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

**August 27–29, 2017, Chautauqua Institution**

**Edited by Mark David Agrast and David M. Crane**



American Society  
of International Law

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

*August 27–29, 2017  
The Chautauqua Institution*

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# Eleventh International Humanitarian Law Dialogs

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ASIL’s nearly four thousand members hail from more than one hundred nations with nearly 40 percent residing outside the United States. Its members include scholars, jurists, practitioners, government officials, leaders in international and nongovernmental organizations, students, and others interested in international law. Through its many publications, conferences, briefings, and educational events, ASIL seeks to serve the needs of its diverse membership and to advance understanding of international law among policymakers and the public.

ASIL is a volunteer-led organization governed by a sixty-member Executive Council elected by its membership. In partnership with the elected leadership, ASIL is led by an executive director and supported by a professional staff.





*This volume is dedicated to*

***Zainab Hawa Bangura***

2017 Recipient of the Joshua Heintz  
Award for Humanitarian Achievement

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Robert H. Jackson Center





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## Prosecutors at the Eleventh International Humanitarian Law Dialogs



*Back row (left to right): Stephen J. Rapp, David M. Crane,  
Robert Petit*

*Front row (left to right): Nicholas Koumjian, Kevin C. Hughes,  
Normal Farrell, Fabricio Guariglia, Mohamed A. Bangura*



# Foreword



## Foreword

**Mark David Agrast\***

For over a decade, the American Society of International Law has joined the Robert H. Jackson Center and our other partner institutions in convening the International Humanitarian Law (IHL) Dialogs, held annually at the Chautauqua Institution in New York.

The Dialogs, for which the Society publishes the *Proceedings*, bring together leading experts in international criminal and humanitarian law, including most of the current and former chief prosecutors for the various UN courts and tribunals dealing with war crimes and mass atrocities, including the International Criminal Court and the special courts for Rwanda, Sierra Leone, Cambodia, Lebanon, and the former Yugoslavia.

A year ago, we convened the Tenth IHL Dialogs in Nuremberg, Germany, to mark the seventieth anniversary of the closing of the International Military Tribunal. This year found us back on the shores of Lake Chautauqua—a tranquil setting that belies the harrowing testimony recounted in these pages.

As always, we came together to mark both progress and setbacks in the continuing struggle for justice and accountability in places where both are in short supply. We came to honor the victims—and survivors—of unimaginable barbarism, and to celebrate the courage and tenacity of the witnesses and their advocates who were determined to put a stop to it.

These *Proceedings* offer a window into the development of international humanitarian law in real time, as experienced by those

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\* Executive Director and Executive Vice President, American Society of International Law.



who helped shape it. Together with the ten previous volumes, they represent a singular contribution to the literature.

On behalf of the Society, I would like to express my appreciation to David Crane, who established this annual forum and continues to guide and nurture it; and to the Robert H. Jackson Center and our fellow cosponsors for their generous support of the Dialogs—the American Bar Association, the American Red Cross, Case Western Reserve University School of Law, Impunity Watch, the International Bar Association, IntLawGrrls, the Center for Global Affairs at the NYU School of Professional Studies, the Public International Law & Policy Group, the Planethood Foundation, Syracuse University College of Law, the International Peace and Justice Institute, the Whitney R. Harris World Law Institute at Washington University School of Law, and the United States Holocaust Memorial Museum.

Finally, I wish to thank Caitlin Behles, the Society's Director of Publications and Research and the Managing Editor of these *Proceedings*.

# **Lectures and Commentary**



## Heintz Award Ceremony Keynote

**Zainab Hawa Bangura\***

Ladies and gentlemen, distinguished guests:

I am deeply honored and humbled to receive the Joshua Heintz Award for Humanitarian Achievement. I regret that I could not join you in person this evening owing to the ongoing political activities happening right now in the lead up to the March 7, 2018, elections that I am hoping to be actively involved in, and due also to the recent humanitarian tragedy that has struck my homeland, Sierra Leone. Having overcome eleven years of brutal civil war, and having emerged from the ravages of an Ebola epidemic, my nation is now reeling from devastating mudslides in which hundreds have perished—including babies swept from their mothers' arms. Coincidentally, I had to travel on a road beneath the shadow of Sugarloaf Mountain barely three hours after disaster struck. I witnessed the deadly floodwaters rage in all directions, submerging homes and vehicles. For many Sierra Leoneans, this is the third time their world has come crashing down around them: first due to war, then disease, and now natural disaster.

My life-story as a humanitarian activist is deeply entwined with the turbulent history of my nation. It is a history that has taught me a great deal about resilience and the importance of social justice. Despite being raised in conditions of grinding poverty, in a family in which no woman had ever been taught to read or write—not even her own name—my mother insisted that I have the chance to attend school and later university. When war erupted and my beloved country fell into the grip of a military junta, I abandoned my corporate career in the insurance industry and took to the streets to advocate for democracy and human rights. I confronted warlords, rebel commanders, and

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\* Former United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict, Former Minister of Health, and Foreign Minister of Sierra Leone.

soldiers alike, urging them to cease committing atrocities against civilians and to lay down their arms. I founded civil society groups and women's networks, which proved to be a vital force for peace and reconciliation. In 2009, the Special Court for Sierra Leone issued the first-ever conviction for forced marriage and sexual slavery as crimes against humanity. I personally gathered evidence by going from village to village documenting the stories of women, and I testified before the Special Court as an expert witness, helping to set this new international precedent.

As United Nations Special Representative on Sexual Violence in Conflict, I once again worked to amplify the voices of women who had suffered history's oldest, most silenced, and least-condemned crime of war. Through this work I came to realize that we must never accept an injustice simply because it is deemed "inevitable." It became clear to me that we cannot *prevent* what we do not adequately *understand*, and that we will never understand this scourge if it continues to be omitted from official accounts of war and peace.

Chief among these accounts are the historical records created by national and international courts and tribunals. In that respect, the past two decades have seen dramatic progress in delivering justice for crimes of sexual violence amounting to war crimes, crimes against humanity, and constituent acts of genocide. Indeed, the mandate I held for the past five years was based on a series of Security Council resolutions that were built on the firm foundations of international humanitarian law (IHL). This body of law represents a universal legal and moral consensus among nations that *even wars have limits*.

Historical breakthroughs in international justice, including the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia, have recognized sexual violence as a grave breach of IHL. Building on this precedent, last year the International Criminal Court (ICC) convicted Jean-Pierre Bemba Gombo, former

Vice-President of the Democratic Republic of the Congo, of sexual violence crimes committed by troops under his command and control operating in the Central African Republic. This was the ICC's first command responsibility conviction for sexual violence crimes, resulting in its longest sentence to date. Just a few months ago, the ICC further ruled, in a case against a Congolese warlord named Bosco Ntaganda, that IHL prohibits rape and sexual slavery committed by an armed group against its *own* members, not only against enemy soldiers or civilians. This is a critical development that places the spotlight of international scrutiny on the intersection between the forced recruitment of child soldiers and sexual violence by armed groups.

In Guatemala, the *Sepur Zarco* trial held last year marked the first conviction in a domestic court for sexual slavery committed during armed conflict. Furthermore, the Extraordinary African Chambers in the Senegalese Courts convicted former Chadian President, Hissène Habré, of rape and sexual slavery as crimes against humanity, using the principle of universal jurisdiction.

All of these cases have been hailed as victories for *both* international criminal law and for women's rights—two agendas that have not always gone hand in hand. Indeed, shame, stigma, and structural gender-based inequality have made it difficult for survivors of sexual and gender-based violence to speak out or to put their faith in the traditionally male-dominated institutions of criminal justice. This is especially true in the aftermath of war, when women are largely excluded from peace negotiations, enabling men with guns to forgive other men with guns for war crimes against women.

However, change is possible. In November 2016, the landmark peace accord that put an end to more than fifty years of armed conflict in Colombia included sexual violence as a crime that cannot be amnestied. To date, over 2,000 sexual violence survivors have received reparations, including financial compensation and land restitution.

Behind the headlines, women played a vital role on both negotiating teams to ensure that victims of sexual violence were able to directly address and influence the talks. I visited the Colombian peace talks in Havana on several occasions, resulting in my office being named as a key implementing partner in translating the promises of the accord into practice. Similarly, following the appalling, politically-motivated mass rape of 109 women in the Guinean capital of Conakry in 2009, my office supported the government to indict seventeen high-level officials and to give many of the survivors a chance to testify and make their voices heard.

Yet, as we take stock of this progress, we are also compelled to confront stark new realities and previously unimaginable threats, including the use of sexual violence as not only a *tactic of war*, but also a *tactic of terrorism*.

The most dramatic illustration of this is the ongoing crisis in Syria. It has unleashed a wave of sexual violence, sexual slavery, forced marriage, human trafficking, and trauma, which will take generations to heal. In 2015, I visited the Middle East to document and report on the use of sexual violence by terrorist groups such as the Islamic State (or *Da'esh*), as well as by the Syrian Government. I travelled to Damascus in Syria, as well as to Baghdad, Erbil, Dohuk, and Lalish in Iraq. I met with displaced communities in the neighboring countries of Jordan, Lebanon, and Turkey, where women refugees consistently mentioned the fear of rape as a major factor inducing their displacement.

It is staggering that in the 21st Century—the year 2017—wars are still being fought on the bodies of women and girls. In our own lives and times, women and girls are being captured, enslaved, and sold as the “spoils of war,” just as they were in the battles of antiquity. Their bodies continue to serve as a form of currency in the political economy of conflict and terror.

My personal and professional experiences, in Sierra Leone and in countless war-torn corners of the globe, have taught me that justice is a transformative force that can turn *victims* into *survivors*. Transitional justice processes should never again treat women as second-class victims of second-class crimes. Impunity means “license to rape”; but prosecution can mean prevention. Prosecution can restrain the behavior of belligerents and deter future crimes.

It is, therefore, critical to convert age-old cultures of impunity for warzone rape into cultures of deterrence. To that end, we must continue to strengthen and reinforce the rule of law, at both the national and international level. This is the best way to signal that no military or political leader is above the law, and no woman or girl is beneath the scope of its protection. The rule of law is the foundation for peaceful and inclusive societies, and for a more just, stable, and equitable world.

I thank you again for your support and shared commitment to that cause.





## Clara Barton Lecture

### Elhadj As Sy\*

Thank you all for this invitation to join you to give the Clara Barton lecture at this year's International Humanitarian Law Dialogs.

It was Dean Michael Scharf of Case Western University, who—on behalf of you all—issued this invitation. I knew it was important to join you, so I have squeezed in this U.S. visit between two trips to the Middle East.

When I look at the very long list of prestigious Case Western alumni, I cannot help spotting the name of M. Scott Peck, who gave us one of the world's best-known self-help books in *The Road Less Travelled*. Peck's routes to fulfilment remain a lifetime's work for most of us. His title also speaks specifically to me, as one who is anything but "less" travelled: I spend almost half of my time travelling, seeing ordinary people doing extraordinary things in extraordinary situations.

And it also speaks to an expression that we use in the International Federation of Red Cross and Red Crescent Societies (IFRC), where we talk about "the last mile," and "the first mile": two roads that are not easily and often travelled. Our uniqueness in the IFRC is that we are based on the ground and in our communities, in 190 National Societies (that is almost everywhere on earth), and in the form of some 17 million volunteers. We are everywhere you work, working alongside the communities we all seek to serve.

We are there before, during, and after crisis, simply because we are always there, in crisis or not. We walk the first mile with the people we serve; we walk the last mile with them. And that "last mile" is often

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\* Secretary General of the International Federation of Red Cross and Red Crescent Societies.

the one that others will not walk. It is the mile that leads to the hardest places and the hardest people to get to. We accompany the communities we serve, and the people within them. We help people to recover the thing that is the most precious to them—their human dignity.

It is this principle of humanity—the fundamental principle of humanitarianism and what former International Committee of the Red Cross (ICRC) President Max Huber described as “the unconditional recognition of the value of everything that has a human face”—that overarches everything you will discuss over the next few days and that clearly links you, as international humanitarian lawyers and criminal lawyers, to me and the IFRC, as plain international humanitarians.

Nobody personified humanity and the humanitarian principles quite like Clara Barton, who is rightly held in the highest esteem not just in this country but the world over. The fact that she was born on Christmas Day in 1821 may have hinted that she was destined to be a gift to the world.

So much of what she believed and did rings true to the work of the IFRC well over a century later.

As a fearless campaigner against slavery, she was a forerunner of all our work with the most marginalized, the most vulnerable, and the most abused.

As one of the mothers of volunteerism—famously mobilizing hundreds of people to tend to wounded soldiers at the Battle of Sharpsburg in September 1862—she was a forerunner of an international organization now numbering, as I said, 17 million volunteers. When we talk of battlefields, we reflect that they used to be defined geographically: battlefields had names like Sharpsburg. But now our battlefields cross borders. They come in the form of

things like climate change and disease and ideology. And they are in our cities, our schools, and even our places of worship.

As someone who brought her “supply wagons” to the aid of the distressed on both the Union and the Confederacy side, Clara Barton was a pioneer of the humanitarian principles of neutrality and impartiality.

As someone who set out to find missing people, alive or dead, and make contact with their families—most notably at Annapolis—she could easily be transplanted to some of the work that the Red Cross is doing right now in so many places, for instance, in Sierra Leone, as people search frantically for their loved ones lost after the mudslides of a fortnight ago, or on migrant routes, where we reconnect families and children.

Clara memorably said, “Everybody’s business is nobody’s business, and nobody’s business is my business.” I like that. Again, it speaks to me and to the International Red Cross and Red Crescent Movement, which is concerned with precisely everybody, with “everything that has a human face.” That includes all those whom society rejects as “nobody”—those left behind because of their race, their ethnicity, their sexual orientation, their legal status, their geographical remoteness, or just their sheer poverty.

Clara of course also founded the American Red Cross in 1880, and it is a pleasure to see Koby Langley, Senior Vice President, here today. So let me also take this opportunity to pay my respects to the American Red Cross.

I pay special tribute today of all days, as thousands of American Red Cross volunteers help to fight the horrific results of Hurricane Harvey in Texas.

The American Red Cross is one of the largest National Societies in terms of staff and volunteers. It is a key player in our global Federation as one of the original founders and a current member of our Governing Board.

Many of you here will have seen the way they mobilize this great country's responses to tragedies near and far—from the Indian Ocean Tsunami at the very end of 2004, to the Haiti earthquake of January 2010, to Hurricane Sandy in November 2012. A month ago, I saw the laying of the first stone of an American Red Cross-funded blood transfusion center in Port-au-Prince, Haiti. There have been five American presidents of the IFRC, including the iconic Henry Davison as the first in 1919.

Ladies and gentlemen, it serves my purpose to acknowledge some of the moving spirits behind this lecture and these dialogs because the theme that unites them all is the relief of suffering. That is why we are all here. Today I would like to look at both international humanitarian law (IHL) and international humanitarianism. They are part of the same continuum, and two things link them: the legal and regulatory environment in which we as humanitarians operate, and the fundamental humanitarian principles that underpin all our work.

Here, perhaps, I should also acknowledge the spiritual, emotional, and intellectual forefather of both international humanitarianism in the form of the Red Cross Red Crescent, and also of one of your professional disciplines, that of IHL. I am of course referring to the Swiss banker Henri Dunant who, in the terrible wake of the slaughter at the Battle of Solferino in 1859, laid the foundations of two things: first, the movement of which I am a part; and second, the Geneva Conventions, which are of course central to your work, and which have become ever stronger since the Protocol of 1977.

## **International Humanitarianism – A Sketch**

We all share this same context because we all share the same world.

It is a world that is hurting, in which the UN estimates that 100 million people need humanitarian assistance in any one year, at a cost of USD 22 billion. It is a world of multiple possibilities for unhappy alliteration, in which today I will simply mention three diabolical Ds: disaster, disease, and displacement.

The first D is for disaster.

This week, our focus is on the victims of the mudslides in Sierra Leone, with 400 dead and counting.

The focus is also on the worst floods in South Asia in living memory. More than 800 people have been killed and 24 million are affected following widespread floods in India, Nepal, and Bangladesh. Bangladesh—a country of flatlands that was devastated by floods with massive loss of life a generation ago and that has since done so much to mitigate their damage—has experienced the most severe flooding in 100 years.

Any week, the disaster agenda is different, but it is always there. We approach the morning news headlines with trepidation. We know that disasters impact most on the most vulnerable: the poor and most marginalized, women and children, the elderly, and the disabled.

We also know the reasons for so many disasters. Natural shocks and natural hazards—like the monsoon season which we know always comes—do not have to turn into natural disasters.

In Sierra Leone, for instance, the causes of the mudslides were the result of a lethal cocktail: deforestation and environmental degradation;

badly-constructed homes in informal settlements at the bottom of denuded hills; poor sanitation and drainage systems that are easily blocked by bad waste management; and no early warning systems.

That is why our disaster preparedness work gets ever more important. We in the IFRC have carried out research on our own projects showing that a dollar spent on disaster preparedness saves sixteen dollars in disaster relief.

And those dollars also save countless lives—not least the lives of life-givers themselves, with half of all preventable maternal deaths worldwide occurring in conflict or disaster settings. Disaster-preparedness is life-readiness. It is central to what we do in the IFRC.

Meanwhile, the second D is for disease.

Disease is so often a compound of famine, the scourge by which 20 million lives are still in grave danger in South Sudan, Somalia, Nigeria, and Yemen. We measure famine as such: level 1 is okay, level 2 is stress, level 3 is crisis, level 4 is emergency, and level 5 is famine. Most of the places where we work are at very best at level 2, “stress,” which is bad enough in itself. These four countries are at level 4. And insult has been added to injury in the form of horrific cholera outbreaks in Somalia and Yemen. Can you believe that 540,000 out of 27 million Yemenis, 1 in 50 people, have already contracted the disease; 2000 have died; and there are more than 25,000 new cases still occurring every week?

There is more. This week we hear of chronic measles in Somaliland. In recent months, we have been on the trail of yellow fever in Brazil and dengue fever in Sri Lanka. In 2014 we were at the forefront of the Ebola response in Guinea, Sierra Leone, and Liberia: our volunteers carried out over 50,000 safe and dignified burials, and are thought to have

saved 10,000 lives in the process. It is unusual to measure the success of a program by how many you buried, but this time, we did just that.

The third and final D is for displacement.

Today we see the highest number of displaced people globally since the period of trauma at the end of the Second World War. There is no Third World War, but I so often repeat that we have never seen anything like this, since the Second World War. The UN puts the figure at 66 million: 44 million people displaced within their own countries and 22 million refugees and asylum seekers outside their own countries.

To alight on just one situation of which we are all painfully aware: in Syria, Turkey, Lebanon, and Jordan, our National Societies—along with the IFRC and the ICRC—are strengthening a movement-wide response to the Syria crisis, which is now entering its sixth year. Over five million Syrians have been displaced outside their own country and even more within it. Of those outside, three million are in Turkey, while Syrian refugees make up a full third of the population of Lebanon. What generosity, from a country with so many of its own challenges before it takes on those of anyone else.

Our IFRC member the Syrian Arab Red Crescent (SARC) has led the humanitarian response inside Syria from the beginning. We collectively reach more than five million people each month through the combined efforts of more than 7,000 active volunteers and 2,000 staff. We do so at a terrible price—we have lost over sixty staff and volunteers in Syria.

It has been my privilege to visit Syria three times as Secretary General. The last time, in March, I witnessed SARC-run livelihoods projects in al-Hisn in the Homs governorate and Qutayfah in the rural Damascus governorate. I sensed that these projects were testament to a new Syrian will to recover normality and get on with their lives.



But when people are outside their own country—whether as migrants or refugees—the IFRC and its National Societies are present where they can be, in trying to help them at every stage of that journey:

– in their points of origin, for instance in West Africa, in giving impartial and factual information on what it is to move countries, for whatever reason, and on how there are those—smugglers, traffickers—who would abuse them;

– in their often-perilous journeys, for instance across the “Saharan Sea” to North Africa, and the Mediterranean Sea to Europe;

– in their points of arrival, supporting their immediate needs when they get to countries such as Greece, Italy, Turkey, Lebanon, and Uganda (How is it that we speak of a “refugee crisis” when one million people try to come to Europe, but not when three million go to Turkey, one million to Jordan, one million to Lebanon, and now one million to Uganda?);

– and in their points of near or final destination, for instance in teaching livelihoods in Turkey, or language and vocational skills in Germany and Scandinavia.

We in the IFRC believe protection and assistance should be provided to all who need it, regardless of their status.

Ladies and gentlemen, I offer this quick and grim sketch of global humanitarianism simply to say that this is the humanitarian world—and this is of course our collective world. It is a world in which I want the IFRC to do even more to educate young people—in conflict situations and in all situations—to put into practice the values of humanitarianism, all of which are based on the brotherhood of man. We call it “Education Plus,” and it teaches self-esteem, dignity, respect, tolerance, and the recovery of hope.

## **International Humanitarian Law – The Humanitarian Dimension**

Let me now turn to your specific field, that of international criminal law and IHL (or the law of armed conflict).

Within the International Red Cross and Red Crescent Movement, as you know, situations of war and conflict are largely the preserve of our sister organization the ICRC. As ever, I pay tribute to the ICRC, which carries out magnificent work in situations of extreme danger and is officially the guardian of IHL.

Today I would like to acknowledge the important work undertaken by investigators, prosecutors, lawyers, and others in the pursuit of justice in the wake of war crimes. Never have I felt so safe! I am pleased to see representatives from the international criminal tribunals, including the International Criminal Court. It has been fifteen years now since the Rome Statute entered into force, and there have been some forty individual indictments at the ICC.

It has been a time in which there have been achievements and results, and also a time in which there have been complications to match: the accusations of imperialism and an over-focus on Africa; the tensions between the pursuit of justice and the pursuit of peace; the challenges of avoiding politicization and bias; the complexities of “complementarity” whereby the national state is supposed to be the first to deal with a violation, with the ICC a support for that process, and a court of last resort.

I am not the person to unpack those issues, but I can talk to how the work of international investigators and prosecutors can affect the work of humanitarians.

IHL violations clearly lead to massive humanitarian needs, and they need to be stopped. At the same time, we must always be careful

that any work undertaken to prevent and respond to IHL violations, including by international criminal processes, does not create further needs, nor create challenges for humanitarian actors to do their work.

The obvious challenge comes down to neutrality. While humanitarians would like to see an end to violations of IHL, at the same time, as you know, we cannot engage with or support these legal processes. Even speaking to court staff may mean that the humanitarians come to be seen as not being neutral, undermining their ability to provide assistance to people in need.

All I can say today is that some of our ways of working may be useful for you in your work, given that we are often operating in similarly complex environments. In particular, humanitarians take a “do no harm” approach that seeks to evaluate every one of its actions to ensure that it only does good, not harm.

For humanitarians, the “do no harm” approach can be applied at the most granular of levels, and it makes very real sense. “Do not build a well in a place where the water it produces will be fought over,” we say, simply and practically enough. “Do not build toilets without locks in places that are darkened at night,” we say. This is common sense: consideration of “do no harm” is a prerequisite for every humanitarian action.

How can court staff apply the same principle? You can answer that question better than us.

To look at just one example: Could it be useful for prosecutors and investigators to ask themselves whether their choice of witnesses (or the process to identify them) might have unintended negative impacts on a community? If, say, the investigators view teachers as key interviewees (which makes perfect sense, in that teachers are literate and they often speak an international language), then the

investigators must ask themselves a question. If a teacher is taken out of a community to be interviewed (and often removed to safe housing in the process), then who will remain behind to teach children? And who will give them “Education Plus?”

You will see that I am trying to offer practical wisdom here, but it comes alongside a philosophical observation that I think is of real interest to you in applying bodies of formal law to decidedly “informal” situations.

The IFRC’s humanitarian work in the farthest reaches of the communities we serve—or “the last mile,” which I mentioned at the outset of this lecture—often takes us to places not just without government, but without formal laws. We are often operating in places that uphold ancient and customary law, shaped by tradition and values. I draw a parallel here between the fundamental principles of humanitarianism, which I have so emphasized in this lecture, and some of the fundamental principles of the communities in which we work. These are the principles behind the law—be it international humanitarian law or customary law.

There are messages here for us as well as for you about how to plug into the values and norms of communities that may seem oceans away from the tenets of international humanitarian law.

### **The Legal and Regulatory Environment for International Humanitarianism – Disaster Law, Volunteering**

Let me now explore further some of the legal and regulatory aspects of humanitarianism, going beyond IHL.

You are lawyers, and I feel it will be of interest to you to know how laws—or at least guidelines—can enhance our humanitarian work. One of the IFRC’s big tasks is to take disaster law to the same scale and effectiveness as humanitarian (or war and conflict) law. The

one is not much more than fifteen years old and the other is over fifty, and the age difference shows.

The lack of laws and procedures to regulate incoming disaster relief—at the national and international level—has had and continues to have significant effects. We see the problem of over-regulation, which leads to unnecessary bureaucratic bottlenecks slowing the entry and distribution of relief, and we see the problem of under-regulation, which permits poor quality and lack of coordination.

Laws and guidelines are essential to enabling us to undertake our work, providing assistance during crises.

The UN's International Law Commission (ILC) has prepared a set of “draft articles on the protection of persons in the event of disasters.” The draft articles are due to come up for consideration before the UN General Assembly at the end of 2017. These articles could form the basis of a new global agreement: an agreement that could spur further interest and commitment among states to put in place domestic laws and procedures to bring about better international assistance after disasters.

Before the ILC began its work, the International Red Cross and Red Crescent Movement had set about rectifying this serious problem. We spoke to governments, as well as local and international aid providers, and developed the formal “Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance” (IDRL Guidelines).

To date, IFRC and National Societies have worked in over fifty countries worldwide to review their legal frameworks for disaster management and response. Twenty-six countries have adopted provisions based on the IDRL Guidelines into their national legislation. A further seventeen draft bills or regulations are pending. IFRC has been called

on by National Societies and governments to provide operational IDRL advice to help facilitate emergency response operations in the Philippines, Vanuatu, Fiji, Nepal, Haiti, Ecuador, and Myanmar.

Customs and border entry issues, import tariffs, unsolicited donations, first aid awareness and training—these are the kinds of areas that are covered in the Guidelines and that can go into legislation.

One of the most important characteristics of our Disaster Law work is the primacy of local actors—national governments and national organizations such as the National Societies of the Red Cross and Red Crescent. They lead and others follow.

Enshrining this in disaster laws sits alongside the global commitment to “localize” aid that was made at last year’s World Humanitarian Summit in Istanbul, and which the IFRC leads and champions. One of the stated targets of localization is to increase the funding channeled to local organizations from an estimated 0.4 percent to 25 percent.

So the cause and the practicality of IDRL is the flagship of the IFRC’s efforts to bring into law the elements that will allow us to do our work better and also allow governments to regulate what are often chaotic disaster situations.

Let me briefly mention one other way that we are trying to improve the environment in which we work.

This is the area of volunteer protection. Again, this is of interest to you because of the increasing death toll among humanitarians in either conflict or disaster settings. Just a week ago, on August 19, you may have seen that the world marked International Humanitarian Day with the hashtag and the slogan that volunteers and civilians are “NotATarget.”

It was a grim anniversary for us. Every violent death of a health or aid volunteer sends a shudder through the humanitarian world. This happened yet again two weeks ago. In the Central African Republic, where we are working closely with our member, the Central African Red Cross, to strengthen health systems, nine Red Cross volunteers were gunned down alongside two dozen civilians attending a crisis meeting at a health facility in Gambo.

In 2016, eleven Red Cross and Red Crescent volunteers were killed in violent incidents. So far in 2017, twenty-four volunteers and staff have lost their lives to violence in far-flung locations including Syria, Nigeria, Mexico, and Mali, as well as the Central African Republic. This year is on track to become the deadliest since at least 2011.

Our 17 million Red Cross and Red Crescent volunteers are our greatest treasure. Much of our moral authority and unique presence derives from them and their simple desire to do good and offer time and help to their fellow human beings. They speak local languages and they understand local cultures. These people are courageous and committed, but if we want them to keep coming forward and continuing their vital work, we must do more to ensure their safety. We simply cannot measure the courage of volunteers by recounting the numbers of those we lose in the line of duty.

The obligation to protect aid workers and civilians lies with parties to the conflict. International humanitarian law makes this clear.

## **Conclusion**

Ladies and gentlemen, in coming to a close, I hope you see that I have tried to link your worlds of international criminal and humanitarian law with mine. One of those links, of course, is IHL's younger sibling, IDRL. But I think the greatest of the links is humanity—the fundamental principle of humanitarianism—which unites us all.

Our world is suffering. For all the advances of the 20th Century, never has the world looked more parlous and more threatened than in these first two decades of the 21st Century. None of us can stand for this—all of us have a role play as stewards of our inheritance, in preserving our planet and civilization for our children and our children's children and grandchildren.

What has gone before is not good enough. I think it is fitting that Clara Barton herself should have the last word. She wrote:

I have an almost complete disregard of precedent, and a faith in the possibility of something better. It irritates me to be told how things have always been done. I defy the tyranny of precedent. I go for anything new that might improve the past.

Thank you.





## Introduction of Andrew Cayley

**Mark David Agrast\***

Good afternoon. I am Mark Agrast, Executive Director of the American Society of International Law, and I bring you greetings on behalf of our President and Executive Council. The Society is a nonpartisan, educational membership organization founded in 1906 and chartered by the U.S. Congress in 1950. Its mission is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. Its 4,000 members include lawyers, judges, diplomats, and academics from over 100 countries.

The Society has been honored to cosponsor these Dialogs since their inception. These annual gatherings are among the many ways in which we advance and renew our mission. Nobody here today needs to be told that that mission has taken on increased importance in light of current political realities in the United States and abroad, and we are pursuing our efforts to educate policy makers and the public with renewed vigor.

As part of our contribution to the Dialogs, the Society publishes the annual *Proceedings*, and I am pleased to announce that the *Proceedings of the Tenth International Humanitarian Law Dialogs* have just been published and are available for purchase online. This is a special edition that constitutes a unique record of the ceremonies, keynote speeches, and discussions that took place in Nuremberg, to mark the seventieth anniversary of the closing of the International Military Tribunal. I would like to express my appreciation to my co-editor, David Crane, and to the managing editor for this volume, Molly White.

It is now my honor to introduce our luncheon speaker.

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\* Executive Director and Executive Vice President, American Society of International Law.

Andrew Thomas Cayley, QC, is the Director of Service Prosecutions for the United Kingdom. He previously served as a British military prosecutor assigned to the International Criminal Tribunal for the Former Yugoslavia (ICTY), and from 2001–2007 as a senior trial attorney with both the ICTY and the International Criminal Court (ICC).

At the ICTY, he investigated and prosecuted a series of major cases, many of which have figured prominently in these Dialogs, including the *Rajić*, *Krstić*, and *Talić* prosecutions. He was responsible for bringing the case against Ratko Mladić that is now nearing completion, and led the first prosecution of members of the Kosovo Liberation Army.

At the ICC he was responsible for the investigation and prosecution of serious violations of international humanitarian law in Darfur, and filed the first case for war crimes and crimes against humanity in the region.

From 2009–2013, after leaving the ICC, he was the International Co-Prosecutor of the Khmer Rouge Tribunal—formally known as the Extraordinary Chambers in the Courts of Cambodia—which he discussed on last night’s panel with Nick Koumjian and Robert Petit.

Andrew was appointed Queen’s Counsel in 2012, where he is a governing bencher of the Inner Temple. He was awarded the Companion of the Order of St. Michael and St. George in 2014 for services to international criminal law and human rights.

Given his extraordinary breadth of experience, Andrew could hold forth on any number of the subjects with which these Dialogs are concerned. But he has chosen to speak to us today on the complex challenge in which he is currently engaged: “The UK, Iraq, and the International Criminal Court: The domestic investigation of war crimes and the role of the ICC.”

As Director of the U.K. Service Prosecuting Authority, Andrew is responsible for providing legal advice to the Iraq Historical Allegations Team that was established in the United Kingdom in 2010 to review and investigate allegations of homicide and abuse made by Iraqi civilians against U.K. armed forces personnel operating in Iraq from the commencement of coalition operations in 2003 until July 2009. Those allegations are also the subject of a preliminary examination by the ICC.

These cases have presented extraordinary challenges to the investigators and prosecutors. They have had to contend with many factors, some of which will be familiar to this audience, including the lack of evidence, the unavailability of witnesses, and the lengthy passage of time since the events took place. In addition, they have had to take account of a number of unique circumstances, including the views of the British press and public of a deeply unpopular war, and recent revelations of attorney misconduct that have cast serious doubt on some of the original allegations.

We are fortunate to have Andrew with us today to help untangle these complexities and to offer his reflections on how investigators and prosecutors can overcome obstacles to reach a just result.

Please join me in welcoming Andrew Cayley.



## **Luncheon Keynote Address**

### **Andrew Cayley\***

I was approached at the beginning of 2013 by the U.K. government to consider applying, along with a number of other people, for the position of the Director of Service Prosecutions. At the time, I was doing the job that Nick Koumjian is doing now in Cambodia. I was the International Co-Prosecutor in Cambodia. I was approached completely out of the blue for this position and had not really considered doing it before.

There is quite an interesting background to the position. The legislation, the Armed Forces Act 2006 (Act), which created the role uses and defines the term: “Director of Service Prosecutions.” In 2006, the British government had decided that it would rationalize the way that members of our Armed Forces are prosecuted. Prior to the Act coming into force, which was in 2010, we had three separate prosecuting authorities: one for the Army, one for the Royal Navy, and one for the Royal Air Force. They were all headed up by very senior legally qualified members of those armed forces, so an Air Force lawyer, a Navy lawyer, and an Army lawyer.

As a country we had been subject to a number of cases in the European Court of Human Rights that questioned the fairness of our proceedings before military courts. The perception was that the chain of command within the Armed Forces had too much influence on the decision-making process. Historically, senior officers were able to quash a proceeding. They might have no legal qualifications at all but simply decided the case was not going to be prosecuted.

In 2006, the government decided to unify the three separate service prosecuting authorities so there would be one prosecuting authority for the Navy, the Army, and the Air Force, and that there would be

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\* Director, Service Prosecutions, United Kingdom.

a civilian head. There would no longer be somebody in uniform although the Act does not prohibit this. The first prosecutor was Bruce Houlder, QC. I am the second person, and the reason for a civilian appointment was to ensure that the individual who occupied the position was completely independent of the military chain of command. There would not be any influence over the Director of Service Prosecutions by reason of his or her rank or position in the three Armed Forces. He or she would be able to make decisions independently on who to prosecute or not.

I came into this new job not in my wildest dreams believing that I was going to still be dealing with war crimes. In fact, one of the reasons I took the job was to get away from that work and go back to domestic English law where my future after Cambodia would lie. I also wanted to work once again in a domestic setting with independent judges and a proper functioning legal system, which I had taken for granted in my own country until I went to Cambodia.

So that is the background to how I got involved in this.

The allegations against U.K. forces arise out of Iraq during the Second Gulf War, which, as you know, both the United Kingdom and the United States participated in. Coalition forces entered Iraq on March 20, 2003. Major combat operations came to an end very, very quickly; much quicker than anybody had anticipated. Subsequent to that, the United States and the United Kingdom became occupying powers under Article 42 of the Hague Regulations and Common Article 2 of the Geneva Conventions.

That concept of an occupying power is extremely important in respect of what I am going to discuss with you. It was important from a prosecutorial sense because the grave breaches provisions of the Geneva Conventions continue to apply during a period of occupation, so all of the war crimes that apply in international armed conflict

applied during the period of occupation. Now, granted, today the war crimes both in non-international armed conflict and international armed conflict are similar, but there was this perception of the nature of the role of the U.K., and, indeed, the U.S., as being an occupying power with the duties and obligations that rested upon them.

The Coalition Provisional Authority (CPA) was created on April 21, 2003. The United Kingdom and the United States were both members of that organization, which was effectively the Occupying Power's military government of Iraq. The United Kingdom was responsible for maintaining security and supporting the civilian administration in the southern Iraqi city of Basra. In July 2003, the Governing Council of Iraq was established. It consisted of various Iraqi political and tribal leaders who were appointed by the CPA to provide advice and leadership of the country until transfer of sovereignty to the Iraqi Interim Government. In June 2004, the Security Council passed Resolution 1546, in which it transferred authority from the United Kingdom and the United States, as the occupying powers, to the Iraqi government. The occupation ended but British troops remained until 2009. In fact, the International Criminal Court (ICC) reports say 2011. Actually, most of the troops had left by 2009, though some troops remained in an advisory capacity.

The United Kingdom was in Iraq for a period of six years, and I want to reiterate that the British Army was policed in Iraq during this period. Many allegations were investigated at the time. Those that were not, you will understand later why they were not. The principal source of the criminal allegations against U.K. forces come from civil complaints—Iraqi citizens who made complaints under the European Convention on Human Rights in both U.K. courts and before the European Court of Human Rights.

Now, you ask yourself the question, why did the European Convention on Human Rights apply in Iraq? Generally it has territorial application



only, so if you sign and ratify that treaty, the basic fundamental human rights in that document apply in your national territorial space. But the European Court of Human Rights, based in Strasbourg, which is the final arbiter of this Convention, decided that since the United Kingdom was in occupation in Iraq, it had control and authority over Iraqi citizens, so the Convention applied.

A number of Iraqi citizens brought claims against the U.K. government for breach of the fundamental rights contained within the European Convention—the right to life, the prohibition against torture, and the right to liberty. They brought civil claims within the U.K. courts and before the European Court of Human Rights, claiming that their fundamental human rights within the Convention had been breached. Many of those allegations also constituted criminal complaints. Not only were they complaining about a breach of their human rights but also criminal conduct that the United Kingdom was obliged to investigate.

The potential offenses do look very serious—murder, manslaughter, grievous bodily harm, rape, sexual offenses, and war crimes. There were domestic English criminal offenses alleged that arose under the Armed Forces Act 2006, which governs my role as the Director and the role of my organization, the Service Prosecuting Authority. Under that Act, the criminal law of England and Wales applies to service personnel—the British Army, Royal Navy, and Royal Air Force—wherever they are in the world. I think the Uniform Code of Military Justice of the United States has a similar legal effect.

There are reasons for this form of legal jurisdiction. One has to do with our colonial history as a country where we often had members of the Armed Forces based in parts of the world outside the United Kingdom. Also for example, when we had a significant number of troops in the Federal Republic of West Germany (and then Germany) after the end of the Second World War, they were subject to English

criminal law. The German authorities actually could try British forces in their own courts under a Status of Forces Agreement between the United Kingdom and the Federal German Government (SOFA), but generally speaking they operated what was called the waiver under the SOFA and they would say to the military authorities, “No, you try them in your military courts, under English criminal law.”

When we were looking at allegations against U.K. forces in Iraq, we could look at our own suite of criminal offenses of murder/manslaughter and grievous bodily harm under the Offences Against the Person Act 1861; rape and sexual offenses under the Sexual Offences Act 2003; and war crimes—murder, unlawful killing, torture, inhumane treatment, cruel treatment, outrages upon persons, and also rape under the International Criminal Courts Act 2001.

The Rome Statute, which is the governing statute of the International Criminal Court, is incorporated within our domestic law under the International Criminal Court Act of 2001, which means that we can try offenses under the Rome Statute domestically in the United Kingdom over which the International Criminal Court would have potential jurisdiction. This goes to the heart of this concept of complementarity: that the International Criminal Court’s basis of jurisdiction is first member states themselves should investigate and try these war crimes offenses, and the International Criminal Court will only intervene where the member state that has primary jurisdiction is unable or unwilling to investigate and prosecute these kinds of crimes itself. As a state that claims to have the rule of law and a fairly developed legal system, our claim is that we are able to investigate and, if necessary, prosecute these alleged crimes that have arisen in Iraq.

Also, through domestic jurisdiction we have incorporated the principle of command responsibility, which is a unique principle of responsibility within international criminal law. It is essentially where if a commander fails to prevent or punish crimes about to be

committed or having been committed by those under his command, he can be held liable under this concept of command responsibility.

Now, interestingly, we have received nearly 3,500 allegations. When I started it was several hundred but it rose to 3,500 allegations, mostly as a result of individuals making civil complaints that their human rights had been breached or abused by British soldiers in Iraq. To date, 70 percent of those complaints, on a criminal basis, have been dismissed—often for lack of evidence concerning very basic things. Often you cannot even identify who actually fired the shots that killed the victim: not surprising in what became a counter-insurgency campaign.

The basis of these civil claims—so the evidence—as ridiculous as it sounds, was often only a few lines of text. An Iraqi would make a complaint to a private law firm called Public Interest Lawyers. The senior partner of Public Interest Lawyers, a law firm that is now no longer operating, was struck off, disbarred for dishonesty this year in connection with these Iraqi claims. That has created other significant problems for us in terms of the credibility of complaints that have come through Public Interest Lawyers. But as I said, 70 percent of these claims have been dismissed, and most of them because you cannot launch any kind of criminal investigation on the back of the complaint being made, which is so vague. This is not to say that amongst these many claims there are not some serious matters that need to be looked at carefully.

The Iraq Historic Allegations Team (IHAT) was established by the U.K. government in 2010 because there were a growing number of claims being made by Iraqis. The government became concerned, so they saw the need to set up a specialist investigative team, and this was three years before I was appointed as Director Service Prosecutions. Its mandate was to review and investigate allegations of ill treatment

during Operation Telic between 2003 and 2009. Operation Telic was the British codename for British military operation in Iraq.

The mandate of IHAT in the beginning was just to look at allegations of abuse. This included Iraqis who had been taken into custody by U.K. forces and alleged that they had been tortured, ill-treated, or abused. That mandate expanded to include homicides after we received a significant number of allegations that U.K. forces had unlawfully killed Iraqi citizens in Iraq.

IHAT was originally staffed by approximately 150 people—civilian investigators, analysts, and the Royal Naval Police. We could not include the Military police of the Army in IHAT because many of them had been involved in the detention and internment of Iraqis during British military operations in Iraq. The Court of Appeal in England stated that these individuals would not be seen as independent in their investigation if they had been providing advice on detention in Iraq. IHAT was under the overall supervision of the chief police officer of the Royal Navy.

When I arrived at the Service Prosecuting Authority (SPA) in 2013, I set up an Operational Offenses Team because, at the time, we were dealing with our advice to IHAT on an ad hoc basis, and I felt that we needed to be seen to be doing things properly. We needed a separate team of prosecutors. I was fortunate to be able to call on all of my experience in the international courts, so I set up a discrete team of prosecutors at the Service Prosecuting Authority. I was mindful of the fact that I had Army prosecutors working for me at SPA who had been advising the chain of command on the ground in Iraq beforehand, where some of these cases, particularly involving homicides, had not been investigated at the time. I felt that because the Army lawyers in my organization had been advising the chain of command on the ground during military operations, I had to conflict them out of all of this IHAT advice, and I brought in Royal Navy and Royal Air Force

prosecutors, as well as four civilian prosecutors from our civilian prosecuting service—the Crown Prosecution Service. All of them are directly accountable to me, and I report to the Attorney General of England and Wales, who essentially supervises my work in this field.

So this was the system that I set up to deal with this. I know it is unbelievably complex, but there are legal reasons for this. Much of what we are doing here is not just answering to the International Criminal Court. It is also answering to the requirements of the English Divisional Court.

We receive an allegation and often the allegation is very thin. It is a couple of lines of text. So what we put in place was a pre-investigation assessment. Is there a realistic prospect that we can actually investigate this case? Do we have enough evidence to go on, all these years later? Do we have enough information to even launch an investigation? Oftentimes at that stage the answer is no, we do not have enough information to carry out any form of investigation at all.

Where there is sufficient information, a fairly hefty report is put together. Legal advice is given by my organization, and then we have what is called a joint case review panel with the Iraq Historic Allegations Team, where lawyers and investigators work together. Again, this was something that I could relate to from my international experience. It was a quick way of going to a focused inquiry. With very serious allegations like rape or homicide we would do focused inquiries even where there was not much evidence supporting the allegation.

The other option was a full investigation. That was agreed upon between the Service Prosecuting Authority and the Iraq Historic Allegations Team. Everything we agreed to do was in a Joint Investigative Strategy Document, and the lawyers and I, as well as the senior police officers, signed off on it. The case would then go to a full investigation.

The Evidential Sufficiency Test is a test that the service police apply after they believe an investigation is complete. They simply decide whether there is sufficient evidence to refer it to the Director of Prosecutions for him or her to decide whether to prosecute or not. If not, the police discontinue the case. Where the offence alleged is a serious one, there is a statutory obligation to consult with me. I can send it back if I think it should be further investigated, or referred to me.

If it is referred to the SPA, it is then for my lawyers and me to decide whether there is a realistic prospect of conviction. That is the test in English law: whether a jury—a military board—properly directed by a judge, is more likely than not to convict on the basis of the evidence. If the answer to that question is yes, we prosecute. If the answer to that question is no, we discontinue.

Any decision that I make is subject to two forms of review. First of all, under the English system, because of European Union law, victims have a right to review. So if I decide not to prosecute a case, a victim can say, “Well, actually, I don’t agree with what you decided. You need to get another lawyer to look at this to decide whether or not to prosecute.” That is by virtue of a European Union directive.

I am also subject to judicial review by the Divisional Court, so my decisions can be judicially reviewed. In fact, you can see the decisions I am making are subject to a great deal more external scrutiny than any of the international courts I have worked in, and I have been judicially reviewed in one case already.

Furthermore, another body, the Iraq Fatality Investigation (IFI) was set up on the decision of the Divisional Court in England and Wales in order to fully meet all of our obligations under the European Convention on Human Rights, in terms of the Article 2 the right to life—which includes in certain circumstances a right to a publicly accountable investigation into the specific and wider circumstances

of death, with participation from the families of the deceased. This is a form of a coronial inquiry. You will be familiar in the United States with a coroner's inquiry. So in a homicide case arising from Iraq where I decide not to prosecute, I then have to refer that case back to the Ministry of Defense, which then decides whether or not it should be sent to Sir George Newman, a retired High Court judge who is the Inspector of the IFI and who then reviews everything IHAT have done. He investigates himself where necessary and then essentially produces a narrative report on the reasons why somebody died.

So this is what we are doing in the United Kingdom. When I read in the press that they are questioning what we are doing and saying, that we are not actually carrying out our duties properly, I really do question that because together all this is an incredibly expensive and intensive process. It has already cost nearly 100 million pounds. Politically, it is extremely unpopular, and I will get on to that in a moment. But this is the gold standard of scrutiny, in my view.

The Divisional Court has appointed another High Court judge, Sir George Leggatt, to supervise the criminal and civil cases. He acts as kind of arbiter. IHAT and SPA appear in front of him twice a year to explain where we are with the criminal cases so he can plan the progress of the linked civil claims.

In 2016, Sir George Leggatt agreed to the application of the following test to the IHAT criminal cases at the investigative stage: "Is there a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offense?" In many cases (1) we could not identify the individual who had committed this alleged crime, and (2) in many instances, we knew that we would never get sufficient evidence to charge anybody. He agreed that if you apply that test at the outset of a case and if the case does not meet that standard, then you can switch it off, and you do not need to look at it further. That saves a lot of time and a lot of money.

So what are the problems? The problems, I think, we share with all of the international courts. I do not think it is any different from that which we have experienced at the International Criminal Court and the International Tribunal for the former Yugoslavia. Many of these crimes took place in the early 2000s, so the lapse of time was an issue, which we saw in the Khmer Rouge Tribunal where thirty years had passed. Iraq is also essentially is an unstable state and not a very secure place in which to do investigations.

Unfortunately, the British forces documentary records are not that great. We have some of them. We do not have all of them. Much of it was destroyed when they left, not for any criminal purposes, but simply because there were limits as to what could be brought back to the United Kingdom. And it was not always stored very well electronically. There is nothing sinister in any of that. This was the practice. These documentary records were not records of crimes. They were often unit records of deployment of troops. If you get an allegation that a crime happened in a certain place and look at the brigade records, you can actually find out whether a U.K. military unit was in that place at that time.

In so many of our homicide cases, no post mortem was ever carried out on the body. In Islamic culture, the body is buried very quickly. Oftentimes we do not know where the body was buried. We have no ballistics to match the specific ammunition the British forces use, and very little medical evidence, unless somebody was taken to a military hospital, as to cause of death.

Dealing with hearsay is an experience we have all had in the international courts when people give accounts to make it sound as if it is actually from them, and they are talking about somebody else's account. Iraqi witness interviews have been extremely complex and demanding to secure. We have had to move witnesses out of Iraq to neighboring countries in order to interview them. We have had all



kinds of problems with immigration. You also know all the dangers and security problems on Middle Eastern borders at the moment. That has been an extremely difficult process.

We have also had to be very aware of the welfare and health problems of individuals who served in the British Armed Forces in Iraq. Members of the Armed Forces with mental health issues have gone to the press and made complaint that they are the victims of a witch hunt. Then we have problems with Iraqi witnesses who are suffering with mental health issues. So we have had to bring in psychologists to assess witnesses in advance, to make sure that they are actually fit give evidence. Those mental health issues are not always the result of the allegations that they are making against British Armed Forces. It is a result of their situation in Iraq.

The preliminary examination by the International Criminal Court is a preliminary process that the Court engages in, in essence to decide whether or not it is going to exercise its jurisdiction. In 2006, the ICC prosecutor decided not to seek authorization to investigate allegations against U.K. forces in Iraq. So a complaint had previously been made to the International Criminal Court that the United Kingdom was not investigating and prosecuting these crimes. The Prosecutor looked at it and found that while there was the possibility that war crimes had been committed, the nature of the allegations and the number of allegations were not serious enough for the Court to deal with. For the Court to intervene in any situation, it has to meet the gravity threshold. The Court only deals with the most serious crimes. And in that instance it was decided that it was not serious enough. Yes, the possibility of war crimes. No, not serious enough.

On February 10, 2014, two bodies made further complaint: the European Center on Constitutional and Human Rights out of Berlin and Public Interest Lawyers, which is now a defunct law firm in the United Kingdom. They again went to the ICC and said there were

war crimes committed by U.K. forces in Iraq, many more than was first alleged in 2006, and the United Kingdom was not doing anything about it. In May of 2014, the Prosecutor of the ICC announced a decision to reopen the preliminary examination.

Then in August of last year, it was announced that Phil Shiner, who was the managing partner of Public Interest Lawyers, was to face charges before the Solicitor Regulatory Authority for malpractice and dishonesty. After a hearing and determination, he was disbarred from practice this year and I understand he is now being investigated by the National Crime Agency. He is essentially the provider of a majority of the complaints that we are dealing with.

It was found by the SRA that he had been paying off witnesses who were making complaints. Oddly it seems he was paying off witnesses, some of whom were speaking the truth about what had happened. So you can imagine how enormously damaging that is for the work that we are trying to do. You can imagine what defense lawyers are going to argue in any case.

On February 2, 2017, Phil Shiner was struck off by the Solicitor's Disciplinary Tribunal for professional misconduct. They found to the criminal standard that he had been dishonest when representing claims by Iraqis against British soldiers. As I have said, the vast majority of the allegations against British forces in Iraq have been brought through his law firm, and it was also those allegations that, in large part, caused the ICC to reopen the preliminary examination.

We have had discussions with the International Criminal Court. They are well aware of all of this information. They are concerned about it too. We are trying to identify those cases that are not linked to Phil Shiner and his firm so those hopefully untouched by dishonesty.

But our relationship with the International Criminal Court has been extremely constructive. I attended a conference at the end of June, in The Hague, where there were a number of individuals, including human rights bodies, that were very critical of the ICC and the manner in which these preliminary examinations are conducted. But for me, I have found it a very constructive process. I use the word “handrail.” It gave me a handrail at the time to go to U.K. officials who were getting worried about a lot of very negative media around these cases, because many members of the U.K. Armed Forces were looking at this process and saying it is a witch hunt. The Defense Select Committee of the U.K. Parliament had an inquiry into these Iraq investigations and was extremely critical of the Iraq Historic Allegations Team.

I was able to say: “Look, we have got to do this, because if we do not the International Criminal Court could intervene. It is unlikely, but they might. And it will be a very poor thing if we are seen to be making decisions based on politics, however unpopular all of this is. That is going to put the United Kingdom in an extremely bad place.”

It has been extremely useful for me, in the face of all of this, to say to people, “We have got to do it.” This is not just because we are a country that respects the rule of law, but because we have international treaty obligations that we have to fulfill. We are not a country that is going to breach those obligations. This has to be done. You have to find the money. But it is not easy, because the process has come in for a lot of criticism.

The Iraq Historic Allegations Team was closed at the end of June by the Minister of Defense, Michael Fallon. There is a residual body which has been set up. It is called the Service Police Legacy Inquiry. So we have a new body with mostly naval and air force police officers, and we are trying to build that team up to finish the work.

There are about fifty remaining cases, some of which are very serious and need to be addressed. To put this in a realistic perspective so that it does not seem that all of this is a waste of time, in 2003–2004, a case was brought before the courts involving a man called Baha Mousa, who was a hotel receptionist in Iraq who had been arrested by U.K. forces, on the basis that he was suspected of being involved in insurgency, and he was beaten to death in British custody.

That serious crime, I think in reality, was one of very few that was committed by U.K. forces. This poor man was beaten to death in the custody of British forces. There was a trial, before my time, from 2006 to 2007, in which everybody was acquitted, apart from one individual, who pleaded guilty, and not to a homicide offense but to a lesser offense involving another victim in the case who was not killed.

So that is a microcosm of the problems that we have. As I have said, we have an obligation to go on doing this until it is complete. I hope that we will be done with all of this by the end of 2019. The preliminary examination by the International Criminal Court remains open. We have made representations to the Prosecutor to bring it to a conclusion. Obviously the government would prefer that we are not under the preliminary examination. In some respects it is embarrassing for a state like the United Kingdom. We simply get on with this, we do our job, and we keep our records. We can show them everything that we have done. The Prosecutor will close the Preliminary Examination when she is ready to close it. It does not really affect what we do because we will go on doing what we are doing.

I had hoped to complete the work by the end of my five-year term, which is at the end of next year, but I suspect that it will go on for another year after that. Thank you.



# The Future of International Justice

Jennifer Trahan\*

Good morning. Thank you for being here today.

Let me start by saying that I should have entitled my talk: “*Views of the Future of International Justice*.” I am not trying to predict the future, but discuss potential pathways for the field.<sup>1</sup>

What I have employed is more of a political science technique—future scenarios predictions. For instance, one might examine the future of a country (the future of Turkey, Russia, or China), using a number of variables, economic and political, and then expanding on how these scenarios might unfold using expert participants. This kind of future-looking-scenarios work is conducted by companies for investment purposes, governments, think-tanks, etc.

I have tried to use this methodology to examine possible approaches to the future of the field of international justice.<sup>2</sup>

I conducted two studies. The first—in which some of you here today participated when we were in Nuremberg, Germany, for the International Humanitarian Law Dialogs—consisted of twenty

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1 These remarks are based on a more comprehensive study. See Jennifer Trahan, *Views of the Future of the Field of International Justice: A Scenarios Project Based on Expert Consultations*, 33 AM. UNIV. INT’L L. REV. 837 (2018).

2 By “the field of international justice,” this study means the current international, hybrid, and domestic tribunals that prosecute the crimes of genocide, war crimes, and crimes against humanity, along with additional transitional justice tools. While domestic prosecutions of international crimes are more precisely “national justice” mechanisms, they are also considered herein because they provide a potential alternative or supplemental venue to international and hybrid tribunal prosecutions.

interviews, primarily of international and hybrid tribunal prosecutors.<sup>3</sup> (A full list of interviewees is contained in Appendix A hereto.) The second study was a “scenarios workshop” held at NYU’s Center for Global Affairs, on February 10, 2017, with approximately forty-five expert participants, including legal advisers of UN missions, NGO representatives, academics, and others.<sup>4</sup>

Today, I will provide some highlights of the interviews from the first study.<sup>5</sup>

### **Rationale for the Study**

One might wonder why I embarked on this inquiry.

Firstly, it appears that the field is rather ad hoc in how it responds to particular situations. For example, the international community examines what can be done to advance justice for Sri Lanka, South Sudan, etc., so that it is responding only to the challenge of the moment, in terms of what is both politically and economically feasible. Maybe this is how this field will necessarily operate. This may be a field that is not susceptible to long-term planning. For instance, former Sierra Leone Special Court Registrar and Registrar of the Residual Special Court for Sierra Leone Binta Mansaray suggested this.<sup>6</sup> Nevertheless, I thought it would be useful to try to engage with these questions.

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3 See Trahan, *supra* note 1, for the full article discussing the interview findings.

4 See Jennifer Trahan, *Report of Symposium on The Future of the Field of International Justice*, IMPUNITY WATCH, SYRACUSE COLLEGE OF LAW (Mar. 10, 2017), available at <http://impunitywatch.com/report-of-symposium-on-the-future-of-the-field-of-international-justice>.

5 Many views were expressed during the course of the interviews, only a few of which are encompassed herein.

6 9/30/16 interview of Binta Mansaray, at 1–2 (taking the view that it was simply “too political” whether new tribunals will be set up, and would be done on a “case-by-case” basis, making it impossible to predict where the field is heading).

Secondly, I embarked on this inquiry because in International Criminal Court (ICC) circles (particularly among state party representatives), I perceive something of a pattern of what one might call “annual thinking,” because there are various topics addressed annually at Assembly of States Parties (ASP) meetings. For instance, there are annual draft resolutions on cooperation and complementarity (or language on these topics inserted into the so-called “omnibus resolution”). States appear to consider only how the relevant language can be improved from the prior year. Yet, such slight improvements year after year may not be getting the ICC where it needs to be.

Thirdly, particularly from the NYU workshop, I received feedback from legal advisers that they were pleased to engage in discussion about the *field* of international justice, because they, for example, only handle ICC-related issues. Yet, I think one cannot look at the ICC only in isolation because justice initiatives need to complement each other, and, for example, if one does not have successful complementarity, that could ultimately breed disenchantment with the ICC and the limited number of individuals prosecuted in each situation country. Thus, it is important to examine the field of international justice as a whole.

### **Overview of the Scenarios**

The three scenarios that I presented to the interviewees and participants were basically as follows:

Scenario 1: Will the ICC be the central institution in twenty years’ time in the field of international justice? And, if so, what will or should the ICC of the future look like? In this scenario there might be additional tribunals and complementarity/ domestic prosecutions, but the ICC would be the key institution.

Scenario 2: Will there be more hybrid tribunals as the central features of the system? Here, I also asked participants if there



was a particular model of a hybrid tribunal that they favored, and if they saw a role in the future for regional criminal tribunals and/or tribunals the size of the International Criminal Tribunal for the former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR). The ICC and complementarity/domestic prosecutions were not excluded, but would not be the dominant approach.

Scenario 3: Will there be much more investment in “complementarity”—that is, domestic prosecutions in ICC situation countries? And, here I would include domestic prosecutions in non-ICC states parties. This scenario really covered a shift to domestic prosecutions. I then asked a second question: *If* this is to be the key focus of the future, is the international community doing enough to make this happen, or should domestic capacity-building be somehow centrally coordinated and/or funded, and, if so, by whom?<sup>7</sup>

None of these scenarios were designed to exclude universal jurisdiction prosecutions or other transitional justice tools over and above prosecutions (such as truth commissions, vetting, reparations, and institutional reform), both of which would ideally complement each of the above scenarios.

## **Scenario I: The ICC**

### ***Proponents of Scenario 1 and Rationales***

A number of interviewees endorsed the ICC (Scenario 1) as the dominant or central feature of the system of international justice in twenty years’ time. Of course, ICC Prosecutor Fatou Bensouda and

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<sup>7</sup> The full scenarios are described in Appendix B hereto.

ICC Deputy Prosecutor James Stewart were among the interviewees, so I would have been surprised had they not opined that way.

Also, founding Chief Prosecutor of the ICTY and ICTR Richard Goldstone explained:

I've really got very little doubt that we are going to continue with the ICC. I don't believe there is any practical alternative. If the ICC were to collapse, I think we would be back to the pre-1990 period where there would be complete impunity and there would be no international criminal justice at all. That would, I think, be a tragedy for humankind . . . . [T]he reason I'm optimistic for the ICC is, I don't think there is any real alternative. And if there wasn't [an ICC], I think we'd all be working around setting one up.<sup>8</sup>

Some of the reasons provided for supporting Scenario 1 were: (1) the ICC was designed to be the permanent institution for prosecution of atrocity crimes; (2) the reluctance of states to fund further ad hoc<sup>9</sup> tribunals—and of course, we know there have been cost concerns about the ICTY and ICTR (a topic I will return to when we discuss whether there is a future for ad hoc tribunals); (3) the inefficiency of creating multiple new tribunals; and (4) from a jurisprudential standpoint, concern about fragmentation of the law through multiple tribunals.<sup>10</sup>

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<sup>8</sup> 11/19/16 interview of Richard Goldstone, at 1.

<sup>9</sup> “Ad hoc” simply means they were created for a particular situation. Given that all existing international and hybrid tribunals (other than the ICC) are “ad hoc,” calling only the ICTY and ICTR “ad hoc” is somewhat misleading. 10/1/16 interview of William Schabas, at 3. Nonetheless, I did employ the widely used terminology of referring to the ICTY and ICTR as the “ad hoc” tribunals.

<sup>10</sup> 10/3/16 interview of Judge Carmel Agius, at 2 (noting that when there is only the ICC, it will create only one body of law).

A number of interviewees also opined that one should not really discuss Scenario 1 in isolation, as it needs to be coupled with Scenario 3 (complementarity/domestic capacity).

### *Challenges to Making Scenario 1 Effective*

I then asked whether the ICC of the future, in twenty years' time, would resemble the ICC of today, or if we could imagine a stronger, improved ICC.

A number of interviewees spoke of the recognized need to improve ICC effectiveness and efficiency. For instance, former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations Hans Corell stressed the need to have ICC judges with more courtroom experience.<sup>11</sup> Professor William Schabas<sup>12</sup> raised a good question about victim representation and how much that costs, and whether the victims might not, for example, rather receive the money themselves directly.<sup>13</sup>

Responding to the cost criticism, in one of my favorite quotes, James Stewart opined:

[I]nternational criminal justice is expensive. *You're not making widgets.* You can't really make these calculations. I think our responsibility is to use the resources that we are given in the most efficient and the most effective way that we can. And whatever may have been the case in the past, certainly from what I've seen since I arrived, there is a genuine effort amongst all the principles in the Court. I'm talking about the Prosecutor,

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11 10/3/16 interview of Hans Corell, at 3.

12 Professor of International Law at Middlesex University in London, and Professor of International Criminal Law and Human Rights at Leiden University.

13 10/1/16 interview of William Schabas, at 4–5.

the Registrar, and the President, and the people in the different organs in the Court . . . . I think the buzzword these days is “synergies.” So that we avoid duplication in the purchase and use of resources. We make very careful calculations as to how we are going to apply our resources, but it is expensive.<sup>14</sup>

In terms of institutional capacity, I asked whether the ICC (if the funding were forthcoming) would ideally keep growing in capacity. Some expressed the need for the ICC of the future to have expanded institutional capacity, to handle more preliminary examinations, investigations, and trial proceedings. Others suggested the opposite—that ideally there should be a shift to complementarity, so that one does not need to keep expanding the ICC. For instance, former ICTR Prosecutor and current Chief Justice of The Gambia Hassan Jallow opined: “The picture, which I see, which I hope, also, will be what will be there, is every country being a State Party to the Rome Statute, and the ICC with very little work to do and most of the work being done by the national courts and the regional courts and the hybrid courts.”<sup>15</sup> However, no interviewee opined that this shift to domestic prosecutions would occur fully in the next twenty years, obviating a need for the ICC.

Many focused on the need for stronger state cooperation with the ICC, and, in particular, many noted the number of outstanding ICC arrest warrants. Former ICTY President Judge Carmel Agius noted that it took the leverage of the European Union (EU) to make countries in the former Yugoslavia cooperate with the ICTY,<sup>16</sup> and that the ICC

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14 9/29/16 interview of James Stewart, at 5 (emphasis added).

15 9/29/16 interview of Hassan Jallow, at 8.

16 Initially, the United States conditioned financial assistance to countries in the region on their cooperation with the ICTY (particularly as to arrests), and, later, the EU conditioned progress towards EU accession.

was not in a comparable situation.<sup>17</sup> Others noted the ICC's difficulty in investigating and/or prosecuting state actors.

In terms of situations referred to the ICC by the UN Security Council, various interviewees opined that it should be the Security Council that ensures follow up and funding in such situations, which not the case with either of the current referrals, of the situations in Darfur, Sudan, and Libya.<sup>18</sup>

As to how to increase ratifications/universality, many saw the need for this. Various interviewees noted that the pace of ratifications has diminished (indeed, there had been three withdrawals lodged in fall 2016, although two were subsequently withdrawn).<sup>19</sup> A variety of views were expressed on how to increase ratifications/universality. One of my favorite quotes was from founding Extraordinary Chambers in the Court of Cambodia (ECCC) International Co-Prosecutor Robert Petit that the victims will demand of their countries that the countries join the ICC:

I think humanity as a whole, people always want justice. People want a fair treatment, a fair shot at having a better life, and certainly having their victimization recognized and accounted for. The push to bring some of those countries in line, if you want, will have to come from their own population . . . . I don't think the pressure to at least recognize that there has to be accountability, I don't think that pressure will let up. It's part of the political discourse now . . . . [I]f the ICC has done anything, it's certainly that—to make accountability a fact in

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17 10/3/16 interview of Judge Carmel Agius, at 7.

18 S.C. Res. 1503 (Aug. 28, 2003); S.C. Res. 1970 (Feb. 26, 2011).

19 In the fall of 2016, South Africa, Burundi, and The Gambia announced their withdrawals from the Rome Statute. However, South Africa and The Gambia later withdrew their withdrawals, leaving only Burundi's withdrawal. Now, the Philippines has also announced its withdrawal from the Rome Statute.

any conflict. So, I think there's a good chance eventually that "outliers," as you call them, and I won't mention any names, will be brought into the fold.<sup>20</sup>

I also asked whether the ICC in twenty years' time would have more crimes added to its jurisdiction. Among this group of interviewees, there was not much enthusiasm on this topic. (Of course, the ASP recently activated the ICC's fourth crime, the crime of aggression, with jurisdiction having commenced July 17, 2018,<sup>21</sup> and three additional war crimes were also adopted this past December at the ASP,<sup>22</sup> in addition to the three adopted at the Kampala Review Conference.)<sup>23</sup> The Working Group on Amendments has in the past examined a variety of proposals to add Rome Statute crimes, such as the use of nuclear weapons as a war crime, drug trafficking, and/or additional war crimes.<sup>24</sup>

Professor Carsten Stahn<sup>25</sup> hoped that in the future there would be examination of the "interconnection between crimes and structural violence," particularly the "nexus between international crimes and

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20 9/29/16 interview of Robert Petit, at 6–7.

21 ICC Assembly of States Parties Res. 5 (Dec. 14, 2017).

22 Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court, U.N. Doc. ICC-ASP/16/Res.4 (Dec. 14, 2017), *available at* [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf).

23 Amendment to Article 8 of the Rome Statute of the International Criminal Court, June 10, 2010, 2868 U.N.T.S. 195.

24 *See, e.g.*, Secretariat of the Assembly of States Parties, Informal Compilation of Proposals to Amend the Rome Statute (Jan. 23, 2015), *available at* [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf). While the Netherlands had proposed adding the crime of terrorism, that proposal has since been withdrawn.

25 Professor of International Criminal Law and Global Justice, Leiden Law School.

transnational crimes,” as well as accountability for business leaders and the “financial streams” behind some of the crimes.<sup>26</sup>

Some interviewees opined that the ICC of the future might not have significantly more capacity than at present, but that it would serve as a model of best practices.

### *Skeptics of Scenario 1*

Finally, for those who appeared skeptical that the ICC would have a central or important role in twenty years’ time, I inquired as to the reasons for their skepticism.

Some of the answers received were: (1) due to limitations on capacity to handle cases, the ICC will never be the full solution for the prosecution of core atrocity crimes; (2) the high costs of the ICC; (3) its inability to prosecute large numbers of individuals from any one situation country; (4) that “world powers” will remain outside the Rome Statute system as there is not in fact momentum towards universal ratification; and (5) “push-back”/non-cooperation hampering the ICC’s work, particularly when it pursues state actors.

For example, as to the ICC’s inability to handle large numbers of cases from any single situation country, while this view was expressed by some, various other interviewees opined that the ICC would in fact be the best institution to conduct high-level Syria prosecutions should that someday be possible.<sup>27</sup> As to how many can be prosecuted from each situation country, Deputy ICC Prosecutor James Stewart

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26 10/4/16 interview of Carsten Stahn, at 5–6.

27 There presently is no ICC jurisdiction over the situation in Syria due to Russia and China vetoing a referral to the ICC. See *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, THE GUARDIAN (May 22, 2014), <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>. Syria is not a party to the Rome Statute.

pointed out that the ICC can do what it is funded to do—that states parties could provide the funding for the ICC to prosecute more than a handful of individuals in each situation country.<sup>28</sup>

On the topic of “push back” against the ICC, particularly when it is examining the conduct of state actors, Prosecutor Bensouda opined as follows:

The very nature of what we do, the ICC, investigating and prosecuting these crimes and holding people who normally would not be held accountable, holding them accountable. . . . It is for sure that there will be push-back against the institution, as surely there will be elements that don’t want this legal scrutiny.<sup>29</sup>

When asked how the ICC could be strengthened against political interference in its work, Hassan Jallow suggested increasing the prosecutor’s powers of initiating investigations on her own (*proprio motu*).<sup>30</sup> James Stewart spoke of the importance of the ICC formally examining “lessons learned” from the Kenya situation in order to adjust its practices.<sup>31</sup>

## **Scenario 2: Hybrid and Other Tribunals**

As noted above, Scenario 2 posits that more hybrid tribunals keep being created.<sup>32</sup>

In addition to the hybrid tribunals that have prosecuted, or are prosecuting, crimes committed in Sierra Leone, Cambodia, East

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28 9/29/16 interview of James Stewart.

29 5/9/17 interview of Fatou Bensouda, at 6.

30 9/29/16 interview of Hassan Jallow, at 6.

31 9/29/16 interview of James Stewart, at 3, 6.

32 *See also* Appendix B hereto.



Timor, Kosovo, Bosnia, Chad, and Lebanon, there is now another hybrid tribunal for Kosovo (the Kosovo Specialist Chambers), a hybrid tribunal in the Central African Republic (the Special Criminal Court), and there will perhaps be a hybrid tribunal in South Sudan.

For a while after the ICC was created, many seemed to take the view that because this permanent institution existed there would be no more need for hybrid tribunals. Yet, there appears to be a shift away from this approach as to: (1) pre-2002 crimes, where the ICC is not a possible venue (e.g., the situation with the Kosovo Specialist Chambers); (2) the crimes are occurring in a state not party to the ICC's Rome Statute (e.g., South Sudan); or (3) for reasons of capacity (e.g., the Central African Republic's Special Criminal Court). Special Tribunal for Lebanon (STL) Registrar Daryl Mundis stated that "although we keep talking about 'it's the end of all these specialized courts and tribunals,' we keep creating them."<sup>33</sup>

### *Proponents of Scenario 2 and Rationales*

Some of the factors cited for supporting the creation of additional hybrid tribunals were: (1) the efficiency of hybrid tribunals; (2) the successful outreach that is possible; (3) the benefits of locating hybrid tribunals in their situation countries—which has generally been the practice;<sup>34</sup> (4) the limited capacity of the ICC, suggesting the need for additional hybrid or other tribunals in situations of large-scale atrocity crimes; (5) the ability of hybrid tribunals to better resist attempts at domestic political control than purely national tribunals; (6) the ability of hybrid tribunals (particularly ones located in their situation countries) to contribute to domestic capacity-building and

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33 10/5/16 interview of Daryl Mundis, at 3.

34 The only hybrid tribunals not located in their situation countries are the STL, which sits in The Hague, Netherlands; the Extraordinary African Chambers, which sat in Senegal but had jurisdiction over crimes committed in Chad; and the Kosovo Specialist Chambers, which also sits in The Hague.

allow for more local ownership; and (7) the ability of hybrid tribunals to demonstrate to local communities rule of law functioning.

For example, as to the successful outreach by at least one hybrid tribunal, the Special Court for Sierra Leone, one of my favorite quotes was from founding Chief Prosecutor of the Special Court for Sierra Leone David Crane, who reminded us that accountability is not for its own sake, but for the victims:

It's about the victims. How can we effectively account for them, get justice for them? And that's what we're missing. We're starting to miss the point. We don't create courts for accountability, whatever that looks like—domestic courts, regional, international, or . . . the ICC. We have to ask ourselves: is this what needs to be done for the victims? And we may be surprised . . . . You're talking to the victims, you're listening to the victims, you're investigating. You may be able to have a town hall program, a dialogue with the victims. They need to understand what's going on, why it's going on this way.<sup>35</sup>

As to the ability to contribute to capacity-building and local ownership, others mentioned that hybrid tribunals (particularly those that sit in their situation countries) can contribute more readily to capacity-building and local ownership. The nature of a hybrid tribunal is that it will necessarily incorporate features of both the national and international systems, and local officials will work alongside international staff.

Various interviewees opined that the international community will need to create future hybrid tribunals because for large-scale crime scenes, the ICC cannot conduct all the prosecutions, and national courts are generally still not strong enough to do so. For instance,

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35 9/29/16 interview of David Crane, at 9.

former U.S. War Crimes Ambassador David Scheffer stated: “If you look at the world today, you have to conclude that the worth and the value of hybrid tribunals must be available for us, because we have too many situations in the world which the International Criminal Court is simply not addressing today and may not in the future.”<sup>36</sup>

As to the ability to resist political pressure, some opined that hybrid tribunals are better at resisting political pressure than purely domestic institutions, as they add neutrality and objectivity. However, the contrary view was also expressed that sometimes locating the hybrid in the situation country does not necessarily make it able to resist political pressure. Here, the ECCC was mentioned, as a model not to follow.

In terms of demonstrating rule of law at work, current ECCC International Co-Prosecutor Nicholas Koumjian stated that a hybrid can demonstrate to the local population that “justice is possible”—that cases can be decided based on “evidence and the rule of law” and not “who has the most money or power.” He stated:

[W]hen a court tries cases about the horrible crimes that happened in Cambodia during the Khmer Rouge time, or the horrible civil wars in Sierra Leone, the fact that those trials are going on in a transparent process, with the evidence, with the law applied, this raises the expectations of people in the country. The students that come to watch, the ordinary people that observe it, the lawyers and judges in the country that see this process go on . . . . I think it has a benefit of raising expectations that this kind of justice is possible. Cases can be decided not based on who has the most money or power, but based upon evidence and rule of the law. I think there is a very subtle but very, very important benefit of international justice in these countries.<sup>37</sup>

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36 9/29/16 interview of David Scheffer, at 2.

37 9/29/16 interview of Nicholas Koumjian, at 5.

I then inquired of interviewees whether there is a preferable model of a hybrid tribunal—whether this would be through a freestanding new hybrid tribunal, a hybrid chamber created within an existing court system, or adding international staffing to an existing domestic institution. Various interviewees opined basically that situations differ, so that the answer may be somewhat context-specific, and therefore one should not necessarily support a single model hybrid. Various interviewees (such as Sierra Leone Special Court Prosecutor and Prosecutor of the Residual Special Court for Sierra Leone Brenda Hollis, as well as Daryl Mundis) opined that funding of hybrid tribunals should not be done through voluntary contributions.<sup>38</sup>

### *Skeptics of Scenario 2*

Those skeptical of Scenario 2 were generally supportive of Scenarios 1 and/or 3, but additional criticisms of hybrid tribunals were: (1) that they have not been as cost-effective as originally envisioned; (2) that local ownership could also bring added difficulties in preserving independence and impartiality; and (3) that victims have expressed dissatisfaction at the high cost, slow speed of prosecutions, and limited number prosecuted.

As to the issue of cost, it was noted that hybrid tribunals were developed to be more efficient than the ad hoc tribunals, yet they have also had considerably large budgets. (I remember first meeting David Crane when he had just been hired to be Sierra Leone Special Court Prosecutor, and there was an initial three-year plan for the Court's work, which then took much longer.) Thus, it appears that the "price tag" issue bedevils ad hoc tribunals, hybrid tribunals, and the ICC.

When I conducted the scenarios workshop in New York, various legal advisers to states opined that they could do a better job explaining

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38 9/29/16 interview of Brenda Hollis; 10/5/16 interview of Daryl Mundis, at 3–4.

to their states some of the intangible benefits of tribunals in order to encourage more financial support.<sup>39</sup>

We all know that for any tribunal if you do a simple math calculation of the number prosecuted in the numerator, over the total cost of the tribunal in the denominator, the math will not come out well. Yet, this kind of simplistic cost per prosecution calculation overlooks so much, including so many of the intangible benefits of prosecutions.

For example, Brenda Hollis suggested that rather than measuring the cost of each person prosecuted, one might alternatively measure the number of crimes covered by the cases:

[I]n terms of the number of people that were indicted you can turn it around and say what were the number of crimes that were disposed of in these cases and you're talking about tens of thousands of crimes for which accountability was attached . . . . And so, you may have 13 people we indicted, 10 went to trial, 9 to judgment, but these were individuals that in our belief based on the evidence we had gathered were the greatest responsible for the tens of thousands, hundreds of thousands of crimes that were committed there. So, if you talk about a case that determines accountability on that scale then all of a sudden that money becomes more relative.<sup>40</sup>

Robert Petit observed the value of helping to rebuild a society, which cannot be measured by purely numeric calculations:

Ask them if in their own country they think their own justice system is too expensive and they should do away with it? There has to be accountability for crimes. Can it be done better in a

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39 See Trahan, *supra* note 4.

40 9/29/16 interview of Brenda Hollis, at 4.

more cost-efficient manner? Of course there can always be improvement and there should be, and anybody who has control over a budget should be held accountable. That's a given. However, justice has its own price, but it has a reward that's not calculated, or able to be calculated, in money. Its impact is not a budget line. It's what it helps, how it helps society to rebuild. So, I don't think you can put a price on it because that return is over many generations. Yes, you're accountable. You should be careful with the money you're given, but the return is not only in dollars.<sup>41</sup>

Daryl Mundis, former ICTY Prosecutor and now International Residual Mechanism for Criminal Tribunals Prosecutor Serge Brammertz, and Gregory Townsend<sup>42</sup> all noted the minimal cost of international justice compared to the cost of continued armed conflict.<sup>43</sup>

Indeed, it is very hard to prove that a tribunal's work saved money that might otherwise have been required had the conflict continued to rage. While it appears common sense that because former Republika Srpska President Radovan Karadžić and former Republika Srpska military commander Ratko Mladić were indicted and marginalized from positions of influence, this contributed to peace and stability in the region, it is very hard to prove this or to try to quantify the extent of such a contribution. Yet, that does not mean there was no such "peace dividend."

As to the difficulties of local ownership, the ECCC was previously mentioned. Serge Brammertz also spoke of the difficulties of conducting STL investigations in Lebanon.<sup>44</sup>

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41 9/29/16 interview of Robert Petit, at 8.

42 Former Chief of the Court Support Services Section, ICTY Registry.

43 10/5/16 interview of Daryl Mundis, at 5–6; 10/1/16 interview of Serge Brammertz, at 3; 10/3/16 interview of Gregory Townsend, at 6.

44 10/1/16 interview of Serge Brammertz, at 3.

While it was noted that there is sometimes victim dissatisfaction at the high cost, slow speed, and limited number prosecuted by hybrid tribunals, this criticism could of course also be aimed at the ICC (although this topic was not raised during the interviews).

Commenting on the difficulty in explaining to Sierra Leoneans that the Special Court would only prosecute a few individuals, Hans Corell provided this moving account:

Here, I never forget my meeting with the traditional chiefs, some 25 of them—a few were women. And they asked me: “What can I tell my people?” One of the chiefs rose in his dignified African way and asked the question: “What can I tell my people when you come here with this Court that can judge only a few when we know among us there are so many who have committed the most heinous crimes?” And I thought for a moment: what can I say as a white European to this African chief? And, all of a sudden, it came to me. “Well look at your own continent. Look at Nelson Mandela, Madiba. What did he say when he came out of prison? Look at Kofi Annan. How do they act? So, you have now also a reconciliation commission in Sierra Leone, so these will work in parallel.”

And this is the only way ahead because even the best organized national criminal justice system would crumble if all these people would be brought to justice. And I saw in my eyes, when I came in my armored car to go to the negotiations, there were children coming, showing arms with no hands. Or a little boy sitting on a little four-wheeled thing, pushing himself forward like if he [were] on skis. His legs had been chopped off. And these were crimes committed by other young people who had been drugged and taught by grownups to commit these crimes.<sup>45</sup>

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45 10/29/16 interview of Hans Corell, at 6–7.

### *Regional Criminal Tribunals*

Regional criminal tribunals were also included in Scenario 2 in terms of whether they might have a role to play in the future.

A couple interviewees spoke of “complementarity” not including solely domestic prosecutions, but that a regional criminal chamber or a hybrid tribunal could complement the ICC. This view was expressed, for example, by Director of the Secretariat of the ICC’s Assembly of States Parties Renan Villacis.<sup>46</sup>

Such an approach seems to reflect an evolution in thinking because Rome Statute Article 17 appears to envision “complementarity” as domestic court prosecutions,<sup>47</sup> but, today one can envision a broader understanding of complementarity.

The “Malabo Protocol,” by which the jurisdiction of the yet-to-be-established African Court of Justice and Human Rights was expanded to cover a variety of crimes,<sup>48</sup> suggests the potential of regional criminal tribunals. Yet, the Malabo Protocol has a startlingly broad immunity provision for state actors.<sup>49</sup> Hassan Jallow opined that that immunity provision would need to be removed.<sup>50</sup>

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46 10/5/16 interview of Renan Villacis, at 2.

47 See Rome Statute of the International Criminal Court art. 17, July 18, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

48 See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) art. 28A, June 27, 2014, available at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>

49 See *id.* art. 46Abis.

50 Response of Hassan Jallow to the author’s question, Georgetown Law School, April 4, 2017.



Thus, there did seem to be buy-in that a regional criminal chamber could be utilized in the future to prosecute atrocity crimes, even if the precise formulation found in the Malabo Protocol is not necessarily that model due to its immunity provision.

### *Future Ad Hoc Tribunals*

Finally, interviewees were asked whether a tribunal the size of the ICTY would be required in a situation of extremely large-scale crimes, such as those being perpetrated in Syria (when the political situation permits the creation of such a tribunal).<sup>51</sup>

Various interviews expressed the conventionally-accepted thinking that there will never be another ICTY or ICTR created due to issues of cost<sup>52</sup> (and, even if an ad hoc of that size were created, it would not be created through the UN Security Council).<sup>53</sup>

A few interviewees, however, endorsed the view that in terms of capacity, the ICTY could provide a model for a future Syria tribunal, or elsewhere, should there be the political will to create one.<sup>54</sup>

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51 It is presently not possible to create a tribunal for crimes perpetrated in Syria, as Russia (and possibly China) would veto the Security Council's creation of a tribunal, and the present Syrian government would never consent to creating a tribunal because regime actors are heavily implicated in war crimes and crimes against humanity. *See, e.g.*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Special Inquiry into the Events in Aleppo, U.N. Doc. A/HRC/34/64 (Feb. 2, 2017), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/026/63/PDF/G1702663.pdf?OpenElement>.

52 10/3/16 interview of Judge Carmel Agius, at 3–4; 9/29/16 interview of Hassan Jallow, at 2.

53 9/29/16 interview of Brenda Hollis, at 5.

54 10/5/16 interview of Daryl Mundis, at 5; 10/3/16 interview of Gregory Townsend, at 3.

The most optimistic voice regarding Syria was that of David Scheffer who opined that a multilateral hybrid tribunal for Syria could be created presently by agreement between a number of states in the region and the UN, acting through the General Assembly.<sup>55</sup> Former U.S. War Crimes Ambassador and Head of the Office of Global Criminal Justice Stephen Rapp predicted that justice for crimes in Syria would come in the form of a hybrid tribunal or Syrian domestic trials.<sup>56</sup>

### **Scenario 3: Complementarity/Domestic Capacity-Building**

While Scenario 3 was originally described as “complementarity,” it was later broadened to complementarity/domestic capacity-building because “complementarity” refers solely to capacity-building in ICC states parties. Yet, capacity to prosecute atrocity crimes at the national level is also required in non-ICC states parties.

#### ***Proponents of Scenario 3 and Rationales***

As to whether there will be, in twenty years’ time, a shift in capacity towards Scenario 3, some of the reasons expressed why this should be the case included: (1) that national justice “has to be delivered where the crimes have happened”;<sup>57</sup> (2) the benefits of strengthening national institutions; (3) that strengthening rule of law domestically can contribute to avoiding future conflict; and (4) that international institutions do not have the capacity to prosecute large numbers, which domestic courts potentially could.

For example, Sierra Leone’s Anti-Corruption Commissioner, Attorney-General, and Minister of Justice, Joseph Kamara, opined

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55 9/29/16 interview of David Scheffer, at 6.

56 9/29/16 interview of Stephen Rapp, at 5. Syria-related prosecutions are also occurring in European countries.

57 9/29/16 interview of Robert Petit, at 2.

on the importance of prosecuting atrocity crimes before national courts.<sup>58</sup> Serge Brammertz, as well as ICC Trial Attorney Matthew Gillett, also opined on the benefits of local trials.<sup>59</sup>

Several interviewees suggested that national court prosecutions will always play a role in the field, even if they do not become the dominant model or central focus.

### *Skeptics of Scenario 3*

Other interviewees were skeptical that domestic prosecutions/complementarity would be the way of the future. These interviewees tended to be supporters of Scenario 2, or simply skeptical of domestic capacity to fairly conduct major war crimes trials. Some of the reasons for skepticism included: (1) the difficulty of national judiciaries conducting high-level prosecutions in an evenhanded and fair manner, particularly vis-à-vis the gravest atrocity crimes; (2) the difficulty of a state prosecuting “its own” state actors; (3) the difficulty of building “will” as opposed to capacity; and (4) the significant efforts needed for domestic capacity-building.

Thus, for example, as to the difficulties of fairly prosecuting high-level perpetrators through national courts, Brenda Hollis stated:

For there to be true access to justice for victims and survivors you need an independent and impartial judiciary. That doesn't exist in an awful lot of countries in this world and without that then that's simply a way to avoid [responsibility] or it's only your opponents who would ever find themselves being held accountable. Perhaps they should be held accountable, but it should be broader than

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58 9/30/16 interview of Joseph Kamara, at 1.

59 10/1/16 interview of Serge Brammertz, at 1–2; 10/3/16 interview of Matthew Gillett, at 1.

that. So, I don't think the state model, unless the world evolves a great deal more than it has, will ever be truly a just model.<sup>60</sup>

Nicholas Koumjian also opined that it is difficult for domestic courts to adjudicate high-level cases:

[T]here are many, many courts and countries around the world that simply don't have the capacity to do the cases at a high level. If you want to do it at a high level, particularly to do cases that link leaders to crimes on the ground is something very difficult to do and then international involvement in the investigation and in the cases would be very useful.<sup>61</sup>

As to the difficulty of prosecuting "one's own," David Scheffer explained:

It's not that difficult to say, "Oh yes, if we can get jurisdiction over the neighboring country that inflicted so much pain and suffering on us, we'll bring those individuals in to court and prosecute them even under our existing national criminal code." But, the real question is turning the light on one's self and doing that.<sup>62</sup>

Others spoke of the problem that "will" is not as easy to build as "capacity," and the significant work required for domestic capacity-building.

### *Centralized Coordination*

For those who supported Scenario 3, as to how one would reach that outcome—that is, complementarity/national court trials being

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60 9/29/16 interview of Brenda Hollis, at 2.

61 9/29/16 interview of Nicholas Koumjian, at 1.

62 9/29/16 interview of David Scheffer, at 8.

the dominant mechanism or even just a more effective mechanism in twenty years—interviewees were asked whether capacity-building efforts should be centrally coordinated. It was noted that the current approach is rather ad hoc, with countries and institutions supporting what they choose to work on, but not centralized in any kind of coordinated way.

Many interviewees expressed the view that centralized coordination of complementarity/ capacity-building would be helpful. Others predicted this would not occur because national jurisdictions do not like to be told by outsiders how to reform their court system, and donor countries like to retain control over their own donor dollars and do not want to lose discretion by surrendering funds to a centralized donor pool.

As to what body, if any, should centrally coordinate complementarity/ capacity-building, some opined that it should be the ICC as it will be operating and interacting with authorities in situation countries. Others were concerned about creating a competitor to the ICC. ICC officials made it clear that they presently have no mandate or funding from the ASP to do any real degree of capacity-building.

Thus, it is worth considering, if the international community does not centrally coordinate capacity-building, will Scenario 3 ever be reached, or will the failure to invest in enabling Scenario 3 mean there will be a perpetual need for the ICC and hybrid solutions?

### **Additional Scenarios**

As to whether any additional scenarios should have been included, David Crane noted that the author had left off Scenario 4 where the ICC collapses, and Scenario 5 pursuant to which there is a massive

retreat from the international community's commitment to the field of international justice.<sup>63</sup>

Most other interviewees rejected these scenarios and were much more optimistic. Most opined that the field has come too far, and that it will not go backwards. Richard Goldstone suggested that if we did not have the ICC, we would be creating it.<sup>64</sup> Fatou Bensouda similarly opined that she did not see the ICC's capacity diminishing over the next twenty years.<sup>65</sup> Nicholas Koumjian opined that victims by now demand justice, so it is "here to stay":

I think the world has changed in the past 23–24 years since the ICTY was set up, and what we see now, which is different than two or three decades ago, that when there's a conflict like Syria, North Korea, even domestically, you immediately have people talking about international crimes, talking about accountability. This wouldn't have happened two or three decades ago. So, I do think [international justice] is here to stay. Victims in the conflicts I've handled in many different countries from different economic levels and different religions, the feeling of victims that I find is quite universal. They want to see their suffering recognized and someone held to account for what happened to them. I think they will continue to demand justice. So, I think [the field] is here to stay.<sup>66</sup>

### **Combining Scenarios**

The above exercise, with three competing scenarios, admittedly presented something of an artificial choice. As noted above, some proponents of Scenario 1 (the ICC), opined that it needed to be

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63 9/29/16 interview of David Crane, at 1–3.

64 11/19/16 interview of Richard Goldstone, at 1.

65 5/9/17 interview of Fatou Bensouda, at 4.

66 9/29/16 interview of Nicholas Koumjian, at 5.

combined with Scenario 3 (complementarity/domestic capacity-building), i.e., 1 + 3. Various other interviewees thought that the future would actually combine elements of all three scenarios, i.e., 1 + 2 + 3.

## **Conclusion**

This field of international justice is a remarkable one, but it is worth stepping back to consider how it can maintain its positive momentum. How can one strengthen the field against “push back” and attacks on the courts? How can one better explain to donor countries the benefits of tribunals so that they continue to provide crucial funding? What lessons can be learned so that missteps are not repeated and the field moves forward in the strongest way possible? These were some of the ideas I was trying to probe and have participants reflect on.

It was a fantastic experience to be able to interview so many of the tribunal prosecutors and other key experts in the field while in Nuremberg (and some in The Hague), and I am very appreciative of that opportunity.

Perhaps those who either read the full report, or attended this morning’s talk, can also further reflect on some of these important questions as to which direction the field is heading towards, and/or which direction it optimally should be heading towards.

## APPENDIX A

### **Interviewees (in the order in which they were interviewed):**

**Robert Petit** – Founding International Co-Prosecutor, the Extraordinary Chambers in the Courts of Cambodia

**Hassan Jallow** – Former Prosecutor, International Criminal Tribunal for Rwanda; current Chief Justice of The Gambia

**David Crane** – Founding Chief Prosecutor, the Special Court for Sierra Leone

**David Scheffer** – Former U.S. War Crimes Ambassador; UN Secretary-General Special Expert on UN Assistance to the Khmer Rouge Trials

**Nicholas Koumjian** – International Co-Prosecutor, the Extraordinary Chambers in the Courts of Cambodia

**Brenda Hollis** – Former Chief Prosecutor, the Special Court for Sierra Leone; Prosecutor, the Residual Special Court for Sierra Leone

**Stephen Rapp** – Former Chief Prosecutor, the Special Court for Sierra Leone; former U.S. War Crimes Ambassador and Head of the Office of Global Criminal Justice

**Hans Corell** – Former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations

**James Stewart** – Deputy Prosecutor, International Criminal Court

**Binta Mansaray** – Former Registrar, Special Court for Sierra Leone; Registrar Residual Special Court for Sierra Leone



**Joseph Kamara** – Anti-Corruption Commissioner, Attorney-General and Minister of Justice, Sierra Leone

**William Schabas** – Professor of International Law, Middlesex University, London; Professor of International Criminal Law and Human Rights, Leiden University

**Serge Brammertz** – Prosecutor, the Mechanism for International Courts and Tribunals; former Prosecutor, International Criminal Tribunal for the former Yugoslavia

**Judge Carmel Agius** – Former President, International Criminal Tribunal for the former Yugoslavia

**Gregory Townsend** – Former Chief of the Court Support Services Section, International Criminal Tribunal for the former Yugoslavia

**Matthew Gillett** – Trial Lawyer, Office of the Prosecutor, International Criminal Court; formerly International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor, appeals counsel and trial attorney

**Carsten Stahn** – Professor of International Criminal Law and Global Justice, Leiden Law School

**Renan Villacis** – Director of the Secretariat of the International Criminal Court’s Assembly of States Parties

**Daryl Mundis** – Registrar, Special Tribunal for Lebanon

**Richard Goldstone** – Founding Chief Prosecutor, International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda

**Fatou Bensouda** – Prosecutor, International Criminal Court

[Many interviewees have held, or do hold, additional positions. The above list includes either the current, and/or most significant past, position(s). All interviewees spoke in their individual capacities and not on behalf of the UN or the particular tribunals with which they are currently, or were previously, affiliated.]

## APPENDIX B

### **SCENARIO I: The International Criminal Court as the Dominant Institution of the Future**

*In the first scenario, the International Criminal Court (ICC) is the dominant institution twenty years into the future in the field of international justice. The ICC is not necessarily the only institution conducting atrocity crimes prosecutions, as there might be other tribunals (such as a few other hybrid tribunals and/or possibly a regional tribunal), as well as complementarity (national prosecutions in ICC situation countries) or other national court proceedings. Yet, the ICC would be at the “center of the stage” in terms of importance, and, thus, the main judicial institution combatting core atrocity crime prosecutions. The ICC of the future would not necessarily precisely resemble the ICC of today.*

### **SCENARIO II: Additional Tribunals as the Dominant Approach of the Future**

*In the second scenario, the international community continues to create a number of additional tribunals. These might take the form of hybrid tribunals (either freestanding new tribunals or ones created within existing national judicial systems). There might even be future ad hoc tribunals, with capacities similar to the ICTY and ICTR, although perhaps not created through the UN Security Council. Perhaps one or more regional criminal tribunal would also be created. While the ICC would also exist, it would not be the dominant institution—rather, it would be one of many institutions. Similarly, national courts would also continue with some domestic atrocity crimes prosecutions, although they too would not be the central feature of the system.*

**SCENARIO III: Complementarity/National Court Prosecutions as the Dominant Approach of the Future**

*In the third scenario, complementarity/national court prosecutions become the most dominant feature of the future of the field of international justice. Complementarity here refers to the exercise of jurisdiction in ICC situation countries. In this third scenario, there is less need for the ICC or hybrid tribunals, as there is a shift towards domestic prosecutions—whether through a specialized war crimes chamber or the ordinary court system. Thus, “complementarity is made meaningful,” with national courts having much stronger capacity (and, possibly, will) to fairly conduct domestic atrocity crime prosecutions. If complementarity is to be “made meaningful,” should there be centralized coordination of domestic capacity-building?*

None of the three scenarios rules out the existence of other transitional justice tools being utilized (such as truth commissions, vetting, reparations, or institutional reform), or universal jurisdiction prosecutions in national courts.



## Year in Review Lecture

**Milena Sterio\***

Good morning! It is a pleasure to be here and share with you my thoughts on the topic of “Year in Review.” As opposed to boring you with facts, graphs, statistics, and numbers, I have decided to focus on three of the most significant themes or cases in international humanitarian law over the past year. These include the International Criminal Court (ICC) *Al Mahdi* case; the closing and legacy of the two ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and the ongoing conundrum with the situation in Syria.

### **International Criminal Court *Al Mahdi* Case**

Ahmad Al Faqi Al Mahdi, also known as Abou Tourab, was a member of the radical Islamic group Ansar Eddine, a Malian armed jihadist group linked to al-Qaeda in the Islamic Maghreb (AQIM). Al Mahdi served as head of the Islamic Police in Timbuktu and was one of the four commanders of Ansar Eddine during its brutal occupation of Timbuktu in 2012. During this time, Al Mahdi worked closely with the leaders of all the armed groups in the area, and, according to the allegations asserted against Al Mahdi, played an active role in the occupation of Timbuktu.

How did the *Al Mahdi* case wind up before the ICC? The Malian government itself referred the situation in Mali to the Court in 2012. The Office of the Prosecutor (OTP) then opened an official investigation into alleged crimes committed in Mali in January 2013, and in February 2013 the Malian government and the ICC signed a cooperation agreement in accordance with Section IX of the Rome Statute. On September 18, 2015, ICC Pre-Trial Chamber I issued an

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\* Associate Dean for Academic Enrichment and Professor of Law, Cleveland-Marshall College of Law.

arrest warrant against Al Mahdi. At this particular point in time, Al Mahdi was detained in a prison in Niger, and on September 26, 2015, he was transferred to ICC authorities by the government of Niger.

On March 24, 2016, charges against Al Mahdi, consisting of war crimes constituted by attacks against religious and cultural sites, were confirmed by Pre-Trial Chamber I. The ICC indicted Al Mahdi on several charges of war crimes, specifically intentional attacks against ten religious and historic buildings and monuments. Article 8.2(e)(iv) of the Rome Statute of the ICC provides that war crimes include “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.” All the buildings that Al Mahdi was charged with attacking had been under UNESCO protection, and most had been listed as world heritage sites.

In addition to the ICC’s charges against Al Mahdi, human rights groups accused Al Mahdi of other crimes and have encouraged the OTP to consider credible allegations of Al Mahdi’s involvement in crimes committed against civilians, including rape, sexual slavery, and forced marriage. Al Mahdi indicated that he would plead guilty on March 1, 2016; his trial opened on August 22, 2016, and concluded within a single week. The Court sentenced Al Mahdi to nine years of imprisonment on September 27, 2016.

In the most recent development on August 17, 2017, Trial Chamber VIII of the ICC issued a Reparations Order in the *Al Mahdi* case, concluding that Al Mahdi is liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city. Noting that Al Mahdi is indigent, the Chamber encouraged the Trust Funds for Victims (TFV) to complement the reparations award and directed the TFV to submit a draft

implementation plan for February 16, 2018. The Chamber highlighted the importance of cultural heritage and stressed that, because of their purpose and symbolism, most cultural property and cultural heritage sites are unique and of sentimental value. Their destruction thus carries a message of terror and helplessness, destroys part of humanity's shared memory and collective consciousness, and renders humanity unable to transmit its values and knowledge to future generations.

While some have applauded the ICC prosecution of Al Mahdi as a victory for the institution and as a ground breaking legal precedent, others have criticized the court's decision to go after a relatively little-known defendant, for a relatively insignificant crime.

Commentators have applauded the *Al Mahdi* case and called it a big victory for the ICC. Let me briefly summarize some of the main arguments in favor of the *Al Mahdi* case as a victory for the ICC.

First, Al-Mahdi's trial was short and efficient, which is important for a Court that has been hobbled by inexcusably long proceedings. The ICC has a small budget, and completing an efficient trial without expending many resources represents an important legal accomplishment for the Court and will arguably free up the ICC to pursue other cases and alleged criminals. Al Mahdi is the first ever defendant in the ICC to plead guilty. From the start of his case, he promised to cooperate with the ICC—in exchange, perhaps, for a lenient sentence. Thus, prosecuting Al Mahdi, while knowing in advance that the defendant would plead guilty and cooperate with prosecutors, and also perhaps provide information about other future cases, would appear to have been a particularly efficient use of the ICC's limited resources.

Second, the ICC has been perceived as a largely inefficient institution as cases against other alleged criminals have languished. Sudanese President Omar al-Bashir has been free since becoming the first person charged by the ICC for genocide. Joseph Kony, the notorious



leader of the Lord's Resistance Army, continues to wreak havoc in Central Africa, ten years after being indicted. The trials of Kenyan President Uhuru Kenyatta and Deputy President William Ruto collapsed as a result of a lethal combination of shoddy case construction by ICC prosecutors and Kenyan political interference. According to some, securing a conviction against an Islamic terrorist such as Al Mahdi will send the right message that the ICC is efficient and capable of arresting individuals and successfully completing trials within a reasonable time period.

Third, Al Mahdi's surrender to the ICC was accomplished through the cooperation of both Niger and Mali, two African states. This cooperation may help the ICC to counter criticism of bias against the African continent and the perception that African states are somehow against the institution.

Fourth, Al Mahdi's evidence and testimony could be of use during future prosecutions; as I already mentioned, he has proven to be more than willing to cooperate with ICC investigators and prosecutors. Al Mahdi may have been targeted by the ICC because of this promise, as the ICC may have believed that Al Mahdi's cooperation and eventual testimony would potentially help in bringing other perpetrators in Mali to account. As one commentator observed, "If al-Mahdi provides solid testimony and evidence of other crimes, he could emerge as an extremely useful resource not only for the ICC but for accountability in Mali more generally." This possibility may also help to alleviate the skeptics' concern that the ICC should not be focusing on the destruction of property, but should instead focus on violence committed against populations and individuals.

Fifth, Al Mahdi's conviction may bolster the Court's image as a relevant institution seen as prosecuting crimes that shock the conscience of mankind, such as the destruction of UNESCO sites. Because of its limited jurisdictional reach, the ICC has been unable

to prosecute individuals responsible for the destruction of cultural sites in places such as Palmyra or Bamiyan. Securing a conviction against an individual accused of similar destruction in an ICC member state, where the court does have jurisdiction, signals that the destruction of cultural heritage is a war crime of legitimate concern to the international community.

In other words, the ICC showed that accountability for cultural crimes is possible. The Court's action also signaled other shifts. Most crucially, the Court tapped into global outrage about the destruction of cultural heritage sites. While the Court has no jurisdiction in Syria or Iraq, where Islamic State fighters have wantonly obliterated historic sites, it could do something about the destruction of Timbuktu shrines. In prosecuting *Al Mahdi*, the ICC joined with UNESCO to form a new front line against the violent destruction of culture.

While many have pointed out the limitations of the *Al Mahdi* precedent in terms of deterring future war criminals tempted to destroy other cultural sites, the *Al Mahdi* case does demonstrate that the international community cares about the protection of buildings and monuments and is willing to expend focus and energy on this issue.

Sixth, the *Al Mahdi* case is a "first" of many kinds. This case marks the first time that the destruction of cultural sites has been prosecuted as a war crime at the ICC. It is also the first time that an Islamic radical has been prosecuted at the ICC. Finally, it is the first time that an ICC defendant has pleaded guilty.

Critics have pointed out that the case may not be such a welcome development in international criminal law. For example, scholars have criticized the *Al Mahdi* case as stretching the limits of the ICC to a breaking point because the case fails to respect two core principles of the ICC: gravity and complementarity.

First, gravity.

The ICC was established to exercise its jurisdiction over persons for the most serious crimes of international concern. Article 17(1)(d) of the Rome Statute provides that a case is inadmissible before the ICC if the case is not of sufficient gravity to justify further action by the Court. The Prosecutor has stated in the context of the *Al Mahdi* case that “attacks against religious buildings are so grave that they warrant action by the international community.” One has to wonder, however, whether the destruction of buildings should qualify as one of the most serious crimes of international concern. In another recent case, the so-called Flotilla incident, where Israeli special forces killed ten activists on board a vessel that had been about to breach the Israeli naval blockade of Gaza, the ICC OTP defined the principle of gravity as:

- (i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and
- (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.

Subsequently, the OTP defined the elements that are to be taken into account when assessing the gravity of the crimes, namely, the “scale, nature, manner of commission of the crimes and their impact.”

With this precedent in mind, it is important to address two questions: whether *Al Mahdi* bears the greatest responsibility for the alleged crimes, and whether the crimes themselves are of sufficient gravity.

First, it is unclear whether *Al Mahdi* is indeed the most responsible for the crimes. While it is likely that he had been involved in the destruction of the religious buildings, it is equally likely that other members of the Islamic groups were similarly involved in the

planning and commission of these crimes. It has been suggested that Al Mahdi is on trial because all of the other leaders of the various extremist militia groups that operated in the region have been killed or otherwise escaped. This suggestion would indicate that Al Mahdi was selected for prosecution for pragmatic reasons, which had little to do with the gravity principle.

Second, it is uncertain whether the war crime of destruction of cultural property is grave enough to warrant prosecution at the ICC. Despite the Rome Statute's prohibitions against the destruction of religious buildings, one must assume that the drafters envisaged that these crimes would only be prosecuted once committed in combination with other crimes that qualify as a war crime. For example, in the current trial of Bosco Ntaganda, the defendant is facing twelve war crimes charges and five charges of crimes against humanity, in addition to the destruction of cultural and religious property.

Thus, the *Ntaganda* case seems to pass the gravity threshold more easily than the *Al Mahdi* case. Although the destruction of cultural and religious buildings may constitute an attack on humanity as a whole, as recent ISIS-perpetrated attacks on the cultural heritage of Syria may demonstrate, this does not automatically lead to the conclusion that the ICC should prosecute the perpetrators. The gravity threshold imposes a limitation on the Court: in light of its limited resources, the Court should focus on the prosecution of those most responsible for serious crimes. It may be argued that Al Mahdi's alleged crimes are not grave enough.

Second, complementarity.

It is questionable whether the *Al Mahdi* prosecution satisfies the principle of complementarity. The ICC is not supposed to interfere with national prosecutions, and the Court should only prosecute suspects if a state is not able or willing to prosecute. According to

Article 17(1)(a) of the Rome Statute, a case is inadmissible when it is being investigated or prosecuted by a state that has jurisdiction over it, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution. In other words, if a state is able and willing to prosecute an individual, that state should be given the opportunity to do so, and the ICC should step away.

Al Mahdi had already been indicted on terrorism charges in Niger before the ICC issued its arrest warrant. When Niger was informed that the ICC wanted to prosecute Al Mahdi, Nigerois authorities transferred Al Mahdi and relinquished jurisdiction over the case. Niger never stated that it was unwilling or unable to prosecute Al Mahdi, and the ICC authorities themselves never bothered with the complementarity issue. Thus, it seems that the ICC decision to prosecute al Mahdi is contrary to the complementarity principle, and, in light of the fact that the case may not pass the gravity threshold, one has to wonder whether Al Mahdi's prosecution should have remained in the hands of Niger authorities.

While the *Al Mahdi* case may be applauded as a precedent-setting victory for the ICC as an institution and for international criminal law in general, the case can also be criticized as an improper use of the Court and of its limited resources to prosecute a lesser-known defendant for relatively insignificant crimes. The case remains relevant, however, for another reason: it demonstrates that the ICC may function properly if cases are carefully selected and referring states actively cooperate in the defendant's arrest and prosecution. It may be better for the ICC to pursue lesser-known defendants if the OTP determines that a conviction can likely be secured with limited resources, than to issue arrest warrants against defendants who are unlikely to find their way to The Hague. Limited justice may be better than no justice at all.

## **Closing and Legacy of Ad Hoc International Criminal Tribunals**

As all of you know, the Rwanda tribunal officially closed, having completed all of its trial and appellate-level work, at the end of 2015. The ad hoc international criminal tribunal for the former Yugoslavia is also coming to a close. The Yugoslavia Tribunal is currently finishing its last trial in the *Mladić* case (judgment is expected in November 2017). In the last appellate case, *Prlić et al.*, the appellate judgment is also expected in November 2017. Remaining proceedings in the cases of *Karadžić*, *Šešelj*, and *Stanišić & Simatović* are under the jurisdiction of the so-called Mechanism for International Criminal Tribunals.

The Mechanism has been mandated to perform a number of essential functions previously carried out by the ICTY and the ICTR and has assumed responsibility for, inter alia, the enforcement of sentences, administrative review, assignment of cases, review proceedings, appeal proceedings, contempt, requests for revocation of the referral of cases to national jurisdictions, the variation of witness protection measures, access to materials, disclosure, changes in classification of documents, and requests for compensation and assignment of counsel. In carrying out these multiple functions, the Mechanism maintains the legacies of these two pioneering ad hoc international criminal courts and strives to reflect best practices in the field of international criminal justice.

With the closing of these ad hoc tribunals, an important chapter in international criminal law has come to an end. The ICTY and the ICTR played crucial roles in the development of international criminal law four decades post-Nuremberg. They reignited the development of this field of law, and their case law contributed toward the fine-tuning of complex legal doctrines, such as genocide, superior or command responsibility, the definition of international armed conflict, the prosecution of crimes of sexual violence, and many others. What are the legacies of the Yugoslavia and Rwanda Tribunals?

In the context of international criminal tribunals, scholars have defined “legacy” to mean a lasting impact, most notably on bolstering the rule of law in a particular society by conducting effective trials while also strengthening domestic capacity to do so. Legacy, in this context, implies the extent to which a particular court has had a significant effect by modeling best practices in handling the individual cases and compiling a historical record of the conflict. Legacy also means laying the groundwork for future efforts to prevent a recurrence of crimes by offering precedents for legal reform, building faith in judicial processes, and promoting greater civic engagement on issues of accountability and justice. This type of legacy is supposed to be long lasting and continue to have an impact even after the work of the tribunal is completed.

A 2008 United Nations High Commissioner’s Report on maximizing the legacy of hybrid courts asserted that the need for such tribunals to leave a legacy is firmly accepted as part of United Nations’ policy. In addition to the above view of legal legacy and impact, tribunals can have other types of roles that can meaningfully affect the pursuit of justice and human rights. Professors Kimi King and James Meernik have described the core missions of the ICTY’s mandate (to bring to justice those responsible for serious violations of international humanitarian law) as follows: (1) developing the Tribunals’ functional and institutional capacities; (2) interpreting, applying, and developing international humanitarian and criminal law; (3) attending to and interacting with the various stakeholders who have vested interests; and (4) promoting deterrence and fostering peace-building to prevent future aggression and conflict.

This framework is also applicable to the ICTR, as this Tribunal was charged with the same mandate as the ICTY, with the addition of promoting national reconciliation in Rwanda. In light of the above, “legacy” can be defined more broadly as the enduring influence of the Tribunals’ work and processes on the ideals,

conceptions, and instrumentalities of international criminal law, justice, and human rights.

Thus, while the Tribunals' legacy is equally important in the development of domestic justice and human rights more broadly, the focus of my remarks today is on the field of international criminal law (ICL) and international humanitarian law (IHL). What is the significance, impact, and legacy of the ad hoc tribunals through this particular lens? It is my hope that the legacy of ad hoc tribunals in the fields of ICL and IHL will be of particular assistance to those who work with the International Criminal Court (ICC), as much of the ad hoc tribunals' case law has served and will serve as important precedent within the ICC, and as the ICC will most likely continue to enhance the same IHL principles and doctrines that the ad hoc tribunals have developed.

First, the ad hoc tribunals have contributed to the development of ICL by successfully charging and convicting defendants of genocidal offenses.

The Rwanda Tribunal in the *Akayesu* case became the first international tribunal to enter a judgment for genocide, as well as the first to interpret the definition of genocide set forth in the 1948 Geneva Conventions. In the *Kambanda* case, also before the Rwanda Tribunal, the defendant pled guilty to genocide, marking the first time in the history of ICL that an accused person admitted responsibility for genocide and conspiracy to commit genocide. By accepting this guilty plea in the *Kambanda* case, the Rwanda Tribunal became the first international tribunal since Nuremberg to issue a judgment against a former head of state. In another case (*Nahimana, Barayagwiza, and Ngeze*), the Rwanda Tribunal convicted members of the Rwandan media by holding them responsible for broadcasts intended to inflame the public to commit acts of genocide.



The Yugoslavia Tribunal was the first international criminal tribunal to enter a genocide conviction in Europe. In April 2004, in the case against Radislav Krstić, the Appeals Chamber determined that genocide was committed in Srebrenica in 1995, through the execution of more than 7,000 Bosnian Muslim men and boys following the take-over of the town by Bosnian Serb forces. Several other completed ICTY cases relating to the Srebrenica events have ensured that the genocide has been well documented and, in the words of ICTY President Theodor Meron, “consigned to infamy.”

According to the appellate judgment in the *Krstić* case, “Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.”

In sum, the ad hoc tribunals have significantly contributed to the prosecution of the crime of genocide and toward the notion that genocide is a crime against all that will never again be tolerated by the international community.

Second, the ad hoc tribunals have contributed to the development of ICL and IHL by developing case law on crimes of sexual violence and by focusing on specific gender issues. In the *Akayesu* case, the Rwanda Tribunal for the first time defined the crime of rape in international criminal law and recognized rape as a means of perpetrating genocide. The Rwanda Tribunal created a special unit for gender issues and assistance to victims of genocide, choosing to focus on gender issues and to provide support and care to the victims of genocide. In this manner, the tribunals have, in addition to developing case law on crimes of sexual violence, created a participatory legacy—the idea that victims of serious crimes have a voice within international criminal prosecutions of such crimes. This idea, for better or for worse, is squarely present within the Rome Statute of the ICC.

The Yugoslavia Tribunal has also played a historic role in the prosecution of wartime sexual violence in the former Yugoslavia and has paved the way for a more robust adjudication of such crimes worldwide. From the first days of the Tribunal's mandate, investigations were conducted into reports of systematic detention and rape of women, men, and children. More than a third of those convicted by the ICTY have been found guilty of crimes involving sexual violence. Such convictions are one of the Tribunal's pioneering achievements. They have ensured that treaties and conventions that have existed on paper throughout the 20th Century have finally been put in practice, and violations have been punished.

The ICTY took groundbreaking steps to respond to the imperative of prosecuting wartime sexual violence. Together with its sister tribunal for Rwanda, the Tribunal was among the first courts of its kind to bring explicit charges of wartime sexual violence, and to define gender crimes such as rape and sexual enslavement under customary law.

The ICTY was also the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as crime against humanity, as well as the first international tribunal based in Europe to pass convictions for rape as a crime against humanity, following a previous case adjudicated by the ICTR. The ICTY proved that effective prosecution of wartime sexual violence is feasible and provided a platform for the survivors to talk about their suffering. That ultimately helped to break the silence and the culture of impunity surrounding these terrible acts. In addition, the ICTY established a robust Victims and Witnesses Section (VWS), which provided the witnesses with assistance prior to, during and after their testimony, ranging from practical issues to psychological counseling during their stay in The Hague. In this manner, the Yugoslavia Tribunal, like the Rwanda Tribunal, has contributed significantly to the legacy of developing and prosecuting gender-specific crimes

and crimes of sexual violence, and to ensuring meaningful victim participation in the adjudication process.

Third, both ad hoc tribunals have contributed toward the development of the doctrine of superior responsibility by holding that superior responsibility applies to civilians in leadership positions and that it is not confined to purely military leaders. This contribution by the ad hoc tribunals is particularly relevant in light of modern-day warfare where conflicts are often fought outside of well-defined militaries and where orders and policies are often crafted by non-military leaders.

Fourth, the ad hoc tribunals have established a legacy of cooperation and impact on domestic jurisdictions between international tribunals and national authorities. Multiple countries have signed agreements on the enforcement of Rwanda Tribunal's sentences (Mali, Benin, France, Italy, Mali, Rwanda, Senegal, Swaziland, and Sweden). These agreements illustrate the important role national authorities play in ensuring that those convicted of serious violations of international law serve their sentences in compliance with international detention standards. In addition, the Rwanda Tribunal upheld the first referral of an international criminal indictment to Rwandan national authorities for trial, in the case against Jean-Bosco Uwinkindi. A total of eight ICTR cases have now been referred to Rwanda. Two additional cases have been referred to France for trial. Monitoring in all referred cases is presently being conducted by the Mechanism.

Throughout its existence, the ICTY OTP has worked closely with the new states and territories that emerged from the former Yugoslavia on their domestic prosecutions. In the aftermath of the war in Bosnia and Herzegovina (BiH), returning displaced persons and refugees voiced fears about arbitrary arrests on suspicion of war crimes. To protect against this, the OTP agreed to operate a "Rules of the Road" scheme under which local prosecutors were obliged to submit case files to The Hague for review. The Rules of the Road procedure,

established under the Rome Agreement of February 18, 1996, regulated the arrest and indictment of alleged perpetrators of war crimes by national authorities.

As part of the Tribunal's contribution to the reestablishment of peace and security in the region, the ICTY prosecutor agreed to provide an independent review of all local war crimes cases. If a person was already indicted by the OTP, he could be arrested by the national police. If the national police wished to make an arrest where there was no prior indictment, they had to send their evidence to the OTP. Under the Rome Agreement, decisions of the OTP became binding on local prosecutors.

To ensure as many persons as possible suspected of war crimes are brought to justice, the OTP has provided assistance to national bodies in the region by passing on evidence that may be of use in local investigations and by transferring whole cases for prosecution locally. A dedicated transition team within the OTP was tasked with handing over to national courts cases involving intermediate- and lower-ranking accused. Such cases have included case files of suspects investigated by the OTP but where no indictments were ever issued, resulting in the referral of some files with investigative material to authorities in Serbia, Croatia, and Bosnia, which have then pursued these cases. Secondly, despite indictments issued by the ICTY, a total of eight cases involving thirteen accused have been referred to courts in the former Yugoslavia, mostly to Bosnia and Herzegovina, pursuant to Rule 11bis of the Rules of Procedure and Evidence. On the basis of an ICTY indictment and the supporting evidence provided by the Tribunal's prosecution, these cases are then tried in accordance with the national laws of the state in question.

Finally, the OTP has promoted regional cooperation among national prosecutors. The ICTY prosecution strongly supports efforts to enhance cooperation in criminal matters between states of the former

Yugoslavia, as it is an essential step towards rebuilding trust and justice in the region. Successful trials before national courts require that prosecutors in neighboring countries can collaborate in the collection of evidence and securing witnesses. OTP officials have taken part in several regional meetings, facilitating the creation of good working relationships between the prosecutors in the different states.

Thus, the Rwanda and Yugoslavia Tribunals have created a significant legacy of cooperation with national authorities and have developed specific models of cooperation that have contributed toward the rebuilding of national justice systems.

Fifth, the ad hoc tribunals have created a significant legacy in the operational sense by establishing specific case management strategies for the prosecution of complex international crimes and by establishing particular evidentiary procedures resulting in the long-term preservation of evidence that will enable national jurisdictions to prosecute additional cases in the future. For example, the Rwanda Tribunal held special deposition proceedings in the case concerning Félicien Kabuga to preserve evidence for use at trial once he is arrested. Similar proceedings were later held in the cases of two other fugitives: Augustin Bizimana and Protais Mpiranya. By holding these proceedings, the ICTR is ensuring that the passage of time does not jeopardize the international community's ability to bring these suspects to trial when they are finally apprehended.

The ICTY has also established specific evidentiary standards regarding victims of crimes of sexual violence, by allowing them to testify anonymously—witnesses have been able to testify under a pseudonym, with face and voice distortion in video feeds, or in closed session. Through the development of its rules of procedure, the ICTY has also sought to protect the victims of sexual violence from abusive lines of questioning during testimony. The ad hoc tribunals have thus

left behind an operational legacy, which will undoubtedly serve as a model for future international criminal prosecutions.

### **The Ongoing Situation in Syria**

The last theme of my remarks focuses on Syria—both in terms of the recent United States’ use of force against the Assad leadership, as well as in terms of creating an accountability mechanism for crimes committed in Syria.

Back in 2013, President Obama drew a “red line” and threatened that the United States would use force against the Syrian regime in the wake of the latter’s use of chemical weapons against Syrian civilians. Obama ultimately decided against using force in Syria, but President Trump reversed this decision and launched several air strikes against Syrian President Assad’s forces in 2017. President Trump offered the following justification for the United States air strikes against Syria: (1) That it was in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons; (2) that Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention and ignored the urging of the UN Security Council; and (3) that the refugee crisis continued to deepen and the region continued to destabilize, threatening the United States and its allies.

Most international law experts would agree that the United States’ use of force in Syria this year is illegal. As we all know, international law allows the use of force in two limited situations: pursuant to Security Council authorization and/or in self-defense. No particular Security Council resolution has authorized the use of force in Syria, and it is very difficult for the United States, located thousands of miles away, to claim that it has somehow been threatened by the Assad regime and that it must act in self-defense.

The United States' use of force in Syria is significant however for another reason: this intervention can be analyzed from a different standpoint—that it may be acceptable (while not legal) for states to act outside the framework of the UN Charter when deemed necessary or when pursuing a “legitimate aim.” Many of you may remember that this was the argument used to justify the NATO air strikes against the Federal Republic of Yugoslavia in 1999. In 2013, the U.K. Prime Minister's Office argued, in the wake of the ongoing Syrian crisis, that a state could take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime.

According to this argument, such a legal basis is available, under the doctrine of humanitarian intervention, provided that a set of conditions is met. These conditions require that (1) there is “convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief”; (2) it is “objectively clear that there is no practicable alternative to the use of force if lives are to be save”; and (3) the force used is “necessary and proportionate to the aim of relief of humanitarian need.”

The U.S. military action in Syria has resurrected debates regarding the humanitarian intervention exception to the general international law ban on the use of force. As of today, most of us would agree that humanitarian intervention has not become a norm of positive law. Moreover, in the Syrian context, it appears that American air strikes have not contributed toward a broader humanitarian mission and cannot be easily interpreted as constituting part of a larger humanitarian operation. Thus, the humanitarian intervention exception does not provide an easy legal basis for the American use of force against Syria.

The Syrian situation however underscores and highlights the limitations of international law. Many states in the international community have reacted to the U.S. actions in Syria with approval; such approval may reflect a political understanding for this course of action chosen by the United States in the face of the crimes committed, rather than legal acquiescence. The U.S. military action in Syria does not constitute the first time that the prohibition on the use of force has been violated and not sanctioned by the international community.

However, this should not necessarily mean that the legitimacy of the UN Charter is diminished. Instead, the U.S. military action in Syria highlights the limits of international law and its inherent tie to international relations and geopolitics: the UN Security Council, the only international law body authorized to officially “bless” the use of force against a sovereign state, is often blocked and unable to take legal action, thus resulting in a unilateral use of force by the United States in an illegal yet perhaps legitimate manner. The obvious risk that such unilateral military action creates is that although the attack may be seen as morally or ethically legitimate, it nonetheless results in acts committed outside the purview of international law. This dangerously opens the door to using force under possible false pretenses in the future. Of course, the same false pretenses could be pursued within the boundaries of the existing legal framework, but at least the law acts as a barrier in limiting the recourse to force in such situations. In sum, the U.S. intervention in Syria has sparked new debates regarding the limits of international law and regarding the utility and appropriateness of the humanitarian law exception.

Another important consequence of the U.S. military action in Syria relates to the law applicable to this conflict. Until recently, there was a conflict between ISIS and the Assad regime together with a conflict between the U.S. (and the international coalition) and ISIS, which both qualified as non-international armed conflicts (NIAC). The U.S. attack against Syria could transform the conflict into an



international armed conflict (IAC) between the United States and Syria, meaning that a different and more extensive set of rules will apply. Depending on the position adopted, this could lead to either the internationalization of the entire conflict in Syria, meaning that there would be an IAC between all the actors (including ISIS) or that there would be a situation of mixed conflicts, an IAC between the United States and Syria and an NIAC for all the other actors, which in turn would lead to different applicable rules.

Finally, the Syrian situation has resulted in an ongoing debate within our professional circles regarding the best accountability mechanism to address violations of ICL and IHL committed in Syria. While all agree that those responsible for such violations should face justice, many disagree as to which form of justice—international, hybrid, or domestic. The ICC, because of its jurisdictional limitations, is of limited use in Syria. A new Syria tribunal could be established either pursuant to a true international model, similar to the Yugoslavia and Rwanda tribunals, or pursuant to a hybrid model, similar to the Special Court for Sierra Leone or the Lebanese Tribunal. Or, accountability could be imposed through domestic justice, assuming that the Syrian leadership is reformed and able and willing to meet the demands of accountability. To conclude, Syria may, sadly, preoccupy our legal minds for years to come.

Other than the *Al Mahdi* conviction, the international law themes of the past year that I have addressed here today have not been happy. This conclusion, however, does not diminish the role of international law and, in particular, of international lawyers, in matters of international justice. I encourage all of us to continue our hard work in the field of international humanitarian law and to continue to contribute toward the development of this area of the law.

## **Transcripts**



## Reflections by the Current Prosecutors

*This panel was convened at 10:30 a.m., Monday, August 28, 2017, by its moderator, Michael Scharf, Dean and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law, who introduced the panelists: Mohamed A. Bangura (for) Brenda Hollis, Residual Special Court for Sierra Leone; Fabricio Guariglia (for) Fatou Bensouda, International Criminal Court; Norman Farrell, Special Tribunal for Lebanon; Kevin C. Hughes, (for) Serge Brammertz, Mechanism for International Criminal Tribunals; and Nicholas Koumjian, Extraordinary Chambers in the Courts of Cambodia. An edited version of their remarks follows.*

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**MICHAEL SCHARF:** I am going to introduce the prosecutors who are here today. The reason this part of the conference, and really the conference itself, is called the “Dialogs” is because we have this dialog. For years, I have been fortunate enough—with a couple of exceptions—to be the moderator of this dialog. The way this works is we ask the prosecutors very short questions about modern and contemporary things that are going on in their tribunals, and you get a comparative glimpse of not just the ancient history of the tribunals, but a snapshot of what is going on right now.

So let me introduce the prosecutors that we have here starting with Mohamed Bangura, who is representing the Residual Special Court for Sierra Leone (RSCSL). Next to Mohamed is Fabricio Guariglia from the International Criminal Court (ICC).

Then next to Fabricio is Norman Farrell. Norman, is this your first time here?

**NORMAN FARRELL:** First time as the prosecutor.

**MICHAEL SCHARF:** It is fantastic to have you here. Norman is the prosecutor for the Special Tribunal for Lebanon. And then next to Norman, we have Kevin Hughes from the Mechanism for International Criminal Tribunals (MICT), which is, as you know, the Yugoslavia and Rwanda Tribunals' Residual Mechanism.

Next we have Nicholas Koumjian, who is the current chief prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

So, without further ado, we are going to launch into these questions, and I will start it out with a general question for everybody. Then I would like one or two prosecutors, maybe three, to answer the question if you believe it is particularly relevant to your tribunal. You will see that we do not get through many of the questions because it always gets bogged down. But let us try to keep it moving fast since we want to have fifteen minutes of Q&A from the audience at the end.

So the first question, can you describe what you consider the most important developments at your tribunal during the last year? Let us make it "development" singular, so we can move it along, and we will start with Mohamed.

**MOHAMED A. BANGURA:** Thank you. The most important development in the Residual Court over the past year was a decision given in an application for conditional early release of one of our prisoners, and that is a prisoner called Allieu Kondewa. The Special Court has provisions for prisoners to apply for early release upon having served two-thirds of their term, but he is not the first who has been granted early release. Though if we are keeping it within a year, that is the most important development.

But that decision was subject to a delay. The judge ordered a ten-month delay for him to get further training in understanding how to get integrated back into society and understanding the importance

of the process by which he was convicted in the first place. That was important because the previous prisoner who was released had similar conditions applied to him, and had training as well, but no sooner was he released than he broke one of his conditions. Even in his case there was a delay provision of six months for training him to understand the process by which he had been convicted. But notwithstanding that, he broke one of those conditions and got involved in politics, which is one of the main conditions on which we release. Basically, when you are released through conditional early release you are not completely free. You still have that part of your term to serve, but in an open and supervised environment. So that is the most important development in the last year.

**MICHAEL SCHARF:** And this is an issue that we can return to later on, because many of the tribunals now have the equivalent of parole—early release—and even those that are in jail seem to be finding ways to violate the conditions of their jail terms. I understand that Charles Taylor has been making phone calls where he has been threatening people throughout Africa. Who knew?

So let us go to Fabricio.

**FABRICIO GUARIGLIA:** First, on behalf of Fatou Bensouda, the Chief Prosecutor of the International Criminal Court, we want to express, again, our gratitude to the organizers for inviting us and giving us the opportunity to discuss with you what we do and how we are doing it. She sends her regards and expresses her regret for not being here.

I will name four big developments from last year, in no particular order. The first is the conviction of five accused, in a bit of a spinoff from the *Bemba* trial. Five accused were convicted of offenses against the administration of justice, including the chief counsel for Jean-Pierre Bemba Gombo, the case manager, plus three other indictees.

It was the first time that we brought a case against a group of people for offenses against administration of justice. In that case, the crimes charged all related to the presentation of false evidence at trial surrounding fourteen witnesses—that their testimony was basically fabricated. I think it is the first time ever that the international criminal jurisdiction has presented a case of this magnitude, involving the leading counsel and part of the defense team, plus associates.

And in our case, I think an important thing to note is that when we realized the level of corruption that had been reached, we simply said this is not something that the Office of the Prosecutor and the institution as a whole can tolerate, so we need to send a clear and strong message that this type of behavior will not be condoned. The particular type of litigation before international criminal jurisdictions does not entail that you are free from all the ethical rules that bound your activity as defense counsel, and the fact that you are defense counsel does not mean that you can get away with murder. So we felt it was an important conviction and one that we hope will deter similar conduct in the future.

The second development was the conviction of Ahmad Al Faqi Al Mahdi for the crimes of destruction of culture and religious property in Timbuktu. I think it is important in two ways. First, it is the first time that there has been an international case with the focus only on the destruction of cultural and religious property, without any other crimes charged. And I think it is important in the same way as *Lubanga*, where we wanted to put the light on the suffering of the child soldiers. That suffering was usually viewed as some sort of second-class type of victimization, but we wanted to say, no, this is a terrible thing. It destroys children's lives. This has to be given the importance that it deserves, and it has to be treated as the great crime that it is.

We wanted to do the same thing with *Al Mahdi*. We wanted to emphasize the centrality of religious and cultural property to the

communities involved. One important thing that came up from that small trial, which I am going to discuss in a second, was the fact that it became clear how much impact the destruction of the shrines had in the community in Timbuktu, how key those objects were to the community's life, and how much they had suffered as a result. An important thing to note is that this was the first time we had an admission of guilt in the ICC. We do not call it a guilty plea. We call it admission of guilt. That is the language of Article 65 of the Rome Statute. And it was important for a number of reasons, including the very significant expression of remorse by Al Mahdi himself during the short trial that we had. It lasted around a week. He apologized to the communities for the crimes that he had committed, and he encouraged others not to engage in that type of conduct in the future. So that was also an important development.

We started the Dominic Ongwen file. Ongwen, as you may know, is one of the commanders of the Lord's Resistance Army, which committed crimes in northern Uganda, primarily. It is a very important case. The case was dormant for around ten years, and then when Ongwen turned himself over we had to relaunch the investigation and basically fill in all the gaps and resuscitate some of the evidence. It is a trial that is very important in a number of ways, but it has a very significant component of sexual violence. It has this panoply of different forms of sexual violence that have been charged. It is the first time that forced pregnancy as a crime against humanity has been charged internationally, so in that sense it is also a first in the ICC.

Lastly, we were talking about international humanitarian law (IHL) earlier today, and one ruling that is important, I think, for the development of international humanitarian law, has been the Appeals Chamber ruling in the *Ntaganda* case, where the Appeals Chamber said that for rape and other forms of sexual violence, there is no requirement that the victim belong to a different party than the perpetrator. So there is no requirement that the victim of rape



be a member of the opposing party in an armed conflict, and there can be rape of your own rank and file. This is a pretty significant development, which also relates to the sexual violence inflicted on the child soldiers in the *Lubanga* case. Ntaganda was Lubanga's number two in the Union des Patriotes Congolais/Force Patriotique pour la Libération du Congo (UPC/FPLC).

One important aspect is, I think, the learning curve of the Office of the Prosecutor, because when we initially looked at this conduct in *Lubanga* we said it did not sound like a war crime since the conduct was inflicted on the UPC/FPLC's own soldiers. Then when we were looking into the *Ntaganda* case we said, "We probably have a very rudimentary understanding of this." This may require a more sophisticated approach. We sought out a wide range of consultations with different experts, and we reached the conclusion that actually, contrary to common assumptions, there is no overarching requirement of adverse party in IHL. In some aspects of IHL it is required, but not in all of them.

That was a position that was first adopted by the Trial Chamber and then the Peace Chamber, with what we believe was a landmark ruling confirming this, and I think it is an important ruling that expands the protection of international humanitarian law. It has to be born in mind, though, that the Appeals Chamber is primarily applying treaty law. It is primarily applying Article 8 of the Statute. But the chapeau of Article 8 of the Statute also requires the Chamber to examine the principles of IHL in general, and it reached the conclusion that there is no generalized demand that the victim belong to a different party than the perpetrator. So in that sense, I think it is a very important contribution of the ICC judges. We have Judge Van den Wyngaert here. She was the presiding judge of that particular decision, so I will be quiet before she tells me that I got it wrong. She is here for questions as well.

**MICHAEL SCHARF:** Norman, briefly, what is the most important development at the Special Tribunal for Lebanon?

**NORMAN FARRELL:** For those of you who do not know the Special Tribunal for Lebanon, we are engaged in prosecuting persons responsible in Lebanon for the killing of former Prime Minister Rafic Hariri. The allegations are that there are, at the moment, four members, all associated with Hezbollah, that carried out this assassination.

In brief, the progression of the evidence in the trial has been the transforming of lead evidence for investigative purposes, intelligence evidence, technical data or contextual evidence into evidence of guilt. That has been the most difficult, and I think the most progressive, development that the Tribunal can point to. This is not a case where there is significant human source evidence, such as witnesses on the ground. This is not a case where there are insiders. This is certainly not a case where anyone has decided to plead guilty or give an admission of guilt. And so the establishment of new investigative techniques, including new technological techniques in transforming telecommunications data, is not only a means of starting an investigation but of proving the guilt of the perpetrators on the ground.

In our case, those involved in the crime worked in separate groups or cells, and those cells operate independently. They do not communicate, so there is no linkage between the cells or the hierarchy. Then we have to try to understand how it was done in a manner that was completely covert, where any identifying information is false. We had to figure out how it was done without direct links to any organized structure, allegedly, and turn all that technical data, intelligence or background information into evidence such that we have. We are about one month away from finishing the prosecution's case. And, of course, it is up to the Court to decide the result.

In a terrorist case such as this, the nature of the evidence is so different and the investigative techniques are so different than anything I experienced at the Yugoslav Tribunal, the Rwanda Tribunal, other tribunals, and in my domestic practice. Hopefully that will be something that we can share with others as a form of prosecution in the terrorist context when you do not have insiders or human source witnesses as your primary source of evidence. Thank you.

**MICHAEL SCHARF:** Kevin. The MICT.

**KEVIN C. HUGHES:** From the International Criminal Tribunal for the former Yugoslavia (ICTY) side, the most important development is that we are four months away from completing our mandate and closing our doors. At the end of November, we will have one of the most important trial judgments in international criminal law, the trial judgment against Ratko Mladić, and we will have one of the most important appeal judgments in the ICTY's history, the appeal judgment in the case of *Prlić et al.* But I hope we can talk about the ICTY and its legacy a bit later.

The most important development for the Mechanism is the beginning of the retrial in the *Stanišić and Simatović* case. Why is this so important? From our perspective, this is our last opportunity to address some of the gaps that are still outstanding in the ICTY's legal and factual legacy regarding the conflicts in the former Yugoslavia. In particular, this is an opportunity to get back on the right track after what I consider the disaster of the *Perišić* appeal judgment a couple years ago.

Factually, why is this an important development? Jovica Stanišić and Franko Simatović were two of the most senior officials in the Serbian State Security Service, which was a combination of the CIA, FBI, NSA, all those kinds of organizations. What we argue in the trial is that they were tasked by Slobodan Milošević to implement and support ethnic cleansing campaigns in Croatia and in Bosnia.

Unfortunately, however, we have not yet secured any convictions of Serbian officials for crimes in Bosnia, so this is our last chance to really enter into the factual record what we believe the evidence proves—that there was a joint criminal enterprise (JCE) to commit ethnic cleansing in Croatia and Bosnia, and that it involved senior Serbian political, military, and, in this case, State Security Service officials. So this is really an important case for us to hammer that issue of the responsibility of senior Serbian officials for these crimes.

Legally, this is our opportunity to get back on the right track after *Perišić*, and particularly the erroneous notion of specific direction. Like *Perišić*, who was acquitted on appeal, *Stanišić* and *Simatović* were acquitted based upon this erroneous notion of specific direction at the original trial. Thankfully, the *Taylor* appeal judgment at the Special Court for Sierra Leone (SCSL) and the *Šainović* appeal judgment at the ICTY have sent specific direction to hopefully the waste bin of international criminal law.

At the same time, and perhaps even more importantly, *Stanišić and Simatović* is about ensuring that the law is appropriate to hold people accountable for the acts of aligned irregular forces, particular paramilitary forces. This is a particularly big gap in international humanitarian and criminal law today, and you just have to look at what is happening in Syria today to understand the vital importance of this kind of attribution and liability.

So what we are really looking to do is prove that even though there was not a unity of command between the paramilitary forces and other forces and individuals, there was a unity of effort. There was support, there was cooperation, there was coordination, and we really hope to show that the law is developed enough to hold people accountable when there is that unity of effort and that kind of cooperation with irregular armed forces.

So, as I said, in Syria today you see multiple groups of very confusing and difficult lines of chains of command to understand, but clearly there is cooperation ongoing. That is why I think this case is really going to be very important for the future of accountability in international criminal law.

**MICHAEL SCHARF:** Nick, since we heard a lot about the developments last night from the ECCC, I want to ask you a very specific question about something that was not discussed last night but that I think is going to have a very significant impact, and that is the November 2016 decision of the Appeals Chamber that joint criminal enterprise III (JCE III), the extended form, does not apply to the crimes before the Cambodia Tribunal, which occurred from 1975 to 1979, because it had not yet ripened into a principle of customary international law at that point.

Tell us a little bit about the significance of that to your case and how it might have significance beyond Cambodia.

**NICHOLAS KOUMJIAN:** Thank you. JCE III did not play a significant role in affecting the judgment in Case 002/1, because we were not relying upon joint criminal enterprise in the third form. So, technically, while we had appealed a decision by the Trial Chamber, upholding the Pre-Trial Chamber decision that joint criminal enterprise in the extended form was not part of customary international law in 1975, the Supreme Court ruled that this was not appealable as it had no effect on the judgment. However, in discussing joint criminal enterprise, they rejected our appeal arguments about JCE III, but they more or less dealt with the issue of whether JCE III was part of customary international law during the period of the Democratic Kampuchea in discussing the first form of joint criminal enterprise.

One of our arguments, which they did not deal with at all, referred to the whole point of the principle of legality, which we feel the Pre-

Trial Chamber and Trial Chamber got mixed up. The principle of legality is about fundamental fairness. You do not punish someone for conduct at the time they had no reason to believe was illegal. If there is no law against copying CDs, and suddenly you change the law, you cannot then arrest people who had copied CDs the day before and charge them with that.

What we argued is that joint criminal enterprise should be viewed as a whole, and that joint criminal enterprise of the first form was part of customary international law. In other words, if you enter into an agreement with a plurality of persons to commit a crime within the jurisdiction of the court, you cannot then say you did not know that you could be held liable for the crimes your co-participants commit in carrying out the joint criminal enterprise, assuming those crimes were foreseeable. To me, that would be overextending and misunderstanding the basic principle of the concept of legality.

So in our view, if you order millions of people to leave a city within twenty-four hours and crimes are committed against them, if you order young soldiers to detain, torture, and execute young women and they end up raping them, there is no issue about the person's conduct being unfairly criminalized. They cannot claim to not have known that ordering those killings, that torture, or the evacuation of those cities was illegal.

The Supreme Court never dealt with that legality argument, but rather they looked at World War II case law to see what kind of JCE liability was recognized as part of customary international law. We had given our arguments citing various decisions, such as the Albert Speer judgment at the International Military Tribunal. When they talked about *Speer* and all of those World War II cases, they did not really talk about modes of liability. It is not clear what modes they are using, what crimes they are actually even being convicted of. So it is all sort of art in interpreting what it was that they were talking about.

But in case after case, and *Speer* is an example, they said yes he was responsible for the slave labor and organizing that. He probably did not want the abuses that occurred, the killing and the torture, but he knew about it and he still participated in the slave labor program. In our view, that is an example of extending joint criminal enterprise to crimes that are foreseeable as a result of the criminal plan. But the Supreme Court rejected our arguments about that.

Now what effect does it have? In a way, we lost and maybe we won, because there was another issue in the case—and it was in this context that the Supreme Court discussed joint criminal enterprise in customary international law. What does it mean to have the intent for the first form of joint criminal enterprise? All of the JCE cases from the other tribunals talked about the elements of JCE being a plurality of persons who have the intent to commit a crime within the statute. Our Trial Chamber had talked about these crimes and said, for example, that when the Khmer Rouge leaders ordered the evacuations of the city, they were aware of the substantial likelihood that additional crimes would occur. So is awareness of a substantial likelihood the kind of intent that satisfies the basic elements of the basic form of JCE?

What we argued on appeal is that the intent should be at least what, in civil law, is called *dolus directus* of the first and second degree. *Dolus directus* of the first degree means that the crime is the accused's conscious objective. *Dolus directus* of the second degree, indirect intent, means that the accused is aware that the crime is the likely result of the conduct that he plans to engage in. Different legal systems use different words to express that that the accused is aware of the probability that the conduct will result in the crimes. Some say that he must be aware that the crime will occur in the "ordinary course of events." There are various ways of expressing the probability of this, but I think they all express a similar concept that in criminal law, every day you hold people responsible not just for the intent, the objective, or what they wanted from their conduct, but also the results

of their conduct, even when it was not their objective but they had a good idea the crime was going to happen because of their conduct.

If someone drives a car on a crowded sidewalk to get away from the police it may not have been their objective to hit people. They just wanted to get away. But clearly they would be held responsible, in any court, for murdering those people because it is a result that they must have known was the likely result of their conduct.

What was interesting about the judgment is that the Supreme Court went a little further, in some ways, than we had asked for in regard to what is required to be proved about the accused intent for the basic form of JCE. They said, “Well, intent means the intent for the crime. And so if it is a specific intent crime, then the accused person would have to have the specific intent.” So, specifically, in our case, we had charged them with extermination and murder. Extermination requires the intent to kill on a mass scale. So they held that for exterminations the prosecution had to prove the specific intent to kill on a mass scale.

But for crimes with no specific intent, in civil law systems normally it is sufficient to prove intent under *dolus eventualis*. The Supreme Court judgment in our case specifically held that an accused can be held responsible for murder under *dolus eventualis*. And I presume that would extend this to any general intent crime, such as rape. One of the reasons we appealed JCE III is we think it is very important to hold leaders responsible for sexual violence in particular. Leaders of criminal campaigns in conflicts rarely order rape, but very often widespread sexual violence is the result of the more general criminal policies targeting specific groups. Rape is a foreseeable result of the joint criminal enterprise.

What the ECCC Supreme Court held in Case 002/1 is that for *dolus eventualis* crimes, general intent crimes, including murder, all that is necessary is for the prosecution to establish that the accused



was aware that the general intent crime was a possible result of the plan they had and that the accused reconciled themselves with that result. It is a classic, civil law formulation of intent. So they made the standard much higher than we wanted for specific intent crimes but they actually made it easier to prove responsibility for general intent crimes as they held that the accused only has to intend those crimes within the meaning of *dolus eventualis*—they were aware it was a possible result of the plan and reconciled themselves with that possible result, continuing to contribute to the plan.

**MICHAEL SCHARF:** Ever since the *Tadić* Appeals Chamber decision, the Yugoslavia Tribunal, the Rwanda Tribunal, and the Special Court for Sierra Leone, the extended form of joint criminal enterprise has been spreading, and I think it is currently thought of as customary international law. But that is not necessarily the case at the ICC because they have this alternate theory called the “control of the crime principle.” Fabricio, can you explain that to us?

**FABRICIO GUARIGLIA:** I think it is not so much that we have an alternate theory. It is that we apply statutory principles, not international customary law. For us, the principle of legality leads to the crimes as defined by the Rome Statute, and most are defined by the Statute. So, in a way, we have the advantage that we can sidestep the whole discussion of what was customary international law at a given time because we primarily apply treaty law, and it is a matter of interpreting the provisions of the Statute. As such, yes, the Court can resort to customary international law under Article 21, basically to better interpret the provisions of the Statute. But the answer to a number of those questions for us lies in the text of the law more than in the depths of customary international law.

For us, JCE III was off limits, in any event, and that is because we have a heightened *mens rea*. We have a *mens rea* in Article 30 of the Statute that captures direct intent and something that is

certainly more than *dolus eventualis* but probably less than a *dolus* of unavoidable consequences. The Statute basically says that you are responsible for those consequences that occur in the ordinary course of events. So it is not a mere risk that a consequence might occur. It is something where, in the words of the Appeals Chamber in *Lubanga*, it is a virtual certainty that a consequence is going to happen as a result of the conduct.

So it does limit us. That is obvious. In the context of attribution, criminal liability, we have a heightened burden in terms of establishing *mens rea*. It is not an insurmountable obstacle, and we have been able to work around it.

But going back to your question, yes, what we have is primarily the Statute defining liability as a crime committed jointly with another or through others. The case law of the Court has interpreted that as somehow embracing the concept of “control over the crime”; so you are responsible if you make an essential contribution to the commission of the crime through a common plan. There is a heightened *actus reus* compared to JCE that requires an essential contribution in the sense that the crime would not have occurred in the same manner had it not been for your contribution, so the absence of your contribution would have significantly complicated the execution of the crime.

Also, each co-perpetrator must be aware of the contribution that he or she is making to the common plan. That can be normal co-perpetration or it can be co-perpetration through others—indirect co-perpetration—which is something that we have used with some frequency in the cases of military commanders and people who use the structures of power as a tool for the execution of crimes.

This has links to developments in civil law criminal theory. It comes from a German scholar, Claus Roxin, who started developing this

theory when he was analyzing World War II cases on the crimes committed through the Nazi structures. It is handy. I think that it is a theory that tends to explain, in a comfortable fashion, what ends up happening in a number of these crimes. It has some clear boundaries. It is not a panacea, but it is developing very nicely in the ICC.

Then we have common purpose liability at the other end of the spectrum, which is a residual mode of liability that captures the lesser forms of contribution. There is no particular threshold for the contribution. Any contribution, in principle, with the corresponding *mens rea*, suffices. Then what we penalize is not so much the contribution to the crime but the contribution to the group that is behind the crime, in the awareness of the criminal agenda. So it is there between conspiracy and aiding and abetting.

**MICHAEL SCHARF:** So this JCE issue really illustrates one of the aspects where the tribunals have been most divergent. In many areas, however, the tribunals have been looking at each other's precedents and have been guided by them. Let us change tracks and talk about one of those. Ever since Slobodan Milošević died of a heart attack before his trial was over, keeping elderly and ill defendants alive through trial has become a recurring challenge for all of the tribunals. Kevin was just mentioning the *Stanišić* case. Last week his Court announced that it would try Stanišić, technically not in absentia, but without his presence, because he waived his right to be present, and he is going to watch the proceedings from back home.

Tell us how the tribunals have generally dealt with this challenge of keeping the defendants alive and how that has made it more difficult for your prosecutions. Anybody can jump in. Kevin?

**KEVIN C. HUGHES:** I am happy to talk about this because, as you mentioned, we have this issue with Stanišić and Simatović. But to step back a second, and to put it bluntly, we deal with it generally

by providing these defendants with some of the best medical care available in the world. It is kind of ironic. Ratko Mladić has repeatedly praised the Tribunal for keeping him alive. He has said himself that he likely would have died if he had not been arrested and treated by the Tribunal. So that is one way that we deal with it.

The Stanišić and Simatović situation is really quite interesting. It is often the case that we have defendants who are ill or are getting quite old. We have had a number of situations, in fact, where trials have ended without a judgment, most recently in the *Hadžić* case, due to the death of the accused during trial. One way we deal with this is trying to encourage the judges to be as expeditious as possible.

Slobodan Milošević probably did not want to see the trial end. But in the case of Jovica Stanišić, he does want to be with his family during this difficult time. So between the Office of the Prosecutor and the Defense there was a common interest. He wanted to be with his family and to get his medical care. We wanted the trial to proceed quite expeditiously. So there was this decision by the Trial Chamber, which we support, that he will be able to remain at his home, receive his medical care, and be represented by his counsel—he has waived his right to be in the courtroom. That is going to allow us, hopefully, to move from a trial schedule of maybe three sitting days a week to four or five sitting days a week.

So in the end, because he wants to be at home and because we want to have the case proceed expeditiously, hopefully this trial is going to end sooner than it would have. And hopefully we will get a conviction that may have been at risk if he had been in the courtroom during the trial itself.

**MICHAEL SCHARF:** Norman, it is not for illness but for the failure of the local authorities to surrender that your Tribunal implemented the idea of trials *in absentia*. So you have defense

counsel who have never talked to their clients, I assume. How have you dealt with that challenge?

**NORMAN FARRELL:** Thank you for the question. First of all, no accused have been arrested at our Court, so the trial is proceeding with just the prosecution and the defense counsel in the courtroom, and the four accused have remained at large. From a prosecution point of view, we still have to prove the case beyond a reasonable doubt and we still have to call all the evidence in, as challenged effectively by the defense. So there is less impact on the prosecution. In terms of the defense, I think it is more difficult for the defense to deal with this situation. They have no accused, they have no client, and they have no instruction from their client. Therefore, they are running their defense based on their alternative theory, or just challenging the prosecution's case. They do not often have their own defense theory without a client.

The one thing I will note, which I have raised before, though not in this context—and it will get a response from the defense counsel, but I stand by my position wholeheartedly—is that the defense counsel have argued, since the beginning, that they cannot agree to any facts, and cannot take a position on any facts because they do not have a client. Yet when they want facts to go in that assist their case, they are more than willing to agree that the prosecution's case goes in in a particular manner. The inconsistency of this position is backed, in part, by the view of some of them that they would be in violation of their National Bar Association if they actually agreed to certain facts.

It took six months after I arrived to get the defense counsel to agree, or at least not to object, that Rafic Hariri died. That was a waste of time, and I do not think there is any legal principle that would prevent you from acknowledging facts that were not contested. It has had an impact on the way in which we present the case and present the evidence.

They would take a different view, but, quite frankly, my view is that they are not working in their national jurisdiction. In my national jurisdiction, I could not prosecute anyone *in absentia*. It is not permitted. We work in a different system and we are bound by the rules of that system. I think there is no reason—despite all the difficulties the defense faces—why they cannot look at their case and decide which aspects they are really going to challenge and save us the time of presenting evidence that is really not in dispute.

**MICHAEL SCHARF:** And, Nick, last night you were telling us that one of the ways that your Tribunal has dealt with this is by severing the case and dealing with a shorter, more compact trial first, and then having the more complex genocide trial come later. I am reminded of when Mike Newton, who is out in the audience, and I were helping with the Saddam Hussein trial. They had the same theory. After they tried and convicted Saddam for the Dujail case, and he was hanged and was not around for the genocide case, they said it was like trying Al Capone for tax evasion and not for all the murders.

Is there a sense in Cambodia that if the defendants do not live for the end of the bigger trial that there is a missed opportunity through this strategy?

**NICHOLAS KOUMJIAN:** I think absolutely. There were definitely compromises, and I think the prosecution opposed the decision at the time requesting that the charges for the first phase of the trial be expanded to include this famous Tuol Sleng, S-21 school. At that time, the prosecution had a list of about 12,000 individuals executed at that one security center. We have updated those lists based on additional work and we now have a list with names of about 18,000 people who were executed at that school. So the answer to your question is yes, I think a lot would have been missed if we had not been able to continue with the second trial and deal with the remaining charges such as the forced marriages, the rapes in the forced marriages, the two genocide charges, and the security centers. It would have been a tremendous

loss. So hopefully the accused live through at least the trial judgment for this second trial where we are dealing with all these charges.

**MICHAEL SCHARF:** The very first time one of these international tribunals dealt with somebody who died right before the judgment was the *Dokmanović* case, and it was not clear under the precedent why, at that point, they could not have just gone ahead and submitted their judgment since the trial had completely concluded.

Ever since then, it seems to be the case that if the last defendant in a case is dead, the tribunal just packs up and does not issue a decision. Is that a good policy or are we somehow erasing history from being written? Go ahead, Fabricio.

**FABRICIO GUARIGLIA:** It is an internationally recognized human right to have your conviction appealed, to clear your name and prevent a wrongful conviction. If you are dead, that is a different story. Your right dies with you, unless you started some sort of compensatory measure, for instance, to allow the family members of the deceased person to appeal on that person's behalf. We have something like that with revision. Again, it is probably from the European continental provision that after the convicted person has died, a plea for revision can still be brought forward by those surviving members of the family. But it seems to me that when the person has died, the process dies with them.

**KEVIN C. HUGHES:** I want to say really quickly that obviously none of us want to see the accused pass away before the trial judgment, but it is really important not to forget that in most of these cases, when the prosecution has completed its case, that means we have put the evidence into the record. The facts are in the record. So, yes, there is not a conviction. There is not a judgment. But for the legacy, for the future, for the people who suffered the crime, the facts have been

entered into the record and I think that is extremely important, and it is not something we should forget.

**MOHAMED A. BANGURA:** In one of the cases tried by the SCSL, the Civil Defense Forces case, we did have a situation where one of the accused persons, Hinga Norman, died after the trial was completed from post-surgery complications. He had been sent out of the country for treatment, and then he died. It was determined that nothing more could be done, that this person is dead, and so the case was discontinued against him. The Court continued with a judgment against the other accused persons.

**MICHAEL SCHARF:** And partly it is a good idea to always have another defendant there who is in better health in case that happens, because otherwise you will not have history written.

Let us go to one of the big-picture challenges that is facing the international justice community. In Africa over the last year, several countries have announced their withdrawal from the ICC or announced that they are contemplating withdrawal from the ICC. At the same time you have Al Bashir, who has been indicted by the ICC, hopscotching across countries throughout Africa, and these African countries failing or, in some cases, refusing to turn him over to the ICC.

So the question is this: What do each of you think will be the future of Africa's relation with international criminal justice? Mohamed, do you want to start us off?

**MOHAMED A. BANGURA:** Thank you. My belief is that the relationship will continue, notwithstanding the posturing that we have seen in recent times, headed by countries who believed they had good reason for wanting to pull out of the Rome Treaty. In fact, we have seen some reversal of those decisions already, in the case of The Gambia and the case of South Africa.



I say that the relationship between African countries and the ICC will continue because, first of all, even though the Rome Statute was created by a multilateral treaty, the relationship is in practice bilateral, meaning that every state has to maintain separately its relationship with the ICC. So you would want to see the number of states that actually are not very supportive of the idea of pulling out of the ICC.

But let us take it even further. Through the African Union, African states are now trying to create an African court—basically a court that will address violations of international humanitarian law and various other crimes. But in their statute they have also included provision for the principle of complementarity, meaning that where a state lacks the capacity or is unwilling to carry out an investigation or prosecution, then the African court can try any situation where there has been a violation.

**MICHAEL SCHARF:** Mohamed, the African court has something different than the ICC regarding head-of-state immunity, correct?

**MOHAMED A. BANGURA:** Oh yes, of course.

**MICHAEL SCHARF:** One thing about the African court is if they say, “Well, we cannot prosecute because he is the head of state,” then ICC can say, “Send them to us.” With the African court you cannot go anywhere for the heads of state, right?

**MOHAMED A. BANGURA:** Oh yes. But my feeling, generally, is that the principle of complementarity is simply that states must be able to exercise whatever remedies they have, and if they cannot, then the case comes to the Court. And if you are still a member of the ICC, as a state, it means implicitly you can have the ICC deliberate on a matter that involves a violation of crimes.

**MICHAEL SCHARF:** Fabricio, I know Fatou Bensouda is spending a lot of her time reversing some of these initial setbacks and has been successful. What has been the general strategy of your office?

**FABRICIO GUARIGLIA:** The general strategy has been that the office has to continue to discharge its mandate and protect it in an impartial manner, while trying to simultaneously engage with African states and build the partnerships we have with African states. I think that one problem here has been reductionism, because we have a few very vocal states that are actually representing the African voice. We have a number of states that are great supporters of the Court, which have been working with us, and they are much quieter. They are also much more intelligent in a number of ways. They are basically building support for the Court in a different manner.

This was a challenge for the Court. It was obviously something of concern to us. But at the end of the day, The Gambia returned to the Assembly of States Parties and South Africa withdrew its withdrawal. Burundi has left the Court, and Burundi, in a way, may think it has good reasons to try to evade the scrutiny of the Court. I will not say anything else right now.

I think that we need to put this in its proper dimension. I think that, in any event, there is a conversation to be had with African countries as to the model of international justice and how they want to develop their relationship with the Court. We are engaged in that conversation, and I think that is an important piece of news.

At the same time, I think it is very important for everyone to know that at the operational level we have kept working with our African partners normally. Cooperation was forthcoming, by and large. We have had some glitches—serious ones, like in the Kenya cases—but we have been working with our African colleagues. We have been obtaining the cooperation that we need to build our cases. We have

been promoting and supporting domestic efforts, we are training local prosecutors, and we are building capacity wherever we can. So there is a much richer story to be told there than the narrative we are getting.

**MICHAEL SCHARF:** Related to that is the question of the international politics of international justice and how it affects what you all are trying to accomplish. I am sure prosecuting the former head of state of Liberia at the Special Court for Sierra Leone was enormously challenging, politically. But David Crane has also spoken about how they contemplated, at one point, prosecuting or indicting Muammar Gaddafi and felt that might be a political bridge too far. At the Cambodia Tribunal, you talked, Nick, last night about how your co-domestic prosecutor has marching orders and that you had to spend a lot of time working on compromises to try to even get the minor cases moving forward.

At the ICC we have had some investigations that sparked a lot of controversy in the last year: the Ukraine investigation, which caused Russia to say it may withdraw; the Afghanistan investigation that has the United States nervous; and the Gaza investigation, where Israel is actually playing a constructive role but, at the same time, is probably nervous. All of those are politically charged.

**FABRICIO GUARIGLIA:** You have opened three investigations that we have not opened, Mike.

**MICHAEL SCHARF:** What are they?

**FABRICIO GUARIGLIA:** Preliminary examinations.

**MICHAEL SCHARF:** Preliminary examinations. Thank you. Let us keep the record clear on that. But they have led to political outcries and nervousness among the international community. Would any

of you comment on how you have dealt with, as a prosecutor, the political milieu that your court operates in?

**KEVIN C. HUGHES:** Since part of my job description is political advisor, I think I can address this question. I think one of the big lessons from the ICTY is that, as Prosecutor Brammertz repeatedly says, prosecutors have to admit and understand and accept that they are working in a realpolitik world. Our objectives, our goals, and our prosecutorial decisions can only be guided by our ethical obligations and the facts and evidence that we have. However, the methods, the timing, and how things get done are ultimately questions that involve very significant political questions.

At the ICTY Office of the Prosecutor, there has been a political advisor since the early days. There was a diplomatic advisor. The chief prosecutor understood that one of the primary functions of that position is to be a diplomatic actor. Again, the prosecutorial decisions that are being made are only guided by the evidence and our ethical obligations. But we do have to recognize that to obtain the surrender of an accused and to ensure that we are getting the right evidence, we have to go out and build support. We have to negotiate with the diplomatic community and the countries that are the targets of some of these investigative activities. So that is the reality. We cannot shy away from it, and we need to embrace it and understand that we have to have lawyers, we have to have trial attorneys, we have to have investigators, and we also have to have people who are performing that diplomatic and political advisory function to ensure that our offices can get the things that we need to be successful in our work.

**MICHAEL SCHARF:** A couple years ago Richard Goldstone, who had launched the very first Yugoslavia Tribunal prosecutions, said, over and over again, that his job as a prosecutor is to ignore politics and just follow the evidence, and I do not think anybody believed that

was true or the best approach. So to hear that there is a much broader strategic approach from you, at the ICC, is very interesting.

Nick, you have had a lot of experience with this. Do you want to add anything?

**NICHOLAS KOUMJIAN:** I want to defend what Goldstone said a little bit. I also worked in East Timor, where there were some difficult political issues. When I was there we got an arrest warrant against General Wiranto, who was then a candidate to be president of Indonesia, nominated by the largest political party. The government of East Timor was quite against pursuing these investigations and the arrest warrant particularly, for understandable reasons. East Timor is a very small country. In their minds, we international lawyers were only going to be there a few years, while the border with Indonesia will be there forever. The Timorese leadership felt that their need to get along with their much more powerful neighbor outweighed the need to hold anyone responsible for the crimes.

But it reminded me of domestic violence cases in domestic prosecutions. In those cases, a woman might come into court after being beaten and say, “I do not want to go forward with this case because I need my husband’s paycheck, and he is the father of my children so I want to drop it.” We eventually recognized in these situations that to protect the woman and to deter future conduct we had to ignore her wishes. The case had to proceed. It is unfair to put the burden on the victim to decide whether or not the prosecution would go forward. That had to be done by the prosecution, and I think, in some ways, the international community has to take the burden off some domestic actors in making these decisions.

While certainly you have to deal with cooperation issues in all of these cases, what is very important is that the international prosecutors maintain their integrity, that they are doing things for the

right reasons, that they are not indicting people without evidence, and that the first thing they look at is whether the person is guilty. Can we prove it beyond a reasonable doubt? Those matters are critical. As much as possible, it is also important that the process be transparent so that people can judge what has happened, and if there is a failure, we can determine the reason and who is responsible.

**MICHAEL SCHARF:** Let me ask one last question for Fabricio before we open it to the audience. Your office's September 15 policy paper on case selection and prioritization, from last fall, has been read in the press as suggesting that the prosecutor is interested in going after corporate offices, potentially for crimes against humanity related to the destruction of the environment. Can you tell us a little bit about the background of that policy, and is that a fair spin that the press has given to it?

**FABRICIO GUARIGLIA:** It was funny because when I saw that our policy had made the international *New York Times* I thought something has been misread, because this is not the type of stuff that usually makes the headlines. And, of course, it was the issue of the environmental impact.

No, we have not added any new crimes or new modes of liability. When we have a cluster of crimes and we try to determine which crimes we want to prioritize, the ICC is in a complicated spot. We have very limited resources. We have growing demands. We have multiple situations spewing up. When we open a situation there are a myriad of cases that we could investigate and prosecute, but we are forced to make choices. There is a whole discussion with state parties as to whether we should be demand driven or resource driven and how far we can go in terms of expanding the structure of the Court.

The reality is we have to make painful choices when we select cases. We wanted to be transparent about it and show the world the criteria

that we are going to use to make that selection. The policy paper is a result of a wide range of consultations, internally and externally. We are saying that we are going to look into the manner of commission of the crimes and the impact of the crimes. Within both manner and impact, the issue of extensive destruction of the environment is one that we are going to consider, because, for instance, you cause displacement by destroying the environment and forcing communities out of a given geographical area, or because the way you attacked the civilian population caused extensive damage to the environment. But it does not add anything new. It just simply adds one element to the same practice that we are going to consider.

**MICHAEL SCHARF:** I wonder if, intentional or not, this sends a signal to corporations to be more careful. That was a signal that Nuremberg wanted to send when they made the directors of the Krupp Group defendants. It was a signal that the Rwanda Tribunal sent when they went after the tea companies and the media defendants.

**FABRICIO GUARIGLIA:** I think it was more about picking up the lessons of history. We know through the experiences of the African tribunals and other tribunals that these crimes go this way. Look at the Kosovo campaign conducted by Milošević. Part of that campaign was a scorched earth strategy, whereby you destroy absolutely everything: you destroy the crops, you kill the animals, and you force the population out, but you also make sure that they do not return, because if they return then the winter is going to kill them because they have no way of surviving.

These forms of victimization do happen. At times they operate under the radar. People do not realize how central they are to the criminal plan and how devastating the results are for the civilian population. But these are the types of things that international criminal jurisdictions should tackle, one way or the other.

**MICHAEL SCHARF:** Okay. Let us open this to the audience. This is always the part of the Dialogs that people go home remembering the most, so I encourage you to come up and take advantage of this opportunity.

**ATTENDEE:** Good morning. My name is Maria Szonert Binienda. I am a Polish American attorney representing some of the families of the victims of the Smolensk crash of 2010 that took the life of the president of Poland, Lech Kaczynski, and the entire Central Command of the Polish Armed Forces.

The question is to Mr. Norman regarding Lebanon. First of all, I would like to know the legal basis of forming the tribunal that you represent, or the body that investigates the death of President Hariri. And the second question is what are the finances behind this process? Who is paying for it? And the third question is would you have any recommendations for the current Polish government to pursue the investigation of the Smolensk crash? For all practical purposes, the investigation between 2010 and 2016 has been obstructed completely. Thank you.

**NORMAN FARRELL:** First of all, thank you for your question. There was an initial attempt by the Lebanese government and the United Nations Secretary-General and the Secretariat to reach an agreement for the investigation and prosecution. That never happened. When the agreement failed, a number of states introduced a resolution before the UN Security Council under Chapter 7 of the UN Charter. That Security Council resolution created the Tribunal, giving us the authority to investigate and prosecute through this independent body based in The Hague. Funding comes from the Lebanese government and by voluntary contributions from states. We are not a UN body so we do not get a regular budget within the UN. We spend some of our time—as the other prosecutors here from similar tribunals know—raising money from states who support it.



In terms of the pursuit of an investigation domestically, there was a finding by the Security Council that Lebanon required support and expressed concerns regarding the ability to investigate and prosecute this case, so it had to be brought to the international level. An assessment was made as to the capability or willingness of the domestic jurisdiction to proceed. That was the first step. If a situation is not brought to the attention of the international community where there are other alternative means for the creation of criminal investigative institutions, and if it is left to the domestic level, then, of course, you are left with whatever the domestic decisions are.

**ATTENDEE:** Thanks for your remarks. I am Mark Drumbl. I am a law professor at Washington & Lee University. You have spoken very eloquently about accomplishments and objectives, and you have spoken very carefully about challenges and obstacles. I want to ask you about a different human emotion, and that is the emotion of disappointment. I would like to ask you what has happened in the past year in your tribunal or respective institution that has left you feeling disappointed and empty? Thanks.

**FABRICIO GUARIGLIA:** You don't want to see five grownups crying, right?

[Laughter.]

**KEVIN C. HUGHES:** Believe me, I have had quite a number of disappointments, and it may not be the best thing for me to do but I am happy to speak about them. In the last year, my biggest disappointment has been the backward trend in national war crimes prosecutions in the countries of the former Yugoslavia. Prosecutor Brammertz has spoken about this repeatedly to the United Nations Security Council. We are regularly seizing this issue with the European Commission, European states, the United States, and anyone we can speak to, yet we are seeing very little effective action. We are seeing very little change.

Most recently, the first Srebrenica genocide trial in Serbia was revoked due to a purely formalistic reasoning by the Belgrade High Court. It is extremely disappointing. The victims are absolutely devastated. It took years and years and years of effort to get this case transferred to Serbia and to get them ready to prosecute it, and to have the Court revoke it solely because the prosecutor, who was acting at that time, had not been formally appointed by the republic prosecutor is just really a disappointment.

We are seeing this repeatedly. Where I would say five years ago the trend was very positive in national war crimes prosecutions, it is now dramatically reversed. The only bright spot I find today is, surprisingly enough, in Bosnia and Herzegovina. Due to a lot of engagement, particularly by our office, the situation has changed in Bosnia in the last year and a half. They are now on the right track. We are seeing some positive prosecutions and investigations. For the first time in relation to the conflicts in the former Yugoslavia, the Bosnian prosecution has issued an indictment that was confirmed for crimes against humanity committed by Bosnian-Croat forces against Bosnian-Serb civilians in the Posavina region. That is an enormous precedent. Even our Court did not issue such an indictment.

So in Bosnia there is a big change. It is going in the right direction, but more generally throughout the region, politics, denial of crimes, and hero-worshipping of convicted war criminals are getting worse and worse.

**MICHAEL SCHARF:** Kevin, I am going to ask you a follow-up about how the Tribunal was designed by the Security Council in part to facilitate reconciliation. Outside of Bosnia, is it failing to do that twenty years on?

**KEVIN C. HUGHES:** I think the Tribunal has facilitated reconciliation in the sense that accountability is essential for reconciliation. Is there effective reconciliation today? No. Is that

partly the Tribunal's responsibility? I would say of course, yes, because we definitely did not do enough in terms of outreach, in terms of explaining our judgments, and in terms of engaging with the communities. I really do not want to be seen as passing the buck here, but I honestly believe that the primary responsibility for the lack of reconciliation is with the national authorities who are continuing to use the politics of ethnic division, the politics of divide, and the politics of hatred to secure power.

There is also the failure of the international community to hold them accountable for that. I do not think that the European Commission and the United States have been nearly strong enough in explaining to these countries and officials that the denial of genocide is unacceptable, that hero-worshipping of convicted war criminals and generals who oversaw the ethnic cleansing of 800,000 people is unacceptable. There needs to be stronger words from the international community to these local actors.

**ATTENDEE:** Hello. My name is Valerie Oosterveld. I am a law professor from Canada, and I have a question for Prosecutor Bangura. The Special Court for Sierra Leone was the first to close and transition into a residual special court. What have been the greatest challenges the Residual Special Court has faced over the last three years?

**MOHAMED A. BANGURA:** Thank you very much. I was almost tempted to jump in on the last question as to disappointment, but you have put me in the right spot on this.

Primarily, the biggest challenge that the Residual Court faces today is one of funding. I think earlier Norman mentioned the fact that the mode of funding of most of these tribunals now is based on voluntary contributions. Throughout the life of the Court itself, we had funding by that method. Now, in a residual phase, we are a smaller, leaner

court. Our budget is just in the region of about three million compared to twenty or thirty million a few years ago in our normal court life. Raising that money has become a huge challenge year after year. Since the Residual Court started, we have had to look to the UN for subvention grants, and that requires us to prove that we have exhausted the option of going around, cap in hand, begging. That remains a huge challenge and it is even threatening our survival, in a sense.

What we have been seeking support for, from the international community, is a sustainable kind of structure that ensures our continued survival without the need to go around cap in hand. In most cases, these efforts yield nothing, so we go back for subvention grant to the UN. That remains a huge challenge to the survival of the Court.

**FABRICIO GUARIGLIA:** Can I add one thing to that? You will see that if all of us start talking about our different budget problems we will be here for a few hours. And at some point I would need to order a beer so I can start forgetting about it.

But there are some profound questions as to the sustainability of the criminal justice project because what you have here is criminal justice in different places, with different aspects, but all part of a global struggle against impunity, which you either do properly or you do not do it properly. To try to do it on the cheap is an insult to the victims. And if you have to do it on the cheap and fail, what purpose are you serving? Increasingly you see that the international community and those who are paying seem to be getting some international justice fatigue. And at times you get the feeling that no one is listening when you show up and say, “Look, we’re making a difference here. Look at this. Look at that.”

Talking about Mark Drumbl’s frustration from last year, I thought some of the discussions from yesterday and in the last year were

disheartening because you get to the point where you just say, well, at the end of the day do you really want this court? Do you really want international criminal justice? Do you believe in it? If the answer is yes, there is a price tag to pay, which I think, compared to other things, is a very cheap price tag that brings our good, positive results.

**MICHAEL SCHARF:** Final question.

**ATTENDEE:** My name is Albert. I am here from Rwanda. My question goes to Bangura regarding the discussion we had on the ICC and the involvement of African countries. I do support African countries. They should do more to accept and support the ICC. But I am not seeing the same pressure that is put on African countries to stay with the ICC as on the United States, and countries like United States, to ratify the Rome Statute. I would like to hear your comment on that.

**MOHAMED A. BANGURA:** I do not think I am competent enough, being, first of all, a non-American, to take on the job of getting the United States to ratify the Rome Statute. While I agree with you that it is important and it would help to boost the image of the United States in ratifying the Statute, it is obviously something completely out of the scope of what I am able to do. I do not know whether somebody else here would like to comment.

**MICHAEL SCHARF:** I would add that the question of ratification is not currently the most important question. The current question is whether the United States is going to continue to be an influential supporter of the ICC or to be a hostile outsider, with all the implications of that. We had some conversation about whether the Trump administration is going to discontinue the Office of the Ambassador-at-Large for War Crimes Issues, in its new title, which would be a sign that it is going to be a hostile outsider and discontinue the policies that both Republican and Democratic administrations have had of

supporting the ICC and referring cases through the Security Council to the ICC. So stay tuned, everybody, and we will see how that unfolds.

Everybody, a big hand for Mohamed, Norman, Kevin, Nick, and Fabricio.



## **Roundtable: Changing Times – New Opportunities for International Justice and Accountability**

*This panel was convened at 2:30 p.m., on Monday, August 28, 2017, by its moderator, Mark Drumbl, Professor of Law and Director, Transnational Law Institute, Washington and Lee University, who introduced the panelists: Valerie Oosterveld, Professor, University of Western Ontario Faculty of Law, and Associate Director, Western University Center for Transitional Justice and Post-Conflict Reconstruction; BG Mark Martins, Chief Prosecutor of Military Commissions, Washington, DC; Hon. Duncan Gaswaga, Judge, International Crimes Division, High Court of the Republic of Uganda, and Fellow, Commonwealth Judicial Education Institute; David M. Crane, Professor of Practice, Syracuse University College of Law; and Robert Petit, Senior Counsel, War Crimes Office, Canadian Department of Justice.*

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**MARK DRUMBL:** This is a very exciting panel and I am really thrilled to be part of it. The topic is “Changing Times – New Opportunities for International Justice and Accountability.” I think it is particularly exciting that the International Humanitarian Law (IHL) Dialogs are picking up pictures of dialoguing about justice through multiple forms and multiple venues. The heart of our panel today is what I would describe as the new, the novel, the innovative—something that is undiscovered and under-discussed, whether generally or more specifically, to the topics that are raised at the IHL Dialogs.

To me, novelty and innovation and newness can arise on multiple fronts. One front, of course, is in terms of the methods of justice. Another way to innovate is by thinking about challenges to overcoming impunity that take different forms. We can also diversify our conversations about where places of injustice may be, and we can energize conversations by looking at opportunities to do better



in different ways, in different places, and by welcoming a much broader array of faces. I would ask our panelists here today to use this as an opportunity to identify one or two such opportunities for entrepreneurial and creative thinking.

I will very briefly introduce our distinguished panelists today, in the order of speaking, and I encourage them, when they open their remarks, to offer a little bit more about their backgrounds and experience, and how they have come to some of these particular issues.

Our first speaker will be Associate Professor and Associate Dean Valerie Oosterveld from the University of Western Ontario Faculty of Law, where she also serves as Associate Director of Western University's Center for Transitional Justice and Post-Conflict Reconstruction. Valerie has been a pioneer in thinking effectively and programmatically about addressing gender issues within international criminal justice, and I am happy to say we went to law school together.

She will be followed on our panel by Brigadier General Mark Martins, who serves as the Chief Prosecutor of Military Commissions in Washington, DC. Prior to this assignment, Brigadier General Martins was deployed to Afghanistan where he served as the Interim Commander and then Deputy Commander of Joint Task Force 435, and is Commander of the Rule of Law Field Force. Also of interest, I noted in his bio, is that he is a Rhodes Scholar, and we will leave it at that.

He will be followed by Justice Duncan Gaswaga, who has an absolutely fascinating judicial background. He is currently a judge of the International Crimes Division of the High Court of the Republic of Uganda and a Fellow of the Commonwealth Judicial Education Institute. In his capacity as a judge on the International Crimes Division, he is positioning himself, judicially, at the intersection and forefront of some of the most complicated issues of transitional justice—amnesty, accountability, trial, definitions of war crimes

and crimes against humanity—and he has a real opportunity to try to operationalize international justice at the national level. Of great fascination in his particular background is that he had had previous experience in dealing with issues of piracy—not personally, but at the judicial level—so another fantastic opportunity.

Our last two speakers I will take much less time in introducing since they are well known to all of us. Our fourth speaker will be David Crane, Professor of Practice at Syracuse University College of Law, and one of the founding beating hearts of the Dialogs themselves. Our last speaker, who we also had the joy to hear last night, is Robert Petit, who has a distinguished and varied legal career in international criminal justice in a variety of institutions, and is now doing what might be one of the most important future steps in our particular field of accountability, namely, thinking about this operationally at the national level.

Each speaker will have up to fifteen minutes. It will give us lots of time afterward for questions, answers, commentary, reflection, and rumination.

Valerie.

**VALERIE OOSTERVELD:** Thank you very much, Mark. Normally I research and speak in the area of sexual and gender-based violence, but I am not going to talk to you about that today. I am going to speak to you about Canada's Truth and Reconciliation Commission (TRC). In Canada, the TRC is quite well known, but outside of Canada that is not necessarily the case.

The TRC was created to deal with the treatment of Indigenous children in residential schools. Residential schools for Indigenous children began in Canada in the 1870s. These were government-funded, church-run schools, and they were set up with very specific

goals. First, these schools aimed to remove and isolate Indigenous children from the influence of their homes, families, traditions, and cultures, and second, these schools aimed to assimilate them into the European, Christian-dominant culture in Canada. These goals were based on the assumption, at that time, that Indigenous cultures and spiritual beliefs were inferior and unequal, and residential schools were specifically tasked—and this is an infamous phrase now, in Canada—to “kill the Indian in the child.” These objectives were stated by Canada’s first prime minister in Parliament in the 1800s and were reiterated in Parliament as late as 1969.

Over 130 residential schools were located across Canada. Most of the schools had closed by the 1970s, but the last school closed in 1996, which is shockingly recent. From the 1870s until 1996, more than 150,000 First Nations, Métis, and Inuit children were taken from their families and placed in these boarding schools that were intentionally placed far away from their homes so their families could never see them and interrupt the assimilation process.

In 1920, under the Indian Act, it became mandatory for every Indigenous child in Canada to attend a residential school and illegal for them to attend any other kind of school in Canada. There are more than 80,000 survivors of residential schools living in Canada today.

Residential schools provided an inferior education, often only to the level of grade 5, even though many students stayed until the end of high school. The schools were focused on training Indigenous children for manual labor in agriculture, light industry, or domestic work, like laundry and sewing.

These schools created massive intergenerational impacts. Social problems stemming from PTSD, alcoholism, substance abuse, and suicide were passed from generation to generation, and the schools created a gap for the victims and their families as they could not

experience and pass down Indigenous traditions and cultures. Parents were not allowed to pass their cultures down to their children. The children grew up with no experience of a nurturing family life, and, indeed, brothers and sisters were not allowed to interact with each other within residential schools.

While some former students had positive experiences and told the Truth and Reconciliation Commission about them, many more suffered neglect and abuse. In fact, the TRC identified emotional and psychological abuse as being absolutely constant; physical abuse as common and used as punishment; and sexual abuse as very common. These abuses were compounded by overcrowding, poor sanitation, and severely inadequate food and health care, resulting in a shockingly high death toll among these children. Many of the children's families also never knew where they were buried.

In the 1990s and 2000s, former residential school survivors decided to take to court the federal government, as well as the churches—Roman Catholic, Anglican United, and Presbyterian. Their cases led, in 2006, to the Indian Residential Schools Settlement Agreement. While part of that agreement was related to financial compensation for these experiences, another part of the agreement was to create a Truth and Reconciliation Commission, which is the TRC I am talking about today.

Due to the fact that they were settling out of court, the former students were worried about their stories being lost. They therefore insisted upon the creation of a TRC. They wanted their experiences to be put on the historical record.

The TRC began operation in 2008, immediately after Canada's prime minister issued an apology on behalf of the government to Indigenous peoples for the creation and running of the residential schools. The TRC operated between 2008 and 2015 and heard over

6,000 witnesses. In 2012, it issued an interim report titled, “They Came for the Children,” and, in 2015, issued a multi-volume final report. The multi-volume final report clearly identified that Canada had committed genocide through the residential schools policy, and it defined cultural genocide.

The TRC report contained ninety-four Calls to Action. These Calls to Action related to everything in Canadian society: what governments, individuals, corporations, public institutions, et cetera, could do. Of these recommendations, there were seventeen that were law-related, and they were put in a special section titled “Justice.” It was very important for the TRC to deal with justice issues because of the role law played in facilitating and carrying out the residential school system in Canada.

I am going to focus on one particular recommendation today, and that is Call to Action 28, which said: “We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown [the federal government] relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.”

The Truth and Reconciliation Commissioners recommended this because of the role law schools play in creating the foundation of knowledge for those who go on to practice law. The Commissioners saw that if law students could be taught early about the history of Canada and the role law played in residential schools and intercultural awareness, they could carry this knowledge into the practice of law.

This Call to Action, with respect to law schools, led to quite a bit of soul-searching and a lot of debate in law schools across Canada.

There are twenty-two law schools in Canada, and there were twenty-two very different discussions across Canada about what to do. For any of you who work in academic institutions, it will not be a surprise to you that there were a range of positions and the discussions were long, complex, and very psychological, as well as theory-based.

In the end, the law schools adopted different approaches. The debates were, first of all, about whether they should implement this Call to Action, which is a recommendation. Secondly, if, as a law school, they decide they should, how should they do it? The recommendation is for mandatory courses and mandatory intercultural training for all students, but some academics were worried that mandating the courses and training might undermine the goal, as some students might tune out.

My law school decided, after quite a bit of soul-searching and discussion, to update and reinforce a module that all first-year students must take. This is the mandatory part. They must take an Indigenous law module in a course called “Orientation to Law and the Legal System.” We created a partnership with a local area First Nation, and that First Nation hosted an Indigenous Law Boot Camp. For three days, students and faculty who wished to go learned about the Indigenous law as practiced in that particular area, Anishinaabe law. Many law schools in Canada now organize this sort of boot camp in Indigenous law.

We also hosted Western Law Reads, where everyone who wanted to be involved read a particular book on Indigenous law in Canada, and then we discussed it and debated it. We also did an audit of all of our courses and determined which ones could include expanded references to international or domestic. Finally, we implemented more outreach measures. We created a free law school admission test course for Indigenous students—any of you who are in the academic law school environment know that these courses can be very expensive—and we also sought applications from those students.

Other law schools have done very different things. On the far end of the spectrum is the University of Victoria, which created a joint JD/JID degree. The JID degree is a law degree in Indigenous law: students can pursue both law degrees jointly. This law school also created an Indigenous law research unit. That is the deepest step taken by a law school to implement the TRC Call to Action.

Lakehead University, which is located in northern Ontario in an area with many First Nations reserves, has three sets of mandatory courses for its law students. First, students take a semester-long mandatory course called Indigenous Legal Traditions. Second, Lakehead offers another course called Aboriginal Perspectives, which is an experiential learning course. Finally, in their second year all students must take a full-year course on Aboriginal Peoples and the Law.

University of Ottawa created an optional Indigenous law stream within its JD common law curriculum. As part of this stream, twenty students take Maanaajitooon/Torts in their first year. Maanaajitooon is a local Indigenous word for resolving disputes that are like torts. This course considers Anishinaabe, Haudenosaunee, Dene and Métis law, as well as Canadian common law. The University of Ottawa also has an Elder in Residence. This is the very first law school in Canada to have an Indigenous elder in residence from a local area First Nation. This person helps to inform the curriculum, inform the research, and work with the students on Indigenous law issues.

I will end by saying that these initiatives happening within law schools are just a microcosm, because Call to Action 28 is only one of over ninety calls to action. All across Canada, these discussions are being had. There are many other Calls to Action that apply to educational institutions, so my university has adopted an Indigenous Strategic Plan. Part of the strategic plan involves hiring more Indigenous faculty, including within my own law faculty. All across Canada, universities are also hiring Indigenous faculty.

There are also symbolic steps. Some universities, such as my own, are acknowledging that they are located on Indigenous territory. At every significant gathering we have at my university we recognize that University of Western Ontario is situated on the grounds of the Attawandaron—or the Neutral peoples—as well as the Algonquin, the Haudenosaunee, the Anishinaabe, and the Lenape peoples. That symbolic recognition is meant to decolonize the Canadian relationship with Indigenous peoples. I will end here.

**MARK DRUMBL:** Thank you. In fact, you stopped thirty second early.

**VALERIE OOSTERVELD:** Fantastic.

**MARK DRUMBL:** So, Mark, you do not get to keep that time, but you get to start thirty seconds early.

**MARK MARTINS:** Thank you, Professor. I am grateful to Dave Crane, old friends Jim and Pam Johnson, Michael Newton, Michael Scharf, and Mark Agrast for welcoming the United States Office of Military Commissions and me to participate in this dialog. I have to say that it can be a bit daunting for a simple infantry soldier and the son of second-generation immigrants to the United States such as I am, to be here, experiencing with such immediacy, the spirit of Chautauqua, of Justice Robert Jackson, of Geneva, of The Hague, and of Nuremberg, through the books and speakers we have had, with such diverse applications as Cambodia, the former Yugoslavia, Lebanon, and Rwanda.

But I am encouraged to add a voice to the dialogs on international humanitarian law itself. A revered Old Testament Psalm, in many texts of civilization, says that a just law gives wisdom to the simple. Jim Johnson would say, “Hey, I need a lot more than that.” The Military Commissions Act of 2009 is a piece of legislation that was



broadly supported in the United States Congress and signed into law by President Barack Obama. We are built around a military justice system. The Department of Defense and the United States are very proud to be subordinated to the rule of law and to fulfill the rule of law. Part of that is to enforce the rule of law through the courts-martial system, as necessary.

The Military Commissions Act has the law of war and international humanitarian law in its first section, in its last section, and in many of the sections in between. The definition of hostilities is a key jurisdictional component of our practice. Our jurisdiction is limited to situations of hostilities, and each of our offenses has to have taken place in the context of, and associated with, hostilities. That is an international test.

Some of you may be familiar with the *Tadić* case at the International Criminal Tribunal for the former Yugoslavia (ICTY) and with Elihu Root. This has to be a protracted armed conflict, as Elihu Root said in the context of the Philippine armed conflict that we were involved with over 100 years ago, and then the *Tadić* case also spoke of this test at the ICTY. It has to be protracted violence of a nature, scope, and intensity such that a nation must use its military to defend itself. And that is what all three branches of our government say we are in with al Qaeda and associated forces. We have an authorization for the use of force. We understand this is not how the world necessarily sees it, but it is certainly the law of our land.

Under the 2009 Military Commissions Act there is a convening authority, an official with the same roles entrusted to commanding officers under the 1950 Uniform Code of Military Justice by which our service-members are disciplined. Under the Military Commissions Act, the original convening authority is Secretary of Defense James Mattis. He, in turn, is authorized to delegate the duties to another senior U.S. official. Presently, that designee is Harvey Rishikof.

I am a prosecutor. Our office brings charges. We must investigate them. We must ensure that we can prove the offenses, and then we forward them to the convening authority, who, at this point in the process, serves something of a grand jury function, providing a testing of the charges, to ensure they state an offense under the applicable law and that the accused is the one who did what is alleged in the charge sheet. If convening authority Rishikof makes these findings, he will then refer the case to a military commission, which is a board of officers. It is a board of five or more officers when the case is not subject to capital punishment. It has to be at least twelve when it is a capital case.

At that point, a trial ensues that almost all of you will recognize. The accused is presumed innocent. The prosecution must prove guilt beyond a reasonable doubt. The accused is entitled to notice of charges in a language he or she understands; the right to counsel, and in a capital cases so-called learned counsel (capitally qualified counsel), at government expense; the right to be present at trial; protection against self-incrimination; and protection against the use of statements that are obtained as a result of torture or cruel, inhumane, or degrading treatment. The standard for admissibility of a statement is that the statement is voluntary under a totality of the circumstances. There is also the right to compulsory process, which refers to the state going out and making sure the accused can get witnesses, and certainly the ability to confront the witnesses that the prosecutors and I will bring.

In regard to exculpatory evidence during discovery, our law refers to *Brady* and *Giglio* constitutional obligations, which mean I have to turn over that which undermines my case. That is an ethical responsibility and a legal responsibility of prosecutors. The accused has the right to an impartial decision-maker, which refers to people in the jury who have no connection to the case and are subject to examination and challenge by opposing counsel. Accused persons also have the right to protection against double jeopardy, so they cannot be charged and tried for the same offense twice; the right to represent themselves, if

they do so knowingly, voluntarily, and intelligently (they do not have to take the lawyer that has been assigned to them); and the right to appeal.

Our first level of appeal is a military-civilian court called the United States Court of Military Commission Review (USCMCR). That court is referred to as an “Article I” court, in that its authority is derived from Congress’s powers under Article I of the Constitution. The next level of appeal for an accused convicted before a military commission is to an all-civilian “Article III” court—its authority is derived from the judicial power under Article III of the Constitution—and that court is the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). If the accused loses at the USCMCR and at the D.C. Circuit, he or she may appeal by petition for writ of certiorari to the United States Supreme Court. So those are the rights the accused gets in our system.

We currently have seven arraigned accused, all of whom by law are thus presumed innocent. I am a sitting prosecutor. I will certainly stay within the bounds of my obligations in my comments here today, and caution you that I am speaking about *alleged* offenses. We have arraigned the five co-accused, Khalid Sheikh Mohammed, Ramzi bin al-Shibh, Walid bin Attash, Mustafa Al-Hawsawi, and Ali Abdul Aziz Ali, alleged to have committed the 9/11 attacks. We also have arraigned Abdul al-Rahim al-Nashiri, the alleged bomber of the USS *Cole* in October of 2000, and Abdul Hadi al Iraqi, who is an Iraqi alleged to have led field forces of al Qaeda in Afghanistan following 9/11, when international forces arrived in Afghanistan. We have two other cases where the individuals have been found guilty and are in various states of post-trial process, short of sentencing. One of them we will actually be sentenced in about a week.

Then there are three cases that are very active on appeal, including one, Ali Hamza Suliman Ahmad al Bahlul, which was just decided last summer by the United States Court of Appeals for the District

of Columbia Circuit. We are not sure if the Supreme Court is going to grant the convicted accused's petition for certiorari in that case. Bahlul was convicted of his role as essentially an al Qaeda's pre-9/11 suicide recruiter. He made a very well-known propaganda video, "State of the Ummah," which had pictures of the USS *Cole*. This was used to indoctrinate, among others, the 9/11 suicide attackers.

I have a rather large office with many active cases, wonderful public servants from across our government, and at any given time six to eight career prosecutors from the Department of Justice (DOJ). These attorneys are from the National Security Division of the DOJ, field U.S. attorneys' offices, and judge advocates from all services—Army, Air Force, Marine Corps, and Navy. We also have wonderful paralegal specialists from all services, civilian analysts, twenty to twenty-five full-time Federal Bureau of Investigation agents, and many Department of Defense investigative law enforcement officers from the Army Criminal Investigation Division, Naval Criminal Investigation Service, Air Force Office of Special Investigations, and others.

We have defense counsel who are quite formidable. Some of you may know that Jim Harrington is defending Ramzi bin al-Shibh. He is a long-time defender from Buffalo, New York. There is also Cheryl Bormann, a capital defender out of Illinois and Rick Kammen, who defends Abdul Rahim al-Nashiri and is one of the most accomplished capital defense attorneys in Indiana, among others. Our trials are also not harmonious: we clash, as you would expect.

One idea for advancing the goal of the group gathered here—namely to end impunity and to go after it wherever it lives—is to use national forums, as well as the esteemed international forums we have been hearing about, to enforce the norms and rules of international law. We in military commissions refer to and cite these norms and rules every day in our proceedings, and in this way pursue essential principles of justice.

Thank you.

**MARK DRUMBL:** Thank you. Our next speaker will be Judge Gaswaga. We look forward to hearing from you, sir.

**DUNCAN GASWAGA:** Thank you very much. I would like to thank the organizers of this event for the invitation. I have no doubt that these are changing times and a lot of things are happening, especially in the area of international humanitarian law. We have already had a look at the manner in which offenses are committed, the technology that is applied, and the legal regime used—for instance, modes of liability and so on. A lot is changing. I feel these changes present some challenges as well as opportunities. I want to look at the opportunities.

In Uganda, we have the War Crimes Division, where I work with six other judges, although two have recently retired. They are just completing their work. This War Crimes Division is supposed to deal transnational and international crimes as well. Now, how do I look at it as an opportunity? Before I do that, I want to look at how it came about.

I am sure most of you have read about the war in Uganda between the government of Uganda and the Lord's Resistance Army (LRA) that has lasted over twenty years. It was agreed, in Juba, South Sudan, that some things should be done in order to end this war, one of them being that a War Crimes Chamber should be set up, and those people who have committed grave breaches of international humanitarian law and human rights law, should be dealt with and prosecuted.

Already, one person is before the International Criminal Court (ICC). A group of the top leaders are supposed to appear before the ICC, and others are supposed to appear before this Chamber. At that time, the Chamber was called the War Crimes Chamber, but the name changed a few years later to International Crimes Division (ICD). I do not know what is in a name anyway. It was as a result of a

resolution that was written by the Chief Justice of Uganda because the International Crimes Division is a division of the High Court of Uganda. So we are talking about a domestic court that is going to deal with international and transnational crimes.

As a result, this court took on seven judges. It has a registrar and it has a prosecution unit, although that prosecution unit falls under the Directorate of Public Prosecutions of Uganda. Under that particular unit we also have investigators. These are also attached to the Uganda police. We do not have foreigners, so to speak, working in this system, although we have some that do advise.

In the war between the government of Uganda and the LRA there were many deaths and a lot of destruction of property. A number of other crimes were also committed. They needed a way to address all these crimes. How should these atrocities be dealt with? It was felt that we would receive an answer by establishing the War Crimes Division. How is it operating right now? We have registered about thirteen cases, and I believe two more came in last week. One of them is purely a war crimes case, and that is where our main interest lies.

When the mandate was enlarged in 2011, we also included the cases of piracy, human trafficking, and terrorism. We have concluded two terrorism cases. Those have been fairly easy, but the war crimes case has proven to be a problem. I will speak about it later. Let me first look at these other cases. The terrorism cases were easier because we had most of the witnesses there, they were not that expensive, and we managed to hear the evidence and conclude them quickly.

The war crimes trial is the case of Colonel Thomas Kwoyelo. Right now I would say we are at the pretrial level, after all these years, because when he was arrested and placed in detention in 2009, he decided to apply for amnesty. This was because there was a law that had been enacted in Uganda to give amnesty to some of the people

that had participated in the LRA war. They would be forgiven if they applied—and without actually giving the details of what they did—as long as they admitted that they had committed some crimes and they were ready to give up rebellion. That has caused other problems in the *Kwoyelo* case. I want to end with the *Kwoyelo* case, and I will come back to this when I am discussing it.

This division has no permanent judges. The judges that work there work elsewhere as well, the reason being we have very few judges. Yet the government wants those that committed atrocities in the LRA war to be prosecuted. At the same time, a lot of resources are needed, and I do not think they are ready to give those resources as of now. The other reason is that because of the amnesty act, and particularly Section 3, some people believe that those who should have been prosecuted are not being prosecuted and will not be prosecuted because they have already been given amnesty. This also carries with it a lot of other problems, which I will not go into today.

In the case of *Kwoyelo*, there is an application of international law as well as domestic law because the laws that were supposed to apply before the ICD are those of Uganda. We have the Constitution, the Geneva Conventions Act, the ICC Act—which we have domesticated and applied with the necessary modifications here and there—the Terrorism Act, and so on.

The prosecution decided to bring twelve counts in their indictment against *Kwoyelo*. Later, when *Kwoyelo* had unsuccessfully applied for amnesty, the prosecution decided to continue with the trial and amended the indictment to add fifty-three other offenses. The problem is that most of the offenses were brought under international law and the others were brought under our domestic law, the penal code.

I am also being very careful when talking about the *Kwoyelo* case because I am one of the judges that agreed to decide it. I should not

get into the merits here. But those are decisions. I am trying to explain what I feel is going to raise some issues, and already the defense has intimated that they will be raising certain objections to the indictment, which is yet to be confirmed by the pretrial chamber.

Now, on top of that, we feel that the ICD should be able to deal with these crimes, including international crimes, but there are going to be objections. I have already intimated as much. I am trying to be careful. I do not know how I should put it, and is it a bit problematic. But there are definitely going to be objections.

The issue I am trying to get across here is that the applicable law is an issue for the ICD. How do you bring international law into the domestic jurisdiction? We shall deal with that question when the time comes.

The ICD faces numerous problems, and through my coming here I feel that I will also have interactions with quite a number of you and will be able to find some solutions. One area giving us a lot of problems is that in the cases that we have done, we have no witness protection program. In the *Kwoyelo* case, even on the ground, where the offenses were committed, some people told the judge, “We will not come to testify unless we are protected.” You see, offenses were committed in a particular society. These people are neighbors living with each other, and they know exactly who did what and how, but they will not come to testify unless they are assured of protection.

The other is that we have our rules of procedure and evidence, which we adopted recently, where we decided that we should borrow a page from some of the international criminal courts and other jurisdictions to help us. This is a domestic court, yes, but given the nature of the cases that it is going to deal with, we need to have some special procedures. Witnesses want to participate and the rules do provide for their participation, but the mechanism is also another very big challenge, even at the pretrial level.



In the few cases we have concluded, one being a terrorism case where people were killed while watching the World Cup in Uganda in three different areas, the people who were supposed to testify told us that they would not come. That is how some of the people managed to escape liability. The others, where at least we had people coming in, we managed to get some evidence.

For this particular trial, the war crimes trial, I will not tell you that we are worried. We have had a bill before Parliament since 2012 that has not yet been tabled. How do we handle this? We do not know the reasons why the bill is not being tabled. But these cases involve a lot of politics. Sometimes we may not even be aware of the issues. So we pick some parts of the bill and place them in the rules of procedure and evidence, where we come up with some arrangements as a court to be able to protect some witnesses. But we cannot offer much.

I am sorry. This may sound like I am reading from the Book of Lamentations, but we are here for justice, and I really want to borrow a lot from you.

I have just a few minutes left. I am sure many of you have read about this Court. We are trying to do our best, and we are not ready to give up. Recently, they almost closed down the Court, saying, “Well, when we look at other divisions, they produce a lot of judgments, but you have produced one judgment in one whole year.” It was true, but how do we go about that? Of course, these cases are so demanding. There is a lot that is needed. That case, which we concluded, had eighty-four witnesses, some of them ferried in from various countries. It went down, I think, close to 500 million Uganda shillings. They were looking at this one judgment, and then all the other divisions—the land division, the commercial division—that are churning out a lot of judgments. How do we go about that?

At the ICD we should be able to deal with international and transnational crimes within a domestic setting. This is the first one in the region, and many people are trying to see what we are doing. Others want to establish such courts. But we are facing all these problems, and I have just hinted at a few, as you can see. There are a lot. I could talk about this division all day.

I want to end on that note and by asking you to join us in this struggle so that we can look at international justice and accountability and bring all these people that I hope to book. We do not let them just roam the streets. We do not want to encourage impunity, because if that Court fails, that will be the end of it all. We will have authenticated impunity and the other people that want to borrow from us will not be able to do so. It is unfortunate that there is little time. Thank you.

**MARK DRUMBL:** Thank you. Following our speaking order as presented, David.

**DAVID CRANE:** Thank you, Mark, and, again, it is a real pleasure to talk to you every year, as good friends, as we go through the Dialogs. I am really heartened to see a lot of students here. When we were putting together the Dialogs one of the key aspects was student involvement. So again, you are welcome and we are glad to have you among us.

I have been sitting here listening to some very fascinating ideas and domestic solutions to national challenges from Canada, the United States, and Uganda. I am going to shift this a little bit and put us back at the international level and discuss some interesting alternatives as we approach the issues regarding Syria. We live in a very kaleidoscopic world. I am a child of the Cold War and I thought that was a pretty crazy time, but I have never seen a world more challenged since the Cuban Missile Crisis. We have shifting power structures. Old world alliances that we relied upon in the Cold War are challenged, weakened, and questioned. We have a multitude

of dirty little wars around the world. No one seems to be following any of the laws of armed conflict. International criminal law is being questioned and challenged and seems to be wavering because of these geopolitical challenges that we face.

And, of course, the bright red thread of international criminal law, as you have heard me say many times, is politics with a small “p.” And right in the middle of all this is the tragedy that was, and is, Syria, because of the fact that in order to create some type of justice mechanism for the victims of these atrocities, we have to have that all-important political support—a political will, a political desire—to do something about that. I know that morally and personally we are horrified by all of this, and the world community, individually and in groups, is horrified by this. There is a great interest of doing something, but because of the geopolitical checkmate that is going on between various powers and the current situation in Syria, there is little to be done.

Well, there is something to be done, and in the past seven or eight months, a very significant new organization has been created, which I think augurs well for the future. I am not going to get into the Syrian tragedy. I have been involved in this issue since the very beginning, in March of 2011, and through the Syrian Accountability Project I have been working on a conflict map and a major incident index, which analyze, summarize, and pick out from a 9,000-page crime base matrix the key issues and the key possible crimes that could be prosecuted by a future domestic, regional, or international prosecutor. We also have sample indictments for all of those who bear the greatest responsibility of the now thirteen warring factions that are moving in and about that region.

Over the past six years that I have been dealing with this there has really been no real movement towards some type of justice mechanism. It is just stalling. I was a co-author of the Caesar Report and I briefed the

UN Security Council, where talked to them and showed those horrific photos. Even that did not move the Security Council. Even though everyone on the Security Council, but for two countries, voted to do something about that, we are still politically checkmated.

Over the past couple of years, I have been involved with an unofficial group of ambassadors in the UN that has been talking about these issues and looking at ways to prepare to be ready someday to deal with the tragedy. I personally feel that it is not going to be for another five, perhaps ten years from now.

But I was getting a little frustrated sitting around with the group of ambassadors. I told them I had an idea that I wanted to proffer—this was back in August of 2016—to create a Syrian Accountability Center. We have a lot of nongovernmental organizations—I head one of them—that are doing some great work. Some of them are doing excellent work based on the experience of the individuals who are running them. We are collecting a great deal of data, most of which is not criminal information that can be converted into evidence. That is a huge challenge in this day and age of social media, where we have petabytes of data coming out of Syria, to the point where the evidence is buried in there somewhere. It is almost like a needle in a haystack, trying to find verifiable, useful evidence to prosecute those who commit these crimes against humanity and war crimes.

There is also no standardized approach to it. The Syrian Accountability Project has a standard process that we use, but we do not have a unified official office with professionals able to take all of this data and begin to actually turn it into evidence.

I was talking among this group of ambassadors and I think I told them that we need to establish a centralized, official United Nations office—I called it the Syrian Accountability Center at the time. This group, which was chaired by Ambassador Christian Wenaweser and

Ambassador Ali Al Thani from Qatar, began to shape and mold that idea over the fall, and it went from the very easily recognizable name of Syrian Accountability Project to—it will take me about a minute to actually give the official name for it—the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (International, Impartial and Independent Mechanism for Syria). I was fine with that because the idea is that we are going to be able to move all of this data, by all the NGOs and all the other people doing work, and be able to give it to this official United Nations office. They will then begin to do official work so that someday a domestic, regional, or international prosecutor can turn to this office and be assured that it has been put together in a way that it is evidence and not just petabytes of data.

I think that is a fascinating beginning. In late December of 2016, we went to the United Nations General Assembly. We chose not to go to the UN Security Council, for obvious reasons—it would still be in the dustbin of history if we had. The General Assembly, in an extraordinary assembly, voted 105–0, with, obviously, some abstentions, to create the International, Impartial and Independent Mechanism for Syria, and directed that the Secretary General, within forty-five days, create terms of reference for this new office. Working together with some great folks in Geneva, we came up with those terms of reference, and now we have the head of an office of the Mechanism, which is coming together.

I think that is a very important step forward because we are finding—and we all know this, particularly those of us that have been in this business for quite a while—that we have these dirty little wars, war crimes, and crimes against humanity, but we do not have the political conditions by which the world can do something about it. Yet the crimes continue, the evidence begins to disappear,

and over a period of time the challenges start to mount related to whether we can create a case against individuals committing war crimes and crimes against humanity.

I think that the International, Impartial and Independent Mechanism for Syria—I still like to call it the Syrian Accountability Center myself—is a great beta test for a global accountability system by which we have an office in Geneva that starts gathering evidence, officially and appropriately, in all these dirty little wars, and puts it in a way that it can be cared for and gathered. And when the world, in two, three, or five years from now decides to do something about it, then the global accountability center, or whatever we call it, would be able to say it has all the evidence for that issue that took place in South Sudan, and it had been gathered as the conflict was ongoing, or certainly just shortly after that.

What I am offering are new ideas and new ways thinking about that. That evidence could be then turned over to the ICC, for example, which is challenged by all of the things that our colleague talked about, and that is just the reality. This would be a neutral center gathering appropriate evidence that has the appropriate foundation and reliability to be used in court. That evidence could be turned over to the ICC, a regional court, another international tribunal, or a domestic prosecutor when a decision is made, one, two, three, five, or ten years down the line, that perhaps we should do something about the situation. We will then have an office that prosecutors can actually go to.

I think that the International, Impartial and Independent Mechanism for Syria, is a good beta test for this idea of getting this evidence to a place where someday the Security Council, the Secretary General, and the General Assembly can turn to an office that they know has done something official and appropriate, headed by extremely experienced individuals.

What is neat about all of this is that as we were beginning to put this together—just ten years ago but certainly twenty years ago—we had very few people that had ever done this before. Now, as we say in basketball, we have a deep bench. We have a lot of very experienced chief prosecutors, trial counsel, registrars, chiefs of investigations, what have you. I think that we can bring them together to start building those crime-based matrices and conflict maps, gathering all the evidence, and establishing proper chains of custody so that if and when we do decide to do something, we can be assured that we can, as we used to say in my office, put bad guys in jail. Thank you.

**MARK DRUMBL:** Great. Thank you so much, David. And our last presenter is Robert, and then we will have time for Q&A.

**ROBERT PETTIT:** Thank you. First of all, thanks again to the Dialogs for inviting me here. I have been coming here, off and on, since the very first one in 2006, and it is always a joy to be here.

Of course, I came here because of my international work, but currently I am a senior counsel and team leader with the War Crimes Office of the Canadian Department of Justice. At the risk of exceeding allowable Canadian content, I am going to talk to you a little bit about Canada's War Crimes Program because Mark has asked us to talk about what is sometimes under-discussed in this fight against impunity. One of the things that I think needs to be talked about more is the fundamentally important role of the state in discharging their own obligation, either as a member of the ICC or simply as a moral construct, in the fight against impunity. I think, in a very humble Canadian way, that Canada could serve as one of the models of how to do that.

A little bit of history: in the 1980s, following a series of newspaper articles, a national commission of inquiry was created and it concluded that potentially thousands of Nazi war criminals had made their way into Canada after World War II and were living peacefully

and undisturbed. By then they had, of course, acquired Canadian citizenship and built lives. Following that report and the public outcry that followed, Canada created the War Crimes Program, with the stated motto that Canada would not be a safe haven for people who committed these types of crimes and managed to find their way into our country.

This was essentially the very beginnings of the Canadian Department of Justice. We initiated a few prosecutions under what was then our statute, the criminal code. We had crimes against humanity, genocide, and war crimes as part of our criminal code, and issued three cases, I think. One of these, the most well-known, *R v. Finta*, went all the way to the Supreme Court, but first made a stop in the Ontario Court of Appeals, where Louise Arbour was sitting. The final judgment ruled upon the threshold that the Crown had to prove intent for some of these crimes, and basically rendered our disposition, our statutes, inoperable. The burden made it impossible for us, essentially, to pursue criminal prosecution under that statute at the time.

What we did was to basically reorient our program then on civil remedy. Most of these people were, for the most part, law-abiding Canadian citizens, having obtained citizenship. We undertook several revocation of citizenship cases. Obviously, most of these people had come as refugees to Canada and then gained citizenship. For those who do not know, all states that are members of the convention are bound to give assistance to refugees. You will have a ground if you are under threat of persecution in your own country, and you may well then be granted refugee status.

However, one of the grounds of inadmissibility—one of the reasons you cannot be given refugee status, even you fear persecution in your home country—is if you were responsible for crimes against humanity or genocide. In other words, you cannot commit the crime, lose the fight, make your way somewhere else, and then hope to gain from it a status in that country. And, lo and behold, most of these



former Nazis had forgotten to mention in their applications that they had been responsible for these crimes.

What happens then is that it gives us a ground to revoke their citizenship for fraud, having obtained their citizenship or status in a misleading manner, and we did that. We went after several World War II cases, and believe it or not, there is still one active World War II case. We are still trying to revoke the citizenship of Helmut Oberlander, an individual who, maybe not coincidentally, is a wealthy builder in Ontario. There have been several actions in courts since we were in primary school to attempt to revoke his citizenship.

That, I think, concludes our current World War II inventory, although I have to tell you that when we did have a few active cases, the Royal Canadian Mounted Police (RCMP) had a monitoring device called a proof-of-life call. They would actually call our subject every year, once a year, and say, "Are you alive? Thank you."

[Laughter.]

**ROBERT PETTIT:** So the case is still open. These World War II cases were our bread and butter for quite a while, until 2004 when we adopted the War Crimes Act. That came about during the movement for universal jurisdiction and the creation of the ICC and the Rome Statute. Canada was very much involved in all the negotiations leading up to the Rome Statute and the creation of the Court, as I think most of you know. During that time, mentalities and political priorities followed within the country, so that once the Rome Statute was signed in 1998, we worked on that legislation, and in 2004 we adopted the War Crimes Act. If I am not mistaken, we were the first country to integrate the Rome Statute into our laws.

Interestingly enough, Senegal was the first country to deposit its instruments with the Court, if I am not mistaken, right back at the hotel after the Rome Statute was enacted.

With that, we focused on “modern war crimes,” and you see the air quotes? Just in case you do not remember, the Rwandan genocide occurred twenty-three years ago. That is modern for us, and you can well imagine all the implications that has on our faculties. So the War Crimes Act was created and war crimes were expanded to be an integrated model with four partners. We have the Department of Justice, which is us, the War Crimes Section; the Royal Canadian Mounted Police, which is our national law enforcement agency; what used to be Canadian Immigration and Citizenship, which is now Immigration, Refugee, and Citizenship Canada; and Canada Border Services Agency (CBSA), the people you meet when you come to Canada.

The four partners basically have their own jurisdiction and their own roles to plan. For example, the RCMP, being the law enforcement arm, has sole jurisdiction to conduct criminal investigation, and we have each our own role in this. The way it works is that our cases come from different streams. Most of them come through the immigration stream. Someone will come to Canada, manage to get in, and someone, in their paperwork, will notice a red flag of some kind. For example, a man might say that he was not ever a member of the armed forces when we know that at the time somebody of his age should have been in the armed forces.

Obviously, you hope that these red flags are caught when they are making their application abroad, but sometimes that is not always possible. Leaving aside the people who are not walking across from the United States—the people who go to points of entry at the border from the United States are normally assessed in the United States—normally you cannot get your ticket and come here if you do not have a proper visa, but it happens. People will show up at the airport,

the passport is now in the bin in the airplane, and they will declare refugee status and tell us a story.

There are also denunciations. People from their own community will point a finger in different ways, and we have had several of those. We have several cases that came from assistance requests from tribunals. They would like to come to Canada and interview somebody who knows something. Generally it is because he knows something and has committed it himself or least been party to the offense. The media as well as NGOs, which are very active in Canada, also bring these cases to our attention.

If the person is still under consideration for refugee status or has refugee status, then that person will be dealt with by CBSA under our immigration system. Eventually, if the case is founded, the person will be deported to his or her country or another country willing to take him or her.

We cannot deport a Canadian, so if the person has feigned citizenship we have to first revoke the citizenship of that person, establishing that that person has taken part, has been complicit, or has committed the crime him or herself, and obviously committed fraud while obtaining his or her status.

It is an action in federal court. It is a civil action. The threshold for evidence is lower than a criminal process, but we still have to prove that the person was involved. Because of the nature of the allegation, even though it is a civil remedy, we have to bring forth a very solid case before a judge will conclude that that person participated and then lied about it during the process. We have not brought one case where somebody has told us and still came in.

In some cases where the person is not deportable for whatever reason or the offense occurred after that person became a Canadian citizen, then

the remedy would be a criminal prosecution. So far, we have had four cases of modern revocation, and in those cases of modern revocation it is my office, DOJ, that has had the lead. We conduct the case from investigation and analysis of the initial allegation, to the end of the litigation process. As lawyers, analysts, and paralegals we go find the evidence, find the witnesses, interview them, get our affidavits, come back, make our statement of claim, build a case, litigate, et cetera.

If it is a criminal investigation, the RCMP has jurisdiction, and we provide advice so that the person who decides to initiate prosecution and who conducts prosecution is not involved during the investigation. That is why we advise, and if the case goes to prosecution, we pass the case for actual litigation to what used to be called our Crown prosecution service. The prosecutor and counsel in our office are part of the team that assists in court.

Our office has done four modern revocation cases and we have done two criminal prosecutions so far, two Rwandan cases. One was *Munyaneza*, involving an individual who was convicted of several counts of genocide and crimes against humanity, and who, interestingly, was one of my subjects in 1996 when I joined the International Criminal Tribunal for Rwanda. He was one of our four suspects that we were supposed to investigate, and in 2014 he was found guilty by the Supreme Court. In the other one, *Mungwarere*, the accused was acquitted. The challenges are incredible, especially in terms of criminal investigations and getting that level of evidence, thousands of miles away, twenty-three years after the facts. It also costs a lot of money—millions of dollars—for one case. So we are facing the same challenge, albeit in a different manner, than most of the courts, but we are part of the government's budget line items. We are a formal section, and I think, hopefully, we will not only continue but grow as part of Canada's commitment for the fight against impunity. Thank you.

**MARK DRUMBL:** Great. Let's thank all of our speakers.

[Applause.]

**MARK DRUMBL:** We have about ten or fifteen minutes for questions and comments. I have been quite firm in managing time, so please ask questions or else I will feel sad.

**ATTENDEE:** [Speaking off microphone.]

**VALERIE OOSTERVELD:** Thank you, Leila. So at the high political level, in terms of political parties, no, there was no opposition. In fact, when the TRC report was issued in December of 2015, the prime minister said, "We commit, as a federal government, to implementing all of the recommendations that we can that relate to the federal government." He was then joined by all of the other political parties, saying, "We commit to the same thing."

However, there is a difference between the high politics and ingrained racism across Canada. The residential school system could not have happened if there was not racism that stemmed from colonial settlement times through to today. So it has been quite a process in trying to have this discussion across Canada and then seeing that racism arise in different circumstances.

I only talked about the law school part of implementing the TRC Calls to Action. There are many, many other parts of it, including the fact that the Commission called for an inquiry into missing and murdered indigenous women, which was announced and is being undertaken by the federal government. But the fact that so many indigenous women could go missing and be murdered shows that there is a severe problem in our criminal justice system that must be tackled at the same time as racism. It is going to be a long process, but there are some good, positive discussions going on.

**MARK MARTINS:** Thank you, Professor Sadat. On the jurisdictional issue, the professor refers to a debate over whether conspiracy can be tried in a military commission. The latest is the *Bahlul* case that I mentioned was affirmed. The conviction of Bahlul was affirmed at the United States Court of Appeals for the District of Columbia Circuit last year, 5–3, sitting en banc. The D.C. Circuit found that Bahlul was properly convicted of conspiracy. It was a complicated, fragmented opinion, but a clear majority ruled that he was properly convicted.

We talked about joint criminal enterprise this morning and this is something that in many ways bedevils international criminal tribunals, but also law tribunals in national forms. The upshot of the five judges who joined was that Bahlul was properly convicted of conspiracy because he had personally and knowingly committed overt acts in furtherance of an agreement to commit war crimes, and this was clear on the record.

Was it a perfect trial? No. I mean, there very rarely is a perfect trial. But the judges found that he was properly convicted. It did figure into the judgment that Bahlul forfeited a lot of his rights at trial and did not confront a lot of the evidence that came in, and this caused them to use a plain error standard of review. So it is important not to take too much from this, and we do not.

In all of the current cases, we are charging individuals with essentially completed conspiracy—something very kindred to a joint criminal enterprise. Conspiracy is essentially a mode of liability. It is a theory of liability to get to a completed attack. We are proving attacks on civilians. We are going to be proving murder. We are going to be proving terrorism that actually happened. We are not to the left of boom. We are beyond boom. And this is a lot less controversial in the history of the international law of armed conflict.

You asked about why federal courts cannot do this. The simple answer, and something of a dodge, is that it would be against U.S. law to bring these detainees to a federal district court in the continental United States. We do not have consensus to bring Guantánamo detainees to the United States. That has been the law of our land since 2010. If we are going to have a trial, we are going to do it under the Military Commission system. That is the law.

Moreover, the federal prosecutors who work with me every day and I agree that there is a category of cases that is best brought in a Military Commission. We have rules of evidence that include a slightly broader aperture for the admissibility of hearsay testimony. Such testimony has to be probative, reliable, and lawfully obtained. The witness has to be unavailable. But this is not unusual in a war or in situations of armed conflict.

Statements also have to be voluntary. This goes to your third point about torture. Statements have to be voluntary but they do not have to be Mirandized. These rule differences make a difference. Their significance can sometimes be overplayed, but they make a difference in an important category of cases. And I applaud my federal prosecutor sisters and brothers. I want every case that goes after impunity to be prosecuted. But federal prosecutors cannot handle everything, and commissions can handle a narrow but important jurisdiction.

Then on torture, our law is that no statement obtained as a result of torture—as well as statements derived from cruel, inhuman, and degrading treatment that falls short of the definition of torture—is admissible, and the standard for admissibility of a statement is that it is voluntary. More practically, the defense counsel are receiving thousands and thousands of pages, under our classified information procedures, of information about their client's detention, and this has been a big source of the litigation since 2014.

We have been working seven days a week in order to provide the judges in each of these cases the original information from the Central Intelligence Agency's Former Rendition, Detention and Interrogation Program, where it applies. The judge looks at the original and a substitute that protects genuine sources and methods that continue to be protecting people, and provides the defense the information they are entitled to. That is an important accountability mechanism of this sharply adversarial process. We are not going to satisfy everybody that what we are doing is fair, but it is going to be as transparent as possible and it is going to be sharply adversarial. It happens to be the process that our legal system has said we are going to do this by.

On transparency, which is another important aspect of implementing the questions you mentioned, sixty different news organizations cover these proceedings at Guantánamo. We also have our proceedings transmitted back to the United States by closed-circuit television. It is not televised, but if you go to an extension of the courtroom that the judge has approved in the Washington, DC, area, you can watch these proceedings. There are also transcripts of the proceedings published, usually the same day as the proceedings themselves. Sometimes it takes a little more than a day to be put online at [www.mc.mil](http://www.mc.mil). This allows people to take note of the proceedings.

So there are criticisms galore, but it happens to be a system that is accountable, that is sharply adversarial, and that attempts to apply the law.

**MARK DRUMBL:** Do we have time for one more?

**ATTENDEE:** [Speaking off microphone.]

**DAVID CRANE:** I can speak very briefly, even though I am deeply saddened about Burundi. We have all been in this business a long time and Burundi has been an open sore for all the time that we have



been in modern international criminal law. At the end of the day, Burundi versus Syria deals with that bright red thread of politics. There is no political will to do anything about Burundi, period. Right now, even though there is a lot of interest and concern, there is no international political will to create a domestic, regional, or international tribunal. That is why the Independent Mechanism was set up. Essentially it is an office of a prosecutor by another name. We do not say it but we all wink at each other.

What we are doing is building a case against those who are committing war crimes and crimes against humanity in Syria, and we will be doing that until it is time to hand that case over to a real office of the prosecutor, or it will just be a transfer. And that is why I am very interested in possibly having a centralized global accountability center where this is done routinely, it is sanctioned by the United Nations, and they build these dossiers and hand them over to a domestic, regional, or international prosecutor someday.

But let us just see how the Independent Mechanism goes. I am excited about it. People do not really realize how different this has shifted the paradigm. We have always just seen tragedies and then, all of a sudden, we build a court around it and we go out and put bad guys in jail. Now, we cannot do that anymore. There are real challenges to that.

So let us continue trying to get something done through something like an Independent Mechanism.

**MARK DRUMBL:** Judge, you have come the furthest to be with us today, and you have the final word.

**DUNCAN GASWAGA:** Thank you. The short answer to your question is that I cannot tell you exactly where *Kwoyelo* fits in because the Constitutional Court and the Supreme have already pronounced on this matter.

Now, I want to say that the application of the Amnesty Act of 2000 has caused a little controversy here and there, and that is probably one of the reasons why you are asking. I do not want to look at Kwoyelo as a small fish when I look at other people that actually were granted amnesty. Of course, those with the greatest responsibility, the top commanders, were taken to ICC, but Kwoyelo is one of those that were supposed to be tried at the ICC.

Now, there are people within his category—I would call them top commanders—who are in detention and who are granted amnesty, but they did not grant amnesty for him. I hinted on this matter when I was making my presentation. I said he applied and he did not get it. On the very first year of his trial, he went to the Constitutional Court and the lawyers raised it. They went to the Constitutional Court and the Constitutional Court agreed with them. The attorney general representing the Directorate of Public Prosecutions of Uganda appealed to the Supreme Court, and the Supreme Court reversed the decision of the Constitutional Court and said he should be tried.

They played about with Section 2 and Section 3 of that Act, and Section 3, Subsection 1 and Subsection 2, where *Kwoyelo* falls under Subsection 2, if you are already in detention. So that is now where *Kwoyelo* fits in. If you want to know my own opinion, because I cannot overrule the other courts, then we can have a discussion later on. But that is the official position the courts have ruled on, and that is it. No appeal. Thank you.

**MARK DRUMBL:** Let us thank everyone.



## **Conclusion**



## **Conclusion**

**David M. Crane\***

We live an age of extremes, changing alliances, perspectives, a resurgence of nationalism, and a retraction of the international order that we relied on for over seventy years. These are truly changing times and they are having, and will continue to have, an effect on international justice and accountability for some time to come.

The Eleventh International Humanitarian Law Dialogs sought to carve out a path for international humanitarian law and the process of modern international criminal law. The program highlighted the challenges and possible opportunities for practitioners and academics alike. The discussions on the porch sessions were robust and showed a diverging set of perspectives and opinions on those “new opportunities.” During the many breaks, receptions, and informal gatherings that are the hallmarks of the Dialogs, colleagues and friends continued to discuss these challenges and opportunities with no clear consensus or path. At the end of the day, the participants did agree that the fight for justice and accountability must continue unabated.

In the pristine setting of the world famous Chautauqua Institution on the banks of Lake Chautauqua, the Tenth Chautauqua Declaration was drafted and issued by the attending international chief prosecutors. Reflecting on the declaration itself, one can see that swirling dust of concern, some frustration, yet a cold steel determination to soldier on despite the challenges and changing dynamics of justice for the oppressed.

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

Taking from the declaration itself, there are some notable steps forward reflecting the changing times and how determination and focus can bring new opportunities:

Commend the United Nations for creating the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes in Syria, but note the continued atrocities in Syria and call upon the international community to seek ways that justice can be done for the people of Syria;

Commend the start of accountability in the Central African Republic, but note that there appears to be a lack of funding and support for these courts and that the courts are needed to continue the process of stabilization and civilian protection, a condition that continues to challenge current justice mechanisms around the world;

Note the completion of the trial of Hissène Habré in the Extraordinary African Chambers and the support of Senegal;

Note the imminent completion of the judicial mandate of the International Criminal Tribunal for the Former Yugoslavia and commend its contribution to the development of international criminal law, its record of successful prosecutions of those most responsible for the crimes committed, and its promotion of accountability and peace in the former Yugoslavia;

Note the importance of the work of residual mechanisms in the accountability process and the need for sustained support for their operations;

Recognize the efforts of national prosecuting authorities to prosecute war crimes, whether in the countries where the crimes were committed or in third states.

They also highlight a clarion call and a practical and realistic awareness of the changing times:

Note the importance of accountability for the crimes committed in South Sudan and the agreement to establish the African Union Hybrid Court for South Sudan;

Condemn the dangers of the glorification of convicted war criminals and of the denial of crimes;

Declaring that states must continue to support the work of the International Criminal Court and to promote the universality of the Rome Statute;

Reaffirming that states should fund and support the International, Impartial and

Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes in Syria, and should create and support other mechanisms to prosecute and document atrocities and to promote the fight against impunity;

Calling for the implementation and full funding of the special criminal courts in the

Central African Republic and the African Union Hybrid Court for South Sudan; Encouraging the United States to appoint as Ambassador-at-Large for War Crimes Issues an individual with a demonstrated commitment to international justice.



Reviewing the above one realizes after reading, reviewing, or even perusing the important *Proceedings* volume that the chief prosecutors “hit the nail on the head” as they usually do in their pragmatic view of international justice.

This process has been in place for just twenty-five years. Much of what is settled jurisprudence was theory in law texts or not even around, yet the system is in place to deal with the challenges of atrocity accountability should there be a political willingness to do so. During the Dialogs the general editors, authors, and even some of the founding chief prosecutors came together to discuss this in the context of their new book by Cambridge University Press entitled *The Founders*. It was a time during the Dialogs for the audience to look back on just how far we have come and how difficult that journey was to seek an accounting for the destruction of several million human beings from 1993 to the present

The way ahead is dimly lit, the bright light of justice that shone in the dark corners gone. As questions abound on the effectiveness of international justice, it is imperative that those who believe in justice and accountability marshal their talents, skills, influence, and experience to continue to counter moves to step away from holding those who commit atrocity accountable.

The discussion at the Eleventh International Humanitarian Dialogs at Chautauqua bolstered that will, that drive to fight on and to ensure that those who are victims of atrocity get some justice; and those who commit atrocity are held accountable.

We thank all our friends and colleagues, as well as our stalwart sponsors once again for making the Dialogs an exciting time. Once again, the weather was perfect, we are eleven for eleven, and it set a hopeful tone for the discussions. As the sun set over Lake Chautauqua

that last evening after a wonderful dinner cruise, we all stepped forward back to this challenging world, steady in purpose and the comfort that all our friends at the Dialogs have our backs.

We will conclude the proceedings of the Eleventh International Humanitarian Law Dialogs with a quote from William Hague:

Governments that block the aspirations of their people, that steal or are corrupt, that oppress and torture or that deny freedom of expression and human rights should bear in mind that they will find it increasingly hard to escape the judgement of their own people, or where warranted, the reach of international law.



## **Appendices**



## Appendix I

### Agenda of the Eleventh International Humanitarian Law Dialogs

Sunday, August 27–Tuesday, August 29, 2017

#### Sunday, August 27 – Arrival

- 2:00 p.m.      **Movie Screening at Chautauqua Cinema**  
**“Never Again: Forging a Convention  
for Crimes Against Humanity”**  
Presented by Prof. Leila Sadat  
Panelists: Kevin Hughes, Robert Petit,  
Hon. Christine Van den Wyngaert
- 4:30 p.m.      Movement to Robert H. Jackson Center
- 5:30 p.m.      **Welcome Reception and Dinner**  
*at the Robert H. Jackson Center (Invitation Only)*
- 7:00 p.m.      **Joshua Heintz Award for  
Humanitarian Achievement Ceremony**  
Recipient – Zainab Bangura  
Accepted by Dean Aviva Abramovsky  
**Evening Panel: Reflections on  
the ECCC Office of the Prosecutor**  
Panelists: Nicholas Koumjian, Robert Petit,  
Andrew Cayley  
Moderated by Gregory Peterson

**Monday, August 28 – Day One**

- 7:30 a.m.      **Breakfast with the Prosecutors**  
*at the Athenaeum Hotel*
- 4:30 p.m.      Movement to Robert H. Jackson Center
- 9:00 a.m.      **Welcome at Fletcher Hall**
- 9:15 a.m.      **The Impunity Watch Essay Contest**  
**Award Ceremony** *at Fletcher Hall*
- 9:25 a.m.      **Keynote Address – The Clara**  
**Barton Lecture** *at Fletcher Hall*  
Delivered by Secretary General Elhadj As Sy  
Introduced by Koby Langley
- 10:00 a.m.     **Break**
- 10:30 a.m.     **Reflections by the**  
**Current Prosecutors** *at Fletcher Hall*  
Moderated by Dean Michael Scharf
- 12:15 p.m.     **Lunch** *at the Athenaeum Hotel*
- 1:00 p.m.      **Luncheon Address** *at the Athenaeum Hotel*  
Delivered by Andrew Cayley  
Introduction by Mark Agrast

- 2:30 p.m.      **Roundtable Discussion: “Changing Times – New Opportunities for International Justice and Accountability”**  
*at Fletcher Hall*  
Panelists: Prof. Valerie Oosterveld, BG Mark Martins, Hon. Duncan Gaswaga, Prof. David Crane, and Robert Petit  
Moderated by Prof. Mark Drumbl
- 4:15 p.m.      **Student “Porch Session”** *at Fletcher Hall*  
A conversation with the Prosecutors and students
- 6:00 p.m.      **Reception** *on the Porches at the Athenaeum Hotel*
- 6:30 p.m.      **Dinner** *at the Athenaeum Hotel*
- 7:30 p.m.      **Katherine B. Fite Lecture** *at the Athenaeum Hotel*  
Delivered by Hon. Christine Van den Wyngaert  
Introduced by the IntLawGrrls Blog
- 9:30 p.m.      **Informal Reception** *on the Porches at the Athenaeum Hotel*

**Tuesday, August 29 – Day Two**

- 7:45 a.m.      **Breakfast with the Prosecutors**  
*at the Athenaeum Hotel*



- 8:00 a.m.      **Breakfast Presentation: “The Future of International Justice”** *at the Athenaeum Hotel*  
Delivered by Professor Jennifer Trahan
- 9:00 a.m.      **Year in Review** *at the Presbyterian Chapel*  
Presented by Professor Milena Sterio
- 9:30 a.m.      **Break**
- 11:00 a.m.      **Porch Sessions** *at the Athenaeum Hotel*  
Hybrid Courts: Hon. Duncan Gaswaga, Prof. Margaret deGuzman, and Paul Williams  
Military Commissions: BG Mark Martins and Prof. Michael Newton  
Accountability Center vs. Tribunals: Prof. David Crane and Prof. William Schabas  
Victim-Driven Approaches to International Criminal Justice: Andrea Gittelman, Prof. Milena Sterio, Prof. Leila Sadat, Prof. Jennifer Trahan, and Prof. Valerie Oesterveld
- 12:30 p.m.      **Lunch** *at the Athenaeum Hotel*
- 1:00 p.m.      **Book Release and Discussion** *at the Athenaeum Hotel*  
Panelists: Prof. David Crane, Robert Petit, Dean Michael Scharf, and Prof. William Schabas  
Introduced by Prof. Leila Sadat
- 2:30 p.m.      **The Issuance of the Tenth Chautauqua Declaration** *at the Athenaeum Hotel*  
Moderated by James Silkenat

5:00 p.m.      **Dinner Cruise on the Summer Wind**  
(Invitation Only)

9:30 p.m.      **Informal Reception on the**  
*Porches at the Athenaeum Hotel*



## Appendix II

### **The Tenth Chautauqua Declaration August 29, 2017**

*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:*

Commend Zainab Hawa Bangura as the ninth recipient of the Joshua Heintz Humanitarian Award for her important and impressive service to humanity;

Commend the United Nations for creating the [IIIM], but note the continued atrocities in Syria and call upon the international community to seek ways that justice can be done for the people of Syria;

Note that there are other areas of continued distress around the world that need appropriate accountability mechanisms, such as Yemen, Myanmar, Sri Lanka, and Northern Iraq, and call upon the international community and national authorities to ensure accountability, in accordance with international standards;

Commend the start of accountability in the Central African Republic, but note that there appears to be a lack of funding and support for these courts and that the courts are needed to continue the process of stabilization and civilian protection, a condition that continues to challenge current justice mechanisms around the world;

Note the completion of the trial of Hissène Habré in the Extraordinary African Chambers and the support of Senegal;

Note the imminent completion of the judicial mandate of the International Criminal Tribunal for the Former Yugoslavia and commend its contribution to the development of international criminal law, its record of successful prosecutions of those most responsible for the crimes committed, and its promotion of accountability and peace in the former Yugoslavia;

Note the importance of standing behind the findings of international judicial mechanisms;

Condemn the dangers of the glorification of convicted war criminals and of the denial of crimes;

Note the importance of the work of residual mechanisms in the accountability process and the need for sustained support for their operations;

Recognize the efforts of national prosecuting authorities to prosecute war crimes, whether in the countries where the crimes were committed or in third states;

Note the importance of accountability for the crimes committed in South Sudan and the agreement to establish the African Union Hybrid Court for South Sudan;

*Now do solemnly declare and call upon the international community to keep the spirit of the Nuremberg Principles alive by:*

Reaffirming our commitment to mindful stewardship of the resources allocated to international criminal justice;

Declaring that states must continue to support the work of the International Criminal Court and to promote universality of the Rome Statute;

Reaffirming that states should fund and support the IIIM and also create and support other mechanisms to prosecute and document atrocities and promote the fight against impunity;

Calling for the implementation and full funding of the special criminal courts in the Central African Republic and the African Union Hybrid Court for South Sudan;

Encouraging the United States to appoint as War Crimes Ambassador an individual with a demonstrated commitment to international justice.

*Signed in Mutual Witness:*



Fatou Bensouda  
International Criminal Court



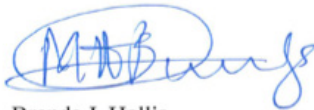
Serge Brammertz  
International Criminal Tribunal  
for the Former Yugoslavia



David M. Crane  
Special Court for Sierra Leone



Norman Farrell  
Special Tribunal for Lebanon



Brenda J. Hollis  
Residual Special Court for  
Sierra Leone



Nicholas Koumjian  
Extraordinary Chambers in the Courts of  
Cambodia



Stephen J. Rapp  
Special Court for Sierra Leone



## Appendix III

### Biographies of the Prosecutors and Participants

#### *Prosecutors*

##### **Mohamed Bangura**

Mohamed Bangura is the Prosecution Legal Adviser/Evidence Officer at the Residual Special Court for Sierra Leone, The Hague. He was previously a Trial Attorney in the Office of the Prosecutor, Special Court for Sierra Leone, where he served throughout the life of the court (2002–2013). He was member of the prosecution team in all the four major trials conducted by the court, including the Trial of former President of Liberia, Charles Ghankay Taylor. Mr. Bangura started his legal career in Sierra Leone with the firm, Renner-Thomas & Co. He is a member of the Sierra Leone Bar Association, and holds an LL.M degree from the University of London and an MSc in Property Law from London South Bank University.

##### **Andrew T. Cayley**

Andrew T. Cayley currently serves as Director of Service Prosecutions, Service Prosecuting Authority, where he is head of the independent prosecuting authority of the United Kingdom armed forces. Mr. Cayley was appointed as Director in December of 2013 by HM Queen Elizabeth II. Previously, he was appointed as Chief International Co-Prosecutor of the ECCC in December 2009, and remained until September of 2013. Mr. Cayley previously served as Senior Prosecuting Counsel at the International Criminal Court and was responsible for the first Darfur case. He also served as Senior Prosecuting Counsel at the International Criminal Tribunal for the former Yugoslavia. Prior to that, he served as Prosecuting Counsel at ICTY. He is a Barrister of the Inner Temple, was appointed Queen's Counsel in 2012, and was appointed a Companion of the Order of St Michael and St George (CMG) for his services to international criminal law and human rights in the 2014 Queen's birthday honours list. He holds an LL.B and



an LL.M from University College London. He is also a professional officer graduate of the Royal Military Academy Sandhurst.

**David M. Crane**

David Crane is a Professor of Practice at Syracuse University College of Law. From 2002 to 2005 he served as the Prosecutor for the Special Court for Sierra Leone and indicted former Liberian President Charles Taylor for his role in the atrocities committed during the Civil War in Sierra Leone. Professor Crane was the first American since Justice Robert H. Jackson and Telford Taylor at the Nuremberg trials in 1945, to serve as the Chief Prosecutor of an international war crimes tribunal. He founded and advises Impunity Watch ([www.impunitywatch.com](http://www.impunitywatch.com)), a law review and public service blog. Previously, he served for over thirty years in the federal government of the United States. He was appointed to the Senior Executive Service of the United States in 1997, and held numerous key managerial and leadership positions during his three decades of public service, including as the Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School.

**Norman Farrell**

Norman Farrell serves as the Chief Prosecutor for the Special Tribunal for Lebanon (STL). Prior to his appointment as STL Prosecutor, Mr. Farrell was the Deputy Prosecutor since 2008 at the International Criminal Tribunal for the former Yugoslavia (ICTY). He was also the Head of the Appeals Section and a Senior Appeals Counsel from 2002–2003 at the International Criminal Tribunal for Rwanda (ICTR). He held the same post at the ICTY from 2002–2005, and previously was Appeals Counsel from 1999–2002. After being the Head of the Appeals Section he was appointed Principal Legal Officer at the Office of the Prosecutor from 2005–2008. Before his involvement in international law, Mr. Farrell prosecuted cases in Canada and argued cases before the Ontario Court of Appeal and the Supreme Court of Canada. He has a Master of Laws specializing in International Law

from Columbia University in New York, and was admitted to the Law Society of Upper Canada, Ontario in 1988. He also has a Bachelor degree in Laws as well as Arts from Queens University in Canada.

### **Fabicio Guariglia**

Fabicio Guariglia was appointed Director of the Prosecution Division of the International Criminal Court in October 2014. Previously, he held senior positions within the Prosecution Division, including Senior Appeals Counsel, Head of the Appeals Section, and Prosecutions Coordinator. Prior to joining the International Criminal Court, Dr. Guariglia was a member of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia beginning in 1998, first as a Legal Officer in the Legal Advisory Section and subsequently as Appeals Counsel in the then shared ICTY/ICTR Appeals Section. Between 2003 and early 2004, Dr. Guariglia was a visiting fellow in London School of Economics, where he taught International Criminal Law and Public International Law. As a Legal Advisor to the Argentine Ministry of Justice from 1995 to 1998, he advised on domestic criminal legislation and international criminal law matters, and was closely involved in the process of negotiation of the Rome Statute including during the Rome Conference. Dr. Guariglia practiced law as a defense counsel and victims representative in criminal cases in Buenos Aires from 1989–1995, and was also involved in various human rights and rule of law projects in post-civil war El Salvador during 1992 and 1993. Dr. Guariglia has a law degree from the University of Buenos Aires (Argentina) and a Ph.D. (Summa Cum Laude) in criminal law from the University of Münster (Germany).

### **Kevin C. Hughes**

Kevin C. Hughes is Legal and Political Advisor to Prosecutor Serge Brammertz of the United Nations International Criminal Tribunal for the former Yugoslavia and the Mechanism for International Criminal Tribunals. Most recently, he served as Senior Legal Officer

to the Appeals Chamber of the Special Court for Sierra Leone for the appeals proceedings in *Prosecutor v. Taylor*. He was previously Senior International Legal Officer to the War Crimes Chamber of the State Court of Bosnia and Herzegovina and Legal Officer in the ICTY Registry. He received his J.D from Columbia Law School.

### **Nicholas Koumjian**

Nicholas Koumjian has served as the international Co-Prosecutor of the Extraordinary Chambers for the Courts of Cambodia since October 2013. He worked as a prosecutor for twenty years in Los Angeles and since 2000 he has served in various international criminal tribunals. He was a prosecutor at the International Criminal Tribunal for the former Yugoslavia and later at the State Court of Bosnia and Herzegovina. He headed the UN-staffed Serious Crimes Unit in East Timor and was Principal Trial Attorney at the Special Court for Sierra Leone in the trial of Liberian President Charles Taylor. He was also director of a U.S.-funded human rights program in Colombia, working on anti-corruption initiatives. Additionally, he has represented both defendants and victims before the International Criminal Court.

### **Robert Petit**

Robert Petit was called to the Bar in 1988 and started his legal career as a Crown Prosecutor in Montreal for eight years eventually focusing on organized criminality and complex cases. In 1996 he embarked on an international career first as a Legal Officer in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda. Subsequently between 1999 and 2004, he was a Regional Legal Advisor for the United Nations Interim Administration Mission in Kosovo, a Prosecutor for the Serious Crimes Unit of the United Nations Missions of Support to East Timor, and a Senior Trial Attorney with the Office of the Prosecutor of the Special Court for Sierra Leone. In 2006, he was named by the United Nations as International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, a position he held until September 2009 when he returned to Canada and to his

long-term position as Counsel and Team Leader with the War Crimes Section of Canada's Federal Dept. of Justice.

**Stephen J. Rapp**

Ambassador Stephen J. Rapp is a distinguished fellow at the USHMM and The Hague Institute for Global Justice working to strengthen human rights inquiries capacities to document mass atrocities. He served as US ambassador-at-large for global criminal justice from 2009 to 2015 coordinating U.S. support to international criminal tribunals and hybrid and national courts responsible for prosecuting persons charged with genocide, war crimes, and crimes against humanity. He was credited with arranging UN Commission of Inquiry and other prosecutorial authorities' access to 55,000 photos documenting torture by the Assad regime. From 2007 to 2009, he served as prosecutor of the Special Court for Sierra Leone, leading the prosecution of former Liberian President Charles Taylor. His office achieved the first convictions in history on crimes against humanity charges for sexual slavery and forced marriage and for attacks on peacekeepers and recruitment and use of child soldiers as violations of international humanitarian law. From 2001 to 2007, he served as senior trial attorney and chief of prosecutions at the ICTR, where he led the trial team that achieved the first convictions in history against leaders of the mass media for the crime of direct and public incitement to commit genocide. He was the United States Attorney for the Northern District of Iowa from 1993 to 2001. He received a B.A. from Harvard College and a J.D. from Drake University Law School.

*Speakers, Panelists, and Sponsors*

**Mark David Agrast**

Mr. Agrast is the Executive Director of The American Society of International Law (ASIL). He previously served as deputy assistant attorney general in the U.S. Department of Justice's Office of Legislative Affairs from 2009 to 2014. Mr. Agrast was a senior vice

president and senior fellow at the Center for American Progress from 2003 to 2009, and held senior staff positions with the U.S. House of Representatives from 1992 to 2009. He practiced international law with the Washington office of Jones Day from 1985 to 1992. Mr. Agrast has served in numerous leadership capacities in the American Bar Association, including as a member of its Board of Governors and its Executive Committee, a longtime member of the ABA House of Delegates, chair of the Commission on Immigration and the Section of Individual Rights and Responsibilities (now the Section of Civil Rights and Social Justice), and chair of the Commission on Disability Rights. He currently serves on the Council of the Section of International Law and as a member of the Center for Racial and Ethnic Diversity. After graduating from Case Western Reserve University, Mr. Agrast pursued his post-graduate studies as a Rhodes Scholar at the University of Oxford and received his J.D. from Yale Law School where he was editor in chief of the Yale Journal of International Law.

### **Margaret M. deGuzman**

Professor Margaret M. deGuzman teaches criminal law, international criminal law, and transitional justice. Her scholarship focuses on the role of international criminal law in the global legal order, with a particular emphasis on the work of the International Criminal Court (ICC). Her recent publications have addressed such issues as how the concept of gravity of crimes affects the legitimacy of international criminal law, the relationship between international criminal law and the responsibility to protect doctrine, proportionate international sentencing, and the selection of cases and situations for ICC investigation and prosecution. She is currently participating in an international expert group studying the proposed addition of criminal jurisdiction to the mandate of the African Court on Human and Peoples' Rights. Before joining the Temple faculty, Professor deGuzman clerked on the Ninth Circuit Court of Appeals and practiced law in San Francisco for six years, specializing in criminal defense.

### **Mark A. Drumbl**

Mark A. Drumbl is the Class of 1975 Alumni Professor at Washington and Lee University, School of Law, where he also serves as Director of the University's Transnational Law Institute. Professor Drumbl's research includes public international law, global environmental governance, international criminal law, post-conflict justice, and transnational legal process. Prior to becoming a Professor, Professor Drumbl clerked for Justice Frank LaCobucci of the Supreme Court of Canada. He was appointed co-counsel for the Canadian Chief-of-Defense-Staff before the Royal Commission investigating military wrongdoing in the UN Somalia Mission. Professor Drumbl has also served as an expert in ATCA litigation in the U.S. federal courts, in U.S. immigration court, as defense counsel in the Rwandan genocide trials, and has taught international law in a plethora of countries. Professor Drumbl's research and teaching interests include public international law, global environmental governance, international criminal law, post-conflict justice, and transnational legal process. His work has been relied upon by the Supreme Court of Canada, the United Kingdom High Court, United States Federal Court, and the Supreme Court of New York.

### **Duncan Gaswaga**

Justice Duncan Gaswaga is a Judge of the International Crimes Division (ICD) of the High Court of the Republic of Uganda, and a Fellow of the Commonwealth Judicial Education Institute (CJEI), Canada. He is also the Chairman of the Anti-Corruption Commission of the Republic of Seychelles. He holds a Bachelor's Degree in Law (LL.B, Hons), Dar-Es-Salaam University, Tanzania, a Post Graduate Diploma in Legal Practice (Bar), LDC Uganda, a Master's Degree (LLM) with Distinction in Human Rights Law, University of Pretoria, and Master's Degree (LLM) in International Criminal Law, Case Western Reserve University (CWRU). At ICD he deals with terrorism, human trafficking, war crimes and other transnational and international crimes. Previously, Justice Gaswaga served as an expatriate Judge

of the Supreme Court and the Constitutional Court of the Republic of Seychelles, headed the Criminal Division where he handled the most serious crimes including murder and drug trafficking, and had the rare opportunity of adjudicating modern day maritime piracy cases committed on the Indian Ocean off the coast of Somalia. He is a mentor and capacity builder for judges, prosecutors, lawyers and police officers at high level global terrorism, maritime security and anti-piracy events. He was the “Distinguished Jurist in Residence” at CWRU School of Law, (2012–2013) and a Visiting Professional at the International Criminal Court. He was also the first General Secretary of the East African Magistrates and Judges’ Association.

### **Andrea Gittleman**

Andrea Gittleman is the program manager for the Simon-Skjoldt Center for the Prevention of Genocide. Previously, she was interim director of U.S. policy and senior legislative counsel at Physicians for Human Rights. She served as an Arthur Helton Global Human Rights Fellow with the Burma Lawyers’ Council in Mae Sot, Thailand. She also worked with the New York University Immigrant Rights Clinic as a law student and has had legal internships with Legal Momentum, the New York Civil Liberties Union’s Reproductive Rights Project, and Human Rights Watch’s Women’s Rights Division. Prior to attending law school, she served as a Peace Corps volunteer in Mauritania, where she managed gender and development programs.

### **James C. Johnson**

James C. Johnson serves as Co-Director of the Henry T. King Jr. War Crimes Research Office and Adjunct Professor of Law at Case Western Reserve University School of Law. Mr. Johnson also served as the President and CEO of the Jackson Center from 2012 until 2015. From 2003 until 2012, Mr. Johnson served as Senior Trial Attorney and as the Chief of Prosecutions for the Special Court for Sierra Leone. As such, Mr. Johnson supervised trial and investigative teams, which prosecuted ten accused, including the former President

of Liberia, Charles Taylor, for war crimes, crimes against humanity, and other serious violations of international law. Prior to joining the Special Court for Sierra Leone, Mr. Johnson served for twenty years as a Judge Advocate in the United States Army.

### **Koby Langley**

Koby Langley serves as the American Red Cross' Senior Vice President for Service to the Armed Forces and International Humanitarian Law. Previously, Mr. Langley was Director of Veteran, Wounded Warrior, and Military Family Engagement at the White House during the Obama Administration. He also previously served at the Department of Defense where he was appointed to the Senior Executive Service by Secretary Robert Gates in 2010, and worked as the Special Assistant to the Deputy Assistant Secretary of Defense for Wounded Warrior Care and Transition Assistance Policy. Mr. Langley also served in the U.S. Army as an officer and JAG attorney, with tours overseas in Kosovo and Iraq. Mr. Langley also practiced law as private practitioner as managing member of a litigation group.

### **Mark Martins**

Brigadier General Mark Martins serves as Chief Prosecutor of Military Commissions in Washington, DC. Prior to this assignment, Brigadier General Martins was deployed to Afghanistan where he served as the Interim Commander and then Deputy Commander of Joint Task Force 435 and more recently as Commander of the Rule of Law Field Force-Afghanistan. Brigadier General Martins commissioned in the infantry upon graduation from West Point in 1983, and served as an officer in the 82nd Airborne Division. Upon graduation from Harvard Law School, he joined the JAG corps as a judge advocate. He has served in a variety of positions including: Chief of Administrative Law; Chief of Legal Assistance; Staff Judge Advocate for the 1st Armored Division in Germany and Iraq; Deputy Legal Counsel to the Joint Chiefs of Staff; and Staff Judge Advocate for Multi-National Force – Iraq. Brigadier General Martins



is a Rhodes Scholar, and holds an LL.M in Military Law and a M.A in National Security Strategy.

### **Susan Moran Murphy**

Susan Moran Murphy, President and Chief Executive Officer of the Robert H. Jackson Center, has extensive experience in the non-profit sector at both the senior operating and board levels. She earned her Bachelor of Science in Education Summa Cum Laude at Boston University and received a Master of Business Administration from the University of Pittsburgh. In her previous role as Director of External Affairs for Detroit Country Day School, Susan developed strategy and led execution in all areas of institutional advancement for the four campus, 1600 student independent school in Southeast Michigan. Ms. Murphy has served in numerous leadership capacities for non-profit boards including the Chautauqua Foundation from 1997 to present, Chautauqua Institution, Detroit Country Day School, and the Friends of the Arts Association. She has been heavily involved in strategic planning, governance, and fundraising in all of these organizations.

### **Michael Newton**

Professor Michael Newton is currently the Director of the Vanderbilt-in-Venice Program at Vanderbilt Law School where he teaches an innovative International Law Practice lab. He is also an expert on accountability, transnational justice and conduct of hostilities issues. Professor Newton is an elected member of the International Institute of Humanitarian Law and the International Bar Association. Additionally, he serves on the executive council of the American Society of International Law and previously served on its Task Force on U.S. Policy Toward the International Criminal Court. Notably, Professor Newton served as the U.S. representative on the UN Planning Mission for the Sierra Leone Special Court. From 1999 to 2000 served in the State Department's Office of War Crimes Issues and worked as the senior advisor to the Ambassador-at-Large for War Crimes Issues. After a successful military career as an armor officer

and a military attorney, Professor Newton served as a professor of international and operational law at the Judge Advocate General's School and Center in Charlottesville, Virginia from 1996–1999.

### **Valerie Oosterveld**

Valerie Oosterveld is Associate Dean (Research and Graduate Studies) at the University Of Western Ontario Faculty Of Law, and is the Associate Director of Western University's Centre for Transitional Justice and Post-Conflict Reconstruction, where her research and writing focus on gender issues within international criminal justice. She is a member of the Royal Society of Canada's College of New Scholars, Artists and Scientists. Before joining Western Law, Professor Oosterveld served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade, where she provided legal advice on international criminal accountability for genocide, crimes against humanity and war crimes. She was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly of States Parties, and served on the Canadian delegation to the 2010 Rome Statute Review Conference of the International Criminal Court.

### **Theodore Parran III**

Ted Parran is an Adjunct Professor at CWRU School of Law and an Assistant Prosecutor with the Ohio State Attorney's Office in Cleveland, Ohio. As an Adjunct Professor, Mr. Parran is the Managing Director of the Canada-United States Law Institute, a unique bi-national legal institute jointly supported by CWRU Law and Western Law in London, Ontario and supports the Frederick K. Cox International Law Center, assisting with programming such as the IHL Dialogues. As an Assistant Prosecutor in Cleveland, Ohio, he is responsible for prosecuting serious felony crimes, arguing appeals before Ohio's Eighth District Appeals Court, and assisting in investigations into organized crime activities in the Northeast Ohio region. Mr. Parran earned his J.D. from CWRU Law and his LL.M in

Comparative Law and Development from Loyola-Chicago School of Law's Rome, Italy-based PROLAW program.

**Gregory L. Peterson**

Gregory L. Peterson, is a Partner at Phillips Lytle LLP and Office Leader of the Chautauqua office, where he focuses in all areas of real estate, including development and financial transactions, areas of corporate counseling including acquisitions, administration and strategic planning, not-for-profit corporate formation, tax exemption and qualification with New York State administrative areas. He has been recognized for numerous awards, including in The Best Lawyers in America© and Chambers USA: America's Leading Lawyers for Business, 2017. He received his B.A. from Allegheny College Phi Beta Kappa, and his J.D. from the Dickinson School of Law of the Pennsylvania State University.

**Leila N. Sadat**

Professor Leila N. Sadat is the Henry H. Oberschelp Professor of Law and Israel Treiman Faculty Fellow at Washington University School of Law and has been the Director of the Whitney R. Harris World Law Institute since 2007. In 2008, she launched the Crimes Against Humanity Initiative and, since then, has served as Chair of its Steering Committee. In December 2012, she was appointed Special Adviser on Crimes Against Humanity by International Criminal Court Chief Prosecutor Fatou Bensouda, and earlier that year was elected to membership in the U.S. Council on Foreign Relations. In 2011, she was awarded the Alexis de Tocqueville Distinguished Fulbright Chair in Paris, France. Sadat is an internationally recognized human rights expert specializing in international criminal law and justice and has published more than seventy-five books and articles. From 2001–2003 Professor Sadat served on the United States Commission for International Religious Freedom.

### **William A. Schabas**

Professor William A. Schabas is professor of international law at Middlesex University in London. He is the editor-in-chief of *Criminal Law Forum*, a quarterly journal of the International Society for the Reform of Criminal Law, and President of the Irish Branch of Criminal Investigation. From 2002–2004 he served as one of three international members of the Sierra Leone Truth and Reconciliation Commission. Professor Schabas served as a consultant on capital punishment for the United Nations Office of Drugs and Crime, and drafted the 2010 report of the Secretary-General on the status of the death penalty. He was named an Officer of the Order of Canada in 2006, and elected a member of the Royal Irish Academy in 2007. He was awarded the *Vespasian V. Pella Medal for International Criminal Justice* of the *Association Internationale de Droit Pénal*, and the *Gold Medal in the Social Sciences* of the Royal Irish Academy. Professor Schabas has authored more than 20 books dealing with international human rights law and has published more than 300 articles in academic journals.

### **Michael P. Scharf**

Professor Michael P. Scharf is the Dean and Joseph C. Baker – Baker & Hostetler Professor of Law at Case Western Reserve University School of Law. In 2005, Scharf and the Public International Law and Policy Group, a NGO he co-founded and directs, were nominated for the Nobel Peace Prize for their work. Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for UN Affairs, and delegate to the UN Human Rights Commission. In 2008, Scharf served as Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal. He is the author of sixteen books and won the American Society of International Law's Certificate of Merit for outstanding book in 1999, and the International Association of Penal Law's book of the year award for 2009. Professor Scharf produces and hosts the radio program "Talking Foreign Policy," broadcast on WCPN 90.3 FM.

**James R. Silkenat**

James R. Silkenat is Vice President and Member of the Board of Directors of the World Justice Project. He also served as the President of the 400,000 member American Bar Association (ABA) in 2013–2014. Mr. Silkenat is a Partner in the New York office of Sullivan & Worcester LLP, where he is a member of the corporate department. Mr. Silkenat has extensive experience in international mergers and acquisitions and joint venture transactions, particularly in the energy industry, and is a former Legal Counsel at the World Bank’s International Finance Corporation. Mr. Silkenat is also a former Adjunct Professor of Law at Georgetown University Law Center. Mr. Silkenat has served as Chair of both the ABA Section of International Law and the ABA Section Officers Conference. He served on the ABA Board of Governors from 1994–1997 and 2012–2015, and has chaired the American Bar Association’s Latin American Legal Initiatives Council and the ABA’s China Committee.

**Milena Sterio**

Professor Sterio is Associate Dean of Cleveland State University John Marshall School of Law & Charles R. Emrick Jr. – Calfee Halter & Griswold Professor of Law. In her capacity as expert on maritime piracy law, Professor Sterio has participated in the meetings of the United Nations Contact Group on Piracy off the Coast of Somalia, and has been a member of the Piracy Expert Group, an academic think tank functioning within the auspices of the Public International Law and Policy Group. Professor Sterio is one of six permanent editors of the prestigious IntLawGrrls blog. In the spring 2013, Professor Sterio was a Fulbright Scholar in Baku, Azerbaijan, at Baku State University. She received her J.D. from Cornell Law School, a Maitrise en Droit Franco-Americain, and an M.A in Private International Law from the University Paris I-Pantheon-Sorbonne.

### **Elhadj As Sy**

Elhadj As Sy is the Secretary General of the International Federation of the Red Cross (IFRC). He began this leadership role on August 1, 2014 and is based at the IFRC secretariat in Geneva, Switzerland. Mr. Sy has extensive experience in leadership roles in the humanitarian sector, having previously served at a senior level with UNICEF, UNAIDS, the Global Fund to Fight AIDS, Tuberculosis and Malaria, and other agencies for more than twenty-five years. Before joining the IFRC, Mr. Sy was UNICEF's Director of Partnerships and Resource Development in New York. He has also served as UNICEF Regional Director for Eastern and Southern Africa and Global Emergency Coordinator for the Horn of Africa. From 2005 to 2008, Mr. Sy was Director, HIV/AIDS Practice with the United Nations Development Programme in New York. Before that, he worked with the Global Fund to Fight AIDS, Tuberculosis and Malaria as its Africa Regional Director and later as Director of Operational Partnerships and Country Support in Geneva. Mr. Sy has also held the position of UNAIDS Representative in New York and Director of the New York Liaison Office. Mr. Sy holds a Bachelor's Degree in Arts and Human Sciences from the University of Dakar, pursued Master's studies in Arts and Germanistik at the University of Graz, and graduated from the Diplomatic Academy in Vienna. He was also awarded a post-graduate diploma in Education from the Ecole normale superieure in Dakar.

### **Jennifer Trahan**

Jennifer Trahan is an Associate Clinical Professor of Global Affairs at New York University. She has served as counsel and of counsel to the International Justice Program of Human Rights Watch; Iraq Prosecutions Consultant to the International Center of Transitional Justice; and worked on cases before the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. She served as an observer for the Association of the Bar of the City of New York to the International Criminal Court's Special Working Group on the Crime of Aggression, as Chairperson of the American

Branch of the International Law Association's International Criminal Court Committee, as a member of the ABA 2010 ICC Task Force, and as a member of the New York City Bar Association's Task Force on National Security and the Rule of Law. She was a NGO observer at the ICC Review Conference in Kampala, and lectured at Salzburg Law School's Institute on International Criminal Law.

### **Paul R. Williams**

Paul Williams is the Grazier Professor of Law and International Relations at American University and the president/co-founder of the Public International Law & Policy Group (PILPG). In 2005, Dr. Williams, as Executive Director of PILPG, was nominated for the Nobel Peace Prize by half a dozen of his pro bono government clients. Dr. Williams has assisted over a dozen clients in major international peace negotiations, including serving as a delegation member in the Dayton, Lake Ohrid, and Doha negotiations. He also advised parties to the Key West, Oslo/Geneva and Georgia/Abkhaz negotiations, and the Somalia peace talks. Previously, Dr. Williams served in the Department of State's Office of the Legal Advisor for European and Canadian Affairs, as a Senior Associate with the Carnegie Endowment for International Peace, and as a Fulbright Research Scholar at the University of Cambridge.

### **Christine Van den Wyngaert**

Judge Van den Wyngaert has served on the bench of the ICC since March 2009, and currently is a Judge in the Appeals Division. She graduated from Brussels University in 1974 and obtained a Ph.D. in International Criminal Law in 1979. She was a professor of law at the University of Antwerp (1985–2005) where she taught criminal law, criminal procedure, comparative criminal law and international criminal law, was a visiting fellow at the University of Cambridge (1994–1997), and a visiting professor at the Law Faculty of the University of Stellenbosch, South Africa. Her merits as an academic were recognized in the form of a Doctorate Honoris Causa, awarded

by the University of Uppsala, Sweden (2001). In 2010, she was awarded a doctorate honoris causa by the University of Brussels, Belgium. In 2013, she received two further a Doctorates Honoris Causa, one from Case Western Reserve University (Cleveland Ohio) and one from Maastricht University (The Netherlands). Judge Van den Wyngaert gained expertise in various governmental organizations, including as a member of the Criminal Procedure Reform Commission in Belgium and as an expert for the European Union in various criminal law projects. She has extensive international judicial experience, serving in the International Court of Justice as an ad hoc judge (2000–2002) and was elected as a judge in the International Criminal Tribunal for the former Yugoslavia (2003–2009). In 2013, the Flemish Government awarded her a golden medal for her achievements in international criminal law, and in 2014, she was elected Vice President of the International Association of Penal Law. Judge Van den Wyngaert was granted the title of Baroness by the King of Belgium for her merits as an academic and as an international judge.