binta's angst on this because it really has become a month-by-month exercise. But I also do it with great pride.

When I sit down with a government, I tell them, "I need money for the entire exercise, and we need to

understand what is required by this court. That is quite different from how you look at budgets in your domestic justice ministries and judicial systems. You don't get the whole budget in front of you for all costs: the building, the salaries, the defense counsel. That all doesn't show up on your domestic ledger for your domestic justice budget. It does show up on this ledger, and one of the items on that ledger is defense counsel. The only way we can remain true to international standards of due process in these trials is if defense counsel are properly funded to do their job in the courtroom, because otherwise everything you're saying about the integrity of this court will be undermined. So that is part of the dialog with governments. Sometimes they don't quite latch on to the fact that we have the responsibility to pay for defense counsel fees. The clients are not generally paying for them. The Court is paying those fees.

Just to get back to your original point, Bill, about whether this is a model for the future. Every one of these tribunals is somewhat *sui generis* because of their different domestic circumstances. Even in the Special Court for Sierra Leone Statute, there are very unique provisions in there to deal with peacekeeper liability, with the liability of juveniles, with the funding stream, and even with the seat of the Court. We actually got a great benefit out of this particular statute on the translation issue in that English is the only language that needs to be officially used by the Court. That cuts down enormously on a certain budget line for these courts, which is translation and interpretation.

Right now, for the Extraordinary Chambers, every year I have to find \$4 million to cover translation into

French for a fairly small number of individuals who rely upon it in the Court and for the Francophone world that wants to read the trial transcripts in French. But that's \$4 million every year that has to be found for the French language, whereas this court only has to use the English language. So there are those differences, and they do show up as you work through each one of these courts.

PROFESSOR WILLIAM SCHABAS: Let me ask if we can turn our attention to the issue of the time frame of the Court's operation. I'm not talking about the period during which it worked, but the period that it covers for prosecutions, what lawyers call "the temporal jurisdiction of the Court." It's something we don't normally think of in a national justice system, because we assume that any crime that's committed more or less at any time in our lifetime can be prosecuted by the courts. But in international courts, there's usually a limited timeframe. Even at the International Criminal Court, when situations are referred to the Court we have issues of timeframe. I think the most recent decision of the Court in the *Bemba* case dealt with such an issue related to the referral.

At the Special Court for Sierra Leone, there's no end date in the Statute, but the start date is November 30, 1996. It's not an arbitrary date. It was chosen because there was a failed peace agreement reached on that date. But actually, the conflict began in March of 1991 with the Revolutionary United Front's incursion into Sierra Leone.

I think the date is justified in the U.N. Secretary-General's report on the basis that it would overburden the Court to have to deal with the period prior to November 30, 1996. This was an odd explanation considering this is a court set up to deal with impunity, and if it was going to prosecute those who bore the greatest responsibility, one might think that the Court could figure out where it needed to focus, including prior to that date.

So what was the consequence of this? Did it hurt the work of the Court? Did it result in the Court delivering an incomplete picture of the conflict in Sierra Leone? Stephen?

AMBASSADOR STEPHENSTEPHEN RAPP: I had to deal with the burden of it. For instance, in Rwanda, our start date was January 1, 1994. And in the *Media* trial, we weren't able to use the *Hutu Ten Commandments*, the horribly inciting document published in Kangura, because it was published before January 1, 1994. We had constant difficulty in dealing with the events that led up to the genocide because of this date. The judges would allow some to come in as evidence of a continuing conspiracy or for background but not as evidence of the commission of crimes.

I think this mistake was replicated, though with not quite such harrowing consequences, in Sierra Leone with this November 30, 1996 date, because the war began in March of 1991. So it was possible for Charles Taylor to take the stand and say, "Oh, of course, my forces went in there in March '91," and then not contest the evidence of

horrors that had been committed by NPFL forces in Sierra Leone in 1991 that people remembered. This is because he then could say, "But we got out in 1992. After that, I had nothing to do with it." So, to a large extent, our hands were tied behind our backs in terms of being able to present the entire picture. It was important for background, but in terms of the particular counts, the evidence upon which an individual could be held responsible for crimes had to come after November 30, 1996.

I think it was artificial. If you're going to deal with these conflicts, if you're going to deal with a civil war, you need to go back to the date when that conflict began, or you're asking parties to go through contortions. You're limiting relevant evidence from the trier of fact's consideration.

PROFESSOR WILLIAM SCHABAS: Justice Bankole Thompson.

BANKOLE THOMPSON: The issue of the temporal jurisdiction came before the courts. In the *RUF* case, it was an issue in the Trial Chamber in which I officiated. Prosecution witnesses were giving evidence related to episodes and events that had taken place before November 30, 1996. Again, in a very vigilant and gatekeeping mood, the three of us decided to stand the case down. We went into chambers and conferred about whether we were being ensnared into some difficulty, whether evidence was being brought out which actually related to the time prior to the cutoff date. I cautioned my colleagues that I'd have nothing to do with it, and I

didn't even want any exceptions to be canvassed by the prosecution as to whether they could use this as part of the historical background, as this properly belonged to the kind of work the Truth and Reconciliation Commission would be doing.

My colleagues were initially of the view that it was permissible to use this evidence for explanatory purposes. But I said, "From an abundance of caution, let us get away from this particular area. It may well be a snare for us."

And you're right. This may well have been part of the political ramifications that were at work during the negotiations as to how the Court should proceed, and what its temporal jurisdiction should be, and what its personal and subject matter jurisdiction should be. You can see how everything was restricted in terms of temporal and personal jurisdiction. Of course, when it came to the subject-matter jurisdiction, there was a broad scope.

So, again, in recognition of the sensitivity of the compartmentalization of functions, we were there to judge the cases, not to question the wisdom of provisions like that in the Statute. I think we did the best we could not to bring about any difficulty over that issue.

PROFESSOR WILLIAM SCHABAS: Well, you have one of the godfathers of the Court sitting next to you. I am going to have to give him the floor and ask him for a comment on this. David?

AMBASSADOR DAVID SCHEFFER: I would simply comment that my memory is not perfectly precise on this very specific point of the start date, other than the general memory that we, just as Judge Thompson said, were very focused on restricting the personal jurisdiction of the Court to those with the greatest responsibility. There was a political dynamic in that discussion, such that if you are going to so restrict the personal jurisdiction, it would make sense not to burden the Court with opportunities that stretch all the way back to 1991, but rather to restrict the temporal jurisdiction to some reasonable period that would relate to those who would be suspected for rising up as possible accused, as those with the greatest responsibility.

It was somewhat similar to the thinking we had on Rwanda in 1994. Believe me, we went through many weeks of discussions with the Rwandan government. We actually began with the proposed start date of the early 1960s. They wanted the temporal jurisdiction of the Rwanda Tribunal to go all the way back to the early 1960s. Governments found that utterly intolerable because it cast too wide of a net in which the Tribunal could become ensnared. So it kept getting more and more constricted as the weeks went by in the negotiations, until it fell only within the year 1994, because governments felt much more comfortable with that in terms of their future commitment to the Court, financially and otherwise.

PROFESSOR WILLIAM SCHABAS: Binta Mansaray?

BINTA MANSARAY: Questions about the temporal and personal jurisdiction of the Court were the most frequently asked questions by the people of Sierra Leone when this court was set up, because many of the abducted victims knew when they were abducted. So people were asking, “How about us? Why is this court only mandated to look at November 1996 and after? Why is the mandate of the Court limited only to those who bear the greatest responsibility, and what does that mean?”

David Crane helped us respond to that question during the first year of the Court’s inception. He went around the country telling the people in town hall meetings, in rural areas, that although the Court’s temporal jurisdiction began after November 30, 1996, as Prosecutor, he would be telling the whole story. So that’s how we explained to the people that, yes, the Court is limited to November 30, 1996, but your collective sufferings will be looked at. If you look at the suffering broadly, whether crimes against humanity and war crimes were committed in November 1996 or 1991, people will be held accountable. And that did have an impact on the people.

Personal jurisdiction was trickier, because decisions made by the Security Council for all sorts of reasons do have an impact on the people. It became very clear to us at the Special Court that what was considered those who bear the greatest responsibility by the decision-makers, and even perhaps the prosecutors, was different from what the community members were saying in most cases. The war spanned over a decade, and people saw the perpetrators of crimes against them in their

communities, they were next-door neighbors. So, as far as they were concerned, those were the people who bore the greatest responsibility. One of the questions they were asking us was, “Why those people? What about are the ones we are seeing here, why weren't they brought to justice?”

Of course, we did respond to the question by linking their experiences—the crimes committed by perpetrators on the ground, the rank and file—with the leaders who bore the greatest responsibility, for it to make sense to the people. The point I am trying to make is, yes, these kinds of limitations do have an impact and have an impact perhaps that will even outlive the existence of the Court.

PROFESSOR WILLIAM SCHABAS: For what it's worth, I once speculated that the reason why the United Nations limited the jurisdiction to that date was because there had been an earlier peace agreement which the United Nations had endorsed, and which included an amnesty provision without an objection from the United Nations. Perhaps there was a concern that it would be too legally complex to prosecute prior to that date, but I have no evidence to support that theory. It's pure speculation.

AMBASSADOR STEPHEN RAPP: I am pleased that they didn't make the Lomé Peace Accord of July 1999 the start date, because then we would have lost all of the horrible criminal conduct of operations “Spare No Soul” and “No Living Thing” in 1998 or the attack on Freetown in January 1999. That would have been

devastating. So we're happy that it was brought back to this rather quickly-failed Abidjan peace agreement of November 30, 1996. It's just another date, but I do think it allowed us to pursue representative conduct, and we were able to bring up some prior events as background and as similar conduct evidence. But as Justice Thompson indicates, the judges were uncomfortable with that, and I think it did make it much more difficult sometimes to prove certain counts against individual accused persons.

PROFESSOR WILLIAM SCHABAS: We have a temporal limitation at the Truth Commission as well, and we basically decided to ignore it. But then we didn't have defense counsel to disrupt that.

Now, Binta has sort of directed our attention to the next dimension of the jurisdiction problem: the selection of defendants was limited to those who bore the greatest responsibility. David Scheffer alluded to this in his remarks as well at lunchtime.

David Crane bears the greatest responsibility for the choice of those defendants who bore the greatest responsibility. Obviously, that was his decision, and he did something very interesting in that he selected three groups of defendants. Later, we learned of Charles Taylor as well, but at the time, there were three categories of defendants from the three combatant factions. I was there at the time, and I recall that one of the choices was not very popular with many of the people in Freetown: the decision to prosecute the CDF, the pro-government militias who defended the civilians,

as people saw it, from the attacks of those who bore the greatest responsibility. It was a courageous decision on David's part, I think, and it was quite remarkable. It's something that has plagued other prosecutors and will continue to do so, particularly at the International Criminal Court where those types of decisions have to be made.

So, in hindsight, ten or nine years after those decisions, did he get it right? Was that the right mix of defendants? Was it a mistake to go after the CDF, because they didn't ultimately bear the greatest responsibility? We can look at the sentences and say, "Their sentences weren't as high as those of the others, so that demonstrates that they weren't in the same category." I'd like your reflections on that.

AMBASSADOR STEPHEN RAPP: Let me just jump in. Obviously, when I became Special Court Prosecutor, the decision to charge people had already been made by the first Prosecutor. I considered perhaps charging one additional person. But my own view was that the decision to prosecute CDF leaders—including Sam Hinga Norman, who was one of the most popular people in the country and the effective Minister of Defense, as well as the two other co-accused—was one of the most courageous and important decisions made at the Court.

I know your work in the TRC. I remember that the TRC published totals for each armed group based on reports of victims who came in and identified the groups that had committed the crimes against them, and the

group leading the list was the RUF with thousands of victims. The AFRC had thousands of victims coming forth as well, and violations by the CDF were north of a thousand. Every other faction was way down under a hundred, so there's no question that there were enormous numbers of crimes committed by certain elements of these three organizations. And to some extent, the violence of the conflict was a reflection of people associated with one group being violated and then using that as an excuse to do something even more brutal to people associated with the other group.

This is not to say that the CDF wasn't properly motivated in fighting to restore the democratically-elected government. It's not the whole CDF that was a joint criminal enterprise like the RUF was, but there were individuals that were involved in horrific acts. As Sam Hinga Norman said in his speech before they went into Koribondo, "I want everybody dead. I want every building destroyed, except the town hall, the mosque, and the school," and he was angry when there were people left alive. This was viewed as fighting fire with fire, but it's the kind of fighting fire with fire that burns every building down and burns up every life.

So I think that going after both sides was key to justice and key to the relative peace that we have in the country today. I think it was extremely important, and I was proud that we were able to follow through and win convictions. Then when sentences were short, in the case of the two surviving defendants who were convicted, we won longer sentences on appeal.

PROFESSOR WILLIAM SCHABAS: Justice Bankole Thompson?

BANKOLE THOMPSON: My short answer would be clearly—and again speaking here not only judicially but judiciously—I think it was a legitimate exercise of prosecutorial discretion.

PROFESSOR WILLIAM SCHABAS: Raymond Brown.

RAYMOND BROWN: I have no experience in selecting defendants for prosecution, but I do think there is an interesting question that needs to be discussed, and maybe it warrants a conference of its own. Outside of command responsibility, what are the theories of accountability by which we reach the conduct that was reached in Sierra Leone through the concept of joint criminal enterprise (JCE)? We, on the defense side, saw this as “just convict everybody,” but is it really a joint criminal enterprise?

I liked the *Lubanga* verdict because I'm a victim representative, but I think the concept of foreseeability as the touchstone of JCE is very troublesome. What troubles me the most is the draft Protocol Statute for the African Court of Justice and Human and People's Rights, which would seek to criminalize unconstitutional changes of government and make it an addendum to the core crimes. There are lots of other issues to discuss surrounding that court that I'm sure we don't have time to go in to, but I don't know what the outer parameters of that are, because it would seem to criminalize what

we've always thought of as lawful conduct—overthrowing a government, following the laws of war and in manner consistent with human rights, especially if that government is itself engaged in violations of human rights. It seems to me that it may be a statute designed partly in response to the Bashir warrant, even though some of its drafters say that's not true. But it would seem to create a notion of political impunity that's quite dangerous.

I think that at some point, both scholars and prosecutors—and again, the voices of prosecutors are critical—need to look carefully at what the outer limits of this kind of liability are going to be and how far should we go, because I think that's a very dangerous place to go.

BANKOLE THOMPSON: Let me just respond to that quickly. If you look at both the academic literature and the judicial judgments, you have two schools of thought. One school of thought supports your apprehensions and worries that if the concept of foreseeability in JCE is taken too far, we will have an unruly horse that can cause much damage and result in a miscarriage of justice. Then there's the other school of thought, which maintains that in cases of crimes against humanity, war crimes, and other serious violations of international humanitarian law, the concept of foreseeability seems quite a logical thing to apply. So I see it as a discussion which will get nowhere in terms of a resolution, because we wrestle with that too as judges.

I think in one of my own separate concurring opinions, I did comment that it is possible to see how difficult this concept can be. It is not easy to formulate, of course, and it's equally difficult to apply, but I think we are stuck with it until some kind of wise judicial counsel, or maybe some divine intervention, will guide us along the line.

RAYMOND BROWN: Since Judge Thompson always treated us with such courtesy and fairness, I wasn't particularly criticizing his opinion.

BANKOLE THOMPSON: No, no, no, no. I did not think so.

RAYMOND BROWN: But I do think that since there were two dissents in the case of *Augustine Gbao*, one each in the Trial and the Appellate Chambers, and since this is an area that has to be handled with nuance... I don't know that I can connect it jurisprudentially to the Draft Protocol, but the Draft Protocol is a pretty profound statement and I think well behind where we are now. It raises some serious problems, unless one is going to say as a matter of law that any time there is an armed conflict, we assume that, without further proof, even though a person may exercise command responsibility over troops and may keep his own troops disciplined, that where there are some violations of humanitarian law, that person who started that conflict, if its purpose was to unseat constitutional government—no matter how dictatorial it may be, no matter how much it may violate the laws of war—is a violation. I'm not saying that's what you said. I'm saying that's the logical extension. I

don't know how else they got it into the Draft Protocol, and I'm not saying they studied your jurisprudence to get there.

AMBASSADOR STEPHEN RAPP: We didn't get involved in the Draft Protocol, and I think there is an important distinction here. I know there was, following the Trial Chamber decision on JCE in the *AFRC* case and then during the appeal, some confusion about what was being alleged. In one sense, the judges were right in saying that if the intention was to take over Sierra Leone, that was not a crime. It's not a crime under the Statute of the Tribunal.

But what was clear, according to our pleadings, was that we were alleging that they were attempting to do this through criminal means: through mass killings, the terrorization of civilian populations, enslavement to dig diamonds, and by rape and other crimes, and this was all part of it. It was only because you had those crimes as essential parts of the JCE that if someone joined in it knowing what was going on and intending that those criminal means be used, and they took action to further it, that it was appropriate that they be held responsible.

These crimes are quite different than crimes in the streets, such as where one person aggresses against one person wanting to steal something or for some other individual motive. It takes a great movement to make possible the killing of tens of thousands of individuals, and the key people aren't necessarily those who are there hacking victims to death with machetes, but they are

playing a role behind the scenes that is enabling these crimes at the end of the day.

I would note that in terms of the decisions at the Special Court for Sierra Leone, I don't think that judges went all the way to JCE3, to convict based on foreseeability. Basically, the facts indicated that because these crimes were ongoing over all of this period, and because everyone knew that there was rape and murder and enslavement and terrorization and the use of child soldiers, that all of these means were understood and within the contemplation of the actors. So you didn't need to get to the level of foreseeability.

I know Prosecutor Jallow spoke today of the *Karemera* case. This is a case that actually went all the way to JCE3 and it's now up on appeal—because it did involve sending out the Interahamwe to kill people, knowing that, of course, sexual violence was happening all over the place. There was this victimization idea in the propaganda that the Tutsi women were responsible for destroying the manhood of Hutus, so if you sent out people to kill Tutsis, you could have foreseen that rape of Tutsi women would be committed, even though you didn't intend it, or it wasn't part of the plan. Whether that frontier is going to be crossed is going to have to be decided by the ICTR Appeals Chamber, but in the jurisprudence of the Special Court, it really had to be within the plan and within the understanding or there was no conviction.

BANKOLE THOMPSON: Let me just add that, whether we like it or not, there will be some problems as

to the clear borderline between morality and legality. The question for me would seem to be also whether one who was not part of an original plan but who came in at some stage and joined and helped achieve the objective of the plan, where should his liability begin and where should it end? That's one of the complexities of JCE. We are dealing with situations of plural criminality, and these are the peculiarities. If somebody just comes late in the picture, but yet does something to advance or promote the criminal design, does he necessarily escape liability because he came late, even though he assisted to pursue the criminal design with knowledge of the criminal design? These are the complexities, and plural criminality poses its own peculiar problems of liability.

PROFESSOR WILLIAM SCHABAS: I think for the benefit of the people in the audience here who are not specialists, I should explain that in international criminal law, the acronym JCE refers to a concept known as “joint criminal enterprise,” which is kind of like an organized crime approach to prosecution. It's a very arcane debate that several of us could spend the whole weekend discussing in detail, but I'm going to suggest that we move on.

I think Binta had another comment about the selection of the candidates for prosecution.

BINTA MANSARAY: Very simply, as you rightly said, this will be an ongoing debate and definitely a legacy of the Court which academics and all sorts of people will continue to discuss.

PROFESSOR WILLIAM SCHABAS: Yes. You will have to leave us that.

BINTA MANSARAY: But for the people of Sierra Leone, it is very simple. When the indictments were issued, the question was, should people who fought a just war be indicted or not? So there was confusion, there was anger, and there was curiosity. For the population of Sierra Leone, the whole Special Court concept was new thing. We had to explain through our outreach programs how the Court worked. So we had to explain to the people, yes, the Court was indicting based on how people fought wars, not why the war was fought. We continued to get that question for several years.

The important thing is the first two or three years where, in every corner of Sierra Leone—whether it was in the south, north, east, or west—people asked, “Why did you indict the CDF?” Today, that question is basically not coming up at all. That shows the power of outreach and of engaging with the communities to explain how the Court works, because this cannot be an exercise only for lawyers and judges.

So, in terms of did we get it right, from the people's perspective, initially it was a very confusing act by the prosecutor's office, but eventually, the people understood why even those who fought just wars could be indicted.

PROFESSOR WILLIAM SCHABAS: Can we look at a development that was referred to in last night's panel and that was one of the more dramatic decisions by

the Special Court for Sierra Leone, and that was the decision to move the Charles Taylor trial to The Hague?

Stephen Rapp told us about how much of a benefit it was for the Court to actually be on site where the conflict took place and where the victims and the perpetrators were. If I'm not mistaken, we were told last night as well that this was really at the demand of the new president of Liberia who was terrified of the trial going on there. There may have been other reasons.

I think that the move took place under Sir Desmond's watch. So in hindsight, was that the right decision at the time, or could it have stayed there? I don't mean to criticize those who made the decisions, but to look back and say if we knew then what we know now, could it have been held in Freetown?

AMBASSADOR STEPHEN RAPP: I think it could have been. The security situation that I faced when I arrived there was such that I think we could have safely tried Charles Taylor and conducted the trial there. But the decision was made. At the end of the day, there were some benefits to being in The Hague with the world watching this important trial, but there were certainly enormous costs in terms of bringing the witnesses there and protecting them. It was also a challenge to deal with informing the public, because as you said, this Freetown location was the great virtue of this court. The other tribunals had been 500 miles and 1,000 miles from the scenes of the crimes. But in *Taylor* we were able to bring the trial to those at the scenes of the crimes, through

outreach efforts, by showing the videos around the country, by working with civil society in Liberia.

One of the better projects was run by the BBC World Service Trust. Working with them, we raised funds to bring three radio journalists from Liberia and three from Sierra Leone to The Hague, and every night, they produced actualities for community radio that were broadcast across Liberia and Sierra Leone, to such an extent that, whenever I was traveling in those places, I heard those broadcasts. So I think at the end of the day, though we could have done it in Sierra Leone, we did it in The Hague and brought word back.

BINTA MANSARAY: There were two perspectives from the people. At the time, the business people, those who really had a lot to lose, were very anxious not to have the trial in Sierra Leone, because they were just starting to rebuild their lives. They were afraid of the consequences of trying Charles Taylor in Freetown and of the security implications of having a trial in Sierra Leone.

Then a decision was taken by the Security Council. Again, opinions were divided as to whether it was the right decision or not, but the majority of the people would have liked to see Charles Taylor tried in Freetown.

In my view, I think it was the right decision at that time because we do outreach all the time. We are out with the people. We are very familiar with the security apparatus in Sierra Leone and Liberia. The border is so

porous. In fact, even before the trial was moved, we had an influx of Liberians coming. No one knew where they were coming from. Security was very busy, you know, and Liberia was just starting their peace process, while Sierra Leone was trying to consolidate its peace process.

I think it was a very tough decision to make between peace and justice. In my view, the ideal thing would have been to hold the trial in Freetown, but at that time, I think the right decision was to hold the trial in The Hague. So, again, there's a tension between peace and justice right there.

AMBASSADOR STEPHEN RAPP: I just want to add, the perception—and it's something that we constantly have to deal with, one of the reasons we want the *Habré* case to go forward in Senegal, if we can—is that somehow this is Europe trying Africa; this is somehow the North trying the South. This is the sort of neocolonial argument that we've heard, and it's profoundly unfair to put that on the Special Court for Sierra Leone. The point is if we had been there and people would have seen it being done in Africa, I think that would have been a powerful message. That's one of the things we forfeited. We always joked that the ICC would receive the credit for trying the case. For the first two and a half years, no matter how many times we said it was the Special Court for Sierra Leone that tried Charles Taylor, the moment would come that we would read in the press that it was in the ICC. Even in April 2012, CNN said that the ICC convicted Charles Taylor. Going to The Hague created the impression this was being done by the ICC and not by us.

BANKOLE THOMPSON: Let me just put forward a hypothetical position. If catharsis is one of the objectives of trying cases involving crimes against humanity et cetera in the countries in which the crimes did take place or allegedly took place, then a question to put forward is, was it achieved in the case of *Charles Taylor*? In other words, if we agree that catharsis is a very important element, and that having the trial there would help the victims and the population of the country to appreciate that justice has been done, and that what has happened is a moral condemnation and stigmatization of the offenders, and that this helps the society to heal, then it remains doubtful whether the trial of Charles Taylor will in fact fulfill that aspect of it.

PROFESSOR WILLIAM SCHABAS: Binta?

BINTA MANSARAY: As I say, I don't want to belabor this particular issue because the fact is I think all of us agree that the trial could have been held in Freetown. But we cannot ignore the fact that we don't have the security apparatus to make that work. There is no way we can man the Sierra Leone and Liberia border, so the decision at that time—again, I wasn't part of the decision-making—but for us, what was important was to achieve the objective of peace and justice, and I think the international community and the Special Court achieved that. Yes, there are downsides to it, but the decision, I think we have to—

AMBASSADOR STEPHEN RAPP: And the bottom line is, the Court made it work.

BINTA MANSARAY: Exactly.

AMBASSADOR STEPHEN RAPP: Yes, it was the reality. In so many of these situations, we face the global reality. We face the political constraints. We face all of these concerns, and we work to achieve a just solution, and it was done here.

PROFESSOR WILLIAM SCHABAS: David Scheffer, did you want to jump in?

AMBASSADOR DAVID SCHEFFER: Right. I might just add a little perspective from the origins here on this issue of proximity to sort of amplify what Ambassador Rapp just said about the importance of proximity to the crime scene.

We were extremely sensitive to this issue in considering where the seat of the Court would be. Of course, the decision was made that it would be in Freetown, but we had to have an escape hatch for security purposes to some other location.

Now, I have to say that back in 2000, we were not contemplating The Hague. It was not really a subject of discussion that the trial would be transferred to The Hague; rather, it was where else in West Africa could a trial be transferred for security purposes, or could it go to Arusha itself, to the Rwanda Tribunal? So that was really the gist of it. It was West Africa or Arusha.

During one of my trips to Freetown in the summer of 2000, I stopped off in Bamako, Mali, and I met with

the President of Mali at the time, President Konaré, also Chair of the West African Economic Community of West African States. During our discussion, I happened to mention to him that we were trying to determine where else in West Africa the Court could sit in the event of a security crisis in Freetown, and would he have any suggestions, because he was chair of the whole regional group. He smiled very broadly. He said, “Ambassador Scheffer, follow me.” So we left his office in a limousine and raced off at high speed over dusty roads to a hill overlooking Bamako, and that hill was the defunct Solar Energy Center of Africa. It was all built up; there was an office building and a nice auditorium that could easily be converted into a courtroom. They had a housing facility that could have very easily served as the jail. They had an eating facility too. But it was all closed because there was no funding for the Solar Energy Center of Africa.

We walked around, and President Konaré finally turned to me and said, “Ambassador Scheffer, this is your alternative site for the Special Court for Sierra Leone. I give it to you.” It even had a barbed wire fence all around it.

I thanked him profusely, and I floated this idea when I got back. It did not fly, but nonetheless, it was there. I have no idea whatever happened to the Solar Energy Center of Africa, but it was a ready-built facility.

PROFESSOR WILLIAM SCHABAS: Raymond, did you want to—

RAYMOND BROWN: Yes. Not about the location, but the bringing of Charles Taylor there, since my main preoccupation in life at the moment is the question of whether and how Mr. Bashir can be brought to the ICC. You started off by asking about the issue of lessons and models. The question is, were the events surrounding the *Taylor* case that we heard about last night so *sui generis* in terms of time and place and diplomatic alignment, that little of what we have learned is useful in supporting a very fine prosecutor, Fatou Bensouda, who has the task of obtaining international cooperation to bring Bashir to The Hague even with the help of some NGOs who are equally interested and other counsel? Are there general lessons here about bringing to trial someone who is a sitting head of state, who apparently thinks he can act with impunity while under indictment, and who has some diplomatic support for not coming to trial?

PROFESSOR WILLIAM SCHABAS: Let me ask about the most recent development now of significance at the Court. Brenda Hollis described it this morning, which is, of course, the conviction and sentencing of Charles Taylor. We know that Charles Taylor was found guilty, as Brenda described, of aiding and abetting and of planning but not of the joint criminal enterprise part of the charge. In other words, the Prosecutor got some of what she was asking for, but not all of it, and I presume this is a matter that's going to be litigated on appeal, and we can't exactly predict the outcome.

But how important is that to the narrative that emerges from the conflict, for situating Charles Taylor as the linchpin in the conflict, the man who bears the

greatest responsibility, rather than someone who was on the sidelines or in the periphery? How important is that to the legacy of the Court, and will it be satisfactory to have a judgment of aiding and abetting and planning, or does that appeal have to succeed in terms of what the Court leaves as a legacy? Anybody want to handle that? Stephen.

AMBASSADOR STEPHEN RAPP: Obviously, we are awaiting an appeals decision, and we can't anticipate that, but as I said last night, I was enormously satisfied by the judgment. Obviously, the Court didn't find him responsible on each of the modes of liability, but the fact is that the judges did say the aiding and abetting that he provided was so substantial, that without it, it would have been impossible for these crimes to be committed—the RUF would have run out of gas, resources, and ability to do what they did in those horrible years of 1998 and 1999. And they also held him responsible for the planning of really the most brutal terror campaign.

I think if this is the final resolution, I think it's a success, and a story is told. Of course, in every case, there are acquittals. In Nuremberg, there were three acquittals. You can go back and revisit and wonder about evidence and the responsibility of individuals, but in a criminal proceeding you never win everything. You can't see every event. You don't see every connection, and you have this burden of proof beyond a reasonable doubt. People don't expect a court to tell history; historians do that. Courts establish criminal responsibility based upon admissible evidence, vigorously challenged by the

defense, and then finally decided by judges, both at trial and on appeal.

PROFESSOR WILLIAM SCHABAS: David Scheffer?

AMBASSADOR DAVID SCHEFFER: I, of course, defer to the prosecutors in terms of the significance of the ruling at the Trial Chamber and then what we may anticipate at the Appeals Chamber for Charles Taylor. But I would just add that from the perspective of my experiences in the 1990s, I was very satisfied at least with the level of accountability that was established at the Trial Chamber level.

You know, when we were drafting the Statute, the point of it was to ensure that Charles Taylor would be someone who would be investigated by the Court. We really weren't going beyond that in our expectations of what the Court might produce with respect to the results of that investigation of Charles Taylor. But we certainly wanted the Court to have the jurisdiction to investigate him for the alleged crimes committed in Sierra Leone. So at least from a negotiator's point of view, when I heard the judgment, I certainly was not shedding tears. I thought that was a productive outcome given what our expectations had been.

PROFESSOR WILLIAM SCHABAS: Thank you. Well, I think our time is up. We have scratched the surface of some of these important issues. Thanks to the organizers, Jim and David in particular, and Chautauqua

Institution. We have another day or so to ruminate on these subjects.

Let me just leave you with a parting thought about the Special Court for Sierra Leone after ten years. We often ask in discussions about international justice, what does this do, what do we accomplish, what is the purpose of it? Part of it is to promote peace, and that's in the Statute of the Special Court for Sierra Leone. We will never be able to know how much the Special Court for Sierra Leone contributed to the well-being of the people of Sierra Leone. But over the decade since it was created, Sierra Leone has been through the most prolonged period of democracy and peace in its history since independence. I would like to think that maybe the Court had something to do with it. Thank you.

Conclusion

Conclusion

Elizabeth Andersen*

The 2012 International Humanitarian Law Dialogs (and this volume that records them) reflected some important transitions in the international justice project. The first of these annual gatherings to focus on a particular institution, the 2012 meeting mined the experience of the Special Court for Sierra Leone for lessons learned. With the work of that court and the ad hoc tribunals for Yugoslavia and Rwanda coming to an end, and the International Criminal Court (ICC) moving into its second decade, the 2012 Dialogs had a decidedly retrospective cast, looking not to the Nuremberg precedent, as we have in the past, but rather to more recent history and to what has become a treasure trove of experience from the first two decades of the modern international criminal law era. The 2012 Dialogs were a rare gathering of many of the key actors in that history, and their reflections, captured in this volume, provide a number of important insights for our field.

First among these insights is the importance of countless, seemingly mundane aspects of international justice work. In his gripping account of the path-breaking investigations he has led from the Balkan mountains to the Libyan desert, Professor Cherif Bassiouni, recipient of the 2012 Joshua Heintz award,

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reminded us that while abstract principles of international law may preoccupy the academy, it's logistics and resources that more often than not will make or break an accountability effort. How to get the tents and latrines and hot water for a mass grave exhumation may be less sexy than mapping new legal ground, but it is no less the critical work of an international justice professional.

More than in any of the previous five years, in 2012, the prosecutors' discussions turned again and again to the challenge posed by uncertain and limited budgets. This was a particular challenge for the Special Court for Sierra Leone, wholly dependent on voluntary contributions, but it came up too in discussion of the Extraordinary Chambers for the Courts of Cambodia—where David Scheffer described a precarious month-to-month existence for the Court—and even with respect to the permanent International Criminal Court, where Prosecutor Fatou Bensouda has the unenviable responsibility for managing an ever-growing docket on a zero-growth budget. Managing these processes in an efficient and effective manner, against significant budget constraints, is certainly a key challenge for all of the prosecutors. Making the broader public case for support of these institutions, by explaining their processes and long-term benefits, is a charge to all of us in the international justice field.

The second lesson highlighted in these dialogs was the need for flexibility and creativity in selecting from among a diversity of justice tools to identify those appropriate to a particular time and place. Sierra Leone in 2000 was not Bosnia in 1991, nor was it Rwanda in

1994. Hans Corell, Bill Schabas, David Crane, and David Scheffer, all present at the founding of the Special Court, recalled the particular circumstances that shaped that institution and distinguished it from the Yugoslavia and Rwanda precedents. The international community's reluctance to initiate another lengthy and costly accountability process, Sierra Leone's interest in domestic involvement in the process, and the need to accommodate a parallel Truth and Reconciliation Commission, required creative thinking about the establishment, jurisdiction, personnel, and process that would work for Sierra Leone. As Stephen Rapp observed, "every one of these tribunals in a sense is somewhat *sui generis*, because of the domestic circumstances."

This lesson raises real questions for the ICC, which, as a permanent court, is by definition more rigid and less flexible to accommodate a diversity of circumstances. A challenge for new ICC Prosecutor Fatou Bensouda and other ICC officials will be to devise ways to keep that permanent structure limber and to innovate to meet the justice requirements of particular situations.

A third insight that came through the 2012 Dialogs was the role that fortuity—particularly the alignment of personality and politics—plays in international justice. In hindsight, the work of the Special Court for Sierra Leone seems to have proceeded according to a well-ordered plan. And yet, the prosecutors' accounts at the sixth Dialogs reveal myriad moments of uncertainty, speculation, and contingency, in which critical choices were made and the course of the proceedings set through the mere force of personality, politics, and the personal

relationships and motivations of a whole cast of characters in this accountability story. The indictment, political demise, arrest, trial, and conviction of Charles Taylor was not a foregone conclusion, and as the prosecutors described, there were powerful forces working in the opposite direction. A different constellation of actors might not have persevered or succeeded in this case, which has changed the course of history in West Africa. Yet fortuity placed each of the four Special Court Prosecutors in his or her seat at a critical moment, when their particular skills, relationships, insights, and convictions made all the difference. Their free-flowing account of the case offers inspiration and hope to all who pursue justice against great odds.

Even as the Dialogs hailed the triumph of the *Taylor* case, they also pointed to other circumstances where such hope is certainly needed, where the stars have not (yet) aligned. William Smith's frank account of governmental interference at the Cambodia Tribunal was a stark reminder of the seemingly insurmountable obstacles in these cases. And Raymond Brown, who, as counsel to victims in Darfur, is working to bring Sudanese President Omar Al-Bashir to justice, challenged Dialog participants to consider whether "the events surround Taylor... [are] so *sui generis* in terms of time and place and diplomatic alignment, that little of that is useful... or are there lessons about bringing to trial someone who is a sitting head of state, [who] apparently thinks he can act with impunity while under indictment, and who has some diplomatic support for not coming to trial?"

The answer to that question is not easy, and that difficulty points to the value of these dialogs and the opportunity they provide to learn, reflect, and strategize. Certainly there is no “cookie cutter” approach to impunity that can be used to punch out justice in situation after situation. But there are important lessons to be learned in searching the prosecutors’ accounts for the array of factors that align in favor of justice and to analogize from one case to the next to develop an effective strategy. Thus Sir Desmond de Silva recalled drawing on the experience of the Yugoslavia Tribunal and how it used Serbia’s interest in European Union membership as leverage to get its cooperation on arrests. In the same vein, he found Nigeria’s interest in a permanent Security Council seat an effective pressure point to get its cooperation in the *Taylor* case.

We can only hope that those struggling with today’s impunity challenges came away from the 2012 Dialogs with new ideas and inspiration to continue their efforts, and that this record of the Dialogs can play that role for years to come. It is with this goal that the American Society of International Law, whose mission is the promotion of international relations on the basis of peace and justice, embraces the Dialogs and is privileged to publish these proceedings. We could not do so without the assistance of ASIL Fellow Shannon Powers, who served as managing editor of the volume. We are also much indebted to all those who make the Dialogs possible. We are especially grateful to David Crane for the vision and leadership he had to launch the Dialogs and with which each year he organizes this special gathering. Thanks are due too to the other co-sponsoring organizations and institutions, especially Chautauqua

Institution and the Jackson Center. Collectively, these individuals and organizations are drawn together each year to a remote corner of upstate New York—itsself a logistical feat that may rival the organization of an international commission of inquiry! They come out of a commitment to accountability and a conviction that, as arduous and uncertain as the road may be, “the long arc of history bends toward justice.” We hope that readers of this volume will come away equally inspired, committed, and ready to join these efforts.

Appendices

Appendix I

Agenda of the Sixth International Humanitarian Law Dialogs

Sunday, August 26 through Tuesday, August 28, 2012

“Hybrid International Courts: A Tenth Anniversary Retrospective on the Special Court for Sierra Leone”

The sixth annual International Humanitarian Law Dialogs, co-sponsored by the Robert H. Jackson Center at the Chautauqua Institution, is an historic gathering of renowned international prosecutors from Nuremberg through the present day and leading professions in the international criminal law field. This unique three-day event, held August 26–28, will allow participants and the public to engage in meaningful dialogue concerning past and contemporary crimes against humanity, and the role of modern international criminal law.

Sunday, August 26

Arrival of the Prosecutors & Participants

2:00 p.m. **Screening of the film “Granito”**, followed by a discussion with with Executive Producer Paco de Onis.

Monday, August 27

7:00 a.m. **Breakfast.** Athenaeum Hotel.

- 9:00 a.m. **Welcome & Introduction of Prosecutors** by Jim Johnson (President of the Robert H. Jackson Center) and Tom Becker (President of the Chautauqua Institution). Fletcher Hall.
- 9:15 a.m. **Awarding of the *Impunity Watch* Essay Contest Winner.** Drew Beiter and Emily Krause, Editor-in-Chief of “Impunity Watch.” Fletcher Hall.
- 9:20 a.m. **Keynote Address.** Amb. Hans Corell, Former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations. Introduced by Professor David M. Crane. Fletcher Hall.
- 10:00 a.m. **Break.**
- 10:30 a.m. **Update from the Current Prosecutors.** Moderated by Professor Michael Scharf. Fletcher Hall.
- 12:30 p.m. **Lunch.** Athenaeum Hotel.
- 1:15 p.m. **First Annual Clara Barton Lecture.** Cherif Bassiouni, DePaul University College of Law (Emeritus Distinguished Research Professor). Introduced by Jennifer Khurana, American Red Cross. Athenaeum Hotel.

- 2:30 p.m. **Panel on the Special Court for Sierra Leone: An Assessment.** Moderated by Professor William Schabas. (Panelists: Amb. David Sheffer, Amb. Stephan Rapp, Binta Mansarey, Bankole Thompson; Ron Brown.) Fletcher Hall.
- 4:00 p.m. **Break.**
- 4:15 p.m. **Student Porch Sessions: “Practitioners/ Prosecutors”** (moderated by Andrew Beiter) and **“The Challenge of Piracy”** (moderated by Professor Scharf).
- 5:30 p.m. **Reception.** Athenaeum Hotel.
- 6:30 p.m. **Dinner.** Athenaeum Hotel.
- 8:00 p.m. **Second Annual Katherine B. Fite Lecture.** Professor Leila Sadat. Introduced by Professor Diane Marie Amann. Athenaeum Hotel.

Tuesday, August 28

- 7:00 a.m. **Breakfast with the Prosecutors.** Athenaeum Hotel.
- 7:45 a.m. **Breakfast Address.** Professor David Scheffer. Introduced by John Bradshaw and sponsored by “The Enough Project”. Athenaeum Hotel.

- 9:00 a.m. **Drafting of the Sixth Chautauqua Declaration.** (Private – Prosecutors only.)
- 9:15 a.m. **Lecture: “Recent Developments in International Criminal Law”.** Professor Valerie Oosterveld of the University of Western Ontario. Athenaeum Hotel.
- 11:00 a.m. **Porch Sessions with the Prosecutors: “SCSL Outreach”** with David M. Crane and Binta Mansaray (moderated by Valerie Oosterveld); **“SCSL New Crimes/New Law”** with Brenda Hollis and Bankole Thompson (moderated by Leila Sadat); **“Blood Diamonds”** with Doug Farah, Ian Smillie and Alan White (moderated by Mark Quarterman); **“Sierra Leone Truth and Reconciliation Process”** with William Schabas and Hans Corell (moderated by Michael Newton).
- 12:30 p.m. **Lunch.** Athenaeum Hotel.
- 1:15 p.m. **Luncheon Address: “The Future of the ICC”** by Judge Hans-Peter Kaul of the ICC. Introduced by Mark Ellis.
- 2:30 p.m. **Issuance of the Sixth Chautauqua Declaration.** Moderated by Elizabeth Andersen of the American Society of International Law. Athenaeum Hotel.

Appendix II

The Sixth Chautauqua Declaration August 28, 2012

In the spirit of humanity and peace the assembled current and former international prosecutors and their representatives here at the Chautauqua Institution...

Recognizing the continuing need for justice and the rule of law as the foundation to international peace and security, and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere:

Welcome the establishment of the International Residual Mechanism for Criminal Tribunals by the U.N. Security Council and the commencement of its operations on 4 July 2012;

Note, while celebrating the tenth anniversary of the entry into force of the Rome Statute of the International Criminal Court, the issuance of the first guilty verdict in the trial against Thomas Lubanga, the first trial of the International Criminal Court, as well as the first decision on sentencing and reparations for victims;

Note, while celebrating the tenth anniversary of the Statute of the Special Court for Sierra Leone, the obtaining of a guilty verdict against Charles Taylor, the first former head of state indicted whilst in office, and

recognizing that this is the first such verdict since Nuremberg;

Note the decision by the Special Tribunal for Lebanon to try the indicted individuals in absentia;

Note the commencement of the trial against the senior leaders of Democratic Kampuchea at the Extraordinary Chambers at the Courts of Cambodia;

Note the commencement of the trial against General Ratko Mladic before the International Criminal Tribunal for the former Yugoslavia, one year after his arrest;

Note the judicial achievements of the courts and tribunals in the last year, in particular regarding the completion of the trial phase of the mandates of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, the conclusion of the prosecution case presentations, and the arrest and surrender of suspects;

Note the increasing importance of the role of international criminal justice in preventing future crimes and ensuring peace and security;

Further note with continued concern the outstanding arrest warrants issued by international courts and tribunals, requiring the cooperation of all states and the international community as a whole for their enforcement;

Now do solemnly declare and call upon the international community to keep the spirit of the Nuremberg Principles alive by:

Cooperating with efforts to locate, arrest, and hand over to the various international courts and tribunals those individuals who have been indicted for crimes falling within the jurisdiction of the International courts and tribunals, wherever found;

Ending impunity for the gravest of crimes by refusing to include or accept amnesty or immunity clauses for such crimes in peace agreements, and calling on mediators and peace negotiators to integrate the International criminal justice dimension in their activities;

Ensuring adequate resourcing of all courts and tribunals, despite the difficult world economic situation, to enable them to fulfill their mandates effectively, including the ability to meet their obligation to protect witnesses;

Recognizing and supporting the independence of Prosecutors of international criminal courts as essential to the exercise of their mandates and the furtherance of international criminal justice;

Providing strong and consistent diplomatic and public support for the work of the courts and tribunals;

Emphasizing the need to ensure effective complementarity between national jurisdictions and

international courts and tribunals by ensuring that national laws encompass international crimes;

Ensuring accountability for the perpetrators of all crimes and recognizing the victims, in particular women and children.

Signed in Mutual Witness:

Fatou Bensouda
International Criminal Court

Serge Brammertz
International Criminal Tribunal for
the former Yugoslavia

H.W. William Caming
International Military Tribunal
for Nuremberg

Andrew Cayley
Extraordinary Chambers for the
Courts of Cambodia

David Crane
Special Court for Sierra Leone

Sir Desmond de Silva, QC
Special Court for Sierra Leone

Norman Farrell
Special Tribunal for Lebanon

Brenda Hollis
Special Court for Sierra Leone

Hassan Jallow
International Criminal Tribunal
for Rwanda and the International
Residual Mechanism for
Criminal Tribunals

Appendix III

Biographies of the Prosecutors and Participants

Diane Marie Amann

Professor Amann is currently the Emily and Ernest Woodruff Chair in International Law at the University of Georgia School of Law and is an expert in the interaction of national, regional, and international regimes in efforts to combat atrocity and cross-border crime. She is also the founder of IntLawGrrls blog, which blogs about international law, policy, and practice.

Elizabeth Andersen

Elizabeth Andersen is Executive Director and Executive Vice President of the American Society of International Law (ASIL), a position she has held since 2006. Her area of expertise is international humanitarian, human rights, and refugee law. Earlier in her career, she served as Legal Assistant to Judge Georges Abi-Saab of the International Criminal Tribunal for the former Yugoslavia.

M. Cherif Bassiouni

M. Cherif Bassiouni is a distinguished research professor of law emeritus at DePaul University College

of Law and president emeritus of the law school's International Human Rights Law Institute. He also is president of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, and honorary president of the International Association of Penal Law in Paris, France. He was instrumental in the creation of the International Criminal Court, for which he was nominated for the Nobel Peace Prize in 1999. Professor Bassiouni has authored 32 books and over 240 published articles.

Andrew Beiter

Mr. Beiter is the founder and director of the Summer Institute for Human Rights and Genocide Studies in Buffalo. He is a social studies teacher at Springville Middle School in New York, the Regional Education Coordinator for the United States Holocaust Memorial Museum, and a teacher fellow for the Lowell Milken Center for Tolerance in Kansas. Mr. Beiter is the winner of the 2008 Irena Sendler Award for Repairing the World, the 2009 Toby Ticktin Back Award for Holocaust Education, and the 2009 New York State United Teachers Local Leadership Award.

Fatou Bensouda

On June 16, 2012, Ms. Bensouda took office as the Chief Prosecutor of the International Criminal Court, becoming the first African woman to assume the top job at an international tribunal. Previously, she was elected

Deputy Prosecutor in September 2004. Ms. Bensouda also served as a Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda, and as the Senior Legal Advisor and the Head of the Legal Advisory Unit.

Serge Brammertz

Mr. Brammertz is the prosecutor for the International Criminal Tribunal for the former Yugoslavia. He previously served as deputy prosecutor (investigations division) of the International Criminal Court, and commissioner of the United Nations international independent commission into the assassination of former Lebanese prime minister Rafik Hariri.

Raymond Brown

Professor Brown is a partner at Greenbaum, Rowe, Smith and Davis and has significant international experience qualifying as Counsel before the International Criminal Court in the Hague, and served as Co-Lead Defense Counsel at the Special Court for Sierra Leone. Mr. Brown is the host of the Emmy Award-winning New Jersey Network Program "Due Process" and teaches at Seton Hall University School of Law as a visiting professor and research scholar. He is also one of the founders of the International Justice Project.

H.W. William Caming

H.W. William Caming received his master's degree in labor law from NYU Law School and his doctorate from Harvard. He served in the U.S. Air Force during World War II and was named Chief Prosecutor in the "*Ministries Case*" at the Nuremberg Trials which investigated members of the German Foreign Office and other governmental ministers from the Nazi regime. Upon his return, he worked as a privacy and security consultant for the CIA, FBI and Congress, then as senior counsel for the American Telephone and Telegraph Company (AT&T) until his retirement in 1984.

Hans Corell

From 1994 until 2004, Ambassador Corell served as the Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations. Prior to that, from 1984 to 1994 Mr. Corell was Ambassador and Under-Secretary for Legal and Consular Affairs of Sweden. Mr. Corell was a member of the Permanent Court of Arbitration at The Hague and a member of the CSCE Moscow Human Dimension Mechanism to Bosnia and Herzegovina and Croatia; the group that presented the first proposal for the establishment of an international criminal tribunal for the former Yugoslavia.

Irwin Cotler

Mr. Cotler is a member of Canada's Parliament, for Mount Royal, and serves as Vice-Chair for both the House of Commons Subcommittee on International Human Rights and the Standing Committee on Justice and Human Rights. Mr. Cotler served as the Minister of Justice and Attorney General of Canada from 2003 to 2006.

David M. Crane

Professor Crane is a professor of practice at Syracuse University College of Law. In 2002 he was appointed Chief Prosecutor of the Special Court for Sierra Leone, a position he served in through 2005. Professor Crane was the first American Chief Prosecutor at an international war crimes tribunal since Justice Robert H. Jackson at Nuremberg in 1945. Professor Crane is also the creator and advisor for the Syracuse University College of Law online publication *Impunity Watch*.

Sir Desmond de Silva

Sir Desmond is one of England's leading Queen's Counsel in criminal law. He is a former Chief Prosecutor for the Special Court for Sierra Leone, a position he was appointed to in 2005, and one in which he brought about the arrest of former Liberian president Charles Taylor. In July 2010, the President of the United Nations Human

Rights Council appointed him to the independent fact-finding mission regarding the Israeli interception in international waters of an aid flotilla en route to Gaza.

Mark Ellis

Mr. Ellis is the Executive Director of the International Bar Association (IBA), and was the first Executive Director of the Central European and Eurasian Law Initiative. Mr. Ellis has also served as Legal Advisor to the Independent International Commission on Kosovo and advised the Serbia War Crimes Tribunal, the Iraqi High Tribunal, and is currently on the Advisory Panel to the Defense Counsel for the ICTY. He appears regularly on CNN International, Al Jazeera, and BBC.

Douglas Farah

Mr. Farah is the president of IBI Consultants and a Senior Fellow at the International Assessment and Strategy Center. He works as a national security consultant and analyst regarding transnational criminal organizations and armed groups and their affects on states, with a particular focus on the Western Hemisphere, Africa and globalized networks. Prior to this, Mr. Farah worked as a foreign correspondent and investigative reporter for the Washington Post and other publications, covering Latin America and West Africa.

Brenda Hollis

Ms. Hollis is the current Chief Prosecutor for the Special Court for Sierra Leone. She was appointed in February 2010 from her previous position as Senior Trial Attorney of the Special Court. Prior to this, Ms. Hollis worked as an Expert Legal Consultant on international law and criminal procedure, training judges, prosecutors, and investigators for international criminal tribunal work. From 1994 until 2001 she served as Senior Trial Attorney at the International Criminal Tribunal for the former Yugoslavia, and assisted the Office of the Prosecutor at the International Criminal Tribunal for Rwanda.

Hassan Jallow

Mr. Jallow is currently serving as the Prosecutor of the International Criminal Tribunal for Rwanda, a position he has held since 2003. Mr. Jallow worked in Gambia as the State Attorney from 1976 to 1982, when he was appointed Solicitor General. In 1984, Mr. Jallow served as the Attorney General and Minister of Justice for Gambia, then in 1994 he was appointed as a justice of the Supreme Court of Gambia. Up until 2002, Mr. Jallow worked as a judge for the Appeals Chamber of the Special Court of Sierra Leone.

Hans-Peter Kaul

Judge Kaul is the current appointed Ambassador and Commissioner of the Federal Foreign Office for the International Criminal Court; prior to this he participated in creating the Rome Statute of the International Criminal Court as the head of the German delegation. Judge Kaul also served as Head of the Public International Law Division of the Federal Foreign Office and brought several cases involving Germany to the International Court of Justice.

Jennifer Khurana

Ms. Khurana currently serves as the manager of the International Humanitarian Law Dissemination Unit at the American Red Cross in Washington D.C. From 2003 to 2006 she worked for the International Criminal Court as a Legal Advisor and External Relations Advisor.

Binta Mansarey

Ms. Mansarey is currently the head of the Outreach Programme of the Special Court for Sierra Leone; in this capacity she is the direct link between the Court and the citizens of Sierra Leone. Before joining the Court, Ms. Mansarey served from 2001 to 2003 as the Protection Partner and Country Representative for the Women's Commission for Refugee Women and Children in Sierra Leone. She has also worked as a partner and consultant to WITNESS, a Gender Officer

and Acting Human Rights Officer for the Campaign of Good Governance, and an Associate Producer of the documentary “Operation Fine Girl - Rape Used as a Weapon of War.”

Michael Newton

Professor Newton is a professor of the practice of law at Vanderbilt University and is an expert in international law, international criminal law, terrorism and counterterrorism, and special tribunals. He helped to establish the Iraqi Special Tribunal, co-authored the book *Enemy of the State: The Trial and Execution of Saddam Hussein*, served as senior advisor to the U.S. Ambassador-at-Large for War Crimes Issues in the U.S. State Department, and had a distinguished military career as an armor officer and a Judge Advocate General.

Valerie Oosterveld

Professor Oosterveld is an Associate Professor and Director of the International Internship Program at the University of Western Ontario. Prior to this, Professor Oosterveld worked in the Legal Affairs Bureau of Canada’s Department of Foreign Affairs and International Trade, providing advice on international criminal accountability for crimes of war, crimes against humanity and genocide. She also advised for the International Criminal Tribunals for Rwanda, the former Yugoslavia, and the Special Court for Sierra Leone.

Robert Petit

Mr. Petit was a co-prosecutor for the Extraordinary Chambers in the Courts of Cambodia until September 2009. Prior to this, he worked with Cambodian Chea Leang from 2006 to 2009, prosecuting Khmer Rouge leaders for violations of international criminal law. Mr. Petit also served as a Crown Prosecutor in Montreal for eight years, as a lawyer in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, a legal advisor for the United Nations Interim Administration Mission in Kosovo, a prosecutor for the Serious Crimes Unit of the United Nations Mission of Support to East Timor, and a prosecutor for the Special Court for Sierra Leone.

Mark Quarterman

Mr. Quarterman currently serves as the Research Director for the Enough Project, where he creates the center's policy prescriptions to end genocide and crimes against humanity. Mr. Quarterman was the Senior Advisor and Director of the Program on Crisis, Conflict and Cooperation at the Center for Strategic and International Studies (CSIS). He has also served in a variety of positions for the United Nations, as a staff member of the Africa Subcommittee of the Foreign Affairs Committee of the U.S. House of Representatives, and as a director of a foreign NGO electoral observation project during South Africa's first non-racial elections in 1994.

Stephen Rapp

Mr. Rapp is the current Ambassador-at-Large and heads the Office of Global Criminal Justice in the U.S. Department of State. Prior to this appointment, Ambassador Rapp served as Prosecutor of the Special Court for Sierra Leone; during his tenure, his office won the first conviction in history for recruitment and use of child soldiers, sexual slavery, and forced marriage as crimes under international humanitarian law. From 2001 to 2007, Ambassador Rapp worked as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, and from 1993 to 2001 served as a United States Attorney in the Northern District of Iowa.

Leila Sadat

Professor Sadat is the Henry H. Oberschelp Professor of Law at Washington University School of Law. She is also the Director of the Crimes against Humanity Initiative and serves at the University of Cergy-Pontoise in Paris, France as the Distinguished Fulbright Chair. Professor Sadat served as a delegate to the United Nations Preparatory Committee and the 1998 Diplomatic Conference in Rome that established the ICC.

William Schabas

Professor Schabas is the newly appointed Chair in International Criminal Law and Human Rights at the Leiden Law School. Additionally, he teaches at Middlesex University in London as a professor of international law. He is the author of more than twenty books and over 300 articles, and a leading academic on the international and domestic dimensions of criminal law and human rights. Professor Schabas is the editor-in-chief of the quarterly journal *Criminal Law Forum*, President of the Irish branch of the International Law Association, and in 2002 worked on the Sierra Leone Truth and Reconciliation Commission.

Michael Scharf

Professor Scharf is currently a Professor of Law at Case Western Reserve University School of Law, where he is the director of the Frederick K. Cox International Law Centre, the U.S. Director of the Canada-U.S. Law Institute, and the director of the Henry T. King War Crimes Research Office. Professor Scharf co-founded and directs the Non-Governmental Organization Public International Law and Policy Group, which has been nominated for the Nobel Peace Prize for their work in prosecuting several major war criminals. Professor Scharf has been widely published with several award-winning books, numerous scholarly articles, and opinion editorial pieces in major newspapers. In 2008, Professor Scharf worked as a Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal.

David Scheffer

Professor Scheffer was designated this year as the Special Expert to advise on the United Nations Assistance to the Khmer Rouge Trials, and is a Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law. Professor Scheffer has been involved in the establishment of the Extraordinary Chambers in the Courts Cambodia, the International Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, and the Special Court for Sierra Leone. He served as the U.S. Ambassador-at-Large for War Crimes Issues from 1997 until 2001.

Ian Smillie

Mr. Smillie is the Chairman of the Board for the Diamond Development Initiative, and has lived and worked in Sierra Leone, Nigeria and Bangladesh. He was the founder of the Canadian NGO Inter Pares, was Executive Director of CUSO, and is a long-time foreign aid watcher and critic. He is the author of several books, served on a U.N. Security Council Expert Panel examining the relationship between diamonds and weapons in West Africa, and helped develop the “Kimberley Process” for certification of diamonds as conflict-free.

William Smith

Mr. Smith is currently in the Office of the Co-Prosecutors for the Extraordinary Chambers in the Courts of Cambodia. Prior to that, he served for ten years as a trial attorney, legal advisor and analyst for the International Criminal Tribunal for the former Yugoslavia. Mr. Smith also spent seven years as a police prosecutor on the South Australian Police Force.

Bankole Thompson

Dr. Thompson is a Sierra Leonean judge with academic, professional, and judicial credentials in criminal law and procedure, comparative criminal justice, international criminal law, and international humanitarian law. He served as a judge for the Special Court for Sierra Leone and currently teaches at Eastern Kentucky University Criminal Justice school.

Alan White

Dr. White is the President and CEO of Allan White Associates, Inc., an international consulting and business development company based in the Washington D.C. area. Dr. White served as the Chief of Investigations for the Special Court for Sierra Leone from July 2002 to July 2005. He previously served as the Director of Investigative Operations for the Defense Criminal Investigative Services from 1998 to 2002.

Ekkehard Withopf

Mr. Withopf is currently a senior trial attorney with the Office of the Prosecutor of the International Criminal Court. Before joining the Court in 2004, he was a lawyer in private practice, an Assistant Professor at the University of Würzburg, Judge at the Würzburg and Nürnberg Regional Courts, and Public Prosecutor at the Office of the Federal Attorney General in Karlsruhe. From May 1999 to May 2004, Mr. Withopf served as a Trial Attorney and subsequently as a Senior Trial Attorney at the International Criminal Tribunal for the former Yugoslavia.

About the ASIL

The American Society of International Law (ASIL) is a nonpartisan membership association committed to the study and use of law in international affairs. Organized in 1906, the ASIL is a tax-exempt, nonprofit corporation headquartered in Tillar House on Sheridan Circle in Washington, DC.

For over a century, the ASIL has served as a meeting place and research center for scholars, officials, practicing lawyers, judges, policy-makers, students, and others interested in the use and development of international law and institutions in international relations. Outreach to the public on general issues of international law is a major goal of the ASIL. As a nonpartisan association, the ASIL is open to all points of view in its endeavors. The ASIL holds its Annual Meeting each spring, and sponsors other meetings both in the United States and abroad. The ASIL publishes a record of the Annual Meeting in its Proceedings, and disseminates reports and records of sponsored meetings through other ASIL publications. Society publications include the American Journal of International Law, International Legal Materials, the ASIL Newsletter, the ASIL occasional paper series, Studies in Transnational Legal Policy, and books published under ASIL auspices. The ASIL draws its 4000 members from nearly 100 countries. Membership is open to all—lawyers and non-lawyers regardless of nationality—who are interested in the rule of law in world affairs.

For information on the ASIL and its activities, please visit the ASIL Web site at <http://www.asil.org>.